

The Flexible Land Tenure System – The Namibian solution bringing the informal settlers under the register

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SUMMARY

The present land surveying and registration system covers only part of Namibia. In many newly created towns there is frustration at the inability to survey and register land rights and ease access to credit for investment and development. In the rapidly expanding urban areas, many poor people have no official rights to the land on which they have settled, and it is difficult for the influx of poor rural people, who come to the urban areas in search of jobs, to find vacant land on which to settle. Others are uncertain about how their long-standing traditional land rights on the edges of towns will be affected by the expansion of urban boundaries and the establishment of municipalities. Such problems affect up to 100,000 families in Namibia. A major part of the solution for these families is a cheap, accessible, creditworthy and secure form of tenure.

To solve such problems, it was decided to develop a parallel interchangeable property registration system for Namibia wherein the initial secure right is simple and affordable but may be upgraded according to what the residents and the government need and can afford at any given time. This paper presents the new legal framework for the so-called: Flexible Land Tenure System.

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1. INTRODUCTION

The present land surveying and registration system covers only part of Namibia. In many cities and towns, there is frustration at the slow pace of the present methodology to plan, survey and register land rights and ease access to credit for investment and development. In the rapidly expanding urban areas, many poor people have no official rights to the land on which they have settled. Their long-term security and that of their children to occupy their land holding is not guaranteed. It is even more difficult for the influx of poor rural people, who come to the urban areas in search of better opportunities, to find vacant land on which to settle. Others are uncertain about how their long-standing traditional land rights on the edges of growing towns will be affected by the expansion of urban boundaries and the establishment of municipalities. Such problems affect up to 100,000 families in Namibia.

The existing freehold system is not an option, because it requires high and complex expertise in a magnitude that is not adequately available in Namibia. To address such problems, it was decided to develop a parallel interchangeable property registration system for Namibia wherein the initial secure right is simple and affordable but may be upgraded according to what the residents and the government need and can afford at any given time. This became the subject for a two-years research programme in the Ministry of Lands, Resettlement and Rehabilitation featuring consultative workshops with stakeholders, pilot testing of a model for an upgradeable land registration system and finally preparation of a proposal – the Flexible Land Tenure System. The final proposal was completed in 1997.

Since 1997 the Ministry has prepared the legislation and regulations, which however are not promulgated yet. Moreover, the Ministry has commenced pilot implementation of the core elements of the system as well the Ministry has begun preparation for the institutionalisation of the new tenure system in the Ministry. However, the implementation of the proposed system has not progressed well as anticipated. The Project has not really managed to move beyond the consultation and design phase since 1997. There are now concerns that the Project is losing its momentum.

The Flexible Land Tenure System has been addressed in several other papers and publications. In order to address specifically the Expert Group Meeting on secure land tenure, this paper focuses on the underlying legal principles of the proposed system and the challenges that have to be addressed. For readers who want to have a full picture of the present land administration system, tenure system, present socio-economic situation, etc. please see the reference list for additional information.

The views presented in this paper are those of the author in his personal capacity and may not necessarily represent the official views of his previous employer.

2. URBAN LANDS TENURE ISSUES – IN POINTS

- Roughly half of the total land area is held under registerable freehold title, while the remainder communal land subsumes a number of different land tenure systems ranging from individual rights to residential and arable land to communal rights to grazing.
- Until recently, all communal land – whether rural or urban – shared one important characteristic: it could not be held under freehold title. In fact, until the early 1980s black Namibians could not obtain title to any land, whether urban or rural, communal or commercial.
- After independence in 1992-98, the entire areas of the towns were registered in the name of the Government or a local authority to eventually be subdivided into plots, serviced and sold to the public to be held under freehold title.
- Co-existing with state owned property, is the system of customary tenure. The traditional authority system includes land management among the main tasks of its headmen and women. This authority system has been extended into urban areas. Customary grants came under threat when additional local authorities were established in 1992, because land falling within the boundaries of the local authorities was now placed under the jurisdiction of local authorities. Residents in the informal settlements feared that their land rights would not be recognised by newly created local governments.
- After experiencing problems with compensations to informal settlers who had to be moved, local authorities now seem to accept informal settlers. However, they would like to formalise these areas in order to collect taxes and charges for utilities. Moreover, government and local authorities in the north have accepted that existing customary rights cannot be summarily extinguished and holders ordered to leave.
- As the urban population grows, there is a greater demand for serviced land not only for residential purposes but also for business. At the same time, the housing backlog is already huge.
- Official provision of residential plots has not been able to keep up with the level of population influx to the towns because the procedures for establishing a township are too slow and cumbersome, taking between 18 and 24 months. The necessary processes of planning, land surveying and the post survey administrative process, take many months to be concluded.
- Substantial bottlenecks occur because there are not enough land surveyors, conveyancers and town planners in both the public and private sectors in Namibia. Most local authorities that have been established in many areas of the country lack the technical and financial capacity to manage the land.

3. THE PILOT PROGRAM

Different options for responding to the above problems were considered. The most obvious solution was to extend the freehold system to the whole country. However, factors as legislative requirements, shortage of required skills in private and public sectors, lack of regular income, etc. all hindered the extension of the formal system. After a series of workshops with all stakeholders it was decided to develop a second property registration system which is parallel to and interchangeable with the existing system, one providing an affordable, more secure, but simple right which can be upgraded according to what the government need and can afford at any given time.

The model for a parallel interchangeable property registration system was then tested in a programme of pilot projects and pilot studies from June, 1995 to November, 1996.

The pilot projects addressed practical land surveying and related planning issues, covering identification of different surveying and registration approaches for upgrading of tenure in different environments. The absolute and relative accuracy of different survey methods under different environmental conditions was ascertained, as well as the time consumption, the materials cost and the skills demand for each of the applied survey methods. The pros and cons of using computers for land surveying recording were assessed. New approaches for land surveying were compared to the methods of the present land surveying system, and the costs of time, materials, skills and accuracy were assessed. To achieve community participation in the adjudication and planning of an area, community based organisations from informal settlements were involved in the pilot projects.

An important hypothesis tested was that properly trained para-professional land measurers could perform adequate survey work under the supervision of experienced land surveyors. Land measurer trainees were selected and involved in the pilot projects to gauge the backgrounds required of recruits and to identify any additional training requirements.

The pilot programme did also evaluate the present land registration systems in Namibia with regard to certainty of title as perceived by the users. Minimum requirements for the maintenance of an unambiguous property registration system were also assessed. The possibilities were investigated of a local authority, a community based organisation or another body issuing tenure documents based on a locally held registry map.

Finally it was recommended that two new types of tenure be introduced in addition to the existing freehold tenure. They are:

- Starter title, a statutory form of tenure registered in respect of a block of land.
- Landhold title, a statutory form of tenure with all of the most important aspects of freehold ownership, but without the complications of full ownership.

The existing freehold system should as such not be changed. However, in the policy decision it was proposed to consider to streamline and simplifying it.

A more detailed analysis of the new flexible system is given below.

4. CURRENT STATUS

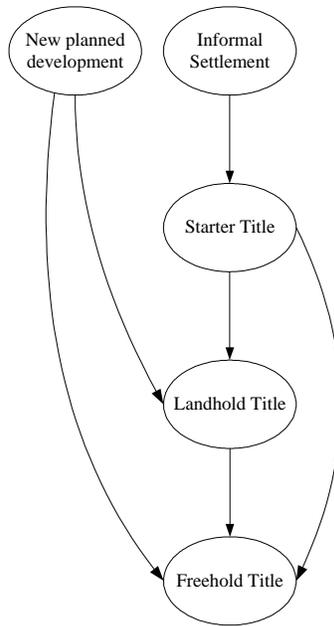
Cabinet approved the principles of the new system in 1997 and the Ministry established a Project to commence the implementation. The Flexible Urban Land Tenure Bill was in a final version in July 2004 but has not yet been scrutinized by the required legislative bodies. Furthermore, detailed regulations were drafted in 2004 but not yet examined by a Regulation Committee to be established when the Act is promulgated.

The Ministry made advanced preparations for the initial application of the system. The Project opened a land rights office in Oshakati in line with the requirements of the proposed system in 1998. Meanwhile the training of para-professionals (land measurer and land registration officer) has been secured through a certificate course at the Polytechnic of Namibia. The course is from 2005 upgraded to a diploma course.

The Flexible Land Tenure System has become established within the Namibian Government. The Government has been committing some funds to the Project since 1998. However, the continued decline in financial allocation to the Project and the delay in putting up the necessary legislative framework is now a matter of serious concern. There has been a dramatic decrease in budget allocation to the Project since 1998. The Government is committed to the Project; however, the severe shortage of funding and recognition of the necessary institutionalisation of the project within the Ministry constitutes a major threat to its successful implementation.

5. THE LEGAL FRAMEWORK FOR THE FLEXIBLE LAND TENURE SYSTEM

The basic concept is illustrated graphically in figure 1 (MLRR, February 1997).



Figur 1: Schematic illustration showing the possible routes to follow when upgrading an informal settlement or when planning a new development.

The system would operate *parallel* to the existing registration system in the sense that parallel institutions will be responsible for the registration of different tenure types. This means that the same land parcel would be the subject of registration in both the starter and landhold title registry and the Windhoek Deeds registry. However, the Deeds registry would only reflect the ownership of the whole block erf of land and the fact that a starter and landhold title registry exists. Individual starter title and landhold title rights within that block erf would not be visible in the main registry, but only in the starter and landhold title registry.

The system would be *interchangeable* in the sense that the different tenure types catered for in the parallel registries could be upgraded, over time, from an initial base offering basic security, into individual full ownership or freehold title, as it is currently known to the common law and registration statutes of Namibia. In other words, starter title would be *interchangeable* in the sense that starter title rights could be upgraded in accordance with prescribed procedures to landhold title or freehold title.

5.1 Starter Title

Starter title is a new basic form of tenure. The purpose of starter title is:

- to create an inexpensive and simple form of land registration which provides a degree of security of tenure to existing urban dwellers in the context of an upgrading project or to new occupants in an area earmarked for development in a “green fields” context;
- to provide a tool for land management at the local government level;
- to provide a record of families and individuals occupying land in a defined area;
- to underpin a system of fair taxation;

- to establish a rational basis for planning the layout of the area and the installation of engineering services; and
- to establish a basis for the further upgrading of tenure over time.

Starter title is an *individual* type of tenure in that one person, as a custodian for a family or a household, is allocated a right to an unspecified site. It is, however, *group based* in that each household within a block erf must abide to the rules of the community laid down by a community association.

Starter title is precisely defined in the Bill to be a standard, nationally uniform statutory form of tenure for proclaimed urban areas. This standard form of tenure would be registered in respect of all starter title situations, while the block erf may be held in ownership by a local, central or regional government body, or even by a private sector developer or a community organisation.

Registration as an occupier within the block erf would vest in such a beneficiary the right to occupy in perpetuity a site within the boundary of the block erf or in another block, preferably in the immediate vicinity. An individual specific parcel to which the occupier may eventually acquire landhold title or freehold title is not defined at this stage.

In practice, informal sites may have been laid out within the block erf without proper survey by the local authority. This informal lay-out does not however affect the nature of the starter title right and the fact that it does not include a right to a specific site.

Only a defined number of starter title's should be permitted in a block erf so as to provide security against overcrowding through the continuous addition of relatives and newcomers.

According to the Bill the Starter title should be capable of being sold, donated and inherited, subject to restrictions that may be imposed by a constitution drawn up by the group or other rights recognised by the group. It should be subject to changes in matrimonial property regimes flowing from, for example, marriage, divorce, or the dissolution of marriage upon the death of a spouse. The nature of starter title and the fact that it is not defined in space would imply that the allowable transactions should be kept to a minimum and it is impossible to register personal servitudes, including fideicommissum, usufructs, etc. It would also be impossible for such tenure to be encumbered by mortgage, lease, or praedial servitudes since the site has not yet been defined.

Starter title holders are advised on the starter title certificate that they should not erect permanent structures before their rights have been upgraded to landhold title rights or a layout for the area has been approved by the local authority. If they should erect permanent structures and then be required to move in order to allow for roads or service provision, they will not be entitled to any compensation.

There are certain advantages to registering starter title electronically in a nationally uniform computer based registry located in Windhoek for overall management purposes but allowing full access for the registration of transactions and updating at the land right office. This would not detract from the importance of the land rights office but rather provide a means to

improve the accuracy and reliability of transactions processed by the land rights office as well as facilitating the upgrading of the different tenure types. A land registration officer will process the transaction in accordance with standardized computer based forms. The community association plays an important role in collecting names of heads of households, etc. The land registration officer bases his/her registration upon the information collected.

5.2 Landhold Title

Landhold title is in the Bill described as a statutory form of tenure with a limited range of transactions associated with it. The most important aspects of ownership, including mortgages, are allowed without the full range of transactions (with resulting complexities) that might arise in freehold ownership.

Landhold title, like starter title, would be registered in a computer based deeds registry, which would exist parallel to the Windhoek Deeds registry. The underlying parcel of land on which landhold title rights are registered would remain registered in the Deeds registry, but endorsed to the effect that it is subject to the registration of landhold title recorded in the landhold title register. As is the case with starter title, the effect of such an endorsement will be that the block erf may not be dealt with nor further encumbered in any way whatsoever. The owner should however be entitled to register servitudes over the property in order to facilitate the installation of services.

Transactions would be processed by the land registration officer or a conveyancer in accordance with standardised computer based forms, increasing the accuracy and reliability of the register and decreasing the opportunity for fraud.

The rights and obligations of landhold title are set out in Bill creating this statutory form of tenure. Landhold title should be capable of being sold, donated and inherited. It should be subject to all applicable changes in matrimonial regime. In contrast to starter title, it should be capable of being mortgaged and therefore sold in execution.

By limiting the range of transactions allowed in respect of landhold title to those most commonly used, the land registration officer can be trained to recognise and record transactions without extensive legal training.

The cadastral map, which is an integrated part of the cadastral information system, showing landhold title sites should be capable of amendment in order to ensure subdivisions and consolidations of sites. The land measurer is by legislation (the Bill) permitted to undertake the adjudication, land survey and mapping of the plots.

The regulations describe that bonds be registered by means of an endorsement on the title deed. This expected to be facilitated by banks lodging standard bond conditions at the Deeds Registry.

The fact that landhold title is issued in relation to a specific site implies that the owner will be entitled to build a permanent structure, subject to applicable building regulations, without fear

of having to be moved. Should the state require such a site for public purposes, it would have to compensate the owner in accordance with the applicable expropriation laws.

5.3 Institutional model

A land rights office will be staffed with a land rights registrar, linked to a land registration officer and a land measurer (the latter two para-professionals). Formalisation of informal settlements will be performed by the para-professional working with the land rights registrar, bringing an informal land delivery system into the wider urban management system. This partnership should link the local community and the built environment professionals and the various authorities involved in the land delivery process. It is expected that the para-professional will speak the local language and understand local customs and practise.

The Project should continue to be attached to the Ministry Lands, Resettlement and Rehabilitation. More precisely the Division of Land Boards, Tenure and Advice should have the overall responsibility for the implementation. Land boards are being established throughout Namibia. It is proposed that the land rights offices could work with the secretariat of the land boards and the chairman might be utilised as the land rights registrar. This will strengthen the integration of land administration in rural areas and urban areas into one system. Moreover, this will ensure proper information flow between governmental bodies involved with land administration and land management.

6. THE WAY FORWARD

The introduction of the concept of a parallel land registration system that has the potential to address the tenure security needs of the poor communities living in informal urban settlements in Namibia brought high hopes to many urban inhabitants since its inception in the mid 1990's. The enthusiasm and support for the Project shown during the various consultation forums gave a clear indication of the urgent need to take appropriate measures that will address the security uncertainties facing thousands of urban dwellers in informal areas.

Unfortunately, the implementation of the Project has not yet proceeded as anticipated and the stakeholders are yet to see any tangible results. The Project has not managed to move beyond the consultation and the pilot Project phases in the last five years. There is now a growing impatience and disappointed due to what the stakeholders see as a slow pace of progress. Despite various efforts by the Ministry of Lands Resettlement and Rehabilitation to keep the Project on track, there are still a number of institutional, technical, legal and financial issues that have to be resolved before the implementation process can proceed forward.

7. CONCLUSION

The mushrooming and expansion of informal settlements is a major problem in many cities and towns of the developing world. Namibia is not an exception to this phenomenon. In Namibia, thousands of families from the poor section of the population live in unplanned settlements without any form of security of tenure. These informal settlements are typically characterized by lack of basic infrastructure, lack of development and poor living conditions.

The Government of the Republic of Namibia, through the Ministry of Lands, Resettlement and Rehabilitation, is committed, among other things, to extend the rights to land ownership to the informal settlers, and assist to improve the living conditions of this poor sector of the society. The implementation of the Flexible Land Tenure System is expected to assist the Government in achieving this goal. There are, however, major obstacles to be overcome. There is a lack of the required technical skills and the financial implications for the exercise are enormous while the limited Government resources must be shared to cater for all other developmental and social needs.

It is fortunate that the political support has been secured at the highest level of Government after Cabinet approved the idea in 1997. The stakeholders are eager to participate in the Project. It seems therefore that, the challenge is, to find the means and take the necessary steps to expedite the implementation of the Flexible Land Tenure Project and lift the hopes and aspiration of thousands of poor families living in informal settlements.

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