



LESOTHO

Law, Land Tenure and Gender Review: Southern Africa



UN-HABITAT

Scale 1:51,400,000

Cylindrical Equal-Area Projection

LAND TENURE, HOUSING RIGHTS AND GENDER

IN
L E S O T H O



2005

Law, Land Tenure and Gender Review Series: Southern Africa

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HS/786/05E

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

ISBN Number:(Volume) 92-1-131770-3

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 These include pre-colonial customary law which co-exists with a mixture of outdated and often draconian colonial laws and more recent legislation.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.

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Acknowledgements

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

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Editing: Greg Rosenberg

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Kuena Thabane would like to thank the following persons for the information they have shared for this research:

The Chief of Thaba-Bosiu

Mr. Qhobela Cyprian Selebalo, Coordinator, Land Management Authority

Mr. Lebeta, Special Prosecutor, Land Cases, Magistrate Courts of Lesotho

Mr. Leduka; Mr. Makhele Makhele, Valuation Officer at the LSPP

F. Makoa, Lecturer, National University of Lesotho, Department of Public Administration & Political Science

Mr. Mathabang Folobi from the village of Ha Foso

Mrs. Mathabo Makuta, Chief Administrator, Housing Division of the LSPP

Mrs. Mpho Molapo, Managing Director, Lesotho Housing & Land Development Corporation

Ms. Ntsiki, Master of the High Court, Maseru; Ms. Palesa Khabele, Lecturer, University of Lesotho, Faculty of Law

Mr. Seqhee Mothusi, Programmes Officer, Transformation Resource Centre, Maseru

Mr. T. Hlaoli, Practicing Lawyer, Maseru.

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

List of Abbreviations

AIDS	Acquired immunodeficiency syndrome
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
DS	District Secretary
FIDA	Federation of Women Lawyers
HIV	Human immunodeficiency virus
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICC	Interim Community Council
JSC	Judicial Service Commission
LHLDC	Lesotho Housing and Land Development Corporation
LGA	Local Government Act
LSPP	Land Survey and Physical Planning Department
MCC	Maseru City Council
NGO	Non-governmental organisation
SDA	Selected Development Area
SLAC	Standing Committee on Land Affairs
TRC	Transformation Resource Centre
ULC	Urban Land Committees
WLSA	Women and Law in Southern Africa

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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 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

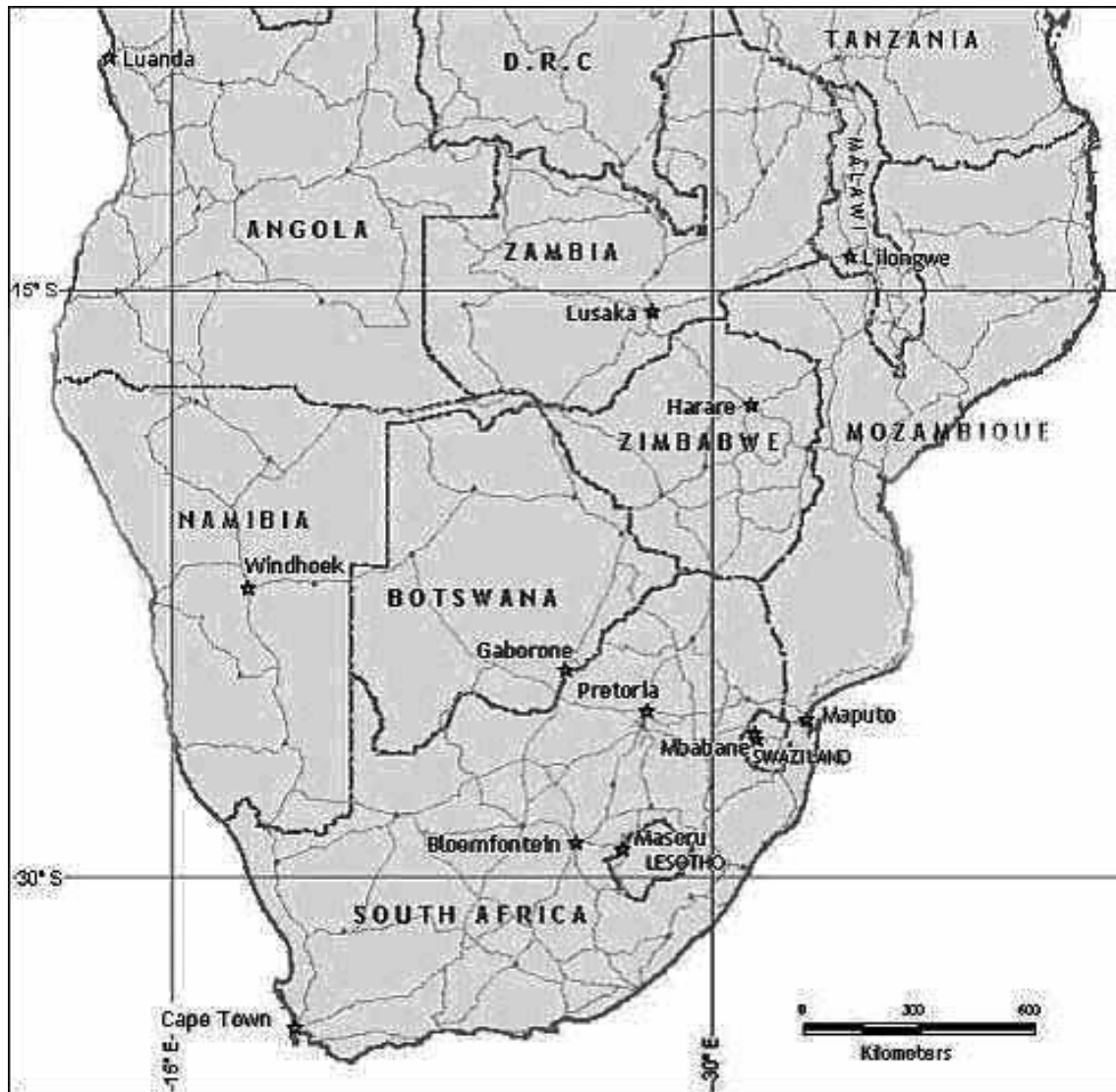
recommendation in this respect stands out. The effects of HIV/AIDS on urban land rights are unknown, although the agreed view is that it makes households and women in particular, more vulnerable to dispossession. This is an area requiring more and detailed research so that appropriate and specific interventions 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 achieve lasting results.



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,

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

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 rights. Patterns of land owner-

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.

ship 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,

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.

where 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 June¹⁰ 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 SARP 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

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

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

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

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”.

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 Africa 22

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.

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

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.

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.

in law reform processes. The Gender Forum, for example, 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

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.

their 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 de-

liberate effort to include women in the National Housing Strategy.

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

³⁴ Op. cit.,49.

³⁵ Caldwell, J. & Caldwell, P. (undated). Fertility Transition in Sub-Saharan Africa, see www.hsrcpublishers.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.

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 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

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.

³⁸ The Herald, Harare, June 8 2004.

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 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

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

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.

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 func-

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.

42 Op. cit., 11.

tions 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

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.

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.

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 Africa 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

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.

things for women by recognising customary law marriages 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, al-

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.

lowed women married in community of property to register immovable 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.

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

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.

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

ensured the continuation of this practice in spite of the fact that it clearly discriminates against women.⁵⁷

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

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 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

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.

Dispossessing widows

Dispossessing widows of property, though a criminal offence in most of the region, is a common practice and a big prob-

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.

lem 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/AIDS5
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

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

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.

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

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

and housing sector, especially insofar as the rights of women are concerned.

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.

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.

(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 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. Spe-

cific efforts, perhaps through the organs of AMCHUD, 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 Lesotho

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 previous 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 1.1 Map of Lesotho



Background

1.1 Historical background

Lesotho is a landlocked country surrounded entirely by the Republic of South Africa. It occupies 30,355 km² and ranges in altitude from 1,400 metres to 3,484 metres above sea level. The Basotho nation emerged out of the coming together of mainly Sesotho⁶⁸-speaking groups in 1824, when Moshoeshoe I and his followers fled regional upheaval – the ripple effects of political and military conflicts among the Zulu people known as the *mfecane*, and armed expansion by European settlers – to a mountaintop refuge, Thaba Bosiu, near what is now Maseru, the capital of Lesotho.⁶⁹ In 1868 the Basotho nation, still under the leadership of Moshoeshoe I, successfully applied to become a British protectorate, known as Basutoland.

At this time the British seat of government in southern Africa was in Cape Town and the High Commission for Basutoland operated from there. The administrative seat of government for Basutoland was set up in Maseru, where a police camp had been established. A distinction was drawn between law that governed land falling inside police camps, and laws that governed land occupied by the indigenous Basotho outside the camps. The Basotho chiefs thus had the authority to allocate fields and residential land outside the camps, while the law applying inside these camps, and to foreigners residing there, was that of the neighbouring Cape Colony, enforced under the General Administration Proclamation No. 2b of 1884. In 1938, a colonial law also established a system of Basotho courts, and these courts used Sesotho customary law to decide cases in which all the parties were Basotho.⁷⁰ This duality of laws, a characteristic of British colonial rule, is replicated in several African countries and its legacy continues to be felt in Lesotho today.

When Lesotho achieved independence from Britain in 1966 the laws in place then remained in place, hence preserving the duality inherited under colonialism.

Post-independence politics in Lesotho have been stormy, with a dictatorship running the country from 1970 to 1986 and military coups in 1986 and 1991. Unrest following the elections in 1998 led to the invasion of Lesotho by a regional peacekeeping force, resulting in the destruction of large parts of the major towns. Since holding peaceful and fair elections in 2002, the country has stabilised politically.

The role of the king and the chiefs has always been central to land matters in Lesotho. Historically, land belonged to the community and was held in trust by the king. Every married man was entitled to three fields for agriculture and a piece of land for residential purposes.⁷¹ There was no formal recording of these allocations nor were such allocations ever made to women. The powers of the king were delegated to the chiefs, who were his representatives throughout the country. As the population grew in size, governance was delegated to the king's sons and to other clan leaders. The descendants of these leaders constitute today's chieftainship. Moreover, apart from being the head of state, the king has constitutional power to allocate land, a power that has traditionally been delegated to the chiefs.⁷²

Land law in Lesotho is in considerable flux, with two land policy review commissions having completed their work in 1987 and 2000 respectively. Most recently, a White Paper on National Land Policy was completed in 2001, from which a Draft Land Bill was drawn up. The impetus for these reforms

⁶⁸ Sesotho is the language of Lesotho, while Basotho (singular, Mosotho) are the people of Lesotho.

⁶⁹ Gill, S. (1993). *A Short History of Lesotho*. Morija Lesotho.

⁷⁰ Local and Central Courts Proclamation of 1938.

⁷¹ WLSA. (2001). *A Critical Analysis of Women's Access to Land in the WLSA Countries*. Harare.

⁷² Section 108(1) of the Constitution.

was the perceived failure of various legislative attempts at creating an appropriate and workable system of land law.

1.2 Legal system and governance structure

The Constitution is Lesotho's supreme law.⁷³ It establishes three arms of government: parliament, the judiciary and the executive.⁷⁴ The king is a constitutional monarch and ex officio head of state. Executive authority rests in him and is exercised through officers of the government.

Chapter II of the Constitution provides for "protection of fundamental human rights and freedoms".⁷⁵ These rights and freedoms are enforceable by the courts and may be enforced against the state as well as against private individuals.

Chapter III provides for principles of state policy⁷⁶ that are not justiciable by the courts, but instead are meant to "guide the authorities and agencies of Lesotho, and other public authorities, in the performance of their functions". A right to housing is not one of the specified fundamental human rights, nor is it mentioned under state policy. However, such a right may be inferred from the call, in this chapter of the Constitution, for the government to provide "policies which encourage its citizens to acquire property including land, and houses".⁷⁷ It should be emphasised, however, that a citizen may not sue the government for failure to provide adequate housing.

The monarchy and its related institutions are created by the Constitution. The king is nominated by the College of Chiefs acting in accordance with customary law of Lesotho.⁷⁸ This makes the king, in addition to being head of state, also head of the chieftainship. The Constitution provides that

parliament may make provisions for the regulation of the office of the chiefs.⁷⁹

The legislature

Legislative power is vested in parliament,⁸⁰ which consists of the king, the Senate and the National Assembly. The Senate is made up of 22 principal chiefs and 11 senators appointed by the king, acting upon the advice of the state council.⁸¹ Out of the total of 33 members, 12, or 36 percent, are women. The National Assembly is less gender representative; it consists of 120 elected representatives of political parties, of whom only 14 are currently women – a mere 0.8 percent. Legislation is initiated in most cases outside parliament, goes through the cabinet, and is presented by the minister under whose authority the matter falls to the National Assembly for discussion. From the National Assembly the Senate discusses the bill, and subsequently it is put before the king for his assent.

The judiciary

At the apex of the judicial system is the Lesotho Court of Appeal. The chief judicial officer of the court is the President of the Court of Appeal. The next in line is the Chief Justice of the High Court. Both are appointed by the king on the advice of the prime minister and the Judicial Service Commission (JSC).⁸² The puisne judges on the other hand are appointed by the king, acting on the advice of the JSC.⁸³ Below the High Court are 10 Subordinate courts (otherwise known as Magistrate Courts), situated in each of the 10 districts of Lesotho.⁸⁴ These courts are on an equal footing with the Judicial Commissioner's court, which hears appeals from the next level of courts; the Local or Central courts (also known as the Basotho courts).⁸⁵ Basotho courts

⁷³ The full text of the Constitution can be seen at <http://www.lesotho.gov.ls/constitute/gconstitute.htm>.

⁷⁴ Section 86.

⁷⁵ Chapter II, Ss. 4-24.

⁷⁶ Chapter III, Ss. 25-36.

⁷⁷ S. 34.

⁷⁸ S. 45 of the Constitution.

⁷⁹ S. 103 (1) and (2).

⁸⁰ S. 70 (1) of the Constitution.

⁸¹ S. 55.

⁸² S. 120 (1) (2) and 124 (2).

⁸³ S. 120 (2). Puisne (pronounced "puny") judges are the judges of the High Court who do not hold senior posts. In most cases this refers to a judge who holds an acting position to be confirmed after a specified period.

⁸⁴ Magistrates Courts are created by the Subordinates Courts Act of 1988. They are able to exercise civil jurisdiction of up to a maximum M40,000.

⁸⁵ Established under the Local and Central Courts Proclamation of 1938.

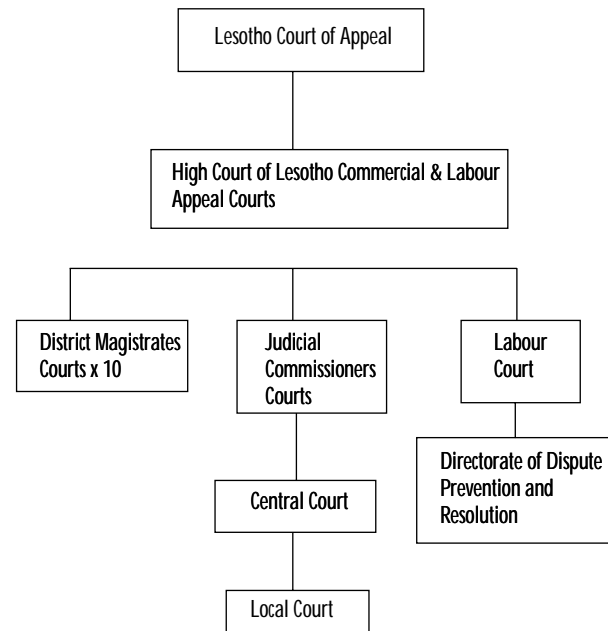
have jurisdiction over indigenous Basotho only. Cases from both the Magistrate courts and the Judicial Commissioner's court may be taken on further appeal to the High Court of Lesotho on a point of law and finally to the Lesotho Court of Appeal.

Judicial functions in land matters are exercised by the Land Tribunal.⁸⁶ The tribunal is presided over by a judge of the High Court or a resident magistrate and two assessors. These can be a principal chief and either a lawyer or a land economist. In practice the chairman of the tribunal has always been a resident magistrate of the Maseru district court. The prescribed jurisdiction of the tribunal is to adjudicate on claims relating to land. Such claims include:

- Grievances from a refusal to grant a lease or licence relating to agricultural land;⁸⁷
- Disputes arising from the valuation of land by a government property valuation officer, on the amount of compensation due to a citizen;⁸⁸
- Compensation arising from the revocation of right of use, in favour of land declared suitable for public purpose use; and⁸⁹
- Grievances arising from the revision of ground rent.⁹⁰

However, the tribunal does not have exclusive jurisdiction. A case may also be instituted at the Central Courts, Magistrates Courts or the High Court.⁹¹

Figure 1.2 The court structure in Lesotho



Local government

A traditional focus on municipalities and councils is not enough to understand local governance in Lesotho because, apart from the Maseru City Council (MCC), Lesotho has no municipalities or councils.

⁸⁶ Part VII, Section 64 of the 1979 Land Act.

⁸⁷ S. 11(3) of the 1979 Land Act.

⁸⁸ S. 42(8).

⁸⁹ S. 56(3).

⁹⁰ Land Regulations of 1980.

⁹¹ S. 68 of the 1979 Land Act.

Historically, institutions of local governance in Lesotho have varied greatly. They are created and controlled by a number of statutes, and there is a general state of overlap and uncertainty. A large number of committees and boards exist, invariably with traditional authorities present in them. Additionally, central government officials have always had a presence at district level.

Units of decentralised governance known as development committees exist at village, ward and district level. They have elected officials as well as chiefs who are *ex officio* members. These institutions are created and empowered by the 1979 Land Act.

Table 1.1 Roles and composition of institutions of local governance⁹²

Structure	Level	Functions	Composition
Village Development Committee (VDC)	Village level – for each area that falls under a gazetted chief	<ul style="list-style-type: none"> • Plan, formulate, implement and maintain development activities and social services. • Represent and guide the local community in its efforts to identify village development needs. • Raise funds for local development. • Stimulate local participation in development activities. • Inform government on local development options 	Seven members elected at a pitso with a chief as an <i>ex officio</i> member and chair. Holds office for 3 years.
Ward Development Committee (WDC)	Ward level	<ul style="list-style-type: none"> • Collate development proposals from VDCs. • Monitor implementation of development projects 	Twelve members elected from the VDC members, with the ward or principal chief as an <i>ex officio</i> member and chair. Holds office for three years.
District Development Committee (DDC)	District level	<ul style="list-style-type: none"> • Monitor and implement development projects. • Raise funds for projects. • Promote socio-economic development. • Ensure district projects are in line with national plan. • Consult with Central Planning, the Development Office & other ministries on development planning 	15 members elected from WDC with ward or principal chief as an <i>ex officio</i> member and chair. If more than one, they alternate.
District Administration – District Secretary (DS).	District level	<ul style="list-style-type: none"> • CEO of district and coordinates activities of central government departments in the district. • Preside over meetings of departmental heads 	The DS is an officer in the public service.

⁹² Steyn, L. & Aliber, M. (2003). The existing system of land administration and institutional options for implementation of a new Land Act in Lesotho. Report prepared for the APCBP Lesotho Land Policy Law Harmonisation and Strategic Plan Project - Organisational Management and Human Resource Development, and Financial and Economic Components.

In 2001 Village Development Committees were replaced by Interim Community Councils (ICCs). The functions of the ICCs include land allocation, natural resource control, water resource supply maintenance and the development of minor roads.

Urban areas have a different set of local governance structures. The Urban Government Act of 1983 creates an urban area in each of the 10 districts serving as the district headquarters, plus an additional two, making a total of 12 urban areas. Further, the Act provides for the establishment of municipal and urban councils, which have only been established in Maseru to date. The Act provides for a wide range of activities to be performed by councils, including sanitation and housing, control of building permits, roads and traffic, local administration of central regulations and licences. The MCC is also tasked specifically with the following functions by the Act:

- To control, manage and administer the municipality and generally assist in the maintenance of good order and government within its area;
- Generally promote the public health, welfare and convenience, and the development of sanitation and amenities of the municipality;
- Act as a rating (property tax) authority and undertake all the duties with respect to rating as imposed on any local authority under any law; and
- Undertake planning functions under the Town and Country Planning Act 1980.

The local government experiment in Lesotho is not considered a success. The sole municipality, Maseru, was first formed in 1989, and composed of 15 elected councillors from the wards and three principal chiefs on whose territory the council sits. The council was dogged by conflict between the elected councillors and the executive authorities, culminating in its dissolution in 1990. A commission appointed to inquire into its operations resulted in the dismissal by the government of the mayor, deputy mayor and two other council members. The commission highlighted a number of problems, including political party factionalism and councillors who failed to

fulfil their required roles. No other elections were held, but the life of the council was twice extended, until it was finally dissolved in 2000. A town clerk was subsequently appointed to assume its powers and functions.⁹³

Urban areas are also governed by Urban Land Committees (ULCs). These are creations of the 1979 Land Act. The role of ULCs includes land allocation, land-related dispute resolution and control of illegal settlement. Their land allocation functions were, however, suspended by a government edict in 2002. Maseru has a ULC consisting of three principal chiefs, the town clerk or his or her representative, the Commissioner of Lands or his or her representative, and three other members and officials from the MCC and Land Survey and Physical Planning Department (LSPP).

The Local Government Act (LGA) of 1997 is intended to repeal the Urban Government Act, but it has not yet been implemented, despite having been on the statute books for eight years. The new LGA proposes major reforms, including the countrywide establishment of local government in the form of community councils, rural councils and either urban or municipal councils in urban areas. The Act sets out the duties and functions of these bodies, including land allocation and physical planning. The LGA provides that local government fulfils its functions “subject to the powers reserved to or vested in any other authority by this Act, or by any other written law”,⁹⁴ considerably limiting local government’s autonomy.

An important aspect of the evolution of local governance has been the historic tension between elected institutions and chiefs. This is especially true in relation to land allocation duties. Through progressive legislation, including the 1979 Land Act, the chiefs’ land allocation powers have been reduced considerably. The LGA provides for the incorporation of the chiefs into community, rural and urban councils in which elected councillors will form the majority of rep-

93 Silitsehean, R. M. K. and Kabi, M. M. (2005). *Cities Without Slums Programme: Maseru Situational Analysis*. A report Prepared for the Ministry of Local Government Maseru.

94 S. 5.

representatives. For example, urban councils will be made up of between 9 and 13 elected councillors and 2 chiefs. Some legal observers consider this a violation of the Constitution, arguing that since all land in Lesotho is held in trust by the king, who delegates such authority to the chiefs, removal of such powers by legislation is unconstitutional.⁹⁵

1.3 Socioeconomic context

Lesotho is a very poor country, with very little in the way of natural resources. It is landlocked and has a small population. Most of the country is too mountainous for agriculture. Almost half the population lives on less than \$1 a day. The per capita gross national income is \$550 a year. Income distribution is also highly unequal, with the richest 20 percent of the population holding 71 percent of the national income and the poorest 20 percent only 1.4 percent.

Urbanisation

The 1996 census put Lesotho's population at 1,835,867, of which roughly 51 percent were women.⁹⁶ In 2000 Maseru's population was estimated to be 300,000 and growing at an annual rate of 7-10 percent, which would put the capital's current population over 400,000 people. The rapid urban growth rate reflects high internal migration rates.⁹⁷ Labour-intensive clothing manufacturing and retailing industries in the Maseru, Leribe and Mophale's Hoek districts are part of the reason for this influx. Characteristically, internal migrants are well-educated women aged between 15 and 29 who are seeking work in the factories.⁹⁸ An important consequence of this high growth of urban populations is that 90 percent of Maseru residents live on land outside the 1905 colonial city boundaries.⁹⁹ This effective extension of urban

95 Makoa, F. Interview with the author. See also Makoa F. (1994). *Lesotho: the Politics of Development 1966-1993*. PhD Thesis, (Unpublished), University of Liverpool.

96 Government of Lesotho Bureau of Statistics, (1996). *Population Census, 1996*, Maseru.

97 Makatjane T, in Government of Lesotho, (2003). *2001 Population Census Analytical Report*, Bureau of Statistics. Maseru. The districts that experience the highest rates of influx are Maseru, Berea, Mafeteng and Mophale's Hoek.

98 For details of these studies see Wellings, P. (1983). *A case of mistaken identity: the squatters of Lesotho*. University of Natal Durban.

99 Leduka R, (2004). *Informal Land Delivery Systems and Access to Land for the Poor in Maseru*. Research Report.

boundaries has incorporated land that was previously under the administration of local chiefs, leading to tension between the decentralised units of governance and the institution of chieftainship.

In Lesotho, the distinction between what is urban and rural is often blurred. Every part of Maseru, for example, is an extension of a rural ward under a chief. This affects the application of the correct laws, raises questions of which documents of title are valid and which land allocation authority is in charge. To illustrate the lack of certainty regarding this issue, Roma, with substantial urban developments including Lesotho's only university, has been changed from rural, to urban, and then back to rural again.¹⁰⁰

HIV/Aids

The HIV/Aids epidemic is of grave concern. The rate of adult infection is high, consistently put at above 30 percent. In 2001, there were 360,000 people living with the virus, and 73,000 Aids orphans.¹⁰¹ Generally, the infection rate among women is higher, placed at 55 percent of the total number infected. In certain age groups (for example those between 15 and 29) women constitute the majority of cases.¹⁰²

HIV/Aids affects land rights and has a particularly strong impact among vulnerable groups: widows, orphans, youth and children. This happens when they are inheriting land that is often under the custodianship of relatives.¹⁰³ Loss of household income lowers the living standards of the affected household and can lead to loss of assets, including land, which is often sold off to meet medical and funeral expenses. Additionally, stigmatisation and accompanying poverty overwhelm community support structures and weaken the traditional kinship ties.¹⁰⁴

100 Land Act (Amendment) Order 1986.

101 World Bank. (2004). *African Development Indicators*. The World Bank, Washington.

102 Ibid.

103 The chief of Thaba Bosiu indicated that land occupied by HIV/AIDS affected orphans is often grabbed by relatives, leaving the children destitute.

104 See Drimie, S. (2002). *The Impact of HIV/AIDS and Land: Case Studies from Kenya, Lesotho, & South Africa*. SARP, Johannesburg.

1.4 Civil society

Recent evictions underline the need for stronger civil society agitation for land rights. There are no known slum dwellers' organisations specifically mobilised to fight against illegal evictions or that take up land issues more broadly. Some advocacy work is carried out by the Transformation Resource Centre (TRC) concerning the rights of people affected by the Highlands Water Project. 105 Indigent people also utilise the services of the National Legal Aid Unit within the Ministry of Justice and Human rights. In addition, people who cannot afford lawyers seek assistance from the Federation of Women Lawyers (FIDA), which often takes cases involving land administration. In addition to litigation, both FIDA and Women and Law in Southern Africa (WLSA) lobby the government to reform policies that are gender insensitive or unfair to women. They also educate women about their rights.

An umbrella organisation, the Lesotho Council of NGOs (Lecongo), 106 runs various support programmes for NGOs. It appears to focus primarily on issues of rural development and gender.

2 Land Tenure

2.1 Relevant constitutional provisions

The Constitution provides that all land is vested in the Basotho nation. Further, the power to allocate land is vested in the king in trust for the Basotho nation 107.

2.2 National laws related to land and property rights

Key legislation governing the system of landholding includes:

- The Land Act of 1979. This is the principle law governing landholding in Lesotho. Government intends to repeal this and replace it with the Land Bill;
- The Deeds Registry Act (1969), which is principally a registration statute for various deeds;
- The Town and Country Planning Act (1980) – the principal planning law;
- The LGA (1997), which, as mentioned earlier, has yet to be enacted. It establishes community, rural, urban and municipal councils; and
- The Urban Government Act (1983), which provides for the establishment of urban councils.

Related legislation includes the Land Husbandry Act (1969) and the Valuation and Ratings Act (1980).

The Land Act of 1979

The principal land legislation in Lesotho is the Land Act (1979), which came into effect on the June 16 1980. It was a consolidation of the Land Act and the Administration of Lands Act, both 1973 laws. Through this Act the state nationalised all rights to land and provided that all land must be leased from it. The statutory lease was introduced as the legal tenure for both rural and urban land.

This attempt at nationalisation caused tension between the modern state and traditional authorities. It has its origins in the Constitution, which provides that the king, acting in trust for the nation, may “make grants of interests or rights in or over such land, to revoke or derogate from any allocation or grant that has been made or otherwise to terminate or restrict any interest or right that has been granted.” The section also provides that “this power vested in the king shall be exercised in accordance with this Constitution and any other law.” 108

The 1979 Land Act was influenced by discourses of economic development that then held sway among international development agencies, primarily the notion that formal titling of land was of paramount importance. Observers have suggested that the haste with which the 1979 Land Act was enacted was an outcome of external pressures from these

105 The Highlands Water Project, initiated in 1986, is a joint dam-building project between Lesotho and South Africa. Inhabitants of the locations where these dams now stand were resettled elsewhere.

106 For more information see www.lecongo.org.ls.

107 Ss. 107 and 108.

108 S. 108.

agencies, arising from Lesotho's urgent need to secure foreign aid. 109

2.3 Customary law

Land in Lesotho was traditionally governed by customary law. The primary source of customary law is a codified text of custom known as the Laws of Lerotholi. This code is further augmented by several authoritative writings. 110 Through it land was considered to be part of the communal heritage of its users. It was not capable of belonging to any one individual. Land was held by the chiefs in trust on behalf of the larger community. Such land was allocated for use to the allottee and his family. It could not be bought, sold, transferred or exchanged. Rights to allocation were traced from one's membership in the community, although in certain circumstances outsiders could obtain land. 111

The Laws of *Lerotholi* were codified at the instigation of the colonial rulers. 112 The Basutoland National Council, (later the Basutoland Council) carried out the codification in 1903. The laws provided that land was "communal" in character and not privately owned, and that the king could delegate land allocation to chiefs. It is from these laws that the notion of "land belonging to the nation" held in trust by the king became part of the written law, and is reflected in the Constitution.

One writer 113 notes that:

"Colonial officials used and adapted customary law to suite their own ends; and the customary law long ago ceased to be part of traditional society – a

bulwark against the colonial authorities – and became instead part of the colonial apparatus of rule".

The origins of the Laws of Lerotholi thus formed part of the furtherance of colonial objectives. One consequence of this is the widespread and inevitable misrepresentation of complex traditional relationships. It is also important to remember that customary law, like any other source of law, evolves over time and so the reference now back to a codification performed in 1903 has obvious risks and disadvantages.

2.4 Tenure types

Leases

This 1979 Land Act makes the lease the principal form of tenure for both rural and urban areas. There are various types: 114

- Residential leases for periods of 90 years¹¹⁵;
- Commercial and industrial leases for periods of 30 and 60 years;
- Agricultural leases for periods of 10-90 years; and
- Others, including religious, educational and charitable leases, for periods of 90 years.

A grant of title to urban land – made by an Urban Land Committee (ULC) – under the 1979 Land Act automatically entitles the recipient to a lease that can be registered and entitles the leaseholder to transfer, sublease or mortgage the land. Leases are also inheritable. The Act provides that the sale, sublease or mortgaging of a lease is always subject to the consent of the minister of local government, although in practice it does not seem that the minister invokes his or her power to withhold that consent.¹¹⁶

Customary tenure and the Form C

Under customary law in Lesotho there was no documentary title as proof of land tenure. Rights of allocation were purely a function of community membership. In 1973, the Form C

109 Franklin, A. S. (1995). *Land Law in Lesotho*. Ashgate Publishing Ltd, England.

110 See for instance, Duncan, P. (1960). *Sotho Laws And Customs*, Cape Town; Poulter on legal dualism *infra* 160; Palm and Poulter *The Legal System of Lesotho* 1972, Michie Co, Virginia USA; and Maqutu on family law *infra* 147.

111 *Op. cit.*, 114.

112 Lerotholi is derived from the name of a former paramount chief, equivalent to today's office of the king, during whose term of office the customary practices were given the formal status of law.

113 McAuslan, P. (2000). Only the Name of the Country Changes: The Diaspora of "European" Land Law in Commonwealth Africa, in: Toulmin, C. and Quan, J. (eds) *Evolving Land Rights and, Policy and Tenure in Africa*. DFID/IED/NRI, London, at 84.

114 *Op. cit.*, 97.

115 Residential leases were applicable to both urban and rural land and to land allocation made both before and after 1979.

116 S. 8.

was introduced as a document to provide evidentiary proof of customary tenure. The chief, upon granting the applicant an allocation of land, issued this document. The introduction of the Form C was tied to land reforms that were intended to introduce an element of collective decision-making and discourage corrupt practices among the chiefs. A Form C had to be procedurally allocated, and chiefs were required to maintain a register of all issues, and to keep copies for subsequent accounting. The reforms also provided for Land Advisory Boards. These boards were meant to advise chiefs, who were legally obliged to work with them, but they were never established, largely due to resistance from the chiefs.

The Form C was officially abolished by the 1979 Land Act, but all forms issued before this date remained valid. The Forms C1, C2, CC2 and C3 were to replace the original Form C; they are considered allocation certificates, similar to traditional allocations before the 1979 Land Act. These certificates entitle the holder to different right uses:

- For agricultural use of land in rural areas, a C1 is issued;
- For uses other than residential or agricultural in rural areas, a C2 is applicable;
- For residential use in rural areas, a CC2 applies; and
- In the case of urban leases, a C3 is provided.¹¹⁷

These allocation certificates, and Form Cs, can be converted into leases through the 1979 Land Act. A title deed obtained before the 1979 Land Act can also be converted to a lease in terms of the 1979 law.

As part of these changes in the law, chiefs were directed to return all old, unused Form C documents. However, they were never required to return their registers of all the issued forms made before the 1979 Land Act came into force, nor were they directed to either change or return the date stamps that they had been using to authenticate the Form C.¹¹⁸ This made it possible for the chiefs to continue issuing Form C documents. This was fraudulently done by backdating the

official stamps to dates before June 16 1980, the commencement date of the 1979 Act. These are still widely used as proof of tenure rights in Lesotho.

Licence

Another form of tenure relates to agricultural land within the urban areas declared by the 1979 Land Act. This was automatically converted into a tenure right called a licence. The licence was created to enable flexible planning and to provide some form of tenure security to insecure occupiers of peri-urban areas. These areas were under customary tenure. This land right is neither transferable, subject to inheritance nor negotiable. Licences are therefore still held under customary tenure. They do, however, have the added benefit of greater security, and enable progressive planning.

Rental as a form of tenure

Rental is an important form of derived tenure and is widespread in the urban areas of Lesotho. Structures for rent are a popular form of investment for wealthier Basotho; as many as 48 percent of urban residents are tenants.¹¹⁹ The type of rental dwellings vary considerably, but the most common form is known as the *maline* or *malaene*. These are mostly built in the form of lines of one-roomed units with shared ablution facilities and standpipes, and with rents ranging from M20-200 (\$3-33) per month. The price depends on the state of the room, availability of electricity and other factors. Densities are very high, with (on average) more than 20 families living on one plot of 900m².¹²⁰ Many of these rental units are found in areas where there are a large number of migrant workers, students and young people. The Lesotho Housing and Land Development Corporation (LHLDC) also provides formal flats for rental. The “received law” of landlord and tenant governs rental tenure.¹²¹ There is no rent control statute in Lesotho.

¹¹⁷ Op. cit., 97.

¹¹⁸ Pointed out in an interview with Mr. Leduka.

¹¹⁹ Op. cit., 98 at 8.

¹²⁰ Ibid at 136.

¹²¹ Received law is often referred to as common law in Africa. It was literally received from colonising powers, in Lesotho from Roman-Dutch law. A receiving law enables this, in this case the General Administration Proclamation no. 2b of 1884.

2.5 Land policy

Gender policy

The Lesotho Gender Policy was adopted on March 2003. It makes some direct references to land. Policy objectives include achieving equal access to education, training and health services. Crucially, it calls for equal access to and control over resources such as land and credit. The policy advocates the allocation of land in accordance with availability, not in terms of gender.

2.6 Main institutions

The Ministry of Local Government

The Ministry of Local Government comprises a number of departments that are relevant for land management. They include: 122

- Lands, Survey and Physical Planning
- Deeds
- Rural Development
- Housing
- District Secretariat
- Chieftainship

Lands, Survey and Physical Planning Department (LSPP)

The LSPP was established in 1974. Its purposes are: preparing and issuing titles to land, maintaining records of transactions, providing cadastral surveys and mapping, undertaking physical planning and development control, and collecting land taxes.¹²³ Its functional units include the lands office, surveyor's office, physical planning, land use planning, human resource and administration and urban development services. These units are involved in a wide range of functions, including dealing with land disputes, national level planning and processing, and granting lease applications. The department has 11 decentralised offices, but final decisions are made at the head office in Maseru.

¹²² Op. cit., 97.

¹²³ Op. cit., 98.

The Deeds Office

The Deeds Registry Office registers titles to land and keeps national records in safe custody.

Rural Development Department

The rural development department handles a range of issues, including the demarcation of district boundaries for final mapping in conjunction with principal chiefs and district secretaries, awareness, and sensitisation and education of communities on various issues.

District Secretariat Offices

These are involved in local government support and coordination of service delivery at local level. These offices are where most LSPP functionaries and other staff linked to the local government ministry are located.

The chieftainship

This is an important actor in land issues. It is governed by the Chieftainship Act of 1968. This law provides for its role in land dispute resolution and succession matters. It is an elaborate structure, consisting of up to 24 principal chiefs with offices and support staff, and as many as 2,500 area chiefs and headmen countrywide.

The Maseru City Council

The MCC – the only municipal council created by the Urban Government Act of 1983 – is empowered to carry out functions of a planning authority in accordance to the Town and Country Planning Act of 1980. It consists of 18 members, 15 elected from the wards and three principal chiefs. The MCC, through the Maseru Urban Land Committee, is involved in land allocation activities. This committee deals with lease applications both for residential and commercial sites, inheritance applications and applications for subdivision and changes in land use. It is not the final allotting authority, and has to report to the LSPP for final approval. The council is

principally involved in development control, not land allocation.

The MCC was dismissed by the government in 2000 and its functions have been taken over by an administrator.

2.7 Summary

The above section has briefly traced the development of Lesotho's land laws, from the pre-colonial period until the enactment of the 1979 Land Act. Today in Lesotho there are two tenure systems: customary and leasehold. Customary tenure is governed by customary law, which is found in the Laws of Lerotholi. Under the customary tenure recognised "title" is a Form C, and the various allocation certificates that succeeded it.

Box 1.1 Historical summary of tenure types in Lesotho

Period under which the type was applicable	Character of type of tenure	Type of document of title	Type of land use	Rural/urban
From 1967	Customary/Communal	No title document	Residential and agricultural	Rural
	State owned	No title document	Official/public use	Urban
1973 - 1980	Customary	Form C	Residential	Rural
	State owned	No title document	Official/public use	Urban
1980 to date	Customary	Form C1, C2 & CC2	Residential/agricultural	Rural
	'Modern' none Customary form	Lease. The registrable right is the Form C3	Residential/agricultural	Urban
	Customary	Licence	Transitional land uses	Rural/peri-urban

Later in this report we discuss the need for coordination among the multiple institutions involved in land administration and management.

3 Housing

3.1 Relevant constitutional provisions

The Principles of State Policy in the Constitution provide that the state should fulfil a number of policy principles, "subject to the limits of the economic capacity and development of Lesotho". One principle requires the state to adopt policies that encourage its citizens to acquire property, including land, houses, tools, and equipment. Such principles, however, are not enforceable by the Constitution. As a consequence, a direct and enforceable right to housing does not exist in Lesotho.¹²⁴

The bill of rights in the Constitution provides for the "right to respect for private and family life", which provides that "every person shall be entitled to respect for his private an (sic) family life and his home" unless these conflict with the interests of "defence, public safety, public order, public morality or public health."¹²⁵ The Constitution also indirectly protects against eviction. It prohibits "arbitrary seizure of property" except when "provision is made by a law applicable to that taking of possession or acquisition for the prompt payment of full compensation". Property may only be acquired by the state in the interests of "defence, public safety, public order, public morality, public health, town and country planning or the development or utilisation of any property in such manner as to promote the public benefit."¹²⁶

Lesotho is a signatory to the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)¹²⁷ and a

¹²⁴ See also 1.2 Legal system and governance structure.

¹²⁵ S. 11.

¹²⁶ S. 17.

¹²⁷ Ratified on the December 9 1992 and August 22 1995 respectively.

state party to the African Charter on Human and People's Rights. 128 In terms of Article 11(1) of the ICESCR, state parties must recognise the right of everyone to an adequate standard of living. This includes adequate food, clothing, housing and the continuous improvement of living conditions. Further, state parties must take appropriate steps to ensure the realisation of the right, and recognise the importance of international cooperation based on free consent. To fulfil these obligations, a state must provide its citizens with judicial remedies to enforce these rights.¹²⁹

By ratifying CEDAW, Lesotho is required under article 14(2) to provide appropriate measures to eliminate discrimination against women, and to ensure the right of women to enjoy adequate living conditions.

Lesotho participated in the United Nations Conference on Human Settlements (Habitat II) in Istanbul in 1996. This reaffirmed its commitment to the full and progressive realisation of the right to adequate housing.

Theoretically, failings in a national law describing the state's duty to provide housing could be remedied by international human rights commitments. This has not, however, been the attitude of the courts. While Lesotho is a signatory to, and has ratified these treaties, the appropriate legal procedures that make these instruments part of local laws have not been carried out. On this ground, the courts have upheld customary law, which provides that a female person may not inherit intestate.¹³⁰

3.2 Relevant housing legislation

There are no housing specific laws in Lesotho.

3.3 Housing policy

Lesotho has a draft National Shelter Policy. Through it, government maps out its intended strategies in housing delivery. A previous attempt at formulating a housing policy, the draft National Housing Policy 1987-2001, failed because it did not meet with the approval of all stakeholders.

A Rapid Assessment on Housing and Urban Management preceded the current policy formulation process in 1998, and identified some key challenges:

- The need to empower people working in the informal sector to meet their shelter needs;
- Facilitating alternative delivery systems for housing; and
- Credit and the provision of an urban environment services system.

The policy outlines a number of guiding principles:

- Market-driven shelter delivery;
- Transparent, efficient and consistent delivery systems;
- Equitable access to the shelter delivery market;
- Developing an effective regulatory framework;
- Recognising, supporting and integrating all sectors of the economy, including the informal sector, into shelter delivery; and
- Localisation of housing solutions for effective outcomes.

The objectives of the draft policy are:

- To empower the informal sector;
- To strengthen the institutional capacity of community-based organisations and NGOs active in the shelter sector;

¹²⁸ Ratified on the April 9 1991.

¹²⁹ Provided by General Comment no. 3 of 1990 by the Committee on Economic, Social and Cultural Rights.

¹³⁰ Mahase v Mahase (CIV/APN/534/2002 unreported).

- To empower women in the shelter sector;
- To strengthen the institutional capacity of the financial sector;
- To make land markets transparent and efficient;
- To increase the depth of the formal shelter delivery system;
- To align shelter delivery systems alongside the decentralisation process;
- To strengthen the government's capacity to monitor and preserve urban environmental quality;
- To provide support for marginalised groups, including victims of HIV/AIDS, to access shelter and other sectors of the economy; and
- To integrate shelter programmes with the mainstream economic and fiscal programmes.

The policy is yet to be adopted and it has elicited some criticisms. These include that it fails to clearly set out the country's priorities in the housing sector, that it has no realistic objectives and that it relies too much on the market.¹³¹ Nevertheless it is an important step towards a comprehensive approach to housing in Lesotho.

There is no clear state policy on informal settlements. In practice, the government has been tolerant of informal settlements, with only occasional attempts to evict people. Where they have taken place, evictions have often occurred during implementation of government and donor-driven housing projects aimed at upgrading these same settlements. Another cause of evictions is to prevent encroachment on arable land. This was started after a government edict in 2002. The subsequent campaign was based on an LSPP strategy document titled "Proposal for a strategy to address the problem of encroachment on agricultural land by unplanned settlements." Consequently ICCs were stopped from allocating land and court-ordered demolition of illegal houses followed. A special prosecution division charged with the task of prosecuting cases was also established. The division operates from the Maseru Magistrate Court. Accused persons are prosecuted for contravening sections of the 1979

Land Act and the Building Control Act of 1995. Most of the accused are women.¹³² Between April 1 and June 1 2004, 201 cases were prosecuted in Maseru. Only two of these were completed.¹³³ In the rest of the country approximately 37 such prosecutions have been launched, but none of them have been completed.¹³⁴

A positive development touching on evictions has been the judgement of the High Court in the Loanika case.¹³⁵ In this case the court declared an eviction that failed to consult and compensate the occupiers of land was in fact illegal.

Gender policy

While the gender policy makes no direct reference to housing, it calls for equal access to resources including education, training, health services, land and credit.

3.4 Tenure types

The meaning of "informality" in Lesotho is not precise. This is because the majority of urban land for settlement is obtained by informal procedures. As many as 70-90 percent of households in Maseru have obtained land by bypassing formal land acquisition procedures.¹³⁶ Arguably then, the majority of urban settlements are informal, though they may not all fit the description of "slum" or "shack dwelling". Despite this, many of these settlements were not planned and consequently suffer from a lack of services.

In a survey of three areas of Maseru – Qualing, Lower Thamae and Motimposo – as many as 70 percent of the households had access to a communal tap. However, only 18 percent had access to electricity, only 1.3 percent access

¹³² Information obtained from a court prosecutor, Mr Lebata.

¹³³ In the first, the accused, a woman who was found guilty, and sentenced to a fine of M5000 (\$833) or a five-year prison term. It was further ordered that she must be allocated an alternative site. In the second, a man was found guilty and sentenced to a fine of M1000 (\$167), or one year in prison. The court further ordered that the structure on the site be demolished and that the accused vacate the site.

¹³⁴ Op. cit., 137.

¹³⁵ Loanika Moletsane and 42 others v Attorney General and the Minister of Local Government, (CIV/APN/163/2001 unreported) ('Loanika Case').

¹³⁶ Op. cit., 98at 33.

¹³¹ Op.cit., 98 at 91.

to waterborne sewerage and more than half had to use pit latrines. For 37 percent, access to the house was through a “track”.¹³⁷ Overall in Lesotho’s urban areas, only 2.7 percent of the residents have their refuse regularly collected. Many of the households are also very poor. This means they cannot afford services even where they are provided.

In these settlements, land is usually formerly agricultural, and subsequently allocated for residential purposes by a chief’s allocation and a Form C certificate. This is not always legal.¹³⁸

Tenancy agreements are usually concluded orally between the holder of the certificate and tenants. Sometimes, written sublease agreements are used in tenancies, but this is generally only for business uses. Backyard shacks are also common.

3.5 Main institutions

Department of Housing

The Department of Housing is tasked with the formulation and implementation of a housing policy, currently in draft form.

The Lesotho Housing and Land Development Corporation (LHLDC)

The LHLDC is a parastatal formed under the Ministry of Local Government in 1988. It is tasked with the acquisition and development of land for housing. Though its mandate is quite broad, it has mainly been involved with the provision of serviced plots and rental units. Apart from the LSPP, which sometimes does this, it is the only current provider of land and housing. Its projects are based in a number of urban areas but mainly in Maseru. The LHLDC provides a mix of serviced sites, fully constructed houses and flats for rental.

4 Inheritance and Marital Property Rights

4.1 Relevant constitutional provisions

Section 18 of the Constitution protects citizens generally against discrimination on the basis of “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”. However, it derogates from this general right by providing that it will not apply to any law of persons. This includes issues of adoption, marriage, divorce, burial and devolution of property on death. Customary law is also accorded special mention. Any discrimination arising from customary law practices will not be held to be contrary to the section.¹³⁹ No clause of the constitution may be amended without the approval of a national referendum; it is thus very difficult to implement constitutional change in Lesotho. A bill is currently being drafted with the intention of reducing the discrimination against women in Lesotho, but it is at an early stage of preparation.

The duality of marriages in Lesotho

The Administration of Estates Proclamation of 1935 distinguishes between three types of estates:

- Those of non-Basotho people;
- Basotho who have shown that they have abandoned the customary way of life, and if married, have solemnised their marriage under received law; and
- Basotho governed by customary law.

This last category is expressly excluded from the application of the provisions of the Administration of Estates Proclamation.¹⁴⁰

¹³⁷ Op. cit., 98at 125.

¹³⁸ Op. cit., 104.

¹³⁹ S. 4 (b & c).

¹⁴⁰ S. 3(b).

In reality, the distinction between the last two categories is difficult to make. This is because the line of demarcation between people who live a customary way of life and those who have abandoned it is inevitably blurred, especially in the case of formally educated people in urban areas. Their traditional customs remain part of their culture regardless of their level of education and “Western” lifestyle. Also, it is very rare that a marriage in Lesotho will be concluded without an element of custom. This attachment to custom, while at the same time following “Western” ways of concluding marriages, has led to the notion of dual marriages.

It is uncertain whether customary law or statutory law should prevail in such cases. One view argues that where parties to a customary law marriage conclude a subsequent marriage under civil law, the couple voluntarily subject themselves to the rules of civil marriage.¹⁴¹ Others emphasise the personal intention of the individual and do not discount the possibility that a person might wish to revert to customary law once they have concluded a civil marriage, especially should a man subsequently enter into a polygamous marriage.¹⁴² The courts have tended to side with customary law,¹⁴³ even where the parties are married using civil law.¹⁴⁴ This undermines the freedom of individuals to explicitly opt out of customary law.

4.2 Legislation related to marital property rights

Whether marital property issues are governed by statute or customary law, they generally discriminate against women. In practice, women's autonomy and their powers to contract are severely restricted.

In terms of the Administration of Estates Proclamation, women who by their own choice are governed by the received law attain the age of majority at 21 years, provided that they

¹⁴¹ Zola v Zola (1971-73 LLR 286).

¹⁴² Maqutu W. C. (1992). Contemporary Family Law in Lesotho, Morija, Lesotho, (“Maqutu on family law”).

¹⁴³ Khatala v Khatala (1963-66 High Commissioner's Territorial Law Reports 97).

¹⁴⁴ Tsosane v Tsosane (1971-73 Lesotho Law Reports 1).

are not married. If married, they retain their majority status only if the husband's marital power was specifically excluded under a prenuptial contract before marriage. If not, they are subjected to the husband's marital power upon marriage. This means that women married in community of property, i.e. without a prenuptial contract, may only enter into contracts with the permission of their husbands.

Under the Deeds Registry Act, a statement giving particulars of marital status should accompany any deed to be registered in favour of a woman. Women married out of community of property need to be “assisted” by their husbands to register their property, unless the husband's marital power is specifically excluded in the prenuptial contract. Further, unless the property or rights are by law or other means excluded from the community of property, such property shall not be registered in the name of a woman married in community of property.¹⁴⁵ Effectively, this exempts the property of a deceased husband from being inherited as joint property of the surviving spouse, as would ordinarily happen in a marriage in community of property. This position has been repeated in the Companies Act of 1967, which prevents a woman married in community of property from holding the position of a company director without the written consent of her husband.¹⁴⁶ Companies and corporations will also rescind contracts entered into by women when the husband refuses consent.¹⁴⁷

Lawyers differ in the way they deal with the registration of property in the names of women married in community of property. Some practitioners have succeeded in effecting such registration, while others refuse to effect registration in the names of the women.¹⁴⁸ Led by organisations like

¹⁴⁵ S. 14 (3).

¹⁴⁶ S. 144.

¹⁴⁷ In an incident related by the MD of the LHLDC, a married woman obtained a site through the corporation, got it registered and started making payments in the absence of her husband, to whom she was married in community of property. Upon discovery of the agreement by the husband, he insisted that the agreement be cancelled because he had not consented and threatened to sue. The management of the corporation cancelled the agreement and repossessed the site for resale.

¹⁴⁸ This was obtained from interviews with Adv. Hlaoli, a long-standing legal practitioner in Lesotho, and women employed by the University of Lesotho. The latter have had leases of property acquired through loan agreements with their employer in the names of the husbands, although the employee and beneficiary of the loan is the wife.

FIDA, this aspect of the Deeds Registry Act has increasingly become the target of legal challenge.

This status of women under statutory law means that they cannot be allocated land. Consequently, joint registration of property during the marriage is rare. The inability of women to register land in their own names has led to various ways of circumventing the law, for instance registering property in sons' names.

A number of more recent statutes have tended towards non-discrimination. The 1979 Land Act for example provides for the allocation of land in a gender-neutral language. 149 Amendments providing that rural land may pass to the widow upon a husband's death call into question the validity of provisions in both the Deeds Registry Act and the Administration of Estates Proclamation.¹⁵⁰ While legal interpretation holds that the 1979 Land Act should apply, this does not happen in practice. Instead, customary law is used as an escape route, given the duality of many marriages.

Judicial precedent

In practice, courts have not ruled in favour of women. In one case, the wife sought an order to divide joint property during the subsistence of the marriage. This was to protect her share from the husband's gambling habit. The court ruled in favour of the husband. 151 In another case, the wife was denied a similar order to prevent the husband from wasting the parties' matrimonial property, pending divorce. The court stated the marital power of the husband was absolute, that it applied to the whole matrimonial property, extending even to the person of the wife. 152

4.3 Legislation related to inheritance rights

Inheritance law is governed by, among others: the Wills (Execution) Ordinance of 1845; Attesting Witnesses Act of

1876; the Inheritance Act of 1873; the Administration of Estates Proclamation of 1935; and the Intestate Succession Proclamation of 1953. 153

Issues of inheritance often hinge on the question of whether statutory or customary law should apply. The Administration of Estates Proclamation provides that African law and custom must apply, except in instances of Africans who have abandoned tribal custom. 154 This is often expressed in the form of a clause in the will. Opposing this view is one emphasising instead the right to complete freedom of testation.¹⁵⁵ This view is also supported by law.¹⁵⁶ Courts often side with customary law in such matters, with the result that freedom of testation is inevitably compromised.¹⁵⁷

Under the Administration of Estates Proclamation, women married in community of property, or out of community without the exclusion of the husband's marital power, are made executors of the estate only if consent is given by the woman's husband prior to his death. There is, however, a discretionary procedure. It allows for the property of the deceased person to be transferred to the surviving spouse, on condition that this "will not result in prejudice to any interested person", a category which obviously could include male relatives. 158

4.4 Customary law

Marital property

The Marriage Act of 1974 exempts the estates of people governed by customary law from its application. 159 The Deeds Registry Act also provides that the registrar of deeds can refuse to register property in favour of married women

153 The first three are Statutes of the Cape of Good Hope. They were made laws applicable to Lesotho through the General Administration Proclamation of 1884.

154 This position is also supported by S. 3 of the Intestate Succession Proclamation of 1953.

155 Poulter, S. M (1981), *Legal dualism In Lesotho*, Morija Publishers Lesotho.

156 The Law of Inheritance Act 26 of 1873.

157 See *Khatala v Khatala*, Op. cit., 148. *Tsosane v Tsosane* op. cit., 149; *Mahase v Mahase* op. cit., 135.

158 S. 51.

159 S. 24.

149 S. 6.

150 Amendments to the 1979 Land Act in 1992.

151 *Kurubally v Kurubally* (1982- 84 Lesotho Law Report 377).

152 *Matjeloane v Matjeloane* (1977 Lesotho Law Reports 4).

whose rights are governed by customary law – if the registration would conflict with the customary law – unless compelled to do so by court order. 160 Circumstances under which the registration of immovable property would be in conflict with customary law are not specified by the Act and so left to the discretion of the registrar of deeds.

Most marriages in Lesotho are conducted under customary law, under which women are effectively perpetual minors, subject to the guardianship of male relatives from birth to death. While a woman is unmarried or divorced her father is her guardian. The guardianship is transferred to her brothers or paternal uncles when the father dies. Upon marriage, guardianship over the woman passes to her husband and his male relatives. The status of women as minors means that they have no say over marital property under customary law.

Inheritance

The Laws of Lerotholi provide that no widow shall be deprived of her land except in exceptional cases.¹⁶¹ Further, no person shall be deprived of “his hut or huts” except under the authority of an order of a competent court.”¹⁶² However, several provisions under the same laws take away from these general rights:

- The heir is the first-born male of the first married wife, or the next male in line of the deceased’s wives, in a polygamous marriage;¹⁶³
- Where there is no male son, the widow (or senior widow in the case of polygamy), shall be the heir. She is however expected to consult with relatives of her deceased husband;¹⁶⁴
- Disputes among the deceased’s family members over property rights are referred to the brothers of the de-

ceased, and other persons whose rights under customary law need to be consulted, for arbitration;¹⁶⁵ and

- If the widow was living separately from her husband at the time of his death, a family council must first declare her the lawful widow and successor of her husband, before she is entitled to inherit.

Widows and girl children are therefore highly vulnerable to disinheritance under customary law in Lesotho.

4.5 Recent developments in gender issues

Gender policy

The Gender Policy of 2003 aims to redress the various aspects of discrimination against women. Some aspects of the policy deal specifically with inheritance and marital property rights. The Deeds Registry Act is condemned both as a barrier to poverty alleviation and as an impediment to the implementation of progressive aspects of the 1979 Land Act, and its repeal is recommended. Customary attitudes and practices are identified as discriminatory to married women, especially in the area of land allocation. The husband’s marital power and impediments to daughters inheriting intestate from their parents are singled out as areas requiring reform. The policy also calls for the alignment of Lesotho’s laws in terms of its international law commitments.

- It proposes a number of structures and interventions, from policy planning and implementation at the ministerial level to a support group that would sensitise traditional leaders to gender issues.

The 1979 Land Act

The 1979 Land Act confirmed common practices of inheriting land. It provided for the first-born male of a deceased to inherit. Previously, it was required that the land revert to the chief for reallocation. In practice, the eldest son of the house was always the beneficiary.¹⁶⁶ However, the Act was amended in 1992 to recognise the inheritance rights of women governed by customary law. It provides that where a

¹⁶⁰ S. 14 (6).

¹⁶¹ Article 8 Laws of Lerotholi. These exceptions are: taking away of land from people who “have more land than is necessary for their needs” and when the chief exercises his discretion to take away land from any subject who fails to cultivate it for two successive years. These exceptions are rarely used however.

¹⁶² Article 8 Laws of Lerotholi.

¹⁶³ Article 11(1).

¹⁶⁴ Article 11(2).

¹⁶⁵ Article 14(4). See also *Ramatekoa v Ramatekoa* (1978 LLR 384).

¹⁶⁶ *Op. cit.*, 114.

male allottee of land dies, the widow is given the same rights in relation to the land as her deceased husband. In cases of remarriage an exception is made: the land will not form part of any community of property and upon the widow's death, title will pass to a person nominated by the surviving members of the deceased person's family.¹⁶⁷ This provision is theoretically applicable to land in rural areas only.

The Married Person Equality Bill

The Married Person Equality Bill of 2000 does away with the marital power of the husband. It provides for equality between spouses in decision-making regarding matrimonial property, guardianship of children, as well as contractual capacity. The Bill has experienced delays in enactment. This is because it is not a popular law, and the small number of women in parliament has hampered its progress.

The Draft White Paper on National Land Policy and Draft Land Bill

The Draft White Paper on National Land Policy of 2001 recommends abolishing all laws that allow for discrimination based on gender. The Draft Land Bill follows up by outlawing discriminatory practices against women. The Bill provides that women may apply for a primary or demarcated lease without the need for consent.¹⁶⁸

4.6 Administration of estates

For purposes of administering estates held under received law, the office of the Master of the High Court is established. This is an office within the Ministry of Law and Constitutional Affairs in Maseru. It is assisted in the administration of estates by the District Administrative offices in the other nine districts. The Office of the Master of the High Court is not well known, particularly at village level.

When dealing with estates governed by received law, the procedure under the Master involves:¹⁶⁹

- The nearest relative of the deceased, or any person near the deceased at the time of death, reports the death to the Master within 14 days of its occurrence;¹⁷⁰
- The surviving spouse takes an inventory within six weeks after the death, in the presence of all interested parties.¹⁷¹ This inventory is forwarded to the office of the Master or to the appropriate District Administrator;¹⁷²
- The office of the Master furnishes the Deeds Registry with a return with the name of the deceased and his interests in land;¹⁷³
- The office of the Master may then grant letters of administration to any person authorised by the deceased to administer the estate before his death. Where no such authorisation was granted by the deceased, the Master may appoint one;¹⁷⁴
- Women married in community of property, or out of community without the exclusion of the husband's marital power, are made executors of the estate only if prior consent is obtained from the woman's husband; and
- Upon the receipt of the letter of administration, the executor must draw up an inventory; call upon all creditors of the estate to lodge and prove their claims; and pay these claims subject to the estate's solvency.¹⁷⁵

There is a discretionary procedure that allows for the property of the deceased person to be transferred to the surviving spouse. This is on condition that the Master is satisfied that this "will not result in prejudice to any interested person".¹⁷⁶ Further, should the surviving spouse remarry, and there is still a minor child from the first marriage entitled to claim from the estate, the parent must pay the inheritance to the child or have it certified by the Master as a nominal amount.¹⁷⁷ A surviving spouse in whose name the joint estate has been

¹⁶⁷ S. (8)(2).

¹⁶⁸ Clause 34.

¹⁶⁹ Administration of Estates Proclamation.

¹⁷⁰ S. 13.

¹⁷¹ S. 20.

¹⁷² S. 22.

¹⁷³ S. 25.

¹⁷⁴ S. 31.

¹⁷⁵ S.44, 46 and 48

¹⁷⁶ S. 51.

¹⁷⁷ R200.00 (US\$ 33.3). S. 56 (1) & (2).

transferred can only lawfully transfer property with authorisation by the Master.¹⁷⁸

The Master does not have jurisdiction over estates that are not reported to his or her office. Thus it will depend on family's choice of law. Additionally, it has to be proved to the satisfaction of the Master that the deceased person had indeed abandoned the customary way of life if the family wish the received law to apply to the estate.

This process can be characterised as long, centralised and costly. It is also disadvantageous to women. The handicapped position of women during the marriage in terms of marital property continues when the spouse dies. Whether married in community of property or whether the property is part a joint estate, with rare exceptions women have no rights as executors of the deceased's estate.

Customary law

Procedures for estates that are governed by customary law involve the following:

- The heir to the estate is nominated by the family council. This is made up of members of the deceased family, mostly men;
- The family council issues a nomination letter naming the heir, addressed to the local headman;
- The village headman endorses the letter. He forwards it to the chief next above him in hierarchy, seeking further endorsement for his approval;
- The principal chief writes another letter addressed to the District administration authorities approving the nomination of the heir; and
- The District Administrator confirms the nominee in writing.

Customary law procedures, while procedurally simpler, present similar hurdles to a surviving female spouse. The system is dominated by men and fairly expensive due to the need to consult multiple authorities. More importantly, the

procedure rarely leads to a widow inheriting, as the first-born male son is inevitably the heir.

5 Interim Poverty Reduction Strategy Paper

Though it was finalised in December 2000, the Interim Poverty Reduction Strategy Paper reads like a work in progress. It lacks detail in terms of sectoral objectives, goals and strategies towards poverty alleviation, and its generalised pronouncements affect its coverage on poverty reduction strategies based on land and gender.

5.1 Rural and urban land

There is only a passing reference to "land reform and natural resource management" under the agriculture sector.

5.2 Gender

A section deals specifically with "gender and poverty". It states that a lack of access to credit for wives of immigrant workers is a cause of poverty. It also makes reference to policy reforms to incorporate more women's participation, for example, in the roads sector. There is a recognition of a lack of information on gender-based distribution of poverty, with a call for further research. Apart from these few references, there is very little else to glean from the document on gender issues, particularly relating to land.

5.3 Summary

It would be premature to come to any conclusions on Lesotho's poverty reduction strategies, which are yet to be concluded.

¹⁷⁸ S. 57.

6 Land Management Systems

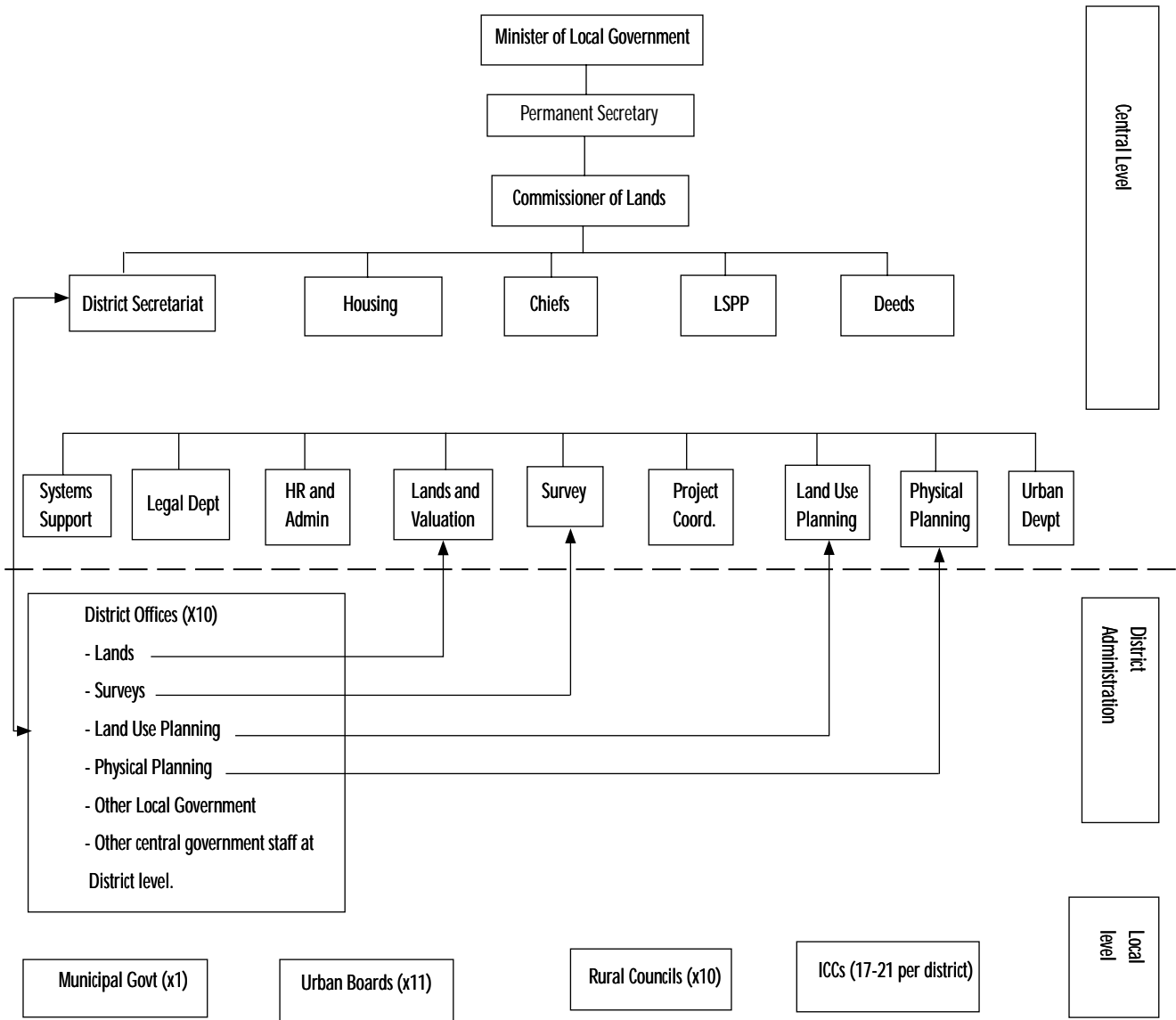
6.1 Main institutions involved

The management of land in Lesotho is characterised by multiple agencies, unclear reporting procedures and overlapping authorities. The organogram on page 72 illustrates the range of institutions involved in land management. Creating a clear institutional picture is thus difficult. This is despite efforts in 2001 to strengthen and coordinate land administration. The Deeds Registry was removed from the Ministry of Justice and Human Rights, and the Land Use Planning division from the Ministry of Agriculture. Both were then placed under the LSPP.

It is clear that the onus rests with the Ministry of Local Government, particularly the LSPP. Land management, including aspects of land use planning and development control are functions of central government, with little role for any

local government structures. Provision of land for housing development is still exercised by several departments through largely uncoordinated efforts. Currently, there is uncertainty on land allocation roles, with duplication between the roles of a number of institutions like the LSPP and MCC. The LSPP is currently understaffed by as much as 42 percent. It also suffers high staff turnover. This has hindered its proper functioning. Lines of reporting within the ministry are generally fragmented, particularly when district level institutions are factored in.

Figure 6.1 Organogram of the main institutions involved in land management (Steyn and Aliber 2003)



6.2 Informal settlements and the formal system

This section examines the manner in which informal settlement in Lesotho relates to the formal system of land management. These relationships are discussed under four broad headings: land use planning, land allocation, registration of land rights and resettlement.

Land use planning

The powers exercised under land use planning ultimately rest with the LSPP.

A Land Use Planning Division was created in 1981, supported by the Swedish International Development Cooperation Agency, and was meant to do national level planning, but this never occurred.¹⁷⁹

Town and Country Planning Act of 1980

Land use is governed principally by this Act. It provides for the creation of structure plans for all urban areas under the Act. It also requires permissions for any development of land within any designated areas and provides for the enforcement of planning control. Functions under the Act are carried out by the Physical Planning Division located within the LSPP. There is a Town and Country Planning Board that hears objections to decisions.

Building Control Act of 1995

This Act aims to “to provide for the promotion of uniformity in the law relating to the erection of buildings in Lesotho and for the prescribing of building standards.”¹⁸⁰

It provides the power of the minister to appoint a building authority, which can be a local authority or a government department.¹⁸¹ Among the powers of the local authority so appointed are those of making building bylaws. The minister’s powers under the Act are sweeping. They include

demanding a report from the authority regarding the adequacy of certain measures and building projects.¹⁸² If the authority fails to perform its function, the minister may strip it of its powers and duties.¹⁸³

The Development Control Code of 1989

This code supplements the Building Control Act of 1995 with building design requirements.

The 1979 Land Act

The Act creates a number of local governance structures, which are also involved in some planning functions. The 12 ULCs (including Maseru) created under the Act include among their functions land allocation, land-related dispute resolution and control of illegal settlements.

Since 2002, the power of ULCs to allocate land has been suspended. This is due to the perceived encroachment of urban development onto agricultural land. Instead, they have been increasingly involved in inspections and issuing warnings to potential infringers. This makes them mainly enforcers of laws. A number of prosecutions have been instituted at their behest. These cite infringement of provisions of the 1979 Land Act and the Building Control Act.

Land allocation

Land allocation powers and duties changed considerably during and after the colonial period. This has been one of the most important drivers of land reform in the country. Debate has often revolved around who has the powers to allocate, pitting the chiefs’ traditional authority against “new” government authorities.

Brief history

Historically, land allocation was done by chiefs, based on customary law. During colonialism, this power came under increasing challenge from the state. After independence in 1966 a series of laws were passed that effectively eroded the chiefs’ powers over land allocation, and increasingly subject-

¹⁷⁹ Op. cit., 97.

¹⁸⁰ Preamble.

¹⁸¹ S.11.

¹⁸² S.14.

¹⁸³ S. 17.

ed them to outside authority and influence. The 1974 Land Regulations, for instance, established advisory development committees. These were intended to introduce transparency in the land allocation process. These committees were widely – and successfully – resisted by the chiefs.

Current situation

The 1979 Land Act provides that the power of allocating and revoking land rights is delegated to the minister responsible for administration of the Act. In rural areas these powers are in turn delegated to the Land Committees, and in urban areas to ULCs.

Rural areas

As delegated allocating authorities, Land Committees had chiefs merely serving as *ex officio* members. Decisions were made on a majority vote with chiefs voting only in stalemates. However, chiefs often simply ignored these bodies.¹⁸⁴ Land Committees were replaced by Village Development Committees (VDCs).¹⁸⁵ They had seven elected members and the chief as an *ex officio* member and chairperson. The power thus swung back in the chiefs' favour. VDCs, together with the chieftaincy, governed land allocations until 1993, when the composition of these institutions was changed. It was then required that the chairperson must be elected and thus not automatically be the chief.¹⁸⁶ This move saw a reduction in the powers of the chiefs and was resisted. Finally, 210 Interim Community Councils (ICCs) replaced the roughly 1,600 VDCs countrywide. One of their functions is land allocation. Although each ICC has two elected chiefs on the committee, there are far fewer ICCs than there were VDCs. On average an ICC covers land under the control of up to eight chiefs, which effectively dilutes the chiefs' representation. ICCs unsurprisingly have also encountered resistance from the chiefs.¹⁸⁷

Urban areas

The 1979 Land Act demarcated urban areas in its second schedule. The body responsible for land allocation for these areas is the ULC. Members of a ULC in Maseru are typically chiefs, the town clerk, and representatives of the Commissioner of Lands, MCC and LSPP. The town clerks provide administrative support to these committees, and are employed by the Ministry of Local Government's District Offices. They report to the head of this office, the District Secretary, and are therefore ultimately answerable to the ministry. In 2001, further changes introduced the Urban Boards.¹⁸⁸ ULCs are principally involved in the initial stages of processing lease applications as well as land allocation.¹⁸⁹

ULCs have encountered practical problems. Principal chiefs often do not attend committee meetings. The ULCs also do not involve the local chiefs (headmen), who are the people whom residents approach for land allocation certificates.

ULC and ICC land allocations can be registered, and a lease obtained. The ultimate authority granting leases is the LSPP. It has decentralised district offices, although the final decisions are made in Maseru.¹⁹⁰

Registration

It is possible to register a number of rights to land when converting them into leases. This can be by way of:

- Conversion of a pre-1979 Land Act Form C certificate;
- Conversion of post-1979 Land Act allocation certificates; or
- Registration of title deeds obtained before the 1979 Land Act came into force.

¹⁸⁴ *Op. cit.*, 116.

¹⁸⁵ Development Committee Order No. 9 of 1986.

¹⁸⁶ Through the Development Councils (Amendment) Act of 1994

¹⁸⁷ *Op. cit.*, 97.

¹⁸⁸ *Ibid.*

¹⁸⁹ *Ibid.*

¹⁹⁰ *Op. cit.*, 116.

There is an elaborate procedure to register any of these interests in land. The following procedural mapping reflects this process.¹⁹¹

Procedure to obtain registered lease based on Form C certificate

Automatically, by operation of law, Form Cs are deemed converted into registrable leases.¹⁹² This is provided that the Form C is valid and was issued before the cut-off date of June 16 1980. Most people who opt to register their Form C rights intend to enter commercial transactions with the land such as applying for a mortgage, selling or subdividing the land.¹⁹³ In such cases a holder of a Form C would go through the following registration procedures:

1. The applicant makes an application to the LSPP for the conversion of the Form C to a lease. The application is allocated a lease number. LSPP officials are involved in lease applications for all rural land lease applications. Urban applications are handled by the ULC if the allocation upon which the lease is derived from was done by the ULC.¹⁹⁴
2. Site visits and verification of the authenticity of the Form C.
3. The applicant makes a declaration of all the land he/she owns in urban and rural areas.
4. If the process was being handled by a ULC, it writes a report approving or rejecting the application. An appeal goes to the Land Disputes Tribunal.
5. The application ends up with the LSPP and the Chief Surveyor. The latter issues instructions to private surveyors.
6. The survey is sent to the LSPP's land survey division for examination and approval.
7. The 1979 Land Act requires that applications must be advertised in a newspaper. This allows for objections to the conversion to leasehold.
8. If there is no adverse claim, the lease is drafted. This involves among other things calculation of the ground

rent and stamp duties, and completion of data records.

9. A draft lease is sent to the applicant along with the payment.
10. The lease, in triplicate, is sent to the Commissioner of Lands in Maseru for signature.
11. The lease is sent to the registrar of deeds for registration.

This process takes between one and four years to complete.¹⁹⁵

Selected Development Area

In addition to this voluntary scheme of conversion, the 1979 Land Act provides for the Selected Development Area (SDA) process. Once an SDA is granted, all titles within a given area are converted into leasehold plots. The intention of the SDA is to supply land for housing and urban development. It is envisaged that by turning land in peri-urban areas into well-planned settlements, uncontrolled development and excessive land speculation can be prevented. Upon the declaration of an SDA, plot holders with titles to residential or commercial land in the area are entitled to compensation. Those holding fields or arable land are not compensated. Instead, they are provided alternative land outside the SDA wherever possible. This has not always necessarily happened.¹⁹⁶

Problems with the current registration system

A number of concerns have been raised about the current system:

- Long application procedures, caused by multiple internal steps in the decision-making process. Many decisions have to be referred from the district offices to Maseru, where the commissioner or minister's approval can be obtained. There are too few staff allotted to deal with the processing of land applications and dispute resolution in the court system is drawn out;
- High costs. Form Cs are converted to formal leasehold titles, provided that the applicant meets the costs of surveying and preparing the lease deed. This costs the

¹⁹¹ Ibid.

¹⁹² S. 28(3) of the 1979 Land Act.

¹⁹³ This was pointed out by Mr. Makhele of the LSPP.

¹⁹⁴ This is because the area may not have been under a ULC during the allocation.

¹⁹⁵ Op. cit.,97.

¹⁹⁶ Op. cit.,116.

equivalent of about \$80. Lesotho's minimum wage is equivalent to about \$91 per month;

- Processing backlogs. There is a big gap between the ability of the authorities to process leasehold applications and the demand for leases. The LSPP processes only 50 percent of the applications it receives annually, and the backlog is growing. This has led to people opting out of the formal system;
- High unmet demand in urban land for housing. Less than 10 percent of demand is met by the formal market. Further, institutions like the LHLDC provide serviced plots for housing that are priced out of reach of the poor – a result of a lack of affordable housing finance. The shortage at the higher end of the market has resulted in down-raiding;
- Planning and building standards within the formal land system are stringent;
- The constricted urban land market has led to encroachment upon agricultural land through informal allocation. This creates uncertainty as to whether residents still fall under the authority of the traditional leaders or the MCC. The issue was serious enough to cause a government edict in 2002 restricting settlement on arable land, and suspending the work of ICCs and ULCs in land allocation;
- Constricted land supply pushes up urban land prices;
- Growth in urban settlements has been sprawling, with very little densification and lack of service provision. The urban boundary has lost meaning because of rapid urban sprawl due to backdated Form Cs;
- A lack of human resource capacity has stifled proper operation of the modern system;
- Land administration is a very small percentage of the government's recurrent budget. Basic necessities like vehicles and computers are in short supply in the LSPP;
- Lack of cooperation from the chiefs. Chiefs have largely been uncooperative and hostile towards the formal land allocation committees, such as the ICCs and ULCs. They have consequently retained their traditional powers of land allocation in practice, bypassing formal institutions;

- Enforcement of the legislation is generally regarded as poor, especially with regard to control over illegal land allocations in urban areas; and
- Uncertainty about the law. The law has been fragmented, implementation has been slow, and common "illegal" practices have often gained de facto legal legitimacy through the conduct of the authorities. Formal institutions have, to lesser or greater degrees, turned a blind eye and even in some instances worked with these practices. Aptly, the system is described as lacking "any order" with "no clear customs, laws or guidelines".¹⁹⁷

These numerous problems have meant that typically, formal procedures both for allocation and registration of land have been bypassed. Instead, mixtures of customary, informal and illegal systems of land acquisition proliferate. In Maseru, these mixed practices are particularly obvious. Many people do not bother to apply for leases, and 70-90 percent of the city's residents are estimated to receive their land allocations through the informal or illegal systems. This leads to the blurring of "urban" and "rural", and between what constitutes "formal" or "informal" settlements.

This occurs in a number of ways. One example is informal transactions between buyer and seller, in which chiefs play a central role in legitimating (for a fee) transactions. This is quick, with people acquiring a site and a letter or form from the local chief within a month. Form C certificates are fraudulently backdated and issued by chiefs. These are easily converted into registered leases. Administrators accept these unlawfully issued documents with little query. According to one government official

¹⁹⁷ Comments of the judge in the Loanika Case op.cit., 140.

“the legality of the Form C documents is not ordinarily challenged by the LSPP except where there could be some kind of dispute and one party happens to know that the other party is applying for a lease.”¹⁹⁸

The courts, however, have not shared the same attitude, and have ruled against the validity of Form Cs fraudulently issued by chiefs when these cases have come before them.¹⁹⁹

Often when SDAs are declared, fraudulent Form Cs are issued immediately.

These trends in acquiring land have had a number of consequences. On a positive note, they have helped people living in urban areas access land for housing. The informal system bypasses formal registration processes that are convoluted, bureaucratic, inflexible and expensive. Instead, they provide quick access to relatively secure tenure, which is sufficiently secure to encourage investment in housing. However, such settlements are generally on urban peripheries and the dwindling supply of land ensures that they move further and further away from the centres. These settlements do not offer basic services to residents. They are also leading cause of urban sprawl and encroachment on scarce arable land.

Reform proposals

The Draft White Paper on National Land Policy proposes a number of reforms to address the numerous problems identified. They include:

- Decentralisation of dispute resolution;
- Training of personnel;
- Establishing a dedicated Ministry of Lands, replacing the current setup, in which land matters fall under the Ministry of Local Government;
- Establishing a land information system;
- Institutional reforms, including rationalising fragmented institutional structures;
- Compensation for land acquired for public purposes;

- Abolishing all laws that allow for discrimination based on gender;
- Defining an urban boundary beyond which further expansion of settlements will not be tolerated; and
- Making available the necessary funds and resources for land acquisition and for development of low-income housing.

The Draft White Paper also recommends that tenure arrangements be reviewed with a view to granting certificates of right to long-term urban dwellers. These may be transferred or inherited with the permission of the allocating authority.

The Draft Land Bill incorporates these reform proposals. It proposes several main forms of tenure:

- A “registrable” lease as currently found in the 1979 Land Act;
- A “demarcated lease”, which is a way of formalising tenure in informal settlements. This is intended to be an upgradeable form of tenure. This lease can be formalised and then registered. It is inheritable and transferable at will;
- A “primary lease”, which is similar to the traditional form of landholding under customary law. Land obtained through previous allocations, whether legal or not, can be recognised as legitimate primary leases. This is necessary given that the majority of land is held through informal or “illegal” allocation; and
- A “qualified lease” granted in a case where it is not possible to undertake or complete a full and final survey of the land. It is strictly speaking not a different type of lease, but a registrable lease that has not gone through the full rigours of surveying and demarcation.

Under these categories the Draft Land Bill attempts to cover all types of land rights in Lesotho. The procedures for applying for primary and demarcated leases are greatly simplified, acknowledging that persons applying for this type of lease are likely to be poor.²⁰⁰ The Bill recognises the rights of people who acquired rights to land through unauthorised processes, especially in urban and peri-urban areas. Accordingly, these

¹⁹⁸ Op. cit., 104.

¹⁹⁹ See for instance *Selloane Putsoane v Motlatsi Lekatsu* (1993-1994 Lesotho Law Reports & Legal Bulletin 282).

²⁰⁰ Clause 36.

unauthorised occupiers are deemed to occupy the land under a short lease of five years. They may then upgrade their rights to primary or other leases.²⁰¹ Further, the Bill provides for schemes of regularisation in urban and peri-urban areas.²⁰² The aim of these schemes is to determine the tenure rights of occupiers of informal settlements, and formally recognise them.

The Bill also curtails the powers of chiefs considerably. Allocation of land has been decentralised to local government. Rural and urban and municipal councils receive and determine applications for all the lease types.²⁰³ These local authorities also have the powers of land adjudication, subject in certain circumstances to intervention from the Commissioner of Lands.²⁰⁴ The Bill provides for a Standing Committee on Land Affairs (SLAC) consisting of five councillors, with the power to take decisions on matters such as the allocation of land and the grant of leases in land.²⁰⁵ Other clauses that point to the containment of chiefly authority include those forbidding the need for a landholder to give produce from his or her land to any traditional authority.²⁰⁶

Discriminatory practices against women in the current law are eliminated. The Bill recognises “the rights of adult women to acquire, hold, use, deal with and transmit by or obtain through the operation of a will, land”.²⁰⁷

It also addresses the problems with the present system of requiring government consent to changes in leases, such as transfer, sale or subdivision. It provides for most dispositions without government consent, and provides general consents in advance.²⁰⁸

201 Clause 93.

202 Clauses 109-113.

203 Clauses 14 and 15.

204 Clause 103.

205 Clause 16.

206 Cause 24(9).

207 Clause 3(2).

208 Clause 80.

A Land Markets Board is introduced to regulate land markets. It provides for codes of conduct for practitioners and sets up a system for the public to formally submit complaints; advises the minister on various questions like consents to dispositions and permits to exceed land ceilings; and provides information on the market.²⁰⁹ The bill also provides that consents requiring government approval are deemed to have been granted if they are not attended to within a specific time period.²¹⁰

Claims for a prior right to land can now be lodged to a local authority or court. This acknowledges that courts are often inaccessible in practice.²¹¹ A system of decentralised dispute resolution is created, with a National Land Court established as a division of the High Court, District Land Courts and Local Land Courts.²¹² There is a legal recognition of alternative dispute resolution mechanisms, including traditional systems.²¹³

The Bill has continued with the trend of decentralisation, in this case to local authorities. According to the Local Government Act of 1997, which the Bill builds on, municipal, urban and rural councils will have elected chiefs as members. This means that the chiefs' role is still recognised, albeit within a democratic framework.

There are attempts at enabling the efficient functioning of a land market. Measures like decentralising allocation; reducing the number of transactions requiring consents; establishing a market regulator; decentralising dispute resolution; and providing for time limits for decision-making by authorities are provided. These are geared towards resolving the problems that have led to widespread illegal land allocations by

209 Clause 68.

210 For instance under Clause 36(3).

211 Clause 48.

212 Clause 121.

213 Clauses 129-135.

chiefs. It will now make economic sense to apply through the formal system.

The Bill provides for more flexible and practical tenure systems. This means that tenure security is provided for interests in land that fall short of stringent formal definitions. Further, these interests can be recognised through simple and cheap processes. They can subsequently be upgraded to more comprehensive forms when deemed necessary by the holder. Occupiers of land obtained through unauthorised systems can also progressively upgrade their tenure systems. This is important because it greatly simplifies the processes and costs of acquiring interests in land, and provides a viable alternative to the illegal system. It is trying to integrate into the formal system the qualities that make the alternative system so attractive.

Resettlement

Evictions have not been common in urban Lesotho and the need for large-scale resettlement has not arisen. The recent evictions have not been accompanied by any compensation or resettlement on alternative sites. This has been criticised by the courts in a number of cases.

6.3 Dispute settlement mechanisms

*The courts system*²¹⁴

Jurisdiction, the monetary value and progression through the hierarchy usually decide the choice of court. However, other matters often play a role in this regard. A person whose case arises in rural area is more likely to take up the matter with the Local Court rather than Magistrates Court in circumstances where either is applicable because the subject of litigation may concern customary law.

The Magistrates Court is the court of first instance on matters of received law. The court is also vested with the powers to review decisions of the Local and Central Courts, but it may not do the same in cases decided by the Judicial

Commissioner's Court. In particular, the Magistrates Court decides cases involving ejection from land.

The Land Tribunal

The Land Tribunal was established through the 1979 Land Act.²¹⁵ It is made up of three officers: a chairperson with the rank of a judge of the High Court or a resident magistrate; and two assessors, one of whom is a principal chief and the other either a practicing lawyer or a land economist. The operations of the Land Tribunal are overseen by the Chief Justice. Appeals from the decision of the tribunal lie with the High Court and then with the Court of Appeal.

The tribunal is intended to speedily address land disputes by removing such disputes from the normal court system. The tribunal has not lived up to expectations and a number of problems have been cited:²¹⁶

- Length of time cases take through the system;
- Low levels of public awareness;
- Administrative problems such as non-quorate meetings, low remuneration of members and poor administration; and
- Overlapping jurisdiction with other dispute resolution structures.

The Land Bill tries to address a number of these issues.

6.4 Relevant court decisions

A number of land-related cases have been mentioned. The following section is a brief summary of the key matters arising from some important court decisions.

On evictions and the declaration of a Selected Development Area

*Loanika Moletsane and 42 others v The Attorney General*²¹⁷

²¹⁵ S. 64.

²¹⁶ Op.cit.,97.

²¹⁷ Op.cit. 140.

²¹⁴ See also "The judiciary".

This illustrates the positive role the courts can play in preventing unlawful evictions. The evictions in this case were, as often happens, preceded by the declaration of an SDA. The court ruled in favour of an interdict against the government, preventing it from demolishing the houses of the residents without proper compensation. In terms of the judgement, the SDA's declaration was improper because:

- Consultation with the occupants and other occupiers seeking cooperation and consent had not taken place;
- The purpose and nature of the envisaged SDA was not properly specified legally;
- The specific properties subject to the SDA were not provided; and
- Occupants who legally occupied and developed the land need to be compensated.

The court was also highly critical of the system of land administration in Lesotho, stating:

"The problem that this court is faced with is the non-existence of order in land allocation in Lesotho. The truth is that there is no more any (sic) clear customs, laws an (sic) policy guidelines on the allocation of land."²¹⁸

On the jurisdiction of courts over estates governed by customary law

Customary law requires that the heir to the estate is nominated by the family council. This is made up of members of the deceased family. Additionally, any disputes that may arise must be referred for arbitration to the brothers of the deceased and other persons whose right it is under customary law. In the case of *Ramatekoa v Ramatekoa*²¹⁹ it was held that only after this process of arbitration can the courts preside over cases in customary law.

On the creation of leases

In *Motaba v Letsie & others*²²⁰ the courts have upheld the provisions of the 1979 Land Act that provide that to obtain a lease from a Form C interest in land, it is not necessary to make an application.

On the validity of backdated Form C documents

In the case of *Selloane Putsoane v Motlatsi Lekatsu*²²¹ the plaintiff's deceased husband had lodged an application with the LSPP for the issue of a lease. On being requested to prove his allocation of the land, he submitted a Form C, as well as an affidavit from the chief proving its validity. The Form C was in fact issued in 1985, and the court found that the chief could not have lawfully issued a Form C. This is because as from the June 16 1980, the allocating authority was the ULC. Thus the defendant who had taken possession of the land succeeded against the plaintiffs claim to the land, which was based on this illegal allocation.

On women's power over marital property

In the case of *Kurubally v Kurubally*,²²² the court refused to order the division of the marital property in favour of a wife to protect her share from her gambling husband. The court held the husband's marital power over the property effectively precluding her ability to challenge his use of it.

Similarly in the case of *Matjeloane v Matjeloane*,²²³ the wife sought a court interdict against the husband's acts of wasting the matrimonial property pending a divorce. The High Court once again held that during the subsistence of marriage, the husband exercises absolute marital power over the matrimonial property. Further, this marital power extends even to the person of the wife.

²¹⁸ Ibid at par.65.

²¹⁹ 1978 LLR 384.

²²⁰ CIV/T/164/96 (unreported).

²²¹ 1993-1994 Lesotho Law Reports and Legal Bulletin 282.

²²² Op.cit.,156.

²²³ Op.cit.,157.

In *Mahase v Mahase*²²⁴ the plaintiff, an adult unmarried woman, wanted to inherit from her adoptive father's estate. The plaintiff's uncle argued that plaintiff had no right to inherit property from her father on the grounds that she is female. Under customary law, a female person may not inherit intestate. The court agreed with the uncle's argument, declaring him the rightful heir to the estate. This was despite arguments that Lesotho was bound by its international obligations against discrimination under CEDAW and other instruments. On this ground, the court relied on a technical point: the legal aspects of these instruments had not been specifically incorporated into Lesotho's law (even though it could be argued that the existence of section 19 of the Constitution, prohibiting discrimination, indicates that this might not be entirely true).

In dual marriages under both customary and statutory law, the courts have favoured the application of customary law in matters of inheritance. In *Khatala v Khatala*,²²⁵ a son's attempts to inherit his late father's property were challenged by his late father's second wife. While the son's late mother was married to his father under customary law, the second wife was married under a mixture of both civil and traditional marriage. The judgement was in favour of the son's right to inherit as provided for by customary law.

Similarly in *Tsosane v Tsosane*²²⁶ it was held that the son had superior rights over the widow according to the customary laws of inheritance, despite the fact that the parties had been married following civil rites.

In contrast to these decisions, the court in *Zola v Zola*²²⁷ held that a couple, who during the subsistence of a customary marriage decided to contract a civil marriage, effectively chose that civil marriage, which then supersedes their customary one, and that they are then governed by civil law.

224 Op.cit.135.

225 Op.cit.,148.

226 Op.cit.,149.

227 Op.cit.,146.

7 Local Laws and Policies

The system of government in Lesotho is largely centralised and directed from the capital, Maseru. There are some decentralised units of central government at district level, but they have no real autonomy. Efforts are underway to decentralise, and the Local Government Act of 1997 is seen as an important step in this direction. The Act will be implemented after countrywide local government elections in 2005. The Act sets out a number of duties of local government. These include the making of by-laws concerning land and property. However, until the enactment of the Act, there will be little legislation at local level.

8 Implementation of Land, Housing and Property Rights

8.1 Housing delivery

Previous sections have commented on the limited capacity of formal land delivery systems in providing land for housing construction. People seeking land in an urban area have two alternatives. They can approach the chief, who may allocate them a piece of vacant land upon which a house can be built. This is the dominant form of land acquisition in urban areas. Because of this system of land allocation, houses constructed on this land are typically owner built and financed. Alternatively, they can acquire land through formal mechanisms such as the LHLDC or the LSPP.

The LHLDC

The LHLDC allocates sites of 375m² or more, with rudimentary road connections and water standpipes. Estimates vary as to the scale of land delivery by the LHLDC, but it is generally put at 300 to 600 serviced sites per year.²²⁸ Regardless of the precise figures, it is clear that the LHLDC is not able to meet Lesotho's land and housing needs on its own. This is primarily because the corporation has to operate on a cost-

228 Sechaba Consultants and Payne, G. (2002). Regulatory frameworks governing access to legal low-income housing in Maseru. Leduca op. cit., 104 places the figure at 460 units per year between 1989-2003 and while Silitshena and Kabi op. cit., 98 quote the figure at 426 between 1989-2005.

recovery basis. Since there is no capital subsidy provided by the state, the LHLDC tends to cater for the middle classes, not the poor.

Because there are no housing finance facilities in Lesotho the LHLDC has also had to step in as a housing financier, providing instalment agreements for the payment of land and housing prices.

Box 8.1 Sites delivered by the LHLDC²²⁹

Year	Number of Sites	Place	Low/Middle-High Income	Size of Site
1988	805	Thetsane Development Area - Maseru District	Middle-High	600 m ²
	100	Teya-teyaneng town-Berea district	Low	375 m ²
	232	Hospital area-Mafeteng district	Middle-High	400-600 m ²
	93	Mohaleshoek town-Mohaleshoek district	Low	375 m ²
	293	Outhing town-Outhing district	Low	375 m ²
	111	Ha Mokhele-Mafeteng district	Low	375 m ²
	80	Motse-mocha-Mafeteng district	Low	400 m ²
1989	900	Ha Matala-Maseru District	Low	275 m ²
1992	116	Hlotse-Leribe district	Middle and High	700 m ² average
2000	1121	Ntjabane-Berea district	Low and Middle	700 m ² average
2002	817	Maseru South-West-Maseru District	Low	375 m ²
2003	791	Maseru South-West-Maseru District	Middle-High	400-600 m ²

²²⁹ Source: Lesotho Housing and Land Development Corporation Records. 2004.

Box 8.2 Fully constructed houses delivered by the LHLDC 230

Year(s) of development	Place	Size of Structure	Number of Plots
1981	Khubetsoana - Maseru district	2 roomed of 15sqm	860
1981	Maputsoe - Leribe district	2 roomed of 15sqm	396
1984	Katlehong - Maseru district	1,2 and 3 roomed 9sqm; 15m ² and 22 m ² respectively	315
1987	Mafeteng town - Mafeteng district	2 roomed of 15m ²	125
1988	Teyateyaneng town - Berea district	1,2 and 3 roomed 9sqm; 15m ² and 22 m ² respectively	125
1992	Arrival Centre - Maseru district	3 bedroomed	25

Box 8.3 Rental flats delivered by the LHLDC 231

Date	Place	Size	Number
1976	Ooqolosing Flats	3 bedrooms	12 units
1978/79	Friebel Estates	3 bedrooms	50 units
1979/80	Letsie Flats, Maseru	3 bedrooms	34 units
1981	Kuena Flats, Maseru	3 bedrooms	45 units
1989	Leseli Flats, Maseru	3 bedrooms	26 units

The LHLDC has plans to put up for transfer 900 serviced plots at Maseru South-West (MASOWE); 677 in Mafeteng; 1,600 in Butha-Buthe; 500 in Mohaleshoek and 300 in Qacha's Nek; plus 300 housing units at MASOWE; 150 in Mafeteng; 100 in Butha-Buthe and 60 in Maseru; and 119 units in three different blocks of flats planned for Maseru.

The LSPP

The LSPP occasionally provides serviced plots. Through the SDA mechanism, land that is surveyed and serviced is provided for housing. These projects are generally tied to the availability of donor funding. They are thus infrequent, and cannot keep up with demand. Typically, an SDA project will be on land already acquired through informal means. This is because the declaration of an SDA is often followed by intensive plot subdivision and issuing of Form C certificates, as there is no

²³⁰ Ibid.

²³¹ Ibid.

compensation provided after declaration. The LSPP often works in collaboration with the LHLDC and many of the previously mentioned projects were also SDA projects.

There have also been upgrading projects that have been carried out by the LSPP. Projects intent on formalising and planning settlements, as well as providing services, have been carried out in Ha Thamae and Mabote (both in Maseru).

Upgrading projects

A more than decade-long hiatus in the upgrading of settlements resulted in the proliferation of increasingly poor settlements, especially in peri-urban areas. In 2002 the MCC initiated an Unplanned Settlement Upgrading project on the city's periphery. Implementation of this project involves registered land surveyors producing detailed maps of areas of settlements. MCC planners will then propose roads based on map details. Surveyors then demarcate the land parcels per the new plans, as well as surveying the resultant sites to cadastral standards for lease allocation.²³²

From the initial stages of the projects implementation in four settlements – Ha Lesia, Ha Tsolo and Ha Leqele – a number of lessons have emerged:²³³

- The costs to individuals are still quite high, since communities bear the costs of land surveying. Each land parcel costs M650 (\$108) to survey. The payment rates by communities have consequently been very slow;
- The MCC has limited resources to implement the project;
- Often the mapping produced by the surveys is not representative of the ever-changing situation on the ground; and
- Lack of institutional capacity in the formal registration system plays itself out in the project. Obtaining a lease for the surveyed land will take a long time once all the applications are provided to the LSPP.

Community participation has been especially strong in this project. The approach is also one of working with the situa-

tion on the ground. Surveying has been done to accommodate, as far as possible, the existing layout. This is a considerable shift in attitudes, with previous projects often preceded by demolitions.

Previous upgrading projects undertaken²³⁴

Mohalalitoe Housing Cooperative, 1976-1979

Sponsored by the United Nations Capital Development Fund, the International Cooperative Housing Development Association and Government of Lesotho, this was essentially a sites and services project for low-income earners. Beneficiaries were to construct their own houses through a single mortgage for their cooperative. Cooperative management in house construction and development of community facilities proved difficult. Also, with time, less construction work was done by individual families and more by skilled workers. Default in payments by cooperative members also were a problem.

Khubetsoana Project, 1989

Sponsored by CIDA, the World Bank and the Government of Lesotho. Costs of site infrastructure and land were fully covered by the donors and the government. The cooperative approach was abandoned. Service standards were reduced – for example, pit latrines were installed instead of water-borne sewerage, and public water standpipes were installed with an option for plot extension. Construction was done by private builders hired by beneficiaries. Loans from a revolving fund with 9 percent interest were made available to low-income beneficiaries. However, at reduced sizes of 240m² the plots were often considered too small by beneficiaries. More importantly, there was evidence that some applicants understated their incomes to qualify.

Ha Thamae Project, 1984-1988

The project area had experienced land allocation by the chief over the years. It was characterised by informal development, poorly planned with little road infrastructure, nor reliable water supply, latrines and waste disposal. The project was

²³² Op.cit., 98 at 98.

²³³ Ibid.

²³⁴ Op.cit., 98at 93-97.

thus preceded by the declaration of an SDA, entailing the termination of existing rights of occupation under the 1979 Act without compensation. The project was intended to upgrade roads, provide water infrastructure, install street lighting, develop refuse collection, provide loans for low-income earners to construct houses and ventilated improvement pit toilets, and to regularise tenure.

However, there was little enthusiasm for the new leases. Traditional tenure was considered secure enough. Further, the poor were again excluded because the value of plots went up due to the extension of services. Cost recovery was never pursued because of political problems enforcing payment from people who had been living on the plots free of charge. Landowners did not sell off large plots as intended, and no subdivision occurred. Densification did occur, however, through the building of extra rooms to let.

Mabote Project, launched in 1982

Another SDA project involving survey and layout plans demarcating plots, road lines and open spaces. The project attempted to work with the existing plot developments to guide development. The anticipated termination of rights to land was pre-empted by rapid subdivision and sale of plots by landowners, helped by chiefs who gave backdated Form Cs to new landowners. This development of the plots was chaotic, characterised by high prices driven by speculation, large unsustainable plot sizes and few services. Acceptance of the project by the plot owners – including requirements to reduce plot sizes, subdivide fields to allow for road reserves and so on – was on condition that these illegal allocations be recognised. However, the project was marked by fictitious claims to plot ownership, and in the ensuing chaos the sponsors withdrew.

Ha Thetsane Project, Phase One commencing 1988

Sponsored by the World Bank this green fields sites and services scheme intended to provide land for all income groups. Cross-subsidisation mechanisms were built in between the income groups. Chiefs were incorporated to prevent any pre-emptive illegal subdivisions. Compensation was also of-

fered for plot owners. This, however, was relatively low, and subsequent to Phase 1, other phases were also characterised by subdivisions and sales as in the Mabote project.

8.2 Implementation of land, housing and property rights

Technical capacity issues

The bureaucracy involved in the land administration process lacks capacity to fulfil its mandate. These deficiencies have been attributed to a number of factors:²³⁵

- High staff vacancy levels. As of 2003, 42 percent of all land administration posts in Lesotho were vacant;
- A lack of basic resources, such as vehicles, drivers, computers and so on;
- A lack of adequate accommodation and office space in some districts;
- A fragmented structure lacking in coordination and communication;
- Limited budgetary allocations to the ministry;
- High staff turnover due to a lack of job satisfaction resulting from lack of career development opportunities and low remuneration; and
- Placement of staff into inappropriate positions.

Over and above these constraints, land administration procedures are generally considered complex and time consuming, while the demand for services increases rapidly. With the envisaged implementation of the Land Bill, issues of capacity will increasingly become important to ensure its successful implementation.

Accessibility of procedures and processes

Land processes including allocation, registration, succession, mortgages and transfers are complex and time consuming. The LSPP only manages to handle half of the lease applications it receives per year, which obviously only adds to the backlog. A typical lease application from a Form C can take between 10 months and 3.5 years. The process is also expensive and unaffordable to the majority of Lesotho's citizens.

²³⁵ Op.cit., 97.

Decision-making is centralised, land offices understaffed and dispute resolution protracted. Many structures involved in the processes, for instance the ULCs and ICCs, encounter resistance, especially from chiefs. These structures also suffer from a lack of finances. There is often confusion about their exact roles in the face of the ever-changing legal framework that guides them. This means that the implementation of land and housing rights has had limited success.

Generally, these hindrances affect women especially hard because of their particular legal status in Lesotho. Overall, Lesotho's women have fewer economic opportunities and are generally underrepresented in higher-end jobs, including professional and technical positions. On average, they earn only 38 percent of their male counterparts' income, despite having higher school enrolment rates and higher literacy levels.²³⁶ Also, Lesotho's laws of marital property and succession subject women to discrimination. The attainment of property rights is thus that much more difficult.

HIV/AIDS

Little research has focused on the effects of HIV/AIDS on land rights in urban areas. Rural areas have received most of the attention.²³⁷ This is inevitable given the proportion of the population that is rural. However, the impact of the epidemic in urban and peri-urban areas need to be determined. More people from rural areas are moving into urban centres because of declining agricultural production and the towns are also increasingly having to accommodate rural orphans and widows affected by HIV/AIDS.

The high value of urban land means the stakes are higher, and the vulnerability of groups without clearly protected land rights increases. Urban land is often on registered lease and thus easily mortgaged. This exposes households to eviction in the event of their defaulting on their payments. Households in urban areas may not necessarily have the same

coping strategies as those in rural areas, for instance share-cropping and the *mafisa* system of sharing livestock-rearing responsibilities. Possibly then, there will be an increasing urbanisation of the rural manifestations of HIV/AIDS. These include loss of income; disintegration of traditional kinship support structures; increasing exclusion from land by widows and orphans; and shifting land maintenance and use responsibilities to the young and the elderly. Additionally, Lesotho's policy framework on HIV/AIDS, while covering many important aspects of the disease, fails to recognise its effects on land and housing rights.

The second part of the section dwelt on capacity issues in the implementation of land laws. The failure of the land management system is partly attributable to the lack of human capacity. Several areas need attention, including filling vacancies, provision of basic resources to perform tasks, training, and improved terms of service. A major impediment to achieving the right to land and housing, especially among women, is the complex, expensive and time-consuming procedures. Simplification of procedures is a critical area that needs reform. The examination has also determined that there is a vacuum in research on the effects of HIV/AIDS on urban land rights. Indications are that the effects are probably magnified due to the peculiar characteristics of urban living.

Finally, the question of the urban-rural interface has to be resolved. Not only the confusion in terms of boundaries, but crucially how a sustainable balance of urban land for residential development and rural land for agricultural purposes can be achieved.

9 Best Practices

There are some positive practices on land rights and tenure in Lesotho.

People are often ignorant of land processes and procedures. In attempting to address this, the Ministry of Local Government and LSPP have provided an information pamphlet on the subject of land tenure. The pamphlet is

²³⁶ UNDP, (2004). Human Development Report. INTERNET. <http://hdr.undp.org/reports/global/2004/>, Cited on June 15, 2005.

²³⁷ See for instance Drimie, S. (2002). *The Impact of HIV/AIDS and Land: Case Studies from Kenya, Lesotho, & South Africa*. SARPN, South Africa and Mphale, M. Rwabali B. Makoae, M. (2002). *HIV/Aids and its impacts on land tenure and livelihoods in Lesotho*, Food and Agriculture Organisation.

available in both the vernacular and the English language, free of charge. Information that appears in the pamphlet includes the physical addresses of LSPP offices countrywide; the procedures to be followed when applying for a site and subsequently for a lease; the correct way of engaging in transactions and transfers involving land; and procedures for subleasing, subdividing and changing ownership of land. The pamphlet is well designed and easy to understand. With new land processes and procedures as well as tenure reforms underway, a well-organised publicity campaign incorporating such positive elements is important.

Habitat For Humanity's activities in the country have resulted in the provision of some housing for low-income earners.²³⁸ Through community-based and community-run projects relying on sweat equity the project allows people, including those with no regular income, to build houses for themselves. Habitat For Humanity provides all the necessary building material except for a bag of cement per house. The bag of cement must be paid for by the household as a contribution intended to inculcate a sense of ownership in the owner(s). Further, owners must supply their own labour for building the houses. The houses are two- or three-roomed buildings. The sites are provided by LHLDC to the Ministry of Local Government's Housing division. Most of the beneficiaries of this initiative are women.²³⁹

A positive aspect of settlement upgrading that has the potential to emerge as a best practice is the increased community participation in the identification of priority areas for implementation. The MCC's Unplanned Settlement Upgrading project reflects this changed attitude. Further, it is intended to mould the project design around existing settlement patterns, rather than disrupt them through evictions and demolitions. This changed attitude, especially with regard to tenure security, has been a general characteristic of Lesotho's land administration and court system. There is an undercurrent

that is increasingly recognising that forced evictions are an infringement of land and property rights.

The Ministry of Local Government established the Urban Services Unit in 1989/1990. This unit operates land servicing and allocation, community development and loan fund programmes. It was initially aimed at low-income earners for housing countrywide. The unit is government funded and today it caters for all income earners. Through its operations, people have been granted easy payment loans for developments such as installation of household electricity, and telephone lines and water.

10 Conclusions

Below we summarise the issues emerging from the overview of the situation in Lesotho.

10.1 Constitutional issues

Lesotho's Constitution does not recognise the right to housing, which inevitably weakens efforts to speed up the delivery of housing and land, as well as efforts to protect occupiers against forced eviction.

Further, the anti-discriminatory clause under Section 18 allows for exceptions when personal law and customary law are in question. This effectively entrenches discrimination against women in Lesotho.

10.2 Discriminatory laws and practices

Many laws that deal with land, property, inheritance and administration of estates discriminate against women.

- The Deeds Registry Act of 1969, which under Section 14 restricts the rights of women to have immovable property registered in their own names without the written consent of the husband. Women married under customary law may not be registered as owners

²³⁸ Habitat For Humanity is an international NGO. It started operating in 1999 and has since commenced a project at Lithoteng in Maseru.

²³⁹ Interview with Mathabo Makuta.

except under an order of the court, as they are considered governed by customary law;

- The Administration of Estates Proclamation of 1935, which provides for the husband's marital power unless excluded under a prenuptial contract concluded before marriage;
- The *Laws of Lerotholi*, which among others under Article 11 provides that first-born male children have precedence in inheriting. Also, a widow's inheritance is subject to consultation with male relatives; and
- The Companies Act of 1967, which under Section 144 prevents women married in community of property from holding the position of company director without the written consent of their husband.

Prevailing attitudes have been shaped by a society that has traditionally been male dominated and patriarchal. This may explain some aspects of court judgements that shy away from gender equality, as well as the delays in enactment of progressive laws. Furthermore, the absence of gender-disaggregated data on land issues makes it difficult to monitor women's progress in obtaining access to land.

10.3 International law

Local Courts can circumvent Lesotho's obligations under international law. This is because these treaties have yet to be made applicable domestically by parliament. The courts have used this technicality to avoid implementing international obligations.

10.4 Forced evictions

Forced evictions have occurred to a limited extent, with no compensation or alternative provided. However, evictions are not occurring on a large scale and have, in a number of cases, been condemned by the courts.

10.5 Complex systems for land delivery and management

- Many institutions, with overlapping functions, carry out land management functions;
- Land management processes and procedures are long, complex and expensive. There is thus, for example, a growing backlog of lease applications in the LSPP;
- The system is aggravated by staffing capacity issues within the land administration bureaucracy. These include a high number of vacancies; lack of basic resources such as vehicles and computers; high staff turnover; and a lack of sufficiently qualified personnel; and
- Estate administration procedures, apart from being discriminatory against women, are also long, complex and expensive.

10.6 Land supply

The price of land available through formal channels is very high. Consequently, there is a lack of affordable land in urban areas for the poor, who are left with little choice but to pursue informal alternatives.

There is very little public provision of housing and land, and that which is provided is either at a very small scale or caters for middle-income groups.

10.7 Local governance

With the exception of Maseru, there is almost no developed local government in Lesotho. In practice this means that there is no authority with a clear mandate for land use planning at a local level. It also means that there is very little public participation in decision-making at a local level.

The historic tension between the chieftaincy and more modern institutions of government has endured and shows few signs that it will be resolved. This has led to parallel systems of authority operating in relation to land in Lesotho.

10.8 The courts

Dispute resolution mechanisms provided are slow, centralised and inadequate.

10.9 Encroachment

There is extensive and continuing encroachment of urban land onto agricultural land, which has led to land evictions and demolitions.

10.10 Civil society

There is an absence of a strong and active civil society advocating for land rights, and pushing for speedy legal reform on various fronts.

A number of reform initiatives have addressed these issues. The Land Bill, for example, addresses matters of land management and administration. It also recommends the reform of tenure types, does away with discrimination against women in land allocation, shortens procedures and improves dispute resolution mechanisms. The Marriage Persons Equity Bill also, if enacted, will do away with the unequal status of women in marriage. The draft Shelter Policy also suggests a positive way forward for Lesotho. However, slow implementation and delays in the finalisation of various important policies and Bills undermine the positive aspects of these initiatives.

So while there are a number of critical issues already on the reform agenda, albeit without an immediate prospect of implementation, many other issues remain off the reform agenda altogether. These include:

- Amending the Constitution to eradicate discrimination against women;

- Obtaining land for the poor in urban areas; and
- Effective devolution to local government.²⁴⁰

Reform on these fronts points to much larger issues that cannot be addressed solely as land rights issues. These relate to the overall macroeconomic situation of Lesotho. The country's prospects for significant economic growth and development are slim and this has implications for a wide range of relevant issues, including the state's capacity to subsidise land and housing and its ability to pay more competitive salaries to its officials. Neither of these problems are likely to be addressed in the foreseeable future. A sense of realism and strategy is needed in charting the way forward. Many of the key issues for reform have been identified in draft policy and law-making processes, but the conditions have not been conducive to their implementation.

11 Recommendations

11.1 The Constitution

Certain sections of the Constitution should be repealed, including Section 18 (4) (b), which exempts the rule against discrimination on issues of personal law such as adoption, marriage, divorce, burial, devolution of property on death or other like matters. Section 18 (4) (c), which exempts the rule against discrimination in cases of customary law, should also be repealed.

Constitutional amendment is an onerous task. Under Section 85, amendments to certain parts of the Constitution, including this one, are subjected to a national referendum. Realistically, this can only be a long-term objective, but it should remain on the agenda.

²⁴⁰ Historically, decentralisation efforts in Lesotho have competed with perceptions from central authorities that local institutions are dominated by political opponents. The MCC for instance was taken over by central government when political factionalism was seen to threaten its operations.

11.2 Reform of laws discriminating against women

This perhaps represents the most realistic area of law reform in the short term. The repeal of a number of offending sections in the following is necessary:

- The parts of the Deeds Registry Act that restrict the rights of women to control property without their husband's permission;
- The sections of the Administration of Estates Proclamation that provide similar restrictions;
- Aspects of the *Laws of Lerotholi* that place restrictions on women and girls inheriting, and place women under the guardianship of male relatives; and
- Sections of the Companies Act requiring the written consent of the husband for a woman to hold directorship.

11.3 Implementation of pending laws, bills and policies

Swift enactment of the Local Government Act (1997), the Married Persons Equality Bill (2000) as well the Land Bill (2004) is necessary. Finalisation and adoption of the Draft National Shelter Policy should also be prioritised:

- The Local Government Act provides for the establishment of local government countrywide to fill the current gap in institutions of local governance. It is also vital for the implementation of the Land Bill, for instance various leases will be managed entirely by local authorities;
- The Married Persons Equality Bill represents an important first step in remedying discrimination against women, short of Constitutional amendments;
- The Land Bill will provide for tenure security for current occupiers of land through the primary lease and schemes of regulation; protect the rights of women to acquire land; and improve dispute resolution mechanisms; and
- A housing policy is a fundamental step a state should take towards fulfilling the right to adequate housing of its citizens.

11.4 Applicability of international treaties in Lesotho

There is a need to domesticate relevant international treaties to which Lesotho is a signatory, particularly ICESCR and CEDAW. International treaties provide a rich resource for courts to tap into when there is a lack of guidance from local laws. The ICESCR for instance has greatly expounded on the right to housing.

11.5 Forced evictions

A clear policy that sets out instances of justified forced evictions and upholds the highest of standards is needed. This need not be a substantial policy-making process, but a departmental circular, for example, that is disseminated. It should state clearly the instances and circumstances in which eviction is justified, and the standards that must be upheld. It should identify eviction as a measure of last resort; insist that it be strictly controlled (e.g. through a court order); address the plight of vulnerable groups like women, children and persons with HIV/AIDS; and ensure proper consultation and the exploration of all feasible alternatives.

The judgement of the *Loanika Case* is a good start in developing such principles, which can be incorporated into a finalised version of the National Shelter Policy.

11.6 Reform of processes and procedures in land administration and management

The inaccessibility, cost and complexity of various transactions relating to land is hampering the fulfilment of housing and land rights in Lesotho. These procedures hit women and vulnerable groups particularly hard. The implementation of the Land Bill is the first step in remedying these problems. However, an important aspect of the Bill's implementation should be monitoring and feedback to ensure that "business as usual" attitudes do not recur. Monitoring should include performance indicators such as turnaround times for applications, number of applications including women applicants

within given periods, number of women landowners and so on.

11.7 Reform of processes and procedures of estate administration

Reform of the Estates Administration Proclamation and the *Laws of Lerotholi* to quicken procedures is necessary. These laws are an important impediment to quick resolution of estate distribution. The *Laws of Lerotholi*, for example, go through a hierarchy that includes a headman, a local chief, and then a principal chief, all of whom may be located in different places.

11.8 Improve access of the poor to land

Efforts towards the provision of land, especially targeting the poor, should be stepped up. Urban plans should include land allocations for the poor. Donor funding for low-income housing needs to be obtained. This should include increased budgetary allocations toward housing provision for the poor. New and innovative ways of harnessing the contribution of the poor to housing projects is also important.

It requires political will to set aside areas for development of low-cost housing. Many of these recommendations also require an element of subsidisation. Donor funding for land acquisition and infrastructure development is helpful and should be sought, and there must be increased budgetary priority to urban housing for the poor in the face of high urbanisation rates. Learning from international experience on this issue is vital.

11.9 Creation of a functioning and capacitated local government

The implementation of the Local Government Act is the first step. The absence of local government is felt in the lack of community participatory structures that can influence policy at local level. There is no local authority to plan urban areas and legally enforce regulations, or to guide development.

These are areas that newly formed councils should focus on. The new leases recommended by the Land Bill, for instance primary and demarcated leases, have their administration devolved to these local authorities, and the structures under the Bill match those under the LGA.

11.10 Improve dispute resolution mechanisms

Implementation of the Land Bill, which has elaborate dispute resolution reforms, is necessary.

11.11 Resolve staffing problems

Vacancies for trained personnel need to be filled. Better terms of service and clearer career paths and lines of authority need to be formulated. It is important to consider using "lower-level" staff from the communities trained in speciality areas to implement specific areas of land management.

The implementation of the Land Bill will necessarily place additional burdens on staffing, but may also be an opportunity due to the relative flexibility it achieves in devolving essential services to local communities. This means that members of the community can be increasingly involved, in adjudication for instance, with technical expertise provided by fewer full-time employees.

11.12 Provision of gender disaggregated data

Data collection in the land administration processes and other areas should incorporate aspects of gender in all vital statistics.

11.13 The urban-rural divide

Local government should provide strategic spatial plans that spell out desirable patterns of land use. Nationwide land-use planning is essential to provide for overall policy guidelines to local government. This is one of the areas

where the absence of a functioning local government with a strong strategic planning mandate has been most felt. The perceived encroachment of urban land into agricultural land has raised enough concern to warrant demolitions and evictions. It should clearly be a priority area for newly formed local government.

11.14 Determine the effects of HIV/AIDS on land and housing rights

Research on the effects of HIV/AIDS on urban land rights is needed. Further, implementation of laws and policies should be especially cognisant of this vulnerable group. Updating the 1999 Policy Framework on HIV/AIDS to recognise the particular impact of HIV/AIDS on land rights is also necessary.

Research to date has focused on the effects of HIV/AIDS on rural households. It would be important to know the effects on urban livelihoods, and how this affects land and housing rights. All policy and implementation of laws should be driven by the principle that the plight of people with HIV/AIDS deserves special consideration.

11.15 Support and promote a strong and active civil society

Many of the processes of land law and policy reform have foundered because of a lack of stakeholder participation, leading to broken trust and failed processes. Effective policy and law-making must be supported by effective organs of civil society.

11.16 Improve public participation

Implementation of the LGA should be accompanied by the incorporation of community structures in the functioning of the councils. The historically centralised structure of governance in Lesotho has meant that there is little public participation in governance. The implementation of the LGA is an opportunity to go beyond elections in public participation,

and include community groups and women, youth and the disabled in critical decision areas of the council.

11.17 Reduce the gap between government and traditional authorities

There is a need to negotiate with traditional authorities and to win chiefs' support for the new institutions of land allocation, and other amendments to laws that affect them. This is an important aspect of reform, and success may hinge on this. The need to exert some democratic control over processes of land allocation and estate administration may conflict with chiefs' traditional authority. The LGA and Land Bill for example subject chiefs to elections. This has the potential of being resisted given past experience. The solution is negotiated settlement, retaining the overall dignity and authority of this institution, while implementing important reforms.

11.18 Publicity and education

Well-designed publicity campaigns are needed to inform the population of various legal reforms. A best practice that has emerged is the publication of the pamphlet by the LSPP detailing, in simple language, procedural matters in land transactions. Implementation of the Land Bill will mean the introduction of new systems that people need to become familiar with. The Bill provides that before it comes into operation, the minister may initiate a programme of public education and awareness. This is an important element to ensuring its successful implementations. While no publicity campaign can quickly change attitudes that have developed over generations, it may affect perceptions and soften resistance in areas of critical importance like the judiciary, civil service and the bureaucracy. The youth are especially critical.

The recommendations above represent broad areas of action that include law and policy reform, local government reform, strengthened civil society and striking a balance between government and traditional authorities. They need to be acted upon in a holistic manner to ensure progress with regard to land and housing rights in Lesotho.



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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)²⁴¹:

- 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)²⁴²:

- Article 11(1) recognises the right to adequate housing²⁴³;
- Article 2(2) prohibits discrimination; and
- Article 3 recognises equal rights between men and women.

The International Covenant on Civil and Political Rights (ICCPR)²⁴⁴:

- 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)²⁴⁵:

- 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.²⁴⁶

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

242 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.

243 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>

244 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.

245 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.

246 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)²⁴⁷:

- 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)²⁴⁸:

- 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 Countries²⁴⁹:

- 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)²⁵⁰: 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")²⁵¹:

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

247 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.

248 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.

249 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>

250 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.

251 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.²⁵²

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	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

²⁵² 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



HS/786/05E

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

ISBN NUMBER (Volume) : 92-1-131770-3



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