



## Single women, customary law and the Constitution: Findings from the rural women and land survey

### Introduction

Recent research in three areas that were part of the apartheid “homelands” provides strong evidence of a large increase in the number of unmarried rural women getting residential sites in their own right. This research seems to contradict the oft-repeated claims that customary law denies women access to land except through their husbands, fathers, brothers or sons.

The fact that single women were accessing land in rural areas had already become evident in consultation meetings organised by non-governmental organisations (NGOs) in 2002-03 around the draft Communal Land Rights Bill. Further evidence emerged in more recent consultations around the Traditional Courts Bill.

### Why a survey was needed

Participants in all meetings spoke about the problems women experienced in relation to land. They spoke, for example, about wives who were evicted by the husband or his family when the marriage broke down or the husband died. They also spoke about the risk of bothers evicting their sisters from the natal home when the parents died.

Participants described struggles by women to be allocated residential land in their own right so that they would not experience these problems. The stories recounted by participants in the 2002-3 meetings showed differences between provinces, especially in relation to unmarried women. Women in Tswana-speaking areas were most likely to get land, while this seemed far less likely in Zulu-speaking areas. Single and widowed women in North West and the Northern Cape described how they had fought for the right to be allocated residential land on the same basis as men with families to support. They said that according to customary law, men were eligible for separate sites if they had families to support. They said that many women were in the same position and should be eligible on the same basis as men.

Participants said that sometimes women were given land. However, this was the case only for some categories of women, such as older women with several children, women who could prove that they could support their families, or women with sons.

Only five years later, in the second round of consultation meetings, it seemed that women were more likely to get land. Both younger and older women were getting land, regardless of marital status and whether they had children to support. However, again, there were differences between areas in the extent to which women were getting land, and also in the women’s self-confidence.

Despite all these stories, the then Department of Land Affairs dismissed evidence presented by applicants in the constitutional challenge to the Communal Land Right Act as “anecdotal”. The Department’s response highlighted the need for quantitative research to back up the women’s evidence. Quantitative evidence would also help in measuring and comparing the extent of the change across different parts of the country.

### The three sites

The survey was done in three different sites, to allow for comparison, with 1 000 randomly selected women interviewed in each site. Funding was provided by the Canadian International Development Research Centre and the United Nations Development Programme. Local organisations assisted in facilitating access in the survey sites, and also helped to recruit fieldworkers and participants for pre- and post-survey focus groups and report-back sessions.

The three sites were Ramatlabama in North West, Msinga in KwaZulu-Natal, and Keiskammahoek in the Eastern Cape. All three areas fall within the former “homelands” and are thus subject to the Traditional Leadership and Governance Framework Act of 2003. This Act defines people who live in these areas as “traditional communities” governed by “traditional councils” according to customary law.

Ramatlabama is a resettlement area inhabited by people who were forcibly removed in the late 1970s from a farm near Lichtenburg into what was then Bophuthatswana. People in the area speak Setswana. The survey found that most land in Ramatlabama was acquired through resettlement after forced removal or, subsequent to the removal period, through payment to a local leader.

Msinga, near Tugela Ferry, is a very “traditional” area of KwaZulu-Natal. The survey covered several villages falling under two chiefdoms, Mchunu and Mthembu. Some of the homesteads covered in the survey were on former labour tenant land acquired through the government’s land redistribution programme, others fell within the former KwaZulu “homeland”. People in the former labour tenant areas consider themselves to be part of the local chiefdoms and are accepted as such by others who live in these chiefdoms.

Keiskammahoek, in the Border region of the former Ciskei in Eastern Cape, has many different forms of tenure. An added complication is that during the 1960s people living on communal land in the area were subjected to “betterment” removals, in which they were brought together in planned villages. The survey found that 45% of homesteads were given land through betterment, 31% through customary tenure, 10% through purchase, 5% through a local leader, and 10% through other means.

### The survey findings

It was important to ask in the survey about the marital status of the interviewed women given the common view that within customary systems married and widowed women gain access to land through their husband while unmarried women gain access through a father or brother.

Marriage patterns were very different across the three areas, as can be seen if we look at the three main marital statuses of never married, married and widowed. In Ramatlabama, about half of the women had never been married, compared to 30% of the Keiskammahoek women and 22% in Msinga. In Msinga, 46% of the women were married, compared to 38% in Keiskammahoek and 26% in Ramatlabama. In Keiskammahoek and Msinga nearly 30% of the women were widowed, while only 15% of the Ramatlabama women were widows.

The survey asked through whom the residential land occupied by the homestead was first acquired. The responses to this question give an indication of the extent to which women are accessing land in their own right.

The table below shows the percentage of never married, married, and widowed women who reported that the plot was acquired through them for the periods before and after 1994. The table shows that for both never married and widowed women the percentage who themselves acquired the plot was much higher after 1994 than before 1994. For married women there is no real difference before and after 1994. These changes match what was reported in the NGO consultation meetings referred to above.

	Pre-1994	Post-1994
Never married		
Keiskammahoek	9%	44%
Msinga	3%	11%
Ramatlabama	9%	40%
Widowed		
Keiskammahoek	10%	48%
Msinga	9%	41%
Ramatlabama	15%	41%

**Women reporting plot acquired through them by marital status, period and site**

How can we explain these changes? There was no special legislation passed in 1994 or afterwards that said that women in communal areas must get access to land. But there was a new Constitution that stated clearly that there must be no discrimination on the basis of race, gender and other differences between people. In addition, the Constitution states that customary law is subject to the Constitution, including the Bill of Rights.

### **How women and men explained the changes**

In the focus group discussions held after the survey, women and men were asked to explain what the reasons for the changes were. In all areas the women and men referred to the big political change that happened in 1994, with the introduction of democracy.

A man in Keiskammahoek explained that women were not previously allocated residential sites but that this “changed after the elections and voting, that showed everyone has rights.” Another man in the same group discussion said: “So now that there are equal rights, women are allocated land.... Even more so, if the woman already has a child.”

A woman in Keiskammahoek talked about the changing balance of power. She said that young women would no longer allow their husbands to evict them: “They would have you arrested.”

A man from Msinga said: “It is now democracy [which has its] own laws that we have to obey... We still have [our] old laws in our minds. But the laws that are written down have changed a lot.” In the same focus group another man said: “[The change] is because of these democratic rights ... everyone has their own rights.”

In Ramatlabama a woman explained that: “After democracy anyone could get a stand, even a child could go, as long as she has a pass [identity document] and is independent.... But before [democracy] ... even me as an unmarried woman, I couldn't ... It's the government that caused the change. ... I don't think it's the chief who one day said: 'If you want a stand come to me and take out [pay] R500...’.”

### **Changes in how land was acquired**

The survey also showed changes in how land was acquired when comparing the pre- and post-1994 periods. For the sample as a whole, the percentage of residential land allocated by a chief or headman remained fairly constant, at 42% pre-1994 and 45% post-1994. In contrast, acquisition through payment to a local leader increased from 9% pre-1994 to 26% post-1994, while purchase increased from 2% to 6%.

Among never married women who were responsible for acquiring their homestead's land, the percentage allocated by the chief or headman fell from 31% before 1994 to 17% after 1994. The percentage allocated through payment to local leaders increased from 17% to 42%, and land allocated through purchase increased from 2% to 25%.

These changes in the way in which land was acquired raise the question of whether these are changes *away from* customary law, or changes *within* customary law. Recent Constitutional Court judgments suggest that the changes are *within* customary law.

### **The Constitution and “living” customary law**

As noted above, Section 211(3) of the Constitution recognises customary law but says that it is subject to the Constitution. There have already been several judgments that illustrate what this means. These judgments include the Bhe and Shibi cases which deal with succession and inheritance, the Gumede case which deals with marital property, and the Shilubana case which considers whether a woman can become chief.

The survey findings suggest that what is actually happening “on the ground” does not match commonly assumed versions of customary law, including codified customary law. However, the Constitutional Court judgments view customary law as “living law”, rather than accepting the unchanged codified version that was written down during historical times. The judgments illustrate that customary law can be flexible and that practices have changed over time.

In the Bhe case the judgment asserted that “[t]rue customary law... recognises and acknowledges the changes which continually take place”. In the Alexkor judgement, the Court stated that “living” customary law is created when enough “people who live by its norms change their patterns of life.” In the Shilubana case, the court stated that “change is intrinsic to and can be invigorating of customary law.”

This understanding of customary law is supported by academic studies. For example, anthropologists Comaroff and Roberts note that a chief’s judgment will only be accepted as a new norm if the chief is regarded as legitimate. They note, also, that “new” judgments are often accepted on the basis that they reflect changes that have already happened in the way people live. Customary law is in this way similar to common law in that it must reflect societal values and social change.

The survey and focus group discussions suggest that the Constitution has shifted norms and changed the balance of power at local level, both within households and within rural communities more generally. The research suggests that people have found ways of bringing the principle of equality into customary land allocation practices in ways that match the current reality, which includes large numbers of unmarried women who are bringing up children alone.

However recent legislation draws on a different notion of custom than has been recognised by the Constitutional Court. The recent legislation leaves it to traditional authorities to decide whether or not these changes are *within custom*.

### **Legislated “custom”**

The Traditional Leadership and Governance Framework Act of 2003 states that the apartheid tribal authority boundaries created by the Bantu Authorities Act of 1951 will serve as the boundaries for new traditional councils headed by “senior” traditional leaders. Within these areas traditional councils will administer the affairs of “traditional communities” according to “custom and tradition”. The Traditional Courts Bill of 2008 gives traditional leaders unilateral powers to apply and interpret customary law within their jurisdictional boundaries. It prohibits people living within these boundaries from choosing other courts and makes it a criminal offence for someone not to appear once summoned by the senior traditional leader. These new laws affect about 15 million of South Africa’s population of just under 50 million.

In 2008 the African National Congress’s national conference in Polokwane resolved to:

“[e]nsure that the allocation of customary land be democratised in a manner which empowers rural women and supports the building of democratic community structures at village level, capable of driving and coordinating local development processes.”

However, the new laws imply that chiefly power is the basis of customary law.

The problem is that these new statutory laws appear to give traditional leaders the power to determine what customary law is without the indigenous checks and balances that existed historically. The danger is that the new laws, instead of supporting the changes that have happened, will reinforce powers that traditional leaders had within the “homelands”.

The fact that some rural women, including some unmarried women, accessed land even before 1994 suggests that there are values within customary law that allow for this. The arrival of “democracy” and the new Constitution has provided new opportunities for women to take advantage of these values. In contrast, the new legislation is likely to restrict the opportunities.

The research suggests that policy makers and legislators need to pay more attention to the positive changes that have happened on the ground for women. They must then do their best to ensure that new policies and laws support these changes rather than undercutting them.

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