

N A M I B I A

Law, Land Tenure and Gender Review: Southern Africa



UN-HABITAT

Scale 1:51,400,000

Azimuthal Equal-Area Projection



LAND TENURE, HOUSING RIGHTS AND GENDER

**IN
N A M I B I A**



UN-HABITAT

2005

Law, Land Tenure and Gender Review Series: Southern Africa

Copyright (C) United Nations Human Settlements Programme (UN-HABITAT), 2005

All Rights reserved

United Nations Human Settlements Programme (UN-HABITAT)

P.O. Box 30030, Nairobi, Kenya

Tel: +254 20 7621 234

Fax: +254 20 7624 266

Web: www.unhabitat.org

Disclaimer

The designations employed and the presentation of the material in this publication do not imply the expression of any opinion whatsoever on the part of the Secretariat of the United Nations concerning the legal status of any country, territory, city or area, or of its authorities, or concerning delimitation of its frontiers or boundaries, or regarding its economic system or degree of development. The analysis, conclusions and recommendations of this publication do not necessarily reflect the views of the United Nations Human Settlements Programme, the Governing Council of the United Nations Human Settlements Programme, or its Member States.

HS/788/05E

ISBN Number(Series): 92-1-131768-1

Foreword to Southern Africa Law And Land Tenure Review



Africa is currently the region of the world that is witnessing the most rapid rate of urbanisation. The Southern African sub-region is no exception. The chaotic manifestations of rapid urbanisation include poor and inadequate infrastructure and services, urban poverty and the proliferation of slums and informal settlements. The precarious nature of land tenure characterizing these settlements renders millions of people vulnerable to evictions. Their illegal status further hinders their access to basic infrastructure and services, a key challenge that has to be overcome in order to attain the Millennium Development Goals of improved water and sanitation, gender equality, health, education, nutrition and the prevention of diseases.

Through the generous support of the Government of the Netherlands, UN-HABITAT is pleased to publish its review of the legal and policy frameworks governing urban land tenure in Southern Africa. In addition to an overview of the situation in all ten countries of the sub-region, the present report contains four case studies which analyse the specific cases of Lesotho, Mozambique, Namibia and Zambia. These case studies provide a comprehensive examination of the laws and policies governing urban land tenure, with a special focus on their impact on women's rights to land and housing. National experts in each country have conducted extensive research to reveal the often-complex legal issues which hinder or enable the efforts of Governments, local authorities and their civil society partners in improving the living conditions of the urban poor. The study reveals that the sub-region is characterised by overlapping legal regimes. These include pre-colonial customary law which co-exists with a mixture of outdated and often draconian colonial laws and more recent legislation.

Strengthened security of tenure for the urban poor of Southern Africa is an essential step towards sustainable urbanisation and development of the sub-region. Without secure tenure, the prospects for local economic development, a safe and healthy environment, and stable homes for future generations to grow up in will remain bleak. Secure tenure alone will, however, not be sufficient and a clear message that emerges from this review is that good local governance is essential for tenure security programmes are to achieve their desired goals and effectiveness.

This review contains findings and recommendations for both immediate and longer-term law reform to strengthen the tenure rights of all people, especially the poor and women. While they will further guide and inform UN-HABITAT's normative work through its two Global Campaigns for Secure Tenure and Urban Governance, it is my sincere hope they will contribute to furthering broad-based dialogue and engagement in land reform and security of tenure in all countries in Southern Africa in support of attaining the Millennium Development Goals.

Mrs. Anna Kajumulo Tibaijuka

Executive Director

United Nations Human Settlements Programme

(UN-HABITAT)

Acknowledgements

Global Coordinator and Substantive Editor: Marjolein Benschop, UN-HABITAT

Assisted by Florian Bruyas, UN-HABITAT

Regional Coordinator Law, Land Tenure and Gender Review in Southern Africa:

Stephen Berrisford and Theunis Roux

Regional Overview and summary of Poverty Reduction Strategy Papers: Stephen Berrisford, Theunis Roux and Michael Kihato

Women's rights sections in regional overview: Joyce McMillan, Women and Law in Southern Africa

Executive Summary, Introduction, restructuring and shortening of final draft: Stephen Berrisford and Michael Kihato

Editing: Greg Rosenberg

Namibia Chapter:

Legal Assistance Centre: Willem Odendaal, Researcher, with assistance from Shadrack Tjiramba and guidance from Norman Tjombe, Director.

UN-HABITAT and the Legal Assistance Centre would like to express special thanks to

Søren Christensen, who wrote the section on the Flexible Land Tenure System and provided additional comments and corrections to the final draft.

The Legal Assistance Centre would like to thank the following persons and organisations:

Anna Muller, Director, Namibia Housing and Action Group

Albert Engel, Sector Coordinator Natural Resources and Rural Development for

GTZ in Namibia

Aunue Shipanga, Manager Public Relations, National Housing Enterprise

Edith Mbanga, National Coordinator, Shack Dwellers Federation of Namibia

Fenny Nauyala, Deputy Director, National Built Together Programme Ministry

Local Regional Government and Housing

Francois Swartz, Director, International Development Consultancy; Director

Irene Marenga, Administrator, Association of Regional Councils

Jacques Korrubel, Director, Habitat Research and Development Centre

Jana De Kock, Corporate Legal Advisor for the Municipality/City of Windhoek

Jane Gold, Town Planner

Joas Santos, Executive Director, Urban Trust of Namibia

Johan Oppermann, Director, Urban Dynamics Africa

Jonathan Sam, Public Relations Officer, National Housing Enterprise

Maureen Nau/oas, Acting Chief Administration Officer Association of Local

Councils Namibia

Mike Kavekatora, CEO, National Housing Enterprise

Søren Christensen, Ibis Advisor on land surveying and land administration at

the Lands Project at the Ministry of Lands, Rehabilitation and

Rehabilitation

Ted Rudd, Director, Urban Dynamics Africa, 11 June 2004.

This publication was made possible through funding from the Government of the Netherlands.

List of Abbreviations

AIDS	Acquired immunodeficiency syndrome
CLB	Communal Land Board
DSM	Directorate of Survey and Mapping
GDP	Gross Domestic Product
HIV	Human immunodeficiency virus
IMSCLUP	Inter-Ministerial Standing Committee for Land Use Planning
LAC	Legal Assistance Centre
MRLGH	Ministry of Regional and Local Government and Housing
MLRR	Ministry of Lands, Resettlement and Rehabilitation
NGO	Non-governmental organisation
NHAG	National Housing Action Group
NHP	National Housing Policy
NHE	National Housing Enterprise
NPRAP	National Poverty Reduction Action Programme 2001-2005
PRSP	Poverty Reduction Strategy Plan
PTO	Permissions to Occupy
SDFN	Shack Dwellers Federation of Namibia
WLSA	Women in Law in Southern Africa
WAD	Women's Action for Development
WLSA	Women and Law in Southern Africa

TABLE OF CONTENTS

FOREWARD	iii
EXECUTIVE SUMMARY	1
SOUTHERN AFRICA	1
Southern Africa Regional Overview	5
1. Introduction	5
2 Legal systems of the region	7
3 International law	8
4 Land reform in the region	8
5 Land and housing movements in the region	11
6 Slums and informal settlements	12
7 Tenure types and systems	14
8 Land management systems	15
9 Women’s rights to land and housing in the region	17
9.1 Constitutional provisions	17
9.2 Marital property rights	18
9.3 Inheritance rights	20
9.4 Affirmative action policies	22
9.5 Best legislation, policies and practices on gender issues	23
10 Racial and ethnic equality	23
11 Regional recommendations and priorities	24
Land law reform in Namibia	27
Introduction	27
1 Background	29
1.1 Historical background	29
1.2 Legal system and governance structure	30
1.3 Socioeconomic context	33
1.4 Civil society	34

2. Land Tenure	36
2.1 Types of land	36
2.2 Tenure types	36
2.3 Land policy	42
2.4 Main institutions	43
3 Housing	45
3.1 Relevant constitutional provisions	46
3.2 Policies related to housing	46
3.3 Relevant housing legislation	47
3.4 Tenure types	48
3.5 Main institutions	48
4. Inheritance and Marital Property Legislation	50
4.1 Relevant constitutional provisions	50
4.2 Legislation related to inheritance rights	51
4.3 Legislation related to marital property rights	52
4.4 Customary law	53
4.5 Administration of estates (inheritance procedures)	55
5. Poverty Reduction Strategy	56
5.1 Introduction	56
5.2 The National Poverty Reduction Action Programme 2001-2005 (NPRAP)	56
5.3 Summary	57
6. Land Management Systems	58
6.1 Main institutions involved	58
6.2 Informal settlements and the formal system	60
6.3 Dispute settlement mechanisms	62
6.4 Most relevant jurisprudence	63
7. Local Laws and Policies	63
7.1 Local authority regulations	63
7.2 Windhoek housing policy	64

8 Implementation of Land and Housing Rights	65
8.1 Implementation of policy and legislation	65
8.2 Role of the judiciary	66
8.3 Cultural issues	66
8.4 Race and class issues	66
8.5 Access and affordability issues	67
8.6 Educational and capacity-building issues	67
8.7 Impact of HIV/AIDS	67
9 Best Practices	68
9.1 The Land Management Diploma	68
9.2 CBO, NGO and government partnerships	68
9.3 The city of Windhoek	68
9.4 The social and economic empowerment of women in the SDFN	69
9.5 Low-cost alternatives to better housing	69
9.6 Sustainable development and environmental health programme	69
10 Conclusion	69
11 Recommendations	70
11.1 Flexible Land Tenure Bill	70
11.2 Law reform	72
11.3 Governance	72
11.4 Coordination and integration	73
11.5 Further research needed	73
REFERENCES	75
APPENDIX	81

EXECUTIVE SUMMARY

Southern Africa

This report was commissioned by UN-Habitat to review the laws and land tenure of a selected number of southern African countries. It involved the appointment of country specialists who researched and produced country chapters for their respective countries namely, Lesotho, Mozambique, Namibia and Zambia. A regional expert was appointed to produce a regional overview to serve as a source document for the country reports, as well as provide overall coordination of the project. The project was carried out over a period of roughly one year, which began in March 2004.

The economic, social and political diversity of the region precludes one from reaching sweeping conclusions. Nevertheless it is possible to recognise a number of common themes. The recommendations that flow from this work obviously have to be considered in the light of the difficult socio-economic conditions prevailing in the region. Among the worst poverty levels in the world as well as high HIV/AIDS infection rates need to inform any reform initiatives, and infuse a sense of realism and strategic thinking into any conclusions or recommendations. This also means that all reforms should have poverty alleviation as their foremost priority, followed closely by a concern with the interests of vulnerable groups like people infected or affected by HIV/AIDS. Because poverty and HIV/AIDS have the greatest impact on women, all initiatives must prioritise the importance of women's rights to fair and equal treatment, as well as their specific needs and challenges.

The first area of reform that arises in the region is the need for constitutional review in a number of the countries. The degree of reform required varies depending on the country, but they all reflect a number of shared concerns. Firstly, there is a widespread need to enshrine and strengthen the right to adequate housing. With this right come related aspects of

service provision as well as the prevention of unlawful evictions. Secondly, constitutional reform that eradicates against women is essential. While all the constitutions within the region appear to prohibit overt discrimination on the basis of gender, many allow for such discrimination where customary law is applicable and where customary law permits it.

Across the region a number of other areas of law also have to be tackled as a matter of urgency. The first category is land laws, which have to be reviewed and revised to provide flexible and practical methods of ensuring secure land tenure rights for the poor. This includes the recognition of existing tenure arrangements through simple, cheap, informal and incremental systems. Another important area of legal reform recommended is changing laws that deal with marital and inheritance rights. The influence of marital and property laws has often not been linked to land reform initiatives. Many of these laws however discriminate against women in the acquisition, control and inheritance of land and housing. Laws that discriminate against women on issues of marital property and inheritance rights should therefore be repealed. This means that both men and women should have equal rights over marital property during and after the marriage or death of a spouse, irrespective of how they are married. A third priority area for law reform is the need to review high planning and building standards to facilitate provision of land and housing for poor people. Finally, law reform is also needed in most countries of the region to regulate better the relationship between landlords and tenants, with a view to promoting rental as a secure and useful form of land tenure for those people who require it.

Legal reform is successful only within a supportive framework. Tied to reform initiatives, is the need for supportive structures of implementation. The first is local government. A key recommendation in this work is for the creation of capacitated and functioning local government with a clearly defined mandate for managing land and housing issues. The second is judicial reform. It is recommended that dispute resolution mechanisms on issues dealing with land are made simpler, easier to access and more recognizable to people

at local level. Civil society is an important driver of legal reform. Support for strong civil society organisations with an urban land focus is therefore recommended. Many recent reform initiatives have stalled, and a vigilant and active civil society is important to sustain the reform drive. The role of traditional leadership in land reform also cannot be overlooked. Traditional leaders still command a lot of legitimacy and are closely linked to land allocation and local dispute resolution. Traditional leadership should be incorporated more into reform initiatives and traditional leadership's decision-making processes must become more transparent and accessible. Finally, structures in government involved in land often perform their task in an uncoordinated manner due to overlapping mandates and unclear roles. A key aspect of reform is the creation of well-defined mandates and lines of responsibility among institutions involved in implementing and administering land and housing programmes.

Capacity building is a recurring theme upon which many recommendations are based. There are many structures that need to be capacitated to ensure the success of these reform initiatives. Structures within government are the first category. Local government, departments directly dealing with land matters and the judiciary all need larger budgetary allocations as well as more and better-trained staff. In recognition of the reality of limited government ability to provide for this, it is recommended that cheaper and more innovative ways are found to increase capacity. This includes partnerships with the private sector, the use of trained technicians rather than professionals for certain tasks and more efficient revenue collection and spending. Capacity also has to be built in community structures and NGO's. Civil society in most of these countries is not active and requires support.

The reform initiatives have to be backed up by monitoring and evaluation initiatives. For these initiatives to succeed it will be essential that efficient and effective systems of data collection and data management are established. It is also strongly recommended that data in future be disaggregated according to gender. This serves as a useful tool to measure the success of the reform initiatives in altering gender biases

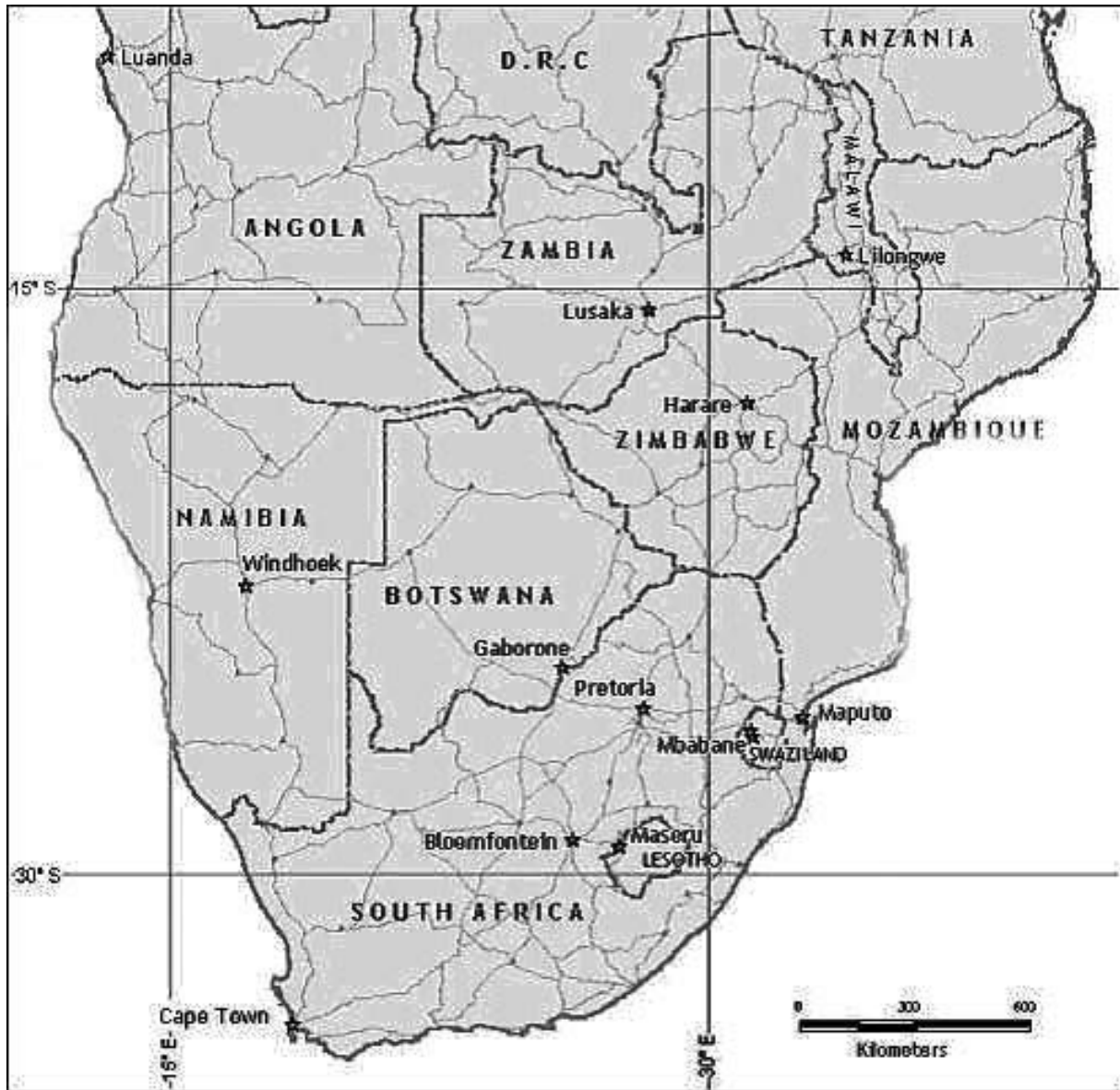
and to inform ongoing law and policy review. Related to data collection is the need for further research. One particular recommendation in this respect stands out. The effects of HIV/AIDS on urban land rights are unknown, although the agreed view is that it makes households and women in particular, more vulnerable to dispossession. This is an area requiring more and detailed research so that appropriate and specific interventions can be formulated.

Finally, an important and recurring aspect that influences reform is attitudes. Many recommendations that emerge from the reports are aimed at defeating long held patriarchal attitudes in society. These attitudes impede the equal treatment of women at virtually all levels of society, in households, communities and government. Many recommendations call for equal representation of women in decision-making bodies. Government organs like the legislature, judiciary and departments dealing with land are singled out. Traditional leadership structures should also be expanded to incorporate women and other marginalized groups. Additionally education and awareness is recommended as a way of gaining acceptance for reform from the public. It is however generally acknowledged that it is difficult to change attitudes without long and sustained efforts.

There is significant clamour for reform of land and housing laws and policies across Southern Africa. Laws that deal with land in general are being re-examined and more progressive laws suggested to replace them. The core finding of this report is there is need to sustain the momentum of these reform initiatives, and in many instances to expedite them to



Figure 1.1 Map of Southern Africa



Southern Africa Regional Overview

1. Introduction

This overview introduces four separately published reports covering law and land tenure in Lesotho, Mozambique, Namibia and Zambia. It provides an overview of trends and issues emerging in the Southern African region. Almost all the countries in the region are engaged in processes of land law reform.¹ Although the focus of much of this law reform is the region's rural land, there are also many examples of new laws being formulated and discussed that deal specifically with urban land. In addition, a feature of the region is that boundaries between urban and rural tend to be indistinct. This, together with a widespread tendency to "import" customary laws and practices from the rural areas to the towns and cities, means that it is not always helpful to distinguish too sharply between urban and rural land laws. It is also interesting to note that while every country in the region has a land ministry, their primary concern is rural land. Urban land is dealt with as a secondary concern of ministries of local government and planning. To date, no country in Southern Africa has a dedicated policy framework within which to manage the urbanisation process.

All countries in the region face the considerable challenge of capacity shortfalls. Not only do the various government departments and municipalities lack suitably skilled or experienced personnel, but they also lack the financial resources to either train or hire new recruits, or to procure professional services from the private sector.

Southern African governments receive, or have received, donor support for their land law reform processes. Obviously, the overriding rationale for donor support for land law reform is that it can alleviate poverty. Beneath the umbrella of poverty alleviation, donor support for land law reform tends to be motivated by two main concerns. First, there is a concern with the often unequal effects of land law on

women, but also on certain ethnic and racial groups. Second, and perhaps more importantly, there is a widely held belief that the economic development of the region requires firmer, more individualised and more secure land rights in order to promote investment in the region's economies. This second concern inevitably adds weight to those voices advocating the increased privatisation of land rights in Southern Africa.

Some key contextual features of the entire Southern African region include:

- Poverty: the region includes some of the poorest countries in the world. Low levels of economic activity, leading to weak government revenue flows, hamper efforts to address land reform, and increase dependence on international donors;
- Wealth gap: high levels of income inequality prevail across the region. Countries such as Namibia and South Africa are among the most unequal countries in the world;
- HIV-AIDS: the global epidemic has hit Southern Africa the hardest of any region in the world. While considerable research has been done in some countries on the epidemic's impact on rural land holding patterns² there has been very little equivalent research done in the urban areas;
- Gender division: although it is unwise to oversimplify this point, access to land rights is largely determined by gender, with women's land rights often being secondary rights, in that they are derived from land rights held by their husbands or other male relatives;³ and
- Colonial history: all the countries in the region suffered under various forms of colonisation from the mid-17th century through to the second half of the 20th century. This has had a marked impact on land rights, although this impact varies from country to country. Each country has also responded to the colonial legacy of skewed and unequal land allocations in different ways, inevitably involving some form of redistribution of land

² This research highlights especially the way in which women's land rights are negatively affected by the phenomenon of HIV-AIDS. See, Strickland, R. (2004). *To have and to hold: women's property and inheritance rights in the context of HIV-AIDS in Sub-Saharan Africa*. ICRW Working Paper.

³ Walker, C. (2002). *Land Reform in Southern and Eastern Africa: Key Issues for Strengthening Women's Access to and Rights in Land*. Report on a desktop study commissioned by the FAO.

¹ For an overview, see SARP (2003). *Seeking Ways out of the Impasse on Land Reform in Southern Africa*. Notes from an Informal "Think-tank: Meeting".

rights. Patterns of land ownership inherited from the colonial era have also contributed to a number of cases of weak governance, as well as civil conflict.

Table 1.1 Social development indicators Southern Africa⁴

Country (with total pop.)	Access to services (% of total pop.) 2000		Age group as a percentage of total pop. (2002)			Poverty		Income distr. (share of income held by groups) 1989-2000)		Urban-isation		HIV/Aids estimates (end 2001)	
	Safe water	Sanitation	0-14	15-64	65+	% population < \$1 / day	Per capita GDP	Richest 20%	Poorest 20%	Urban population growth	Urban pop. Growth as % of total	Adult rate (%)	Aids orphans (0 - 14)
Angola (13 million)	38	44	50	52.7	3.1	n/a	2,053	n/a	n/a	5.3	35.5	5.5	100,000
Botswana (2 million)	95	66	41.3	55.3	2.3	23	8,244	70.3	2.2	4.2	49.9	38.8	69,000
Lesotho (2 million)	78	21	46.2	65.7	5.0	43	2,272	70.7	1.4	5.3	31.3	31.0	73,000
Malawi (11 million)	57	76	44.6	51.8	3.5	42	586	56.1	4.9	4.5	29.5	15.0	470,000
Mozambique (18 million)	57	43	42.4	53.6	3.6	38	n/a	46.5	6.5	6.6	34.3	13.0	420,000
Namibia (2 million)	77	41	38.1	49.6	3.4	35	6,410	78.7	1.4	3.9	31.9	22.5	47,000
South Africa (45 million)	86	87	30.7	60.4	4.3	7	10,132	66.5	2.0	3.4	58.4	20.1	660,000
Swaziland (1 million)	N/a	N/a	41.8	54.5	2.8	n/a	4,503	64.4	2.7	4.2	27.0	33.4	35,000
Zambia (10 million)	64	78	45.6	53.7	2.3	64	806	56.5	3.3	2.7	40.1	21.5	570,000
Zimbabwe (13 million)	83	62	43.4	52.1	3.1	n/a	n/a	55.7	4.6	4.3	36.7	33.7	780,000

⁴ World Bank. (2004). *African Development Indicators*.

2 Legal systems of the region

In addition to the continuing application of African customary law, which is a feature of all countries in the region, there are three main settler legal systems in Southern Africa: Roman-Dutch law⁵ (Botswana, Lesotho, Namibia, South Africa, Swaziland and Zimbabwe); Portuguese colonial law (Angola and Mozambique); and English law (Malawi and Zambia). In general, the form of the settler legal system does not seem to exert much influence over land and housing policy. There are some differences in approach, however, that may be attributable to underlying legal systemic differences, particularly in relation to marital property and inheritance issues.

Table 2 1 Main settler legal systems

Settler legal system	Southern African countries
Roman-Dutch	Botswana Lesotho Namibia South Africa Swaziland Zimbabwe
Portuguese	Angola Mozambique
English	Malawi Zambia

First, the Portuguese legal system inherited by Mozambique and Angola is a so-called civilian system. The main difference between common-law and civilian systems is that, in civilian systems, each judicial decision is taken to be a fresh interpretation of the civil code as applied to the facts of the case. This tends to reduce the significance in civilian systems of past judicial decisions, and consequently the role of the courts in the development of land and housing rights.

The second possible significant difference relates to the dominant position of ownership in Roman-Dutch common law, in comparison to English and Portuguese land law, where

⁵ Roman-Dutch law was introduced to Southern Africa by Dutch colonisers in the 17th century and has remained the basis for a number of legal systems in the region.

freehold is less hegemonic. In Mozambique, the socialist-inspired policy of state land ownership thus finds support in Portuguese colonial law, which also favoured state land ownership and private use rights. In Zambia, the influence of English land law may have bolstered the post-independence preference for leasehold over freehold tenure, although that country’s post-independence land reforms were, like those in Mozambique and Angola, also carried out within a socialist framework.

Thirdly, the *superficies solo cedit* rule in Roman-Dutch law (in terms of which anything permanently attached to land is regarded as part of the land⁶) means that in Botswana, Lesotho, Namibia, South Africa and Zimbabwe the distinction between land and housing rights is one of emphasis rather than law. In the absence of a purpose-designed statute, such as the Sectional Titles Act in South Africa,⁷ it is not legally possible in these countries to separate rights to a structure from rights to the land on which the structure is built (which is not to say that separate rights to land and structures do not feature in extra-legal land allocation practices⁸). Generally speaking, land *policy* is equated with rural land reform in the countries where Roman-Dutch legal tradition holds sway, whereas housing *policy* is mostly given an urban inflection. Within these separate policy domains, the term “land rights” is used to emphasise the preoccupation of rural land reform with land as a productive asset, and the term “housing rights” to connote the right to shelter and tenure security.

In practice, legal systemic differences are a less significant determinant of the approach to land and housing policy than the colonial legacy in each country. For example, in Mozambique, the current difficulties over the continued application of colonial law have more to do with the nature of Portugal’s withdrawal from that country, and the ensuing

⁶ See van der Merwe, C. G. (1987). *The Law of Things*. para 144 (in relation to structures built on land, the *superficies solo cedit* principle supports a form of original acquisition of ownership known to Roman-Dutch and modern South African law as *inaedificatio*).

⁷ Act 95 of 1986.

⁸ Royston, L. (2002). Security of Urban Tenure in South Africa: Overview of Policy and Practice. in A Durand-Lasserve and L Royston (eds). *Holding Their Ground: Secure Land Tenure for the Urban Poor in Developing Countries*. pp. 165-81.

civil war, than with the character of the received legal system. Post-independence land speculation was the immediate reason for Zambia's turn to state land ownership.

Although each of the different legal traditions inherited in the Southern African region had a different name for it, they nevertheless all provided for some form of transferring land rights to an unlawful occupier of that land, for a prescribed period of time, where the lawful occupier had neglected his or her land. Various called adverse possession, prescription or *usucapião* in the different countries of Southern Africa, the common-law roots of this doctrine have almost all been translated into new statutes that spell out the criteria for obtaining land rights in this way.⁹ Any differences in the common-law approach to this question have therefore been rendered irrelevant.¹⁰

All countries in Southern Africa have dual legal systems in the sense that both customary law and inherited colonial common law are applicable (in addition to pre- and post-independence statute law). The exact time of reception of colonial common law differs from country to country. For example, Roman-Dutch law was imported into the Protectorate of Bechuanaland (now Botswana) on June 10 1891,¹¹ and into Basutoland (now Lesotho) by the Cape General Law Proclamation 2B of 1884.¹² The time of reception of colonial common law is obviously less important than the date of independence, for it is the latter that determines the degree to which the independence government has had the opportunity either to abolish or harmonise the dual legal system.

9 See, for example, Art. 12(b) of the 1997 Mozambique Land Law and section 3(4) and (5) of the Extension of Security of Tenure Act 62 of 1997 (South Africa).

10 In practice the prescribed time periods for this form of land acquisition can vary widely, from 10 years in Mozambique to 30 years in South Africa.

11 McAuslan, P. (2004). *Tensions of Modernity*. Paper presented at the University of Reading Centre for Property Law IVth Biennial Conference, p. 6.

12 Selebalo, Q. C. *Land Reform and Poverty Alleviation: Lesotho's experiences during the last two decades*. Paper presented at the SARPN Conference on Land Reform and Poverty Alleviation in Southern Africa, p. 2.

3 International law

Most countries in the region are party to the main international and regional human rights instruments. In the appendix the most relevant international human rights conventions are listed and an overview is provided of which countries are party to which instruments.

4 Land reform in the region

One of the main distinctions relevant to land reform in Southern Africa is between those countries that had substantial settler populations and those that did not. South Africa, Namibia and Zimbabwe all still have significant settler populations, holding large areas of land, especially agricultural land.¹³ In comparison, the majority of the settler populations of Mozambique, Angola, Zambia and Malawi left those countries shortly after independence. Within this group of countries there is a further distinction between, on the one hand, Mozambique and Angola, where the independence governments were not hampered by the duty to compensate departing settler landowners, and, on the other hand, Malawi and Zambia, where initial land reform efforts were constrained by the duty to compensate. The third main category consists of Lesotho and Botswana, neither of which had significant settler populations. Swaziland is unique in the sense that, although it had significant settler land ownership, much of this land was repurchased by the Swazi people during the last century.¹⁴

The first main consequence of these differences is that in countries with significant settler populations the land

13 In Zimbabwe, until very recently, roughly 50 percent of all agricultural land was in the hands of a few thousand white farmers. In South Africa, 87 percent of the land surface was under settler control. The amount of land currently owned by the white minority group is unknown, but the basic landholding pattern has not changed greatly since the transition to democracy in 1994. In South Africa, by the end of 2000, six years after the transition to democracy, less than 2 percent of agricultural land had been redistributed. See Sibanda, S. (2001). *Land Reform and Poverty Alleviation in South Africa*. Paper presented at the SARPN Conference on Land Reform and Poverty Alleviation in Southern Africa, Pretoria. (4-5 June 2001).

14 The Swazi Land Proclamation Act, 1907 reserved 37.6 percent of the land for occupation by the Swazi people, and the remainder for settler occupation. The first land repurchase programme commenced in 1913, and has been resumed at various intervals. By 1991 one third of the land targeted for repurchase had been acquired. See Alfred Mndzebele 'A Presentation on Land Issues and Land Reform in Swaziland' paper

question in the immediate aftermath of independence has tended to be dominated by rural land reform, especially land redistribution. In countries with limited human and financial resources, such as Namibia and Zimbabwe, this has resulted in prioritisation of laws that aim to redistribute commercial farmland over laws aimed at urban tenure reform. Thus, in Namibia, the Agricultural (Commercial) Land Reform Act, 1995, which provides for redistribution of commercial farm land, was enacted within five years of independence, whereas the draft Flexible Land Tenure Bill, which provides innovative, low-cost tenure forms for the urban poor, has yet to find its way to parliament. The main reason for the delay in enacting the Flexible Land Tenure Bill appears to be the absence of a political champion in government.

The second important effect of the distinction between “settler” and “non-settler” countries is the symbolic significance of land ownership as the preferred form of land tenure in the former group, where land ownership was invariably the exclusive preserve of the settler minority. In South Africa, especially, this has influenced the forms of tenure that have been made available in urban housing programmes, which show a distinct preference for ownership. By contrast, in Zambia, the departure of the settler population freed the independence government’s hand to abolish private land ownership. Without ownership as a dominant tenure form it was possible to experiment with alternative forms of tenure in the urban setting.¹⁵

The different historical legacies in the region have also influenced patterns of urbanisation, although here the causal link between the size and permanence of the settler population, and the urbanisation rate, is harder to isolate from other factors. For example, South Africa is now experiencing very high rates of urbanisation to its industrial centres, following a long period of influx control, which lasted until the mid-1980s. Yet in Mozambique, where the settler population departed en masse in 1975, the annual percentage urban

growth rate is the second highest in Africa, at 6.6 percent. Indeed, apart from Zambia, all of the countries in the region register urban growth in excess of 3 percent.¹⁶ In none of them is this process particularly well understood.

The table below compares the degree of urbanisation prevailing in each of the region’s countries.¹⁷ It is significant that only one country in the region has more than 50 percent of its population currently living in urban areas.

Table 4.1 Urbanisation prevailing in Southern African countries

Country	Total population (millions)	Urban population as % of total
Angola	13.1	35.5
Botswana	1.7	49.9
Lesotho	1.8	29.5
Malawi	10.7	15.5
Mozambique	18.4	34.3
Namibia	2.0	31.9
South Africa	45.3	58.4
Swaziland	1.1	27.0
Zambia	10.2	40.1
Zimbabwe	13.0	36.7
Southern Africa	117.3	42.8
Sub-Saharan Africa	688.9	33.1

The dual legal systems found in all the countries in the region recognise, to a greater or lesser degree, customary laws, which are inherently patriarchal. In some of the countries, such as South Africa and Namibia, the independence constitution specifically asserts the normative priority of equality rights over rights to culture.¹⁸ In others, such as Lesotho, patriar-

¹⁶ Op. cit., 4.

¹⁷ World Bank. (2004). *Little Green Data Book*.

¹⁸ See section 9 (equality) read with section 30 (language and culture) of the 1996 South African Constitution. Section 30 reads: “Everyone has the right to ... participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights”.

presented at the SARPN conference on Land Reform and Poverty Alleviation in Southern Africa (June 2001).

¹⁵ See specific references to the relevant provisions of the Zambian Housing (Statutory and Improvement Areas) Act [Cap 194] in Chapter 5.

chal forms of land holding are constitutionally entrenched.¹⁹ The constitutional position in a country obviously affects the degree to which land reform and urban tenure laws can address gender discrimination. In Namibia and South Africa, new laws applicable to areas under customary law guarantee minimum representation for women on district level land management bodies.²⁰ And in Zambia the national gender policy mandates that 30 percent of all land parcels allocated in urban areas are to be set aside for women. In Lesotho, by contrast, the Deeds Registries Act, 1997 “empowers the Registrar to refuse to register a deed in respect of immovable property in favour of a married woman whose rights are governed by Basotho law and custom, where such registration would be in conflict with that law”.²¹

The table below sets out the way in which land is broadly categorised in the region as state-owned ‘trust’ land, privately owned rural land or state-owned public purpose land (including urban development).

Table 4.2 Patterns of land distribution in Southern Africa²²

Country	State-owned ‘trust’ and/or customary tenure	Privately owned rural land	State-owned public purpose (including all urban) land
Namibia	43%	39%	18%
South Africa	14%	67,5%	18,5% (8,5% urban)
Zimbabwe	51% (trust 42%; resettlement 9% ¹)	30%	19%
Botswana	71%	6%	23%
Lesotho	95% ²	5%	-
Malawi	67%	11%	22% (3% urban)
Mozambique	100% ³	-	-
Swaziland	+/- 56%	25% (approx.)	19% (approx.)
Zambia	Predominant ⁴	-	-

19 See section 17(4)(c) of the Lesotho Independence Order, 1966 (exempting customary law from the constitutional prohibition against discrimination).

20 See the Namibian Communal Land Reform Act, 2002 and the South African Communal Land Rights Act, 2004.

21 Selebalo, Q. C. (2001). *Land Reform and Poverty Alleviation: Lesotho’s experiences during the last two decades*. Paper presented at the SARP Conference on Land Reform and Poverty Alleviation in Southern Africa, June 2001 p. 7.

22 Op. cit., 3.

5 Land and housing movements in the region

The position of nongovernmental organisations (NGOs) in the land sector varies considerably from country to country. The strongest NGOs tend to be more active in the rural areas than in the towns and cities, with notable exceptions being the Namibian Housing Action Group and the Homeless People’s Federation in South Africa. Many NGOs in the region have strong ties to international NGOs and donors, with Oxfam, Ibis, the UK government’s Department for International Development (DFID) and German development agency GTZ being particularly prominent.

In Angola and Mozambique, the NGO sector has been ravaged by decades of civil war, but has recently emerged as a strong force. The participation by civil society in the drafting of the 1997 Mozambican Land Law is perhaps the best-known regional example of civil society involvement in policy-making.²³ In Angola, the Land Forum (*Rede Terra*) was formed in 2002 and is attracting donor support, although it has yet to play a significant role in shaping policy.²⁴ Namibia provides a possible good practice example in the partnership formed between the national government, the Namibian Housing Action Group and the Shack Dwellers’ Federation of Namibia to implement the block system of land tenure. The Zambia Land Alliance is a coalition of civil society organisations that has been strongly critical of the policy process leading up to the adoption of the land policy in that country.²⁵ Pursuant to these criticisms, the alliance was invited to partner the government in coordinating civil society contributions to the policy process. It is yet to be seen to what extent the views gathered by the group will change the published draft policy.

23 Conceição de Quadros, M. (2002). *Country Case Study: Mozambique*. Paper presented at the Workshop on Integrating Land Issues into Poverty Reduction Strategies and the Broader Development Agenda, Kampala, April 2002. Tanner, C. (2002). *Law-making in an African Context: the 1997 Mozambican Land Law*. FAO Legal Papers Online #26, March 2002.

24 Op. cit., 1.

25 Zambia Land Alliance. (2002). *Initial Position Paper on the Draft Land Policy*. Paper presented to the Zambian Government Land Policy Technical Committee Lusaka Province Workshop, December 2002.

There is only one regional NGO operating in the land sector: Women and Law in Southern Africa (WLSA). It is active in Botswana, Malawi, Mozambique, Swaziland, Zambia and Zimbabwe. Land Net Southern Africa, a network of organisations and individuals concerned with land policy, which operated briefly, supported by DFID, is no longer operative because of funding problems. DFID is however investigating support for an experience-sharing and learning network between NGOs in the region (the Southern Africa Regional Land Reform Technical Facility).²⁶

Figure 5.1 NGO participation in policy-making

Weak NGO participation in policy-making

Weak NGOs	Malawi Botswana South Africa Lesotho	Angola Swaziland Zambia Zimbabwe	Strong NGOs
		Mozambique Namibia	

Strong NGO participation in policy-making

Women’s movements

Many women’s coalitions in the region are loose alliances that are formed around specific issues, such as the Justice for Widows and Orphans Project in Zambia. In Swaziland women’s NGOs came together on constitutional issues, fighting for recognition of women and children’s rights. Professional organisations have also been instrumental in advancing women and children’s rights through research, advocacy and litigation. Many women’s organisations have been involved in law reform processes. The Gender Forum, for example,

26 For more information on this initiative Lelanie Swart at DFID Pretoria can be contacted on +27 12 431 2100. An important regional source of land-related information is the website of the Southern Africa Regional Poverty Network – www.sarpn.org.za.

spearheaded the fight for legal reform in women's rights in Mozambique's Family Law of 2004.

Although some coalitions are formalised and survive beyond specific projects,²⁷ many disintegrate after they meet their objectives, or after the initiative for which they were formed fails to yield results. They also often face political and social resistance. Many women's movements in the region have also not been as forceful or organised around land and housing rights as they have been on other issues.²⁸

6 Slums and informal settlements

As noted earlier, all countries in the region are experiencing relatively rapid urbanisation, with mostly inappropriate or non-existent policy responses. None of the countries actively resists the growth of informal settlements. However, the absence of resources, weak local government capacity, and a reluctance to acknowledge the permanence of new urban migrants prevent effective management of this issue.

At a regional level, there is no clear trend towards regularisation of informal settlements. The *Zambian Housing (Statutory and Improvement Areas) Act* represents perhaps the most comprehensive attempt so far to enact a legal framework for regularisation. In South Africa, regularisation has largely been ignored in favour of mass-produced, subsidised housing.²⁹ After nearly 10 years of implementing this approach, the South African housing minister announced a major new housing policy direction in September 2004, which supports "in situ upgrading in desired locations". However, it remains

27 A good example is Zambia's umbrella Non-Governmental Organisations Coordinating Council (NGOCC), which is recognised by government and is represented on leading government and quasi-governmental institutions such as the Law Reform Commission. It submits regular reports and recommendations to parliamentary select committees on issues affecting women and children, and mounts media and advocacy campaigns. Similarly, in Mozambique, the Women's Coalition survived the end of the Family Law initiative.

28 Such as the increase of women in decision-making positions and on violence against women.

29 See Huchzermeyer, M. (2004). *Unlawful Occupation: Informal Settlements and Urban Policy in South Africa and Brazil*. cap. 6. It is however important to note that as early as 1995 the new South African government enacted legal provisions for upgrading, in the Development Facilitation Act, but these provisions have not yet been used.

to be seen how this will be translated into practice.³⁰ In Namibia some regularisation has occurred in the absence of a dedicated legislative framework (see Chapter 4).³¹

Throughout the region there is a blurred distinction between urban and rural land, both on the edges of towns and cities as well as in dense settlements in rural areas, the latter often resulting from land redistribution projects (Namibia, South Africa and Zimbabwe). A second reason for the blurred urban-rural distinction is the continuing importance of customary law in land allocation practices on the urban periphery. In Botswana, for example, the land boards are "involved in the process of allocating tribal land for urban use and development".³² This could produce conflict between the boards and the land development procedures laid down in the *Town and Country Planning Act*.³³ The conflict between customary and modern law is explored in detail in each of the four reports.

In countries with extensive private land holdings, the primary problem facing informal settlement dwellers is the illegality of their occupation. In contrast, state ownership of land, e.g. in Mozambique and Zambia, means that there is less legal opposition to informal settlements. Regardless of the underlying legality of a household's occupation of land, the absence of basic service provision is a common and persistent problem across the region.

There are some good examples of informal settlement organisations developing and implementing innovative practices to secure the tenure and improve the conditions of their

30 See Press Statement by LN Sisulu, Minister of Housing, on the Public Unveiling of the New Housing Plan, September 2 2004, available at www.housing.gov.za. As the current housing subsidy programme was not specifically designed and geared for informal settlement upgrading, the new programme is instituted in terms of section 3(4) (g) of the Housing Act, 1997, and will be referred to as the National Housing Programme: In Situ Upgrading of Informal Settlements. Assistance takes the form of grants to municipalities to enable them to respond rapidly to informal settlement upgrading needs by means of the provision of land, municipal services infrastructure and social amenities. It includes the possible relocation and resettlement of people on a voluntary and cooperative basis, where appropriate.

31 See also World Bank (2002). *Upgrading of Low Income Settlements Country Assessment Report: Namibia*. (Reporting on informal settlement upgrading in Windhoek on the basis of City Council Guidelines).

32 Op. cit, 11.

33 Ibid.

members. These include the Shack Dwellers Federation of Namibia's pioneering block system and the South African Homeless People's Federation's community-led social surveys of informal settlements.

Women in slums and informal settlements

Although gender disaggregated data is sketchy, literature indicates that in most of Southern Africa, the poorest of the poor are women, and their lack of access to land and housing has largely been due to their limited access to resources.³⁴ Scarcity of jobs especially for women and inadequate wages to purchase housing means that women have little chance to own decent housing. Other problems such as poverty, illiteracy, violence, high costs in freehold and leasehold titled land, HIV/AIDS and unfair inheritance and divorce laws, also tend to force women into slums and informal residential areas. HIV/AIDS, poverty and pregnancy are noted as keeping adolescent women in slums³⁵.

Women are also often excluded in land or housing allocation. Expulsion of women from marital homes (sometimes without divorce) also often forces women into poor housing areas. In some countries retaining marital power of the husband in statute books, laws restrict the registration of immovable assets in married women's names. As in formal settlements, the man is still the owner of the house except in women-headed households.³⁶

Few upgrading projects have catered explicitly for women. Land redistribution also often fails specifically to target women. A good example of the exception to this rule is Namibia, which did not initially target women as potential beneficiaries, although this changed and there is now a deliberate effort to include women in the National Housing Strategy.

³⁴ Op. cit., 49.

³⁵ Caldwell, J. & Caldwell, P. (undated). *Fertility Transition in Sub-Saharan Africa*, see www.hsrapublishers.co.za

³⁶ Keller, B. Phiri, E. and Milimo, M. (1990). *Women and Agricultural Development*. in Wood, A. P. et al (eds). *The Dynamics of Agricultural Policy and Reform in Zambia*. pp. 241-262.

Table 6.1 Land distribution and upgrading projects in Southern Africa

Country	Scheme	Objective	Services	Women
Angola	Self-finance urban infrastructure	Shelter for internally displaced urban migrants	2,210 houses for 16,702 people; 12 km of power lines; 70 km of clean water; 23 km of drainages; 29,000 km paved road	No statistics
Lesotho	Urban upgrading Project	Improving living conditions for slum dwellers and providing housing units	Housing for 267 families	134 female headed households
Namibia	Nations Shelter Strategy	National Housing Policy	3,400 housing units with additional 1,300 families per year	No statistics available but there is a deliberate effort to include women
South Africa	Alexandra Renewal Project, etc.	Generally increasing housing units	1 million low-cost housing units in six years	No statistics available

(Source: www.grida.no/aeo/214.htm accessed December 30 2004)

7 Tenure types and systems

The vast majority of land in the region is still held under customary tenure, mainly in the rural areas, although the proportion of land held in some or other form of individualised title (not necessarily ownership) is increasing. Accurate figures for the amount of land held under different tenure forms are not available. In Zambia, where 94 percent of the land is officially “customary land”, the actual proportion of land held under customary tenure is decreasing as the process of conversion to leasehold tenure under the Lands Act, 1995, gathers momentum.³⁷ A similar process of conversion is underway in Mozambique. In all countries in the region attitudes towards land tenure are undergoing a dynamic process of evolution. In urban areas this process is particularly complex, as customary attitudes, rules and practices are adapted to fit within the more “modern” tenure laws either inherited from the colonial powers or enacted since independence.

As noted earlier, in countries where the Roman-Dutch legal system applies, ownership tends to be the dominant form of tenure. There has, however, been some experimentation with group ownership and other more flexible forms of tenure. In South Africa, the Communal Property Association Act, 1995, which was originally designed as a vehicle for rural land reform, has been used in the so-called Peoples’ Housing Process, which is the “self-help” part of the government’s urban housing programme. There has also been considerable donor support for cooperative housing in South Africa, although many of the initial schemes have struggled to succeed, for financial reasons. Informal backyard rental continues to be a major tenure form in both South Africa and Namibia. Across the region it is also common to find private rental arrangements between the owner or primary occupant of a plot or structure and tenants, or sub-tenants, renting a part of the main property. This phenomenon

³⁷ See section 2 of the Zambia Land Act, 1995 (defining “customary area” as meaning the area described in the Schedules to the Zambia (State Lands and reserves) Orders, 1928 to 1964 and the Zambia (Trust Land) Orders, 1947 to 1964. This formulation effectively freezes the proportion of land held under customary tenure in Zambia at the colonial level, notwithstanding the fact that the Lands Act provides for the conversion of customary tenure into leasehold.

is especially evident in Lesotho where a large number of residents of Maseru, the capital, live in *malaene* homes, which are rooms specially constructed by private individuals in a row formation and then rented out on an individual basis.

The exception to the dominance of ownership in Roman-Dutch-law countries is Zimbabwe, where the government recently announced its intention to convert all freehold titles into 99-year leaseholds.³⁸ If implemented, this policy will shift the land tenure system in that country closer to that of its northern neighbour, Zambia.

The draft Namibian Flexible Land Tenure Bill provides for two innovative and closely linked forms of tenure: a type of group ownership of surveyed urban land with individual rights in unsurveyed plots, subject to conditions laid down in the constitution of the group (“starter title”); and individual rights to measured (but not formally surveyed) plots in a surveyed “block erf”. The thinking behind this is not unlike the thinking behind the Zambian Housing (Statutory and Improvement Areas) Act. What these two pieces of legislation have in common is a shared commitment to informal settlement regularisation through the creation of local level registries, in which people are able to acquire rights in informally surveyed land or unsurveyed (but readily identifiable) plots. The intention in both cases is to provide an adequate level of tenure security, capable of supporting municipal infrastructure investment, without incurring the costs of formal surveying. In Zambia, where the local level registry system has been in operation since the mid-1970s, the system has largely succeeded in providing security of tenure to residents of informal settlements, but not in supporting loan-finance for improved housing. The installation of basic services has also been hampered by overly ambitious and costly service standards, which have proved impossible to maintain.³⁹

Article 12 of the 1997 Mozambican Land Law provides an interesting example of how tenure security can be provided by statute without the need for surveying. There is some

³⁸ The Herald, Harare, June 8 2004.

³⁹ In addition to the similarities between the Zambian and Namibian experiences of local registries there are also some important differences. For example, in Zambia there is no possibility

evidence to suggest that the provision in this article for acquisition of land after 10 years’ occupation in good faith provides an effective form of security of tenure for the residents of informal settlements. However, the continued uncertainty over the application of the Land Law in urban areas, and the delay in adopting the Urban Land Regulations, may progressively undermine this position. It is also doubtful whether the device used in Art. 12 of the Land Law can be replicated in other countries where land on the urban periphery is in private ownership. In South Africa, for example, the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 1998, tries to strike a balance between procedural protection against arbitrary eviction and enforcing the rights of private owners to evict people who illegally occupy their land. In Zambia, the recent eviction of people from land owned by the Catholic Church⁴⁰ indicates the limitations of that country’s Housing (Statutory and Improvement Areas) Act in protecting people whose occupation of land has yet to be legalised.⁴¹

8 Land management systems

In all the countries in the region there is a stark distinction between formal and informal land management systems. Even in South Africa, where most of the land surface is surveyed and mapped, the land management system applicable in the former “homeland” areas is in a chaotic state, with existing documentation either outdated or destroyed. The Communal Land Rights Act, 2004, was in part enacted to remedy this situation.

of upgrading a registered right from the local registry to the „mainstream“ registry, whereas in Namibia this is possible.

⁴⁰ The first of these incidents took place in November 2002. Armed police acting on behalf of the Catholic Church demolished 600 houses in an illegal settlement in Lusaka’s Ng’ombe residential area. The squatters, who had been resisting eviction over the six months prior to this date, were taken by surprise by police, who razed their structures without removing household goods. Police beat and apprehended about 10 of the squatters who blocked the road leading to the disputed land to protest the destruction of their homes (see Zambia report).

⁴¹ Section 9 of the Land Act, 1995 provides that „[a] person shall not without lawful authority occupy or continue to occupy vacant land.. Thus, where land is not declared as an improvement area under the Housing (Statutory and Improvement Areas) Act, residents of informal settlements are vulnerable to eviction.

In respect of land falling under customary law, one of the more contentious issues has been the attempt to subject land allocation by local chiefs to democratic control. Botswana provides an early and thus far successful example of this phenomenon, with the land boards in that country playing a legitimate and accepted role, not only in tribal land management, but also increasingly in the allocation of land on the urban periphery.⁴² By contrast, in South Africa, the Communal Land Rights Act took more than five years to negotiate and, in its final form, largely preserves the land management functions of traditional councils, some of which were created by the apartheid state.⁴³ In Mozambique and Zambia there has been no attempt thus far to “democratise” customary land management systems. Rather, legislation in both these countries provides for the conversion of customary tenure to leasehold tenure.

Lesotho represents perhaps the most complete form of interdependence of customary and formal rules in relation to urban land management. The primary evidence of secure tenure that is accepted by the courts as a basis upon which to issue a lease title is a certificate signed by a chief, known colloquially as a “Form C”.

One of the more innovative developments in the region has been the decision to create local level registries in Namibia and Zambia, independent of but connected to the formal deeds registry. This has allowed simpler, more appropriate and less costly forms of land administration to develop, catering to the needs of the urban poor.

Across the region, the tensions inherent in trying to manage comprehensive, up-to-date, responsive and accessible registries of private land rights, cadastral surveys and public land inventories within a context of limited capacity and highly constrained resources are enormous. These tensions

play themselves out in different ways but are most frequently characterised by highly inefficient and inaccurate systems that cost their respective governments a great deal more than they benefit them. In some countries, as indicated above, innovative solutions to this problem are arising, from both the formal and informal sectors, but these innovations have not yet been tested at scale.

A further challenge to effective land management is the question of building standards. Primarily as a result of the region’s colonial legacy most countries have one set of building standards applicable to the urban areas previously reserved for settler occupation and a different set applicable to other areas. South Africa, Namibia and Zimbabwe are all examples of this phenomenon. In other cases the authorities have simply never been able or willing to apply building standards to the more marginal urban areas, as has been the case in Mozambique. Across the region however there is a growing realisation that lower building standards inevitably result in higher levels of access to land and housing for the poor, through lowering the cost of the final housing product. This has resulted in various policy initiatives, particularly in Zambia and Namibia, to revise building standards to a more realistic level.

⁴² Op. cit., 11.

⁴³ For criticisms of this Act, Cousins, B. & Claassens, A. (2004). *Communal Land Rights, Democracy and Traditional Leaders in Post-apartheid South Africa*. in Saruchera, M. (ed) *Securing Land and Resources Rights in Africa: Pan African Perspectives*. pp. 139-54; Cousins, B. (2004). *The Communal Land Rights Act: Likely to Face Constitutional Challenge*. *Umhlaba Wethu* No. 1, August 2004; Cousins, B. (2004). *The Continuing Controversy Over the Communal Land Rights Bill of 2002*. *ESR Review*, Vol. 5 No. 4.

9 Women’s rights to land and housing in the region

9.1 Constitutional provisions

The table below shows the position of non-discriminatory clauses in the constitutions of Southern African countries.

Table 9.1 Constitutions and non-discriminatory clauses in Southern Africa

Country	Right to equality	Discrimination on basis of sex prohibited	Right to land, housing or property recognised
Angola	Yes, Art. 18	Yes, Art. 18	No
Botswana	No. While Art. 15 recognises equality, customary law is allowed to compromise the right to equality	No. Art. 15 excludes discrimination on grounds of sex	No, only protection from deprivation of property in Art. 8
Lesotho	Yes, Art. 19	Yes, but Art. 18 (b) and (c) allows for discrimination in personal law and customary law	No, only protection from deprivation of property in Art. 17
Malawi	Yes, section 20:	Yes, Sections 20 and 24 including marital status and gender	Yes, Sections 24 and 28
Mozambique	Yes, Arts. 66 and 67	Yes Art. 69	Yes, Art. 86 right to ownership of property recognised and guaranteed
Namibia	Yes, Art. 10 (1): “all persons shall be equal before the law”. Art. 14 provides for equal rights to men and women on dissolution of marriage	Yes, Art. 10 (2): “no person may be discriminated against on grounds of sex, race, colour, ethnic origin, religion, creed, socio-eco status”	Art. 16: “all persons shall have the right to acquire own dispose of all forms of property individually or in association with others ...”
South Africa	Yes section 9: “everyone is equal before the law...”	Yes, section 9 includes grounds of pregnancy and marital status.	Yes section 26: “everyone has the right to have access to adequate housing”
Swaziland (this is a draft document still under discussion)	Yes sections 15, 21 and 29 have provisions that recognise the right to equality	Yes, in section 21. There is also a section on rights and freedoms of women	No only protection from arbitrary deprivation of property
Zambia	Equal worth of men and women recognised.	Yes in Art. 23 which also allows for discrimination in personal law and customary law	No only protection from deprivation of property in Art. 16
Zimbabwe	Yes, Art. 9	Yes in Art. 23 which also allows for discrimination in personal law and customary law	No, only protection from deprivation of property

Some key points:

- Apart from Malawi, in the rest of the region, no specific mention is made of women in provisions that relate to property rights. This leaves the recognition and enforcement of women’s rights to land, housing and property to the interpretation of the law;

- Apart from Namibia, where ratified international instruments are self-effecting, most Southern African countries have signed and ratified international instruments but have not domesticated them for local use;
- The constitutional provisions relating to equality and non-discrimination can be avoided in some instances. Often customary law is used, for instance in Botswana, Lesotho, Swaziland, Zambia and Zimbabwe;
- In practice, recognition of women's rights in the constitution does not automatically result in the actual enjoyment of the rights. This is largely due to attitudes. Often, socioeconomic circumstances, for example the war in Angola, interferes with implementation of these laws;
- The right to adequate housing is recognized in the South African Constitution but not in the constitutions of the other countries and cannot therefore be enforced in court. Equally legislation on housing has no specific reference to women as a disadvantaged class of people;
- Joint tenure by couples, although permitted in the sub-region, is not a common phenomenon due to sociocultural factors;
- Patriarchal attitudes, where men have always been the heads of homes and documental evidence of ownership or occupancy of land and housing has always been given to men, also impede women's access;
- A lack of resources and knowledge about opportunities for ownership of land by women is also cited as a problem;
- Commercialisation and privatisation of land and housing ownership has compromised access to land by women previously provided under customary land tenure. Market pressure and individual registration processes are compromising traditional rights of women, for instance in matrilineal societies;⁴⁴ and
- War in some countries and the prevalence of HIV/AIDS in almost the entire region has disproportionately affected women's land and housing rights.

There have been some government efforts to improve the situation, including affirmative action provisions and law

reform. However, a great deal more must be done to ensure that women in the region access and enjoy their rights to land, housing and property. Legislative provisions that disadvantage women or discriminate against them need to be amended or repealed; the trend where women can only access land and property by virtue of their roles as wives, daughters or sisters has to be reversed as these are mere secondary rights; implementation mechanisms need improvement; sociocultural barriers need to be removed; and poverty levels and HIV/AIDS need to be addressed with a gender and rights perspective in mind. Larger and more coordinated efforts need to be made by civil society given that the political will is not always there. Above all attitudes towards women need to change.

9.2 Marital property rights

Marital property rights law is not always clear – a mixture of legislation of the former colonial rulers of each respective country and the local customary rules and practices. Generally, married women are considered to be under the guardianship of their husbands. This means that even when the woman buys the house or property, it is often registered in the name of the husband.⁴⁵

Under customary laws

Most women in Southern African are married under customary law. Marital property rights under custom also depend on whether the marriage is matrilineal or patrilineal (which in turn are either *matrilocal*, where the man moves to the wife's home, or *patrilocal*, where it is the wife who moves). The marital property rules under custom are similar to the rules of persons married out of community of property. The property a man comes with into the marriage is to be used for the benefit of the family. The property the wife comes with is hers as is that which she acquires during the marriage. However, while men will acquire immovable and larger kinds of property including housing, women acquire smaller property and seldom housing. After the marriage is dissolved

⁴⁴ Women's Rights to Land and Property, www.unhcr.org/csd/documents

⁴⁵ Women and Law in Southern Africa Research and Educational Trust (WLSA). (2001). *Critical Analysis of Women's Access to Land in the WLSA Countries*.

the woman may take her smaller property but is not entitled to the larger property acquired during the marriage.

Women experience difficulties in accessing marital property, especially upon dissolution of marriage and often solely depend on the good will of their former husbands. Even where the customary law court has awarded property settlements to women, the High and Supreme courts have overturned such judgments.⁴⁶ Many customary laws - for instance Ushi and Chibwe customary law in Zambia - entitle women to a reasonable share of the marital property.⁴⁷

In some countries, for instance Swaziland and Lesotho, women are still regarded as legal minors. Husbands have the marital power to administer the joint property and represent their wives in civil proceedings. In Botswana, a couple married under customary law can actually choose to be exempt from customary rules to an extent that a customary law marriage can either be in or out of community of property.⁴⁸ However a woman married under customary law is held to be a legal minor and requires her husband's consent to buy land or enter into contracts. The position of women married under customary law is summed up in the Zimbabwe High Court decision in *Khoza Vs Khoza*⁴⁹ where a woman was deprived of the parties' communal land and marital home built jointly and maintained by her for 23 years because the marriage was patrilocal.

There are, however, some positive developments. In Mozambique, the passage of the Family Law of 2004 changed things for women by recognising customary law marriages

⁴⁶ *Mwiya Vs Mwiya* 1975 ZLR; C Vs C SCZ, 2000 (Zimbabwe).

⁴⁷ *Chibwe Vs Chibwe*, Appeal No.38/2000 SCZ (Zambia) This was a marriage under Ushi customary law and the woman also got a house which had been built by the husband on a plot that was in her name and a restaurant and an award of \$4000 for damages arising from the husband's attempt to defraud her of the house (see SCZ Appeal No. 123, 1998)

⁴⁸ Center On Housing Rights and Evictions (COHRE). (2004). *Bringing Equality Home: Promoting and Protecting the Inheritance Rights of Women*. p.42.

⁴⁹ HH 106 see also WLSA. (1997). *Paradigms of Exclusion: Women's Access to Resources in Zimbabwe*. p.54-55. The couple had been married for 23 years and the wife had built and maintained the matrimonial homestead during this time. Upon dissolution of marriage the court denied her any right to the matrimonial home and residence on grounds that the marriage was patrilocal. She was awarded the family's town house in Bulawayo yet her means of subsistence was farming. The matrimonial home was on communal land.

and non-formal unions. Now women married under custom can claim marital property. Although it is a progressive piece of legislation, it defines a household, which is the basis for allocation of land, as a "set of people living in the same home under the authority of the head of the household, married or in de facto union." It has been argued that this leaves room for the land to be allocated to the man, who under patriarchy is considered to be the head of the household.⁵⁰

Under statute

Most statutory marriages provided can either be in or out of community of property.

For marriages in community of property all the belongings and debts of husband and wife are combined into a joint estate. On dissolution of marriage these are divided equally to the parties. Marriages out of community of property keep each party's debts and assets separate, and on dissolution each takes their portion.

People are generally married out of community of property. In some countries, for example Zimbabwe, those who choose to marry in community of property have to sign a special deed to this effect. Marital power is excluded⁵¹, although women still have to be "assisted" in registering property and property transactions.⁵² Where marital power is retained over women by men – for example in Swaziland and Lesotho – it effectively nullifies any rights to property that accrue to women. This is because property will often be registered under a husband's name. Women married out of community of property have to be assisted by their husbands to register property in Swaziland.

Some positive developments have occurred. In Botswana, passage of the Deeds Registry Amendment Act 1996, allowed women married in community of property to register im-

⁵⁰ Women and Law in Southern Africa Research and Educational Trust-Mozambique. (1997). *Families in a Changing Environment in Mozambique*, pp. 132-133

⁵¹ The Married Persons Property Act of 1929 excludes marital power from marriages entered into after 1929

⁵² Section 15 (1) of the Deeds Registry Act, 1996. A Deeds Registry Amendment Bill (2001), which is aimed at removing this, is still pending.

movable property in their names and eliminated the requirement for women to be assisted in registering land. However this amendment only limits marital power over immovable property, so that men still retain it over movable property. Similarly, in Namibia, the Married Persons Equality Act was passed so that women married in community of property can now register property in their own names. In Lesotho, the Married Persons Equality Bill has been pending enactment since 2000.

Joint ownership of marital property

Joint ownership by married couples is not common. In Zambia, for instance, only 12 percent of housing units transferred were held in joint ownership of couples.⁵³ In Zimbabwe, 98 percent of the resettlement area permits of farming and grazing land are held by husbands and only 2 percent by wives – and women married under customary law cannot hold property jointly with their husbands. On the dissolution of a marriage there are some difficulties in the settlement of property due to the kind of laws in operation. In Malawi there is a provision for jointly held property, but not for common property. There seems to be a problem in calculating the women's contribution to common property because most women's contribution is in reproductive labour, which is not quantified.

9.3 Inheritance rights

Most of Southern Africa has a dual legal system, meaning property rights are governed by two systems of law. Consequently the rules of inheritance are derived from both systems.

Under customary law

Under the customary law system, inheritance is, with a few exceptions, determined by rules of male primogeniture⁵⁴. This means the oldest son of the senior wife (in cases of polygamy) is the heir. Ultimately the heir is always a male relative, never a female.

⁵³ *Zambia Daily Mail*, July 5 2004, p7

⁵⁴ The South African Constitutional Court in the case of *Bhe V Magistrate, Khayelitsha* and others, CCT 49/03 (2005 (1) BCLR 1(CC)) has however ruled against this practice.

Male preference is effected whether under matrilineal or patrilineal principles. So while under matrilineal societies the female line is used to inherit, (most of the region is matrilineal) property normally passes to the nearest matrilineal male, usually a nephew of the deceased person and not necessarily the sons. In patrilineal societies it goes to the sons. The daughters therefore do not inherit in their own right and can only be assigned land to use by the inheriting male (who may be their cousin, brother or uncle). In most societies, the order of priority is thus always male, with male descendants, ascendants, siblings, collateral males, then only widows and daughters. Women are at the end of the inheritance list and are therefore unlikely to inherit.

Patrilocal marriages, where the woman moves to the husband's homestead, also often make the widow vulnerable to expulsion from the matrimonial home. In cases of matrilineal marriage, women inherit their mother's property, but the heir to a deceased father's estate is a maternal male. In Islamic communities, for example in Mozambique, daughters are entitled to a quarter of the estate according to Islamic law. This does not always happen however as customary laws distort this practice.

Widows' inheritance rights are also subject to certain conditions. In some cases, they may only inherit if they comply with certain customary rituals.⁵⁵ Often, where customary inheritance is controlled by an act,⁵⁶ patriarchal attitudes and male preference and dominance in property ownership and inheritance are a problem.

Finally, in countries where the constitution still allows the application of customary law in inheritance matters, such as Lesotho, Zambia and Zimbabwe, High Court decisions have ensured the continuation of this practice in spite of the fact that it clearly discriminates against women.⁵⁷

⁵⁵ Women and Law in Southern Africa Research and Educational Trust-Swaziland, *Inheritance in Swaziland: Law and Practice*, 1994, 56-57. In Swaziland, these rituals are traditional mourning rites, (kuzila) and kungenwa (levirate or widow inheritance).

⁵⁶ For instance Namibia's Communal Land Reform Act 2002 read with Art. 66 of the constitution

⁵⁷ See the Women and Law in Southern Africa Research and Educational Trust-Zimbabwe. (2001). *Venia Magaya's Sacrifice: A case of Custom Gone Awry*. Venia

In general, women in Southern Africa have a very limited right to inherit; they often only have a secondary right to use the property of the deceased husband or father.

Under statute

The effect of the inheritance and succession statutes in the region is to vary the provisions under customary law.

In Lesotho, the Draft White Paper on Land does not support the radical abolition of customary law, but the conversion of customary law rights to common law rights.⁵⁸ Proposals have been made to the effect that decisions about who should get rights in land including through inheritance would be determined by who would make the most proactive use of the land. Currently, one is obliged to show that they have moved away from customary law to be able to bequeath property to daughters in a will. However, the Lesotho Land Act of 1997 allows widows to stay in the matrimonial home provided they do not remarry, thereby giving the widow usufruct rights and not ownership rights. Therefore women do not inherit property but acquire a right to use the property.

In Botswana and Namibia, inheritance under the statute is tied to the marriage regime for people married under Civil Law (i.e., in or out of community of property). The Administration of Estates Act 1979 in Botswana allows men to exclude their wives from the will if the marriage is out of community of property. In Zimbabwe, the key statute dealing with inheritance is the Administration of Estates Act (as amended by Act No. 6 of 1997). The customary law heir, usually a male, now only receives traditional heirlooms (the name and traditional knobkerrie) and ownership of the matrimonial home devolves to the surviving spouse. The rest of the estate is shared in equal portions between the surviving spouse and the children of the deceased. The Deceased Persons Family Maintenance Act is also relevant. Somewhat

superseded by the Administration of Estates Amendment Act, it gives usufruct rights to the widow and children.

In Malawi the distribution of the estate depends on whether the marriage was patrilineal or matrilineal. In patrilineal marriages, half the share goes to the widow, children and dependants and the other half to customary heirs; if it was matrilineal, the wife, children and dependants get two-fifths and the customary heirs three-fifths.⁵⁹ The personal chattels of the deceased go to the widow, who is also entitled to dwell in the matrimonial house as long as she remains chaste.

Widows in polygamous marriages have to share the property meant for the widow. In Zambia each widow is entitled with her children absolutely (i.e. to the exclusion of other beneficiaries) to her homestead property (property in the house or room she occupies) and the common property (used by all family members) is to be shared between the widows.⁶⁰ Similar provisions exist in the South African Intestate Succession Amendment Act (2002) and the Zimbabwean Administration of Estates Amendment Act 1997. This is difficult because there is often only one of each item and unless these are sold, sharing is impossible. If the widows continue using this common property, problems of maintenance often arise.

Apart from Mozambique, women in informal unions are not entitled to inherit their deceased partner's property. In Mozambique, women who have lived with their partners for more than one year are entitled to inherit property.

Magaya Case 1998 SC 210; 1999 1 ZLR 100 (Zimbabwe); *Chilala Vs. Milimo* LAT 09/99 (Zambia); and *Tsosane and Tsosane*, 1971-73 Lesotho Law Reports 1 (Lesotho).

⁵⁸ Walker, C. (2003). *Land Reform in Southern and Eastern Africa: Key Issues for Strengthening Women's Access to and Rights in Land*. Report to FAO. See also www.oxfam.org.uk

⁵⁹ Sections 16 and 17 of the Will and Inheritance Act. See also Women and Law in Southern Africa Research and Educational Trust- Malawi, *Dispossessing the Widow*, 2002

⁶⁰ Section 10 of the Zambian Intestate Succession Act, Chapter 59 of the laws.

Dispossessing widows

Dispossessing widows of property, though a criminal offence in most of the region, is a common practice and a big problem in the region.⁶¹ This is because the statutes are often a compromise on the customary law position, or conflict outright with custom and are therefore not fully accepted. Traditionally, widows could continue accessing the property left by their deceased husbands when they joined the household of the one entitled to inherit, but this practice is dying out especially due to HIV/AIDS. As a result husbands' relatives are grabbing property from widows, especially those who are refusing to remain as part of the family (through widow inheritance).⁶²

The high incidence of HIV/AIDS has worsened dispossession of widows. The table below illustrates the scale of the problem.

Table 9.2 HIV/AIDS infection rates in Southern Africa

Country	% of adult population infected with HIV/AIDS ⁵
Angola	5,5
Botswana	38,8
Lesotho	18
Malawi	15
Mozambique	13
Namibia	22,5
South Africa	20,1
Swaziland	33,4
Zambia	21,5
Zimbabwe	33,7

Generally, the epidemic has made women more vulnerable to disinheritance. In some cases, relatives often delay the administration of the estate, waiting for the beneficiaries to die. As a result a lot of widows and their children fail to

61 For instance in Zambia the highest number of complaints made to the police in 2002 and 2003 were those of "depriving beneficiaries of deceased's property".

62 Conteh, M. Le Beau, D. & Ipinge, E. (2004). *Women Face Discrimination From Cradle to Coffin: Women's Rights to Property in Namibia*. Abstract presented at women's land rights workshop in Lusaka, 2004 citation not yet available. See also the United Nations. (2004). *Report of the United Nations Secretary General's Taskforce on Women and Girls in Southern Africa*.

access anti-retroviral therapy because they cannot access the property (including money) they are entitled to⁶³.

9.4 Affirmative action policies

The Southern African countries signed the Blantyre Declaration⁶⁴ under which 30 percent of people in decision-making positions should be women. Apart from Mozambique, state parties have not yet implemented this declaration. Affirmative action measures have often been attempted but have not been entirely effective.

- Women are still underrepresented in elected positions. In Zambia's 2001 elections, only 19 women were elected into a 120-seat parliament. Women constitute less than 10 percent of senior government officials. There are more far more men than women in formal wage employment;⁶⁵ and
- Many positive laws that address affirmative action issues are yet to be enacted due to the reluctance of law-making institutions. In Lesotho for instance, the Married Person's Equality Bill, which is meant to abolish women's minority status and allow them to register land in their names, has been pending since 2000.

There have been some positive developments. In Mozambique, the Land Act contains a clause entitling women to property rights. The Family Law in Mozambique also recognises customary marriages and informal unions between men and women. Some governments have made efforts to allocate land to female-headed households. In Zambia, the draft land policy provides for 30 percent of all land allocated being reserved for women. In Namibia, there are schemes to assist female students who have financial problems to improve enrolment, retention and completion of education.

Implementation is a major stumbling block to these initiatives. In Zambia, for instance, land allocated to women was far away from the city, was undeveloped and without any services. Service charges and survey fees were also unaffordable

63 For instance in Zambia.

64 SADC declaration on Gender and Development 1997.

65 Zambia Association for Research and Development and SARDC-WIDSAA. (1998). *Beyond Inequalities: Women in Zambia*. P. 25.

to many women. A regional audit of the states' implementation of the Southern African Development Community Declaration on Gender and Development and its addendum on violence against women and children shows a relatively poor picture,⁶⁶ yet the compliance period has come to an end (1987-2005).

9.5 Best legislation, policies and practices on gender issues

Some of the legal and policy provisions and practices are good, and replication in other countries should be considered. The following fall into this category:

- Provisions in Mozambique's Land Act 1997 and the Family Law that recognise the right of women to own land and allow for the joint registration of property;
- The initiative by Mozambique's National Survey and Mapping Department to give women applicants title in the absence of male applicants, contrary to local custom;
- A mass sensitisation programme on women's land rights and the initiative to integrate it into literacy programmes were good practices, as was the joint initiative in Namibia by the United Nations Food and Agriculture Organisation, local authorities and NGOs to guarantee women's rights through access to information and resources;
- The draft land policy in Zambia, which provides for 30 percent of all land demarcated to be set aside for women, and the remaining 70 percent to be competed for by both men and women as an affirmative action measure;
- Law reform proposals in Lesotho for the harmonisation of laws and the repeal of discriminatory provisions that hamper women's property rights;
- Upgrading schemes for informal settlements and slums are a good practice. Special attention, however, needs to be paid to women so that they can benefit from these schemes. The urban upgrading scheme of Lesotho is a good example, where female-headed households benefited; and

- The Statutory Housing and Improvements initiative in Zambia where people in informal settlements were given licences is also a good practice because they can use these as collateral for credit to improve their housing situation.

10 Racial and ethnic equality

In countries like Namibia, South Africa and Zimbabwe stark inequalities remain between the patterns of land holding by the descendants of white settlers and those of indigenous Africans. This is primarily because of the harsh restrictions on urban land ownership by blacks implemented prior to independence. The high cost of acquiring land in these formerly white areas, together with well-off neighbourhood resistance to the settlement of poor people close to their homes, has meant that these unequal patterns of land ownership persist. In South Africa, the 1995 Development Facilitation Act was enacted to encourage local government planning towards integration, but its effect has been limited to date.

Also largely as a legacy of colonial "divide and rule" policies, there are some examples of ethnic tension between various groups, especially in relation to access to land and housing. In some cases these tensions are reflected in particularly insecure tenure rights for certain ethnic minorities, such as the San in Botswana. Generally however, the process of urbanisation has resulted in communities that are more ethnically diverse than in the past.

In addressing the range of issues relating to race, gender and ethnicity it is important to note that governments in the region vary widely. Some are guided by, and generally follow, progressive new constitutions, while others are guided by more traditional and conservative philosophies. These differences tend to manifest themselves starkly in the land and housing sector, especially insofar as the rights of women are concerned.

⁶⁶ See <http://216.239.59.104/custom?q=cache:19QFlm85YyoJ:www.genderlinks.org.za>

11 Regional recommendations and priorities:

Because of the region's diversity it is not appropriate to make detailed recommendations on this scale. Detailed recommendations are made at the conclusion of each country report. However, it is clear that there are a number of initiatives on a regional level that could strengthen land rights, and especially those of women, and which could also benefit from the support of organisations such as UN-HABITAT. The various instances of good practice emerging from the region could form the basis for a well-focused testing and rollout of these experiences on a wider scale.

Initial recommendations for further action within the region are set out below:

- (1) **Women's land, housing and property rights are compromised by discriminatory laws. There is need for law reform.** The relevant statutes need to be harmonised and updated and the international instruments need to be domesticated. Constitutions should make unequivocal commitments to gender equality.
- (2) **Develop country-specific, step-by-step strategies for improving security of tenure of residents of informal settlements, particularly women.** The assistance and support of UN-HABITAT's Global Campaign for Secure Tenure as well as the Cities Alliance's "Cities without Slums" programme will be essential for the realisation of this objective. The recently established African Ministerial Conference on Housing and Urban Development⁶⁷ (AMCHUD) is setting up a secretariat that should provide continental leadership in the development of innovative urban land management practices.
- (3) **Clarify the legal basis for tenure where the formal, informal and customary tenure systems overlap.** While there can never be a quick fix to the problem of overlapping tenure systems, there is a great deal to be done by both national and local governments to clear up the existing confusion. This needs the development of effective conflict-resolution mechanisms as well as

the provision of alternative land for persons who may have to move as a result of conflicting rights to the same land. It will be very useful to model efforts in this regard on the Namibian and Zambian good practices relating to the creation of local level registries and flexible new tenure forms for residents of informal settlements.

- (4) **Design pragmatic and equitable strategies for managing informal settlements.** This is an ongoing challenge, also without a likely quick fix. Nevertheless it is imperative that countries in the region accept that informal settlements are a reality that cannot be wished away. Instead they have to be integrated into the existing urban fabric. Upgrading of these settlements will a key element in the success of these strategies.
- (5) **Accommodate anticipated effects of migration, social changes and HIV/AIDS in all policies and plans.** Data collection and information management techniques have historically been very weak in the region. The impact of HIV/AIDS on women's land, housing and property rights for instance needs to be extensively investigated. Gender disaggregated data needs to be compiled. Increasingly, however, data collection has grown stronger. It is essential that resources and capacity are developed, with the assistance of development partners.
- (6) **Strengthen regional social movements and NGOs involved in the urban land sector.** The region is poorly served by social movements and NGOs, especially ones operating at the regional scale. Prevailing poverty, as well as the so-called brain drain evident throughout Africa, necessitates the focused support and assistance of development partners.
- (7) **Strengthen organs of the African Union to exchange information on best practices and establish regional standards for urban tenure security.** AMCHUD provides a timely opportunity to build networks between African Union member states. The secretariat, supported by UN-Habitat, will provide technical and administrative assistance to member states.
- (8) **Encourage donor support to national governments to develop dedicated urbanisation policies.** To date most donor support has been directed towards rural development in Africa. New institutions such

⁶⁷ For more on the AMCHUD's Durban Declaration and the Enhanced Framework for Implementation see the UN-Habitat's website www.unhabitat.org/amchud.

as the New Partnership for Africa's Development's Cities Programme, the Commission for Africa and AMCHUD provide vehicles for concerted action to ensure that donor support is focused on empowering Southern African countries to meet their urbanisation challenges.

- (9) Support initiatives to develop new, innovative and appropriate practices for land registration and cadastral survey in the region, building on some emerging good practices.** UN-HABITAT is shortly to launch a global network of "Land Tool Developers" and it is imperative that this network reflects the innovative practices emerging from Southern Africa, as well as promoting greater understanding within the region to effective innovations elsewhere in the world. Specific efforts, perhaps through the organs of AM-

CHUD, should be made to ensure that the region benefits from the activities of this network.

- (10) Focus governments' attention on ensuring a more prominent place in poverty reduction strategy papers for more equitable and efficient land management and gender issues.** In the recent AMCHUD Durban Declaration African countries committed themselves to prioritising the potential of good urban land management in economic and social development, as well as poverty reduction and "mainstreaming" these in their poverty reduction strategy papers. This initiative deserves to be supported and strengthened.



Land law reform in Namibia

Introduction

Origins of report

This is one of four reports that examine in detail land tenure systems and law reform in selected southern African countries: Lesotho; Mozambique; Namibia; and Zambia. The preceding regional overview provides a broad summary of issues across the region, i.e. over and above the four countries selected for individual study, and highlights key themes upon which the four country studies are based. The country reports flow from an extensive examination of laws, policies and authoritative literature, in addition to a wide range of interviews. Each country report is authored by a resident specialist consultant. UN-HABITAT, the sponsor of the project, conducted a workshop to set the research agenda.

Themes

In this report examination of land tenure has been considered broad enough to cover matters regarding housing, marital property issues, inheritance, poverty reduction and local government. An additional important aspect of the study is its focus on gender and its relationship to each of these issues.

Structure

The report is structured to capture the wide-ranging topics mentioned above. Standard headings have been used across all four reports, with some inevitable variation.

The first part of the report sets the scene for the study, providing a brief historical background, followed by a snapshot of how the governments and legal systems of the country function in relation to the subject matter. There is a discussion of the socioeconomic conditions. The section concludes by examining the level of civil society activity in the countries of study.

The next section, on land tenure, is the core of the report, defining the various types of land in the country and the relevant constitutional provisions, laws and policies. The chapter also attempts to define what rights accrue to the holders of various types of land.

The next section examines housing rights, including related matters such as the accessibility of services like water and sanitation. It deals with constitutional matters and relevant laws and policies.

The next subject area is inheritance and marital property issues. The initial emphasis here is on determining whether a constitutional provision that prevents discrimination on grounds of gender is provided. Issues of marital property rights hinge on whether both men and women enjoy equal property rights under the law. An important matter that influences this right is the applicability of customary law – an issue of enormous importance in southern Africa.

A section is then dedicated to examining the country's poverty reduction strategies or similar initiatives and their relationship to the primary themes of the report.

The section on land management systems maps the institutions involved in land management and administration, and how far their functions filter down to the local level. This section also analyses the relationship this formal bureaucracy has with informal settlements and their dwellers. The section concludes with a selection of court decisions on land and housing rights cases.

Local laws and policies are then scrutinised to determine how they address land and housing rights, as well as their relationship with national laws.

Implementation of land and housing rights is the next topic of discussion. It addresses how successful the actual delivery of these rights has been.

The final sections draw on information provided in the pre-

vious parts of the report. The best practices section tries to identify any positive and possibly replicable practices that have emerged. The conclusions section infers from the previous section, identifying problems and constraints to land and housing rights delivery. The final part of the report makes recommendations. These are designed to be realistic, taking into account the specific conditions in the subject country.

Figure 1.0 Map of Namibia



Africa. Land held by the German colonial administration became Crown or state land of South Africa.⁶⁹

The urban policy of both the German and South African colonial administrations was to create exclusively white towns and cities. Throughout the colonial era, both public and private investments were concentrated in these urban centres. Blacks were allowed to move in, mainly as contract labourers, and lived in separate areas or “townships” with inferior social services. Permanent black urbanisation was discouraged, while a number of discriminatory laws, such as pass laws and prohibition of urban land ownership, controlled most aspects of black residents’ lives.⁷⁰ The development of informal settlements was also strictly regulated by apartheid policies. For example, residential growth in Katutura, one of Windhoek’s only black townships at the time, was prohibited. As a consequence, the formal low-cost houses in Katutura became heavily overcrowded before independence.⁷¹

With independence in March 1990, apartheid policies were abolished, and the Namibian Constitution introduced the right of all Namibians to reside and settle in any part of the country.⁷² A dramatic increase of informal settlement in Windhoek resulted, mostly around Katutura. Many of those who lived in overcrowded conditions in Katutura moved onto vacant land nearby, and many others migrated in from impoverished rural areas.⁷³ Newly settled urban residents lived in unhygienic conditions, with no easily accessible water or sewerage facilities.

69 Under the terms of the Treaty of Versailles and the South African Parliament’s South West Africa Act 49 of 1919.

70 Christensen, S.F. Wolfgang, W. & Hojgaard, P.D. (1999). *Innovative Land Surveying and Land Registration in Namibia*. The Development Planning Unit, University College, London, p. 5.

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

72 Art. 21(1)(h).

73 A 2001 survey conducted in Windhoek’s informal settlements indicated that residents had lived in these areas for an average of 5.2 years and in Windhoek itself for 12.4 years. These figures suggest that informal growth is driven more by people who previously lived in overcrowded conditions in the city searching for more space for themselves and their families, and less by immigration from the countryside to the city.

Despite this, Namibia has never developed large urban centres. This is because of the relatively small population and environmental conditions that are not favourable to large concentrations of people. Namibia does not have sufficient economic surpluses⁷⁴ to maintain specialised urban functions. In addition, regional trade and migratory routes do not support the growth of large-scale urban areas.⁷⁵

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, old English law and customary law prevalent in rural areas.

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.⁷⁶ The main organs of the state are the executive, legislature and judiciary.

The executive

The Constitution creates an executive, headed by the president, who is assisted by the cabinet. The president is obliged to act in consultation with the cabinet.⁷⁷ In 2004, 14.2 percent of all cabinet members were women. The president is elected by direct popular vote for a term of five years and can be re-elected for a second term of office.⁷⁸ A number of statutory policy bodies advise the president on relevant matters of the state. These include the Judicial Service Commission and the National Planning Commission.

74 In 1995 Namibia’s gross domestic product was N\$11.47 billion (US\$3.1 billion) with a per capita income of N\$7,387 (\$1,996), triple the African continent’s average. These statistics, however, conceal the fact that Namibia is one of the world’s most unequal societies. The poorest 90 percent consume significantly less than the remaining minority. Republic of Namibia, (1998). *Programme Review and Strategy Development Report*, United Nations Population Fund, p. 2.

75 Tvedten, I. & Mupotola, M. (1995). *Urbanisation and Urban Policies in Namibia*. NEPRU Working Paper no. 47 Windhoek Namibia, p. 7.

76 Art. 1 of the Constitution of Namibia.

77 The cabinet consists of the president, the prime minister, deputy prime minister and ministers appointed by the president. Together they implement the policies 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.

78 Art. 29(3).

The territory of Namibia is divided into 13 administrative Regions, which in turn are divided into 102 constituencies.⁷⁹ A Governor heads each Region, while elected Regional Councillors head the constituencies and local councillors form the Town, Municipal and Village Councils.⁸⁰ Currently there is only one woman Governor - the Governor of Omaheke Region - and only 6 out of the 102 Regional Councillors are women.⁸¹ According to the Association for Local Authorities in Namibia (ALAN), there are 37 local authorities, municipalities and village councils in Namibia. These include 16 municipalities, 10 towns and 11 villages. Municipal councils have between 7 and 15 members, town councils between 7 and 12 members and village councils have 5 members. In total, there are 140 councillors representing these 37 local authorities, municipalities and village councils, of which 36 (25%) are women. Local councillors are elected directly every five years.

Traditional authorities shall exercise their powers, duties and functions under customary law as well as give support to the policies of the Government, regional councils and local authority councils, while refraining from any act, which undermines the authority of such institutions.⁸² However this supportive role is not always clear or well defined. Efforts to co-ordinate functions between traditional, local and regional authorities have so far not been very successful,

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

80 Regional Governors are elected by Regional Councillors.

81 Information obtained from the Association of Regional Councils in Namibia (20 July 2004).

82 See Section 16 of the Traditional Authorities Act, 25 of 2000. The Traditional Authorities Act defines a "chief" as a supreme leader of a traditional community who is- (1) from a royal family of a traditional community and who has been instituted as the chief or head of that traditional family; (2) 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)). A 'head' or headman is defined in the same way, with one difference: a 'head' must have been designated as such by a traditional community and must be a member of a traditional community and appointed as the head of a traditional community (Section 1 read with Sections 4(1) (a) 4(1) (b) and (6)). Chiefs often have a more senior position in their community and have a final say in the election of heads.

despite central government efforts to do so and despite the fact that standards as reflected in the Namibian Constitution, the Regional Council Act, the Local Authorities Act, the Traditional Authorities Act and the Traditional Leaders Act have brought a new political dispensation to post-independence Namibia.

The President recognises the designation of a traditional leader by publishing the information in the *Government Gazette*. No chief or head of a traditional community will get government recognition if such designation has not been published in the *Gazette*.⁸³

Most Town Councils are in debt and have no capacity. During 2004, towns such as Okakarara, Katima Mulilo, Usakos and Karibib had their electricity and/or water supply cut or reduced because of non-payment. The lack of development in most towns currently undermines the authority of the Town Councils and their ability to raise revenue from tax and as a result may jeopardise their political legitimacy. All local authorities (villages, towns and municipalities) are given certain powers automatically.⁸⁴ However, villages may only exercise these powers if the Minister of Local Government and Regional Government and Housing deems that they are ready to do so. Central government can step in to help towns and villages that are having trouble providing adequate services to their residents.

The legislature

The legislature makes laws, approves the executive's budget and exercises control over the government. The legislature

83 See Section 6 of the Traditional Authorities Act. A chief or a head may not hold political office unless s/he takes leave of absence from his or her position as chief or head. The central government provides allowances to the chief or head of a traditional community and up to six senior traditional councillors and six additional traditional councillors.

84 Relevant powers include

- Supply of water, sewerage and drainage systems and refuse disposal
- Purchase and sales of land and buildings
- Operate farms on town lands
- Set up housing schemes
- Setting fees for services provided and accept donations or borrow money from sources inside Namibia.

consists of two houses: the National Assembly and the National Council.

The 72 voting members of the National Assembly are directly elected for a five-year term on the basis of proportional representation, and the president appoints an additional six non-voting members. In 2005, 26.9 percent of all parliamentarians were women.⁸⁵

The National Council consists of two members from each of the 13 geographic regions of Namibia. These 26 members are directly elected for a term of six years. The National Council reviews bills passed by the National Assembly and recommends legislation on matters of regional concern to the National Assembly.⁸⁶

The judiciary

The courts consist of a Supreme Court, a High Court and Lower Courts – Magistrates, Regional and District Labour Courts.⁸⁷ Namibia has an independent judiciary, which means that no member of the cabinet or legislature, or any other person, shall interfere with its functions.

The Supreme Court is the highest court and is headed by the chief justice, who is appointed by the president upon the recommendation of the Judicial Service Commission.⁸⁸ The Supreme Court hears and adjudicates upon appeals from the High Court, including on constitutional issues.⁸⁹

The High Court is the second-highest court. It consists of the judge-president and other judges appointed by the president on the recommendation of the Judicial Service Commission.

85 Inter-Parliamentary Union, *Women in National Parliaments*, 30 April 2005. Available on: <http://www.ipu.org/wmn-e/classif.htm>

86 Art. 63 and 74 of the Constitution outline the wide-ranging functions and powers of the two houses of parliament.

87 Art. 78 of the Constitution.

88 The Judicial Service Commission, as established as per Art. 85 of the Constitution, makes recommendations with regard to all judicial appointments and disciplinary actions against a judge. It 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 from the legal profession.

89 The Supreme Court also deals with matters referred to it for decision by the attorney-general and with others as may be authorised by act of parliament.

There are 11 full-time judges of whom only two are female. At the time of writing, seven of the judges are black. The High Court has the jurisdiction to hear and adjudicate on all civil disputes and criminal prosecutions, including constitutional issues, as well as appeals from lower courts. Cases concerning land and housing disputes are referred to a Magistrates Court or the High Court.⁹⁰ Issues of inheritance, succession and bankruptcy are dealt with at the High Court.⁹¹

The Agricultural (Commercial) Land Reform Act makes provision for the Land Tribunal. It adjudicates on prices offered for expropriated commercial farms, although it is yet to be used for this purpose.

Chapter 10 of the Constitution provides for an ombudsman, who reports to the National Assembly. The office investigates any violations of fundamental rights by an organ of state or a private institution.

Local government

Namibia is divided into 13 administrative regions, which in turn are divided into 102 constituencies.⁹² A governor heads each region, while elected regional councillors head the constituencies and local councillors form the town, municipal and village councils.⁹³ Currently there is only one woman governor.⁹⁴

There are 37 local authorities: 16 municipalities, 10 towns and 11 villages. Municipal councils have between 7 and 15 members; town councils between 7 and 12 members; and

90 Section 28(1)(g) of the Magistrates Court Act, Act 32 of 1944 gives jurisdiction in respect of any person who owns immovable property in respect of such property or in respect of mortgage bonds thereon.

91 For the time being, Magistrates Courts deal with those inheritance cases as provided for under the Native Proclamation.

92 The delimitation and governance of regions by regional councils and local councils occur in accordance with Articles 102 to 111 of the Constitution. The Regional Councils Act, Act 22 of 1992 and the Local Authorities Act, Act 23 of 1992 further regulate establishment, powers, duties and functions of these councils. Functions relating to the management and development role of regional councils are stipulated in section 28 of the Regional Councils Act. These include: regional development planning in co-operation with the National Planning Commission; the establishment, management and control of settlement areas; and assisting local authority councils in the exercise of their functions.

93 Regional governors are elected by regional councillors.

94 Information obtained from the Association of Regional Councils in Namibia, July 20 2004.

village councils have 5 members. In total, there are 140 councillors representing these 37 local authorities, municipalities and village councils, of which 25 percent are women. Local councillors are elected directly every five years.⁹⁵

1.3 Socioeconomic context

Namibia, with an approximate geographical land area of 824,200km², is southern Africa's most sparsely populated and arid country. The estimated population of Namibia in 2001 was 1,830,330,⁹⁶ with a resulting population density of about two persons per square kilometre. While this would seem to provide a basis for an orderly agricultural land reform process, Namibia's land is very dry and suited only to a few types of agriculture.⁹⁷

Poverty

Namibia has a relatively high unemployment rate of 31 percent. Thirty five percent of the population survive on less than US\$1 a day. The difference between rich and poor is extreme, giving Namibia one of the highest rates of inequality in the world.⁹⁸ This is a contributing factor to the rural-urban migration process, and builds particular challenges into both urban land reform and development policy. Women remain generally disadvantaged in terms of economic well being. In 1998 real GDP per capita for women was N\$3,513 (\$586) compared to N\$6,852 (\$1,142) for men.⁹⁹ Women occupy fewer high positions in the economy and administration, and salaries for female employees trail behind those of their male counterparts. This is despite the fact that women's life expectancy (50 years) and combined school enrolment

(84 percent) are higher than those of men (48 years and 80 percent respectively).¹⁰⁰

Urbanisation

In 2001, an estimated 33 percent of the Namibian population lived in urban areas, an increase of 5 percent since the 1991 census.¹⁰¹ Windhoek is the largest city in Namibia with a population of 233,529. It has witnessed high rural-urban migration since independence.¹⁰² With an annual urban growth rate of 5.4 percent, of which 3.9 percent is in-migration, a substantial increase in serviced land delivery is needed, particularly in the city's low-income housing areas.¹⁰³

Urban areas in Namibia have more people in the economically active age groups than rural areas.¹⁰⁴ This suggests that people in economically active age groups are migrating from rural to urban areas in search of work. Informal settlements have grown in urban areas, and shacks have become the second most common form of dwelling in urban areas.¹⁰⁵ In 2000, the informal settlement population living in Windhoek was estimated at 57,000 people.¹⁰⁶ Informal settlements have also formed near farms. These are inhabited by former farm workers who have lost their jobs. No legislation exists that provides long-serving farm workers with any form of secure tenure rights.

HIV/AIDS

In 1999, HIV/AIDS was the number one cause of death, accounting for 26 percent of all deaths in hospitals. In 2000 the prevalence rate was estimated at 20 percent, while 22 percent of deaths in hospitals for all ages in 2001 were caused by AIDS.¹⁰⁷ Some 70,000 persons were diagnosed with HIV and 2,868 died from AIDS. Life expectancy is set

95 Ibid.

96 Republic of Namibia. (2003). *2001 Population and Housing Census*. National Report, Basic Analysis with Highlights, p. 18. The World Fact Book estimates that the current population of Namibia is 1,954,033. These estimates take into account the effects of excess mortality due to AIDS. The World Fact Book. (2004). <http://www.cia.gov/cia/publications/factbook/geos/wa.html>.

97 Harring, S. & Odendaal, W. (2002). *One day we will all be equal... A socio-legal perspective on the Namibian land reform process*. Windhoek: Legal Assistance Centre, p. 8.

98 World Bank. (2004). *African Development Indicators*.

99 Research and Teaching on Human Rights. (undated). *Gender Issues and Democracy in Southern Africa*, Human Rights and Documentation Centre University of Namibia, <http://www.hrhc.unam.na/home.htm>.

100 Op. cit., 103.

101 Op. cit. 30, p. 4.

102 Ibid, p. 21.

103 Op. cit., 76, p. 24.

104 Ibid, 30, p. 24.

105 Ibid, p. 50.

106 World Bank. (2002). *Upgrading Low Income Urban Settlements: Namibia Country Assessment Report*. p. 22.

107 World Fact Book. (2004). <http://www.cia.gov/cia/publications/factbook/geos/wa.html>. See also Republic of Namibia. (2003). *Epidemiological Report: HIV/AIDS & STI*

to drop between 2005 and 2010 to just 45 years. 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%).¹⁰⁸

Women bear a disproportionate burden of the epidemic. Women aged 15-24 years show an HIV prevalence of 18.8-20.8 percent, whereas the corresponding estimate for young men is 7.9-10.4 percent.¹⁰⁹ Women tend to get infected at a younger age than men. There are several factors contributing to this picture. Women's biology makes them more susceptible to HIV infection, and a range of behavioural patterns and women's status in the overall social fabric reinforce the trend.

1.4 Civil society

NGOs and community based organisations were actively discouraged and suppressed by the pre-independence regime. Today it is recognised that civil society organisations play an important role in the development and management of informal settlements in urban areas: lobbying on behalf of vulnerable groups, providing financial skills and offering legal aid to those who cannot afford it.

In the densely populated informal settlements in and around Windhoek, Swakopmund, Walvis Bay and some of the northern communal towns, NGOs such as the National Housing Action Group (NHAG) and the Legal Assistance Centre (LAC) play important roles in terms of lobbying on behalf of informal settlers' housing rights, building financial skills and offering legal aid.

Legal Assistance Centre (LAC) and paralegal training

When the LAC had to close down some of its Advice Offices due to financial constraints, an urgent need existed to train paralegals to take over the functions of these offices in order

for the year 2001. Ministry of Health and Social Services, National AIDS Coordination Programme, p. 8.

¹⁰⁸ *Ibid* at 10 and 11.

¹⁰⁹ *Ibid*, p.13.

to give legal advice to their communities. Together with community organisations and activists, the LAC has implemented an extensive national training programme to train paralegals. In 2001 the LAC initiated the Community Paralegal Volunteer Project with the aim of establishing a paralegal resource base in most parts of Namibia. The ultimate aim is to set up community advice centres where people could obtain free legal advice. The LAC provides legal knowledge and general skills to paralegal volunteers. The LAC has also been instrumental in the establishment of the voluntary Namibia Paralegal Association, which looks after the rights, duties and interests of paralegals. Between 2001 and 2003 a total of 280 paralegals were trained.¹¹⁰ Currently the LAC is attending to the problems and experiences of paralegals operating in their communities and provides them with advice on legal issues on an ongoing basis. Paralegals work in all areas of the country, whether it is rural or urban, but their priority focus is on the neediest communities. Paralegals also play a mediatory role in many cases, giving advice for example on maintenance issues etc.

Women's Action for Development (WAD)

WAD is a self-help organisation that works primarily with rural women. Established in 1994, it is active in six regions and plans to expand. WAD helps its members establish "Women's Voice bodies". These bodies, which consist of seven members per region, address social problems within their communities by working through the decision-makers, community leaders and traditional authorities. They also take up membership in various development committees and encourage women to stand as candidates in elections.

¹¹⁰ A first introductory training focuses on the Constitution and human rights. An advanced training focuses on criminal procedure law. In addition, paralegals get training on topics such as writing a will, HIV/AIDS and gender and law related topics. Paralegals are usually persons who play an active role in their communities. Efforts are made to keep a gender balance. After the training, they are sent into "their communities" to test their skills.



Namibia Housing Action Group (NHAG)

This is an umbrella organisation for low-income housing organisations formed in November 1992. The organisation is managed by a board consisting of representatives of member groups. NHAG's main goal is to strengthen the member groups' activities to obtain housing for low-income households. Other objectives include:¹¹¹

- Supporting members in negotiations over evictions, land issues and loans;
- Advocating for the needs of low-income households in the formulation of housing policies, municipal regulations and standards;
- Providing training in construction, brick-making and alternative building methods;
- Stimulating awareness and sharing experience of housing development;
- Establishing links between domestic and international organisations; and
- Providing and facilitating other services to assist members in obtaining shelter.

NHAG members have applied for loans from the Build Together Programme of the MRLGH, which has been in operation since 1992. Since 1995 the Twahangana Loan Fund has provided such loans.

¹¹¹ Republic of Namibia. (1995). The First National Development Plan. National Planning Commission, Windhoek, vol. 1, p. 463.

Box 1.1 The Twahangana Loan Fund

Twahangana means "united" in Oshiwambo. In 1995 the Twahangana Loan Fund was established as a mechanism to strengthen the capacity of NHAG member groups to manage money and to provide financial access to the poor. NHAG administers the fund, which has received donations from Norwegian, German and Spanish donors over the past decade.

The main features of the fund are to provide housing, small business and service loans. The main conditions for savings group members to obtain a loan are based on:

- Their active participation in the saving group's activities;
- How much the member can afford per month;
- The cost of the house; and
- Five percent of the house loan amount being paid as a deposit.

Regional loan facilitators from the saving scheme network inspect the loan applications to ensure that the right procedures are followed and approve the group's application. A contract is signed with each member group and the individual. The groups deposit the money directly into the bank, and the office records the payment and informs each region about the status of the repayments.

In addition to the Twahangana Loan Fund, a savings scheme of a similar name has been initiated by NHAG members. The members save in their own groups and borrow from their savings for emergencies and to improve their income. These savings are used to acquire other resources like land and loan funds.¹¹²

Shack Dwellers Federation of Namibia (SDFN)

The SDFN was established in October 1998 by the 30 housing member groups of the NHAG. The SDFN is a network of housing saving schemes, aiming to improve the living conditions of low-income people living in shacks, rented rooms and those without any accommodation, while promoting women's participation. Following the establishment of the federation this initiative experienced dynamic growth, with 220 saving groups in 43 urban groups to date.

The SDFN is involved in a number of activities:

- It acts as a treasury for the regional and national activities, ensuring equal distribution of resources among

¹¹² Muller, A. Interview with the author, July 2004.

thorities have been very slow in responding to the survey. As regional councils lack proper recordkeeping systems, they find it difficult to provide correct answers to questions such as the percentages and types of construction materials used in building houses. There is therefore a need to train personnel to establish an information database. In addition, a lack of coordination at central government level often leads to the duplication of activities and the waste of resources.

While the promotion of indigenous building materials and designs by the Habitat Research and Development Centre must be applauded, the emphasis on *owning* a house does not take into account that there are other, often cheaper, forms of tenure that also provide security.

2 Land Tenure

Types of land

Land belongs to the state if not otherwise lawfully owned.¹¹⁵ There are a number of land categories.

State land

This is used for nature conservation, game parks, agricultural research farms and military bases. It also includes land owned by local authorities in urban areas for development and sale to private developers.

Private land

Urban land privately owned within proclaimed boundaries¹¹⁶ as well as rural commercial farmland or freehold agricultural land.¹¹⁷

Communal land

This category includes all land used by indigenous communities. It is owned by the state but held in trust for them. On the edges of growing towns in communal areas, uncertainty

¹¹⁵ Art. 100 of the Constitution.

¹¹⁶ Under the Town Planning Ordinance 18 of 1954 and Townships and Division of Land Ordinance 11 of 1963.

¹¹⁷ Private ownership of commercial farmland in Namibia is commonly referred to as freehold, a term that is not used for private ownership of urban land in Namibia.

exists about longstanding traditional rights and how these will be affected by the expansion of urban boundaries, and what the duties of local authorities will be in such areas.

Table 2.1 Land categories

Land Category	Km ²	Percent of total area
Rural Private Land	355,907	43,2
Communal Land	326,293	39,5*
National Parks (State Land)	114,500	13,9
"Registered" Diamond Areas (State Land)	21,600	2,7
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)

The categories of land rights holders are: individuals, family trusts, legally constituted bodies and institutions that exercise joint ownership rights, duly constituted cooperatives and the state.¹¹⁸

All other town/urban land (in communal and commercial areas) that is proclaimed 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 to be held under freehold title.

2.2 Tenure types

Relevant constitutional provisions

The Namibian Constitution does not contain explicit provisions recognising the right to adequate housing and access to land. It recognises the right for all persons to acquire, own and dispose of all forms of immovable and movable prop-

¹¹⁸ Republic of Namibia. (1998). *National Land Policy*. Ministry of Lands, Resettlement and Rehabilitation Windhoek, pp. 7-8.

erty in any part of Namibia.¹¹⁹ It also authorises the state to expropriate property in the public interest, subject to the payment of just compensation, in accordance with the law.¹²⁰ Art. 21(1)(a) recognises the right to freedom of speech and expression for all persons, while (h) states that every person has the right to reside and settle in any part of Namibia.

The right to property is balanced against the constitutional obligation to affirmative action.¹²¹ This enables parliament to enact laws that provide for the advancement of people who have been disadvantaged by past discriminatory laws or practices. It also allows for the implementation of policies and programmes aimed at redressing such imbalances.

The state is obliged to actively promote and maintain the welfare of the people by adopting policies aimed at the following¹²²:

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

The fundamental right of every citizen to freedom of speech and access to information implies that adequate and appropriate consultation with all interested and affected parties must be present in all land use plans. Land use plans must encourage the well being of all citizens through the promotion of access to services, facilities and resources on a sustainable basis.¹²³ According to the Constitution, there are specific

bodies that govern planning and land use. Coordination between these bodies is therefore crucial.¹²⁴

National laws related to land and property rights

Agricultural commercial land

The Agricultural (Commercial) Land Reform Act, Act 6 of 1995 This law provides for the acquisition of agricultural land by the government for purposes of land reform and redistribution. The land reform and redistribution is focused on agricultural land and targets Namibian citizens who have been disadvantaged by past discriminatory laws or practices.¹²⁵

Communal Land

The Communal Land Reform Act, Act 5 of 2002 The Act provides for the recording and registration of all land rights in communal areas, either as customary land rights or as rights of leasehold.

Communal land includes settlement areas but excludes municipalities, towns and villages. Communal land cannot be bought or sold, but it can be transferred. The Act provides for the allocation of rights in respect of communal land outside the boundaries of proclaimed towns. It further provides for the establishment of Communal Land Boards (CLBs), and regulates the powers of chiefs, traditional authorities and boards in relation to communal land.

CLBs have been established in 12 regions. They exercise control over the allocation of customary land rights by chiefs or traditional authorities. They are also tasked with administering the entire system of granting, recording and cancelling of customary land rights, with consultation with traditional authorities. CLBs comprise representatives of the traditional authorities, farming community, regional council, women, the public service and conservancies in their area of jurisdiction.

Customary land rights for various uses may be allocated to individuals in communal land. If the land is used for a

¹¹⁹ Art. 16(1).

¹²⁰ Art. 16(2) . Such laws include for instance the Agricultural (Commercial) Land Reform Act 6 of 1995.

¹²¹ Art. 23(2).

¹²² Art. 95(1).

¹²³ Republic of Namibia. (2002). *The Draft National Land Use Policy in Annexure A: Applicable Legislation, Policies and Regulations on Land Use Planning*. Ministry of Lands, Resettlement and Rehabilitation, Windhoek, p. 1.

¹²⁴ Such bodies include local authorities and the MLRGH.

¹²⁵ Preamble.

commercial purpose and not subsistence farming, the applicant must apply to the CLB for a leasehold. Lessees, unlike persons with a customary land right, have to pay an annual fee to the CLB.

Joint registration in both spouses' names is possible with the registration of land allotments on resettlement projects.

Traditional Authorities

Traditional Authorities Act, Act 25 of 2000

This Act recognises traditional authorities as legal entities and provides for various aspects of their functioning. A Council of Traditional Leaders is established to assist 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 Act also states that traditional authorities should promote affirmative action, particularly with regard to positions of leadership, as required by the Constitution.¹²⁶

The primary functions of the traditional authorities are to promote peace and welfare among community members, and to supervise and ensure the observance of the customary law of that community by its members.

With respect to land use planning they perform the following:

- Assist and co-operate with the government, regional councils and local councils in the execution of their policies and to keep the members of the traditional community informed of developmental projects in their area; and
- Ensure that the members of their 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.

Traditional authorities are required to be fully involved in land use planning and development.

¹²⁶ Section 3(g).

Urban Land

Urban areas are municipalities, towns, villages or settlements as defined in the Local Authority Act.

The Squatters Proclamation, AG 21 of 1985

This law was passed to control the development of informal settlements, especially after influx control measures were abolished in 1977. It deals with prohibited occupation of land and buildings, and eviction. It has not been used since independence.

Leases and shack rental

A tenant can enforce rights against a landlord even if the tenancy has not been registered and the premises not controlled. A lease contract therefore offers sufficient protection to the lessee.¹²⁷ Backyard shack dwellers have informal rental agreements with landlords.

Prescription

The Prescription Act 68 of 1969 provides that a person becomes the owner of land or other property possessed openly for an uninterrupted period of 30 years. Only four cases of prescription have occurred since independence and none of them applied to an informal settlement.

*Flexible Land Tenure Bill*¹²⁸

Background

The formal land registration systems cover only part of the country, excluding 60 percent of those residing in the former homelands, now communal areas.¹²⁹ As many as 100,000 families in informal settlements and peri-urban communal areas with longstanding traditional rights have insecure rights to their land.¹³⁰ The solution for these families is a cheap, accessible, creditworthy and secure form of tenure. The

¹²⁷ Derived from the Roman-Dutch law rule *huur gaat voor koop* (lease overrides sale). See Scott, S. Brink, P. D. & Knobel. I. M. (2003). *Law of Property*. University of South Africa, Pretoria, pp. 202-203.

¹²⁸ This section has been drafted with the assistance of Søren Christensen. See also Christensen, S.F. & Højgaard, P.D. (1997). Report on A Flexible Land Tenure System for Namibia. Ministry of Lands, Resettlement and Rehabilitation, Windhoek.

¹²⁹ Op. Cit., 30, p. 3.

¹³⁰ Information obtained from the Ministry of Lands, Resettlement and Rehabilitation, August 2004.

current freehold and leasehold-based systems are costly and cumbersome. In addition, the human and financial resources necessary to administer them are not available.

A consultative three-year pilot programme was implemented and various alternatives were considered. This culminated in a parallel registration system – proposed in the Flexible Land Tenure Bill and accompanying draft regulations. This draft law was completed in February 2004 and cabinet approval is pending.

Tenure types

The Flexible Land Tenure System recommends two new types of tenure:

- The “starter title” – a form of tenure registered in respect of a block of land. It provides the holder with the right to occupy a site within a block. The occupier may only transfer this right subject to a group constitution requiring group consent to transfer. As the individual household’s site is not yet defined, the right cannot be mortgaged; and
- The “land-hold title” – a form of tenure with all the most important aspects of freehold ownership except the complexities of full ownership. The title provides the owner with the right to occupy a defined site and to transfer of such right. Mortgaging is therefore possible.

Starter and land-hold titles are interchangeable. A starter title can be upgraded to land-hold title or to a freehold title. A block is obtained by a saving scheme group, which forms an association after it has drawn up a constitution. The group can obtain freehold title provided it is situated in an approved urban area. Once tenure security is obtained it is envisaged that the occupants will build their own houses, with the local authority providing services.

Application

The system is designed for all urban areas, including peri-urban land within municipal boundaries.¹³¹ In theory, it is possible that the Flexible Land Tenure System could also be

¹³¹ Urban areas are municipalities, towns, villages or settlements as defined in the Local Authority Act.

considered for rural areas, but in practice, a real need for acquiring land for low-income households exists around peri-urban areas and larger towns, but not necessarily in rural villages.

The Flexible Tenure Bill does not address the issue of proclaimed towns situated within communal areas. It therefore seems that if an area has been set aside for the development of a block system, and this area happens to overlap with an area that is under the control of a traditional authority or a chief, the local authority will have to get permission from the traditional authority or chief to use such land for residential purposes (i.e. to develop a block system). An alternative option is that local authorities can simply confine the block system to designated town land boundaries, thus avoiding potential conflicts.

Although many people hold the view that the state owns such land and should be able to deal with it as it sees fit, the Constitution nevertheless requires that it is necessary to formally acquire the land rights that certain citizens hold in relation to it. 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 the north of Namibia, together with central government, have learned that these rights cannot be wished away by merely ordering such holders to leave.

The main goal of the Flexible Land Tenure System is to formalise existing rights in such a way that allows for traditional rights to continue to exist in a peri-urban area. In other words, the system serves as a guideline to local authorities in communal areas on how to deal with urban and peri-urban land disputes, especially in the case of grey areas in peri-urban locations where traditional authorities feel that they have the right to deal with such issues instead of local authorities.

Administration

Freehold ownership is registered in the deeds registry in Windhoek, while starter and land-hold titles are at a land

rights office situated in the district. Through electronic data communication links registry records should be easily available for inspection throughout Namibia. Recognition of the starter and land-hold titles will remain parallel to the existing registration system. This means the same land parcel will be the subject of registration in both the starter and land-hold title computer-based registry and in the deeds registry. However, the deeds registry will only show the ownership of the whole block of land; individual rights within that block will not be visible in the deeds registry.

Staff and training

Only paraprofessionals are needed to process starter and land-hold titles. It is expected that the paraprofessional will speak the relevant local language and understand local customs and practise. Further the land rights office staff will also be trained to assist people with the preparation of transfer agreements and other simple transactions

Monitoring and control

It will be the responsibility of the Ministry of Lands, Resettlement and Rehabilitation (MLRR)¹³² to take measures against corruption. Public complainants may also approach the Office of the Ombudsman.

Status of the bill

A land rights office has been established in Oshakati and more than 2,000 plots have been surveyed. As the bill has not yet been made law, it has not been possible to issue any starter and land-hold title certificates. At this early stage, however, it is emerging that there is a vital need for local authority and community linkages in implementation. Further, de-densification of the settlements is creating demand for additional land. Possible solutions are communal land at the edges of the urban areas, although issues of location emerge. Concerns have also been raised about continuing in-migration, which will put pressure on existing blocks already formalised.

Although there is growing impatience at the slow pace of progress, people living in the upgraded settlements are already

¹³² Renamed the Ministry of Lands and Resettlement in March 2005. For purposes of this report the old name is used.

displaying a sense of tenure security, and are now investing in brick houses. The training of paraprofessionals has been secured through established courses at the Polytechnic of Namibia. The government has other more urgent land reform priorities, especially commercial agricultural land reform. It may, therefore, be unrealistic to expect large budgetary allocations for implementation of the law. Donor support has been offered, although there has been no firm agreement.¹³³

In terms of joint ownership the bill in Section 10(8) provides for the following: "Except for persons who are married in community of property, a starter title right may not be held by more than one person jointly."

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

Customary law

Ownership, use and control of land

Communal land is vested in the state by the Constitution. The state has a duty to administer communal lands in trust for the benefit of the traditional communities residing on these lands and for the purposes of promoting the economic and social development of these areas. Communal land cannot be bought or sold nor used as collateral for loans.

Land within communal areas can be registered under customary land rights or rights of leasehold. Customary land rights in communal areas include:

- A user right to a farming unit;
- A user right to a residential unit; and
- 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.

¹³³ Engel, A. Interview with the author, August 2 2004.

In most communal areas, traditional leaders such as headmen, chiefs, *indunas* and kings control the land. These, with few exceptions, are men.¹³⁴ Under matrilineal groups¹³⁵ matrilineal uncles and brothers have a greater say in decision-making.

It is men who usually approach the traditional leader to be allocated a parcel of land for a fee.¹³⁶ Land may also be distributed to extended families, which distribute it to men.¹³⁷ Married men may then bring their wives to live in a patrilocal village. Women, both married and unmarried, therefore gain access to land through their husbands, brothers, uncles or parental families. The control of land is therefore usually in the hands of men. Women are often more involved in use of the land, for instance tending crops.

The Windhoek-based LAC has a small office in the north at Ongwediva where it receives an average of two complaints per week, mostly from women, related to lost access to land. By far the majority of cases are settled out of court. There is possible scope for the LAC to take on more of these cases, but at the moment, the Ongwediva office does not have a lawyer or sufficient resources to further deal with such cases.¹³⁸

Art. 66 of the Constitution provides that both customary law and the common law of Namibia in force at independence will remain in force as long as they do not conflict with the Constitution or any other statutory law. Art. 66 also says that common or customary law may be repealed or modified by parliament. However, discriminatory practices will need to be

challenged before a court before such laws can be declared unconstitutional.

The Community Courts Act, Act 10 of 2003

The Act aims to bring the traditional court system into the mainstream of the administration of justice. It provides for the establishment of Community Courts with the power to have their decisions enforced. These are yet to be established.¹³⁹

Community Courts include traditional authority representation and function as lower courts. They apply customary law to the specific rural communal area under which they are established.¹⁴⁰

While Communal Land Boards were established to deal with land disputes, it is expected that Community Courts will deal with movable property. Civil laws still apply to proclaimed communal urban or town areas. It is not clear what role Community Courts have in disputes between people who recognise a specific traditional authority, but reside in areas outside its jurisdiction. Also, little clarity exists on the exact boundaries between local and traditional authorities around proclaimed communal urban or town lands.¹⁴¹

¹³⁴ With the possible exception of the Nama in the south of Namibia.

¹³⁵ For instance the Owambo and Okavango communities.

¹³⁶ Although Section 43 of the Communal Land Reform Act prohibits payment for any kind for customary land rights, it still occurs. There is also standard administration fee of N\$25.

¹³⁷ For instance the Lozi in the Caprivi.

¹³⁸ The Windhoek-based lawyers drive up to Ongwediva on a monthly basis (approximately 750km one way) to take statements from complainants. One case is currently being handled in Uutapi Magistrate Court and concerns a woman who is threatened with eviction by her in-laws.

¹³⁹ Traditional authorities have until December 2004 to apply to the Ministry of Justice to run a Community Court in their areas.

¹⁴⁰ Section 12.

¹⁴¹ World Bank (2003). *Comparative of Land Administrative Systems: Critical Issues and Future Challenges, Preliminary Report*, p. 49.

Summary

Table 2.2 Tenure types

Type	Characteristics	Legal basis
Customary land rights	Administered according to customary law. These occur in communal areas and can be registered.	Schedule 5(1) of the Constitution Communal Land Reform Act, Act 5 of 2002
Freehold ownership	Ownership can be held in perpetuity, is transferable, alienable and may be obtained through prescription. Land may be expropriated for purposes of public interest on a just compensation basis.	Art. 16 of the Constitution. Section 14(1) of the Agricultural (Commercial) Land Reform Act, Act 6 of 1995
Leasehold	For periods of 99 years. Available in both communal and commercial areas, primarily for business purposes. Communal Land Boards may grant rights of leasehold to any portion of communal land, only if the relevant traditional authority consents.	Common Law Communal Land Reform Act National Resettlement Policy National Land Policy
Permission to Occupy (PTO)	PTO certificates are granted by the MLRR. To 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 relevant Communal Land Boards for conversion to leasehold.	Part I of the Local Authorities Act, Act 23 of 1992 refers to various aspects of PTO rights held in communal areas. Communal Land Reform Act, Act 5 of 2002
Proposed starter title	The starter registered in respect of a block of land.	Section 10 of Flexible Land Tenure Bill (4 th draft)
Proposed land-hold title	Freehold without the complications of full ownership.	Section 9 of Flexible Land Tenure Bill (4 th Draft)
Prescription	Prescription period is 30 years.	Section 1 of the Prescription Act 68 of 1969
Informal tenure	Shack and backyard dwellers.	

2.3 Land policy

The National Land Policy 1998

The National Land Policy provides for a unitary land system for Namibia, in which all citizens have equal rights, opportunities and security across a range of tenure and management systems. The policy also has a specific gender provision in accordance with the Constitution. Women are accorded the same status as men with regard to all forms of land rights, either as individuals or as members of family land ownership trusts. According to the policy everyone, irrespective of gender, is entitled to maintain the land rights enjoyed during their spouse's lifetime.¹⁴²

The policy also provides for multiple forms of land rights, including customary grants, leaseholds, freeholds, licences, certificates or permits, and state ownership. It has provisions on the urban poor, providing that informal settlements need to be given attention through appropriate planning, land delivery, tenure, registration and finance in an environmentally sustainable manner.

¹⁴² Op. Cit., 52, p. 1.

The policy requires the establishment and proclamation of urban areas as townships and municipalities to promote decentralisation and the close involvement of communities in their own administration. The policy states that particular attention needs to be given to the establishment of a transparent, flexible and consultative local authority planning system and development regulations. The policy recommends that laws be enacted to enable the compulsory acquisition of land by central or local government authorities for public purposes in accordance with the Constitution. The compulsory acquisition of commercial agricultural land for public purposes is provided for under the Agricultural (Commercial) Land Reform Act. No similar laws exist for urban land reform.

The National Resettlement Policy of 2001

The National Resettlement Policy aims to redress past imbalances in the distribution of economic resources, particularly land and secure tenure. The government's classification of beneficiaries for resettlement covers a wide range of people, and arguably virtually every poor person in Namibia.¹⁴³ Under the programme, the government has purchased farms for resettlement purposes and constructed and allocated houses. In addition, a considerable number of farms have been allocated to emerging black commercial farmers under the Affirmative Action Loan Scheme since 1992.

Problems in implementation include the emergence of wealthy black part-time farmers, and the lack of services and support for skills training for the beneficiaries. An estimated 36 percent of farmers under the loan scheme are in arrears of their payments.¹⁴⁴ The Commercial Agricultural Land Reform Act additionally provides for the expropriation of land. This was in response to the slow pace of land redistribution under a willing-buyer, willing-seller system. No land has yet been expropriated, by early 2005, although as many as 25 expropriation notices have been handed out to white commercial farmers.

The Land Use Planning Policy

This is a summary of all the policies and legislation applicable to land in Namibia. A final draft was formulated in 2002.

National Gender Policy, 1997

The policy does not directly refer to land issues. It does, however, call for supporting women in all mainstream national, regional and local development initiatives.¹⁴⁵

2.4 Main institutions

The Ministry of Lands, Resettlement and Rehabilitation (MLRR)

The MLRR was established in 1990 as the main actor in the planning and administration of land. In an effort to improve coordination of activities related to land, the MLRR has established the Inter-Ministerial Standing Committee for Land-Use Planning (IMSCLUP), which it coordinates.

The ministry consists of two main departments: Land Management and Administration; and Land Reform, Resettlement and Rehabilitation. In turn, these departments are divided into several directorates.

The Directorate of Survey and Mapping, headed by the Surveyor-General, provides services in support of land planning, surveying, mapping and administration. It provides information for the planning exercises to government, parastatals, private institutions and the public. The Office of the Registrar of Deeds and the Office of the Surveyor General fall under this directorate.¹⁴⁶ The directorate plays an active role in the process of township proclamation by coordinating all township surveys in collaboration with the Ministry of Regional and Local Government and Housing (MRLGH).

The Directorate of Lands advises on the planning of land as well as its administration. This includes advice to the

¹⁴³ Op. Cit., 31, p. 54.

¹⁴⁴ Angola Admits AA Loan Scheme Defective. (2004). The Namibian.

¹⁴⁵ Republic of Namibia. (1997). National Gender Policy. Office of the President, Department of Women's Affairs, Windhoek, p. 7.

¹⁴⁶ The functions of these deeds registries are currently outlined in the Deeds Registries Act, No. 47 of 1937 and the Registration of Deeds in Rehoboth Act, No. 93 of 1976.

Directorate of Resettlement and Rehabilitation, which deals with the planning and implementation of resettlement schemes. (For now, these schemes are mostly directed towards agricultural land use.)

The main function of the Rehabilitation Division (under the Directorate of Rehabilitation) is to facilitate increased access to services by people with disabilities. The division is responsible for the implementation of the National Disability Policy.

The MLRR has also been responsible for the development of a parallel interchangeable property registration system for Namibia, in order to make 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 any given time. The system has been designed to be locally maintained in a land rights office (located near a demarcated informal settlement), affordable and operated by fewer skilled personnel than the present system. While the MLRR has been responsible for the drafting of the Flexible Land Tenure Bill, the MLRGH, will be responsible for the implementation of this legislation.

A major challenge to the MLRR is the legacy of different types of land tenure in Namibia. These represent a complex and sometimes inefficient legal framework in terms of land use planning. Government officials often have to deal with different systems within the jurisdiction of each authority on national, regional or local level. This complex legal legacy compounds the already difficult task of planning for sustainable, integrated and equitable land use and development.¹⁴⁷

The Agricultural (Commercial) Land Reform Act has provided for the creation of the Land Reform Advisory Commission consisting of 16 members from the public and

private sectors.¹⁴⁸ This commission operates independently from the MLRR.

The MRLGH will also be responsible for the implementation of the National Land Use Planning Policy.

Regional Communal Land Boards

Twelve regional CLBs were established under the Communal Land Reform Act of 2002. On these boards, different ministries and every traditional authority recognised under the Traditional Authorities Act are represented.¹⁴⁹ At least four women must be on each board, though the total number of board members varies. Communal land is allocated by the Land Boards through registered certificates. The boards:¹⁵⁰

- Control the allocation and cancellation of customary land rights by chiefs or traditional authorities;
- Decide on applications for rights of leasehold;
- Create and maintain registers for the allocation, transfer and cancellation of customary land rights and rights of leasehold;
- Advise the minister on regulations needed to meet the objectives of the Act; and
- Give effect to the provisions of this Act.

Section 24 of the Act deals with the ratification of customary land rights allocations. While the chief or traditional authority may allocate customary land rights, the relevant board must ratify the allocation before it is legally valid. The chief or traditional authority must within 30 days of allocating a customary land right inform the board of the allocation and provide all information about the allocation. The boards have considerable power in the allocation of customary land rights

¹⁴⁸ The commission consists of two officers of the MLRR, two officers of the MAWRD, two persons involved in agricultural affairs, one person nominated by the Agribank, five persons of whom at least two shall be women and who are not employed in the public services. See *op. cit.*, 45, p. 206.

¹⁴⁹ According to Section 4 of the Act, the minister (MLRR) requests nominations for the CLB.

¹⁵⁰ Section 3 of the Communal Land Reform Act.

¹⁴⁷ *Op. cit.*, 57, p. 3.

and can veto allocations made by traditional authorities. This includes reallocations as described in section 26 of the Act.

The procedure related to ratification of customary land right allocations is as follows:

- (1) The board must ratify the allocation if it is satisfied that the allocation was properly made.
- (2) The board must refer the matter back to the chief or the traditional authority to decide the matter again, considering the comments made by the board.
- (3) The board must veto the allocation if the right has been allocated for an area of land, over which another person has rights, or the size of land allocated exceeds the maximum prescribed size, or the right has been allocated for land reserved for common usage or for any other purpose in the public interest.
- (4) The board must give written reasons to the applicant and the chief or traditional authority when it vetoes an allocation of a customary land right.

In other words, the board must decide whether the chief or the traditional authority made the allocation in accordance with the provisions of the Act. To do this, the board may enquire into the matter and consult with other people. After the board has ratified the allocation of a customary land it must ensure the right is registered and maintain the relevant paperwork.¹⁵¹

- The registration of leasehold rights is regulated in Section 33 of the Act. Once the board has granted an application for a right of leasehold it must ensure registration of the right and issue a leasehold title to the applicant.

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

Local Authority Councils

In urban areas and formal rural areas, local authorities own most of the land. Local authorities are responsible for the development of land for housing and the sale of residential

plots, which are transferable with freehold title. With the enactment of the Local Authorities Act, Act No. 23 of 1992, designated urban areas in the former communal areas are in the 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.

The Local Authorities Act 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. Those classified under Part I have more autonomy in their administration and more councillors than those listed under Part II.

Traditional authorities

Traditional authorities used to give out land rights, but their role is now limited because of the CLBs. Some traditional authorities are not formally recognised under the Traditional Authorities Act, and as a result they cannot be included in the CLBs. In return they refuse to recognise the decisions of the boards. In informal settlements in proclaimed towns in communal areas, headmen still have a strong influence and in practice may still be involved in land administration in these areas.

3 Housing

3.1 Relevant constitutional provisions

The Constitution does not directly provide for housing rights. It provides however that no person shall be subjected to interference of their homes.¹⁵² The state is required to actively promote and maintain the welfare of people by adopting policies aimed at ensuring that every citizen has a right to fair and reasonable access to public facilities and services.¹⁵³

¹⁵² Art. 13 (1).

¹⁵³ Art. 95 (e).

¹⁵¹ According to section 25 of the Act.

In addition, Namibia has signed a number of international treaties that are binding on the state.¹⁵⁴

3.2 Policies related to housing

National Housing Policy of 1991

After independence, the government identified the provision of adequate and affordable housing to all Namibians as one of its first priorities. To ensure the development of a sound and comprehensive approach, it created a Housing Policy Advisory Committee soon after independence. The committee, consisting of representatives of a wide range of private and public interest groups, drafted the first National Housing Policy (NHP),¹⁵⁵ which was adopted by the cabinet in 1991.¹⁵⁶

Preparation of the NHP involved an analysis of the housing situation in Namibia at independence, the development of a broad framework for action and identification of areas requiring further research.¹⁵⁷ The NHP aims to secure the provision, enactment and tenure for all members and types of households of the society on land or in apartment buildings for rent or purchase. In addition, the NHP 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”.¹⁵⁸

The policy states that the role of the government is to facilitate and promote partnership networks between public and private sectors, local authorities, regional councils, NGOs, CBOs, and individuals. It appears from the policy that government intervention will only occur when relating to issues of access to serviced land and means of finance that are beyond

an individual’s control and capacity. The NHP further states that the primary responsibility for the provision of housing is placed upon the head of each household.¹⁵⁹

Despite making little reference to low-cost housing, the NHP nevertheless recognises the achievements of the SDFN and other saving groups in organising and building homes for themselves. The policy says government must support these efforts through the MRLGH.¹⁶⁰ The NHP includes no provision on female-headed households or women.

Section 6 of the NHP states that:

- (a) “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.
- (b) 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.”

National Water Policy

The National Water Policy was adopted in 2002 and states that all Namibians shall have the right of access to sufficient safe water for a healthy and productive life.¹⁶¹

National Gender Policy of 1997

The policy does not directly refer to housing. It does however call for supporting women in all mainstream national, regional and local development initiatives.¹⁶²

¹⁵⁴ In terms of Art. 144 of the Constitution, international public law forms part of Namibian law.

¹⁵⁵ The first National Housing Policy dates back to 1991. Since then a number of drafts have seen the light that aimed at updating aspects of the 1991 policy.

¹⁵⁶ Op. cit., 1165. no 467.

¹⁵⁷ Ibid, p. 468.

¹⁵⁸ Republic of Namibia. (2004). *The National Housing Policy of Namibia*. 5th Draft Ministry of Local and Regional Government and Housing, Windhoek, p. 9.

¹⁵⁹ Ibid, p. 6.

¹⁶⁰ Ibid, p. 13.

¹⁶¹ Republic of Namibia. (2002). *National Water Policy (White Paper)*. Ministry of Agriculture, Water and Rural Development, Windhoek, p. 23.

¹⁶² Op. cit., 79, p. 7.

3.3 Relevant housing legislation

Low-cost housing

The National Housing Development Act, Act 28 of 2000

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

Regional and local authorities may establish Housing Revolving Funds to be used for low-cost housing.¹⁶³ A Housing Revolving Fund grants loans to persons for the construction of low-cost housing and acquisition of land. It also grants loans to persons for the construction of low-cost housing on behalf of other persons.¹⁶⁴

Decentralised Build Together Committees for each region deal with applications for assistance from the Housing Revolving Funds. The functions of a Decentralised Build Together Committee include:

- Inform the inhabitants of a geographical area about the existence, objectives and purposes of a Housing Revolving Fund;
- Receive applications for assistance from a Housing Revolving Fund and determine whether applicants are eligible;
- Submit applications and recommendations to the relevant council;
- Submit quarterly reports to the regional council or local authority council; and
- Perform such other functions as the minister may designate to it in writing.¹⁶⁵

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:

- Reporting problems to the MRLGH concerning housing in the various regions;
- Preparation of regional housing policies;
- Responsibility to increase and sustain regional land and housing development, especially in neglected rural areas; and
- Act 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, Act 23 of 1992

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

- Preparation of local housing policies;
- Development of land for housing;
- Development of plots at a cost affordable by low-income people through subsidies, community work and appropriate technologies; and
- Overseeing the construction process of housing.

National Housing Enterprise Act, Act No.5 of 1993

This Act sets out the duties and responsibilities of parastatal enterprises such as the National Housing Enterprise (NHE).¹⁶⁶ The NHE has been operating without direct subsidy allocations from the government's development budget since 1993. It raises capital from the private sector and uses returns on investment for housing. Financing is provided to households based on their ability to make repayments.¹⁶⁷ In theory, the NHE caters for lower- to middle-income groups, but in practice it is mainly middle-income households that are able to afford the support and loans that it provides.

Rental tenure rights and protection

Rent control

The Rents Ordinance 13 of 1977 determines the rent payable in respect of leased dwellings. The ordinance provides for the establishment of rental boards, which consist of the local magistrate of the area and four additional members. The most important function of the rental boards is to ensure

¹⁶³ Section 8(1).

¹⁶⁴ Section 9.

¹⁶⁵ Section 29 of the National Housing Development Act.

¹⁶⁶ The Act changes the name of the "National Building and Investment Corporation" to the National Housing Enterprise.

¹⁶⁷ Op. Cit., 1165, p. 463.

that reasonable rent is charged for dwellings. Rental boards are responsible for reviewing rental prices on a continuing basis or at least once a year. A number of factors are taken into consideration, such as the area where the premises are situated, the rate of inflation and the rising costs of service provisions such as water and electricity supplies. Appeals against the decision of a Magistrates Court can be done in the High Court.

Section 1 (vii) of the ordinance provided for some protection of a widow or deserted wife. A widow or deserted wife was allowed to stay on at the premises if she was living with her husband at the time of his death or desertion. However, this right could only be exercised if the main lease did not prohibit a sublease, cession or assignment by the lessee. In 1996 the Married Persons Equality Act 1 of 1996 was adopted, which amended this ordinance and substitutes Section 1.¹⁶⁸

Common law eviction procedures

Evictions are the exception to the rule, according to the Windhoek municipality. When they do take place, they usually occur where water and electricity payments remain in arrears for long periods. Legal procedures in cases of arrears in the payment of bills may result in the removal of movable property to be sold on auction, monthly deductions from the debtor's salary or an eviction order. Namibia has inherited common law eviction procedures from South Africa, which generally still apply in such eviction cases.¹⁶⁹

The procedure that the Windhoek municipality follows before an eviction order is issued to a person who is in arrears of municipal bills must be in line with the Local Authorities Act. Eviction is the measure of last resort. If no acceptable arrangement can be made and there are no assets whatsoever to be used to repay municipal rates or service rendered, the matter is handed over to the city's lawyers to obtain the neces-

sary relief in either the Magistrates Court or High Court.¹⁷⁰ This is usually after a period of 1-2 years of default. There are currently 59,000 account holders in arrears owing the city N\$180 million (US\$25.7 million).

3.4 Tenure types

High house prices make rental tenure a popular option, especially in Windhoek and Swakopmund. If one does not have a housing subsidy, it is nearly impossible to buy a house. The government and some private companies grant employees housing subsidies.

Usually, people who usually rent a shack in the back of someone else's yard tend to be family members or extended family members. These arrangements tend to be for short periods, informal, and without formal rental rights and protection.

3.5 Main institutions

Ministry of Regional and Local Government and Housing (MRLGH)

The MRLGH has the responsibility to facilitate the provision of housing, human settlement and the development of shelter in Namibia, and to promote the development of sustainable human settlements. The development of urban areas involves a large number of activities and includes provision of urban land, housing and services. Urbanisation policy is the responsibility of the MRLGH and National Planning Commission (NPC).¹⁷¹

MRLGH coordinates many of the activities of regional and local authorities. The ministry is subdivided into four directorates (see Figure 4.6.2): Regional and Local Government Coordination; Housing, Habitat and Technical Services

¹⁶⁸ The Married Persons Equality Act abolishes the marital power that previously applied to civil marriages and amends the law on matrimonial property in civil marriages in community of property. It also amends the common law on the domicile of married women and minor children, and on the guardianship of minor children.

¹⁶⁹ Legal Assistance Centre and Law Society of Namibia. (2004). *Debt Collection and the Role of the Sheriff/Messenger of the Court*, unpublished, pp. 1-4.

¹⁷⁰ Disputes involving a property value of N\$25,000 are referred to a Magistrates Court, while disputes involving a property value of more than N\$25,000 are referred to the High Court.

¹⁷¹ Art. 129 of the Constitution entrusts the NPC with planning the priorities and direction of national development, and acting as adviser to the president on economic planning.

Coordination; Decentralisation and Coordination; and Finance, Human Resources and Administration.

The *Directorate of Regional and Local Government Coordination* is again subdivided into four divisions (Local Government Coordination, Town and Village Administration, Regional Government Coordination, and Town and Regional Planning).¹⁷²

The main functions of the ministry regarding local government are:

- Coordination and management of regional and local government;
- Rendering town and regional planning services;
- Dealing with matters concerning towns and villages in terms of the Town Planning Ordinance and the Township and Division of Land Ordinance of 1963 (both amended);
- Acting as a secretariat for the Namibia Planning Advisory Board;
- Training officials for regional councils and local authorities; and
- Presenting development budgets to the National Planning Commission, on behalf of regional, town and village councils.¹⁷³

Municipalities

A municipality is a legal body with its own assets and consists of a proclaimed town layout with town lands for future extensions.¹⁷⁴ All municipalities have an organised and formal administrative structure, performing the functions of a local authority. Administratively they are divided into departments of general administration, finance, health and engineering. Their functions include water supply, provision of systems of sewerage and drainage, collection of garbage, construction and maintenance of streets and public places, supply of electricity and gas and facilitating housing development. They are, in principle, independent from higher authorities,

both administratively and financially. The main sources of income for municipalities come from local rates, charges and fees from provision of urban services (water, electricity and sewerage) and sales and taxation of land. Government contributes to their finances in the form of loans for development purposes and subsidies on streets, traffic control and fire brigades.

With a steady influx of people to Windhoek, especially to the informal parts of Katutura, the costs for development of urban services are likely to be considerable in the future.

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:¹⁷⁵

- Reporting of problems to the MRLGH concerning housing;
- Preparation of 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 with regard to housing as contemplated in the National Housing and Development Act.

There seems to be no clear perception about the roles and responsibilities of regional councils for urban areas and the Regional Council Act of 1992 is not very specific on the issues. The Flexible Land Tenure Bill does not mention any role for regional councils, but it is foreseen that once the Bill becomes an Act, 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 the registration of the two new tenure systems.

However, the potential impact of regional councils on urbanisation could be considerable, because they are responsible for development within regions and the location and design of

¹⁷² Op. cit., 45, p. 449.

¹⁷³ Ibid.

¹⁷⁴ Ibid, p. 452.

¹⁷⁵ Op. cit., 92, p. 15.

infrastructure and social services, all of which influence the process of urban migration.

Towns and villages

Towns are proclaimed and surveyed in accordance with the procedures laid down in the Townships and Division of Land Ordinance (1963), while villages are not. Some towns in communal areas have been proclaimed as municipalities since independence, which allows them to generate additional income through charges for water, electricity, sewerage and rent on the use of land. The MRLGH is responsible for the administration and personnel of the majority of towns. Most towns are not self supporting and rely on central government to cover salaries and some maintenance costs.¹⁷⁶ The lack of development in most towns currently undermines the authority of the town councils, which could jeopardise their political legitimacy.

A village council consists of elected members of the community who in turn elect a chairperson and a vice-chairperson. These officials play a similar role as the mayors and deputy majors in larger local authorities.

4 Inheritance and Marital Property Legislation

A complex web of civil and customary laws governs inheritance and marital property rights in Namibia. Civil inheritance and marital property legislation has mainly been influenced by Roman-Dutch law, the common law inherited from South Africa, and some old English law. The two basic marital property regimes for civil marriages are “in community of property” and “out of community of property”.

4.1 Relevant constitutional provisions

According to the Constitution “men and women ... shall be entitled to equal rights as to marriage, during marriage and at its dissolution.”¹⁷⁷ It provides that the family is “en-

¹⁷⁶ Op. cit., 92163.

¹⁷⁷ Art. 14 (1).

titled to protection by society and the State”.¹⁷⁸ Art. 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, with regard to the fact that women in Namibia have traditionally suffered special discrimination. Art. 95 on the Promotion of the Welfare of the People calls for enactment of legislation to ensure equal opportunities for women, and makes equal remuneration of men and women, as well as maternity and related benefits for women, a government issue.

Discrimination against women is prohibited by the Constitution. Art. 10(1) clearly states that “all persons shall be equal before the law.” Art. 10(2) lists “sex” as one of the prohibited grounds of discrimination. In addition, Art. 16(1) provides for the right of any person “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”.

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

“Nothing contained in Art. 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...”

The Constitution clearly provides that women and men have equal property rights.

4.2 Legislation related to inheritance rights

A confusing and overlapping set of laws still applies in this area, some in violation of the Constitution because they discriminate on the basis of race. Examples are: the Administration of Estates Act of 1965, the Native Administration Proclamation

¹⁷⁸ Art. 14(3).

of 1928, the Intestate Succession Ordinance of 1946, and the Administration of Estates (Rehoboth Gebiet) Proclamation of 1941.

Testate succession, which is regulated by the Administration of Estates Act of 1965, stipulates that a deceased has to have left a valid will to determine how succession to her or his property is to take place. Husbands and wives have equal rights to make wills and have no duty to leave any part of their estate to the surviving spouse or to the children of the marriage.

However, the Native Administration Proclamation 15 of 1928 imposes race and gender-based restrictions on the power to make wills.¹⁷⁹ For example, a black person living inside the old Police Zone has the full power to bequeath his or her estate by will, whereas a black *man* outside the Police Zone does not have full testamentary freedom. The colonial administration did not take into consideration that black women, married according to customary law, could also leave a will. Black men outside the Police Zone do not have the legal power to leave by will (1) movable property allotted to or accruing under customary law to any woman he lived with in a customary union, or (2) any movable property accruing under customary law to a particular “house”. Property that falls into these two categories must be distributed according to customary law.¹⁸⁰

In terms of intestate succession, the Intestate Succession Ordinance 12 of 1946 determines inheritance. But again, the rules are dependent on race. Only if the deceased black person is a widower, widow or divorcee from a civil marriage in community of property or under prenuptial contract and was not survived by a partner to a customary union entered into subsequent to the dissolution of such marriage, then the

property shall devolve as if s/he had been a “European” (i.e. as provided for under the Ordinance of 1946).

The ordinance ensures various people inherit when a person dies without a will. These include the surviving spouse, children and even in certain instances parents, brothers and sisters of the deceased.

In a civil marriage, if the deceased’s estate has no creditors to whom debts have to be settled out of the estate, the surviving spouse has a first claim on the land and house. In a customary marriage, when a person dies the customary land right reverts back to the chief or traditional authority for reallocation.¹⁸¹ The chief or traditional authority must relocate the right to the surviving spouse, if s/he consents to such allocation, or a child of the deceased (if there is no surviving spouse or if the spouse does not accept the allocation of the right).

Daughters and sons have equal inheritance rights under civil marriages, but the Communal Land Reform Act provides that customary law has to be applied if there is no surviving spouse, or if the spouse does not accept the allocation of the right.¹⁸²

Section 26(2)(b) of the Act states that the right should be allocated to such a child of the deceased as the chief or traditional authority determines to be entitled to the allocation in accordance with customary law. This provision can work against daughters 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.

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.¹⁸³

¹⁸¹ Section 26 of the Communal Land Reform Act.

¹⁸² An added risk is that the surviving spouse may be coerced into refusing the customary land right, in order for the right to be allocated to the eldest son. The Legal Assistance Centre is carrying out research on the implementation of this provision.

¹⁸³ The Administration of Estates Act 66 of 1965 does not apply to the “Rehoboth Gebiet”. The Administration of Estates (Rehoboth Gebiet) Proclamation 36 of 1941 regulates the administration of estates in Rehoboth.

¹⁷⁹ LeBeau, D. Ipinge E. & Conteh, M. (2004). *Women’s Property and Inheritance Rights in Namibia*. In Hubbard, D. & Zimba, E. (eds). University of Namibia, Pollination Publishers, Windhoek, Namibia, p. 24.

¹⁸⁰ *Ibid.*

4.3 Legislation related to marital property rights

Marriage in community of property means that all or most of the belongings and the debts of the husband and the wife are combined into a joint estate. Everything that belonged to the husband or the wife before their 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 their 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. They each keep their own earnings and the ownership of property remains with the person who acquired it.

The Married Persons Equality Act, Act 1 of 1996, provides for gender equality in civil marriages and is therefore not applicable to customary marriages. The common law rule, in terms of which a husband acquired the marital power over the person and property of his wife, has been abolished by the Act. This 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.

In addition, through the provisions of the Act, women farmers married in community of property are entitled to joint, as well as independent, land ownership under the Agricultural (Commercial) Act.¹⁸⁴

The Act does not make a difference between a widow and a widower in terms of reallocation of the customary land right of the deceased spouse. In the case of absence of or

lack of consent from the surviving spouse, the customary land right will be reallocated “to such child of the deceased person as the Chief or Traditional Authority determines to be entitled to the allocation of the right in accordance with customary law”. As eldest sons are often given preference under customary law, it is clear that daughters and younger sons are not granted equal rights with eldest sons under this Act. Moreover, the surviving spouse could be pressurised into refusing allocation, in order for the eldest son to inherit the land right.

Couples who are in a civil community of property marriage now have equal rights over their joint property. They are required to consult each other on major transactions, with husbands and wives having identical powers and restraints. If either spouse withholds a transaction unreasonably, there are avenues of redress. Where either husband or wife ignore the requirement of consent, the wronged spouse can, in theory, seek recourse during the existence of the marriage as well as upon its dissolution. If the marriage is out of community of property, the abolition of marital power means that husband and wife each control their own separate property.¹⁸⁵

The default position on civil marital property is different for some black Namibians. The Native Administration Proclamation 15 of 1928, part of which is still in force, makes a different rule for civil marriages between black persons north of the old Police Zone that took place on or after 1 August 1950. These marriages are automatically out of community of property, unless a declaration establishing another property regime was made to the marriage officer one month before the marriage took place.

Customary marriages place a number of restrictions on women. All customary marriages are potentially polygamous and are not registered in Namibia. Customary marriages are regulated primarily by unwritten customary laws that differ from community to community. For example, in Herero communities, civil marriages are usually technically in com-

¹⁸⁴ Section 5 reads as follows: “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.”

¹⁸⁵ The Married Persons Equality Act I of 1996. See Hubbard, D. (1999). *Proposals for Law Reform on the Recognition of Customary Marriages*. Legal Assistance Centre, Windhoek, p. 45.

munity of property, while husband and wife have separate movable property in terms of customary law.¹⁸⁶

Evidence suggests that it is not uncommon in regions other than the Caprivi¹⁸⁷ for a couple to marry in terms of *both* civil and customary law, and to rely upon different legal and social norms, depending on the situation at hand.¹⁸⁸

Civil marriages seem to be growing in popularity, except in the Caprivi Region. According to the 2001 Namibian population and housing census, 26 percent of the population are married under civil law, 9 percent are married according to custom, 3 percent are divorced, 4 percent are widowed and 56 percent have never married.¹⁸⁹ Civil marriages have risen in popularity in Katutura in recent years, chosen by almost half of the conjugal households in the early 1990s, while customary marriages are extremely rare. However, civil marriages in Katutura often incorporate elements of customary marriage, such as bridewealth, thus producing an intertwining of the two systems.¹⁹⁰

It also occurs that a man is married under civil law to one wife, while cohabiting with a second wife under customary law. When the husband dies, the woman married according to civil marriage law often lays claim to a portion of the deceased's property that could also be claimed by the other wife.¹⁹¹ Also, according to the Native Administration Proclamation, all civil marriages between "natives" north of the Police Zone are automatically out of community of

property, unless the couple make a statement that they want to marry in community of property.

A Bill on Customary Marriages is under discussion and review by the Law Reform and Development Commission. This has been a very slow process so far, but it is expected that this legislation will bring customary marriages more in line with the Marriage Equality Act 1 of 1996.

4.4 Customary law

Although sex discrimination, which is present in some aspects of customary law, is unconstitutional, there have been no court challenges to customary law on this ground since independence. Art. 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 they do not conflict with the Constitution or any other statutory law.

The property arrangements applying to customary marriage are determined solely by customary law.¹⁹²

In matrilineal communities, such as the Owambo and Okavango communities, the custom is that spouses have some control over their own individual property regarding marriage, divorce and inheritance issues. Matrilineality and matrilocality determine the laws of inheritance and succession, as well as post-marital residence. Since descent is matrilineal, these relations must fall on the mother's side.

However, in customary practices, matrilineal as well as patrilineal systems tend to discriminate against women. Under both customary systems, wives need the consent of their husbands for some property transactions, but husbands do not need the consent of their wives. In addition, under the matrilineal system, immovable property such as houses tend to be treated under such customary law as "male property" regardless of which spouse actually acquired them. Furthermore, under matrilineal systems, the control of mov-

¹⁸⁶ See Hubbard, D. (1999). *Proposals for Law Reform on the Recognition of Customary Marriages*. Legal Assistance Centre, Windhoek, p. 39.

¹⁸⁷ Civil law has less influence in Caprivi, and this region used to be administered by South Africa for a long time under the then Transvaal Administration, rather than through the South West Administration. As a consequence, there have been different customary law applications for Caprivi and the rest of the communal areas in Namibia.

¹⁸⁸ *Ibid* at 37.

¹⁸⁹ *Op. Cit.*, 30, p. 4.

¹⁹⁰ Pendleton, W. (1994). *Katutura: A Place Where We Stay*, in D. Hubbard. (ed). *Proposals for Law Reform on the Recognition of Customary Marriages*, Legal Assistance Centre,

Windhoek, pp. 82-90.

¹⁹¹ Interviews conducted with men by the author in Okongo in the Ohangwena region, April 2005.

¹⁹² *Op. cit.*, 113, p. 21.

able property, such as cattle, usually vests in the wife's male relatives.¹⁹³

Where no declaration has been made in terms of the Native Administrative Proclamation of 1928, section 17(6) of the Native Administration Proclamation provides that a marriage between "Natives", contracted after the commencement of this Proclamation, shall not produce the legal consequences of marriage in community of property between the spouses.

The administrative procedures relating to deceased estates depend to a great extent on the racial classification of the deceased. The Administration of Estates Act, Act 66 of 1965 is applicable only to whites and coloured persons, meaning that the Master of the High Court administers their estates. If the deceased was classified as a "Baster"¹⁹⁴ then the estate would be administered by a magistrate under the Administration of Estates (Rehoboth Gebiet) Proclamation 36 of 1947. Black estates are administered by magistrates in terms of the Native Administration Proclamation, but since the *Berendt vs. Stuurman* case, they may choose a magistrate or master, until parliament has amended this proclamation.

The practice in communal areas is that, upon the death of a land rights holder, land is usually allocated to the husband or another male member of the deceased's family. This has often led to the problem of widows in some communities being stripped of land and household goods by a husband's extended family members after his death.

Section 26 of the Communal Land Reform Act, Act 5 addresses this discriminatory practice:

"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) of the Communal Land Reform Act). 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."¹⁹⁵

For example, in the 2001 case of *Kauapirura v the Herero Traditional Authority*, a woman who had a common-law relationship with her partner, approached the High Court to prevent herself or her children from being disinherited as her late partner's estate was being divided among relatives according to their customary laws.¹⁹⁶ The *Kauapirura* case was eventually settled out of court, allowing the mother and children to inherit from the deceased. However, as a result of the out of court settlement, the constitutionality of the common law rule excluding children who were born out of wedlock from their father on an equal footing with legitimate children if the father has died without leaving a will, was left unchallenged.

The 2003 case of *Berendt v Stuurman* held that several sections of the Native Administration Proclamation are unconstitutional violations of the prohibition on racial discrimination in Art. 10 of the Constitution. Parliament has been told to replace these offensive sections with a new regime although this is yet to happen. As an interim measure, heirs of black estates can currently choose between a magistrate and the Master as an administrator. The *Berendt* case has helped to speed up the removal of some of the remaining discriminatory practices concerning inheritance and marital property in Namibian legislation.

193 Op. cit., 120, p. 38.

194 The Basters are the offspring of Nama and Dutch Settlers in South Africa who settled in the area of Rehoboth in 1880. The home language of the Basters is Afrikaans, a language they share with many white Namibians.

195 Malan, J. (2003). Guide to the Communal Land Reform Act, Act No 5 of 2002. Legal Assistance Centre and the Namibia National Farmers Union, Windhoek, Namibia, p. 13.

196 Menges, W. (2001). Outdated laws face challenge, *The Namibian*, 13 June.

4.5 Administration of estates (inheritance procedures)

As explained earlier, the Master of the High Court administers estates of white and coloured deceased persons, while magistrates administer the estates of deceased Basters living in the Rehoboth Gebiet and the estates of deceased black persons. However, since the *Berendt v. Stuurman* case of 2003, heirs of black estates can choose between a magistrate and the Master as an administrator.

Administration of estates by a magistrate

In terms of section 18(6) of the Native Administrative Proclamation, the Estates Act is only applicable to black persons who left valid wills and then only in respect of property of which the deceased was entitled to dispose of in terms of a will. Only immovable property can be put in a will, while movable property is administered under “native law and custom”.¹⁹⁷

While the procedure through a magistrate is more informal and decentralised, it is less thorough and effective than procedures through the Master.

Administration of estates by the Master of the High Court

The administrations of estates procedures, which are applicable to white and coloured persons, are much more thorough and effective than the process through the Magistrates Courts. These estates are administered under the supervision of a specialist office, that of the Master of the High Court, while the administration of estates by the Magistrates Courts often lacks the proper supervision that exists in the High Court.¹⁹⁸

¹⁹⁷ Section 18(1) states that “All movable 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.” 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 administered according to native law and custom.”

¹⁹⁸ Op. cit., 113, p. 26.

Divorces of civil marriages

Civil marriage registers are kept by the Ministry of Home Affairs, and are not accessible to the public. Many divorces are not legally recorded. Women often have to initiate divorce, as men have other options. Religious and cultural attitudes frown upon women initiating divorce; as a consequence women often have no legal record of their separation and/or divorce from their husbands. Another reason for such lack of legal records is that often people are not aware of the legal requirements.

Divorces of civil marriages can be granted only by the High Court in Windhoek, which is not accessible to many poor people that live far away. Magistrates Courts do not have jurisdiction over divorce cases. There are four grounds for divorce: adultery; malicious desertion; imprisonment for at least five years of a spouse who has been declared a habitual criminal; and incurable insanity of a spouse that has lasted for at least seven years. These grounds (with the exception of incurable insanity) are based on the outdated principle of fault – the idea that one spouse must have committed some type of wrong against the other spouse. Unlike the law of most countries today, Namibian law does not allow a divorce to be granted simply because the couple’s marriage has broken down. The Law Reform and Development Commission is considering reforms to Namibia’s outdated divorce law.

The way that the couple’s property will be divided upon divorce depends on the marital property regime that applies to the marriage. If the couple was married in community of property, the joint marital estate will be divided into two equal parts, and each person will receive a half share. If the couple was married out of community of property, each person will retain his or her own separate property. In practice, couples that are divorcing almost always come to an agreement on how their property will be divided without judicial intervention.

Divorces of customary marriages

A number of grounds for divorce are recognised under Namibia’s various customary systems. These include adul-

tery by the wife, taking a second wife without the consent of the first, barrenness, and various forms of unacceptable behaviour such as drunkenness, witchcraft or neglect of the children.

The fact that several of these grounds for divorce apply only to wives (adultery by the wife, barrenness and witchcraft) and only one of them to the husband alone (the taking of an additional wife without the consent of the first) probably violates Art. 10(2) of the Constitution forbidding sex discrimination, as well as Art. 14(1), which guarantees men and women equal rights in marriage and at its dissolution. Another gender-based inequality arises from the fact that some communities may require the return of *lobola* (the bride price).

The extended families of the two spouses play a large role in mediation and attempting to resolve marital disputes, along with community elders and other members of the community in some cases. Divorce is usually accomplished by an informal procedure that takes place without any intervention from traditional leaders, who are more likely to become involved if there are issues that cannot be resolved between the couple and their families.

It has been suggested that the Namibian Constitution could be interpreted to require that the courts hear divorce cases involving customary marriages. Art. 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”.¹⁹⁹

¹⁹⁹ *Ibid.*

5 Poverty Reduction Strategy

5.1 Introduction

Namibia’s poverty reduction strategy was prepared under the tutelage of the World Bank and the United Nations Development Programme.

5.2 The National Poverty Reduction Action Programme 2001-2005 (NPRAP)

The familiar sectors of education, health, agriculture and so on are identified and within these sector headings strategies, targets, indicators and actions are formulated. There are dedicated sections on monitoring and review, and a small budgetary link. Ten principles are set out, underlying the design and operation of all poverty reduction strategies. Although the need to incorporate gender issues features as one of these policies, strategies formulated in this regard are weak.

Urban land

Urban land is dealt with under the subheading “urban title” and features under a section addressing small and medium enterprise development. This is telling, considering it primarily targets businesspeople. The strategy notes that indigenous businesspeople, because of their lack of collateral, are at a disadvantage when it comes to borrowing from commercial banks. To remedy this, the strategy 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”.²⁰⁰

The mention of de facto rights is in fact a reference to Permissions to Occupy (PTO), a historical form of tenure in former “homelands” now considered insecure by banks. Within these areas, PTOs should be converted into “free titles” or leaseholds by 2005.²⁰¹ The strategy paper notes that the conversion process has been slow due to constraints on

²⁰⁰ Republic of Namibia. (2002). *National Poverty Reduction Action Plan*. National Planning Commission, Windhoek, p. 54.

²⁰¹ *Ibid.*

valuation of land by local authorities. Also, businesspeople who are holders of de facto title are giving up their right to the land by selling it. To solve this, the ministry concerned intends to embark on an awareness campaign and to speed up the process of creating valuation rolls. More surveyors and town planners will be trained to meet the target of creating town-planning schemes and guide plans for all towns and settlements by 2005.

The NPRAP notes that the proclamation of towns and villages has brought relief to businesspeople, but not to poor citizens living in informal settlement areas, who are excluded from the opportunity to obtain title. It says that “in the rapidly expanding urban areas, many poor people have no official rights to the land on which they have settled. Further 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”.²⁰² The action recommended is the flexible land tenure system in towns and municipalities. The document 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)”.²⁰³

Rural land

In general, rural Namibia gets a lot of attention in the NPRAP, with a special mention in almost all the sectoral strategies. However, there is little mention of the role of rural land in poverty alleviation. Land redistribution may be considered a vehicle for poverty alleviation, and the NPRAP mentions that the skewed distribution of commercial land has enhanced household vulnerability, and concentrated poverty among the majority of the nation’s farmers.

Gender

One of the principles that underlies all poverty reduction strategies is ensuring gender responsiveness because “poverty has a gender dimension that should be recognised throughout the design, implementation and monitoring of poverty

reduction measures”.²⁰⁴ Apart from this, gender issues as a whole receive little attention, and the link between gender, land reform and poverty does not feature.

5.3 Summary

The NPRAP proposes the flexible tenure system as a means for the urban poor and people in informal settlements to register their rights to land. It sees 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 is optimistic, especially if the experience of other countries is considered.

It is important that tenure security provision itself be seen as a poverty alleviation strategy. Rural land reforms on the other hand are scarcely mentioned, and in the light of the widely known land redistribution process in Namibia, more direct linkages would have been useful. Finally, Namibia fails to adequately reflect gender issues in its programmes and strategies, which is an obvious shortcoming.

²⁰² Ibid, p. 55.

²⁰³ Ibid.

²⁰⁴ Ibid, p. 21.

6 Land Management Systems

6.1 Main institutions involved

Figure 6.1 Organogram of main land management institutions

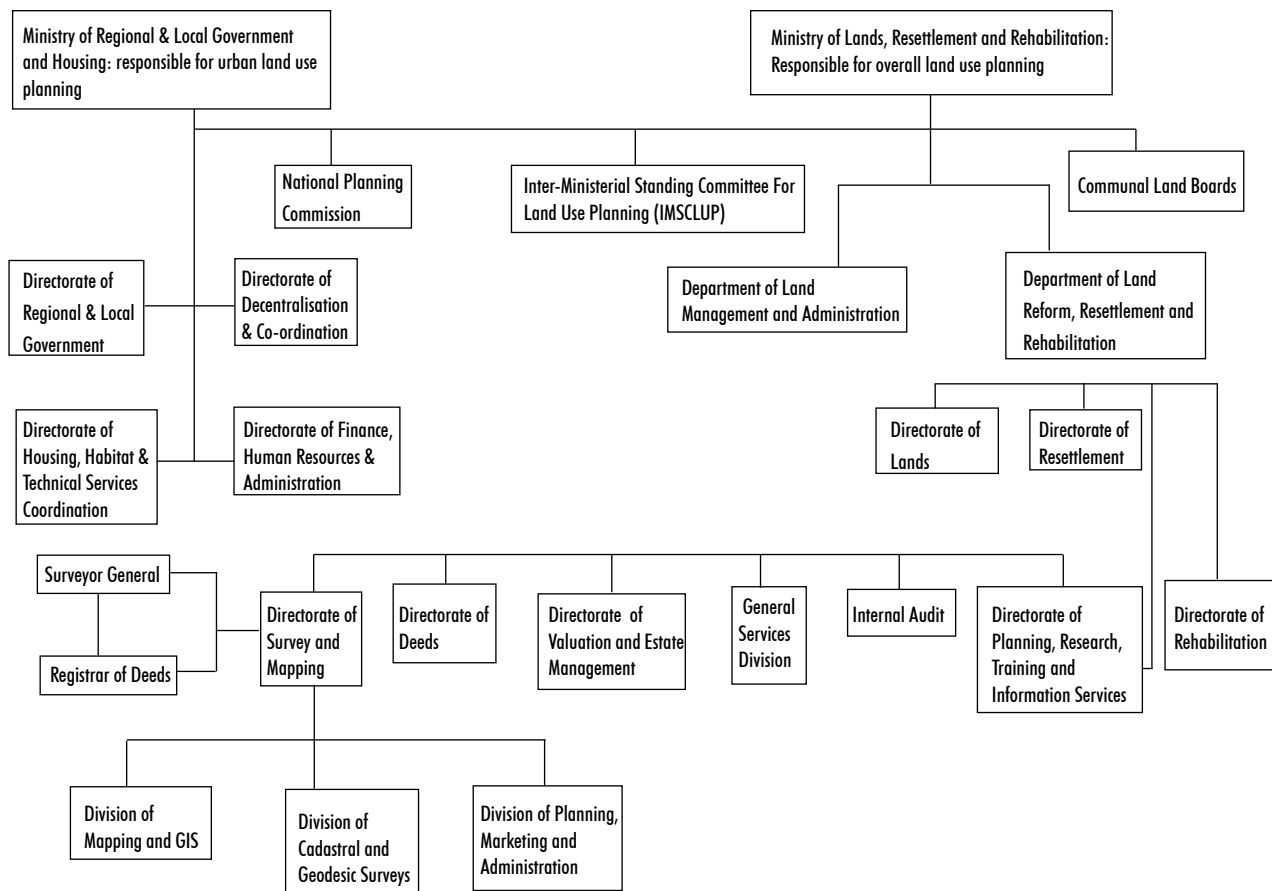
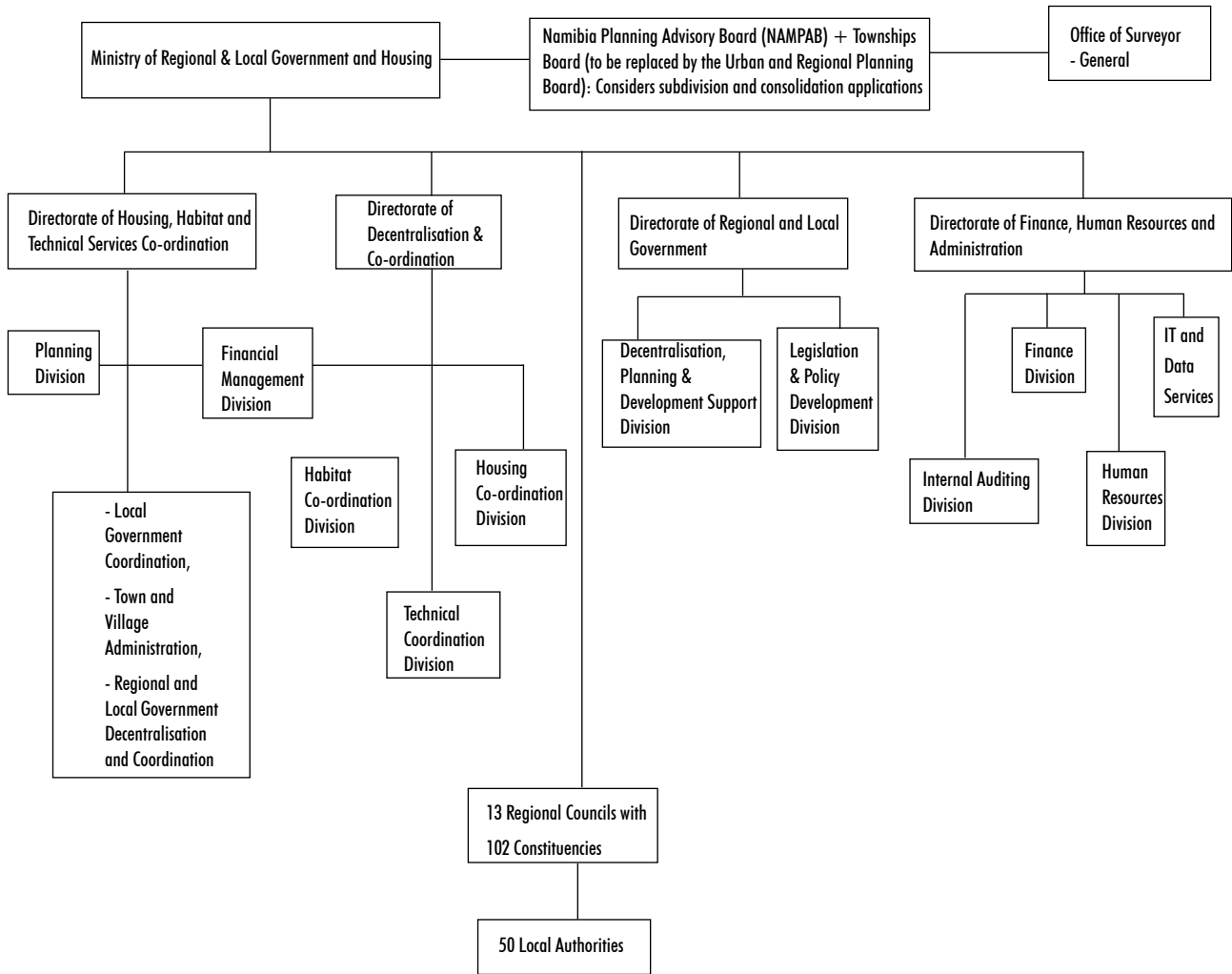


Figure 6.2 Organogram showing regional and local governance institutions



6.2 Informal settlements and the formal system

Land use planning

The MRLGH is drafting a Town and Regional Planning Bill, which will replace the two ordinances that have governed land use planning and management in Namibia up to now.²⁰⁵ The Bill seeks to replace the Namibia Planning Advisory Board and the Townships Board with one Urban and Regional Planning Board. The new board will coordinate, evaluate and supervise structure planning, zoning schemes, planning policies 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 must be prepared.²⁰⁶ These plans will have statutory status in terms of the new Act. It will therefore be possible to enforce its provisions for a specific area.

The national structure plan being drafted will deal with spatial aspects of Namibia's social and economic development. The regional councils must prepare regional structure plans and sub-regional structure plans.

The Bill also requires local authorities to prepare zoning schemes. These schemes will govern the land use rights of each erf in that area and owners will apply to their local authority to rezone 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.

This Bill will provide the basis for the integration of all sectoral aspects related to sustainable development in the regions. The opportunity exists to merge this "strategic physical planning process" with the Flexible Land Tenure Systems of the various local authorities to ensure integration and avoid overlapping responsibilities.²⁰⁷ As the MLRR developed the

Flexible Land Tenure Bill, but the MRLGH is responsible for its implementation, the need for strong coordination between the two is crucial.²⁰⁸

The upgrading and development of informal settlements in Namibia is subject to formal town planning schemes. A problematic consequence of this is that building standards are often inappropriately rigorous for informal residential development. In addition, almost 80 percent of building materials for the housing sector are imported and consequently very expensive.²⁰⁹

The extreme poverty of informal settlers makes modern housing materials and construction almost nonexistent. Shacks are often built with any materials that can be found and these do not provide adequate protection against the weather. Temperatures in Windhoek can vary widely, from below 5°C up to 40°C, due to its high elevation and dry desert climate. Insufficient access to electricity makes 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 showed that wood costs an informal household as much as N\$10 (US\$1,66) per day amounting to N\$300 (US\$50) per month to satisfy only basic cooking needs.²¹⁰ This excludes consumption of paraffin and candles for lighting, which are also the predominant cause of shack fires.

In recent years local authorities have become more flexible with informal settlers and their needs to develop the land they reside on, according to Dr. Anna Muller of NHAG. For

authority... (e) must consider all relevant legislation and any town planning scheme applicable to the area in which the piece of land concerned is situated."

208 *Ibid.*, p. 5.

209 *Ibid.*, p. 466.

210 Information obtained from R3E Bureau, July 9 2004. The R3E Bureau, a non-profit association, conducted research in early 2004 in collaboration with the Ministry of Mines and Energy, the SDFN, NHAG and the city of Windhoek. The researched aim to identify low-cost, do-it-yourself methods to improve the comfort of shack homes by making them less susceptible to the external climate. A shack was refurbished using reeds from riverbeds, off-cut cloth materials from a local textile factory and cardboard from a nearby dumpsite to create effective insulation. Measurements were taken throughout this process and the refurbished shack became 4°C cooler during the day and 2°C warmer at the night. The Habitat Centre building in Katutura, in which the R3E is located, was built almost entirely from low-cost building materials such as clay and car tyres.

205 The Town Planning Ordinance 18 of 1954 and the Townships and Division of Land Ordinance 11 of 1953.

206 *Op. cit.*, 57, p. 5.

207 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

example, towns like Otjiwarongo, Keetmanshoop, Omaruru and Henties Bay have given permission to low-income households to build with clay. The development of informal settlement areas is recognised by some town planning schemes. Windhoek, for example, has a clear strategy about identifying informal settlement areas, how they should be upgraded and where informal settlers should reside. Johan Oppermann, a town planner with the company Urban Dynamics in Windhoek, is also of the opinion that conventional planning laws have become more flexible in recent years in terms of providing for the specific needs of informal settlements (e.g. provision of site sizes, road widths, flood prone areas etc.).

Where the land registration process is linked to planning regulations, Muller says that certain restrictions have been overcome with the communal block development. Local authorities' regulations currently seem to require that a block in its totality should meet certain planning requirements, such as that the block should be treated as a single development and not as individual plots. As a result, planning approvals do not hold back registration of land rights, because block development does not require registration of individual rights, only that of the community. However, the approval of block and land development is generally slow and undeveloped land usually needs to be serviced. This requires financing, which is not always that readily available to low-income households.

One view is that the Namibian cadastral system is unable to meet the demand for surveyed plots in informal settlements, which further slows down the delivery of land to informal settlers. Initiatives are underway to generate computerised coverage of all cadastral and administrative boundaries, which will benefit the processes of land evaluation, land taxation, development planning, land administration and the flexible land tenure system.²¹¹ However, it remains to be seen if these initiatives will meet the demand for surveyed plots in informal settlements.

²¹¹ University of Melbourne. (2003). Namibia Cadastral Template Report. A Worldwide Comparison of Cadastral Systems, Cadastral country reports based on a jointly developed PCGIAP/FIG template, Department of Geomatics of the University of Melbourne, p. 7.

Local authority planning laws will play an important role in the implementation of the Flexible Tenure Bill. According to Section 10(1)(e), the holder of a starter title may transfer his/her rights to any other person, whether that other person is his/her heir or whether the transfer is another transaction recognised by law. Section 12(6)(c) however provides that the relevant authority may impose conditions, prohibiting the transfer of the plot to another person.²¹² While the allocation and registration of blocks is provided for in the Flexible Land Tenure Bill, town planning aspects are laid down extensively in the Flexible Land Tenure Draft Regulations.

To overcome some of the above-mentioned problems concerning informal settlements 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.

Restrictive conditions of title

Restrictive conditions of title are registered against the title deeds of erven within a proclaimed township, restricting use in a particular manner. Such restrictive conditions could include prohibiting the subdivision of property or the erection of a building unless it complies with certain requirements (e.g. that it must have a specific type of roof). The sale of property may also be restricted in terms of the provision of 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 has reached a certain age.²¹³ A key intention of the Flexible Tenure Bill is to remove restrictive conditions in regard to particular parcels of land in informal settlements. Freed from such conditions, a parcel of land can be planned as needed, without the need for a conveyancer for complex

²¹² 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.

²¹³ 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, Act 94 of 1965. The Removal of Restrictions Ordinance 15 of 1975 provides for the alteration, suspension or removal of restrictions on the usages of land. Applications are made to the High Court for an order authorising the lifting of the prohibition, which will be granted only if there is a good reason why it should be lifted. Namibia Estate Agents Board. (2001). *Real Estate Study Guide*. p. 47.

transactions, but instead with a local property officer using pro forma computer forms.

Local authorities in Namibia usually have their own master plans, development frameworks and town planning schemes that determine a broad land use pattern for present and future development. A town planning scheme is used to regulate services such as the protection of public health, safety and welfare and contains the following basic information:²¹⁴

- Use Zones: The purposes for which buildings may be erected and used, for example, residential;
- Density Zones: Information concerning the number of dwellings that may be erected on a property, or a minimum erf size that is required for a house;
- Floor Area Ratios: The total floor space that may be built on a property;
- Height: The number of storeys that that are permitted on a property;
- Coverage: The amount of land that may be covered by the buildings;
- Building Restriction Areas: The distance from the street boundary, or the distance from the side and rear boundaries that may not be built upon. Commonly referred to as building lines; and
- Parking: The number of parking bays required in developments.

While the allocation and registration of blocks is given attention in the Flexible Land Tenure Bill, a shortcoming in the Bill is that the town planning aspect is not covered. As a consequence, the formal requirements for a town planning scheme listed above would also apply to informal settlements, and the self-help housing constructed under the Bill would violate town planning regulations. To prevent this, town planning aspects will have to be linked to the Bill.

6.3 Dispute settlement mechanisms

Land disputes are formally dealt with through the civil courts. The CLBs under the Communal Land Reform Act are sup-

posed to deal with immovable property disputes, such as customary land rights. Community courts are not yet in operation, but are expected to deal with movable property disputes only. However, according to Edith Mbanga, National Coordinator of the SDFN, people living on block systems usually deal with urban land disputes through internal leadership structures, rather than seeking immediate civil legal advice. She describes civil court procedures as sometimes complicated, formal and too expensive for low-income households to afford.

Traditional authorities, chiefs and headmen play a mediatory role in settling land disputes in communal areas, but usually not on proclaimed town lands. The challenge in dealing with land dispute settlement mechanisms in communal areas is to break with the tradition of discriminatory practices against women and their right to obtain and inherent land.

The Communal Land Reform Act, Act 5 of 2002, has been introduced to address these discriminatory practices, which are still prevalent in some customary land dispute mechanisms. However, contrary to the Act's provision to address discriminatory practices against women, if customary law as provided under section 26(2)(b) of the Act (see discussion of Customary Law) is to be applied rigidly, it would surely have a detrimental effect on promoting gender equality and the improvement of the position of women in traditional Namibian society.

Windhoek has recently adopted a strategy to try to avoid land invasions with the assistance of community leaders, especially in upgrading areas.

6.4 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 the South African Constitution imposes a duty on the state to provide temporary housing or shelter to persons in desperate need. This precedent-setting case charted a new course for

²¹⁴ Ibid, p. 50.

the judiciary in South Africa as it sought to give substantive meaning to the socioeconomic rights in the South African Constitution. It allowed for the evolution of constitutional thinking in terms of the economic and social disparities between the rich and the poor.

The extent to which Namibians can rely on the judgment to obtain individual relief when faced with situations of homelessness is still open for debate. Even though South African judgments have considerable weight in Namibian courts, it should be noted that the Namibian Constitution does not have a provision such as section 26 of the South African Constitution, which provides housing rights protection to the vulnerable.

Art. 95 (e) of the Constitution nevertheless requires the state to actively promote and maintain the welfare of people by adopting policies aimed at ensuring 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 Art. 144 of the Constitution.

Articles 144 and 95 (e) of the Constitutional Principles of State Policy create the condition of an enforceable right to access to housing. In terms of Art. 144 of the Namibian Constitution, international public law forms part of Namibian law. Art. 144 provides that “the general rules of public international law and international agreements binding upon Namibia shall form part of the law of Namibia”.

The 2001 case of *Kanapirura v the Herero Traditional Authority* is also important in this regard (for a fuller discussion of this case, see Customary Law section). However, as a result of the ultimate out-of-court settlement, the constitutionality of the common law rule excluding children who were born out of wedlock from their father on an equal footing with “legitimate” children was left unchallenged.

The 2003 case of *Berendt v Stuurman* held that several sections of the Native Administration Proclamation were unconstitutional violations of the prohibition on racial discrimination in Art. 10 of the Constitution. As explained earlier, the Native Administration Proclamation treated the estates of deceased blacks as if they were “Europeans” in some circumstances, while providing in other circumstances that they should be distributed according to “native law and custom”. The *Berendt* case has helped to speed up the removal of some of the last remaining discriminatory practices concerning inheritance and marital property in Namibian legislation.

Finally, since 1996 the Marriage Equality Act has been used to solve disputes during and upon dissolution of civil marriages. Case example is *S v Gariseb* 2001 NR 62 (HC). In this case the abolition of marital power makes it possible for a husband to be charged with theft of his wife’s property in a marriage in community of property.

7 Local Laws and Policies

7.1 Local authority regulations

Most municipal or town bodies make their own regulations and bylaws and have the authority to enforce these rules. Town planning schemes are essential for the management and control of land use and land development and are usually designed to meet the needs of the specific municipal or town body.

Katima Mulilo, in the Caprivi region, is the only town in Namibia that does not have a town planning scheme and as a result finds it difficult to manage and control land use.²¹⁵ In towns like Katima Mulilo and Okakarara the planning system has virtually no impact on the emerging urban form and this raises a serious question about whether conventional physical

²¹⁵ Katima Mulilo was proclaimed as a town in 1995. According to the Chief Control Officer for Katima Mulilo Town Council, the town council is currently busy designing a town planning scheme.

planning that assumes high levels of formalised control can adequately deal with the urban challenge.

Town, regional and local bodies have the power to legislate regarding their own affairs as long as their acts and conduct do not conflict with the overall guidelines in the Constitution. Their laws and acts are subject to judicial review.²¹⁶

The draft National Land Use Planning Policy mentions that, while the local authority will still handle the land administration of each urban area, the MLRR, MRLGH and the local authority council may establish a local property office or land rights office to deal with the registration of the starter and land-hold titles.

7.2 Windhoek housing policy²¹⁷

Between 1991 and 1999, Windhoek developed a number of formal low-income housing schemes. At the time, the existing serviced plots were unaffordable to the vast majority of the poor. In response to the influx of poor migrants, the Windhoek city council developed three “reception areas” that were intended to be temporary. It was believed that once a new household had established itself in the city, it would move out of the reception area onto a fully serviced area somewhere else. The provision of the reception areas was a top-down emergency initiative, developed and implemented by city planners and engineers to deal with what was perceived at the time as a temporary nuisance.²¹⁸

However, income levels of those households living in reception areas remained very low and they still occupy these reception areas. In addition, efforts by the city to resettle some of these households have proved to be very slow and have been met with some resistance, while spontaneous settlement beyond the reception areas has also grown significantly.²¹⁹

²¹⁶ Opperman, J. Interview with author, July 20 2004.

²¹⁷ Windhoek Housing Policy adopted in 2001. Information on the Housing Policy of the City of Windhoek was obtained from Ms JS de Kock, Corporate Legal Advisor of the Municipality of Windhoek.

²¹⁸ Op. cit., 40

²¹⁹ Ibid, p. 22.

Lessons learned from this experience include the observation 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 process. Moreover, security of tenure appears to be a major requirement in the case of urban settlers and needs to be a key component of upgrading/housing programmes.²²⁰

Currently, the Windhoek’s housing policy serves as a guideline on how access to housing and security of land tenure is to be addressed. The objectives are 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;
- Establish uniform housing standards for different development options;
- Set parameters for orderly incremental upgrading;
- Facilitate access to land, services, housing, and credit facilities;
- Establish a participatory process to self-reliance and partnerships and to facilitate self-help development;
- Secure land tenure; and
- Promote a safe and healthy environment and increase the quality of life.

The municipality recognises that facilitating access to land, services and housing is inextricably related to affordability, cost recovery, sustainability and replicability. The ability to extend services and housing is increasingly dependent on cost recovery via contributions, user charges, taxes and loan repayments.

The Windhoek city council receives no subsidy for providing for the needs of the poor.

Without subsidy, only about 16 percent of the 17,700 low-income households currently in need of land can afford a 300m² plot in a communally serviced township. This fact makes low-income land delivery through means of private ownership in the city particularly difficult, and invariably slow.

²²⁰ Ibid, p. 18.

The lack of available land means that increasing numbers of urban migrants will be forced to settle on marginal land.

Although 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 mentions:

- Incentives for regular payments can increase access to housing loans or upgrading erf loans and different types of land title. For example, the control body is to give defaulting members warnings to comply and explain what happens if default in payments persists. Evictions should be the last resort;
- A more humanitarian approach is followed; officials are educated to not act aggressively, but according to good governance principles; and
- Face-to-face meetings with communities twice annually on an ad hoc basis to ensure that information is conveyed and to stress responsibilities for payments.

In case of default, a first alternative is that relatives may take over the obligations of the defaulter. Should payments not follow, eviction can be contemplated, provided that the principles of the Local Authorities Act are adhered to.

8 Implementation of Land and Housing Rights

8.1 Implementation of policy and legislation

Due to the political sensitivity associated with agricultural land reform, the MLRR seems to have focused less on the urban Flexible Land Tenure system. The Bill has still not been adopted, which causes problems. For example, a case occurred where a block member left and upon return found another person on his plot. As long as the Bill is not yet law, such problems are likely to occur.

The MLRR has been responsible for the drafting of the Flexible Land Tenure Bill, but the MLRGH will be responsible for its implementation. It would have made sense if both

ministries had been involved from the beginning in drafting and implementation.

There also seem to be coordination difficulties between various ministries involved in the implementation and administration of the National Housing Policy. Currently the MLRGH plays the leading role in providing the framework from which the Housing Policy is being implemented. Regular meetings on the overall National Housing Policy have not been held and a coordination mechanism does not yet exist.

The MLRR is responsible for implementation of the Communal Land Reform Act, the land policy and the draft land use planning policy.

The Ministry of Justice and the courts are responsible for the implementation of marital property and inheritance legislation. Implementation of this Act in practice will need to be monitored to assess the impact on inheritance patterns of customary land, as well as the homestead and livestock on that land. Law reform related to other property is expected to take place in relation to legal recognition of customary marriages. The LAC is conducting a study on inheritance practices under customary law, with a view to informing law and policy makers.

The LAC has also conducted training for the government and NGO sector on various gender issues involving new legislation.²²¹

8.2 Role of the judiciary

There are problems associated with the administrative side of Magistrates Courts. One complaint is that magistrates often lack knowledge on the interpretation of the Native

²²¹ Initially there was some resistance against the Combating of Rape Act 2000 and Combating of Domestic Violence Act 4 of 2003 from certain male MPs during the discussions of these Bills. Both these Acts represent a good reflection of gender issues. The LAC was invited by the Law Reform and Development Commission to give input to the Acts. The LAC also campaigned and lobbied considerably for both Bills to be passed. An awareness raising campaign was carried out among men living in rural areas about the new legislation. In 2000 the LAC held a conference called Men Against Violence Against Women, with men from 12 regions attending. This campaign raised some attention to the issues of violence and discrimination against women. The LAC also ran a TV campaign in 2000 focusing on domestic violence.

Administration Proclamation and on customary law in general. There are also problems in terms of issuing letters of executorship (i.e. such letters being issued on the same estate to different executors). Furthermore, no formalities exist in terms of following up on liquidation and distribution accounts. In other words, after the Magistrate Court has issued a letter of administration, the matter is seen as having ended there. If someone wants to withdraw a letter of administration issued by the Magistrate Court, he or she has to apply to Master of the High Court, which could be a lengthy process. In addition, case files are either badly filed or lost.

Lack of access to courts and a general lack of knowledge about their functions are also a major problem among, for example, surviving spouses. Therefore, inheritance disputes are mostly handled by headmen, chiefs or even arbitrarily by family members.

8.3 Cultural issues

While discriminatory customary practices and patriarchal attitudes are a problem in the rural areas, they seem to be less of a factor in hampering the implementation of the flexible land tenure system. For example, in Windhoek many of the women who have access to starter/land-hold titles are often single mothers who are the sole breadwinners for their children.²²² Also, as was mentioned earlier, women in especially Windhoek's informal settlement areas are actively involved in savings schemes to improve their housing conditions. The SDFN's policy is to encourage women to take part in saving schemes and the construction of their houses. In Ms. Mbanga's experience, women tend to be more punctual with the repayment of loans than men.

8.4 Race and class issues

Under apartheid's racial lens, a minority of the population (white) was given access to privileges (better income, work opportunities, education, health, housing, etc.), while the majority (black) was excluded. In the post-independence era,

the legacy of problems inherited from these racist policies has increasingly become intertwined with issues of class.

Since independence, a growing black middle class has emerged, along with a smaller number of very wealthy blacks. However, most of the black population remains very poor. In addition, many whites still have a very high standard of living in relation to their black compatriots. Those whites who have found the post-independence political dispensation untenable have left for "greener pastures" in Europe, North America and Australia.

8.5 Access and affordability issues

Affordability of serviced municipal land is subject to land management and layout regulations. When informal settlements are to be proclaimed, layout plans have to be submitted to the Namibian Planning Advisory Board (Nampab) and the Townships Board for approval. To overcome issues pertaining to access and affordability, 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 to in the Flexible Land Tenure Bill, a shortcoming in the Bill is that the town planning aspect is not given sufficient attention.

The Townships Board has recently rejected plans for the layout of an informal settlement in Swakopmund known as the "Democratic Resettlement Community" based on concerns that the geometric design only allows for four rows of erven between two streets with limited, unusable access to the middle two rows of erven.²²³ It is feared that such a design may soon lead to urban decay and slum conditions. However, the layout design indicates that cost factors were of major importance, while social needs, acceptability, climatic (wind, temperature, fog) and geographical conditions were low-ranking issues.²²⁴

²²² Data provided by SDFN.

²²³ Barnard, M. (2004). DRC layout plan nixed, *The Namibian*. August 3.

²²⁴ Ibid.

The regulations prescribe that certain environmental and public health regulations have to be adhered to, but they also challenge town planners to design affordable and accessible layout plans.

Access to basic services remains a problem for a great many low-income Namibians. For example, the present legal framework for water in Namibia is based on the Water Act 54 of 1956, an act that was developed for South Africa, and which effectively excludes non-land owners – the majority of the population – from having adequate and equitable access to water.²²⁵ Government intends to replace the Act and update its entire regulatory framework for managing water resources. The new Water Bill, which is still in the pipeline, would give rise to new institutions to regulate the industry, among these a pricing regulator to deal with issues of affordability. The new policy framework is designed to redress inefficient water management.²²⁶

In April 2004, the Minister of Agriculture, Water and Rural Development, Helmut Angula, denied claims that the government was making water unaffordable. He said that water provision required investment, and that it was impossible to provide free water in Namibia. The standard rate is just over N\$4 for a cubic metre of water per month.²²⁷ State-owned NamWater maintains that it operates on a cost-recovery basis and that all profits are ploughed back into building and maintaining water infrastructure.²²⁸

8.6 Educational and capacity-building issues

Educated city dwellers are generally aware of their inheritance rights and of legal instruments, such as written wills, which do not exist in customary inheritance systems.²²⁹ Widows and children among educated urban residents as a result enjoy more security and protection from the looting of their

property by greedy family members through the use of wills. However, this does not mean that the influence of customary inheritance systems does not exist in urban areas.

The LAC has done much educational work on human rights in recent years. However, no campaign focusing specifically on women's equal land, housing and property rights has been undertaken. Legal aid is provided by the Ministry of Justice's Directorate of Legal Aid, which is a statutory body established by the Legal Aid Act, 1990 (Act No. 29 of 1990). As per the provisions of Art. 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.

8.7 Impact of HIV/AIDS

The impact of HIV/AIDS can lead to distress sales of land. This phenomenon has not yet reached the same critical levels as in some other African countries. But reportedly people who are HIV-positive do find it increasingly difficult to get access to home loans.²³⁰

9 Best Practices

9.1 The Land Management Diploma²³¹

In the late 1990s, MLRR and the International Institute for Aerospace Survey and Earth Sciences in the Netherlands agreed on a human power development project in Land Surveying, which has since been institutionalised at the Polytechnic of Namibia. The project aims to generate a team of trained Namibian staff to strengthen the Directorate of Survey and Mapping (DSM). It also aims to lay a good foundation for the production of future Namibian land-use planners, land surveyors, geodesists, hydrographers, photogrammetrists, cartographers, Geographic Information System and Remote Sensing Experts. Twenty staff members have graduated from this programme so far and joined the

²²⁵ Op. cit., 1287 p.12.

²²⁶ Ibid, p. 13.

²²⁷ Dentlinger, L. (2004). No Free Water says Angula, *The Namibian*. April 13.

²²⁸ Ibid.

²²⁹ Op. cit., 1843, p.3. xiii.

²³⁰ Information obtained from the LAC Aids Law Unit.

²³¹ Information obtained from Faculty of Natural Resources and Management at the Polytechnic of Namibia.

DSM. Included in the package are a number of fellowships for training abroad in land surveying.

The Land Management Diploma Programme, which was introduced in 2000, includes five specialised fields: Land Use Planning, Land Measuring, Land Valuation, Urban Land Use Management and Land Registration, all sharing core modules. Students are required to choose their specialty in semester one. The curriculum emphasises theory and practice in equal measure. Diploma 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, through their newly developed skills acquired through practical training, will help the ministry implement, maintain and develop the Flexible Land Tenure System. The Polytechnic of Namibia is also to introduce a B. Tech qualification in 2005 and 2006, which will enable the paraprofessional Land Management Diploma graduates to upgrade their qualifications and become full professionals.

9.2 CBO, NGO and government partnerships

The SDFN, NHAG and MLRGH have established effective partnerships to find solutions to informal settlement challenges. Regular meetings are held between the ministry, NHAG and the SDFN where issues of loan schemes, land ownership and servicing are discussed and prioritised before actions are taken.

Since independence, the SDFN and NHAG have been carrying out functions for local authorities, which have freed up resources in the local authority administration for other pressing tasks. At the same time, the SDFN and NHAG have also become aware of the limitations (especially financial) of the local authority, and they do not demand service improvements that neither they nor the local authority can afford. In this regard, the Twahangana Loan Fund is an excellent example of how CBO, NGO and government partnerships can meet each other halfway in order to provide financial access to the poor.

9.3 The city of Windhoek

Windhoek, as the largest municipality in Namibia, has taken a leading role in developing solutions to informal settlement challenges. Pending adoption of the Flexible Land Tenure Bill, the city has demonstrated a willingness to overturn conventional approaches to standards and regulations to reach low-income groups with improvements that are affordable to them.

Windhoek's land use and town planning policies also acknowledge the importance of representative organisations, seeking to create and nurture them to strengthen local networks and group savings schemes in low-income neighbourhoods. Consequently the foundations are in place for a cost-effective and participatory strategy that provides better housing and services for the most marginalised members of the society. In practice, many of the provisions of the Flexible Land Tenure Bill have already been implemented, except for the formal issue of starter and land-hold titles.

9.4 The social and economic empowerment of women in the SDFN

Women have fewer opportunities than men in terms of raising their income and socioeconomic status to acquire secure tenure in urban areas. However, the majority of SDFN members are women, who are playing a significant role in participating and managing group loan schemes to obtain secure land tenure and housing for themselves and their families.

9.5 Low-cost alternatives to better housing

The Renewable Energy and Efficiency Bureau of Namibia, a non-profit association, in collaboration with the Ministry of Mines and Energy, the SDFN, NHAG and the city of Windhoek has identified low-cost, do-it-yourself methods of improving the comfort of shack homes by making them less susceptible to the external climate. Keeping in mind that the R3E Bureau project is still a fairly new project, further

research is needed to test whether the Windhoek experience can be replicated in other parts of the country.

9.6 Sustainable development and environmental health programme

In 2001, members of the SDFN started an environmental health programme to ensure sustainable improvements in their lives. This programme addresses issues related to HIV/AIDS, tuberculosis, food security, environmental hygiene and communications between emergency assistance in the communities. In addition, the federation works closely with health workers at clinics where an emphasis is placed on first aid training and the provision of home-based care for people with HIV/AIDS.

10 Conclusion

At independence, the new government began to confront a range of complex challenges. These included the socio-economic consequences of rural-urban migration, and the growth of large-scale unplanned urban settlements – often without secure tenure or basic needs such as clean water and electricity. The government responded by developing new policies that could accommodate the growing part of the population living in low-cost and 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 some obstacles still exist before the system will be able to operate smoothly. First, there is a lack of technical skills to secure its long-term sustainability. However, it is expected that newly graduated Land Management Diploma holders from the Polytechnic of Namibia will strengthen the technical capacity of the ministry in the near future. Fortunately, there is firm political support for the system. Stakeholder organisations such as SDFN, NHAG and the various group loan schemes have

shown an eagerness to make this a long-term success. The challenge now is to proceed to full implementation.

The government has committed a substantial amount of funding to the Flexible Land Tenure System since 1998. However, given current funding levels, it may take at least two decades before the benefits of secure title are extended to the majority of poor people living in informal settlements. It is therefore important that the benefits derived from the system are maintained to keep up the momentum, to ensure constant social and political support, and to prevent the emergence of large-scale doubts about the system.

A further important conclusion emerging from this study is that law reform should focus more on equitable distribution of property during divorce or upon death. Vulnerable people, such as rural women and orphaned children, should be protected from existing discriminatory and unconstitutional customary laws. Significantly, law reform on inheritance of communal land has already taken place to protect women, while law reform on other property, which will take place in the context of the recognition of customary marriages, is still forthcoming. It will be necessary to assess the use of the Communal Land Reform Act in practice once it has been in place for some time to determine its effect on the inheritance of other forms of immovable property, such as the home-stead. Community courts, once in operation, will hopefully be able to address issues relating to movable property disputes, especially those issues relating to “property grabbing” where movable property such as livestock and household goods are involved.

11 Recommendations

11.1 Flexible Land Tenure Bill

Adoption of the law

No official strategy seems to exist for the implementation of the new legislation. The Flexible Land Tenure System has experienced difficulties in getting on the political agenda because there are other land reform programmes of great importance, such as the commercial agricultural land reform programme. As a result, it may be unrealistic now to expect huge financial investment in the system to come entirely from the regular government budget provisions. It is thus recommended that external assistance from major financial donors should be made a priority to extend the system on a national scale, at least in the short to medium term.

Scope of the bill

The Flexible Land Tenure Bill could eventually be considered for rural areas. The successful implementation of the system in urban areas could help create better integrated and coordinated land management in rural areas. However, the immediate focus of the Bill should remain on urban and peri-urban areas. The real and immediate need for acquiring land for low-income households is in peri-urban and urban areas around larger towns, and not necessarily rural villages.

Coordination between ministries

The MLRR has been responsible for the drafting of the Flexible Land Tenure Bill and will be responsible for its implementation, in cooperation with the MLRGH. Coordination between these two ministries is crucial.

In terms of coordinating the legislative, technical and social context of the proposed flexible tenure system, we recommend that the following institutional model of Christensen and Juma is adopted:²³²

- A local property office draws on local expertise to resolve disputes and increase accessibility, while carrying

out planning, surveying and registration;

- There is a computer-based registration system; and
- A land-hold title audit is conducted by the Windhoek Deeds Registry.

In addition, land rights offices, which fall under the MLRR, should be established in local areas and in regional councils, thus integrating MLRR and MLRGH responsibilities. The establishment of these offices should take into consideration areas where the pressure for such services is greatest while carefully ensuring a sensible regional balance. The first land rights office should be established in Windhoek to test the procedures and the computer system before being replicated elsewhere.

Computerisation of the Flexible Land Tenure System registration process

A computer-based registration system should be introduced to handle the registration of starter and land-hold titles. The advantages would be as follows:

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

Human and financial resources

A lesson from the introduction of the Communal Land Reform Act in 2003 is that investment in human resource capacity building is essential for the successful implementation of the Act. We recommend that for the Flexible Land Tenure Bill to be successfully implemented, the MLRR should invest in human resource training and capacity-building programmes of land rights officers.

²³² Christensen, S. F. and Juma, S. Y. (2001). *Bringing the Informal Settlers under the Register – The Namibian Challenge*. International Conference on Spatial Information for Sustainable Development, Nairobi, Kenya, 2-5 October, p. 9.

Technical capacity building

The MLRR should consult private-sector 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 land registration officer and a land rights registrar could be combined or performed by seconded employees with the necessary skills. For larger local authorities, the post of land rights registrar may require a full-time employee.

Participatory governance

It is crucial for the successful formalisation of the Flexible Land Tenure System that there is understanding, respect and cooperation between the community and local authority. This has to be constantly worked on to create a positive environment for future development of the settlement area. The local authority and the community have to discuss the formalisation process thoroughly before it is started.

Women’s security of tenure

We recommend the following provisions be included in the Flexible Land Tenure Bill:

- A provision that safeguards women’s and children’s inheritance rights;
- Compulsory joint starter/land-hold title for spouses or cohabitants;
- Automatic inheritance of starter/land-hold title for surviving spouses; and
- Participation quotas for women in decision-making bodies within blocks.

Town planning

The surveying and registration of rights as proposed in the Flexible Land Tenure System require the existence of a framework that will give legal credibility to the processes through which different rights can be created and conferred. The system, once it is formalised, will require a simpler and speedier process of developing layout plans and obtaining permission to develop urban lands. Plans should be adapted to the reality of informal settlements, and informal settle-

ments should be legally isolated from conventional planning laws. The legislation should allow realistic standards for developing individual plots in areas such as informal settlements.

Access to additional land

Access to additional land for allocation to those displaced by upgrading processes is an important issue that needs attention. Unless land is available for starter and land-hold title developments, continuing migration will put pressure on existing blocks already formalised in the form of squatters. We recommend that an assessment of access to suitable additional land be made a requirement in the Bill.

Access to justice

The Bill does not make provision for solving disputes regarding inheritance, marriage, informal unions, group rights or the role of customary functionaries in land designated as urban. This needs to be considered. An amendment would make the formal legal system more accessible to low-income households – for example, through decentralisation of dispute-resolution mechanisms related to land.

11.2 Law reform

Relevant constitutional provisions

The Constitution does not directly provide for the protection of housing rights. We recommend that such a provision be included.

Communal Land Reform Act

Section 26 of the Communal Land Reform Act violates Art. 10(2) of the Constitution (prohibition of discrimination on basis of sex) as it allows for inheritance of customary land rights to sons only. Also, the allocation to the surviving spouse “unless the surviving spouse refuses allocation” leaves the door open for pressure on a widow to relinquish the reallocation of a customary land right to her. We recommend amendment of Section 26 to remove this discrimination and bring the law in line with the Namibian Constitution.

Inheritance and marital property law

In light of the *Berendt vs Stuurman* case, parliament was mandated to adopt new legislation to regulate inheritance under customary law. In the meantime the Native Administration Proclamation 15 of 1928 has remained applicable. This discriminatory proclamation should be repealed. Uniform procedures for succession and inheritance should be applied to all Namibians, along with a more accessible procedure.

Reviewing the administration of estates procedures

A simplified, more accessible administration of estates procedure should be introduced, one that will run 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, which are accessible for people from all over the country, should be strengthened to deal with the administration of estates of a certain value. Administration of estate procedures should be simplified to be understood.

NPRAP

Women's equal rights to access, own and control land should be included in the document. There should also be a provision to include peri-urban areas or communal areas on the edges of growing towns and to clarify that the Flexible Land Tenure Bill/Act covers these areas as long as they are within a municipal boundary. Such areas can be brought within municipal boundaries by ensuring that flexible land tenure is used in formalising such areas and by applying the system flexibly. The traditional rights existing on those land should be recognised ("traditional urban"), and with consent of the community in that peri-urban area, the traditional land rights could be registered as land-hold titles within blocks.

Potential conflict between traditional land right registered under the Communal Land Reform Act and the land-hold title (essentially a freehold title) under the Flexible Land Tenure Bill could be avoided through clear demarcation lines. It is essential that traditional authorities are included in the decision-making processes.

11.3 Governance

Decentralised local governments should be coupled with the decentralisation of fiscal powers and resources. However, it is doubtful that all local authorities currently have the necessary skills, capacity and financial sources to function as decentralised units, separated from central government. To help smaller municipalities to become more efficient and less dependent on central government, larger nearby municipalities could take up some responsibilities. For example, when the municipality of Usakos experienced financial difficulties in 2003, the municipality of Walvis Bay, a more efficiently run municipality, assisted Usakos with the auditing of its accounts. In addition, the MRLGH could create a bureau of experts that the smaller municipalities could draw on.

11.4 Coordination and integration

Coordination between ministries

As mentioned above, coordination between the MLRGH and the Ministry of Lands, Resettlement and Rehabilitation is important, as is their cooperation with local authorities. CLBs, traditional authorities and local authorities will also need to coordinate in areas where rights may overlap, such as peri-urban areas.

Incorporating informal settlers' participation and needs into policies

Affordability of serviced municipal land is an important feature in land management policy formulation and is often subject to land management and layout regulations. Experience with informal settlement policy formulation has shown that top-down decision-making, without incorporating the needs of those who are affected by such policies, may quickly lead to urban decay and slum conditions, mainly because of the concentration of thousands of people in a very small area. It is important that social needs, affordability, acceptability, natural climate and geographical conditions need to be

ranked more highly in decision-making concerning informal settlements.

Strengthening government and local authority capacity

There is a need for qualitative information about the type of management and capacity training needed in local authorities. Strengthening of such services will depend on the availability of finance. To manage this complex task, local authorities have to share their experience of good practices, as well as information about user-friendly mechanisms for generating targets, costs, timing and capacity.

Integration

Consideration should be given to integrating customary land tenure systems with the formal urban land administration systems, especially in communal areas, where customary tenure features prominently, to ensure tenure security for all. Integrating customary and formal land administrations systems could avoid 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 traditional authority.

Access to justice

Civil marriage records should be made available to the public, along with a link to the Deeds Registry.

The High Court in Windhoek is not accessible to all Namibians who want to obtain a divorce. We recommend that the divorce procedure and the administration of estates, including those under customary law, be decentralised. Lower level courts, circuit courts, and mobile courts under the supervision of the High Court could also deal with such cases. Government should also support paralegal networks.

Affordability and acceptability

Affordability and acceptability need to be given greater priority when informal settlements are proclaimed. Acceptable environmental and public health standards should be main-

tained with the implementation of informal settlement layout plans.

11.5 Further research needed

Informal settlement households tend to maintain close links with their rural areas of origin. This has implications for their social organisation, economic conditions and long-term commitment to the city. 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 in curbing or redirecting migration is needed. Such information can help policy makers develop strategies for a sustainable economic base for low-income households in urban settlements.

The block systems in communal areas of Oshakati and Rundu, for example, are likely to work differently than in commercial areas, such as Windhoek and Swakopmund. We recommend further research on block systems in the north.

REFERENCES

- Amathila, L. (1996). Minister of Regional, Local Government and Housing in Namibia at the time. Habitat II Conference/City Summit, June 3-24, Istanbul, Turkey. INTERNET. <http://www.un.org/Conferences/habitat/eng-stat/4/nam4p.txt>, accessed on June 29 2004.
- Benschop, M. (2002). *Rights and Reality: Are Women's equal rights to land, housing and property implemented in East Africa?* UN Habitat, United Nations Settlements Programme.
- Christensen, S. F. & Juma, S. Y. (2001). *Bringing the Informal Settlers under the Register – The Namibian Challenge*. International Conference on Spatial Information for Sustainable Development, Nairobi, Kenya, October 2-5.
- Christensen, S.F. & Højgaard, P.D. (1997). *Report on A Flexible Land Tenure System for Namibia*. Ministry of Lands, Resettlement and Rehabilitation, Windhoek.
- Christensen, S.F. Wolfgang, W. & Hojgaard, P.D. (1999). *Innovative Land Surveying and Land Registration in Namibia*. The Development Planning Unit, University College, London.
- Dentlinger, L. (2004). No Free Water says Angula. *The Namibian*. April 13.
- Dentlinger, L. (2004). Water cuts loom again. *The Namibian*, November 26.
- Gold, J. Muller, A. & Mitlin, D. (2001). *The Principles of Local Agenda 21 in Windhoek: Collective action and the urban poor*. Urban Environment Action Plans & Local Agenda 21 Series Working Paper, Human Settlements Programme, IIED, London, December.
- Harring, S. & Odendaal, W. (2002). *One day we will all be equal... A socio-legal perspective on the Namibian land reform process*. Legal Assistance Centre, Windhoek.
- Hubbard, D. (1999). *Proposals for Law Reform on the Recognition of Customary Marriages*. Legal Assistance Centre, Windhoek.
- Kolberg, H. (1995). *International Conference and Programme for Plant Genetic Resources*, Country Report for Namibia, July, in Harring S and Odendaal W. (eds). *One day we will all be equal... A socio-legal perspective on the Namibian land reform process*. Legal Assistance Centre, Windhoek.
- LeBeau, D. Ipinge E. & Conteh, M. (2004). *Women's Property and Inheritance Rights in Namibia*. In Hubbard, D. & Zimba, E. (eds). University of Namibia, Pollination Publishers, Windhoek, Namibia.
- Legal Assistance Centre and Law Society of Namibia. (2004). *Debt Collection and the Role of the Sheriff/Messenger of the Court*, unpublished.

- Menges, W. (2001). Outdated laws face challenge. *The Namibian*, June 13.
- Malan, J. (2003). *Guide to the Communal Land Reform Act, Act No 5 of 2002*. Legal Assistance Centre and the Namibia National Farmers Union, Windhoek, Namibia.
- Namibia Estate Agents Board. (2001). *Real Estate Study Guide*.
- Pendleton, W. (1994). Katutura: A Place Where We Stay, in D, Hubbard. (ed). *Proposals for Law Reform on the Recognition of Customary Marriages*, Legal Assistance Centre, Windhoek.
- Republic of Namibia. (2004). *The National Housing Policy of Namibia*. 5th Draft Ministry of Local and Regional Government and Housing, Windhoek.
- Republic of Namibia. (2003). *2001 Population and Housing Census*. National Report, Basic Analysis with Highlights.
- Republic of Namibia, (2003). *Epidemiological Report: HIV/AIDS & STI for the year 2001*. Ministry of Health and Social Services. National AIDS Coordination Programme.
- Republic of Namibia. (2002). *National Water Policy (White Paper)*. Ministry of Agriculture, Water and Rural Development, Windhoek.
- Republic of Namibia. (2002). *National Poverty Reduction Action Plan*. National Planning Commission, Windhoek.
- Republic of Namibia. (2002). *The Draft National Land Use Policy in Annexure A: Applicable Legislation, Policies and Regulations on Land Use Planning*. Ministry of Lands, Resettlement and Rehabilitation, Windhoek.
- Republic of Namibia. (2001). *National Resettlement Policy*. Ministry of Lands, Resettlement and Rehabilitation, Windhoek.
- Republic of Namibia. (1998). *Programme Review and Strategy Development Report*. United Nations Population Fund.
- Republic of Namibia. (1998). *National Land Policy*. Ministry of Lands, Resettlement and Rehabilitation, Windhoek.
- Republic of Namibia. (1997). *National Gender Policy*. Office of the President, Department of Women's Affairs, Windhoek.
- Republic of Namibia. (1995). *The First National Development Plan*. National Planning Commission, Windhoek, vol. 1.
- University of Namibia, (undated). *Gender Issues and Democracy in Southern Africa*. Research and Teaching on Human Rights. Human Rights and Documentation Centre. INTERNET. <http://www.hrdc.unam.na/home.htm>, accessed on July 7 2004.
- Scott, S. Brink, P. D. & Knobel. I. M. (2003). *Law of Property*. University of South Africa, Pretoria.

Tvedten, I. & Mupotola, M. (1995). *Urbanisation and Urban Policies in Namibia*. NEPRU Working Paper no. 47 Windhoek, Namibia.

United Nations Development Programme. (1999). *Namibia Human Development Report 1999, Alcohol and Development in Namibia*.

United Nations Development Programme. (2000). *Namibian Human Development Report 2000/2001: Gender and Violence in Namibia*.

United Nations Institute for Namibia. (1988). *Namibia: Perspectives for National Reconstruction and Development*.

University of Melbourne. (2003). *Namibia Cadastral Template Report*. A Worldwide Comparison of Cadastral Systems, Cadastral country reports based on a jointly developed PCGIAP/FIG template, Department of Geomatics of the University of Melbourne.

University of Namibia. (undated). *Administration of Estates, Practical Legal Training*, Justice Training Center, Windhoek.

Windhoek City Council. (2001). *Conclusions and implications of various statistical reports for urbanisation management in Windhoek*, unpublished.

World Bank. (2004). *African Development Indicators*.

World Bank. (2003). *Comparative of Land Administrative Systems: Critical Issues and Future Challenges, Preliminary Report*, p. 49.

World Bank. (2002). *Upgrading Low Income Urban Settlements: Namibia Country Assessment Report*. p. 22

World Fact Book. (2004). <http://www.cia.gov/cia/publications/factbook/geos/wa.html>.

Newspaper articles

Angula Admits AA Loan Scheme Defective. (2004). *The Namibian*.

Barnard, M. (2004). DRC layout plan nixed. *The Namibian*. August 3.

Amoo, S.K. (2004). *Property Rights of Women in Namibia: Myth or Reality*.

Amoo, S.K. (2004). *Bringing Equality Home: Promoting and Protecting the Inheritance Rights of Women*, Unpublished.

Benschop, M. (2003). *Security of Tenure: Best Practices*. Paper presented at FAO/Oxfam GB Workshop on Women's Land Rights in Southern and Eastern Africa, Pretoria.

- Berrisford, S. et al (2003). *International Shifts in Shelter and Settlement Policy and their Implications for South African Praxis*. Consulting report for South African government and USAID.
- Caldwell, J. & Caldwell, P. (undated). *Fertility Transition in Sub-Saharan Africa*. INTERNET. www.hsrpcpublishers.co.za
- Center On Housing Rights and Evictions (COHRE). (2004). *Bringing Equality Home: Promoting and Protecting the Inheritance Rights of Women*.
- Conteh, M. Le Beau, D. & Ipinge, E. (2004). *Women Face Discrimination From Cradle to Coffin: Women's Rights to Property in Namibia*. Abstract presented at women's land rights workshop in Lusaka, 2004 citation not yet available.
- Cousins, B. (2004). The Communal Land Rights Act: Likely to Face Constitutional Challenge. *Umblaba Wethu*, No. 1.
- Cousins, B. (2004). The Continuing Controversy Over the Communal Land Rights Bill of 2002. *ESR Review*, Vol. 5 No. 4.
- Cousins, B. & Claassens, A. (2004). Communal Land Rights, Democracy and Traditional Leaders in Post-apartheid South Africa. in Saruchera, M. (ed) *Securing Land and Resources Rights in Africa: Pan African Perspectives*.
- Huchzermeyer, M. (2004). *Unlawful Occupation: Informal Settlements and Urban Policy in South Africa and Brazil*.
- Keller, B. (2000). *International Federation of Surveyors Commission 7 Taskforce on Women's Access to Land*.
- Keller, B. Phiri, E. & Milimo, M. (1990). *Women and Agricultural Development*. in Wood, A. P. et al (eds). *The Dynamics of Agricultural Policy and Reform in Zambia*.
- McAuslan, P. (2000). Only the name of the country changes: the diaspora of 'European' land law in Commonwealth Africa. In Toumin, C & Quan, J. (eds). *Evolving land rights, policy and tenure in Africa*.
- McAuslan, P. (2004). *Tensions of Modernity*. Paper presented at the University of Reading Centre for Property Law IVth Biennial Conference.
- Mndzebele, A. (2001). *A Presentation on Land Issues and Land Reform in Swaziland*. Paper presented at the SARPN conference on Land Reform and Poverty Alleviation in Southern Africa.
- Mvududu, S. & McFadden, P. (Eds.). (2001) *Reconceptualising the Family in a Changing Southern African Environment*.
- Quadros, M da C de. (2002). *Country Case Study: Mozambique*. Paper presented at the Workshop on Integrating Land Issues into Poverty Reduction Strategies and the Broader Development Agenda, Kampala.
- Royston, L. (2002). Security of Urban Tenure in South Africa: Overview of Policy and Practice' in Durand-Lasserve, A. & Royston, L.(eds). *Holding Their Ground: Secure Land Tenure for the Urban Poor in Developing Countries*.

- Selebalo, Q. C. (2001). *Land Reform and Poverty Alleviation: Lesotho's experiences during the last two decades*. Paper presented at the SARPN Conference on Land Reform and Poverty Alleviation in Southern Africa, June 4-5 2001.
- Sibanda, S. (2001). *Land Reform and Poverty Alleviation in South Africa*. Paper presented at the SARPN Conference on Land Reform and Poverty Alleviation in Southern Africa, Pretoria, June 4-5 2001.
- Strickland, R. (2004). *To have and to hold: women's property and inheritance rights in the context of HIV-AIDS in Sub-Saharan Africa*. ICRW Working Paper.
- Tanner, C. (2002). *Law-making in an African Context: the 1997 Mozambican Land Law*. FAO Legal Papers Online #26.
- UNAIDS. (2002). *Report on the Global HIV-AIDS Epidemic*
- United Nations. (2004). *Report of the United Nations Secretary General's Taskforce on Women and Girls in Southern Africa*.
- Van der Merwe, C. G. (1987). *The Law of Things*.
- Walker, C. (2002). *Land Reform in Southern and Eastern Africa: Key Issues for Strengthening Women's Access to and Rights in Land*. Report on a desktop study commissioned by the FAO.
- Women and Law in Southern Africa Research and Educational Trust. (2001). *Critical Analysis of Women's Access to Land in the WLSA Countries*.
- Women and Law in Southern Africa Research and Educational Trust-Zimbabwe, (WLSA). (2001). *Venia Magaya's Sacrifice: A Case of Custom Gone Awry*.
- Women and Law in Southern Africa Research and Educational Trust-Mozambique, (WLSA). (1997). *Families in a Changing Environment in Mozambique*.
- Women and Law in Southern Africa Research- Zimbabwe, (WLSA). (1997). *Paradigms of Exclusion: Women's Access to Resources in Zimbabwe*.
- World Bank. (2004). *African Development Indicators*, World Bank, Washington.
- World Bank. (2004). *Little Green Data Book*, World Bank, Washington
- World Bank. (2002). *Upgrading of Low Income Settlements Country Assessment Report: Namibia*. Reporting on informal settlement upgrading in Windhoek on the basis of City Council Guidelines.
- Zambia Land Alliance. (2002). *Initial Position Paper on the Draft Land Policy*. Paper presented to the Zambian Government Land Policy Technical Committee Lusaka Province Workshop.

Zambia Association for Research and Development and SARDC - WIDSAA. (1998). *Beyond Inequalities: Women in Zambia*.

Zambia Daily Mail. (2004). July 5.

APPENDIX

Appendix I: International human rights law and Southern Africa

Equal land, housing and property rights are recognised in various international human rights instruments, including: The Universal Declaration on Human Rights (UDHR)²³³:

- Article 17 recognises every person's right to own property and prohibits arbitrary deprivation of it;
- Article 25 confirms the right to an adequate standard of living, including housing;
- Article 2 entitles everyone to the rights and freedoms laid down in this Declaration, without discrimination; and
- Article 16 entitles men and women to equal rights as to, during and upon dissolution of marriage.

The International Covenant on Economic, Social and Cultural Rights (ICESCR)²³⁴:

- Article 11(1) recognises the right to adequate housing²³⁵;
- Article 2(2) prohibits discrimination; and
- Article 3 recognises equal rights between men and women.

The International Covenant on Civil and Political Rights (ICCPR)²³⁶:

- Article 3 recognises equal rights between men and women;
- Article 17 lays down the right to protection from arbitrary or unlawful interference in a person's home;
- Article 23(4) requires appropriate steps to ensure equal rights as to, during and upon dissolution of marriage (including marital property rights); and
- Article 26 confirms that everyone is entitled to the equal protection of the law, without discrimination on any ground, including sex, race and ethnicity.

The International Convention on the Elimination of all Forms of Racial Discrimination (ICERD)²³⁷:

- Article 5 (d) paragraph (v) recognises the right to property, while paragraph (vi) confirms the right to inherit; and
- Article 5(e) paragraph (iii) recognises the right to housing. These housing and property rights include the right to return.²³⁸

233 Universal Declaration of Human Rights, adopted on 10/12/1948 by General Assembly Resolution 217 A (III), UN GAOR, 3rd Session.

234 *International Covenant on Economic, Social and Cultural Rights*, adopted on 16/12/1966. General Assembly Resolution 2200 (XXI), 21st Session, Supp. No. 16, U.N. Doc. A/6316 (1966), 993, U.N.T.S. 3, entered into force on 3/1/1976. As of June 2005, 151 states had become party, while 66 states had signed but not (yet) ratified.

235 The right to adequate housing consists of the following elements: (1) legal security of tenure irrespective of the type of tenure; (2) availability of services, materials, facilities and infrastructure; (3) affordability; (4) habitability; (5) accessibility (including access to land); (6) location; and (7) cultural adequacy. See UN Committee on Economic, Social and Cultural Rights, General Comment No. 4 on the Right to Adequate Housing. See UN Doc. EC/12/1991/41 (1991). For full text see: <http://www.unhcr.ch/tbs/doc.nsf/MasterFrameView/469f4d91a9378221c12563ed0053547e?Opendocument>

236 *International Covenant on Civil and Political Rights*, adopted on 16/12/1966 by General Assembly Resolution 2200 (XXI), Supp. No. 16, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171. The ICCPR entered into force on 23/3/1976. As of June 2005, 154 states had ratified the ICCPR, while 67 had signed it.

237 *International Convention on the Elimination of All Forms of Racial Discrimination*, adopted on December 21 1965 by General Assembly resolution 2106 (XX), entry into force on January 4 1969. As of June 2005, 170 states were parties to this Convention, while 84 had signed but not (yet) ratified.

238 See UN Committee on Elimination of Racial Discrimination, General Recommendation nr. XXII on Article 5: Refugees and Displaced Persons, 1996. Available on: [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/fed5109c180658d58025651e004e3744?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/fed5109c180658d58025651e004e3744?Opendocument)

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)²³⁹:

- Article 13 requires the elimination of discrimination against women in areas of economic and social life to ensure women's equal right to bank loans, mortgages and other forms of financial credit;
- Article 14(2)(h) confirms women's right to enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications; and
- Article 15 accords women equality with men before the law, and recognises their equal right to conclude contracts and administer property.

The Convention on the Rights of the Child (CRC)²⁴⁰:

- Article 27 recognises the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development.

The Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries²⁴¹:

- Article 7 recognises the right of indigenous and tribal peoples to their own decisions regarding the land they occupy or otherwise use;
- Article 8(2) confirms the right to retain own customs and institutions, where these are not incompatible with international human rights;
- Article 14 requires the recognition and protection of the right to ownership and possession over the lands which indigenous and tribal peoples traditionally occupy, and the right of use for subsistence and traditional activities; and
- Article 16 stipulates that relocation from land has to be done with free and informed consent, the right to return or equal land and compensation.
- The African Charter on Human and Peoples' Rights (ACHPR)²⁴²: Article 18(2) and (3) require states that are party to the charter to ensure that "every" discrimination against women is eliminated, and that the rights of women and children are protected.

The African Union Protocol on the Rights of Women in Africa ("Women's Protocol")²⁴³:

This protocol, linked to the African Charter, is a treaty in its own right:

- Article 7(d) recognises women's equal rights to an equitable share of joint property deriving from separation, divorce or annulment of the marriage;
- Article 8 commits the states that are party to the protocol to take all appropriate measure to ensure (a) effective access by women to judicial and legal services, including legal aid; (b) support initiatives towards providing women with access to legal aid; (c) sensitisation to the rights of women; (d) equipping law enforcement organs to effectively interpret and

²³⁹ Convention on the Elimination of All Forms of Discrimination Against Women, adopted on 18/12/1979, General Assembly Resolution 34/180, U.N. G.A.O.R., 34th Session, Supp. No. 46, U.N. Doc. A/34/36 (1980), entered into force 3/9/1981. As of March 2005, 180 states had become party.

²⁴⁰ Convention on the Rights of the Child, adopted on 20/11/1989 by General Assembly Resolution 44/25, U.N. Doc. A/44/25, entered into force on 2/9/1990. All states except U.S.A. and Somalia have become parties.

²⁴¹ Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries, Adopted on 27 June 1989 by the General Conference of the International Labour Organisation at its seventy-sixth session. Entered into force on 5 September 1991. Convention 169 was ratified by 17 countries. See <http://www.ilo.org/ilolex/cgi-lex/ratific.pl?C169>

²⁴² The African Charter on Human and Peoples' Rights adopted on 17/6/1981 by the Eighteenth Assembly of the Heads of State and Government of the Organisation of African Unity, entry into force on 21/10/1986, ratified by 35 states.

²⁴³ The African Union Protocol on the Rights of Women in Africa was adopted on 11 July 2003 in Maputo, Mozambique. Assembly/AU/Dec. 19 (II).

enforce gender equality rights; (e) equal representation of women in judiciary and law enforcement organs; (f) reform of existing discriminatory laws and practice;

- Article 9(2) binds state parties to ensure increased and effective representation and participation of women at all levels of decision-making;
- Article 16 recognises women’s right to equal access to housing and to acceptable living conditions in a healthy environment, irrespective of marital status;
- Article 19(c) commits state parties to promote women’s access to, and control over, productive resources, such as land, and guarantee their right to property;
- Article 21(2) recognises the equal rights of sons and daughters to inherit property; and
- Articles 22-24 commits state parties to undertake special measures for elderly women, women with disabilities and women in distress.

The table below provides an overview of which countries in southern Africa are party to these different human rights instruments.²⁴⁴

Treaty	Angola	Botswana	Lesotho	Malawi	Mozambique
ICESCR	YES a: 1992	NO	YES a: 1992	YES a: 1993	NO
ICCPR	YES a: 1992	YES s: 2000 r: 2000	YES a: 1992	YES a: 1993	YES a: 1993
Optional Protocol to ICCPR of 1966 ⁶	YES a: 1992	NO	YES a: 2000	YES a: 1996	NO
ICERD	NO	YES a: 1974	YES a: 1971	YES a: 1996	YES a: 1983
CEDAW	YES a: 1986	YES A: 1996	YES s: 1980 r: 1995	YES a: 1987	YES a: 1997
Optional Protocol to CEDAW of 1999 ⁷	NO	NO	YES s: 2000 r: 2004	NO s: 2000, but not yet ratified	NO
CRC	YES s: 1990 r: 1990	YES A: 1995	YES s: 1990 r: 1992	YES a: 1991	YES a: 1991
Convention 169 on Indigenous and Tribal Peoples	NO	NO	NO	NO	NO
ACHPR	YES r: 1990	YES R: 1986	YES s: 1984 r: 1992	YES r: 1989	YES r: 1989
Women’s protocol to ACHPR of 2003 (not yet entered into force)	NO	NO	YES	NO	NO

²⁴⁴ After country representatives have signed an international or regional agreement, their head of state has to approve it. Upon such approval the signed agreement is ratified. Whether ratification is necessary or not is stated in the agreement. If a state has not signed and ratified such agreement, it can still accede to the treaty at a later date. By ratifying or acceding to an international or regional agreement, the state becomes party to it is bound to the obligations laid down in that agreement. If the state only signs but does not ratify, it is nevertheless bound to do nothing in contravention of what is stated in that agreement. In this Table, the letter S stands for “signed”, the letter R represents “ratified” and the letter “A” indicates “acceded”.

Treaty	Namibia	South Africa	Swaziland	Zambia	Zimbabwe
ICESCR	YES a: 1994	NO s: 1994	YES a: 2004	YES a: 1984	YES a: 1991
ICCPR	YES a: 1994	YES s: 1994 r: 1998	YES a: 2004	YES a: 1984	YES a: 1991
Optional Protocol to ICCPR of 1966	YES a: 1994	YES a: 2002	NO	YES a: 1984	NO
ICERD	YES a: 1982	YES s: 1994 r: 1998	YES a: 1969	YES s: 1968 r: 1972	YES a: 1991
CEDAW	YES a: 1992	YES s: 1993 r: 1995	YES a: 2004	YES s: 1980 r: 1985	YES a: 1991
Optional Protocol to CEDAW of 1999	YES s: 2000 r: 2000	NO	NO	NO	NO
CRC	YES s: 1990 r: 1990	YES s: 1993 r: 1995	YES s: 1990 r: 1995	YES s: 1990 r: 1991	YES s: 1990 r: 1990
Convention 169 on Indigenous and Tribal Peoples	NO	NO	NO	NO	NO
ACHPR	YES r: 1992	YES s: 1996 r: 1996	YES r: 1995	YES s: 1983 r: 1984	YES s: 1986 r: 1986
Women's Protocol to ACHPR of 2003	YES	YES	NO	NO	YES

* S = signed; R = ratified; A= acceded.



UN-HABITAT

UNITED NATIONS HUMAN SETTLEMENTS PROGRAMME

P.O. Box 30030, GPO Nairobi 00100, KENYA

Telephone: 254-20-7623120; Fax: 254-20-7624266/7 (Central Office)

E-mail: infohabitat@unhabitat.org; Website: <http://www.unhabitat.org>

HS/788/05E
ISBN: 92-1-131768-1

Scale 1:51,400,000

Equal-Area Projection