

Women's Rights and "Living" Customary Law

Research context and questions being explored

This project explores women's rights and customary law in South Africa. It focuses on land rights, but includes related issues of inheritance, marriage and involvement in decision-making processes. The research focuses on African (in the apartheid sense of the term) women living in the former "homelands" that are the poorest parts of South Africa. It uses three case studies that reflect different language groups (and thus customary laws and practices), and different land tenure histories. The first site is Msinga in deep rural KwaZulu-Natal, in the ex-Kwazulu homeland. This is a Zulu-speaking area in which traditional customs and authorities are strong, and access to land occurs mainly through customary law and practice. The second site is Keiskammahoek in the Eastern Cape, in the former Ciskei homeland. This is a Xhosa-speaking area. The site consists of several sub-sites, which include areas subject to "betterment" schemes in previous decades, as well as some areas where freehold tenure was possible for Africans. The third site is Ramatlabama in North West province, in the former Bophuthatswana homeland. This is a Tswana-speaking area. The majority of the people living here were subject to forced removals from land that they owned in what is now Gauteng. In all three areas there have been some land reform initiatives subsequent to 1994 that also affect current land tenure and access.

The research was initiated to explore the interface between rights and "custom". The South African Constitution recognises and protects both customary law and the Bill of Rights. Customary law is thus recognised as a fully established system of law in its own right, not simply as a set of traditional or long-established practices. Yet much of the "official" customary law inherited from colonialism and apartheid abrogates human rights, particularly the right to equality. Several Constitutional Court judgments have addressed the tension between customary law and the Bill of Rights by interpreting customary law to be not the distorted and codified version inherited from colonialism and apartheid and contained in old statutes and judgements, but also the constantly changing "living law" that develops as society changes. The judgments state that customary law derives its authority from the Constitution and must be interpreted in terms of the Bill of Rights. The judgments potentially enable litigation and organisation to build on current initiatives by rural women which challenge reactionary versions of customary law. However, as the Constitutional Court itself has pointed out, there are real legal difficulties in establishing the content of changing "living law" for the purposes of litigation. Research to provide evidence of "living law" (and, in particular, living law that enables access to and control over land to women) is thus a necessary component of legal and organisational strategies that seek to support existing processes of challenge and positive change.

The primary research tool consists of a survey. This methodology was chosen as the intention is to provide quantitative evidence of how land access and decision-making occur "on the ground" to avoid dismissal of the evidence of women gaining rights as anecdotal and relating only to exceptional cases. The questionnaire has been administered to 3 000 women – 1 000 in each of the three sites. One woman was randomly selected from each of 1 000 randomly selected homesteads from among the female members of the homestead aged 18 years and above who were living in the homestead at the time of the survey. Random selection was used as we wanted to avoid the bias that would result from, for example, focusing on the

(first) wife of the “household head”. This approach was particularly important as the research is intended to explore the extent to which different categories of women – not only the married or widowed women focused on in most discussions of women’s access to land – have access to and decision-making power over land.

The questionnaire phase was preceded by a series of focus groups in each of the three areas. These focus groups were mainly intended to inform the design of and terminology used in the questionnaire. In particular, the focus groups discussed how local people defined the “homestead” as well as the different types of marriage and other relationship prevalent in the area. Each focus group was made up of a different category of people – typically one with younger women, one with older women, and one with men of different ages. This strategy was chosen to explore whether there might be different views and understandings among different sub-groups of the population on issues such as marriage. A further series of focus groups will be conducted once the quantitative data have been more fully explored. These later focus groups will be used to obtain a more nuanced and qualitative understanding of the reasons for patterns that emerge from the quantitative data.

Our research will hopefully increase the availability of “empirical” information gathered from people who are living the current realities, and thus contribute to theoretical debates but, more importantly, to the organisation and advocacy around these issues.

A summary of key research findings to date

This is a two-year project, which started in early 2009. At the time of writing this summary, we are therefore three-quarters way through the project. The survey is completed, but data analysis is still ongoing, and we must still conduct focus groups that explore issues that emerge from the survey. It is thus too early to speak of key research findings.

However, preliminary analysis has confirmed – as we expected – that many women use land, and that women feel that they have more decision-making power over the use and disposal of land than is often portrayed in crude gender analysis. Further, these powers extend beyond married women to those who are single (never married) as well as those who are widowed. This is not to deny that there are gender inequalities, but instead to assert that the relationships are more complex than often portrayed, and that the variations are greater than some might think.

Preliminary analysis has also confirmed, as expected, that relative powers are affected by the types of land tenure, history of land tenure in a particular area, as well as the relative strength of “traditional” structures, relationships and “culture”. Further, the analysis has confirmed the limited extent to which many rural homesteads have access to land other than the residential site and, where they have such land, the sometimes limited use that is made of this other land for productive purposes. In this respect, the findings in South Africa may be different to what one would find in rural areas of other countries that might decide to conduct similar research.

Highlights of key innovative practices, or stories regarding women’s land rights

Important elements in our research approach included the emphasis placed on getting the translations correct, especially around key terms such as those used for different types of

marriage. This task included ensuring that we had translated the terms used so readily in more academic debates – such as “access to” and “control over” and “decision-making power” into concrete everyday terms. In working on this, we discovered that some of the standard instruments used in South Africa – including those used by Statistics South Africa – make “mistakes” in respect of translation on such seemingly simple concepts such as marriage. We have alerted Statistics South Africa to this problem.

For the fieldwork we employed local people from the relevant site. Each fieldworker worked in a part of the site some distance from where she (there were also some male fieldworkers, but the majority were women) lived, so as to avoid problems in respect of confidentiality. Our initial requirement was that the person should have reached the final year of schooling, and that they should be unemployed (so that they would have time for the fieldwork). In Keiskammahoek, one of the local organisations with which we collaborated consisted mainly of older women, most of whom did not have this level of education. They were keen to participate as fieldworkers. We therefore devised a “competency” test that helped gauge whether, despite not having the necessary formal education, they had the skills needed to administer the questionnaire effectively. All the women passed this test and performed well as fieldworkers.

We took special care with fieldworker training. The training used a range of methods rather than mainly lectures. The practical work included daily “tests” that participants completed. These allowed the trainers to assess individual trainees as well as giving them insights as to the aspects which were difficult for trainees.

In each of the sites we have worked with local organisations. These organisations have helped us gain entry to the sites (which usually requires meetings with local traditional leaders), as well as assisting in recruiting potential fieldworkers, organising venues for training, and assisting in other ways with the various steps. This collaboration is important to us as we hope that local organisations will find the research useful and use the findings in taking their struggles forward.

After completion of preliminary analysis in each site, we organised a feedback meeting for each site. In two sites this was a relatively small meeting with 20-30 people. The meetings were organised in collaboration with the local traditional leader, and included representatives from each of the sub-sites. In the two sites with a (relatively) smaller number of participants we asked that those who were present report back to other community members, and suggested that they use our short summary of findings for this purpose. In the third site the feedback meeting had 80 participants as we were given time in a full-day meeting organised by the traditional leader. In all three meetings participants were taken through some of the key findings and asked whether what we had found reflected the reality as they knew it. Participants in all sites agreed with the findings, but the discussion served as a form of focus group in adding more nuance to the findings.

Based on the findings, key policy recommendations

It is too early at this point to discuss these. However, the need for the project has become even more apparent since the project was initiated as there are strong moves by some within government to strengthen traditional leadership and the role of traditional leaders and structures in governance and development. In some senses this can be seen as an attempt to

establish a fourth sphere (tier) of government – something that is not provided for in the Constitution.

Research gaps or further research entry points

Again, it is too early to offer definite thoughts on research gaps and further research entry points. We are, however, certain that there will be many issues that need to be followed up emerging from the project. Further, our research report/s will by no means exhaust the analysis possibilities in respect of the database. There will thus be a range of possibilities in respect of further analysis of the data generated.

Research team members and their institutional affiliations

The research is being conducted by Community Agency for Social Enquiry, and all core research team members from the organisation. Those attending the symposium are:

- Debbie Budlender: Project coordinator
- Sibongile Mgema: Fieldwork coordinator
- Ketleetso Motsepe: Researcher/analyst