



# Customary law and institutions: Protecting or undermining community land rights in Southern Africa?

Comparative perspectives from across the SADC development community

Online Discussion  
28 June – 9 July 2021

## Discussion objectives

This online discussion and knowledge sharing forum hosted by the Land Portal is scheduled for 28 June – 9 July 2021.

Overall, the session aims to:

- Profile the contemporary role of customary law and institutions – ‘traditional leaders’, ‘chiefs’, ‘customary authorities’ – in the allocation and governance of land rights across fourteen of the sixteen different countries, which are members of the Southern African Development Community (SADC).<sup>1</sup>
- Identify changing trends in the ways in which customary law and institutions play a land governance role across the SADC region and assess the extent to which this is supported in land policy and law.
- Examine how customary institutions may best protect community land rights and enable inclusive land access and secure tenure/ownership models.
- Explore ways to protect these institutions from co-option by elites seeking to capture land, minerals and natural resources and corruption, due to lack of transparency and unaccountable leaders.
- Collect recommendations on these issues to support the design and implementation of policy, development initiatives and research for better land governance in the SADC countries and other regions with similar challenges.

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<sup>1</sup> Angola, Botswana, Democratic Republic of Congo, Eswatini, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, South Africa, Tanzania, Zambia and Zimbabwe.

## Background

About two thirds or 2.2 billion hectares<sup>2</sup> of all cultivated land in sub-Saharan Africa is thought to be under customary tenure. However reliable figures for land currently held under customary tenure in SADC have proved to be hard to come by.

The role of customary law and institutions in land governance and administration in Southern Africa remains deeply contested and highly context specific. These contestations span both the colonial and post-colonial eras. The colonial project sought to implement systems of indirect rule over subject peoples, whereby local leaders were elevated as ‘chiefs’ to act as proxies for colonial powers.

As part of this process colonial officials sought to record and codify customary law<sup>3</sup>, and in so doing often fundamentally/wilfully misunderstood many of the values and social accountability mechanisms built into different systems. In particular, colonial interventions often inflated and distorted the powers and functions of traditional leadership and governance institutions, replacing downward accountability to communities with vertical accountability to the state, while enabling authoritarian leadership styles.<sup>4</sup>

The extent to which colonial rule succeeded in reshaping customary systems varied widely across the region. In countries where there was a substantial settler presence, colonial powers expended much effort to render chieftainship compliant and dependent on the state. This was achieved through the regulation of functions and the payment of salaries and stipends. In apartheid South Africa and Namibia chiefs were recast by the State as representatives of officially recognised ‘tribes’ and many – but certainly not all – came to be regarded as an extension of the apartheid state, benefitting directly from apartheid and minority rule.<sup>5</sup>

Post-colonial governments in the region have taken widely differing approaches with respect to the recognition of customary law and institutions. In the immediate post-independence period some incoming governments of countries like Zimbabwe and Mozambique regarded chiefs as colonial collaborators.<sup>6</sup> They aimed to marginalise the influence of chieftainship and severely limit their power and influence. In Botswana the focus was on bureaucratising chieftainship to serve elite interests.<sup>7</sup> However in South Africa in a bid to end conflict and prevent civil war in the 1990’s, Section 211 of the Constitution explicitly recognised “the institution, status and role of traditional leadership, according to customary law subject to the Constitution”.<sup>8</sup>

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<sup>2</sup> (Wily 2011)

<sup>3</sup> (McClendon 2010).

<sup>4</sup> (Mamdani 1996)

<sup>5</sup> (Mamdani 1996)

<sup>6</sup> (Augustine 2016).

<sup>7</sup> (Morapedi 2010)

<sup>8</sup> Constitution of the Republic of South Africa (No 108 of 1996).

Throughout the SADC region customary institutions have proved to be resilient and adaptive, with analysts pointing to a resurgence in their influence and powers.<sup>9</sup> A previous [online discussion](#) on the Land Portal examined the role of chiefs in the documentation of customary land in Zambia, while the [dialogue on land and corruption](#) in Africa focused in part on the role of traditional leaders in customary land administration with a focus on Ghana and Zambia.

Women's land rights in terms of customary law and practice, and their changing place within customary systems remain a complex issue. The ways in which these rights are recognised are also influenced by different patrilineal and matrilineal descent and inheritance systems. Again, there are variations according to different contexts.<sup>10</sup> In settings where there has been a sharp rise in the number of households headed by single women, there is evidence that customary law is increasingly recognising women's land rights and that women are being allocated land in their own right.<sup>11</sup>

There have been many attempts to 'reform' customary tenure. From the 1990's neo-liberal reforms promoted by agencies in the global north have prioritised programmes of land registration and titling to create land markets and attract investment to revitalise agriculture. This pattern has evolved in different ways across the countries which make up the southern African region. These processes have attracted criticism for the ways in which they have enabled local elites and global capital to grab land and place the livelihoods of households which depend on access to land and natural resources at risk.

So, two overarching questions emerge:

- How can customary law and governance institutions be strengthened and supported to ensure social inclusion, secure community access to land and effective management of natural resources?
- How can these institutions best be protected against corrupt and authoritarian leadership and capture by local elites and global business partners?

## The structure of the discussion

The online discussion will be open for two weeks. We are planning a mix of discussion, collaborative knowledge generation and formulation of policy recommendations.

### Setting the scene

Participants who sign up for the discussion will be asked to complete a [Google form](#) to help collate current information on the status of customary law and institutions across the different SADC countries. This will help highlight key issues and trends impacting on the governance of land held

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<sup>9</sup> (Ng'ong'ola 1982, MacMillan 1985, Cheater 1990, Devereux 1996, O'Laughlin 2000, Mbiba 2001, Kingwill 2003, Southall and Kropiwnicki 2003, Owusu-Sarpong et al. 2003, Cousins and Claassens 2005, Ooomen 2005, Ntsebeza 2005, Peters and Kambewa 2007, Claassens and Cousins 2008, Cousins 2007, Lebert and Rohde 2007, Hellum and Derman 2009, Scoones 2009, Peters 2013, Wicomb and De Souza 2013, Claassens 2014, Beinart 2014, CLS 2014, Weinberg 2015, Werner 2016, Clark and Luwaya 2017, Wily 2017, Hull and Whittal 2018, Werner 2018, Griffiths 2019, Peters 2020, Scoones 2020 )

<sup>10</sup> (MacMillan 1985, Rose 2002, Whitehead and Tsikata 2003, Cotula 2007, Chu 2011, Claassens 2013, Oosome 2014, Weinberg 2016, Nakanyete et al. 2020)

<sup>11</sup> (Cousins 2011).

under customary tenure systems. All participants will have access to this data which will also be summarised in the form of an accessible report.

This scene setting activity will help shape the online conversation over the two weeks:

### Week 1

In Week 1 we will examine four questions:

1. How have relationships between the state and traditional leaders changed over time in different SADC countries pre and post-independence?
2. In countries where colonial authorities set out to codify customary law (e.g Lesotho and South Africa) what impact did this have on traditional leadership, customary governance systems and community land rights?
3. What are the main changes in access to and management of land under customary tenure within SADC member states resulting from:
  - a. government policies and programmes that seek to promote commercialisation and investment (or fail to support small-scale farming);
  - b. urban-based business people acquiring land for medium-scale commercial farming (often via 'customary' institutions);
  - c. NGOs and social movements, some local and some international, playing in relation to promoting the positive features of customary tenure, while promoting women's land rights;
  - d. donor driven programmes promoting a switch to individual and titled forms of property?
  - e. Constitutional commitments to gender equality?
4. To what extent are customary law and associated institutions serving to recognise and protect community land rights?

### Week 2

5. How are living customary law and contemporary customary institutions adapting to address women's land rights?
  - f. Are processes of social change such as declines in marriage, or in customary forms of marriage, leading to changes in land tenure systems?
6. What is the evidence from different countries that customary law and institutions have been co-opted/corrupted to facilitate land grabs, mining deals and elite capture of resources?
7. To what extent do the problems encountered by those with customary land rights derive from wider problems in relation to land administration systems in general?

### Concluding the discussion: Finding solutions

To conclude the online discussion the focus will be on drawing out the trends, identifying policy recommendations and the need for SADC wide research. Recommendations will propose how customary law, traditional leadership and governance institutions can be consolidated as a force to protect inclusive community land rights and resource ownership models, enabling flexible land access and use, while also providing secure and defensible rights.

## Signing up

To participate in the discussion, you will need to [sign up](#) or [create a profile](#) on the Land Portal. It is quick, easy and free. We hope to attract a wide range of contributors with different positions and perspectives to shape this important regional conversation. Please feel free to share this invitation widely.

## Selected references

There is an enormous literature on this topic. Participants will be invited to add new country specific references to the listing below.

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