

WOMEN'S LIVED REALITIES UNDER CUSTOMARY TENURE IN RURAL SOUTH AFRICA AND POLICY IMPLICATIONS

POLICY BRIEF 60

Authors: Authors: Phillan Zamchiya and Shula Lebepe¹

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This policy brief reports findings from a study undertaken by researchers at the Institute for Poverty, Land and Agrarian Studies (PLAAS) and Nkuzi Development Association investigating how land tenure relations and livelihoods for women and men living on customary land are being reconfigured by the state, traditional leaders, and domestic elites and the wider implications for policy. The research was conducted in Kwena Moloto and Ceres located in Limpopo province between 2021 and 2022. The study reached 24 respondents through in-depth interviews. In addition, the researchers conducted a survey of 103 households across the two study areas.

KEY MESSAGES

1. Customary land access, use, and ownership for most women are still largely dictated by entrenched traditional authorities and patriarchal norms.
2. Most married women still gain access to land through their husbands. The traditional councils even expect newly married women to re-register land they might have acquired before marriage in the husband's name. In the case of divorce, traditional councils require women to leave the matrimonial home.
3. Age plays a significant role in determining women's and men's access to land, as only 3.95% of our respondents who acquired land in the past ten years were aged between 18 and 35 years.
4. Women are not equally represented in traditional councils, which usually rule in favour of men when adjudicating on land-related issues.
5. Traditional systems are demonstrating a degree of adaptability through accommodating and allocating independent residential sites to the growing number of single women and protecting widows from eviction even though there is still lack of clarity about the real rights of these landholders.
6. Commodification of customary land leads to the exclusion of poor and vulnerable women, as 75.25% of our respondents paid cash to acquire customary land (though illegal) in the past ten years.
7. There is an emergence of new private players without any legal recognition exercising authority over customary land through mimicking 'stateness'.
8. Women are using their agency to opt out of the jurisdiction of authoritarian and non-gender-responsive traditional leaders but the Traditional Courts Bill does not provide for this lived reality.
9. Social and gendered conflicts over land are escalating over boundaries, double allocation of residential plots, and over access to the community cemetery resulting in physical violence against women who seek to assert their land rights.
10. The majority of female respondents (90.5%) prefer to live under customary tenure systems but with more democratic, gender-equal and accountable land administration institutions that can expunge patriarchal norms and practices.

¹ Phillan Zamchiya is a Senior Researcher at the Institute for Poverty, Land and Agrarian Studies (PLAAS) at the University of the Western Cape and he serves on the editorial advisory board of *Oxford Development Studies*. Shula Lebepe is the Senior Project Officer at Nkuzi Development Association.

CONTEXT

Most countries in sub-Saharan Africa are struggling with how to reform customary tenure to improve land tenure security for all and deepen democracy. South Africa, a relatively democratic country on the continent with a progressive Constitution – section 25 (6) mandates government to secure tenure for the previously disadvantaged – is not an exception. Twenty-nine years after the end of apartheid, South Africa is yet to introduce a permanent law to secure land tenure for 17–18 million women and men who live off-register in the former homelands (Cousins 2021). Land rights are protected through the Interim Protection of Informal Land Rights Act (IPILRA) 31 of 1996, which must be renewed annually. Within this context, there have been various processes reconfiguring customary tenure. First, are the state-driven policies meant to reform customary land tenure. These include the Communal Land Rights Act 11 of 2004, which was struck down by the Constitutional Court in 2010 because Parliament did not follow the correct procedure, resulting in insufficient public consultations; the Traditional Leadership and Governance Framework Amendment Act 2 of

2019; the Traditional and Khoi-San Leadership Act 3 of 2019; the Communal Land Rights Bill; and the Traditional Courts Bill B1–2017. One problem with these Acts and Bills is that they intend to enshrine into law a distorted version of customary law that venerates Chiefs as owners of the land with absolute power over the people, and within that configuration the land rights of women are not explicitly protected. The second process is characterised by foreign multinational corporates and domestic elites acquiring huge tracts of customary land for various land-based investments but especially for mining and residential purposes. The third process involves traditional leaders trying to consolidate their power and authority derived from distorted versions of custom and sustained through state support. The fourth process relates to adaptations from below to changing policies, practices, and the increasing demand for land. Consequently, this policy brief outlines observable recent changes and continuities on how women and men who live under traditional authorities relate to land and the wider implications for policy.

DISCRIMINATION AGAINST MARRIED, DIVORCED, AND YOUNG WOMEN

Customary land access, use, and ownership for most women are still largely dictated by entrenched traditional authorities and patriarchal norms that perpetually place women under the authority of men and fail to protect their land rights. Most married women still gain access to land through their husbands under the guise of protecting marriage and families. Chief Solomon Malesela Dikgale, Chairperson of Limpopo Provincial House of Traditional Leaders said, “Married women get a site to build a house

with their husbands. This is to protect the marriage”. Given the entrenchment of patriarchy in society, most women also think that it is unacceptable for a married woman to approach the Chief to acquire her own land. Only in exceptional circumstances can a married woman register land in her name. This is done through acquiring the Permission to Occupy (PTO) certificate issued by traditional councils.

The traditional authorities even require a newly married woman to re-register the PTO certificate

she might have acquired while single in her new husband's name. However, even where married women do not change the registered name on the PTO, most no longer consider themselves as primary landholders. Even when a married woman's name remains on the PTO certificate, it does not always transform the gendered power relations over who controls the land. In marriages, power relations and decision-making over land continue to favour men, as entrenched by patriarchy and reinforced in day-to-day practices by traditional authorities. In the event of divorce, traditional leaders require women to move out of the homestead. Staying married even

under abusive husbands seems to provide some sense of 'security' for women because they retain access to matrimonial property.

Single women below the age of 25 years cannot apply for land and participate in forums convened by traditional authorities. Mahlangonolo Patience Aphane, a 24-year-old unmarried woman, explained that she could neither apply for land nor attend meetings called by the Chief to air her views over land. From our survey, only 3.95% of our respondents who acquired land in the past ten years were aged between 18 and 35 years. Young women and men remain excluded due to some traditional beliefs.



A young smallholder farmer standing in her crop field in Limpopo. Photo Credit: Phillan Zamchiya

THE ADAPTABILITY AND LIMITATIONS OF LIVING CUSTOMARY LAW

Notwithstanding the above challenges, traditional systems demonstrated the adaptability of living customary law through accommodating and allocating independent residential sites to the growing number of single women with children above 25 years. However, there is still lack of clarity about the real rights of these landholders.

Single women with children did not face many restrictions concerning land acquisition in their name, with 25 years being considered the acceptable age to register land through a PTO. Shadi Setati, a 56-year-old single mother, said that she easily acquired land from the traditional authorities, and she was free to attend community meetings convened by the Chief. Traditional leaders considered single women with children to be more 'stable'; hence, their ability to access land is much more effortless than single women without children or married women. However, single men are also prohibited from acquiring land, confirming the relationship between marital status and access to land.

Encouragingly, traditional systems are adapting to ensure that the widows are not evicted by family members upon the death of the husband. However, there are a litany of rules that perpetuate discrimination against widows. In many cases, if they decide to remarry, they are required to leave their matrimonial property, including land and houses. Additionally, widows are not allowed to wave at men as a way of greeting and they are obligated to be inside their homesteads by 6 pm for a period of six to 12 months after the death of a husband. This applies whether the widow is employed or not. Failure to follow these rules attracts huge fines from the traditional authorities and repeated offences might lead to expulsion from their land. Widows also felt that the traditional courts discriminated against them because they did not have the protection of a male partner. There is still lack of clarity about the real rights of the widows even though custom seems to be adapting to curtail their eviction.

MONETISING ACCESS TO COMMUNAL BURIAL GROUNDS

The traditional authorities are denying indigent families access to the communal cemetery to bury their relatives until they pay outstanding levies and fines. The traditional leader's representatives audit the bereaved family for outstanding tribal levy payments and for any previous cases of disrespecting the Chief. In instances where the family is found guilty, a fine ranging between R6,000 and R12,000 is imposed before burial is allowed. Mmeta Sekoaila, a 70-year-old widow, considered disloyal to Chief Kgabo Moloto III, confirmed this practice:

"For those who do not get along with the Chief, if there is death in our families, we cannot bury our

loved ones. They lock the gate and pelt us with stones; they shoot and beat us. They don't want burials there because they say the land belongs to the Molotos."

When Mmeta Sekoaila lost her son, traditional leaders charged her R3,500 to access the burial site and imposed a fine of R3,500 emanating from a dispute between her deceased husband and an Induna 22 years prior. The money collected from such incidents is never publicly accounted for. Traditional leaders seem to consider themselves as the owners of the land; yet, they are supposed to be mere custodians.

OPTING OUT OF ABUSIVE TRADITIONAL JURISDICTIONS

Despite the predatory practices and patriarchal norms in Chief Moloto's community, women have seized the opportunity to exercise their agency in determining under whose traditional authority to live. For example, Mmeta Sekoaila later decided to leave Chief Moloto's jurisdiction because of these rules. She said, "My move from Chief Moloto was voluntary. I just went on my own with a few others who were tired of the rules. I told them that I don't

belong to them anymore". Women are opting out of the jurisdiction of abusive and non-gender-responsive traditional leaders and choosing new communities to join beyond the fixed tribal boundaries. This is an affront to the Traditional Courts Bill, which has no explicit opt-out provisions. Such a negation of lived realities compromises the nature of living customary law and the freedoms enshrined in the country's Constitution.

WOMEN'S MARGINALISATION IN DECISION-MAKING FORUMS

Women are not equally represented in forums where decisions about land are taken, such as in traditional councils. These councils usually rule in favour of men where land disputes are concerned. The Traditional Leadership and Governance Framework Act stipulates that 40% of traditional council members must be elected and that one third of members must be women. Contrary to the law, the traditional councils in our study sites are composed of the Chief's appointed representatives and more than 90% of members are men. Even if the law were to be followed, the majority of female respondents (91%) were unhappy that the Chief still has sovereign powers to appoint 60% of members of the traditional council and to chair the council. This

practice skewed decision-making in favour of the Chief. The lived realities again reveal the pitfalls of the Traditional Courts Bill that states that all the levels of the traditional court system must be exhausted before referral is made to a magistrate's court. This traps rural women living in Kwena Moloto and Ceres under the abusive and authoritarian jurisdiction of the Chief. This system has the potential to reproduce apartheid's bifurcated structure of the "civil" and the "customary" citizens and subjects respectively (Mamdani 1996). In this situation, subjects governed by traditional councils do not enjoy the same constitutional rights and liberties and are not fully protected under the law.

COMMODIFICATION OF CUSTOMARY LAND

Amid all the changes and continuities, the acquisition of customary land by urban elites in Moletjie and Ceres is accelerating processes of commodification of customary land. Almost three quarters (75.25%) of our respondents who acquired residential plots or arable land in the past ten years paid for them in cash

to the traditional authority or individuals. However, traditional leaders are the ones mainly selling land. For example, 82.1% of respondents who bought land in Ceres bought it from the traditional leader and only 7.6 % bought it from private individuals. The emergence of private players without any legal

recognition exercising authority over customary land through mimicking 'stateness' (Lund 2006) signals the rise of hybrid forms of land administration.

Our research revealed that rural areas are a preferred location for some urban elites due to the non-application of municipal fees such as rates. These urban

elites are thus moving to areas such as Moletjie to build their homes while commuting to work in Polokwane town. They are also building their retirement homes in the rural areas. This has resulted in high land prices, further excluding poor women from accessing land.

CHANGES IN LAND USES

The type of land targeted for sale by traditional leaders and private individuals includes communal fields and land covering common property resources, such as grazing land and natural resources central to rural livelihoods. This migration of urban elites into the rural areas is leading to changes in land uses and relations of production. The most significant change in land use is the conversion of arable and grazing

lands to residential uses. Every respondent in Ceres acquired land for residential purposes. Related to this, is a shift in land use for food production to non-food uses and an increase in land held for speculative purposes by elites. A significant 30.4% of respondents who acquired land in Ceres in the past 10 years had not made any investments on the land.

SOCIAL AND GENDERED CONFLICTS OVER LAND

There is increasing social and gendered conflicts over land and over boundaries. In Moletjie, the traditional leader has private security that goes around destroying people's houses built on land under contestation with another Chief. The fight is over land boundaries between the two chieftaincies. Furthermore, double allocation of land is prevalent in these informal land markets. Headmen within the

same traditional authority, can sell the same piece of land twice to different people, leading to conflict between the two buyers and conflict within the ruling lineages. Related to this, is increasing violence by local gangs targeting women who speak out against the Chief and the illegal sale of common land to urban elites. The local gangs are allegedly aligned to traditional leaders.

WOMEN'S PREFERRED TENURE SYSTEM

Despite the challenges, the majority of female respondents (90.5%) preferred to live on customary land, because: (a) it is cheaper and they do not have to pay council rates; in 2022 in Kwena Moloto, they paid an annual levy of R20 and the PTO certificate cost R800; (b) it is part of their heritage; (c) it supports a diverse range of land-based livelihoods for the poor and vulnerable; and (d) the adaptability

of customary arrangements works well for the poor and future generations. These advantages notwithstanding, women still wanted a transformation of the existing patriarchal norms and practices and land governance institutions within customary tenure systems, to a dispensation characterised by democracy, gender equity, and accountability.

RECOMMENDATIONS

1. The government and traditional leaders should embrace customary tenure reform that allows women and men to choose the tenure system appropriate to their circumstances. This involves allowing communities the right to choose an entity to govern their land even where traditional councils exist.
2. Parliament should amend the Traditional Leadership and Governance Framework Act of 2019, the Traditional and Khoi and San Leadership Act, the Traditional Courts Bill, and the Communal Land Rights Bill. The objective is to shift the balance of power to individuals, families and members of the community living on customary land because the current land bills and laws vest too much power and authority over land in the traditional leaders.
3. Residential and arable land rights should be vested in families (rather than individuals), where there are other family members with rights, to avoid possible exclusion of other users, especially women and children. Additionally, common property resources should be vested in members of the community, ensuring the inclusion of women.
4. Parliament should ensure – through the new and amended land governance laws – that women have secure rights legally equivalent to those of men in ownership of residential plots and arable land along with clearly defined access rights to natural resources held in common; this applies regardless of women’s social and legal status (married, single with or without children, the young, the poor).
5. Parliament should amend IPILRA, focusing on mechanisms that safeguard smaller groups against dispossession of their rights and muting of their voices in community decision-making; IPILRA should allow for flexibility of boundary definition, particularly in relation to smaller groups directly affected by community land issues.
6. The Ministry of Agriculture, Land Reform and Rural Development, in collaboration with civil society organisations should strengthen women’s land rights by introducing a suitable, dynamic, and affordable national system of land administration; it should pilot geospatial digital technologies to record multiple, nested, and layered property rights, to reflect the continuum of rights on the ground, without invalidating social tenure systems that are impossible to register.
7. Parliament should facilitate a process aimed at eliminating all forms of violence against women and children residing in customary territory, through well-resourced state policing, a capable judiciary, and credible independent institutions.
8. Traditional leaders must be held to account and face consequences for their collusion with urban elites in land grabbing in customary areas, thus affecting common property resources central to rural livelihoods.
9. The Ministry of Justice, in collaboration with civil society organisations should provide greater access to justice for women through effective, affordable, and accessible means to address rising land tenure conflicts, promote gender justice, and bring about social cohesion.
10. The government, in collaboration with civil society organisations should develop mechanisms that ensure at least 50% direct participation of

women in all levels of land administration institutions in the country.

11. Civil society must intensify civic education to deepen society's understanding and respect for

customary land rights in general and women's land rights in particular.

12. The President should refrain from authorising any land legislation that discriminates against women, notably the Traditional Courts Bill.

REFERENCES

Cousins, Ben. Review of Rights to land: A guide to tenure upgrading and restitution in South Africa, edited by William Beinart, Peter Delius and Michelle Hay. Johannesburg: Jacana Media, 2017. 208 pp. ISBN 978 1 928232 48 3 (2021), 187–195.

Lund, Christian. Twilight institutions: An introduction. *Development and Change* 37, no. 4 (2006): 673-684.

Mamdani, Mahmood. *Citizen and subject: Contemporary Africa and the legacy of late colonialism*. Princeton, NJ, USA: Princeton University Press, 1996.



Institute for Poverty, Land and Agrarian Studies
 School of Government
 University of the Western Cape
 Private Bag X17 Bellville 7535 Cape Town South Africa
 Tel: +27 021 959 3733 Fax: +27 021 959 3732
www.plaas.org.za