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Women's access to land in the former bantustans:

Constitutional Conflict, Customary Law,
Democratisation and the role of the State

Michelle M Mann

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telephone: (021) 959 3733/3961, fax: (021) 959 3732,
email: vmagerman@uwc.ac.za

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Michelle M Mann

Counsel with Aboriginal Justice Directorate,
Department of Justice, Ottawa, Canada

Programme for Land and Agrarian Studies

School of Government
University of Western Cape
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Abstract

The transition to local democratic institutions in the former bantustans of South Africa will not in itself fulfil the constitutional imperative for the promotion of gender equality, specifically in relation to women's access to land. In order for the state to balance its competing constitutional obligations, it must undertake a programme of community education, consciousness-raising, and support for women's organisation at the grassroots level.

This paper provides an overview of land tenure in the former bantustans, focusing on the access of rural women to this land. It examines the potential conflict between the constitutional recognition and protection of gender rights on the one hand and the recognition of customary law/ traditional leadership on the other, especially the adverse impact of customary law and traditional leadership on the access of rural women to land. It then examines state initiatives towards implementing local democratic institutions in these areas, and considers whether these initiatives are sufficient to fulfil the state's obligation to promote gender equality.

The paper concludes that state support for community activism and community education can serve to balance the constitutional imperatives for gender equality and respect for traditional leaders and customary law. Such an approach would allow the community to be active participants in, and the 'drivers' of their own development.

1. Introduction

1.1 Overview of land tenure in the former bantustans¹

After the first democratic elections in South Africa in 1994, the new government declared its intention to make land reform a priority. The land reform programme in South Africa is designed to remedy the legacy of apartheid, while contributing to national reconciliation, growth, and development. The tenure reform² programme is geared towards securing formal land rights for black South Africans whose land rights are informal as a result of apartheid (DLA 1998). The focus of the tenure reform programme is the strengthening of land rights of individuals and communities in the former bantustans of South Africa.

Until the 1990s it was apartheid government policy that black people should not own land. The bantustans were the result of the government's programme of dispossessing black South Africans of land ownership from 1913 onward, and forcibly relocating them to 'ethnic' homelands, in order to free up valuable land for white colonialists. Under apartheid policy, all black people were eventually to be dispossessed

of any land they had in 'white' South Africa, and relocated to bantustans.

In the bantustans themselves, black land rights were subject to government control via the permission to occupy (PTO) system, the land being held in trust by the state. Pursuant to the 1913 and 1936 Land Acts,³ the bantustans were characterised as unsurveyed and unregistered trust land (Ntsebeza 1999:4).⁴ Under trust tenure, the lands were held for the beneficiaries by the state. Under this system, land was divided into areas for communal grazing while arable fields and residential plots were allocated to individual families. However, these individual allocations could not be transferred directly between families, and were to be returned for redistribution if the holder died or left the community. While in practice land was frequently inherited, this practice required the approval of the allocators who had the power to give the land to someone else (Cross & Friedman 1997:17–19). Pursuant to the 1936 Black Land Act, land allocation in the bantustans was based on the PTO system; while meant to secure permanent occupation, the holder of the permit was vulnerable if for example, the government, as owner of the land, decided to forcibly remove him. Some PTO holders were evicted and their houses demolished without compensation or legal recourse (Ntsebeza 1999:4). Some former bantustans continue to issue PTOs under the 1936 legislation, even after 1994.⁵ There is a need for clarification as to who is responsible for the issuing of PTOs, as both transitional local councils and traditional authorities were issuing PTOs, often to different people for the same plot, at variable fees (DLA 1999b:7).

In the former bantustan communities land was, and in some areas still is, controlled and distributed for the community by the headmen and council, the chief or agricultural officers acting on behalf of the district magistrate or Cabinet minister. Under this system of landholding, hereditary traditional leaders and their councils were responsible for the allocation of land held in trust by the state, particularly after the apartheid state passed the Black Authorities Act.⁶ This legislation created a system whereby traditional leaders were utilised to implement apartheid policies and laws. Between 1976 and 1981, certain bantustans were subject to apartheid-generated



‘independence’⁷ under which the power of those traditional leaders was strengthened (Platzky & Walker 1985). A feature of bantustan government during the apartheid period was the concentration of power (administrative, judicial, and executive) in the traditional authority (Mokgoro 1994:4). This concentration of such authority has led to allegations of despotism on the part of the chief and council:

However, some chiefs have begun to disregard legal restrictions on their power, and are moving to exercise greater informal control over land. In these areas the rights of the individual landholders may be in decline. Some chiefs now seem to see land as their private property. This trend further marginalises women (Cross & Friedman 1997:19).

In fact, tenure reform is often viewed as directly threatening to the power of chiefs, who were, or still are, in control of land allocation. As the movement for change in South Africa spread from the urban to the rural areas in the late 1980s and early 1990s, traditional authorities also became a target of the demand for change. For example, in the Ciskei, the traditional authority system collapsed and the civic associations took over, while in the Transkei, the traditional authorities were also affected (Ntsebeza 1999:5). The challenges to traditional authority rule greatly influenced the collapse of land administration in most of the former bantustans. Government authorities in some regions report that they have not received applications for PTOs for quite a while (Ntsebeza 1999:5). In post-apartheid South Africa, it is the reincorporation of the former bantustans in 1994 which has put the issue of the role of traditional leaders into the forefront of the constitutional debate.

With the dissolution of the bantustans and the South African Development Trust (SADT) in the 1990s, the Minister of Land Affairs became the trustee of some 17 million hectares of former bantustan and SADT land (DLA 1997a:145). In the early 1990s the apartheid government introduced a land reform programme in the bantustans, proposing to eliminate the PTO system and either transfer the land to ‘tribes’ to be held communally, or to upgrade PTOs to full individual title. The government indicated a preference for the latter option (Ntsebeza 1999:5). These options came under attack from critics, including non-governmental organisations (NGOs) working in the field, who

indicated that the realities of overlapping land rights would be very problematic for issuing title. Further, the emphasis on individual, rather than communal land rights was criticised (Ntsebeza 1999:6). Yet another problem with upgrading of the PTO to full title is that it may serve to further entrench existing gender inequalities. Men traditionally held the permits to occupy land, and it would therefore generally be men's land rights that are upgraded to full title. This can serve to formalise women's inequality:

The upgrading of tenure rights leads to a market in land and can create greater insecurity, as well as limit access to land rights for some. Upgrading a man's rights can result in a man selling land. Particularly vulnerable are women married to migrant workers with a second wife. Or it can result in the family member with title evicting others (Classens, 1996). Women have expressed fears about the consequences to them of such upgrading (Budlender 1997:180).

Simultaneously, tenure reform does provide the Department of Land Affairs (DLA) with a valuable opportunity to ensure that women's land rights are recognised, by developing mechanisms which make certain that all community members are accommodated in the new form of land holding.

Land tenure reforms have not yet been fully implemented largely due to problems arising from the land being unregistered and unsurveyed. The tenure reform programme is challenging to implement given that there are poor records of land occupation, and it is often difficult to ascertain to whom the land should be transferred (Budlender 1997:180). Land administration in these areas is still chaotic, with residents not having clear legal rights to the land, despite generations of occupation. This legal insecurity makes it difficult for people to protect and develop their land. Because the land is still nominally owned by the state, various decisions pertaining to the land have legal status only if taken by the Minister of Land Affairs as trustee.

Finally, it is important to note that most de facto tenure is heavily influenced by informal tenure practices, not just by the legal tenure system. 'Real tenure in rural African areas rarely works the way it is legally supposed to' (Cross & Friedman 1997:20). In fact,

It seems that what was formally written into law rarely



reached down to the ground. For example, the former KwaZulu government legislated that women were allowed to hold land, but it seems that in most districts this right was not recognised in practice, and women heirs still have difficulty defending their land against male claimants (Cross & Friedman 1997:20).

In reality, there is a broad range of ways in which communal land distribution and allocation can be controlled. It can be controlled almost entirely by the community, with little outside intervention, and disputes arbitrated at the local level, or it can be arbitrarily controlled by chiefs, dependent upon informal land tenure practices (Cross & Friedman 1997:21). Given the informal nature of this process, legislation alone will not suffice to change power relations.

1.2 Women⁸

Whatever the system of tenure in place in rural South Africa, when compared to men of the same race and class, women are generally disadvantaged with regard to access to land, and also in the control they are able to exercise over this resource (Mjoli-Ncube 1999:4–5). African women constitute the poorest socio-economic sector of the population, with the majority unemployed and living in impoverished rural areas (Kadali 1995:64, 66). Although women make up the majority of the population in rural areas, they have rights to only a small proportion of the land (Small 1997:45). There are numerous reasons why rural women should have independent and equal access to land, including poverty alleviation, the economic, social, and political empowerment of women and their general welfare, efficient use of land, the furtherance of women's equality and challenging male oppression (Agriwal 1999). For most rural women, land is predominantly a means of survival and subsistence and a productive resource during times of poverty and high unemployment.

Most rural women face major obstacles with respect to legitimate access to land, and any access they have is insecure. In rural areas, access to land 'entails secure tenure, or title, deciding on the best land use, having a right to dispose of it in a manner that maximises returns, and

finally the right to inherit it and transfer it to one's children'. It is extremely difficult for women to access land in the former bantustans:

Because field size is pegged and fields cannot be legally subdivided, most areas under state tenures have had long waiting lists for arable fields, and male candidates are still preferred. Women are still not normally given land in their own right under this tenure (Cross & Friedman 1997:19).

Women also have less access to authority and less decision making powers, ranging from the level of the home to that of the nation. In rural South African communities, land was and is, used as a means to access community leadership and political power. Thus, women's exclusion from independent access to, and control over land, has also contributed to their political disempowerment at the community level:

Married men have the highest status and are expected to participate in all decisions about the general welfare of the community. In the past, when the chief convened a community meeting, men were the only ones expected to participate. It was assumed that their husbands, brothers or fathers would look after women's interests. Their exclusion from all decision-making functions has hindered women from challenging many discriminatory practices (Small 1997:48).

Once women have established a right to deal in land, they may also be able to establish a right to be heard in public (Cross & Friedman 1997:26). Given that control over land is a key factor in control over the social order in these rural communities, men's fears relate to maintaining dominance in local affairs. In fact, case studies have shown that men and women have different land and development priorities, and unless women have a voice in development initiatives, the priorities that emerge will be those of the men of the community. Without being consulted in the community, women face further marginalisation in land planning and development processes (Middleton 1997:74, 83).



2 The Constitution

2.1 The interim Constitution

Prior to the first democratic election in April 1994, South Africa was governed under the 1993 ‘interim’ Constitution⁹ which enumerated 34 constitutional principles¹⁰ that would have to be embodied in a final Constitution. The two houses of Parliament, sitting together as the Constitutional Assembly, were given two years to complete this task. The final Constitution was adopted by the Constitutional Assembly on 8 May 1996 and referred to the Constitutional Court for a decision on whether the constitutional principles had been satisfactorily incorporated. The final Constitution was amended in line with the court’s judgment and adopted again on 11 October 1996.¹¹

It has been noted that the very existence of these principles for drafting the 1996 Constitution evidences the lack of trust and uneasy compromises between the parties at the negotiating table (Kaganas & Murray 1994:409). During the negotiations process, the interests of traditional leaders emerged as being particularly complicated and controversial. It became apparent that, for the traditional leaders, one of the most troubling features of the draft Constitution was the commitment to gender equality (Kaganas & Murray 1994:409–10). Accordingly, the debate centring on women’s right to equality, and the constitutional protection of customary practices and traditional leadership, became quite heated. The difficulty appears to have largely resided in the fact that African customary law is patriarchal in nature, thereby putting it into direct conflict with gender equality rights. It has been speculated that the traditional leaders may have felt their power base to be threatened by the equality rights provisions, and were seeking to ensure that they remained powerful in their communities (Kaganas & Murray 1994:410).

With respect to the role of traditional leaders in the negotiations for the 1993 Constitution, it was noted that:

Their representatives in the negotiating process mounted a challenge to this emphasis on equality. For instance, Mwelo Nonkonyana, chief negotiator for the Cape Traditional

Leaders repeatedly and provocatively insisted that women are not the equals of men. This attitude was not surprising, given that customary law, the legal system over which traditional leaders preside, does not recognise women and men as equals. Nor was it surprising that views like this were presented as axiomatic, as the articulation of time-honoured values of which these leaders were the natural and legitimate custodians (Kaganas & Murray 1994:410).

This dispute between equality rights and culture came to a head at the negotiations when traditional leaders attempted to secure special treatment of customary law by arguing that the Bill of Rights should not apply to it. However, a lobby group, consisting largely of black women and supported by rural women's organisations, contested the assertions of the traditional leaders that they represented all of their people (Kaganas & Murray 1994:410). The success of this group ensured that the right to gender equality was included in the 1993 Constitution.

2.2 The final Constitution

The conflict between customary law and gender equality was carried over from the 1993 Constitution to the final Constitution, and surrounds the current Bill of Rights, with questions relating to gender equality, culture, and tradition still unresolved. Many women feel that the constitutional protection of customary laws is in opposition to their right to gender equality and freedom from discrimination:

Given that cultural practices and customary law often disadvantage women, it is not difficult to predict situations where the right to engage in culturally sanctioned practices would conflict with the constitutional guarantees of equality and non-discrimination (Kaganas & Murray 1994:416).

With respect to clarity, there is unfortunately no simple 'ranking' of rights, which would resolve the dilemmas involving the rights to equality and to culture. Nor does the 1996 Constitution indicate which right is to prevail should there be a conflict.

What exactly does the 1996 Constitution say on these issues? Section 1 provides that the values on which the country is founded are those of human dignity, the



achievement of equality, the advancement of human rights and freedoms, non-sexism, supremacy of the Constitution and the rule of law. The Bill of Rights¹² enshrines the rights of all people in the country and affirms the democratic values of human dignity, equality and freedom. The state must respect, protect, promote and fulfil the rights in the Bill of Rights.¹³ These rights are subject to certain limitations.¹⁴

The equality clause¹⁵ states that everyone is equal before the law and has the right to equal protection and benefit of the law. Equality is defined to include the full and equal enjoyment of all rights and freedoms, and the state is prohibited from discriminating unfairly, either directly or indirectly against anyone on one or more grounds, including gender, sex, pregnancy, and marital status. This section also requires that the state be proactive in enacting national legislation to prevent or prohibit unfair discrimination. This requirement has resulted in the recent passage of the Promotion of Equality and Prevention of Unfair Discrimination Act.¹⁶ The objectives of the Act are to prevent, prohibit and eliminate unfair discrimination as contemplated in the Constitution and to promote equality. In particular, the Act focuses on discrimination on the grounds of race, gender and disability. Section 8 states:

All forms of gender discrimination, including the following are prohibited:

- (a) the system of preventing women from inheriting family property;
- (b) any practice, including traditional, customary or religious practice, which unfairly violates the dignity of women and undermines equality between women and men, including the undermining of the dignity and well-being of the girl child;
- (c) any policy that unfairly or unreasonably limits access of women to land, finance, and other resources.

The Act outlines special measures to prevent and eliminate gender discrimination and to promote gender equality, which are the duty and responsibility of the state.¹⁷ The Act is binding on the state, which should force the government to cease its protection and tolerance of discriminatory gender practices in land allocation, and to act to further gender equality in this area.

The Constitution provides that everyone has the right to

freedom of conscience, religion, thought, belief and opinion, and that legislation may recognise traditional or customary law marriages, and traditional systems of personal or family law.¹⁸ It provides that everyone has the right to participate in the cultural life of their choice.¹⁹ It further provides that members of a cultural, religious or linguistic community have the right to enjoy their culture, practise their religion, and to have cultural, and religious associations.²⁰ These sections protect and recognise cultural, religious, and traditional beliefs, but only so long as they are in accordance with the other provisions of the Constitution, and do not interfere with any other right protected in the Bill of Rights, for example, gender equality. The Constitution also provides that the Bill of Rights does not deny the existence of any other rights or freedoms recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill of Rights.²¹

Section 25 of the Constitution obliges the government to redress inequities in access to land in South Africa:

The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.²²

And further:

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.²³

Legislation has been enacted which provides some tenure security for people with informal land rights.²⁴ The Restitution of Land Rights Act provides for the restitution of rights in land in respect of which persons or communities were dispossessed under any racially discriminatory law.²⁵

Chapter 7 of the Constitution deals with the sphere of local government. It requires the establishment of democratic local municipalities for the entire area of the country.²⁶ Local government is meant to provide democratic and accountable government for local communities, and encourage the involvement of communities in their local government.²⁷

Traditional leadership is dealt with in Chapter 12 of the



Constitution. The 'institution, status and role of traditional leadership, are recognised, subject to the Constitution'.²⁸ 'A traditional authority that observes a system of customary law may function subject to any applicable legislation and customs', and 'the courts must apply customary law when that law is applicable, subject to the Constitution and any legislation dealing specifically with customary law'.²⁹ Section 212 provides for national legislation to possibly continue a role for traditional leadership as an institution at the local community level. Thus, the role of traditional leaders in the new democratic South Africa is recognised, albeit subject to the Constitution.

In addition to the guarantee of gender equality enshrined in the Constitution, South Africa is also a party to international instruments dealing with gender issues. Since 1995, South Africa has been a signatory to the Convention on the Elimination of all forms of Discrimination against Women (CEDAW),³⁰ and must report to the United Nations on its progress in complying with CEDAW. The Convention states that 'discrimination against women violates the principles of equality and respect for human dignity, is an obstacle to the participation of women on equal terms with men, in the political, social economic and cultural life of their countries'. CEDAW requires state parties to embody gender equality in national constitutions and to ensure through law and other means the practical realisation of this right to equality.³¹ Parties must also take appropriate measures 'to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women'.³² Article 14 further requires that state parties take appropriate measures to ensure that rural women participate in, and benefit from rural development and planning, and have equal treatment in land and agrarian reform. Another important aspect of CEDAW is that its scope includes discrimination that is intentional as well as any act that has the effect of gender discrimination.

CEDAW recognises the obligation of the state to take action to eradicate discrimination against women. The state must therefore advance the position of women in South Africa. However, CEDAW only provides the minimum acceptable international standard, and should be interpreted in accordance with South Africa's constitutional

commitment to gender equality. Further, in response to the Beijing Platform for Action,³³ the Ministry of Land Affairs undertook to 'take legislative and administrative measures to give women and men equal rights to economic resources including access to ownership and control over land and other properties, credit facilities, natural resources and appropriate supporting technology' (DLA 1999a:4–5). However, despite the admirable objectives of these international instruments, their usefulness in the South African context has been questioned, given that the government is not complying with its own policies (see below), legislation, and Constitution (Sunde & Gernholtz 1999:37).

In light of the Bill of Rights and the international instruments to which South Africa is a party, the challenge becomes one of translating the provisions so that they have real impact on the lives of women in general, and particularly, on the most disadvantaged group, rural African women. As noted by one author:

Nevertheless, while women enjoy the protection of the Bill of Rights in theory, customary law is widespread in practice and so, therefore, is the gender inequity inherent in it. This situation is likely to persist for some time, regardless of legislation (Kadali 1995:70).

While legal equality has the potential to transform society at the highest level, the legal right to equality will not in itself revolutionise existing gender relations. Due consideration must also be given to the fact that traditional leaders and customary law both enjoy constitutional protection.

3 Traditional leadership/customary law

3.1 Introduction

U*buntu* is a concept that has been described as a worldview of African societies, or a philosophy of life (Mokgoro 1998:49). *Ubuntu* is rooted in a fundamental belief in the communal way of life of traditional African communities, where individual rights were seen in the context of the whole: family and community. Individual rights per se were not recognised, as individuals were served



by the best interests of the community (Freddie 1999:14). This is reflected in customary marriage, discussed below, with its non-individual, and communal focus on kinship ties. The individual's well-being is considered to be relative to that of the group, and key social values underlying *ubuntu* can be defined as 'group solidarity, conformity, compassion, respect, human dignity, humanistic orientation and collective unity' (Mokgoro 1998:50). It has been argued in the South African context that:

...the fact that African women, men and children are viewed in light of community, oneness or wholeness and not on the basis of individualism refute the allegations of discrimination, inequality and oppression (Freddie 1999:14).

However, one may question whether the existence of a communal way of life necessarily means individuals within that society cannot be recognised as oppressed:

there is another aspect to this favouring of group interests over those of the individuals involved: in patriarchal societies group interests are framed in favour of men. Here is the first indication of why inequality is such an enduring part of African customary systems. The field of family relations is one in which Africans construct the foundations of their social lives. If that system masks inequality under the guise of group interests, women and children, lacking a say in the articulation of those interests, are certain to be disadvantaged (Nhlapo 1995:160).

Further, the issue of women's access to land as a group can be conceptualised not as individual rights, but as group rights, communal rights in a sense.

3.2 Traditional leadership/customary law

It is a well-established fact that traditional African communities are patriarchal in nature; African women were considered to be minors and therefore subjected to perpetual minority (Freddie 1999:12–13).

Indeed, it was only through legislation in 1985 and 1998 that rural African women overcame their legal status as minors in relation to land.³⁴ However, this status is still reflected in customary law, and obviously impacts women's access to land. With no laws providing for women's independent access to land, a woman's access will depend on whether or not she can persuade the traditional authorities of her need.

Given the power of chiefs, who are almost invariably men,³⁵ women encounter obstacles in inheriting land, and in obtaining allocations for themselves. In seriously corrupt rural communities, men also have greater access to power and the powerful, giving them another advantage in delivering bribes and obtaining favour (Cross & Friedman 1997:26).

As circumstances in these rural communities evolve, and traditional family values weaken, women find themselves in increasingly disadvantaged positions, as they are faced with greater responsibilities to support themselves and their families, without access to the resources to be able to do so. 'The burden on women then increases, without the control of the resources shifting to them' (Cross & Friedman 1997:23). The increasing responsibilities of women at home have in fact fostered the demand by rural women for equality, fuelled by practical rather than theoretical considerations (TRAC 1991:4).

In general, women's access to land is limited as a result of underlying social values in the community, which determine which types of household are eligible to hold land rights. Challenges pertaining to women's access to land can be perceived as threatening the social structure and the well-being of the community. In a patriarchal system, married men see themselves as guardians of the land, and can perceive the claims of women as a threat (Cross & Friedman 1997:24–25). In general, rural communities, regardless of the form of tenure, tend to limit land rights to married households with children. Authority over the land is perceived to be in the hands of the male head of the household. While marital status determines land rights for men and women, men are not threatened with dispossession of the land if divorced or widowed while women are (Small 1997:46). In many cases women need to have a husband in order to have a home, rendering them vulnerable. Residential land is a primary concern of most rural women (Small 1997:52). Since access to land usually depends on their relationship to a man, married women are often forced to remain in difficult or even violent marital situations in order to ensure their own survival and the survival of their children.

While it is beyond the scope of this paper to provide a



detailed analysis of the impacts of colonialism on traditional South African culture, it must be recognised that firstly, there is no single understanding of the term ‘customary law’:

A variety of institutions and practices defended as ‘cultural’ or ‘traditional’ are assumed to be based on customary law, which is seen as the formal expression of ‘African ways’ dating back to pre-colonial times, unchanged and pure (Nhlapo 1995:161).

Customary law has been defined as ‘the enactment of African customs, which find their basis in African traditional society’ (CLC 1994:9). However, it is important to note that customary law has been distorted and, to some extent, created through the process of colonialism and cannot be blamed in isolation for its current impact on women in rural communities. Formal customary law developed as a result of an alliance between colonial authorities and African male elders who, as holders of resources, sought to protect their vested interests in a time of change by promoting the development of legal rules to replace custom (Nhlapo 1995:161). The construction of ‘official’ customary law had grave consequences for women in society, as it distorted, exaggerated and entrenched the already existing patriarchal bias of African law and custom:

Thus, even though one views with sympathy African notions of the family, an institution famed for its traditional solidarity and supportiveness, contemporary reality demands a certain cynicism about what purports to be customary law today. Protection from distortions masquerading as African custom is imperative, especially for those they disadvantage so gravely, namely women and children (Nhlapo 1995:162).

The institution of hereditary traditional leadership also bore the effects of colonialism, as the government adopted a practice of appointing chiefs to replace those who were not co-operative with government objectives (Mokgoro 1994:4).

3.3 Customary marriage and intestate succession

African customary marriage is traditionally viewed as an alliance between two kinship groups for the purposes of achieving goals beyond the immediate, individual interests of husband and wife (Nhlapo 1995:159).

It has, however, also been a marital union based on patriarchal control of land and other property:

It can plausibly be argued that a system of marriage where the most important aims are external to the parties involved, where men acquire rights over women and children but women enjoy no reciprocal rights, and where these male rights are secured by the movement of cattle, has a direct bearing on the perpetual subordination of women. It must also have a bearing on widespread physical violence against women, not to mention the position of widows... (Nhlapo 1995:160–1).

However, as noted above, the Constitution provides for the recognition of customary marriage, so long as it does not conflict with other protected rights. South African law recognises African customary marriage via the Recognition of Customary Marriages Act³⁶ which provides that a valid customary marriage existing at the commencement of the Act, or entered into thereafter which complies with the requirements of the Act, is recognised as a marriage under South African law.³⁷ The Act provides that:

A wife in a customary marriage has, on the basis of equality with her husband and subject to the matrimonial property system governing the marriage, full status and capacity, including the capacity to acquire assets and to dispose of them, to enter into contracts and to litigate, in addition to any rights and powers that she might have at customary law.³⁸

The proprietary consequences and contractual capacity of spouses in a customary marriage are outlined – where the customary marriage was entered into before the commencement of the Act, the marriage continues to be governed by customary law.³⁹ However, a customary marriage entered into after the commencement of the Act, in which a spouse is not a partner in any other existing customary marriage, is a marriage of community of property and of profit and loss between the spouses, unless the spouses effect a marriage contract to the contrary.⁴⁰ The Matrimonial Property Act⁴¹ applies in respect of any customary marriage that falls under the community of property provision.⁴²

Thus, the Recognition of Customary Marriages Act recognises the equality and legal status and capacity of women pertaining to property rights in a customary marriage,



subject to the matrimonial property system governing the marriage. A woman entering into a customary marriage subsequent to the enactment of this legislation would at least have property rights upon dissolution of the marriage since it would fall under the community of property regime. The Act also contains provisions that protect the property rights of women in a customary marriage, where the husband wishes to enter into a further customary marriage after the enactment of the legislation.⁴³ This law is very recent, having coming into force in December 1998, and its effects remain to be seen. However, as discussed elsewhere in this paper, changes in the law are not likely to be sufficient to dramatically change rural women's lives on the ground.

Closely related to the principles of customary marriage are customary inheritance provisions. One example of how women's access to land is limited in traditional patriarchal African society is by the customary rules of intestate succession:

...under customary law any property belonging to the family is controlled by the male head of the household. When he dies, this control may be assumed by his nearest male relative, who may act as the wife's guardian should she choose to reside in his family home. ...Whether or not the widow gains control of the property depends entirely on the whim of the heir (Kadali 1995:68–69).

The law of succession relates to the disposition of a deceased person's estate; in African customary law succession is intestate, meaning that there is no will, or reflection of the deceased's intentions. Rather, upon the death of a 'family head', the eldest son inherits the status of the deceased. The heir inherits both the deceased's property, and his responsibilities, particularly in relation to supporting other family members (Freddie 1999:2). If the eldest son does not survive his father, then the next male descendant of the eldest son is the heir, and if there is no surviving male descendant in that line, then an heir will be sought in the line of the second, third and further sons, in accordance with the principles of primogeniture (Freddie 1999:2–3).

Inheritance then, is exclusively male to male, and specifically excludes women. However, it has been argued that the exclusion of women from certain duties and roles on

the basis of their gender does not necessarily imply discrimination (Freddie 1999:13). It is contended that customary rules of succession do not exclude women from intestate succession. This position is based on the argument that, in the rural areas, the devolution of the deceased's estate onto a male heir involves a concomitant duty of support of the woman (or women) to whom he was married by customary law and of the children produced under that system (Freddie 1999:11). However, the voices of rural women are not adequately represented in this debate, and praise for this system by men is suspect, since the system clearly functions to keep power and wealth in the hands of men. Although widows are entitled to claim maintenance from the male heir, they remain in a precarious situation, with their right to maintenance in practice dependent upon the strength of their relationship with the heir:

Unfortunately, circumstances do not favour this relationship. Widows are all too often kept on at the deceased's homestead on sufferance or they are simply evicted. They then face the prospect of having to rear their children with no support from the deceased's family (SALC 1998).

Interestingly, in KwaZulu-Natal, a widow may request that a district officer initiate an inquiry into a deceased's estate. Where officers are satisfied that the application of customary law would be unjust to a widow, taking into account the assets and liabilities of the estate, and the widow's and heir's contributions to it, they may order that the estate devolve according to common law.⁴⁴

Parliament has recognised the importance of customary laws of succession through various legislative instruments permitting the courts to take judicial notice of customary law. The Black Administration Act⁴⁵ provides that all movable property which belongs to a black person and which was allotted by him or which accrues under black law and custom to any woman with whom he lived in a customary union, or to any house, will upon his death devolve and be administered under black law and custom.⁴⁶ The Act further states that all land in a traditional settlement which is held in individual tenure upon quitrent⁴⁷ conditions by a black person will devolve upon his or her death on one male person to be determined in accordance with tables of



succession to be prescribed by regulations.⁴⁸ Gender discrimination is clearly entrenched in this legislation in accordance with the principles of male primogeniture. As noted by the South African Law Commission, 'The Land Regulations are now of dubious validity. In the first place, they are likely to fall foul of s. 9 of the Constitution, which prohibits discrimination on grounds of sex or gender' (SALC 1998). Section 23(3) of the Black Administration Act deals with those forms of property that may be devised by will, yet this section seems to have little practical applicability, according to the Commission (SALC 1998).

The Act further provides that regulations may be made to prescribe how the estates of deceased blacks will be administered and distributed, and to prescribe tables of succession.⁴⁹ In 1987, regulations pertaining to the administration and distribution of the estates of deceased black people were promulgated. Where a black person dies leaving no valid will, his or her property, including immovable property which does not fall within the purview of section 23 (1) or (2) of the Act will under certain conditions be distributed according to black law and custom.⁵⁰ The Intestate Succession Act⁵¹ prescribes how the estate of a person who dies intestate shall devolve, but does not apply to the intestate estates of black people.⁵² The Law of Evidence Amendment Act⁵³ provides that the court may take judicial notice of indigenous law insofar as it can be ascertained readily and with sufficient certainty. However, the indigenous law shall not be opposed to the principles of public policy or natural justice.⁵⁴

It is noteworthy that all this legislation was passed prior to the entrenchment of gender equality in the 1993 Constitution and the 1996 Constitution. It is evident that the customary rule of male primogeniture conflicts with the constitutional guarantee of gender equality,⁵⁵ since girl children are discriminated against. As noted by the South African Law Commission:

The Constitution now provides a legal foundation for these changes in practice. Section 9 of the Bill of Rights prohibits any discrimination on grounds of age or gender, which might suggest that the rule of male primogeniture is invalid and that descendants of whatever age or gender should be entitled to succeed (SALC 1998).

The constitutionality of the legislation discussed above, and of the customary law of succession, has in fact been challenged on the basis of gender discrimination. In *Mthembu v. Letsela and Another* the court, on appeal, recognised the rule of male primogeniture, indicating that:

...the aforesaid rule cannot be looked at in isolation. It must be seen in perspective. If regard is had to the relevant customary family law rules then it becomes apparent that the rule of succession fits in with those rules...⁵⁶

In the result, the court declined to decide the constitutional equality issue based on a finding of fact that the applicant was not actually married to the deceased, and therefore her daughter was illegitimate, so she was not entitled to inherit, regardless of sex. It therefore followed that there was no unfair discrimination on the basis of sex in this case. However, the judge commented that the development of the customary law of succession in accordance with the Constitution would also affect customary family law rules, and was therefore better left to Parliament.⁵⁷ In considering the provisions of subsection 1(1) of the Law of Evidence Amendment Act, the court in *Mthembu* found the customary law of succession is not invalid by reason of offending against public policy, since such a finding would be to apply Western norms to a rule of customary law which was still followed by many Africans.⁵⁸

Subsequent to the decision in the *Mthembu* case, the Amendment of Customary Law of Succession Bill was introduced to Parliament by the Department of Justice in 1998. This Bill proposed to change the law so that South African laws of testate and intestate succession apply to all persons in the country. The Bill proposed to repeal section 23 of the Black Administration Act, and to amend the Intestate Succession Act so that it would apply to the intestate estate of a person who entered into a valid customary marriage still subsisting at that person's death, before the Act came into force. To date this Bill has not been enacted, and the issue is still under investigation by the South African Law Commission.

The *Mthembu* case appears to have followed the argument that since the duty to provide support is a necessary corollary of the system of primogeniture, one cannot equate this form of differentiation between men and women with



discrimination on the basis of sex. However, it seems that customary intestate succession has the effect, if not the intention, of generating dependency based on gender. The generation of dependency and the resulting disempowerment of women cannot be said to be mere differentiation on the basis of gender. It is worth questioning whether a system that may have worked well for a culture at a particular point in time cannot evolve when it is pressured from within to do so. A delicate balancing act comes into play between respecting cultural values, and listening to the voices of women within those communities, and those who work with them.

3.4 Women

Increasingly, women in South Africa, particularly women in traditional African communities, are speaking out against cultural practices and are contesting the sacrifice of their interests in the name of culture.

It is the women who live in these communities who must decide whether they are oppressed by any given cultural practice to avoid a situation where mainstream feminists make choices for other women, thereby contributing to their oppression and silencing. Yet another consideration is whether or not these women are effectively silenced in their own communities, such that they may not feel free to demand equality or to make their voices heard. It has been noted that in the general rural climate of instability 'the underground gender war for control of land may involve brutal trade-offs for uneducated women who have very little control over resources' (Cross & Friedman 1997:24). The existing tenure systems are characterised by:

...endemic violence which stems from overcrowding, land hunger, the insecure status of most forms of black land rights (which gives rise to disputes and uncertainty), power relations between men and women, and other issues. This state of affairs may subject women to unintended risk in the process of creating an environment to enable them to claim their rights with regard to land (DLA 1999a:1)

In other words, women in rural communities become easy scapegoats for the hostility of men frustrated by land shortages and changes in role structure (Cross & Friedman

1997:24). However, given that we must 'Let those people in the rural communities teach the academics, legal scholars, government officials, and the parliamentarians about the core of customary law' (Freddie 1999:18), we must ascertain what the women in these communities have to say. This is where the role of NGOs becomes crucial as facilitators and monitors of gender equality.⁵⁹

In that regard, the Transvaal Rural Action Committee (TRAC), an NGO working with rural women, has noted that:

Women's insecurity due to the powerful traditions of male control over land has developed in many of them an acute consciousness about land rights. Mothers feel that with no independent land of her own, their daughters are especially vulnerable. If she does not marry, she may be forced to become a squatter or tenant. If her husband divorces her she could lose her home (TRAC 1991:5).

Women involved in workshop with TRAC in the Northern Transvaal (now Northern Province), took issue with chiefs and traditional authorities demanding that:

Recognised women's committees should be part of the land distribution mechanism. Currently, men are in charge of land distribution and women are discriminated against (TRAC 1994:8).

Rural women themselves have also been demanding the inclusion of women in the line of succession to traditional leadership status (Mokgoro 1994:8). Women in Northern Province villages, who successfully demanded a place on traditional community decision-making structures, are actively demanding change. Among their demands are equal power in the household, security of tenure in their own right, and equal representation on political structures (Meer 1997:1, 4).

With respect to community participation, one rural woman observed that:

*Kgotla*⁶⁰ meetings are attended by men only. They once held a meeting at the *kgotla* for all residents. We attended, they asked our views, one woman asked to speak; they said 'sit down, woman don't speak in these occasions'. Most of the things are experienced by women, for example when your child is arrested or dead, you're the first person to know, you will have to wait for the child's father to come and tell the chief at the *kgotla* because you're a woman you can't



say anything at the *kgotla* (TRAC 1991:8).

However, it has been observed over the past few years that even in remote areas of the former bantustans it is becoming common for women to attend public meetings and 'even' to speak (Cross & Friedman 1997:26).

In June 1991, the Rural Women's Movement (RWM) drafted a constitution in a process facilitated by TRAC. It included demands for: forums for rural women, equal rights to land for women, and a say in political matters for women, nationally and locally (TRAC 1994). By 1993, RWM's objectives for that year included gaining recognition for women's leadership in the *kgotlas*, meeting with government to get their voices heard, the evolution of oppressive traditions, access to land for single and married women, women's representation in negotiations, and the election of rural women to government (TRAC 1994:20). Even in the early 1990s, TRAC observed that with the changing political climate, and the resulting democratisation of community decision-making processes, the *kgotlas* now often call general meetings which women can attend and speak at. However, TRAC noted that 'a problem in these larger community meetings is that women bear the legacy of entrenched traditional values which make it difficult for them to speak freely in the presence of men' (TRAC 1991:8). Thus, it is not only the issue of formal access to decision making structures which needs to be dealt with in rural communities in order to ensure the empowerment of women. Rather, community education initiatives, organisational support for the women, and facilitation of a gradual shift in community attitudes are all necessary prerequisites to women's equality.

In a meeting conducted with nine focus groups of rural women, the women discussed the problems they have in relation to accessing land:

Firstly, women have no independent rights to land. For one's application to use or occupy a piece of land to be considered, the chief expects to get a gift (usually R300) which is offered secretly. Women resent this as they cannot afford it. They feel that they are looked down upon by their leaders and some male members in their communities. For them this is a problem related to the inheritance laws (Ngubane 1999:7-8).

Through their sharing of stories, the women identified the essential needs for programmes in their areas and for lobbying for women's equal land rights. The following are some of the needs identified in these meetings:

- Programmes which enhance the status of women in rural areas, including workshops which raise gender issues and awareness of women's rights.
- Rural women's empowerment and inclusion in all government and private sector structures, especially in decision-making.
- Firm action by government to ensure that those traditional leaders and *indunas*⁶¹ who are oppressive and who do not want to be bound by the Constitution are dealt with severely.
- Setting aside land for women's projects.
- Ensuring that girl children have equal rights to boy children in inheritance.
- Informing women about the options and opportunities open to them in regard to land access and resource utilisation.
- Respecting and strengthening women's representation on community structures and landholding structures (Ngubane 1999:10–11).

Even more recently, in April 1999, the Rural Development Initiative (RDI) was launched, including the adoption of a Rural People's Charter through the combined efforts of the land and rural development sector NGOs and rural communities. The purpose of the RDI is to engage with rural people in order to formulate a coherent rural development strategy in which gender plays an integral role (Billy 1999:7). The Rural People's Charter (1999) set out some key demands for rural women including that:

- traditional laws which oppress rural women be urgently reviewed
- all obstacles to women's independent ownership of land be removed.

The Charter also highlights violence against women in the rural context as a development problem requiring immediate attention (Hargreaves 1999:46).

The voices of all rural women cannot be represented here, nor are the voices of those women who support traditional leadership and customary law unchanged. However, it is



quite clear that, given adequate organisational support, many rural women are actively seeking gender equality in their communities, particularly in relation to access to land and community decision-making structures.

3.5 Cultural values and self-determination

Closely connected to the issue of respect for different cultures and traditions is the avoidance of the imposition of Western values, particularly on communities that are redefining themselves post-colonialism, and post-apartheid. As noted by one South African author:

The more annoying part of this, for me at least, is the culture of lack of confidence that is being re-enforced in the indigenous communities. Everything seems to have come from outside. What comes outside Africa is always good. What is homegrown is bad (Freddie 1999:15–16).

And:

We believe that we need to develop a process which moves the African experience towards the centre stage of our society, after it was marginalised for so long by the pre-eminence acquired by Western cultures and traditions. We need to liberate our African culture and the institutions of customary law to assert their primacy within African society, for we cannot accept having achieved political freedom while remaining bound to live and exist by the rules and social patterns of a different culture (Freddie 1999:17).

In fact, the continued recognition and constitutional protection of traditional leadership may be perceived as an assertion of African nationalism in a political system previously known for its ‘suppression, manipulation and exploitation of African national symbols’ (Pallo Jordan, quoted in Mokgoro 1994:3).

However, the question arises as to who exactly the ‘we’ in these communities represents. Is it sufficient for male representatives of these communities to speak on everyone’s behalf? Women and men do not necessarily agree on which cultural values are significant and ‘too often it is the male definitions of culture that are accepted as being those of the community’ (Meer 1997:12). Again, the competing values of gender equality and the protection of custom and tradition appear to conflict. However, it seems entirely plausible that

there are ways of respecting culture and tradition while simultaneously facilitating change if this is desired by a significant faction of the community. Respect for African custom and tradition should inform and shape the development of the constitutional ethos in South Africa. However, as discussed below, custom is a constantly evolving concept, thereby leaving ample room for transformation.

3.6 Evolving concepts of culture

Customary law has been challenged not only on the grounds that it discriminates on the basis of gender, but also on the impact of colonialism on the constantly evolving concept of culture. It appears to be a truism that culture is constantly evolving in any given society as it is actively created by community members, and is not fixed at a particular point in time. The concept of custom involves an ongoing process of selecting, giving meaning to, and modifying the mores of a given group of people. There should be an:

...emphasis on the flexibility and the contingent nature of culture; its substance is shaped by a process of exclusion, interpretation, and adaptation. Culture cannot be seen as a given, as immutable and sacrosanct. Rather it is the product of constant change and sometimes opportunistic manipulation (Kaganas & Murray 1994:422).

Thus, the formulation of custom and tradition is value-laden, and not necessarily representative of the interests of all members of the community.

Customary law in South Africa was to a certain extent selected by male traditional leaders and colonialists; losing its fluidity and capacity for evolution in the process (Kaganas & Murray 1994:423). In the bantustans, the government entrenched the power of chiefs through legislation, thereby reducing the flexibility of customary law, which would have naturally evolved. As the values within a given society begin to shift, often as a result of pressure from within, concepts of custom and tradition can simultaneously transform. As noted by the South African Law Commission, customary law is bound to reflect new social patterns as culture transforms, and different rules develop. In fact, the Commission noted



that the preference for only male heirs is one customary law rule that is 'probably' changing, as women become breadwinners and manage households on their own (SALC 1998). In particular, the organisation of women, and community education, possess the potential to inform and influence the development of custom and tradition in accordance with the equality values embodied in the Constitution.

4 Local democracy

4.1 Democratic initiatives

While customary law institutions can be criticised for not being inclusive of women or their interests, the question arises as to whether women in rural African communities would fare better under local democratic institutions. When women's basic needs within the community are threatened, they mobilise and take action, yet when community political structures are set up, they are not involved: 'this applies equally to traditional structures and to elected structures of local government' (Meer 1997:4).

The Constitution requires the establishment of elected local government structures. In most of the former bantustans, rural councillors were elected to Transitional Representative Councils (TrepCs) (Ntsebeza 1999:2).⁶² The TrepCs are meant to represent public interests, possess control, regulatory and development functions, and are responsible for service delivery. Landholders are therefore constitutionally compelled to co-operate with the TrepCs (Ntsebeza 1999:8). However, it appears that there is a lack of support for these rural councillors, who are few and far between, they lack adequate resources, and are poorly remunerated (Ntsebeza 1999:3). This attempt at developing local government and democracy pertaining to rural land and development issues does not appear to have been overly successful to date.

The government's tenure reform programme has revealed that there is a preference for communal ownership in the former bantustans. In trying to secure tenure in these communities, the government is faced with the conflict

between the constitutional requirements of democratically-elected representation, and the constitutional protection of traditional leadership and customary law. One step taken after the first democratic elections was to amend the Upgrading of Land Tenure Rights Act⁶³ in 1996⁶⁴. This included amending the definition of 'tribal resolution' to mean 'a resolution passed by the tribe democratically and in accordance with the indigenous law or customs of the tribe'.

While the government was reflecting a desire to balance the requirements of democratic participation and customary law, this amendment appears to only reiterate the existing conflict.

In April 1997, the Department of Land Affairs launched its land reform programme by releasing the *White Paper on South African Land Policy*. As noted earlier, one important goal of land tenure reform is the establishment of co-ownership rights for communities living in former bantustans. The White Paper recognised the importance of eliminating gender discrimination in women's access to land, as a key factor in women's inability to overcome poverty. It noted that:

Leadership is often dominated by men who assert that they have their own traditions and culture, and do not require the interfering advice of government officials on how to handle gender relations (DLA 1997b:17).

Soon after the White Paper, the department released its guiding principles on tenure policy which included the recognition of the underlying land rights of individuals and groups on most land which is state-owned (as is the case in the bantustans). These rights should vest in the rights holders themselves, and not in institutions such as traditional or local authorities. Where the rights are communal, the holders must have a choice about the system of land administration, and the basic human rights of all members must be protected, including democratic decision-making processes and equality. However, where a traditional system is popular, functional and democratic, it should continue to function.⁶⁵ The Minister of Land Affairs, addressing a conference of the Congress of Traditional Leaders of South Africa (Contralesa), clearly stated that no level of government can disregard the views and concerns of the people who have underlying historical land rights to land



which is registered as state-owned. Any action to simply disregard the rights holders in such areas and dispose of or develop the land would be unlawful (Ntsebeza 1999:7).

Prima facie, these statements indicate a concern for land rights holders, and a desire to see that these rights holders are represented. There is a stated requirement that the form of local governance and land administration must be democratic and representative. However, who exactly will be considered a land rights holder in these communities, and whose interests will thus be represented?

Former bantustan communities applying to the state for ownership of communal land must constitute an accountable land-holding entity. There are various options available, such as trusts, companies, other legal entities and traditional systems. Regardless of the structure utilised by the community, it must be accountable to its members, as they are co-owners of the land, and thereby have legal power to take decisions with respect to ownership issues (DLA 1998). One method of establishing a legal land-holding entity is via the Communal Property Associations Act⁶⁶ (CPA Act). The Act provides for the establishment of legal institutions – CPAs – for disadvantaged communities to hold and manage land in common. CPAs must be established and managed in a manner that is non-discriminatory, equitable and democratic and must be accountable to their members. Members must also be protected against abuse of power by other members.

Under this Act, rules and regulations pertaining to the CPA must be enshrined in a constitution which is lodged with DLA.⁶⁷ Membership on the CPA may be based on either individuals or families. If it is based on families, then detail must be provided in the constitution as to how the family is to be represented in the decision-making process.⁶⁸ The Act also provides that the constitution must be consistent with the principles of equality of membership, in that there is no discrimination against any prospective or existing member of the community, directly or indirectly, on the grounds of gender or sex. Further, where different classes of membership are created, the basis for the differentiation must be compatible with the overriding principle of equality and all members must have fair and non-discriminatory access to the property of the CPA. The Act also provides that

there must be fair and inclusive decision-making processes within the CPA, that democratic processes must be observed, and that the CPA must be accountable and transparent.⁶⁹ While the Act does not prescribe how land is to be allocated, or the decision-making processes of a CPA, a this legal entity must conform with the requirements of the Constitution, in particular, the Bill of Rights and democratic decision making. For example, if a CPA constitution says that only sons may inherit, DLA will reject it (Budlender 1997:181).

While it is admirable that the principle of gender equality must be reflected in the constitution of a CPA, this does not resolve the problem where membership is based on the family rather than the individual. The formal principle of gender equality alone does not address the power imbalance in the home, by means of which the husband might effectively control the land despite the anti-discrimination provisions. This reiterates the point made earlier that laws and *de facto* land holding practices are not always consistent. Further, while the Act requires equal representation of women, the equal participation of women is not guaranteed, and may not be able to be guaranteed. Obviously, external factors beyond mere representation impact how effective women's participation is. Despite 50 percent representation of women, women's participation in many CPAs is minimal. When women sit on a CPA management structure, they are generally given a supporting role, such as secretarial or administrative positions (Govender-Van Wyk 1999:66, 67; Jordaan 1998:66–73.). The fair access provision also pertains to 'members' which avoids the question of who is a member, and who effectively controls the land.

The most recent development regarding land tenure reform in the former bantustans is the draft Land Rights Bill, 1999 which proposes to create a class of legally protected and enforceable land rights for rural residents of the former bantustans. Almost all the land in these areas is held in trust by the state. The proposed legislation would apply where a community has not applied for the land to be transferred from the state. In this situation, the state would remain the official landowner, but the rights of the people on the land would be strengthened. These rights would have the status



of property rights in that they could not be derogated, except with the rights holder's consent, or through expropriation.

Under this proposed legislation, rights holders would be entitled to participate in management decisions regarding the land, and entitled to any proceeds arising from the right, such as a sale or lease. Communities would choose a local body (known as a 'land rights holders' structure') to administer their land interests, but this structure would have to be accredited. Applications for accreditation would be made to proposed local structures called land rights boards. Any land rights structure could apply to be accredited, including a traditional authority, but accreditation would only be granted if board was convinced that the rights holders had authorised the structure and that it will fulfil its duties. Further, the draft Bill proposes the establishment of two other structures, one at the departmental level, and one at a magisterial district level, which function to monitor compliance with the proposed Act, monitor decisions, resolve disputes, and protect the interests of rights holders, among other functions (Ntsebeza 1999:10–11). As noted by Ntsebeza (1999:10):

This Bill, once it becomes an Act, will go a long way to protect rural people from arbitrary decisions by the state, local and traditional authorities, as in the past when people were forcibly removed, or their homes were destroyed without compensation. It will have far-reaching implications for traditional leaders, who for over four decades have not been accountable and democratic.

However, to be in accordance with the Constitution and the DLA's own policies, this Bill must define 'rights holders' in such a way that women are not discriminated against, either directly or indirectly.

The preamble to the Bill recognises that 'in some areas, systems of land rights operate in ways which abrogate fundamental rights, in particular the rights of women and the right to participate in democratic decision-making processes'. One of the objects of the Bill is to create rights and processes that protect the right to equality in respect of occupation, use of, and access to land.⁷⁰ It identifies persons who hold protected rights to land.⁷¹ While the definition is broad, it is not clear that women will receive equal rights to

the land under this provision. However, the Bill also provides that:

- (a) Women may not be discriminated against, either directly or indirectly, in determining–
 - (i) the occupation or use of, or access to land;
 - (ii) attendance at, or participation in, decision making forums regarding the occupation or use of, or access to land; or
 - (iii) membership of any structure involved in the management of protected rights.⁷²

While this provision reflects progress on behalf of the state in meeting its constitutional obligations to gender equality, what constitutes discrimination against women is not defined. In determining the nature and content of a right protected under the Bill must take into account:

any practice, whether customary or otherwise, generally accepted as binding and authoritative by persons in the area concerned.⁷³

Thus, the state again appears to be attempting to balance its competing constitutional obligations, perpetuating the conflict between gender equality and customary law. This conflict is also evident in the membership of the proposed land rights boards which must reflect an 'appropriate' balance between customary or traditional structures, local government, and experts.⁷⁴ The presence of traditional authorities on the boards may conflict with the objectives of the Bill regarding gender equality and community facilitation on these issues.

Yet, the Bill does attempt to remedy some obstacles faced by rural women in their access to land. It provides that where protected rights are shared by family members, the rights must be registered jointly, by two adult members. Where practicable, one of these adults must be a woman.⁷⁵ While the Bill does not provide an explanation of what constitutes practicability, this section does reflect some awareness by the state of the precarious situation of women where male-headed households are awarded property rights. Simultaneously, the Bill does not, and probably could not, redress issues of power imbalance in the home, even where the right is co-registered in the woman's name. Where protected rights are held jointly by family members, exclusive use property may be sold, leased, and so on only if



the majority of family members have agreed to the transaction.⁷⁶ Similarly, any person representing family members in respect of a transaction has a fiduciary responsibility to the family and must act accordingly.⁷⁷ Finally, new land rights institutions may not approve a transaction unless the interests of any woman, minor child and elderly person have been adequately provided for.⁷⁸ This of course, raises questions as to what is adequate, and who will likely be making these determinations.

While the Land Rights Bill reflects a growing awareness and attention to the obstacles rural women face in obtaining access to and control over land, it remains clear that these obstacles will not be eradicated by legislation and policy alone. The level of proactivity constitutionally required of the state in its promotion of gender equality goes beyond well-intentioned legislation, to programmes which implement and facilitate the goals of that legislation.

4.2 The response of traditional leaders

In general, traditional authorities are reported to be unhappy with the development of local democratic initiatives, which threaten their authority and political and economic powers. 'Traditional leaders are vehemently opposed to the transfer of land to legal entities, and want land to be transferred to traditional or tribal authorities' (Ntsebeza 1999:11). The land tenure policies developed by DLA do appear to weaken the powers of traditional leaders with respect to land allocation.

However, some traditional leaders have maintained that democracy and traditional leadership are not incompatible, given that traditional leaders are obliged to act in to the interests of the people of their community.⁷⁹ It has been argued that traditional leadership, correctly understood as the repository of norms, customs and traditions of African people, is viewed as the custodian of the land, for and on behalf of the people.⁸⁰ In fact, in February 1998, DLA indicated that given the resources required for the formation and registration of rural legal entities, several existing options should be developed so as to provide communities with a choice for land administration. One possible choice was for land to be administered 'according to traditional

tribal systems'. However, the administrative structure must be accountable to the members as co-owners of the land (DLA 1998). Thus, the traditional structure would have to be responsive to the community and truly act as its representative in land matters.

There has been some acknowledgment from Contralesa that the role of traditional leaders must change, along with the rest of South Africa. In fact, there has been some recognition of the need for evolution in order to balance cultural interests with the Bill of Rights:

We as traditional Africans have a culture we need to protect...We want a Bill of Rights that caters for all of us – not a separate system of customary law, but that which allows these customs to evolve (CLC 1994:13).

In 1993, a Contralesa representative at a conference indicated that traditional men harbour traditions that have been distorted, and are misusing culture and tradition. He stated his commitment to 'implement programmes, consultations and workshops with men', saying it is essential that Contralesa works with women's organisations in order to make new laws that are acceptable to all (CLC 1994:21).

It may well be that popular, progressive, traditional leaders who accept that custom is constantly evolving, have nothing to fear from democratic institutions as they will be elected, with a resulting strengthening of their power base.

4.3 The role of the state

Will this state-propelled movement towards local democratic institutions as land authorities resolve gender discrimination in land allocation and tenure in the former bantustans? The Department of Land Affairs appears to recognise the importance of land access for rural women in overcoming poverty, and gaining access to decision making:

Not only has South Africa's land ownership, tenure and use system been racially based, it has also been based on a gender discriminatory system. This has resulted in a gender-skewed distribution of land resources, which further perpetuates women's powerlessness. *Because women have much less power and authority than men, much more attention should be directed to meeting women's needs and concerns.*



Unless this is done, existing gender inequities in the allocation of land and its productive use could be exacerbated by the land reform programme [emphasis added] (DLA 1999a).

The DLA gender policy further recognises the constitutional imperative of furthering gender equality. In fact, the White Paper itself recognises that the fulfilment of the promise of Section 9 of the Constitution (the equality clause) requires positive action by government (DLA 1997:17).

However, despite the White Paper, and the gender policy, the Department has no statistics whatsoever on women's access to land in the rural areas.⁸¹ This is despite the fact that the policy itself provides that gender-disaggregation of data plays an important role in raising consciousness, promoting change, and in developing, monitoring and evaluating departmental policies (DLA 1999a). DLA releases an annual quality of life report on how the land reform process is impacting claimant communities, but as recently as the 1998 report, there is no mention of gender as a quality of life factor whatsoever.⁸² The lack of gender-disaggregated data calls into question the government's commitment to gender equality, since its absence prevents effective programme monitoring. Further, recent studies have established that the government is still using the male-headed 'household' as the actual unit for grant allocation and beneficiary identification in land reform policy.⁸³ This reinforces existing gender inequality with regards to women's access to grants and the benefits of land reform. There appears to be a lack of awareness as to why gender equity is a crucial aspect of land reform within the government:

Policies are not guided by gender equity principles, mechanisms to implement gender equity is not in place and there is a lack of understanding of the highly unequal power relations of gender which mediate access and control over land and resources (Billy 1999:16).

Given the recent nature of the developments towards local democratic institutions in the former bantustan areas, it is not yet possible to fully indicate how these changes will impact upon women's access to land. However, this author cautions against the belief that local democratic institutions alone will bring about an improvement in women's access to land in the former bantustans.

5. Conclusion

The constitutional conflict existing between the protection of gender equality and tradition/custom is an issue facing the government in its development of new laws and policy for land tenure reform. To date, the South African government has managed to evade the contradictions between its commitment to equality, and its concessions to traditionalists. There is a need for government to adopt a coherent, consistent gender policy, combined with a commitment to implementation. Apparently gender-neutral laws or policies can actually serve to further entrench existing gender inequality:

A gender strategy needs to be part of a broader strategy that aims at transforming power relations. Land reform gender policy should be informed by the recognition that women's land rights, development and support, have to be approached as the central components of an integrated strategy for the transforming of power relations that are obstacles to women's participation in land reform (DLA 1999a).

In particular, land reform policies and practices need to reflect empowerment objectives, so that the dispossessed and the disadvantaged may be active agents in development (Meer 1997:7). There is a significant risk that in the process of delivering speedy land reform, the government may not allocate sufficient time and resources to strengthen and support women's participation in the land reform programme. What then can the state do in furtherance of its constitutional, international and legislative obligations to promote gender equality in the tenure reform process?

Public education and awareness-raising coupled with support for activism by the women in these former bantustan communities would be a good start. Despite obstacles to women's involvement, such as time and power relations in the home, 'women's organisation is a key arena for the deployment of empowerment strategies' (Meer 1997:7). The benefits women receive from land reform are limited by their lack of knowledge of the formal structures and available legal opportunities. In its land reform gender policy, DLA has recognised that:



Due to socially defined sex roles, stereotypes and other factors, women are often not aware of the opportunities that exist for them. Male domination in decision-making structures and positions is a contributing factor to women's lack of access to information. Information that should empower women to make informed choices, does not get through to them when they are not seen as consumers of such information (e.g. since women are not regarded as heirs to land, opportunities with regard to land will often not be discussed with them). The Department has a responsibility to inform women and men about their rights in land reform.

...Project identification and project planning should be viewed as opportunities for building women's capacity and organisations in communities where they are (DLA 1999a:2).

In order to fulfil its constitutional mandate to ensure the equality of all citizens, the state must view rural women as consumers of information about land development opportunities and processes. Public education and the encouragement of increased activism by women within these communities could further the dual constitutional goals of fostering gender equality while respecting cultural rights. Given that the dynamic nature of customary law means that it can evolve, and can respond to changes in norms, it can then respond to the evolving culture of equality, and be refashioned to incorporate the values of a non-sexist society. As noted by one conference participant, 'if we identify a particular interest of non-sexism, we can change tradition' (CLC 1994:6). The promotion of gender equality and respect for custom, can be perceived to co-exist in harmony:

The founding values of the democracy established by this new Constitution – viz. human dignity, equality, promotion of human rights and freedoms – arguably coincide with some key values of *ubuntu* (-ism), for example, human dignity itself, respect, inclusivity, compassion, concern for others, honesty and conformity.

...*ubuntu* (-ism), it seems, can play an important role in the creation of responsive legal institutions for the advancement of constitutionalism and a culture of human rights in South Africa (Mokgoro 1998:51).

Thus, we can go beyond the approach of merely incorporating gender to transforming the existing reality (Mokgoro 1994:6). Education and societal transformation are

key to the achievement of a society based on equality as women are disadvantaged not only by official tenure systems, but also by social assumptions and informal land practices. Thus, tackling only the official systems, be they traditional or democratic leadership, will not eradicate the issues facing rural women in South Africa as long as the prevailing attitudes remain unchanged. Tenure is a social and political process, and is largely determined by the values of the community, prevailing power relations and unspoken social assumptions (Cross & Friedman 1997). This renders it difficult, if not impossible, to redress women's unequal access to land through legal reform alone. Neither democratic institutions nor the law itself is sufficient to guarantee women access to land and security of tenure. The distance between formal rights and women's actual access and power needs to be addressed (Meer 1997:12). As pointed out by one author:

In India, changes in the law allowed women to inherit land, but custom remained unchanged and demanded that a good woman was one who would give such land to her brother. Changes in law unaccompanied by changes in attitude and custom will not allow women to claim rights (Meer 1997:12).

Thus, an approach needs to be undertaken which will not only change the formal laws, but will also initiate change at the level of the community. While legal reform and democratic land mechanisms represent substantial efforts at fostering gender equality, it is the organisation of the women, and the education of the community, which will determine whether women are able to take advantage of these developments. State support for community activism and community education can serve to balance the constitutional requirements of gender equality and respect for traditional leaders and customary law. This approach allows the community to be active participants, and the 'drivers' in their evolution, rather than recipients of a foreign imposition.



Notes

1. Various terms have been applied to the African areas by government throughout South African history. Bantustan refers to land set aside by the government for Africans during the apartheid period, and is used throughout for consistency.
2. Land tenure may be defined as the terms and conditions on which land is held or used and transacted. Land tenure reform refers to a planned change in the terms and conditions (DLA 1999b:4).
3. Black Land Act 27 of 1913; Development Trust and Land Act 18 of 1936, both repealed by Act 108 of 1991.
4. Initially, The South African Native Trust, later the Bantu Trust, then the South African Development Trust.
5. For example, the Transkei and Ciskei. See Ntsebeza 1999:4.
6. Act 68 of 1951.
7. Transkei, Ciskei, Bophuthatswana and Venda.
8. While one cannot assume homogeneity, this discussion focuses on women as a category, based on the assumption that there are certain common issues faced by rural black women in former bantustans.
9. Constitution of the Republic of South Africa, Act 200 of 1993.
10. Schedule 4 of the 1993 Constitution.
11. Constitution of the Republic of South Africa, Act 108 of 1996.
12. Chapter 2 of the 1996 Constitution.
13. Section 7.
14. Section 36 and other limitations contained or referred to in the Bill of Rights.
15. Section 9.
16. Act 4 of 2000.
17. Section 28(3).
18. Section 15.
19. Section 30.
20. Section 31.
21. Section 39(3).
22. Section 25(5).
23. Section 25(6).

24. The Interim Protection of Informal Land Rights Act 31 of 1996 and the Extension of Security of Tenure Act, 62 of 1997 (ESTA). Both Acts provide some tenure security by protecting occupiers from evictions, and providing some recognition for informal land rights. ESTA gives women the same rights as men, recognising that women are also occupiers, and creates a legal right for occupiers to live on the land where they are.
25. Act 22 of 1994. Section 35(3) provides that the Land Claims Court may impose conditions on the claimant community to ensure that all members of the community have access to the land or compensation, on a basis which is non-discriminatory, including women. This provision also provides for the person who holds land or compensation on behalf of the community to be accountable.
26. Section 151(1).
27. Section 152.
28. Section 211(1).
29. Sections 211(2) and (3).
30. United Nations General Assembly resolution 34/180 of 1979.
31. Article 2(a).
32. Article 2(f).
33. Beijing Platform for Action (1995) Fourth World Conference on Women.
34. A minority status was legally imposed on women by Section 11(3)(b) of the Black Administration Act 38 of 1927, as amended. When Section 11(a) was inserted in 1985, this minority status was removed, and the legal capacity of black women in relation to leasehold and ownership was recognised. The Recognition of Customary Marriages Act 120 of 1998 repealed Section 11(3)(b) of the Black Administration Act.
35. The hereditary process for traditional leaders is fundamentally male primogeniture. See Mokgoro 1994:3.
36. Act 120 of 1998.
37. Sections 2(1) and 2(2).
38. Section 6.
39. Section 7(1).
40. Section 7(2).



41. Act 88 of 1984, as amended.
42. Under section 7(3) of the Recognition of Customary Marriages Act.
43. Sections 7(6)B(9).
44. Section 81(6)(a) of the Natal and KwaZulu Codes (Proclamation R151 of 1987 and KwaZulu Act 16 of 1985).
45. Act 38 of 1927, as amended.
46. Section 23(1).
47. This provision dates from the mid to late 1800s when colonial administrations allowed certain Africans to acquire land under quitrent title. In order to prevent plots from being fragmented into uneconomic holdings amongst a number of customary-law heirs, succession was legislatively regulated (SALC 1998).
48. Section 23(2).
49. Section 23(10).
50. Government Notice R200, *Government Gazette* 10601, 6 February 1987, Regulation 2:21B2.
51. Act 81 of 1987.
52. The Act itself does not differentiate between men and women or between children. However, in section 1(4)(b), the Act defines an intestate estate as including 'any part of an estate that does not devolve by virtue of a will or in respect of which s.23 of the Black Administration Act does not apply'.
53. Act 45 of 1988.
54. Section 1(1).
55. Section 9 of the 1996 Constitution.
56. *Mthembu v Letsela and Another* 1998 (2) SA 675, 685B86.
57. *Mthembu v Letsela and Another* 1998 (2) SA 675, 686B87.
58. *Mthembu v Letsela and Another* 1998 (2) SA 675, 688.
59. See, for example, Commission on Gender Equality (1998).
60. *Kgotla* is a traditional community decision-making body (TRAC 1991:14).
61. A type of traditional leader.
62. Under the Local Government Transition Act 209 of 1993, as amended.
63. Act 112 of 1991.

64. Upgrading of Land Tenure Rights Amendment Act 34 of 1996.
65. Thomas, G. 1998. Current developments in South Africa's land tenure policy. Memo issued by the Department of Land Affairs. Cited in Ntsebeza 1999:6B7.
66. Act 28 of 1996.
67. Sections 6, 7, 8 and 9.
68. Section 1(ix), Schedule.
69. Sections 9(1)(a), (c), and (e).
70. Land Rights Bill, 1999, section 2(f)(ii).
71. Section 5.
72. Section 8.
73. Section 9(6).
74. Section 54(2).
75. Section 27.
76. Section 14(4).
77. Section 14(5).
78. Section 14(6).
79. Holomisa, P. 1993. *The role and place of the community courts and chiefs= courts*. Cited in Kaganas & Murray 1994:410
80. P. Holomisa, opening address at the Conference on Customary Law and the Future Role of Traditional Leaders, Broederstroom, 16B18 July 1993, cited in Kaganas & Murray 1994:410.
81. Telephone interview Sarah Manthata, Deputy Director, Land Reform Implementation Branch, Department of Land Affairs, Pretoria, 2 November 1999.
82. Telephone interview Sarah Manthata.
83. Centre for Rural Legal Studies & Surplus People's Project. 1998. *Household study: An investigation of the use of 'the >household' as the unit of subsidy allocation and basis for beneficiary identification in land reform policy*. Cited in Billy 1999:6



6. References

Agriwal, B.

1999. A field of one's own: Gender and land rights in South Asia. Annexure 6 in *Land reform gender policy: A framework*. Pretoria: Department of Land Affairs.

Bennett, TW.

1995. *Human rights and African customary law under the South African Constitution*. Cape Town: Juta.

Billy, A.

1999. *The progressive realisation of socio-economic, cultural and gender rights in land, housing and environment*. Cape Town: Legal Resources Centre.

Budlender, D (ed).

1997. *The second women's budget*. Cape Town: Idasa. CLC (Community Law Centre).
1994. *Custom and religion in a non-racial non-sexist South Africa*. Cape Town: University of the Western Cape.

Commission on Gender Equality.

1998. *Report of the Commission on Gender Equality information and evaluation workshop, Western Cape province*. Cape Town: Commission on Gender Equality.

Cross, C & Friedman, M.

1997. Women and tenure: Marginality and the left-hand power, in *Women, land and authority*, edited by S Meer. Cape Town: David Philip.

DLA (Department of Land Affairs).

- 1997a. *Annual report, 1997*. Pretoria: DLA.

DLA (Department of Land Affairs).

- 1997b. *White Paper on South African Land Policy*. Pretoria: DLA.

DLA (Department of Land Affairs).

1998. *Summary of current developments in tenure policy.*
DLA website <http://land.pwv.gov.za/tenure/DEVELOP>

DLA (Department of Land Affairs).

- 1999a. *Land reform gender policy: A framework.*
Pretoria: DLA.

DLA (Department of Land Affairs).

- 1999b. *Tenure*, 3(1).

De Klerk, M (ed).

1991. *A harvest of discontent: The land question in South Africa.* Cape Town: Idasa.

Freddie, KS.

1999. African customary rule of intestate succession and Bill of Rights: Fallacies and dilemma of interpretation. Paper presented at the US/UNW RULCI Colloquium, University of Stellenbosch, August 12–13, 1999.

Govender-Van Wyk, S.

1999. Gender policy in land reform. *Agenda*, 42.

Hargreaves, S.

1999. Land reform: putting gender in the centre. *Agenda*, 42.

Jordaan, D.

1998. Women on the Elandskloof Communal Property Association, in *Voices from the field*. Johannesburg: National Land Committee.

Kadalié, R.

1995. Women in the new South Africa: From transition to governance, in *The Constitution of South Africa from a gender perspective*, edited by the Community Law Centre. Cape Town: University of the Western Cape.



Kaganas, F & Murray, C.

1994. The contest between culture and gender equality under South Africa's Interim Constitution. *Journal of Law and Society*, 21:409.

Legal Resources Centre.

1999. *Customary law, power of chiefs, traditional authorities and land rights*. Cape Town: Legal Resources Centre.

Meer, S.

1997. Introduction, in *Women, land and authority*, edited by S Meer. Cape Town: David Philip.

Middleton, S.

1997. Women's land rights and needs: the case of Thornhill and Merino Walk, in *Women, land and authority*, edited by S Meer. Cape Town: David Philip.

Mjoli-Mncube, N.

1999. Land and housing: Women speak out. *Agenda*, 42.

Mokgoro, Y.

1994. Traditional authority and democracy in the interim South African Constitution. Paper delivered at the annual meeting of the Law and Society Association, Phoenix, Arizona, USA, 17 June 1994.

Mokgoro, Y.

1998. *Ubuntu and the law in South Africa*. Occasional paper, The African Renaissance. Johannesburg: Konrad Adenauer Stiftung.

Ngubane, S.

1999. Title to the land? *Agenda*, 42.

Nhlapo, T.

- 1995 African customary law in the interim Constitution, in *The Constitution of South Africa from a gender perspective*, edited by the Community Law Centre. Cape Town: University of the Western Cape.

Ntsebeza, L.

1999. *Land tenure reform in South Africa: An example from the Eastern Cape province*. London: International Institute for Environment and Development.

Platzky, L & Walker, C.

1985. *The surplus people: Forced removals in South Africa*. Johannesburg: Ravan Press.

Ramphela, M & McDowell, C (eds).

1991. *Restoring the land*. London: Panos Institute.

SALC (South African Law Commission).

1998. *Harmonisation of the common law and indigenous law: Draft issue paper on succession*. Pretoria: South African Law Commission. <http://www.wits.ac.za/salc/salc.html>

SALC (South African Law Commission).

1999. *The harmonisation of the common law and the indigenous law*. Project 90. Pretoria: South African Law Commission.

Small, J.

1997. Women's land rights: A case study from the Northern Transvaal, in *Women, land and authority*, edited by S Meer. Cape Town: David Philip.

Sunde, J & Gerntholz, L.

1999. *Die man is die dak, die vrou is die vloer*. Lobbying for women farmworkers' rights. *Agenda*, 42.



TRAC (Transvaal Rural Action Committee).

1991. *Demanding a place under the kgotla tree: Rural women's access to land and power.*
Johannesburg: Transvaal Rural Action Committee.

TRAC (Transvaal Rural Action Committee).

1994. *The Rural Women's Movement: Holding the knife on the sharp edge.* Johannesburg: National Land Committee.

Vaughan, A & McIntosh, A.

1998. *The role of traditional leaders in land development.*
Paper prepared for the National Development and Planning Commission: Pretoria.