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**GENDER, LAND AND THE TENSION BETWEEN AFRICAN CULTURE AND THE
CONSTITUTION**

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Declaration of Originality

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Declaration

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Abstract

GENDER, LAND AND THE TENSION BETWEEN AFRICAN CULTURE AND THE CONSTITUTION

The main purpose of this mini-dissertation is to understand the relationship between gender, land, culture and the tension between African culture and the constitution in the context of communities under traditional authorities in South Africa.

South African has a number of communities residing in the former 'homelands' or Bantustan States created by the apartheid government and colonists. These communities have their own cultures and custom and their relationship is generally governed by indigenous law.

However some of their cultures and customs have been adulterated by colonists who imposed Western imported laws which subjected indigenous law to a repugnancy clause, whereby sections of indigenous law that were considered to be in conflict with the Western principles of justice, equity and fairness were regarded as inferior and unenforceable.

For communities under traditional authorities land is very important as it is used for building a home and for subsistence farming. However all land in these communities is held in trust by the Chief who allocates it to communities members in line with indigenous law.

With the adulteration of African culture and the introduction of legislation to enforce patriarchy in South Africa by colonists, as an example, by the use of the Black Administration Act of 1927, the system currently used to allocate land in traditional communities is gender based and discriminates against women and this creates tension between the currently used custom of allocating land and the Bill of Rights.

The mini-dissertation proposes that that tension between African culture and the Bill of Rights could possibly be mediated using the African philosophy of Ubuntu

Dedication

This mini-dissertation is dedicated to the memory of my beloved brother

Bhekumuzi Joshua Ntuli

who tragically passed away in a car accident on

9 October 2019

No words can describe the sorrow we felt in learning about his passing away.

He is now resting in the grave, awaiting for that great glorious day of resurrection when Christ comes back to take His own.

Size Sibonane Kwelizayo Mfo kaNtuli!

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GENDER, LAND AND THE TENSION BETWEEN AFRICAN CULTURE AND THE CONSTITUTION

Chapter 1: Introduction

1.1 Background

South Africa has a significant number of communities residing in communal areas of the country.¹ These communal areas are former homelands created by the apartheid government to resettle black people from urban areas or what was regarded by the apartheid government as 'white areas'. Most of the communal areas are headed by a traditional leader who may either be a chief or a headman, hence they are referred to as traditional communities. South Africa's communal areas will be referred to as 'traditional communities' from henceforth in this mini-dissertation. The chiefs, headmen or kings heading traditional communities will, from henceforth in this mini-dissertation, be collectively referred to as 'traditional leaders'. Traditional communities were integrated into a unitary South Africa after the first democratic elections of 1994.²

The population in the traditional communities forms about forty-five (45) percent of South Africa's population and is comprised mainly of women and children as men seek work in urban areas.³ Traditional communities generally follow indigenous law and various customs associated with African culture. Land is very key for the survival of traditional communities as it is used for subsistence farming and for building a home.

In African culture land, is generally allocated by blood line and gender.⁴ Men in In African culture, are the beneficiaries of land since they are regarded as permanent members of the family, while women are expected to marry and cease to be members of their father's family, hence they are not directly allocated land.⁵ But this does not necessarily mean that in African culture, women are denied the use of the family land, it is only that it is not directly allocated to them. Land in

¹ K Motlanthe 'Report of the High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change' (2017) 3.

² Motlanthe (n 1 above) 3.

³ C Albertyn 'Cultural diversity, 'living law', and women's rights in South Africa' in DB Maldonado (ed) *Constitutionalism of the global south, the activist tribunals of India, South Africa, and Colombia* (2013) 176.

⁴ AO Akinola 'Women, culture and Africa's land reform agenda' (2018) 5 *Frontiers in psychology* 5.

⁵ Akinola (n 4 above) 5.

African culture is also important for the veneration of ancestors, therefore it cannot be directly transferred to women as they are expected to marry and join themselves to new ancestors.⁶ Women in traditional communities therefore do not directly own or control land, the most important resource for survival in African communities.⁷ Women in traditional communities still face barriers with regard to directly accessing land due to the practice of gender based allocation of land.⁸

The Bill of Rights in the constitution,⁹ in particular Section 9(3) and Section 9(4) specifically prohibit gender based discrimination. Despite the Bill of Rights and the enactment of gender equality laws in many African states, women today continue to be denied ownership of land in many parts of the continent in the name of indigenous law.¹⁰ It is important to note that the original South African indigenous law, has been altered and adulterated by colonists as discussed under paragraph 1.5.5 below. This makes it difficult to distinguish between the true South African indigenous law and colonists' adulterated indigenous law. It is therefore important to note that in South Africa, what at times is depicted as indigenous law may include parts of colonists' adulterated indigenous law. South Africa's indigenous law will be referred to as 'indigenous law' from henceforth in this mini-dissertation.

1.2 Research Problem

This mini-dissertation seeks to understand the relationship between gender, land and the tension that arises between African culture and the constitution in the context of traditional communities. This tension revolves around patriarchy, gender equality, individual land tenure and property rights of women. The mini-dissertation will endeavor to understand what could possibly be done to mediate the tension between African culture and the constitution. This mini-

⁶ See para 1.5.2 of this mini-dissertation below.

⁷ European Training and Research Centre for Human Rights and Democracy *Understanding human rights, manual on human rights education* (2012) 100.

⁸ European Training and Research Centre for Human Rights and Democracy (n 7 above) 100.

⁹ Traditionally reference to the constitution is capitalized to indicate its supremacy over any law. However, the constitution has incorporated many aspects of imposed colonial law that dominated and looked down upon African law as barbaric. In protest against the domination of African law by the constitution and colonial law, the first letter of the constitution will not be capitalized. My view is that the constitution since it is not indigenous in nature as it incorporates many aspects of colonial law, it must be subject to indigenous African law and not the other-way round.

¹⁰ Akinola (n 4 above) 1.

dissertation will however not attempt to formulate a detailed proposal to address this tension. Lastly, the mini-dissertation will be confined to African culture and the rights of women in traditional communities. Issues pertaining to commercial agricultural land, land in urban areas and townships of South Africa and any other matter affecting women outside traditional communities of South Africa are beyond the scope of this mini-dissertation.

1.3 Research Questions

The following research questions emanate from the research problem as outlined above:

- 1.3.1 What is the relationship between gender, land and African culture in traditional communities?
- 1.3.2 How is this relationship creating tension between African culture and the constitution, in particular the Bill of Rights?
- 1.3.3 What could possibly be done to negotiate tension between African culture and the constitution in particular the Bill of Rights which prohibits unfair gender based discrimination?

1.4 Motivation for the Study

1.4.1 Background

Africans, just like any other nation in the world have their own cultures and customs. Culture or custom is developed through longstanding practices of people when they adapt themselves to their environment and this influences the way they live.¹¹

Generally, different communities have different cultural practices because of the peculiarities of each group.¹² In Africa, many communities share some cultural beliefs and practices as they descend from common ancestors. As an example, African people in South Africa, which include Amazulu, Amaswati, Amaxhosa, Amandebele, Bapedi, Basotho, Batswana, the Vha-Venda and Tsonga people, share many cultural practices.¹³ Some examples of shared cultural practices include the delivery of *lobola* (a bride's price) when a male wants to get married, polygamy and

¹¹ AC Myburgh *Papers on indigenous law in Southern Africa* (1985) 2.

¹² Mayburgh (n 11 above) 2.

¹³ S Marks 'South Africa: the myth of the empty land' (1980) 301 *Journal history today* 9.

veneration of ancestors. The history and culture of the above-mentioned African people can be traced as back as 1200 years before the Portuguese first rounded the southern tip of the continent in 1488.¹⁴

A significant number of African people believe in ancestors and are deeply rooted in various cultural practices. Ancestors are regarded as guardians of family affairs, traditions, ethics and activities because they are perceived to be 'closer' to God and are able to petition on behalf of the living.¹⁵

At times, African culture may be in tension with the constitution, however, this tension should not necessarily be read to mean that African traditions and culture are inferior to the constitution.

In South Africa, the tension between African culture and the constitution is evidently manifested in traditional communities consisting of black people who were re-settled by the apartheid regime to former homelands of South Africa as discussed earlier.¹⁶ One significant tension between culture and the constitution manifests itself in the context of gender equality, especially with respect to issues of access and ownership of land by women, a right protected by section 9 of the constitution.

In African communities, the issue of land plays a significant role in gender inequalities, exclusion and the expected subordination of women in general.¹⁷ Women, seen as adjuncts to their husbands, are not expected to have land directly allocated to them, but generally depend on their husbands to access it.¹⁸ As an example, in South Africa, to date, women are still faced with the same obstacles of gender inequalities and lack of socio-economic opportunities that have been a norm in the country throughout its colonial history.¹⁹ However, this worsens for women

¹⁴ Marks (n 13 above) 9.

¹⁵ S Masondo 'The practice of African traditional religion in contemporary South Africa' in TW Bennett (ed) *Traditional African religions in South African law* (2011) 22.

¹⁶ See para 1.1 of this mini-dissertation above.

¹⁷ C Albertyn 'Cultural diversity, 'living law', and women's rights in South Africa' in DB Maldonado (n 3 above) 163

¹⁸ Akinola (n 4 above) 5.

¹⁹ 'Women must be the focus of land redistribution' 22 July 2018 <http://m.news24.com/guestcolumn> (accessed 7 October 2018).

living under traditional communities due to poverty and lack of opportunities being more prevalent for women living in traditional communities.²⁰

The irony of the manifested tension between African culture and the constitutions with respect to gender equality is that a number of African countries, especially those who are part of the Southern African Development Community (SADC), including South Africa, have adopted constitutions which totally abolish discriminatory and unequal treatment of men and women.²¹ Moreover these countries have ratified a number of international treaties which guarantee equality between men and women.²² However, with all the constitutions and international treaties, in many African countries, including South Africa, women under traditional leadership still face gender based discrimination.

However, it should be acknowledged that the perceived discrimination against women in traditional communities is not an arbitrary act to showcase the power of men, but rather it is influenced by African customs and cultural practices.²³ It should also be acknowledged that the constitution is significantly influenced by Human Rights system emanating mainly from the West, hence the tension between the latter and African culture.

This tension between African culture and the human rights system from the West should not be interpreted to mean that African culture is inferior to the constitution. It should also be acknowledged that Western laws have their own patriarchal flaws. As an example, to date a number of States in the United States of America (USA) which include Louisiana, Ohio, Kentucky, Mississippi, Georgia, Alabama and Missouri continue to have anti-abortion laws that are designed to control the reproductive rights of women in the name of safety.²⁴ In these States medical professionals who provide abortion are prosecuted and criminalized.²⁵ One of the harrowing stories which involves anti-abortion laws from the West is that of a woman who was denied

²⁰ 'Women must be the focus of land redistribution' 22 July 2018 <http://m.news24.com/guestcolumn> (accessed 7 October 2018).

²¹ F Banda 'Women, law and human rights in Southern Africa' (2006) 32 *Journal of Southern African Studies* 5.

²² M Ssenyonjo *Economic, social and cultural rights in international law* (2009) 259.

²³ Ssenyonjo (n 22 above) 259.

²⁴ Amnesty International 'Anti-Abortion Laws are an Attack on our Right to Live with Dignity and Decide what Happens to our Bodies' (2019) 1.

²⁵ Amnesty International (n 24 above) 1.

abortion in Ireland after being beaten and raped by paramilitaries in her country.²⁶ The patriarchal flaws of the human rights system from the West will not be further discussed as they are beyond the scope of this mini-dissertation.

1.5 Overview of Literature

In this section I highlight the relationship between African culture, spirituality and land. This section will further highlight the differentiation in roles between males and females in line with African culture. The section will further discuss how this differentiation is impacting on the issues of allocation of land to women. Lastly, this section will discuss the adulteration of indigenous law by colonists which enforced patriarchy in South Africa through legislation.

1.5.1 African Culture and the Veneration of Ancestors

African Culture and Spirituality

In African culture when a person dies, he or she is not considered to be dead. Death is regarded as a process that transforms human beings to spiritual beings.²⁷ Spiritual beings are regarded as consisting of the living-dead (ancestors) and Spirits.²⁸ Spirits and ancestors are considered to be playing a crucial role in the lives of African people as they are regarded to be guardians of the family and they influence how people live and conduct their affairs.²⁹ In African culture the spirits and ancestors play distinct roles in the lives of people as discussed below:

i) Spiritual Beings or Spirits

In the hierarchy of African spiritual world, spirits are of a relatively high status compared to the ancestors.³⁰ Therefore the hierarchy of the African spiritual world consists of spirits followed by the ancestors.³¹ In other words, when a person dies, he or she first becomes what is considered to be a 'living-dead' (an ancestor) and then later is transformed to a spirit. Both spirits and ancestors are considered to be subordinate to God.³²

²⁶ Amnesty International (n 24 above) 1.

²⁷ See para 1.5.1.1 (i) of this mini-dissertation below.

²⁸ JS Mbiti *African religions and philosophy* (1969) 74.

²⁹ Mbiti (n 28 above) 74.

³⁰ Mbiti (n 28 above) 77.

³¹ Mbiti (n 28 above) 77.

³² Mbiti (n 28 above) 77.

The origin of the concept of spirits is not clearly known, but some people believe that they are what remains of human beings when they die physically, thus to be a spirit is an ultimate destination of human beings.³³ It is believed that human beings cannot develop beyond a spirit except national heroes who can be deified.³⁴ Spirits are regarded to be within the state of immortality and generally do not have formal ties with human beings.³⁵ Generally as the living do not have connections with spirits, people generally do not remember their names and also fear them as they are regarded to be having more power than human beings.³⁶ It is not clear where spirits live, some people believe that they live underground, hence they are called *abaphansi* (those who live underground) while others are of the idea that they are above the earth, they are *badimo* (the gods) in the stars, the sun or the moon.³⁷ Spirits are therefore believed to be nearer to God, hence they communicate the needs or convey prayers of human beings to Him.³⁸

ii) The 'Living-Dead'

In the African traditional belief system, when a person dies the process of dying is not considered to be immediately completed.³⁹ A person who dies is considered to move from being a living human being to becoming part of the living-dead (an ancestor). Ancestors are considered to be a connection between the living human beings and the spirits, who in turn are considered to be closer to God.⁴⁰ Since the ancestors are the closest connection between human beings and the spirits, they are considered to be bilingual.⁴¹ Ancestors are considered to be speaking the language of the living human beings and that of spirits whom they are drawing nearer ontologically.⁴² Hence with this interpretation, when a person dies, he or she becomes an ancestor and later a spirit. To move and be a spirit, ancestors are transformed after the passing

³³ Mbiti (n 28 above) 77.

³⁴ Mbiti (n 28 above) 78.

³⁵ Mbiti (n 28 above) 78.

³⁶ Mbiti (n 28 above) 78.

³⁷ Mbiti (n 28 above) 79.

³⁸ Mbiti (n 28 above) 79.

³⁹ Mbiti (n 28 above) 82.

⁴⁰ Mbiti (n 28 above) 82.

⁴¹ Mbiti (n 28 above) 82.

⁴² Mbiti (n 28 above) 82.

of about four to five generations, when the last person who knew them while they were still human beings dies.⁴³ When the last person who knew a particular ancestor also dies, the process of death is completed and an ancestor becomes a spirit, or assumes a higher status.⁴⁴ The ancestor who has transformed into a spirit is then no longer remembered by name and it therefore becomes no longer necessary to pay direct attention to the said spirit.⁴⁵

Ancestors are considered to be guardians of family affairs, traditions, culture, ethics and activities.⁴⁶ Ancestors are believed to frequently visit their relatives whom they have just left to convey different messages, whether the messages are positive or negative about the family.⁴⁷ Ancestors when visiting the family also take prayers of the family members and communicate them to spirits, who then communicate the same to God.⁴⁸

Ancestors as they are considered to be closer to human beings, are therefore regarded to be resting in graves next to their families.⁴⁹ Graves are very important in African culture based on this concept that ancestors rests in them. Since ancestors are considered to be the direct decedents of human beings, the African spiritual world focuses more on ancestors than spirits.⁵⁰ When ancestors need to communicate to their previous families they approach the oldest member of the family to either inquire about the well-being of the family, or to give warning about the impending danger or even to rebuke those who fail to follow their instructions.⁵¹ In essence the African family not only consists of human beings, but also includes ancestors and the 'yet to be born' members of the family.⁵²

⁴³ Mbiti (n 28 above) 83.

⁴⁴ Mbiti (n 28 above) 83.

⁴⁵ Mbiti (n 28 above) 83.

⁴⁶ Mbiti (n 28 above) 87.

⁴⁷ Mbiti (n 28 above) 82.

⁴⁸ Mbiti (n 28 above) 87.

⁴⁹ Mbiti (n 28 above) 83.

⁵⁰ Mbiti (n 28 above) 82.

⁵¹ Mbiti (n 28 above) 87.

⁵² Mbiti (n 28 above) 105.

Veneration of Ancestors

Many African cultural practices or beliefs include the veneration of ancestors. Ancestors are considered to be supernatural and capable of bestowing blessings or allowing misfortune to happen upon the living.⁵³

The blessings that ancestors are believed to be capable of bestowing to the living include wealth, health and children. When coming to misfortune, ancestors are regarded as not inflicting harm to people, but rather they simply withdraw their protection and forces of evil are then able to attack.⁵⁴ There are a number of misfortunes that are regarded as those that can befall a person who does not do rituals required by ancestors. These include being exposed to witchcraft, illness, family disorders, *isinyama* (a Nguni phrase indicating a dark cloud hanging over a person), *isidliso* (a Nguni phrase basically meaning to be poisoned), *isichitho* (a Nguni phrase meaning to be divorced especially applicable to women).⁵⁵

Because ancestors are regarded as elders of the living human beings expert service and recognition from their juniors or living human beings and they become irate when ignored or neglected.⁵⁶ Ancestors are also believed to accompany a person wherever he or she goes to any unknown territory to protect him or her from danger and to bring him or her back home safely. However, he who is protected must build his homestead from the place of origin of ancestors where he or she belongs, because that is where ancestors stay.⁵⁷

1.5.2 Land and the Veneration of Ancestors

A number of rituals that are part of the veneration of ancestors require land for their performance. Land in African culture has spiritual significance because family ancestors are

⁵³ S Masondo 'The practice of African traditional religion in contemporary South Africa' in TW Bennett (n 15 above) 22.

⁵⁴ S Masondo 'The practice of African traditional religion in contemporary South Africa' in TW Bennett (n 15 above) 23.

⁵⁵ S Masondo 'The practice of African traditional religion in contemporary South Africa' in TW Bennett (n 15 above) 29.

⁵⁶ S Masondo 'The practice of African traditional religion in contemporary South Africa' in TW Bennett (n 15 above) 23.

⁵⁷ S Masondo 'The practice of African traditional religion in contemporary South Africa' in TW Bennett (n 15 above) 24.

buried on it, and is regarded as belonging to ancestors as much as the living occupiers.⁵⁸ As land is used for the burial of family members who have passed on and who are then regarded as ancestors, it is perceived as a deity which requires placating since it belongs to ancestors.⁵⁹ Furthermore, certain rituals, like communicating to ancestors, need to be performed at the family burial place. This burial place is normally on the land allocated to the family or clan by the headman or chief. Therefore land in African communities is very important as it has multiple functions which include building of a home, cultivation of crops, grazing place for animals, burial of the dead and performance of various cultural rituals, like burying of the umbilical cord upon the birth of a child. It is therefore in this context that land becomes very important in African culture.

In African culture, when a person dies, both his or her body and spirit must be brought back to his or her home or the land of the clan. The ritual of *ukubuyisa* (a Nguni phrase meaning bringing the spirit of the dead who is now an ancestor to the homestead) is performed when a person dies.⁶⁰ This ritual culminates in the burial of the person who has died. A significant number of traditional community members still bury their dead in the homestead and not at a public cemetery. An example of this is the burial of the late president Nelson Mandela, who was laid to rest in the family plot at Qunu in the rural Eastern Cape.⁶¹ Those who pass on, as they are then regarded as ancestors, protect the homestead, hence they are not buried anywhere but must be buried within the land allocated to the homestead.⁶² Therefore it is clear that each homestead must have enough land to bury their dead, or to 'house their ancestors' in their resting place or graves. This makes land very important to traditional communities.

Moreover, all married adult males are expected to build their homes on their ancestral land.⁶³ Ancestors accept that a person can go away to work, but not to return to the community to build

⁵⁸ RB Mqoke *Basic approaches to problem solving in customary law, a study of conciliation and consensus among the cape Nguni* (1997) 131.

⁵⁹ Mqoke (n 58 above) 131.

⁶⁰ S Masondo 'The practice of African traditional religion in contemporary South Africa' in TW Bennett (n 15 above) 26.

⁶¹ J Simpson 'Nelson Mandela buried at Qunu ancestral home' 15 December 2013 <https://www.bbc.com/news/world-Africa> (accessed 27 February 2019).

⁶² See para 1.5.1 of this mini-dissertation above.

⁶³ S Masondo 'The practice of African traditional religion in contemporary South Africa' in TW Bennett (n 15 above) 24.

a home and be under the authority of traditional leadership is regarded as taboo.⁶⁴ The building of the home in the ancestral land is very important because there are many rituals that can only be performed at home. Some of these rituals include the rites performed to indicate transition of a person from one state to another, examples are birth, where the umbilical cord is buried in a sacred and special place in the homestead as well as puberty (initiation), marriage and death.⁶⁵ All these rites need to be performed in the homestead in the ancestral land. With traditional communities, land cannot be separated from ancestral veneration. Land is integral to the cultural beliefs and practices of traditional communities.

1.5.3 African Culture and Gender

In African culture, there is differentiation between the roles of males and females. The differentiation is manifested in many ways. Males have specific cultural responsibilities that cannot be performed by women. One example of this is the initiation of young boys to manhood. In the same vein, senior women culturally take responsibility for the initiation of girls to womanhood, this responsibility cannot be performed by men.

The differentiation in gender is also manifested in the context of marriage. To give another example, in Xhosa culture the process of marriage starts with the custom of *ukuthwala* ('abduction' of a woman for marriage purpose). There are three forms of *ukuthwala*, namely (a) where the woman is aware of the intended abduction, (b) where the families agree but the woman to be abducted is not aware, and (c) where neither the family nor the woman is aware of the intended abduction.⁶⁶ It should be noted that *ukuthwala* where there is no consent between the parties who are to be married is now outlawed by section 4 of the Prevention and Combating of Trafficking in Persons Act 7 of 2013.

Another differentiation between males and females in African custom is through the *lobola* custom. *Lobola* is defined as property in cash, or in kind which is transferred to the parents of the

⁶⁴ S Masondo 'The practice of African traditional religion in contemporary South Africa' in TW Bennett (n 15 above) 24.

⁶⁵ S Masondo 'The practice of African traditional religion in contemporary South Africa' in TW Bennett (n 15 above) 25.

⁶⁶ C Rautenbach et al *Introduction to legal pluralism* (2010) 47.

bride during marriage negotiations.⁶⁷ *Lobola* in line with African custom, for marriage purposes is paid for females only.

The differentiation between men and women in African culture does not necessarily mean that in all African communities women are regarded as inferior to men. In Africa, there are matriarchal societies whereby women have played a role in leading the community. One example is from Zimbabwe in the kingdoms of the Manyika and the Teve which were in the South-east of Zimbabwe.⁶⁸ Some of the women who led in these kingdoms included Kanganya in North-West Manyika and Sherukuru in Manyika.⁶⁹

Coming closer home, in South Africa, in the province of Limpopo in the Northern part of South Africa, senior women in the community still play a role as diviners, or *Makhadzi* (a senior aunt who provides counsel to the king or head of the family). Also, among the Nguni people, there are powerful women who played a significant role in the kingdom of the Zulu nation. As an example, Mkabayi, who was the sister of King Shaka's father Senzangakhona and Nandi, who was King Shaka's mother played a significant and influential role in the kingdom of the Zulu nation.⁷⁰ These two women held a considerable influence and played leadership role in guiding the affairs of the kingdom of the Zulu nation.⁷¹ However, the existence of matriarchal societies in Africa does not negate the reality of the existence of patriarchy in African communities.

1.5.4. Gender and Land in African Culture

Differentiation between men and women in African culture is also manifested on the issue of allocation of land. Families in African communities are generally either nuclear or compound. These families, whether nuclear or compound are headed by a male who is generally a husband and father in the family. Only men who are heads of families are allocated land directly in African culture by the chief, this land can further be re-allocated by the family head to his son upon him

⁶⁷ Rautenbach (n 66 above) 56.

⁶⁸ O Dodo et al 'African women in traditional leadership role in Zimbabwe: The case of Shona' (2017) 53 *African journal of democracy and governance* V4 n I-Z.

⁶⁹ Dodo (n 68 above) 53.

⁷⁰ J Weir 'Chiefly women and women's leadership in pre-colonial southern Africa' in N Gasa (ed) *Women in South African History* (2007) 9.

⁷¹ J Weir 'Chiefly women and women's leadership in pre-colonial southern Africa' in N Gasa (n 70 above) 9.

getting married.⁷² The family head can simply transfer land to his son by showing him where to build his home upon getting married.⁷³ Daughters are never beneficiaries of this type of land acquisition.⁷⁴

Also, upon the death of the family head, his successor can only be a male who will take over as the head of the family. The simple rules of succession in African culture are as follows:⁷⁵

-The heir of the family head is the eldest son.

-When the eldest son has predeceased the family head leaving no son of his own, the second son is the heir. However, if the deceased son had his own son (a grandchild of the original head of the family), then that grandchild becomes the heir.

- If the second son has also predeceased the family head the third son is the heir, and so forth.

- If the family head does not have his sons, then his eldest brother becomes the heir.

The heir steps into the shoes of his predecessor and inherits all the latter's rights and liabilities past, present and potential in respect of the family and the property of the house of which he is heir.⁷⁶ This is contrary to the Western concept of inheritance whereby only benefits are inherited. In African culture, the intension of allocating land to heads of families is that such land will be used for the benefit of all family members including females, therefore the head of the family does not personally own the allocated land.⁷⁷

⁷² CG Bowman & A Kuenyehia *Women and law in Sub-Saharan Africa* (2003) 132.

⁷³ Bowman & Keunyehia (n 72 above) 132.

⁷⁴ Bowman & Keunyehia (n 72 above) 130.

⁷⁵ JC Bekker *Seymour's customary law in Southern Africa* (1989) 274.

⁷⁶ Bekker (n 75 above) 50.

⁷⁷ Bekker (n 75 above) 57.

1.5.5 Colonialism and Adulteration of African Culture

It should be acknowledged that during colonial era, colonists manipulated African traditions and culture to further the aims and goals of segregating people according to race, culture, ethnicity, gender and languages.⁷⁸ During that era, colonists, in order to rule Africa, re-settled black people from their land or the so-called 'white areas' to black reserves or communal areas.⁷⁹

The colonialists did not end by segregating people according to race, but they even tempered with indigenous law and customs of African people to effectively rule and control them.⁸⁰ Indigenous laws in Africa and customs of African people were considered by the colonists to be barbaric, nasty and brutish, hence the need to modify or destroy them.⁸¹

When David Livingstone came to Africa, he had three goals in mind, firstly to address the problem of 'cotton famine' in England by finding new territories to produce cotton, secondly to introduce Christianity and thirdly to introduce 'civilization' in Africa.⁸² These goals were to be achieved by centralizing colonial power around the monarchy, having an administrative chief in every conquered region and the enforcement of patriarchy in every homestead and kraal to diminish the role of females in communities.⁸³ Basically colonialist usurped power from chiefs as custodians of land and converted them to administrative heads controlled by the monarchy in England.

To effectively control Africa, colonialists went further and created a plural legal system in Africa by introducing 'tribal' courts of chiefs whereby Africans were required to take their matters for ruling as courts of first instance.⁸⁴ Tribal courts were to apply 'tribal laws' to all cases between Africans, subject to the proviso that these laws were not to be repugnant to 'justice and equity' or contrary to 'good policy and public morals'.⁸⁵ Colonists did not limit themselves to seeing the

⁷⁸ M Chanock 'Law, state and culture: Thinking about 'customary law' after apartheid' in TW Bennett et al (eds) *African customary law* (1991) 55.

⁷⁹ M Mamdani *Citizen and subject contemporary Africa and the legacy of colonialism* (1996) 8.

⁸⁰ Mamdani (n 79 above) 5.

⁸¹ Mamdani (n 79 above) 109.

⁸² Mamdani (n 79 above) 38.

⁸³ Mamdani (n 79 above) 39.

⁸⁴ Mamdani (n 79 above) 109.

⁸⁵ Mamdani (n 79 above) 68.

indigenous laws through the lens of Western law, but further manipulated them to be ethnically defined.⁸⁶ In these courts, therefore, adulterated patchwork of ethnically defined and manipulated indigenous law and customs were used to adjudicate matters between Africans while in the formal courts the imported law of colonists was used.⁸⁷ The adulteration of indigenous laws and practices was achieved through a whip and where resistance was apparent, colonists resorted to the barrel of a gun.⁸⁸ The colonists simply claimed to be the custodians of general humanitarian notions of what was right and wrong.⁸⁹

The British, during the colonial era went even further to perpetuate patriarchy by legislating a 'customary' code that treated women as perpetual minors subject to patriarchal and controlling power of men.⁹⁰ Thus the English common law legalized husbands' controlling power over their wives, denounced polygamy as female slavery and denounced the bride-price as purchases in women.⁹¹ Therefore, the adulteration of African customs and culture by colonialists played a significant role in enforcing patriarchal structures in colonized areas which reinforced the empowerment of men and disempowerment of women.⁹² As an example, section 11(3)(b) of the Black Administration Act of 1927 enforced patriarchy by restricting black females from owning property.

Other than the impact of colonization to indigenous law, it should be acknowledged that segments of the original indigenous law were lost due to lack of recording and loss of institutional memory because the custodians of original indigenous law are no more.⁹³ Therefore the impact of the adulteration of indigenous law and cultural practices of Africans by colonists and the loss of the original indigenous law due to it not being properly recoded should not be discounted when addressing issues of gender, land and the tension between African culture and the constitution. Moreover, it should be acknowledged that what at times is regarded as indigenous

⁸⁶ Mamdani (n 79 above) 112.

⁸⁷ Mamdani (n 79 above) 111.

⁸⁸ Mamdani (n 79 above) 50.

⁸⁹ Mamdani (n 79 above) 115.

⁹⁰ Mamdani (n 79 above) 117.

⁹¹ Mamdani (n 79 above) 117.

⁹² Akinola (n 4 above) 3.

⁹³ Mamdani (n 79 above) 113.

law and customs as discussed under paragraph 1.1 above, may in reality be the ‘adulterated indigenous law and customs’. Hence the impact of colonists on indigenous law should always be taken into consideration when discussing it and African customs.

In the post-apartheid South Africa, efforts have been made to introduce legislation in line with the equality section of the constitution to treat women and men as equals, to abolish unfair gender based discrimination and patriarchal laws. As an example, section 6 of the Recognition of Customary Marriage Act 120 of 1998 provides for the legal capacity of women in marriage to be equal to that of their husbands.⁹⁴ This abolishes the legal incapacity of women as well as the subjection of women to the husband’s marital power.⁹⁵ The big question however is about the practical implementation of such laws as the Recognition of Customary Marriage Act 120 of 1998 by men in traditional communities. Some of these laws remain ‘paper laws’ because their implementation is often tied up with power struggles between women and men in the context of patriarchy.⁹⁶ Basically men in traditional communities disregard these laws, hence women still find themselves discriminated against, especially on issues of land.⁹⁷

1.6 Methodology

A desktop approach will be used primarily focusing on reports, journal articles and literature on indigenous law. This will help with the analysis and critique required for this mini-dissertation. Case law in particular focusing on gender and land will supplement this mini-dissertation. Lastly, the constitution, legislation and policies will be consulted as an input to the mini-dissertation.

1.7 Structure

Chapter two will look at historical land tenure system in South Africa before, during and after colonization to determine its impact to women in traditional communities

Chapter three will focus on policy and legislative reforms abolishing gender based allocation of land in South Africa and their impact on women in traditional communities.

⁹⁴ C Himonga ‘The advancement of African women’s rights in the first decade of democracy in South Africa: The reform of the customary law of marriage and succession’ (2005) 82 *Acta Juridica* 2.

⁹⁵ Himonga (n 94 above) 2.

⁹⁶ Himonga (n 94 above) 3.

⁹⁷ See para 1.4.1 of this mini-dissertation above.

Chapter four will look at tension between African culture and the constitution on issues of gender and land in traditional communities of South Africa. The chapter will consider possible measures that could be taken and be explored further to reduce this tension. The chapter in particular will focus on how the African philosophy of Ubuntu can help reduce this tension

Chapter five will be a conclusion to reflect on findings, observations and arguments developed throughout this mini-dissertation.

Chapter 2: The Historical Land Tenure System in South Africa and its Influence on the Current Patterns of Allocation of land in Traditional Communities

2.1 Introduction

This chapter will focus on historical land tenure in South Africa from the pre-colonial period up to the demise of Bantustan states just after the introduction of multiracial constitutional democracy.

The aim of this chapter, firstly is to indicate that individual land tenure was not part of the original indigenous law as land was held in trust by chiefs for the benefit of their subjects, but secondly to indicate that under the democratic government, traditional leaders who were former Bantustan leaders, currently use the adulterated indigenous law and patriarchy for land allocation in communal areas to promote selfish interests which do not benefit their subjects.

In this chapter I will argue that colonists introduced individual land tenure to adulterate indigenous law in an attempt to undermine the authority of chiefs over their subjects and to perpetuate patriarchy in South Africa.

I will further argue that currently, failure by the legislature to develop legislation to clearly define powers of traditional leaders over communal land has created a fertile ground for them to be land despots who are using their undefined powers over land to serve their own self-interest and to disadvantage women in their communities. I will also contend that traditional leaders use adulterated indigenous law for pecuniary gain and for perpetuating patriarchy in traditional communities.

2.2 General Land Tenure System in South Africa before Colonization

Before colonization, generally land tenure in South Africa had the following characteristics:⁹⁸

- i) Land was occupied by clans who stayed as groups;
- ii) Land was used for subsistence farming and not commercial agriculture;
- iii) Absence of codified commercial transactions;
- iv) Cultural significance; and
- v) Undefined titles and boundaries;

⁹⁸ Mqeke (n 58 above) 130.

For example, before the arrival of the Dutch people, the indigenous communities of the Cape occupied land by customary right and strangers could not hunt or graze thereon without their permission.⁹⁹ The centre of the settlement of each clan was usually a waterhole, and clan members claimed all surrounding land where they graze their cattle.¹⁰⁰ The land occupied by clans was used on equal terms by its members and it was not held to be belonging to the chief.¹⁰¹ Moreover, land could not be alienated or handed over for individual control.¹⁰²

In the eastern part of Cape or what would later be called the Transkei, the report of the Cape Native Laws Commission of 1883 explains the land tenure system that was followed by black communities before colonization.¹⁰³ The Commission found that according to native customs, the land occupied by the community was regarded 'theoretically' as the property of the chief, who in relation to the community was the trustee holding land for people who occupied and used it under his authority.¹⁰⁴

In African communities, chiefs as custodians of land held extensive power over it. They exercised legislative, executive and judicial functions as they made laws pertaining to the land, adjudicated upon them and enforced the sentence they imposed for any offences relating thereto.¹⁰⁵

In African communities, therefore, no individual subject 'owned' land. For example, during the months of June up to September, the livestock of community members was allowed to graze in any portion of land because by then all the fields would have been reaped. In Xhosa communities, the seasons between June and September are known as *buqisa* (loosely meaning that the reaping of fields is done). During the *buqisa* period, land is regarded as belonging to all.¹⁰⁶

⁹⁹ D Philip *The right to the land* (1974) 9.

¹⁰⁰ Philip (n 99 above) 9.

¹⁰¹ Philip (n 99 above) 9.

¹⁰² Philip (n 99 above) 9.

¹⁰³ Philip (n 99 above) 36.

¹⁰⁴ Philip (n 99 above) 36.

¹⁰⁵ DS Koyana *Customary law in a changing society* (1980) 68.

¹⁰⁶ Koyana (n 105 above) 68.

With indigenous communities of South Africa across the country, boundaries separating land from each community were not sharply defined, but they generally followed natural barriers such as rivers, mountains or watersheds.¹⁰⁷

2.3 Land Tenure in South Africa during Colonization

2.3.1 Colonization in the Cape

The colonization of the Cape through the arrival of Jan Van Riebeeck in 1652 altered the land tenure system of indigenous communities in the Cape. When Jan van Riebeeck arrived in Table Bay, his intention was to establish a small refreshment station where Dutch merchants could get fresh water, fruit, vegetables and grain.¹⁰⁸

However, this refreshment station grew and resulted in the expansion of the occupied territory from the shore of Table Bay to further inland.¹⁰⁹ This expansion resulted in the first confrontation between the Dutch East India Company and the indigenous people of the Cape on 10 February 1655.¹¹⁰ The expansion of the colonized area was due to the release of some of the Dutch East Indian company employees as free burghers.¹¹¹ They were then given land to cultivate various crops as farmers.¹¹² Secondly the Dutch East India Company wanted more land for the cultivation of vegetables and grains to meet the increasing demand for fresh supplies to ship passing the Cape of Good Hope.¹¹³ This act of releasing employees as free burghers and the expansion of farms for fresh supplies necessitated taking away of more land from indigenous people of the Cape which left local pastoralists with no land for cattle grazing.¹¹⁴

When Jan van Riebeeck arrived in the Cape, he interfered with the communal land tenure system used by indigenous people by giving freehold grants of land to white settlers.

¹⁰⁷ JC Bekker 'Tribal and land tenure: some crucial issues' in J Church (ed) *The future of indigenous law in Southern Africa* (1991) 9.

¹⁰⁸ L Thomson *A history of South Africa* (2014) 33.

¹⁰⁹ Thomson (n 108 above) 33.

¹¹⁰ Thomson (n 108 above) 33.

¹¹¹ A burgher is someone who is regarded as a citizen of a town or a city, in this context, the employees of the Dutch East Indian company were regarded as citizens of the Cape.

¹¹² Thomson (n 108 above) 33.

¹¹³ Thomson (n 108 above) 33.

¹¹⁴ Thomson (n 108 above) 33.

The first freehold grants of land were announced by Mr. Van Riebeeck on 21 February 1657 for the benefit of Dutch settlers.¹¹⁵ The act of conveyance, developed in the Netherlands, which leads to the transfer of ownership of land was introduced in South Africa during this period.¹¹⁶ In this period, the transfer of land was executed before two Commissioners of the Council of Policy and subscribed by the Secretary.¹¹⁷ The earliest record of individual land ownership in South Africa is from the journal that was kept by the commander of the Cape of Good Hope settlement after 21 February 1657.¹¹⁸ On this journal, the date 21 February 1657 as discussed above, is noted as the day that grants of land were made to certain men '*in vollen eygendom*' translated in English to mean 'in full ownership' and this date is normally referred to as South Africa's birthday of private ownership of land.¹¹⁹ However, this 'full ownership' of land only applied to the Cape settlers and did not extend to African communities because colonizers did not regard them as citizens of Cape of Good-Hope.¹²⁰

When Jan van Riebeeck handed over the Cape colony to his successor, Mr Zacharias Wagenaer in 1662, the colony had become a complex, racially stratified society.¹²¹ By 1700, white colonists had acquired control of the land between the Cape peninsula and the mountain escarpment and this left many indigenous people landless.¹²²

2.3.2 Annexation of Land from Black People in the Transkei Area

Colonists did not began to invade the eastern part of Southern Africa until the late eighteenth century.¹²³ Most of the black communities in the eastern part of South Africa were scarcely affected by European colonization before 1830.¹²⁴ However, from the 1830s, white missionaries and pastoral white farmers with large herds of cattle and sheep started invading the eastern part

¹¹⁵ Philip (n 99 above) ii.

¹¹⁶ DL Carey Miller 'The transfer of ownership of land' in R Zimmermann & D Visser (eds) *Southern cross civil and common law in South Africa* (1996) 748.

¹¹⁷ Carey Miller 'The transfer of ownership of land' in Zimmermann & Visser (n 116 above) 748.

¹¹⁸ JRL Milton 'Ownership' in R Zimmermann & D Visser (eds) *Southern cross civil and common law in South Africa* (1996) 657.

¹¹⁹ JRL Milton 'Ownership' in Zimmermann & Visser (n 118 above) 657.

¹²⁰ Only Burghers were regarded as citizens of the Cape and not indigenous black people in the area.

¹²¹ Thompson (n 108 above) 33.

¹²² Thompson (n 108 above) 45.

¹²³ Thompson (n 108 above) 70.

¹²⁴ Thompson (n 108 above) 70.

of South Africa.¹²⁵ At first, the arrival of the white missionaries and farmers was not resisted by local black communities and visitors were allowed to settle within the community.¹²⁶ However, white farmers started to claim the land they were permitted to use by local communities and this resulted in an on-going conflict between local communities and the white invaders.¹²⁷ By around 1846 the British who had conquered the Cape colony in 1806 had moved to the eastern part of the Cape and defeated Xhosa speaking people in the Eastern Cape through Sir Harry Smith who was also responsible for killing King Hintsa, the king of Amaxhosa.¹²⁸ During this period, the British forcefully took land from Amaxhosa.¹²⁹

Before the British forcefully took land from Amaxhosa, individual land ownership was a foreign concept to communities in the Eastern Cape.¹³⁰ But soon after annexation, the British started experimenting with a new form of tenure around the Transkei area in the hope that the population would abandon their customary system of land ownership.¹³¹ Land tax of quitrent was selected as the best tenure suited to facilitate 'social transformation', to also allow the Crown to actually keep land under its control and to guarantee constant source of revenue from land taxes.¹³² The envisaged 'social transformation' by the British meant black communities had to abandon their cultural practices, their way of living and their customs as these were considered to be barbaric by colonists.¹³³ Sir Theophilus Shepstone, a British colonizer is quoted to have said the following:¹³⁴

'At the earliest practicable period the Native custom in the matters of land tenure shall be superseded by the better system of holding land under individual right and by separate title deed'.

¹²⁵ Thompson (n 108 above) 71.

¹²⁶ Thompson (n 108 above) 71.

¹²⁷ Thompson (n 108 above) 71.

¹²⁸ Thompson (n 108 above) 76.

¹²⁹ TW Bennett 'African land – A history of dispossession' in R Zimmermann & D Visser (eds) *Southern cross civil and common law in South Africa* (1996) 71.

¹³⁰ TW Bennett 'African land – A history of dispossession' in R Zimmermann & D Visser (n 129 above) 71.

¹³¹ TW Bennett 'African land – A history of dispossession' in Zimmermann & Visser (n 129 above) 71.

¹³² TW Bennett 'African land – A history of dispossession' in Zimmermann & Visser (n 129 above) 73.

¹³³ Mamdani (n 79 above) 109.

¹³⁴ Mqoke (n 58 above) 133.

The first beneficiaries of the quitrent scheme were from the region where the Mfengu people were located in 1854.¹³⁵ Individuals were given plots with the rent below the market value but subject to a number of conditions which included good behavior, prohibitions from speculating with land, alienation, subdivision or subletting.¹³⁶ The individual tenure system was introduced to legitimize and consolidate the power of colonists and to convert people to Christianity since their customs were regarded to be nasty and brutish.¹³⁷ Moreover, the colonists planned to undermine the authority of chiefs by taking away their power over their people.¹³⁸ Many strategies were used by colonists to humiliate African chiefs while taking land from their people. For example, going back to 1847 when Sir Harry Smith killed king Hintsa and took his land, he declared the conquered territory of king Hintsa to be *Kaffraria* (meaning the land of 'kaffirs'), a derogatory word used to insult black people.¹³⁹ By 1883, attempts to introduce an individual land tenure system were reinforced in Transkei without any significant success.¹⁴⁰

2.3.3 Intensification of Land Dispossession in the Union of South Africa

In the Transvaal area, the introduction of the colonial land tenure system started as far as 1855 when the Transvaal government adopted Resolution 159 on 18 June which prohibited anybody who was not a white burgher from owning land.¹⁴¹ The 1855 resolution was followed by a number of Acts and more Resolutions with the sole purpose of regulating the movement of black people and their access to land.

The crowning legislation that consolidated the dispossession of black people from their land was the Natives Land Act (No. 27) of 1913, enacted just after the formation of the Union of South Africa in 1910. The Natives Land Act imposed a policy of territorial segregation with a very heavy

¹³⁵ TW Bennett 'African land – A history of dispossession' in Zimmermann & Visser (n 129 above) 73.

¹³⁶ TW Bennett 'African land – A history of dispossession' in Zimmermann & Visser (n 129 above) 73.

¹³⁷ See para 1.5.4 of this mini-dissertation.

¹³⁸ TW Bennett 'African land – A history of dispossession' in Zimmermann & Visser (n 129 above) 72.

¹³⁹ Thompson (n 108 above) 76.

¹⁴⁰ Mqoke (n 58 above) 133.

¹⁴¹ Agri-SA 'Expropriation without Compensation' (2018) 2

hand.¹⁴² This was the first legislative attempt to divide the Union of South Africa into areas where Africans could own land and areas where they could not.¹⁴³

Section 1(a) of the Natives Land Act explicitly prevented 'natives' from entering into agreements for the purchase or leasing of land with any other person except a 'native'. Furthermore, section 5(1) provided that anyone who was found guilty of disregarding the provisions of the Act was to be liable to a fine not exceeding hundred pounds or, if in default of payment, the person will be imprisoned with or without hard labour for a period not exceeding six months. The heavy penalties that were to be imposed on black people for disregarding the provisions of the Natives Land Act show the resoluteness of the colonial government to get rid of African land ownership in locations that were considered to be 'white areas' in South Africa.¹⁴⁴

The Natives Land Act was enacted based on the recommendations of the South African Native Affairs Commission of 1903.¹⁴⁵ Section 195 of the report of the Native Affairs Commission indicates that one of the objectives of the enactment of the Natives Land Act of 1913 was to limit the purchase and leasing of land by 'natives' to areas where they will not be in conflict with European land owners.¹⁴⁶ The Natives Land Act limited land ownership by Africans to demarcated reserves, and transformed black people who lived in rural areas into wage or tenant laborers for white farmers.¹⁴⁷ The black reserves, where black people could purchase and lease land, constituted about seven (7) percent of the total area of the Union of South Africa.¹⁴⁸ Many Africans after the enactment of the Natives Land Act were resettled to the reserves. By the 1920s, the black reserves, overpopulated with livestock and people, began to deteriorate. The original vegetation was also disappearing; streams and waterholes were drying up due to over use and the spreading of soil erosion.¹⁴⁹ The quality of life of black people declined drastically in the reserves as they were no longer able to produce enough food for themselves due to

¹⁴² TRH Davenport *South Africa a modern history* (1987) 259.

¹⁴³ Philip (n 99 above) 32.

¹⁴⁴ Davenport (n 142 above) 259.

¹⁴⁵ WH Beaumont 'Union of South Africa. Natives Land Commission. Minute addressed to the honourable the minister of Native Affairs' (1916) 1.

¹⁴⁶ Beaumont (n 145 above) 2.

¹⁴⁷ Thompson (n 108 above) 163.

¹⁴⁸ Thompson (n 108 above) 163.

¹⁴⁹ Thompson (n 108 above) 164.

overpopulation and the declining quality of land.¹⁵⁰ The creation of reserves and the enactment of the Natives Land Act resulted in increased squatting of black people in 'white' areas.¹⁵¹

2.3.4 The Intensification of Land Dispossession under the Bantustan Governments

In the mid-1950s, the apartheid government devised strategies to intensify the dispossession and displacement of black people from their land especially in the so-called 'white areas'. By 1955, the apartheid government grouped the reserves created through the Natives Land Act to eight, but eventually ten territories who became the homelands of South Africa.¹⁵² Transkei was the first homeland to be created by the apartheid government in 1963 and became 'independent' in 1976.¹⁵³ Bophuthatswana followed in 1977, Venda in 1979 and Ciskei in 1981.¹⁵⁴ Additional homelands in South Africa included Gazankulu, KwaNgwane, KwaNdebele, KwaZulu, Lebowa, and Qwaqwa. All of these homelands were ruled by Bantustan chiefs. Basically these Bantustans or homelands were used as the dumping ground for black people relocated from major centres of economic activity in South Africa.¹⁵⁵ Black South Africans were relocated to Bantustans' states according to their ethnicity. As an example, Ndebele people were relocated to KwaNdebele, Swazi people to KwaNgwane, Xhosa speaking people to the Ciskei and Transkei, Zulu people to KwaZulu and Sotho speaking people to Qwaqwa. By 1980, about sixty nine (69) percent of the African population of South Africa lived in the homelands.¹⁵⁶ This population has since been reduced due to people seeking work in urban areas.¹⁵⁷

2.4 Incorporation of Bantustan States back to South Africa

With the demise of apartheid in 1994, the Bantustans were incorporated back into being part of South Africa. Schedule 1A of the 1996 constitution describes new geographical boundaries of provinces of South Africa incorporating the former Bantustan territories.

¹⁵⁰ Thompson (n 108 above) 164.

¹⁵¹ Philip (n 99 above) 33.

¹⁵² Thompson (n 108 above) 191.

¹⁵³ Thompson (n 108 above) 191.

¹⁵⁴ Thompson (n 108 above) 191.

¹⁵⁵ M Nokaneng 'Land: some crucial issues' in J Church (ed) *The future of indigenous law in Southern Africa* (1991) 65.

¹⁵⁶ Thompson (n 108 above) 195.

¹⁵⁷ See para 1.1 of this mini-dissertation above.

The former Bantustan areas that were incorporated into South Africa today are generally known as 'tribal areas' or traditional communities of South Africa.¹⁵⁸ These former Bantustan states are currently the backbone of communal land in South Africa governed by traditional leaders.¹⁵⁹

The KwaZulu Bantustan, though incorporated as part of KwaZulu-Natal province, however, just before the first democratic elections in South Africa, Prince Mangosuthu Buthelezi, who was a prime minister of KwaZulu Bantustan government negotiated with the apartheid government to allocate about three (3) million hectares of land to be under the trusteeship of King Goodwill Zwelithini through the Ingonyama Trust Act.¹⁶⁰ This Act confers upon King Zwelithini sole control over a vast territory of land in KwaZulu-Natal province.

2.5 Powers of Chiefs on Land Post 1994 Constitutional Democracy

Chapter 12 of the constitution recognizes traditional leaders without giving any specific details about their powers. Section 211 (2) makes provision for the formation and functioning of traditional authorities, subject to applicable legislation, while section 212(1) contemplates legislation to give further details of the powers and function of traditional leaders. However, to date, the role of traditional leaders with respect to the allocation of land in traditional communities is not clear.

Although powers of traditional leaders with respect to the allocation of land are currently not clear and also, with all attempts by the British to dilute their powers in the 1800s by introducing individual land tenure, traditional communities generally have remained loyal to their chiefs.

Though theoretically land that was under the former Bantustans or traditional communities reverted back to the new government in 1994, the reality on the ground is that chiefs to date have exercised a tight grip over traditional communities and communal land that were part of the Bantustan states, and the current government is somehow not sure how to deal with their power and their tight grip over communal land.¹⁶¹

¹⁵⁸ JC Bekker 'Tribal and land tenure: some crucial issues' in J Church (ed) *The future of indigenous law in Southern Africa* (1991) 36.

¹⁵⁹ Thompson (n 108 above) 195.

¹⁶⁰ Motlanthe (n 1 above) 262.

¹⁶¹ B Mthombothi 'Why does the ANC kowtow to the very tribal chiefs it had on the run under apartheid?' 08 July 2018 <https://www.timelives.co.za> (accessed 14 February 2019).

The issue of land being controlled by traditional leaders recently came to spotlight when the former President of South Africa Kgalema Motlanthe urged government to take land away from them and redistribute it to community members as traditional leaders were acting like ‘village tin-pot despots’ over the issue of land in traditional communities.¹⁶² This irked traditional leaders who sent a strong warning to the African National Congress (ANC) to keep away from land under traditional leaders. This strong warning forced the ANC to distance itself from the statement of Motlanthe.¹⁶³ To make peace with traditional leaders, President Ramaphosa had to go to the royal palace of King Goodwill Zwelithini to meet with him and explain that government will not take land away from traditional leaders.¹⁶⁴ On 9 October 2018, King Goodwill Zwelithini demanded guarantees in writing from government that the nearly three million hectares of land under Ingonyama Trust controlled by him will be exempted from land expropriation.¹⁶⁵ It should be noted that section 25(6) of the constitution requires that the issue of insecure land tenure in South Africa be addressed. This section includes land held in trust by traditional leaders. The section reads as follows:

‘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’.

It is not clear how government is going to find a balance between the demands of section 25(6) of the constitution and that of King Goodwill Zwelithini and other traditional leaders that government must keep away from communal land.

¹⁶² See para 2.4 of this mini-dissertation.

¹⁶³ T Madia ‘Mkhize distances government from Motlanthe’s comment on traditional leaders’ 6 July 2018 <http://www.news24.com> (accessed 10 October 2018).

¹⁶⁴ M Mahlase ‘Ramaphosa tells Zulu king Zwelithini than land in Ingonyama Trust is safe’ 7 July 2018 <http://www.news24.com> (accessed 10 October 2018).

¹⁶⁵ ‘King Zwelithini wants Ramaphosa’s commitment to exempt Ingonyama Trust in land expropriation’ 8 October 2018 <http://www.news24.com> (accessed 10 October 2018).

2.6 Communal Land Tenure System under Traditional Leaders

The introduction of constitutional democracy has not taken away the powers of traditional leaders over land in former homelands of South Africa. Traditional leaders continue to function as a powerful force within a post-colonial civil society in South Africa.¹⁶⁶

The lack of clarification of constitutional powers of traditional leaders with respect to land in traditional communities has created a fertile ground for the abuse of power by these leaders. Land in traditional communities is controlled by traditional leaders, not as custodian of it on behalf of communities, but in contrast to indigenous law, as despots using it to oppress their subjects. This clearly contradicts the indigenous law principle of land being held in trust by the chief on behalf of his subjects. The problem of traditional leaders being despots over communal land was highlighted by former president Motlanthe as discussed below.

In 2017 former president Motlanthe produced a report entitled 'High Level Panel on the Assessment of Key Legislation and Acceleration of Fundamental Change' (The Motlanthe report). This report was as a result of intensive investigation of current problems faced by communities in South Africa due to land dispossessions introduced by colonists and the apartheid government. The investigation extended to land currently under the administration of traditional leaders in South Africa. This is the land that was allocated to Bantustan states under apartheid rule.

One of the findings of the Motlanthe report is that the current communal areas in South Africa that are governed by traditional leaders are a site of persistent poverty and inequality.¹⁶⁷ The investigation reveals that people in these areas are more vulnerable to land dispossession because traditional leaders collude with powerful players to take advantage of the vulnerability of these communities.¹⁶⁸ According to the Motlanthe report, land under traditional communities in South Africa, especially in mining areas, is sold to foreign investors at the expense of communities.¹⁶⁹ This is clearly contrary to the original principles of chiefs controlling land for the benefit of their people. In line with indigenous law, land was never sold to individuals or to

¹⁶⁶ R Federico 'Indigenous authorities and the post-colonial state: the domestication of indigeneity and Africa nationalism in South Africa' (2010) *Social dynamics* 53.

¹⁶⁷ Motlanthe (n 1 above) 265.

¹⁶⁸ Motlanthe (n 1 above) 265.

¹⁶⁹ Motlanthe (n 1 above) 266.

commercial enterprises, land was always held in custody by the chief for the benefit of his subjects. As current traditional leaders have powers to control land in traditional communities without accountability to anyone, not even to the government of the day, corruption and greed have become the order of the day. Land is no longer benefiting communities, but some traditional leaders are more interested in making money out of mining royalties by signing away communal land to unscrupulous mining companies at the expense of vulnerable community members. These traditional leaders are repeating the same mischief done by colonialists of taking away land from African communities to benefit white settlers.¹⁷⁰ The only difference now is that the beneficiaries are no longer white settlers in a sense, but are multinational mining giants with strong links to the West. Traditional leaders have been found to be denying communities their land rights including long standing customary rights allowing them to use their land.¹⁷¹ This again is the manipulation of indigenous law, this time for selfish pecuniary interests.

According to the Motlanthe report, women currently under traditional leadership in South Africa are more insecure when it comes to land issues compared to men.¹⁷² This again is the continuation of the manipulation of indigenous law which occurred when patriarchy was legally institutionalized by colonists in South Africa for the benefit of white settlers.¹⁷³

The Motlanthe report explains that during surveys conducted in communities under traditional leadership in South Africa, women reported a wide range of abuses directed at them. This included widows being expelled from their homes when their husbands die, land being allocated only to men and widespread collusion between traditional leaders and families of single women to deny these women access to land.¹⁷⁴ In African culture, the chasing away of widows from their home and land after the death of their husbands is taboo and contrary to cultural norms. The current action of traditional leaders is clearly the perpetuation of patriarchy and the manipulation of indigenous law to disadvantage women as they are not regarded as equal to men. Due to the manipulation of the indigenous law, the rights of women to land are still tied to

¹⁷⁰ See para 2.3.2 of this mini-dissertation above.

¹⁷¹ Motlanthe (n 1 above) 202.

¹⁷² Motlanthe (n 1 above) 267.

¹⁷³ See para 1.5.4 of this mini-dissertation above.

¹⁷⁴ Motlanthe (n 1 above) 267.

their status as wives and typically terminate upon divorce or death of the husband.¹⁷⁵ During colonial period the manipulation of indigenous law led to women being used as mere helping hands to till or work on the land for the benefit of men¹⁷⁶. The Motlanthe report is revealing similar manipulation of indigenous law to disadvantage women under the disguise of traditions and customs of African people.

From the Motlanthe report, it is evident that the impact of manipulation of indigenous law by colonists has endured even after the introduction of democracy in South Africa.¹⁷⁷ This has been seen through the endurance of patriarchal laws with respect to gender and the allocation of land. However, the situation has somehow worsen because of the commercialization of communal land by traditional leaders. Some commentators attribute this worsening situation to the inability of the ANC to consolidate an electoral base in rural constituency without the support of traditional leaders.¹⁷⁸

This persistent deep-rooted adverse patriarchal attitudes and firmly entrenched stereotypical behavior with respect to the role of women in traditional communities limit the full realization of human rights of women in these communities.¹⁷⁹

2.7 Emerging Patterns of Land Allocation in Traditional Communities.

Not all is lost with the issues of land and women in traditional communities. Increasingly a number of women in South Africa remain unmarried or are cohabiting and have children out of wedlock. This dynamic is affecting the approach of traditional leaders with respect to the allocation of land to women. The changing marriage patters as well as continuing decline in marriage rates are generating tensions within rural societies and are prompting innovations in the character of women's rights to land.¹⁸⁰ Since 1994, there is an emerging practice of single women in some traditional communities of acquiring residential sites to build *umuzi* (or home)

¹⁷⁵ Bowman & Keunyeheia (n 72 above) 128.

¹⁷⁶ Bowman & Keunyeheia (n 72 above) 131.

¹⁷⁷ Federico (n 166 above) 54.

¹⁷⁸ Federico (n 166 above) 53.

¹⁷⁹ Ssenyonjo (n 22 above) 259.

¹⁸⁰ B Cousins 'Women's land rights and social change in rural South Africa: the case of Msinga, KwaZulu-Natal' (2013) 13 *Acta Juridica* 73.

for themselves and their children.¹⁸¹ However to date, no concrete evidence has been presented to suggest that women in these communities are also able to access land on their own for *amasimu* (fields for crops) other than a small home based garden.¹⁸² The allocation of land to women to build their homes is a positive step, but not significant enough, since women still do not enjoy full benefits of land allocation equal to men in traditional communities.

In the land study at Msinga in KwaZulu-Natal, views were expressed by community members that unmarried women with children should also be allowed to apply for land to be used as *amasimu* in their own right, but there is no concrete evidence to show that this is happening.¹⁸³

The emerging trends of approving allocation of land to women are not happening in a vacuum. Since 1994, government has introduced a number of legislation and policies removing barriers that prevent women from accessing land. Moreover, international treaties which South Africa is a signatory to, as an example, the 'Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol),' which requires State Parties to combat all forms of discrimination against women, have played a significant role in influencing policy direction in South Africa to remove gender-based barriers against women. One of the key policy documents that sets the tone for the elimination of all gender based allocation of land in South Africa is the White Paper on South African Land Policy of 1997. This will be discussed further in chapter 3 of this study.¹⁸⁴

2.8 Conclusion

Historical land tenure in South Africa has been discussed and evidence was presented to show that individual land tenure was a foreign concept in African culture. Arguments from Mqoke and Phillip were used to support this claim. In the Transkei area evidence from the Cape Native Laws Commission of 1883 was used to confirm that no individual land tenure was practiced before colonization. Writings of Koyana were also used in the discussions to show that historically before colonization land was held in trust by chiefs on behalf of their subjects.

¹⁸¹ Cousins (n 180 above) 76.

¹⁸² Cousins (n 180 above) 76.

¹⁸³ Cousins (n 180 above) 91.

¹⁸⁴ See para 3.2 of this mini-dissertation below.

In this chapter arguments were also brought to show that the concept of private property was first introduced in the Cape Colony by Jan Van Riebeeck on 21 February 1657 for the benefit of Dutch settlers. The land tenure system from colonization in the Cape up to the demise of Bantustan states was also discussed. It has also emerged from the Motlanthe report that currently, traditional leaders who are in control of communal land from former Bantustan states are abusing the authority they have over their subjects to perpetuate patriarchy, for instance by chasing away widows from their land after the death of their husbands. This is the adulteration of indigenous law on land allocation. The Motlanthe report has also been used to show that currently, traditional leaders are colluding with mining companies to sign-off communal land for mining purposes. The signing-off of community land for the benefit of mining companies at the expense of communities is an adulteration of African culture, as in line with African custom, land was never sold to anyone. The conclusion to be made from this chapter is that the introduction of democracy in South African has not changed the lot of women with respect to land in traditional communities as traditional leaders still continue to use the adulterated indigenous law to exclude women from accessing land. The source of this abuse was shown to be due to lack of clear definition of powers of traditional leaders over land by any legislation or the constitution.

Chapter 3: Legislative Reforms and Policies addressing Gender Based Allocation of Land in South Africa

3.1 Introduction

The aim of this chapter is to briefly discuss key legislation and policies introduced by the post-1994 ANC government after the certification of the constitution to address gender based allocation of land. The chapter will focus on highlighting how the government has gone about addressing gender based allocation of land in South Africa. Firstly the constitutional framework addressing gender based allocation of land will be discussed. This will be followed by legislation, case law and lastly policies and their programmes addressing gender based allocation of land.

In this chapter, I will argue that the constitution, legislation and case law, the new policies and land programs of government addressing gender based discrimination and patriarchy with regard to the allocation of land have not brought material change to the situation of women in traditional communities

3.2 Constitutional Provisions Abolishing Gender Based Allocation of Land

One of the key contributing factors to female's inability to overcome poverty in South Africa especially in rural communities is lack of access to, and rights in, land.¹⁸⁵ Gender based practices of allocating land are largely contributing to these inequities.¹⁸⁶ With the advent of democracy, a number of provisions in the constitution have been made to address gender practices that contribute to inequalities between men and women.

The constitution, in particular the Bill of Rights is the foundation of all legislation, case law and policies addressing gender based land programmes in South Africa.

Sections in the Bill of Rights which address issues of inequality include section 9(1) which states that everyone is equal before the law, section 9 (2) which guarantees everyone equal enjoyment of all rights and freedoms in the Bill of Rights, section 9(3) which outlaws unfair gender based

¹⁸⁵ Commission for Gender Equality 'A gendered analysis of land reform policy and implementation outcome in South Africa (2006-2008/09)' (2009) 30.

¹⁸⁶ Commission for Gender Equality (n 185 above) 30.

discrimination and section 9(4) which directs that national legislation must be enacted to prevent unfair discrimination.

Furthermore, section 15(3)(a)(i) of the constitution makes provision for the enactment of legislation to recognize marriages (and their consequences) concluded under any tradition or culture. However, section 15(3)(b) clarifies that the recognition of any marriage (and its consequences) must be consistent with the provision of the constitution. It is therefore important to note that the consequence of any woman marrying in line with indigenous law should not result in her being discriminated against, this includes discrimination with regard to allocation of land, as this will be contrary to the Bill of Rights.

Moreover, section 39(2) directs that any court when interpreting or developing 'customary' (indigenous) law must promote the spirit, purport and the objective of the Bill of Rights. This objective should include the elimination of any unfair gender based discrimination. Therefore the court when interpreting or developing indigenous law should eliminate any practices that involve unfair gender based allocation of land. Furthermore, section 39(3) of the constitution recognizes the existence of rights in terms of 'customary' (indigenous) law as long as these rights are consistent with the Bill of Rights. The allocation of land in terms of indigenous law is therefore recognized provided that it is done within the framework of the constitution.

It is apparent from the above mentioned sections of the Bill of Rights that since the introduction of post-apartheid constitution in South Africa, all practices that use gender to unfairly discriminate against women are unconstitutional. Hence, gender based allocation of land becomes unconstitutional irrespective of cultural practices or customs of the people.

Moreover, section 10 of the constitution states that everyone has inherent dignity and the right to have their dignity respected and protected. Earlier it was indicated that with the adulteration of indigenous law by colonialists and the apartheid government, women in traditional communities were regarded as being under perpetual tutelage irrespective of their age.¹⁸⁷ This

¹⁸⁷ See para 1.5.4 of this mini-dissertation above.

is infringing on the rights of women to be treated as equal with men and has a negative impact on their inherent dignity in terms of the constitution.

3.3 Legislation Abolishing Gender-Based Allocation of Land

The key legislation removing some of the gender based customary practices pertaining to land is the Recognition of Customary Marriages Act 120 of 1998. Section 6 of this Act in summary states that a wife in a customary marriage, on the basis of equality with her husband, has full status and capacity, including capacity to acquire assets and dispose of them. These assets include land.

With this Act in place, women have now powers just as men, to acquire and dispose of land as they deem fit, without any restriction from any customary practice.

Himonga explains that this Act provides for the legal capacity of women in marriage to be equal to that of their husbands, and that it abolishes the perpetual minority and legal incapacity of married women as well as the subjection of women to the husband's marital power.¹⁸⁸ This is in line with section 9 of the Bill of Rights as earlier discussed. This legislation in summary gives women in customary marriage equal rights and power as those of men to own property including land irrespective of any customary belief or practice.

3.4 Case-Law Abolishing Gender Based Allocation Land

The introduction of the Bill of Rights and the legislation abolishing gender-based allocation of land has triggered a number of court cases whereby women approached different Courts to enforce their rights to be treated as equals with respect to issues of land or property in general. Some of the cases are briefly discussed below:

i) Bhe v Magistrate Khayelitsha and others

In this case, the Constitutional Court declared the African law principle of male primogeniture unconstitutional and allowed widows and children the right to inherit from their families irrespective of their gender or legitimacy.¹⁸⁹

¹⁸⁸ Himonga (n 94 above) 2.

¹⁸⁹ *Bhe and others v Khayelitsha Magistrate and others* 2004 (CCT 49/03] ZACC.

The *Bhe* case involved two young female applicants, Nonkululeko, and Anelisa who could not inherit the house of their father who had passed away due them being girls. Their right to inherit their father's house was affected by section 23 of the Black Administration Act 38 of 1927 which promoted male primogeniture. Their mother brought an application to secure the deceased house for them. The Constitutional Court ruled that the African customary rule of male primogeniture was unconstitutional and also declared section 23 of the Black Administration Act to be unconstitutional.

This is one of the cases in South Africa that paved the way for females to be treated as equal with men when coming to issues of property inheritance, including land.

ii) *Case Number 63462/12*¹⁹⁰

One of the more recent cases indicating that gender based allocation of land is unconstitutional is *Case Number 63462/12* held before Molefe J in the Gauteng Division of the High Court, Pretoria on 22 July 2014. The first respondent was the eldest son of a deceased man originally from Venda who was in a polygamous customary marriage. The first responded will be called Mr. X for the purpose of this discussion, as the court for some reason did not allow the use of names in this matter. The deceased man bought and owned two plots which he allocated to his two customary wives for the purpose of subsistence farming (see paragraph 6 of the judgment). When the deceased passed away intestate on 30 April 1971, Mr. X, was appointed by Bantu Affairs Commissioner as the heir of the diseased estate in terms of the Venda culture. Mr. X therefore inherited both plots to be used for the benefit of the entire homestead that includes children from both wives. Since the diseased had titles deeds to both farms, these were officially transferred to Mr. X, again in line with the Venda Culture (see paragraph 7 of the judgment). However, the children of the second wife approached the court to pray that the second plot ought to have been transferred to them in line with section 9 of the constitution.

As part of the Judgment, Molefe J acknowledged that the African 'customary' law of succession in South Africa was based on the principle of primogeniture and therefore the eldest son from the first wife was entitled to inherit the entire estate in line with Venda 'customary' law, to the

¹⁹⁰ *Case Number 63462/12* (Personal information of the applicants were not disclosed by the directive of the court).

exclusion of female children and younger children (see paragraph 14 of the judgment). However, Molefe J in summary further stated the following:

-the deceased bought and owned the land in the Western sense with a title deed, therefore the farms were not communal land (see paragraph 16 of the judgment);

-The Reform of Customary Law of Succession Act 11 of 2009 which came into operation on 20 September 2012 introduced a new era into the 'customary' law of succession (see paragraph 18 of the judgment);

-Women and children are specifically included in Section 1 of the above mentioned Act (see paragraph 18 of the judgment);

- The principle of primogeniture in the context of 'customary' law of succession is in conflict with sections 39(2) and 39(3) of the constitution (see paragraph 19 of the judgment);

-The two prohibited grounds of discrimination are evident in the case, the first one relates to gender and the second one relates to unfair discrimination on the ground of 'birth' (see paragraph 21 of the judgment).

At the end, the Judge ruled in favour of the applicants and children of the second wife including females had their right to inherit from the deceased father confirmed (see paragraph 27 of the judgment).

i) *Rahube v Rahube and others*¹⁹¹

This is one of the latest cases whereby a woman challenged male primogeniture.

Ms. Rahube, the applicant challenged section 2(1) of the Upgrading of Land Tenure Rights Act 112 of 1991. She challenged the constitutional validity of the above-mentioned section of this Act which converts land tenure rights into ownership as discussed below.

The applicant lived with her brother, the first respondent, her grandmother and other family members in her grandmother's house in the early 1970s (see paragraph 6 of the judgment). The grandmother was the de facto owner of the house, though she did not have any documentary evidence in this regard. The grandmother passed away in 1978. The applicant had moved out of

¹⁹¹ *Rahube v Rahube and others* [2018] ZACC42.

the house in 1973 to live with her husband, but moved back to the property in 1977 after her marriage was dissolved, and had lived there since (see paragraph 7 of the judgment).

Her three brothers (including the first respondent) and uncle had moved out of the house between 1980 and 2000. In 1987, the first respondent was nominated by the family to be the holder of a certificate of occupation with respect to the property. In 1988, by virtue of his earlier nomination, the first respondent was issued a deed of grant. The deed of grant was issued in terms of Proclamation R293, emanating from the Black Administration Act 38 of 1927 (see paragraph 8 of the judgment).

The Upgrading of Land Tenure Rights Act 112 of 1991 automatically converted rights in property such as deed of grant to ownership right. This means that the first respondent, as the holder of the deed of grant, automatically became the owner of the property in terms of section 2(1) of the Upgrading of Land Tenure Rights Act. This was irrespective of whether he was residing at or using the property (see paragraph 9 of the judgment).

In August 2009, the first respondent instituted eviction action proceedings against the applicant and other occupants of the property (see paragraph 10 of the judgment). The applicant raised the constitutional invalidity of section 2(1) in opposition to the eviction proceedings (see paragraph 11 of the judgment). The matter then went to the High Court due to issues pertaining to the constitutionality of section 2(1), as this section provides for automatic conversion of land tenure rights into ownership without any procedures to hear and consider competing claims.

The High Court reasoned that people who were not holders of a certificate of occupation or deeds of grant were prevented from acquiring ownership of properties in which they have substantial interest. This exclusion was inherently gender-based as Proclamation R293 was promulgated through the Black Administration Act. Proclamation R293 prevented women from being heads of the family, hence they could not have certificate of occupation or deed of grant registered in their name (see paragraph 14 of the judgment). Section 2(1) of the Upgrading of Land Tenure Rights Act recognized and converted rights that had been acquired through a discriminatory legislative scheme. The High Court therefore held that this section was inconsistent with sections 9 and 34 of the constitution as it did not protect, allow for notification or consultation with the

occupants of a property who do not have a certificate of occupation or a deed of grant registered in their name (see paragraph 16 of the judgment). The Constitutional Court agreed with the High Court, though it slightly varied the judgment (see paragraph 75 of the judgment).

3.5 Policies and Government Programmes Promoting the Elimination of Gender Based Allocation of Land

3.5.1 The White Paper on South African Land Policy

For rural communities, land is key for a number of reasons which include subsistence farming. The lack of access to land for rural women contributes to their inability to overcome poverty as stated earlier under section 3.2 above.¹⁹² Moreover, gender based allocation of land increases inequalities between men and women.¹⁹³

After the demise of apartheid in South Africa, the new ANC government sought to address gender based allocation of land by introducing a policy framework to attend to this matter.¹⁹⁴ The process started by the Department of Land Affairs developing a White Paper on South African Land Policy (White Paper) in 1997. This White Paper seeks to address practices that have prevented women from accessing land in South Africa.

The White Paper is significant in the context of women under traditional leadership in South Africa because over years they have faced gender based discrimination with respect to allocation of land as was described in the Motlanthe report.¹⁹⁵ The White Paper, though not necessarily focusing on traditional communities, addresses some of the challenges faced by women in these communities under traditional leadership. It should be noted that power relations with respect to land ownership over years have impeded women's attainment of productive and fulfilling lives due to lack of access to land for farming or building their homes.¹⁹⁶

¹⁹² Commission for Gender Equality (n 185 above) 30

¹⁹³ Commission for Gender Equality (n 185 above) 30

¹⁹⁴ The phrase 'gender-based' for this study is used in the context of customary practices of allocating land to men and not to women.

¹⁹⁵ See para 2.5 of this mini-dissertation above.

¹⁹⁶ Commission for Gender Equality (n 185 above) 30.

Moreover, legal restrictions have also prevented women's access to land and the financial services to develop it.¹⁹⁷ The White Paper introduces reforms to eliminate such policies in South Africa.

The White Paper acknowledges that in South Africa, women have been discriminated against when it comes to allocation of land.¹⁹⁸ It places a considerable emphasis on gender equality with respect to issues of access to land and effective participation of women in decision-making procedures.¹⁹⁹ It gives directives that seek to introduce reforms to make sure that all forms of discrimination against women in accessing land are removed.²⁰⁰ The White Paper demonstrates that traditional leadership in South Africa is often dominated by men who assert that they have their own traditions and culture and that they do not need the advice of government on how to handle gender relations with respect to land programmes.²⁰¹

Communal tenure systems is cited by the White Paper as the most widely practiced form of discrimination which promotes gender based allocation land in South Africa.²⁰² To ensure that women achieve a fair and equitable benefit from land reform programmes, the White Paper proposes measures like the removal of all legal restrictions to promote participation of women in land reform.²⁰³ Specific provision for women to enable them to access financial and other support services and to gain opportunities in agricultural provision and training in gender awareness are also proposed by the White Paper.²⁰⁴

Since women have not only faced discrimination with regard to the allocation of land, but have also struggled to access funding to be used for land related purposes, the White Paper introduced an important element in land reform that addresses issues of funding. A grant of R15 000.00 to be used for farming programmes was introduced to benefit households with gross monthly

¹⁹⁷ Commission for Gender Equality (n 185 above) 30.

¹⁹⁸ White paper on South African land policy 32.

¹⁹⁹ Commission for Gender Equality (n 185 above) 30.

²⁰⁰ White paper on South African land policy (n 198 above) 32.

²⁰¹ White paper on South African land policy (n 198 above) 40.

²⁰² White paper on South African land policy (n 198 above) 59.

²⁰³ White paper on South African land policy (n 198 above) 72.

²⁰⁴ White paper on South African land policy (n 198 above) 72.

income not exceeding R1500.00 per month.²⁰⁵ Though this grant was to benefit both men and women, the importance of making sure that women participate in the programme was emphasized by the White Paper. To ensure that women achieve a fair and equitable benefit from land reform programmes, the White Paper proposes some of the following measures:²⁰⁶

- The removal of all legal restrictions on participation by women in land reform;
- Clear mechanisms in land related project planning, beneficiary selection and project appraisal to ensure equitable benefit from the programme for both men and women;
- Specific provision for women to enable them to access financial and support service and to gain opportunities in agricultural provision;
- Training in gender awareness and participatory gender planning for all officials and organizations involved in implementing land reform programmes;
- Introduction of measures to ensure that those involved in land reform are equipped to undertake gender analysis with regard to land programmes; and
- A monitoring and evaluation system that will provide the information necessary to monitor women's participation in land reform programmes.

In Summary, the main emphasis which runs throughout the White Paper pertains to women participating equally and gaining equal rights to land.²⁰⁷

3.5.2 Additional Policies and Programmes Facilitating Access to Land for Women

Since the introduction of the White Paper, a number of programmes and additional policies have been introduced by government which aim to eliminate gender based allocation of land. Some of the policies include the following:

- The White Paper on Agriculture;
- Proactive Land Acquisition Strategy;
- State Land Lease and Disposal Policy;
- Comprehensive Rural Development Programme;

²⁰⁵ White paper on South African land policy (n 198 above) 94.

²⁰⁶ White paper on South African land policy (n 198 above) 72

²⁰⁷ Commission for Gender Equality (n 185 above) 31.

- Agricultural Landholding Policy Framework;
- The Land Redistribution for Agricultural Development Sub-programme;
- Comprehensive Agricultural support Programme;
- Agricultural Policy Action Plan;
- Land Reform for Agricultural Development;
- Recapitalization and Development Policy Programme;
- Land and Agrarian Reform Project; and

With respect to gender issues, broadly, these policies have some of the following objectives:

- To create guidelines to promote the participation of women in land projects;
- To promote the recruitment of appropriate expertise to address gender issues with respect to land;
- To facilitate gender sensitive land programmes;
- To promote advocacy programmes with respect to gender and land; and
- To create an enabling environment to make it possible to address issues affecting women with respect to land.

Some of these policies and programmes are directed at addressing gender based allocation of land while others are general but are emphasizing the removal of gender based inequalities with respect to land programmes in South Africa. The main achievement of these policies with respect to gender based allocation of land is that pragmatic programmes dealing with gender issues and land were established and consolidated in practice.²⁰⁸ Though these policies were not as specific as the White Paper on gender issues, however their implementation indicated a policy direction to eliminate gender based allocation of land in South Africa. These policies will not be individually discussed, but their collective impact on gender based allocation of land in South Africa will be briefly discussed.

From these policies, a number of programmes have been implemented by government which show commitment to eliminate discriminatory gender based land programmes. Between 2005

²⁰⁸ Commission for Gender Equality (n 185 above) 41.

and 2006, a total of 18 284 women benefitted from government's Land Redistribution and Tenure programme.²⁰⁹ Furthermore, between 2006 and 2009, a total of 62 077 female-headed households benefited from government's land restitution programme.²¹⁰ Other programmes that were introduced by government to support the incorporation of women to benefit from land redistribution programmes included approval of gender responsive budgeting framework, gender-focused bursary programmes in areas of scarce skills in agriculture, establishment of national and provincial structures aimed at providing organized discussion forum for women to participate in land reform programmes.²¹¹ Some of these programmes aimed specifically to raise the profile of rural women and their communities to ensure the sustainable growth of agriculture, especially because women in rural areas still experience problems in accessing finance and land.²¹² Furthermore these programmes are aiming to directly dismantle negative socio-economic impacts felt by rural women due to culture and gender based allocation of land in South Africa. As women still bear the brunt of colonists' and Bantustan land policies, it was inevitable for government to develop policies and programmes that would address gender issues with regard to redistribution of land and transformation of agriculture sector in South Africa.

3.6 Conclusion

In this chapter the White Paper on South African Land Policy of 1997 was discussed. Additional policies that address issues of gender and land which include the White Paper on Agriculture; Proactive Land Acquisition Strategy of 2006; State Land Lease and Disposal Policy and Comprehensive Rural Development Programme were briefly discussed. Various programmes emanating from these policies which include funding, advocacy programmes promoting the participation of women in land programmes, procurement of expertise to assist with gender issues for land programmes were discussed. Furthermore the Recognition of Customary Marriages Act 120 of 1998 as key legislation abolishing previous customary practices that were discriminating against women especially on issues of property which include land were discussed.

²⁰⁹ Commission for Gender Equality (n 185 above) 45.

²¹⁰ Commission for Gender Equality (n 185 above) 52.

²¹¹ Commission for Gender Equality (n 185 above) 42.

²¹² Commission for Gender Equality (n 185 above) 42.

Case law that include *Rahube and Bhe* which show that male primogeniture and any gender based land programmes are unconstitutional were discussed.

The constitution, the cited legislation, the discussed case law and government policies starting from the White Paper on South African Land Policy of 1997 all are sending the same message of equality between men and women with respect to allocation of land. Thus, we can conclude that since the certification of the constitution, government and courts have moved to eradicate laws and policies that promote gender based allocation of land. However, as Himonga stated, many of the laws aimed at protecting women remain as mere paper laws in rural communities with no practical implementation.²¹³ Though the cases discussed above make it to be illegal for anyone in South Africa to use gender based policies with respect to the allocation of land, but generally they have not benefited women in traditional communities as to date women in such communities are still faced with gender based land policies. The Motlanthe report which is based on recent surveys and face to face interviews with rural women in traditional communities has highlighted that gender discrimination with respect to the allocation of land is continuing unabated in these communities.²¹⁴ Therefore all the good intentions of government and the legislature to create an enabling environment to eradicate gender based discrimination with respect to all issues pertaining to the allocation of land in South Africa have failed to yield any significant impact on the lives of rural women under traditional communities. These women still have to contend with gender based allocation of land in their communities.

²¹³ See para 1.4.1 of this mini-dissertation above.

²¹⁴ See para 2.6 of this mini-dissertation above.

Chapter 4: The Tension between African Culture and the Constitution

4.1 Introduction

The aim of this chapter is to discuss the tension between African culture and the constitution with respect to gender and the allocation of land in traditional communities. The main focus of the chapter will be to identify the nature and source of this tension. Furthermore, the chapter will focus on how this tension could possibly be addressed using the African philosophy of Ubuntu. Firstly, the impact of colonialism on indigenous law will be discussed, followed by discussions on the impact of colonialism on the constitution.

I will argue that the attitude of colonists towards African culture has filtered through into the constitution, hence its domination of indigenous law. I will further argue that the tension between African culture and the constitution with respect to the allocation of land in traditional communities revolves around issues of patriarchy, gender equality, individual land tenure system and the property rights of women. Lastly I will contend that the incorporation of Ubuntu principles in all our laws, whether they be indigenous law, imposed colonial law or even the constitution itself, could mediate this tension between African culture and the constitution

4.2. The Impact of Colonialism on Indigenous Law

One of the lasting legacies of Western colonization is that the legal systems of the European powers have become entrenched in their former colonies.²¹⁵ Variants of Spanish, French, Italian, Portuguese, Dutch and English law determine the daily affairs of people in vast areas of Africa.²¹⁶ This is also true in South Africa. South African law is dominated by Roman-Dutch and English laws at the expense of indigenous law. Moreover, colonists' attitudes towards indigenous law have been characterized by racism, sexism and ethnocentrism and were based on false beliefs that indigenous law is inferior to any law emanating from the West.²¹⁷ Colonists concluded that indigenous law was repugnant to Christianity and thus regarded it as some form of a pagan

²¹⁵ R Zimmermann, & J Visser 'A Pan-African view: imperial law without the imperialist' in R Zimmermann & D Visser (eds) *Southern cross civil and common law in South Africa* (1996) 7.

²¹⁶ R Zimmerman & J Visser 'A Pan-African view: imperial law without the imperialist' in Zimmermann & Visser (n 215 above) 7.

²¹⁷ J Thomas & DD Tladi 'Legal pluralism or a new repugnancy clause (1999) 32 *The comparative and international law journal of Southern Africa* 356.

custom to be destroyed and substituted with higher colonial law.²¹⁸ Colonists failed to understand the fact that indigenous law, especially its human right system, since it not prescribed in the Western sense does not negate its value.²¹⁹ It should be noted that the African Human Right System promotes group rights, while the Human Right System from the West is more concerned about individual rights.

As a result of this superiority complex of colonists and their imposed laws, the recognition of indigenous law in South Africa has been subject to a repugnancy clause. In other words, those parts of indigenous law which are held to be in conflict with the Western 'principles of justice, fairness or equity' are regarded as unenforceable.²²⁰ Because of the perceived superiority of laws emanating from the West, the indigenous system has been pushed to the periphery where it could not develop, while the Western system has maintained a central position enabling it to flourish.²²¹ The British colonial administrators and later the apartheid government in South Africa took it upon themselves to decide which principles of indigenous law were relevant to be incorporated to what was called 'civilized' law and which ones were irrelevant to be pushed to the periphery of laws.²²²

It should also not be forgotten that the colonialists adulterated the original indigenous law to make sure that the African life would be managed and controlled under white rule.²²³ There are strong sentiments that the adulteration of the original indigenous law was achieved in collaboration between the colonialists and indigenous elites.²²⁴ This collaboration unfortunately left African women severely affected.²²⁵ To date, indigenous law is still considered to contain some 'uncivilized elements' that need to be polished. The colonists' idea that Western law is superior to indigenous law and the collaboration between colonialists and the indigenous elites

²¹⁸ D Kuwali 'Decoding Afrocentrism: Decolonizing legal theory' in O Onozi (ed) *African legal theory and contemporary problems: critical essays* (2014) 72.

²¹⁹ D Kuwali 'Decoding Afrocentrism: Decolonizing legal theory' in O Onozi (n 218 above) 88.

²²⁰ Thomas & Tladi (n 217 above) 356.

²²¹ Thomas & Tladi (n 217 above) 356.

²²² Thomas & Tladi (n 217 above) 356.

²²³ T Nhlapo 'Indigenous law and gender in South Africa: taking human rights and cultural diversity seriously' (1995) 13 *Third World Legal Studies* 54.

²²⁴ Nhlapo (n 223 above) 52.

²²⁵ Nhlapo (n 223 above) 53.

to adulterate indigenous law have laid the foundation for tension between African law and the constitution. This is because the constitution is influenced by laws from the West as discussed below.

4.3. The Impact of Colonialism to the constitution

The constitution is modeled in line with the human rights system from the West. It has incorporated many elements of laws emanating from the West. For example the property laws of the country are influenced by the Roman-Dutch law and the Bill of Rights is influenced by the Universal Declaration of Human Rights. If the attitude of colonists when they introduced Western law like the Roman Dutch and English laws to South Africa was that indigenous law was barbaric and uncivilized, surely their attitude would be reflected in the Roman-Dutch and English laws of our country. The question then is what prevents the attitude of colonialists from being reflected in the constitution if it has incorporated some elements of Roman-Dutch and English laws, and the universal human rights system from the West? Can it be concluded that the constitution partly reflects the 'spirit' and attitude of colonialists who regarded indigenous law as barbaric and full of pagan customs? If indeed the constitution partly reflects the attitude of colonists, will this not lead to some general indignation against it from some sectors of the society? These questions cannot just be ignored or dismissed.

In *State v Makwanyane and another* Justice Sachs observed as follows pertaining to the constitution:

'[m]any aspects and values of traditional African (indigenous) law will also have to be discarded or developed to ensure compatibility with the new constitution'.²²⁶

The pertinent question on the minds of the critics of the constitution is why many aspects and values of 'traditional African law' have to be 'discarded or developed' to ensure their 'compatibility' with the new constitution? Is this statement not in line with the original attitude of colonialists towards indigenous law whereby they regarded certain provisions of it to be barbaric and uncivilized, hence a need to 'discard or develop them? Is the Western system of law

²²⁶ Thomas & Tladi (n 217 above) 357.

so righteous and perfect that it had nothing to be discarded or modified or developed? These are some of the questions on the minds of critics of the constitution in South Africa.

Davis, for instance sees the constitution as nothing more than an attempt to rearrange an unjust order rather than as addressing questions of historical justice from the perspective of those who were materially oppressed and formally excluded.²²⁷ There is a general feeling in some sectors of the society that the constitution is ensuring that those who have been excluded continue to be excluded.²²⁸ Furthermore, Davis, when discussing the constitution, expresses the view that 'African law', the indigenous law of the land, is made subject to the constitution which is not purely indigenous to Africa [due to the influence of Western law to it], but yet it regulates and governs the relationship between those who conquered the country through the unjust wars of colonization and the conquered indigenous people.²²⁹ From a range of quarters the constitution is therefore viewed as an obstacle to the radical transformation of South African society and is considered as representing a perfection of colonial conquest.²³⁰ The constitution is regarded as failing to address the pressing question of historical injustice, the restoration of sovereignty, land and dignity to the indigenous black people of South Africa.²³¹ It is further viewed as having failed to bring about any substantial change to the profound inequality and levels of poverty fashioned over 365 years of racist and sexist rule in South Africa.²³²

Madlingozi for example views the constitution to be perpetuating the old order of domination, and to be facilitating a transition from 'settler' domination to 'settler' hegemony.²³³ Madlingozi further contends that the constitution is the project of white South Africans in collusion with 'black *boers* / black colonialist' or black elites to banish those who are still socially excluded and racially dehumanized to the other side of the 'abyssal' line.²³⁴ This abyssal line, Madlingozi

²²⁷ DM Davis 'Is the South African constitution an obstacle to a democratic post-colonial state?' (2018) *South African journal of human rights* 364.

²²⁸ Davis (n 227 above) 364.

²²⁹ Davis (n 227 above) 364.

²³⁰ Davis (n 227 above) 360.

²³¹ Davis (n 227 above) 360.

²³² Davis (n 227 above) 361.

²³³ T Madlingozi 'One settler colonialism and post-conquest constitutionness: The decolonizing constitutional vision of African nationalists of Azania/South Africa' Unpublished paper, University of Pretoria, 2016 2.

²³⁴ T Madlingozi 'Social justice in a time of neo-apartheid constitutionalism: critiquing the anti-black economy of recognition, incorporation and distribution' (2017) *Stellenbosch Law Review* 124.

contends, divides historically colonized worlds, parceling out such worlds into a 'zone of beings' and a 'zone of non-beings'.²³⁵ The 'non-beings' are the poor, socially excluded and racially dehumanized, hence the constitution perpetuates their banishment to the other side of the abyssal line.

With the advent of democracy in South Africa, there were some expectations that South African law would be completely transformed from being dominated by Roman-Dutch and English laws. After all, the struggle was dominated by the shouts of '*mayibuye i-Africa*' (Africa must come back).²³⁶ However, the words of Justice Albie Sachs summarize what eventually happened:²³⁷

'In the case of South Africa, the rules that govern purchase and sale and insurance and companies and cheques, that deal with self-defense and dishonesty and with when people should be held responsible for injuries to others, happened to have come from Europe. Like the railways and trousers and dresses and Bibles and the English language, they came in the context of dispossession and domination, but like the railways and trousers and dresses and the Bible and the English language, they have been taken over in varying degrees by the whole population and have now become South Africanised. Thus, after two hundred years, English has become a South African language: where else in the world can one say – he slipped on his guava? Shorn of their associations with domination, there is no reason why these institutions should not be taken over and infused with a new spirit so as to serve the people as a whole rather than just a minority'

Courts over years have tried to bring more aspects of indigenous law back into South African law, through the process of 'harmonizing' indigenous law 'to be in line' with the constitution.²³⁸ However, there is a view that the approach being taken to 'reform' indigenous law is to replace it with South African common law with little accommodation of 'real' indigenous law.²³⁹ It is

²³⁵ Madlingozi (n 233 above) 124.

²³⁶ R Zimmerman & J Visser 'A Pan-African view: imperial law without the imperialist' in Zimmermann & Visser (n 215 above) 8.

²³⁷ R Zimmerman & J Visser 'A Pan-African view: imperial law without the imperialist' in Zimmermann & Visser (n 215 above) 8.

²³⁸ Himonga (n 94 above) 1.

²³⁹ Himonga (n 94 above) 1.

therefore not surprising that a number of South Africans are neither accepting the constitution nor believe that it will bring the much needed transformation to the country. This creates a general lack of trust in the constitution. The domination of indigenous law by the constitution is yet another building block towards tension between indigenous law and the constitution.

4.4 Human Rights and Indigenous Law

Traditional leaders in South Africa have expressed some dissatisfaction about the constitution. Their dissatisfaction is directed more towards the equality sections in the Bill of Rights. The human right system in the Bill of Rights, especially the equality sections are regarded as posing the most serious threat to the survival of the indigenous law in the new constitutional dispensation.²⁴⁰ However, the question is whose concept of 'human rights' is right? Madlingozi contends that the demand for 'human rights' and their presumed enabling of justice-in-society often end up being a claim to be like the white man or less subtly, to live like the white man.²⁴¹ To live like a 'white man' then may translate to one abhorring indigenous law since in the colonial era it was considered to be barbaric and uncivilized. The view of Madlingozi is that to colonists, 'blacks are human if they can speak white rights'.²⁴² Or this may translate to black people can only be human if they discard the 'barbaric and uncivilized' indigenous law. The conclusion Madlingozi is making is that the Bill of Rights in the constitution in reality is the 'Bill of Whites'.²⁴³ This view may be based on the premise that the Bill of Rights is influenced more by laws from the West, than indigenous law, hence it becomes the 'Bill of whites' and not the 'bill of Africans'. The interpretation of the constitution is that it promotes rights in the context of white people and not in that of African people. This is the core of the contention of traditional leaders as they regard the human right system in the Bill of Rights to be Eurocentric.²⁴⁴

It should be remembered that the human rights in the context of Western law was inaugurated on the moment of imperial or colonial expansion of the Western world.²⁴⁵ Rights emerged in the

²⁴⁰ Thomas & Tladi (n 217 above) 357.

²⁴¹ Madlingozi (n 233 above) 137.

²⁴² Madlingozi (n 233 above) 138.

²⁴³ Madlingozi (n 233 above) 140.

²⁴⁴ Himonga (n 94 above) 4.

²⁴⁵ D Mignolo 'Who speaks for the 'human' in human rights?'(2009) *Hispanic Issues On-line* 10.

process of building what today is conceived as modern or colonial world.²⁴⁶ It is therefore not surprising that human rights today are considered by some sectors of the society as being an imperial tool to perpetuate the unfinished agenda of colonization.²⁴⁷ Roman legacy of *humanitas* (human nature, civilization and kindness) and *civitas* (citizenship) were rehearsed when European men and citizens appointed themselves to carry 'civilization' to all corners of the planet.²⁴⁸

During the certification of the constitution, the issue of the status of indigenous law versus law from the West, came up in a number of objections to certain sections of the constitution by the Congress of Traditional Leaders.²⁴⁹ Some of the concerns raised related to status and role of traditional leadership, principles of equality before the law, the role of traditional courts, the impact of the Bill of Rights on indigenous law and the principle of primogeniture in terms of indigenous law.²⁵⁰ Basically, traditional leaders had a view that the introduction of the constitution was there to wipe away the traditional African values and traditional way of living of African communities.

This objection to the constitution was not the first one. In 1998, traditional leaders objected to the replacement of indigenous law of succession by the common law on the ground that the approach taken was Eurocentric.²⁵¹ Other arguments brought by traditional leaders was that of cultural autonomy and the protection of indigenous law from Western human right values.²⁵² On the other hand, cultural activists, when commenting on Western human rights values, have also argued that it is not necessarily true that universal human rights defined in one context, in most of the times, the Western context can apply equally to all cultures, particularly cultures of African people, who had no role in developing the human right system of the West.²⁵³

²⁴⁶ Mignolo (n 245 above) 11.

²⁴⁷ Mignolo (n 245 above) 11.

²⁴⁸ Mignolo (n 245 above) 15.

²⁴⁹ Mqoke (n 58 above) 8.

²⁵⁰ Mqoke (n 58 above) 8.

²⁵¹ Himonga (n 94 above) 4.

²⁵² C Albertyn 'Cultural diversity, 'living law', and women's rights in South Africa' in DB Maldonado (n 3 above) 175.

²⁵³ A Claassens & S Mnisi 'Rural women redefining land rights in the context of living customary law' (2009) *South African Journal on Human Rights* 496.

Furthermore, other arguments brought against human rights in the constitution is that the constitution presents these rights as a 'universalist' model that makes indigenous law subject to a 'top-down' liberal framework.²⁵⁴ The critics of the Bill of Rights see it as demanding that what is perceived as discriminatory customary norms must thus always be subject to the test of liberal equality, originating from Western philosophies of equality.²⁵⁵

During the drafting of the interim constitution Nhlapo warned that, due to cultural diversity, most challenges before the Constitutional Court would arise because of the equality section of the constitution.²⁵⁶ With all the arguments of traditional leaders and cultural activist, it is then not surprising that since the certification of the constitution, matters of marriage law and family law in general and issues of traditional leadership have assumed the center stage in any litigation involving indigenous law.²⁵⁷ The resentment against the constitution and the methods adopted to reform indigenous law has resulted in traditional leaders and their communities frustrating the implementation of the constitution in traditional communities.²⁵⁸ On the other-hand the vocal supporters of the Bill of Rights, at times who are well resourced promoters of the constitution, to them rights can only be human rights if they follow the Western definition of human rights.

Jennifer Nedelesky describes rights as 'collective decisions about the implementation of core values' and points out that once we recognize the negotiability of basic human rights, we must similarly recognize that their definition and defense are inseparable enterprises.²⁵⁹ She argues that democracy is the expression of 'rights' to an equal voice in the determination of these collective choices.²⁶⁰ We should also be careful not be blinded to the fact that rights can be 'brought to life' in ways and forms that may not necessarily conform to our preconceptions or formalist assumptions.²⁶¹ The content of rights has been shown to be variable and subject to

²⁵⁴ C Albertyn 'Cultural diversity, 'living law', and women's rights in South Africa' in DB Maldonado (n 3 above) 170.

²⁵⁵ C Albertyn 'Cultural diversity, 'living law', and women's rights in South Africa' in DB Maldonado (n 3 above) 170.

²⁵⁶ T Nhlapo 'Customary law in post-apartheid South Africa: constitutional confrontations in culture, gender and 'living law'' (2017) *South African Journal on Human Rights* 52.

²⁵⁷ Nhlapo (n 256 above) 9.

²⁵⁸ Himonga (n 94 above) 4.

²⁵⁹ Claassens & Mnisi (n 253 above) 498.

²⁶⁰ Claassens & Mnisi (n 253 above) 497.

²⁶¹ Claassens & Mnisi (n 253 above) 515.

constant re-negotiation at all levels of society, including within the jurisprudence of different countries and international instruments.²⁶² This is also true for issues of gender equality in the Bill of Rights, which is the main point of contention and tension between traditional leaders and the supporters of the Bill of Rights. What prevents gender equality and human rights from being negotiated in the context of culture and customs of people? In traditional communities human rights are more contextually negotiable, intersectional and sensitive to the interdependence of human beings.²⁶³ Celestine Nyamu Musembi argues that people live in a context of legal and cultural pluralism, and strategically draw from both their culture or religious norms and formal rights regimes in dealing with real-life situations.²⁶⁴ She further argues that pluralistic approaches capture the everyday experiences of citizenship as mediated by factors such as gender, ethnicity, caste and kinship structures.²⁶⁵

With indigenous law, group rights generally supersede individual rights.²⁶⁶ This does not mean that indigenous law is not compatible with the doctrine of rights, but the philosophical framework of indigenous law's conception of rights is located within the African variant of humanism and group rights superseding individual rights.²⁶⁷ Therefore in line with African customs, no individual can claim exclusive rights as individuals always function within the milieu of the collective.²⁶⁸

The concept of group rights from indigenous law is somehow in conflict with the equality section in the Bill of Rights which promotes individual rights.

In *Nyali Ltd v Attorney General*, Lord Denning stressed the fact that English common law could not be applied to a foreign country without considerable qualification as cultural factors need to be taken into consideration.²⁶⁹ In his judgment, Lord Denning is quoted as saying:²⁷⁰

²⁶² Claassens & Mnisi (n 253 above) 497.

²⁶³ Claassens & Mnisi (n 253 above) 499.

²⁶⁴ Claassens & Mnisi (n 253 above) 497.

²⁶⁵ Claassens & Mnisi (n 253 above) 498.

²⁶⁶ Mqoke (n 58 above) 10.

²⁶⁷ Mqoke (n 58 above) 10.

²⁶⁸ Nhlapo (n 256 above) 22.

²⁶⁹ Mqoke (n 58 above) 20.

²⁷⁰ Mqoke (n 58 above) 20.

'Just as with an English oak, so with the English common law. You cannot transplant it to the African continent and expect it to retain the tough character which it has in England. It will flourish indeed, but needs careful tending so with the common law'.

To traditional leaders, the drafters of the Bill of rights have done exactly what Lord Denning cautioned us about. The human rights in the constitution influenced by the universal declaration of human rights are perceived to have been applied to South Africa without considerable qualification or considering cultural factors.

4.5 The main source of tension between Indigenous Law and the constitution

Traditional leaders who are the guardians of African customs, values and traditions have shown some reservation about the constitution, especially the equality sections in the Bill of Rights. Their view is that the constitution is Eurocentric and disregards indigenous law.²⁷¹ Nhlapo also warned that the constitution will lead to litigation due to the equality sections in the Bill of Rights.²⁷² These reservations from Traditional leaders and warnings from Nhlapo should not be taken lightly or dismissed as insignificant. Already as predicted by Nhlapo, we have seen a number of litigation involving issues of male primogeniture in our courts.

The fact that South Africa has seen a number of cases involving issues of patriarchy and male primogeniture shows that women also have concerns about indigenous law which is perceived to be biased towards males especially on issues of land and property in general.²⁷³ As much as issues raised by traditional leaders pertaining to the constitution should not be ignored, in the same vein, issues raised by women concerning indigenous law and patriarchy should not be ignored.

The opposing attitudes about the constitution between traditional leaders and women who have taken issues of patriarchy to court confirms tension between indigenous law and the constitution. The center of gravity of this tension revolves around issues of patriarchy, gender

²⁷¹ See para 4.3 of this mini-dissertation above.

²⁷² See para 4.3 of this mini-dissertation above.

²⁷³ African law is under inverted commas in this context because patriarchy was never part of the original African law, only adulterated African law has elements of patriarchy in it. See para 1.5.5 of this mini-dissertation above.

equality, land and property rights of women. In any attempt to negotiate this tension, it is critical to also consider that the original version of indigenous law was adulterated by colonialism and parts of it were lost due to lack of proper recording.²⁷⁴ Therefore what is currently regarded as indigenous law, may actually be the adulterated version of true indigenous law.

Moreover, irrespective of whether we have the true or adulterated version of indigenous law, we should also note that there are many changes with respect to the family structure in traditional communities. The original family structure which includes a husband or a male as the head of the family may no longer be relevant as traditional African family structures have evolved over years. Some women opt not to marry and be part of the traditional family structure, while others prefer cohabitation without tying themselves to any man. There are also women who are single parents and therefore are heads of their families. All these dynamics should be taken into consideration when attempts are made to negotiate tension between indigenous law and the constitution

The real question South Africans should ask themselves is whether should we still try and tie women to the traditional family structures of husband and wife in order for them to access land in traditional communities? Probably the answer is no. If the answer is no, then what should happen to issues of land in traditional communities? Should women who are not part of the traditional family structure be excluded from accessing land because of their choices? Again the answer is probably no.

While the arguments of women are important pertaining to the allocation of land in traditional communities, however, it should be noted that in terms of the original indigenous law, individual land tenure is a foreign concept in Africa as traditional leaders were custodians of land on behalf of communities. Therefore comments by Motlanthe that traditional leaders are acting like 'village tin pot despots' over land and that their power over it should be taken away may have some merit due to the reported abuse with regard to the allocation of land in traditional communities.²⁷⁵ However, this reported abuse of power should not be used as a convenient

²⁷⁴ See para 1.5.5 of this mini-dissertation above.

²⁷⁵ See para 2.6 of this mini-dissertation above.

pretext to deny traditional leaders their rights as custodian of land in traditional communities. While trying to address the abuse, we should not find ourselves perpetuating the adulteration of indigenous law by introducing a foreign concept of individual land tenure to be part of African law. There should be no attempts to dismiss with a stroke of a pen the rights of traditional leaders as custodian of land on behalf of communities. This attempt, justifiably so, has irked traditional leaders when Motlanthe suggested that the custodianship of land should be taken away from them.

4.6 The Possible Role of the African Philosophy of Ubuntu in Negotiating Tension between Indigenous Law and the constitution

Colonists have dehumanized African people, undermined their laws and perpetuated the unjust system of patriarchy in Africa through legislation. This has caused untold suffering to African women. The adulteration of indigenous law, the imposition of foreign laws in Africa which have partly influenced the constitution are contributing to the tension between indigenous law and the constitution. Colonization was predicated on the idea that the African was not a full and complete being, was devoid of reason and could therefore not qualify as a human being.²⁷⁶ Justice demands the restoration of the humanity of African people and the restoration of their value system. Moreover, justice demands that where there is tension between indigenous law and the constitution, such tension should not be left unattended. The root cause of the tension should be identified in order to be addressed. The African philosophy of Ubuntu could play a crucial role in identifying and negotiating the tension between African culture and the constitution.

Ubuntu is an African philosophy which demands that we must always act humanely and with respect towards others as a way of demanding the same from them.²⁷⁷ The Ubuntu philosophy upholds the principle that all humans are equal in their humanity.²⁷⁸ From this principle flows the idea of justice by recognizing the rights of others and giving them what is due to them.²⁷⁹

²⁷⁶ MB Ramose 'African perspective on justice and race' (2001) *Polylog: Forum for Intercultural Philosophy* 3

²⁷⁷ Ramose (n 276 above) 10.

²⁷⁸ Ramose (n 276 above) 1.

²⁷⁹ Ramose (n 276 above) 1.

Mokgoro describes Ubuntu as flexible in nature, as having the potential to inform every set of circumstances and is capable of addressing many issues including gender equality in any respect and form.²⁸⁰ More importantly, the concept of Ubuntu *regulates the exercise of rights by emphasizing sharing and co-responsibility and the mutual enjoyment of rights by all.*²⁸¹

In *S v Makwanyane & another*, Mokgoro J stated the following:²⁸²

Generally, Ubuntu translates as 'humaneness'. In its most fundamental sense it translates as personhood and 'morality'. Metaphorically, it expresses itself in umuntu ngumuntu ngabantu describing the significance of group solidarity on survival issues so central to the survival of communities. While it envelopes the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity, in its fundamental sense, it denotes humanity and morality. Its spirit emphasizes respect for human dignity, marking a shift from confrontation to conciliation.

Ubuntu philosophy says '*umuntu, ngumuntu ngabantu*' (we are human because of other human beings), therefore this philosophy demands that we always act humanely and with respect towards others as a way of demanding the same from them.

Ramose states that the Ubuntu philosophy is capable of bringing equilibrium in the restoration of justice.²⁸³ Therefore it is clear that where there is no justice, Ubuntu can come to play to bring the required equilibrium. However, one of the most important aspects of Ubuntu concept is that Ubuntu is flexible, reasonable has no formalities and is linked to morality.²⁸⁴ Moreover, Ubuntu demands that we act humanely and with respect towards others as a way of demanding the same from them.²⁸⁵ These principles are crucial for the negotiation of the tension between African culture and the constitution.

²⁸⁰J Mokgoro 'Ubuntu as a legal principle in an ever changing world' in F Diedrich (ed) *Ubuntu, good faith & equity: flexible legal principles in developing a contemporary jurisprudence* (2011) 2.

²⁸¹ TW Bennett 'African land – A history of dispossession' in R Zimmermann & D Visser (n 129 above) 19.

²⁸² Mqoke (n 58 above) 10.

²⁸³ Ramose (n 276 above) 10.

²⁸⁴ Ramose (n 276 above) 2.

²⁸⁵ Ramose (n 276 above) 3.

Using the above-mentioned Ubuntu principles, we can incorporate Ubuntu to our law by developing an 'Ubuntu Prism' to test for Ubuntu principles of justice, equity and fairness in any aspect of the current law of our country, whether this law is based on the constitution, or is imposed European law, or be it the original or even adulterated indigenous law. The Bill of Rights from our current constitution can also be taken through the 'Ubuntu prism' to test for Ubuntu principles in it. Basically the idea of incorporating Ubuntu to our law is that every aspect of it must pass the test of Ubuntu. If any law, including the constitution and its Bill of Rights fail the test of Ubuntu such law can be rejected as not being aligned to Ubuntu philosophy and hence cannot be part of South African law. In this way, a balance can be found between indigenous law and the constitution since both forms of law would have been taken through a rigorous test of Ubuntu and would have passed the test of the Ubuntu test. This balance will help reduce tension between indigenous law and the constitution.

As an example, using some of the principles of Ubuntu discussed earlier, we can develop the 'Ubuntu prism' as described below to test for principle of Ubuntu in any of our law, including the current Bill of Rights in the constitution (all italic texts are based on Ubuntu principles):²⁸⁶

1. Is the law principle *humanely and recognizing that all people as equal?*
2. Is the law principle *promoting the exercise of rights by emphasizing sharing and co-responsibility and the mutual enjoyment of rights by all?*
3. Is the law principle *promoting the restoration of justice by bringing through equilibrium in the exercise of any right?*
4. Is the law principle *showing compassion, respect, human dignity, and promoting basic African norms and collective unity?*
5. Is the law principle *morally correct?*

²⁸⁶ It is important to note that the proposed 'Ubuntu prism' is just a concept or a model to illustrate what could be done to test any law for Ubuntu principles. For the model to be fully developed, it would need to be taken through a rigorous process of firstly determining the core Ubuntu principles. This cannot be formulated using 'laboratory' methods, but a thorough research process, including extensive consultation with all stakeholders which include people from grassroots would need to be done. The process of developing the Ubuntu principles is beyond the scope of this research. However, it is hoped that this can be taken forwarded and be funded adequately to come up with an African concept of human rights which will be accepted by the majority of South Africans, including traditional leaders, cultural activists, academics, the judiciary and ordinary people from grassroots level.

6. Is the law principle *enabling us to shift from confrontation to conciliation*?
7. Is the law principle *promoting group rights, solidarity and survival of the community*?

If the Ubuntu prism is applied to some contentious indigenous law principles and the constitution, the results can actually tell if such principles should be part of our law or not.

Taking as an example patriarchy and male primogeniture through the Ubuntu prism, it is clear that they will fail principles 1-6 of the prism and therefore should automatically be rejected as part of our law. If we consider individual land tenure in traditional communities as prompted by Motlanthe and take it through the Ubuntu prism, this will fail principle 7 of the prism and therefore should be rejected as part of our law. Lastly taking the issue of gender based allocation of land as currently practiced in many traditional communities, this will again fail principle 1-6 and should automatically be rejected as part of our law.

The incorporation of the Ubuntu principle into our laws will probably be history making in the context of our legal system, especially when we think of the European law and the constitution in particular, taking a concept from African principles which were previously considered to be inferior, barbaric and anti-Christian.²⁸⁷ Ubuntu can therefore transform the imposed European law, adulterated indigenous law and the constitution to be in line with core African values.

4.7 Conclusion

As part of this chapter arguments were brought to show that colonists undermined indigenous law and regarded it as a form of a pagan custom that needed to be replaced. Arguments from Thomas and Tladi were also used to support the claim that the adulteration of indigenous law was achieved through it being subjected to the repugnancy clause. This simply translated to the replacement of elements of indigenous law that were considered to be unenforceable. My argument was that this process laid the foundation for tension between the constitution and indigenous law.

²⁸⁷ TW Bennett 'Ubuntu: An African Equity' in F Diedrich (ed) *Ubuntu, good faith & equity: flexible legal principles in developing a contemporary jurisprudence* (2011) 3.

In this chapter, I further argued that laws from the West which are the original source of undermining indigenous law were used to model the constitution. I therefore argued that the 'spirit' of these laws, unwittingly found its way to the constitution. My arguments were that if the building blocks of the constitution are the Western laws, therefore their DNA or 'genes' will be passed through to the constitution, hence it is inevitable that the constitution will have some elements that still continue with the path of undermining indigenous law. Arguments from Ramose which show that indigenous law was always made to be subject to the constitution which is partly influenced by laws from the West were used to support my contention that the constitution contains some elements of the Western laws that were used to undermine indigenous law. . To further support this arguments, Himonga's argument was used which shows that indigenous law is taken through a process of 'harmonization' to make it to be in line with the constitution, but this 'harmonization' is nothing else other than replacing elements of indigenous law that are perceived not to be in line with the constitution with common law of South Africa. My argument was that this process is actually contributing to tension between indigenous law and the constitution.

This chapter also discussed the domination of African culture by Western law, this was confirmed by arguments from Justice Albie Sachs who contended that the current laws of South Africa came through the domination of African culture. My argument in this chapter was that this domination of African culture by Western law, was also contributing to tension between the African culture and the constitution. However, I contend in this chapter that the core elements of the tension between African culture and the constitution revolve around issues of patriarchy, gender-equality, individual land tenure system and property rights of women. This argument was supported by using Nhlapo who warned us that due to cultural diversity, most challenges before the constitutional court would arise because of equality sections of the constitution. His warnings were based on the dissatisfaction of traditional leaders about the Bill of Rights, in particular the equality sections of the Bill of Rights.

To mitigate tension between indigenous law and the constitution, I suggest the use of African philosophy of Ubuntu. I argued that the core values of African philosophy of Ubuntu should be used to test the laws of our country for their compatibility with Ubuntu principles. I argued that

all laws of our country, including the adulterated version of indigenous law, the colonists' imposed Western laws like the Roma-Dutch law and the constitution must be tested against the core values of Ubuntu. I also argued that any elements of our law found not to be in line with the core values of Ubuntu, such should be rejected from being part of our laws. My argument was that the subjection of our laws to the core values of the African philosophy of Ubuntu would act like a 'cleansing' process to our laws, to remove all elements of colonialism in them. Lastly my contention was that if all elements of colonialism could be removed from our laws, then the tension between the constitution and indigenous law would be mitigated against, since only laws that would have passed the Ubuntu test will be accepted as part of our law.

Chapter 5: Summary and Recommendations

5.1 Summary

The main purpose of this dissertation was to understand the relationship between gender, land and the tension between African culture and the constitution in the context of communities under traditional authorities in South Africa.

Chapter one provided an overview of the African cultural belief system and the importance of land as part of the cultural beliefs of African people, especially the veneration of ancestors. The chapter further discussed African culture and gender based allocation of land

Chapter two provided a synopsis of historical land tenure in South Africa from pre-colonial period up to the demise of Bantustan governments in South Africa just after the first democratic election of 1994. From this chapter it emerged that land in African culture was always held in trust by chiefs on behalf of community members and that individual land tenure was introduced by colonists in their attempt to undermine chiefs in African communities. The chapter further discussed the use of colonists' adulterated indigenous law that perpetuates patriarchy for the allocation of land in traditional communities. It was explained that this was due to the missed opportunity by the constitution and the legislature to clearly define and confirm powers of traditional leaders with respect to land under their control, hence the abuse of their powers as heads of communities.

Chapter three highlighted policies, legislation and case law addressing male primogeniture and gender based-allocation of land. However, in this chapter it emerged that irrespective of policies, legislation and the constitution that that prohibit gender based allocation of land, this was continuing unabated in traditional communities of South Africa under traditional leaders

Chapter four dwelt on the source of tension between indigenous law and the constitution. The source of this tension was found to be revolving around patriarchy, individual land tenure system and the constitutional rights of women not to be discriminated against due to their gender on all issues pertaining to land.

5.2 Recommendations

Recommendation 1

Since issues around land are very contentious due to colonization and the adulteration of African customs on land, it is recommended that powers of traditional leaders over communal land be clearly defined in the constitution and confirmed through appropriate legislation, taking into consideration their indigenous rights as custodian of land on behalf of their subjects in terms of indigenous law.

Recommendation 2

It is recommended that uniform guidelines or regulation be developed for use by traditional leaders for allocating land in communal areas under their leadership to create certainty about the process to be followed and to protect women from being subjected to patriarchy in the process of allocating land. This is very important since the traditional family structure of husband and wife is rapidly changing as many women are now heads of households in traditional communities. It is therefore no longer acceptable to allocate land to females indirectly through the head of the family who happens to be a male as this will exclude families headed by females from accessing land.

However, the Motlanthe report has indicated that traditional leaders are widely abusing their powers when allocating communal land to their subjects and this is negatively impacting on the rights of women to access land. To mitigate against the risk of traditional leaders continuing to abuse their powers when allocating land to communities, an appeals tribunal should be considered in all the provinces to address any issues of abuse of the land process by traditional leaders. The tribunal should have powers to reverse the decision of any traditional leader, should it be found that the decision was unfair or unconstitutional. Should the traditional leader, however feel aggrieved by the action of the appeals tribunal to reverse his/her decision, then such traditional leader should have a right to approach the court of law to review the decision of the tribunal. The mechanics and the details of how the appeals tribunal should work are beyond the scope of this mini-dissertation, but can be explored further through any future studies that may further be conducted on this subject.

Recommendation 3

The Bill of Rights and indigenous Law must be subjected through Ubuntu principles to test their compatibility with the African philosophy of Ubuntu. This will remove any trace of colonial influence in them and will help balance tension between indigenous and law and the constitution because both of these laws would have been tested on equal footing using Ubuntu principles. The core Ubuntu principles should be developed in a consultative process which involves traditional leaders, religious organizations, civic organizations, academics, cultural activists, human rights organizations, the judiciary, the legislature and any other structure that plays a role of being a moral compass in traditional communities.

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