RURAL WOMEN REDEFINING LAND RIGHTS IN THE CONTEXT OF LIVING CUSTOMARY LAW

ANINKA CLAASSENS* AND SINDISO MNISI**

ABSTRACT

Women’s rights and customary law are often understood as being in opposition to one another. This article challenges the usefulness of the prevailing custom/rights dichotomy, arguing that it obscures the way in which struggles to claim resources such as land combine ‘human rights’ equality claims with claims to customary entitlements. The article focuses on contestation over who has the power to define custom, rights and customary entitlements. It discusses the democratic potential inherent in Constitutional Court judgments that define customary law as ‘living law’ reflecting changing practice, and the dangers posed by national legislation that reinforces the power of traditional leaders to unilaterally define custom. It argues for legal strategies that engage with, and support, the struggles for change taking place at the interface between custom and rights in the former reserves. We draw on insights about the nature of rights and rights struggles in the work of Nedelsky, Nyamu Musembi and Merry to argue for an approach to rights that focuses on the relationships and power relations that rights mediate, rather than solely on rights as ‘boundaries of autonomy’. Moreover, engaging with processes of women claiming, redefining and ‘vernacularising’ rights within their communities relates directly to the project of engendering socio-economic rights, given the primacy of claims of need, and of access to material resources, within indigenous constructs of relative rights.

I INTRODUCTION

Women’s rights activists and lawyers in Africa have tended to treat the customary arena as inherently dangerous to women’s interests, pointing to the frequency and regularity with which the discourse of the customary is used to disempower women and bolster patriarchal interests.1 Anne Whitehead and Dzodzi Tsikata conclude that there are ‘simply too many examples of women losing out when modern African men talk of custom’.2 In this context, strategies to secure women’s land rights in Africa have tended to avoid the customary law arena in favour of formal legal initiatives such as the registration of joint land titles for both spouses.

However, these legal strategies have also proven to be problematic. Titling programmes are often captured by elites and used to entrench the position of

* BA (Cape Town), BA Hons (Wits); Senior Researcher at the Law, Race and Gender Unit at the University of Cape Town.
** BA LLB (Cape Town), MSt DPhil (Oxon); Senior Researcher at the Law, Race and Gender Unit at the University of Cape Town.
those with formal rights (mostly men) at the expense of overlapping ‘secondary’ entitlements vesting in women, especially unmarried women. Further, strategies that focus on attaining individual ownership for women have been criticised as relevant only to small numbers of middle class women and for failing to articulate with the concerns of women whose survival is embedded within a web of reciprocal family and community relationships, for whom the protection and preservation of the land rights vesting in the family or group may be a priority.

Furthermore, legal strategies that focus exclusively on the creation of a ‘formal’ statutory property regime separate from the customary arena fail to come to grips with the fact that in South Africa many of the most serious land-related problems facing women exist at the interface between distorted custom and past colonial and apartheid statute law. Customary entitlements to land vesting in women are rendered invisible to the formal legal system even in instances where women continue to use and occupy the land in question. For many women living in rural areas, the only means of countering threatened evictions lies in asserting use and occupation rights derived from customary entitlements that are at odds with overlaid ‘formal’ legal rights held by men. Legal strategies that seek to avoid the customary arena may unwittingly remove the ground from under the feet of those women for whom customary entitlements are the best or only basis on which to assert or prove land rights. Moreover, they ignore the fact that the women concerned are entitled to have their rights recognised through a system of law that the Constitution recognises as legitimate, and to demand that they have a say in how this system of law develops.

To outline the shortcomings of statutory reforms that focus on providing land titles as the ‘solution’ is not to deny that the discourse of the customary is fraught with serious dangers for women. These, as will be discussed below, are well illustrated by the recent package of South African legislation dealing with the powers of traditional leaders in respect of communal land rights and traditional courts. Nor is it to deny that the land rights of rural women are structurally vulnerable, nor that legal interventions in this arena are critically important.


5 Nhlapo (note 1 above) 162.

6 Such as Permission to Occupy Certificates (PTOs).

7 See ss 30, 31, 39(2) & (3), & 211(3) of the Constitution.

8 See the Banjul Charter, arts 17(2), 18(2), 18(3), 19, 20(1) & 22; African Protocol for Women, arts 9 & 17; Declaration on the Right to Development, arts 1 & 2.
We suggest, however, that legal strategies to support women’s land rights cannot evade the customary law arena and instead should engage with it directly, not least because of its impact on power relations at the local level. Rural women have no option but to grapple with issues of rights and custom in local customary law arenas. The perils associated with the discourse should not blind us to the democratic and transformative possibilities inherent in the contestations taking place in these arenas. It is these contestations that, when brought to light, are the most effective rebuttal to the distorted versions of custom that dominate the national level discourse.

This article therefore focuses on processes of contestation and change underway, in the former homeland provinces, which have significant implications for women’s land rights under s 25(6) of the Constitution of the Republic of South Africa, 1996. The former homelands are the poorest parts of South Africa and women constitute 59 per cent of the 17 million people living in these ‘communal areas’. In most instances the changes discussed below are not the outcome of the implementation of new laws and are only tangentially related to government policy and land reform initiatives. Instead, they are the product of local processes of struggle and negotiation spear-headed by women and engaging a wide cross-section of people in rural society. The processes described appear to have gathered momentum after 1994 and to be closely related to the post-apartheid political environment.

We suggest that legal strategies aimed at enhancing women’s land rights need to prioritise engagement with the changes taking place. However, we argue that to do so entails interrogating – indeed, debunking – some of the formalist assumptions underlying ‘orthodox’ policy approaches to women’s land rights in Africa. It requires going beyond legal initiatives that focus on the problems facing women as wives, and that posit statute law reform and registered co-ownership rights as the ‘solution’.

Instead we advocate attention to the changes taking place outside the statutory law arena, where women are playing a key role in renegotiating the content of both custom and rights. We argue for an approach to rights that acknowledges their mutable nature and pays attention to processes of contestation around the content and definition of rights – including at the local level – as opposed to approaches that assume a fixed legal content.

For this purpose, it is important to move beyond the binaries of modern/traditional, formal/informal, urban/rural, individual/communal, which underlie the rights versus custom dichotomy. These binaries are deeply entrenched and resonant at many levels of society and in the political discourse that frames the legislative process. They obscure the cross-cutting reality of the lived experience of people in ‘communal areas’ and their ongoing efforts to reconcile custom and tradition with the broader values and changes taking place in society. Another problem with such binaries is that they reinforce the idea of separate spheres of ‘modern’ and ‘traditional’ life, and thereby bolster chiefly

claims to zones of customary authority outside the legal regime that operates in the rest of South Africa.  

From our perspective, the struggles over land rights that are underway in South Africa are inextricably bound up with struggles over the content of custom. They are not so much struggles against custom, but rather, contestation over the content of customary entitlements to land in the context of the equality rights guaranteed by the Constitution. The changes we describe are put at risk by new South African laws that bolster the power of traditional leaders to unilaterally determine the content of custom, and thereby silence competing voices and interpretations. Attempts to engender land rights are likely to have limited impact unless they acknowledge and engage with the unequal power relations within which land rights are embedded.

Recent legislation, such as the Traditional Leadership and Governance Framework Act 41 of 2003 (TLGFA), the Communal Land Rights Act 11 of 2004 (CLRA) and the Traditional Courts Bill B 15-2008, is controversial because of the top-down statutory powers it gives traditional leaders to control land and arbitrate custom, thereby changing the balance of power in rural areas. The passage of the legislation focuses attention on whether ‘customary law’ should be ascertained and developed through political processes at the national level, or whether it can be established only by reference to actual practice and ongoing processes of change at the local level.

Issues concerning how the content of customary law should be ascertained are at the heart of the emerging jurisprudence about living customary law in the South African Constitutional Court. The judgment in Bhe v Magistrate, Khayelitsha; Shibi v Sithole; South African Human Rights Commission v President of the Republic of South Africa 11 rejects ‘official customary law’ as a ‘poor reflection, if not a distortion of the true customary law’. It holds that ‘[t]rue customary law will be that which recognises and acknowledges the changes which continually take place’. 12

This interpretation potentially enables a more nuanced examination of the content of custom and its interaction with rights. It shifts the focus from a national political discourse informed by false dichotomies to actual practice at the local level framed by the efforts of rural people to reconcile customary entitlements to land with the rights promised by the Constitution.

Notwithstanding judgments of the Constitutional Court directing us to the local level, a central concern remains the impact of national law in determining whose voices are able to participate in the definition of custom and rights at the local level and on what terms. National-level discourses and laws have a far-reaching impact on the local power relations within which rural people contest, challenge and construct both custom and rights at the local level.

10 M Mamdani Citizen and Subject Contemporary Africa and the Legacy of Late Colonialism (1996) 61.
11 2005 (1) SA 580 (CC).
12 Ibid para 86.
In this article we argue for close attention to the processes of change being led by rural women. We point to the potential inherent in the mutually constitutive changes to the content of both custom and land rights that are underway in many areas. But we also draw attention to the vulnerability of that process, and the need to be vigilant to national laws and policies that marginalise women’s voices in the ongoing processes of negotiation that shift practice and redefine custom. We point to the need for defensive interventions in the national legislative and policy arena to protect the spaces for change that women and other rural people have opened up.

The first section of the article is a critique of some of the theoretical dualities underlying orthodox approaches to women’s rights and custom in Africa. We point to the dangers of the essentialised versions of custom and rights that inform the long-running debate between universalism and cultural relativism and suggest that an understanding of rights as constantly changing and shaped through struggle is a more illuminating starting point for engaging with women’s land struggles. We draw on Jennifer Nedel’sky’s work illuminating how rights work in practice, not as boundaries to protect autonomy, but to structure relationships of interdependence in an unequal world. She argues that once we acknowledge the changing and contested quality of basic rights the problem of defending rights becomes inseparable from the problem of defining them. The second section provides examples of changes driven by women in rural areas at the interface between custom and rights, particularly in relation to the acquisition of residential sites by single mothers, and the inheritance of family land by daughters alongside sons.

The third section briefly reviews the emerging jurisprudence of ‘living customary law’ in recent Constitutional Court judgments about land rights, inheritance and the succession of women to chieftainship.

The fourth section deals with those aspects of a legal challenge to the CLRA which relate to women’s land rights. In this litigation, four rural communities argue that the Act is unconstitutional because instead of enhancing tenure security as required by s 25(6) of the Constitution, it reinforces the insecurity of vulnerable categories of people, including single women living on family land. The section touches on some of the related problems introduced by the Traditional Courts Bill. It suggests that the new laws reflect an attempt by the traditional leader lobby to close down processes of change that challenge autocratic versions of chiefly power.

The fifth section suggests that the socially embedded nature of women’s land rights illustrates the fruitfulness of focusing on how rights mediate unequal relationships, as opposed to the focus on rights as protecting boundaries of autonomy. It suggests that rather than focusing on socio-economic rights as establishing minima, we should focus on their role in balancing overlapping entitlements to land.

The conclusion concentrates on the opportunities created by the living law approach but also discusses some of the practical difficulties associated with it. It argues that, notwithstanding these caveats, the emerging living law
jurisprudence in South Africa creates important opportunities to interrogate reactionary versions of custom by reference to actual practice on the ground.

II CHALLENGING THE ASSUMPTIONS UNDERLYING THE ‘RIGHTS’ AND ‘CUSTOM’ DICHOTOMY

The popular discourse counter-posing rights and culture is mirrored by an academic discourse that contrasts ‘universalism’ and ‘cultural relativism’. The two poles of universalism and cultural relativism have been debunked as false opposites which obscure more than they clarify; however, it remains useful to outline the debate because it continues to resonate in the public arena and in legal strategies that seek to avoid ‘tangling’ with the content of custom in favour of relying on the equality ‘trump’ in litigation.

The universalist position holds that human rights are a universal imperative that derive from each individual’s humanity, and that all governments are therefore bound by universal standards to protect human rights. Cultural relativists challenge the idea that universal rights defined in one context (the West) can apply equally to all cultures, particularly those that had no role in their definition. They posit that ‘rights’ claims, the values that they call on and the entitlements they refer to, are culturally specific. At their most extreme, cultural relativists entirely reject the idea of universal rights across different cultures. Closely associated with the universalist/relativist divide is the opposition posited between individual and group rights. Universalists tend to focus on the individual and relativists on the community. Another tendency in this debate is to prioritise rights in hierarchical order: universalists generally putting civil and political rights first and relativists claiming the greater importance of social, economic and cultural rights.

International political agendas coincide with these debates. At one extreme, liberal human rights agendas are used to justify invasion of other countries. At the other is the practice of countries refusing to endorse equality provisions on the basis that they conflict with local custom or group identity which must be protected from ‘western influence’. Scholars have sought to mitigate the unhelpful (and unrealistic) extremity of the arguments constituting these poles by interrogating their premises, thus enabling more nuanced understandings of how rights claims and culture claims intersect in practice at the interface between law and politics.

14 Nyamu Musembi (note 13 above).
15 It is often pointed out that the United States, which is the main ‘culprit’ in this regard, has refused to ratify major human rights conventions. See U Mattei & L Nader Plunder When the Rule of Law Is Illegal (2008).
Of these studies, several critiques are particularly pertinent to our discussion of women’s land rights and customary law. First, the bounded group identities and closed ‘cultures’ posited by the cultural relativists have been subject to recurrent challenge. This characterisation of culture leads to essentialism and belies the ongoing processes of contestation, change and adaptation that occur within and between cultures.\(^\text{16}\) It ignores the fact that there are no longer (if ever there were) bounded cultures circumscribing people’s life experience. Cultural relativists tend to privilege static versions of custom that deny competing, internal constructs advanced by marginalised groups who often employ rights claims in their struggles for change.

Universalists, on the other hand, are critiqued for essentialising the content of human rights. The content of rights has been shown to be variable and subject to constant re-negotiation at all levels of society, including within the jurisprudence of different countries and international instruments.\(^\text{17}\) Once the content of rights is recognised as the outcome of context-specific processes, claims of universalism need to be tempered by the recognition of the context-specific processes in which rights are claimed, negotiated, adjudicated, developed and re-defined.\(^\text{18}\)

Perhaps the most pragmatic criticism of both universalism and relativism is couched in legal pluralism. The argument here is that both sides fail to take into account the plural legal contexts in which people invoke rights claims (whether to individual or cultural rights) in most societies, and in post-colonial and post-socialist societies in particular.\(^\text{19}\) In the context of overlapping international instruments, state law, informal local law and customary regimes, people tend to ‘mix and match’, drawing on whichever authority, law or ‘right’ best advances their specific interests in those instances.\(^\text{20}\) Implicit in the pluralist position is that claims are forged at the interface between overlapping systems of law and custom which combine the ‘imported’ and the local, the formal and the informal. Hence, nowhere can ‘rights’ or custom be said to exist or operate in isolation from the other.

Celestine Nyamu Musembi argues for an actor-orientated perspective on human rights, which acknowledges that people live in a context of legal and cultural pluralism, and strategically draw from both their cultural or religious norms and formal rights regimes in dealing with real-life situations.\(^\text{21}\)

\(^{16}\) Cowan, Dembour & Wilson (note 13 above) 3; Merry (note 13 above) 41–3.


\(^{19}\) Lund (note 17 above) 2; A Hellum ‘Women’s Rights and African Customary Laws: Between Universalism and Relativism – Individualism and Communitarianism’ in Lund (note 17 above) 96.


\(^{21}\) Nyamu Musembi (note 13 above) 37.
argues that pluralistic approaches capture the everyday experiences of citizenship as mediated by factors such as gender, ethnicity, caste and kinship structures and enable us to see that overlapping identities can function simultaneously as forces of inclusion and exclusion. She cites the work of Sally Engle Merry in arguing that struggles at the interface between rights and custom constitute a two-way process which not only brings the global discourse of rights into local struggles, but also ‘vernacularises’ rights by imbuing them with local understandings of their content.

Jennifer Nedelsky adds valuable insights to this discussion. She argues that shifts in the meaning of rights are ongoing, and that a workable conception of rights needs to take account of the depth of the continuing disagreement in democratic societies about the content of rights. Nedelsky builds on the focus on relationships in feminist theory that is often sublated in mainstream rights discourse. In her view, what makes autonomy possible is not independence, but constructive relationships. She argues that a conception of rights that routinely directs our attention to how law and rights structure relationships is better suited to facilitate the transformation of unequal social and intimate relations between men and women than one, like the liberal conception, aimed at protecting the narrowly defined boundaries of autonomy. Once we foreground that what rights in fact do, and have always done, is construct relationships – of power, or responsibility, or trust – we are better able to see the power relationships and hierarchies in society which liberal notions of rights tend to hide whilst they shore them up.

Nedelsky describes rights as ‘collective decisions about the implementation of core values’ and points out that once we recognise the negotiability of basic rights we must similarly recognise that their definition and defence are inseparable enterprises. In that sense, she argues, democracy is the expression of ‘rights’ to an equal voice in the determination of these collective choices.

Sandra Fredman’s framing article in this special issue develops a conception of rights that is also aimed at ‘supporting [women’s] roles within a complex network of interdependence’, specifically highlighting ‘women’s own role in framing rights claims’. She does this by expanding on Amartya Sen and Martha Nussbaum’s capabilities approach in order to articulate a notion of socio-economic rights informed by the feasible options that people are able to secure under conditions of genuine freedom rather than minimum standards.

22 Ibid 46.
26 Nedelsky 2008 (note 23 above)139.
Fredman argues for the incorporation of a substantive equality analysis alongside a capabilities approach in order to engender socio-economic rights.

The ‘synergistic’ relationship Fredman establishes between socio-economic rights and equality gives expression to the need to acknowledge and value human interdependence and promote and facilitate responsibility and caring. In other words, it challenges the idea of bounded and fixed rights that are individualistic and opposed to relative, communal cultures by making human rights more contextually negotiable, intersectional and sensitive to the interdependence of human beings. It also dispels the myth of civil and political rights (such as equality and dignity) being higher up the hierarchy than socio-economic rights and, hence, challenges the tendency to use equality as a ‘trump’ by instead making it inherent in all rights conceptions.  

Her approach puts the real life experiences of women at the centre of all rights calculations and makes women an indispensable part of the determination of their content. Similarly Beth Goldblatt’s chapter argues that ‘The formulation of these [socio-economic] goals as well as the strategies to achieve them must also arise from women’s own demands. This means that the process of developing them must involve democratic engagement with women on the ground’. And, because Fredman’s focus is not on rights as entitlements to goods, but on action that advances and supports women’s substantively equal capabilities to the greatest extent possible, her conception prioritises that the state should act to empower women and enable their equitable involvement in all manner of fora in society.

These observations assist in illuminating that the changing content of land rights and custom is intimately linked to which voices are permitted to engage in their contestation. Struggles over the content of land rights are inextricably linked with struggles to be part of the process of their definition.

III LAND RIGHTS AND CURRENT PROCESSES OF CHANGE AND CONTESTATION

Provincial consultative meetings held in 2002 and 2003 indicated that land allocation to single mothers is a burning issue, but also that significant processes of change are underway. During the meetings, women explained the ‘rule’ that residential land should be allocated only to men, and only when men marry and establish families. The underlying rationale is that only families (and not individuals) are entitled to establish themselves as separate units.

29 Fredman (note 28 above) 422, 441.
31 Fredman (note 28 above) 422–4.
33 And in subsequent field investigations by one of the authors, A Claassens, into land allocation processes in other areas, for example, at Makuleke in September 2004, at Mundzedzi in October 2004 and at Kalkfontein in November 2004. Also at a workshop with women from 12 areas in KwaZulu-Natal in October 2008, at a workshop with women from six areas around Qunu in November 2008, and a workshop with women from six villages in North West in Madikwe in February 2009 and in research trips to Cata and Msinga in May 2009.
within the community. The women in the meetings described the uneven processes of change underway that challenge these rules. They explained the changes as arising from the large numbers of unmarried women who have children and need residential sites to establish homes for their children. At Mpindweni in the Eastern Cape, they said that unmarried mothers are now allocated residential sites, although the land is often allocated in the name of a male relative. In many KwaZulu-Natal areas women described that only unmarried women with sons were allocated residential sites. Participants at the Sekhukhuneland meetings said stands were routinely allocated to established single women who were older and had children.

The changes described in the meetings are borne out by research in various former homeland areas. They are also consistent with trends in other parts of sub-Saharan Africa. More recent investigations by one of the authors (Aninka Claassens) in various South African provinces indicate that the process of change seems to have accelerated during the last five years, although it remains remarkably uneven between and within different localities.

In our experience, women use a range of arguments to advance their claims. Many are couched in terms of ‘customary’ values. One such value is that all members of the community are entitled (by birthright) to land to fulfil their basic needs and support their children; women point to the fact that men are entitled to land only when they marry and establish families. Now that the structure of the family is changing and women are fulfilling the role of providing for the family, often without men, they are entitled to be allocated land on the same basis as men with families to support.

Often the principle of equality is asserted, and women refer to ‘democracy’ and the Constitution. They say that the times and the laws have changed, and that discrimination is no longer legal. In many instances, arguments about the values underlying customary systems (in particular the primacy of claims of need) and entitlements of birthright and belonging are woven together with the right to equality and democracy in the claims made.

Some of the dynamics at play in relation to land allocation to women were illuminated at a lively meeting in Kalkfontein in Mpumalanga in 2004. Young women challenged the community trust as to why women were not represented on the land allocation sub-committee. Single mothers in Kalkfontein have been allocated residential sites for the last ten years or so. As explained by the chair-
person of the trust at the meeting, after 1994 women became more active in the affairs of the community. They started to attend the kgotla meetings and, in time, to challenge the practice of allocating sites only to ‘sons’ of the community. They argued that as ‘daughters and granddaughters’, they were just as much ‘descendants’ of the original purchasers of Kalkfontein as sons were, and that they also needed to be able to house their children. At the meeting, the land allocation committee conceded that daughters were entitled to residential stands, and also that women should be included in their committee.

Both the men and women at the meeting agreed that these days any adult ‘heir’ could apply for a stand – son or daughter, married or unmarried. It was agreed that stands were to be allocated to men and women on an equal basis. However, a long and energetic discussion ensued about the problem of ‘outside’ men marrying Kalkfontein women and then causing trouble in the community by refusing to acknowledge the authority of the committee in resolving disputes. Women said that they shared the committee’s concern about unruly outsider men coming into Kalkfontein. They argued passionately, however, that this problem should not be used to justify reverting to the old system of women not being allocated land. They said single women were in desperate need of residential sites and that no one could say for sure that a single woman would subsequently marry or that her husband would be ‘troublesome’.

The tenor of the debate was passionate and engaged, but also good-humoured and pragmatic. Women engaged forcefully but respectfully. The trustees present, who were all men, articulated their concerns but conceded the merits of the women’s arguments. Women have subsequently been co-opted onto the allocation committee.

Another form of agency is that of women living on family land who resist being evicted by male relatives and assert that they must be accommodated within the family land. Often they, too, rely on arguments that combine both custom and equality. Claassens and Ngubane tell the story of a woman who successfully challenged her brother’s attempts to evict her, on the basis that as a family member she had a ‘birthright’ to belong. They refer to widows and divorcees who had managed to hold on to their married homes despite attempts to evict them. There are increasing numbers of women whose parents have bequeathed them (not their brothers) control of the family home and land in recognition of the role they have long played in supporting their parents and in balancing the interests and needs of other family members.

38 Ibid 160.
A striking feature of anecdotal stories about how changes come about – particularly in relation to women being allocated residential sites – is how often they are described as starting with a particular woman’s brave attempts to challenge the status quo. Time and again when asked to date the changes the answer includes a specific woman’s name, and the phrase ‘after 1994’. Another striking feature of stories of change is the supportive actions of key men in the community.

Those male councillors and headmen who have supported the changes often attribute the relatively easy transition to the fact that people are familiar with the plight of single mothers because of the number of family disputes heard in customary courts, and the realisation that the situation cannot improve without adaptation. In Makuleke in Limpopo Province, Shadrack Mngomezulu, 40 a tribal clerk, said they had begun to allocate land to unmarried women with children because of the case of a specific woman who had approached the council and insisted on being given the opportunity to argue her case after 1994. Asked whether the date signified that the change came about because of democracy, he said this was a background factor but that the main reason was that:

single women were fighting with their brothers. Serious family disputes were caused by the partners of unmarried women visiting them at home. There are lots of problems to do with lack of respect and privacy when grown women with children have to live at home. 41

Another change described by the clerks at the office is that they now recommend the allocation of residential sites to young families without the approval of their parents. Previously they would not have processed them:

Because of democracy we consider the age of the applicant, and if the applicant is old enough then we will open the door for them. Before that we used to recommend sites for grown-up children only if their parents applied. But there were a lot of internal family disputes because children wanted their own houses. Now if a person comes to us for a site and he is married we accept his application. We do ask if the parents know and agreed to the application. We have opened the door to them but we also advise them to speak to their parents. Change is not difficult because the community agrees. 42

Nevertheless, alongside the often dramatic processes of change underway in many areas, there are other areas where it remains virtually impossible for women to obtain residential sites despite repeated efforts. 

IV CONSTITUTIONAL COURT JUDGMENTS THAT DEVELOP THE JURISPRUDENCE OF ‘LIVING CUSTOMARY LAW’

Customary law is recognised by the South African Constitution, which provides that ‘[t]he courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with

40 Interview by Claassens at Makuleke, 8–9 September 2004.
41 Ibid.
42 Ibid.
43 See the testimony of Thandiwe Zondi in Claassens & Ngubane (note 37 above) 154.
customary law’.\textsuperscript{44} Furthermore, the Constitution’s recognition of traditional leadership is ‘according to customary law’\textsuperscript{45} and provides that ‘[a] traditional authority that observes a system of customary law may function subject to any applicable legislation and customs …’\textsuperscript{46}

The Constitutional Court has described the importance and benefits of customary law:

The positive aspects of customary law have long been neglected. The inherent flexibility of the system is but one of its constructive facets. Customary law places much store in consensus-seeking and naturally provides for family and clan meetings which offer excellent opportunities for the prevention and resolution of disputes and disagreements. Nor are these aspects useful only in the area of disputes. They provide a setting which contributes to the unity of family structures and the fostering of co-operation, a sense of responsibility in and of belonging to its members, as well as the nurturing of healthy communitarian traditions such as \textit{ubuntu}.\textsuperscript{47} These valuable aspects of customary law more than justify its protection by the Constitution.\textsuperscript{48}

However, Constitutional Court judgments go on to differentiate between ‘codified’ customary law and the ‘living’ customary law practised on the ground.

Moseneke J said in \textit{Gumede} that ‘during colonial times, the great difficulty resided in the fact that customary law was entirely prevented from evolving and adapting as the changing circumstances of the communities required’.\textsuperscript{49}

In the \textit{Richtersveld} land restitution judgment, the Court says that ‘[i]t is important to note that indigenous law is not a fixed body of formally classified and easily ascertainable rules. By its very nature it evolves as the people who live by its norms change their patterns of life’.\textsuperscript{50}

The \textit{Richtersveld} decision emphasised the distortions that arose through customary systems being viewed in terms of common law constructs:

While in the past indigenous law was seen through the common law lens, it must now be seen as an integral part of our law. Like all law it depends for its ultimate force and validity on the Constitution. Its validity must now be determined by reference not to common law, but to the Constitution. The courts are obliged by section 211(3) of the Constitution to apply customary law where it is applicable, subject to the Constitution … In doing so the courts must have regard to the spirit, purport and objects of the Bill of Rights.\textsuperscript{51}

The Constitutional Court’s judgment in the \textit{Shilubana}\textsuperscript{52} matter warrants extended discussion. It focuses on the critical question of who has the authority to develop customary law and the dilemmas facing courts of law in adjudicating the content of changing customary law. Moreover, the \textit{Shilubana} story

\textsuperscript{44} Constitution s 211(3).
\textsuperscript{45} Constitution s 211(1).
\textsuperscript{46} Constitution 211(2).
\textsuperscript{47} See Mogkoro J in \textit{S v Makwanyane & Another} 1995 (3) SA 391 (CC) paras 307–8.
\textsuperscript{48} Bhie (note 11 above) para 45.
\textsuperscript{49} \textit{Gumede v President of the Republic of South Africa & Others} 2009 (3) SA 152 (CC) para 20.
\textsuperscript{50} \textit{Alexkor Ltd v The Richtersveld Community} 2004 (5) SA 460 (CC) para 52.
\textsuperscript{51} Ibid paras 51–2.
\textsuperscript{52} \textit{Shilubana & Others v Nwamitiwa} 2009 (2) SA 66 (CC).
typifies the kinds of initiatives underway in rural areas to bring custom in line with the Constitution, and the challenges they face.

The case hinged on a resolution made by the Valoyi royal family in 1996, with the participation of the then chief, Richard Nwamitwa, that the chieftainship should be conferred on Tinyiko Shilubana, the daughter of the previous chief Fofoza. Fofoza had only daughters and when he died in 1968 the chieftainship passed to his younger brother Richard. Notwithstanding the resolution, Ms Shilubana decided not to take up the chieftainship during her uncle’s lifetime. She was a member of parliament in Cape Town at the time and planned to take up her responsibilities as Hosi (chief) at the end of her term in parliament.

When her uncle died in 2001, the community (at a meeting called by the royal family and attended by the Tribal Council, representatives of local government, civic structures and stakeholders of various organisations) re-endorsed the resolution that she should be made Hosi.

The resolution noted:

53 Though in the past it was not permissible by the Valoyis that a female child be heir, in terms of democracy and the new Republic of South African Constitution it is now permissible that a female child be heir since she is also equal to a male child.

The Premier of Limpopo duly appointed Tinyiko as Hosi of the Valoyi community. However her cousin, Sidwell Nwamitwa, who is the son of Richard, challenged her appointment as contrary to customary law. The case was first heard in the Transvaal Provincial Division (TPD), which found in Sidwell’s favour on the basis that the role of the royal family is limited to recognising and confirming the Hosi who qualifies to succeed according to the rules of customary law. The Court found that the ‘election’ of a Hosi was beyond the mandate of the royal family.54 The community’s decision, the Court stated, ‘was probably a bout of constitutional fervour’.55 The TPD decision was upheld in the Supreme Court of Appeal (SCA).

The Congress of Traditional Leaders of South Africa (CONTRALESA), which appeared as an amicus curiae on behalf of Sidwell Nwamitwa in the Constitutional Court appeal, said the resolution was invalid because the TLGFA was not in force when the royal family first ‘purported to outlaw gender discrimination and harangue traditional structures to support its view’.56

The Constitutional Court judgment of June 2008 reversed the previous decisions of the TPD and the SCA that the appointment of Tinyiko Shilubana as Hosi of the Valoyi community was contrary to customary law and therefore invalid. The Constitutional Court judgment cautioned that courts should be circumspect in striking down the efforts of communities to develop custom-

53 Quoted in Shilubana (note 52 above) para 4.
54 Ibid para 22.
55 Ibid.
56 The preamble to the Act states that ‘gender equity within the institution of traditional leadership may progressively be advanced’.
57 Shilubana (note 52 above) para 39.
ary law in line with the Constitution, and found that the Valoyi royal family did, indeed, have the authority to develop its own customary law of succession. In reaching its decision to uphold Ms Shilubana’s appointment, the Constitutional Court found:

As has been repeatedly emphasised by this and other courts, customary law is by its nature a constantly evolving system. Under pre-democratic colonial and apartheid regimes, this development was frustrated and customary law stagnated. This stagnation should not continue, and the free development by communities of their own laws to meet the needs of a rapidly changing society must be respected and facilitated.58

The judgment also noted that:

‘Living’ customary law is not always easy to establish and it may sometimes not be possible to determine a new position with clarity. However, where there is a dispute over the law of a community, parties should strive to place evidence of the present practice of that community before the courts, and courts have a duty to examine the law in the context of a community and to acknowledge developments if they have occurred.59

The Court summed up its position in relation to situations where there is a dispute over the content of customary law.

[A] court must consider both the traditions and the present practice of the community. If development happens within the community, the court must strive to recognise and give effect to that development, to the extent consistent with adequately upholding the protection of rights. In addition, the imperative of section 39(2)60 must be acted on when necessary, and deference should be paid to the development by a customary community of its own laws and customs where this is possible, consistent with the continuing effective operation of the law.61

The Court found that if, as Sidwell Nwamitwa maintained, the royal family and traditional authority had no power to make the resolution and appoint Tinyiko Shilubana as Hosi, then ‘no body in the customary community would have the power to make constitutionally-driven changes in traditional leadership’.62 The Court upheld Ms Shilubana’s appointment as Hosi of the Valoyi community.

V NEW LAWS THAT BOLSTER CHIEFLY POWER: THE CLRA CHALLENGE AND THE TRADITIONAL COURTS BILL

(a) Tongoane v the Minister of Agriculture and Land Affairs (TPD 11678/06)

A key issue in recent litigation challenging the CLRA63 is whether or not the Act adequately secures ‘indigenous’ entitlements to land that are legally

58 Ibid para 45.
59 Ibid para 46.
60 Section 39(2) provides: When interpreting any legislation and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.
61 Shilubana (note 52 above) para 49.
62 Ibid para 72. This decision focuses on the powers of formally recognised customary institutions to develop customary law. Hopefully, the Court will also recognise developments of customary law at lower, less centralised levels when the opportunity is presented to it.
63 See Claasens & Cousins (note 9 above).
vulnerable because of past discrimination, or exacerbates the distortions that undermined them in the first place. Central to the litigation is s 25(6) of the Constitution, which provides that: '[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 in an Act of Parliament, either to tenure which is legally secure or to comparable redress'.

Many of the people who currently use and occupy ‘communal’ land are ‘legally insecure’ precisely because past laws and administrative practices (which applied only to black people) failed to recognise the strength and nature of their socially-embedded indigenous entitlements to land. These laws and practices downplayed the strength and status of women’s entitlements relative to those of men, and the strength of rights exercised by individuals within families and by families relative to top-down power vested in chiefs and tribal authorities.64 In this process the strength of user rights to land (particularly those of women) was denied and undermined, as were decentralised and participatory local processes of land allocation and dispute resolution. The conceptual tools of past – and current – understandings of hierarchical property relations constrained the ability to ‘see’ and understand the coexistence of overlapping entitlements to land.65

The decision in the North Gauteng High Court, handed down on 30 October 2009 declares key provisions of the Act to be invalid and unconstitutional. It focuses on the problems created when traditional councils are imposed on rural communities as land administration committees. It refers to the layered nature of land rights in customary systems including those existing at family, clan, village and group levels, and the problems that arise when these rights are subjected to the control of overarching Traditional Councils. The matter has been referred to the Constitutional Court for confirmation where it has been set down for hearing in March 2010.

(b) The tenure argument in relation to women

The underlying problem for women as described in an expert affidavit by Professor Thandabantu Nhlapo is as follows:

The CLARA completely ignores the family as an institution and the family-based nature of land rights in African systems of customary law. It provides for the formalisation of land rights at two levels only, that of the community and the individual. In this respect it


entrenches, to some extent, previous colonial and apartheid distortions that conceived of land rights as being the property of the male household head.\textsuperscript{66}

The 2008 Constitutional Court judgment in the case of \textit{Gumede}\textsuperscript{67} cites historical and ethnographic evidence indicating that women’s customary entitlements to land were undermined by colonial and apartheid laws.\textsuperscript{68} Moseneke DCJ described the case as bringing into sharp focus:

the issues of ownership, including access to and control of family property by the affected women during and upon dissolution of their customary marriages. At one level, the case underlines the stubborn persistence of patriarchy and conversely, the vulnerability of many women during and upon termination of a customary marriage.\textsuperscript{69}

The judgment found that:

Whilst patriarchy has always been a feature of indigenous society, the written or codified rules of customary unions fostered a particularly crude and gendered form of inequality, which left women and children singularly marginalised and vulnerable. It is so that patriarchy has worldwide prevalence, yet in our case it was nurtured by fossilised rules and codes that displayed little or no understanding of the value system that animated the customary law of marriage.\textsuperscript{70}

The judgment cites articles which describe how women’s customary entitlements to land were rendered vulnerable by discriminatory laws that:

had a profound and deleterious effect on the lives of African women. They were deprived of the opportunity to manipulate the rules to their advantage through the subtle interplay of social norms, and, at the same time, denied the protections of the formal legal order. Women became ‘outlaws’.\textsuperscript{71}

The argument in the CLRA case is that instead of securing women’s vulnerable tenure as required by s 25(6) of the Constitution, the Act further undermines the tenure security of certain categories of rural women, particularly unmarried women living on family land. It does this by providing for the upgrading and registration of ‘old order’ land rights when it is common cause that the outcome of past discriminatory laws is that most ‘old order’ land rights are held by men.

\textsuperscript{66} Paras 33–4 of Nhlapo’s affidavit in the CD ROM of Court papers that is included in \textit{Land, Power and Custom} (see note 9 above).

\textsuperscript{67} \textit{Gumede} (note 49 above), Mrs Gumede was married under customary law in 1968. She challenged those provisions of the Recognition of Customary Marriages Act which provided that only customary marriages entered into after 2000 would be in community of property. Marriages prior to 2000 would continue to be governed by ‘customary law’ which in the province of KwaZulu-Natal where she lives, is codified by the Natal Code of Zulu Law and the KwaZulu Act on the Code of Zulu Law, both of which, in ss 20 & 22 respectively, assign husbands not only dominium over all family property but also custody of all family members in that home. Mrs Gumede successfully challenged these provisions as well as s 7(1) of the Recognition Act.

\textsuperscript{68} \textit{Gumede} (note 49 above) para 18 refers to historical and ethnographic sources reviewed and discussed by A Claassens in ‘Women, Customary Law and Discrimination: The Impact of the Communal Land Rights Act’ (2005) \textit{Acta Juridica} 42.

\textsuperscript{69} Ibid para 1.

\textsuperscript{70} Ibid para 17.

\textsuperscript{71} Nhlapo (note 1 above) 157–66, quoted in para 17 of the judgment.
This issue was raised by women’s organisations during the parliamentary process and the Bill was amended to provide that:

An old order right held by a married person is, despite any law, practice, usage or registration to the contrary, deemed to be held by all spouses in a marriage in which such person is a spouse, jointly in undivided shares irrespective of the matrimonial property regime applicable to such marriage and must, on confirmation or conversion in terms of section 18(3), be registered in the names of all such spouses.72

The consequence of this section (4(2)) is that where a man is the holder of an old order right, he and his wife/wives become joint holders of the new order right. However, this section addresses the inequality only in so far as married women and men are concerned. It has the consequence of entrenching and deepening insecurity for all except married men and women. All others such as widowed mothers and unmarried sisters or brothers or the orphaned children of siblings are excluded: their existing rights fall away. This is particularly significant in the light of an analysis of the General Household survey of 2003 indicating that 41 per cent of rural women over 18 are neither the household head, nor married to, nor the partner of the household head.73 Those who become particularly vulnerable are widows and unmarried women living on family land.

The deeming provision in s 4(2) does not address the issue of the family-based nature of land rights in extended families. According to Nhlapo’s evidence, the Act:

superimposes the Western construct of exclusive ownership and registered rights on the customary law system of relative and ‘nested’ rights. This inevitably undermines the integrity of the system. New order rights are vested in individuals, thereby marginalising family members with shared rights. Freehold ownership of land, with all its legal consequences, is vested at the level of the community, thereby making the rights of families or sub-groupings purely secondary.74

The state responded that the definition of ‘old order rights’ includes customary entitlements, and thereby protects women, whether married or single. This answer ignores the reality and potency of documented countervailing old order rights to the same land held by male household heads such as Permission to Occupy certificates for residential sites and fields,75 khonza receipts,76 or witnessed allocation decisions.77 Written evidence and records of allocation to male household heads would create great practical difficulty for unmarried women, unmarried men, and widows seeking to assert informal customary

72 Section 4(2).
73 Affidavit by D Budlender in Tongaone v the Minister of Agriculture and Land Affairs (TPD 11678/06) available in Claassens & Cousins (note 9 above) (para 10 of Budlender’s affidavit in CD ROM of Court papers included with Land Power and Custom).
74 Nhlapo (note 66 above) para 36.
75 PTOs issued in terms of the Proclamation 188 of 1969.
76 Receipts for land allocations by traditional leaders or would-be traditional leaders. The word ‘khonza’ implies recognising a chief’s authority, but in many areas khonza payments have degenerated into informal land transactions.
77 The witnessing of land allocation processes by neighbours constitutes important proof in disputes over tenure security, especially in areas where written records are not kept.
entitlements to overlapping use rights against these more formal documents and processes. Moreover the schema of the Act is not one that provides for the co-existence of overlapping rights. It provides for the establishment of a general plan of registered individual ‘new order’ rights within blocks of land owned by ‘traditional communities’.79

No explanation was forthcoming from the Department of Land Affairs about how overlapping customary entitlements could, or would, be accommodated within the schema of registered land parcels envisaged by the Act. The Department of Land Affairs dismissed as ‘anecdotal’ extensive evidence put forward about the current vulnerability of single women and the serious eviction problems experienced by widows.

(c) The process argument in relation to the CLRA

At the heart of the challenge to the CLRA is the nexus between the nature and strength of indigenous land rights on the one hand, and the scope and extent of chiefly authority over land on the other. The arguments discussed above turn on the impact of the Act on the content and vesting of land rights. The other impact of the Act is that it undermines and trumps the local family and village forums in which rights are currently claimed, negotiated, distributed, and defended and centralises power to the overarching traditional council.

Security of tenure is, in practice, closely bound up with which voices dominate in the forums where decisions about overlapping entitlements to land are made. It is generally easier for women to speak out and stake their claims in village-level forums80 than in intimidating tribal council meetings, many of which are notoriously dismissive of women’s views. Yet the CLRA gives unilateral power to administer ‘communal’ land to traditional councils acting as land administration committees.81 It trumps the family and village forums that currently mediate power and enable ordinary people to participate in decisions about land rights.

The Act therefore bolsters patriarchal power relations in a manner likely to make traditional leaders less receptive to pressure for change from rural women and other sectors of rural society. This has the consequence of

78 Problems arise where the law formally recognises customary rights but fails to define the status of women’s use rights or provide mechanisms to assert them against stronger countervailing rights (see Claassens (note 68 above) 54–7 for the implications in relation to the CLRA). I Ikdahl ‘Engendering the Human Rights Protection of Property Rights: Women’s Local Land Use in Tanzania’ in Hellum et al (note 35 above) 262, 271 writing about Tanzania refers to Manji’s argument that the status of women’s custom-based land use is therefore dependant on how those in power categorise use, which is often as insecure access.

79 Communal Land Rights Act s 6.

80 Compare Rie & Weis writing about Tanzania (note 35 above). They found that the preferred dispute resolution forum is the one nearest to the family. Female respondents were especially likely to say that they preferred the nearest level. Reasons for this choice included ‘fear of damaging family ties and losing social networks; fear of not being well understood outside the village; lack of confidence in the higher levels …’

81 See Okoth-Ogendo (note 9 above), Cousins (note 9 above), Delius (note 9 above), and Claassens (note 9 above).
undermining the indigenous accountability mechanisms inherent in the co-existence of layered decision-making forums at different levels of rural society. Issues of contestation around the CLRA therefore include the level at which particular decisions about land should be taken, what constitutes proper decision-making processes, and how different levels of decision-making and accountability articulate with one another.

(d) The Traditional Courts Bill

The Traditional Courts Bill (the Bill) raises serious additional threats in relation to skewing the power relations within which women struggle for change. The Bill gives traditional leaders far-reaching power to determine the content of customary law. Like the CLRA, it provides no recognition of decision-making authority and dispute resolution at family or village level. The Bill vests statutory power in the presiding officer of a traditional court, who must be an officially recognised senior traditional leader or his delegate. No role, function or support is provided for village-level councils or to the council members who, in practice, play the pre-eminent role in existing customary courts. In this respect, the Bill follows the precedent set by the Black Administration Act 38 of 1927.

The Bill makes it an offence not to appear before a customary court once summoned by the senior traditional leader as presiding officer. The South African Law Reform Commission (SALRC) previously recommended that people must have the right to opt out of customary courts, and appear before another court instead, should they so desire. The current Bill’s failure to incorporate such choice is highly problematic. The jurisdictional areas of the courts are based on the old tribal authority boundaries established in terms of the 1951 Bantu Authorities Act, which are controversial in many areas, because they incorporate groups who may have no historical affiliation with the chief, or do not recognise his authority.

The decisions of the court (which are effectively decisions made by the presiding officer) have the legal status of rulings made by the magistrates’ courts. Traditional courts (evidently in the person of the senior traditional leader) have the authority to order unpaid labour, and to strip people of ‘customary entitlements’. Land rights are one such entitlement, community membership is another.

The Bill was sharply criticised by a range of human rights organisations during the public hearings held in May 2008. A key issue of contention was the lack of consultation with rural people and the privileging of traditional leaders in the drafting process. The memorandum attached to the Bill states that it was drafted in collaboration with the National House of Traditional Leaders. It attaches a short list of consultative workshops, all of which were

82 Okoth-Ogendo (note 9 above), and Claassens (note 9 above).
84 TLGFA s 28.
with traditional leaders. Questions were asked about what had happened to the SALRC’s 2003 recommendations and Draft Bill concerning customary courts.\(^85\) Traditional leaders had strongly opposed the SALRC’s recommendation that ‘opting out’ of the jurisdiction of traditional courts be allowed, on the basis that it would undermine their authority. The controversy that surfaced during the public hearings contributed to the Bill being held over to the next session of parliament. Many submissions pointed to the fact that the Bill was inconsistent with various provisions in the Constitution. The Bill was revived in July 2009 and, after receiving a briefing from the Department of Justice, the new Portfolio Committee on Justice and Constitutional Development concluded that there were constitutional concerns with the Bill that required that provincial consultations be held. These should take place in 2010.\(^86\)

There is concern that the new laws symbolise a shift in government’s previously unequivocal support for the principles of equality and equal citizenship rights and will have far reaching implications for the balance of power in rural areas. The Bill removes the need for traditional leaders to accommodate the countervailing views of women and ordinary people in the interpretation and development of customary law.

(e) Provisions affecting women

Women were at the forefront of opposition to the Traditional Courts Bill. The CGE opposed the Bill, as did the Women’s Legal Centre and the Rural Women’s Movement of KwaZulu-Natal. The parliamentary Joint Monitoring Committee on the Quality of Life and Status of Women also made a submission criticising the Bill and calling for joint sittings with the Justice Portfolio Committee.\(^87\)

The problems facing women in traditional courts include the fact that generally the courts are composed of male councillors who are not sympathetic to women’s issues, and that in many areas women litigants are not allowed to speak or represent themselves, but have to rely on male relatives to represent them.\(^88\) This puts women at a serious disadvantage, particularly in eviction

\(^85\) The SALRC’s 2003 final report addressed problems facing women in traditional courts described in a joint submission by the Commission for Gender Equality (CGE), the Centre for Applied Legal Studies (CALS) and the National Land Committee (NLC) arising from a series of consultation meetings the three organisations convened with rural women in different provinces; pages 1, 7, 8, 9,11, 14, 18 & 19.

\(^86\) The Black Administration Act of 1927 was amended by the Repeal of the Black Administration Act and Amendment of Certain Laws Amendment Act 7 of 2008, consequently extending the effective repeal date of the section dealing with the powers of traditional leaders to hear disputes to 30 December 2009, and again by Amendment Act 20 of 2009, thus extending it to 30 December 2010. The effect is that the existing legal provisions dealing with traditional courts remain in force only until that date, unless the Black Administration Act is extended yet again.

\(^87\) Despite this the Justice Portfolio Committee held subsequent meetings about the Bill without the participation of the Joint Monitoring Committee.

\(^88\) The 1999 joint submission to the SALRC by the CGE, CALS and the NLC raised the problem of customary courts being either dominated by, or exclusively composed of male councillors, and of women’s inadequate representation before customary courts (note 85 above).
and domestic violence cases arising from disputes with their male relatives, or where they have no adult male relatives available to represent them.

Clause 9(3)(a) of the Bill bars lawyers from traditional courts and clause 9(3)(b) provides that a party may be represented by 'his or her wife or husband, family member, neighbour or member of the community, in accordance with customary law and custom'. Therefore, it enables the continuation of the practice of male relatives representing women 'in accordance with customary law and custom'. This is justified on the basis that men, too, may be represented by their wives; in reality, a far-fetched possibility which cloaks the continuation of inequity in formal equality.

The controversy generated by the Bill illustrates how the content of law reflects the interests of those who are privileged during the law-making process, and that struggles over the content of custom cannot be separated from struggles over the process of defining custom. The processes of negotiated change that are underway in rural areas\(^9\) indicate that, at least in some areas, traditional leaders no longer have the kinds of power they had during the apartheid-era to unilaterally 'lay down' versions of customary law that bolster their authority and suit their vested interests. The strong lobby by traditional leaders for statutory powers through legislation such as the Bill and the CLRA indicates their reliance on government to assist in 'trumping' the other forums and structures in rural areas that are engaged in renegotiating and developing the content of custom and land rights. The new laws redirect the flow of authority 'downwards' from the state via traditional councils as opposed to 'upwards' from rural citizens exercising customary entitlements through a range of interlocking and self-mediating decision-making forums.

We contend that it is critically important to interrogate the package of post-2003 laws dealing with the powers of traditional leaders\(^90\) and to engage with the legislative process of those still to come. They put at risk the fluid and open political spaces within which significant numbers of women have managed to secure land rights during the last 15 years and threaten to return the exclusive power to define customary law to government-appointed traditional leaders.

VI RETHINKING RIGHTS

The changes underway in rural areas hold out significant potential, not only in relation to improving the position of rural women, but also for the incorporation of positive customary values into South African understandings of rights. In our attempt to interrogate the rights/custom dichotomy by reference to the rights claims being negotiated by rural women we are in agreement

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89 These are not limited to women's land rights and participation in decision-making processes. Other common developments include the emergence of development committees alongside 'tribal authorities' and the development and adoption of 'tribal' constitutions to check potential abuse of power. For a description of the processes of negotiated change underway in Sekhukhuneland see B Oomen Chiefs in South Africa: Law, Power & Culture in the Post-Apartheid Era (2005).
90 Including the TLGFA and the various provincial laws dealing with traditional leadership enacted pursuant to the national framework Act. It is these provincial laws that appear to be having the most substantial, and in our view negative, impact on the balance of power in rural areas.
with Goldblatt’s view that ‘[r]ights serve as a critical framework for those challenging the dominant social order. Their political importance outweighs any objections to their nature and demands that we engage in reframing and reconstructing rights for progressive ends’. 91

To this end, we suggest that law and legal strategy in relation to women’s land rights need to engage more seriously with the processes of negotiated change underway in rural areas, and pay close attention to the strategies and discourses used by rural women as they grapple with debates and contestation about the meaning of equality in the context of rural power relations. The dynamics underway are obscured if seen primarily as a stand-off between custom and rights or rights are reduced to formalist legal categories.

This approach is consistent with Nedelsky’s perspective that we should move beyond an understanding of rights as having fixed boundaries, and instead pay attention to the processes of negotiation about underlying values that shift the content of rights over time. It is widely recognised that it is at the level of shifts in values and practice, rather than at the level of statute law reform that positive changes for women have the best chance of taking root. According to Oomen, change ‘has to be forged locally, laboriously negotiated within local power relations’. 92 She says that for the South African state to return the power of defining local ‘customary’ law to ordinary rural people, it would have to provide additional resources to support the marginal voices involved in the negotiation of local rule. Measures such as the CLRA and Traditional Courts Bill do the opposite.

If we recognise rights as the outcome of ongoing negotiations and conversations about basic values we are better able to see the potential for the development of uniquely South African land rights that combine the flexibility and inclusiveness underlying indigenous systems of relative land rights with constitutional values such as equality. A key feature of indigenous systems of land rights is the deeply-rooted value that all families have a claim on the community for land. 93 Other key features include the recognition of overlapping entitlements to land vesting in different people, 94 and the primacy of claims of need in adjudicating which claims take precedence. The evident need of the children of unmarried mothers has clearly been a motivating force in changes in the practice of land allocation to single women.

We suggest that current accommodations built on indigenous precedents that prioritise claims of need in balancing relative rights are particularly important in relation to the development of socio-economic rights in South Africa. They ‘vernacularise’ land rights by incorporating underlying indigenous values. And in so doing, they have the potential to enrich understandings of rights in South Africa by reference to precedents and values that focus on

91 Goldblatt (note 30 above) 446.
92 Oomen (note 89 above) 251.
94 Bennett refers to them as ‘complementary interests held simultaneously’ (TW Bennett Customary Law in South Africa (2004) 318).
inclusion rather than exclusion, and on balancing relative rights, rather than ‘trumping’ them.

Anne Griffiths describes the debate over tenure reform as stuck in the either/or of whether ‘individual property rights [should] take precedence over customary land tenure or vice versa’. Nedelsky’s insights about the way in which rights function, not primarily to create boundaries around individuals, but to structure the relationships of interdependence that advance or undermine autonomy, help us escape this trap by acknowledging the socially embedded nature of women’s land rights. Whitehead and Tsikata⁹⁵ cite studies from other parts of Africa that:

suggest not only that women’s claims to land are much more diverse, but also that women’s claims to land are much stronger than usually represented … Ironically for those who link social embeddedness with women’s weaker claims, the empirically demonstrated strength of women’s claims seems to lie precisely in their social embeddedness.”

In such situations, interventions that support women’s ability to participate effectively in the local forums that allocate land and decide disputes may have more impact in assisting women to assert claims to autonomy within the context of family and group-based rights than reforms focusing on the boundaries of individual ownership.

The single mothers who claim separate residential sites and the male dominated structures that grant them often explain recent changes as closely linked to declining rates of marriage in rural areas and changing family composition. We do not know enough about the reasons for and the scale of changes in marriage patterns to be able to establish what forces are driving the underlying changes in family composition. Two issues however seem relatively clear. The first is that the claims of single mothers are articulated as arising from community membership, from their ‘birthright’ as children born in that community, or their affiliation through paying ‘khonza’ fees, and from their entitlement as community members to the resources necessary to provide for their children, who are also children of the community. In that sense, their land rights are established through socially recognised claims within the community, rather than on the basis of their separation from it.

The other issue to note is that, while there is evidence of declining rates of marriage from at least the 1930s, the dramatic increase in land allocation to single mothers is often described in currently available evidence as starting from 1994. This suggests that the changes in land allocation, while linked to changes in family composition, were made possible primarily by changes in the overarching political and legal environment, and the possibilities that women saw for themselves within this new environment.

In our view, rural negotiations about the interface between customary entitlements and constitutional rights contain important potential for shifting power relations and transforming women’s land rights in practice, in ways that

⁹⁵ Whitehead & Tsikata (note 2 above).
⁹⁶ Ibid 78.
reach deeper than many legislative reforms. This potential, being played out in various rural areas, is, however, under threat, not only from measures such as the Traditional Courts Bill which would enable traditional leaders to silence all those who challenge top-down versions of customary law, but by human rights approaches that posit custom and rights as inimical to one another and women’s only salvation in reforms that would insulate them from custom.

VII CONCLUSION – AT THE INTERFACE BETWEEN STATE LAW AND LIVING LAW: CAVEATS AND OPPORTUNITIES

In arguing that legal and rights strategies are likely to backfire if they fail to grapple with the power relations, values and relationships within which rural women live their lives, we do not advocate a withdrawal from the arena of national law and policy. National laws have a far-reaching impact on the power relations at local level which frame the context in which women struggle for change and influence the possibilities they dare imagine.

Moreover, a focus on the local terrain at the intersection between custom and rights illuminates that the idea of equality as a universal right has been fundamental to the changes of the last 15 years, especially at a symbolic level and in framing the overarching political environment. However, the importance of universal rights at the symbolic level should not blind us to the mutable nature of rights and to the messy local processes in which rights are ‘brought to life’ in ways and forms that may not necessarily conform to our preconceptions or formalist assumptions. A key insight of the legal pluralists is that, in practice, women mix and match claims derived from the overlapping legal and customary regimes of post-colonial society according to whichever best suits their specific interests in that instance. Our suggestion is that legal strategies to secure women’s land rights need to be informed by a similar pragmatism and engage with the overlapping forms of ‘law’ and ‘custom’ operating at different levels and in different arenas.

Similarly, struggles over the content of land rights cannot be separated from struggles over the process of defining custom and land rights. It is therefore critically important to pay attention to discourses about custom in the national arena and the potential impact of national legislation such as the CLRA and the Traditional Courts Bill.

It is because struggles over land rights are inherently bound up with contestation over the content of both custom and rights that the emerging ‘living law’ jurisprudence in South Africa is so important. It enables us to move beyond the discourse of false dichotomies and the distorted versions of customary law established by apartheid precedents towards an examination of changing practice. This takes us into the realm of the processes of debate, contestation and change being forged by the full cross-section of people active in rural society, and out of the realm where traditional leaders have sole authority to put forward versions of custom that suit their specific interests. More than that, it enables recognition of those processes of transformative change at the
local level that are beginning to redefine the content of land rights through conversations between constitutional and customary values.

It is important however, not to overstate the potential inherent in the living law paradigm. Patriarchy palpably suffuses gender relations in rural areas. Moreover ‘living law’ has been deeply affected by the versions of autocratic customary law that were enforced during the Bantustan era and before that by colonial governors and native commissioners. Many of the precepts of distorted custom have been internalised by both men and women, and men (and sometimes women) rely on them to advance narrow interests that disadvantage and oppress marginalised women. The ‘living law’ in some parts of South Africa is very similar to the old official version and large numbers of rural women are not in a position to take the risks entailed in challenging it. Thus, in some areas proof of practice also constitutes proof of ongoing discrimination and distortion. Even in those areas where contestation and change are underway, it is notoriously difficult to prove the content of living law. As Bennett has remarked:

in spite of the failings of the official version of customary law, mere availability of information has had the effect of creating a de facto presumption in its favour. Litigants are entitled to object, but in practice this right seldom amounts to much, because in the heat of litigation, time and money militate against undertaking a possibly inconclusive search for the living law. 97

A fundamental difficulty with proving ‘living law’ in the formal court system is that inherent in the concept of living law is the fact that its content will vary from place to place. Expensive empirical research conducted in one area is of limited value for other cases. Moreover, many lawyers, judges and legal positivists find the structure and symmetry of many of the abiding colonial stereotypes of bounded ‘tribes’, clear rules, fixed boundaries and neat hierarchies of authority orderly and reassuring. 98 They struggle to come to grips with the idea of relative and overlapping rights, boundaries that expand and contract and hierarchies of overlapping authority that exist in a state of constant tension with one another. Oomen notes the inherent difficulties in reconciling the processual, flexible, ‘persistently renegotiated legal culture’ of customary systems with the ‘absolutist, binary system of state law with its emphasis on legal certainty’. 99

Whatever the difficulties in proving the ‘positive content’ of living law, evidence of historical and ongoing contestation around the content of custom challenges distorted versions of ‘official’ customary law by reference to the arguments and actions of ordinary people. In this sense, the living law approach contains inherently democratic possibilities. Also, notwithstanding the serious problems at the interface between its processual nature and the rule-bound character of positivist state-law, it is an important safeguard against the triumph of the distorted versions of autocratic ‘custom’ that are reinforced by recent South African laws enacted under the banner of preserving custom.