

woman

know your rights



**WOMEN'S PROPERTY RIGHTS
UNDER CUSTOMARY LAW**



WOMEN'S LEGAL CENTRE

First published in 2010 by the Women's Legal Centre
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Cover photograph by © Karen Roach, 2006, "Handing the key"

Printing by



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1. INTRODUCTION

Traditionally, women have been denied rights to property under customary law in South Africa. Under customary law, a woman was generally regarded as a legal minor under the guardianship of her father, husband or brother, incapable of owning or acquiring property.

Until very recently, the intestate law of succession also excluded women. Succession under customary law was traditionally based on the principle of primogeniture, which requires that only males can be heirs. As a result women were incapable of inheriting from the deceased estate of their father or husband when they died without leaving a will.

Women continue to experience discrimination in accessing land tenure rights in traditional areas, and suffer from a lack of standing and influence in traditional councils with respect to land issues.

Women's rights to equality and their property rights have been protected by the **Constitution Act 108 of 1996** (the "Constitution") since 1996, yet many women continue to face obstacles, both social and legal, to accessing and using property.

There are serious consequences to this dispossession of land that women traditionally experience as a result of customary law – many women in South Africa, particularly in poor, rural areas, rely on access to land to perform subsistence farming, to produce food and to provide for children. Access to and security of rights to land are critical factors in combating poverty.

Recently, there have been some important changes to customary laws that recognize and protect women's property rights. The purpose of this booklet is to promote public awareness about these vitally important changes in the law. The Constitution guarantees equality, and discrimination on grounds such as gender and race is prohibited. As a consequence, customary laws that are discriminatory on the grounds of gender or race are unconstitutional. Important cases at the Constitutional Court, and new laws introduced by the government have struck down the customary laws that prevent women from owning property within customary marriage and from inheriting property. These changes are discussed in detail in Chapters 4 and 5.

1.1 What to use this booklet for

You can use this booklet to:

- Learn about the importance of the legal rights of women to property under customary law
- Learn about the Constitution and the guarantees of women's equality and rights to property
- Learn about important changes in the law that improve women's rights to property under customary law, especially in the area of women's property rights under customary marriage and women's rights to inherit property under the customary laws of succession
- Learn about the Traditional Courts Bill and its impact on women's rights to property
- Assist other people in learning about women's legal rights to property under customary law

1.2 Why are women's property rights under customary law important?

There are many reasons why women's property rights under customary law are important:

- Although women have traditionally been denied rights to property under customary law, women's rights to property are now protected by the Constitution of South Africa and international law.
- There have been important changes in the laws governing women's property rights, and it is important that people are able to learn about the new laws.
- Many people in South Africa are subject to customary law, but often people are not aware of or do not understand the laws and their rights as developed by the Constitution. It is very important that people are able to learn about their property rights under customary law.
- Customary laws that are discriminatory and restrict women's rights to property have a real and serious impact because they affect women's day to day lives, including their ability to support themselves and their children and to confront poverty. Often women are the most socioeconomically disadvantaged in our society, with limited access to justice, especially in rural areas.

2. OVERVIEW OF THE LAW

2.1 What are property rights?

Property includes all land, houses, buildings, livestock, household goods and personal belongings. Most often property refers to land and houses or other buildings, known as “immovable property”.

Under customary law, property rights are generally communal rather than individual, as land is shared by members of a specific community rather than owned privately by one person exclusively. In the context of customary law, the main types of property are:

- Land
- Livestock
- Personal property (personal items such as clothing and household goods)

While land belongs to the community, usually livestock belongs to the family, and personal belongings to the individual. However, note that because customary law is fluid and it evolves over time, different communities may have different interpretations of land and property rights, and different methods of allocating land.

Generally, members of the community are allotted land over which they have exclusive rights to use for residential and cultivation purposes, as well as communal rights to grazing land, but this is not same as ownership in the Western legal sense. The Chief or headman of a community is the person responsible for allocation of communal land, usually in consultation with a traditional council.

2.2 What is customary law?

Customary law means the customs and practices observed among the indigenous African people of South Africa which form part of the culture of these people.¹ Customary law is fluid and varies from community to community, depending on specific cultural factors and customs.

There are two types of customary law: “official” customary law and “original” customary law. “Official” customary law is a product of codification of perceived customary law practices in the past by traditional leaders, colonial and apartheid governments and courts. It is what

¹ Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009, section 1.

customary law is based on. However, because customary law is fluid and flexible, and can change from time to time, official customary law may not accurately reflect the customary law that is actually used in a community. This is known as “original” customary law.

The Constitutional Court has considered this dilemma and held that the official rules of customary law were sometimes contrasted with what was referred to as ‘living customary law’, in which the rules were adapted to fit in with changed circumstances. The problem with these adaptations was, however, that they were ad hoc and not uniform. Magistrates and the courts responsible for the administration of intestate estates continued to adhere to the rules of official customary law, with the consequent anomalies and hardships as a result of changes which have occurred in society.² The court also held that customary law had been distorted in a manner that emphasised its patriarchal features while minimising its communitarian ones.³ Customary law is recognized by section 211 of the Constitution as a core source of law in South Africa that courts must apply in applicable situations. This recognition is expressly subject to the Constitution and any legislation that deals with customary law. When the courts are faced with constitutional challenges to customary law, they will strive to develop the living customary law in line with the Bill of Rights.

Many South Africans are subject to customary law, particularly in rural areas. Customary law is governed under its own system of customary courts and community councils, usually run by traditional leaders.

The status and powers of the traditional leadership is also recognised by the Constitution in terms of section 211 and 212. The **Traditional Leadership and Governance Framework Act 41 of 2003** recognized traditional communities as those who are subject to traditional leadership and observe customary law, and established traditional councils to oversee and administer these communities in accordance with customary law. The Act seeks to move towards bringing traditional governance in line with constitutional principles of democratic rule and equality, requiring that 40% of the traditional councils be democratically elected and that a third of all members must be women. The Act also recognizes and affirms the powers of traditional leaders.

2.3 How are women treated under customary law?

South African customary law, like our Roman Dutch and English common law, is largely based on the tradition of patriarchy. Patriarchy assumes that men are superior to women, and are viewed as the head of the family and the household, with the power to make all decisions and control all assets and property.

2 *BHE and others v Magistrate, Khayelitsha, and Others (Commission for Gender Equality as amicus curiae)* 2005 (1) SA 580 (cc) (Paragraph [87] at 620B - C/D.)

3 *Ibid* at Paragraph [89] at 620F.)

Patriarchy views women as subordinate to men. As a result, women have traditionally been denied equal rights under customary law. Until recent changes in the law, under customary law women were not permitted to inherit land or own property during customary marriage.

2.4 The Constitution and women's property rights and customary law

The **Constitution** is the supreme law of South Africa. It includes a Bill of Rights which guarantees the rights of all South Africans and is based on the principles of freedom, equality and dignity.

As women have long been denied equal rights to own property under customary law, the constitutional protection of equality is very important. Section 9 of the Bill of Rights states that “everyone is equal before the law and has the right to equal protection and benefit of the law”. This right to equality includes the “full and equal enjoyment of all rights and freedoms”.

The equality section prohibits discrimination against anyone on specific grounds, including race, gender, sex, pregnancy and marital status. This means that any laws which discriminate against women by treating them differently than men violate women's right to equality and will be found to be unconstitutional by the courts. If a law is unconstitutional, it will be struck down and declared invalid.

The Constitution also specifically protects the rights of all South Africans to own and manage property. Section 25 of the Constitution states that “no one may be deprived of property except in terms of law of general application...”. This means that women, like men, have a constitutional right not to be denied the ability to own property. As well, section 25(5) of the Constitution imposes a duty on the State to “take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis”.

In addition, the **Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000**, which elaborates on the constitutional guarantee of equality, expressly prohibits discrimination against women on the basis of gender. Section 8 states: “no person may unfairly discriminate against any person on the ground of gender”, and provides specific types of discrimination that are prohibited, including:

- (c) the system of preventing women from inheriting family property;
- (d) any practice, including traditional, customary or religious practice, which impairs the dignity of women and undermines equality between women and men, including the undermining of the dignity and well-being of the girl child;
- (e) any policy or conduct that unfairly limits access of women to land rights, finance, and other resources.

2.5 International law and women’s property rights

The equality of women and the right of all people to own property is also protected under international law. Article 17 of the **International Declaration of Human Rights** states that “everyone has the right to own property alone as well as in the association of others”.

The **Convention for the Elimination of all Forms of Discrimination against Women** (CEDAW), an international treaty that protects the rights and equality of women, and is binding in South Africa, specifically protects the right of all women to own property. Article 14 requires all member states, including South Africa, to ensure equal treatment between men and women in land and agrarian reform and land resettlement schemes. Article 15(2) states that women have equal rights to “administer property”, while Article 16 protects women’s equal rights to ownership and enjoyment of property within marriage.

2.6 How do women acquire rights to property under customary law?

There are three main ways that women usually acquire rights to property under customary law:

- Land tenure
- During and after customary marriage
- By inheritance

In the past, under customary law women were prohibited from owning property within marriage and from inheriting property upon the death of a father, husband or brother. However, there have been important changes in the law due to several decisions of the Constitutional Court and new laws introduced by the State, which recognize that these customary laws were discriminatory and unconstitutional:

- Women are now entitled to inherit property under customary law. The customary law of succession which permitted only men to be heirs was found to be unconstitutional and is no longer the law.
- Women in a customary marriage are entitled to own and administer property. All customary marriages are deemed to be automatically in community of property, which means that wives have a right to half of the marital assets upon divorce.

These changes are explained in more detail in Chapters 4 and 5.

3. LAND TENURE UNDER CUSTOMARY LAW

3.1 What is land tenure?

Land tenure is a traditional system of governing access to and use of land and its resources, including how land is allotted, transferred and managed within a community. Land tenure implies some degree of security in the exclusive use and occupation of a parcel of land by a community member, but without the full rights of private ownership that are characteristic of Western concepts of private property and exclusive ownership.

The process by which community members request plots of land to build houses and grow crops has been described as the right of avail. Once a person is granted a right of avail over a plot of land, he obtains grazing rights on communal lands as well. This right is exclusive, and in theory is protected by the traditional authority. Generally, exclusive rights to the land allotment are recognized as long as there is continued occupation and active use of the land.

Customary land tenure is governed by traditional rules and practices and administered by traditional leaders, which may differ in various communities. Land tenure is the main form of land management in the former “homelands” established under apartheid rule, where many South Africans continue to live. These boundaries persist today, and form the basis of the jurisdictions of different tribal leaders and their communities. The land rights of people in these areas were never registered, meaning that there is no administrative system to ensure the registration and security of individual tenure rights.

3.2 Efforts to reform land tenure in South Africa

The South African government has introduced various laws and policies focused on land reform since apartheid, with an emphasis on restitution and redistribution, as well as reform of the land tenure system. Restitution recognizes that black South Africans were historically dispossessed of land, and should receive compensation, while redistribution seeks to correct the imbalance of land ownership by transferring land taken by whites during apartheid to black South Africans.

The **Interim Protection of Informal Land Rights Act 31 of 1996** protects “informal land rights”, defined as land rights held in terms of customary or traditional law or practice, for example, from appropriation or illegal evictions. Section 2(1) states that “no person shall be deprived of any informal rights to land without his or her consent”.

Another new law, the **Communal Land Rights Act 11 of 2004**, was enacted to comprehensively reform land tenure. However, the Act, which had been widely criticized, especially by women’s rights groups, was ruled unconstitutional by the Constitutional Court in 2010 and struck down

in the case of *Tongoane and Others v National Minister for Agriculture and Land Affairs and Others*⁴, because the government had failed to consult with traditional leaders and communities prior to introducing the new law, which they are required to do under the Constitution.

As a result, there is presently no comprehensive law in place to reform land tenure. Serious concerns with the current situation of land tenure persist. There is a lack of consistency or certainty in the administration of land tenure, and a widespread problem with insecurity of tenure.

The rights of many people to the land they occupy and use is uncertain, and sometimes overlap.

3.3 What are women's rights under land tenure in customary law?

The Constitution requires that traditional leaders must treat women equally while managing and allocating rights to land tenure.

Under traditional customary law, men are viewed as the head of the family and the household. They have the exclusive power to make decisions for and about the family, including land and other property. Typically, only men are entitled to apply to the traditional authorities for a land allotment. As head of the family, the man is required to support his dependent family members, including his wife and children. This may include providing female family members with small plots of land to farm in order to produce food, although women's access to these plots is entirely dependent upon and subject to the relationship with the male head of the household.

Thus women are typically excluded from obtaining rights to land in their own capacity under customary law. Although there is some evidence of cases where self-supporting women have obtained allotments from traditional authorities, this is rare and not the usual practice. Traditional authorities tend to favour requests for land allotments from adult, married males.

In addition, women are often not represented among the traditional authorities, and are usually not involved in traditional decision-making within the community with respect to land. It is also common for women, especially in rural areas, to be unaware of their rights to land under the Constitution and the new laws explained in this booklet.

However, women's rights to land tenure in traditional areas *are* protected by the Constitution. As traditional leaders are recognized as public officials in the Constitution, they are required to carry out their public duties in compliance with the constitutional guarantee of equality. They are not permitted to discriminate against women by restricting women's equal access to land rights while managing and allotting land in communal areas.

4 2010 (6) SA 214 (CC)

One should also be aware of the paralysing effect that colonialism and apartheid have had on customary law, denying women the opportunity to participate in its development and decision making structures.

4. WOMEN'S RIGHTS TO INHERIT PROPERTY UNDER CUSTOMARY LAWS OF SUCCESSION

4.1 What is the law of succession?

The law of succession under customary law governs inheritance in situations where a person dies without a will. This is not uncommon. The customary law of succession in South Africa is based on the principle of primogeniture, which requires that only males may inherit from a deceased's estate. Generally, the heir is the eldest son, or failing that, the eldest grandson, of the deceased. If the deceased does not have any male children, then his father becomes the heir.

The traditional rules of succession required that the male heir acquire all of the assets of the deceased, but also that he assumes all responsibilities that the deceased had towards his family. The heir is expected to continue to support the deceased's widow, children and other dependants. However, in practice, sometimes the heir would fail to carry out these responsibilities, and widows were left with little recourse.

4.2 What are women's rights to property under the customary laws of succession?

Important changes to the laws of succession mean that women are now entitled to inherit property under customary law. The customary law of succession is now subject to the Intestate Succession Act⁵, which provide rules that protect the rights of women and children to inherit.

Traditionally, because of the rule of primogeniture, women were not entitled to inherit property under the customary law of succession. Although the heir is supposed to inherit the deceased's responsibilities to support and protect his family, sometimes the heir does not respect these obligations. This leaves women dependent, and without any means to obtain property, and therefore to produce food and support their children.

This changed with the landmark case of *Bhe and others v Magistrate, Khayelitsha, and Others (Commission for Gender Equality as amicus curiae)* 2005 (1) SA 580 (cc), which came before the courts in 2004. The father of Ms. Bhe's two daughters had died without a will and according to

⁵ 81 of 1987

the laws of succession under customary law the deceased's father was to inherit the house she lived in with her daughters. Ms. Bhe claimed that her daughters, as the deceased's children, should inherit the property.

The Women's Legal Centre argued on Ms. Bhe's behalf that the customary law of succession that allows only males to inherit was unconstitutional because it discriminates against women, and the Constitutional Court agreed. The court said that the customary law of primogeniture was a violation of women's equality and rights to dignity, which are protected under the Bill of Rights in the Constitution. Ms. Bhe's daughters, as the children of the deceased, were allowed to inherit the property.

As a result of the Constitutional Court's decision, the government introduced a new law, the **Reform of Customary Law of Succession and Regulation of Related Matters Act**⁶. This law reforms the customary law of succession by finally prohibiting the principle of primogeniture. The law recognizes that widows and children of a customary marriage were not adequately protected under the customary laws of succession.

The practical effect of these recent amendments to the law are that the rights of women to inherit property under customary law are now governed by the **Intestate Succession Act**. The rules under the Act recognize and provide for polygynous marriages. Under this Act, the following rules of succession apply:

- If there is one spouse, and no children, the spouse inherits the entire estate.
- If there is more than one spouse, and no children, the spouses will inherit equal shares of the estate.
- If there is no spouse, but there are children, the children will inherit equal shares of the estate.
- If there is one spouse, and children, the spouse inherits a child's share (ie. the spouse and children all share equally) or R125 000, whichever amount is greater. The children will inherit equal shares of the remaining estate.
- If there is more than one spouse, and children, each spouse inherits a child's share (ie. the spouses and children all share equally) or R125 000, whichever amount is greater. The children will inherit equal shares of the remaining estate.

Please note that the rules of succession apply to the deceased's estate which comprises half of the marital assets by virtue of the fact that all customary marriages are deemed to be in com-

munity of property as explained in Chapter 5. This means that the surviving spouse will receive half of the estate of the deceased BEFORE the above rules are applied in terms of the marriage in community of property. Therefore deceased's estate will only include the deceased's half share of the marital assets. The surviving spouse will receive the other half of the marital assets prior to applying the rules of succession, plus her share of the remaining estate as determined by the above rules.

5. WOMEN'S RIGHTS TO PROPERTY DURING AND AFTER CUSTOMARY MARRIAGE

5.1 What are women's rights to property during and after customary marriage?

Women have an equal right to all property acquired during a customary marriage.

In the past, the courts interpreted customary law to require that all assets and income held by a married couple were under the husband's control. The guiding principle was that married women were viewed as legal minors, incapable of owning or using property, which was the exclusive domain of their male "guardians" – fathers, husbands or brothers. This meant that even income that women earned themselves was viewed as accruing to their husbands. This principle was codified into law in section 11(3)(b) of the Black Administration Act, which has since been struck down. It stated that:

A black woman [...] who is a partner in a customary union and who is living with her husband, shall be deemed to be a minor and her husband shall be deemed to be her guardian.

To remedy the obvious injustice of denying married women any right to property or even their own income, the **Recognition of Customary Marriages Act (RCMA)**⁷ came into effect in 1998. Section 6 of the Act provides that women have "full status and capacity" and equal rights to acquire and dispose of property in a customary marriage.

The RCMA makes all customary marriages automatically in community of property unless the parties contract otherwise. This means that the assets and income of both spouses are merged into one estate, and both husband and wife have equal powers to manage the estate. Upon dissolution of the marriage, each spouse has an equal right to the estate. Thus women are guaranteed an equal share in all property held by the couple during the marriage.

⁷ 20 of 1998

However, there was a problem with the RCMA in that it specifically limited its application to marriages occurring after 1998, when the Act came into force. Women who entered into customary marriages before 1998 were still subject to the discriminatory principles regarding property ownership under African customary law. In 2008 the Legal Resources Centre brought the case of *Gumede v President of the Republic of South Africa and Others*⁸ to the Constitutional Court to challenge this part of the law, arguing that the RCMA arbitrarily discriminated against women on the basis of gender, race and culture. The Women’s Legal Centre supported the arguments that this was discrimination on the basis of gender, race and culture.

Ms. Gumede entered into a customary law marriage with her husband in 1968, and by the time the parties divorced in 2003 they had acquired two houses. Because the marriage pre-dated the Act, it was subject to customary law and Ms. Gumede was denied any property rights to the two houses. The Constitutional Court agreed that this restriction in the Act was discriminatory and unfair, and struck down the limiting provision. Now all women in customary marriages, whenever the marriage was entered into, have equal rights to property, because their marriages are all automatically in community of property.

Table of Women’s Property Rights Under Customary Law

RIGHT	TRADITIONAL CUSTOMARY LAW IN THE PAST	CUSTOMARY LAW TODAY
Right to own property	Women are generally not permitted to own property.	Women must be treated equally, and they have equal rights to own and acquire property.
Right to land tenure	Women typically do not have access to land tenure.	Women have equal rights as men to acquire land tenure. Traditional leaders and councils must treat women equally.
Right to inherit intestate	Women do not have any right to inherit, only men can (the rule of primogeniture).	Women do have an equal right to inherit. Primogeniture is unconstitutional.

6. THE TRADITIONAL COURTS BILL

6.1 What is the Traditional Courts Bill?

The Traditional Courts Bill is a draft law that would establish traditional courts across South Africa, in the territorial jurisdiction of the former homelands. Under the Bill, the tradition-

al courts would have the power to hear and determine civil disputes arising out of customary law and custom, as well as certain criminal matters.

The Bill has been criticised by civil society organizations, especially women's groups, for a number of reasons. Firstly, the Bill was drafted without any consultation with rural communities who will be subject to it. The Bill also perpetuates and further entrenches the apartheid-area boundaries of the former homelands, by basing a traditional court's jurisdiction on these territorial boundaries, which may not conform with actual traditional community groups.

Another major problem is that the Bill gives wide powers to "senior traditional leaders" to act as presiding officers of the traditional courts. This is contrary to the common practice of traditional councils operating as the bodies that hear and decide disputes. Additionally, under the Bill, traditional leaders are not elected, but appointed by the Ministry. Thus the Bill consolidates the power of unelected traditional leaders, almost exclusively male, and undermines the status of the traditional councils and collaborative, consensus-based models of dispute resolution.

The Bill also provides for harsh penalties, which allow the court to order any person to perform unpaid services for the benefit of the community, or to deprive an accused person of any benefits that accrue in terms of customary law or custom. This has particular implications for property rights, as "benefits" could include land rights.

6.2 How does the Traditional Courts Bill impact women?

The implications of the Bill for women are serious. The Bill gives male traditional leaders so much power that it will further perpetuate gender inequality. The traditional leaders will have wide powers to impose their interpretations of customary law upon women, which are likely to include traditional patriarchal views about women's lack of capacity to own and inherit property – despite the important changes to these laws that were discussed above.

Women will also be denied access to decision-making roles in the traditional courts, as only traditional leaders, typically men, can be presiding officers. A report by the Law Reform Commission in 2003 recommended that women's representation in the traditional courts that usually hear and disputes be guaranteed in the new legislation. This recommendation was not included – in fact, the traditional councils are not even recognized in the Bill.

In addition, the Bill will limit women's access to traditional courts, and to legal representation. Although in theory both men and women can represent themselves in the traditional courts, under the Bill this is based on customary law. There is no provision to expressly state that women can represent themselves in the traditional courts. Some traditional leaders could interpret their community's customary law to find that women are not permitted to appear and represent themselves. In addition, the Bill expressly prohibits legal

representation in the traditional courts, denying women the option to rely on their own legal counsel.

The traditional courts will have jurisdiction over all people living under customary law. They will have extensive powers, which could seriously undermine recent significant legal gains in recognizing and protecting women's right to property. The Women's Legal Centre believes that the Bill is unconstitutional and must be substantially revised before it can be enacted into law.

LIST OF CONTACT ORGANISATIONS

The Women's Legal Centre	021 424 5660
Masimanyane Women's Support Centre	043 743 9169
Women on Farms	021 887 2960
Centre for Rural Legal Studies	021 883 8032
Legal Resource Centre	021 481 3000
TCOE – Trust for Community and Education	021 685 3033
SCAT – Social Change Assistance Trust	021 418 2575
Surplus People's Project	021 448 5606
ANCRA Association for Community & Rural Advancement	053 0791/2/3/4
RWM – Rural women Movement	073 8405151
TRANSLO – Transkei Land Service Organisation	047 531 2851/2
AFRA – Association for Rural Advancement	033 345 7607
NKUZI Development Association	015 297 6972
Action Aid	011 731 4500
Rural Legal Trust	011 403 8079 or 4426



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