

# MOZAMBIQUE

## 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

M O Z A M B I Q U E



UN-HABITAT

2005

## Law, Land Tenure and Gender Review Series: Southern Africa

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 These include pre-colonial customary law which co-exists with a mixture of outdated and often draconian colonial laws and more recent legislation.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

|          |                                                                                                       |
|----------|-------------------------------------------------------------------------------------------------------|
| AIDS     | Acquired immunodeficiency syndrome                                                                    |
| AIDS     | Acquired immunodeficiency syndrome                                                                    |
| AMMCJ    | Associação Moçambicana das Mulheres de Carreira Jurídica (Women Lawyers' Association)                 |
| CBO      | Community-based organisation                                                                          |
| DCU      | Directorate of Construction and Urbanisation                                                          |
| DUAT     | Direito de Uso de Aproveitamento da Terra (Right to use and benefit from land)                        |
| DINAGECA | Direcção Nacional de Geografia e Cadastro (National Directorate of Geography and Cadastre)            |
| FAPF     | Faculdade de Arquitectura e Planeamento Físico (Faculty of Architecture, Eduardo Mondlane University) |
| FFH      | Fundo de Fomento de Habitação<br>(Housing Promotion Fund)                                             |
| FRELIMO  | Frente de Libertação de Moçambique (Liberation Front of Mozambique)                                   |
| G20      | Group of NGOs                                                                                         |
| GTZ      | German development organisation                                                                       |
| HDI      | Human Development Index                                                                               |
| HIV      | Human immunodeficiency virus                                                                          |
| IMF      | International Monetary Fund                                                                           |
| INE      | Instituto Nacional de Estatística (National Statistical Institute)                                    |
| IPAJ     | Instituto de Patrocínio e Assistência Jurídica (Institute for Legal Assistance)                       |
| LDH      | Liga dos Direitos Humanos (Human Rights League)                                                       |
| LINK     | NGO network                                                                                           |

|        |                                                                                                       |
|--------|-------------------------------------------------------------------------------------------------------|
| MAE    | Ministério da Administração Estatal (Ministry of State Administration)                                |
| MICOA  | Ministério para a Coordenação da Acção Ambiental (Ministry of the Environment)                        |
| MOPH   | Ministério da Obras Públicas e Habitação (Ministry of Public Works and Housing)                       |
| NGO    | Non-governmental organisation                                                                         |
| ORAM   | Organização Rural de Ajuda Mútua – a rural development NGO                                            |
| PARPA  | Plano de Acção para a Redução da Pobreza Absoluta (Action Plan for the Reduction of Absolute Poverty) |
| RENAMO | Resistência Nacional de Moçambique (Mozambican National Resistance)                                   |
| SPGC   | Serviço Provincial de Geografia e Cadastro (Provincial Service for Geography and Cadastre)            |
| UNAC   | União Nacional de Camponeses (National Peasants Union)                                                |
| 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 evic-

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

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

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

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

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

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

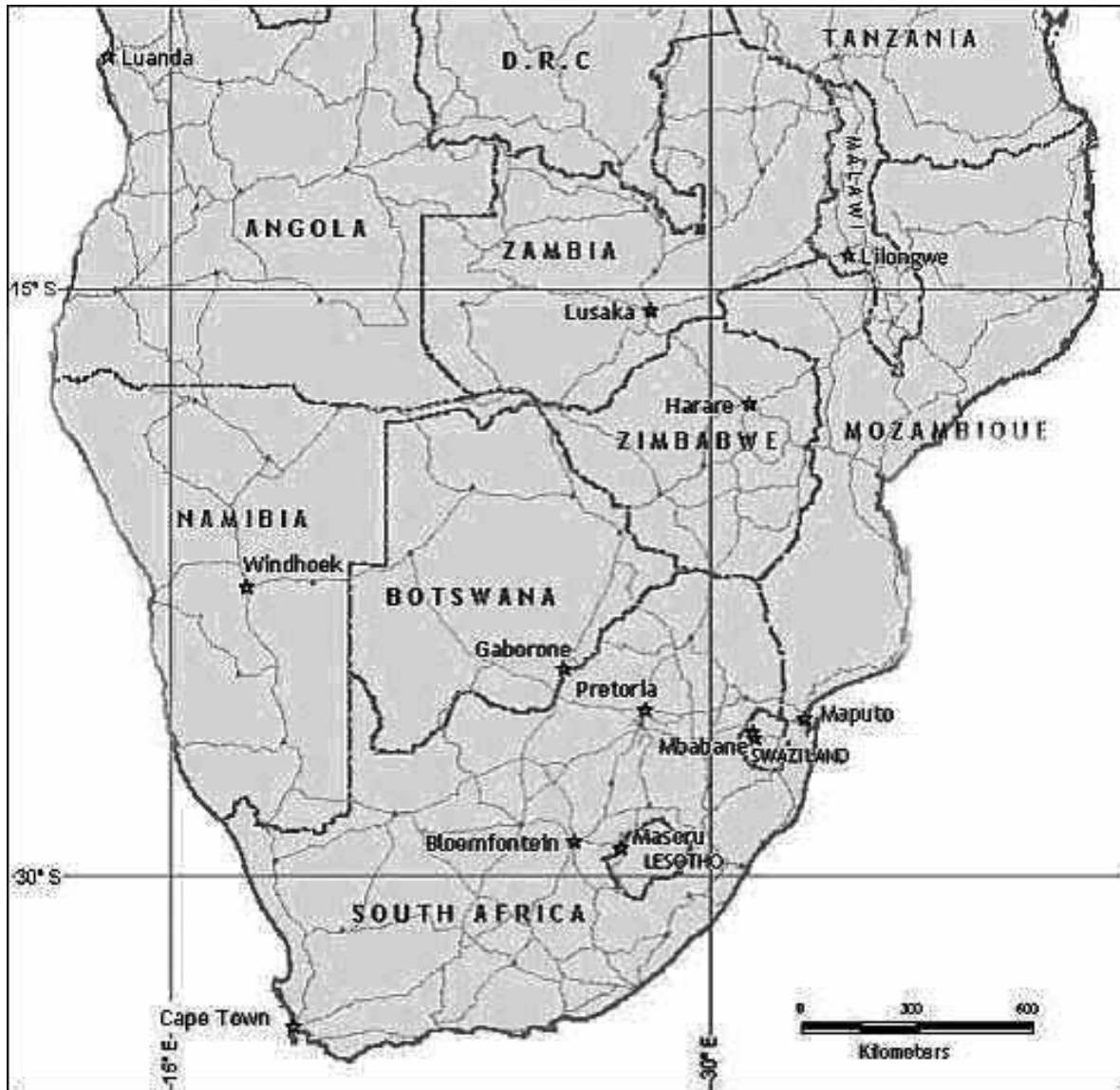
collection is the need for further research. One particular recommendation in this respect stands out. The effects of HIV/AIDS on urban land rights are unknown, although the agreed view is that it makes households and women in particular, more vulnerable to dispossession. This is an area requiring more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

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

There is significant clamour for reform of land and housing laws and policies across Southern Africa. Laws that deal with land in general are being re-examined and more progressive laws suggested to replace them. The core finding of this report is there is need to sustain the momentum of these reform initiatives, and in many instances to expedite them to 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.<sup>1</sup> 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,

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

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 patterns<sup>2</sup> 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;<sup>3</sup> and
- Colonial history: all the countries in the region suffered under various forms of colonisation from the mid-17<sup>th</sup> century through to the second half of the 20<sup>th</sup> 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

<sup>2</sup> 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.

<sup>3</sup> 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.



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

Table 1.1 Social development indicators Southern Africa 4

| Country<br>(with total<br>pop.) | Access to<br>services<br>(% of total<br>pop.) 2000 |            | Age group as a<br>percentage of<br>total pop. (2002) |       |     | Poverty                     |                | Income<br>distr. (share<br>of income<br>held by<br>groups)<br>1989-2000) |             | Urban-isation              |                                       | HIV/Aids<br>estimates (end<br>2001) |                          |
|---------------------------------|----------------------------------------------------|------------|------------------------------------------------------|-------|-----|-----------------------------|----------------|--------------------------------------------------------------------------|-------------|----------------------------|---------------------------------------|-------------------------------------|--------------------------|
|                                 | Safe water                                         | Sanitation | 0-14                                                 | 15-64 | 65+ | % population <<br>\$1 / day | Per capita GDP | Richest 20%                                                              | Poorest 20% | Urban population<br>growth | Urban pop.<br>Growth as % of<br>total | Adult rate (%)                      | Aids orphans (0<br>- 14) |
| Angola<br>(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<br>(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<br>(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<br>(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<br>(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<br>(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<br>(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<br>(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<br>(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<br>(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 law<sup>5</sup> (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 1Main settler legal systems

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

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

The second possible significant difference relates to the dominant position of ownership in Roman-Dutch common law, in comparison to English and Portuguese land law, where freehold is less hegemonic. In Mozambique, the socialist-

<sup>5</sup> 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.

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 land<sup>6</sup>) 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,<sup>7</sup> 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 practices<sup>8</sup>). 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 civil war, than with the character of the received legal system.

<sup>6</sup> 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*).

<sup>7</sup> Act 95 of 1986.

<sup>8</sup> 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.

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.<sup>9</sup> Any differences in the common-law approach to this question have therefore been rendered irrelevant.<sup>10</sup>

All countries in Southern Africa have dual legal systems in the sense that both customary law and inherited colonial common law are applicable (in addition to pre- and post-independence statute law). The exact time of reception of colonial common law differs from country to country. For example, Roman-Dutch law was imported into the Protectorate of Bechuanaland (now Botswana) on June 10 1891,<sup>11</sup> and into Basutoland (now Lesotho) by the Cape General Law Proclamation 2B of 1884.<sup>12</sup> 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.

<sup>9</sup> 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).

<sup>10</sup> 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.

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

<sup>12</sup> 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.<sup>13</sup> 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.<sup>14</sup>

<sup>13</sup> 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).

<sup>14</sup> 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.<sup>15</sup>

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

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

growth rate is the second highest in Africa, at 6.6 percent. Indeed, apart from Zambia, all of the countries in the region register urban growth in excess of 3 percent.<sup>16</sup> 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.<sup>17</sup> 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.<sup>18</sup> In others, such as Lesotho, patriarchal forms of land holding are constitution-

<sup>16</sup> Op. cit., 4.

<sup>17</sup> World Bank. (2004). *Little Green Data Book*.

<sup>18</sup> 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”.

ally entrenched.<sup>19</sup>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.<sup>20</sup> 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”.<sup>21</sup>

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<sup>22</sup>*

| 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%)            | 30%                        | 19%                                                   |
| Botswana     | 71%                                         | 6%                         | 23%                                                   |
| Lesotho      | 95% <sup>2</sup>                            | 5%                         | -                                                     |
| Malawi       | 67%                                         | 11%                        | 22% (3% urban)                                        |
| Mozambique   | 100% <sup>3</sup>                           | -                          | -                                                     |
| Swaziland    | +/- 56%                                     | 25% (approx.)              | 19% (approx.)                                         |
| Zambia       | Predominant <sup>4</sup>                    | -                          | -                                                     |

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

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

<sup>21</sup> 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.

<sup>22</sup> 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.<sup>23</sup> 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.<sup>24</sup> 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.<sup>25</sup> Pursuant to these criticisms, the alliance was invited to partner the government in coordinating civil society contributions to the policy process. It is yet to be seen to what extent the views gathered by the group will change the published draft policy.

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

24 Op. cit., 1.

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

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

Figure 5.1 NGO participation in policy-making

### Weak NGO participation in policy-making

|           |                                               |                                           |             |
|-----------|-----------------------------------------------|-------------------------------------------|-------------|
| Weak NGOs | Malawi<br>Botswana<br>South Africa<br>Lesotho | Angola<br>Swaziland<br>Zambia<br>Zimbabwe | Strong NGOs |
|           |                                               | Mozambique<br>Namibia                     |             |

### Strong NGO participation in policy-making

### Women's movements

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

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

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

Although some coalitions are formalised and survive beyond specific projects,<sup>27</sup> 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.<sup>28</sup>

## 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.<sup>29</sup> 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

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

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".<sup>32</sup> This could produce conflict between the boards and the land development procedures laid down in the Town and Country Planning Act.<sup>33</sup> 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

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.

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](http://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.<sup>34</sup> 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 slums<sup>35</sup>.

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.<sup>36</sup>

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

*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](http://www.grida.no/aeo/214.htm) accessed December 30 2004)

<sup>34</sup> Op. cit., 49.

<sup>35</sup> Caldwell, J. & Caldwell, P. (undated). *Fertility Transition in Sub-Saharan Africa*, see [www.hsrapublishers.co.za](http://www.hsrapublishers.co.za)

<sup>36</sup> 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.



## 7 Tenure types and systems

The vast majority of land in the region is still held under customary tenure, mainly in the rural areas, although the proportion of land held in some or other form of individualised title (not necessarily ownership) is increasing. Accurate figures for the amount of land held under different tenure forms are not available. In Zambia, where 94 percent of the land is officially “customary land”, the actual proportion of land held under customary tenure is decreasing as the process of conversion to leasehold tenure under the Lands Act, 1995, gathers momentum.<sup>37</sup> 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.<sup>38</sup> If implemented, this policy will shift the land tenure system in that country closer to that of its northern neighbour, Zambia.

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

Article 12 of the 1997 Mozambican Land Law provides an interesting example of how tenure security can be provided

<sup>37</sup> 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.

<sup>38</sup> The Herald, Harare, June 8 2004.

<sup>39</sup> 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

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 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 Church<sup>40</sup> 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.<sup>41</sup>

## 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

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.

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.<sup>42</sup> By contrast, in South Africa, the Communal Land Rights Act took more than five years to negotiate and, in its final form, largely preserves the land management functions of traditional councils, some of which were created by the apartheid state.<sup>43</sup> 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

42 Op. cit., 11.

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

that cost their respective governments a great deal more than they benefit them. In some countries, as indicated above, innovative solutions to this problem are arising, from both the formal and informal sectors, but these innovations have not yet been tested at scale.

A further challenge to effective land management is the question of building standards. Primarily as a result of the region's colonial legacy most countries have one set of building standards applicable to the urban areas previously reserved for settler occupation and a different set applicable to other areas. South Africa, Namibia and Zimbabwe are all examples of this phenomenon. In other cases the authorities have simply never been able or willing to apply building standards to the more marginal urban areas, as has been the

case in Mozambique. Across the region however there is a growing realisation that lower building standards inevitably result in higher levels of access to land and housing for the poor, through lowering the cost of the final housing product. This has resulted in various policy initiatives, particularly in Zambia and Namibia, to revise building standards to a more realistic level.

## 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;<sup>44</sup> 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.<sup>45</sup>

### *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 mar-

<sup>44</sup> Women's Rights to Land and Property, [www.unhcr.org/csd/documents](http://www.unhcr.org/csd/documents)

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

riage. 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 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.<sup>46</sup> Many customary laws - for instance Ushi and Chibwe customary law in Zambia - entitle women to a reasonable share of the marital property.<sup>47</sup>

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.<sup>48</sup> 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*<sup>49</sup> where a woman was deprived of the parties' communal land and marital home

built jointly and maintained by her for 23 years because the marriage was patrilocal.

There are, however, some positive developments. In Mozambique, the passage of the Family Law of 2004 changed things for women by recognising customary law marriages 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.<sup>50</sup>

#### *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 excluded<sup>51</sup>, although women still have to be "assisted" in registering property and property transactions.<sup>52</sup> 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

<sup>46</sup> *Mwiya Vs Mwiya* 1975 ZLR; C Vs C SCZ, 2000 (Zimbabwe).

<sup>47</sup> *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)

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

<sup>49</sup> 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.

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

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

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

of property have to be assisted by their husbands to register property in Swaziland.

Some positive developments have occurred. In Botswana, passage of the Deeds Registry Amendment Act 1996, allowed women married in community of property to register 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.<sup>53</sup> 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 primogeniture<sup>54</sup>. 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.<sup>55</sup> Often, where customary inheritance is controlled by an act,<sup>56</sup> patriarchal attitudes

<sup>54</sup> 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.

<sup>55</sup> 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).

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

<sup>53</sup> *Zambia Daily Mail*, July 5 2004, p7

and male preference and dominance in property ownership and inheritance are a problem.

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

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

In Botswana and Namibia, inheritance under the statute is tied to the marriage regime for people married under Civil Law (i.e., in or out of community of property). The Administration of Estates Act 1979 in Botswana allows men to exclude their wives from the will if the marriage is out

of community of property. In Zimbabwe, the key statute dealing with inheritance is the Administration of Estates Act (as amended by Act No. 6 of 1997). The customary law heir, usually a male, now only receives traditional heirlooms (the name and traditional knobkerrie) and ownership of the matrimonial home devolves to the surviving spouse. The rest of the estate is shared in equal portions between the surviving spouse and the children of the deceased. The Deceased Persons Family Maintenance Act is also relevant. Somewhat superseded by the Administration of Estates Amendment Act, it gives usufruct rights to the widow and children.

In Malawi the distribution of the estate depends on whether the marriage was patrilineal or matrilineal. In patrilineal marriages, half the share goes to the widow, children and dependants and the other half to customary heirs; if it was matrilineal, the wife, children and dependants get two-fifths and the customary heirs three-fifths.<sup>59</sup> 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.<sup>60</sup> 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

<sup>57</sup> 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).

<sup>58</sup> 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](http://www.oxfam.org.uk)

<sup>59</sup> 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

<sup>60</sup> Section 10 of the Zambian Intestate Succession Act, Chapter 59 of the laws.



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 problem in the region.<sup>61</sup> 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).<sup>62</sup>

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

*Table 9.2 HIV/AIDS infection rates in Southern Africa*

| Country      | % of adult population infected with HIV/AIDS <sup>5</sup> |
|--------------|-----------------------------------------------------------|
| 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                                                      |

<sup>61</sup> 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".

<sup>62</sup> 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*.

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 to<sup>63</sup>.

### 9.4 Affirmative action policies

The Southern African countries signed the Blantyre Declaration<sup>64</sup> 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;<sup>65</sup> 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.

<sup>63</sup> For instance in Zambia.

<sup>64</sup> SADC declaration on Gender and Development 1997.

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

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 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,<sup>66</sup> yet the compliance period has come to an end (1987-2005).

### 9.5 Best legislation, policies and practices on gender issues

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

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

slums are a good practice. Special attention, however, needs to be paid to women so that they can benefit from these schemes. The urban upgrading scheme of Lesotho is a good example, where female-headed households benefited; and

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

## 10 Racial and ethnic equality

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

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

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

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

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 Development<sup>67</sup> (AMCHUD) is setting up a secretariat that should provide continental leadership in the development of innovative urban land management practices.
- (3) **Clarify the legal basis for tenure where the formal, informal and customary tenure systems overlap.** While there can never be a quick fix to the problem of overlapping tenure systems, there is a great deal to be done by both national and local governments to clear

up the existing confusion. This needs the development of effective conflict-resolution mechanisms as well as the provision of alternative land for persons who may have to move as a result of conflicting rights to the same land. It will be very useful to model efforts in this regard on the Namibian and Zambian good practices relating to the creation of local level registries and flexible new tenure forms for residents of informal settlements.

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

<sup>67</sup> For more on the AMCHUD's Durban Declaration and the Enhanced Framework for Implementation see the UN-Habitat's website [www.unhabitat.org/amchud](http://www.unhabitat.org/amchud).

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. Specific efforts, perhaps through the organs of AM-

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

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



# Land law and Reforms in Mozambique

## 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 1.0 Map of Mozambique



## Background

### 1.1 Historical background

Portugal began colonising Mozambique in 1505. As Portugal extended its grip over the territory, European settlers were subject to a set of formal written laws. Much of this was taken directly from Portuguese law. The indigenous population, however, was exempted from these laws. Instead they were governed by a series of customary laws under the jurisdiction of *regulos* or local chiefs, co-opted or replaced from the pre-existing system of local rule.<sup>68</sup> These chiefs were generally elderly men who had a privileged role in interpreting local custom to the colonial authorities. This meant there was a strong patriarchal bias. Another privileged partner of the colonial power was the Roman Catholic Church, the influence of which contributed to a strong male bias in the formal civil code, parts of which are still in force today.

The settler population was concentrated in the towns and cities, and only in the 1950s were efforts made to penetrate rural areas more deeply. This was done through the provision of infrastructure and the subdivision of some of the most fertile land. For the African population, colonial tax and forced labour meant that many men were forced to work on plantations in the north and centre of the country, and the ports and factories of Lourenço Marques (now Maputo). Mozambique also provided large quantities of migrant labour to the mines of South Africa. Women generally remained in the rural areas as peasant farmers.

Except for a small assimilated class, the African population had very limited legal rights to acquire land. With the migration of Africans to the cities in search of jobs, densely occupied shacks were formed immediately outside the formally planned European cities, with little or no provision for services. At the urban periphery, land was allocated by local chiefs, who were allowed to retain this right under colonial

law. Land allocated by chiefs, however, did not confer rights. As a result, Africans could be evicted at any time. The colonial authorities were generally tolerant of these settlements, however, and settlements on peri-urban land and suburban *bairros*<sup>69</sup> expanded and became denser over time. Not until the late 1960s did the colonial authorities start to provide land and infrastructure for the indigenous population.

In 1964 the Liberation Front of Mozambique (FRELIMO), launched the struggle for liberation against colonial rule, which culminated in Mozambique's independence in 1975. Most Portuguese settlers left the country, and this left a severe shortage of experienced professional and skilled workers, because the colonial rulers had severely restricted educational opportunities for the African population.

After independence, FRELIMO embarked on a highly centralised, proto-socialist development programme. This included the nationalisation of all land, the introduction of state farming and the socialisation of rural areas. In theory, this was intended to increase agricultural production and permit rapid industrialisation. The peasant sector was largely ignored and there was no major redistribution of land to family farmers. In the cities, rented and abandoned housing was nationalised, but very limited resources were available for improving peri-urban housing conditions or to provide serviced land. A programme of promoting women's emancipation to bring them into social production and participation in public life was also initiated.

By the mid-1980s, it was clear that the government's agricultural policies were not working and were contributing to an economic crisis. This was also fuelled by de facto sanctions imposed by the government of apartheid South Africa. Development was also hampered by war in the countryside with the Mozambican National Resistance (RENAMO) as well as successive droughts and floods. The government opted to change its policies, reducing state control and accepting Structural Adjustment Programmes under the World Bank and the International Monetary Fund (IMF). In 1990, a

<sup>68</sup> Waterhouse, R. and Vijthuisen, C. (eds) (2001). *Strategic Women, Gainful Men: Gender, land and natural resource tenure in different rural contexts in Mozambique*. Land Studies Unit, Faculty of Agronomy and Forestry Engineering, Eduardo Mondlane University and Action Aid Mozambique, Maputo, p.16.

<sup>69</sup> *Bairro* literally means neighbourhood, but is also a local and administrative unit in both rural and urban areas.

new Constitution was approved, providing for a multiparty democracy and paving the way for the peace accord with RENAMO, which brought the war to an end in 1992. The new Constitution is progressive in that it provides rights to land for all Mozambicans, and equal rights for women.

Since the early 1990s the government's emphasis has been on developing a market economy. Macroeconomic indicators are showing rapid growth, averaging 8.1 percent gross domestic product growth per annum since 1993. This is largely a result of foreign investment.<sup>70</sup> The socioeconomic impact, however, has been variable. Many formal sector jobs have been lost and few new ones have been created. In the urban areas in particular, there has been a rapid informalisation of the economy. Only a minority are benefiting from this economic growth, and there is a growing gap between the rich and poor. Wealth is increasingly concentrated in Maputo and neighbouring areas in the extreme south of the country, favourably located on the transport corridor from South Africa to the coast.

The Land Law of 1997<sup>71</sup> was drafted through a remarkably open participatory process. It provides land rights to communities to enable them to negotiate with investors. In urban areas however, land provision to low-income groups has become more complicated by the introduction of the Land Law and the simultaneous decentralisation of local government through the creation of 33 municipalities.<sup>72</sup> While long-term occupants have new legal rights, there is no consensus among different state bodies as to how these rights should be applied. Further, the new municipalities have very few resources or technical capacity. Some have

<sup>70</sup> World Bank. *Mozambique Country Brief*.

<http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/AFRICAEXT/MOZAMBIQUEEXTN/0,,menuPK:382142~pagePK:141132~piPK:141107~theSitePK:382131,00.html>

<sup>71</sup> Law 19/97 of 1 October. The numbering system of laws and decrees in Mozambique is: Law or

Decree Number/Year of Promulgation.

<sup>72</sup> Jenkins, P. (2001). *Emerging urban residential land markets in post-socialist Mozambique: The*

*impact on the poor and alternatives to improve land access and urban development*. Research Paper No. 75, Centre for Environment and Human Settlements, School of Planning and Housing, Edinburgh College of Art – Heriot-Watt University, p. 8.

focused mainly on serving the rich as a means of obtaining greater revenue.

## 1.2 Legal system and governance structure

The Constitution provides for the separation of powers of the three autonomous bodies of state: the legislature, the executive and the judiciary.

### *The legislature*

The legislature consists of the Assembly of the Republic consisting of 250 elected representatives.<sup>73</sup> Of the members of the current Assembly, 78 are women (31.2 percent).

For a bill to become law, approval has to be obtained from the Assembly and then the president, following which it can be published in the gazette.<sup>74</sup> The president may send a law back to the Assembly for revision if it is found to contain any legal deficiencies or contradictions.

Decrees are legislation subordinate to laws. The Council of Ministers, rather than the Assembly, approves decrees. The president also finally approves them.<sup>75</sup> The Council of Ministers also approves national policies, such as the land policy.

The civil code is currently under review although this process will take many years to complete. To preclude conflict between laws passed before and after independence, the pre-independence civil code and other colonial laws in conflict with the Constitution are automatically revoked.<sup>76</sup> Laws that are not contrary to the Constitution remain in force until modified or revoked.<sup>77</sup> Nevertheless, in this transitional phase, it has been observed that the law in Mozambique presents "a clear collision between two historically different legal systems: one, the retrograde law of a backward colonial

<sup>73</sup> Art. 141.

<sup>74</sup> *Boletim da República*.

<sup>75</sup> Arts. 137 and 157.

<sup>76</sup> Art. 162.

<sup>77</sup> Art. 209, formerly 203.

power, the other inspired in the egalitarian ideas of the legal system of the ex-socialist countries and the most advanced democracies." <sup>78</sup>

### *The executive*

The Constitution provides that the executive consists of ministers appointed by the president. <sup>79</sup> While individual ministers predominantly exercise administrative functions within their ministries, the political function is exercised by them jointly as the Council of Ministers. The Council of Ministers is presided over by the prime minister (currently a woman) and the minister of finance. In August 2004, the government consisted of 23 ministers, 3 of whom were women, and 18 vice-ministers, 5 of whom were women. <sup>80</sup>

### *The judiciary*

The judiciary comprises the courts of law. <sup>81</sup> These are sovereign bodies <sup>82</sup> presided over by judges. The Constitution defines the types and functions of various courts. These are the Supreme Court and other judicial courts (consisting of District and Provincial Courts), the Administrative Court (concerned with the legality of decisions by public bodies), and specific courts for the military, customs and excise, fiscal, maritime and labour issues.

Land and housing questions are generally dealt with by the judicial (civil) courts. In rural areas, minor disputes concerning land may be considered by community courts. <sup>83</sup>

Appeals are made from District Courts to Provincial Courts and finally to the Supreme Court. The creation of more

sections of the Supreme Court is under consideration to accelerate the hearing of the large number of outstanding appeals.

### *Governance structure*

General elections have been held every five years since 1994. The country is divided into 10 provinces, including the City of Maputo, and 128 districts. After independence governance was highly centralised because of the socialist system and the acute lack of qualified personnel to run government services at local level. A programme of gradual decentralisation has been initiated in recent years, under which 33 municipalities were established in 23 cities and 10 towns, and local elections for municipal presidents and assemblies were held in 1997 and 2003. Municipalities are responsible for a limited range of public services, including solid waste management, sanitation and drainage and, in some cases, land administration. However, they have little financial or technical capacity. As their financial and human resources increase, and through greater revenue collection, it is intended that they will gradually take over more functions from the state.

Outside the municipalities central government functions are being decentralised to non-elected local bodies. <sup>84</sup> The provincial governments carry out government policies and programmes at provincial level. Provincial governors and provincial directors, both appointed by central government, head them. Provincial governors appoint district administrators. District governments that they head are gradually being given greater financial and administrative autonomy. District governments, however, have very limited technical capacity and not all sectors are represented at district level. Districts are subdivided into government-headed administrative posts and then finally into localities, which as yet have no government presence. The percentage of women in senior positions in the district and provincial governments is very low, and

<sup>78</sup> WLSA Mozambique. (1997). *Families in a Changing Environment in Mozambique*. p.150.

<sup>79</sup> Art. 149.

<sup>80</sup> Republic of Mozambique. (2004). *National Gender Policy Draft*. p.12.

<sup>81</sup> Art. 167.

<sup>82</sup> Art. 109 of the Constitution.

<sup>83</sup> Community Courts were created by Law 4/92 of 6 May, to attend to minor conflicts of a civil nature and issues arising from family relations and marriages constituted according to customary practices. They may also consider minor misdemeanours, applying principles of customary law. They operate in the headquarters of the administrative posts and localities, in the urban *bairros*, and in villages, and are presided over by judges elected by and from the community. Criticisms have been made as to their impartiality, and the Law of Community Courts is currently being revised. In the meantime,

the government has proposed capacity-building activities for judges of the Community Courts in matters of human rights (planned for 2005-2006).

<sup>84</sup> Administrative and financial decentralisation is being promoted mainly through Mozambique's Poverty Reduction Strategy Process and the complementary public sector reform strategy.

only 13 percent of district administrators and 3 percent of heads of administrative posts are women.<sup>85</sup>

Localities have a duty to work together with community authorities consisting of traditional leaders, *bairro* secretaries<sup>86</sup> and other community leaders.<sup>87</sup> The function of community authorities is to mobilise the community and channel their views. They also collect local taxes for government. Recognition of community authorities, particularly chiefs, was a reaction to political pressure to recognise the powers they lost after independence.

### 1.3 Socioeconomic context

#### *Poverty*

The population of Mozambique was estimated as approximately 18 million in 2002<sup>88</sup>, with about 52 percent women and 48 percent men. Forty two percent of the population is under 15 years of age, and only 3.6 percent is 65 or over.<sup>89</sup>

Mozambique is considered one of the world's poorest and least developed countries although recent surveys indicate a gradual improvement. In 1998, with an HDI of only 0.28, it was ranked 166 out of 174 countries, according to UN estimates. In 2001 the HDI was 0.378, showing a significant increase, albeit from a very low base. This improvement reflects, in part, a reduction in the adult illiteracy rate from 60.5 percent in 1997 (74.1 percent for women) to 56.7 percent in 2001 (71.2 percent for women).

Overall, 30 percent of households are headed by women, with little difference in this respect between urban and rural households. The first national household survey in 1996-1997 indicated a 69 percent incidence of poverty. The survey in 2002-2003 found a substantial decline in the overall level

of poverty to 54 percent.<sup>90</sup> This decline has been greater in rural than urban areas, although rural poverty levels remain higher. It is estimated that the richest 20 percent of the population share 46.5 percent of the national income, while the poorest 20 percent share only 6.5 percent.<sup>91</sup>

#### *HIV/AIDS*

It is estimated that in 2001, 13 percent of adults between the ages of 15 and 49 were infected with HIV, with a higher rate among women (14.2 percent) than men (11.8 percent).<sup>92</sup> Additionally, there were 420,000 AIDS orphans.<sup>93</sup>

#### *Urbanisation*

In 2002, 34.3 percent of the population lived in urban areas. The urbanisation rate from 1990-2002 was 6.6 percent per year, the highest in southern Africa.<sup>94</sup> This can be partly attributed to movement of the population from the rural areas after the war. It is possible that a reduction in this rate will occur in future.

### 1.4 Civil society

Organised civil society was suppressed both by the Portuguese and during the early years of independence. The past 10 years, however, have seen a rapid growth in national NGOs and civil society organisations, with assistance from donors.

During the formulation of the 1997 Land Law and its Regulations, many NGOs came together for discussion and lobbying, and achieved considerable influence. Once the Land Law Regulations were adopted, the NGOs again joined forces in a Land Campaign to publicise the law, mainly among rural communities. NGOs such as ORAM and the

85 Op. cit., 85.

86 Identified with the ruling party.

87 As defined in Decree 15/2000.

88 Instituto Nacional de Estatística (INE). (1997). *General Population Census*. www.ine.gov.mz

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

90 National Directorate of Planning and Budget et al, *Poverty and Well-Being in Mozambique: the Second National Assessment*, 2004.

91 African Development Indicators, supra no 94.

92 Instituto Nacional de Estatística (INE). (2002). *Impacto Demográfico do HIV/SIDA em Moçambique*.

93 Op. cit., 94.

94 Ibid.

National Peasants Union (UNAC) specifically give advice on land questions.

The Land Campaign has since become the Land Forum (Forum Terra), and other civil society forums have been created around specific issues, such as gender (Forum Mulher), as well as for more general purposes (LINK and Teia). Civil society forums and individual organisations are increasingly involved in the formulation of national laws, such as the new Family Law and Land Use Planning Law, as well monitoring government programmes like poverty reduction.

Despite this, civil society remains weak, particularly in urban and peri-urban areas. Churches and other religious groups increasingly fill this gap at the neighbourhood level.

Legal assistance for issues of land and housing is provided free of charge by several organisations, including the Mozambican Association of Women Lawyers (AMMCJ), and the Mozambican Human Rights League (LDH). They have advice centres in Maputo, most provincial capitals and some rural areas. There are very few CBOs and NGOs concerned specifically with urban land and housing issues, though some NGOs were involved in rebuilding the southern towns and cities after the floods in 2000.

## 2 Land Tenure

### 2.1 Relevant constitutional provisions

The Constitution provides that land is the property of the state. It may not be sold or otherwise pass into other ownership, nor be mortgaged nor pledged. The use and benefit from land for creation of wealth and social well being is the right of all the Mozambicans<sup>95</sup>. Rights to use and benefit from land may be granted by the state to individuals and other bodies, with priority given to direct users and producers. Land should not be used to the detriment of the majority of citizens.<sup>96</sup> Importantly, the state recognises and protects

the rights to land acquired through inheritance or occupation, except in legally defined reserves or areas where land has been legally transferred to another person or body.<sup>97</sup>

All citizens have equal rights and duties under the law.<sup>98</sup> This means women have equal rights with men in terms of access to land and housing.

The state guarantees the right to property and the right to compensation in case of expropriation, which can only take place in the public interest, as defined by law.<sup>99</sup>

### 2.2 Land policy

The National Land Policy<sup>100</sup> was made to reflect Mozambique's entry into the market economy, with the objective of promoting post-war reconstruction. Key principles of the policy are "to ensure the rights of the Mozambican people over the land and other natural resources, and to promote investment in sustainable and equitable use of these resources."<sup>101</sup>

Under agricultural land, one of the principal directives of the policy is that customary land rights should be recognised. This represents a major change from the Land Law of 1979, under which, in order to obtain a user right, it was necessary first to obtain a formal concession or title. This is difficult for the majority of the rural population, given the high illiteracy rate and the poor capacity of the institutions responsible for land administration.<sup>102</sup>

<sup>95</sup> Art. 46.

<sup>96</sup> Art. 47.

<sup>97</sup> Art. 48.

<sup>98</sup> Art. 66.

<sup>99</sup> Art. 86.

<sup>100</sup> Council of Ministers Resolution No. 10/95 of 17 October.

<sup>101</sup> Ibid, Clause 18.

<sup>102</sup> Law 6/79, of 3 July.

In addition, the policy provides the following:

- The state should provide land for every family to have or build their own house;
- The state is responsible for land use and physical planning, although plans may be made by private sector;
- Urban land cannot be transferred when it contains no buildings or other infrastructure investments. This retains a similar provision under the 1979 Land Law;
- Urban land gains value from the public infrastructures provided, and this value should serve as a source of income for both the state and private agents; and
- Urban expansion, and the consequent occupation of land previously under other uses, should take into account the people who are living on the land and the investments already made by them, unless they were in conflict with a previously existing land use plan.<sup>103</sup>

The Land Policy proposes a revision of the Land Law of 1979 and the Land Law Regulations of 1986.<sup>104</sup> The changes proposed include:

- Recognition of customary rights and land management systems;
- Provision of a system for the transfer of rights to use and benefit from land;
- Only one title should exist for a given land parcel, whatever the legal basis of the rights acquired;
- Introduction of a system of taxation, for both agricultural and housing use; and
- Simplification of administrative procedures.

The policy also includes directives for institutional development, including the establishment of a single national land cadastre, covering the whole country; training officials of the district and community conflict resolution; and the establishment of an inter-ministerial land commission and technical secretariat.

### *Gender policy*

A National Gender Policy (and implementation strategy) is being formulated by the Ministry for Women and Social

Welfare, through a consultative process. This will be submitted to the Council of Ministers for approval.

There are no direct references to land in the policy. Instead, the overall stated objective is “to promote a gradual change of mentality, among both men and women, awakening and creating the necessary awareness among both, in relation to the existing situation of inequality of treatment in social, economic, political and cultural issues”. Objectives include:

- Promoting gender equity;
- Defining gender-based principles for orientation of national development;
- Establishing and strengthening links between the government, civil society and the private sector;
- Securing observance of, and respect for, issues of gender;
- Establishing monitoring mechanisms; and
- Preventing and combating gender-based violence.<sup>105</sup>

The draft outlines strategies for implementation, including specific actions in politics, the economy, the law and the sociocultural field. Under law its strategy is “to guarantee the equality of rights between men and women, and the defence of human rights”.<sup>106</sup>

## 2.3 National laws related to land and property rights

The National Land Policy was partly implemented through the Land Law of 1997<sup>107</sup> and its Regulations of 1998,<sup>108</sup> applicable in rural areas.

### *The 1997 Land Law*

This law was formulated through an open and highly participatory process of discussion and consensus building, includ-

<sup>103</sup> Council of Ministers Resolution No. 10/95 of 17 October, Clause 33.

<sup>104</sup> Decree 16/87 of 15 July.

<sup>105</sup> Op. cit., 85.

<sup>106</sup> Ibid p. 17.

<sup>107</sup> Law 19/97 of October 1.

<sup>108</sup> Decree 66/98 of December 8.

ing a national conference to debate the final draft.<sup>109</sup> Among the important features of the law:

- There was a shift towards a rights-based approach reflected in the policy;
- Community use of land and natural resources was recognised, together with the legitimacy and utility of customary land management systems;
- It provides a strong degree of security of tenure for existing land occupiers and users, whether rich or poor, in rural or urban areas;
- It reiterates that all land is the property of the state, and cannot be sold or mortgaged; and
- It provides that rights to use and benefit from land can be acquired by both men and women – regardless of their marital status – individuals and groups, including local communities.

Land rights can be acquired in the form of individual title, or joint title, which is automatic for couples married under the community property regime and optional for other groups.

There are three ways of acquiring the right to use and benefit from land – known as DUAT<sup>110</sup> – according to the law:<sup>111</sup>

- Occupation by both individuals (men and women) and local communities in accordance with customary norms provided that these do not contradict the Constitution;
- Occupation by individual nationals in good faith, provided that they have used the land for at least 10 years. This right is only available to individuals;<sup>112</sup> and
- Formal authorisation of an application submitted by individuals or groups/organisations.

A high degree of tenure security is provided. A title is not necessary to prove a right to land under the first two DUAT methods listed above.<sup>113</sup> For rights acquired through means

of the third mechanism, the titles are subject to registration by the titleholder in the registry.<sup>114</sup> Additionally, procedures of proving land rights were eased. Land rights can now be proved by the presentation of a title, witnesses from the local community or expert opinion.<sup>115</sup> In practice, oral evidence is being accepted as proof, in the light of the high levels of illiteracy in rural areas.

Formal land use rights for rural communities, family businesses and single households are granted for an indefinite period.<sup>116</sup> For economic activities, land rights are subject to a limited term of up to 50 years, renewable for an equal period through submission of a further application. This type of user rights may be removed if the land is not used or occupied in accordance with the plan of use submitted with the application.<sup>117</sup> An application to use land is first given as a provisional authorisation of five years for Mozambican nationals and two years for foreigners. During this time, the land must be developed for its intended purpose. Only after this is the definitive authorisation granted, and a land title issued.<sup>118</sup>

Women and men are recognised as having equal status before the law. In this regard they both may inherit land.<sup>119</sup> Inheritance of land rights was also made possible. Additionally, titleholders may now transmit infrastructure, buildings and other improvements on land to other parties, and raise mortgages on infrastructures and buildings that they have legally constructed or acquired.<sup>120</sup>

### *The Land Law Regulations*<sup>121</sup>

Prepared by the Land Commission, these regulate the procedures to obtain land. They are applicable to rural land and

109 See Tanner, C. (2002). Law making in an African context: the 1997 Mozambican Land Law.

<http://www.fao.org/Legal/pub-e.htm>

110 *Direito de uso e aproveitamento da terra*.

111 Art. 12.

112 This is sometimes commonly referred to as *usucapião* although there are doubts on the

appropriateness of this terminology.

113 Art. 14.

114 Art. 20 of the Land Law Regulations, as amended by Decree 01/2003 of 18 February.

115 Art. 15.

116 Art. 17.

117 Art. 18.

118 Articles 25 and 26.

119 Art. 16/1).

120 Art. 16.

121 Decree 66/98 of 8 December.



areas within municipalities but outside their cadastral services.<sup>122</sup> The regulations also apply to unplanned peri-urban areas.<sup>123</sup> Although it has been argued that these regulations were intended to apply to urban areas, in practice this rarely happens.<sup>124</sup>

Important features of the regulations include:

- Where there is joint title, the title belongs to all the titleholders equally.<sup>125</sup> When one of the titleholders dies, the others continue as the rightful titleholders;
- Consultations between the applicants for land and the local community are mandatory before a decision to grant is made by the provincial governor or higher authority;<sup>126</sup>
- Good faith occupiers and local communities may apply for demarcation and title. The application procedure is simplified and a single definitive authorisation is given instead of provisional authorisation;<sup>127</sup> and
- Titleholders are required to pay a tax for authorisation of the right to use land, plus an annual tax. Family businesses and local communities are exempt from such taxes.<sup>128</sup>

Though rights are defined in gender-neutral language, neither the Land Law nor the regulations contain any specific protective measures for women and other vulnerable groups. Issues of rights to transfer land rights and other marital property are instead dealt with under Family Law. Another issue that is not covered in the regulations is the basis for compensation in cases of expropriation.

<sup>122</sup> Art. 2.

<sup>123</sup> Mugumela, O. Interview with the author.

<sup>124</sup> Dr Conceição Quadros, of the Technical Secretariat of the Land Commission. It was for this reason that the references to "rural community" in the draft law were changed to "local community".

<sup>125</sup> Art. 12.

<sup>126</sup> Art. 27.

<sup>127</sup> Art. 34 and 35.

<sup>128</sup> Art. 29.

### *Annex on procedures for delimiting community land*<sup>129</sup>

This separate technical annex formed by the Ministry of Agriculture came into effect in March 2000. It sets out the process of participatory rural appraisal, which is used to prove and delimit land rights.

### *Decree 15/2000 of June 20*

This law legitimises community leaders, both traditional chiefs or *regulos*, and local political secretaries. It gives them powers under Art. 24 of the Land Law to participate in conflict resolution, represent community opinions on applications for land, and identify and delimit community land.

### *Proposed urban land regulations*

For urban land covered by a land cadastre or urbanisation plans<sup>130</sup> there are no relevant national regulations. This includes extensive areas of informal occupation, since many urbanisation plans approved during the colonial period have never been implemented. Urban land regulations have been in preparation since 1998. This was initially under the leadership of the Land Commission. From 2000 onwards, however, responsibility for the urban regulations passed to the Ministry of Public Works and Housing (MOPH). The latter has been criticised for failing to involve relevant stakeholders, including other government bodies and municipalities, in the process.

In late 2004 the draft regulations were submitted to the Council of Ministers for discussion and approval. It has been suggested that the haste and lack of consultation was caused by pressure from the World Bank, which considers that there is insufficient security of land for large investors. Illustratively, the draft regulations supposedly recognise the value of urban

<sup>129</sup> Unlike in some other southern African countries, the Land Law does not define specific categories of land, such as public land, or communal land. Land used by local communities may be delimited and

title issued and registered, as for any other land.

<sup>130</sup> Urbanisation plans (*planos de urbanização*) are defined in Article 1 of the Land Law as "documents

which establish the how areas within the urban boundary should be organised, their design and form,

parameters for occupation, building use, assets to be protected, location of social facilities, open spaces

and the schematic layout of the road network and main infrastructure."

land.<sup>131</sup> This has the potential, if not well regulated, of pushing low-income households to less valuable land on the urban periphery.

The proposed regulations provide for land use plans. These plans will incorporate existing occupation. Occupiers in good faith will be eligible to apply for title. If their occupation cannot be satisfactorily integrated in the plan, they are eligible to priority in the allocation of new plots and compensation for buildings and improvements on their land. Public consultation is limited to community representatives being able to voice their opinions at the survey stage, though not, it seems, on the planning proposals.

### *Policy and law for land use planning 132*

Consultants to the Ministry of Environment (MICOA), funded partly by UN-HABITAT, have prepared Mozambique's policy for land use and planning. This was through a participatory process at provincial, regional and national levels. In August 2005 the draft policy was being discussed with other ministries prior to submission to the Council of Ministers for approval.

Among other elements, the draft:<sup>133</sup>

- Recognises existing occupiers and communities of land as the most important element in any intervention of ordering or planning of land use and natural or built resources;
- Promotes the concept of territorial planning as a means of achieving sustainable use of natural resources; and
- Defines the type of plans, the responsible bodies and means for approval, alteration, revision and suspension. It also establishes a public right to information, participation and objection.

A land use planning law flowing from this policy is urgently needed. Until now, many land use plans have been prepared but ignored in decisions on location of investments and land concessions, as their legal status has been doubtful.

Although preparation of urban land regulations and the planning policy law has been carried out simultaneously, there has been little coordination within the government of the processes. The different timetables for their approval may also prevent a coherent, informed and wide-ranging debate.

### *Municipal laws 134*

Under various municipal laws, municipalities are empowered to exercise powers given to them under the Land Law and Regulations. They may also prepare and approve general and detailed land use plans, urban development programmes, and land development schemes, in collaboration with relevant central government bodies. Municipalities may also collect taxes on urban land and buildings, including unused land that has been provisionally allocated.

### *The Land Registry Law 135*

This pre-independence law is the only procedural framework for the registration of land. It often contradicts the Constitution. For example, it provides for mortgaging land that is not yet developed, even though this is strictly illegal under the Constitution. It creates a land register<sup>136</sup> to record land titles and transactions. There has been no legislation to bring this law in line with the current Constitution.

## 2.4 Customary law

Before the 1997 Land Law, 90 percent of land was under customary land practices.<sup>137</sup> In recognition of this, the 1997 Land Law took on many aspects of customary law, in particular in its provisions for community land rights.

Mozambique has both matrilineal and patrilineal societies roughly to the north and south of the Zambezi River. In a matrilineal kinship system, descent is established through the mother's line. Matrilineal societies can also be matrilocal, meaning a couple may live on the wife's family land. In

<sup>131</sup> According to a senior MOPH official.

<sup>132</sup> *Ordenamento do território*.

<sup>133</sup> MICOA, *Anteprojecto de Lei de Ordenamento do Território*, 15 Feb 2004.

<sup>134</sup> See also Municipalities.

<sup>135</sup> *Decreto-Lei no. 47 611 of 28 March 1967 (Código de Registo Predial)*.

<sup>136</sup> *Registo Predial*.

<sup>137</sup> Op. cit., 114.

such areas, principally in non-Islamic societies,<sup>138</sup> a man traditionally goes to live on the land of his wife's family, and the couple will generally ask the wife's eldest brother for land. In patrilineal societies and patrilocal societies, which are in the majority, the man takes his wife or wives to live with him on his family's land. Dowry<sup>139</sup> is often paid to compensate the wife's family. Within a family, the oldest man allocates land to his sons and when he dies, the land remains in his family. An elderly widow, who is not expected to marry again, will be allowed to remain in her husband's house, but widows considered eligible for remarriage will be expected to return to their parental homes. The same holds in case of separation or divorce. In these areas, the children "belong" to the father. Neither of these practices exists in pure form but are instead negotiated, depending on family circumstances such as class and wealth.<sup>140</sup>

Traditionally, older family members have the greatest say in allocating land to outsiders. Large land allocations, however, are preceded by family and community consultations, a positive aspect that has been incorporated in the Land Law. In the precolonial period, the clan or tribal chief carried out land allocation. Traditional practices were, however, destroyed first by the colonial regime, which instituted the system of *régulos*, who gained the status of traditional leaders, and then by the revolution at independence.

Under customary law, married women gain access to land through their husbands (in patrilineal societies) or parents' families (in matrilocal societies). The position of unmarried women is less clear. One interpretation is that women without a husband are landless, and it is hard to find women with their own land in patrilineal areas. But another view is that women, especially elderly widows, do control land but they do not publicly identify it as theirs, saying that it belongs to their sons.<sup>141</sup>

138 Those in the areas of Nampula and Niassa provinces and parts of Cabo Delgado and Zambezia.

139 Commonly known as *lobola*.

140 Braga, C. (2001). They're Squeezing Us! in Op. cit., 73.

141 Nhampossa, D. of the peasants' union, UNAC. Interview with the author.

There has been little research into whether discriminatory practices under customary law have any impact on urban-rural migration by women, or on how far customary practices survive among urban families.<sup>142</sup> In interviews it was constantly stressed that, although urban women have greater access to education and are more aware of their rights, customary practices continue to dominate matters such as marriage and inheritance in urban areas, except among a small elite.

## 2.5 Tenure types

The Land Law of 1997 defines three main categories of tenure: customary tenure, occupation in good faith and formal use rights. Strictly speaking, these are rights to use and benefit from land rather than ownership, since all land is held by the state.

Studies in Maputo have found, however, that informal mechanisms are by far the most important means of access to land for housing (even for formally planned and demarcated plots).<sup>143</sup> These mechanisms include allocation at local levels of the city administration, inheritance and ceding within families, swapping, direct occupation and private purchase.

## 2.6 Main institutions

### *The National Directorate of Geography and Cadastre (DINAGECA)*

This falls under the Ministry of Agriculture and Rural Development. It is the main body responsible for land administration and manages the national land cadastre. It has under it the Provincial Services of Geography and Cadastre

142 Although not the main focus of the research, some light is shed by the WLSA Mozambique research

publication "Families in a Changing Environment" (1997), which looks at family survival strategies in

rural and urban areas, in the face of changes induced by structural adjustment policies and the war

which ended in 1992. This concludes that, although women in urban areas take on new roles, "it is

questionable whether the woman's accumulation of functions is any more than an addition to her tasks

without altering the social role(s) destined for her." (p.19)

143 Op. cit., 77 & infra 226.

(SPGC)<sup>144</sup>, which is responsible for receiving and processing applications to use land and for organising the provincial sections of the national land cadastre.

The government intends to digitise all land records and establish a government-wide database on land. Eventually, this will be expanded beyond the Ministry of Agriculture to other central and local government agencies that produce and use land information and provide services to the public and businesses.

#### *The Ministry of Public Works and Housing (MOPH)*

The MOPH is drafting the Regulations for Urban Land and National Housing Policy.

#### *The Ministry of the Environment (MICOA)*

Through its National Directorate of Territorial Planning it promotes physical planning throughout the country. It has recently prepared a national policy and a draft national land use policy and law, which is awaiting approval by the Council of Ministers.

#### *The Ministry of State Administration (MAE)*

It is responsible for the process of decentralisation and the establishment of municipalities, including supervising the municipalities and providing them with support and guidance. The ministry is currently involved in drafting bylaws and regulations for municipalities.

#### *Municipalities*

Under the Municipal Framework Law, municipalities are given the responsibility for urbanisation, housing and licensing construction, in accordance with their capacity, and in conjunction with other state bodies.<sup>145</sup> Municipalities are also given the competence to exercise powers given to them under the Land Law and Regulations. The Municipal Finance Law gives municipalities the power to prepare and approve general and detailed land use plans, urban development programmes, and land development schemes, in collaboration with relevant

central government bodies.<sup>146</sup> Enforcement of such plans is subject to ratification by the government. Municipalities may also collect taxes on urban land and buildings, including unused land that has been provisionally attributed.<sup>147</sup>

Municipalities that possess their own cadastral services may authorise applications for the use of land in areas covered by urbanisation plans.<sup>148</sup> The cities with their own cadastral services are currently limited to Quelimane, Nacala, Vilankulo and Maputo. In these municipalities, with the exception of Maputo, the SPGC deals with applications in areas outside the very limited planned areas. All municipalities that have not yet formally established municipal cadastral services should in theory work together with the SPGC with regard to land administration and allocation.<sup>149</sup> In practice, some municipalities work closely with the SPGC, but many do not, especially the larger ones, as they consider that the SPGC is usurping their powers.

#### *The Conservatory of Real Property Register<sup>150</sup>*

This is a registry under the Ministry of Justice responsible for registering land and building titles. The register is held in each provincial capital and still operates under colonial law, based on private ownership.<sup>151</sup> The Conservatory has no coordination with DINAGECA, which holds the cadastral register. In registering land titles, it requests information from DINAGECA on a case-by-case basis.

#### *The Public Notaries*

These are civil servants of the Ministry of Justice responsible for authenticating all legal documents. They are also involved in sales of property, divorce, execution of wills and other inheritance procedures.

<sup>144</sup> *Serviços Provinciais de Geografia e Cadastro*.

<sup>145</sup> Law 2/97 of 18 February (Municipal Framework Law), Art. 6.

<sup>146</sup> Law 11/97 of 31 May, Articles 24 and 27.

<sup>147</sup> The Urban Building Tax (Imposto Predial Autárquico), Law 11/97, Articles 54-61.

<sup>148</sup> Art. 23 of Law 19/97.

<sup>149</sup> Including important cities such as Beira and Nampula.

<sup>150</sup> *Conservatório do Registo Prédial*.

<sup>151</sup> *Decreto-Lei no. 47 611 of 28 March 1967 (Código de Registo Predial)*.

### 3 Housing

#### 3.1 Relevant constitutional provisions

The Constitution makes no reference to rights to adequate housing or to protection from forced evictions. Nor is there reference to basic services such as water supply and sanitation.

#### 3.2 Housing policy

There is no officially approved housing or urban policy. In 1990 the first national housing policy was approved by the Assembly of the Republic, but was never adopted. A new housing policy is now being prepared by the MOPH with assistance from UN-HABITAT. Unfortunately, little consultation by MOPH with other organisations has occurred. UN-HABITAT in Mozambique is increasingly urging a participatory process with a wide range of parties.

Policies regarding informal settlements are the responsibility of the Ministry of the Environment. It has recently drafted a policy for land use planning for consideration by the Council of Ministers. The draft policy recognises informal settlements and provides for their upgrade where possible. To date there has been little coordination of policies between the Ministry of the Environment and MOPH.

#### Other related policies

##### *Gender policy*

There are no direct references to housing in the gender policy.

##### *Water and sanitation policies*

The National Water Policy recognises that urban residents suffer from deficient water supply and sanitation services. It also provides that peri-urban residents without piped water supplies pay more for their water than more affluent residents with better supplies.<sup>152</sup>

<sup>152</sup> Republic of Mozambique. (undated). *National Water Policy*. National Water Directorate.

While the policy states that one of its prime objectives is the provision of basic water supply to low-income groups, and emphasises women's participation, it is heavily influenced by the structural adjustment and cost-recovery policies of the World Bank. The policy says that water should be viewed as having both social and economic value. The price of water should therefore reflect its economic value and be geared towards cost recovery.<sup>153</sup> The policy paved the way for the privatisation of the management and operation of water supply services, and concessions for water supplies in seven major urban centres.

##### *Electricity supply policies*

Electrification in urban and peri-urban areas is driven by demand, and the national electricity company extends supply on request, provided that the owner can pay for the costs. Pre-paid electricity supply schemes are being promoted in selected areas.

In general, people are not evicted for not paying utility bills. Instead, supply is discontinued. This has therefore not posed a threat to tenure security.

##### *Credit policies*

Several banks are active in providing credit for housing. Requirements for guarantees and very high interest rates – as high as 20-30 percent – have restricted access to the wealthy.

#### 3.3 Relevant housing legislation

There is little legislation related to housing. Laws mainly address the rental sector, specifically, property nationalised in 1979.<sup>154</sup> These laws were a response to divestiture to sitting tenants of high-rise flats owned by the government.<sup>155</sup> A Condominium Law was compiled from various colonial

[www.dna.mz](http://www.dna.mz)

<sup>153</sup> Ibid, section 2(c).

<sup>154</sup> Law 8/79 of 3 July and Ministerial Diploma 71/80 of June 30.

<sup>155</sup> Law 5/91 of 9 January and Decree 2/91 of January 16.

laws to promote the formation of condominiums to ensure management and maintenance of the buildings.<sup>156</sup>

### *Other related laws*

There are no laws relating to the right to basic services like water and sanitation.

## 3.4 Access to housing and tenure types

### *Access to housing*

Mozambican towns and cities display the physical patterns developed during the colonial period. During this period, permanent housing and infrastructure was largely denied to the Africans, who subsequently housed themselves in unplanned and un-serviced settlements on the outskirts of the colonial towns. Today, towns and cities typically include a central area (the “cement city”), formally laid out during the colonial period for the settler population and provided with some public services. Surrounding these are a mix of unplanned occupation and areas laid out since independence with plots for self-built housing.

Overall housing quality and access to public services is very poor. Roughly 75 percent of the urban population lives in unplanned areas.<sup>157</sup> According to the 1997 census approximately 62 percent of urban housing is built of mud block and vegetable matter and a further 3 percent of precarious materials such as cardboard and sacks; 79 percent of urban households lack electricity; 69 percent have piped water to their plot or house; 34 percent are without any form of household sanitation; and only 55 percent have a latrine of some sort.<sup>158</sup> Even formally planned central areas often lack main drainage and sewerage systems.

In rural areas, more than 95 percent of houses are made of local materials, less than 1 percent have piped water or

electricity, and more than 76 percent have no form of sanitation.<sup>159</sup>

While there is no absolute shortage of land in Mozambique, nor a body of landless peasants, there is a skewed distribution of rights and control over land and increasing competition for fertile land between family farming communities and foreign investors. Research shows that most rural households are headed by poor, single, divorced or widowed women.<sup>160</sup>

There is a very high rate of owner occupation at 83 percent, and only about 10 percent of housing is rented. In all cities there is a severe shortage of serviced land and credit for housing. The law provides a high degree of security of land tenure, even in the unplanned peri-urban areas.

There are no statistics on the demand for housing, although it is clear that access to housing is a major problem in urban areas. This especially true in Maputo and Matola, where there is a high demand for urban land. This is because private-sector housing development is aimed at the top end of market. Government housing initiatives have been limited to the FFH, which despite its mandate has targeted middle-income families in formal employment. NGO involvement is limited to re-housing victims of the 2000 flood. Further, there is no government policy or system that seeks to provide housing finance for the great majority of the population whose incomes are far too low to be considered for a bank loan.

As a result, many low- and middle-income families build their own housing. In the north and centre of the country in particular, houses are built with local materials and self-built housing is affordable. This is more difficult in the larger

<sup>156</sup> Decree 53/99 of September 9.

<sup>157</sup> According to a senior government planner.

<sup>158</sup> Op. cit, 93.

<sup>159</sup> Ibid.

<sup>160</sup> Waterhouse, R. & Vijffhuizen, C. (2003). Presentation to the FAO/OXFAM GB Workshop on

Women's Land Rights in Southern And Eastern Africa, Pretoria, June 2003.

urban centres where local materials and building land are in short supply.

### *Owner occupation*

Unlike land, housing may be privately owned. The majority of housing is owned by the people who live in it.

Ownership of a house that has complied with planning building regulations and other authorisations is in the form of a freehold right to the building, linked to the leasehold right to the land. This right must be registered in the property register. The registration procedure is still based on the colonial Land Registry Act. Ownership of informal housing<sup>161</sup> is normally demonstrated by a written declaration from the community authorities or the *bairro* secretary.

Although land markets are strictly illegal, housing markets are legal, and when houses are sold the rights to use of the plot on which they are built are automatically transferred with the house.

### *Rented housing*

Less than 10 percent of housing units in urban areas are rented.<sup>162</sup> In this regard there are three types of rental housing:

- Rented units emerging from the government's policy since 1991 of divestiture to existing tenants at concessionary prices and interest rates.<sup>163</sup> The majority of this stock has been sold and what remains consists mainly of apartments in very poorly maintained apartment blocks in the cities. About 8,000 households in Maputo are still living in nationalised property, which now consists mainly of the apartment blocks in worst condition. This housing is governed by the Regulations to the Rental Law;<sup>164</sup>

- Luxury properties, including some previously nationalised housing, rented to high-income tenants. Tenancy is normally regulated through a contract. There is no legislation providing security of tenure for tenants; and
- Private rental of low-income housing. The extent of this type of rental is not known, although it does not appear to be significant. Importantly, there is no information on the state of renting of rooms or backyard houses. There is no legislation regulating this category of tenants.

## 3.5 Main institutions

### *The Ministry of Public Works and Housing (MOPH)*

The MOPH is drafting the Regulations for Urban Land and National Housing Policy. It is also concerned with control of the quality of building and infrastructure works as well as regulating the construction industry. Under the MOPH is the National Water Directorate, which is responsible for regulating issues relating to domestic water supply.

### *The Housing Promotion Fund (FFH)<sup>165</sup>*

The fund<sup>166</sup> was created with the intention of providing access to housing for people with few resources. The FFH is partly self-funded and partly state-funded. In practice, it has targeted a relatively small number of middle-income households, since they are required to build or pay for houses of formal standards. It is given priority in the acquisition of rights to use and benefit from land.

The FFH provides access to housing for a very limited number of middle-income families. Although, it is mandated to benefit low-income families, qualified technicians and young married couples, in practice its target group is middle-income families in formal employment, as it is required to cover its costs.<sup>167</sup> The FFH acquires land and develops

<sup>161</sup> That is, buildings that cannot be legalised by the municipality or provincial authority because they do

not comply with building regulations or because their location conflicts with land use plans or zoning.

<sup>162</sup> Op. cit., 93.

<sup>163</sup> Law 5/91 of January 9.

<sup>164</sup> Diploma Ministerial 71/80 of July 30.

<sup>165</sup> Fundo de Fomento de Habitação

<sup>166</sup> *Fundo de Fomento de Habitação* created by Decree 24/95 of June 6.

<sup>167</sup> It works only with households who earn 3-10 minimum salaries (equivalent to \$150-\$500 per

month) and can prove their income, i.e. those who work in the informal sector are excluded.

and sells fully serviced sites for the construction of basic housing, in conformity with the building regulations. It allocates its plots through sale on a first-come, first-served basis. Demand is much higher than supply. In formally laid out urban expansion areas, roads and drainage are usually developed after the houses have been built and occupied. Septic tanks are provided for sanitation.

The FFH also provides low-interest loans for modest amounts, usually not enough to build a house, repayable over periods of 5-20 years. Banks do not accept an FFH plot as a guarantee for a loan, although the loan helps its beneficiaries to start building. It is assumed that once the loan has been spent, construction will be sufficiently advanced to be mortgageable with a bank. Allocation of loans is decided through a lottery, after proving eligibility. Since construction costs are very high<sup>168</sup> and the FFH credits are small, the FFH has decided to build houses for clients, achieving much lower costs through economies of scale. From 1996-2004 the FFH laid out a total of 7,488 plots and funded 1,021 new houses throughout Mozambique. This is an important but small contribution when the overall demand is considered.

## 4 Inheritance and Marital Property Rights

### 4.1 Relevant constitutional provisions

The Constitution states that all citizens have equal rights and duties under the law, regardless of colour, race, sex, ethnic origin, birthplace, religion, degree of education, social position, marital status of their parents or profession.<sup>169</sup> Thus equal rights for women are enshrined and all children are considered legitimate.

Rights to inherit are recognised and guaranteed by the state although there is no specific reference to marital property and inheritance rights.<sup>170</sup> The Constitution also provides

<sup>168</sup> Costs of a 60m<sup>2</sup> 2-bedroom house built by a contractor are estimated as \$15 000-18 000. If a house is self-built, costs can be reduced by about half.

<sup>169</sup> Art. 66.

<sup>170</sup> Art. 87.

that Mozambique is a secular state. Religious marriages are recognised only if they are registered in the Registry Office.<sup>171</sup> Pre-existing inheritance and marriage laws that are contradictory to the Constitution are automatically revoked.

### 4.2 Legislation related to marital property rights

Marital property rights are still governed by Book IV of the 1966 civil code. It recognises only civil marriages,<sup>172</sup> which are celebrated by a minority of couples. Women married under customary law cannot claim marital property because the official law of Mozambique does not recognise their marriages. A new Family Law has been approved and is expected to enter into force in 2005.

Many of the articles of the 1966 civil code are counter to the principle of equal rights for women and have therefore been revoked by the Constitution of 1990. For example, the Code declares the man to be head of the family.<sup>173</sup> This authorises him to administer all the couple's assets, including those of the wife, unless she has reserved this right in a prenuptial agreement. In practice, however, it is found that many male judges continue to apply the discriminatory provisions of the civil code rather than enforce the Constitution.<sup>174</sup> Efforts are being made to re-train judges.

#### *The new Family Law*

The new Family Law was approved in August 2004 after a four-year participatory process.<sup>175</sup> This law eliminates all dis-

<sup>171</sup> Art. 9.

<sup>172</sup> Under the civil code, non-polygamous traditional marriages may be registered and considered as civil marriages. However, this right has not been widely publicised, and is therefore not widely used.

<sup>173</sup> Art. 1678.

<sup>174</sup> In such situations, women should appeal to the Supreme Court, which will apply the law in its

(eventual) decision. When an appeal is lodged, the judge's decision is automatically suspended and, in

case of continued illegal actions by her husband, a woman should demand action from the police. In

Maputo at least, the police have become more responsive to women's needs in this kind of case.

<sup>175</sup> A previous version of the Bill was approved by the Assembly in December 2003, but was recalled



crimination and inequality in family relations on the grounds of gender and marital status. As in the case of the Land Law efforts have been made to reflect customary practices provided they are in line with the Constitution.

Some provisions of the law include:

- The minimum age of marriage is raised to 18 years for both men and women. Since traditionally marriage brings money and gifts to the bride's family, those desperate for money often marry their daughters early;
- In addition to civil marriages, the new law recognises de facto unions of at least one year's duration. Monogamous religious and traditional marriages are also recognised if they comply with requirements similar to civil marriages, for instance respecting the minimum age for marriage and the ban on marriages between close relatives;<sup>176</sup> and
- In contrast to the old civil code, the new law includes provisions that give either spouse responsibility over the family and the ability to decide who will represent the family on a particular issue. This means both may legitimately deal with the property while safeguarding the other's rights. Immovable property, whether belonging to either spouse individually or common property, may only be transferred to others with the express permission of both spouses.

This law has greatly aided in re-emphasising the rights of women expressed in the Constitution. In practice it is hoped that this law will help to strengthen women's marital property rights.

### *Marital property regimes*

Before marriage, couples must choose how they want to hold their property. There are three ways:

- General community of property;
- Community of accrued property; and
- Separation of property.

by the president, who found contradictions with the Constitution with regard to the proposal to recognise religious marriages in a secular state.

<sup>176</sup> In polygamous situations, which occur widely under customary and Islamic Law, the first marriage

may be recognised.

### *General community of property*

Co-ownership of property, including houses, is recognised under the civil code.<sup>177</sup> This is the most common type and is associated with first marriages. Under it, all property brought into the marriage by either spouse, and all property acquired for use by the couple during the marriage is considered to be their joint property. The house and other items acquired by the couple, including rights to use and benefit from land, belong to the husband and wife in equal shares.<sup>178</sup>

In the case of separation or divorce, the property is divided equally. Upon the death of a spouse, the other retains their half of the common property and the other half is subjected to inheritance procedures. This may also benefit them directly or through the children.

### *Community of accrued property*

The new family law provides for community of accrued property. In it, property owned by each individual spouse does not enter a common pool. Such individually-owned property includes the property each owned before the marriage, the property received by each during the marriage by succession or donation, the property acquired by each (even after the marriage) under prior rights, and tools for each spouse's own work.

Property acquired under prior rights specifically includes property acquired through land occupation in good faith which started before the marriage, although compensation for loss may be payable to the common property.<sup>179</sup> A spouse therefore does not gain a half share of land or other property acquired through occupation in good faith.

The new law defines this type of property holding as the default for de facto unions and traditional marriages, or instances where none is specified.<sup>180</sup> This is important as a

<sup>177</sup> Art. 1403 et seq.

<sup>178</sup> The marriage regime is included in the information required in the application form for the DUAT.

Where a marriage is under community of property, joint title will automatically be issued.

<sup>179</sup> Art. 1717, No 2.

<sup>180</sup> Articles 1712 and 1778.

woman may now retain ownership of her possessions prior to marriage, as well as automatically be owner of half the marital property. This protects women who are expelled from the family home when they separate from their husband or when the husband dies.

On the death of a spouse, the surviving spouse keeps a half share of the common property. The deceased's own property plus the remaining half share of the common property is subject to inheritance proceedings.

In the case of divorce, the proposed Family Law provides that the spouses or their heirs receive their own goods and their half share of the common property. If there are debts, the “communicable debts” are paid first, up to the value of the common property (Proposed Art. 1684).

### *Separation of property*

Under the civil code, this type of marriage was obligatory when a spouse already had children from a previous union, to protect the children's rights. Under the new Family Law however, this is no longer the case, and the parties can discuss what type suits them.

In this case, each party retains the ownership of their present and future assets, and may dispose of them as they please. The ownership of furniture and other moveable goods acquired in the marriage may be stipulated in a pre-nuptial agreement. In case of any doubts over ownership, moveable goods are considered co-owned by both parties.<sup>181</sup>

Under separation of property, on divorce or a husband's death women are at a particular disadvantage. This is because a woman may lose the house and other marital property registered in the husband's name.

### **4.3 Legislation related to inheritance rights**

Succession is still governed by the 1966 civil code. These laws

are in urgent need of amendment. A preliminary draft of a revised law is nearing completion.

### *Succession without a will*

The most common form of succession in Mozambique is “legitimate succession”, where the deceased has made no will. The civil code defines the order of succession as follows<sup>182</sup>:

- (1) Descendants (children of both sexes, grandchildren)
- (2) Ascendants (parents, grandparents)
- (3) Siblings and their descendants (
- 4) Spouse
- (5) Other relatives up to the sixth degree (uncles and cousins)
- (6) The state

A spouse, being fourth in line of succession, hardly ever inherits in practice. If a couple were married under general community of property however, the surviving spouse has the right to half the goods of the couple. Thus before succession, the surviving spouse has to receive the half share before the property is divided.

In practice, husbands are more likely to predecease their wives. This makes women more subject to the discriminatory elements of this law. The proposed Family Law does not address these issues. Changes will only be effected when the revision of the civil code is complete. This is expected to start after final approval of the Family Law. Also, until the eventual enactment of the Family Law, women in de facto unions will have no legal rights to inherit.

### *Succession with a will*

The author of a will may dispose of assets as s/he wishes.<sup>183</sup> In certain cases, the author may also enter into a contract with another party, for example a prenuptial agreement to dispose of assets to them.<sup>184</sup> Wills and contracts are drawn up by a notary and registered in the Register Office.

<sup>181</sup> The concept of co-ownership, *compropriedade*, is defined in Art. 1403 of the civil code as when two or more people simultaneously hold property rights over the same item of either moveable or

immoveable property.

<sup>182</sup> Art. 2133.

<sup>183</sup> Civil code 1996, Art. 2179 (1).

<sup>184</sup> Civil code 1966, Art. 2028.

Wills and contracts cannot completely override the rights of legitimate heirs. A person is obliged to leave a portion of his or her property to legitimate successors. If there is more than one child or grandchild, at least two-thirds of the estate is reserved. If there is only one child or grandchild, a minimum of half is reserved. If there are none, at least half of the property is reserved for parents and one third for grandparents.

Among low-income groups, wills are infrequent. The cost of drawing up a will is not prohibitive,<sup>185</sup> though enough to exclude the very poor. Wills are drawn up by the notaries. There are only four in Maputo and other provincial capitals. Interestingly, it is not necessary to produce a formal title deed to will property.

#### 4.4 Customary law

Customary law is important in Mozambique as it governs inheritance for the majority of people in both urban and rural areas. Community courts in rural areas generally follow the rules of customary law in their decisions.<sup>186</sup> Common to all these customary systems is the unfavourable position of women and the wife in the order of succession.

##### *Patrilineal societies.*

In patrilineal and virilocal traditions<sup>187</sup> succession is through the male line. Dowry is also paid to establish a link between the two families. It is argued that dowry creates inequality because it represents the transfer of powers from a woman's family to that of her husband, which has responsibility to support her, making her their collective "property".<sup>188</sup> In return for this support the woman must bear children and perform domestic work. The woman is considered in terms of her utility and if she does not perform these tasks, she can be rejected and given back to her family.

<sup>185</sup> About \$20.

<sup>186</sup> Op. cit., 83, p. 50.

<sup>187</sup> Virilocal: where a man takes his wife to live with his family or on his family's land.

<sup>188</sup> Op. cit., p. 49.

Succession rights in patrilineal societies have the following hierarchy:

- (1) Sons.
- (2) Parents and grandparents.
- (3) Brothers of the deceased, with priority given to those of the first wife.
- (4) Male collaterals, i.e., cousins, nephews and so on, without limit.
- (5) Widows with preference given to the oldest.
- (6) Daughters, with preference given to single ones.

In polygamous marriages, the first wife enjoys seniority over the other wives, and this extends to her first-born over the children of the other wives. The main characteristic of this succession is that its hierarchy places women at a disadvantage. As wives, they will inherit from their husbands only if there are no known male relatives. As daughters, they are even further down the line of succession. Further, widows are often expelled from their husband's home, unless they are seen as unlikely to marry again. Young widows and separated women can only seek protection by returning to their parents' home, and even this depends on a woman's parents being able to refund dowry.

##### *Matrilineal societies*

In matrilineal societies succession and inheritance go through the female line. Further, in matrilineal marriages, men go to live with their wives' families when they marry. The term matrilineal, strictly speaking, means from the mother or blood relatives of the mother to the mother's descendants. Thus while women may inherit from their mothers, it also often means that maternal uncles (mothers' brothers) transmit their property to their nephews (sisters' sons).<sup>189</sup> Further, in matrilineal systems, gender relations are not necessarily in favour of girls and women as power is usually in the hands of uncles and brothers. In matrilineal and especially matrilineal societies, however, women generally receive a degree of protection from their parental families. When the husband of a woman who has moved to live with him dies, she is

<sup>189</sup> Op. cit., 73.

likely to be able to continue to live in the marital house and land.<sup>190</sup>

Inheritance is not always exclusively matrilineal or patrilineal, and in some societies both daughters and sons may inherit from either parent.

### *Islamic marriages*

Many coastal areas have been subject to strong Islamic influences. Among the Muslims in Macua for instance, the matrilineal tradition has been replaced by polygamous practices. According to Islam, Muslims leave half their property to their sons and a quarter to their daughters, although this is often modified by local customary rules.

## 4.5 Administration of estates

The formal process for the administration of estates is used in a minority of cases. Instead, customary law is more frequently used. These procedures leave many women and children without legal protection, especially in areas with patriarchal traditions. Women are becoming more aware of their rights, however, especially in urban areas, and dispossession of widows by their in-laws is gradually becoming less frequent.<sup>191</sup>

Formal inheritance procedures involve the following:

- A death certificate is issued and succession proceedings commenced through a family meeting in the deceased's last place of residence;
- The public notary publishes a notice<sup>192</sup> published in the newspaper on two consecutive days, listing the heirs and calling for any others to appear before the notary;
- Where there are minor children or other legally incapable heirs, the spouse requests an inventory of the deceased's assets from the Public Prosecutor. In this process, the Public Prosecutor's role is to represent the interests of the minors. In such cases, the court sum-

mons the family together to prepare the inventory and agree how the property should be divided. Disputes often arise at this stage;

- Where there are no minor children involved in the succession, the family may make its own inventory and divide up the estate themselves. Where a will has been made, it is obligatory for the family to use a notary to wind up the estate. If disputes arise, the successors may go to court; and
- Once the division of assets has been agreed, the heirs can claim their share. In the case of land and houses, however, only properties formally registered in the property register can be claimed. Informal land rights cannot be inherited through the public notary's office. For land or property with a formal title, the heir must formally request the registry to register the rights in their name, submitting supporting documentary proof of their inheritance.

The surviving spouses must wait for this entire process to be completed before receiving their half share. Often however, spouses as executors of estates may request the court to grant access to money for specific purposes while succession proceedings are pending. Courts, the Public Prosecutor's office, public notaries and the registry are located in all districts. These services are therefore fairly accessible to those aware of the formal procedures.

In practice however, a number of problems arise:

- The cost of court procedures is high, and often exceeds the value of the inheritance;
- Complex issues relating to succession leave those who cannot afford a lawyer without legal protection;
- Delays in the court system. The court-driven process where minor children are involved takes two years on average. Often, where property is mortgaged, delayed proceedings affect the families' ability to keep up instalments;
- Corruption among officials involved;
- The procedure is biased towards a literate population with access to information, which excludes the majority of Mozambicans; and
- It is difficult for widows to share indivisible assets like

<sup>190</sup> Op. cit., 145.

<sup>191</sup> AMMCJ lawyers. Interviews with the author.

<sup>192</sup> *Habilitação dos herdeiros*.

houses with the heirs of the deceased. Sale of the house in turn does not guarantee women a house of equivalent quality, and may also cause considerable hardship, as their incomes are generally low.

## 5 The Action Plan for the Reduction of Absolute Poverty (2001-2005)

Mozambique's poverty reduction strategy paper – the Action Plan for the Reduction of Absolute Poverty 2001-2005 (PARPA) was approved in April 2001. It is a very long document that sets out six fundamental areas of intervention, including agriculture, and five complementary areas, which include housing.<sup>193</sup> These priority areas were selected on the basis of the determinants of poverty in Mozambique, international experience of poverty reduction, and consultations with civil society and the private sector.<sup>194</sup> The PARPA document brings together pre-existing government programmes, policies and commitments, which have largely been imposed by international funding agencies, in particular the IMF and the World Bank.

Overall, land reform, housing and gender receive little attention in the strategy. Of particular concern is the lack of adequate attention paid to gender issues. It is difficult to see how prioritised matters like AIDS and education are addressed without reference to their gender dimensions.

### 5.1 Urban land

Finding direct references to urban land in the PARPA is difficult, although it is mentioned in passing. For instance, the poverty strategy notes that there is a trend of migration to urban areas in Mozambique. The section on shelter and

<sup>193</sup> Other priority areas are education, health and rural development; basic infrastructure; good

governance and macroeconomic and financial management. The other complementary areas are

employment and business development; social action; housing; mines; fisheries; tourism; industry;

transport and communications; technology; the environment; and protection against natural disasters.

<sup>194</sup> Republic of Mozambique. (2001). PARPA 2001-2005, paragraph 17.

housing also indirectly addresses urban land.<sup>195</sup> It makes the following observations:

- A home is a means of accessing credit;
- There is a need to ensure cost reduction through rising productivity and innovation;
- There is a need to promote self-construction and investment in modular houses to make housing accessible to the poor;
- Expanding access to land is key to expanding housing; and
- Financial mechanisms need to be made available for housing, including the expansion of building societies.

The PARPA provides that the main objective of housing is fostering private initiative in the expansion of housing construction. This shall be achieved through:

- Speeding up the process of granting land for building purposes;
- Proceeding with the demarcation of plots in areas subject to territorial/urban planning in localities, towns and cities, while maintaining a reserve stock of available plots for immediate concession;
- Ensuring accessibility in terms of prices to the poorest segments of society for standardised architectural plans for self-construction and modular housing;
- Creating the necessary legislation to promote financing schemes for private home building, including building societies;
- Expanding the territorial coverage of the Housing Support Fund;
- Financing research and development on innovative, low-cost building plans, including those based on traditional patterns; and
- Introducing new housing products through innovations in traditional housing methods and exploring material changes.

These strategies all point to the pivotal role of the private sector in land reform. The impression created is that the housing strategy is losing sight of its poverty alleviation ideals and potential. For instance, self-construction alone is

<sup>195</sup> Ibid, paragraphs 224-231.

insufficient as a strategy to provide quality housing for the poor on a large scale. In contrast, attention paid to middle- and higher-income housing needs is greater, with provision for building societies, speeding up the process of granting land for building, and reserving stock for immediate concessions. While issues like the need to ensure cost reduction and the introduction of new housing products can be beneficial to the poor, it is important that this is explicitly stated. In the context of the stated priority of fostering private initiative in housing however, it is doubtful that this would be the aim. Experience in other countries has shown that the private sector is reluctant to house the poor. The claim that standardisation of architectural plans will provide better accessibility for the poor is not necessarily true. Finally, there is no mention of the role of tenure security in poverty alleviation.

## 5.2 Rural land

Agricultural land features in the PARPA, with the observation that almost all rural households have access to at least a plot of land to farm. It calls for it to be managed sustainably and to be made available timeously to investors and citizens. To this end, it recommends:

- A national land register is organised;
- The process of adjudication is simplified;
- Strengthening and equipping, with both material and personnel, the institutions responsible for managing and granting land concessions; and
- Together with other institutions, informing peasants of their rights regarding land, including consultations with the communities.

From the little above, it is apparent that policy with regard to rural land is in transition. Two components of this transition are mentioned: one, the strengthening of rural communities' rights to land, and two, the easing of the process of "concessionary grants". It therefore appears that land tenure and rights of rural communities are a poverty alleviation priority. Through investment by granting concessions to individuals, the incorporation of the private sector also emerges as a key ingredient of poverty alleviation efforts.

## 5.3 Gender

Gender concerns in the PARPA do not come out strongly. It states that the feminisation of poverty hypothesis "has not been statistically proven", given that women-headed households are not poorer than male-headed ones in Mozambique.<sup>196</sup> It does note, however, that three out of every four Mozambican women are illiterate, and that in the rural areas, a poor boy has a stronger probability of attending school than a non-poor girl. This suggests recognition of the problem of feminisation of poverty. There are no strategies that are geared towards female poverty alleviation through land reform.

## 5.4 Monitoring and review of the PARPA

A comprehensive review of the PARPA was carried out in March 2004 by the government and donors. The review noted:

- In rural areas, processing of land titles had improved considerably and, in urban areas, numerous land use plans have been prepared; and
- The performance in legal and judicial reform continues to be poor, and courts are unable to keep pace with the incoming caseload.

The review made no comments on the relatively weak treatment of urban land and housing in the PARPA.

The review noted the need to undertake further research to understand the role of gender, HIV/AIDS and one's status as rural/urban/peri-urban on poverty. It also emphasised the need for strategies to mainstream gender in all development activities.

Civil society is taking an active part in monitoring the PARPA and poverty reduction in general through the Poverty Observatory, a forum created by the government. One review noted that there is a high level of perceived insecurity of tenure among Mozambicans despite constitutional and

<sup>196</sup> Ibid, paragraph 43.1

legal safeguards for land rights. This is because of the lack of transparency in land adjudication and management and the slowness of the land registration process.<sup>197</sup>

As a step towards resolving this issue, the G20 forum of NGOs proposes the creation of consultative councils at various levels in both rural and urban areas, which would, among other functions, participate in the management and allocation of land as a means of improving the efficiency of allocation and of land use, of monitoring transactions in land rights and to increase productive investments in land.

## 5.5 Summary

The role of urban land in poverty alleviation strategies in Mozambique points to the preoccupation with some form of “formalisation” or “organisation” of land in towns and cities, possibly through legislation and policy. Terms such as “demarcation of plots”, “territorial/urban planning”, and “expanding access to land” are illustrative. It would have been appropriate, however, if explicit statements were made that such a process should take on a pro-poor approach, or guarantee everyone rights to land. The undercurrent is that there is a push to expand home building through private financing. This has the potential of alienating the poor. Gender issues are absent and this is a major gap.<sup>198</sup> In particular, it is difficult to see how matters such as HIV/AIDS, health and education can be tackled without reference to gender. Civil society is involved in monitoring poverty and the PARPA, and its report for 2004 found a surprisingly high degree of perceived insecurity of land tenure, reflecting the lack of transparency in land adjudication and land administration procedures.

## 6 Land Management Systems

A wide range of ministries and municipalities are involved in land administration, particularly in urban areas. Coordination

197 Grupo de 20. (2004). Annual Poverty Report. [http://www.iid.org.mz/html/3\\_pobreza.html](http://www.iid.org.mz/html/3_pobreza.html)

198 The World Bank and IMF joint staff assessments of the PARPA also note this with concern.

between these institutions has improved significantly, though there is need for better coordination at higher levels.

Decision-making over rural land is still highly centralised. For areas not covered by urbanisation plans, applications to use and benefit from land are authorised by the provincial governors, the minister of agriculture and rural development, and the Council of Ministers depending on the size of the land. Municipalities are required to administer urban land, including processing applications for use of land and performing planning functions. The lack of capacity has been a problem in them adequately fulfilling this role.

### 6.1 Formal land allocation procedures

#### *Rural areas*

Applications for formal land allocation are made to the SPGC. This category includes areas in urban municipalities where no cadastral services exist. It requires submission of a standard application form indicating the applicant's details, the purpose of the application (for occupation, legalisation of existing occupation, inheritance), the proposed use, description of the land and natural resources on the land. The land may have already been identified, or the applicant may request the SPGC to assist in identifying appropriate land.

The form must be submitted together with a sketch plan of the location, the exploitation plan (agriculture) or investment project, the minutes of consultations with the community and other bureaucratic documents. Once all the relevant documentation and technical and community consultations have been made, the SPGC prepares a report, making a recommendation to the authority competent to determine the application.

Once land has been developed or put into use in accordance with the provisional authorisation, the user must register their rights in the Real Property Register.<sup>199</sup> In order to do this, s/he requests a certificate<sup>200</sup> from the SPGC and presents

199 Decree 1/2003 of 18 February.

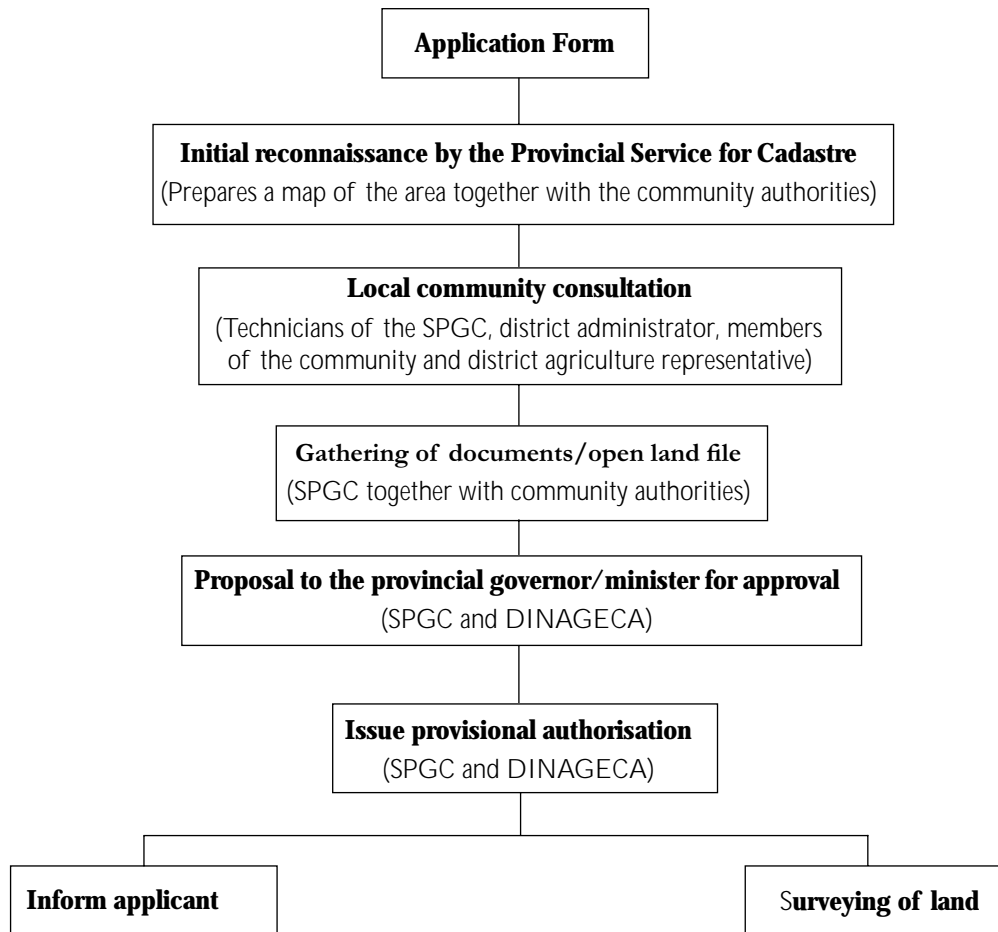
200 Certidão.

it to the Conservator of the Real Property Register. In the process of registration, the conservator requests information from the SPGC.

The Ministry of Agriculture has set a target of 90 days for the completion of this process, and the target is currently being met for applications where consultations are not protracted.



Figure 6.1 Simplified procedures for authorisation for use and benefit of rural land (adapted from DINAGECA)



Occupiers in good faith may apply for demarcation and title, if they wish. In these cases, the application procedure is simplified, and there is no need for the applicant to submit a sketch map of the land, or a description of the proposed use.

Local communities may also apply for demarcation and title. However, they must pay the expenses associated with the process, which is often beyond the capacity of poor communities in rural areas.

Following the approval of Land Law and Regulations, national and international NGOs undertook a public campaign to inform rural communities of their land rights.<sup>201</sup> Despite this, adequate community consultations often do not occur. Sometimes this is because some interest groups are not involved, or applications are made directly to chiefs. Women, in particular, have been

201 See Negrão, J. (1999). The Mozambican Land Campaign. 1997-1999.

<http://www.oxfam.org.uk/landrights/>

excluded from or ignored in community forums for land consultations.<sup>202</sup>

On the advice of NGOs, local communities are increasingly interested in delimiting their land and applying for title. This is despite the fact that their rights to continue using and benefiting from their land are enshrined under the 1997 Land Law. This demonstrates a perceived insecurity of tenure and a feeling that, to prove their rights, a legal title is worth more than the testimony of witnesses.

### *Land applications in municipalities*

The Land Law Regulations do not apply in areas under the jurisdiction of municipalities that have municipal cadastral services.<sup>203</sup> This has resulted in municipalities applying their own procedures for land allocation. They often resort to colonial legislation and bylaws, although these were based on private ownership of land. In cities, this includes land use plans dating from the pre-independence period, and covering only limited areas in the formally planned areas.<sup>204</sup> In the case of Maputo, two plans have been prepared since independence, in 1985 and 1999, although neither was approved. Instead, the municipality sometimes resorts to the 1969 master plan, which is outdated.

The typical procedure for the formal authorisation of rights to use land in urban areas involves the following applications from the municipality:

- Apply for concession of a plot of land from the relevant municipal directorate or municipal cadastral services. The state of the land being applied for will be verified, through consultations with the *bairro* secretary or other local official, and by checking in the municipal land registers;
- After receiving provisional authorisation, apply for a topographic map to show boundaries and their coordinates. Append a copy of the land concession to the application. Provisional authorisation gives an applicant who is a Mozambican citizen five years to develop the

land for the stated purpose, otherwise the concession will lapse;<sup>205</sup>

- Apply for a building licence, and submit complete design of building showing its location on the topographic map. Append a copy of the land concession. A number of departments are involved in approval including the health department and the fire brigade. The building regulations used are colonial laws.<sup>206</sup> The charge for a building licence is related to the costs of the proposed building;
- After the building licence has been issued and the building completed, apply for an inspection and land certificate, appending a copy of the land concession, building licence and the topographic map. The land certificate can be provisionally registered in the Real Property Register; and
- Apply for a land title, attaching the land certificate and the plan. The title is authorised by the president of the municipal council. It can then be registered in the property registry.<sup>207</sup> In Maputo, the issue of title depends on two departments, the building inspectors and the cadastre.

A number of problems are associated with this process:

- The process is long and protracted. In Maputo, as many as 103 administrative steps are involved. Applications for concessions frequently take several years,<sup>208</sup>
- The excessive bureaucracy in the process has encouraged corruption;
- Recordkeeping in the planned urban areas depends on a complex cadastral system, based on costly and time-consuming procedures.<sup>209</sup> As a consequence, only

<sup>205</sup> Articles 25-27 of Law 19/97 of 1 October. In Maputo, concessionaries are required, under the terms of the provisional authorisation, to start development of the site within two years and complete it within five years.

<sup>206</sup> Regulamento Geral de Edificações Urbanas- RGEU). Portuguese Diploma Legislativo 1976 of 10 May 1960.

<sup>207</sup> Adapted from a research report on Maputo, Conselho Municipal de Maputo, (1999). *Estudo Comparativo*, Vol. 1, p.8.

<sup>208</sup> Conselho Municipal de Maputo. (1999). *Estudo Comparativo*, Vol. 1, p 13.

<sup>209</sup> Pilot projects have been established in some of the municipalities for setup of simplified cadastral systems, including in Nacala, Vilankulo and part of Manica, mainly to introduce cheap and quick simplified methods, such as rapid mapping using satellite imagery, for land use administration. Similar systems are likely to be proposed for all municipal areas, under the municipal development programme of the ministry of state administration, funded by the World Bank.

<sup>202</sup> Op. cit., 73.

<sup>203</sup> Art. 2 of Decree 66/98.

<sup>204</sup> A notable exception is Nacala.

small parts of the municipalities today have plots appropriately registered;

- In Maputo, for a plot of 15x30m, typical of a low-middle income *bairro*, the official cost for the concession process up to the issue of the topographic plan is about \$25-\$30. This is unaffordable for most Mozambicans; and
- The Land Regulations require consultations with communities before land is allocated to investors. However, there are often irregularities in consultations on peri-urban areas, and individual community leaders sometimes illegally sell community land to investors. Often, depending on the municipalities' procedures, investors negotiate with the communities directly, making the latter vulnerable to exploitation.<sup>210</sup>

All this means that municipalities are unable to provide a reliable formal system that guarantees security of tenure; cannot facilitate and provide safe procedures for the transfer of land use rights; and cannot avoid duplication of land allocations or support the enforcement of established rights when they are abused.

The Maputo municipality has initiated a process of overhauling its procedures.<sup>211</sup> It proposes to introduce new procedures for applications to reduce delays and increase transparency. It has set a target of 30-60 days for determining applications for land. Time limits for dealing with applications for building licences have also been introduced by law, and if applications are not determined within the stipulated period, the licence is considered to be approved.<sup>212</sup> The municipality has constituted a Committee for Building Licensing and Land Concession, including councillors, architects and engineers to speed up allocation procedures. These targets are considered by many people to be overly ambitious.<sup>213</sup>

210 Until recently, the Administrators of the Municipal Districts of Maputo played a strong role in identifying land for investors, and for assisting in negotiations. However, they had a reputation for corrupt practices, and the municipal government that took over in 2004 has restricted their role in land allocation.

211 Launched in February 2004, the plan identifies strategic objectives and priority areas for the new councils' five year mandate.

212 Decree 2/2004.

213 Fonseca, R. Interview with the author.

## 6.2 Informal settlements and land allocation

### *General description*

Before independence, there was a clear distinction between formally planned areas with land cadastre (the "cement city") and informal settlements (the "reed city"). Since 1975 however, this distinction has been eroded through a process of hybridisation, through the deterioration of the "formal" urban fabric and some improvements within the "informal".<sup>214</sup> The distinction between "formal" and "informal" is therefore not clear cut. Much occupation and activity within the formally laid out urban cores has become unregulated and unplanned, while outside these areas there is a wide range of settlement types initially laid out according to approved plans, but which have now been transformed by illegal occupation and subdivisions.<sup>215</sup>

Overall, however, the great majority of residential land occupation in Mozambican towns and cities is unplanned and very poorly serviced by public infrastructure. And due to constraints in the delivery of serviced land, the unplanned residential areas are growing much faster than the planned areas.<sup>216</sup>

### *Tenure security*

Occupants of unplanned settlements have a high degree of security of tenure under the law. In the areas settled before independence, land was often distributed by the local *regulo* or chief, and is therefore considered to be legitimately occupied under customary law, and grants tenure rights under the Land Law of 1997.<sup>217</sup> Similarly, occupiers in good faith

214 Op. cit., 77. p.13.

215 A titleholder can formally request subdivision, provided that the area to be separated from the

main plot contains infrastructures and other betterments – i.e., it is land that is occupied and used and, in accordance with the law, not a vacant plot that is being sold.

216 Between 1980 and 1998, about 13,000 plots were formally demarcated in Maputo, while during the same period the population rose by over 400,000. This situation is repeated in other major cities and towns, with the exception of Nacala.

217 A view expressed by a lawyer from DINAGECA and the Conservator of the Real Property Register

in Maputo.

of more than 10 years' standing have also acquired tenure rights.

While existing occupants have secure tenure, it is difficult for low-income households in the larger cities to obtain well-located land. For instance, Maputo currently has no vacant plots.<sup>218</sup> As a result, a growing number of unplanned informal settlements are being built on land that is unsuitable for building (e.g. it is polluted, has steep erodable slopes, or is prone to flooding).

### *Allocation procedures*

Informal land allocation usually takes place through the *bairro* secretaries, who were empowered to do this shortly after independence.<sup>219</sup> This power, however, is not provided by any law. Payment is usually involved, but no title is provided.

Informal mechanisms are the most important means of access to land for housing. Informal mechanisms include allocation by chiefs and local levels of the city administration, inheritance and ceding within families, swapping, direct occupation and private purchase. These mechanisms also serve formally planned and demarcated plots. Many formal sites and services schemes, for instance, have the land allocated through informal structures such as chiefs, and unofficially by council officials<sup>220</sup>. Further subdivision of such plots is often informal, with council officials assisting, but the new status not reflected in records. Plots of undeveloped land frequently change hands between households for a fee, usually between family members and friends. It appears such payments are for the service of granting access to the land, rather than payment for the land itself.<sup>221</sup>

<sup>218</sup> Op. cit., 218.

<sup>219</sup> Through the *Direcções de Bairros Comunaís* (Directorates of Communal Neighbourhoods) set up

under the post-independence socialist regime in the former City Executive Councils which operated until 1997.

<sup>220</sup> For instance in the Magoanine/Zimpeto sites and service, where 12 of 15 households interviewed obtained access through informal mechanisms. See Op. cit., 77.

<sup>221</sup> Jenkins, P. (2001). Strengthening access to land for housing for the poor in Maputo. Mozambique,

p.8.

### *Unplanned settlements and land use planning and building regulations*

As seen, occupiers in good faith may apply for demarcation and registration without any link to land use planning.<sup>222</sup> In other instances however, applications for titles are in practice linked to building licences. This means titles can only be granted for buildings with a building licence, which is issued for projects that comply with building regulations and that are in accordance with an existing urbanisation plan.<sup>223</sup> Urban planning and building regulations can therefore be used as mechanisms to prevent the registration of land rights. The draft Urban Land Regulations have adopted this strategy of regulating the rights of existing occupiers and discouraging further informal settlement.

Building regulations require construction with conventional materials such as concrete blocks, burnt bricks and reinforced concrete structural elements. Given the lack of finance mechanisms for low-income groups, only a small percentage of informal settlement dwellers is able to afford the costs of regularisation and eventual acquisition of title. Some municipalities have recognised the use of cheaper and traditional materials in construction. There have been no attempts at the national level to formulate more flexible building regulations. Further, new regulations for private buildings have recently been introduced providing that buildings without a building licence are not normally be eligible for regularisation, but subject to demolition.<sup>224</sup>

On the other hand, the strategy of the Ministry of the Environment, in its draft land use planning policy, is that the informal city should be recognised and gradually improved,

<sup>222</sup> Since occupation in good faith rights can only be held by individuals, these rights cannot be used by

groups of occupiers for the regularisation of informal settlements.

<sup>223</sup> This certainly has been the practice in Maputo, although it is not clear under what current

legislation. The Portuguese *Portaria* no 516 of 16 October 1970 (which made *Decreto-Lei* no 166/70

applicable to the overseas provinces) gives non-conformity to the urbanisation plan as a reason for

refusal of an application for a building licence.

<sup>224</sup> Decree 02/2004.

where possible, and land rights registered in a simplified cadastre.

### 6.3 Resettlement

The state recognises and guarantees the right to property, and the right to just compensation in case of expropriation. Expropriation may only take place in the public interest as defined in law.<sup>225</sup> In acquiring land for urban expansion for instance, municipalities compensate occupants with alternative land.<sup>226</sup> Similarly, when the FFH needs land, negotiations with communities usually involve providing plots. Where existing occupants have built permanent houses, they are normally offered plots and houses of at least equivalent size and quality. The FFH avoids financial compensation because this is illegal. In some instances, however, alternative land is not well located.<sup>227</sup> The floods in southern Mozambique in 2000 resulted in resettlement of occupants of unplanned settlements, including the provision of houses.<sup>228</sup>

### 6.4 Land markets

Despite the constitutional principle that land in Mozambique is the property of the state and may not be bought or sold, there is a thriving land market, particularly in urban areas. A range of land markets can be identified, with differential prices according to the degree of formality, risk and knowledge of land values:

- A formal market in buying and selling buildings with legal title. The land rights, DUAT, are automatically transferred with the building;
- Markets in land, with or without buildings, for which title is expected to be obtained eventually. This especially concerns officially demarcated plots with a valid concession, but without buildings. These are a major source of land speculation. The plot is only le-

<sup>225</sup> Art. 86.

<sup>226</sup> In Matola for instance, one plot for each household living on the site, plus one plot for each son and daughter over 21 who actually lives on the site. The municipality used to give more on negotiations, but found that most of the plots granted were being sold.

<sup>227</sup> For instance resettlement resulting from the Maputo to South Africa toll road.

<sup>228</sup> Maputo municipality relocated more than 2,000 families to Magoanine to the north of the city.

gally transferred to the new owner when the building construction has reached one-third of its final value, which is considered to constitute effective use;<sup>229</sup>

- Land unofficially subdivided by the existing occupier, which may or may not be possible to regularise through formal or informal procedures; and
- Markets for low-income groups in undefined plots for informal housing in unplanned areas.

Informal land markets of the second and third type are very active, although they involve a high risk, as tenure is insecure and can be challenged in court.<sup>230</sup> The official denial of land markets and the market value of land creates large profits for some investors at the expense of the poor and the state. Further, security of tenure of the poor is threatened when land is bought and sold through illegal means. This is because existing occupiers often do not know their rights or are unable to pursue them in court.<sup>231</sup> It is argued that land markets should be legalised in urban areas, where there is a high demand for land. Public auctions for concession of serviced plots are proposed in the draft urban land regulations.

Steps need to be taken to recognise and regulate these informal land markets to prevent the relocation of lower-income residents from well-located urban land without adequate compensation.<sup>232</sup>

### 6.5 Dispute settlement mechanisms

In rural areas, disputes where two parties both claim the same piece of land are often resolved by DINAGECA and the SPGC. The party that has been using the land for the

<sup>229</sup> According to the council member responsible for urban planning and environment, the municipality is under strong pressure to increase the time limit of two years for beginning development

and five years for completion. On the other hand, it would like to reduce these periods, seeing them as a motor for speculation and sterilisation of serviced land.

<sup>230</sup> Muchanga, V. (undated). *Land Markets in Maputo and Matola Cities: Problem and Solution for Urban Planning*, Land Studies Unit, Faculty of Agronomy and Forestry Engineering, Eduardo Mondlane University, Maputo.

<sup>231</sup> According to Orlanda Lampião of the AMMCJ, in July 2004, the AMMCJ was called to assist a group of single women who had been forced off their land on the outskirts of Matola by a group of men who wanted to sell the land as informal building plots.

<sup>232</sup> Op. cit., 77. p. 62.

longest has precedence in such instances. Community courts, with elected judges, have also been set up to deal with minor misdemeanours and family problems by applying customary law. Disputes may also go to civil courts however, with final appeals to the Supreme Court.

In urban areas, land disputes are infrequent in most unplanned settlements. They are however, very common for formally demarcated plots. In Maputo these land disputes are caused by:

- Reappearance of people with pre-independence titles, who have not been using the land, nor applied for updating of the land record;<sup>233</sup>
- Building on sites without consultation with the Municipal Directorate of Construction and Urbanisation (DCU). Such land is often obtained through the local governance structures for instance the district administrator, *bairro* secretary or block chief. This leads to disputes with people who have been legally allocated the land;
- Double concessions of the same site, caused by the poor condition and organisation of the DCU's land archive; and
- Sites for which the provisional allocation has expired, without it being used.<sup>234</sup> The municipality may then allocate the site to a new applicant, which creates conditions for conflict.

These formal disputes rarely involve the poor. Poorly maintained land records often undermine effective dispute resolution in other cases such as divorce, inheritance or sale of land. Women are the most vulnerable group in such instances.<sup>235</sup>

There are no land courts in Mozambique and land disputes are resolved in ordinary courts. A shortage of trained and qualified judges causes long delays in the civil courts. Difficulty in enforcing decisions and poor judgements also

<sup>233</sup> Under Art. 45 of the 1998 Land Law Regulations, previous title holders can no longer request re-validation of old titles under Art. 79 of the Land law Regulations of 1987. Holders of colonial titles who are still occupying the land have *usucapião* rights, but those who have not been making use of the land have no special rights and will have to reapply to use the land.

<sup>234</sup> Op. cit., 213.

<sup>235</sup> Ibid.

mean that disputes are often resolved in out-of-court settlements, including cases concerning marital property and inheritance rights.

Decisions made by the municipalities can be appealed in the ordinary courts or the Administrative Court. Most of the cases where municipalities' decisions have been challenged have concerned construction standards rather than land.<sup>236</sup> Many actions by municipalities lead to disputes, for instance double allocation.

Free legal assistance and representation for people with low incomes is provided under the law by the IPAJ.<sup>237</sup> Although IPAJ exists in all provinces, it does not function well, and uses law students and legal assistants to provide advice. Often clients are required to pay. Other institutions involved in offering free legal advice include the AMMCJ and the Human Rights League.

Women are particularly vulnerable to conflicts over land and housing due to the difficulty of access to housing in general and to traditional practice. In traditional marriages, the house belongs to the husband, and he can expel his wife upon separation. De facto unions, which until now had not been recognised under the law, also left women vulnerable with regard to marital property.

## 6.6 Relevant jurisprudence

The Mozambican legal system is not based on precedent. Although there are well-organised reports of cases, courts and public bodies involved in land administration, such as DINAGECA and the municipalities, do not adhere to judgements in cases involving land.<sup>238</sup> Published cases for the

<sup>236</sup> The Councillor for Urban Planning and Environment in Maputo claimed that no one has sued the municipality through the courts over land issues.

<sup>237</sup> Instituto de Patrocínio e Assistência Jurídica, created by Law 6/94 of 13 September, with the essential objective of guaranteeing the exercise of the fundamental and constitutionally recognised right (No 1 of Art. 100 of the Constitution) of free access for all citizens to the courts, as well as the right to legal defence and to legal assistance and support.

<sup>238</sup> Despite this, according to a senior lawyer in the Public Prosecutor's Office, several cases involving occupation in good faith had come before the civil courts, with the courts ruling in their favor.

post-independence period in Mozambique only cover the decisions of the Administrative Court. For cases concerning land rights, jurisprudence is almost non-existent.

## 7 Local laws and policies

During the colonial period, municipalities<sup>239</sup> used an extensive range of local bylaws to regulate activities in the planned areas of towns. These covered many aspects of detailed planning and construction and were zealously enforced. After independence, capacity to enforce the bylaws was drastically reduced and many of them were no longer appropriate.

The city executive councils between 1978 and 1997 had neither the power nor the financial and human resources to revise the bylaws. With the establishment in 1997 of 33 new municipalities, with financial and administrative autonomy, a process of revision and renewal of municipal bylaws has started. Under the World Bank-funded Municipal Development Programme, the MAE is developing model bylaws and regulations for the municipalities. Work is also progressing on developing a model cadastral system that will permit proper municipal management of land use and efficient implementation of municipal taxes. Unplanned settlements and other settlements without cadastral registers are not covered by this programme.

In Maputo, the municipality still has no written policies on land, no relevant development plan and no relevant bylaws. Recourse is therefore made to established practices based on outdated laws. In 2004, a municipal council Strategic Objectives and Priority Action Plan was launched with the objective of filling this gap. The plan aims for the “development of appropriate urban planning with adequate infrastructures and housing”. Among the problems identified in this area were:

- A great demand for land, far exceeding the city's carrying capacity and leading to rapid land degradation, increasing erosion and actual loss of urban land on a scale never seen before;

- Institutional weakness in land management and inspection of land use and occupation, poor procedures and lack of technical and material resources in this field; and
- Widespread failure to develop land within the legally stipulated time limits, thus reducing the land supply and facilitating illicit land transactions in contravention of the law and the Constitution.<sup>240</sup>

The municipality intends to prepare policies and bylaws for procedures for land applications and land administration. Eventual computerisation of the cadastre is also proposed. Coordinated efforts with other government bodies are being made to computerise the process for applications for DUAT and construction licenses.

The previous council would demarcate individual (dispersed) plots in order to regularise existing occupation, at the request of *usucapião* rights holders or those who had occupied land more recently without prior authorisation. Despite pressure from occupiers, the new council has stopped this practice, and intends instead to undertake the regularisation of whole areas rather than individual plots, starting with a number of relatively well-structured neighbourhoods in its plan of action for 2005.<sup>241</sup> In principle the council is interested in providing infrastructure and services and issuing land titles in unplanned neighbourhoods, but it does not have the resources to tackle this.

## 8 Implementation of Land, Housing and Property Rights

### 8.1 Technical issues relating to municipalities

The 33 municipalities are gradually developing their technical capacity with the support of central government and donors. However, they continue to face a number of problems:

- Lack of human and financial resources. Revenue collection systems have only recently begun to be developed;

<sup>239</sup> *Câmaras Municipais*.

<sup>240</sup> Opening address to the Third National Land Meeting by the Substitute for the President of Maputo Municipal Council, Pemba, August 19 2004.

<sup>241</sup> Parts of the *bairros* of Laulane, Magoanine, Malhazine and Zimpeto.

- In many municipalities, records of land applications and allocations, cadastral maps and land titles are outdated and have been damaged over time. Little attention is given to the appropriate collection and updating of information on land allocations. There is little information disaggregated by gender, for instance. This causes inaccurate records, disputes, corruption, loss of potential revenue and inadequate information; and
- In many municipalities, staff dealing with planning and land applications have a very poor knowledge of the 1997 Land Law.

A big concern of municipalities is the poor delivery of services, especially basic ones such as water and sanitation. Inadequate and low standards of infrastructure – much of it dating to the colonial period – present major public health concerns. Disease outbreaks are common in many municipalities.

## 8.2 Cultural issues

Cultural issues affect the implementation of women's rights in particular. Most judges are men. Often, discriminatory elements of the civil code rather than the Constitution are applied. Traditional beliefs invoked in disputes are often used as grounds by the court system to avoid the question of women's rights. The community courts that deal with misdemeanours and family problems under customary law are also staffed by male judges and often not trusted by women. Practices like polygamy have in addition interfered with the wives' right to access to land and housing, and result in conflicts.

## 8.3 Affordability and access to land and housing, including inheritance

Land access is constrained by a number of factors:

- Procedures are expensive in both the formal and the informal systems. In formal land allocation procedures, the official charges are often accompanied by bribes;
- The unmet demand for land suitable for middle-class housing results in "down-raiding" plots occupied by low-income groups;<sup>242</sup>

<sup>242</sup> Op. cit., 77, p.19. "Down raiding" is when poor beneficiaries of state-subsidised housing sell their houses at a throwaway price to wealthier individuals.

- Access to housing finance is restricted to those eligible for bank loans. Housing loans are offered with very high interest rates unaffordable to the majority. Further the separation of land and building rights presents a problem, as banks do not lend money for building unless the loan applicant holds a title to the land, which is rarely the case. A lot of corruption stems from this, as people try to have definitive titles registered without there being effective occupation of the land, in order to get loans to build;
- Beneficiaries of land, especially in peri-urban areas; often informally sell the land because they are unable to comply with building and urban standards tied to the land use; and
- Formal procedures are extremely expensive and subject to long delays. Wives and children are also subject to discrimination in these processes.

In most municipalities, the availability of plots for building is constrained by the lack of capacity for land use planning and implementation of plans.

## 8.4 Issues relating to education and information on rights

Municipal staff often do not have adequate knowledge of land law or land rights.<sup>243</sup> The training of professional staff like surveyors, planners and engineers has had a technical bias in the past, without covering social and legal issues. Many therefore view the city through the high standards of the central areas that developed during the colonial era. Further, they often resist granting residents of unplanned settlements land rights, and argue against the rights of occupiers in good faith.

Very few CBOs are concerned with land and housing issues in urban informal settlements. NGO campaigns to publicise land rights under the 1997 Land Law were aimed mainly at rural communities. Municipalities have not publicised these rights.

<sup>243</sup> Garvey, J. Interviews with the author.



Similarly, marriage officials and other paralegal or legal officials in public service are generally not trained to provide the public with information on their rights. For example, marriage officials do not, as a matter of course, explain to couples the different marital property regimes.

## 8.5 Impact of HIV/AIDS

Despite the high rate of adult HIV infection (2001: 13 percent)<sup>244</sup> there is very little quantitative data on the impact of the epidemic. No studies have been carried out on HIV/AIDS in relation to urban land and housing issues. The new Family Law does not mention HIV/AIDS, despite the fact the epidemic is increasingly exposing the fragility of Mozambican women's rights. Costly and lengthy court processes, biased laws and legal systems, and a civil society that is generally inaccessible and inadequate all add to the burden of sick and poor women and widows. The only law addressing issues of HIV/AIDS is a labour law protecting infected workers from unfair dismissal.<sup>245</sup>

Women often bear the brunt of the effects of HIV/AIDS because of cultural practices and attitudes. In patrilineal societies they are especially vulnerable during inheritance. Women are often blamed for the death of their husbands and, if known to be HIV-positive, expelled from the marital home.<sup>246</sup> A tradition of male migrant labour to South Africa from the southern areas of the country also puts women at high risk to exposure.

<sup>244</sup> Op. cit., 94.

<sup>245</sup> Decree 2/2002.

<sup>246</sup> In one case reported by the AMMCJ, the money received by a widow from her late husband's workplace for funeral expenses was taken by her in-laws. They also took her late husband's documents, so that she was unable to prove that she was married to him. See also HEALTH-MOZAMBIQUE, AIDS Stripping Widows of their Rights, 31 August 2004, <http://www.unaids.org>

## 9 Best Practices

### 9.1 Women's advocacy groups

#### *The Mozambican Women Lawyers Association*<sup>247</sup>

The AMMCJ is a non-profit organisation founded in 1995. It has 102 active members, mainly women volunteers with legal backgrounds including lawyers, law students, paralegals and police. It is one of the few means by which urban women in Mozambique can obtain free and competent legal assistance. As a consequence, the association depends on (insufficient) funding from foreign donors and NGOs. It handles marriage disputes, especially domestic violence, but also issues of housing, inheritance and labour. Men occasionally seek assistance from the AMMCJ, mostly on labour matters such as unfair dismissal, and are never turned away. Its advice centres are open to the public all day during weekdays. In Maputo an average of 15 people are seen each day.

The association's objectives are to give legal assistance to women, especially victims of domestic violence; to provide training in specific areas of the law; and to undertake research into the main sources of conflict and violence. It also undertakes lobbying and advocacy work in favour of women's rights under international conventions, and is involved in efforts to criminalise violence against women. It was involved in the process of preparing the 1997 Land Law and in the revision of the Family Law.

<sup>247</sup> Lampião, O. Ibraimo, L. & Monteiro, C. Members of the AMMCJ. Interview with the author.

The AMMCJ has members and advice centres in Manica, Quelimane, Nampula and Maputo. Though its advice centres do not extend to rural areas, it provides civic awareness in these areas concerning women's rights, including land rights.

### *Muleide*

This is an organisation similar to the AMMCJ. It operates in Maputo and in provinces where the AMMCJ is not present. Muleide is active in educating women about their rights.



## 9.2 Upgrading of bairro Josina Machel, Manica Town

The upgrading of *bairro* Josina Machel may be considered a best practice. The project is being carried in the municipality of Manica. Josina Machel is an informal settlement on hazardously sloping land with limited vehicular access. Despite this, informal housing has developed over 20 years, granting the dwellers land rights as occupants in good faith.

The overall objectives of the project were to:<sup>248</sup>

- Train municipal technical staff (four technicians with secondary education) to undertake a systematic survey of informal occupation in the town. FAPF worked together with municipal technicians to invent practical

methods of surveying and planning in informal settlements;

- Provide residents with secure tenure through the issue of legal title. Although the residents had occupancy rights, the informal land market was perceived as a threat. Secure tenure was also seen as an incentive for them to improve their dwellings; and
- Ensure accessibility to all dwellings by building pedestrian access ways and roads. The lack of roads especially limited access to the settlement by emergency personnel. Better roads would also facilitate construction of future infrastructure.

Some positive attributes to emerge from the project include:

- The use of low-cost techniques;
- The active participation of the residents;
- The collaborative nature of the project team, consisting of the municipality, FAPF, and the German development agency GTZ;
- The use of simple and affordable technology. Previous settlement upgrading programmes were hampered by the lack of up-to-date, large-scale cadastral information. In Manica this was overcome by the simple use of cheaper satellite imagery to create an upgrading plan by municipal technicians working onsite with local residents. Plots were identified on simple A4 documents, showing text details of the occupier, the names of neighbours and witnesses; and a plan of the plot, indicating the position of the house;
- Minimised demolitions except where buildings were located on hazardous sites or where access routes were needed; and
- The inhabitants, both men and women, participated in the works. They received a small payment and learnt basic construction techniques to allow them to carry out maintenance at minimum cost.

The project is being studied for potential replication by other municipalities.

<sup>248</sup> Trindade, T. G. Karyn B. & Bruschi, S. (2003). Informal Settlements Upgrading in Manica City.

### 9.3 Planning, resettlement and granting of land rights, Nacala<sup>249</sup>

This project involved the municipality of the port city of Nacala. Since 1985, it has embarked on a systematic process of urban planning and registration of occupation. The municipality has organised the provision of plots for all types of demand, through infilling and consolidation of existing settlements, as well as laying out serviced areas for expansion of the city. Plots are provided for people to build traditional housing without having to meet stringent construction standards.

The objectives of the project were the prevention and mitigation of erosion caused by informal settlements, which had formed on land sloping towards the port and industries. In addition, the municipality intended to create a basis for revenue collection to finance further urban development.

Some positive attributes to emerge from the project include:

- Phased and systematic inclusion of bairros and their occupants into the urban master plan. Each year, one more bairro or area is included in the cadastral register. Using its own resources, the municipality has also designed and implemented an area for urban expansion;
- Land slated for urban expansion has emphasised accessibility to all income levels, including low-income groups through the provision of various plot options;
- The municipality routinely updates the land registers and inspects land use;
- The municipality has properly defined and publicised administrative procedures for land applications and building licences;
- Establishment of an archival system and collection of taxes on land use. The municipal property tax, for which the system is currently being organised, will be applied on conventional buildings.<sup>250</sup> For construc-

tions with a provisional licence, an annual land tax will be levied; and

- From the project, a technical services structure has been established including a municipal cadastral service. Services to the public have also improved.

The project has used flexible techniques for recording tenure rights, including:

- Formal registration processes based on demand for conventional construction. The procedures used here are defined in law and result in a land title that can be registered in the registry;
- Registration in new planned areas for buildings using traditional construction techniques. In these areas, plots are demarcated and allocated following simple applications made to the *bairro* authorities. Systematic registration of land occupation and building types is carried out after construction has taken place, through house-to-house surveys, updated annually. There is a cadastral numbering system covering all plots; and
- Registration in existing semi-urbanised areas. In these areas, maps are produced based on aerial photographs. Through a house-to-house survey, the municipality compiles a register of occupants and types of construction on each plot. All plots are included in the cadastral numbering system.

Occupiers in the latter two categories receive a “provisional licence to occupy the land”. This is not a legal title but serves as proof of rights to the land. These documents are kept in the municipal land archive, which covers both the conventional processes and simplified systems. Reference maps exist for both systems.

Based on its experience, the municipality of Nacala is helping to build capacity in other cities.

<sup>249</sup> Much of the information in this section was provided by Liana Battino, architect-planner with

Nacala Municipal Council for over 10 years, until 2003.

<sup>250</sup> See the Municipal Finance Law, 11/97 of May 31, Articles 54-61.

## 10 Conclusions

### 10.1 Conclusions concerning land and housing rights in general

- (1) Security of land tenure for the urban poor is not a major issue today in Mozambique. For occupants of more than 10 years' standing, tenure is secure under the law. Where a formal land application is submitted for land that is already occupied, rights of existing occupants are likely to be respected, and some form of compensation paid. Nevertheless, it is possible for existing occupiers who are not aware of their rights to be forced off their land against their will. Illegal evictions are most likely when land is transacted outside the formal system, but such cases are often simply not reported, and legal advice centres interviewed did not mention any cases of clients seeking advice because of expulsion from urban land.
- (2) Even though land tenure is substantially secure for the poor under the law, their land rights are not properly valued, meaning that people often accept less compensation than they are entitled to, or at least less than the land is worth in the "formal" land market.
- (3) The urban poor in Mozambique fare badly in terms of other components of the rights to adequate housing under international human rights law, including availability of services, materials, facilities and infrastructure; accessibility; and location (in terms of sites that are safe and suitable for building). Safe sanitation and waste collection services are the most critical problems, and cholera has become common in recent years in many urban and rural areas. Privatised services, such as electricity, fixed and cellular telephones and, in some towns, water supplies, have improved in recent years, although they remain unaffordable to many. Clearly, the existing disorganised occupation, which has been encouraged since before independence by poor provision of planned sites for low-income housing, is now a serious obstacle to the provision of services.
- (4) The land management and administration procedures of most municipalities are gravely deficient and are unable to meet the demand for housing land for all social groups, or to provide secure land tenure for formal investors, small or large. However, the land and housing sector in Mozambique cannot be analysed independently of other sectors. One of the major determinants, for example, of access to land and housing is the banking sector, which has insufficient capital to be interested in promoting low-cost housing loans. The legal system, too, appears not to support an expanding housing sector, as shown by the rather antiquated system of conveyancing, which is dependent on handwritten documents produced at the public notary's office.
- (5) Access to urban land is difficult and is likely to become even more difficult for the urban poor if the current policy shifts continue. Given the lack of municipal capacity to deliver land, regulations linking occupation rights to urban planning are likely to severely restrict access to land by the poor.
- (6) As a counter to this approach, there is a need to clarify and re-emphasise land rights. Planning policy and the land law in urban areas will have to address issues of participatory planning, how to deal with land rights if or when large numbers of households have to be moved, and how to ensure the supply of planned and serviced housing land for all income groups. Regulations and strategies must be realistic in their ambition, taking account of the limited capacity to deliver housing land and taking care not to undermine the rights of the poor.
- (7) At central government level, there is a need for greater institutional coordination and collaboration, and development of a coherent urban policy. The weakness of the municipalities and the poor capacity for urban governance can be seen as symptoms rather than the causes of urban problems, which essentially result from a consistent anti-urban bias in development policies and activities, at least since independence.

### 10.2 Conclusions concerning women's land and property rights

- (1) Under current law, despite equal constitutional rights, Mozambican women are very much discriminated against in marital property and inheritance issues. At the time of writing, women who are not legally married (the vast majority) are not protected by the law on separation, divorce or death of a husband. Women will benefit from the new Family Law that will come into force soon, which includes recognition of de facto

unions and greater flexibility of marriage regimes, taking greater account of wives' needs. However, even under the preferred marriage regime of community property, on divorce or separation, a husband may refuse to sell the house for an equal division of the proceeds, and/or the proceeds may not be sufficient for the woman to survive.

Women also face grave difficulties when a husband dies, as spouses are ranked low in the order of succession in the colonial laws, which have not yet been revised. Again, even if a woman is entitled to her half of the common matrimonial property, she may not be able to keep the house, and eviction may be an eventual consequence of too few rights in the civil code.

- (2) The HIV/AIDS epidemic is exacerbating the insecurity faced by women in cases of marital separation or widowhood. They are frequently blamed for infecting their husbands and threatened with expulsion from the family home and dispossession of marital property. The epidemic is also increasing the burden of women as caregivers.
- (3) Application of the law is inconsistent. Judges are mainly male and interpret the law in the own interests of their own sex, without considering the Constitution. In cases of unconstitutional judgements, an appeal to the Supreme Court is likely to be successful, but the overwhelming majority of women cannot gain access to the court system because of their illiteracy, their lack of knowledge, and because they cannot afford the costs. In any event, the legal system is unable to deal with the volume of cases in the pipeline.
- (4) Under customary law, which is the main determinant of social relations in rural areas and is influential in peri-urban and suburban areas, women (particularly wives) are again very much subordinate in terms of rights to land and succession. They are particularly vulnerable to expulsion from the family home in case of conjugal conflicts and on a husband's death.
- (5) The land bureaucracy, the judiciary and other important institutions are male dominated and lack representation. Traditional institutions that play a pivotal role in rural areas are also controlled by men.
- (6) Various crucial policies – for example, the poverty reduction policy – do not adequately address the gen-

der aspects. Gender policy also has few references to women and land rights.

### 10.3 Civil society

Civil society with a strong focus on urban land advocacy is generally lacking, despite the fact that it was heavily involved in rural land advocacy during the passing of the 1997 Land Law.

### 10.4 Legal issues

Mozambique's laws on land have been substantially reformed in recent times, and the 1997 Land Law formulation process is often cited as a positive practice. However a number of issues need to be addressed.

- (1) In line with international legal trends, the law should recognise a right to housing and related socio-economic rights.
- (2) Legal reform should be hastened. Laws related to housing and land are often old colonial laws. The process should include revision of the 1966 civil code, the enactment of a succession law, urban land regulations as well as laws providing for legislative support for land planning.
- (3) Provisions of the Constitution that prohibit discrimination are bypassed when old and outdated laws are applied instead.
- (4) Formulation of urban-related laws, namely the urban land regulations and the planning laws, should be coordinated between the two bodies concerned.

### 10.5 Capacity issues

There is a general lack of financial and human resource capacity among municipalities and the offices involved in land administration and management.

## 10.6 Research and data issues

There are significant gaps in knowledge in a number of areas concerning land rights:

- (1) Little is known about the demand for urban land and housing, although indications are that demand far outstrips supply.
- (2) There have been no studies concerning the effects of HIV/AIDS on rural, urban and peri-urban poverty, or its effects on urban land rights.
- (3) There is no gender-disaggregated data on land and housing issues.

## 11 Recommendations

On the basis of these conclusions, we make the following recommendations:

### 11.1 Recommendations for immediate action

- (1) A campaign should be initiated to provide suburban and peri-urban residents with information on their rights under the land law, and to explain these rights to staff of municipalities and other public bodies. NGOs and municipalities should partner in this campaign.
- (2) The new land use planning law/policy and the Urban Land Regulations should be linked, together with the Municipal Framework Law and the Municipal Finance Law, in terms of defining the responsibilities and procedures for land use planning and land administration. The Urban Land Regulations should only be promulgated after a process of more open debate, which should be coordinated with the process of approval of the land use planning policy and legislation and, ideally, with the elaboration of the national housing policy.
- (3) Once the new Family Law has been promulgated, a campaign should be launched to communicate the rights of women in de facto unions, and women's rights under the various marital regimes. Register office staff should also be given training in advising couples of the advantages and disadvantages of the different marital property regimes.
- (4) Systematic data gathering and research on gender issues in urban land and housing in Mozambique is required. In particular there is a need for data disaggregated by gender. Priority should be given to researching factors that can mitigate the impact of HIV/AIDS on the exercise of land and housing rights by men, women and children.
- (5) A campaign to improve the treatment of women living with HIV/AIDS and widows should be promoted in both rural and urban areas by UNAIDS, NGOs and the National Council for the Combat of HIV/AIDS.

### 11.2 Recommendations for medium and long-term actions

- (1) The Law of Succession should be reformed, with the main objective of providing secure inheritance rights for surviving spouses. It should also address the issue of simplified inheritance procedures for the illiterate and low-income population.
- (2) In policies and programmes for urban areas, priority should be given to the urgent need to improve sanitation and drainage.
- (3) Unplanned settlements should be upgraded where possible, with residents' participation, with a view to providing land documents to existing residents and to accommodating the provision of public services and infrastructure.
- (4) Simplified cadastral systems should be designed and legalised for the granting of land rights in a range of settlement types in urban and peri-urban areas, thus permitting proper municipal administration of land and just implementation of municipal taxes. For recommendations 7 and 8, the experiences of Manica and Nacala are suggested as models for use in urban areas of low to medium density.
- (5) The Land Registry Law (*Decreto-Lei* no. 47 611 of March 28 1967) should be reformed, to bring it into line with the 1997 Land Law.
- (6) A system for valuing informal land rights in urban areas should be devised, through research into urban

- land markets. Holders of such rights should then be educated about the value of their rights.
- (7) Building regulations should be made more flexible to permit legalisation of individual houses of traditional construction and promote improved construction using traditional materials, affordable to peri-urban families.
  - (8) Municipal capacity building needs to increase, particularly through provision of legal support and recruitment of better-qualified staff, who should then be trained in aspects of financial management, municipal and land law (including, in particular, land rights), land valuation, community participation, among other critical areas. Municipal property taxes should be implemented and enforced to increase municipal revenue. Sharing of experience by municipalities, and the use of staff of more capable municipalities to train the staff of others, are recommended. UN-HABITAT could perhaps support this capacity building. Civic education of citizens is also recommended.
  - (9) Flexible systems of small building loans for low-income groups should be developed. For middle-income groups, the legalisation of provisional mortgages should be considered.
  - (10) Access to legal assistance and to the court system should be improved for all income levels. As a first step, national and international NGOs should increase their support for legal and paralegal networks, such as the AMMCJJ and Muleide.
  - (11) Subject to appropriate limits, the determination of applications for land should be devolved to district administrators (including those in rural areas) and municipalities.

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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) <sup>251</sup>:

- 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) <sup>252</sup>:

- Article 11(1) recognises the right to adequate housing <sup>253</sup>;
- Article 2(2) prohibits discrimination; and
- Article 3 recognises equal rights between men and women.

The International Covenant on Civil and Political Rights (ICCPR) <sup>254</sup>:

- 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) <sup>255</sup>:

- 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. <sup>256</sup>

<sup>251</sup> *Universal Declaration of Human Rights*, adopted on 10/12/1948 by General Assembly Resolution 217 A (III), UN GAOR, 3<sup>rd</sup> Session.

<sup>252</sup> *International Covenant on Economic, Social and Cultural Rights*, adopted on 16/12/1966. General Assembly Resolution 2200 (XXI), 21<sup>st</sup> 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.

<sup>253</sup> 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.unhchr.ch/tbs/doc.nsf/MasterFrameView/469f4d91a9378221c12563ed0053547e?Opendocument>

<sup>254</sup> *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.

<sup>255</sup> *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.

<sup>256</sup> See UN Committee on Elimination of Racial Discrimination, *General Recommendation nr. XXII on Article 5: Refugees and Displaced Persons*, 1996. Available on: [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/fed5109c180658d58025651e004e3744?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/fed5109c180658d58025651e004e3744?Opendocument)

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)<sup>257</sup>:

- 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)<sup>258</sup>:

- 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 Countries<sup>259</sup>:

- 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)<sup>260</sup>: 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")<sup>261</sup>:**

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

<sup>257</sup> *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., 34<sup>th</sup> 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.

<sup>258</sup> *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.

<sup>259</sup> *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>

<sup>260</sup> *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.

<sup>261</sup> *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).

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.<sup>262</sup>

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

<sup>262</sup> 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<br>a: 1994            | NO<br>s: 1994             | YES<br>a: 2004            | YES<br>a: 1984            | YES<br>a: 1991            |
| ICCPR                                           | YES<br>a: 1994            | YES<br>s: 1994<br>r: 1998 | YES<br>a: 2004            | YES<br>a: 1984            | YES<br>a: 1991            |
| Optional Protocol to ICCPR of 1966              | YES<br>a: 1994            | YES<br>a: 2002            | NO                        | YES<br>a: 1984            | NO                        |
| ICERD                                           | YES<br>a: 1982            | YES<br>s: 1994<br>r: 1998 | YES<br>a: 1969            | YES<br>s: 1968<br>r: 1972 | YES<br>a: 1991            |
| CEDAW                                           | YES<br>a: 1992            | YES<br>s: 1993<br>r: 1995 | YES<br>a: 2004            | YES<br>s: 1980<br>r: 1985 | YES<br>a: 1991            |
| Optional Protocol to CEDAW of 1999              | YES<br>s: 2000<br>r: 2000 | NO                        | NO                        | NO                        | NO                        |
| CRC                                             | YES<br>s: 1990<br>r: 1990 | YES<br>s: 1993<br>r: 1995 | YES<br>s: 1990<br>r: 1995 | YES<br>s: 1990<br>r: 1991 | YES<br>s: 1990<br>r: 1990 |
| Convention 169 on Indigenous and Tribal Peoples | NO                        | NO                        | NO                        | NO                        | NO                        |
| ACHPR                                           | YES<br>r: 1992            | YES<br>s: 1996<br>r: 1996 | YES<br>r: 1995            | YES<br>s: 1983<br>r: 1984 | YES<br>s: 1986<br>r: 1986 |
| Women's Protocol to ACHPR of 2003               | YES                       | YES                       | NO                        | NO                        | YES                       |

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







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