

# Gender Issues in Land Tenure under Customary Law

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## Introduction

Under all systems of law in many African countries, land ownership is anchored in patriarchy. Law can be used to reinforce or make permanent social injustices, and, in the realm of women's rights, legal rules may give rise to or exacerbate gender inequality. Legal systems can also become obstacles when change is required: often the de jure position, which may provide for gender neutrality, cannot be achieved in practice due to numerous obstacles.

There are three issues to be noted with regard to law in its governance of tenure relationships:

- Statute books contain legal rules and principles that are or can be seen as legitimizing the subordination of women.
- The structure and administration of laws can occasion the subordination of women.
- The socioeconomic and patriarchal realities in many African countries prevent the translation of abstract rights into real substantive rights.

## Women's Land Rights under Customary Law

Customary law is not uniform across Africa, but there are some common factors:

- Customary law tends to be the unwritten social rules and structures of a community derived from shared values and based on tradition.
- Customary law pertaining to women's land tenure is based on social relations between men and women and, more specifically, husbands and wives.
- Customary law seems to have few provisions for divorced women and even fewer for single women.

## Property Rights in General

In Africa, under most systems of customary law, women do not own or inherit land, partly because of the perception that women are part of the wealth of the community and that they therefore cannot be the locus of land rights' grants. For most women, access to land is via a system of vicarious ownership through men: as husbands, fathers, uncles, brothers, and sons. Customary rules therefore have the effect of excluding females from the clan or communal entity.

## Property Rights within Marriage

In several countries, customary land registration systems require a husband's authorization for a woman to acquire title independently, and single women and single mothers are obstructed from acquiring title altogether. Under customary law, widowed women traditionally do not inherit land, but are allowed to remain on the matrimonial land and home until death or remarriage. Over the past decade, however, even this social safety net has eroded, with male heirs tending to sell off the land, leaving widows landless and homeless. In most ethnic groups, a married woman does not own property during marriage. In some communities, all her property, even that acquired before marriage, is under the sole control of her husband.

Although the wife has the right of use over property, such control must be exercised with her husband's consent. Most control exercised by women on land is over use rather than control and ownership. This subordination of women socially and economically renders them less competitive than they should be under the current economic structuring of society.

## Property Rights at Separation and Dissolution

At dissolution, distribution of property depends on whether the property is land or otherwise and whether it was acquired before or after marriage. Generally, a divorced wife may take her personal effects, but all other property remains with the husband.

## Effects of the Registered Land Act (RLA) of Kenya

The RLA was passed for the main purpose of enabling titleholders to deal with the land any way they see fit. Right from the beginning, registration was bound to exclude most women from acquiring titles, since they generally only had use rights. Also, the tenure reform process only considered the rights of people who had land, not the landless or those who had only use rights. In most cases families designated the eldest son or the male head of household to register, and a right of occupation at customary law would only be protected if noted on the register. Since the RLA does not recognize customary rights of use, women are at the mercy of the titleholder. While section 30 states that registered land is subject to overriding interests, these do not include customary rights of use, an interpretation that has been upheld by the courts. The registration process thus unintentionally excludes most women from property ownership and the benefits accruing from such ownership.

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The RLA limits the number of people who can register as common or joint owners of property. This is to control subdivision under the Land Control Act, which controls transactions in agricultural land and generally discourages fragmentation. The act affects succession rights of women, especially in polygamous households where the property of the deceased husband has to be subdivided. Subdivision into uneconomic units will not be upheld by the courts, and this has the indirect effect of excluding some widows from ownership.

## The Intersection of Customary and Statutory Law

The convergence between the English doctrine of coverture and customary and statutory law on property relations has had negative effects on women. For women, patriarchy exacerbates the situation, since male heads of households constitute the exclusive locus of landholding when individual tenure is introduced. The effect of this is to extinguish women's land rights, including rights to access under customary law. Unfortunately, gender neutral laws on land rights apply in contexts that are still very much gendered.

Countries have sought to entrench human rights norms in national constitutions as a way to address discriminatory customary law. They do this by proscribing discrimination generally and by providing for both gender equality and the application of customary and religious laws. However, they leave it to the courts to arbitrate on what rights should prevail. This approach has its limitations: allowing for customary law application in personal law matters maintains biases against women, and leaving the issues for courts to decide presupposes that the arbiters are not themselves influenced by prevailing gender perceptions.

## Conclusions

The predominance of patriarchy in law, policy, and practice ensures that the land has owners but that they are not women. For law and policy to influence gender relations in the tenure realm, there is need to deconstruct, reconstruct, and reconceptualize customary law notions around the issues of access, control, and ownership. The view should be to intervene at points that make the most difference for women.

There is need for innovative and even radical approaches. In determining tenure to land, rights should be earned or deduced from an entity's relationship to the land. Rights should be anchored on use and subjected to greater public good resident in the trusteeship over land for posterity. Given women's roles in land management and husbandry, such an approach will identify them as loci for rights' grants and thus address the skewed gender and land relations under customary law that have been further entrenched by statutory laws.

### ***Further reading:***

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