

THE URBAN HOUSING CRISIS IN NAMIBIA: A YOUTH PERSPECTIVE

National Youth Council of Namibia (NYCN)

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List of Acronyms

AALS	Affirmative Action Loan Scheme
ALAN	Association of Local Authorities in Namibia
BTP	Build Together Project
CBOs	Community-Based Organisations
CoW	City of Windhoek
CPF	Central Provident Fund
CRAN	Communications Regulatory Authority of Namibia
CSO	Central Statistics Office
DBTP	Decentralised Build Together Programme
ECB	Electricity Control Board
ECFSP	Emerging Commercial Farmers Support Programme
EDB	Economic Development Board
FLTA	Flexible Land Tenure Act
FLTS	Flexible Land Tenure System
HDP	Housing Development Board
IMF	International Monetary Fund
LRO	Land Rights Office
LRR	Land Rights Registrar
LSU	Livestock Unit
MANWU	Metal and Allied Namibian Workers Union
MAWRD	Ministry of Agriculture, Water and Rural Development
MET	Ministry of Environment and Tourism
MHP	Mass Housing Programme
MLR	Ministry of Lands and Resettlement
MRLGHRD	Ministry of Regional and Local Government, Housing and Rural Development
NACHU	National Cooperative Housing Union
NACOS	National Council of Students
NAMFISA	Namibia Financial Institutions Supervisory Authority
NAN	National Archives of Namibia

NANSO	Namibia National Students Organisation
NECFF	Namibia Emerging Commercial Farmers Forum
NETNC	Northern and Extra Territorial Native Control
NGO	Non-Governmental Organisation(s)
NHAG	Namibia Housing Action Group
NHE	National Housing Enterprise
NHP	National Housing Policy
NPC	National Planning Commission
NSFAF	Namibian Students Financial Assistance Fund
NSIS	North South Incentive Scheme
NTA	Namibia Training Authority
NUST	Namibia University of Science and Technology
NYC	National Youth Council
NYS	National Youth Service
OECD	Organisation for Economic Cooperation and Development
OMEG	Otavi Minen und Eisenbahn Gesellschaft
OPM	Office of the Prime Minister
OVC	Orphans and Vulnerable Children
PMC	Putna Municipal Council
PTO	Permission to Occupy
RDP	Reconstruction and Development Programme
RED	Regional Electricity Distributor
SDFN	Shack Dwellers Federation of Namibia
SMEs	Small and Medium Size Enterprises
SWACO	South West Africa Company
SWAPO	South West Africa People's Organisation
TCCF	Technical Committee on Commercial Farmland
TIPEEG	Targeted Intervention Programme of Employment and Economic Growth
UN	United Nations
UNAM	University of Namibia
UNCHS	United Nations Centre for Human Settlements
VTC	Vocational Training Centre

FOREWORD

There is no doubt that the urban land and housing question remains one of Namibia's thorniest political and developmental issues. It reaches across all corners of the country, across all developmental spheres and it certainly determines more than any other issue, the political views of most Namibians.

After 25 years, there is little or no substantial shift in the racially and class influenced urban land policy of the past. This is a stark indictment of our country's inability to deal with our racialized past. More specifically, it is difficult to unbundle the social, economic and psychological impact of apartheid. We cannot afford to leave this legacy unaddressed, nor can we allow it to continue determining social and class relations into the future.

There is a case to be made, that housing policy and youth development opportunities form a strong part of the nexus of policy priorities that our country needs to act on. Young people and adolescents represent over 50% of the total population. Young people also bear the brunt of most of our social economic and developmental vices. This, coupled with Namibia's troubling legacy of inequality, creates unsettling and destabilising prospects. Housing policy forms an important part of poverty reduction strategies and thus it makes sense that poverty reduction efforts must be focused on the most productive sectors of society and the economy, which are the working masses and the youth.

This book explores the nexus of ideas and policies that will move Namibia out of its current state of paralysis in regards to urban and housing policy issues. It further seeks to articulate why housing and urban land policies must be a key component of our national strategy to develop our young people.

The National Youth Council of Namibia (NYC) has been seized with the matter of land for some time now, organising in 2014, Namibia's first ever Intergenerational Dialogue on Agricultural Land and Youth. This important platform opened the minds of many, including the Ministry of Lands, on the youth dimension of the land question. It was also at this platform that the need to explore urgent pathways to deal with the urban housing crisis was identified. Our interventions have since led to greater emphasis being placed on ensuring that youth are also beneficiaries of the land redistribution

process. In February 2014, the NYC for the first time published a booklet that explored the various dimensions of the agricultural land debate, including the issue of efficient and effective tenure.

All the above led to the development of this publication, which we hope will provide perspectives of young people on how to resolve the urban land question. It is proposed amongst others that Namibia needs to seriously rethink its market-based and overpriced housing development model. This publication explores alternatives and looks at housing delivery models in other countries such as Singapore.

The NYCN has come to appreciate the value of publications such as this one, as they not only serve as repositories of youth perspectives, but also enrich the contribution of young people to important policy debates in Namibia. It is my hope that in future more issues will be explored in this way.

Mandela Kapere
Executive Chairperson: NYCN

Introduction

This publication is based on the papers presented, as well as discussions held during the NYC Colloquium on youth and urban/land in Otjiwarongo from May 6 to 8, 2015. The publication follows the order of the programme and presents the papers and discussions in an edited version. The written papers were largely retained in their original format with minor editorial changes while the transcripts of the discussions are presented in summary format.

Chapter 1 traces the history of land dispossession in Namibia. Kletus Likuwa outlines the modes of land dispossession by the early European traders and missionaries through the era of German and South African colonial occupation. He points out how the European appropriation of land led to new forms of land tenure and how the colonial forced relocation affected black communities. The colonial legacy of unequal access to land resulted in the challenges of land and home ownership that Namibian youth are experiencing today, and Likuwa thus argues for the creation of educational platforms to raise the youth's awareness about land reform.

Chapter 2 explores the Namibian Constitution and the legal framework for land reform. Clever Mapaure argues that the land reform process has been too slow, hence the historical injustices still prevail. While the Namibian Constitution provides for the protection of private property, it also allows for the expropriation of land in the process of land reform. Mapaure thus argues for an increased pace of the expropriation process, which will have to result in successful black-owned farms. He points to the complex legal, political and economic factors that need to be addressed in order for the land reform programme to succeed. One of the proposals made is the introduction of a new hectare-based taxation system, which would increase state revenue while encouraging more productive use of land.

Maria Lukas points out how corruption contributes to the high costs of housing and that Namibia's unequal distribution of resources is reflected in access to land (or the lack of it). She suggests a significant reduction in land prices and the strengthening of the rights to own land. Lukas also calls for limitations regarding foreign ownership as well as the multiple ownership of houses by wealthy individuals.

Chapter 3 outlines the politics, institutions and management of land in Namibia. Ase Christensen provides an overview of the flexible land tenure system (FLTS), including the different schemes and titles that the system entails. The starter title provides low-income people with a basic group-based tenure and protection against eviction. Over time, a starter title can be upgraded to a land-hold title and eventually to free-hold title. As the FLTS was only enacted in 2012, Christensen argues that further research needs to be conducted to establish how the system functions in practice. However, the shack dwellers federation has already applied the FLTS principles with positive results for the past 20 years.

Wolfgang Werner points out that the focus of land reform in the first years of independence was on commercial farm land through the resettlement programme and the affirmative action loan scheme. He argues that the stated aim of redressing past injustices collided with the definition and prioritisation of beneficiaries, which allowed well-off elites to capture some of the benefits of resettlement. Werner argues that the productive utilisation of land requires a minimum level of assets and that the economic and financial sustainability of small-scale livestock farming needs to be reviewed. Increased agricultural production requires proper support services and the legal protection of access rights to common communal lands needs to be strengthened. Werner believes that land reform in Namibia needs a thorough review.

Narikutuke !Naruses elaborates on how the demand for residential land in Windhoek outstrips supply. She argues for a guided, integrated spatial development in order to discourage sprawling developments. Windhoek's rapid population growth presents a major challenge which is exacerbated by a cumbersome land delivery process that resulted in a time span of three to six years for a plot to be ready for allocation.

The City of Windhoek wants to make land allocation fair and transparent and thus introduced an "offer to purchase" process as well as "private treaties". !Naruses argues that the land and housing issue needs a national policy focus that will make access to land and housing easier. This should cover land delivery, access to finance, infrastructure provision, housing types and decentralisation.

Chapter 4 presents some policy options for mitigating the youth housing crisis. Herbert Jauch argues that adequate housing must be regarded as a basic human right. This requires a move away from treating the housing

market as primarily a profitable investment opportunity. Instead, the price of housing and urban land has to be regulated to overcome the current situation where the average house price is unaffordable to over 90 percent of Namibians.

Jauch argues that the state should play an active role not only as a regulator but also as a provider of housing, in the same way as Singapore has done with great success. He also believes that community-based housing initiatives hold great potential in terms of providing a participatory and affordable form of housing delivery. Providing adequate housing for all can pave the way for sustainable job creation and a more inclusive development path.

Josua Matati examines the history of the land scramble and the key interventions taken after independence. He recommends that the SWAPO Party resolutions on land should be implemented and that the armed forces should be engaged in the mass construction of houses. Furthermore, the land acquisition process should be streamlined and the proclamation of towns should not take place at the expense of communities living in the vicinity.

Chapter 5 critically examines the mass housing programme and asks if it is a panacea to resolving the housing crisis. Guillermo Delgado and Phillip Lühl outline that the housing backlog in Namibia is estimated at over 100,000 housing units and thus the mass housing programme aims to invest N\$45 billion to build 185,000 houses within 18 years. However, the programme's "Blueprint" is superficial in view of the challenges presented by Namibia's apartheid-planned towns.

Delgado and Lühl analyse the impact of the "financialisation of housing" and draw lessons from global experiences with mass housing programmes. They argue that Namibia has a unique opportunity to learn from these experiences and then to forge a different way of development in which housing takes centre stage to overcome the social and spatial apartheid legacies. This will require systematic planning, which the current "Blueprint" fails to provide.

Johannes Uusiku and Tikhala Itaye argue that the role of the government is to ensure that the housing development process is inclusive for all and that those households excluded from the market and conventional housing development mechanism are given the opportunity to access land, housing and services. They point out that the National Housing Policy has shown major deficiencies as housing has become inaccessible and unaffordable for

many. Thus Uusiku and Itaye argue for a more stringent housing policy that will contribute to the development of sustainable livelihoods through effective housing programmes.

Finally, chapter 6 presents the resolutions and recommendations adopted at the NYC colloquium. They reflect the consensus reached regarding the issue of youth and the urban land crisis. The resolutions point to the way forward as envisaged by the participants and they are expected to provide the basis for further discussions within the NYC structures, as well as for engagements with the Namibian government.

Readers will notice that this publication does not present just one line of thought, but instead accommodates the various views and concerns expressed during the colloquium. Written papers that were presented are credited to the authors, while the main points raised during the discussions are presented in summary form. They are credited to individual contributors whose names were captured by the transcript. However, several contributions were not traceable and are thus reflected as participants' contributions. They enriched the debates and thus deserve a place in this publication. Great care was taken not to alter the contents of the contributions made.

We hope this publication will provide the reader with an insight into the various aspects of the debates around the urban housing crisis from a youth perspective.

B.F. Bankie and H. Jauch
Editors

Chapter 1: Tracing the history of land dispossession in Namibia

1.1 Kletus Mukena Likuwa¹: Land dispossession in Namibia

Introduction

This study on land dispossession in Namibia traces the history and modes of colonial land dispossession, as well as the social and economic impact on the people of Namibia. While various studies have dealt with the history of colonialism and land dispossession (for example Goldblatt 1971; Silvester 1993; Hayes 1998; Nujoma 2001) very few linked Namibian youths to the land question (Bankie and Ithete 2014; Likuwa 2014).

A review of literature was complemented with other qualitative approaches such as the use of oral interviews with randomly selected people, and archival documents from the National Archives of Namibia (NAN) to collect the data that was analysed and used to write up the paper.

The aim is to explain the development of the colonial economy in Namibia; the forced relocation and resettlement patterns of black communities in the urban areas; the control to land access and ownership for Namibians during the colonial period; and the implications of colonial land dispossession and settlement patterns on Namibians in the post-colonial period.

I assert that the economic and political interest of European hunters and traders resulted in the loss of land and livestock for Namibians, which increased their social and economic hardships and subjugated them into the colonial economy as low waged labourers. The introduction and implementation of colonial laws and policies, especially during the South African colonial period, resulted not only in the relocation and resettlement of black Namibians, but also in the loss of land and its ownership in the urban areas. Namibia inherited a colonial past of unequal land distribution and ownership in both rural and urban areas, which called for redress in the post-colonial period. Therefore, the current land shortage or unequal land

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distribution can be explained by placing it in a full historical context. This way, it will be possible to suggest the way forward.

The paper outlines the history and modes of dispossession in Namibia by explaining the early activities of European hunters and traders who introduced European goods and eventually paved the way for a permanent colonial settlement in Namibia. It then discusses the development of the colonial economy by explaining the mining and farming developments and how Namibians were integrated as cheap contract labourers. The paper further explores the process of land dispossession and a forced resettlement pattern of the people of Namibia through colonial policies that controlled relocations and resettlement processes. Lastly, the paper discusses the impacts of colonial laws, and their application, on Namibians in postcolonial Namibia in terms of addressing the unequal distribution of land to previously marginalised Namibians. The paper is significant not only because it highlights youths and the land question, but also because the knowledge presented could enhance continued academic discourse on land reform in Namibia. Furthermore, knowledge presented in this paper could become a useful basis for suggesting ideas for the formulation of policy that is beneficial to youths and other Namibians in general.

History and modes of land dispossession

The history and modes of land dispossession in Namibia did not begin with the German conquest of the country in 1885, but included the prior activities of European travellers, hunters and traders and missionaries who traded their European goods or commodities for land and paved the way for the eventual colonial conquest and mass land dispossession of Namibians by a colonial government.

Some traditional leaders and communities believed that missionaries paved the way for colonial military conquest and eventually to the loss of indigenous land. Thus they resisted the presence of missionaries. King Nyangana of Vagciriku in the Kavango was a case in point, as Bierfert (1938) indicated:

"One day he [King Nyangana] came to me and said that he had something heavy on his mind [there was something that worried him] and asked for our help. Thereupon he narrated amply that some years ago, after the unfortunate war with the

Germans, numerous OvaHaherero passed through his land and warned [cautioned] him of missionaries and that one day he would be experiencing the same as they experienced. They too used to accommodate missionaries, but then soldiers came, and these had now taken away their land. At this [King] Njangana [Nyangana] used an expression which in former times was frequently heard in Herero land: 'The wagon has destroyed the Herero people'".

Walvis Bay was an important entry point for missionaries who came to do evangelical mission work. Although there were earlier missionary efforts in various localities in Namibia, a real network was only established after the Rheinish Missionaries Society arrived about 1842 and soon they had 11 stations among the Nama and seven amongst the Herero. The Finnish Missionaries opened stations among the former Owambo land around 1870. In the Kavango, a missionary settlement came quite late, with the establishment of a station by Catholic missionaries in 1910. For example, people of the Kavango rejected the evangelists from Botswana many times and by 1883, King Diyeve of the Hambukushu again refused to accept them (Voltz, 2006). The missionaries supported the work of European hunters and traders and welcomed the permanent establishment of colonial troops in various localities in Namibia.

Namibia experienced a wave of European hunters and traders as early as the 1850s and Walvis Bay was again an important entry point for trade activities, with Otjimbingwe developing as an important trade centre. Traders engaged in the hunting and trade in ivory, cattle and ostrich feathers, in exchange for guns, gun powder, lead, food and clothing and land. Since the 1870s, trade networks from Walvis Bay and Otjimbingwe extended to Owambo and Kavango lands in northern Namibia and as far as Lake Ngami in Botswana. Hunters and traders experienced insecurities due to ongoing attacks upon them by the local populations who felt cheated or betrayed. Furthermore, there were rumours of the land thirsty Boer trekkers planning to settle in South West Africa (SWA) and the Portuguese showed some strategic sympathy towards them. All these developments posed threats to the interests of European hunters and traders and became grounds for petitioning the British government at the Cape colony to annex SWA to protect their interests.

Furthermore, an unequal and unsustainable trade in ostrich feathers, ivory and cattle, which were exchanged for arms and consumer goods, led to a

volatile period of conflict, and this created an opportunity for the colonising power to come in and “divide and rule” under the pretext of providing “protection” (Lau, 1987). Some traditional leaders realised that the idea of protection treaties with the Europeans was a smoke screen to take away the land from Africans and therefore needed to be stopped, as Hendrik Witbooi cautioned another chief:

“You will eternally regret that you have given your land and your rights to rule into the hands of white men. For this war between us is not nearly as heavy a burden as you seem to have thought when you did this momentous thing” (Hillebrecht, 2015).

Despite the interest to annex SWA, the British at the Cape colony avoided the plan due to lack of support from the imperial British government in London and they declared only Walvis Bay as their colonial property and left the rest open to German imperial conquest (Stals 1990). By March 12, 1878, Walvis Bay with its surroundings was annexed by Staff-Commander Dyer of HMS Industry. By May 1, 1878 W.C. Palgrave, a special emissary of the British Cape Colony to SWA, published liquor laws for Walvis Bay, prohibiting the sale of liquor within six miles of any mission station; established local courts and introduced taxes but had no power to reinforce them. The prophetic words of Hendrik Witbooi that a protection treaty with the European can never last long turned true, as by the 1880s, Herero and Nama groups continued to threaten European hunters and traders who seemed to have taken over vast pieces of Herero and Nama lands through dubious dealings. By January 1882, gun boat Wrangler was dispatched to Walvis Bay with 25 men under Captain Whindus, accompanied by Dr C. Hahn, former missionary among the Herero and Nama to calm down the Hereros and Nama groups. As a result of competing political and economic interests, the German Imperial government by August 7, 1884 hoisted a German flag at Angra Pequena (now Lüderitz) and at other near places, with the exception of Walvis Bay. By February 24, 1885, the imperial government at the Cape had irrevocably abandoned all claims to SWA territory, retaining only its freehold at Walvis Bay and therefore left the rest of SWA/Namibia territory in the hands of the German government who declared ownership over SWA/Namibia.

Development of the colonial economy in Namibia

Even prior to a colonial conquest of Namibia, some mining activities took place along the coastal areas of SWA/Namibia, which among these were the exploiting of guano reserves on the Island by the 1847s. As from 1850, copper mining was flourishing near Lüderitz, Kuiseb and Swakop, but soon waned due to high production and transportation costs. It was during the period of the German conquest of Namibia that more minerals were discovered, which led to the development of infrastructure that required lots of local labour. The colonial authorities constructed harbours such as the port at Swakopmund from November 1889 and there was copper mining from 1892 at Otavi conducted by the South West Africa Company (SWACO), whose mining rights were later given to OMEG (the Otavi-Minen-Und Eisebahngesellschaft) (Kohler 1958). The construction of a railway line in South West Africa started from 1898 and the railway line to Otavi was completed by 1906. Copper mines were in operation at Guchab and Khan from 1906, and diamond mining started at Lüderitz after 1908.

What all pre-colonial communities in Namibia had in common was that land was owned by the community as a whole. Land utilisation in pastoral regions was communal, whereas permanent usufruct was granted to arable plots in the north. Namibia suffered under an extreme, protracted and differentiated colonial experience. Under German colonial rule, the extermination of the indigenous population and the expropriation of land began (Hunter 2004). Land alienation by Europeans began in 1883 when a German trader, Adolf Lüderitz, obtained the first tracts of land from chief Joseph Fredericks in the south of the territory. Soon afterwards, German colonialists acquired land by signing protection treaties with indigenous rulers. Exploiting local conflicts, the former offered protection to individual rulers against their adversaries. Signatories of protection treaties in return were not permitted to alienate any land to "a different nation or members thereof" without the consent of the German Emperor. By 1893 practically the whole territory occupied by pastoralist communities had been acquired by eight concession companies. European appropriation of land brought in its wake new forms of land tenure. More specifically, the notion of private land ownership rapidly replaced communal land utilisation and for the first time introduced rigid land boundaries. Settlers took advantage of the plight of stockless pastoralists in the central and southern regions of the country. By means of unequal trade they acquired large tracts of land and substantial numbers of the livestock that had survived the rinderpest.

After the 1904-1908 wars of the Nama and Herero against the Germans, the white farmers, with the legal support of the colonial state dispossessed the black pastoralists of their land and compelled many into becoming labourers for the white farmers (Silvester 1993). The increase in white farm settlers in the police zone after 1908 added to the increased need for African labour (Stals 1967). The new farm settlers needed labourers to work for them but the war of 1904-1908 against the German administration decimated a great number of potential Herero and Nama labourers, forcing the administration to look to the Kavango and Owambo regions for migrant labour. Wage labour in the European sense was unknown to the Owambo and Kavango people before their contract with Europeans. The spread of wage labour was caused by the European economic sector's dependence on African workers (Siskonen 1990). Already, the earlier explorers, traders and hunters and missionaries needed African servants. Wage labour was introduced in, for example, the Owambo communities in the 1880s, with private individuals voluntarily working on sites (Siskonen, 1990). In the beginning of 1889 the district commander of Swakopmund notified the missionary Martti Rautanen that he had sent a man to recruit labour in Owamboland. Owambo labour was also recruited for the plantations of Huilla and the Bie regions in Angola, as well as for the construction of the railway line from Benguela to the interior which got started in 1903 (Siskonen, 1990). Likewise, the directors of the Witwatersrand Gold Mines were interested in the recruitment of Owambo labour in the early 1900s.

The German colonial administration issued regulations at the end of 1905 announcing the expropriation of all "tribal land – including that given to the missionaries by the chiefs". More specific regulations followed in 1906 and 1907, empowering the colonial administration to expropriate all the land of the Herero and Nama. With a few exceptions, the process of dispossession of land from Africans in the Police Zone was just about complete at the outbreak of the First World War in 1914. The conquest of Namibia by Union troops in 1915 brought about certain changes with regard to land policies, where South African land policies were forced onto Namibia. In the context of South Africa, for example, the first formal act of forced relocation occurred in 1658 when Jan van Riebeeck informed Khoi communities that they could no longer live west of the Salt and Liesbeek rivers. From then on, military conquest and colonial settlement became the standard methods of dispossession, although legislation and trickery always played a part (Levin 1996). The South African 1913 Land Act prohibited land purchases by Africans outside of the scheduled reserves, making these the only places where Africans could

legally occupy land. Sharecropping and “squatting” were outlawed (Klug 1996). The Act effectively dispossessed millions of South Africans of their land, and immediately reduced African access to land by ruling out over one-and-a-half million hectares of white-owned land rented by Africans, as well as half a million hectares owned and occupied by Africans at the time (Klug, 1996).

By 1924, the Black Administration Act, No 38 of 1927, became one of the principle tools used in forced removals. By 1936 the Native Trust and Land Act was introduced, which expanded the total reserve area and created the South African Native Trust to acquire and administer that land. The introduction of the 1937 Native Laws Amendment Act removed the surviving rights of Africans to acquire land in urban areas. The majority of forced removal victims were African – although 600,000 non-Africans were forcibly removed under the Group Areas Act. “Black spot” clearance, homelands consolidation, the abolition of labour tenancy, urban township relocation, influx control and betterment planning, were all Apartheid measures to forcibly uproot people. In Namibia, the racial discrimination introduced by the Germans was later maintained by the South African administration on a more systematic and legally enforced basis. All legal structures of discrimination operative in the Republic of South Africa were applied to Namibia, which South Africa regarded as its mandated territory.

Numerous laws to regulate the movement and residence of the indigenous population were implemented. They included the Vagrancy Proclamation of 1920, known as the pass law (as amended in 1922), the Extra Territorial Northern Native Control proclamation of 1935 and the regulation for the Registration and Control and Protection of Natives in Proclaimed Areas of 1955, which are explained further below. In view of the threat of migration and loss of potential labourers, a need for stringent control over the labour movements, settlement patterns and supplies was perceived, and the colonial authority in Namibia passed the Northern and Extra Territorial Native Control (NETNC) Proclamation No. 29 of 1935, which finally allowed control and recruitment of labour outside Namibia (Werner 1993). Defining a “native” as a person whose parents are aborigines, the proclamation it stipulated the compilation of a register of all “natives” in the territory. The policy of the administration was to prevent the detribalisation of the Kavango and Owambo people. In pursuance of this policy, such Africans would normally return to their homes periodically.

The series of colonial regulations that were provided in 1935 did not only prevent the Africans from Kavango and Owamboland from moving permanently to the city, but it helped to channel migrant labour at reduced wages. Proclamation No. 29 of 1935 dealt with the control of the Extra Territorial and Northern Natives, which included the Angolan, Zambian, Owambo and Kavango contract labourers. Under this proclamation all contract labourers at the expiry of contract had to be repatriated and the police on patrols had to ensure that all contract labourers were always in possession of their non-expired employment permits or passes (Werner 1993). Those contract labourers who tried to settle permanently after the contract period faced deportation and jail sentences. Oral narratives also indicate that the colonial administration carried out some clean-up campaigns in the police zone to induce some "mbwiti" people to return home. Proclamation No. 39 of 1935 required all Africans from Kavango and Owamboland to possess an identification pass to be recruited in the police zone and discouraged further issuing of visiting passes to them. Visiting passes were no longer issued to Africans in order to limit their movements to the urban areas, where they could only visit for employment purposes. Thus the Africans were controlled as reserves for colonial labour. It was agreed that a metal tube container, as the one used in Northern Rhodesia, should be issued to the African labourers to carry their identification passes. These Africans were mainly recruited by companies such as SWACO and the Otavi Minen Und Eisenbahn Gesellschaft (OMEG) of Tsumeb, Otavi and Grootfontein areas.

The racially-weighted distribution of land was an essential feature in the colonial exploitation of Namibia's resources. The whole wage structure and labour supply system depended critically on the land divisions in the country. Access to land determined the supply and cost of African labour to the colonial economy. The large-scale dispossession of black Namibians was as much intended to provide white settlers with land, as it was to deny black Namibians access to commercial agricultural production and thus forcing them into wage labour. Therefore, colonial land policies cannot be fully understood unless set within the process of capital accumulation in Namibia.

Capital accumulation in Namibia was facilitated by the establishment of "native reserves". In terms of the mandate all land held by the previous German government was transferred to the South African administration. The proclamation of reserves meant that many Namibian pastoralists who had reclaimed parts of their ancestral lands after conquest were resettled on marginal lands in the eastern parts of the territory. At the same time the

South African government embarked on an accelerated program of settling mainly poor South African whites on dispossessed land. By 1946, surveyed farms in the Police Zone comprised 32 million hectares, representing just over 60 percent of its area or 39 percent of the country. By contrast, the area reserved for black Namibians in the Police Zone amounted to 4.1 million hectares. The alienation of ever increasing portions of land for white settlers implied that large numbers of people were resettled onto more marginal land. No accurate data exists on the extent and nature of such relocations as yet. But several cases have been documented of communities that had to vacate ancestral lands which were reclaimed after 1915, to make way for white settlers.

With the implementation of the recommendations of the Odendaal Commission, Namibia's distribution of land along racial lines was complete. The Native Affairs Department had directed that "where possible large areas should be provided away from European inhabited parts as this gives better opportunities for healthy family life, future control and automatically complies with the Segregation Policy, so much advocated in parts of the Union". After Namibia had fallen under South Africa's control, systematic racial discrimination culminated in the implementation of apartheid politics. Unlike other settler colonies such as Zimbabwe (Rhodesia) and Kenya, the white settlers appropriated agricultural areas that, due to low and unpredictable annual rainfall, are almost exclusively utilisable for extensive stock farming. The central and southern regions, especially those inhabited by the Herero, the Nama and the Damara, were particularly affected by colonial land expulsion.

Colonial forced relocation and resettlement patterns of black communities in the urban areas

The colonial forced relocations and settlement patterns of black communities in the urban areas is not limited to Namibia, but bears similarities with neighbouring countries such as South Africa. This is so because the same Apartheid government administered both countries and thus Namibians and South Africans experienced certain similarities in the application of the colonial laws. In South Africa, for example, the strategies of forced removals were applied in the context of set established laws such as section five of the Black Administration Act. People were moved and stripped of their land ownership, all in accordance with established laws (Murray 1990).

Three-and-a-half million people in South Africa had been moved by the 1960s and were left to live under appalling conditions. This figure was regarded as incomplete as it did not, for example, include the bulk of people affected by influx control in the urban areas (Platzky 1985). The fundamental strategy behind these removals was to perpetuate control, in economic and political contexts. Bantustan strategies were also used to apply indirect rule, politically and economically through the traditional leaders. Conditions of starvation and suffering were common in the resettlement camps in the 1960s to 1970s, after which the state began to soften its methods of relocating black people (Claasen 1984). Resettlement areas for black people in KwaZulu Natal, for example, were scattered, neglected patches of land, overpopulated, eroded and impoverished with no significant industrial development (Walker 1982).

Thousands of people were moved in KwaZulu Natal through the process of betterment schemes (these were projects set up for agricultural production in Bantustan/Homeland areas) and faced appalling conditions in these relocated areas. Africans were moved out of the white urban and rural areas into the homelands without any monetary compensation as an exchange for the lost land. The histories of forced relocations in South Africa are well documented and say much about the relationship between land, law and power (Unterhalter 1987).

While there is a large body of literature on forced removals in South Africa, in contrast, literature on the forced removals of African in Namibia during South African rule is rare. There exists one case study in Windhoek in 1959, where Africans were forced to relocate to a new black township called Katutura, which means “we will not settle” (Pendleton 1974). The study provides a history of the old location until the forced removal of people to Katutura in 1959. It further explains the opposition of the people to the forced relocation from the old location to Katutura. The colonial administration wanted people to move from the old location to the new one so as to make way for further white settlement of the old location, while resettling the Africans in the newly designated black township (Lau 1991). People refused to move because many had lived in the old location for generations, had buried their ancestors in the area and had been the owners of their places. They feared that in the new area of forced resettlement, they would not have ownership of those small houses and that they would be too far from places of work and thus would have to carry high costs for transport. These factors led to the eventual old location shooting and forced relocations to Katutura.

During the years 1957 to 1959, the municipality of Windhoek stepped up its harassment of illegal brewing of African beer such as tombo which was an important source of income for many women beer brewers. The women resented the way in which the municipality was taking over the brewing and selling of their beer and a bakkie fitted with loud speakers patrolled the location calling for the support of the boycott in Oshiwambo, Otjiherero and Nama/Damara. The voices were those of Sam Nujoma, Nathaniel Mbæeva and a third unidentified person speaking in Nama/Damara (Lau 1991). Despite resistance, the people of the old location were relocated in 1959 and these relocations to Katutura were completed in the 1960s.

In another example, the forced removal of residents from the Kavango riverside villages to Nkarapamwe Black Township in 1968 was based on mounting political pressure and on SWAPO's frontier war in the 1960s. The purpose of political security and control overrode the supposed colonial intention for agricultural planning and implementation along the Kavango River. There were various reasons given in January 1967, on why people were unwilling to move into the new black township which they called Nkarapamwe. People felt that the houses in the townships were too small for their families because some had three wives. People also argued that they had children of different sexes and that the houses of Nkarapamwe did not seem to meet the need for different rooms for boys and girls. The houses in Nkarapamwe lacked most of the characteristics of the homesteads at the riverside villages. Residents thus argued that the rooms were not enough for their large extended families, as well as for guests. They also feared that water availability in the township would be less than what they had along the river. They were afraid that they would be compelled to pay for all developments in the town. They also feared that they would have to pay rent for the houses and would have no right of ownership as they did in their homesteads. Blacks were not to be allowed ownership of houses or plots in Nkarapamwe and this was the same situation in Katutura, the black township in Windhoek.

In his letter to the Bantu Commissioner of Kavango in 1970, the Chief Bantu Commissioner in Windhoek explained clearly why it would not be a good idea to allow residents of Nkarapamwe Black Township in Rundu to be given private ownership to the plots and houses of Nkarapamwe, and why they should only be allowed to rent them:

"All the residents of Nkarapamwe have residential rights elsewhere in Kavango and they are only living in Nkarapamwe while they work at Rundu. To give them approval in any instance

would be unnecessary work and would also be time wasting”
(Commissioner, 1970).

{Al die inwoner van Nkarapamwe het nog elders in Kavango woonregte en hulle woon slegs in Nkarapamwe terwyl werksaam te Rundu. Om in alle gevalle 'n goedkeuring te kry, sal omnodige werk en tydmors wees}

The barring of Africans from owning land and houses in the urban areas was in line with apartheid South Africa's government policy, which stated that "Africans are in urban areas such as Windhoek only to work. When Africans are no longer able to work because of health, old age or some reason, they may be asked or required to leave the urban area and return to their previous home" (Pendleton 1974). The removal to Nkarapamwe Black Township did not trigger any physical confrontation with the colonial authority as had been the case in the forced removal in Windhoek. While there were people who did not like to move to the township, there were others who favoured it. It is argued that there was no well-organized and united community resistance. The following explanation by Aninka Claassen regarding the fear to resist may have existed in the case of South African communities, can also be argued as true for the community in Rundu: "In many cases people are terrified of challenging the state precisely because they know that this will bring force into play" (Claasen, 1984).

Implications of colonial land dispossession on Namibians

After the end of the war for national independence the newly born nation of Namibia found itself faced with huge numbers of unemployed and landless people. At independence, 52% of the agricultural farmland was in the hands of the white commercial farmers who made up 6% of the Namibian population. The remaining 94% of the population were left owning only 48% of the agricultural land (Hunter 2004). The white settlers appropriated agricultural areas of black Namibians. The central and southern regions, especially those inhabited by the Herero, the Nama and the Damara, were particularly affected by colonial land expulsions as many remained without access to land for farming and for settlement. In the northern parts of Namibia, although many people did not lose their land, the chiefs lost ownership of the communal land to the state and many experienced a denial to exploiting the local wildlife resources in the communal areas, unlike those in the commercial areas where land ownership remains commercialised and private.

People continue to migrate from rural areas of Namibia in search of better opportunities in the urban areas. The majority of them are the youth. In a recent study on youth voices on customary land ownership and registration in Namibia, the youth stated that the rural areas fall short of their expectations in terms of development and therefore many leave the rural areas and settle in towns, with little intention to leave the urban areas unless their urban future plans fail (Likuwa, 2014). Such settlement patterns of the youth in towns are necessitated by the need to attend good schools, get access to useful facilities or machinery, search for employment opportunities, which they feel do not exist in the rural areas. Migration by the youth to towns means that strong assertions about the need to own land and register it are made by the youth in the urban areas, as they are more desperate to find permanent settlement where they can carve out a future. On the other hand, the rural youth see little future in the rural areas and therefore do not make strong assertions to owning land for settlement. Some youth have children and want land to start families and to live with them.

In order to redress this state of affairs and effectively tackle the problem, the Ministry of Lands, Resettlement and Rehabilitation was brought into existence in 1990 (MLR, 2001). The ministry through the National Resettlement Policy selects beneficiaries for land resettlement. The National Resettlement Policy states that the central focus or priority groups for resettlement include the San community, ex-soldiers, the displaced, destitute and landless, people with disabilities and people from overcrowded communal areas (MLR, 2001).

Conclusions

The economic and political interest of European hunters and traders resulted in the introduction of European goods among Namibians, as well as the loss of their land and livestock which was cheaply traded for European goods and this increased the people's social and economic hardships and subjugated them into the colonial economy as low waged labourers. The introduction and implementation of colonial laws and policies, especially during the South African period, ensured that the movement of black Namibians was strictly controlled and it resulted in the relocation and resettlement of black Namibians and in their loss of land and ownership of it.

Since permanent settlement of black Namibians was limited to the homelands and to the reserves, many black Namibians remain without land or home

ownership, especially in urban areas of Namibia, and continue to rent accommodation at very high cost which many, including Namibian members of parliament, complain is becoming unaffordable. Namibia inherited a colonial past of unequal land distribution and ownership in both rural and urban areas, which needs redress in the post-colonial period. Government through its line ministries has begun to address the past unequal distribution of land. The youth are among those affected by the problem of lack of land and home ownership in both rural and urban parts of Namibia. Youth voices on the need to own land have been heard in the urban areas (where many youth migrate in search for opportunities) rather than the rural areas of Namibia which the youth sees as lacking in terms of socio-economic development and in terms of quality social services such as health and education. There is a need to create educational platforms to encourage youth discussions and awareness on land reform in Namibia. Youth should be identified according to the level and type of their land needs, such as whether they need land for farming or simply for settling to start their families and carve out their futures. This will help to ensure that land allocated does not remain idle but is used potentially for the socio-economic development of the youth and their families.

1.2 Discussion

Elsarine Katiti, NYC board member:

I am sure we will all agree that the San people were the first settlers in southern Africa. I want to address the link between the implications of colonial dispossession as mentioned in the paper and the history and modes of land dispossession. Likuwa's paper states that the National Resettlement Policy identified priority groups for resettlement such as the San community, ex-soldiers, the disabled, destitute and others. In terms of San Communities, they were the first settlers and thus the owners of the land. Of course, history does not record this land ownership on paper. I do not know if it is politically correct to have taken land away from native settlers and I think it is an important point to raise in an information age where history is determined by what we write. History does not mention how especially San communities were removed from their land. I noticed a mention of Owambo people, Kavango people, the Nama people and the Damara people, but I think it is also important and very imperative that we also mention the San communities, especially regarding the dispossession of land.

The Namibian Government has begun to recognise this and it is reflected in some of the programmes like those on resettlement. In order for you to give back something, there should have been dispossession in the past and thus programmes such as the San Development Programme, entail the running of projects that resettle communities as close as possible to the land that they have been dispossessed of. I think it is important for us to always remember that land has also been taken away from the San communities.

Participant:

I think Namibia holds a unique position in Africa as perhaps being the only country that has gone through three different stages of colonialism. We have had the Germans, then we had to some extent British colonialism and then for most of the time we had South African colonialism. I want to ask: is there a difference between the methodologies and the motives behind dispossession, behind these three colonial powers, or were the motives largely the same?

Participant:

The colonial history of land dispossession is a legal issue. Land was dispossessed from the peasants through a law in 1942, the Colonial Land Occupation Act of 1942. That ordinance took away the land from the people and people did not have a say about it because those in power during that time just dispossessed the majority through the law. That is what they did and of course, we (the indigenous population) were not in agreement with that. This is what Africa has to deal with. In certain African countries that kind of law has been abolished and the Africans have repossessed that land which was taken from them through enacting new laws. That is the way we can follow as well.

Participant:

The paper mentioned that the willing buyer, willing seller policy is not solving anything. The problem here is perhaps the indecisiveness or the lack of political will of our leaders. Let us refer to the issue that was mentioned some time ago, namely to raise the tax payable by commercial farm owners so that they could come down with their prices for farms. When the rich white farmers and some elite black farmers complained about the increased tax, that issue disappeared completely. How do we intend to solve the problem if there is such indecisiveness from our leadership?

Participant:

My question is: Before the Europeans came to Africa, who administered the land and how was it administered? I think we should also look at that aspect when we want to solve the current problem. Was the land individually owned or was it owned by the community at large? My second point: When we look at the San, are we also seeing them as Africans or as part of the black community, because I have a feeling that we see the San as a separate group and not as part of the black community.

Participant:

The presentation mentioned that the communal land was owned by the government on behalf of the people. Where does the traditional land fit into this or is the communal land the same as the traditional land? Currently the State is reportedly looking into the possibility of allocating approximately 14,000 hectares in the Ojinene area to settle a group of marginalised people without considering local customary land rights. So, where does the government play a role in terms of owning communal land and where do the traditional authorities play a role? What has changed since the apartheid era?

Participant:

On urban housing my observation is that we now have a situation where no one is limited about where they want to settle in Namibia. We have a situation where some of our citizens are privileged enough to afford to own houses wherever they want to and they are buying houses all over the country. How do we control that pattern while some of us are not fortunate enough to even afford a single house? When government intervenes with certain schemes, house prices are inflated when the middle man comes in. How can we control that?

My second question is about communal land. Why can I not get title deeds for the land I occupy in the communal area?

My third question is regarding agricultural or farming land. We have a situation where farms are allocated to new owners but we do not analyse the agricultural activities taking place on that land. Some farms are not used productively and they do not contribute to the economy, while on the other hand we have

people who have good agricultural ideas and who want to contribute to the economy of this country, but they cannot acquire land because it was given to someone else (maybe) through dubious means. An analysis of the land issue must not focus only on those who acquired land during the apartheid era, but also on those who were resettled after independence. Some only have farms for relaxation and status without engaging in agricultural activities and without adding value to the economy. We must explore how we can repossess agricultural land and give it to people who can add value and use it productively.

Johannes Schmidt, Maltahöhe Village Council:

Although all of us here will applaud the government for its efforts through the willing buyer, willing seller approach, I believe that this approach has been hijacked by the commercial farm owners who are asking astronomical amounts of money for their farms. I know from experience that many of these farmers own vast tracts of land, some of them even own three or four farms adjacent to each other. There should be a way to limit those vast tracts of land so that we can give our people access to the rest of the land that they currently own. We cannot continue to allow one person to own so much land whilst many people do not have even a tiny piece of land.

Nangolo from Oshikoto, representative of youth with disabilities:

When the town councils are enlarging the towns, they expropriate land from the people who have fields around the towns. However, these people receive very little money in return. In a case where the land belongs to a mother, the town councils do not consider the children that were born in that house. They just compensate the mother and will offer her, for example N\$20,000 for a hectare of land and if the person is poor, he/she will just agree. My concern is that the town councils should at least consider the children and youth from those houses, talk to them and hear from them whether or not the compensation is accepted by all the members of the family. When the children grow up they might want to use the land but the land was already taken by the town council and they will again need to look for new land, which is very difficult.

Kletus Mukena Likuwa (Response):

A book titled: Who Owns the Land? looks at the history of dispossession in Namibia. It raises the questions of where do we start talking about dispossession? Only when the Europeans came or do we also talk about dispossession of the San? There have been different debates and there is actually no agreement. Some argued that the San and the majority of the black population are all Africans, and that they have been part of one continent and thus it is their land... It is certainly true that when we talk about the land issue, we need to focus not only on black communities but on all Namibians who have lost land, including the San and I think that is why it is a very strong policy of the government to look towards those marginalised groups, especially the San who are part of the Aboriginals. Therefore, the Resettlement Policy should include all of them.

Regarding the issue of differences between the modes of dispossession of the three colonial groups that colonised Namibia (the Germans, the British, and the South Africans), there are greater similarities than differences as all of them were interested in the accumulation of wealth. When we talk about the German period, we are mainly referring to the period from 1885 onwards, but even before that, other European groups, traders and hunters, paved the way for that occupation. Because of the need to protect the economic interests of the European traders and hunters, they were putting pressure on the colonial government to occupy South West Africa, as it was called at that time. Walvis Bay, for example, was a very important centre of penetration by hunters and traders in Namibia and a very strategic place for the British especially, as they decided to take control of Walvis Bay and leave the rest of the country to German occupation. That is how Walvis Bay became a British sphere of interest while the rest of South West Africa was left to German occupation. The interests of all colonialists and their modes of dispossession were basically the same.

The willing buyer, willing seller approach has not only been a problem for Namibia, it has also been a problem for neighbouring countries, including South Africa and Zimbabwe. Due to the willing seller, willing buyer approach governments there have not been able to purchase a lot of land. The policy has fallen short of the expectation of the governments themselves and it has led to the frustration of many citizens due to the snail's pace of land distribution.

Regarding the youth working on farms and living in communal areas, I remember a study that we did with the Ministry of Lands some years ago. We looked at the Affirmative Action Loan Scheme for Farmers and at the national resettlement of farmers. When we visited most of these farms, we found that the lives of the youth working on most of these farms were not very happy ones. They were frustrated and there is definitely a need for the National Youth Council to start thinking about how to address the issues of the youth on farms and in the communal areas. The youth concerned feel that the National Youth Council has not really prioritised the land issue as there were no significant platforms created to address the issue. They were saying that there is a need for more platforms to be created within the youth structures where they could discuss issues of land reform.

We all agree that despite the good efforts by our government we are still very far from meeting the expectations. Most of the land still remains in the hands of those who owned it during the colonial period. What is the meaning of the equal distribution of land? What do we actually refer to? Namibians should be given an opportunity to get land so that almost every Namibian should have access to land, and not some of them owning vast tracts while others are severely restricted. I think that is actually what we mean by equal distribution. It would be wonderful if each one had the same size of land and equal distribution means that those who have more must be willing to give to those who do not own land.

The land issue is part of the human rights issues in the Constitution and land ownership is entrenched as a human right. It does not matter how this land was taken away from whom as land ownership is now regarded as a human right. It is entrenched in the Constitution, which means that it cannot be changed even by the majority. However, there are different means to address the land issue. Besides the willing seller, willing buyer approach, there is the option of expropriation, especially regarding the land of absentee landlords. I think our government, within the limits of the Constitution, has to find the best way possible to acquire more land, because the willing buyer, willing seller approach has been too slow. We need to come up with other means within the limits of our law to address the land issue.

Regarding the question of changes to the Constitution, I want to draw a parallel. In the story of Jesus of Nazareth it was asked whether it is the right thing to eat corn on the Sabbath. Jesus told them the Sabbath was made for men, not men for Sabbath. In other words, anything made by man can be

changed, and we have to change things ourselves.

In Africa, after independence we often used our positions of influence not just what we have been appointed to do, but to use our positions of influence to advance personally in economic terms ahead of others. This is a problem when you are, for example, in a town council and the first thing you think about is, "how do I become rich and how do I make sure that all the opportunities come to me?" This is a common problem as some want to have everything for themselves. This should not be encouraged as everyone should have access to land.

Historically, the local communities themselves owned the land and they had their traditional structures and authorities to oversee that there were no disputes over land access or land ownership. Charles Anderson was one of the first European hunters and traders within Namibia and he was the first white person to reach the western part of Kavango in 1857. He recounted that when he met the men in the villages and when he was mistreated to some extent, he told them that he knows the king and that he was going to report them to the king so that he can deal with them. The men laughed and told him that "although our chief is the head of our community, every man is actually like the king of his own place. We are in charge of our own places, we decide what must happen on our pieces of land although we have a bigger figure above us." I think that was the social structure, everyone could own land but it had to be overseen by the traditional leaders. Thus it was a communal setting and although individuals did own land, everyone had access. Land was a communal resource in contrast to the western concept of private ownership of land.

Traditional leaders, just like during the colonial period, take care of the communal land on behalf of the State and the communities. The problem is that most of the traditional leaders believe that they are in charge of the land, that the land is theirs and that they own it. However, legally communal areas actually belong to government. Sometimes even government officials find it so hard to explain that traditional leaders must control the land on behalf of everyone, on behalf of the people. The position of traditional leaders is to take care of communal land on behalf of the people and on behalf of the State.

If you look at the history of migration, especially the Bantu, you will be surprised to note that the kind of groups we have now, were not the same in

terms of our languages, in terms of our cultures. As we travelled we met and intermingled along the way with many different groups, speaking different languages, whether Bantu or non-Bantu. In Kavango, you had the people called the Machaube. Every black person in Kavango knows that they are San originally, but they have intermingled with the black communities. Everybody knows that when the Bantu groups arrived, the Machaube were in actual fact settled in most of these places and that is why most of them actually have "click names". Most of the San and the Bantu have intermingled, inter-married and we all have the blood of the San and we should stop thinking of ourselves as different. There has been a lot more in history that has actually brought us together.

Why can I not get title deeds on communal land? This has been a problem for most of the communal farmers who cannot get loans from the bank as they are told that they do not have ownership of the land. Most of them only have leasehold and it seems that leasehold is not taken seriously by most of our financial institutions. Title deeds has to do with ownership and thus we need to discuss if the government can give away ownership of communal land? What will they have left? Everybody wants ownership of land and we need to find a way of moving towards discussing the issue of ownership and title deeds. If people in the commercial area can have title deeds, why can people in the communal areas not have title deeds over their land? I feel that this is unfair. The Ministry of Lands is currently undertaking a study on leasehold agreements and how they can be improved to help the farmers to get access to loans. Let us hope that this research will bear some fruits and improve the situation.

Our land reform is linked to the question of productivity. The whole idea is that we should not only get land but that we should make use of this land in a productive way and that is why the Ministry of Lands conducted a study last year on employment creation through land reform projects. The study examined whether land reform is contributing to employment and whether the new owners are being productive. Thus far, there are many challenges, including the challenge of lack of productivity and if you look at job creation, there seems to be a decline in terms of employment opportunities. There is a need to do more to ensure that the farms become more productive and not just be used like holiday resorts.

How do we control land allocation in urban areas? How do we make sure that the privileged do not acquire more houses than others? At this colloquium we

need to discuss the urban land issue, the high prices and that it is very hard for most of us to own a piece of urban land. The rich buy up all the land and they make it difficult for the rest of us to acquire land. How do we control that as town councils? How do we ensure that land and houses are cheaper for all of us? Should we develop policies that control the buying of land in urban areas or that control the prices? These are some of the issues we have to think about in order to make land affordable for everyone, not only those with a lot of money.

Mandela Kapere, NYC executive chairperson:

The National Youth Council structures are very extensive despite limited resources. In terms of the National Youth Council Act, the basic structures of the National Youth Council are the Constituency Youth Forums. Currently there is a restructuring process underway which is about 80 percent complete, meaning that there are Constituency Youth Forums in almost all of the constituencies in Namibia. We have been able to achieve that with very minimal resources by ensuring that youth groups at local level and constituency level are organised. Constituency Youth Forums elect their own leadership and this is again replicated at regional level and these structures are responsible to the National Youth Council.

Youth organisations exist at all three levels and there are specific programmes that target particularly young people, maybe not on farms but in rural areas. For example, when we refer to our Credit for Youth in Business Programme, which is a micro-finance facility, the emphasis is on informal businesses particularly in rural areas. More can be done to reach out specifically to young farmers, but what we try to ensure is that we support young people with particular interests, be they health-related, economy-related, or social. Young people are encouraged to organise themselves into youth groups and to ensure that their youth groups are affiliated either to the Constituency, Regional or National Youth Council. Our job as the National Youth Council is to be an umbrella body for youth organisations and our primary task is to support and empower youth organisations to be agents for change, whether it is at national, regional or constituency level. Our role is essentially to empower the youth organisations themselves so that they are able to become agents of change in their own communities.

Chapter 2: The Namibian Constitution and the legal framework for land reform

2.1 Clever Mapaure²: Does the Namibian Constitution aid or impede land reform in Namibia?

Namibian land law is hostage to its own history. The land reform programme narrative in Namibia reveals the historical injustices and inequalities of the reviled predecessor government and its abhorrent legal and administrative apparatus. After independence, a new constitution ostensibly was designed to reverse the previous system and indeed some progress has been made but more is still deserved. The constitution provides for the protection of property but at the same time allows the expropriation of some land in the process of land reform.

The legal system of the colonial master created land tenure systems that benefited the oppressive racial minority at the expense of the poor vulnerable majority. Now a new constitutional dispensation emerged with the aim of ironing out differences and bridge across inequalities. However, the constitution's porosity and the implications of some clauses were never discerned. The existing land tenure systems are still claiming their legitimacy from the constructs of the colonial racist administration and are surviving the new constitutional order. Was there a way of avoiding this? Is the constitution an impediment to land reform or does it aid the process? It is the crux of this paper to discuss these questions in the context of the constitutional property clauses. The paper concludes with some proposals and some options for speeding-up the land reform process.

Introduction and background

Twenty-five years after Namibia's independence in 1990, the land question remains the most hotly contested policy reform arena. The question of land in Namibia continues to be a matter of popular concern and political debate. It is mainly centred on unequal distribution of land which is widely regarded as the main cause of the prevalent poverty and economic inequality. This inequality

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is dated back to colonial times and hence the land tenure systems of Namibia owe more to the constructs of the racist South African administration rather than the new constitutional order. Before the new Independence Constitution came into force, land in Namibia was classified as state or crown land, communal land and private land. This historical classification is the genesis of the imbalances in the distribution of land up to this day.

The gist of this paper is a discussion of constitutional land law. In particular, this paper analyses the effects of the Constitution on land reform, interrogating the question whether the Constitution is an impediment to or a catalyst of the land reform programme? The relevance of the constitutional property clauses is discussed with main focus on Article 16 and Article 100 of the Namibian Constitution.

Land Regulation and Administration in Perspective

In the past two decades, with Africa liberated from colonialism and adopting largely western-style constitutions with broad provisions on property rights, a growing body of literature has developed on this topic. Namibia is one such country where analysts have come up with ideas on how the constitutional property clause should be dealt with, specifically how it can be enhanced through further legislation and administrative processes.

There are indeed evident efforts to analyse constitutional property claims from legal, political, economic and philosophical standpoints, among others. Some perspectives are mixed. This article zooms in mainly on the legal aspects, taking a teleological and systematic basis of the provisions of the Namibian Constitution and enabling legislative instruments.

Land is an emotive issue as the legal system that regulates it is a revulsion of the past inequities and demagogical legislative trend on exclusion. The past inequities in land distribution in Namibia necessitated the land reform programme under the new Constitution and other pieces of legislation after 1990. The land issue remains one of the topical and highly political issues in the country. The decision of the government to redress the land problem arose out of the general acceptance by the people, the empowering laws and policies, for the need for change and was also inspired by political reasons behind the liberation war.

In all countries of the world, land is a critical resource and the basis for survival. Its distribution, therefore, threatens not only economic but also the physical well-being of the often marginalised or the lucky few who had the opportunity to snatch, grip and make it their private property when the political and legal system allowed it (UNEP 2006). They retained ownership and participated in the agrarian process aimed at benefiting the few and segregating the majority.

So much for lamentations: like many other Southern African countries, Namibia has always been, and to a lesser extent still is, an agrarian society (Harring and Odendaal 2007). Farms occupy most of the country's land area and farming employs most of the population, hence the work of farming has a deep cultural and social meaning in Namibia. Just a few years ago, almost 70% of the Namibian population depended on agricultural activities for their livelihood (MET and MLR 2007), while about 45% of farmland is privately owned and at least 40% is farmed communally.

The land issue after independence

At independence in 1990, the new Namibian government inherited a highly twisted distribution of land. Commercial Farms constituted the largest part of the land surface with 44% of the total landmass, communal land constituted 41% and national parks together with local authority areas constituted 19%. A World Bank study noted that at independence the average size of a white-owned farm was 7,836 hectares, 23 times larger than the average black-owned cattle farm (World Bank 1991). By 1995, the situation of inequality in land ownership had not changed. Not only did commercial farmers own more land than communal farmers, they also held freehold titles to 74% of the potential arable land (Pankhurst 1996). Given that there were only 6,300 commercial farms owned by just 4,200 commercial farmers (NPC 1995), it is obvious that some farmers owned more than one farm. Up to 382 or 6.1% of commercial farms were estimated to be the private properties of 272 foreigners, most of whom were alleged to be absentee landlords (Pankhurst 1996).

My research has led to the conclusion that even if there has been land redistribution right from the early 90s, approximately 36,2 million hectares of land representing 44 percent of the total land area were held under freehold title until 2003 (Muendjo and Mapaure 2010). This land was commonly

referred to as the commercial farming sector and was privately owned. Under previous apartheid policies, access to this land was reserved for white farmers, and the freehold farming sector is still dominated by white land owners (*ibid*). By contrast, today, the non-freehold areas, formerly known as native reserves and referred to today as communal areas, comprise about 33.4 million hectares, representing 41 percent of the total land area. This shows that the size of communal area land has not changed at all yet the population has grown in those areas and the government has warned of overcrowding in the arable parts of communal areas, especially in the northern regions of the country.

It is submitted here that despite the constitutional provisions, and the provisions of other enabling laws, the already overcrowded communal areas are increasingly facing private enclosures by wealthier communal farmers, and this has become a threat to poor farmers' livelihoods (see Karuuombe 2003; Tapscott and Hangula 1994; Werner 1997). The National Planning Commission (NPC) reported that although agricultural contribution to GDP stands at only 9.4% (mostly derived from commercial agriculture), subsistence farming is the principal source of income of up to 41% of all households in the country (NPC 1995; SIAPAC 1998).

The Ministry of Agriculture, Water and Rural Development (MAWARD) reported that up to 200,000 farm workers and their dependants (or roughly 22% of the total population) are believed to derive their livelihoods from working on commercial farms (MAWRD 1991). Further, with unemployment estimated at 41% (Pomuti and Tvedten 1998) and 53% of all households in Namibia classified as poor or very poor (SIAPAC 1998), people adopt different livelihood strategies. One such strategy is rural-urban migration, such that it is estimated by the Central Statistics Office (CSO) that 3.6% of rural households rely on cash remittances as a source of household income (CSO 1996). Urban migrant workers as well as those who are working on commercial farms send remittances to their families and friends in communal areas.

In addition to the high unemployment figures and the percentage of households living in poverty given above, Namibia's average annual household income, as estimated in 1993 by the Central Statistics office, was N\$17,198 (*ibid*). Karuuombe comments that this meagre income makes it imperative for the majority of urban households to rely on land and land-based resources as a safety net (Karuuumbe 2003). The average household

income, however, masks the vast inequality in the income distribution of different households, as wealth in Namibia is mainly concentrated in the hands of 5.3% of the population according to statistics compiled by the CSO (1996). The effectiveness of land reform, therefore, will be seen in terms of whether it addresses the unequal land ownership in a manner that takes cognisance of the different coping strategies landless and poor people adopt (Karuombe 2003). The major laws and policies that impact on land reform in Namibia are discussed below.

Constitutional Land Law

The Namibian Constitution which came into force on March 21, 1990, has done very little to change the status quo of skewed land distribution. In fact constitutional property clauses like Article 16 entrench the status of private ownership. Article 100 provides that all natural resources (including land) belong to the State unless otherwise “lawfully owned”. This can be interpreted to mean private ownership which existed before independence. This position of the Constitution basically acknowledges ownerships which existed before, hence land reform may be a hard task for the government of Namibia under the Constitution.

The Constitution is founded on the western style of governance with separation of powers and governance which is based on democracy and the rule of law. When we talk about land reform under the Constitution, Article 16 comes into the picture. This Article is part of the entrenched Bill of Rights, (Chapter 3) and provides for the acquisition of land in accordance with the rule of law. The Article says:

- “(1) All persons shall have the right in any part of Namibia to acquire, own and dispose of all forms of immovable and movable property individually or in association with others and to bequeath their property to their heirs or legatees: provided that Parliament may by legislation prohibit or regulate as it deems expedient the right to acquire property by persons who are not Namibian citizens.
- (2) The State or a competent body or organ authorised by law may expropriate property in the public interest subject to the payment of just compensation, in accordance with requirements and procedures to be determined by Act of Parliament”.

In terms of this article land transactions therefore have to be based on the willing seller, willing buyer principle, and this is believed to have raised land prices since independence (Land Alliance 1999). It is clear that compensation is undoubtedly a constraint on how far government can go in acquiring and redistributing land, but it should not be used, as is often the case, to suggest that there is no opportunity to implement land reform (Karuuumbe 2003). For instance, the government is constitutionally free to institute minimal compensation in the case of expropriation of unutilised or under-utilised land (Pankhurst 1996).

Upon assumption of duty in an independent Namibia, the new government decided to address the land issue which had been contentious during colonial times as elucidated above. Cabinet adopted a resolution stating that all stakeholders should be consulted on this issue hence a Land conference was supposed to be held where they would present their views. In terms of this land conference resolution, the Prime Minister appointed the Technical Committee on Commercial Farmland (TCCF) in December 1991 (OPM 1991).

This led to the holding of the first Land Conference in Namibia. After the conference the technical committee had to compile recommendations to the government based on the presentations made by stakeholders during the Conference (Werner 1997a). The recommendations were produced but a close scrutiny thereof shows that they were guided by concerns to bring abandoned, under-utilized and unused land back into production by allocating expropriated land to the land reform programme. This led to the promulgation of various pieces of legislation which are discussed below.

In South Africa, the Constitutional Court in the case of Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd referred to this degradation of rights in land as a "systematic practice of exploiting black people as a cheap source of labour for the financial benefit of white farmers" that enabled landowners to "unilaterally [alter] the status of the claimants and their families without concerning themselves with the consequences of their actions". It is this injustice that the Constitution and the land reform programme aim to redress. Since apartheid land law was one of the most important instruments that the then government used to advance its vision of a segregated nation, it was clear when the apartheid government lost its grip on Namibia that corrective measures were needed under the new dispensation. Land reform therefore became crucial for social transformation, as envisioned by the preamble of the Constitution.

This is what has been termed “transformative constitutionalism”, a long-term project of constitutional enactment, interpretation and enforcement committed to transforming a country’s political and social institutions and power relationships in a democratic, participatory and egalitarian direction. Transformative constitutionalism connotes an enterprise of inducing large-scale social change through non-violent political processes grounded in law. The Constitution is an aid but is not enough as several laws have to be repealed and new ones enacted.

A constitutional property clause is by no means a logical or self-evident part of a bill of rights or of a constitutional order (Van der Walt 1997). Although many constitutional states have enshrined the right to private property in an entrenched bill of rights, others have not, for instance the United Kingdom which does not have a written constitution and hence no property clause (*ibid*). However, despite the absence of a constitutional clause in the United Kingdom, there exists case laws on interpreting the constitutional property clause.

It is thus essential that we reflect on the purpose of a constitutional property guarantee before analysing section 16 in detail. This does not go without pointing out the fear among legal scholars that the property clause would either entrench existing property rights too strongly, or that it would undermine existing property rights for the sake of land reform.³

It is a truism to say that property and property rights underlie most of the world’s constitutions. In turn, many of the provisions of democratic constitutions protect property rights, often indirectly. Political liberty, guaranteed by various legal protections of human rights, protects the right of individuals to freely engage in social activity intended to generate economic benefit. “In general, it can be said that property is protected in the hands of its owners, and that not only property itself, but also to some extent the value of the property is also guaranteed. The function of the property guarantee is to permit the holder of a protected property interest to act freely with the property and to control his/her own economic destiny (Mostert 1999).”

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³ The (admittedly strong) arguments forwarded by both J. Nedelsky ‘Should property be constitutionalized? A relational and comparative approach’ (at 4170 and F.I. Michelman ‘Socio-political functions of constitutional protection for private property holdings (in liberal political thought)’ (at 433) In G.E. van Maanen & A.J. van der Walt (eds) *Property law on the threshold of the 21st century* (1996) do not allow for a constitutional property theory and practice that does not follow the predictable route of political liberalism.

It is often said that the function of the property clause in article 14 of the German Basic Law 1949 (Grundgesetz) was to establish a balance between the protection of private, individual property rights and the promotion of the public interest (Kleyn 1996). The German Federal Constitutional Court describes this balance in terms of the tension between personal freedom and the social function of the property, and interprets and applies the property clause explicitly in such a manner that it contributes to the establishment and maintenance of a balance between private and social interests in property. The function of a property clause is therefore to provide a guarantee for the existence and protection of individual property rights on one hand, and to provide the possibility and the limits for state interference with those same property rights on the other. Be that as it may, the main question in the process of interpretation and application of the property clause is where we draw a line between the protection of private property and legitimate state regulation of property.

The German Courts have adopted the normative approach of interpreting the constitutional property clause (Van der Walt 1997). This interpretation of the property clause in terms of a central, normative guideline focused on achieving an equitable balance between individual interests in property and the public interests in property. This is carried through consistently by the German courts, whether the question is the content of property, the justification of a particular interference with property or the amount of compensation for expropriation. Such an interpretative framework is an essential guideline for the interpretation of article 16 of the Namibian Constitution and there is a strong presumption that the potential importance of such an approach in the Namibian context is likely to be adopted by our courts.

The Namibian Constitution is based on a western style of governance with separation of powers and governance which is based on the rule of law. Article 16 is part of the entrenched Chapter 3. It provides for the acquisition of land but that should be in accordance with the rule of law. The Article guarantees everyone the right to private ownership of land. This provision means that the people are constitutionally entitled to own properties with freehold titles. Freehold titles in urban centres may be acquired either through alienation of land hitherto vested in Local Authorities under the Local Authorities Act, Act 23 of 1992, or through private treaties between individuals.

It is clear from here that this Article was framed in two parts: sub-article (1) was framed positively and the second sub-article negatively. It is thus submitted that the first part establishes a guarantee of the right to acquire own and disposing property. The second part of the clause is a classic negative provision which guarantees property against expropriation by laying down the requirements for a legitimate expropriation.

It arises from here that one of the rights protected by this clause here is the right of ownership. Although racial discriminatory laws with regard to land allocation and holding in urban areas were repealed and Article 16 empowers everybody to acquire land on freehold basis, the situation on the ground does not reflect the laws on paper. This is mainly because of economic and financial constraints faced by the majority of Namibians who live in poverty, leading to their inability to acquire land on freehold basis but on the permission to occupy (PTO).

It must be mentioned that Article 16 is a product of a political compromise, not unknown in southern Africa (see Harring and Amoo 2001; van der Walt 1999). Article 16 is therefore a special provision, dealing with specifically property and more importantly it is included in Chapter 3 on fundamental human rights. Amendments thereto take a complicated legal process which will not be covered in detail here save to say that it will need an amendment to Article 131 of the Constitution and may invite the holding of a referendum.

Making Some Sense of Article 16: A perpetuation of the Apartheid legacy in disguise?

Those who level criticism against this Article first say that the Article was a product of a compromise between nationalists and colonists. It is elucidated that the compromise did very little to accord Namibians with one of their rights that they had always been claiming – the right to own their stolen land.

We have to start with the premise that the legal source of white land rights in Namibia is article 16 of the current Namibian Constitution. Thus while the constitution may be a progressive document, embodying the hope of a new Namibia, it also legally embodies some of the worst German and South African colonialism, the violent seizure of indigenous lands.⁴ Furthermore it

⁴Namibian Land: Law, Land Reform and Restructuring of Post-Apartheid Namibia, p. 16

was noted that the Namibian constitution owes a lot to western power and a lot was taken from international instruments and included in the Constitution without much debate as to their implications on the Namibian society. Thus Diescho (1994) called the constitution "a foreign document imposed upon the Namibian people".

The Constitution, particularly Article 16(1), protects the types of property in white lands "while it ambiguously and unclearly protects the categories of property in black hands giving the constitution a one-sided and potentially biased role in the process of land reform, protecting white property owned in freehold from being expropriated for the benefit of blacks" (Harring and Amoo 2001). This is a reflection of an apartheid policy in a peaceful and somehow tolerant society. Further criticism is levelled against the wording of Article 16 which includes the phrase in "any part of Namibia". This phrase is race-neutral (Hinz et al 2000).

Furthermore the Article equates the rights of whites to purchase communal lands with rights of blacks to purchase apartheid-era owned commercial farms, a political statement of juridical equality that is harrowing to the point of being cynical and offensive. In this sense, it is supportive of the colonial legacy mainly due to the minds of western powers during the constitution making process. However, there are some authors who support the notion that the said Article is one of the most important entrenched articles for its guarantees property rights.

A Guarantee of all Citizen's and Investor's Property Rights?

Article 16(1) is taken as it guarantees the right to acquire, own and dispose of property. It includes the following elements:

- a) The guarantee is provided for the benefit of all persons, individually or in association with others, provided that parliament may regulate or prohibit the right to acquire property by non-citizens.⁵
- b) The guarantee includes all forms of property, movable and immovable.

⁵ The Agricultural (Commercial) Land Reform Act 6 of 1995 section 14, 58 and 59 relates to the acquisition of agricultural land by non-citizens.

- c) The guarantee expletory includes the rights to acquire, own and dispose of property and to bequeath it to their or legatees, subject to certain parliamentary powers to regulate the acquisition of property by non-citizens.

In the case of Cultura 2000 and Another v Government of the Republic of Namibia and Others, the Namibian High Court confirmed that the guarantee in Article 16 (1) applies to all persons including both natural and juristic persons and the guarantee extends to tangible and intangible property. Further, Article 16 must be given its positive phraseology and content and as such it will be seen as a constitutional duty placed upon the state to uphold the institutional framework within which it is possible for people to acquire, own and dispose of property.

In Minister of Defense v Mwandinghi the Supreme Court held that Mwandinghi acquired a right in terms of Article 16 of the Constitution when he sued the South African Minister of Defence and consequently the Namibian Minister of Defence for damages arising from assaults perpetrated on him by members of the South African Defence Force which right constitute (property) as envisaged in Article 16. Mwandinghi was claiming his right in terms of Article 140, which ensures the continuity of the right “which can only be repudiated by way of an Act of parliament”. However, if the repudiated law infringed any of the fundamental rights and freedoms guaranteed by Chapter 3 of the Constitution it would be vulnerable to constitutional attack because in terms of Article 63 the power of the National Assembly to enact legislation must always be exercised subject to the Constitution.⁶

The Agricultural (Commercial Land) Reform Act: Enhancing the Constitution? It is evident from the provisions of the Act that the legislative purpose thereof is to provide for the acquisition of agricultural land by the state for the objective of land reform. Once such land has been acquired, the primary beneficiaries thereof are those Namibian citizens who do not own or have the use of any agricultural land and foremost those Namibian citizens who have been disadvantaged by past discriminatory laws or practices. In a nutshell, therefore, the purpose of the Act is, amongst other things, to address the pressing issue of land reform, a perennial problem associated with the country’s history. It is apparent from the relevant provisions of the Act that the purpose is also to regulate the acquisition of land by foreign nationals.

⁶ 1991 (1) 851 (NmSC)

Indeed “[c]ommercial land is the land that can be bought by private individuals, who then become the owners of the land” (LAC 2003). As noted above, under the colonial government, commercial land allocations were made on racial lines, with the result that there are long-standing grievances with regard to these lands. The Agricultural (Commercial) Land Reform Act of 1995 was enacted to address some of these concerns. In particular, this Act gives the State the right of first option to buy commercial farm land when an owner wants to sell land. The State must decide whether it wants to buy a particular farm before the farm can be sold to another buyer. The Act allows the State to acquire commercial land where the land is too big, has been abandoned or is under-utilised.

Expropriation under the Constitution and the Act

Setting the scene

What is expropriation? What are the implications of this under Namibian law and what is required of the expropriator? These questions may help us in deciphering the answers for the question in topic. Expropriation as defined in the case of *Beckenstrater v Sandriver Irrigation Board*⁷ is the deprivation of property movable or immovable, or a right, real or personal, in property. This includes the appropriation by the appropriator of a particular right and the abatement or extinction as the case may be, of any other existing right held by another, which is inconsistent with the appropriated right⁸. However notwithstanding this common law position, the Constitution limits and regulates the rights to property. Expropriation of property is regulated specially in Article 16(2) and the following requirements as outlined by Van de Walt:

- a) The state or any other competent body or organ authorized by law can expropriate property in terms of a law of parliament that sets out necessary requirements and procedures to be satisfied in addition to the requirement and procedures to be satisfied;
- b) The expropriation must be in the public interest and subject to payment of just compensation.

All these requirements are fairly standard, except for the phrase “just compensation”.

⁷1964 (4) SA 510 (T) 515A-C. See also *Tongaat Group Ltd v Minister of Agriculture* 1977 (2) SA 961 976C-F.

⁸ *Ibid*

A scrutiny of Article 16 shows that expropriation is a limitation of the fundamental right of property which means that expropriation should also be subject to the general requirement for limitation in Article 22, which will be discussed below. Article 16 (2) does not deal with dispositions of property (which set title and possession in the state) either but the term “expropriation” usually includes both. The Article does not distinguish between specific categories of property (Van der Walt 1997). But it must probably be read in conjunction with 16 (1) which refers to all forms of immovable and movable property.

It has been held that the exercise of all public power must comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law¹⁰. In Affordable Medicines Trust and Others v Minister of Health and Others¹¹ Ngcobo, writing for a unanimous court, held that the doctrine of legality, which is an incident of the rule of law, is one of the constitutional controls through which the exercise of public power is regulated by the Constitution. It entails that both the Legislature and the Executive are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law. In this sense the Constitution entrenches the principle of legality and provides the foundation for the control of public power.¹²

Another point of weakness is that the Article does not define “public interest” or what constitutes public interest. Therefore, the determination and definition of public interest lies within the subjective jurisdiction of the state (Hinz et al 2000). However, it can be said that the context of the constitutional and political history of Namibia land settlement and agrarian reform will legitimately come within public interest in this context. The purpose of the Agricultural (Commercial) Land Reform Act, Act 6 of 1995, is to provide for the acquisition of agricultural land by the state for the purpose of land reform and for the allocation to Namibian citizens who do not own or otherwise have the use of any agricultural land.

There is tendency to confuse expropriation with compulsory acquisition or compulsory sale. Expropriation is not compulsory sale. The question of sale does not arise in expropriation. In the case of Pahad v Director of Food

¹⁰ See Pharmaceutical Manufacturers Association of SA and Another: *In re Ex parte President of the Republic of South Africa and Others* 2000

(2) SA 674 (CC) (2000) (3) BCLR 241; [2000] ZACC 1) paragraph 20.

¹¹ 2006 (3) SA 247 (CC) (2005 (6) BCLR 529; [2005] ZACC 3)

¹² *Ibid* paragraph 49

¹³ Supplies it was stated that the owner or bearer of a right need not want to sell. The only remedy left to the expropriated person is compensation. The power to expropriate land is vested in the state which is expropriating land and exercises its sovereign power over the natural resources in its jurisdiction. As for the grounds of expropriation, the author quotes from the case of Texaco v Libya:

"Nationalism, expropriation or requisition shall be based on grounds or reasons of public utility, security, or the national interests which are recognized as overriding purely individual or personal interests, both domestic and foreign. In such cases the owner shall be paid appropriate compensation in accordance with the rules in force in the taking of such measures in the exercise of its sovereignty and in accordance with international law."

Thus the power to expropriate land is vested in a government which is exercising its rights of sovereignty in its jurisdiction. The power to expropriate confers upon the state the right to take ownership of property against the will of the owner and against the will of anyone who has any rights concerning such property, whether real or personal rights. The Pahab case ¹⁵ shows that the power to expropriate is a public power which vests in the state, to exercise for the common good.

The Willing buyer willing seller procedure under the Law: The people are crying!

Under the Agricultural (Commercial) Land Reform Act which gives effect to the imperatives of the Constitution, the process of land acquisition is well spelt out but has its shortcomings. Under the said Act, the Ministry of Lands Resettlement and Rehabilitation (MLRR), has the right of first refusal should a farm be ready to put on sale. It is only when the government has refused to buy the farm that the seller will be allowed to offer the farm to anybody else. This has led the government to acquire unproductive land because the productive ones are not open for sale. This loophole can easily be manipulated to retain the status quo which the Constitution and the Act seek to redress.

¹³ 1949 (3) SA 695 (A) 711

¹⁴ (1977)53 ILR 389

¹⁵ *supra* at 708 – 709. "

A seller of agricultural land is obliged first to offer the land to the state for purchase, before entering into a private agreement of sale and this only after the state has signed a waiver¹⁶. Moreover, foreigners may not purchase agricultural land without the prior consent of the Minister. Accordingly, the Act seeks to pursue the objective of land reform by prohibiting the alienation of agricultural land in commercial farming areas unless it has first been offered to the state. Offering the land to the state provides the state with an opportunity to purchase land it considers suitable for land reform. It is only if the state issues a certificate of waiver in respect of the land that the private landowner may alienate the land to a new owner that is not the state. Section 16 of the Act provides that the certificate of waiver is a statement in writing by the Minister certifying that the state does not intend to acquire the agricultural land in question at the time of the offer. Section 14 provides that any land acquired by the state pursuant to section 17 will be used for land reform. This process has proven to be very slow in so far as the acquisition of land is concerned, with farmers not willing to offer good land to the government.

There have been cases whereby the farmers avoid the provisions of the law. For example some have simulated contracts to disguise the sale as a donation or a lease in an effort to avoid offering the land to the government. In terms of the law, parties may genuinely arrange their transactions so as to remain outside its provisions. Such a procedure is, in the nature of things, perfectly legitimate.¹⁷ There is nothing to forbid it. Nor can a contract be rendered illegitimate by the mere fact that the parties intend to avoid the operation of the law, and that the selected course is as convenient in its result as another which would have brought them within it. An attempted evasion, however, may proceed along other lines.

The transaction contemplated may in truth be within the provisions of the statute, but the parties may call it by a name or cloak it in a guise, calculated to escape those provisions. Such a transaction would be *in fraudem legis*; the Court would strip off its form and disclose its real nature, and the law would operate.¹⁸ The question that arises is whether the contractual scheme here is a disguise calculated to escape the provisions of the Land Reform Act. The Court must be satisfied that there is a real intention, definitely ascertainable, which differs from the simulated intention. For if the parties in fact mean that a

¹⁶ See *Strauss And Another v Labuschagne* 2012 (2) NR 460 (SC) 2012 (2) NR p. 469. "

¹⁷ As *Innes CJ reasoned in Dadoo Ltd and Others v Krugersdorp Municipal Council*, 1920 AD 530 at p. 548. "

¹⁸ *Strauss and Another v Labuschagne* 2012 (2) NR 460 (SC) 2012 (2) NR paragraph 44. "

contract shall have effect in accordance with its tenor, the circumstance, that the same object might have been attained in another way will not necessarily make the arrangement other than it purports to be. The enquiry, therefore, is in each case one of fact, for the right solution of which no general rule can be laid down.¹⁹

The Government's announcement in 2004 that land expropriation would begin, recognised the failure of the "willing buyer, willing seller" process: it simply did not acquire enough farm land fast enough to ensure a politically sustainable land reform process (Gurirab 2004). It is further observed that at the rate of 209 farms in 17 years, resettling only about 9,000 poor people (Harring and Odendaal 2007), it would take almost 100 years to acquire just a quarter of the white owned farms, leaving the Namibian poor and landless, politically and economically marginalised, according to the report by the Legal Assistance Centre (*ibid*). The report further says that the AALS farmers can be expected to acquire some proportion of these farms, but this will not alleviate poverty since those who can afford to buy these farms are obviously not poor. Also, with the spectre of Zimbabwe looming over land reform in Southern Africa, the failure of land reform represents a potential problem of political instability that goes to the core of the SWAPO majority and strong support among the poor (*ibid*).

The "willing buyer, willing seller" process did not allow for any parallel and systematic rural land reform and land use planning. Farms could not be acquired according to any plan, so there could be no reorganisation of the agrarian order to bring about the necessary transformation of an agricultural economy that depends on a single product (cattle) which is both destructive of the land if improperly managed, and a risky strategy in a highly competitive world market (*ibid*). Most of Namibia's remaining white farmers had built their operations under apartheid with favourable government subsidies, and it has become clear that black farmers would not be able to sustain profitable farming operations without similar levels of support under either the resettlement programme or the AALS (Fuller and Eiseb 2002).

Further, the Government refused to buy most farms offered as they were unsuitable for farming operations – a reflection of what is termed "the wasteful nature of the farming system established under the South African

¹⁹ *ibid* "

Administration." (Harring and Odendaal 2008:3). Vast tracts of farmland in parts of Namibia's environmentally sensitive areas have become barren as a result of ineffective and poorly supervised livestock management and land use policies.

The policy of willing buyer, willing seller escaped any form of judicial review from its inception in the first decade of Namibia's Independence, until the handing down of the judgements in the case of Gunther Kessl v Ministry of Lands and Resettlement²⁰, and two essentially identical companion cases, in the High Court of Namibia on 6 March 2008.

Kessl addresses many aspects of the Ministry's land reform programme, and repeatedly upholds the legality of the principle of land expropriation, grounded in Article 16(2) of the Constitution of the Republic of Namibia, but it finds that the Ministry's administration of the expropriation process has violated Namibian law on several grounds. While the final pages of the judgement set out very explicit requirements that the Ministry must fulfil to legalise the process, the judgement also raises difficulties with the ongoing land reform programme that will not be easy to remedy. The Court, uncharacteristic of Namibian courts, explicitly criticises the Ministry for mismanaging the expropriation process and thereby leaving the land reform programme in a state of disarray. After nearly 20 years of independence, with the former Minister of Lands and Resettlement and former President of Namibia, Hifikepunye Pohamba, directly involved in this debacle, this judgement undermines the Government's credibility in terms of its ability to plan and manage its own land reform programme.

Strict legal provisions on compulsory acquisition of land

It must be noted that the Constitution does provide for the compulsory acquisition of property, although this is subject to the payment of just compensation in terms of Article 16(2) of the constitution. The Agricultural (Commercial) Land Reform Act of 1995 allows in Article 14 (2) (a) to (d) for the compulsory acquisition of agricultural land classified as under-utilised, excessive or acquired by a foreign national, or of land where the application of the willing seller, willing buyer principle has failed. The crucial questions are what requirements the "public interest" criterion sets and whether the

²⁰ Unreported case number (P) A 27/2006. "

envisioned expropriations for the purposes of redistribution as part of the land reform and resettlement programme are indeed in the “public interest”. It seems that public interest will be determined by the government according to its developmental goals.

Section 14 (3) (a) of the Act defines any agricultural land which is not substantially utilised for agricultural purposes or which, with regard to the agricultural potential of the land, is not utilised adequately, as being under-utilised land. The assessment of when land is not utilised in a sense that qualifies it for expropriation is, however, the discretionary prerogative of the government and is part of the land reform policy programme. As determination of “public interest” is at the discretion of the government, as stated above, it is hardly possible to set aside an expropriation order on the grounds of its purpose (Treeger 2004). It is authoritatively submitted that the choices made by the legislature or executive as to where the public interest lies will have to be respected, unless they clearly constitute an arbitrary or discriminatory deprivation of property and are deemed to be against the rule of law.

Therefore, even if there is this power to compulsorily acquire land, the Minister responsible for land has to apply reasonable and objective criteria in order to satisfy himself or herself that the lands to be acquired were reasonably necessary for resettlement purposes in conformity with the land reform programme and in accordance with the principles of natural justice. This is a very stringent criterion which has its foundations in international law, which is part of Namibian law under Article 144 of the Constitution.

One of the controversial expropriations was done on the Ongombo West farm which was expropriated in the middle of a dispute with its workers that ultimately provoked the rage of former Namibian President Sam Nujoma who pronounced the following at a May Day rally: “Some whites are behaving as if they came from Holland or Germany. Steps will be taken and we can drive them out of the land. We have the capacity to do so” (Maletsky 2005).

It is further reported that:

“The white owners of Ongombo West purportedly mistreated their workers, degraded their land, shot off their game animals, and behaved in a racist and colonial manner reminiscent of apartheid. The owners asked N\$9 million for the farm, and the amount offered was N\$3.7 million. The owners did not challenge the expropriation order in court,

perhaps for obvious reasons given their behaviour, but perhaps they also did not challenge it due to feeling intimidated by the Ministry and Nujoma" (Haaring and Odendaal 2008:4).

In terms of legal processes stipulated under the Constitution and the Act, it is not clear what procedures were followed in this expropriation, but as reported, it is clear that Ongombo West was not selected for expropriation through any rational process other than simple retaliation for poor treatment of workers (*ibid*). More importantly, no use has been made of this farm for resettlement purposes and this expropriation was not driven by any plan to resettle poor people, nor was it in the public interest as such. However this is not true of the second and third expropriations, of the farms Okorusu and Marburg, neighbouring farms expropriated together in order to resettle a group of five previously resettled farmers displaced from Cleveland, a farm acquired some years before under the "willing buyer, willing seller" scheme, now being re-sold by the Government to the owners of a private cement factory (*ibid*).

The Okorusu/Marburg expropriation seems to have been haphazard in its conception, given that the owners had offered the farms to the Government under the "willing buyer, willing seller" scheme, only to have been ignored, which forced them to sue the Government for a waiver so that they could sell on the open market. After this lawsuit was decided in the owners' favour, the Ministry served them a notice of expropriation. This was completely unnecessary in view of their original willingness to sell, and no explanation for this seemingly arbitrary or even incompetent action has been given. Since the owners wanted to sell anyway, the only issue remaining was compensation. The Government's initial offer of N\$3,675 million in total for the two farms was rejected and the price was challenged in court. However, the Ministry settled the matter with an offer of N\$8 million, which was accepted, ending the litigation, again with no legal challenge to the administrative process which, in light of Kessl, was unlawful (*ibid*).

The legal requirements for legal expropriation under the Constitution are very strict. The government has to have high standards of compliance otherwise the expropriation will not be legal. In the Kessel case the High Court ruled that the compulsory acquisition of land belonging to Kessel and two other farm owners by the Namibian government was illegal for it was done outside the requirements of the law. The court ruled out that the requirement of "public interest", as a prerequisite to expropriation in Article 16 (2) discussed at hand

of international authorities and the case of Aonin Fishing (Pty) v Ministry of Fisheries and Marine Resources.²¹ The court went on to say that that the Minister can only act within the limits of his statutory discretion and should apply his mind to the requirements of the enabling Act. Furthermore, in order to expropriate land, it must be done within the provisions of the Constitution and the Act and involves a double-barrel process, namely, firstly in terms of Article 16 of the Constitution and section 14 of the Act and then in terms of section 2 of the same Act. This must be done before the Minister takes a decision.

The Court further said that before compulsory acquisition, the Minister must have proper consultations with the affected parties. It emphasised that it should be noted that consultation by the Minister with the Commission is a prerequisite for involving the section 20 expropriation processes under the Constitution and the Act and noted that "the essence of consultation is the communication of a genuine invitation, extended with a receptive mind, to give advice". Such consultation should be done already at the section 14 stage of willing buyer, willing seller and before the Minister decides to purchase a particular farm. Since these provisions were not followed and principles of natural justice embodied in the Constitution were flouted, the Court held that the expropriation was illegal. It is thus submitted that:

"This new model of legality is critical in a land reform process that is, for all the statutory detail of the Act of 1995, primarily discretionary. Neither Parliament nor the Courts are going to decide on a plan for land reform, acquire thousands more farms through expropriation or on a willing buyer, willing seller basis, at a cost of billions of dollars to the Namibian state, and redistribute this land to up to 240,000 poor Namibians, together with adequate financial and infrastructural support. It is the Ministry of Lands and Resettlement that must have the legal capacity to carry out land reform. But all the evidence before us now suggests that the Ministry simply does not have this capacity, which flows from a legal culture that has not been instilled in the Ministry since its founding in 1990. Instead, the Ministry has produced a culture of secrecy, conspiracy, insiders and outsiders, and bureaucrats who think that their job is to shuffle papers; a culture of 'getting by'. All this became apparent as the Ministry proceeded to defend the expropriations in the Kessl case".

²¹ 1998 NR 47.

In 2008, “the situation for the beneficiaries resettled since Independence hasn’t changed much; to date no resettlement farm leaseholds have been registered at the Deeds Office. Consequently, resettlement beneficiaries cannot obtain loans if they have insufficient collateral. Resettlement beneficiaries cannot offer the land on which they are resettled as collateral, as the land belongs to the State. Natural justice must afford legal recognition of those whose property rights were denied in the past. Poor people’s land rights have to have the same protection in law as wealthy people’s land rights” (Harring and Odendaal 2008:18).

The Compensation Imperative: buying stolen land?

The requirement for payment of compensation for acquisitions, (and deprivations in some cases), is the most controversial of all the core elements of a property guarantee clause. The requirement is variously described as for payment of ‘full’, ‘adequate’, ‘just’, ‘fair’, or ‘equitable compensation’, or simply for payment of ‘compensation’. Where the measure or method of computing compensation is not carefully indicated, the traditional legal assumption is that the deprived or dispossessed person must be indemnified for the loss suffered, and that the market value of the property is the fairest way of measuring the loss. This is widely regarded as one aspect that most reflects the dominance of libertarian and property interests in property guarantee clauses. The employment of market value can lead to generous awards for property owners. The assessment of market value in land cases can involve taking into account speculative and subjective elements and its value at the time of expropriation may bear little resemblance to the cost at which it was acquired and amounts expended on improvements (see Ng’ong’ola 1998).

It should however be appreciated that there is no sacrosanct principle of constitutional law requiring that loss of property must invariably be indemnified. Under the European Convention of Human Rights, for example, it is acknowledged that it would be legitimate in appropriate cases to attempt to strike a fair balance between the demands of the general interests of the community of the requirement for the protection of individual fundamental rights (Allen 2000). This might entail a departure from a full market value assessment. The challenge for African countries is to construct property guarantee clauses that allow departures from market value assessment in appropriate cases, but without permitting departures from adherence to the rule of law.

Going back to the Constitution, Article 16(2) states that an expropriation of property shall be subject to payment of “just compensation”. However there is no clear explanation here especially with regard to the phrase just compensation. Notwithstanding this, it was submitted in the case of Texaco v Libya that:

“Nationalization, expropriation or requisition shall be based on grounds or reasons of public utility, security, or the national interest which are recognized as overriding purely individual or private interests, both domestic and foreign. In such cases the owner shall be paid appropriate compensation ... With the rules in force in the state taking such case where the question of compensation gives rise to a controversy, the national jurisdiction of the state taking such measures shall be exhausted”.²²

The “original” Constitution of Zimbabwe (The Lancaster House Constitution) provided that there must be “prompt and adequate” compensation after expropriation. In 1990 an amendment was made to change the phrase to “fair compensation”. In the case of Davies and Others v Minister of Lands, Agriculture and Water Development²³, The Supreme Court of Zimbabwe in its interpretation of Section 1(c) of the Land Acquisition Act drew a distinction between an acquisition and deprivation of property by the state. No compensation was required for a deprivation of rights in property and that it was not every deprivation of a right that amounted to a compulsory acquisition of property, nor did every deprivation require that compensation be paid.

The Meaning of “Just and Equitable” Compensation: Jurisdictional and justificatory doldrums?

Constitutions employ different terminologies to provide for compensation should ones property be expropriated. Terms like “fair” “just” or “appropriate” compensation are used or simply “compensation” without going further to define the terms or at least give the quantification thereof. It has been demonstrated (Eisenberg 1993), that courts tend to define and or interpret such terms as requiring full indemnification of the expropriatee for his or her

²² This quotation is widely quoted in writings on expropriation of land or in general property. It actually lays the groundwork for how the rights of sovereignty can be exercised within the parameters of the law so as to comply with the principles of the rule of law.

²³ 1996 (1) BCLR 1209 (ZS)

loss, which most jurisdictions have held to be the market value of the property being expropriated at that point in time or even a higher amount but not a lesser amount which disadvantages the expropriatee. It arises therefore that with consideration to what other jurisdictions have held the constitution of Namibia by including an undefined term “just and equitable” compensation meant the market value of the property being expropriated.

However, compensation based on market value is not a universal requirement. Even here similar words are used as is pointed out by Eisenberg. The international practice is inconsistent, for example the Supreme Court of India repeatedly interpreted the term “compensation” to mean the “true value”²⁴ which still sounds ambiguous but points back to market value whereas the Constitutional Court of Italy held that the constitutional requirements of compensation require the payment of sound and not symbolic compensation, and that that does not oblige the expropriator to pay compensation to the expropriatee based on the market value of the property: it implies an equilibrium between the interest of the public and those of the individual (Catteneo and Motzo 1980).

The result in Italy is therefore similar to that in Germany where the Constitution explicitly provides that compensation is to be determined by establishing a fair balance between the interests of the community and those of the person affected by the expropriation (Schmidt-Assman 1990). This seems to be the view also held by the Zimbabwean government which in some cases expropriates land without even compensating the property owner giving the justification therefore that the interests of the community to benefit outweighs the interests of the person affected. Although this seems to go against the principles of the rule of law, if a balance is actually struck through proper legal and administrative procedures there seems to be no accusing finger to be lifted against the expropriator. This point takes us to the next consideration.

More on public purposes

In case of expropriation, some requirements have to be met. The expropriation has to be for public purposes and against compensation. The provision of compensation can either be implied or expressly provided for by the empowering legislation. There must also be statutes, which indicate

²⁴ See Juta’s *New Land Law and authorities cited there such as, Sigh “Expropriation in India” in Erasmus (Ed) 1954. Compensation for Expropriation: A Comparative Study. Vol. II 34 at 43 and the case cited there particularly State of West Bengal v Bella Benergee 1954 AIR 170.*

the purpose for which the property is being expropriation in order to strike a balance between individual rights to ownership and states power of eminent domain. There is a strong presumption that parliament did not intend to infringe rights without making provision for compensation. This is the situation where property rights are interfered with. In the case of John Freeman v Colonial secretary of Natal²⁵, Connor in his dictum explained such situations as extreme and he said: "On ordinary principles of justice, if the owner of land has under compensation law, to allow interest of his in the land being taken from him a injuriously affected he should be compensated fully unless legislative clearly provides otherwise and there cannot think be any doubt, that unless legislation has so otherwise provided, the tendency should be rather in favour of compensation than otherwise in consequence being such compensation".

Public purpose is not a requirement for expropriation but a factor to be considered in the process. It is argued that the duty to consider public purpose as a factor influencing compensation implies that one should be sensitive to the context within which the property rights are affected by expropriation.²⁶ The amount of the compensation can be less than the market value. That does not imply, however, that the amount of the compensation should in all cases of expropriation be adjusted downwards to reflect the legitimacy of the public purpose the expropriations serve. This might not be just and equitable in every case. In this sense Article 16 as broadened by the Acts on land reform can be regarded as an aid to land reform in the country.

In Apex Mines Ltd v Administrator, Transvaal²⁷, the administration had declared certain public road in terms of the Roads Ordinance 22 of 1957 over property of which plaintiff was the holder of mineral rights. The first question for the decision was whether or not the plaintiff was entitled to compensation for losses suffered an amount of such declaration. The court remarked that although the plaintiff had a registered lease of mineral rights in respect of the property, he did not have any form of dominium over the land. The court also

²⁵ (1889) 10 NLR 71

²⁶ See van der Walt AJ. 2005

"The State's Duty to Pay 'Just and Equitable' Compensation for Expropriation: Reflections on the Du Toit Case", South African Law Journal

SALJ 2005 (122): 772 – 3. See also the case of Mhlanganisweni Community v Minister of Rural Development and Land Reform [2012] ZALCC 7 paragraph 73.

²⁷ 1986 (4) SA 581 (T)

found that the plaintiff could not be regarded as an “occupies” in the sense used in the definition of owner in section 1 (xiv) of the advance. Accordingly, the plaintiff was not of right entitled to compensation in terms of section 94 and 95 of the ordinance except in his capacity as owner of the surface area of the land in question subject to the provision relating to the granting of “equitable relief” by the administrator in section 95 of the ordinance.

This case brings us to the position of a law with regard to state power and land rights. Article 100 provides that land, water and natural resources shall belong to the state if they are not lawfully owned.

Article 100: Challenges to communal land occupiers

Article 100 vests the power and right of ownership in communal land in the state. This means that the state has allodial rights over communal lands. This Article is seen to be in conflict with article 66 of the Namibian Constitution as it subtracts from it with deplorable aggressiveness. There is a right to communal land ownership under customary law which is recognised under the same constitution. Specifically, article 66 provides that both the customary and common law of Namibia shall remain valid to the extent to which such customary law does not conflict with the Constitution. This article expressly recognises customary land law, as long as it does not directly conflict with the Constitution. Since in most contexts customary and common law land regimes are not in conflict ironically, a legacy of an apartheid era set of land laws that very deliberately kept them distinct, may indirectly protect a wide variety of customary and traditional land rights, but it does not directly do so. Article 66 protects customary land rights as long as the National Assembly, acting under the Constitution, permits it to do so.

It is authoritatively submitted that the wording of Article 100 itself makes the whole Article meaningless and nonsensical. A phrase like “land, water and national resources shall belong to the state” has a saving clause “if they are not otherwise lawfully owned”. Philosophically, this is like saying $1 + 1 = 2$ but only if 1 is not 0 . In this sense this section means that “until all other ownership rights are excluded one can have a claim to property.” By virtue of this Article, the government of Namibia has the power to displace the occupants of communal lands at its will and without compensation. This is further reinforced by the provisions of Article 17 of the Communal Land Reform Act which will be considered in brief below. Communal farmers

are not amused. During the deliberations on this Act in 1997 the seven representatives of the San, the Herero and the Owambo were unanimous on these kinds of whimsical take overs by the government which would hinder the reform of communal land. The Owambo submitted:

"The provision in section 16(1) is totally unacceptable. It is tantamount to abolishing traditional authorities or chiefs of traditional communities. All in all, the problem with the bill is that it is trying to put the Regional Land Boards over and above traditional leaders. This is constitutionally wrong and therefore unacceptable. Once this correction has been made, it will follow that several clauses and sub-clauses will have to be amended accordingly."

The Communal Land Reform Act as enabled by the Constitution challenges the order of the local communities in Namibia, and the allocation of land by Traditional Authorities. This explains why Traditional Authorities find it hard to accept that they have no power to allocate land in a proclaimed local authority area. They have to depend on allocation by the Land Boards. Further, it sounds outlandish to hear some officials of a young independent government of a democratic state pronouncing this. This kind of politics does not strengthen the economy of the 43% Namibia that is held as communal lands, nor does it give confidence to communal holders that the state will protect their land rights.

This means that communal farmers have usufructuary rights only whilst the state has allodial (complete) rights. There is therefore no dichotomy between the apartheid colonial legacy with regard to ownership of land in reserves or homelands and the later communal lands ownership under the new independence government. The people in the communal lands must be given their indigenous allodial rights to the land otherwise this will be a repetition of apartheid history in disguise. Hence article 100 will be meaningless and irrelevant if read in the light and spirit of the whole Constitution. The restoration of indigenous land rights and allodia rights to land would be a welcome gesture if the independence Constitution is to achieve its objectives. Allodial rights to communal land are rested in some societies like in Ghana.²⁸

²⁸ Amoo, S.K. 1997. 'A comparative study of the land tenure systems of Ghana, Zimbabwe and Namibia'. In Hinz M. O. Malan J. (eds) 1997. Communal Land Administration Paper No. 38. Centre for Applied Social Sciences. Windhoek pp20-30.

Communal land, indigenous rights and the Namibian Constitution

Although the government of Namibia has embarked on the road to equitable land redistribution, it is bound to be met with irresistible legal impediments. At the same time, the indigenous peasant farmer is crying foul in the face of these legal impediments, which the government continues to uphold. Therefore, land reform efforts based on the concept of aboriginal title, or claims of land rights of aboriginal title, is made difficult by the Government's belief that communal land belongs to the state. This belief is certainly strengthened, based on the interpretation of Article 100 and Schedule 5 of the Namibian Constitution in conjunction with Article 100, which provides that: "Land, water and natural resources below and above the surface of the land and in the continental shelf and within the territorial waters and the exclusive economic zone of Namibia shall belong to the State if they are not otherwise lawfully owned".

Schedule 5 to the Namibian Constitution ("Property vesting in the Government of Namibia") provides that: "All property of which the ownership of control immediately prior to date of independence vested in the Government of the Territory of South West Africa, or in any Representative Authority constituted in terms of the Representatives Authority Proclamation, 1980 (Proclamation AG 8 of 1980), or in the Government of Rehoboth, or in any other body, statutory or otherwise, constituted by or for the benefit of any such government or Authority immediately prior to the date of Independence, or which was held in trust for or on behalf of the Government of an independent Namibia, shall vest in or be under the control of the Government of Namibia."

The Government²⁹ falls victim to the proposition that the colonial governments did own the land legally. However, a closer legal analysis leads to the conclusion, and correctly so, that such a legal position is wrong. The fact that the colonial governments assumed that they could simply take ownership of land in colonised countries, because they could not imagine that the inhabitants could own land, is pertinently obvious in the Privy Council case of ³⁰Re: Southern Rhodesia, where it was held that:

²⁹ And, unfortunately, the general public and public interest lawyers harboured this belief. See generally Sidney L. Harring 'The Constitution of Namibia and 'The rights and freedoms' guaranteed communal land holders: Resolving the inconsistency between Article 16, Article 100, and Schedule 5' (1996) 12 SAJHR, p. 468)

³⁰ [1919] AC 211 (PC)

"The estimation of the rights of Aboriginal tribes is always inherently difficult. Some tribes are so low in the scale of social organization that their usages and conceptions of rights and duties are not to be reconciled with the institutions or the legal ideas of civilized society."

That indigenous peoples were not civilised, was a wide-held view of the judiciary and legislature in Southern Africa in the 19th century. For example, the preamble to the Native Successions Act, 1864³¹ (Cape) begins: "Whereas there are Native Locations in this Colony occupied by Natives who are gradually becoming civilised, but to whom and to whose circumstances the laws of inheritance in force in this Colony are at present unsuitable...!"

The Court fully agreed with the legislature. In the case of Maartens v The Master and Another,³² a full bench decision of the Cape Supreme Court, Laurens J stated: "That being the view of the Legislature in 1864 [a reference to the above quoted preamble of the Native Successions Act], it is difficult to suppose that, when the native territories were annexed in 1877, it was contemplated that such laws [the ordinary laws of the colony] should be applied to the native inhabitants, few of whom had then even begun to emerge from barbarism".³³

This attitude was obviously predicated on the colonial and racist thinking of the 19th century and much of the 20th century. This is the type of thinking which led to the large scale dispossessing of land of the indigenous people, and unfortunately, it is on this premise that the Namibian Government rests its interpretation of the question of ownership of communal land³⁴.

The government holds the view that only the privately owned landowners would be compensated for the use of the land, as the state owns communal land, and therefore no compensation will take place. This is an impediment to proper land reform process in communal areas. Through statements of senior Cabinet Ministers, it is clear that the government is proceeding with its development plans on that basis, including the controversial Epupa Hydroelectric Dam project on communal land of the OvaHimba communities and the plans to move the overpopulated Osire Refugee Camp (which is situated on state land between privately owned farms) to M'Kata,

³¹ Act No. 18 of 1864

³² 1910 CPD 165

³³ at 171

³⁴ *The Applicability of the Doctrine of Aboriginal Title in Namibia: A case for the Kxoe Community in West-Caprivi, Namibia* Norman Tjombe Legal Assistance Centre, Namibia presented at the Southern African Land Reform Lawyers Workshop 21 February 2001, Robben Island, South Africa.

a communal area and home to the !Kung community³⁵ These are merely two cases in point which demonstrate that at no stage during public debates and official government statements did the government mention that the indigenous communities do have some rights to land based on the aboriginal title concept. This has far reaching consequences because communities will not be afforded the constitutional protection provided by Article 16 of the Namibian Constitution.

In this sense it is indeed strange that the Namibian Government holds such views, whilst the Namibian Constitution is preoccupied with bringing an end to the practice of apartheid and colonialism. Therefore, the Constitution is not a problem but rather the administrative attitude of government officials on this specific aspect.

Article 10 of the Constitution guarantees equality before the law and specifically prohibits discrimination based on, *inter alia*, race, colour and ethnic origin. Article 23(1) contains even stronger language: "The practice of racial discrimination and the practice and ideology of apartheid from which the majority of the people of Namibia have suffered for so long shall be prohibited and by Act of Parliament such practices, and the propagation of such practices, may be rendered criminally punishable by the ordinary Courts by means of such punishment as Parliament deems necessary for the purposes of expressing the revulsion of the Namibian people at such practices".

It is almost without dispute that the successive laws that dealt with land and land rights in pre-independent Namibia were arguably invalid. The Odendaal Commission had the mandate to make recommendations for, *inter alia*, the further development of native territories in South West Africa. This led to the enactment of the Representative Authorities Proclamation, 1980 (Proclamation AG 8 of 1980). This proclamation created the homelands, many of which still exist as communal areas under the post-independence constitutional dispensation.

Proclamation AG 8 of 1980 and nine other proclamations³⁶ declared at the same time provided for "the ownership" of land for nine different ethnic

³⁵The !Kung community is a San community living in the area formerly known as "Bushman land". Their leadership already made known their intention to fight for their land rights.

³⁶For the groups that were created refer to the historical background above.

groups. Each representative authority could have a legislative authority with the power to make laws on a list of defined matters, which included the control over the acquisition, alienation, grant, transfer, occupation and possession of the communal land of the population group concerned. At independence, the properties "owned" by these Representative Authorities were transferred to the present Namibian Government in terms of Schedule 5 of the Namibian Constitution.

As noted in the historical background, the colonial laws were part of a racist regime of domination, deprivation and suppression of the peoples of Namibia. I am sure that a sound legal argument can be made that racist laws cannot be the basis of dispossession of land of indigenous communities. In 1966, the United Nations General Assembly revoked South Africa's mandate to administer Namibia. Thus one can argue that the South African occupation in Namibia was illegal at the time of passing these laws, and therefore Article 100 which still seems to be supportive of these laws, cannot be justified.

The Namibian Government's recognition that such colonial laws were particularly racist supports possibilities for the introduction of aboriginal title. This would go a long way towards meeting the constitutional obligation for the Namibian state to express the revulsion at the practices of apartheid and colonialism. It arises therefore that no legislative changes will be made by the Namibian policy makers if this wrong interpretation of the Namibian Constitution persists.

In addition, indigenous people in Namibia, as in the rest of Southern Africa, do not hold economic and political power to push for changes in a less adversarial environment, such as in the legislatures. It must be noted again that people are not comfortable with the term "indigenous people" and the attendant legal possibilities that such people may have. This leaves indigenous people with little option but to approach the courts to claim their ancestral land on allodial rights basis and assert their ancestral land rights which seem improbable at the present moment.

The misplaced philosophy of land redistribution in Namibia?

Land reform in Namibia is not just one process, but a cross cutting process incorporating development and national reconciliation. The concept of

land reform has been limited to the redistribution of formerly white-owned commercial farms to black farmers. Equally important, and completely missing from the current political discourse, is the acquisition of degraded commercial farmlands for the purpose of environmental rehabilitation (Harring and Odendaal 2007). The two processes might be linked as follows: redistributing degraded farmland from white farmers to black farmers will simply continue the colonial process of land degradation. The Government needs a plan to rehabilitate environmentally degraded farmlands – at least several thousand commercial farms. Ultimately these rehabilitated farms might also be suitable for some types of farming and allocated to black farmers, but this type of long-term planning is currently not undertaken as part of the land reform process (*ibid*). Below is a brief analysis of the philosophy behind the land reform processes in Namibia.

Land reform for development

Settlers raised another issue that plagued the colonial tenure policy. Settlers justified their taking over of land with the argument that they could develop the land and make the colony prosperous, more so than the African inhabitants. This was an old and tried argument that underpinned the legal justification a century before in America for removing Native Americans from the land. The “civilising development mission” had precedence over rights.

After independence despite economic setbacks, development became one of the bases of the land tenure policy. The government granted occupation rights in resettlement areas and communal areas. The grant of occupation was limited to 99 years. The reason was that the government grant entailed no more than a lease. It was not a freehold title which would have implied prior extinction of customary tenures especially in communal areas. With an occupancy/lease, customary rights remained intact.

As in other settler colonies, demands for land reform and redistributive land reform in particular derive their impetus and strength from colonial land dispossession. They are as much a demand to bring about more equitable socio-economic development in the country as a desire to have past injustices addressed. Land dispossession was the foundation which underpinned the wealth and power which colonial settlers managed to achieve within a century of colonial rule. A reversal of the status quo would mean economic empowerment of the black populace and alleviating poverty among them.

In the long term, it is unclear how substantial the land reform issue really is in the context of poverty alleviation in an increasingly urbanised Namibia. It has been suggested that one reason for the slow progress of land reform is that the government, increasingly responsive to an urban base, is not fully committed to it. However, since land reform has always been central to the SWAPO platform and is still popular with the ruling party's rural support base, the Government cannot abandon this reform. Related to this, it is not known to what extent Namibia's poor really want small farms as opposed to urban jobs. Farming is a hard way to make a living in most countries, especially in Africa and the Third World (Harring and Odendaal 2007).

At the same time, "the popular demand for the expropriation of white-owned commercial farms is ever present; it has deep roots in Namibia's political culture, and is a powerful symbolic issue too as the expansive white commercial farms in the heart of the country remain a highly visible symbol of white rule and white wealth, especially to black people still living in poverty" (*ibid*: 33). Redistributive land reform with an aim of alleviating poverty is thus not only an economic process but also eminently political. The land question will therefore not be solved on a purely technical level, but must take cognisance of political and emotional issues as well. Economic and environmental considerations will also have to be taken seriously if we want to solve this issue sustainably.

A tool for the achievement of equality

The land reform process has been premised on the notion that past inequalities should be ironed out. The government of Namibia has demonstrated the will to establish a new unitary land tenure system that will ensure that secure forms of land tenure are available to the ordinary citizen in both commercial and communal areas. Expropriation is one of the legal means of fast tracking land reform but it requires a balancing approach – respecting the rights of property owners and also providing land to those who were deprived of it and disadvantaged. The reason that land expropriation was given constitutional status is that the racist and colonial character of Namibian land law had created a grossly unequal society based on land. The very legitimacy of the new State thus required redressing that highly visible imbalance, and doing so quickly. Expropriation was enshrined in the Constitution to ensure that this happened fast enough to achieve equality. The Agricultural (Commercial) Land Reform Act is a popular measure designed to implement this constitutional provision.

Emerging commercial farmers under the land reform process

Under the above-mentioned land reform process and its philosophy, the Namibian government implemented two parallel land reform programmes, namely the Resettlement Programme (RP) and the Affirmative Action Loan Schemes (AALS). The Resettlement Programme is run by the Ministry of Lands and Resettlement in order to resettle poor and landless Namibians on state-acquired commercial farmland. The aim of the Resettlement Programme is to make settlers “self-reliant, either in terms of food production or self-employment and income generating skills.” (MLRR 2001:2). The AALS is implemented by the Agricultural Bank of Namibia (Agribank), primarily to assist strong communal farmers to acquire commercial farms through subsidised interest rates and loan guarantees by the state. The two are dealt with separately below.

The Resettlement Programme

Among the most important objectives of the Resettlement Programme are to redress past imbalances in the distribution of natural resources, particularly land; to give an opportunity to the target groups (i.e. poor and landless Namibians) to produce their own food with a view to attaining self-sufficiency; and to bring smallholder farmers into the mainstream economy through production for the open market.

According to the Ministry of Lands and Resettlement, approximately 243,000 poor and landless Namibians are in need of resettlement. In March 2004, the Ministry considered plans to expropriate 9 million hectares of commercial agricultural land to resettle 230,000 applicants in the following five years (GRN 2004). However, resettlement statistics obtained from the Ministry in February 2005 show that at the time only 1,526 families had been resettled on 142 commercial farms, comprising some 843,789 hectares at a total cost of N\$127,836,132 (Odendaal 2007). On average, this means that approximately 610 persons were resettled per year on commercial agricultural land. If the total costs of buying 142 farms are divided by the total number of people who have been resettled since independence, then the average cost it takes to resettle one person amounts to approximately N\$14,000. This amount excludes food rations, housing and technical services that the Ministry provides for resettlement beneficiaries. Judging by the number of

people who have been resettled over the last 15 years, it is clear that to resettle 230,000 people over the next five years is not only economically unrealistic, but also logically impossible (*ibid*).

The National Resettlement Policy stipulates that beneficiaries should be self-reliant and self-sufficient by the fourth year (MLRR 2001). However, virtually all resettlement projects older than four years still depend heavily on government support for food, drought aid and technical assistance and thus have not achieved self-sufficiency (Odendaal 2005). A major shortcoming of these resettlement projects seems to be a lack of management capacity which is a crucial element in achieving self-sufficiency. Moreover, it appears that beneficiaries are not encouraged to participate in the decision-making processes of their respective projects (Odendaal 2007). In most instances, resettlement beneficiaries seem to wait for the Ministry to make decisions for them.

Resettlement beneficiaries complain that the Ministry seldom visits the projects and, as a result, they are not always aware of the beneficiaries' needs and concerns. In addition, a lack of basic agricultural skills among beneficiaries results in sporadic and low incomes and continued reliance on government. In other words, providing specific agricultural training and skills to resettlement beneficiaries is important in making resettlement projects self-sufficient, as this would lead not only to more skilful farming methods, but also to more frequent and higher income (*ibid*). Furthermore, the lack of tenure security for resettlement beneficiaries remains a contentious topic in the Resettlement Programme. It should be mentioned however that beneficiaries of the resettlement programme have a legal interest in the land that they farm because it gives them a sense of ownership, a social status that accompanies land ownership, stability in their communities, confidence that their work will permanently benefit their families, and also collateral for accessing post-settlement support funds.

Connected to the above, the Resettlement Policy stipulates that land acquired for resettlement purposes will be provided to beneficiaries on leasehold of 99 years. This means that beneficiaries can use the lease agreement as collateral to get a loan from lending institutions for agricultural production purposes (MLRR 2001). Once acquired the leases are registered with the Deeds Office as soon as the MLR has completed the process of providing ownership certificates to the beneficiaries (National Resettlement Policy 2001).

However, many questions regarding the legal implications and practical implementation of leasehold agreements and their use as collateral remain unanswered. Agribank is cautious with regard to granting loans to resettlement beneficiaries because to date not a single resettlement beneficiary has received a leasehold agreement from the government. Therefore, beneficiaries have no legal ownership interest in their land. For example, it is not clear whether leases will be renewable after the 99-year period lapses, and if they are renewable, whether a leaseholder's family will inherit the lease as a matter of right or only with government approval of a transfer to the family (Harring and Odendaal 2002). As indicated in the discussion above, it appears that it will not be possible to trade these leases with commercial banks.

Furthermore, Agribank is not clear about what procedures to follow should a resettlement farmer default on repayment. The repossession of land in case of a default would surely defeat the aims of resettlement. At the same time, denying resettlement farmers commercial credit may undermine their ability to farm successfully.

Affirmative Action Loan Scheme

The government planned to come up with what it is intended to be an instrumental apparatus of equitable distribution and proper utilisation of land for sustained economic growth. This Loan Scheme is tailored to the emerging commercial farmers and is an important component of the land reform programme, which enables innovative new farmers from the previously disadvantaged communities, to acquire farms in commercial areas. Loans are granted against security of the mortgage bond and are repayable over a period of 25 years. For a farmer to qualify, the following requirements should be met:

- Applicants must have a clean credit record (Bi-annual or annual loans are granted)
- Applicants can either be full time or part time farmers against security of fixed property
- Applicants should be Namibian citizens
- Applicants must provide a business plan and an income and expenditure statement
- The available instalment options are: monthly and quarterly.

The Affirmative Action Loan Scheme (AALS) is complemented by the North South Incentive Scheme (NSIS), which is a vehicle for communal farmers to sell off their livestock north of the Veterinary Cordon Fence (VCF) and purchase disease-free livestock south of the VCF on a newly acquired farm.

Approximately 612 farms have been bought by emerging black commercial farmers through the AALS – nearly four times the number of farms that the Ministry has acquired for its Resettlement Programme (Odendaal 2007). Despite this impressive exchange of landownership from mainly white to black hands, the AALS has not been without its controversies. In March 2004 it was reported that at least 199 of 544 AALS farmers, approximately 37 percent, have defaulted on their payments.³⁷ As a result, in December 2004 the government suspended its 35 percent guarantee on AALS loans. This means that prospective farmers now have to pay 10 percent of the purchase price before they can qualify for the AALS (Odendaal 2007).

Later, in January 2005, the Agribank put a moratorium on the AALS, arguing that farm prices had gone out of control, mainly because buyers had access to large loans and were buying farms at inflated prices. In some cases, farms had less production value than quoted when loans were applied for, while in other cases the valuation was based on full production. In this regard, some of the AALS farmers are currently underutilising their farms, in that they have fewer cattle on the farm than the number the farm could carry as a result of inaccurate valuation. As Odendaal notes, this appears to have had a negative knock-on effect on the AALS, as full-scale production is a crucial factor in being able to pay back AALS loans (*ibid*).

Currently, AALS loans are available for periods of 25 years. Years one to three are interest-free for full-time farmers, while over the remaining 22 years the capital amount is to be repaid at an escalating rate, starting with 2 percent and reaching 14 percent after the tenth year in the case of full-time farmers. Farmers have several complaints regarding the AALS, which they claim led to the difficulties in repayment. A major issue surrounds interest rates, which farmers claim are too high, and the grace period of one to three years, which is too short. Part-time farmers with a gross annual income of N\$300,000 to N\$400,000 start with an interest rate of more than 1.2 percent during the first three years, increasing to 14 percent during the fourth year and continuing until the loan is fully repaid.

³⁷ The Namibian 21 September 2004, *supra*, p. 7.

Year 1-3 is free of interest and capital repayment for full-time farmers, and as from year 4 onwards the outstanding amount is redeemed over the remaining 22 years at an escalating interest rate. Part-time farmers may elect to service the interest portion only for the first three years, where after the outstanding amount is redeemed over the remaining 22 years at the appropriate interest rate.

The end result for many AALS farmers is that in trying to make ends meet, they must sell off their cattle herd which in turn has negative effects on farming profitably and paying off mortgages. Alternatively, part-time farmers may elect to capitalise the interest portion for the first three years where after the outstanding amount is redeemable over the remaining 22 years at the appropriate interest rate. The applicant must own productive livestock equivalent to at least 35% of official carrying capacity of the farm which, he/she intends purchasing, and/or have the financial capacity to purchase such livestock.

The above exposition of the state of AALS farmers is a cyclical problem, where the immediate action to stay afloat impairs the ability for long-term financial planning and success. These decisions demonstrate the complications caused by the Agribank not requiring that prospective farmers be equipped with the much-needed practical and financial information to assist them in the transition from communal to commercial farming. In order to assist with this difficult transition, some established farmers have offered training to emerging farmers (mostly AALS) under the Emerging Commercial Farmers Support Programme (ECFSP) on issues such as livestock breeding, selection, animal husbandry, infrastructure maintenance, sustainable rangeland management, the sustainable management and protection of wildlife and, most importantly, financial management. Such technical support would have to continue over the long term in order for the programme to achieve its desired results. However, its future is precarious as it depends on European donor funding. The Emerging Commercial Farmers Support Programme is under the auspices of the Namibian Emerging Commercial Farmers Forum (NECFF) and farmers' unions.

What now?

After highlighting some deficiencies it is important to see what might be done. The first step is to amend the Namibian Constitution and the second is to consider land taxation as a means to achieve some faster way of achieving equitable land reform. These two alternatives will be discussed below.

Amending the Constitution?

Is it possible to amend Article 16 which is the bedrock of land reform under the Constitution? How can it be done, if at all? The amendment of the constitution is provided for in Article 131. In order to bring any change to Article 16 we have to consider touching and changing Article 131, which entrenches Chapter 3 of the constitution of which Article 16 is part. It is titled: "Entrenchment of Fundamental Rights and Freedoms" and provides as follows:

"No repeal or amendment of any of the provisions of Chapter 3 hereof, in so far as such repeal or amendment diminishes or detracts from the fundamental rights and freedoms contained and defined in that Chapter, shall be permissible under this Constitution, and no such purported repeal or amendment shall be valid or have any force or effect."

Article 22 is another provision to consider. It is titled: "Limitation upon Fundamental Rights and Freedoms" and provides:

"Whenever or wherever in terms of this Constitution the limitation of any fundamental rights or freedoms contemplated by this Chapter is authorized, any law providing for such limitation shall:
be of general application, shall not negate the essential content thereof, and shall not be aimed at a particular individual; specify the ascertainable extent of such limitation and identify the Article or Articles hereof on which authority to enact such limitation is claimed to rest".

The third provision to consider is Article 25, which is titled: "Enforcement of Fundamental Rights and Freedoms" and provides as follows:

"Save in so far as it may be authorized to do so by this Constitution, Parliament or any subordinate legislative authority shall not make any law, and the Executive and the agencies of Government shall not take any action which abolishes or abridges the fundamental rights and freedoms conferred by this Chapter, an any law or action in contravention thereof shall to the extent of the contravention be invalid provided that ..."

The above provisions of the Constitution stipulate firstly that the Rights and Freedoms set out in Chapter 3, cannot be repealed and can only be amended in so far as such amendment does not diminish or detract anything from the Rights and Freedoms so set out in that Chapter. Secondly the limitation of the rights is only permissible where this is authorised by the Constitution and then only to the extent set out in Article 22. Thirdly, as it was held in the case of any Act of Parliament which abolishes or abridges any of the Rights or Freedoms shall to that extent be invalid.³⁸

It is discernible that Article 16 has to be interpreted in harmony with Article 100 of the Constitution as stated previously. In this regard it must be noted that the encroachment on the interests of an owner of the mineral rights for example will not be viewed as a legal measure that impacts on property within the contemplation of Article 16. Alternatively, if it is concluded that the encroachment does impact on the property of the surface owner, then it can be argued that Article 16(2) explicitly allows the expropriation of property by a competent body authorized to act in terms of the law and on payment of just compensation. Supreme Court judge Peter Shivute held that:

"Article 16 tacitly permits the reasonable regulation of property rights in the public interest. To that extent the Article authorizes interference with property rights which falls short of expropriation and therefore provides for a reasonable regulation of competing interests of surface owner ..." ³⁹

Therefore, ownership protected by Article 16(1) was not limited to the instances mentioned in the Article or to some "sticks in the bundle" of property rights. However the Article did not exclude reasonable regulation by the State in regard to property rights. This gives the State the right to amend the Constitution as the Supreme Court highlighted. However, this is not the ultimate position of the law on this topic because according to the Supreme

³⁸ See *Namibia Grape Growers and Exporters Association and Others v the Ministry Of Mines And Energy*. Case Number SA 14/2002.

³⁹ *Ibid* page 21.

Court, the interpretation of Article 16 of the Constitution read with Articles 22 and 131 leads to the inevitable conclusion that the ownership in property, be it movable or immovable, is not capable of regulation where such regulation abolishes or abridges any of the rights comprising ownership in property. "The only limitation on ownership provided for in Article 16 is expropriation by the State, or a body set up in terms of the law, for public purposes and against payment of just compensation." This, therefore is due to an oversight by the founding fathers when they drafted the Constitution.

Article 100 of the Constitution uses the term "vested in the State". This phrase means also the property vested in the State since colonial times. Article 16(2) cannot save the situation where property is expropriated without compensation as it deals with "expropriation proper" and does not cover the instance where only one or the other of the rights inherent in ownership of land was diminished.

What is needed therefore is an amendment to Article 131 where an entrenchment is removed. This is not an easy task. Once an entrenchment is removed then the legislature can move into Article 16 and remove the impediment. This way Article 5, 18, 23 and 25 will give way and allow the State to expropriate land under what can be termed the fast track land reform programme akin to the Zimbabwean agrarian land reform. A word of caution though: the world is watching and such an approach comes with economic and political implications that may be negative. The Supreme Court cautiously warned:

"There is no doubt in my mind that if Mr. Barnard is correct, we are facing a major crisis. His submission that the failure to provide for regulation, as far as property was concerned, as a mere oversight which could always be amended is all but reassuring, more particularly bearing in mind that such a correction itself would be, on his argument, an abridging of the provisions of Article 16 and would thus be in conflict with Article 131. No authority was cited by him in support of the proposition that amendment would be possible".⁴⁰

Thus it may not be an advisable option, taking lessons from so many jurisdictions across the world, but it is viable if enough political will is there

⁴⁰ *Ibid* page 25.

and the resources available for national survival are well harnessed and channelled towards majoritarian survival and empowerment of all.

Progressive Area-based Land Taxation as a Means to Accelerate Sustainable Land Reform in Namibia

The issue of land tax was mooted during the 1991 Land Conference. This land reform meeting was held with the primary purpose of coming up with resolutions on how the land question would be handled in the new constitutional dispensation. It resulted in 24 resolutions but of those, only 11 dealt directly with commercial land. One of the 11 resolutions touched directly on the concept of land tax. The Conference concluded and recommended that a land tax on commercial farms be introduced. This resolution was based on the premise that the introduction of land tax would be a mechanism to collect revenue for the State and to encourage productive use of available land and its resources. This shows that the intended land tax did not explicitly target the acceleration of the land reform process itself. In this paper a land tax strategy is proposed which among other positives, intends to accelerate land reform in the country under the Constitution.

The legislative framework and legal basis for the current land tax

Five years after the recommendations were made at the 1991 Conference, parliament came up with the Agricultural (Commercial) Land Reform Act. The application and implementation of the Act is buttressed by the National Land Policy and The Resettlement Policy. This Act with its regulations is the cornerstone in any land taxation process in the country. Specifically, it provides for land taxation in section 76. This section was amended in 2001 by the Agricultural (Commercial) Land Reform Amendment Act, Act No 6 of 2001. The amendment was made to provide for the determination of progressive rates and exemptions for previously disadvantaged new entrants into the commercial agricultural sector. Again this shows that the amendment did not intend to accelerate the process of land reform but to provide for a favourable land taxation method for new farmers (black or generally previously disadvantaged people) who had acquired land.

Under the enablement of this section, the Land Valuation and Taxation Regulations were drafted in 1997 but were only published in 2001, the same

year that the Act was amended. It is under these regulations that the land taxation system is currently applied. However, as alluded to above, the land taxation system has the benefits of general taxation but does not accelerate land reform in the country, or not at the expected speed.

The proposed model below outlines how land tax can induce land acquisition by the government without violating national legislation and international instruments. The proposed model enhances the willing buyer, willing seller approach to land redistribution as adopted by the government but at the same time it puts enough revenue into state coffers which can be used to pay adequate compensation where the state compulsorily acquires land. Notably, it induces farmers to sell their land especially those who have more than one farm and cannot pay tax for all, thus accelerating land reform and redressing past inequities in land distribution. It is the progressive area-based land taxation method – the “Patna model”.

The current method in perspective

Land tax in Namibia has been value based. The valuation of the farms was done under the mass valuation of the farms. This means that the real value of individual properties or individual hectares was done on a mass scale as opposed to real valuation of each single land unit. The mass valuation method which was used is understandable considering the limited resources Namibia has. If individual inspection of farms or hectares therein was undertaken it would be very costly for the government, which would be forced to recover such cost through the land tax itself, and this was going to be a counterproductive process.

In terms of the Land Valuation and Taxation Regulations when a valuer determines the value of the farms, in terms of section 4(5)(a) he or she “shall have due regard to the carrying capacity of such land and any other agricultural land of similar classification and location, but shall disregard in respect of such first mentioned agricultural land”. In doing this, “a valuer shall subject to paragraph (b), value any agricultural land at a value equal to the best price at which in his or her opinion such land might reasonably be expected to be sold by a willing buyer to a willing seller at the date of the valuation.” This means that the farm owner will pay tax according to how his farm is valued under the mass valuation method. The tax therefore is per the value of the whole farm. The determining factor is the market price of the

whole farm with the buyer and seller dealing at arm's length.

This method cannot accelerate land reform. The government is just taxing farm owners just like any other estate owner without having serious regard to the repercussions of the skewed land ownership that exists in the country. This is supported by the soft stance of the willing seller, willing buyer position of the government.

Land and property taxation across the world

Most countries levy taxes on land and property separately. Research has shown that the majority countries have an annual property tax where in most cases the tax base is the market value of land and buildings. This means that the government has to estimate the market value of all taxable properties and, for the tax to be fair, it is important that an evaluation take place at regular intervals – for example every four or five years (Muller 1995). The table below shows in summary form how land tax and property tax are handled in both industrialised and developing countries.

Table 1: Property taxes

Basis of the tax		Coverage	
		Property	Land
Market value	Capital value	<i>USA UK (domestic) Netherlands Denmark Indonesia Chile</i>	<i>Denmark Australia Estonia Belize</i>
	Annual value	<i>UK (commercial) India</i>	
Other value concept	Book value	<i>Russia</i>	
	Acquisition value	<i>California</i>	
Area based		<i>Israel Poland Czech Republic</i>	Nepal

Source: Muller A. 2001

The table above shows that in industrialised countries and in developing countries, property taxes are usually based on the market value of the property. It seems Namibia is following the model of industrialised nations. In the transition countries, property taxes are often area-based. For an area-based property tax, no value estimate is made of the property, but the tax is based on a certain sum of money per square meter, the amount varying for different types and sizes of land and buildings. An area-based property tax also exists in Israel and the traditional land revenue on the Indian subcontinent, which still exists in Nepal, is another example of an area based property tax.

In some countries the property tax is value based, but not based on current market values. In Russia and several other neighbouring countries there is a property tax on business enterprises based on the book value of the land or buildings, machinery and inventory of the businesses in case of property tax. In California, the land and property tax is based on the purchase price of the land and no assessment function is carried out.

There are also differences between the various property taxes which are based on market values. The most common situation is that the land tax is based on the capital value of the land – which is what the land could be sold for on the open market. But in the traditional British system, still in use in many former British colonies, the tax base is the rental value or the annual value of the land – which is what the annual rent for the property would be on the open market. In addition there are some countries that operate land taxes based on the market value of the land alone.

The proposed new method/model

Area-based taxation as a means to speed land reform

It is hereby proposed that Namibia moves away from the valuation system where the farm owner pays tax according to the market value of the whole farm. Instead, the farm owners must be taxed at the value of the hectares that they have. This is called area-based land taxation.

The method is simple and involves only two steps. First, every farm is assigned a value zone based on factors such as location, service available, and quality of the land or its productive capacity. Second, the taxable hectares of the farm are multiplied by a notionally determined value per hectare to arrive at the property tax base. On the one hand, this method of determining the tax base

has gained favour with both taxpayers and local governments in India where it is currently being applied to property taxes.⁴¹ Indian taxpayers appreciate the simplicity and transparency of the resulting valuation/tax tables.⁴²

It should be mentioned that farms vary in size across Namibia and the value of hectares that they hold varies according to the geographical location of the farm and the land use that there is. Therefore, the current valuation system which considers the carrying capacity and other indicators of productivity may continue. The assessment however has to be more accurate and be based on true transactional data.

Rao writes that when the area based taxation was introduced in property tax in India, urban local governments were enthusiastic because they saw significant revenue increases in the aftermath of the introduction of area-based property taxes.⁴³ Moreover, the area-based approach is a way for local governments to circumvent the harmful Indian court ruling that controlled rents are the appropriate tax base in the rental value system.⁴⁴

In the light of the above, it is proposed that the government adopt this model and apply it in taxation of agricultural land whereby it taxes farm owners each hectare at 20% of its value according to up to date and accurate valuation data available. The taxation should be done on a progressive scale. This means that the government will receive a huge amount of revenue from farm owners especially those who have more than one farm to the detriment of hundreds of thousands of Namibians who are occupying useless land. This approach will also mean that those who have more than one farm will decide to sell off at least one farm because the taxes will be too high to maintain, especially given that some farms are just lying idle or are being underutilised. Furthermore, this will also ensure that we have more full time farmers than absentee farmers or the so-called “cell phone farmers” who are compromising agricultural production in the country.

The proposed system offers scope for assessment and will make the entire assessment transparent, especially if there is enough mass support. The

⁴¹Bahl, R. Martinez-Vazquez, J. and Youngman, J. (eds), 2008. *Making Property Tax Work, Experiences in Developing and Transitional Countries*. Lincoln Institute of Land Policy: Cambridge. Massachusetts.

⁴²Rao VUA. 2008. 'Is Area-Based Assessment an Alternative, an Intermediate Step, or an Impediment to Value- Based Taxation in India?' In Bahl, R. Martinez-Vazquez, J and Youngman, J. (eds), 2008. *Making Property Tax Work, Experiences in Developing and Transitional Countries*. Lincoln Institute of Land Policy: Cambridge. Massachusetts, p.241

⁴³Ibid.

⁴⁴Ibid.

proposed method is expected to increase the revenue flow to the national coffers, raising their financial capacity to take up more developmental work. If designed correctly the tax can be progressive and can accelerate the land reform programme by inducing those with more than one farm to sell the other farm/farms. It can demonstrate that commercial land taxation based on area has the potential to improve revenue collection by the government and at the same time leading to improved service provision in the farming sector especially, can result in increased property values (Muller 1998).

This proposed model can also demonstrate effective farmland governance, which means participation by all the stakeholders. In this case, cooperation would be realised among citizens, professionals, officials, state government and media, thus removing some barriers to a speedy land reform programme.

From this proposed model and how it has proved successful in other countries as explained below, it is evident that the model is easily acceptable because it is transparent and we already have legislation in place which can slightly be amended to achieve this. Thus, given an administrative will, legislative and structural changes are possible and positive cooperation can be achieved from the government and other stakeholders.

The revenue is predictable and buoyant to boost national coffers which can be channelled towards other developmental projects for the attainment of the targets in Vision 2030. In fact, the huge sums to be received can be channelled towards the acquisition of some farms on a willing buyer, willing seller basis or even to pay compensation when expropriation takes place, thus speeding land reform.

In general, its implementation faces few hurdles because theoretically there is a good correlation between assessed value and the ability to pay especially among farm owners. It is very well suited as a source of locally generated revenue for governments of developing economies like Namibia (World Bank 1996).

Considering international trends expounded on below, the proposed model also provides a legally tried and tested method of land tax assessment. It presents a simplified method with no complexities especially if it is a result of continuous feedback and critical analysis of other methods already in practice in other countries, including semi-autonomous states of federal countries.

Supportive International trends especially in developing countries

The area-based assessment method was first initiated in the Patna Municipality in India. Property owners in Patna pay tax on each square metre of the floor area. This came to be known as the “Patna model” and it has since gained support across the world.

The area-based taxation in Patna has emerged as a legally tested, administratively tried and feasible method of property tax assessment which has now been replicated in other cities in India. The Patna model presents a simplified assessment procedure based on location, construction and use. This has minimised the discretionary and *ad hoc* nature of assessment and has increased acceptability by taxpayers, as well as their compliance. The model has also prompted the inclusion of stakeholders in the areas of Municipal Finance such as Central/State Government, urban local governments and political and official functionaries to replicate it in a wider context (see Ministry of Urban Development, India 1998).

Other Corporations of the State of Bihar have already adopted the Patna model.⁴⁵ The Government of India has issued guidelines to state governments to modify their assessment procedure of property tax in line with the Patna model. The state government of Uttar Pradesh has already issued notification to enable urban local governments to modify their assessment to area based methods.⁴⁶ The government of Madhya Pradesh has also modified its assessment procedure. Government of Tamil Nadu has made legislation on the basis of Patna model of taxation.

In Namibia, this model has to be applied on farmland. Nepal has already replicated the model to land taxation and research has shown that it is the only country which is doing this with wide acceptance even from the United Nations. After implementing the area-based taxation method in Punta, the Punta Municipal Council (PMC) was acknowledged by the United Nations. It has found laudatory mention in the state of the world’s cities report 2001 brought out by the United Nations Centre for Human Settlements (UNCHS) and released during a special session of the UN General Assembly in New

⁴⁵Area Based Assessment of Property in Patna. India Best practices. See also Rao *supra*.

⁴⁶See: ‘Other States to Follow Magic Formula on Tax Collection’. *Nav Bharat Times*, 26th February, 1994.

York (Chandra 2001). The UN Report notes that the area-based assessment method as initiated in Patna Municipal Corporation has emerged as a legally tested, administratively tried and practically feasible method of property tax assessment in India.

It also notes that the present method of assessing property tax, introduced in 1993, has “minimised discretion and ad hoc nature of assessment and has increased acceptability by the assessed and tax compliance. The model also has prompted the stakeholders involved in the area of municipal finance such as central/state governments, urban local governments and political and official functionaries to replicate it in a wider context”.

The PMC has been cited under the “best practices” category of the report in the section concerning urban governance for having “initiated an area-based, simplified assessment of property tax”. Namibia can also be acclaimed for doing the same to commercial land taxation at a progressive rate.

When the model was initiated in the Patna Municipal Corporation in 1993, it facilitated reduction in tax rate from 44% to 9% of annual assessed value in urban areas where it was implemented.⁴⁷ Despite these reductions, current Indian revenues have escalated from US\$315,660 to 1.34 million.⁴⁸ To begin with, the model was initiated in 1/27th part of the Patna City and now covers half of the City. It has demonstrated a potential of tenfold increase in revenues while drastically reducing rates.

Will it survive potential challenge in court?

If this method is well implemented in the taxation of farmland in Namibia, it will survive any potential court challenge. In Patna, it raised some scepticism in some quarters during the initial implementation. The tax policies which were later adopted into the municipality’s rules were challenged in the Patna High Court in early 1994. The Division Bench in its judgement appreciated the idea of determining the area rental value. But the High Court faulted the rules on the grounds that they violated Article 14 of the Indian Constitution and suggested a detailed classification.

The State of Bihar and the Patna Municipal Council (PMC) challenged the High Court decision and lodged an appeal with the Supreme Court of India.

⁴⁷Area Based Assessment of Property in Patna *supra*

⁴⁸Magic Formula Raises PMC Revenue - Times of India, January 2, 1994.

The Supreme Court overturned the High Court's ruling in 1995 observing that the new system was being designed with good intention and must be allowed to prevail. The Supreme Court held that a detailed classification if evolved would be too complex and elaborate, which would result in arbitrary tax assessment that was rife in the former practice. The Court also noted that the assessment rule does not impose an undue burden on urban taxpayers.

The Supreme Court further noted that the new system is designed with the interest of house-owner taxpayers at heart as well as the Council. The model thus gave legal sanctity from the Supreme Court of India on the grounds of reasonableness and fairness. This judgement not only allowed PMC to go ahead but also paved way for replication of the Patna Model elsewhere.

Lessons for replication in Namibia

As noted above, in India this model was applied on property tax especially in urban areas as opposed to commercial farmland. However, the same model can be adopted and applied on the taxation of agricultural commercial land in Namibia. What the government of Namibia has to do is to develop proper guidelines for the implementation of this model in light of its laws and policies. This was done in India whereby the government (after the PMC won the case in the Supreme Court) issued guidelines to state governments to modify their assessment procedure of property tax in line with the Patna model.

The guidelines should be framed in such a way that when the area-based tax is implemented, it brings additional financial revenue to the kitty of the government along with equity, fairness and acceptability by people. This enables farm owners to better respond to the system but at the same time they will have to sell other pieces of land which they cannot use productively and thus afford to pay tax for. This will accelerate land reform in the country and redress past injustices.

The above is easier said than done and there is great need to scrutinise the laws and policies regarding land reform. Possible amendments to laws (which will not be dealt with in detail here) will have to be made. These include the amendment to the Agricultural (Commercial) Land Reform Act and its regulations. The land policy has to be revisited and revamped for the area-based taxation to be implemented. More importantly, stakeholders should lobby the government so that the area-based taxation is incorporated as a

means of land reform in Namibia in the current National Land Bill which is being framed.

The Patna Municipal Council encouraged the Government of India to issue new policy directives for tax reform at national/federal level. Simplification of procedures, reduced rate of tax with increased revenue is worth replicating in most developing countries. With enough commitment and acceptance of the area-based land taxation, this can happen in Namibia as well. In India after it was seen that this is an acceptable and well planned tax assessment system for real property, amendments were made to the Panchayati Raj Act and the Municipalities Act in 1999 to facilitate a smooth changeover to the new assessment system.

This new model should have some incentives. The Municipality of Patna decided to create an incentive by cutting the tax from 43% to 9% as mentioned above. This can be done in Namibia on the capital value of the farms while also drawing a simple matrix for calculating the rent a property could fetch based on its location, the type of construction, whether it was being utilised – carrying capacity, etc. In Patna, ironic as it may seem, even though tax rates were reduced substantially under the new guidelines, there was a ten-fold increase in property tax collections (Chandra 2001). The logic for the assessment method is that the taxation system should be transparent, simple, and acceptable to the people. The discretion of the assessing authority should be reduced since it helps reduce corruption.

What began as a pilot project in just one twenty-seventh of the area of Patna now extends to the whole city and has been replicated in the whole country. It received praise from the UN and other countries are planning to implement it as well with Nepal having applied it to land taxation already. Why should Namibia not join the league of those who do well and accelerate land reform?

What are the weaknesses and how to address them?

The area-based taxation system can be effectively applied in taxing farmland in Namibia, but we should note that this is not a perfect system. It is also riddled with its own weaknesses which have to be avoided. Rao (2008) acknowledges some significant flaws with the area-based approach. First, he submits that it does not avoid the problem of determining values because the notional values per square piece of land or property still must be determined

for each zone, or farm. This is done on the basis of expert judgment by highly qualified valuers at the expense of State coffers. Furthermore, in developing countries like Namibia, the area approach, no less than the comparative sales approach, faces the perennial problem of a lack of reliable data on comparative sales. In India, it was discovered that the rates of property transfer tax exceed 10 percent in some states, offering a major inducement for understating sales prices (Bahl et al 2008). The table below summarises issues regarding collection and valuation of farms:

Table 2: Tax collection and valuation of farms

	Collection	Valuation
Industrialised countries	No problems.	<p>Only small problems: Well-functioning computerised systems in many countries. Some countries have not had a revaluation for many years. Some countries need to computerise their valuation systems.</p>
Transition countries	Relatively small problems.	<p>Major challenges in the coming years: To establish valuation systems to replace area based property taxes and taxes based on book value. Simplified systems are probably needed.</p>
Developing countries	Often big problems.	<p>Often big problems: Subjective methods used where the taxpayer can influence the assessment. More objective mass valuation systems are needed. Missing or misleading information about sales prices and rents. Weak administrative units responsible for valuation and lack of qualified staff.</p>

Source: Muller A. 2001

However, it is important to bear in mind that in many developing countries the problems with the collection of property tax are more serious than the problems with valuation. Enforcement steps are not taken and as a consequence many farm owners may choose not to pay. Because of this the revenue is reduced and the tax is perceived as unfair. It is, therefore, imperative that collection is improved before, or at the same time, as valuation is improved (see Muller 2000).

A second problem is that the area-based system can be quite complicated because it requires that each property be weighted by value coefficients for

location, land use, carrying capacity, etc. and there can be subcategories for each coefficient (*ibid*; see also Rao 2008). The data requirements here resemble in some ways those associated with the more sophisticated mass valuation approach used by the Namibian government at the time. The transparency of a simple table is undermined by the great complexity of the computations for the values the table presents. In large farms with different land uses, there can be as many different combinations of coefficients.

The third problem is that the area-based systems are characterised by fixed values per square piece of land like a hectare between valuation periods. Hence, they exhibit no growth in response to property value increases (*ibid*). Thus, this method suffers from the same revaluation problem as the traditional market value approach being applied by the Namibian government at the moment.

Watching over the weaknesses

One solution to the problem of valuation would be to eliminate improvements (structures on the land) from the tax base (i.e. taxing only the land). Surely this would reduce the difficulty of the valuation job. Some analysts have reported on experience with site value taxation in both industrialised and developing countries. In general, the results of their analysis square with expectations (Riel et al 2008). They note that land is more easily valued because it tends to be more homogeneous than improvements. Its physical characteristics do not change as much as improvements and, other things being equal, its implementation does not require as much staff as does a tax base that includes both land and improvements (*ibid*). In addition, the celebrated economic advantage of the site value tax is that it does not discourage investment in improvements.

In order for this method to be successfully implemented, the valuation methods should be revised and tightened. In Namibia, like in many developing countries, there are considerable problems in relation to the valuations for land tax. There are many different types of problems which result in reduced revenue and in an unfair distribution of the tax burden (Youngman et al 1994). Farm owners are sometimes able to influence the assessment process, false transaction receipts can be presented, the valuation procedures lack transparency, the basic data are insufficient, and the administrative capacity and staff qualifications are deficient.

To avoid the complexity of weighing value coefficients for location, land use, carrying capacity, etc. and their subcategories, the mass valuation should be continued because the costs of valuation per each commercial farm will be costly considering the limitations of the Namibian budget. What has to be emphasised is that a reliable fiscal cadastre or the tax list and large scale maps have to be available for they can be helpful in ensuring that all properties are included in the database. However, even without maps it is possible to compile a complete tax list.

The identification of the taxpayers is not needed for the valuation process, but is crucial for the collection of the property tax. It is important to note that the gathering of market information on sales and other land transactions is a very important part of the valuation process. This should take place on a regular basis and is necessary for the process to start many years before any system for estimating market values is introduced.

Conclusions

This Chapter has shown that the land issue in Namibia has a long history and it still has a long way to go. Progress has been very slow and the speed of land reform now depends largely on an increased pace of expropriation (Harring and Odendaal 2007). In turn, an increased pace of expropriation probably depends on public confidence that land reform is being successfully implemented at grassroots level, i.e. that small black-owned farms are being created successfully. All of these factors are complex and interconnected; hence a successful land reform programme is a great legal and political achievement. Thus the land expropriation process needs to be more carefully planned and implemented (*ibid*).

This paper has highlighted the status of redistributed land and its utilisers being the Resettlement Programme and the Affirmative Action Loan Scheme. It has analysed the current projects that are underway or are being implemented in order to support emerging farmers. The paper has offered one of the solutions for the speeding of the land reform programme. It advocated a new land taxation that is different from the current one which does not generate much revenue for the state coffers, and does not accelerate land reform in the country. But with effective land taxation systems like per hectare taxation, people would become more innovative and think about what to do with the

land to generate more revenue for them or to sell some of the farms which they may not afford to pay tax for. This is one of the most effective ways for the government to harness the economic potential of domestic resource mobilisation for socio-economic development and to reduce over-reliance on foreign aid.

It should be stressed further that this land tax system can be used with current assessments for better results than the existing land tax system, and will improve the transition to the new full value assessments in the future. Unfair assessments can be appealed in the meantime. This is not a radical change; it simply changes the current property tax rates to tax hectares as opposed to a blanket valuation and taxation system that is being applied right now. This system of taxation does not harm economic activity, instead, it rewards it, unlike sales, wage, or business taxes, which would slow the country's economic growth. The Indian experience has shown that the land value tax per hectare can be used to fund the entire budget deficit with no need for additional cuts to public services (Rao 2008). Increasing the property tax and making it progressive through a land value tax shift is the best choice for fair and efficient taxation to accelerate land reform and to redress past inequities.

2.2 Maria Lukas: Corruption leads to unequal access, use and distribution of land

Corruption leads to unequal access, use and distribution of land. This is caused by the weak governance which results in low levels of transparency and accountability and which consequently undermines the rule of law. When one stands up against the elders, they call it treason, but when Madam (Agnes) Kafula (the former mayor of Windhoek) dished out land to her so-called special people, they call it noble deeds. If nobody had stood up against her, God knows how many more special people she would have given land to.

When I heard that our country has experienced the second fastest increase in housing prices after Dubai, I felt pity for our youth, people with low wages and those with no wages at all. Namibia is our motherland, but the question remains, what kind of mother does not put the needs of her children first and still expects to be called mother in return? Poor Namibians suffer because a poor Namibian will apply for land to live on and not get any. However, the rich Namibians will apply for land to build flats (apartments to rent out) and they will get it.

There is an unequal distribution of resources in Namibia, and land is one of them. Namibia has enough land for every citizen to have their own place to call home and there is still sufficient land for agriculture and industry. My six suggestions regarding the way forward on the land issue are as follows:

1. The land price must be reduced by 50 percent, so that it becomes affordable for every citizen. This does not mean that all people will be able to afford the land. It only means that at least 50 percent of the Namibian population will be able to make a deposit while working to pay off in instalments.
2. The government must give to the people the right to own land, because even if you bought land in Namibia, it is only yours for a while. Once the government tells you to leave, they do not consider whether you bought the land or not, you just have to move. The government needs to sell serviced land to the people. Parents need to own land that they can leave for their children to inherit. I do not know about other parts of Namibia, but in the north, once the owner of the land dies, anyone who wants to stay on the land will have to pay, otherwise they have to leave the land and this rule applies even to the deceased's children.
3. The Namibian people must own land, build on it and rent it out to the foreigners instead of foreigners constructing buildings and renting them out to Namibians. This practice happens a lot in Oshikango. You will find people being moved and the land will then be sold to the Chinese. They build malls and they start renting out space to local people, but it was supposed to be the other way round.
4. The requirements for land application must be affordable for every citizen regardless of their socio-economic status.
5. The practice of one person owning five houses while the next person has none must be reconsidered. If one person owns five houses, he/she just robbed four other people of homes. We have thousands of homeless people who have nowhere to stay while some individuals own several homes.
6. Landlords must reduce their prices so that tenants will be able to afford the rent and still have some money left to live on. In Namibia, the annual rent is sometimes as much as the price of a one-bedroom house. These

things need to be analysed and new policies in favour of all need to be drawn up and implemented. Let us not be prisoners in our motherland.

2.3 Discussion

Ben Uugwanga:

I am going to touch on Christianity, housing and family values. I am a Christian, I have read the Bible and I understand the wisdom in the Bible. Arguments are based on human wisdom which is fallible, which is not valid, which is not reliable, which has created crisis management and inconsistency. We have cultural problems, we have social pathologies, and we have social corruption. I believe in the Word of God and I know that things are going to change, irrespective of whether people air their views or not. Leaders are going to be usurped, they are going to be replaced and they are going to conform to the Law of God. Christianity is the reason why there is salvation for man and Christianity is revolution, because most of the ideas which were expressed here in terms of land acquisition, housing acquisition, access to resources are principles which find their foundation in Christianity.

Even the constitutional reforms which are being advocated and proposed find their expression in the Law of God, because the Law of God says that all human beings are equal. If somebody says that Christianity as a philosophy, as a framework, as a paradigm, as a law, as a principle should be dismissed, then that person is actually contradicting himself. The higher wisdom is to be found in Christianity and the purposes and plans and the will and the Law of God shall always govern humankind, because He is the Lord of Creation, He is the Lord over all men and all purposes, irrespective of the way how they are being presented. Intelligence and wisdom can be expressed through theories and principles, through laws, through ordinances, but we analyse their validity, their reliability, whether they cohere to the Christian faith which is infallible and which is the reason why everybody is here today.

Participant (NANSO Secretary for Basic and Secondary Education):

Regarding Article 16 in relation to Article 131 of the Constitution, I want to ask: when it comes to amendments in favour of public interest, does the interpretation of "just compensation" need better explained to allow Article 131 to serve the public interest? And secondly, will it be viable when it comes to housing in urban areas to have a regulatory authority to look at

viable markets? For example we have Namfisa that regulates banks when they are charging exorbitant prices and so many other authorities, like the Communications Regulatory Authority of Namibia (CRAN). Will it be viable to have a regulatory authority to regulate the prices of houses in urban areas?

Gert Titus, Chairperson of the Karas Regional Youth Forum:

As was said by the presenter, the land was lost and the land was taken due to policies and laws that were drafted at the time. Therefore, the solution to the problem is again to change the law and to amend the Constitution. The first paper was on the history of how we lost our land and I would have expected it not to deal with the history so far back before independence. The paper should also focus on the period after independence. How did it come to this point after independence? Where did we fail as a government? When you only focus on what the apartheid regime did, we deal with matters beyond our control but our government today should be held accountable for what happened after independence. That history from independence up to now is what I would also have loved to discuss because now we have reached the boiling point on the housing issue. We all know what happened last year and what has brought us here. We should not deny the history that has taken place after independence, because we must look at our own mistakes and try to rectify those.

I do not think that the idea of trying to tax farms will be the solution. We must become more aggressive when it comes to the housing issue. After independence, it was only the black people who had to compromise for reconciliation. Only the black Namibians had to compromise. The ownership still remained with the whites and they can now enjoy peace while still remaining with our land. They can now enjoy peace while still retaining our democracy and benefiting from our development. So, what did they compromise on? We are now at a point where we actually have to beg for what was ours in the past. I feel that our approach to housing must become aggressive, not in the sense that it becomes unlawful or criminal, but we should not be intimidated by the threat that if we change certain laws, we may face sanctions by the western world. Let Namibia be managed by Namibians and let us follow the legal framework by amending any laws which are prohibiting us from really and truly enjoying our independence and democracy. I am putting emphasis on the amendments that need to be made to the Constitution.

Housing should never be discriminatory, based on anybody's sexuality. I am a child of God and the Word of God says that God showed His love to us by dying for us while we were all sinners, meaning that He did not exclude anybody's sin from His salvation. Let us not exclude anybody from housing. We are all equal and we need equal housing for everybody regardless of our personal characters or what we do in our personal lives.

Participant:

I agree that we should explore if we cannot regulate the prices of land. Entrepreneurs look for profit and housing became quite a lucrative market, where I can build a house, somebody will rent it and I will make money. It is not to say there was an evil scheme behind it to make somebody pay more, it is just that the entrepreneurs are looking for more money and the fact that the government is staying out of it means that the process is left to just run and regulate itself. If we can regulate the price, it should cover rentals and not only house ownership.

Another issue is demand and supply. The government needs to ensure that we can regulate this demand and supply and not end up with fifty houses for ten thousand people. Obviously, we are going to fight for those fifty houses, meaning that the fight ends up with those winning who can afford the house. How legal is it for the City of Windhoek to sell a plot valued at N\$400,000 for N\$900,000? Is this legal while we have lawmakers that are our own politicians, serving us, the voters? It makes no sense in an independent country when municipalities should be serving their people.

Finally, I want to remind everybody that Namibia remains a secular state and my rights start where yours end and I must respect who you are. Let us recognise that indeed we are one Namibia, one Nation, but we do have different characters and characteristics.

Participant:

The independence of this country was not won through bullets, the independence of this country was won by advocacy. As much as people were fighting politically and militarily, it was the Christian churches that advocated for independence of this country. As Christian young people we will advocate for policies that we want to be implemented. The Shack Dwellers Association must be made an equal partner in mass housing because they work with the people, they are at the grassroots level, they are the ones that know better

who is in need of a house than anybody else.

It is a ridiculous practice of the City of Windhoek to auction erven to poor people. I ask the government the following question: How dare you decide on communal land but you wash your hands clean when it comes to urban land and have councillors decide who gets land and who does not? Government allows municipalities to charge exorbitant prices to poor people. This is not America where states have their own laws, so how is it that the government would act in communal areas, yet would not act when municipalities and local authorities are involved?

Regarding the legal framework issue, I believe that our government shot itself in the foot when it drafted the Constitution, because the Constitution is like a brick wall that we are running against. As a Christian young man I am in favour of a referendum to be called for the Constitution to be amended and Article 131 to be changed, so that we are no longer held hostage by the Constitution of this country.

Participant (Jeremy, Christian org.):

This is our country, we are in charge and we do not have to blame the past. We have our government, we have our leaders of organisations and our future will be bright if we take a decision. We all just want to live in cities like Windhoek and the way we are developing our country is to focus just on one city, like Windhoek. It is time for us to give power to other towns like Karibib and Otiwarongo. I was glad to see that the Municipality of Otiwarongo is also building houses, because the pressure being put on Windhoek will give us more problems in future. My suggestion is for the youth to acquire land in smaller towns like Grootfontein, Karibib, Henties Bay. Let us not only concentrate our development around one city, namely Windhoek.

I want to know what is our government doing to break down the colonial barriers in our towns that were built to make the black people live in informal settlements and black townships. Our leaders must address the issue of colonial poverty and colonial policy regarding land. We are not against our white compatriots, but we must also share the land. We cannot have a population of 6 percent owning 56 percent of the land. We need to address our German farmers, our white Afrikaners, so that we can bring them to the table. We must share our land because all of us need resources, we are all Namibians.

Participant:

I agree that development needs to reach the smaller towns because most of the people are just migrating to the city as activities are taking place there. When I finished my tertiary education I went to the North. I stayed there for a year, but there were no activities taking place there. You only go to work and then return home. Some people just go to the bars, they are not doing anything because development takes place only in the cities, not in the villages. People will not participate in issues like land reform or developing the land because no activities are happening there. People are not interested in the radio because development is not being addressed and their minds are not being opened to participate in discussions. If you go to the North today and ask people about the land issue, they will not answer you, they do not even know that there is a land issue. People in the villages are not encouraged to participate in such discussions. Therefore, I strongly believe that development should go to the smaller towns.

Bensen Katjirijova, Secretary General of the DTA Youth League:

The problem is how are we going to give the land to the people? I do not know who gives the land, whether it is the municipalities or the Ministry of Lands. The councillors and mayors should elaborate on the barriers they face in the process of giving land to the people. We heard about the history, but we do not know what is happening in the municipalities and what barriers exist there. What causes the land to be as expensive as this? We have to know. We want the people to be given a piece of land.

Lazarus January:

I am a concerned youth, a parent and an entrepreneur. Owning a house comes with great responsibility. We, the Youth, cannot just want to own a plot, a house without having a decent job. If you get that salary of N\$7,000 per month, why would you want to live in Kleine Kuppe where the rent is so expensive while you can settle in Katutura for less?

Regarding the prices of houses, the town councils failed to properly manage their structures. I suggest that the extensions in the locations and suburbs

should be classified. For example, extension 1 should only have houses with a certain value, extension 2 houses with another value, etc.

Seth Boois, CEO of Kalkrand Village Council:

Ms Lukas made a comparative analogy of prices between Namibia and Dubai. Dubai is for the super-rich while Namibia is a developing country. What leads to the high prices in Namibia, is the speculative behaviour of the buyers coupled with the system of the mixed economy that we have in Namibia and that states that the councils should also make money. To normalise the situation, we have to look at the valuation roll which reflects the true value of the land. The valuation roll actually indicates that it is possible for young people and all Namibians to acquire land. In the case of a village council, we sell the land by private treaty. This means that people apply for the land, the application goes to the council, it is not advertised, it is not open for speculation. The council then looks at who deserves to receive the land. The council ensures that two or three erven are not allocated to one individual. I think that is a fair way of allocating land. If the valuation roll can be looked at nation-wide, I think it will go a long way in addressing the question of making land accessible to all Namibians.

K.K. Marenga:

Since independence, since our towns got black office-bearers and our regions black governors, some of the plots surrounding towns or villages are owned by these very same comrades of ours. I want to know what the government has done for the past 25 years. Yes, we can deal with the issue of laws and policies, but while we are waiting for the government or the parliament to act, I wish to point out that the government has adopted a capitalist system through a so-called mixed economy. This is so because it has left urban land and housing delivery to the capitalist market forces and thus beyond the reach of low-income earners who are predominantly black people. As part of the solution, the government must integrate the Shack Dwellers Federation of Namibia into the NHE and replace the mass housing project with a Build-Together Programme. This way, the government will be able to bypass the capitalist forces dominating urban land and housing. The Minister of Urban and Rural Development, Sophia Shaningwa, seems to have seen the evil nature of the capitalist market forces and the catastrophic role they play in the urban housing and land delivery. That is why she was quoted in the New

Era of April 27, 2015 as follows: "We cannot leave the price of houses in the hands of the market forces, we must determine the price, and why should the market forces determine the prices of our people?"

Johannes Sisiku, final year Law student, University of Namibia:

When we are tackling this land and housing issue, we are tackling it from different angles, for example from a legal perspective, from a religious perspective, from a historical perspective, but at the end of the day we need to reconcile all our views in order to solve this issue. The issue of why a plot of N\$200,000 is sold at a price of N\$900,000 is not a legal question because there is no law in place which is saying that a plot must not be sold for a specific amount. Land prices have become a typical supply and demand issue. For example, in Windhoek the demand for land is high, whereas the supply is low. That is one of the factors that are pushing the prices up. If you compare the prices of land in Windhoek and Okakarara, prices in Okakarara are lower because the number of people demanding land in Okakarara are few, whereas the supply of land there is higher. We also need to take into consideration that land is expensive in Windhoek because the majority of people are buying land for commercial purposes, not for housing purposes. A practical example are the plots which were recently auctioned in Academia. Those plots are for commercial purposes, not for housing purposes and the solution to this is to adopt a policy that when you are attempting to buy land, you need to state the purpose you intend it for. Are you going to resell it or are you going to build a complex? We need to specify what we are going to use our land for. We need to take into consideration that the conduct of our government is regulated by our Constitution, which is the supreme law of the land. In terms of Article 1(i) Namibia is a secular state, it is neutral on the issues of religion. So, deciding that only those who abide by the Christian values should benefit from government projects with respect to housing would be violating Article 10 of the Namibian Constitution, because you are discriminating on the basis of religion.

Elsarine Katiti, NYC board member:

I have some questions regarding the area-based taxation, as Mr Mupaure mentioned that farms should be taxed based on the value of the hectares. For example, if I own a hundred hectares, but I am only using 25, would I

be taxed for the 25 hectares that I am using? How would this model affect the masses, because in Namibia the majority of the land is owned by white farmers while only some farms are owned by black farmers? Will taxation be different for different kinds of farmers and how will resettled farmers be treated?

I also want to know the implications of this taxation. Namibia's values are basically based on peace and stability, how would this taxation affect our fundamental rights, especially concerning peace in our country? What would be the operational and policy requirements to make this model work in Namibia?

Ben Uugwanga:

I am looking at policy, land and housing in terms of national priorities. A budget is a tool for planning and when you have a budget, you have to prioritise. You have needs, you have wants and you have squander, spending billions and billions of money on squander, while priorities get thrown into the dustbin. Government is informing us that they cannot solve the housing problem for 25 years. This has to be debated and we cannot be restricted in what we want to say.

Johanna Cloete:

Taxation, it is a good strategy, but we need to look at what type of economy we live in. There is something else that needs to be considered. The facilitation of investment can be strained by taxation, so it should be scaled, and we need to consider more factors than just the Land Reform Act.

Clever Mapaure (response):

I want to emphasise the changes to the Constitution. We talked about Article 16 and we talked about Article 100. Article 100 states that all the land is vested in the State unless lawfully owned. The question is: is stolen land owned by the State or it is owned by those people who own it now? We have to deal with the land theft and it is quite difficult but I have to emphasise the legal part of the interpretation here. When judges sit and decide on those kinds of matters, they will tell you, you own this piece of land lawfully because you got that land from your grandmother and your grandfather or a previous

generation. Yes, you own it legally, but the problem is you got it through illegal means, which is now constitutionally protected. What should be done now is basically to reverse those legal provisions which are protecting that stolen land and this is a question of amending the Constitution. Article 100 can actually be amended without any qualms at all because it is not part of Chapter 3 of the Constitution. Article 16 on the other hand is quite problematic.

Article 100 can be amended with a stroke of the pen immediately but the problem with Article 100 is that it is the one which vests all communal land in the hands of the state and the communal leaders are not happy about it as was already expressed during the Land Conference of 1991 and other proceedings in 1997.

Another question is what to do with the laws that perpetuate this system that we are complaining about every day. At the Law Reform Commission we have a programme to repeal all the obsolete and unnecessary laws. We have to take those laws off the statutory books and we have documented all those laws that are not needed. We have actually recommended to the Cabinet to do something about that and it is only for the Cabinet to give us the go-ahead to repeal all these laws. At the end of the day, it is Parliament who should do it because they are the law-makers and we need their expertise. However, in reality it is not actually Parliament does not make laws, it is us (the Law Reform Commission) who make laws and we need Parliament's endorsement and, of course, the President's goodwill to do that.

The next question is on whether we should have a regulatory authority on land matters. There is a Land Tribunal, but I do not know the people involved there. It seems that nothing is really happening. There is something which is called the Land Advisory Board but I do not know what is stopping them from doing something positive. It seems nothing is happening and despite having a regulatory authority on land, we need to understand that there are certain laws regulating that system. The Council of Traditional Authorities has two conferences per year and it seems they are doing something positive. The Council of Traditional Authorities was actually created to advise the President on communal land. This authority only deals with communal land issues. For commercial land we have farmers' unions and they are quite vocal on certain things and they can advise the President or the government in general on what to do. Thus I do not think we need any structures or organisations which simply need to be empowered to play their role.

Regarding the focus on Windhoek, we should understand this whole concept of rural-urban migration. There is so much pressure on that council and we need to control the rural-urban migration. Whether the decentralisation process is working or not is a problem of the ministry which is in charge of implementing that Act. They should see to it that the Decentralisation Act is actually working well and that is what we need. It is up to them to develop the administrative procedures. Once that works well, we will lessen the pressure on the City of Windhoek and once we have done that, it will put an end to these corrupt practices that we always hear about in the media.

I am not an economist, but what I am emphasising in my paper is that taxation provides more money for the government and that is the money that we need to buy farms, because in terms of the Agricultural (Commercial) Land Reform Act the government will tell you that they do not have the money to buy farms at the price that they are offered. This is slowing down the process. Land taxation will mean that those people who have two farms will find it so difficult to meet the requirements and thus they will make an automatic offer to the government.

My proposal on taxation basically targets commercial farms. We do not want to burden communal farmers because we know that communal farmers do not have so much money to pay for those hectares. If you have 20 hectares under the Communal Land Reform Act, it will become very burdensome for such a peasant farmer to pay tax on that land. Commercial farmers operate as a business, whereas peasant farmers use the land for survival. That is the difference.

The taxation model that I propose is based on the whole size of the farm no matter how much of it is actually used productively. You have to pay for that because you are dispossessing another person.

Muesee Kazapua, Mayor of the City of Windhoek:

Some of these issues that we are debating are also challenges to us as local authorities. On the issue of youth and urban land, the technical staff of the City of Windhoek will deal with some of the technical issues. A question was posed regarding our challenges as local authorities, why are we not allocating land to our residents? This is a fundamental question and it touches on the auctioning of land. I just want to highlight some of the issues

that are challenges to us as local authority councillors in terms of allocating land to our people. First and foremost, the legal framework does not really address the needs and aspirations of our people and ALAN has drafted a well-researched, comprehensive document on Local Authority Reform in 2007. Most of the legal issues are being highlighted that put us as local authorities in a difficult situation.

Before I became a councillor I was one of those who could not understand the bureaucratic land delivery process. Even if you apply for land, there is a very bureaucratic process which even frustrates us as leaders of the Council. We are demanding from our ministry that these policies should be reviewed. We as a local authority are busy reviewing those within our mandate, because we inherited the system or Ordinance 43 and other procedures. These are the policies that cannot address the needs and aspirations of our people.

The influx of people into Windhoek and the rapid urbanisation are some of the challenges we experience on a daily basis, because as much as you plan as a city, people are flocking to Windhoek for greener pastures. Despite our planning, we might not be able to provide adequate basic services to all our people. Those are some of the challenges that we want you as the youth, as residents, to pronounce yourself on. The mushrooming of informal settlements is another challenge we are experiencing. The legal framework and operational policies for local authorities are not responsive enough to meet the demands of our people. The Local Authority Act, for example, states that we need to auction the land. I agree with the proposal to push for the amendment of the Local Authorities Act of 1992, because it limits the options for allocating land. Currently most of the local authorities follow a political directive (to stop the auctions), but any person can mount a legal challenge. These are some of the issues that we really need to address and we need to pronounce ourselves strongly.

Some policies, such as the Decentralisation Policy of 2001, are not yet implemented and thus we as a local authority cannot approve the land to be sold as we need approval by the ministry – another bureaucratic process! Why do we not mandate that power to the local authority? We should also review the issues of land acquisition and registration processes, and also the process of reviewing the system and the method of selling land to our people. Irrespective that all of us fought for the land, it is also a basic need for everybody to have a house or to own land but you cannot give land that is not serviced.

Salomon, Swakopmund municipality & ALAN:

I fully agree with the Mayor that we should not only focus on the supreme law but also on the small by-laws. The youth are allowed to attend Local Authority Council meetings and Regional Council meetings. However, they hardly attend these meetings unless there are meetings in a town hall where they will raise their issues. Youth are also allowed to influence by-laws within our local authorities together with their local authority councillors.

Regarding the high prices, we should try to phase out the developers. It is the developers and the estate agents who are interested in driving prices up to such high levels. The reason why land prices differ from one suburb to the others is we are cross-subsidising. We sell land in one suburb to subsidise land in another suburb with lower income. That is how we sometimes determine our pricing.

We must acknowledge that we are short of engineers, town planners and land surveyors in this country and you have to hire those people to help you in your town. This is why some towns are failing to upgrade their infrastructure. They cannot afford an engineer to come and help them and they have to use consultants. At the end of the day, where will you get the money? From the sale of land.

For several years now the local authorities have lost out on the sale of electricity which remains with the regional electricity distributors (REDS). Therefore, you are only left with the land to sustain your operations as a local authority. That is why most of our towns are now being downgraded to villages.

There was mention here of the Build-Together Programme and the Shack Dwellers Federation, but I have a problem with the latter. The Shack Dwellers get a block as a group and the block then belongs to the group. It is not owned by the individuals and that is the problem we are faced with. In the Build-Together Programme we have people who were given money to build a house with two bedrooms and to pay back the loan so that the next sister or brother can also benefit. We ended up having defaulters who cannot even afford to put up a brick. We have people who built a house up to a certain stage and then sold it. Before the house even reaches a certain level it is already sold to a third or fourth person and then the original owners again queue up for land. Those are the challenges faced by local authorities and

you must decide whether the problem is with the local authorities or with the system, or whether we as human beings are also contributing to the problem.

Participant (Ronnie from Kunene Region):

When we discuss the land issue we will, of course, touch on the legal aspect. Various agencies are involved, like the Ministry of Lands. If you have the land you still need to consult with the Ministry of Environment and Tourism. In the case of urban land you need to consult the Local Authorities Act, the Ministry of Mines and Energy in case there are some mineral resources and the Ministry of Agriculture if it is farmland. We all agree that land should be made available to every young person in Namibia. Other aspects that need to be considered are: Who will develop that land, which bank, which agency or which ministry will make sure that your house has been set up and how do you pay it off? How can you leave your private property for future generations? It is a long process and at the end of the day we should have a common approach that will incorporate all these aspects.

Marizahn from the Physically Active Youth Programme:

Regarding the proposal to have houses of one price category in one neighbourhood, I would like to point out that there is an international trend to change that because you create specific sets of problems in specific neighbourhoods. If you have a low-income neighbourhood, you will find certain kinds of crimes and it is better to mix neighbourhoods, so that you have rich people, poor people and middle-income people living together. It is good for the social setting of human beings, it is good for the development of young people in that area, and it is also good for breaking the social class prejudice that exists.

Penoshinga Sacharia, technician from the Municipality of Omaruru:

I think the biggest problem regarding the provision of urban land is the cost incurred by the local authorities in making land available for sale, such as the planning and servicing. Another obstacle is that of approval from the ministry. In order for the government to control the allocation of land, it would be good for the ministry or an independent body to establish what is called a spatial geo-database that would govern all the home-owners in the country. Before

any local authority allocates land, it can check in this national database if this person (applicant) already owns a property in another town in Namibia. If the ministry then takes over the process of servicing or subsidising the local authorities then we, the residents, can get the land at cheaper prices. Those that already own another house and want to buy for the second time, should then have to buy it at a more expensive price. If you are a first-time buyer, you should be able to benefit from purchasing in a town in the country at a cheaper price. This can only be solved if we establish a national spatial database.

Participant:

The Law Reform Commission has documented all the laws that are problematic in terms of land. They need to be amended and Dr Kawana (Minister in the Presidency) has promised that this would be done, and he indicated Cabinet support. The National Land Bill is being developed by the Ministry of Lands and it will deal with two issues, namely the Agricultural (Commercial) Land Reform Act and the Communal Land Reform Act. These laws will be incorporated into the new Bill.

Regarding the ownership of land by foreigners, there is currently no law that prohibits the ownership of land by foreigners in Namibia. However, foreigners cannot just own land, especially commercial farm land. They have to get authorisation from the Ministry of Lands to buy a commercial farm. In reality, they are manipulating the system. They come here, they establish companies and claim these are Namibian companies which are authorised to own land. It is a manipulation of the system, which we have to deal with as it is a major concern. Foreigners continue to acquire and own large tracts of land and this means that some of us cannot own land. That is my concern regarding land ownership and the development of the laws to deal with land issues.

Chapter 3: Understanding the politics, institutions and management of land in Namibia

3.1 Åse Christensen: ⁴⁹ Namibia's Flexible Land Tenure System

The Flexible Land Tenure System (FLTS) was developed in Namibia between 1992 and 1998 by the then Ministry of Lands, Resettlement and Rehabilitation (now Ministry of Land Reform - MLR) with funding from the government of Denmark. It was developed as an alternative and flexible land tenure system in order to cater to middle and low-income groups who were excluded from the freehold land tenure system that was "developed by and for the privileged few in the "white" areas." (Christensen, Werner & Højgaard, 1999).

In post-independent Namibia people from rural areas started moving into towns and cities in search of labour since they were now allowed to acquire, own and dispose of real property and land and settle anywhere in the country (Ombudsman, 2010). This caused people to settle on unused land in peri-urban areas and thus initiated informal settlements in Namibia. Ever since then, the number of informal settlers has increased in major towns and cities and the in-migration rate to Windhoek is around 4% per annum. A combination of such rapid urbanisation and inadequate capability amongst local authorities to cope with the demand upon affordable urban housing and land contributes yet further to an increase in informal settlements. In addition, living in informal settlements often poses a significant health risk due to lack of clean drinking water, sanitation, and basic services. Often shelters are located very closely which, in combination with poor quality building materials, makes the informal settlers vulnerable to fire risks. These informal settlers do not have legal rights to the land they have settled on, which means they have no tenure security, hence neither the right to transfer, sell, inherit nor mortgage the land they have settled on (Christensen & Jakobsen, 2007).

The FLTS was thus developed in order to provide initial tenure security to middle and low-income people in a simple, affordable and upgradeable form. Nevertheless, the Flexible Land Tenure Act (FLTA) was only passed by parliament in 2012 and the regulations are pending completion before the

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act is fully operational.

The global agenda on poverty alleviation

Since the beginning of the 20th century land tenure systems have served as institutions for securing legal rights to real property in the western world and a perception of ownership to land and protection of ownership as a foundation for development has thus emerged (Christensen & Jakobsen, 2007). Many scholars and international development institutions thus consider recording of real property and land as a fundamental infrastructure providing the foundation for support of important functions in societies including provision of tenure security, valuation and taxation of real property and land, planning and regulation of land use as well as development of land for infrastructure and construction work. Those functions altogether constitute a land administration system and are essential in regard to sustainable development of economic, social and environmental character.

The Peruvian economist Hernando de Soto designates land as emerging as active capital when ownership to real property and land entitles the owner to sell, transfer, and mortgage the property in order to reinvest and improve the property and this is considered a fundamental element in development (de Soto, 2001). However, registration of land is most often linked to certain middle- and high-income classes thus excluding low-income people for whom neither purchasing real property nor registration of land is affordable. In a global perspective, a campaign was held in 1999 on secure tenure and it produced the Millennium Development Goals (MDGs) which focus upon improving the lives of poor people in regard to education, health and developing equality. Goal 7, target 11 of the MDG concerns land and secure tenure and states "achievement of significant improvement in lives of at least 100 million slum dwellers by 2020." (UN-Habitat as cited in Christensen & Jakobsen, 2007, p. 13). One of the factors accelerating the campaign was the fact that the UN-Habitat in 2004 estimated that half of the people living in cities in developing countries were living in slums, so-called informal settlements, and out of that 30% were living in poverty, expected to increase to 50% by 2020 (UN-Habitat, 2004).

In order to reach the MDG Goal 7, Target 11 it is considered crucial to improve pro poor land management, tenure security and good governance which calls for the provision of geographic information, secure tenure systems

and systems for valuation and development of land (Enemark, 2006). Since the formal deeds registration system in Namibia is not designed to facilitate incremental tenurial processes which are important for a pro poor system, the FLTS is useful in order to upgrade informal settlements in a stepwise approach allowing for continuous development of tenure security (Christensen & Jakobsen, 2007).

The Flexible Land Tenure System suits well into the above statements since it is constructed to provide secure tenure and housing to poor and low-income people and thus be a tool for use for upgrading of informal settlements and as such contribute to poverty alleviation.

The flexible land tenure system

The objectives of the Flexible Land Tenure Act no. 4 of 2012 (FLTA) are to provide informal settlers and low-income people with security of tenure via the creation of alternative forms of land title that are simpler and cheaper to administer than existing forms of land title and that the persons are empowered economically by means of the rights (FLTA, section 2).

The purpose of the FLTS is to address inadequacies in the existing tenure registration systems in Namibia by creating an alternative and more appropriate system in terms of cost, simplicity, and accessibility to the local urban context in which it is to be applied (Christensen & Jakobsen, 2007). The FLTS provides for a stepwise formalisation of land tenure and is made up of three steps, namely starter title, land hold title, and freehold title. The system is a parallel interchangeable property registration system (Christensen et al., 1999) indicating that the system is a parallel system to the existing deeds registration system and an interchangeable system in the sense that a starter title can be upgraded to either a land hold title or freehold title. Land hold title can be upgraded to a full freehold title. Starter and land hold title schemes may only be established on land situated within the boundaries of a municipality, town or village council or within the boundaries of a settlement area (FLTA, section 3).

The Registrar of Deeds shall establish a starter title and a land hold title register (FLTA, section 6(1)) which shall record information and is also responsible for conducting inspections and quality control of the registers. Land Rights Offices (LROs) are to be established decentrally in the country and will be

operated by Land Rights Registrars (LRRs) with the support of registration officers and land measurers (FLTA, section 5). The LRRs are responsible that the required information is recorded accurately and to render assistance to persons intending to transfer starter title or land hold title rights or create new schemes (FLTA, section 7).

The LRRs have the power to conduct hearings for the determination of matters in regard to disputes between parties, make corrections in the register to ensure it correctly reflects information and transactions, inspect schemes for general consideration of compliance, and in particular for land hold tile schemes to conduct inspections in order to determine accurate registration of boundaries of plots, etc. (FLTA, section 8).

The two registers shall contain information concerning the deed number issued on every block-erf on which a starter title has been established along with a description of the block-erf in question. Furthermore, the registers record the full name and identity number of all right holders in each particular scheme in addition to the provisions of the constitution of the association and any possible conditions imposed by relevant authorities (FLTA, section 6(3-4)). Additionally, the land hold title register shall comprise all conditions imposed by authorities such as the nature of buildings and structures allowed, including distance between buildings and the boundaries of the plot and restrictions on building heights, etc. (FLTA, section 13(6)). Moreover, for land hold titles it is required that particulars of all transactions for example transfers of the land hold title right, any creation or cancellation of mortgages, rights of way, or servitudes on provision of water, electricity, etc. (FLTA, section 10(5)) be included.

Starter title

A starter title provides initial tenure security and is particularly applicable in regard to upgrading of existing informal settlements (Christensen & Jakobsen, 2007). The erf is registered as a block-erf in the Deeds Register and the scheme members possess the right to occupy an undefined plot within the block-erf for perpetuity. However, it does not provide ownership to a specific plot within the block parcel. The starter title holders can agree upon and establish interior boundaries which are however not registered in the Deeds Register. A starter title holder is allowed to erect and occupy a dwelling on a block-erf in perpetuity, and to transfer all related rights to his/her heirs

or to any other person as well as to lease to another person (FLTA, section 9(1)(a-e)). Additionally, a starter title holder has the right to be a member of the association of the scheme in question as well as to utilise possible services provided to the scheme as a whole. The registration of a transaction is considered as proof of the transaction and any transfer of rights must be informed to the LRR by the transferor and the transferee (FLTA, section 9(5-7)).

A starter title right may only be held by one person except for persons who are married in community of property and no juristic person is allowed to hold a starter title right. Furthermore, no natural person who owns any immovable property or a land hold title right in Namibia is allowed to acquire a starter title right of which it is only allowed to hold one (FLTA, section 7-10).

Prior to the establishment of a starter title scheme the specific land must be subdivided or consolidated to ensure the land is situated on one portion of land registered as such in the deeds registry. Furthermore, mortgages, usufructs, fideicommissum or other rights must be cancelled prior to the establishment of a scheme. The relevant authority may also require the owner of the land, the association or the occupiers to pay an amount of money to cover the costs relating to the establishment of the scheme (FLTA, section 11(3)). A list of persons who have committed themselves to become members of a scheme shall be submitted to the authority together with the plot numbers (FLTS, section 11(4-5)). The relevant authority is furthermore allowed to cause the conduct of a feasibility study to investigate the feasibility and desirability of the creation of the scheme. This can include the conduct of, e.g. geological, environmental or any other scientific study considered relevant to the specific block-erf. Town planning schemes applicable to the area or any other relevant legislation must also be considered prior to the establishment of a scheme (FLTA, section 11(6-7)).

The process of establishing a starter title scheme can be initiated by one or more residents, or by the relevant authority or the legal owner of a piece of land (FLTA, section 11(1)). Once the relevant authority has confirmed that a starter title scheme is desirable the local LRR and the Registrar of Deeds must be informed and make an endorsement on the title deed of the relevant block-erf regarding the establishment of a starter title scheme (FLTA, section 12(1-3)). The establishment of a starter title scheme is required for each block-erf and entitles persons to acquire starter title rights over the specific block-erf. The notice to be forwarded to the deeds registrar and the LRR must include the number of the title deed of the block-erf, a list of the heads of households

residing on the block-erf, and the conditions imposed by the authority. The information is entered into the particular scheme in the starter title register (FLTA, section 7-8) after an investigation of the compliance with requirements for being a scheme member. Once the investigation is completed successfully the persons listed on the list are to be considered as starter title holders and the LRR shall issue a certificate to each scheme member.

Authorities in whose jurisdiction a starter title scheme is created or any other person may agree to provide services to the scheme as a whole (FLTA, section 9(2)) in which case the constitution of the association of the scheme must determine the rights and duties of every holder in the scheme.

The relevant authority may impose conditions upon a starter title scheme in regard to, e.g. the nature of buildings and structures that may be erected on a block-erf, limit the number of persons to acquire starter title rights in a scheme, and the laying and maintenance of pipes and sewerage, etc. under or over the block-erf (FLTA, section 6).

A starter title can be upgraded to land hold title or free hold title. If a minimum of 75% of the right holders consent a starter title scheme can be upgraded to land hold title under the condition of approval by the relevant authority. Right holders who do not want upgrading must be granted a starter title right in a similar scheme and the authority can then sell the plots to interested persons (FLTA, section 14). Both starter title and land hold title can be upgraded to full freehold ownership if situated within the area of an approved township. Upgrading to freehold requires that all right holders have agreed in writing and the block-erf must then be surveyed and subdivided in accordance with applicable laws. A quorum of minimum 75% of the right holders shall agree with the upgrading and the authority may pay fair compensation to the holders that do not agree with the upgrading. The authority can then sell the erven to interested parties. All costs for such upgrading must be borne by the right holders proportionally to the size of the plot (FLTA, section 15).

Land hold title

A land hold title holder has all the same rights in the plot as an owner has in respect of his/her erf under common law and may perform all juristic acts as an owner may in respect of common law. Furthermore, a land hold title holder has an undivided share in the common property and is limited

by possible servitudes in favour of the owner of any other property over the block-erf (FLTA, section 10(1)(a-b)). The land hold title is equally registered as a block-erf in the Deeds Register. The land hold title holder obtains the right to a defined plot within the block-erf in perpetuity along with the right to transfer the right to another holder, create or cancel a mortgage, right of way, and servitudes relating to provision of basic services (FLTA, section 10(5)). All transactions must be updated and registered in the land hold title register. Registration of any transaction of a land hold title right is the same as the legal effect of registration in the deeds registry and as for failure to register transactions is also the same as failing to register a similar transaction in the deeds registry (FLTS, section 10(8)(a-b)).

Prior to the establishment of a land hold title scheme, the specific land must be subdivided or consolidated to ensure the land is situated on one portion of land registered as such in the deeds registry, as is the case for the starter title schemes. Furthermore, mortgages, usufructs, fideicommissum or other rights must be cancelled prior to the establishment of a scheme. The relevant authority may also require the owner of the land, the association or the occupiers to pay an amount of money to cover the costs relating to the establishment of the scheme (FLTA, section 11(3)). Moreover, the plots to form part of a land hold title scheme must be measured by a land measurer and the physical boundaries must be indicated on the block-erf and a description of the plot boundaries along with the plot numbers allocated is to be prepared by a land measurer. A list of persons who have committed themselves to become members of a scheme shall be submitted to the relevant authority together with the plot numbers (FLTS, section 11(4-5)). The relevant authority is furthermore allowed to cause the conduct of a study to investigate the feasibility and desirability of the creation of the scheme. This can include the conduct of geological, environmental or any other scientific study considered relevant to the specific block-erf. Town planning schemes applicable to the area or any other relevant legislation must also be considered prior to the establishment of a scheme (FLTA, section 11(6-7)).

If the result of the above investigation is positive and the scheme is desired, the scheme can be approved and the deeds registrar and the LRR must be noticed. The deeds registrar then makes an endorsement of the title deed of the block-erf that a land hold title scheme is established (FLTA, section 13(1-4)). In addition to the conditions that can be imposed by the relevant authority on the starter title schemes, there can also be restrictions such as prohibition of transfer to another person before a specified period of time and without

the permission of the relevant authority (FLTA, section 13(6)(c)). The above mentioned notice to be sent to the deeds registrar and the LRR is similar to the information to be recorded in the land hold title register and includes the number of the title deed of the block-erf, all conditions imposed by relevant authorities, a description of the physical boundaries of the plots and plot numbers allocated, a list of persons who have concluded contracts including the full names and identity numbers of the plot holders (FLTA, section 13(9-10)). Upon successful establishment of a land hold title scheme, each person receives a certificate indicating that he/she is the holder of a land hold right.

Interior boundaries are surveyed by a para-professional land measurer and registered in the land hold title register as established by the deeds registrar. During so-called adjudication, where the interior boundaries are agreed upon, a description of the boundaries and numbers allocated to the plots is produced by the land measurer (FLTA, section 11(4) (a-b)) and this functions as the layout plan.

A land hold title can be upgraded to freehold title if/when all right holders in the scheme agree in writing on such upgrading. Upgrading requires that the scheme is located within an approved township and the block-erf must be surveyed and subdivided in accordance with the applicable laws. It can take place if minimum 75% of the land title holders agree upon the wish to upgrade and the relevant authority may compensate fairly the right holders who do not want to upgrade. In such incidents the relevant authority may for its own account sell the vacant erven to interested persons. The costs related to upgrading to full ownership must be borne by the right holders themselves (FLTA, section 15(4-6)). The last step in the FLTS is equal to a freehold title within the Deeds Registry.

Conclusion

A starter title is providing a limited level of tenure security yet sufficient to prevent eviction without compensation. The cost for registering the block-erf in the deeds registry is shared between the right holders in each scheme, which makes it cheaper and more affordable to obtain this basic form of secure tenure. Although neither providing full ownership to land nor the possibility to mortgage and create servitudes, the starter title does provide low-income people with a basic group-based tenure and the right to erect and occupy a shelter as well as the protection against eviction.

Additionally, the starter title provides the possibility to upgrade to a land hold title or freehold title once they can afford it and a quorum is present in the scheme. Starter title schemes are likely to have access to communal basic services due to the lack of planning within the block-erven and since the layout is likely to change when upgrading to land hold title.

A land hold title holder has the opportunity to mortgage and create certain servitudes, which provides a higher degree of tenure security than the starter title holder yet less than the freehold ownership. The land hold title is creating the link between starter title and freehold title and is important in the stepwise move towards improved tenure security and full ownership. Due to the fact that only the exterior boundaries must be surveyed by a professional land surveyor and the interior boundaries be surveyed by a land measurer, the cost for upgrading to land hold title is lower than for freehold title which requires all boundaries be surveyed by a professional land surveyor. Since the interior boundaries are surveyed by land measurers land hold title holders obtain the right to a defined plot within the block-erf. Land hold title holders are more likely to be serviced with individual basic services due to proper layout planning of the plots being in place.

The FLTS is designed in line with international acknowledged theories. However, the topic requires further research be conducted to establish whether the system functions in practice. The principles from the FLTS have been applied to upgrading informal settlements by the City of Windhoek (CoW) and the Shack Dwellers Federation of Namibia (SDFN) for around 20 years and the results have proven positive. Although the FLTA was enacted in 2012, the approval of the regulations is still pending. The implementation is supposed to be initiated with pilot projects in 2015 before the planned countrywide implementation of the FLTS takes place.

3.2 Wolfgang Werner: ⁵⁰ No peace of mind without a piece of land?' 25 years of land reform

Background

This reflection on 25 years of land reform in Namibia coincides with the inauguration as third President of the country of the person who, in his then capacity as Prime Minister, chaired the preparation and holding of the historic National Conference on Land Reform and the Land Question in 1991. The Conference was purely consultative, and the consensus resolutions taken at that Conference not binding on government. Nevertheless, they continue to serve as broad guidelines for Namibia's land reform programme.

The period under review can be divided into two parts. The first 12 years were almost exclusively dominated by concerns about redistributive land reform in the freehold or commercial farming sector. The overarching aims of this programme were to redress the injustices of the past in a spirit of national reconciliation and to promote sustainable economic development (National Land Policy, 1998). Two main instruments were developed to achieve these objectives. The National Resettlement Programme (NRP) involves the acquisition of freehold farms by the state and their transformation into small-scale farming units to be allocated to previously disadvantaged Namibians. The Affirmative Action Loan Scheme (AALS) complements this approach, albeit targeting a very different group of people. Under this programme previously disadvantaged Namibians with the necessary asset base – financial and otherwise – are supported to buy commercial farms with subsidised loans. The Ministry of Lands and Resettlement and Agribank respectively administer these two components of land reform in the freehold farming sector.

Land reform in the freehold sector

After a quarter of a century it is reasonable to ask: how have we fared as a nation in achieving our aims with land redistribution? Success and/or failure of our NRP and AALS over the period have almost exclusively been measured in terms of how much land we have been able to acquire and reallocate. Since 1990 up to the end of 2014 the state has spent approximately N\$1,087

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billion on acquiring a total of 2,265 million hectares (this figure excludes additional costs for valuation, etc.). This is still a far cry from our target of redistributing 5 million hectares of freehold land by 2020. Moreover, 25 years after Independence, only slightly more than 25% of all freehold land (excluding Rehoboth) has been transferred to previously disadvantaged Namibians. The total number of people who benefited from this programme is approximately 5,100 (figure from budget speech and newspaper reports). This amounts to an overall average allocation of 444ha per beneficiary.

This average is misleading in so far as a large number of beneficiaries have been allocated units exceeding the recommended minimum of 1,000ha in the northern and 3,000ha in the Hardap and Karas regions respectively. But it does point to some serious problems within the National Resettlement Programme. These include the fact that too many farms are still being occupied by too many people. Namatanga in Kunene and Plessis Plaas in Omaheke are just two examples where large numbers of people have been dumped with little hope to sustain themselves on the available land.

The Affirmative Action Loan Scheme has been more successful in transferring land to previously disadvantaged Namibians. At the end of the 2013-2014 Financial Year, 649 farmers have benefited from the Scheme and acquired 3.4 million hectares. An additional 2.2 million hectares were reportedly bought outside the AALS. The AALS thus provided access to larger areas of land by far fewer people.

Rightly or wrongly, many previously disadvantaged Namibians feel that land redistribution has been too slow. One of the reasons cited by the MLR is that it is not being offered enough land of sufficient quality, because white farmers do not want to sell their land. That this is not entirely correct is borne out by the amount of land sold to AALS farmers. The problem is that AALS farmers compete with the MLR for the best land, but at an advantage. Contrary to the Act, an unwritten policy directive exempts owners selling farms to AALS buyers from applying for a waiver. It stands to reason that for most sellers this is a more attractive option than offering the farm to the state with all that this entails. Instead of having a preferential right to buy as the Act provides for, the Ministry ends up having second choice. An analysis of where the state and AALS farmers have bought commercial farms shows quite unambiguously that the majority of AALS farmers have bought land in the better endowed regions of the country such as Omaheke, Otjozondjupa and Kunene. A disproportionate number of farms acquired by the MLR for resettlement lie in

the Hardap and Karas regions. If the MLR wanted more land of acceptable quality, a simple policy decision could give the MLR first choice, and leave what it does not want for other buyers.

The disjuncture between the stated aims of redressing past injustices and the definition and prioritisation of beneficiaries continues to haunt us. Redistributing land from primarily white owners to “previously disadvantaged” Namibians provides the moral justification for land reform. However, the Land Conference agreed that ancestral land rights could not be restored in full. This consensus was relatively easy to achieve on account of overlapping claims to ancestral land.

The practicalities of disentangling such claims would indeed have been nearly impossible. This does not mean, though, that other options to do justice to the dispossessed could not have been explored. The simplest one would have been to prioritise members of dispossessed groups as beneficiaries of land redistribution under the National Resettlement Programme. This, as we know, is not the case.

A possible reason for not exploring alternatives to address the concerns of the dispossessed must be sought in the policy of national reconciliation and the building of a Namibian nation out of a population that was divided spatially and politically into ethnic homelands. Acceding to particularistic demands for restoration would have run the risk of perpetuating past divisions. This required that historical facts and contradictions which might have stood in the way of building one Namibian nation had to be reinterpreted by appealing to an imagined nation that existed before colonialism. The historical specificities of the land question and struggles to fight them in the early 20th century had to be repackaged as struggles that affected all colonised communities. In that sense, as a recent author argued, the consensus resolutions of the Land Conference did not represent consensus on our common history, but rather a reinterpretation of history which expressed a national interest and a broad agreement where we wanted to go as a new nation.

National reconciliation in the interest of a united Namibian nation would not work if our land policy prevented the vast majority of Namibians in the northern and north-eastern communal areas from not benefiting from land reform. This had practical consequences. The most absurd one being that the estimated number of resettlement beneficiaries shot up from “80,000 unemployed, landless and homeless Namibians” in 2007 to “243,000 Namibians in need

of resettlement", the latter including people from overcrowded communal areas (National Resettlement Policy 1997 and 2001).

More significantly and arguably more detrimental to the National Resettlement Programme, selection criteria for beneficiaries had to be wide enough to include all "previously disadvantaged" Namibians. Assets as well as income and educational levels did not matter in the selection of beneficiaries for resettlement. In reality, to be defined as previously disadvantaged was the only criterion that counted. This made it possible for well-off elites to capture some of the benefits of resettlement as the number of Permanent Secretaries, Governors and many other well-heeled people attest to. The dispossessed do not feature explicitly as a target group and are competing with other Namibians for land.

Sovereignty is another reason advanced by politicians and others for engaging in land redistribution. The argument states that without land ownership, we cannot call ourselves sovereign, we would not have achieved full Independence. Whether one agrees with such perceptions or not probably depends on one's political persuasion. What appears to be inescapable, however, is the conclusion that the real problem to be addressed by land redistribution is not poverty or the contradictions of capitalist production that gave rise to it, but rather the ownership of land by predominantly white people, the former colonisers.

If one looks at the discrepancy between policy statements vis-a-vis reducing poverty through land redistribution and the reality of implementation, the critical analyst is forgiven for concluding that redistributing land in the interest of poverty reduction is but another way of legitimating well-off people to gain from land redistribution. A little change in the definition of what constitutes poverty makes this possible. Instead of using the official definition of poverty, it is common in public discourse to equate poverty with landlessness. But landlessness in and of itself does not define poverty, so to equate the two is wrong.

Moreover, and unlike land reforms in many other countries, we have not questioned the property structures we inherited at Independence. Instead, we are busy extending private property regimes into our communal areas, both as official programmes and unofficial enclosures. Land that is being developed for small-scale commercial farming could have been developed for small communal farmers, in particular those who lost access to land as

part of colonial dispossession.

In view of rampant poverty levels and an unequal distribution of land, it is important to reflect critically on the role that access to land in climatically risky agricultural areas can play in reducing poverty. Can small-scale farming in such areas be sustained in the long run, or are there more efficient methods to reduce poverty, particularly given the enormous costs of settling beneficiaries? Should the focus of our land reform programmes not be on small farmers who have the assets and skills to farm productively with appropriate support?

There is a simple point to be made in this regard: access to land in and of itself yields no benefits. Utilising land requires a minimum level of assets (capital, livestock, etc.) and skills to succeed. In applying the definition of poverty used by the National Statistic Agency, none of our compatriots who are officially classified as poor will be able to use the land for lack of assets. Without a sufficient asset base, access to land may start a downward spiral into poverty as beneficiaries will be forced to sell off their assets to survive. Evidence of this happening has been documented.

The Ministry of Lands and Resettlement has been keenly aware of these issues. Since the late 1990s the Ministry has acknowledge that land redistribution failed to assist in helping people out of poverty. In its revised resettlement criteria of 2008 emphasis is placed on the ability to farm productively. Applicants with a proven ability to farm, and livestock numbers that matched the carrying capacity of the land parcel applied for, stood the best chances of success. To contextualise: at a carrying capacity of 1:15, a 1,000 ha parcel can support about 69 LSU. (An asset base of this magnitude hardly suggests poverty as defined by the NSA.)

But the debate needs to go further than poverty reduction. What needs to be reviewed is the economic and financial sustainability of small-scale extensive livestock farming in a highly variable climate. Increasing international competition in the livestock sector has led several agricultural experts to advise that the future of livestock farming lies in mega-farms that will make our large-scale commercial farms look like small-holdings. The simple logic behind this is that declining profit margins will have to be compensated by production volumes. Should this prove to be true, our small-scale resettlement farmers are likely to face an uncertain future as commercial livestock farmers. It has been stated that internationally, small-scale farming has declined in favour of consolidating small farming units into larger enterprises.

Whichever way we want to go in the long term, for agriculture to increase its productivity, output to the national economy and improvements in welfare and social equity, will require proper support services. Farmers in both the communal and freehold areas need an effective extension service, access to input and output markets, access to financial infrastructure and appropriate technology. Tailoring such services particularly to small-scale farmers requires an agrarian reform that will include the development of an integrated programme aimed at reorganising and transforming the institutional framework of agriculture to facilitate progress.

Communal land

While general consensus about the need for land redistribution in the freehold farming sector existed, land reform in the non-freehold or communal areas was highly contested. The first draft of the Communal Land Reform Act was modelled on land policy in Botswana, where communal land was taken out of the jurisdiction of traditional leaders and vested in Land Boards. At a consultative workshop in 1996, a majority of traditional leaders from across the country rejected these proposals, which would have resulted in stripping them of all powers over communal land. This forced the Ministry of Lands, Resettlement and Rehabilitation to review the Bill. The result was the Communal Land Reform Act (CLRA), which became law in 2002. The Act acknowledged the continued role that traditional leaders should play in the allocation and cancellation of customary land rights and defined their powers, in particular vis a vis Communal Land Boards. The latter were established in terms of the Act to register customary land rights and oversee the activities of traditional authorities.

The registration of customary land rights aims to improve tenure security in communal areas, in the hope not only to reduce land disputes, but also to encourage economic development through increased investments on the land. In 2003, the Ministry of Lands and Resettlement started to affirm and register an estimated 295,000 customary land rights in the communal areas. Currently, 80,352 customary land rights have been registered and the process is ongoing. If a recent advertisement for a consultant “to identify and harness wider potential benefits of communal land rights” is anything to go by, the benefits of registering the communal land rights have not, as yet, been tangible for many communal land holders and the uptake on the potential use of registered land rights by the public and private sector is rather low. This raises the question as to whether or not registered land rights per se are

likely to bring about economic development and poverty reduction. Tenure security is certainly a necessary but not sufficient condition to encourage increased investment on land. Moreover, tenure security does not by definition imply registered tenure. Empirical evidence from across the continent suggests that without appropriate support services such as a functioning extension service, access to markets for agricultural inputs and outputs for example, secure tenure, whether registered or not, is not likely to produce the anticipated results.

The CLRA of 2002 also provides for the conversion of communal land into privately owned farms. This approach to development was first developed under the Odendaal Commission. In the wake of its recommendations a total of 200 farms were surveyed on communal land and allocated to individual 'owners' before Independence. These surveyed farms are in the Mangetti and Okamatapati areas.

The CLRA provides that once traditional authorities have agreed to the establishment of small-scale farms in their areas of jurisdiction, the state designates such land for agricultural development and causes it to be properly surveyed and registered in the Deeds Office. This programme was started in all earnest in 2012. A total of 621 parcels of land in Zambezi, Kavango East and West and Ohangwena regions have been surveyed and gazetted.

Rights to such land in Kavango East and West were allocated by the Land and Farming Committees of traditional authorities in the early 1990s. Government, with the financial assistance from its international partners is developing farm infrastructure to enable beneficiaries to farm commercially. The land is to be held under 99-year lease agreements.

While the official development of communal land in designated areas is going on, little progress has been made on how to deal with enclosures of communal land that have occurred since the 1980s and which are commonly referred to as "illegal fencing". Many of these farms, which were fenced with or without authorisation before the CLRA of 2002 prohibited new fences, were developed by individual "owners" without any state financial support. This frequently involved considerable investments into infrastructure development, a process similar to the Programme for Communal Land development currently underway. It is imperative that the Ministry of Lands and Resettlement devises methods to regularise these so-called illegal fences. Legal tools exist in the CLRA to adjudicate the legality of claims made to

such land. The policy framework on commercial farming on communal land should not separate between different categories of commercial farmers: "illegal" and "legal".

Subtle changes on providing improved access of communal farmers to more land are also observable. In one of the submissions to the Land Conference in 1991 the extension of communal areas was considered as an option that ranked high in terms of equity impact relative to investment costs. However, it never officially entered our land reform programme. More recently, however, the MLR acquired farms adjacent to communal areas in the south and west and handed them over to traditional authorities for allocation.

Two significant characteristics of communal land reform need to be highlighted. The first is that the state continues to be the nominal owner of all communal land. This implies that customary land rights holders enjoy such rights at the behest of the state. While the registration of customary land rights provides some protection against the state, rights to commonages enjoy no legal protection, in particular against the state.

It appears far-fetched to argue that customary land rights holders need legal protection against the state. After all, the state is there to protect us all. However, several cases have been reported in the daily press of communities whose land was allocated to agribusinesses without their consent and/or compensation. At the time of writing, the state is reportedly looking into the possibility of excising approximately 14,000 ha in the Otjinene area (Ondjora, Ojomunguni and Otumumbonde villages) to settle a group of marginalised people without consultation or consent of local customary land rights holders. Extending legal protection of groups to commonages is imperative to reduce their risks of losing access rights.

Another aspect is that the power of traditional authorities to allocate land is limited to 20 ha. Applications for land exceeding this size will be considered by the minister. The Minister of Lands and Resettlement was quoted in an interview that this has been done to protect the commonage from being fenced off by a few individuals for personal and individual use and from being depleted through over grazing. The salient point is that the decision to convert communal land into small-scale farming or agribusiness now rests with the state. In the absence of clear and transparent criteria to guide such a process, land rights of communal farmers to common grazing areas remain vulnerable.

A thorough policy review regarding the land reform sector is in order 25 years after Independence. Many old land issues remain unresolved and new ones have arisen as we continue to develop our land reform programme. Simply fusing the existing Agricultural (Commercial) Land Reform Act of 1996 and the Communal Land Reform Act of 2002 will not provide solutions to problems currently experienced.

3.3 Narikutuke !Naruses: ⁵¹ Land delivery by the City of Windhoek

The land issue for the Namibian Youth is at a pertinent stage and the issue evokes emotions. The City of Windhoek takes this matter to heart and I will present some aspects of the land delivery process.

Why land delivery?

Basically when we talk of access to land, affordability, and availability, it all refers to the land delivery aspect. I will highlight the land concerns and point to some possible interventions. Basically, demand for residential land has far outstripped supply and many of us do not own property and experience insecurity of tenure. The need to guarantee security of tenure for us all is a serious concern.

However, we need to create urban development in the context of having to address increased population growth as well as the demands for housing and employment that flow from such growth. We need to focus on guided integrated spatial development to make municipal areas great places to live in today and for future generations. Urban areas need to be developed in an integrated and coordinated manner. We need to strike a balance between complex policy requirements and land affordability and we should discourage sprawling and haphazard developments.

In many of our towns we have seen that people put up shacks because they need housing and that has resulted in a major urban sprawl. We would like to have a predictable growth and development direction which private investment can respond to.

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What are the basic concerns?

As from 2001 until today, one can actually see how the population of Windhoek has grown and the challenges that this provided. The City of Windhoek is mandated to provide services in urban areas and it has come under a lot of strain to meet this demand. The City has to provide about 2,500 new plots in terms of demand for land to meet the rising demand. Currently Windhoek's population grows by 4.4% each year and with this rapid urbanisation, the demand for land and housing is quite high. Related to that, the employment creation aspect is closely linked with the affordability aspect. How much of what is provided by the City can we afford? This is one of the reasons which resulted in the sprawling of informal settlements.

One-third of Windhoek's population now lives in informal settlements and this trend affects many young people. The problem is exacerbated by the cumbersome land delivery processes. The process covers seven phases and it takes three to six years for the municipality to have a plot that can be allocated. The City of Windhoek works under the ambit and the mandates of national legislation and based on those laws we have our methods of alienation that have been identified. We want to emphasise fairness and that means considering also those who cannot afford but need housing or land.

All the strategies used should be transparent and fair. It is actually a directive from national government that the local authorities operate within the mandate. The City of Windhoek has what is called the "offer to purchase" process, where land is being sold at about the average amount of all the offers received. This basically serves to control the price, so that we do not have the highest bidder getting the land. Taking the average amount makes the process a bit fairer. We hope that this can address one aspect of housing needs, especially for the benefit of first-time buyers, who include many young people.

Then we have the well-known auctions that are being carried out. An auction should be the fairest way in which you can sell land because everybody has the opportunity to bid for a property. However, from past experiences we have learned that it does not really work for our society because of the affordability aspect. These are some of the challenges that young people need to be aware of.

Then we have the tenders for special development projects or complexes. We have private treaty which basically means that you come to the City of Windhoek to indicate your need for a plot. The City of Windhoek then asks for the money and the person signs the papers. This is done specifically for people with low incomes who cannot afford the usual prices but have a need for housing. The development of serviced land should generally take place in an orderly and planned manner. Development in Windhoek is guided by, amongst others, the Windhoek Structure Plan and the Town Planning Scheme that facilitates land use in an appropriate manner.

All local authorities are answerable to the line Ministry of Local and Regional Development and Rural Development, which was renamed recently and which lays down national policies to which local authorities must adhere. All major planning applications and amendments are reviewed and deliberated on by the statutory bodies, which are the Namibian Planning and Advisory bodies and Township Boards.

Another area to highlight is land scarcity, be it urban land, agricultural land, or communal land. As young people we need to ask ourselves – is there enough land for us all to share and distribute fairly? That is one of the most important factors. About five years ago the boundaries of the City were expanded. However, if one looks at the statistics, then 95 percent of that is private land and only 4.5 percent is government land which the City can use to provide land for the needy.

Other factors contributing towards land scarcity include the delimitation due to the environmental features. This includes the underground aquifers that are mostly towards the south of Windhoek that limit the development land within the basin of Windhoek. We all know that we are already reaching the mountains, meaning that the valley in which Windhoek is located as a town is already fully developed. We are thus moving to the mountain edges and these are more difficult areas to develop.

Water scarcity in central Namibia is another important aspect that is impeding development, alongside with limits regarding financial and technical capacity. What role do we as youth play in this regard? We need to become professionals to have the required skills for ensuring that land can be delivered in urban areas.

The technical and financial part

The government has in the interim undertaken major interventions such as TIPEEG, the mass housing programme, and also direct financing to local authorities to ensure land delivery in the cities. These interventions aim to make access to land and housing easier and should focus on land delivery, planning processes, and policies and laws that need to be amended. These include the tenureship options, urban plot sizes, access to bonds and loans, decentralisation and the development of amenities throughout Namibia.

The various stakeholders, including local authorities, NGOs and regional councils need to discuss how the decentralisation policy is supposed to take place, how is power supposed to devolve and how will the necessary finances for development be secured? The City of Windhoek has already various policy directives and initiatives in this regard. As the central part of Windhoek has reached the edges, some studies were conducted which support a proposed new township between Okahandja and Windhoek. In terms of growth direction, Windhoek is also exploring the east and the south to look at the main focus areas. In conclusion, land and housing issues need a national policy focus to make access to land and housing easier. The areas that need to be addressed are land delivery, financial access, infrastructure provision, housing types and decentralisation of development. The housing types relate to the questions of high density buildings, flats, sectional titles and the urban sprawl. The current supply and demand of housing within a free market system has led to the high prices in Windhoek and we need to engage on how land and housing can become affordable.

3.4 Discussion

Participant (Jeremy):

If Windhoek is facing pressure, why do we not create other cities? If Windhoek is surrounded by mountains and we see land in Windhoek is becoming expensive and the water for Windhoek is coming from Kombat and Grootfontein, why do we not look to other towns? The former President of the USA, Woodrow Wilson, used to say, "If you cannot convince them, confuse them". Currently we are just confusing the youth to believe that they cannot get land. We have educated people, why do we not change that system which we are saying is internationally recognised to make it work for

the Namibians? That is the way we are confusing people to believe that land is a sensitive issue. Therefore, if Windhoek does not have land, let us go to other cities. Let us not look for excuses for not providing land to the citizens.

Phillip Lühl, Lecturer at the department of Architecture and Spatial Planning, NUST:

I would like to raise the minimum erf size of 300 square metres which I believe is still in place. In my view this complicates many issues and especially when our colleague from the City of Windhoek mentioned the different types of housing models, other than the ones that we know, which is the single detached house on a single erf. We need to address the minimum erf size of 300 square metres at a higher political level because that puts a lot of limitations on which types of housing models one can actually explore.

Mathew Nangula, Regional Chairperson for Oshikoto Region:

My recommendation is that when we are allocating land to people, the allocation should be accompanied by mentorship, because we have seen that people have been allocated land and then the land was lying dormant. In the past, those farms used to be productive. Thus resettlement should come with mentorship so that at least the farms can be productive. I feel we should also attach some requirements to determine on what basis we resettle people. I have seen people resettled in my region who have just one goat and two donkeys on a huge piece of land and this does not constitute a productive use of land.

Benson Katjirijora, Secretary General of the DTA Youth League:

We face the challenge of people flocking to the cities to look for greener pastures. What we need to do is that the whole government, the councillors, the traditional leaders, the Governors and the Ministry of Lands have to add value to rural land. The people are looking for development but instead that development should go to where the people are. Especially the Ministry of Lands needs to take development back to the people, thereby minimising the population of the cities.

Elvin Gariseb, Namibian youth:

My recommendation on the resettlement issue is that the application process for resettlement needs to be reviewed, to become youth friendly. Secondly, we complain that land is expensive but there are Regional Councils and Local Authority Councils who are returning money to the Treasury. What is happening there? We need to talk about that issue. Money is going back while we are saying that there is no land, there is no money. Local Authority Councils are crying here about a lack of money, but they are returning money to Treasury. What is happening?

J.P. Van Der Westhuizen, Council of Churches in Namibia:

I noted that the Namibian Government does not have capable negotiators, therefore land prices in terms of farms are too high. Black and white farmers are charging exorbitant prices and the government negotiators fail to bring down prices. Therefore, the recommendation is that the government needs to appoint capable negotiators who can prevent prices from going up.

Secondly, in terms of ancestral land, I noted that those in charge of land reform deliberately chose not to give ancestral land back to those that it belonged to. They did that because they wanted to occupy the land themselves, knowing it was not their land. Therefore, I recommend that the first settlers, the San people, should be the first to be resettled on resettlement farms. They must be given land and priority in terms of the Resettlement Programme.

Participant:

There are some countries like Brazil that have planned towns where people moved, but our Local Authorities Act makes provision for settlements, villages, towns and cities and there are criteria for the classification. Let us look at those criteria and see how we can upgrade some of them. About five years ago many of the towns were demoted to villages, many of the villages were demoted to settlements and these things have implications in terms of development. How do we as the very ones from the villages of Gibeon or Hoachanas help to upgrade our places? Let us make our places where we are coming from to be places where we can live instead of us all just wanting to come to Windhoek.

I want to share some information on the aspect of resettlement farms. The government has taken some good initiatives. When you are resettled on a farm you are provided with opportunities, for example, AgriBank provides training and money for you to be able to become productive. This forms part of a kind of mentorship because they tell you what type of farming to engage in and they will provide exposure to the type of farming you are interested in. Loans are available to improve your infrastructure and thereby your farming activities.

Johanna Cloete:

Regarding the first-time buyer option in Windhoek, I wanted to ask how a young person can participate in a land auction in Windhoek. He or she has no security, no loan approved, nothing. It is only the rich people who can go to those auctions. Others can only go but they cannot put down a N\$200,000 deposit guarantee to be able to make a bid. This is why auctions need to be changed as Windhoek is not there just for the rich. If you are lucky enough to have a good job, if you are educated and you earn a good salary, and if you bring with you a letter of guarantee from the bank and you can buy one of those plots, then you have the option to develop the land that you own. I heard the Mayor of Windhoek announce that all the undeveloped land will be taken back. Let us have economic considerations when we deal with such matters.

The private treaty system is another laughing stock of the City of Windhoek as it does not enable people to access the land they need. This system needs to be reconsidered and I also do not believe that there is really a scarcity of land. Windhoek is not a big city at all and if cities want to develop land, they tell the people around the city that they have to sell the land. If they refuse, we have to change that option in the Constitution so that the needed land becomes available.

Kashiwana Neshila:

We need to move away from the fact that I have a salary of N\$3,000 and somebody else has a salary of N\$7,000, but we need to say: he is a Namibian, I am a Namibian, we all need to own land. It needs to be clearly understood that the young people of Namibia wish to see land become a human rights issue and not a price issue.

There are some countries that are building little flats and little housing systems that are owned by government. As people are moving between places to find work, they can stay in such places and pay rent until they settle down and buy a property of their own.

We must be clear about the pressure that we are putting on the City of Windhoek because the City has just a small geographical size. There needs to be a deliberate attempt by the people of the country and its government to grow other towns and other areas so that they can provide an alternative. We need a specific strategy to grow Karibib or Usakos. I cannot reside in Karibib as long as there are no opportunities in Karibib for me. So, deliberate government intervention is required in terms of the Ministry of Enterprise Development, the Ministry of Education, etc. This will allow us to grow these towns and provide relief. After 25 years, we have only one city but we are in the 21st century with modern strategies. There are people studying urban planning and design and we want to see a Namibia that will develop at least five cities in the next 10 years.

Ase Christensen (response):

The Ministry of Lands has made some progress in the last year regarding the implementation of the flexible land tenure system. It used to be on hold as nobody really wanted to take ownership of the system and this is also one of the reasons why it has taken such a long time to have the Act passed in Parliament. For this year (2015) several pilot projects are planned but the location of these pilot projects is still under discussion. A project management unit is envisaged which will be responsible for the implementation of the project and it will also take the final decision on the location of the pilot projects.

Back in the nineties there was one pilot project in Windhoek and another one in Oshakati, but we do not know where the new pilot projects will be located. It is important to have the pilot projects, to gain knowledge and experience before we implement the programme nationwide. Amendments and adjustments might have to be made and currently we also do not have the regulations in place. These regulations were supposed to be in place before the pilot projects commence, but I have recently been informed that this decision has been changed. The pilot projects will now be run at the same time as the regulations will be amended and updated. After the completion of

the pilot projects, the regulations will be approved

There is actually quite an important component of decentralisation within the flexible land tenure system. The Project Management Unit will be located most likely within the Ministry of Land Reform in Windhoek. They will have the overall implementation responsibility, but they are also supposed to establish Land Rights Offices in every region in order to handle the informal settlements within the regions. They would be running the title registers and also the land hold title registers, but in close contact with the Deeds Office in Windhoek which carries the overall responsibility and which will also conduct the auditing of the systems.

Chapter 4: Policy options for mitigating the youth housing crisis

4.1 Herbert Jauch: Youth and urban land/housing in Namibia

Introduction to urban land and housing in Namibia

Historically, apartheid-colonialism has denied black Namibians access to land, either through direct land dispossession in rural areas or through the severe limitation imposed by influx control in urban areas. Colonial land policies were an integral part of the apartheid system and caused disruptions to land distribution and use. The colonial urban policy created towns for exclusive white residential, recreational and business purposes with investments focusing merely on these areas. Only the white minority were allowed to register rights over land in the Deeds Registry while black Namibians were denied access to urban land ownership and were only allowed to enter towns as contract labourers. Thus large-scale black urbanisation was discouraged and legally prevented. Inferior townships with basic services were created for blacks who were “excluded from using their land as collateral for economic development and for upgrading their dwellings. Informal settlements were regulated and the expansion of black townships was prohibited, which led to overcrowding in urban black townships or so-called ‘squatting’” (Matthaei and Mandimika 2014: 8).

Although these practices ceased with the achievement of Independence in 1990, the question of access to land in both urban and rural areas remains a contested one. Land reform was expected to provide redress for past injustices and to promote development by restoring land rights to those dispossessed during the apartheid era. Redistribution of land was meant to address historical injustices as part of a wide process of nation-building and the land reform process was envisaged to transform existing political and economic relations of the disadvantaged majority. Thus the land reform process broadly aimed to:

- bring about equity and access to land
- promote sustainable economic growth
- lower income inequalities

- reduce poverty (Matthaei and Mandimika 2014)

The Ministry of Lands and Resettlement (MLR) was mandated to plan, implement and oversee the land reform process. In 1991, following broad consultations, the government convened the National Conference on Land Reform and the Land Question. The conference adopted 24 resolutions which formed the basis for all current land-related policy and legislation. Land reform is guided by the following legal framework:

- The Constitution of the Republic of Namibia
- Agricultural [Commercial] Land Reform Act, 1995
- National Land Policy, 1998
- National Resettlement Policy, 2001
- Communal Land Reform Act, 2002 (*ibid*)

The need for urban land was also expressed by a civil society conference in 1994. This “people’s Conference on Land” resolved that “there must be secure access to urban plots for all, women and low-income households, with different possibilities of ownership and long-term occupancy” (quoted in Matthaei and Mandimika 2014: 13).

Although the National Land Policy of 1998 has a section on urban land which acknowledges the problems resulting from rural-urban migration and informal settlements, the primary focus of Namibia’s land reform process was on rural land and the slow process of land redistribution under the willing buyer, willing seller policy. The resettlement policy was another key instrument that focused on rural farm land while the distribution of land in urban areas received far less attention. This has changed in recent years as an increasing number of Namibians were unable to afford decent housing and thus were forced to live in shacks.

At independence, only 28 percent of Namibians lived in urban areas but this figure rose to 33 percent in 2001 and further to 43 percent in 2011. Migration to urban centres is to a significant extent undertaken by young people and is driven by the search for better economic and social opportunities. The Khomas and Erongo regions are particularly affected by in-migration as over 40 percent of these regions’ residents were born elsewhere. Namibia’s urban population grew from 603,612 in 2001 to 882,100 in 2011, which implies a growth of 46 percent (Matthaei and Mandimika 2014). Based on the assumption that this trend continues, close to half of all Namibians are living in towns today, many under precarious housing conditions.

The market-driven urban land regime has forced many people into shacks and has resulted in long waiting lists for serviced land. It has become apparent that the current practices are unable to provide land and shelter for an increasing number of urban dwellers in need of housing. Ownership of land titles and access to decent housing are beyond reach of the vast majority of youth and if the current trend is allowed to continue, many young Namibians will never be able to live in decent shelter or afford a home of their own.

Namibia's housing crisis has now reached enormous proportions. Well over 500,000 Namibians, constituting more than a quarter of the population, are already living in shacks and the current average house prices in the country of around N\$800,000 are unaffordable for over 90% of the population. As pointed out by Payne (2001), private tenure is a concept introduced in developing countries largely with the aim of serving the interests of colonial settlers. This system ensured unrestricted and efficient use of land which can easily be exchanged. However, lower income groups are virtually excluded from private tenure due to the high costs of servicing and surveying land. "Non-formal" tenure such as squatting basically occurred because of the inability of the existing land tenure systems to provide land for the poor (*ibid* 2014).

This paper focuses on land and housing in urban areas, by examining the economic and social implications of the current land and housing regime. A particular emphasis will be placed on the "financialisation" of housing and on the land practices in Windhoek, as well as the effects of market-driven land and house allocation. Potential systems of social housing will be examined, drawing applicable lessons from international experiences.

This paper will make reference to current housing initiatives such as the mass housing programme and the experiences of the Shack Dwellers Federation of Namibia (SDFN). These initiatives will be assessed in the context of the National Housing Policy and the National Employment Policy with the latter placing specific emphasis on the youth. Attention will also be paid to the question of servicing and allocating land by local authorities.

This paper paves the way for a "Green Paper" for the National Youth Council (NYC) to debate options to resolve the urban land and housing crisis and to make decent housing available to Namibia's youth. The paper is meant to generate innovative thinking amongst the NYC stakeholders, including the youth and its various organisations as well as strategic decision makers.

A colloquium to explore urban land and housing policy alternatives will be convened by the NYC in 2015 to debate the policy options further. The NYC believes that the provision of erven at affordable prices is key to youth empowerment and consequently youth development.

Methodology

This paper was developed based on the following:

- a) A literature and newspaper review on the situation of youth and urban land in Namibia as well as youth and housing in urban areas, with reference to the affordability of housing and the economic situation facing youth.
- b) A brief literature survey of relevant international experiences.
- c) Interviews with key informants from government, state-owned enterprises and NGOs.

Housing delivery modes and relevant international experiences

It is important to define the concept of adequate housing from the onset as this will help focus the debate on the kind of housing envisaged. The United Nation's (UN) Special Rapporteur for adequate housing provided the general definition which could serve as a useful point of departure:

“The right to adequate housing should be understood as the right to live in conditions deemed adequate on the grounds of security of tenure; availability of services, building materials, facilities and infrastructure; affordability; habitability; accessibility; location; and cultural adequacy. Furthermore, the right to adequate housing should be respected and protected during the design, implementation and monitoring phases of housing policies and programmes and elaborated and implemented with full participation of affected individuals and communities.”
[\(http://www.ohchr.org/Documents/Issues/Housing/A-67-286.pdf\)](http://www.ohchr.org/Documents/Issues/Housing/A-67-286.pdf)

On August 10, 2012, the UN General Assembly debated the right to adequate housing. The document guiding the discussion provides critical insights about the changes in housing concepts over time and the increasing financialisation of the housing market. These developments are critical to understanding current trends in Namibia and thus the following sections are

quoted in full from the UN document:

"1. When the acute misery of the urban poor began to be revealed by social reformers in Europe and North America in the late nineteenth and early twentieth centuries, Governments began to provide housing assistance to individuals and households and to supply housing directly.⁵² By the middle of the twentieth century many developing countries in Latin America, Africa and Asia had experienced rapid urbanization of the rural poor. The absence of urban and housing policies to enable this new urban population to access urbanized land led to the creation of self-built informal settlements, characterized by precarious dwellings and a severe lack of basic services and infrastructure. During the same period, the situation was different in most formerly planned economies, where the State was responsible for providing all citizens with adequate housing and the model of centrally planned construction of State rental housing was applied.⁵³

2. In the late 1970s a dramatic shift occurred in housing policies, starting with North America and Europe, followed later by developing countries in Latin America, Asia, Africa and by formerly planned economies. This shift, supported by predominant economic doctrine, called for the transfer of activities from State control to the private sector and for unrestricted free markets and free trade. This view soon gained hegemony, shaping the policies of States, international financial institutions and development agencies. The effects of this approach on housing policies across the globe have been dramatic and well documented (*ibid.*).

3. A growing consensus was formed, according to which Governments should renounce their role as suppliers of affordable housing and become facilitators, supporting market demand rather than directly

⁵² For example, in the United Kingdom of Great Britain and Northern Ireland, about 5.5 million social dwellings were constructed between the end of the Second World War and 1981. M. Harloe, *The People's Home: Social Rented Housing in Europe and America* (Hoboken, New Jersey, Wiley-Blackwell, 1995); D. Fée, "Le logement social en Angleterre: trente ans de déclin", *Informations Sociales*, No. 159 (March 2010), p. 82.

⁵³ József Hegedüs, Stephen E. Mayo and Iván Tóthics, "Transition of the Housing Sector in the East Central European Countries", *Review of Urban & Regional Development Studies*, vol. 8, No. 2 (July 1996), p.101; Economic Commission for Europe (ECE), *Housing Finance Systems for Countries in Transition: Principles and Examples* (New York and Geneva, 2005); Mark Stephens, "Locating Chinese Urban Housing Policy in an International Context", *Urban Studies*, vol. 47, No. 14 (December 2010), pp. 2965 and 2971.

providing outcomes: "Governments should be encouraged to adopt policies that enable housing markets to work ... and avoid distorting housing markets."⁵⁴ This new role implies creating conditions, institutions and regulations aimed at supporting housing finance systems to promote home ownership under the neo-liberal dogma of reliance on private property and market forces.⁵⁵

4. Developed and developing countries have thus been steadily moving away from traditional supply-side assistance to demand-side policies. As a result, support for households to take on credit debt, the financial sector and the private housing market became the primary mechanisms for allocating housing solutions. Foreign assistance from international organizations greatly influenced the development of market-based housing finance and boosted housing market activity in developing countries.⁵⁶ Despite some diversity in housing policy experience, most countries opted for promoting housing markets and individual home-ownership, privatizing social housing programmes and deregulating housing finance markets.

5. In some countries, selling publicly owned houses to tenants has been seen as a way to increase home ownership while diminishing State expenditure.⁵⁷ Privatization was also supported by increased stigmatization of public housing as centres of extreme poverty, crime and segregation. In Europe and North America, the privatization of public housing has taken various forms, including the sale to sitting tenants of public rented housing through right-to-buy policies (e.g. the United Kingdom), property transfers to not-for-profit actors (e.g. the Netherlands) and, in some cases, to profit maximizing actors (e.g. Germany⁵⁸ and the United States of America⁵⁹).

⁵⁴ World Bank, *Housing: Enabling Markets to Work*, World Bank Policy Paper (Washington, D.C., 1993), p. 6.

⁵⁵ J. Doherty and others, *The Changing Role of the State: Welfare Delivery in the Neoliberal Era* (Brussels, European Federation of National Organisations Working with the Homeless (FEANTSA), 2005).

⁵⁶ ECE, *Housing Finance Systems for Countries in Transition*, p. 7; World Bank, *The Emerging Role of Housing Finance* (Washington, D.C., 1988).

⁵⁷ United Nations Human Settlements Programme (UN-Habitat), *Affordable Land and Housing in Europe and North America* (Nairobi, 2011), p. 9.

⁵⁸ K. Scanlon and C. Whitehead, "Le logement social en Europe: tendances communes et diversités persistantes", in C. Lévy- Vroelant and C. Tutin, eds., *Le logement social en Europe au début du XXI^e siècle: la révision générale* (Rennes, France, Presses Universitaires de Rennes, 2010), p. 24.

⁵⁹ In the United States, the Housing and Community and Development Act of 1974 ended most new construction of public housing and initiated the Housing Choice Voucher Program (Section 8), shifting funds from public housing authorities to the private sector, which was to construct low-income housing. These "affordable" houses were eventually too costly for many public housing tenants (A/HRC/13/20/Add.4, paras. 10, and 25).

6. During the 1990s, most formerly planned economies also embarked on projects of large-scale privatization of public housing through “right to buy” programmes, resulting, in some cases, in the almost complete eradication of public housing. In most countries⁶⁰, this process led to radical changes in tenure structure; in many formerly planned economies owner-occupied housing now forms more than 90 percent of the housing stock (e.g. 96 percent in Estonia, 77 percent in Slovenia and more than 80 percent in China).

7. Even in countries where massive privatization did not take place, the ideological transfer of responsibility for provision of housing to the market has been accompanied by the view that home ownership is the best tenure option, to be placed at the centre of all housing policies. This process has overshadowed other well established or alternative tenures, such as rental housing (public and private) and different forms of cooperative and collective ownership, among others.⁶¹ Consequently, since the end of the Second World War homeownership rates have been constantly climbing⁶² and by mid-2000 had reached more than 50 percent in the member States of the Organization for Cooperation and Development (OECD), with the exception of Germany and Switzerland.⁶³

8. The need for housing finance systems was quickly identified as a crucial element in this transformation. Housing finance refers to financial policies and programmes that aim to finance the cost of housing for individuals and families by providing loans (mortgages or microloans) or grants (subsidies or tax exemptions) for the purchase, rental, construction or improvement of housing.

9. The majority of housing finance policies and strategies currently employed are targeted towards individuals rather than institutional landlords, aim to promote ownership, and are based on the premise that the housing market, if properly designed and regulated, and with

⁶⁰ Only a few countries did not adopt the “right to buy” for tenants (e.g. the Czech Republic and Poland).

⁶¹ Julie Lawson, Tony Gilmour and Vivienne Milligan, *International Measures to Channel Investment towards Affordable Rental Housing* (Australian Housing and Urban Research Institute, 2010); Fée, p. 80.

⁶² Mikael Alterhög and Han-Suck Song, “A Survey of Policies that May Increase Access to Home Ownership for Low-Income Households”, *Housing Theory and Society*, vol. 26, No. 4 (2009), pp. 248-249.

⁶³ Spain and Ireland lead with 83.2 percent and 91.4 percent, respectively. D. Andrews and A. Caldera Sánchez, *Drivers of Homeownership Rates in Selected OECD Countries*, OECD Economics Department Working Paper No. 849 (Paris, OECD Publishing, 2011), p. 9.

the necessary supporting legal and institutional framework, is capable of ensuring access to adequate and affordable home ownership for all.

10. Housing finance is now perceived not only as a tool for promoting access to adequate housing but also as critical to the development of the financial sector, and has become a central pillar of the financial market, expanding the terrain for global capital.⁶⁴ The deregulation, liberalization and internationalization of finance that started in the 1980s had major implications for housing and urban development. Funds for mortgage lending now derive from national and international capital markets and not solely from existing savings and retail finance. These developments have been characterized as the “financialisation” of housing”.⁶⁵

11. This process has been accompanied by the conceptual transformation of adequate housing from a social good into a commodity and a strategy for household wealth accumulation and welfare security. Housing has become a financial asset (“real estate”), and housing markets are increasingly regulated so as to promote the financial aspects rather than the social aspects of housing. The real estate sector is perceived as a potential driving force for continued and sustainable economic growth.⁶⁶

12. Yet, market-based housing finance has contributed to a widespread bubble in real estate prices and a decrease in affordability and has done little to promote access to affordable adequate housing for the poorest. Between 1997 and 2004 average housing prices grew by 149 percent in Spain, 139 percent in the United Kingdom, 187 percent in Ireland, 112 percent in Australia, 65 percent in the United States and 227 percent in South Africa.⁶⁷ As real estate prices and rents increased and came to be financed through global instead of local financial surpluses, more households faced difficulties in accessing adequate housing in the market. Many observers have pointed to the negative impacts of housing asset dispersion on social stratification

⁶⁴ ECE, *Policy Framework for Sustainable Real Estate Markets: Principles and guidance for the development of a country's real estate sector*, Geneva, 2010 (ECE/HBP/147).

⁶⁵ Manuel B. Aalbers, “The Financialization of Home and the Mortgage Market Crisis”, *Competition and Change*, vol. 12, No. 2 (June 2008), p. 148.

⁶⁶ World Bank, *Housing Finance Policy in Emerging Markets*, Loïc Chiquier and Michael Lea, eds., (Washington, D.C., 2009), p. xxxiv.

⁶⁷ UN-Habitat, *Financing Urban Shelter: Global Report on Human Settlements 2005* (Earthscan, 2005), p. 1.

and inequality, and the uneven spatial impact of these processes within cities, regions and globally.⁶⁸

13. The affordability crisis was compounded by the erosion, neglect and liberalization of non-market mechanisms for allocating housing resources. Even countries with a long tradition of broad-based social rental housing have redefined heir systems to promote ownership, “free market” principles and competition policies. Thus, there has been a significant reduction in the construction of adequate housing for the poor and most vulnerable groups along with decreasing national budgets and available public funds. In the United States, the budget of the Department of Housing and Urban Development was cut from \$83 billion in 1978 to \$18 billion in 1983 and between 1996 and 2001, no funding was allocated to public housing construction.⁶⁹ The constant reduction in public housing has resulted in long waiting lists, keeping a large number of people in inadequate housing conditions (A/HRC/13/20/Add.4, para. 21; see also A/HRC/10/7). Even in the former Soviet countries, which did not experience a shortage of housing in the short term (following mass privatization), low-income households were soon faced with a huge affordability problem.⁷⁰

14. With the decline of State investment in the social housing sector and the increasing focus on home-ownership — which also led to a shrinking private rental market — access to housing finance became vital for low-income households, who were left with no other option for securing shelter than to embark on credit schemes to purchase homes, if, where and when those homes and credit became available and under the conditions defined by real estate and financial markets.

Based on these global trends and experiences, the UN’s Special Rapporteur on adequate housing points to the critical role played by the state in ensuring adequate housing for all:

“17. When designing, implementing and monitoring housing policies, States must ensure that they not only promote access to affordable

⁶⁸ Ray Forrest, “Globalization and the Housing Asset Rich: Geographies, Demographies and Policy Convoys”, *Global Social Policy*, vol. 8, No. 2 (August 2008), pp. 167 and 178-179; Jian-Ping Ye, Jia-Ning Song and Chen-Guang Tian, “An Analysis of Housing Policy During Economic Transition in China”, *International Journal of Housing Policy*, vol. 10, No. 3 (September 2010), p. 273.

⁶⁹ Western Regional Advocacy Project, 2012 HUD Budget Fact Sheet, 2011.

⁷⁰ Reply of Slovakia to the questionnaire.

housing, but also access to housing that is habitable, accessible and adequately located, and ensure the availability of services (such as health, education and welfare), means of livelihood, building materials, facilities and infrastructure, and security of tenure. States must ensure that housing policies are non-discriminatory and do not increase existing inequalities. When designing housing finance policies, States must pay particular attention to the rights of the poor and disadvantaged. Policies and legislation should be designed to bridge inequality gaps and to ensure access to affordable housing for the poor and marginalized and not benefit already advantaged social groups at the expense of others.⁷¹

18. The obligation to ensure the realization of the right to adequate housing does not oblige Governments to provide publicly built housing for all. Although the Committee on Economic, Social and Cultural Rights expressed the view that in some cases the State is obliged to provide social housing or low-rental units for low-income households⁷², States are encouraged to employ a variety of housing policies⁷³, provided that "measures being taken are sufficient to realize the right for every individual in the shortest possible time in accordance with the maximum of available resources".⁷⁴

19. States are required constantly to monitor housing policies and assess their compatibility with the progressive realization of the right to adequate housing. When a policy proves detrimental to the enjoyment of the right to adequate housing (for example, when housing policies lead to land speculation, increase of homelessness, discrimination or affordability crises)⁷⁵, States should adjust and rectify their policies and programmes accordingly."⁷⁶

⁷¹ Committee on Economic, Social and Cultural Rights, general comment No. 4 (1991) on the right to adequate housing, para 10, which can also be seen as authoritative guidance for the interpretation of the right to an adequate standard of living referred to in other international human rights instruments such as the Universal Declaration of Human Rights, para 11.

⁷² For example, in the Committee's concluding observations on India (E/C.12/IND/CO/5), paras. 30 and 70; Lithuania (E/C.12/1/Add.96), para. 47; Kenya (E/C.12/KEN/CO/1), para. 30; the United Kingdom (E/C.12/GBR/CO/5), para. 29; and France (E/C.12/FRA/CO/3), para. 44.

⁷³ Concluding observations on Cyprus (E/C.12/CYP/CO/5), para 21 and Nicaragua (E/C.12/NIC/CO/4), paras. 24-25.

⁷⁴ General comment No. 4 (1991), para. 14.

⁷⁵ See the concluding observations on Argentina (E/C.12/ARG/CO/3).

⁷⁶ General comment No. 4 (1991), para 11.