Contested power and apartheid tribal boundaries: the implications of 'living customary law' for fixed boundaries

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Abstract

The interface between state and customary law in South Africa has been the subject of much recent litigation in the South African Constitutional Court. The paper describes and reflects on the opportunities created by the emerging jurisprudence of 'living customary law' for asserting and protecting customary entitlements to land in the face of controversial new laws that bolster the authority of traditional leaders within fixed jurisdictional boundaries coinciding with the former "homelands". It examines the impact of the fixed and exclusionary nature of these boundaries (of land, and identity) on the flexible (more inclusive) nature of "nested" boundaries within and at the interface with local more or less "customary" systems. It argues that the new laws attempt to "outsource" the governance of the poorest South Africans and in so doing undermine not only their citizenship rights but also indigenous accountability mechanisms inherent in the consensual character and flexible boundaries of 'living customary law'. It contrasts the 'real world' substantive approach to issues of power and inequality adopted by the Constitutional Court with the bounded top-down view of customary law that informs the new traditional leadership laws.

Key words: customary law, boundaries, power, authority, land rights

Introduction

A central dilemma for legal empowerment strategies is how to acknowledge and engage with the customary law arena in ways that support the resource claims of the marginal and yet do not reinforce patriarchal power dynamics that exclude and discriminate against women, the young and the poor. The problem is compounded by the extent to which patriarchal elites, in particular traditional leaders, have captured the discourse of "the customary" and are able to manipulate it to their benefit. Nhlapo[1] warns that

> "[p]rotection from distortions masquerading as African custom is imperative, especially for those they disadvantage so gravely, namely, women and children."

His warning echoes that of Whitehead and Tsikata, who say that there are "simply too many examples of women losing out when modern African men talk of custom".[2] These authors fully appreciate the centrality of socially-embedded customary entitlements in people's lives. They emphasise, however, that the recent "swing to the customary" in policy discourse contains more pitfalls for women than potential.

The danger of traditional elites using the discourse of the customary to justify

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1 T Nhlapo, "African Customary Law in the interim Constitution" in S Liebenberg (ed), *The Constitution of South Africa from a Gender* perspective (1995) 162.

2 A Whitehead and D Tsikata, "Policy Discourses on Women's Land Rights in Sub-Saharan Africa: The Implications of the Re-turn to the Customary" (2003) 3 *Journal of Agrarian Change*,104.

versions of custom that exaggerate their power and disadvantage women is well illustrated by new South African legislation that gives traditional leaders not only far-reaching powers over "communal" land and the people living on it, but also the power to define customary law. These laws include the Traditional Leadership and Governance Framework Act of 2003 (Framework Act), the Communal Land Rights Act of 2004 (CLRA), provincial traditional leadership laws enacted pursuant to the Framework Act during 2005 and 2006, and the Traditional Courts Bill of 2008. The laws reinforce disputed "tribal" boundaries inherited from apartheid and give traditional leaders unilateral powers within these boundaries which for the most part coincide with the former "homelands".

The legislation is contested by women's groups and rural leaders on the basis that it undermines indigenous accountability mechanisms, overrides the customary entitlements of ordinary people, and is inconsistent with the Bill of Rights in the country's Constitution. In this context four rural communities have brought a successful legal challenge to the validity of the Communal Land Rights Act, arguing that its provisions are inconsistent with the Constitution, and that the legislative process used to enact it was flawed. The CLRA was struck down by the Constitutional Court in May 2010.[3]

This paper argues that notwithstanding the danger of the discourse of the customary being manipulated by elites, customary entitlements are crucial for poor people both in terms of land claims and in relation to the power relations that frame resource-claims at the local level. Thus attempting to side-step the customary arena because of the manifest risk of elite manipulation is not a viable option for strategies that seek to empower the rural poor. The focus of such strategies needs to shift, however, from open-ended support for "the customary" to interventions that pay close attention to power relations and, in particular, which voices dominate and are able to participate in the definition of custom. This in turn raises the articulation between how customary law is framed and defined in national discourse and legislation, and its definition and development at the local level. Even when national laws are implemented only to a limited extent and court judgments are handed down in distant cities, the laws and judgments often have significant symbolic impact in framing power relations at the local level and in opening up or closing down the scope of what changes people dare imagine and the claims they dare assert. Thus legal empowerment initiatives at the local level require tandem measures to support rural peoples' access to key national arenas where important developments are taking place in relation to the setting apart of the former "homelands" as separate zones ruled by customary law as defined by traditional leaders.

This paper focuses on events and issues unfolding at the articulation between three different arenas where customary law is at issue. These are local level struggles over resources and the content of custom; the national legislative arena, in which the traditional leader lobby has mobilised the discourse of the customary in demanding and shaping new laws that bolster a particular version of chiefly power; and the jurisprudence of "living customary law" emerging from the Constitutional Court.

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3 *Tongoane and Others V Minister for Agriculture and Land Affairs and Others*, CCT 100-09 [2010] delivered on 11 May 2010.

Contrary to the pro-traditional leader stance taken in new legislation, Constitutional Court judgements have focused on the protection of marginalised groups and individuals. The paper will discuss far-reaching judgments that recognise indigenous land rights, strike down discriminatory codified customary law and support the development of customary law that, for example, enables the appointment of female traditional leaders. These judgments stress the importance of protecting the vulnerable and redressing the injustices of the past.

Many South Africans live their lives at multiple interfaces between urban and rural, and national and local realities and influences. Inevitably many of the disputes litigated in the Constitutional Court pertain to issues arising at such intersections. This grounding in the facts of lives that, in practice, span changing and overlapping social contexts highlights the limitations of the essentialised stereotype of a separate and insulated customary sphere that informs, and is reinforced by the discourse of "the customary". On the basis of the South African experience, the paper argues for close attention to issues arising at the interface between these three arenas and to the articulation between customary law, other state law and the Constitution, rather than an approach that seeks to understand and deal with customary law in isolation.

The paper explores the potential inherent in the "living law" jurisprudence emerging from the Constitutional Court. It argues that the living law approach has been crucial in three respects. First, in asserting customary land rights against countervailing statutory and common law rights. Second, in striking down codified versions of colonial and apartheid customary law. And, third, in potentially opening up the definition of custom to those who live by its norms, rather than reinforcing the "rules" decreed from on high by traditional leaders and government officials.

It situates the emerging living law jurisprudence within the broader context of the court's "substantive" approach to the realisation of rights. This approach foregrounds contextual realities and power relations in assessing whether people are able, in practice, to enforce their rights rather than relying on what is formally stated in law and documents. Inevitably such a "real-life" approach directs attention to issues that arise not only at the interface between codified custom and changing "living law", but also at the interface between custom and other laws and broader societal realities. I suggest that there is an intrinsic contradiction between the "real world" substantive approach adopted by the Constitutional Court and the vision of bounded and timeless customary law zones that informs the new laws.

The paper proceeds as follows. It begins with reflections on theories about the intersection between property and authority in the context of the global tendency to outsource governance within set-apart zones that are subject to alternative legalities. This broader context assists in illuminating the central role that contested boundaries play in South African disputes concerning the content of land rights and the scope and nature of chiefly power. Section 2 looks at the first of the three intersecting arenas discussed above, that of local-level contestation over the content of custom in struggles by rural people to assert and protect land rights. Section 3 discusses the introduction of controversial new legislation bolstering chiefly power within fixed jurisdictional boundaries. Section 4 examines key judgments emerging from the Constitutional Court. Section 5 discusses the implications of the "living customary law" jurisprudence emerging from that Court in the context of the court's contextual

approach to "real-world" issues of power and exclusion. The paper concludes with lessons arising from the South African experience that have bearing on the relationship between legal empowerment of the poor and customary law.

1. Land rights, governance and boundaries

Property relations are not about things, but about relationships between people about things.[4] According to Lund

> "[i]t is never merely a question of land, but a question of property, and social and political relationships in a very broad sense. Struggles over property are as much about the scope and constitution of authority as about access to resources".[5]

Property, authority and law are closely interconnected. Property exists only insofar as institutions are able to enforce it. At the same time, the processes of recognition and enforcement strengthen the institutions that play this role. In this sense, as Lund points out, these institutions "are equally at stake". He argues that functional property is created not by national laws and policies, but at the local level through processes of interaction between local actors. Nevertheless, national institutions and laws have a major impact at the local level in bolstering the authority of certain groups and in providing alternative avenues for the legitimation of property and authority.[6]

At issue in resource claims and contestations over land in the former homelands are disputed constructs of the content of customary entitlements to land and the scope of chiefly power in relation to land, and in particular, questions as to who has the power to define custom. Struggles over resources are inextricably linked to struggles to be part of the process of defining terms – in this case in defining the content of custom. A central issue concerns the extent of decision-making power held and exercised at different levels of social organisation including for example by the individual and the family, the clan, the village and the "tribe".

It is helpful to situate the events unfolding in South Africa and the contestations underway within the context of wider global trends. Von Benda-Beckmann et al[7] highlight the global pattern of governments increasingly outsourcing large areas of law-making together with various governance tasks, especially *vis-à-vis* marginalised sections of the population.[8] They raise important questions concerning the particular forms of inequality and exclusion created by the increasing plurality of legal orders and governance structures, and in particular the impact of plural governance

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4 C Lund, "Negotiating Property Institutions: on the Symbiosis of Property and Authority in Africa" in K Juul and C Lund (eds), *Negotiating Property In Africa* (2002) 12. C Hann, "Introduction: the Embeddedness of Property" in C Hann (ed) *Property Relations: Renewing the Anthropological Tradition* (1998) 4-5.

5 Ibid 11.

6 Ibid 32.

7 F von Benda Beckman, K von Benda-Beckmann and J Eckert, "Rules of Law and Laws of Ruling: Law and Governance between Past and Future" in F von Benda Beckman, K von Benda-Beckmann and J Eckert (eds), *Rules of Law and Laws of Ruling: On the Governance of Law* (2009) 1.

8 Ibid 10.

structures in creating differential citizenship rights for different segments of the population.[9] The marginal in outsourced areas such as the former "homelands" in South Africa "are virtually excluded from decision-making processes and are governed over, rather than being participants in government."[10] These plural governance roles are often guided and legitimized by alternative legalities and legal forms as will be illustrated by the South African Traditional Courts Bill of 2008.[11] Von Benda Beckmann *et al* highlight the irony that the current global preoccupation with "constitutionalism" and the "rule of law" exists simultaneously with, and tends to mask, concomitant processes of states' "outsourcing" power and legal authority to other structures.[12]

Closely related to processes of outsourcing governance are territorialising strategies that contribute to the stratification of citizenship within set-apart geographical boundaries. Sikor and Lund write that:

> "By making and enforcing boundaries, by creating a turf, a quarter, a parish, a soke, a homeland etc., different socio-political institutions invoke a territorial dimension to their claim to authority and jurisdiction." [13]

Another study[14] highlights the role of law in "creating and organising spaces of inequality" while it "simultaneously creates and legitimizes these inequalities beneath a neutral and professional discourse."[15]

The imposition of controversial tribal boundaries is central to contestation in South Africa about the setting apart of insulated zones of customary authority for "senior traditional leaders". The new traditional leadership laws, which will be discussed in section 3, entrench disputed tribal boundaries that exist wall-to-wall within the former homelands as the jurisdictions within which traditional leaders are authorised to apply open-ended "customary law". In a 2007 affidavit the then Director General of the Department of Provincial and Local Government stated in defence of one of the laws:

> "The traditional councils have clearly defined areas of jurisdiction. Those who find themselves in those areas must adjust to the rules and traditional practices of that area."[16]

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9 Ibid 16.

10 Ibid 11.

11 Ibid 2.

12 Ibid 31. See also J Comaroff and J Comaroff, "Reflections on the Anthropology of Law, Governance and Sovereignty", F von Benda-Beckman et al (eds) n 7.

13 T Sikor and C Lund, "Access and Property; A Question of Power and Authority" (2009), *Development and Change* 40(1), 1-22, 14.

14 "Space and Legal Pluralism: An Introduction" in F von Benda-Beckman, K von Benda-Beckman and A Griffiths (eds), *Spatializing Law: An Anthropological Geography of Law in Society* (2009).

15 A Kedar, "On the Legal Geography of Ethnocratic Settler States: Notes towards a Research Agenda" in J Holder and C Harrison (eds), *Law and Geography*, (2006) 401-441, 412, quoted in F von Benda-Beckman, K von Benda-Beckman and A Griffiths at note 14.

16 Para 45.1 of the answering affidavit of Lindiwe Msengana-Ndlela included in the CD Rom of court papers with A Claassens and B Cousins (eds), *Land, Power and Custom: Controversies Generated by South Africa's Communal Land Rights Act* (2008).

More recently the Deputy Minister responsible for the establishment of the planned Department of Traditional Affairs stated:

> "Under the Cooperative Governance and Traditional Affairs Ministry a new Department of Traditional Affairs is being established to signal the importance the new administration gives to the institution of Traditional Leadership. Clearly, traditional leaders have space to play an important governance and developmental role in traditional authority areas which include over 14 million people."[17]

Yet traditional council boundaries and chiefly versions of customary law are deeply disputed in many areas, especially in relation to the position of women, the imposition of tribal levies, the selling of land allocations and unilateral mining and investment deals. Rural people are increasingly demanding a voice in the definition of custom at both the local level and in the parliamentary processes where the boundaries are entrenched and the meta-rules are set.

2. Processes of change and contestation over land rights

The case studies discussed below, situated in three different areas of South Africa, illustrate processes of contestation and change that are put at risk by the new traditional leadership laws. I begin with two different cases in Rakgwadi (Limpopo Province). The other communities, Makuleke and Makgobistad, were applicants in the successful challenge to the Communal Land Rights Act. In that case they argued that the CLRA undermined their tenure security[18] by vesting far-reaching and unaccountable powers of ownership and control in imposed traditional councils operating as land administration committees. The applicants argued that their identity and internal accountability mechanisms were trumped by the centralised statutory powers being vested in traditional councils notwithstanding ongoing contestation about the legitimacy and boundaries of these institutions.

2.1 Rakgwadi – Limpopo Province

Rakgwadi is an area comprised of twenty-four villages that fall under the jurisdiction of the Matlala tribal authority. The previous Matlala chief co-operated with the apartheid government during the 1950s to establish the Pedi "homeland" (Bantustan) of Lebowa. In exchange for his support, the Matlala chief was offered a block of farms purchased from white farmers by the apartheid government. Whereas the community had previously occupied six farms, they were given twenty-two in the new area. The new area now comprises of 24 villages, including Mmotwaneng.

In the early 1990s, the dying days of apartheid, various Cabinet ministers in Lebowa (all of whom were traditional leaders) entered into negotiations with the South African government to transfer title of about 400 farms, constituting almost 30 percent of the

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17 Speech by Deputy Minister Yunus Carrim at the Traditional Councils, Local Government and Rural Local Governance Summit, Durban: 05/05/2010.

18 Which is guaranteed by s 25(6) of the Constitution which provides: "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".

land area in Lebowa, from the state[19] to "tribes". Thus just before the change of government in 1994 the title deeds of various farms in Rakgwadi were transferred to the Matlala tribe.

Most people in Rakgwadi knew nothing about the transfers until late 1999 when Matlala announced that he now had title to the farms. For people in the village of Mmotwaneng this came as a major shock that explained recent developments such as the chief interfering in internal disputes in Mmotwaneng and leapfrogging village level land allocation processes. Each of the villages in Rakgwadi has a headman (*ntona*) and a village council to advise him. The village council deals with land disputes and internal allocations of fields and residential sites. In Mmotwaneng the council was particularly active. A teacher from Mmotwaneng commented:

> "Thus we managed to support a strong village council to advise *ntona*. We consulted all the *kgoros* (clans) of the village and each selected a representative to be on the *ntona's* council. We have a strong council and we have managed to strengthen our *ntona*… Now lately the *mosate* (chief's headquarters) is interfering in land allocation in Mmotwaneng. Instead of allocations being referred from our *ntona* to the *mosate*, the *mosate* is now allocating our land to outsiders. There is no consultation with us. People just arrive, saying they are sent by the *kgosi* (Chief)."[20]

There was also tension about disputes being decided at the *mosate* instead of locally by the Mmotwaneng headman and village council as was the norm. Requests to the chief to address these issues had fallen on deaf ears. This, together with the announcement that the Mmotwaneng land now belonged to Matlala, led to several busloads of villagers arriving at the *mosate* bearing a petition and demanding a meeting with the chief. The petition demanded the "return" of their title deeds and respect for the decisions and status of their village council.

One of leaders explained that they were not opposing chiefship per se but needed to secure their land rights:

> "We want our own land rights. We don't mind Matlala being our chief, but each man or woman must have their own land rights. We want to feel that we are South Africans … Like other South Africans we are entitled to have rights to our land. The current system works for the benefit of one man. Matlala says we don't have to pay rent under the new system, yet in practice if you want to open a shop, you have to pay him. If you want a residential site you have to be up to date with your tribal levies. And you have to go via him."[21]

The Mmotwaneng dispute is only one example of a series of disputes in Rakgwadi. The disputes have in common attempts by Matlala to centralise and expand control over land, including in areas where he previously had no jurisdiction. The most serious dispute concerns a group of labour tenants, the Tladi yaKgahlane, who can trace their history on the land to long before Matlala's people arrived in 1957. They lived there before white farmers expanded into the area in the 1800s, after which

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19 Most land in the former homelands is owned by the state or the South African Development Trust established in terms of the Natives Land and Trust Act of 1936.

20 Interview by author with teacher in Mmotwaneng, 27 June 2000.

21 Ibid.

they were forced to provide free labour to the farmers for three months each year in return for continuing to farm part of the land. After the change of government in 1994 the Tladi labour tenants lodged a still-unresolved restitution claim to the farms in terms of the post-apartheid Restitution of Land Rights Act. However they subsequently discovered that the fertile river-front farms had been included within the land transferred to the Matlala tribe earlier in 1994.

Matlala has encouraged people from the Rakgwadi villages to plough the extensive fields left behind by the white farmers and to establish homesteads on the Tladi farms. He allocated a large section of the Tladi farms to a group of stock farmers from Rakgwadi as grazing land. This precipitated clashes with the Tladi farmers. Accompanied by a large contingent of uniformed police and army personnel, Matlala arrived to warn the Tladi farmers to curtail their grazing activities on “his” land.

Recent events indicate that Matlala is no longer concerned with balancing issues of local legitimacy and political acceptability as he had to do after the anti-chief rebellions of the mid-1980s and in the early days of African National Congress (ANC) rule. Instead he is now relying on his tribal title to assert centralised control over land in Rakgwadi. This is being resisted by sub-groupings such as the Mmotwaneng villagers who insist that land rights were historically controlled at village level and by groups like the Tladi who claim a separate identity and independent rights to the land.

2.2 Makuleke - Limpopo

The Makuleke community lives in the far north-east of South Africa near the Kruger National Park. In 1969 they were forcibly removed from the land they had historically occupied at Pafuri near the Mozambican border when it was incorporated into the Kruger National Park. During the 1969 forced removal their resettlement land was included within the boundaries of the newly established Mhinga Tribal Authority, without their knowledge. In 1976 the Makuleke traditional leader was officially appointed a headman under Chief Mhinga whereas the Makuleke had been a separate community prior to the removal. After the removal the community established their own “tribal office” and administered the resettlement land independently of Mhinga, refusing to acknowledge him as their chief.

After a long battle, the Makuleke won restitution of their land in 1995. They agreed not to return to the land within the Kruger Park which would be transferred to a Communal Property Association (CPA) and used for eco-tourism purposes. Instead they would continue to reside in the resettlement area of Ntlaveni. However, recently a “headman” supported by Chief Mhinga has been installed as headman over one of the three main villages within the Makuleke resettlement area. He is “selling” allocations of Makuleke compensatory land to outsiders and imposing fines on Makuleke women for collecting firewood.

The actions of the headman, Joseph Nwamba, have led to serious disputes, with several people having been arrested and charged with public violence. Many people are enraged that Mhinga not only asserts that they are a sub-group under his authority but is supporting Nwamba to undermine Makuleke authority within their compensatory land. The Makuleke traditional leader’s status as a headman subordinate to chief Mhinga is strenuously opposed by the community. They have repeatedly made submissions to government and to various commissions dealing

with traditional leadership, stating that they are, and have always been, an independent community on par with the Mhinga community, and that Makuleke is a chief on par with Mhinga, not a headman under him.

When researchers working with the applicants in the CLRA case interviewed the people who administer the Makuleke tribal office an old man who had been the senior headman before the removal told us that in Pafuri the Makuleke chief had had no role in allocating homestead plots and arable land to members of the Makuleke community. This was all done within extended family structures. After the removal, people were put into surveyed "betterment" villages in Ntlaveni and the tribal office was required to assist in the issuing of Permission to Occupy (PTO) certificates for arable and residential sites. In contrast to the official regulations governing PTOs, the Makuleke tribal clerks referred to fields and residential sites as "belonging" to families over generations.[22]

While the institution of chiefly authority is vitally important to people in Makuleke - not least as a symbol of independence from Mhinga - and people invest extraordinary resources of time and energy in the institutions surrounding the chieftaincy, the status of the chief is not bound up with a central role in land allocation processes. Moreover, Makuleke residents consider themselves to be the owners of their fields and residential sites, and openly transact with one another on this basis.

2.3 Mayaeyane fields near Makgobistad

Makgobistad is in the North West Province, bordering Botswana. The farmers in this area do not dispute the legitimacy of the tribal authority or its boundaries. However, they dispute that the tribal authority has the right to make unilateral decisions about agricultural land in an area called Mayaeyane where their families have fields inherited over generations.

A few years ago, the young chief of Makgobistad made his uncle the headman of Mayaeyane. There had previously been no headman because Mayaeyane was an agricultural area and no-one was allowed to live there permanently except for five "caretaker" families. The uncle is currently establishing a new town at Mayaeyane. He allocates land to "outsiders" without the permission of the long-term farmers and, more seriously, has allocated land that was part of people's fields to the new arrivals. A housing project has been announced and a water reticulation system and new road have been built.

The Mayaeyane farmers insist that he cannot unilaterally make decisions that impact on land they have inherited over generations, and that his activities are unlawful. This is both because he has not consulted them and because the Mayaeyane development was neither discussed nor agreed to by the Makgobistad tribal council.

They insist that there is no precedent allowing either the chief or headman to unilaterally reallocate family land. They refer to a series of precedents to show that decisions about residential and arable land have always been, and can only be, taken within the family. According to the Mayaeyane farmers, the young chief calls himself the owner of the land, and struts around as if he owns the place and people.

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[22] Group interview including author at Ntlaveni 9th September 2004.

They say his forefathers were respectful of proper decision-making processes and would never have behaved this way.

They dispute the chief's claims of power to allocate and alienate agricultural land in Mayaeyane. In describing how his grandfather originally acquired the family's field one old man explained:

> "It wasn't as if the chief actually allocated the land to us. My father told me that his father had scouted out the area as suitable for farming; he was one of the first Makgobistad people to expand into the area and start farming there. The chief knew about it, but it wasn't as if he allocated anyone the land, or even gave them permission to do that. In those days people often expanded their farming activities around the *meraka* [cattle posts]."[23]

Part of the objection to the new headman's actions is that people dispute that this type of authority ever existed in the area. They complain that the headman is building up a power and revenue base for himself by bringing in "outsiders" who owe their presence there to him. They say he has established a village *kgotla* or council comprised exclusively of new arrivals. They assert that the nature of land rights in Mayaeyane is different - and more independent. Previously the families who farmed there would choose a "caretaker" to liaise with the Makgobistad tribal council and to be a point of contact with "outsiders" The caretaker role was limited and rotated between people from various families.

2.4 Issues raised by the case studies and the CLRA litigation

The case studies illustrate competing constructs of customary rights in land, and in particular competing versions of the scope of chiefly authority over land. The Makuleke and Mayaeyane applicants in the CLRA litigation argued that the powers vested in traditional councils by the CLRA are at odds with living customary law understood as customary law as actually practised "on the ground". They, together with the other applicants, put forward extensive historical and current evidence of countervailing land rights held and exercised at layered levels of authority including at family, village and sub-group level. They argue that decision- making authority is a key component of land rights, and would be undermined by the CLRA vesting unaccountable land administration powers in traditional councils.

When the CLRA case was first argued in the Pretoria High Court in October 2008 two government departments were responsible for defending the Act. These were the Department of Land Affairs (DLA) and the Department of Provincial and Local Government (DPLG) that dealt with traditional leadership. While the DLA conceded that the Act would be unconstitutional if it did indeed impose traditional councils as land administration committees, the DPLG and traditional leaders insisted that it did just that, and moreover that customary law authorises traditional leaders not only to control land, but to levy tribal taxes, demand free labour and charge "*khonza*" fees for land allocations – the very types of powers that the DLA was trying to downplay. This divergence of views seems to have contributed to the judge taking the concerns of the applicant communities very seriously and ruling that the CLRA would in fact,

[23] Group interview by author at Makgobistad 17 February 2005.

undermine tenure security were the Act brought into operation.[24] The case was then referred to the Constitutional Court for confirmation.

The Constitutional Court judgment of May 2010 found that the Act was unconstitutional because the wrong parliamentary procedure had been used in enacting it. The court stated that since the law had been invalidly enacted, it was unnecessary to examine and rule on its content. A foreshortened parliamentary procedure cutting out provincial consultation had been followed instead of the longer procedure required when legislation impacts on provincial competencies such as customary law and traditional leadership powers. The next section illustrates the intimate connection between which stakeholders are able to participate in the legislative process, and the content of the legislation. Issues pertaining to the privileging of some voices and the exclusion of others, are at the heart of contestation over the new traditional leadership laws in South Africa.

3. The content and impact of the new traditional leadership legislation

Soon after the end of apartheid the South African Law Commission was tasked with identifying laws that conflicted with the Constitution and putting forward alternative approaches to replace them where necessary. The Commission identified laws such as the Native Administration Act of 1927 and the Bantu Authorities Act of 1951 as laws requiring urgent repeal. This was because of their pivotal role in the disenfranchisement of black South Africans and in indirect rule, first by the colonial state and later via the Bantustans.

However the traditional leader lobby fought strenuously to block the repeal of these laws that provided them with statutory authority in a context where their powers were being undermined by the introduction of elected local government in the former homelands.[25] South Africa has a large body of "official" customary law produced during colonialism and apartheid, both in statute form and in judgments emanating from the Native Appeal and other courts. Much of this law reinforces the authoritarian constructs of chiefly power that were central to indirect rule. [26]

There followed a long battle by the traditional leader lobby for amendments to the Constitution and for the introduction of laws to bolster their statutory authority in former homelands. An extensive report commissioned by government in 1999[27] details traditional leaders' recurrent complaints about the changing balance of power in rural areas and their demands for government to bolster their contested authority. Traditional leaders couched their demands for statutory power in terms of the centrality of "indigenous" African customs and tradition – which were characterised as under threat from "imperialist" western values and institutions. Against that background this section discusses the package of new laws that deal with the powers

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24 *Tongoane and others v The Minister of Land Affairs and others* (TPD 11678/2006).

25 L Ntsebeza, "Chiefs and the ANC in South Africa: The Reconstruction of Tradition?", in A Claassens and B Cousins (eds), above n 16, 238-260; B Oomen, *Chiefs in South Africa: Law, Power and Culture in the Post-Apartheid Era* (2005) 83-86.

26 M Chanock, *The Making of South African Legal Culture 1902–1936: Fear, Favour and Prejudice,* Cambridge University Press (2001).

27 *Status Quo* report on *Traditional Leadership and Institutions*, August 1999, Library of Parliament, South Africa.

of traditional leaders and explains how they fit together.

3.1 The Framework Act

The core law in the package is the Traditional Leadership and Governance Framework Act 41 of 2003 (Framework Act). Section 28 of the Framework Act deems pre-existing traditional leaders to be "senior traditional leaders" and pre-existing tribal authorities to be "traditional councils" provided they comply with new composition requirements. The requirements are that 40 percent of the members of a traditional council must be elected and 30 percent must be women. This section entrenches the controversial apartheid-created tribal authority boundaries established virtually wall-to-wall throughout the former "homelands" pursuant to the 1951 Bantu Authorities Act.

The introduction of these laws must be understood against the historical background. Historically there was widespread opposition to the imposition of Bantu authorities which precipitated rebellions in many rural areas.[28] Those traditional leaders who supported the Bantustan agenda were rewarded with large areas of land, while those who resisted were stripped of their power or relegated to headman status and confined to small areas. In many areas, disputes about the apartheid manipulation of "tribal" boundaries and the elevation and imposition of compliant leaders continue until this day.

Moreover, the reality of intermixed and changing identities in rural areas belies the rigid super-imposed apartheid map of discrete "tribes" neatly abutting one another. People with different identities who clubbed together to purchase land, lived on mission settlements, moved from distant areas to be near work, or were evicted from "black spots" and dumped in the reserves, suddenly found themselves defined as the "tribal subjects" of leaders with whom they had little or no shared history.

During apartheid, millions of people were forcibly removed during the process of "Bantustan consolidation"[29] in an effort to try to bring the "untidy" reality of intermingled identities in line with the mythology of 'separate tribes", each with their own homeland. Currently hundreds of thousands of people are in the process of claiming restitution of land in the ethnically mixed areas where they lived before.

Widespread rural uprisings brought the Bantustan political system to its knees during the late 1980s and early 1990s.[30] These uprisings played a key role in the demise of grand apartheid and the transition to democracy. Rural people demanded equal citizenship in a united South Africa and rejected their status as tribal subjects of separate ethnic "homelands". In this context, it is ironic that the new laws entrench controversial apartheid boundaries and provide traditional leaders with far-reaching powers over people living within ethnically defined tribal boundaries.

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28 G Mbeki, *South Africa: The Peasants' Revolt* (1964); A Luthuli, *Let my People Go!* (1962); C Hooper, *Brief Authority* (1960).

29 L Platzky and C Walker, *The Surplus People: Forced Removals in South Africa* (1985) 11

30 P Delius, *A Lion Amongst the Cattle: Reconstruction and Resistance in the Northern Transvaal* (1996) 112-118; E Maloka and R Gordon, "Chieftainship, Civil Society and the Political Transition in South Africa" (1996) 22(37) *Critical Sociology* 37-55.

The Framework Act itself does not provide traditional leaders with much direct power. Instead, through its transitional mechanisms it entrenches existing traditional structures and boundaries as the "officially recognised" traditional structures and boundaries of the future. The "reform" component lies in the new composition requirements.

Section 20 of the Framework Act specifies that national or provincial government may enact laws providing a role for traditional councils in relation to a wide range of issues including (but not limited to) land administration, health, welfare, the administration of justice, safety and security, economic development and the management of natural resources. It is thus other laws, such as the CLRA and the Traditional Courts Bill B15-2008, that provide traditional leaders with substantive powers.

The CLRA is not discussed in detail here because it has been set aside by the Constitutional Court[31]. Suffice to say that it provided traditional councils with the power to administer communal land and to represent "the community" as the owner of the land. Of key concern was the definition of community, which unlike other South African land reform laws did not include provision for separate groupings within overarching traditional council boundaries to be recognised as separate "communities". Thus groups who had historically purchased land, or received restitution land, or had a separate identity, became subsumed as structural minorities within larger communities defined according to controversial apartheid boundaries. Many such groupings had been locked in often violent disputes with traditional leaders during the Bantustan era and were outraged that a post-democracy land reform law resuscitated chiefly claims to power over their land.

3.2 The Traditional Courts Bill

Currently before parliament, and perhaps even more controversial than the CLRA is the Traditional Courts Bill. The Bill gives individual traditional leaders far-reaching power to determine the content of customary law.[32] Like the CLRA, the Bill provides no recognition of decision-making authority and dispute resolution at family, village or headman level, only recognising courts at the apex of the "tribe". The Bill vests statutory power in the presiding officer of a traditional court, who must be a recognised senior traditional leader or his delegate. No role, functions or support is provided for the council members who, in practice, play the pre-eminent role in existing customary courts. In this and other respects, the Bill follows the precedent set by the Black Administration Act 38 of 1927.

The Bill makes it an offence not to appear before a customary court once summoned by the presiding officer.[33] The courts' jurisdictional boundaries are those of the officially recognised traditional council which, as already described, are based on old tribal authority boundaries that are controversial in many areas.

The decisions of the court (which are decisions made by the senior traditional leader as presiding officer) have the legal status of rulings made by the magistrates' courts.

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31 Discussed extensively in *Land, Power and Custom: Controversies Generated by South Africa's Communal Land Rights Act*, see n 16.

32 See ss 5, 8, 9, 10, 11.

33 S20(c).

Traditional courts have the authority to order far-reaching sanctions including unpaid labour by *any person* within their jurisdictional boundaries.[34] The person need not even be a party to a dispute before the court.

Of perhaps even greater concern is clause 10(2)(i), which authorises the court to deprive a litigant of benefits that accrue in terms of customary law in civil matters. Effectively, the court is authorised to revoke a person's customary rights to land, and even strip a person of their community membership.

3.2.1 Implications for indigenous accountability mechanisms

The unilateral power of the presiding officer to deprive people of customary entitlements is inconsistent with living customary law. In most areas decisions concerning the deprivation of rights must first be debated at various levels, for example at clan and village level, and finally at a *pitso*, or general meeting of the entire community.

The layered nature of customary institutions is well documented,[35] as is the role of different levels of authority in mediating and balancing power. Leaders are forced to take into account the views and deliberations of other levels of authority which provide people with alternative forums in which to express their views. The power of different levels in the traditional hierarchy expands and contracts depending on the confidence people have in leaders at the different levels. Unpopular or dictatorial traditional leaders will find sub-groupings referring fewer and fewer issues to them, and instead dealing with issues internally at lower levels. Secession was historically a primary mechanism of accountability in customary systems.[36] However, once fixed jurisdictional boundaries are imposed by the state, and traditional leaders are given centralised statutory authority within those boundaries, the dynamics of indigenous accountability are fundamentally undermined.

3.2.2 The South African Law Commission's recommendations and "opting out"

The Traditional Courts Bill stands in stark contrast to the recommendations of the South African Law Commission concerning customary courts. Between 1999 and 2003, the Commission considered the issue of customary courts and how best to reform the law to support and enhance them. After extensive discussions, submissions and workshops in rural areas it submitted a report and a draft Bill to the Minister of Justice in 2003.

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34 S10(2)(g).

35 H Okoth- Ogendo, "Some Issues of Theory in the Study of Tenure Relations in African Agriculture" (1989) 59(1) Africa 6-17 and "The nature of Land Rights Under Indigenous Law in Africa" in A Claassens and B Cousins (eds), above n 16, 95-106; B Cousins, "Characterising 'communal' Tenure: Nested Systems and Flexible Boundaries" in A Claassens and B Cousins (eds), above n 16, 109-138; I Schapera, *A Handbook of Tswana Law and Custom* (2004) (International African Institute and James Currey); T Bennett, *Customary Law in South Africa* (2004).

36 I Schapera, *Government and Politics in Tribal Societies* (1956) 207. T Bennett *Human Rights and African Customary Law* (1995) 67: 'Whoever currently wielded power would invariably be challenged by rivals, who in their turn would gain power and consolidate their strength, but would eventually lose control to new competitors. These tensions explain why African ruler's power was never in the past absolute. Anyone who attempted tyrannical rule would soon face revolt or secession.' T Bennett cites M Hall, Hammond-Tooke, I Schapera, Ashton and M Hunter to substantiate his point.

By contrast, the Memorandum attached to the Traditional Courts Bill states that it was drafted in collaboration with the National House of Traditional Leaders. It appears that no attempt was made to consult ordinary rural people or to consult rural women as a specific interest group. This despite the fact that women constitute a clear majority of the population in homeland areas. This lack of consultation was one of the complaints raised during public hearings held on the Bill by the Portfolio Committee on Justice and Constitutional Development in May 2008.

Many submissions referred to the differences between the 2008 Bill and the Law Commission's recommendations and expressed concern that the Bill fails to acknowledge or reference the prior Law Commission process and recommendations.

A key difference pertains to the ability of people to "opt out" of traditional courts. The Law Commission recommended that people must be allowed to "opt out" of appearing before customary courts because of the "controversy surrounding the issue of the independence and impartiality of customary courts."[37] The Commission recommended this while noting "strong opposition" by traditional leaders who said that it would undermine their authority if people living within their areas were able to choose to appear in other courts instead.

The fact that the 2008 Bill (in conjunction with the Framework Act) entrenches the old tribal authority boundaries as the default boundaries for traditional courts worsens the underlying problem. Fixed territorial boundaries thereby replace consensual affiliation as the basis for determining the boundaries of the courts' jurisdiction. The Law Commission's 2003 draft Bill had entailed a more open-ended approach to boundaries. It provided that customary courts should operate at "such different levels as are recognised in customary law"

3.2.3 The Traditional Courts Bill and women

Women have been at the forefront of opposition to the Framework Act, the CLRA and the Traditional Courts Bill. Women's groups argued in parliament that the Traditional Courts Bill would reinforce patriarchal power relations and potentially reverse some of the positive changes women have managed to achieve over the last 15 years.[38] The Bill as a whole removes the incentive for traditional leaders to accommodate countervailing views in the interpretation and development of customary law.

Women's organisations have expressed concern that the new laws symbolise a shift in Government's previously unequivocal support for the principles of equality and equal citizenship rights in rural areas. This will have far-reaching implications for the balance of power within which women struggle for change at the local level. These concerns about the changing balance of power heralded by the new laws are borne out by reports of newly appointed women members of traditional councils not being informed of council meetings in some parts of KwaZulu-Natal, reports by women of traditional councils justifying the banning of community meetings in North West and Eastern Cape by reference to the new laws, and reports of traditional leaders extorting excessive tribal levies from women in Limpopo and other provinces.

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37 South African Law Commission Report on *Traditional Courts and the Judicial Function of Traditional Leaders* recommendation 12, 21 January 2003, xiv.

38 A. Claassens and S. Ngubane "Women, land and power: the impact of the Communal Land Rights Act" in A Claassens and B Cousins (eds) *Land Power and Custom* see n 16.

The two most frequently cited problems facing women in traditional courts are that generally the courts are composed of male councillors who are not sympathetic to women's issues, and that in many areas women are not allowed to speak or represent themselves, but have to rely instead on male relatives to state their case. This puts women at a serious disadvantage, particularly in cases arising from disputes with their male relatives, or where they have no adult male relatives available to represent them. Widows in particular, suffer the consequences because their mourning status renders them "unclean" and imposes additional restrictions on their ability to speak in public or approach courts that are held near cattle kraals. Thus they are reduced to being represented by their husbands' male relatives in the eviction disputes that arise after the death of their husbands.

Clause 9(3)(a) bars lawyers from traditional courts. Clause 9(3)(b) provides that a party may be represented by

> "his or her wife or husband, family member, neighbour or member of the community, *in accordance with customary law and custom*." (emphasis added).

Instead of providing explicitly that women should be allowed to represent themselves if they so choose, the Bill enables the continuation of the practice of male relatives representing women "in accordance with customary law and custom". This is justified on the basis that men, too, may be represented by their wives, providing a veneer of even-handedness to a measure that entrenches discrimination in practice.

3.2.4 Discussion

In a series of provincial community workshops about the Bill[39] many people raised the problem of bribery and bias in existing customary courts and their concerns that the new Bill would exacerbate the problem:

> They don't judge a person by understanding the nature of the case. They look at how much money you have. Are you coming from a very big house? Where do you work? If it happens, as in some cases, that you work in the Magistrate's office, you are likely to get a lighter sentence because they are scared that you may challenge them. So now, if you have a case against a person who is well known, then you lose the case just because you do not have influence.[40]

Many delegates also complained about high court fees and the fact that people who are not "up-to-date" with tribal levies will not have their matters heard.[41] This is consistent with the findings of Henrysson and Joireman in relation to customary dispute processes in Kisii, Kenya.[42] They found that contrary to their reputation for

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39 M Cele, "Report of Cedara Workshop with Rural Women's Movement"; T Charles, "Report of Meeting in Nelspruit with Trac Mpumalanga"; S Dolweni, "Report of the Meeting in Qunu Eastern Cape with TRALSO", in *The Traditional Courts Bill of 2008: Documents to Broaden Discussion to Rural Areas*, Cape Town: LRC and LRG (2009).

40 Speaker from Bushbuckridge in Charles, 2009: 182.

41 M Cele, above n 39, 163-164, 168; T Charles, above n 39, 181-183, 185.

42 E Henrysonn and S Joireman, "On the Edge of the Law: Women's Property Rights and Dispute Resolution in Kisii, Kenya" (2009) 43(1) *Law and Society Review* 39.

being inexpensive and accessible, customary processes also carry monetary costs that put them beyond the reach of many citizens.[43] Their results echo the view expressed in the South African workshops that in order to win a case, a complainant must be able to pay more than his/her opponent[44] putting such processes beyond the reach of many rural women.

The rhetoric of customary processes being intrinsically accessible needs to be more closely examined against actual practice. In South Africa this rhetoric is being used to justify vesting far-reaching powers in traditional leaders that will undermine the multiplicity of existing local dispute resolution processes in rural areas. The existence of these multiple forums contributes to accountability by providing people with choices of where to take disputes. Moreover once women are denied the right to stake their claim to particular customary entitlements in traditional courts, and to argue for these rights in different forums, their versions of the customary entitlements vesting in women will remain as hidden and marginalised as they were during apartheid. Failing to attend an officially recognised traditional court once summoned will become a criminal offence even for people who have strong historical grounds for disputing that leader's authority and jurisdiction. For example Makuleke people who refuse to carry out a sanction imposed by Chief Mhinga, will then be dealt with "according to customary law and custom" as determined by Mhinga, the presiding officer of the only officially recognised traditional court in their area.

The Bill together with the Framework Act puts emergent and vulnerable processes of claiming customary entitlements and challenging abuse of power at risk by reinforcing the power of traditional leaders to unilaterally define the content of custom within ethnically delineated tribal boundaries. Just as the new laws restrict which voices are allowed to participate in the definition of custom at the local level, so they are the outcome of a national legislative process that privileged the traditional leader lobby and failed to canvas the views of ordinary rural people.

4. Constitutional court judgments concerning customary law

This section discusses three Constitutional Court judgments about customary law. The nuanced judgments stand in stark contrast to the content and rhetoric of the recent legislation dealing with the powers of traditional leaders. The judgments illustrate three different outcomes in relation to the status of customary entitlements and customary law. The first, and arguably the most "defensive" outcome, is that of striking down previous reactionary versions of customary law as illustrated by the 2004 *Bhe* judgment concerning male primogeniture in the inheritance of property. The second outcome is that of enabling the development of customary law, in the 2008 *Shilubana* case, to allow for the appointment of a woman as traditional leader. The third, and arguably the most "expansive" outcome, entails the positive recognition of customary entitlements to land in the context of land restitution. The 2003 *Alexkor* judgment exemplifies this. The *Alexkor* judgment pre-dates the other two, illustrating that we are not here concerned with the sequential development of the Court's "living customary law" jurisprudence but instead with different kinds of impacts arising from it.

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43 E Henrysonn, ibid 39; T Charles 179, 182; M Cele above n 39, 164.

44 E Henrysonn, ibid 54, T Charles ibid 179.

4.1 The *Bhe* case[45] - striking down reactionary versions of customary law

The *Bhe* judgment deals with the discriminatory impact of s23 of the Black Administration Act of 1927 (BAA). The BAA provided[46] that intestate succession for African people must follow "black law and custom", in other words, male primogeniture. It established a separate regime from the Intestate Succession Act 81 of 1987 that applies to other South Africans.

The primary applicants were Nontupheko Bhe and her two young daughters. Bhe's partner had died leaving her and their two children in the home she and her partner were building together in Cape Town. Because her partner had no sons or brothers the local Magistrate (following the BAA) appointed his father as representative and sole heir of his estate. The father intended to sell the property to defray his son's funeral expenses. This would have left his grand-daughters and their mother homeless. Bhe therefore applied for, and obtained, an interdict from the High Court on the basis that s23 of the Black Administration Act and the rule of male primogeniture are inconsistent with the Constitution. The matter was referred to the Constitutional Court for ratification.

In the judgment, the Court started by affirming the Constitution's recognition of customary law and stressing its positive features. It singled out customary law's value in seeking consensus and its role in providing for "family and clan meetings which offer excellent opportunities for the prevention and resolution of disputes and disagreements."[47] It differentiated, however, between the "official" customary law which "has not been given the space to adapt and to keep pace with changing conditions and values"[48] and "living customary law":

> "[O]fficial customary law as it exists in the text books and in the Act is generally a poor reflection, if not a distortion of the true customary law. True customary law will be that which recognises and acknowledges the changes which continually take place."[49]

It motivated its finding that "official" customary law as contained in the Black Administration Act and in the "rule" of male primogeniture is in conflict with the Constitution by reference to the origins and nature of the wider schema of official and codified customary law within which they were embedded: "section 23 was enacted as part of a racist programme intent on entrenching division and subordination."[50] The court stressed the impact of the "formalisation and fossilisation of a system which, by its nature, should function in an active and dynamic manner."[51]

In response to the argument that a key purpose and function of male primogeniture

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45 *Bhe and Others v Magistrate Khayelitsha and Others* 2005 (10 SA 580 (CC), 2005 (1) BCLR 1.

46 Since repealed in 2005.

47 *Bhe* at [45].

48 At [82].

49 At [86].

50 At [72].

51 At [90].

was to enable the family head to fulfil his duty of supporting vulnerable family members such as children the Court stated:

> "Compliance with the duty to support is frequently more apparent than real. There may well be dependants of the deceased who would lay claim to the heir's duty to support them; they would however be people who, in the vast majority, are so poor that they are not in a position to ensure that their rights are protected and enforced. The heir's duty to support cannot, in the circumstances, constitute justification for the serious violation of rights."[52]

4.1.1 Remedy

The court decided that merely striking down the offending provisions of the BAA and leaving customary law to develop on an "ad hoc" or "piecemeal" basis did not provide sufficient protection given the large numbers of people whose lives are governed by customary law[53] and the vulnerability of women and children.[54] It referred to the lacuna created by delays in anticipated legislative reform and the need for a clear legal regime governing intestate inheritance in the interim.

The majority of the court decided that they were not in a position "to develop" the customary rule of male primogeniture to bring it in line with the Bill of Rights.

> "In order to do so, the Court would first have to determine the true content of customary law as it is today and to give effect to it in its order. There is however insufficient evidence and material to enable the Court to do this. The difficulty lies not so much in the acceptance of the notion of "living" customary law, as distinct from official customary law, but in determining its content and testing it, as the Court should, against the provisions of the Bill of Rights."[55]

Instead the court ordered that pending the introduction of new law the Intestate Succession Act would apply across the board, except where all interested parties had reached an alternative agreement, in a process monitored for fairness by court officials. The Intestate Succession Act provides for the estate to be divided between the spouse and children of the deceased, or other relatives where there is no spouse and children. It does not differentiate on the basis of the sex of children, spouses or siblings.

4.1.2 Dissenting judgment

Justice Ngcobo, who has since become the Chief Justice, wrote a long dissenting judgment. While he supported the striking down of s23 and the "rule" of male primogeniture, he argued that the remedy imposed was inappropriate. In his view, the preservation of the family unit and the duty to support family members is so central to customary law[56] that the court erred in imposing the Intestate Succession

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52 At [96].

53 At [107].

54 At [113].

55 At [109].

56 At [167], [168] and [229].

Act as the interim relief. He argued that, in dividing the estate equally among the heirs, the Act would result in the family home being sold from under the feet of minor children who would be left homeless.[57] Instead, he argued, the court should have developed the customary law to deal with the problem of ossified rules and gender discrimination. His solution was that male primogeniture be replaced by primogeniture so that the eldest child, male or female, would inherit the duty to maintain the family home and support minor children and vulnerable family members. His caveat was that the family should be afforded the choice of whether indigenous law should apply and disputes within the family concerning this choice referred to the Magistrate's Court.[58]

Notwithstanding the lack of evidence of living customary law to guide the court in developing customary law he argued that it was the court's duty to develop, rather than strike down indigenous customary law.[59] He argued that in this case

> "...we are concerned with the development of the rule of male primogeniture so as to bring it in line with the right to equality. We are not concerned with the law actually lived by the people. The problem of identifying living indigenous law therefore does not arise."

4.2 The *Shilubana* case[60] – developing customary law

The *Shilubana* story typifies the kinds of local initiatives underway in rural areas to bring custom in line with the Constitution, and the challenges they face from codified customary law. The Constitutional Court's judgment in the *Shilubana* matter focuses on the question of who has the authority to develop customary law and the dilemmas facing courts of law in adjudicating the content of changing customary law.

The case hinged on a resolution made by the Valoyi royal family in 1996, with the participation of the then chief, Richard Nwamitwa, that the chieftainship should be conferred on Tinyiko Shilubana, the daughter of the previous chief, Fofoza. As Fofoza had only daughters when he died in 1968, the chieftainship passed to his younger brother Richard. Notwithstanding the 1996 resolution, Tinyiko Shilubana decided not to take up her responsibilities as *hosi* (chief) during her uncle's lifetime.

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

The resolution noted:

> "T]hough in the past it was not permissible by the Valoyis that a female child be heir, in terms of democracy and the new Republic of South African Constitution

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57 At [231].

58 At [241].

59 At [211 – 219].

60 *Shilubana and Others v Nwamitwa (*2009) (2) SA 66 (CC).

it is now permissible that a female child be heir since she is also equal to a male child." [61]

The Premier of Limpopo duly appointed Tinyiko as *hosi* of the Valoyi community. However her cousin, Sidwell Nwamitwa, who is the son of Richard, challenged her appointment as contrary to customary law. The case was first heard in the Pretoria High Court, which found in Sidwell's favour on the basis that the role of the Royal Family is limited to recognising and confirming the *hosi* who qualifies to succeed according to the rules of customary law. The court found that the "election" of a *hosi* was beyond the mandate of the Royal Family.[62] The community's decision, the court stated, "was probably a bout of constitutional fervour."[63]

The High Court decision was subsequently upheld in the Supreme Court of Appeal on the basis that Sidwell, as the eldest child of his father, was entitled to succeed his father "according to Valoyi customary law" .[64] "Ms Shilubana was not ineligible to be *Hosi* on account of her gender; she was ineligible because of her lineage[65]. There was therefore no constitutional problem with Valoyi customary law…."[66]

Tinyiko Shilubana successfully appealed to the Constitutional Court which cautioned that courts should be circumspect in striking down the efforts of communities to develop customary law in line with the Constitution. It found that the Valoyi royal family had the authority to develop its own customary law of succession:

> "As has been repeatedly emphasised by this and other courts, customary law is by its nature a constantly evolving system. Under pre-democratic colonial and apartheid regimes, this development was frustrated and customary law stagnated. This stagnation should not continue, and the free development by communities of their own laws to meet the needs of a rapidly changing society must be respected and facilitated."[67]

The Court summarised the appropriate approach to living customary law as follows.

> "[A] court must consider both the traditions and the present practice of the community. If development happens within the community, the court must strive to recognise and give effect to that development, to the extent consistent with adequately upholding the protection of rights. In addition, the imperative of section 39(2)[68] must be acted on when necessary, and deference should be paid to the development by a customary community of its own laws and

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61 Quoted in *Shilubana*, above n 61 at [4].

62 *Shilubana* ibid at [22].

63 Ibid.

64 At [7].

65 Because her lineage was that of her father Fofoza, not her uncle Richard, and the chiefly lineage had switched to Richard's family when he succeeded his brother as chief.

66 At [23].

67 At [45].

68 Section 39(2) provides: When interpreting any legislation and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

customs where this is possible, consistent with the continuing effective operation of the law."

The court stressed that:

> "[C]ustomary law is an independent and an original source of law. Like the common law it is adaptive by its very nature. By definition, then, while change annihilates custom as a source of law, change is intrinsic to and can be invigorating of customary law."[69]

On this basis the court found that while past practice is an important factor to consider among others in examining the content of customary law, it cannot be decisive in and of itself.[70] The Court found that if, as Sidwell Nwamitwa maintained, the royal family and traditional authority had no power to make the resolution and appoint Tinyiko Shilubana as *hosi*, then "no body in the customary community would have the power to make constitutionally-driven changes in traditional leadership."[71] It upheld the traditional authorities' power as the "high water mark of any power within the traditional community on matters of succession"[72] and confirmed Ms Shilubana's appointment as *hosi* of the Valoyi community.

4.3. The Alexkor case[73] – recognizing indigenous ownership

The *Alexkor* case concerns the claim of the Richtersveld community to restitution of their land and minerals in terms of the Restitution of Land Rights Act 22 of 1994. The Restitution Act is mandated by s25(7) of the Constitution which creates a right to restitution for people who were dispossessed by racially discriminatory laws or practices after 1913.

The Richtersveld community is a poor rural community living in the isolated and arid north-western reaches of South Africa adjoining Namibia. The community is descended from the original Nama and Khoi inhabitants of the area. During apartheid they were not ethnically classified as belonging to one of the "Bantu" homelands, thus their history is different from that of the story of classic forced removal told above. Instead, after the discovery of diamonds on their land in 1926, the government used the Precious Stones Act 44 of 1927 to exclude the Richtersveld community from large diamond-rich portions of their land and ultimately to register the land as the property of Alexkor, a state-owned diamond mine.

Section 2(1)(d) of the Restitution Act provides that a person shall be entitled to restitution of a right in land if –

> "(d) it is a community or part of a community dispossessed of a right in land after 19 June 1913 as a result of past racially discriminatory laws or practices."

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69 At [54].

70 At [54-57].

71 At [72].

72 Ibid.

73 *Alexkor Ltd and Another v Richtersveld Community and Others* (2003) (12) BCLR 1301 (CC).

The restitution claim therefore revolved around two key questions: the nature of the community's original rights to the land, and whether the dispossession was the result of racially discriminatory laws or practices. The Act defines a "right in land" as

> "any right in land whether registered or unregistered, and may include the interest of a labour tenant and sharecropper, a customary law interest, the interest of a beneficiary under a trust arrangement and beneficial occupation for a continuous period of not less than 10 years prior to the dispossession in question."

The first court to hear the case, the Land Claims Court, held that the Richtersveld community qualified on the basis of beneficial occupation but concluded that the Precious Stones Act and the steps the government had taken in relation to diamond mining were racially neutral. It therefore dismissed the claim on the grounds that the community had failed to prove that its dispossession was the result of discriminatory laws or practices.

The Supreme Court of Appeal (SCA) disagreed and upheld the restitution claim. It found that when diamonds were discovered the state ignored the rights of the Richtersveld community and that the manner in which the Richtersveld Community was dispossessed of the subject land amounted to racially discriminatory practices as defined in the Act.[74] It also found the Richtersveld community to have been in exclusive possession of the whole of the Richtersveld prior to and after its annexation by the British Crown in 1847. It therefore held that its rights to the land (including minerals and precious stones) were akin to those held under common law ownership and thus constituted a "customary law interest".

The court ordered not only the restitution of the land, but also the restitution of the precious stones that had been extracted from it. Alexkor appealed the judgment to the Constitutional Court reiterating its arguments that whatever rights the community had originally had to the land did not include ownership of the minerals and precious stones.[75] Moreover, Alexkor argued, the land rights of the community were extinguished in 1847 with the annexation by Britain. This meant that the Act did not apply because they were dispossessed before the cut-off date of 1913.

The Constitutional Court upheld the SCA judgment but went further to find that the "right in land" of the Richtersveld community was not limited to "a customary law interest akin to ownership", but constituted indigenous ownership *per se*.

> "The nature and the content of the rights that the Richtersveld Community held in the subject land prior to annexation must be determined by reference to indigenous law. That is the law which governed its land rights. Those rights cannot be determined by reference to common law.[76] ….
>
> While in the past indigenous law was seen through the common law lens, it must now be seen as an integral part of our law. Like all law it depends for its ultimate force and validity on the Constitution. Its validity

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74 As summarised at para 9 of the Constitutional Court judgment.

75 *Alexkor* at [63].

76 At [50].

> must now be determined by reference not to common law, but to the Constitution.[77]…
>
> Such law must be established by adducing evidence. It is important to note that indigenous law is not a fixed body of formally classified and easily ascertainable rules. By its very nature it evolves as the people who live by its norms change their pattern of life".[78]

Following the Privy Council in *Amodu Tijani v The Secretary, Southern Nigeria*[79] the court held that the determination of the real character of indigenous title to land "involves the study of the history of a particular community and its usages."[80] It found that the evidence showed

> "exclusive occupation and use of the subject land by members of the Community. The Community had the right to use its water, to use its land for grazing and hunting and to exploit its natural resources above and below the surface. It follows therefore that prior to annexation the Richtersveld Community had a right of ownership in the subject land under indigenous law".[81]

The judgment refers to undisputed evidence of a history of prospecting in minerals by the community "that is consistent only with ownership of the minerals being vested in the Community."[82]

The Court found that the community's indigenous ownership of the land and minerals survived annexation and remained intact beyond the 1913 cut-off date. In relation to dispossession the court held that the concept must be interpreted broadly given the wide definition of "rights in land" in the Restitution Act. "Whether there is dispossession in this case must be determined by adopting a substantive approach, having due regard to the provisions of the Precious Stones Act and the conduct of the government in giving effect to them."[83]

It found that while the Precious Stones Act did not form part of the "panoply of legislation giving effect to 'spacial apartheid', its inevitable impact was to deprive the Richtersveld Community of its indigenous law rights in land, while recognising, to a significant extent, the rights of registered owners."[84] On this basis the court found the dispossession to have been racially discriminatory thus falling squarely within the scope of the Act.

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77 At [51].

78 At [52].

79 2 AC [1921] 399 (PC).

80 *Alexkor* at [57].

81 At [62].

82 At [60].

83 At [88].

84 At [99].

5. Living customary law – real-world context

In judgments such as these the Constitutional Court has provided important parameters regarding the integration of customary law into the rest of South African law. The first is that customary law forms an integral part of South African law, deriving its validity from the Constitution, and must be applied in accordance with the "spirit, purport and objects of the bill of rights."[85] Secondly, customary law must be interpreted to be "living customary law" and not the codified version built on colonial and apartheid precedents.

The living law paradigm is important in enabling us to move beyond the discourse of false dichotomies between rights and custom towards an examination of changing practice. More than that, it enables recognition of otherwise vulnerable processes of transformative change at the local level which seek to reconcile constitutional and customary values. Mamdani[86] has argued that prior to colonialism, there were multiple sources of custom including clans, women's groups and age groups. Both colonialism and apartheid privileged chiefly versions of custom and silenced all contrary versions, thereby sanctioning an authoritarian version of custom as law.

In challenging the veracity of state-sanctioned versions of codified custom, the living law approach contains some inherently democratic possibilities. Notwithstanding the multiple problems at the interface between customary law's processual nature and the rule-bound character of positivist state-law, it is an important safeguard against the triumph of the distorted versions of autocratic "custom" that are reinforced by recent South African laws enacted under the banner of preserving custom.

That said, it is important to avoid reducing the emerging living law jurisprudence to the product of a "stand-off" between reactionary "official" versus progressive "living" customary law. This would obscure the ways in which the Constitutional Court's wider approach to transformation and its focus on "real-world" context have shaped and are intrinsic to the living law jurisprudence.

The South African Constitution is unusual in that it focuses explicitly on the need for change. It sets out to deal with the legacy of the past and to address inequality. It is different from constitutions that "reflect the outcome of a change which has already taken place" in that its focus is on "the change which is yet to come."[87] In making this point, Budlender quotes a judgment by Chief Justice Langa:[88]

> "The Constitution is located in a history which involves a transition from a society based on division, injustice and exclusion from the democratic process to one which respects the dignity of all citizens, and includes all in the process of governance. As such, the process of interpreting the Constitution must

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85 *Alexkor* at [51].

86 M Mamdani, "Introduction", in M Mamdani (ed) *Beyond Rights Talk and Culture Talk: Comparative Essays on the Politics of Rights and Culture* (2000) 1-13, 5.

87 G Budlender, "Transforming the Judiciary: The Politics of the Judiciary in a Democratic South Africa" (2005) 122(4) *South African Law Journal* 715-724, 715.

88 *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd; in re Hyundai Motor Distributors (Pty) Ltd and others v Smit NO and others* (2001) (1) SA 545 (CC) at para [21].

> recognise the context in which we find ourselves and the Constitution's goal of a society based on democratic values, social justice and fundamental human rights. This spirit of transition and transformation characterises the constitutional enterprise as a whole."

The importance of a contextual approach to the realisation of rights, which foregrounds the real-life impact of poverty and inequality in people's lives, is stressed in various Constitutional Court judgments including *Zondi,*[89] *Dawood,*[90] *Mohlomi,*[91] *and Minister of Home Affairs v Fourie.*[92]

In *Minister of Home Affairs v Fourie* the court stated:

> "Ignoring the context, once convenient, is no longer permissible in our current constitutional democracy, which deals with real lives as lived by real people today."[93]

This contextual approach is pivotal to the Court's reasoning in *Alexkor* that the impact of the Precious Stones Act was indeed discriminatory, notwithstanding its racially neutral language, given the context of registered title for white people and unrecognized indigenous ownership by black people.

It is also central to the Court's findings in *Bhe*. In examining the Black Administration Act provisions the Court stated that "section 23 cannot escape the context in which it was conceived"[94] and referred to the Act as a "cornerstone of racial oppression, division and conflict….that caused untold suffering to millions of South Africans."[95]

In motivating the need to impose an interim remedy pending new legislation the court reasoned that the potential alternative remedy of making a will is available only to "those with sufficient resources, knowledge and education or opportunity to make an informed choice."[96] It highlighted the unrealistic nature of requiring "people who, in the vast majority, are so poor that they are not in a position to ensure that their rights are protected and enforced" to engage in litigation to enforce the heir's duty of support.[97]

The emerging "living customary law" jurisprudence is, in many ways, a product of the court's real-world contextual approach. Codified versions of "official customary law" are exposed as distortions when viewed in their wider historical context, and current practice emerges as a key criterion in the context of the court's affirmation of the flexible and evolving nature of custom in real life.

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89 *Zondi v MEC for Traditional and Local Government Affairs and Others* (2005) (3) SA 589 (CC).

90 *Dawood and Another v Minister of Home Affairs and Others; Shalabi v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Other*s (2000) (3) SA 936 (CC).

91 *Mohlomi v Minister of Defence* (1997) (1) SA 124 (CC).

92 *Minister of Home Affairs v Fourie; Lesbian and Gay Equality Project and Others v Minister of Home Affairs* (2006) (1) SA 524 (CC).

93 *Fourie* at [151].

94 Bhe at [61].

95 At [61].

96 At [66].

97 At [96].

The facts of the cases illustrate the multiple intersections between "customary law" and the other realities of South African life. In this sense the events at issue, together with the court's real-life approach illuminate the mythical nature of the idea of separate and insulated customary and "other" legal arenas. What emerges instead is the dynamic mutually constitutive nature of custom and rights in contra-distinction to timeless and essentialised notions of "traditional custom".

All three of the cases discussed above are about two-way interactions between custom and other contextual realities. The *Shilubana* case concerns the efforts of a range of people in the Valoyi community to reconcile their succession practices with the value of equality, and to defend their appointment of a woman chief from being reversed in the name of customary law.

The positive recognition of customary ownership established in the *Alexkor* case emerges in tandem with the Restitution of Land Rights Act, a law primarily about undoing the wrongs of the past. The existence of the Restitution Act meant that:

> "Whether or not [the dispossession] was unlawful under the laws then prevailing is irrelevant; the question whether the Community after all these years could claim back the land under the common law is similarly irrelevant. The Community does not have to rely on the common law. It has rights under the Act and is asserting those rights".[98]

The *Bhe* case too, concerns the interplay between customary law and the rest of South African law, in particular the Constitution and the Intestate Succession Act. Interesting issues arise in the minority judgment by Judge Ngcobo. Judge Ngcobo argues that the Constitution guarantees the survival of customary law, and on this basis it is the court's duty, where possible, to "develop rather than strike down a rule of customary law."[99] Notwithstanding the lack of evidence about the content of living law and changing practice in relation to succession, he would have liked to develop the customary law by replacing male primogeniture with primogeniture. The oldest child, son or daughter would succeed as head of the family, inheriting both the property and the duty to support dependant family members. However this "development" of customary law retains many of the same dangers as male primogeniture if the eldest child appropriates the inheritance, and vulnerable family members are not in a position to enforce the duty of support against him or her.

Interestingly there are indications of an emerging alternative trend in Southern Africa - the selection of the family member who has, in practice, already shown most responsibility for aged parents and vulnerable children rather than selection by order of birth.[100] Ironically the development of the "rule" of customary succession proposed

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98 Alexkor at [100].

99 *Bhe* at [215].

100 L Mbatha, 'Reforming the customary Law of Succession' (2002) 18 *South African Journal of Human Rights* 259, 268-269; A Claassens and S Ngubane, n 38,158; and see W Bikaako and J Ssenkumba, 'Gender, Land and Rights: Contemporary Contestations in Law, Policy and practice in Uganda' in L Wanyeki (ed), *Women and Land in Africa* (2003) 249-251 for similar changes in rural Uganda; and J Stewart, "Why I can't Teach Customary Law", in J Eekelaar

by Justice Ngcobo would undermine the emergence of such context-sensitive local alternatives in much the same way that male primogeniture codified by the Black Administration Act has done.

Justice Ngcobo motivated the need for the court to develop the customary law rule in the context of the danger of the Intestate Succession Act leading to the loss of the family home if the property is divided equally among the heirs, and one or more heirs then choose to sell their share. There are, however, a range of real-life factors that militate against that outcome for the vast majority of families whose lives are regulated by customary values, especially in the rural context.

For most people living in the former homelands there is simply no formal legal mechanism for selling the family home. It is built on "communal land" which cannot legally be bought and sold. Thus, in practice the key issues that arise in inheritance disputes in rural areas pertain to occupation and eviction, not land sales. Widows are notoriously vulnerable to eviction when their husbands die, as are sisters at the hands of their brothers when their parents die.[101] According to the director of a legal clinic in the rural Eastern Cape[102] the *Bhe* judgment has not resulted in the breaking up of the family home. Instead it has protected women from eviction by male relatives by changing the balance of power within the family meetings that are held to discuss the way forward when the head of the family dies. Because wives, daughters and sisters are recognised as having a share in the property their views must be taken into account by the family representative appointed to wind up the estate.

"Prior to Bhe the appointed representative could do more or less as he pleased, but since Bhe the family representative has had to sit down and negotiate with all the heirs."[103] In the context of the land tenure history and embedded practices of family ownership in many rural areas the Intestate Succession Act does not serve to divide the family home but to protect it. It shifts the locus of decision making to the family as a whole and away from a particular individual who may have moved away and have different interests from the rest of the family.

This illustrates the importance of paying attention to the nitty-gritty issues that arise at the intersections between custom, law and practice – including broader legal and social realities. The recognition of customary entitlements at these interfaces is crucial in protecting them from other laws that fail to "see" and acknowledge them. However attempts to elevate "customary law" out of these intersections and insulate it as separate and self-referential are likely to have unintended and even dangerous consequences because, this too, denies wider contextual realities.

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and T Nhlapo (eds), *The Changing Family: Family Forms and Family law* (1998) 222-225 for Zimbabwe.

101 A Claassens and S Ngubane, above n 38, 156-60.

102 P Pringle, Director of Rhodes University Law Clinic, Queenstown, South Africa. Telephone interview with author on 15 April 2010.

103 Quoting Pringle ibid.

Conclusion

Making the case that the recognition of customary entitlements is important in legal strategies that seek to empower the poor is very different from endorsing the argument for an insulated customary law arena set apart from the rest of law and society. That argument reinforces the false binaries that bedevil the discourse of the customary – the binaries between modern and traditional, urban and rural, rights and custom, citizen and subject. It is a discourse dominated by boundaries and divisions – illuminating the centrality of the physical boundaries inherited from South Africa's colonial and apartheid past in the new traditional leadership laws. These are the same boundaries that set the "homelands" apart from the rest of South Africa and divided South Africans according to ethnic tribal affiliation.

The manifest danger of approaches that seek to set apart and protect a separate customary law arena is that they lead back to second-class citizenship for South Africans living in the former homelands. It would be a different matter if people had a choice between customary and other law, and between "traditional" and other courts. However the new laws do not envisage customary identity being established by voluntary affiliation. Instead they ascribe it by geography. Oomen refers to a "patchwork democracy" that enables chiefs to decide the extent to which the new Constitution is implemented within their jurisdictions, and means that an individual's rights continue to be determined primarily by place of residence. [104]

I argue for an approach that moves away from boundaries and instead focuses on the interface between custom and the rest of law, in particular on the status and protection of indigenous entitlements relative to countervailing common and statute law precedents and provisions. Moreover, instead of attempting to abstract customary law from the wider context in which it operates it should be recognised as firmly embedded within the real-world context of unequal power relations and changing social realities, as all law is. I suggest that the Constitutional Court's wider commitment to a contextual approach that situates the realisation of rights within fluid social realities has been an important contributing factor to its interpretation of custom as "living law"

It is a contradiction in terms to envisage living customary law as a self-referential system of "law" that operates in isolation from the multiple value systems within which even the most isolated rural people construct their lives. The claims that people make in customary fora combine customary entitlements with values such as equality that were asserted during the anti-apartheid struggle and are now entrenched in the Constitution. Approaches that seek to insulate customary law from other values and legal rights so that it can "develop uncontaminated" at the local level fail to recognise the processes of integration, assimilation and change that are underway in rural areas. Moreover they potentially undermine these processes of change in which the Constitution and the Bill of Rights are critical resources for those who oppose patriarchal and autocratic versions of living customary law.

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104 B Oomen, above n 25, 86.

Central to change is the ability of ordinary people to articulate and stake their claims, and the existence of different forums in which to do so. Oomen's study of chiefs in Sekhukhuneland notes that:

> "It is clear that real change has to be forged locally, labouriously negotiated within local power relations. Here returning the "power of definition" to the people means empowering those marginal voices involved in the negotiation of local rule with additional resources".[105]

With the new traditional leadership legislation the South African government has chosen to do the opposite. Ordinary rural residents were not consulted during the drafting process, nor do they benefit from the content of the laws. Traditional leaders are the prime architects of the new legislation and its main beneficiaries.

The drafters chose to side-step the complicated issue of how to acknowledge, support and regulate the interlocking authority structures and customary dispute resolutions forums that exist in reality. Instead, once again those living in the former homelands are defined as tribal subjects, as opposed to citizens of a united South Africa. Once again, customary law, as defined by senior traditional leaders in their capacity as presiding officers of traditional courts, serves to insulate tribal subjects from the laws and rights applicable to other South Africans. This outcome stands in stark contrast to judgments of the Constitutional Court that seek to bring poor people into focus as active citizens of South Africa and make them stakeholders in democratic governance.

The post-apartheid South African experience with customary law illustrates the dangers for poor people of approaches that stress the benefits of customary law and institutions without paying attention to how they work in practice and the power relations they reinforce. Uncritical support for "the customary" lends itself to elite-capture and often unwittingly supports traditional elites in excluding marginal voices from the definition of custom.

On the other hand the South African experience has been one of vibrant processes of change and integration of custom and rights at the local level and important judgments have upheld customary entitlements that were previously invisible in South African law. The key lesson that emerges is that interventions that seek to empower the poor need to pay close attention to processes of privileging and excluding particular voices in legislative processes at the national level, and in disputes over the content of custom at the local level, and to find ways to support access by the marginal to both national and local forums. In addition the focus of attention needs to be on the articulation between customary and other law, in the context of wider societal values and processes, rather than on the protection of customary law from other influences.

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105 Ibid 251.