



UNIVERSITEIT VAN PRETORIA
UNIVERSITY OF PRETORIA
YUNIBESITHI YA PRETORIA

THE ROLE OF CUSTOMARY LAW IN WOMEN'S ACCESS TO LAND

Mini-dissertation submitted in partial fulfilment of the
requirements for the degree of Masters in Law in
Multidisciplinary Human Rights

Submitted by: Zamantungwa Khumalo

Student number: 29135436

Supervisor: Prof Karin Van Marle

November 2017

Declaration of Originality

Full names of student: Zamantungwa Khumalo

Student number: .29135436

Topic of work: The Role of Customary Law in Women's Access to Land

Declaration

1. I understand what plagiarism is and am aware of the University's policy in this regard.
2. I declare that this (eg essay, report, project, assignment, dissertation, thesis, etc) is my own original work. Where other people's work has been used (either from a printed source, Internet or any other source), this has been properly acknowledged and referenced in accordance with departmental requirements.
3. I have not used work previously produced by another student or any other person to hand in as my own.
4. I have not allowed, and will not allow, anyone to copy my work with the intention of passing it off as his or her own work.

SIGNATURE

Chapter One: Introduction

1.1 Research problem

The main aim of the study is to obtain an overview of the role of the legislature and the judiciary in the development of customary law so as to allow women greater access to land. The relationship between women in traditional communities, and land has been governed by customary law and common law and enforced by the colonial and apartheid government. This has resulted in women sitting on the side-lines and observing, as patriarchal principles and laws deprived them of their freedom, dignity and land rights. The courts have been called by the Constitution to protect those who are vulnerable in our country and this includes women. Therefore, the judiciary has an important role to play in shaping land redistribution in South Africa as well as applying and developing customary law to benefit all South Africans, especially women. Similarly the legislature has a mandate to develop legislation which speaks to the Constitutional provisions guaranteeing the right to land to those who have been deprived of land. As such, this study will investigate the challenges which have faced the courts; it will highlight the successes as well and provide recommendations.

The study will reflect on some of the implications and effects of the legislative framework regarding traditional governance; customary law and land governance has had on women's ability to access land. This will be achieved through outlining the legislation and case law relating to traditional leadership and land tenure throughout South Africa and analysing its impact on gender equality.

1.2. Research Questions

- 1.2.1. What is the position of women under customary law with particular reference to land?

1.2.2. What is the legislative framework regarding traditional governance, customary law and land, and what has been its role in enhancing women's access to land?

1.2.3. Have the courts been effective in developing customary law and in countering legislative shortfalls to address women's access to land?

1.2.4. What can be done by the judiciary to enhance women's access to land?

1.3. Motivation

The waves of change have blown yet again in South Africa. It is without a doubt that the perceptions that were once created by our country and its Constitution have been challenged and re-challenged. Thus, the year 2016 resulted in several protests from the youth regarding free education and sexual violence on campuses, amongst other grievances. Similarly, there has been a lot of discussion and critique of South Africa's land reform policy and its results or rather, its lack of results. Critics include black consciousness activist Andile Mnxgitama who is the leader of the Black First Land First (BLF) movement which seeks to avenge black people from the stronghold of white power. Further, the movement allegedly seeks to relieve black South Africans from the perception that the Constitution is the mechanism which will give them land.¹ This and other similar movements such as The Rural Women's Movement, Association for Rural Advancement (AFRA) and Nkuzi Development Association (NKUZI) symbolise the struggle and uncertainty surrounding land redistribution in South Africa.

To best understand the relationship between South Africans and land, one needs to take a brief look at South Africa's land policies over the last 100 years. Due to apartheid

¹ "Tasks of our revolution today!" Andile Mnxgitama, to the Extended National Coordinating Committee Meeting of BLF on 29 October 2016 at Yeoville, Johannesburg

legislation including The Glen Grey Act,² Group Areas Act,³ The Promotion of Bantu Self-Government Act,⁴ Native Land Act,⁵ and the Bantu Homelands Citizenship Act,⁶ black South Africans were deprived of land and citizenry to their ancestral land because of the apartheid government policies and legislation. Regarding the latter Act, four independent Bantustans were created by the apartheid government and the other six Bantustans were self-governing states. Black South Africans had to belong to a homeland, and their status as South Africans was revoked. Black South Africans could only access “South Africa” by permit given by a Minister.⁷ This is only one policy instated by the apartheid government which not only limited the movement of black South Africans but also limited their access to land.

It was therefore, the duty of the Constitution through section 25, to restore the land to those who had lost their ‘property after 19 June 1913 as a result of the past racially discriminatory laws or practices.’⁸ It is under this section that the Restitution of Land Rights Act⁹ and Communal Land Rights Act¹⁰ came into being. The Communal Land Rights Act was aimed at securing tenure for communities who had lost their rights to communal land. Combined, the aim of the legislations was to restore land to those whose land rights had been taken away due to apartheid era legislation. Accompanying these Acts, was legislation which sought to give recognition to traditional authorities and communities in line with Chapter 12 of the Constitution which recognised the ‘institution, status and role of traditional leadership’¹¹ and further recognises the application of customary law by the courts. This resulted in the Traditional Leadership and Governance Framework Act,¹² Traditional Affairs Bill¹³ and the Traditional and Khoi-San

2 Act 25 of 1894

3 Act 41 of 1950

4 Act 46 of 1959

5 Act 27 of 1913

4 Act 26 of 1970

7 Act 26 of 1970

8 The Constitution of the Republic of South Africa Act 108 of 1996

9 Act 22 of 1994

10 Act 11 of 2004 (Declared unconstitutional by the Constitutional Court in *Tongoane and Others v National Minister for Agriculture and Land Affairs and Others* (CCT100/09) [2010] ZACC 10; 2010 (6) SA 214 (CC) ; 2010 (8) BCLR 741 (CC) (11 May 2010)

11 The Constitution of the Republic of South Africa Act 108 of 1996 Section 211 (1)

12 Act 41 of 2003

13 B003B-2005

Leadership Bill¹⁴ amongst others, being enacted. The reasoning behind the enactment of some of this legislation has been questioned as it seems to place people in traditional communities in similar positions, if not worse, than those experienced during the apartheid era.¹⁵ Therefore the argument of land allocation in rural communities cannot exist in isolation but should be considered within the context of the traditional community and its leadership structures.

However, the discussion then and now regarding land allocation and redistribution still fails to take into account the specific relationship that women have with land. The Constitution and other land reform policies have identified gender equality as a key objective for land reform in South Africa. However, women in South Africa still have not had direct access to land, more so women in traditional communities. The 53rd National Conference of the African National Conference addressed the issue and stated that land restitution in South Africa has failed to address the needs of women, and all the impairments which have led to this should be removed to accelerate land access for women.¹⁶ The landscape regarding marriage and succession has changed over the years, but the law has yet to catch up. Land for women symbolises welfare; efficiency; equality and empowerment.¹⁷ It means that women can yield agricultural produce for themselves or trade; the land can be used as a form of security for mortgage and as a form of status.¹⁸ Most importantly, land owned by women increases a woman's bargaining power in her community and reduces 'the debilitating economic dependence on men.'¹⁹ It also provides the women with the political clout, which women desperately seek.²⁰ Agarwal's argument remains relevant in as far as it establishes the relationship that women should ideally have with the land. Indigenous customary laws practiced from generation to generation continue to hinder women's ability to access land.

14 B-2015

15 A Claassens 'Law, land and custom., 1913-2014: What is at Stake?' in B Cousins and C Walker (eds) *Land Divided, Land Restored : Land Reform in South Africa for the 21st Century* (2015) 68

16 20 December 2012

17 B Agarwal 'A field of one's own: Gender and Land Rights in South Asia' (1994) 3 *Journal of Agrarian Change* 184

18 *Ibid* Page 108

19 *Ibid* Page 107 & 108

20 A Tripp 'Women's Movements, Customary Law and Land Rights in Africa: The Case of Uganda' (2004) 7 (4) *African Studies Quarterly* 6

The International Covenant on Elimination of All Forms of Discrimination Against Women (CEDAW)²¹ as well as the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women (Maputo Protocol)²² jointly state that States must actively create appropriate legislative and institutional measures to combat all forms of discrimination against women²³ and that States must create policies which integrate gender perspectives.²⁴ These provisions have been domesticated by South Africa and can be clearly seen in legislation regulating affirmative action in the public and private sector.²⁵ However, legislation regarding land allocation and traditional leadership seems to be lacking behind and does not comply with the above provisions. The development of customary law seems to be happening at a much slower pace, and this is directly impacting women's ability to own land in traditional communities. Social change in rural communities is happening at a faster rate, and parliament cannot seem to keep up. It is then the role of the judiciary to develop customary law and legislation and interpret current laws in light of the Constitution and societal change.

As such this study seeks to contribute to the knowledge and understanding of South Africa's land redistribution process, and its impact on women. The main aim of this study is not to focus on land redistribution and its impact on black South Africans in general but, to look at the impact on black women living in traditional communities with specific cognicance given to the changing and shifting social dynamics in traditional communities. The stance taken is that women in traditional communities should be given ownership rights of land.

1.4 Methodology

I use a desktop approach that primarily focuses on case law and legislation and the critique thereof. The primary source will be case law of the Supreme Courts of South Africa, and legislation will include policies; Bills and Acts of Parliament, minutes of

21 Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979

22 Protocol to the African Charter on Human and Peoples Rights on the Rights of Women , 25 November 2005

23 Article 2(1) Protocol to the African Charter on Human and Peoples Rights on the Rights of Women

24 Article 2(1)(c) Protocol to the African Charter on Human and Peoples Rights on the Rights of Women

25 Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000

parliamentary committees, research reports, and journal articles pre-dating the Constitution and thereafter. Research conducted on traditional communities will supplement the work.

Case law will be the focal point of this dissertation as it is the mechanism by which courts make their decision.

1.5 Structure

Chapter two outlines the status of customary law a source of law through the colonial and apartheid era. This chapter also discusses the current status of customary law and how it is applied by traditional leaders as custodians of customary law and assess whether the current application has granted women better access to land.

Chapter three analyses some of the legislation which has or could have an impact on women's access to land. It analyses the submissions made by organisations at the forefront of the women's rights and determine whether the legislation was able to advance women's access to land.

Chapter four provides a case law analysis. It outlines and comments on some of the cases brought by the Constitutional Court and considers the extent to which they have advanced women's access to land.

The final chapter provides some observations and recommendations.

Chapter Two: What is the position of women under customary law with reference to land?

2.1. Introduction

At the birth of South Africa's democracy in 1994, the status of customary law and its application in the democratic dispensation plagued both the courts and the negotiators of the Constitution. On the one hand stood the traditional leaders who as custodians of customary law argued that customary law, and by extension of their traditional leadership, was the recognized form of government acknowledged in many communities across South Africa. Hence, as a result it should be granted recognition and should not be subjected to the Bill of Rights or national legislation. On the other hand, stood the drafters of the Constitution and the Constitutional Court ("Court") who, in certifying the Constitution recognized the status and role of the traditional leadership according to customary law, and stated that the application of customary law would be subject to the Constitution and legislation.²⁶

Traditional leaders consist of approximately 829 senior traditional leaders supported by 7127 headmen and headwomen and govern approximately a third of South Africa's population.²⁷ Senior Traditional leaders and headmen are sometimes responsible for allocating land in traditional communities. In certain instances, it is these traditional leaders who are the barriers to women's access to land. The right to land determines the unequal power relationship between men and women.²⁸ Despite the recognition entrenched in the Constitution, the status of customary law in South Africa still remains grey and uncertain particularly when it is applied to women as it is deeply rooted in

26 Certification of the Constitution of the Republic of South Africa, 1996 (CCT 23/96) [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) (6 September 1996)

27 Integration of Traditional Leadership, Governance and Local Authorities - Department of Co-operative Governance and Traditional Leadership 3 October 2016

28 C Cross and D Horny 'Opportunities and Obstacles to Women's Land Access in South Africa: A Research Report for the Promoting Women's Access to Land Programme' in Provincial And Local Government Portfolio Committee: Congress of South African Trade Unions Submission On Traditional Leadership And Governance Framework Bill

patriarchy.²⁹ In addition, the question of its development remains controversial as some believe that the interference by the courts and the codification of customary will render customary law fluid and thus contrary to its 'natural form'.³⁰

Therefore it is pivotal that this system of law be developed as it affects nearly 35 per cent of South Africa's population.

In this chapter I will investigate the position of women under customary law with reference to land.

2.2. Access to land under customary law in colonial times

The footprints of customary law, as the 'customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of these peoples'³¹ can be traced as far back as the emergence of traditional communities in South Africa and though then not codified,³² customary law has existed in South Africa since time immemorial. A pseudo dual system of law was applicable in South Africa, though customary law was not recognized as a source of law by the colonial government, it could be applied by the Courts in limited circumstances.³³ Customary law was primarily applied by the traditional leaders in traditional courts and was used by the civil courts in limited circumstances, which are discussed below. Though applied, customary law was seen as subordinate law with the common law seen as the superior law in civil courts though it was the first law.

When the Dutch arrived in the Cape in 1652, they brought a long a system of law which was foreign to the land. They sought to implement the common law as the law of the

29 C Cross and D Horny 'Opportunities and Obstacles to Women's Land Access in South Africa: A Research Report for the Promoting Women's Access to Land Programme 59

30 Certification of the Constitution of the Republic of South Africa, 1996 (CCT 23/96) [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) (6 September 1996) 200

31 Recognition of Customary Marriages Act 120 of 1998 Section 1

32 TW Bennet *Customary Law in South* (2004) 2

33 TW Bennet *Customary Law in South* (2004) 36

land applicable to all who resided within the territory.³⁴ Further along in 1864, the colonial government which was based close to the Xhosa speaking communities, put in place legislation and policies which sought to undermine the traditional rulers. This was done by withdrawing the sole responsibility of administration of justice from the traditional rulers and placing it in the hands of the Magistrates. This resulted in Chiefs losing their power to the Magistrates. This however, posed a problem in areas such as Cape Town where whites lived in close proximity to black South Africans and as a result, the Native Succession Act³⁵ was enacted to allow Magistrates to apply customary law in cases of intestate succession only. Other areas of limitation of application of customary law were also in the Cape where colonial courts were endorsed to apply customary law in limited circumstances, where it was compatible with 'the general principles of humanity observed throughout the civilized world.'³⁶ Similar restrictions also applied in Natal where the courts could apply customary law 'in so far as it was not repugnant to the general principles of humanity observed throughout the civilized world.'³⁷

Though the law limited the application of customary law in common law courts, women's access to land prior to the apartheid era was still very strong and was entrenched in customary law. Claassens and Ngubani³⁸ argue that women had specific rights to parts of the family land and women, including single women, could acquire land in their own right and not in the name of a male or a family. They further submit historical evidence which shows that women had stronger power within the family unit because they were the producers of food. This was all diminished by apartheid era legislation which restricted the rights to land, to men.

Women's rights to land were dramatically impacted by the introduction of native commissioners. In Transvaal, partial recognition was given to customary law. The

34 TW Bennet *Customary Law in South* (2004) 34

35 Act 10 of 1854

36 TW Bennet *Customary Law in South Africa* (2004) 36

37 TW Bennet *Customary Law in South* (2004) 38

38A Claassens *Land Power And Custom: Controversies Generated By The Communal Land Rights Act Of 2004* (2008) 165

Transvaal Law 4 of 1885³⁹ allowed for the appointment of native commissioners who were granted judicial powers and the Department of Native Affairs functioned as a court of appeal. The courts were able to apply customary law in civil disputes between Africans if the disputes were not inconsistent with the 'general principles of civilization recognized throughout the civilized world.'⁴⁰ The Commissioners were further tasked with vetoing allocations of land made to women. This practice changed the custom of wives having their own plot and created the 'one man, one lot' practice.⁴¹ Over time, the rights to land were regarded as male rights which could be inherited from generation to generation by males or eldest male heirs. This in turn became the entrenched customary law applied until today.

Under the Union of South Africa,⁴² the government was plagued with different problems including the Africans' urbanization, their political consciousness and education. The government's previous limited recognition of customary law had resulted in the Africans' detachment from their tribal authorities. As a result, the government sought to 'retribalize' the Africans.⁴³ The Native Land Act⁴⁴ was thus enacted to implement the government's plan of limiting Africans' land tenure. Africans were prohibited from buying and selling land in certain areas. In addition, the Chiefs were reinstated their powers to adjudicate civil matters under the Native Administration Act.⁴⁵ The courts of traditional leaders could only apply customary law in matters concerning Africans only, while the civil courts could apply a plural system of customary law and common law. The culmination of these pieces of legislation resulted in the further segregation of whites and blacks in South Africa; with blacks being less able to secure land. Bennet submits that under the Law of Evidence Amendment Act⁴⁶ customary law was finally given recognition even though it was still limited in application as it could only be applied to

39 Transvaal Law 4 of 1885

40 TW Bennet *Customary law in South Africa* (2004) 39

41 A Claassens *Land Power And Custom: Controversies Generated By The Communal Land Rights Act Of 2004* (2008) 166

42 31 May 1910

43 TW Bennet TW *Customary Law in South* (2004) 41

44 27 of 1913

45 38 of 1927

46 45 of 1988

matters related to Africans and customary law was still seen as subordinate to common law.⁴⁷

At the pinnacle of the apartheid era, the Bantu Authorities Act⁴⁸ was enacted to create independent self-governing homelands. Nine authorities were created under the Promotion of Bantu Self Government Act⁴⁹ namely: North Sotho (Lebowa), South Sotho (Qwa Qwa), the Swazi (Kangwane), the Tsonga (Gazankulu), Tswana (Bophuthatwana), the Venda (Venda), the Ndebele (KwaNdebele), the Xhosa (Transkei and Ciskei) and the Zulu (KwaZulu). By 1976 the Transkei, Ciskei, Venda and Bophuthatwana were granted independence. The introduction of the PTO (“Permission to Occupy”) certificates in the 1960’s and the quitrent title deeds further solidified Africans’ non-existent land ownership tenure and exacerbated the practice that land could not be owned by women. The PTO’s could only be issued in the name of a male family head.⁵⁰

The result of all of these policies was that black communities were displaced and had little or no ownership rights to land. 87% of the land in South Africa was owned by minority white population.⁵¹ Black people had no ownership of land as it was held in trust by a Minister designated by the apartheid government. Another consequence was that women’s land rights by this time were close to invisible.

2.3. Women’s access to land under customary law

In pre-colonial times, women had stronger rights to land. The Constitutional Court quoting Claassens submitted that

there is a range of historical and ethnographic accounts that indicate that women as producers, previously had primary rights to arable land, strong rights to the property of their married houses

47 TW Bennet TW *Customary Law in South* (2004) 42

48 Act 68 of 1951

49 Act 46 of 1949

50 A Claassens *Land Power And Custom: Controversies Generated By The Communal Land Rights Act Of 2004* (2008) 167

51 “Land is our Dignity” *Daily Maverick* 29 June 2017

within the extended family, and that women, including single women, could be and were allocated land in their own right. Furthermore there are accounts of women inheriting land in their own right. However, Native Commissioners applying racially based laws such as the Black Land Areas Regulations and betterment regulations issued in terms of the South African Development Trust and Land Act repeatedly intervened in land allocation processes to prohibit land being allocated to women.⁵²

Prior to South Africa obtaining democracy, women in traditional communities were able to acquire access to land through their family, inheritance and through their community. Primary access to land was through marriage.⁵³ Women would seldom have ownership of land as ownership had to be vested in the male. However, in the post democratic South Africa, the narrative has changed.

Numerous studies⁵⁴ conducted in Eastern Cape, KwaZulu Natal, North West Province and Limpopo, have challenged this narrative and have shown that since 1994,⁵⁵ women in traditional communities have been able to secure land in their own rights. Single women, single mothers or 'women who were never married', are the recipients of residential sites in most areas. Single women have been able to change the existing norms, apply democratic principles of equality and dignity and argue that they are entitled to residential sites. One of the arguments advanced is that in terms of custom, men would be entitled to a residential site once they had a family to support. Single women with children have been able to apply this same argument and state they are entitled to the same benefit because they are supporting families. Other more practical reasons for single women and 'single women with children' acquiring residential sites is that traditional councils were plagued with a number of disputes which were caused by overcrowding in houses. In order to mediate the situation, traditional councils and headmen would allocate residential sites to women and their children. In some communities however, single women are allocated land if they have a male son in

52 Gumedde (born Shange) v President of the Republic of South Africa and Others (CCT 50/08) [2008] ZACC 23; 2009 (3) BCLR 243 (CC); 2009 (3) SA 152 (CC) (8 December 2008) para 17

53 C Cross and D Horny 'Opportunities and Obstacles to Women's Land Access in South Africa: A Research Report for the Promoting Women's Access to Land Programme' (2002) 104

54 A Claassens, D Smythe *Marriage, Land and Custom* (2013)

55 South African Law Reform Commission 'Project 25: Statute Law Report The Repeal Of The Black Administration Act 38 Of 1927 March 2004 15

whose name the site can be registered or if they were accompanied by a male relative.⁵⁶ Therefore land security is also influenced by the traditional leaders and their decisions. The traditional community members are subjects of the traditional leader and if the leader is not pleased with their conduct, they can be chased away or ostracized by the community.⁵⁷

Claassens further argues that this allocation can also be conditional to the payment of a fee. It is common in most traditional communities to pay a customary fee for the allocation of a residential site; however, not all women can afford to pay the required fee for the allocation of a residential site.

Other factors which have influenced this increase of single women acquiring residential sites is, the steady decline of marriage rates in South Africa as a whole, meaning that women have children but are less likely to get married or are choosing to not get married. However, the greatest factor seems to be the Constitution and its impact on women's confidence to stand up and demand the protections afforded to them by the Constitution.⁵⁸

Married women still face difficulty in accessing land because land is allocated to the husband. Married women '*makoti*' usually leave their homes and live with the husband and his family. As young wives, they usually work on the mother-in-law's plot of land until such a time as she is allocated her own plot. Should the '*makoti*' be married in a polygamous marriage, she is allocated her own residential plot. Once the husband dies, married women are at their most vulnerable. In some instances, women who are married have been evicted by their in-laws after the husband has died,⁵⁹ or are forced to marry their husband's brother '*ukungena*' and should they refuse, they are evicted from the home. This means that married women's land tenure is not secure. There have also

56 C Cross and D Horny '*Opportunities and Obstacles to Women's Land Access in South Africa: A Research Report for the Promoting Women's Access to Land Programme*' (2002) 103

57 C Cross and D Horny '*Opportunities and Obstacles to Women's Land Access in South Africa: A Research Report for the Promoting Women's Access to Land Programme*' (2002) 103

58 A Claassens, D Smythe *Marriage, Land and Custom* (2013)

59 *Bhe and Others v Khayelitsha Magistrate and Others* (CCT 49/03) [2004] ZACC 17; 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC) (15 October 2004) 83

been reports of widows acquiring land independently from the traditional leaders after their husband's family has evicted them.⁶⁰ However, this is not the norm. Married women are vulnerable and susceptible to evictions once their spouse dies.⁶¹

2.4. Conclusion

Since the dawn of democracy there have been a number of legislative interventions aimed at developing customary law and its practices to be on par with the Constitution as a result of colonial and apartheid era legislation, which saw Africans left with limited or non-existing rights to land. Pre-constitutional and constitutional era customary law has sometimes failed to take into cognizance the realities of women in traditional communities and has failed to see women past their traditional roles defined through custom. It is evident that a woman's marital statuses has an impact on her ability to access, own and utilize land. Customary law has failed to recognize the struggles of single women with children or 'women who were never married.' It has failed to grant them the required relief which would see them reap similar benefits to land as those of their male counter parts. It has failed to protect widowed women, whose rights to land are determined by their husband's family after he is deceased. It has solidified married women's limited access to land which is only guaranteed by her husband or their family home. Married women's land tenure is the most vulnerable. Customary practices continue to inculcate the sometimes patriarchal values which deprive women of their rights to land. Society continues to change and as a result, customary law applied by traditional leaders needs to change to meet the needs of the changing and evolving society.

60 A Claassens 'Recent Changes in Women's Land Rights and Contested Customary Law in South Africa' (2013) 13 *Journal of Agrarian Change*

61 A Claassens , D Smythe *Marriage, Land and Custom* (2013) 92

Chapter Three: What is the legislative framework regarding traditional governance, customary law and land, and what has been its role on enhancing women's access to land?

3.1 Introduction

The dawn of the democratic dispensation in South Africa brought about the recognition of 'customary' as a source of law equivalent to Roman Dutch Law. This was done through the inclusion of provisions in the Constitution which recognized cultural rights,⁶² traditional leadership⁶³ as well as customary law⁶⁴ as a source of law. However, there were a number of issues which still had to be addressed by the courts before customary law could find equal application. These issues included the lack of legal precedent and legal writing relating to customary law and its applications. This predicament was highlighted by the Court in the land mark judgment, *S v Makwanyane*⁶⁵

It is a distressing fact that our law reports and legal textbooks contain few references to African sources as part of the general law of the country. That is no reason for this court to continue to ignore the legal institutions and values of a very large part of the population, moreover, of that section that suffered the most violations of fundamental rights under previous legal regimes, and that perhaps has the most to hope for from the new constitutional order.⁶⁶

Nonetheless, customary law was still provided its recognition and the platform for it to develop. It has since been developed through the enactment of legislation and case law. This chapter will emphasize the development of customary law through legislation.

62 Constitution of Republic of South Africa Section 30 and 31

63 Constitution of Republic of South Africa Section 211 and Section 212

64 Constitution of Republic of South Africa Section 211

65 1994 (3) SA 868 (A)

66 *Ibid* paragraph 61

3.2 The Traditional Leadership and Governance Framework Act

The Traditional Leadership and Governance Framework Act⁶⁷ (“Framework Act”) was legislated in 2003 with the purpose of outlining the role and ambit of traditional leadership in South Africa. The Act seeks to implement provisions found in the Constitution relating to customary law and governance and also to complement the Constitution and traditional leadership. It is the foremost legislation relating to traditional leadership. Provincial forms of the Framework Act can also be found in Limpopo⁶⁸ and Eastern Cape.⁶⁹

In its draft form, the White Paper on Traditional Leadership and Governance⁷⁰ provided a general strong foundation for the advancement of women’s rights in traditional communities. It stated that women should comprise one third (1/3) membership in the traditional councils, Provincial House of Traditional Leaders and District Houses of Traditional Leaders.⁷¹ However, the only obligation placed on the National House of Traditional Leaders was that it should ‘ensure representation of women’ with no obligatory quota. Pertaining to women’s access to land, the paper however failed to address the detrimental role played by traditional leadership and customary law in limiting women’s ability to access land. It only provided that traditional leaders would play a role in the administration of land however this role was not adequately outlined in the Paper.⁷²

The lack of clarity on the powers bestowed on the traditional leaders to administer land, means that traditional leaders may continue to implement practices which adversely affect women’s access to land. This allows room for the implementation of patriarchal practices which exist in traditional communities and which are administered by

67 Act 41 of 2003

68 Act 6 of 2005

69 Act 4 of 2005

70 The White Paper on Traditional Leadership and Governance, July 2003

71 The White Paper on Traditional Leadership and Governance page 34

72 The White Paper on Traditional Leadership and Governance page 21

traditional leaders which directly impact women's access to communal, agricultural and residential land.⁷³

The Act has been subject to some criticism. The Act stipulates that national or provincial government may provide a role for traditional leadership in the administration of land. During the drafting stage of the Act, the Commission for Gender Equality cautioned against the inclusion of provisions which did not outright preclude sexism and gender inequality. The problem with leaving the administration of traditional affairs to be administered in the interest of the community is that the interests of the community do not represent the interests of all members of the community, especially women's interests in land, inheritance and participation in decision making bodies.⁷⁴

Citing a report published in 2012, *Opportunities and Obstacles to Women's Land Access in South Africa*, the Congress of South African Trade Unions (COSATU), submitted that women's ability to access land was influenced by, amongst others:

- women's lack of access to public process in their communities;
- their increased poverty burden;
- their coping mechanisms and efforts to sustain their household livelihoods;
- collective initiatives to access land;
- gender violence and other mechanisms through which men resist women's attempts at independence and
- the nature and capacity of the institutional structures found in traditional communities.⁷⁵

COSATU emphasized that the Bill had backtracked from its original strong stance on gender equity provided in the White Paper. COSATU stated that the Act had the opportunity to transform the institution of traditional leadership and address customary

73 Commission for Gender Equality Submission To The Provincial And Local Government Portfolio Committee Traditional Leadership And Governance Framework Bill B58-2003 17 September 2003

74 Commission for Gender Equality Submission to the Provincial And Local Government Portfolio Committee Traditional Leadership And Governance Framework Bill B58-2003 17 September 2003

75 C Cross and D Horny 'Opportunities and Obstacles to Women's Land Access in South Africa: A Research Report for the Promoting Women's Access to Land Programme' in Provincial And Local Government Portfolio Committee: Congress of South African Trade Unions Submission On Traditional Leadership And Governance Framework Bill

practices which were prejudicial to women's access to land.⁷⁶ However in its Bill form, it failed to address these issues. Their submission fell on deaf ears because the Act still fails to relinquish from traditional leaders the powers entrenched in them by the apartheid government which results in gender inequity and which directly impacts women's ability to access services and land.

3.3 Communal Land Rights Act

The Communal Land Rights Act (CLARA) will be the primary legislation used to analyse the courts understanding, interpretation and implementation of women's land tenure rights.

The Communal Land Right Act ("CLARA")⁷⁷ was supposed to provide persons living on communal land with security of tenure. The Act received a lot of criticism from rural residents and women's groups because it gave traditional councils ownership powers over communal land.⁷⁸ The Act failed to recognize that in some instances women may have *de jure* rights to land but that did not always translate into *de facto* rights. This means that women should not only have possession, use and enjoyment of land but should equally also have ownership rights. The Act was also criticized because it failed to provide mechanisms which would promote equity and secure women's access to land. It did not provide mechanisms for the protection, extension and monitoring of women's land tenure.⁷⁹

The Communal Land Rights Act was enacted in order to give effect to Section 25(6) of the Constitution which provides

76 Congress of South African Trade Unions Submission on the Draft White Paper on Traditional Leadership & Governance Submitted to the Department of Provincial & Local Government, 30 November 2002

77 11 of 2004

78 Legal Resources Centre's Submissions to the Portfolio Committee to Justice And Constitutional Development on Traditional Courts Bill 6 May 2008

79 Trust for Community Outreach and Education (TCOE) submission to the Department of Agriculture and Land Affairs on The Communal Land Rights Bill (2003)

A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.⁸⁰

CLARA aimed to secure land tenure for those whose tenure was rendered insecure due to policies enacted by the apartheid era government. These policies primarily affected Africans.⁸¹In its draft form, the Bill provided for a land administration committee which would, amongst other resolve land disputes⁸² and would represent a community owning communal land. There were a number of concerns raised by communities which addressed the composition and duties of the land administration committee. The Rural Women's Movement (RWM)⁸³ submitted that the Bill should stipulate that females (from both royal and non-royal families) should be elected by females in the community to represent their interests in the land administration committee. They further submitted that the 30% representation of women suggested by the Bill was not enough.

Most importantly the RWM submitted that the Bill failed to take into consideration the lived realities of women in traditional communities. By providing for the registration of new order rights, customary law practices which dictate that land should be owned and registered to men, would be entrenched. They further brought to light the effects that

80 11 of 2004

81 *Tongoane and Others v National Minister for Agriculture and Land Affairs and Others* (CCT100/09) [2010] ZACC 10; 2010 (6) SA 214 (CC) ; 2010 (8) BCLR 741 (CC) (11 May 2010) para 1

82 Other functions include:

In the exercise of its powers and the performance of its duties a land administration committee must -

(a) take measures towards ensuring -

- (i) the allocation by such committee, after a determination by the Minister in terms of section 18, of new order rights to persons, including women, the disabled and the youth, in accordance with the law; and
- (ii) the registration of communal land and of new order rights;

(b) establish and maintain registers and records of all new order rights and transactions affecting such rights as may be prescribed or as may be required by the rules;

(c) promote and safeguard the interests of the community and its members in their

(d) endeavour to promote co-operation among community members and with any

(e) assist in the resolution of land disputes

(f) continuously liaise with the relevant municipality, Board and any other institution concerning the provision of services and the planning and development of the communal land of the community;

83 The Rural Women's Movement (RWM) is a land rights women's movement comprised of 500 community-based organisations. It's main objectives are to secure land for women and to facilitate the strengthening of a mass based movement for rural women of Kwa-Zulu Natal.

marriage and divorce has on women's access to land. After the dissolution of a marriage, women are usually left with no land as the land and property on the land are tied to the husband by virtue of marriage. They further brought to light that land in traditional communities is held and administered by traditional leaders who at their own discretion can decide whether to provide women with land. Finally, they submitted that land allocation is provided at a price which women would not ordinarily afford. These practices are justified as 'custom.'⁸⁴

Claassens and Ngubane submit that organisations representing women were concerned that the Bill was reinforcing apartheid era policies which saw the land placed and administered by traditional leaders. The result of which was the enforcement of customary practices which discriminated against women. The apartheid era legislation (provided above) significantly reduced women's previous strong rights to part of the land. It was further submitted by the Commission for Gender Equality that S25 (6) should, at its core, aim to address the injustices faced by African women as a result of the apartheid era legislation.⁸⁵ Quoting a study conducted in KwaZulu Natal, Claassens and Ngubane⁸⁶ further submit that the changes happening in society need to be reflected in the customary systems and also in the allocation of land and in the legislative framework. As such, CLARA failed to reflect those changes which were happening in traditional communities.

CLARA⁸⁷ was challenged before the Constitutional Court primarily due to the lack of public participation as required by 59(1)(a) and 72(1)(a) of the Constitution. It was argued by the applicants that CLARA prescribed customary law practices which reduced the tenure security for children and single women. It was also argued that the Act actively discriminated against women in traditional communities. Firstly, it failed to

84 Rural Women's Movement (Kwa-Zulu Natal) Submission To The Portfolio Committee On Agriculture And Land Affairs On The Communal Land Rights Bill (2003)

85 The Bill failed to provide measures to deal with the systematic discrimination practiced by traditional councils and which deprive women of land - Page 172 Land power and custom.

86 A Claassens 'Law, land and custom, 1913-2014: What is at Stake?' in B Cousins and C Walker (eds) *Land Divided, Land Restored: Land Reform in South Africa for the 21st Century* (2015) 169

87 *Tongoane and Others v National Minister for Agriculture and Land Affairs and Others* (CCT100/09) [2010] ZACC 10; 2010 (6) SA 214 (CC) ; 2010 (8) BCLR 741 (CC) (11 May 2010)

grant women the required representation in the traditional councils even though women had a greater population in traditional communities.

Secondly it was argued that by converting old order rights granted by apartheid era legislation, to new order rights by registration in terms of CLARA, CLARA still failed to secure women's land tenure. It was argued that women did not have any rights in the old order and therefore there were no rights to register and convert in the new era. Therefore S4 (2) of CLARA⁸⁸ was superfluous as it only enforced an existing discrimination. To this Professor Nhlapho stated

The deeming provision in section 4(2) of CLARA, which deems old order rights to be held by all spouses in a marriage, will assist married women living in nuclear families, but does not address the issue of the family-based nature of land rights in extended families. Land rights will be vested exclusively in the name of a man and his wife or wives, to the exclusion of the rights of other family members, including any widowed mothers and unmarried sisters or brothers or the orphaned children of siblings.⁸⁹

Finally, it was argued by the applicants that the powers vested in the traditional council were such that a fourth tier of government was created which is contrary to the Constitution which only envisaged a three tier government. These powers would reflect those of the executive branch defined in the Constitution.⁹⁰

To this end, CLARA was declared unconstitutional in its entirety by the Constitutional Court. The Court most significantly noted the impact that apartheid era legislation had on land tenure for Africans. Though there was no specific opinion on CLARA's effect on women, it is evident that CLARA would have had a negative effect on women and their ability to access land and it would have enforced customary land tenure practices which hinder women's ability to access land.

⁸⁸ Section 4(2): An old order right held by a married person is, despite any law, practice, usage or registration to the contrary, deemed to be held by all spouses in a marriage in which such person is a spouse ... and must, on confirmation or conversion in terms of section 18(3), be registered in the names of all such spouses.

⁸⁹ Affidavit of Professor R Nhlapho in *Tongoane and Others v National Minister for Agriculture and Land Affairs and Others* (CCT100/09) [2010] ZACC 10

⁹⁰ Founding Affidavit in the matter *Tongoane and Others v National Minister for Agriculture and Land Affairs and Others* (CCT100/09) [2010] ZACC 10

3.4 The Traditional Courts Bill

The Traditional Courts Bill(s) have yet to see the light of day. The Bill has been presented on numerous occasions and has faced numerous challenges. The Bill seeks to recognize the justice system applicable in traditional communities and to place it in line with Constitutional values.⁹¹ However the Bill has failed to recognize the experience and lived realities of women who approach the courts. In some courts women can only be witnesses or silent listeners or must be represented by a male figure, however in other courts they have won the right to present a case themselves or even to adjudicate in the role of kgosigadi or councillor (regent).⁹² Women have spoken out that the courts should not have authority over issues relating to status, maintenance and land because the courts tend to prejudice women. Women's land tenure would be affected by the customary law of land should the administration of land be within the jurisdiction of traditional leaders. The Bill was highly problematic because it did not speak to the concerns raised by women relating to traditional leadership and patriarchy.⁹³

In 2017, another version of the Bill was presented. Though this version of the Bill has been defined as an improvement, Wicomb warns that we must still tread with caution.⁹⁴ Unlike its predecessors, the Bill allows community members who wish to not have their matter adjudicated by the Traditional Court, to opt out of the traditional court and the matter be heard by another traditional court, court or forum.⁹⁵ The Bill provides in

Section 5(1):

Members of a traditional court must -

- (a) consist of women and men, pursuant to the goal of promoting the right to equality as contemplated in section 9 of the Constitution;.....

Section 5 (2):

⁹¹ Traditional Courts Bill B1-2012 Preamble.

⁹² Trust for Community Outreach and Education (TCOE Submissions to Department of Agriculture and Land Affairs:) on The Communal Land Rights Bill (2003)

⁹³ Cooperative Governance and Traditional Affairs

National Assembly Committee Traditional Courts Bill: public hearings (day 4) NCOP Security and Justice 21 September 2012

⁹⁴ 'Why I'm Cautiously Optimistic About The New Traditional Courts Bill Being Back' *Huffington Post Blog* 27 January 2017

⁹⁵ Section 4(3) Traditional Courts Bill [B — 2016]

Traditional courts must promote and protect the representation and participation of women, as parties and members thereof.

These two provisions and others in the Act, provide women with greater rights than in the other versions of the Bill. The opting out option means that those who are most vulnerable in the communities, can decide to not appear before the traditional leader or council meaning that they may use other mechanisms or tribunals to adjudicate disputes.

3.5 Customary law marriage and women's access to land (Legislative Interpretation)

It is clear from the above that the Courts have to consider the changing societal practices and norms when making a determination of customary law.

3.5.1 Recognition of Customary Marriages Act

In *Women's Land Rights and Social Change in rural South Africa: the case of Msinga, KwaZulu Natal*,⁹⁶ Cousins reflects on a number of studies conducted in the area which reflect a change in societal perceptions of marriage and which have directly affected women's access to land. Firstly, Cousins notes that the pre-colonial practices relating to land and marriage have been obstructed over the years. These obstructions were created in order to reinforce western ideas of marriage and property ownership and to do away with those which have been created through custom. As stated above, in precolonial times women had stronger rights to land. This was diminished by the emergence of colonial laws which enforced property rights to men and which rendered women's rights to land invisible. The result was the distortion of customary law, customary marriage and customary land tenure as it was understood then.

⁹⁶ "Women's land rights and social change in rural South Africa: the case of Msinga, KwaZulu Natal" in A Claassens and D Smythe 'Marriage land and custom: Essays on law and social change in South Africa' (2013) 73

In the 1950's, due to the strict forms of customary marriage enforced by traditional leaders and the government, many women left traditional communities in order to find alternative sources of livelihood. They also rejected these strict forms of customary marriage. The enforcement of these strict forms of customary marriage was also hindered by the rise of unemployment in the 1980's and as such men could not fully comply with the requirements of *lobola*. Further developments occurred around the 80's and 90's where, due to the changing societal perceptions of marriage and the rise of unemployment, women choose not to be married but to find their own way of making a living. Claassens argues that over the last two decades, the emergent social grants have resulted in women's self-sufficiency and less reliance on the migrant labour.

It is clear from the above that marriage is one of the greatest factors for women to access land. Where single women with children used to be unable to acquire land, the norm has started to change and as such, through individual agency, single women with children have been able to argue for their own rights to land. Married and widowed women remain the most vulnerable group though as the rights to land still remain with the husband.

At the forefront of gender equity under customary law is the enactment of the Recognition of Customary Marriages Act ("RCMA").⁹⁷ This Act seeks to provide for the equal status and capacity of spouses in customary marriages and to regulate the propriety consequences of a marriage solemnized in terms of custom.⁹⁸ This Act came about as a result of the continued bias experienced by women married in terms of custom. In some instances, customary law practices limit women's ability to inherit and limit their right to determine whom they wish to marry and if or when they wish to get married. Practices such as *ukuthwala*⁹⁹ and *ukungena*¹⁰⁰ are examples of such

97 120 of 1998

98 Recognition of Customary Marriages Act 120 of 1998 Preamble

99 Ukuthwala is a form of abduction that involves the kidnaping of a girl or a young woman by a man and his friends or peers with the intention of compelling the girl or young woman's family to endorse marriage negotiations - MJ Maluleke 'Culture, Tradition, Custom, Law And Gender Equality' (2012) 15 *Potchefstroom Electronic Law Journal* 12

practices. *Ukungena* directly impacts a women's ability to access land. According to Maluleke,¹⁰¹ some women from KwaZulu Natal and Eastern Cape are forced to marry the brother or male relative of the deceased husband. Should the woman refuse to marry again, the woman is expelled from her home and loses custody of her children, land and her inheritance.

In its draft form, the Bill provided for the recognition of customary marriages and for the equal treatment of spouses in customary marriages. Written submissions provided by the House of Traditional Leaders, Eastern Cape Province ("HTLEC"),¹⁰² specified that spouses in a customary marriage cannot be equal. The HTLEC proposed that the provision should be drafted as 'the wife in a customary marriage should enjoy all the privileges and status in accordance with traditional and culture of the family.' This is contrary to the submission provided by the Commission for Gender Equality¹⁰³ which cautioned against the continued implementation of customary and religious laws which affected women's ability to inherit. The HTLEC failed to consider customary practices which hinder women's access to land, such as inheritance and a refusal to '*ngena*' by the bride.

3.5.2 Recognition of Customary Marriages Act - Requirements

3.5.2.1 Registration of customary marriages

Writers have argued that the coming into force of the RCMA has assisted women, however, some of its provisions have left women more vulnerable in other instances. The RCMA provides that the marriage has to be negotiated and entered into in terms of custom. There is also a requirement requiring the registration of the marriage,¹⁰⁴ which has left many women vulnerable especially if the marriage was not registered prior to

100 The inheriting of a deceased person's wife - MJ Maluleke 'Culture, Tradition, Custom, Law And Gender Equality' (2012) 15 *Potchefstroom Electronic Law Journal* 12

101 MJ Maluleke 'Culture, Tradition, Custom, Law And Gender Equality' (2012) 15 *Potchefstroom Electronic Law Journal* 12

102 House of Traditional Leaders Eastern Cape Submissions to the Justice Portfolio Committee on Recognition of Customary Marriages Bill

103 Commission on Gender Equality Submissions to Justice Portfolio Committee on Recognition of Customary Marriages Bill 22 September 1998

104 Recognition of Customary Marriages Act 120 of 1998 Section 4

their spouse's death. The vulnerability arises in instances when the husband dies and the family of the husband brings an application to court seeking an order declaring that the spouses were never married in terms of the requirements in the RCMA.¹⁰⁵

3.5.2.2 Compliance with requirements in terms of s3 of Recognition of customary marriages Act

Mwambene and Kruise¹⁰⁶ argue that the courts have yet to provide legal certainty whether *lobola*¹⁰⁷ should be paid partially or in full for a marriage to be said to be concluded in terms of custom.¹⁰⁸ They argue that court decisions show that there is an attempt to protect the institution of marriage as opposed to protecting vulnerable parties in marriages. They further submit that in instances where there are negative financial implications for the vulnerable party, the court should consider a decision which seeks to protect the interest of the vulnerable party. In our instance, this would be the protection of a women's right to inherit and by extension, to inherit land and property.¹⁰⁹

In the *Gumede*¹¹⁰ case Section 7 of the RCMA, as well as KwaZulu Act on the Code of Zulu Law 16 of 1985 were challenged before the Constitutional Court. Mrs Gumede was married to Mr Gumede in 1968 and was in the process of obtaining a divorce when the matter was brought before the Constitutional Court. When the RCMA came into being in 1998, it provided in Section 7¹¹¹ that marriages concluded after the 15 November 2000 would ordinarily be a marriage in community of property. The RCMA further provides

¹⁰⁵ Nhlapo v Mahlangu and Others (59900/14) [2015] ZAGPPHC 142 (20 March 2015)

¹⁰⁶ L Mwambene & H Kruise 'Form over function? The practical application of the Recognition of Customary Marriages Act 1998 of South Africa' in A Claassens and D Smythe *'Marriage land and custom: Essays on law and social change in South Africa'*(2013) 306

¹⁰⁷ Recognition of Customary Marriages Act 120 of 1998 Section 3

¹⁰⁸ "Payment of the full amount, however, is not a prerequisite for a valid customary marriage." *Matlala v Dlamini and Another* (35611/2008) [2010] ZAGPPHC 277 (3 June 2010). In *Nemavunde and Another v Mavhungu and Another* (171/2014) [2015] ZALMPHC 5 (10 December 2015) the court found that the marriage had been valid. The deceased had paid R50.00 for "Thodela Ngeno" An amount of R1000.00 was paid as 'lobola'

¹⁰⁹ L Mwambene & H Kruise 'Form over function? The practical application of the Recognition of Customary Marriages Act 1998 of South Africa' in A Claassens and D Smythe *'Marriage land and custom: Essays on law and social change in South Africa'*(2013) 312

¹¹⁰ *Gumede (born Shange) v President of the Republic of South Africa and Others* (CCT 50/08) [2008] ZACC 23; 2009 (3) BCLR 243 (CC); 2009 (3) SA 152 (CC) (8 December 2008)

¹¹¹Section 7(2) provides: "A customary marriage entered into after the commencement of this Act in which a spouse is not a partner in any other existing customary marriage, is a marriage in community of property and of profit and loss between the spouses, unless such consequences are specifically excluded by the spouse in an antenuptial contract which regulates the matrimonial property system of their marriage."

that marriages concluded prior to 15 November 2000 would be marriages governed by customary law. The Code of Zulu Law, which is a codification of customary law, provides that the husband is the head of the family and all property is vested in him. This property right includes rights to land. Mrs Gumede contended that these provisions were discriminatory and as a result of them, she would only be entitled to one quarter of the estate.

The Court noted women's precolonial rights to land and averred

[L]egislating these misconstructions of African life had the effect of placing women 'outside the law'. The identification of the male head of the household as the only person with property-holding capacity, without acknowledging the strong rights of wives to security of tenure and use of land, for example, was a major distortion. Similarly, enacting the so-called perpetual minority of women as positive law when, in the pre-colonial context, everybody under the household head was a minor (including unmarried sons and even married sons who had not yet established a separate residence), had a profound and deleterious effect on the lives of African women. They were deprived of the opportunity to manipulate the rules to their advantage through the subtle interplay of social norms, and, at the same time, denied the protections of the formal legal order. Women became 'outlaws.'¹¹²

The Court provided a strong judgement and stated that in Mrs Gumede's inability to inherit from the joint estate due to the RCMA and the Code were discriminatory. The Court stated

The matrimonial proprietary system of customary law during the subsistence of a marriage, as codified in the Natal Code and the KwaZulu Act, patently limits the equality dictates of our Constitution and of the Recognition Act. The former statutes provide that the family head is owner of all the family property over which he has 'charge, custody and control' and may 'in his discretion use the same for his personal wants and necessities, or for general family purposes or for the entertainment of visitors.'⁴⁸ This patriarchal domination over, and the complete exclusion of, the wife in the owning or dealing with family property unashamedly demeans and makes

¹¹² Gumede (born Shange) v President of the Republic of South Africa and Others (CCT 50/08) [2008] ZACC 23; 2009 (3) BCLR 243 (CC); 2009 (3) SA 152 (CC) (8 December 2008) para 17

vulnerable the wife concerned and is thus discriminatory and unfair. It has not been shown to be otherwise, nor is there any justification for it.¹¹³

The Court declared, amongst other orders, that Section 7 of the RCMA was inconsistent with the Constitution and invalid to the extent that its provisions relate to monogamous customary marriages. Section 20 of the KwaZulu Act and the Code of Zulu Law 16 of 1985 was declared inconsistent with the Constitution and invalid.

3.6 Conclusion

Through the legislative process, communities are able to present their views on legislation and its impact on their lives. The RCMA was hailed a great step forward. It was able to answer a number of concerns raised by women who are married in terms of customary law. RCMA continues to develop as more and more cases emerge which affect women married in terms of custom. Organisations working within the space should continue to push the boundaries of the RCMA and challenge and develop it so that the consequences can benefit all women.

CLARA was criticised because of its inability to translate the issues faced by women in traditional communities, into legislation. Instead of advancing women and speaking to their needs, it merely codified patriarchal and non-inclusive processes. It has been highlighted above that the societal changes must be reflected in legislation and case law. Where legislation fails to consider its constituency, it cannot be said to be effective. Therefore, the consultative process, must be promoted so that many voices can be heard and be considered.

113 Gumedé (born Shange) v President of the Republic of South Africa and Others (CCT 50/08) [2008] ZACC 23; 2009 (3) BCLR 243 (CC); 2009 (3) SA 152 (CC) (8 December 2008) para 46

Chapter Four: Have the courts been effective in developing customary law and in countering legislative shortfalls to address women's access to land?

4.1 Introduction

The South African judiciary has been tasked with developing the common law and customary law by promoting the spirit, purport and objects of the Bill of Rights.¹¹⁴ Prior to the Certification of the Constitution, traditional leaders had approached the Court and argued that the provisions in the Interim Constitution were undermining traditional leadership and customary law. It was further argued by the proponents that the horizontal application of the Bill of Rights would undermine customary practices such as *lobola* and jeopardize 'patriarchal principles which underlay much of indigenous law.'¹¹⁵ Though the Court did not have ambit to resolve the latter argument, the Court declared that in a Constitutional state, no institution-including traditional leadership, could exist outside the ambit of the Constitution. The interpretation of customary law in the future would depend on the societal evolution, legislative development and judicial interpretation.¹¹⁶

In this chapter I will be analyzing the court's interpretation of customary law and its take on legislation which affects customary law and women's access to land. This chapter's analysis will be limited to case law.

4.2 Development of customary law - Case law analysis

4.2.1 Living customary law and official customary law

114 Constitution of the Republic of South Africa Section 39

115 Certification of the Constitution of the Republic of South Africa, 1996 (CCT 23/96) [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) (6 September 1996) 200

116 Certification of the Constitution of the Republic of South Africa, 1996 (CCT 23/96) [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) (6 September 1996) 197

The question of whether 'living customary law' or 'official customary law' has to be applied by the courts, has to be determined through the historical lens. The common law which existed from 1913 until the democratic era had an influence on the current version of law applied as customary law. Legislation implemented by the colonial and apartheid government had the result of stagnating and morphing existing forms of customary law and this directly affected African's land tenure, as discussed above.

In the last 23 years, the Constitutional Court has had to deal with the question of 'living' vs 'official' customary law. One of the first cases that the Court had to grapple with this question was in the *Bhe*¹¹⁷ case. The Court provided an interpretation of s39¹¹⁸ of Constitution and declared that customary law is an independent source of law and should not merely be tolerated, but should be accepted as a source of law provided that it does not conflict with provisions in the Constitution. The Court added that 'customary law must be interpreted by the courts, as first and foremost answering to the contents of the Constitution. It is protected by and subject to the Constitution in its own right.'¹¹⁹ Wicomb¹²⁰ submits that prior to determining the question of interpretation of customary law;¹²¹ the Court has had to determine what it recognizes as customary law, bringing in the question of 'living customary law' verses 'official customary law.' The Court has

117 *Bhe and Others v Khayelitsha Magistrate and Others* (CCT 49/03) [2004] ZACC 17; 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC) (15 October 2004)

118 39 Interpretation of Bill of Rights

(1) When interpreting the Bill of Rights, a court, tribunal or forum :

(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;

(b) must consider international law; and

(c) may consider foreign law.

(2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

(3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.

119 *Bhe and Others v Khayelitsha Magistrate and Others* (CCT 49/03) [2004] ZACC 17; 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC) (15 October 2004).

120 W Wicomb 'Securing women's customary rights in land: the fallacy of institutional recognition' in A Claassens and D Smythe '*Marriage land and custom: Essays on law and social change in South Africa*' (2013) 49

121 Bennet has argued that customary law has emerged with three different meanings:

- "official body of law employed by the courts and by the administration
- The law used by academics for teaching purposes
- The law actually lived by the people" *Supra* (56)

solidified its role and stated that where a customary law rule deviates from the spirit, purport and objective of the Bill of Rights, it is the court's role to remedy the said deviation.¹²² The factors which have to be used to determine whether 'living customary law' or 'official customary law' has to be used were developed by the courts in *Richtersveld*¹²³ case and incorporated in *Shilubana*.¹²⁴ These are:

- A consideration of the traditions of the community
- The right of communities to amend their law
- Balancing of interests-flexibility balanced with the value of legal certainty
- The court must remain mindful of s39 (2) and promote the spirit, purport and objects of the Bill of Rights.

Wicomb submits that this sensitive approach adopted by the Constitutional Court should be adopted by all who wish to strengthen customary law institutions and especially those who wish to strengthen women's land tenure.¹²⁵

It has been declared that customary law is a source of law in South Africa. It is evident that the voice of the community and the development of the society have to be factored in by the courts when they apply customary law. The Constitutional Court has done much to certify the role of customary law in our society. The Constitutional Court provided that 'while in the past indigenous law was seen through the common law lens, it must now be seen as an integral part of our law.'¹²⁶ Bennet argues that this interpretation endorses the 'living' version of the customary law and rejects an interpretation which is common law based.¹²⁷ In concurring with the Certification case

122 Bhe and Others v Khayelitsha Magistrate and Others (CCT 49/03) [2004] ZACC 17; 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC) (15 October 2004) para 215
123 Alexkor Ltd and Another v Richtersveld Community and Others (CCT19/03) [2003] ZACC 18; 2004 (5) SA 460 (CC); 2003 (12) BCLR 1301 (CC) (14 October 2003)

124 *Shilubana v Mwamitwa* 2008 9 BCLR 914 (CC), 2009 2 SA 66 (CC) para 49

125 Claassens is of the view that current debates around law and policy in relation to women's land tenure in communal areas should be based on the fact that custom is "the changing practices and values of ordinary people as shaped by wilder realities and as the outcome of interactions involving a range of people, claims and counter arguments of different people grappling with difficult shared realities". A Claassens, D Smythe 'Marriage, Land and Custom: Essays on Law and Social Change in South Africa' (2013) 77

126 Alexkor Ltd and Another v Richtersveld Community and Others (CCT19/03) [2003] ZACC 18; 2004 (5) SA 460 (CC); 2003 (12) BCLR 1301 (CC) (14 October 2003) 51

127 A Claassens *Land Power And Custom: Controversies Generated By The Communal Land Rights Act Of 2004* (2008) 148

analysis, Bennet submits that customary law practices have to be deemed through current societal practices.¹²⁸

4.3 From *Bhe* to *Gumede*, an analysis of the court's role in the development of customary law to allow women greater access to land

The courts are called upon to apply the Bill of Rights to customary law practices which deviate from the spirit, purport and objective of the Bill of Rights.

4.3.1 Bhe and Others v Khayelitsha Magistrate and Others

In *Bhe and Others v Khayelitsha Magistrate and Others*¹²⁹ the court stated that the practice of male primogeniture as used in Section 23 of the Black Administration Act¹³⁰ was both racist and incompatible with the right to equality and dignity in the Constitution. The Court indicated that the practical application of the practice of male primogeniture precludes widows from inheriting as the intestate heirs of their late husbands, daughters from inheriting from their parents, younger sons from inheriting from their parents and extra-marital children from inheriting from their father's.¹³¹ It noted that In the modern economy women fend for themselves and help their husbands accumulate property during the course of their marriage. In essence, they have outgrown the status assigned to them in traditional society. *Tribal law has lagged behind these economic and social changes. As more and more women begin working outside the home, earning money and acquiring property, the gap between their legal status under customary law and their economic status in society widens*¹³² [emphasis added]. This analysis by the Court echoes the sentiments provided by both Claassens and Cousins, mentioned above.

128 A Claasens *Land Power And Custom: Controversies Generated By The Communal Land Rights Act Of 2004* (2008) 144

129 (CCT 49/03) [2004] ZACC 17; 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC) (15 October 2004)

130 Act 38 of 1927

131 Supra Para 88

132 'The rules of succession in customary law have not been given the space to adapt and to keep pace with changing social conditions and values. One reason for this is the fact that they were captured in legislation, in text books, in the writings of experts and in court decisions without allowing for the dynamism of customary law in the face of changing circumstances. Instead, they have over time become increasingly out of step with the real values and circumstances of the societies they are meant to serve and particularly the people who live in urban areas.' Para 82

The court contended that these exclusions 'constitute unfair discrimination on the basis of gender and birth and are part of a scheme underpinned by male domination.'¹³³

The Court in this case was able to apply the principles in Section 9 and 10 of the Constitution and protect the right to inherit for women. The principles advanced in the case, speak directly to the question of land access for women. As a result of this case, women are able to inherit from the intestate deceased estates of their parents or children and spouses which could translate to greater access to land. Most significant for our case, the Court noted that customary law is stagnant in its development and is not responsive to the needs of its ever changing community.

4.3.2 *Shilubana and Others v Nwamitwa*¹³⁴

The Court was yet again called to make a determination 'whether the community has the authority to restore the position of traditional leadership to the house from which it was removed by reason of gender discrimination, even if this discrimination occurred prior to the coming into operation of the Constitution.'¹³⁵

The Court relied on its findings in the *Bhe* case but also provided a criterion which should be used when making a determination on customary law. In this case, the Court submitted a number of arguments to circumvent those provided by the respondents who argued that the applicant could then even if the tradition and customary law permit women to succeed as Hosi, the respondent as the eldest child of the deceased Hosi, is entitled to succeed him. It was advanced by the respondents that the development of this customary law to allow for a female Hosi, in the form of Ms Shilubana, would lead to a future Hosi who is not fathered by a Chief. The Court responded and stated that the departure by a traditional authority from a past practice cannot render its current decision illegitimate.

¹³³ *Bhe and Others v Khayelitsha Magistrate and Others* (CCT 49/03) [2004] ZACC 17; 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC) (15 October 2004) para 88.

¹³⁴ (CCT 03/07) [2008] ZACC 9; 2008 (9) BCLR 914 (CC); 2009 (2) SA 66 (CC) (4 June 2008)

¹³⁵ *Shilubana and Others v Nwamitwa* (CCT 03/07) [2008] ZACC 9; 2008 (9) BCLR 914 (CC); 2009 (2) SA 66 (CC) (4 June 2008) para 1.

In its submission to the Court, the Rural Women's Movement, as *amicus curiae*, noted the following points:

- The customary law in its nature is flexible.
- That the claim to chieftainship over the generations has been marked with contestations which have led to numerous conflicts and even wars. This means that there is no paved way to obtaining the chieftainship in any community. Determining who will be chief of a community requires the consideration of many factors.¹³⁶
- Similarly, historically women have been appointed as Chiefs even in times when men were seen to have all of the benefits.
- The RWM's argued that the Court should not base its decision on the 'development of customary law' but that its decision should be based on the application of those customs and traditions which found that the most suitable person, who can answer to the needs of the community, should be placed as the Chief.

However, the RWM's argument presupposes that the criterion used to determine a traditional leader who answers to the needs of a community, cannot be influenced by perceptions of gender. The very 'needs of the community' can be influenced by ideas drenched in patriarchy. As a result, the court in this instance would have to balance the needs of the community with the right to equality entrenched in the Constitution.

Bekker and Boonzaaier¹³⁷ argue that the judgment is primarily based on the application of Section 9 and it fails to consider the submissions made by RWM cited above. They advance that the ruling failed to consider its future implications. I differ to the argument advanced by both the RWM and the writers. The question before the Court was whether the community has the authority to restore the position of traditional leadership to the

136 Rural Women's Movement submission to the Constitutional Court in *Shilubana and Others v Nwamitwa* (CCT 03/07) [2008] ZACC 9; 2008 (9) BCLR 914 (CC); 2009 (2) SA 66 (CC) (4 June 2008)

137 Bekker, JC & Boonzaaier, CC 2009, 'Succession of women to traditional leadership: is the judgment in *Shilubana v Nwamitwa* based on sound legal principles?', *Comparative and International Law Journal of Southern Africa*

house from which it was removed by reason of gender discrimination, even if this discrimination occurred prior to the coming into operation of the Constitution.

The reasons advanced by Bekker and Boonzaaier do not substantiate a deviation from the Courts ruling. They argue that

Our concern is that the rule of male primogeniture is by no means intended to discriminate against women. It is meant to ensure the continued existence of the community, the welfare of the members, and their relationship with the ancestors. This appeared to be unimportant to the judge in the *Shilubana v Nwamitwa* case.¹³⁸

In this case and as stated above, the Court has submitted that the argument 'just because it is' is not sufficient to warrant a non-deviation from the practice.¹³⁹ Just because it was so, does not mean that a system cannot be changed to something else. The intention of the creators and implementers of male primogeniture has little or no bearing when its effect directly discriminates and prejudices against women. The road to hell is usually paved with good intentions. Therefore, if the intention of the practice is to ensure continuity and relations with ancestors, an alternative, which will yield the same result and does not preclude women, must be created.

In their argument that customary law is flexible in its nature, both the RWM and Bekker and Boonzaaier, fail to consider that the very flexibility of customary law which they advance could be the very same flexibility which should be applied in favour of the applicant. Though the RWM's submission was primarily in favour of the applicant, their reasoning could be interpreted to be in favour of the respondent. The original succession process followed by the community after the death of the Chief was a deviation from a structured process. The current process concerning Ms Shilubana is also a deviation from a previous deviation and is thus reiterating that there is flexibility however, in this instance the flexibility is furthered by Constitutional values.

¹³⁸ Ibid 455

¹³⁹ *Bhe and Others v Khayelitsha Magistrate and Others* (CCT 49/03) [2004] ZACC 17; 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC) (15 October 2004 para 50).

Bekker and Boonzaaier further argue that if the appointment as traditional leader is reconfirmed, there would be reason to fear that the whole succession dispute may repeat itself when the applicant dies.¹⁴⁰

This argument is ironic as previously, it was noted by the writers that there have been many disputes relating to traditional leadership. Should there be a dispute after Ms Shilubana's death, the question plaguing the community at that time could be resolved internally by the community or sent to the Courts for adjudication. However, a claim by a woman cannot be dismissed merely because it does not exactly fit the accepted norm or that it will bring the succession lineage into question, which was created to not allow her to be Chief in the first place. This argument is deeply flawed and places a higher burden on female claimants as opposed to male claimants.

Bekker and Boonzaaier argue that the essence of their argument is that customary law should be made by its followers and 'not a learned peroration about discrimination and inequality.'¹⁴¹ This argument by the writers displaces the role of the courts in the adjudication of customary law matters. The Courts have been tasked to develop customary law and this development does not presume that the Courts have the formula for the determination of customary law matters. Hence the Courts have stated previously that a determination of customary law has to take into consideration the traditions of the community, the right of communities to amend their law, balancing of interests-flexibility balanced with the value of legal certainty and the court must remain mindful of s39 (2) and promote the spirit, purport and objects of the Bill of Rights. The Court cannot be refrained from adjudicating customary law matters merely because the Court does not sit in the community. The same critique is not argued when the Courts have to adjudicate other civil or criminal matters. The Constitution empowers traditional communities to resolve their disputes internally and equally empowers them to also use the judicial system. The intention of the writers was to empower the voice of the community however, they failed to realise that the same right which exists for the

¹⁴⁰ Ibid 457

¹⁴¹ Ibid 459

community, exists for both the applicant and respondents. This right also extends to seeking redress from the judicial system.

In addition, traditional communities cannot exist outside the ambit of the Constitution. The idea that the communities exist in their own realm and their matters cannot be adjudicated by the Courts is unconstitutional. All conduct has to be placed under the scrutiny of the Constitution. One cannot run to the Courts and then question the legitimacy of the Courts to adjudicate a matter when the matter concerns a traditional community. The arms of the Constitution stretch throughout South Africa and do not preclude anyone from its ambit.

The Court cannot be asked to make determinations on future consequences of its decisions, in fact, should circumstances change within this community or another, questions for determination can be brought before the court at that time. The Court cannot be tasked with scoping all possible scenarios which could come from its judgments and make a ruling on them.

In addition, Bekker and Boonzaaier state that 'however, the judgment will probably lead to unwarranted claims by other women that they are entitled to succession to traditional leadership positions.'¹⁴² Whether a claim is justified or unwarranted is a determination which has to be made on a case by case basis by the community. If a valid claim exists for a woman or man, democracy dictates that such claimant has the right to bring forth the claim and have it adjudicated and determined. This protection is afforded in the Framework Act of 2003 as well.

4.4 Conclusion

The effectiveness of the courts in developing customary law and in countering legislative shortfalls can realistically only be measured by the impact that its decisions

¹⁴² Ibid 462

has on ordinary South Africans affected by the issue brought before it. Customary law and its application is complex and the courts have been cautious in how they deal with issues relating to customary law. The Courts have however, been adamant that customary practices which unfairly discriminate against women is invalid. They have also emphasized that those who seek redress can approach the Court and have their matter determined. As such, the Courts have developed a criterion which seeks to balance the interests of the community and the values of the Constitution.

In *Shilubana* and *Bhe*, the court was able to use the two sets of facts and develop customary law. Post *Shilubana*, there have been cases which have been brought before the courts where women have been able to assert their rights. This assertion is complimented by the writing of Claassen's who argued that the Constitution has given women a leg to stand on when they argue for their rights. Though the Court does not provide a blanket solution, it provides a leg for women to stand on.

Chapter Five: Conclusion and recommendation

The Courts and the legislature have been called by the Constitution to create and implement the law and more specifically, they have been tasked with creating and implementing laws which will redress past indiscretions relating to land while promoting gender equity.

While this may seem like a momentous task, history will remember this era as the era of potential change and an era which could see women regaining their right to land. It is unrealistic though to expect that the current status quo could be amended overnight, however, through certain intervention, it is possible to change perceptions which enforce patriarchal practices.

5.1 Recommendations for the Community

- The current discourse pertaining to land redistribution needs to promote the voices of women. The current discourse is dominated by the voices of men and fails to adequately address the importance of land to women. In addition, the current narrative fails to provide a clear mechanism which will see women reap the benefits of land redistribution and thus amend past indiscretions which saw them unable to acquire ownership rights.
- Communities must be provided the space to mobilize and come together to address their concerns. The Constitution makes provision for public participation in the legislative process and as such, the voices of the communities must be heard the loudest.
- Organizations such as the Rural Women's Movement need to be given the platform to convey the concerns of their constituencies. The organisations otherwise known as 'grassroots' organisations are best placed to provide the

views and concerns of women who reside in traditional communities and are able to articulate their struggles. Parliament, when drafting legislation, must provide sufficient space for these organizations to address their concerns and articulate possible solutions.

- Communities need to tackle practices which are rooted in patriarchy and misogyny and devise mechanisms which will see all community members equally benefiting from the land redistribution process.

5.2 Recommendations for Parliament

- Officials must be informed of their international law obligations and must be held accountable and responsible for any shortfalls, these include reporting obligations to international law bodies.
- Laws and policies should be reviewed and should incorporate international law instruments which promote women's rights and in particular their access to land.
- Programmes must be put in place which will promote women's access to land. These programmes should aim to deter patriarchal practices which hinder women's access to land. Most significantly, these programmes must enable women to address the hindrances which exist and which curtail their access to land.
- It is imperative that specific time frames be stipulated in legislation for the implementation of legislation. This too should be accompanied by the budget which would be needed to implement a particular Act.

- The voices of women must be included in the Portfolio Committee on Rural Development and Land Reform which is composed of primarily men.
- Legislation which seeks to address Section 25 of the Constitution must also be cognizant of gender equity. Positive traditional and cultural values must be included in legislation in consultation with traditional leaders and communities to highlight the consequences of patriarchal violence and exclusion.
- Race, gender and class dynamics must always be considered when drafting legislation pertaining to or which could pertain to land allocation. Women's historical deprivation of land must be at the forefront of the drafter's mind.

5.3 Recommendations for the judiciary

- Adjudicators in traditional courts must be trained on the Constitutional values which are binding to all South Africans. They should be encouraged to uphold Constitutional values in their adjudication of matters and should be bound by the values which are applicable to the judiciary.
- Magistrates Courts must be equipped and empowered to adjudicate disputes which arise from the application or abuse of customary law principals. Though Magistrates Courts are creatures of statute, the Department of Justice's Justice College must ensure that they are kept abreast with the latest judgements and developments because Magistrates courts are usually courts of first instance.
- Women should be given the option of using any legal system which is available in the country. Legal pluralism enhances women's choices and allows women the opportunity to use any judicial process to address their disputes.

- Customary law must be allowed to develop in response to the needs of society. Courts must be cognizant of customary law's ever evolvement and apply the required criterion when adjudicating customary law matters.
- The Constitutional Court should take bolder steps in advancing its obligation to develop customary law. The Court should make bolder judgements, which could see the decline of patriarchal practices which directly or indirectly hinder women's access to land.

There are a number of problems which face women in traditional communities. The studies which have been conducted reflect the changing perceptions and needs of women who reside in traditional communities. The studies further reflect that women who reside in traditional communities are not sitting on the side lines but have used the Constitution and its values to challenge the status quo and demand equal treatment. Though this has not become a norm, the changing societal perceptions of marriage have garnered a new wave of activism in the communities.

At the centre of discussion of this dissertation is the question of women's access to land under customary law. This dissertation does not argue against customary law as a source of law which is applicable to many people who live in South Africa. In fact, this dissertation argues in favour of customary law as it is the lived law practiced by many people in South Africa and has a deep history in South Africa, as it is the first law. However, the main argument advanced is that traditional communities like all communities, are changing in their composition and in their values. These changing values must be incorporated by the communities, legislature and courts so as to promote gender equity and greater access to land ownership for women. As such, the law has to be proactive and be responsive to the needs of the community. The law has to respond to the needs of the society and must be reflective of society's needs. As such, this dissertation promotes campaigns such as the 'One woman, one hector' campaign, in the hope that one day the narrative around land redistribution will prioritize the need for land for women in traditional communities.

Bibliography

Books

Bennet TW (2012) '*Customary Law in South Africa*' (Juta: Claremont)

Claassens A & B Cousins (2008) '*Land, Power and Custom: Controversies generated by South Africa's Communal Land Rights Act*'(Juta & Co Ltd: Cape Town)

Claassens A & Smythe D (2013) '*Marriage, Land and Custom: Essays on Law and Social Change in South Africa*' (Juta & Co Ltd: Claremont)

Cousins B and Walker C (eds) '*Land Divided, Land Restored : Land Reform in South Africa for the 21st Century*' (Jacana Media (Pty) Ltd :Auckland Park 2015)

Journal articles

A Tripp 'Women's Movements, Customary Law and Land Rights in Africa: The Case of Uganda' (2004) 7 (4) *African Studies Quarterly*

A Claasens 'Recent Changes in Women's Land Rights and Contested Customary Law in South Africa' (2013) 13 *Journal of Agrarian Change*

B Agarwal 'A field of one's own: Gender and Land Rights in South Asia' (1994) 3 *Journal of Agrarian Change*

JC Bekker & CC Boonzaaier 'Succession of women to traditional leadership: is the judgment in *Shilubana v Nwamitwa* based on sound legal principles?' (2009) 41 *Comparative and International Law Journal of Southern Africa*

MJ Maluleke 'Culture, Tradition, Custom, Law And Gender Equality' (2012) 15
Potchefstroom Electronic Law Journal

M NDulo 'African Customary law, customs and women' (2011) *Indiana Journal of Global
Legal Studies*

M Koenane 'The ANC And Traditional Authorities In Historical Perspective '(2008) 7
Indilinga – African Journal Of Indigenous Knowledge Systems

R Ozoemena 'Living Customary Law: A Truly Transformative Tool?' (2016)
Constitutional Court Review

W Wicomb 'The Exceptionalism and Identity of Customary Law under the Constitution'
Constitutional Court Review

Case law

Alexkor Ltd and Another v Richtersveld Community and Others (CCT19/03) [2003]
ZACC 18; 2004 (5) SA 460 (CC); 2003 (12) BCLR 1301 (CC) (14 October 2003)

Bhe and Others v Khayelitsha Magistrate and Others (CCT 49/03) [2004] ZACC 17;
2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC) (15 October 2004)

Certification of the Constitution of the Republic of South Africa, 1996 (CCT 23/96)
[1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) (6 September
1996)

Gumede (born Shange) v President of the Republic of South Africa and Others (CCT
50/08) [2008] ZACC 23; 2009 (3) BCLR 243 (CC); 2009 (3) SA 152 (CC) (8 December
2008)

Land Access Movement of South Africa and Others v Chairperson of the National Council of Provinces and Others (CCT40/15) [2016] ZACC 22; 2016 (5) SA 635 (CC); 2016 (10) BCLR 1277 (CC) (28 July 2016)

Matlala v Dlamini and Another (35611/2008) [2010] ZAGPPHC 277 (3 June 2010)

Mayelane v Ngwenyama and Another (CCT 57/12) [2013] ZACC 14; 2013 (4) SA 415 (CC); 2013 (8) BCLR 918 (CC) (30 May 2013)

Nhlapo v Mahlangu and Others (59900/14) [2015] ZAGPPHC 142 (20 March 2015)

Nemavunde and Another v Mavhungu and Another (171/2014) [2015] ZALMPHC 5 (10 December 2015)

S v Makwanyane and Another (CCT3/94) [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1 (6 June 1995)

Shilubana and Others v Nwamitwa [2008] ZACC 9; 2009 (2) SA 66 (CC); 2008 (9) BCLR 914 (CC) (4 June 2008)

Tongoane and Others v National Minister for Agriculture and Land Affairs and Others (CCT100/09) [2010] ZACC 10; 2010 (6) SA 214 (CC); 2010 (8) BCLR 741 (CC) (11 May 2010)

Legislation

Bantu Authorities Act 68 of 1951

Bantu Homelands Citizenship Act 26 of 1970

Bantu Self Government Act 46 of 1949

Black Administration Act 38 of 1927

Communal Land Rights Act 11 of 2004

Constitution of the Republic of South Africa Act 108 of 1996

Eastern Cape Traditional Leadership and Governance Act 4 of 2005

Law of Evidence Amendment Act 45 of 1988

Limpopo Traditional Leadership And Institutions Act 6 of 2005

Native Administration Act 38 of 1927

Native Land Act 27 of 1913

Native Succession Act 10 of 1854

Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000

Proclamation 227 of 1898

Recognition of Customary Marriages Act 120 of 1998

The Group Areas Act 41 of 1950

The Promotion of Bantu Self Government Act 46 of 1959

The Restitution of Land Rights Act 22 of 1994

Traditional Affairs Bill B003B-2005

Traditional Courts Bill B1-2012

Traditional Courts Bill B1 -2017

Traditional Leadership and Governance Framework Act 41 of 2003

Traditional and Khoi-san Leadership Bill B-2015

Transvaal Law 4 of 1885

White Paper on Traditional Leadership and Governance, July 2003

International treaties

Convention on the Elimination of All Forms of Discrimination against Women, 18 December 1979

Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, 11 July 2003

Press statement and Newspaper articles

53rd National Conference of the African National Conference 20 December 2012

Integration of Traditional Leadership, Governance and Local Authorities - Department of Co-operative Governance and Traditional Leadership 3 October 2016

'Introduction to the legal system' *Section 27* April 2010

'Land is our Dignity' *Daily Maverick* 29 June 2017

'Tasks of our revolution today!' Andile Mngxitama, to the Extended National Coordinating Committee Meeting of BLF on 29 October 2016 at Yeoville, Johannesburg)

'Why I'm Cautiously Optimistic about the New Traditional Courts Bill Being Back' *Huffington Post Blog* 27 January 2017

Reports

C Cross and D Horny 'Opportunities and Obstacles to Women's Land Access in South Africa: A Research Report for the Promoting Women's Access to Land Programme' 2002

South African Law Reform Commission 'Project 25 Statute Law Report the Repeal Of The Black Administration Act 38 of 1927' March 2004

Cooperative Governance and Traditional Affairs National Assembly Committee 'Traditional Leadership & Governance Framework Bill: Public Hearings Provincial and Local Government Portfolio Committee' 25 September 2003

Submissions

Commission for Gender Equality Submission to the Provincial And Local Government Portfolio Committee Traditional Leadership And Governance Framework Bill B58-2003 17 September 2003

Commission on Gender Equality Submissions to Justice Portfolio Committee on Recognition of Customary Marriages Bill 22 September 1998

Congress of South African Trade Unions Submission on the Draft White Paper on Traditional Leadership & Governance Submitted to the Department of Provincial & Local Government 30 November 2002

House of Traditional Leaders Eastern Cape Submissions to the Justice Portfolio Committee on Recognition of Customary Marriages Bill (undated)

Legal Resources Centre's Submissions to the Portfolio Committee to Justice and Constitutional Development on Traditional Courts Bill 6 May 2008

Trust for Community Outreach and Education (TCOE Department of Agriculture and Land Affairs on the Communal Land Rights Bill 2003

Rural Women's Movement (Kwa-Zulu Natal) Submission to the Portfolio Committee on Agriculture and Land Affairs On The Communal Land Rights Bill 2003