

**WOMEN AND LAND: ACCESS TO AND USE OF LAND AND NATURAL
RESOURCES IN THE COMMUNAL AREAS OF RURAL SOUTH AFRICA**

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**A mini-thesis submitted in partial fulfilment of the requirements of
the degree of Master of Arts in Development Studies
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KEY WORDS

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ABSTRACT

WOMEN AND LAND: ACCESS TO AND USE OF LAND AND NATURAL RESOURCES IN THE COMMUNAL AREAS OF RURAL SOUTH AFRICA

The typical face of poverty in South Africa is African, rural, and female. As the primary users of rural land, women engage in farming and subsistence activities. Despite this pivotal role played by rural women, they experience grave problems under communal tenure, most notably in relation to access to and use of land and productive resources. Research has shown that the majority of rural households in South Africa derive significant proportions of their livelihoods from land-based activities, and that the value of common property resources associated with land, for example livestock production, crop production, and natural resource harvesting is often overlooked as an important asset of poor rural communities. The importance of these land-based livelihoods sources is even greater for female-headed households, female members of rural households, and the very poor or 'marginalised' members of rural communities, since they tend to be more reliant on land-based livelihoods than those with secure income from pensions, wage-earning activity or remittances from migrant labourers. The importance of security of land tenure to the sustainability of rural livelihoods, particularly insofar as rural women are concerned, is the central focus of this study.

Under customary law, land is generally allocated to men. Most rural women therefore do not have access to land rights of their own; they often lose their homes and fields on divorce, desertion, or widowhood. Despite the government's recognition that past policies have led to unequal gender relations, particularly within the rural sector, its land reform programme prioritises 'race' as the main vector of inequality. Poor, rural women are not being targeted as a specific category of beneficiaries. In an attempt to address the urgent need for tenure reform in South Africa's former bantustans, the government passed the *Communal Land Rights Act (CLRA) of 2004*, which proposes the transfer of title deeds from the state to rural communities. Many community and civil society support groups had raised strenuous objections to this Act being signed into law, particularly since it

seemed to entrench rather than remove discrimination against women in communal areas, as it affords unprecedented powers to traditional authorities, who are likely to reinforce the patriarchal power relations that contribute to the problems rural women face in trying to access land and natural resources. The implementation of this Act has been postponed by the government, primarily due to the strong opposition from rural communities and lobby groups critical of this Act¹, and also because of lack of capacity and resources on the part of the state. Notwithstanding the forceful arguments against the recognition of undemocratic traditional leadership structures within a democratic dispensation, there is acknowledgement that traditional structures remain central to the lives of many rural communities and that there is a role for them at local government level, within the context of 'living' customary law.



¹ In 2006 four rural communities mounted a legal challenge against the unconstitutionality of the CLRA, arguing that their right to tenure security, as guaranteed by the Constitution, would be undermined. In October 2009 the High Court declared key provisions of the CLRA unconstitutional, thereby rendering it impossible to implement in its current form (Cousins, 2009a). The case has been referred to the Constitutional Court. See also: RSA, 2009 - North Gauteng High Court Judgement in this case.

DECLARATION

I declare that "Women and land: Access to and use of land and natural resources in the communal areas of rural South Africa" is my own work, that it has not been submitted for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged by complete reference.

FULL NAME: Ursula Florence Arends

Date: 15 November 2009



Signed:



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LIST OF ABBREVIATIONS

ALARM	Alliance of Land and Agrarian Reform Movement
ANC	African National Congress
ASGISA	Accelerated and Shared Growth Initiative for South Africa
CGE	Commission on Gender Equality
CLRA	Communal Land Rights Act
CLRB	Communal Land Rights Bill
CONTRALESA	Congress of Traditional Leaders of South Africa
CPA	Communal Property Association
CPR	Common Pool Resource
DLA	Department of Land Affairs
DoA	Department of Agriculture
FAO	Food and Agricultural Organisation
GEAR	Growth, Employment and Redistribution
HSRC	Human Sciences Research Council
ICRW	International Centre for Research on Women
IFAD	International Fund for Agricultural Development
IFP	Inkatha Freedom Party
IIED	International Institute for Environment and Development
ISRDS	Integrated Sustainable Rural Development Strategy
LAC	Land Administration Committee
LRB	Land Rights Bill
LRC	Legal Resources Centre
NAFU SA	National African Farmers' Union of South Africa
NGOs	Non-governmental organisations
NTFPs	Non-timber forest products
PLAAS	Institute for Poverty, Land and Agrarian Studies
PTOs	Permission to Occupy certificates
RDP	Reconstruction and Development Programme
RWM	Rural Women's Movement
TLGFA	Traditional Leadership and Governance Framework Act
TRAC	The Rural Action Committee
WLC	Women's Legal Centre
WLSA	Women and Law in Southern Africa

CHAPTER 1

INTRODUCTION

Women are generally disadvantaged, compared with men of the same race and class, in access to land, employment, labour and training ... In addition to disadvantages to access to these resources, women are also disadvantaged in the control they are able to exercise over them. And, compared with men, women have less authority and less involvement in decision-making in the home, the community and the nation (Meer, 1997:1).

The women of these villages are beginning to recognise their strength and their right to make demands. They are already rejecting the complete control that men have over their lives – be this through the chief or through their husbands. In some villages, such as Tsimanyane, the changes are already being felt. However, many more changes are needed. (Small, 1997:51).

1.1 Background and rationale

The areas in South Africa referred to as 'communal areas' constitute 13% of South Africa and fall under 'customary' or communal land tenure. These were the patchwork of areas that had been set aside as 'native reserves' under colonialism, and later transformed into ten ethnic 'homelands' or 'bantustans' by the apartheid regime to serve as reservoirs for cheap migratory labour, servicing the mines and plantations (Walker et al, 2008; Kepe, 2002; McAllister, 2000). The Group Areas Act (1956) provided the justification for removing 'black spots' from designated white areas, forcibly removing black people and dumping them in the over-crowded 'native reserves' (Adams et al, 1999; Ellis, 2000). The migrant labour system translated into the absence of men; women therefore constituted the overwhelming majority of the homeland population. Although they became *de facto* household heads, most women had no direct access to cash income and relied on migrant remittances for the survival of their families. Remittances were often irregular, sometimes non-existent. This reality, together with the depletion of the labour force during crucial farming periods (e.g. ploughing and harvesting), intensified the impoverished state that most rural women found themselves in (Meer, 1994; Mokgope, 2000; Cross and Hornby, 2002).

In post-apartheid South Africa, the densely populated communal areas – in 1994 about half of this country's African population lived in the bantustans (Bernstein, 1997:3); there are presently more than 21 million inhabitants (Claassens and Cousins, 2008:xii) – continue to be characterised by extreme conditions of poverty, unemployment, unequal and distorted access to markets, assets, services, and opportunities. The differential rights of women to many assets, most importantly land, exacerbate these conditions for rural women (May, 2000; Shackleton, S. et al, 2002).

In the communal areas women are the primary occupiers and users of rural land – they engage in farming and subsistence activities, producing food for their families and agricultural products for the markets. Despite this pivotal role played by rural women, they experience grave problems under communal tenure. Under customary law, land is generally allocated to men. Although rural women have access to land, most do not have independent land rights. Rural women often lose their homes and fields on divorce, desertion, or widowhood. In the event of a husband dying intestate, the land (and thereby the family home) passes to male relatives; the widow and daughters generally have no claims to inheritance; rarely do they have recourse to the law (Budlender, 2003; Commission on Gender Equality (CGE), 2003; Claassens, 2005; Cousins, 2005; Fair Share, 2002; Mutangadura, 2005; Whitehead and Tsikata, 2003; Women's Legal Centre (WLC), 2003).

The South African government has a constitutional obligation to design and implement a land reform programme to redress the imbalances of the past. The state initiated a wide-ranging land reform programme that consists of three components, namely a) restitution – the restoration of land lost through dispossession and the payment of compensation where appropriate; b) redistribution – the redistribution of land to achieve greater equity, promote development and reduce poverty; and c) tenure reform – the securing of land rights of people who were previously disadvantaged. Tenure reform has bearing on people living on white-owned commercial farms e.g. black farm workers and labour tenants, as well as the approximately four million households currently living on communal land in the former homelands (Walker et al, 2008; Department of Land Affairs (DLA), 1997).

Regarding tenure security, Sections 25(6) and 25(9) of the South African Constitution (1996) clearly state that:

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

And:

Parliament must enact the legislation referred to in subsection (6). (RSA, 1996).

The majority of households in South Africa's former bantustans endure conditions of poverty and derive the bulk of their livelihoods from land-based activities. Hardest hit are female-headed households, female members of rural households, and the very poor or marginalised members of these rural communities, since they tend to be more reliant on land-based livelihoods than those with more secure income from wage-earning activities or remittances from migrant labourers, or pensions (May, 2000; Shackleton et al, 2000; Cousins, 1999a; Scoones, 1998; Kepe, 1997). These communities manifest the need for greater tenure security, which could contribute in large measure to the reduction of poverty in South Africa's communal areas.

The central focus of this study is the importance of security of land tenure of rural women living under customary law in the former homelands. The study assesses the range of social, economic and political problems experienced by women in the communal areas of rural South Africa with regard to access to, use of and control over land and productive resources. It examines the impact of these problems on their livelihoods and security of land tenure. The study also analyses issues of governance in South Africa's communal areas, and assesses the impact of current legislation, in particular the Traditional Leaders' Governance Framework Act (TLGFA) of 2003, and the Communal Land Rights Act (CLRA) of 2004, on rural women's security of land tenure.

1.2 Research questions and objectives

This study poses the broad question, "What are the problems that women in communal areas in rural South Africa experience in relation to

access to, use of and control over land and natural resources, with particular emphasis on the security of their rights to land?” The following related questions are also considered:

- Why do the former homelands continue to be ravaged by the deeply entrenched, shocking levels of poverty?
- How valid are the pro-poor policies and poverty-alleviation programmes of the African National Congress (ANC) government?
- Is the state doing enough to end the social and economic exclusion of the poorest and most marginalised members of rural society?
- Is ‘agency’ sufficient to counter the discriminatory and oppressive ‘traditional’ and ‘customary’ practices that rural women encounter?
- How viable is agriculture as a productive sector in this country’s rural economy, and are poor rural dwellers participating adequately in agricultural activities that enhance food security, ensure sustainable livelihoods, and alter patterns of accumulation?
- What are the key principles that should guide the implementation of appropriate, gender-sensitive policies and legislation governing South Africa’s rural sector?

These questions are based on the deepening and persistent poverty, gendered inequality and insecurity of land tenure experienced by the poorest and most marginal rural communities in this country. The questions have also been prompted by the disjuncture between the ANC-led government’s high-level policy commitments to gender equality and poverty alleviation, and their effective implementation (Walker, 2003).

The study recognises that over the past fifteen years, since the transition to democracy in 1994, a lot has changed in the lived reality of poor rural communities: new patterns of urbanisation and industrialisation are affecting the roles of agriculture in wider social, economic and political processes; new agricultural technologies, e.g. genetically-modified (GM) crops, are presenting both opportunities and risks; new shocks and challenges, e.g. climate change and HIV/AIDS, are impacting greatly on farming livelihoods; agri-food systems are becoming increasingly globalised with new economic relations and connections being forged; and new

governance arrangements are impacting directly (and often negatively) on those living on the margins (Scoones and Thompson, 2009:4).

This study also acknowledges that within the fifteen years of democracy in this country, some things have not changed: poverty, particularly among rural women, has been devastatingly persistent and remains concentrated in the rural areas, specifically in the former bantustans.

Within this context, the study aims to:

- identify and assess the range of problems experienced by women in the communal areas of rural South Africa with regard to their access to, use of and control over land and productive resources;
- examine the impact of these problems on the livelihoods and security of land tenure of rural women in South Africa's communal areas; and
- consider the policy options and the way forward in addressing these problem areas.

1.3 Research methods

This is a non-empirical, literature-based study that examines (a) selected primary sources, e.g. policies, legislation, newspaper articles; as well as (b) secondary sources, e.g. journal articles, academic books, theses, dissertations and websites on written up case studies, conceptual analyses, sociological/economic/political interpretations and analyses, comparative studies, historical interpretations, etc. It considers and analyses the most recent research findings to determine and synthesize the key debates in this area of study. It traces the path of prior research with the aim of integrating and summarising what is known in this area of study. It also attempts to identify within prior studies the points of agreement, the areas of disagreement, or possible questions for future research.

This study does not involve primary research or fieldwork to collect original data, for the following reasons: firstly, there currently exists a significant and impressive body of recent case studies, research and analysis of the area of study addressed in this thesis. This literature-based study aims to synthesize the rich range of research findings and high-level commentary

and analysis on an area of crucial national and regional importance. Secondly, there is presently much controversy around the current legislation, which is intended to be the state's response to its obligation of implementing tenure reform in the former bantustans, namely the Communal Land Rights Act (CLRA) of 2004. Rural communities and civil society groups have rejected this legislation, arguing that the CLRA strengthens the power that traditional authorities have on land, thereby compromising the tenure security and land rights of rural women and other vulnerable groups. There is also currently a legal challenge against the state by four rural communities – Kalkfontein, Dixie, Mayaeyane and Makuleke – who question the constitutionality of the CLRA, and who have the backing of a number of expert witnesses; it is the intention of these communities to halt the implementation of this controversial Act, which has been placed on hold by the government.

Given this scenario – the availability of a rich body of recent case studies and research, together with the current legal challenge to key legislation on tenure reform (which has been well-documented) – it has not been deemed necessary for this study to include fieldwork to gather additional original data. Instead, the study will discuss, assess and analyse the material at hand in an attempt to present an updated synthesis of the study area under review.

1.4 Overview of thesis

Chapter 1 – Introduction

The first chapter outlines the background and rationale for this study, presents the research questions and objectives, and comments on the research approach. It also provides an overview of the thesis by means of the chapter outlines.

Chapter 2 – Land use and livelihoods in rural South Africa

This chapter considers the importance of land and natural resources in rural South Africa within a livelihoods perspective. It outlines the extent and depth of rural poverty in South Africa, assessing the post-apartheid government's poverty-alleviation programmes over the period 1994 to 2008. It then presents an exposition of rural livelihoods, discussing general concepts and

approaches, which includes the characteristics of rural livelihoods, notably the diverse and complex nature, as well as the importance of livelihoods 'straddling' the rural-urban divide, and the importance of rural 'safety nets'. The focus is then narrowed down to address the gendered aspects of rural livelihoods, first in global terms, and then it discusses rural women's livelihood issues in South Africa's communal areas. The chapter also gives an exposition of the character of rural livelihoods in South Africa, discussing and analysing relevant case studies, within the framework of the diverse, complex, and dynamic nature of rural livelihoods; the role of agriculture as a key component of rural livelihoods is highlighted. The chapter then assesses land uses and gendered priorities, based on research findings of South African case studies.

Chapter 3 – Gendered rights in communal land tenure regimes

The third chapter analyses the historical evolution of the gendered nature of land tenure regimes in this country, tracing it through several eras – from the pre-colonial period, to the colonial and apartheid era, into the contemporary period. It considers a framework for the analysis of gendered land rights, and this includes key aspects of rights, access, power and control, as well as common property as an important component of communal tenure. It then identifies and discusses obstacles to secure tenure rights for women in South Africa's former homelands, as well as a number of creative ways devised by rural women to instigate positive change and to overcome these obstacles.

Chapter 4 – Land administration, traditional authorities and women

This chapter traces the history and functioning of traditional authorities through several eras in the history of this country, from the pre-colonial period, to colonialism and apartheid, into the 21st century. It examines the role and practices of traditional authorities in relation to rural communities in general, and rural women in particular. It considers the role played by traditional authorities as custodians of traditional land and the rural communities that they govern, and their constitutional recognition. In examining the current debates and controversies, it considers why this institution of hereditary rulers and chiefs is regarded by analysts as, on the one hand, inherently undemocratic and unaccountable and therefore out of sync with a democratic

dispensation and in violation of the Constitution of this country, and on the other hand, a resilient body that has adapted to change over the historic eras, and still deserving of recognition as custodians of rural communities. In conclusion, the chapter acknowledges the negotiations, contestations and changes spear-headed by rural women in the former homelands, focusing on rural decision-making structures and the implications for women.

Chapter 5 – Recent land tenure reform legislation

The fifth chapter focuses on the system of governance, and in particular recent land tenure reform legislation in the communal areas and its impact on rural women. The chapter discusses the current legislation, notably the TLGFA of 2003, and the CLRA of 2004, identifying the roles, responsibilities and voices of the different role-players in relation to the different decision-making structures. It highlights the questions and recent debates on the current legislation, assessing its feasibility and legitimacy in relation to this country's Constitution. The major debates include the question of property rights by title deeds, custom vs democracy, 'official' law vs 'living' law, and boundary disputes within the former homelands.

Chapter 6 – Conclusion

The final chapter provides a synopsis of all the chapters, together with the major findings that emerged from each one. The concluding chapter also reflects on the central theme of the thesis and offers suggestions on the way forward.

CHAPTER 2

LAND USE AND LIVELIHOODS IN RURAL SOUTH AFRICA

An average Sekhukhune woman will wake up at dawn to sweep the yard, feed the children maize porridge cooked on a wood fire, walk long distances with a jerrycan of water or spiky branches of firewood on her head, work in the fields, all this time hoping that an absent partner will send back some money for the school fees (Oomen, 2005:188).

While lack of land access and tenure security is an indicator of poverty for a household, having only this resource does not ensure an adequate livelihood for most. Other income-generating options or financial support appear to be essential to maintain a livelihood and potentially reduce the risks women face, even when basic food security is met ... or when women have access to state housing ... (International Centre for Research on Women et al, 2008:viii).

2.1 Introduction

2.1.1 Rural poverty in South Africa

The rural areas of South Africa are characterised by deep impoverishment. This is the result of apartheid-era policies of segregation, discrimination, inequality and neglect (Kepe, 2002:13-14; Khumalo, 2003:2). Almost half of this country's population can be categorised as poor, with most of the poor (72%) living in the rural areas, and the highest concentration of impoverished people eking out an existence in the former bantustans (Budlender, 1999; May, 2000). The face of poverty in South Africa has a distinctly racial, geographic and gender element – this face is typically African, rural, and female (Butt, 2006:1; May, 2000:23). It is therefore hardly surprising that some analysts refer to this phenomenon as the 'feminisation of poverty', since rural women bear a disproportionate share of the burden of being poor (Tengey, 2008:143). In fact, some researchers classify rural women as 'the poorest of the poor' (see for example Tinker, 1990, cited in Ellis, 2000:142; Shackleton, S. et al, 2008:513). However, research has also shown that rural women do not constitute a homogeneous category, since not all rural women are equally disadvantaged (Cross, 1992; Agarwal, 1994; Meer, 1997; Small, 1997; Thorp, 1997; Cross and Hornby, 2002; Walker, 2002b). The aspect of categories of disadvantage is discussed in more detail below.

While the academic literature has formulated sophisticated definitions of poverty, for example:

To be poor is to be hungry, lack shelter and clothing, to be sick and not be cared for, to be illiterate and not be schooled. But for poor people, poverty is more than this. They are particularly vulnerable to adverse events outside their control. They are often treated badly by the institutions of state and society and excluded from voice and power in those institutions (World Bank, 2000, cited in Butt, 2006:1),

... the voices on the ground articulate what it means to be poor in simple, unambiguous language,

... poverty is not knowing where your next meal is going to come from, and always wondering when the council is going to put your furniture out and always praying that your husband must not lose his job. To me, that is poverty (Mrs Witbooi, quoted by Wilson and Ramphele, 1989, cited in Kepe, 2002:13).

Chambers (1988, cited in Kepe, 2002:13-14) contends that poverty is multi-faceted and identifies five dimensions of disadvantage, namely (i) *poverty proper* – lacking adequate income or assets to generate income; (ii) *physical weakness* – as a result of under-nutrition, illness or disability; (iii) *physical or social isolation* – caused by peripheral location, lack of access to goods and services, ignorance and illiteracy; (iv) *vulnerability* – to crisis and running the risk of becoming even poorer; and (v) *powerlessness* – within existing social, economic, political and cultural structures.

2.1.2 Poverty-alleviation programmes in South Africa since 1994

Within South Africa, poverty-alleviation was elevated to a national policy goal following the transition to democracy in 1994. Fifteen years after the African National Congress (ANC) had promised the people of this country 'a better life for all' in its 1994 election campaign (ANC, 1994), analysts declare that there exists in this country 'a persistent, time-resistant poverty that is not easily eliminated' (Adato et al, 2006:228); this despite South Africa having 'living standards that are on average significantly above those in countries where chronic poverty is assumed to be most severe' (Adato et al, 2006:244).

Apart from the land reform programme, the post-apartheid government embarked on a number of other poverty-alleviation programmes since

assuming power in 1994. The ANC's 1994 election manifesto, the *Reconstruction and Development Programme* (RDP) had pledged that attacking poverty and deprivation would be the new democratic government's first priority; the poor would be empowered by the RDP to maximise opportunities to develop to their full potential and also 'to sustain themselves through productive activity'. Furthermore, the state would ensure improved access to a wide range of basic services, notably water, health, electricity, social security and public education, thus enabling all South Africans to enjoy 'a decent living standard and economic security' (ANC, 1994: 15, 16, 79). The RDP, however, was abandoned after only two years, without it being fully implemented (Kepe, 2002:15).

The ANC-led government's second attempt at a development strategy for poverty reduction was the 1996 publication of a macro-economic framework document entitled *Growth, Employment and Redistribution* (GEAR), and regarded by some analysts as a distinct deviation from the ANC's commitment to meeting basic human needs, since GEAR's emphasis was on fiscal discipline and incentives for private investments (Adato et al, 2006:227). Although critics acknowledged that GEAR rested squarely on the principle that poverty-reduction required sustained economic growth, which needed private sector investment, they were unforgiving of what was widely regarded as a cruel abandonment of the poor, and the government's perceived misplaced emphasis on 'boosting investor confidence' (Kepe, 2002:15). According to the South African Human Development Report (UNDP, 2003, cited in Adato et al, 2006:227) 'the employment elasticity of growth actually declined during the implementation of GEAR, while inappropriately targeted fiscal discipline and a preoccupation with cost recovery undermined advances in the delivery of social services'.

In his pre-election address to the House of Assembly in 1998, Thabo Mbeki described South Africa as a 'two-nation' society: 'One of these nations is white, relatively prosperous, regardless of gender or geographic dispersal ... (t)he second and larger nation ... is black and poor, with the worst-affected being women in the rural areas, the black rural population in general, and the disabled' (*Hansard*, House of Assembly, 29th May 1998, col. 3,378, cited in Seekings, 2007:11). In 2000 the Mbeki presidency demonstrated its resolve to

re-focus the ANC-led government's stance on its declared pro-poor policies, by introducing a new ten-year plan, the *Integrated Sustainable Rural Development Strategy* (ISRDS), which 'aimed to bring real change to South Africa's poorest areas, by co-ordinating existing departmental initiatives and programmes in these areas' (Kepe, 2002:15-16). However, seven years down the line, the ANC's National Policy Conference, in preparation for its December 2007 Polokwane Conference, compiled a draft resolution on rural development, land reform and agrarian change, wherein it noted that, 'Interventions such as the Integrated Sustainable Rural Development Programme have made significant, but insufficient progress. Social grants are making a huge contribution to pushing back the frontiers of rural poverty, fighting hunger and improving potential for economic growth in rural areas. However, in the struggle to build a better life for all, grants are no substitute for a broader strategy of rural development and employment creation' (ANC, no date, *circa* 2007:1).

The ANC's 2004 election promises of halving unemployment and poverty rates by 2014 were met with scepticism, in fact, one critic, Meth (2006, cited in Seekings, 2007:25) rejects them as 'simply not achievable within the policy framework to which the ANC seems committed'. The new policy framework proposed, and launched in 2006, was the *Accelerated and Shared Growth Initiative for South Africa* (ASGISA). Government's rationale was that while economic growth was necessary, it was not sufficient for poverty-reduction, hence ASGISA's objective: to achieve the goals of halving poverty and unemployment rates through increasing the economic growth rate and sharing growth, primarily through absorbing more labour into the 'mainstream economy' (Seekings, 2007:26). Ironically, though, as Seekings (2007) points out, in the first progress report on ASGISA (RSA, 2007), the government acknowledges that since poverty is concentrated in the former homelands, there would be no likelihood of significant formal employment creation in the impoverished rural areas. That meant that the government's poverty-reduction programme, which had taken on a distinctly poor-unfriendly character, would require 'either massive migration out of those areas to the towns where formal jobs could be created, or targeted public works

programmes in the former bantustans, or expanding grants or employment subsidies for working-age unemployed adults' (Seekings, 2007:26).

While the ANC-led government has over the past fifteen years demonstrated some recognition of the need for alternative policy approaches to poverty alleviation in South Africa's rural areas, critics and analysts continue to draw attention to the chronic, persistent and dangerously high levels of poverty that keep large numbers of rural dwellers, especially women, trapped in 'blocked pathways of upward mobility' (Adato et al, 2006:226). The ANC-led government has also been berated for its emphasis on development in the urban sector – its historical support base – at the expense of the rural areas, which have been 'shamefully neglected' since 1994 (PLAAS, 2009:2; Hall, 2009:1).

The ANC's 2009 election manifesto (ANC, 2009) had named rural development as one of five key priorities, reverting to the Freedom Charter promise that 'the land shall be shared amongst those who work it'. In his pre-election budget speech, former Finance Minister Manuel emphasized that rural development and small farmer support would receive a boost of R1.8 billion; this has been interpreted as the signal of the ANC's financial commitment to the rural development and poverty alleviation thrust of its election manifesto (PLAAS, 2009:5). It remains to be seen if the new administration under Jacob Zuma will deliver on this promise.

2.2 Rural livelihoods

2.2.1 General concepts and approaches

In defining a livelihood, Chambers and Conway (1992, cited in Shackleton et al, 2000:37) propose that:

A livelihood comprises the capabilities, assets (stores, resources, claims and access) and activities required for a means of living; a livelihood is sustainable which can cope with and will recover from stresses and shocks, maintain and enhance its capabilities and assets and provide sustainable livelihood opportunities for the next generation; and which contributes net benefits to other livelihoods at the local and global levels in the short and medium term.

This definition takes a holistic view, uniting concepts of economic development, reduced vulnerability, and environmental sustainability, making

provision for building on the strengths of the rural poor. Central to this conceptualisation of livelihoods is that it includes non-material aspects of well-being, and also that rural livelihoods are complex and differentiated. The research literature has identified certain distinct characteristics of rural livelihoods. These include: (a) *the bridging of the rural-urban divide* – inhabitants of rural, peri-urban and urban areas engage in the combination of wages, remittances and informal-sector earnings with rurally-based farming activities, as well as state pensions, trade in land-based resources and claiming through social networks (Kepe, 2002, 1997; Cousins, 1999a; Scoones et al, 1992); (b) *the complexity of social and economic relationships* – these link members of families, neighbours, social networks, community institutions and distant markets, at local and non-local level (Kepe, 2002; Shackleton et al, 2000; Chambers, 1997); (c) *the social differentiation* – these are manifested in terms of gender, age, class, education, location, religion, political affiliation, etc. (Cousins, 1999a; Kepe, 2002, 1997); (d) *the mediation of formal and informal institutions and practices* – formal institutions (externally-enforced rules and laws) determine rural people's resource tenure rights, while informal institutions (internally-enforced codes of conduct, by mutual agreement, e.g. customs, taboos) shape the value which local people could derive from natural resources (Kepe, 2000; Peters, 2004); and (e) *the provision of a buffer to risk* – the wider the rural household's livelihoods diversification, the less the potential of added stress and risk (Ellis, 2000; Francis, 2000; Kepe, 2002).

Rural households engage in an assortment of activities and livelihood strategies in order to secure their livelihood outcomes. These outcomes include reduced vulnerability, enhanced quality of life, more and secure sources of income, and improved food security. Many rural households engage in farming, but farming on its own does not always provide a sufficient means of survival; therefore most rural households engage in a diverse portfolio of activities in order to reduce and cope with vulnerability by spreading potential risk (Scoones, 1998; Paumgarten, 2007; Cousins, 1999a; Shackleton et al, 2000; Ellis, 2000; Francis, 2000).

Rural households derive their income from an array of land-based activities, e.g. arable agriculture, animal husbandry, and the use and sale of

non-timber forest products (NTFPs), as well as from off-farm sources, e.g. waged employment, migrant remittances, government grants, and income from small enterprises (May et al, 2000; Shackleton et al, 2000, 2007; Kepe, 2002; Paumgarten, 2007). As shown above, rural households with a greater diversity of livelihood strategies and a broader asset base are better positioned to cope with crisis situations that arise; in fact, 'the more choice and flexibility that people have in their livelihood strategies, the greater their ability to withstand – or adapt to – the shocks and stresses of the vulnerability context' (DFID, 1999:23, cited in Paumgarten, 2007:38).

Shackleton and Shackleton (2004) propose a two-pronged rural safety-net, comprised of assets that households or individuals may resort to (or utilise more heavily) in times of adversity. They distinguish between a 'daily net', which refers to the livelihood benefits of the ordinary daily use of resources, and an 'emergency net', which refers to resources and assets that assist rural households during times of extreme trauma and stress, manifested as sudden and unexpected changes in the household's social, economic or bio-physical environments. This could include the death or retrenchment of the household head or breadwinner, natural disasters, fatal livestock diseases, crop failure, large and unanticipated increases in costs of goods and staple foods (2004:659).

The *Hidden Harvest* research project undertaken by the International Institute for Environment and Development (IIED, 1995) considers the importance of wild plant and animal resources in agricultural systems and to rural livelihoods, challenging conventional agriculture and forestry research, whose research agendas have largely focused on major commodity crops, such as rice, wheat and potatoes. The study maintains that the neglect of the role and value of wild food resources, which have been rendered a 'hidden harvest' to outsiders, has led to the underestimation of the value and importance of these biological products, particularly for those most vulnerable to poverty, namely the rural poor, women and children. These groups generally have reduced access to capital, land and labour (IIED, 1995). Rural households that are considered to be resource poor on the basis of low household incomes and poor socio-economic circumstances, tend to rely more on locally available natural resources, as wild resources represent ready

sources of income and are freely available, particularly where farming is marginal (Hart, 2007; International Institute for Environment and Development, 1995).

Several analysts (notably Shackleton, S. et.al., 2002; Cousins, 1999a) echo the views expressed in the *Hidden Harvest* project regarding poorer and more vulnerable households, particularly those headed by women, tending to be more dependent on the natural resource base, using a greater diversity of resources, and more of each resource than those households with access to other forms of income (e.g. state pensions) or formal employment.

2.2.2 Gendered dynamics

In considering the livelihood relationships between rural women and men, the literature generally bears evidence that women are chronically under-resourced relative to men in many poor households, due to a number of different reasons (Cross and Hornby, 2002; Meer, 1997; Walker, 1997; Thorp, 1997; Nemarundwe, 2003; Hargreaves and Meer, 2000; Francis, 2000; Kabeer, 1994; Young, 1992; Whitehead and Tsikata, 2003).

Among the primary reasons identified for unequal economic livelihood relations between the genders, is female household-headship. A significant body of research asserts that female-headed households are poorer than male-headed households, based on the difference in access to resources, as well as the difference in income levels between the two household types (for example, Paumgarten, 2007; Shackleton and Shackleton, 2004). Other studies show that where marriages have failed, many women would be at a disadvantage in relation to males because of the unequal division of assets; furthermore, their social status in their communities may be diminished, which may lead to the loss of the reciprocal contributions to family resources that are linked to that status (Agarwal, 1994). Tengey (2008) is in agreement about the social status and emphasises that rural women, particularly those heading households, are highly vulnerable to poverty as a result of their life cycle changes:

In particular, women with limited access to labour, such as widows, aged women, childless women and those with young disabled children, are more likely to be looked down upon by society and thus more likely to experience extreme levels of poverty. Increasing

numbers of female-headed households, especially in the rural areas, are classified in the lowest levels of poverty groups. These are self-employed women with little or no education and with low access to credit, health care and the decision-making process (Tengey, 2008:143).

The Food and Agricultural Organisation (FAO) recently presented disturbing new statistics on global food insecurity, revealing that the recent soaring food prices had caused the ranks of undernourished people in the world (842 million) to be swelled by a staggering 75 million people (FAO, 2008:39). Worst hit by this crisis are the poorest people in rural communities, and in particular female-headed households. Villarreal (2008) provides reasons for this phenomenon: firstly, male-headed households generally own larger land holdings than female-headed households (in some countries up to three times larger); secondly, since female-headed households tend to spend relatively more on food than male-headed households, the increased food prices are likely to affect the former more harshly; and thirdly, the highly unequal access to and/or ownership of resources, particularly land, usually cause female-headed households to bear the brunt of the food crisis (Villarreal, 2008:39).

Peters (1996) raises questions about the definition of female and male household headship and asserts that intra-household inequality of consumption between men and women is of greater significance than inter-household inequality based on the sex of the household head. The practice of unequal distribution of consumption within the household impacts on girl children as well – the literature contains evidence, particularly in studies conducted in Africa and South Asia, of the relative deprivation of women and girl children within male-headed households (Agarwal, 1994; Ellis, 2000). Kabeer (1994) cites examples of intra-household welfare inequalities with regard to parents who observe gender differentials in allocating larger shares of family resources to children who are expected to be ‘more economically productive adults’, thus undermining the well-being and productivity of girl children by lower investment in their ‘human capital’ (Kabeer, 1994:101-102). The gender-based inequality in resource allocation within rural families is also extended to the levels of investment made in children’s healthcare, education

and other basic needs (ICRW et al, 2008:3; Kabeer, 1994). Recent research on the levels of education in southern Africa shows that women are more likely to be less educated than men, with the female illiteracy rate in South Africa being around 20% (Mutangadura, 2005:6). There are studies that show that even within households not categorised as 'poor', daughters are often physically impaired because they receive a smaller share of resources than sons (see for example, Young, 1992).

Further studies highlight the dynamics around gender-differentiated patterns in the allocation and disposal of household income: cash in the hands of women is usually utilised primarily for family welfare purposes, e.g. goods for their children and for collective household consumption, which would typically include health and nutritional items. Cash income in male hands is often retained for personal consumption expenditures, and frequently includes what economists term 'adult goods', like alcohol, cigarettes, meals eaten out, adult entertainment, etc. (Agarwal, 1994; Ellis, 2000; Kabeer, 1994; ICRW et al, 2008).

A large number of South African case studies present contrary evidence concerning the association between poverty and female household headship. Noteworthy among these is the work by Cross and Friedman (1997), Cross and Hornby (2002), and Walker (1997; 2002b), demonstrating that rural women do not constitute a homogeneous group; neither are they equally disadvantaged. Cross and Friedman (1997:29-33) identify categories of disadvantage for rural women running households, based on traditional land tenure relationships. Their study shows that married women with children have the most advantages, followed by older widows with grown children, younger widows with young children, with the least advantaged being single mothers with children. Although married women with absent husbands normally do not experience difficulty in gaining access to land, they do not have much cash to develop land, and also have limited decision-making freedom.

It is also important to recognise the range of other social interests and identities that women hold, for example as wives or relatives of traditional leaders, in relation to marital status, class status, political affiliation, etc. (Cousins, 2008a:121). Other factors to take into account are the differences in

terms of income, stock ownership, economic security and attitudes (Walker, 1997:69). Additionally, women of higher class standing with elite identities, e.g. as members of 'royal' families, often gain access to land more successfully than ordinary women on the ground (Walker, 2002b).

From the range of studies it is evident that rural women's experience of poverty extends beyond the economic dimension of insufficient income; they experience an additional range of deprivations that include access to essential services, and that give rise to marginalisation, devalued social status, diminished self-esteem and respect from others, greater vulnerability in power relations with men, and dwindling decision-making powers within the household and the community (May, 2000:23; Diarra and Monimart, 2006:26).

2.2.3 Rural women in South Africa's communal areas

The vast majority of inhabitants of the communal areas are women, with increasing numbers of females functioning as heads of households. This is due primarily to marital breakdown and to urbanisation, with males, generally, pursuing non-farm wage incomes in towns and cities (Kepe, 2002). A newer phenomenon is the increased incidence of widow-headed households, as a result of the HIV and AIDS pandemic (ICRW et al, 2008:7), and which adds substantially to the economic and social pressure on women. These households headed by females are a particularly vulnerable group, with their poverty rate, at 60%, being double that of male-headed households (Shackleton, S. et al, 2008). Households headed by women are also typically smaller than those headed by males, with fewer able-bodied males available for performing certain agricultural and other income-generating activities. Additionally, female household heads are likely to split their time and energies between the demands of domestic responsibilities and farm work and are therefore most often constrained in their efforts at participating in off-farm and non-farm labour markets (Ellis, 2000; Tengey, 2008).

On the other hand, however, the incidence of male migration and long-term absenteeism from the countryside often means that rural women have to rely on their own labour and capital, to provide food and welfare for themselves and their families (Waterhouse and Vijfhuizen, 2001:74). The case study conducted by Hajdu (2006) is illustrative of this phenomenon:

My husband works at a sugar cane plantation in KwaZulu Natal, but he only comes home once per year. Yes, he brings money at that time, but otherwise we have to harvest mussels and sell if we need money. And we have to do everything ourselves, ploughing and working the garden and repairing the house. It is not worth it having him gone all the time for that small amount of money that he brings (Hajdu, 2006:141).

Another recent phenomenon is the rural-to-urban migration of women, particularly those whose active and successful engagement in the commercialisation of NTFPs¹ results in the establishment of profitable networks in nearby towns and cities. Although there are distinct short-term financial benefits to be derived from these patterns of migration, many rural women who had land rights and enjoyed access to productive resources in the communal areas, usually end up living in informal settlements on the fringes of the towns and cities, bereft of their access and rights to land (Cross, 1992).

2.3 Character of rural livelihoods in South Africa

2.3.1 Multiple livelihood options

Given the severe levels of poverty in the rural areas, coupled with the post-apartheid government's various dubious attempts at crafting effective poverty-alleviation policies and programmes, rural communities continue to engage in a diverse repertoire of livelihood strategies in an attempt to make a living and to combat food insecurity. Like rural livelihoods elsewhere in the world, South African rural livelihoods are also characterised by complexity, diversity, rural-urban connectedness, and a combination of farming, non-farming and other land-based resources.

There is a strong rural-urban connectivity as rural communities in the former bantustans attempt to improve their livelihood strategies, cope with the stresses of survival, and enhance their levels of food security and general well-being.

Francis (2000) considers livelihoods activities that bridge the urban-rural divide and comments on the complex network of market and non-market

¹ People earning money from the sale of locally harvested and/or processed products beyond their rural communities (IDS, 2009:8).

exchanges between city and countryside, with people, goods and money moving between urban and rural sectors. This phenomenon, also known as 'straddling', is a widespread response to the uncertainties of constructing and maintaining a livelihood. It is a powerful strategy of urban dwellers who choose to maintain a rural base to return to, in the event of illness, unemployment or retirement (Berry, 1993; Potts, 1995, both cited by Francis, 2000:20).

Straddling the urban-rural divide is an equally powerful strategy when rural dwellers maintain an urban base as an outlet for the sale of goods produced in the rural sector, as this Pondoland² case study illustrates:

Majali was born in (the town of) Flagstaff 55 years ago; she now lives in Khanyayo village. She became involved in this (baskets and mats) industry after her husband passed away. She sells mats and baskets from her home (in the village) and also at the pension market in Flagstaff. She sometimes takes her products along when she goes to Durban to sell medicinal plants. When she is in town she stays with her relatives to reduce her costs. When she cannot sell all her products in four to five days, she leaves them with a friend who sells vegetables in town, to continue selling for her. When everything has been sold, she normally shares her profit with her friend. When she goes to town, she always makes sure that she does everything she needs to do while there, such as visiting relatives, collecting money from those who owe her, buying groceries, and so forth (Makhado, 2004:73 - summarised).

This case study is illustrative of:

- the **diversification** of her range of products – hand-woven baskets and mats made from materials collected locally, as well as medicinal plants collected and harvested from her rural environment;
- her livelihood activities **bridging the rural-urban divide** – selling of locally-produced goods in the village, as well as in the nearby town (Flagstaff) and in a large city (Durban);
- the **complex network of market exchanges** (a friend and fellow trader who will sell Majali's goods on her behalf, and retain her earnings until her next visit; sharing of her profits with her sub-contracted vendor), and non-market exchanges (maintaining good relations with relatives in town by paying courtesy visits, to secure her

² Part of the former Transkei homeland, Eastern Cape.

ongoing low-cost accommodation needs) between city and countryside;

- **people, goods and money moving between urban and rural sectors** – Majali makes regular trips to external markets; she purchases groceries in the town and city for consumption in the village; she has created a financial infrastructure as a service provider making available goods on credit – she collects the money owed to her in the town/city to enhance her rural livelihood;
- Majali's maintenance of both **social and economic relations** – she nurtures good relations with her relatives, as well as her sub-contracted vendor; the latter is both her friend and her business partner;
- the **dynamic nature** of Majali's rural livelihood strategy – it lends itself to diversity; it yields financial returns (profits); it enables the establishment of social and economic networks;
- the potential of her earnings to **reduce her vulnerability** to economic stress and impoverishment; and
- the **non-material aspect of well-being** that is evident – she displays confidence, good social skills and positive self-esteem.

In summary:

Majali, a representative model of her fellow rural women, has demonstrated her skills in accessing her range of **livelihoods assets** (Scoones, 1998; Ellis, 2000; Shackleton et al, 2000; Palmer et al, 2000):

- *Natural capital* – her access to wild resources – medicinal plants and sedge grass for weaving, collected and harvested from the land.
- *Physical capital* – her equipment and tools, e.g. the constructed wooden frame for weaving purposes.
- *Human capital* – her ability to labour; her level of knowledge and skills related to weaving, marketing, finances, production processes, etc; also her apparent good state of health.
- *Financial capital* – the cash that she is able to access in order to travel, and to purchase either production or consumption goods (or both).
- *Social capital* – her social networks and associations established both internally and externally, from which she can derive support to

contribute to her livelihood; these include her networks of kin, as well as the relationship of trust, reciprocity and exchanges that facilitate co-operation with her trader-friend.

Apart from the economic aspects of making ends meet, engagement in differentiated activities also has social dimensions – rural households nurture the social networks of community reciprocity and kinship ties that enable such differentiation to be secured and sustained (Kepe, 2002). Mutual assistance could be rendered in a variety of ways, for example using *ilima* (a ‘work party’), absorbing of family members, or acts of social charity; social networks are particularly resorted to in times of dire need or disaster (May, 2000; Kepe, 2002; Shackleton and Shackleton, 2004).

According to Ellis (2000), insights into the causes and consequences of diversified livelihoods appear to be fragmented and conflicting in the literature. To illustrate his point, Ellis provides a summary of propositions, citing a number of studies that demonstrate how diversification: (a) may occur as both a deliberate household strategy or as an involuntary response to crisis; (b) can diminish or exacerbate rural inequality; (c) can be a safety valve for the rural poor or a means of accumulation for the rural rich; (d) can benefit farm investment and productivity or impoverish agriculture by withdrawing critical resources. Ellis suggests that the causes and consequences of diversification are determined by factors such as assets, income level, social relations, location, opportunity, and institutions. Additional factors, as identified by Francis (2000), include the seasons, climate, age, position in the life cycle, educational level, and time-specific tasks.

Rural economies are not just about agricultural activities. In order for rural households to flourish, they need a supportive infrastructure in the form of a non-farm rural economy that provides services, inputs, local employment and local demand. Francis (2000) contends that multiple sources of livelihoods are a necessity, and cites case studies from elsewhere in Africa to emphasize the need for an extensive range of non-farm skills and services, such as motor mechanics, cycle repairers, electricians, retailers, shoemakers, tailors, insurance agents, etc. ‘The metalworkers were producing household

goods, building components, spare parts for road vehicles and agricultural machinery and tools' (Francis, 2000:21).

It is noteworthy that both wealthy and poor households diversify their livelihood sources, but for different reasons. While the more affluent households diversify in order to maintain or improve their wealth, the poorer households diversify in order to survive a poor season, but also with the motive of improving their future wealth status (Kepe, 1997).

Recent South African research has yielded a number of case studies that show the extensive and diverse range of livelihood resources explored, combined and utilised by rural women in communal areas. The case studies also shed light on the social and institutional complexity of patterns of resource use. See for example, studies conducted in the **Eastern Cape** by Palmer et al, 2000; Ainslie, 2002; Kepe, 2002; 2003; Makhado, 2004; Shackleton and Shackleton, 2004; Keirungi and Fabricius, 2005; and Hajdu, 2006; studies from **Limpopo province**: Shackleton, S., 2005; Paumgarten, 2007; Shackleton, C. et al, 2000; 2007; Shackleton, S. et al, 2002; 2008; and from the **Western Cape**, Williams, 2005.

2.3.2 *The role of agriculture*

Rural livelihoods in South Africa, like elsewhere in the world, continue to depend, directly or indirectly, on agriculture, as Scoones and Thompson (2009) point out:

As emphasized in the recent *World Development Report*, agriculture remains the main source of livelihoods for an estimated 86 percent of rural people (2.5 billion people), and for many countries, the main opportunity for sustained, employment-based growth (World Bank, 2007, cited in Scoones and Thompson, 2009:4).

Although most rural households in this country engage in some form of farming, either for subsistence or for the market, some analysts argue that agriculture is not necessarily a major feature in the livelihoods of rural communities in South Africa's communal areas (James, 2007; Hajdu, 2006:171; ARDRI, 2008:4). These analysts deny that there is a place for small-scale agriculture in contemporary South Africa, and are sceptical about the possibility of establishing land-based livelihoods (even partially) by means

of a land reform programme. For example, James (2007) argues that it has 'become difficult if not impossible for any farmers, black or white, to make a living from the land alone, at a time when South African agriculture has the lowest level of state protection of any country in the world (2007:180). On the basis of research conducted in the Eastern Cape, Hajdu (2006:171) alludes to the 'relative unimportance of environmental resources' and declares that in her areas of research subsistence agriculture contributes 'a meagre 3% of local livelihoods, and does not merit such a heavy emphasis in descriptions of local livelihoods' (2006:171).

The ANC-led government nevertheless remains enthusiastic about the role of agriculture in rural poverty reduction, although the form of agriculture that it has been supporting has focused on 'emerging commercial farmers' – usually black, and often individual – rather than on the masses of impoverished people in the former bantustans, many of them smallholder farmers whose predominant form of land demand is for small plots of land for subsistence farming (ARDRI, 2008:4; Walker et al, 2008:24; Kepe, 2002:25). Furthermore, criticism is also levelled at the government's redistribution programme for placing too much emphasis on the redistribution of land for commercial agricultural purposes, this at the expense of rural poverty alleviation, and in particular smallholder farmers who want to produce for marketing purposes (Hall, 2004:8-9; 2009:3-5).

The National African Farmers' Union of South Africa (NAFU SA), however, is supportive of the government's approach and sees the potential for agriculture to be 'a means to address past injustices – through entry of black farmers into this sector and promotion of equitable land distribution – this being the avenue to accelerate broad-based, pro-poor, rural development' (Banda, 2009:140-1). NAFU remains positive about the future of agriculture in the economy of this country and asserts that although agriculture contributes less than 4 per cent to GDP, it still accounts for 10 per cent of total reported employment (mainly of black farm workers and farmers) (Banda, 2009:140).

There is a significant opinion among some analysts that the full economic value and contribution of agriculture to rural livelihoods in South Africa's communal areas is being underestimated and that the value of common property resources associated with land is very often overlooked as crucial

assets of the rural poor (Walker, 2002b; Shackleton et al, 2000; Cousins, 1999a). Cousins (1999a) in particular, draws attention to the importance of various non-monetised activities, the 'invisible capital', and that include the direct use of locally available natural resources in a range of livelihood-generating activities. He highlights in particular the contribution of communal rangelands to rural livelihoods (and to poverty alleviation) in South Africa:

Since communal rangelands are an important source of food security, nutrition, income, medicine, fertiliser, fuel, building material, spiritual health and aesthetic satisfaction, they may help to explain why more people do not leave the apparently 'impoverished' rural areas to seek their fortunes in the towns and cities (Cousins, 1999a:300).

In another study, Cousins (1996a) acknowledges the value and importance of common property regimes to rural communities, and to the livelihoods of rural women in particular. He asserts that that there are distinct socio-economic, ecological, and political advantages to be gained from a common property regime, particularly where the local natural resource base sustains rural households. He maintains that, despite the significantly larger amounts of household income derived from remittances, pensions and non-rural earning sources, the local natural resource base remains centrally important, particularly to the poorest rural households. Agricultural production is the third most important 'livelihood tactic' used in rural areas, after wage labour and state grants and pensions (May et al, 2000:234, cited by Walker, 2002b:27).

The importance of agriculture in the lives of rural people is further demonstrated by recent research that is increasingly drawing attention to a changing rural political economy, revealing migrants' declining ability to send home adequate remittances. This is, on the one hand, as a result of shrinking urban job markets caused by the restructuring of the mining industry, the falling gold price and the inability of migrants to cope with the high cost of living in towns and cities. On the other hand, diminishing remittances are caused by migrants' decisions not to return to their rural homes because of new associations formed and new commitments made in the urban areas. As already recognised, this phenomenon adds to the increase in *de facto* female-headed households, and the accompanying range of challenges faced by

rural women affected by these changing circumstances (see Meer, 1994; Cross and Friedman, 1997; Cross and Hornby, 2002; Walker, 1997, 2002b; Francis, 2000).

McAllister (2000, cited in Kepe, 2002:25) maintains that agriculture's contribution to rural livelihoods is much greater than has been reported in most surveys; he urges for correct methods to be employed in the measuring of agricultural produce, to ensure that the true value of agriculture is realised. A number of analysts assert that the government should be taking a much more decisive lead in the promotion of a labour-intensive agriculture in the former homelands, rather than a capital-intensive form of agriculture, such as the current large-scale white commercial farming in this country (see for example, PLAAS, 2009:3; Hall, 2009:3; Lipton and Lipton, 1993, cited in Kepe, 2002:25). Hall (2009) presents a compelling argument for much greater governmental support for smallholder farmers wishing to produce for a market (and not only for subsistence), a category of farmers she calls the 'missing middle' between subsistence and commercial farmers:

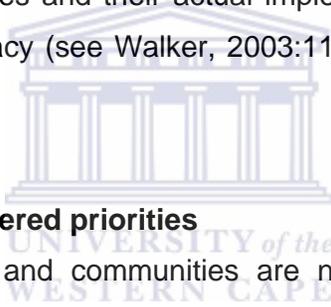
Existing approaches have failed to create opportunities for such people. And the most likely candidates – the approximately 4 million 'semi-subsistence' and 200,000 small- and medium-scale producers – are in the communal areas of the former bantustans, which have attracted the least agricultural (and infrastructural) support and investment. A serious approach to food security would enable them to produce and market on non-exploitative terms, to bypass (or transform) the mass retail markets in which just four large supermarkets dominate, and to benefit from rising food prices (Hall, 2009:3).

Government's response to the recent sharp increase in food prices has been evident at national level – during his February 2009 budget speech, former Finance Minister Trevor Manuel made specific mention of increased allocations towards the provision of agricultural starter packs as part of the state's Comprehensive Agricultural Support Programme (PLAAS, 2009:5). At provincial level, Departments of Agriculture have also announced a range of initiatives to support food production by the poor. For example, in a *Policy Speech*, the Eastern Cape Department of Agriculture (EC DoA, 2008) commits to a number of high priority agricultural matters, ensuring particularly women's participation, both at policy and practical level:

[Item 2.5]: Implement the Freedom Charter's call to empower those working the land with implements, seed, tractors, infrastructure for irrigation and other forms of material support ...Ensure, in particular, that the former homeland areas are properly provided with a sound and sustainable infrastructural base for economic and social development.

[Item 6.6.2]: Promoting dairy products for women, whereby 50 dairy cows together with a tractor and a trailer were purchased as start-up capital for the Qamza/Platjie farm in Amathole District, being the very first dairy owned by women, currently producing 1100 litres of milk every two days and selling at R3.00 per litre, and a new dairy parlour mainly for women was completed ... at Port St Johns.

While it is laudable that the most crucial needs of the poorest members of society are acknowledged as priority policy items, and pledging governmental service delivery of the highest standards, the concerns and cautions raised by analysts about fine-sounding election rhetoric, as well as the disjuncture between impressive policies and their actual implementation, are still valid – fifteen years into democracy (see Walker, 2003:113; Sow Ndiaye, 2008:140; PLAAS, 2009:2).



2.4 Land uses and gendered priorities

Since households and communities are not homogeneous entities, women and men have different needs, interests and priorities, as the discussions on land use show. For example, Middleton (1997) suggests that the different priorities of men and women emanate from their position in relation to the gender division of labour; women's priorities are based on their productive/reproductive role, hence their preference is for smaller sites that are conveniently located close to amenities to be accessed, for example roads, rivers, etc. Men's priorities are based on different productive roles and their virtual exclusion from the reproductive sphere; their preference is for larger and multiple tracts of land.

Walker (1997; 2002b) agrees that land hunger and land need are experienced in gendered ways, and observes that the women in Cornfields (1997) showed a greater interest in preserving an agricultural subsistence base than men, and also displayed a greater reliance on the land for a wider range of resources than did men; women were also noticeably more interested in the land for residential purposes, than were the men. Walker et

al (2008:24) also point to recent research findings by Aliber et al (2006), which highlight that while women want land on a par with men, their preference is for small plots for subsistence farming.

The work of Cross and Friedman (1997) suggests that women tend to treat land as an economic asset, focusing their energies on short-term social reproduction and the immediate support of their household and children, while men display a strong concern for using land to build and underpin social relations, and particularly the development of networks that translate into political power (1997:26-7).

The KwaZulu-Natal case studies highlight the distinct differences that are apparent between women and men as farmers:

Women plant their land more often than men, and worry more about household and human resources for cultivation, including money, labour and technical advice. Men show more concern over physical resources such as equipment and the land itself. Case studies suggest that men's approaches to farming are usually entrepreneurial and profit-driven, while women are cautious and conservative (Cross and Hornby, 2002:53).

2.5 Conclusion

This chapter addressed the theme of land use and livelihoods in rural South Africa. Firstly, it presented the broad context of rural livelihoods, by outlining the extent and depth of rural poverty in South Africa, and also assessing the post-apartheid government's poverty-alleviation programmes over the period 1994 to 2008. Secondly, the chapter presented an exposition of rural livelihoods, discussing general concepts and approaches, which included the characteristics of rural livelihoods, notably the diverse and complex nature, as well as the importance of livelihoods 'straddling' the rural-urban divide, and the importance of rural 'safety nets'. Thirdly, the focus narrowed down to start addressing the gendered aspects of rural livelihoods, first in global terms, followed by a discussion of rural women's livelihood issues in South Africa's communal areas. Fourthly, the focus of the chapter concentrated on the character of rural livelihoods in South Africa, with a discussion and analysis of relevant case studies, within the framework of the diverse, complex, and dynamic nature of rural livelihoods; the role of

agriculture as a key component of rural livelihoods was highlighted. Fifthly, the chapter assessed land uses and gendered priorities, based on research findings of South African case studies.

The majority of rural households in South Africa derive significant proportions of their livelihoods from land-based activities. However, the value of agriculture – livestock production, crop production, and natural resource harvesting – is often overlooked as an important asset of poor rural communities. The importance of these land-based livelihoods sources is even greater for female-headed households, female members of rural households, and the very poor or ‘marginalised’ members of rural communities, since they tend to be more reliant on land-based livelihoods than those with secure income from pensions, wage-earning activity or remittances from migrant labourers. Despite the significantly larger amounts of household income derived from remittances, pensions and non-rural earning sources, the local natural resource base remains centrally important, particularly to the poorest rural households.

The overall scenario that emerges does not inspire great optimism – the very systems and structures that should be working for rural women, are keeping them trapped in ever-deepening, persistent poverty. The state has failed, in 15 years, to devise (and implement) a ‘pro-poor’ policy that works ... this is indeed a betrayal of the most oppressed and vulnerable members of our society! With the recent introduction of a new cabinet, the fate of rural women remains precarious, and highly insecure. Women residing in the communal areas of rural South Africa will now be at the mercy of no less than *six* government ministries: Agriculture, Forestry and Fisheries; Co-operative Governance and Traditional Affairs; Rural Development and Land Reform; Social Development; Water and Environmental Affairs; and perhaps the most bizarre and ubiquitous Ministry of Women, Youth, Children and People with Disabilities. Hall (2009:2) has dubbed the latter ‘the ministry for nearly everyone’. It remains to be seen if this new collective will trip over their many feet and get their lines tangled, or find new pathways to boost rural economic activities, and reshape the countryside in ways that will lead to changed social relations and enhanced livelihood options for the rural poor, and for rural women in particular.

CHAPTER 3

GENDERED RIGHTS IN COMMUNAL LAND TENURE REGIMES

... gender and kinship relations play a central role in the way in which land rights and productive relations are determined. Under the customary land tenure system, control over resources follows clearly defined gender-segregated patterns based on traditional norms which operate in such a way as to limit the rights of women as compared to men. To a large extent, women's access and control over productive resources including land are determined by male-centred kinship institutions and authority structures which tend very much to restrict women's land rights in favour of men (Tengey, 2008:143).

... whether as wives, as sisters or as mothers, case studies show that women still have to fight harder and strategise more skilfully for their access to land. Widowhood, divorce, marriage residence and other life-cycle changes create uncertainties that have to be negotiated carefully (Whitehead and Tsikata, 2003:102).

3.1 Introduction

The focus of this chapter is the deeply gendered nature of land tenure regimes, as evidenced in South Africa's former homelands. The analysis of the land rights in the communal areas confirms that they are legally insecure and therefore the focus of tenure reform policies. Of particular concern is the re-definition of women's land rights as 'secondary' and subordinate to those of males. The chapter discusses the pre-colonial, colonial and apartheid, and contemporary systems of land tenure in relation to women's and men's land rights in southern Africa, showing how the existing land tenure systems have evolved and how these have impacted, specifically on women's position in land matters (Chanock, 1991; Cross, 1992; WLSA, 2001; Bennett, 2004; Cousins, 2007, 2008a, 2008b; Delius, 2008).

The chapter then considers a framework for the analysis of gendered land rights, and this includes key aspects of access, power and control; it also considers common property as an important component of communal tenure. The chapter then identifies and discusses obstacles to secure tenure rights for women in South Africa's former homelands, as well as the creative ways devised by rural women to instigate positive change and to overcome these obstacles.

In the broadest terms, land tenure systems define the relationship between people in the use and occupancy of land. More specifically, land tenure systems refer to 'the customary, legal or otherwise institutionalised relationships between government, society groups and individuals regulating the ownership and control of land, and the rights and duties accompanying such relationship' (Tengey, 2008:143). Property law is characterised by the right to use and manage a property – *usus*, the right to use what is produced on a property – *fructus*, and the right to dispose of a property - *abusus* (Tuyisenge, 2008:155). In South Africa's communal areas, most rural women have access to productive resources and enjoy usufruct rights, but few have independent rights to property, i.e. without a formal connection to a male.

3.2 Historical evolution of the gendered nature of land tenure regimes

3.2.1 Pre-colonial period

In pre-colonial Africa there was a relative abundance of land, as population figures were low (Cross, 1992; Delius, 2008). Cross refers to 'low-density polities', with the most important scarce land-based resource being, not land itself, but 'the human factors it commanded – alliance relations, clientship linkages, rights in relation to people and rights over labour, and the competence to organise these resources (Cross, 1992:311). Features of social and political organisation coincided strongly with principles of land tenure – rights to land within a particular group were determined by the status enjoyed within the group, as well as meeting a host of social obligations to other group members. Land was thus vested in groups, with the underlying principle of African land tenure during the pre-colonial era being that rights to land

... are an incident of political and social status. By virtue of membership in the nation or tribe, every citizen was entitled to claim some land, from the king or chief, or from such political unit as exists in the absence of chiefly authority. (Gluckman, 1965:78, cited by Cousins, 2007:294).

This effectively entitled each community member, both male and female, to an inalienable right to access, control and use of the land on the basis of

identification with and membership of a group, provided that the required respect for the ethical code of the group was maintained. Land rights could also be acquired through marriage, friendship, migration and formal transfer (WLSA, 2001; Cousins, 2007). Although this system of land tenure was broadly communal in nature, it also made provision for individual tenure, primarily residential and arable land, prompting Bennett (2004:381) to describe it as a 'system of complementary interests held simultaneously'. An example of this, is the allocation of land to male heads of households, based on the system of delegated responsibility, which characterised the socio-political organisation of societies in pre-colonial southern Africa:

Men could obtain such rights because the system was androcratic and land was allocated to the household head, who was usually a man. Traditionally, land preparation is the man's domain, while planting and weeding were and still are viewed primarily as women's jobs. The rights of an individual owner once established remained relatively permanent until the cultivator passed them over to his next of kin or relinquished them by abandonment ... While this land was allocated to male heads of families, women only had usufructuary rights over such lands as daughters, wives, or nieces but were not allocated land in their own right (WLSA, 2001:9).

However, Women and Law in Southern Africa (WLSA) studies note that in a number of southern African states there were practices that ensured women's rights to land. For example, in Zambia, women had access to land in their own right under matrilineal systems such as the *Lamba*, *Bemba*, *Tonga* and *Luvale*, especially if they practised matrilocality. Most of the ethnic groups in Malawi practice matrilineality, therefore women had direct access to land in their own right or through heritage. In Zimbabwe, the *Tseu* and the *Isivande* practices protected women's land rights. In Botswana, women's access to land was ensured through the concept of *Serotwana*, whereby a daughter, on the occasion of her marriage, could be allocated land by her father (WLSA, 2001:10-11).

In South Africa's Pondoland, married women enjoyed rights to select and cultivate their own fields. Although the land was not allocated to them, as soon as they had turned over the soil, they had exclusive rights to cultivate those fields, regardless of periods that the fields were left in fallow; there was

also no limit to the size or number of fields they could cultivate (Cousins, 2007).

A central feature of African tenure systems during the pre-colonial period was the right of access to and use of shared natural resources, like water, grazing, forests and a wealth of land-based resources, e.g. edible wild fruits and vegetables, edible insects, small wild animals, grass for thatching and weaving, trees for fuel wood, building and fences, clay and sand for constructing dwellings, etc. Use of these resources, particularly in relation to grazing, was regulated, with attention paid to boundaries of the areas housing shared resources (Cousins, 2007).

Cross (1992:310-319) emphasises the importance of an indigenous social land ethic which structures the social values attached to land; she asserts that 'land is as much a relation between people as it is the means of production' (1992:314). Cross summarises a series of rural land ethic principles that have been shaped into existence since the pre-colonial period, which include the following:

1. Universal access to land is conditional and not automatic.
2. General access to the factors of subsistence; this includes every resource required to make a family self-supporting.
3. Use priority – a family with more land than it needs, could be allowed private discretion in land transfer to those needing it.
4. The obligation to continuing exchange accommodates towards the economic principle that land transfers could be one-off and final.
5. The obligation to return land at need weakens against assertions of the landholder's individual decision autonomy.
6. Belief that occupancy means gradual transfer of control shifts toward acceptance of permanent individual ownership.
7. Pyramiding claims to the land parcel simplify toward an individual ownership right.
8. The commitment to continuity of the descent group dwindles to continuity of the individual family line.
9. The principle of settlement seniority moves towards a simple egalitarianism (Cross, 1992:319).

Cross maintains that despite the social changes that have taken place in rural settings over the years, many of these principles have persisted; she notes, however, that the rate at which these changes take place is highly variable and that some of them are hardly noticeable (Cross, 1992:319).

James (2007) suggests an additional rural land ethic, namely 'benevolent paternalism', which appears to be derived from pre-colonial relationships of dependency on chiefs for land. She contends that these land-related relationships of social dependence persisted into, and were refined in the subsequent period of colonialism and apartheid. Cousins (2009b:425) disagrees with James' assertion that a land ethic necessarily involves notions of trusteeship or 'benevolent paternalism'; he argues that chiefly trusteeship was a colonial construct, an integral component of the system of indirect rule by chiefs during the colonial and apartheid period.

3.2.2 Colonial and apartheid period

The early colonial period was characterised by a rapid growth in the population, which led to the increasing scarcity of land. Colonial governments passed new land laws, which involved the large-scale resettlement of black people. In order to contain the resultant resistance to this dispossession of land, the settler-government created 'native reserves' where black people were dumped, after being forcibly removed from different parts of the country. With the emergence of the mining industry in the 19th century, and the period of rapid industrialisation of the early 1900s, these overcrowded 'reserves' then became the reservoirs of cheap labour to the emerging capitalist economy (Cousins, 2008a; Meer, 1994), hence Walker's (2002b:26) reference to them as 'labour-exporting areas'. The creation of this pervasive system of migrant labour dominated the lives of most rural communities in the 20th century, impacting most severely on the women and families of the migrant workers (Delius, 2008).

Meer (1994:35) comments on the impact of this harsh imposition on rural people:

On the one hand, black males were pushed into wage labour through repressive measures ... On the other hand their families and unemployed black males were prevented from entering cities, through other repressive laws.

Chanock (1991:70) highlights the central role of power relations and interest groups in fully understanding both the changes and continuities in land tenure during the period of colonial transition. The deeply gendered nature of these interests is clearly evident in the re-definition of women's land rights as 'secondary' and subordinate to those of males (Cousins, 2007:299). The colonial response to addressing the new conditions of land shortage was to 'adapt' customary tenure. To this end, women's primary rights to land, as enjoyed during the pre-colonial era, ceased to be. New, downscaled land allocation principles were enforced by chiefs, whereby, initially, each male member of the tribe was entitled to land to support his family. Land scarcity compelled a progressive re-allocation, first unused land, then fallowed land, followed by the restriction of each family to a defined land area (Gluckman, 1961, cited by Cousins, 2007:297).

The colonialist distortion of the concept of 'customary' law and the potential for abuse in interpretation, is highlighted by Walker (2002), particularly with regard to the shifts in the character of women's land rights during this period:

... the interpretation of 'customary' law by colonial administrators and magistrates served to strengthen, not weaken, patriarchal controls over women and to freeze a level of subordination to male kin (father, husband, brother-in-law, son) that was unknown in pre-colonial societies ... this project involved not simply the imposition of eurocentric views and prejudices on the part of colonisers, but also the collusion of male patriarchs within African society, who were anxious to shore up their diminishing control over female reproductive and productive power (Walker, 2002:11, cited by Cousins, 2007:299).

With the 'reserves' becoming more crowded and pressure on land growing, the tenure systems became even more rigid and more discriminatory against women. For example, single women who could not demonstrate 'justifiable family obligations' did not qualify to apply for a land allocation; such women could usually only gain access through marriage (Delius, 2008:226). The process of colonial incorporation of customary law reshaped the systems of tenure, which, according to Delius (2008:226) enhanced the rights of male

heads of households, while downgrading the rights of both single and married women.

The era of segregation and apartheid in South Africa saw the passing of a plethora of discriminatory and oppressive laws; among these were two notorious land laws, namely the 1913 Land Act and the 1936 Land and Trust Act, that declared 13% of the country's land to be scheduled as 'native land', and set aside as the area in which Africans would be allowed land rights. Regulations were passed that impacted severely on tenure security; landholders' rights to bequeath or transfer land were restricted, and women's land rights were even more circumscribed (Cousins, 2007:300-301).

During the closing stage of the apartheid era the two forms of tenure that applied, quitrent for surveyed land and 'Permission to Occupy' (PTO) certificates for unsurveyed land, presented their share of limitations. Paramount were the gender implications – PTO certificates, formal proof of the allocation of individual land rights, were issued to male household heads, giving them sole legal status, and thereby undermining women's position in the family. Women's land rights were not recognised at all, while a rigid system of male primogeniture governed inheritance (Claassens, 2005; 2008a; Claassens and Ngubane, 2008; Cousins, 2008b).

The colonial and apartheid regimes had outlawed the primary rights to land that women enjoyed during the pre-colonial era, and instead created an unequal terrain, subjecting women to customary law within a hostile patriarchal landscape. Women were deemed minors, with their access to land mediated through male kin and restrictions imposed on their inheritance of land. Additionally, land rights vesting in families and user groups – which had been recognised in the pre-colonial period – were replaced by a system of 'permits' allocated to individual men.

3.2.3 Contemporary period

The dawn of democracy in South Africa brought much hope and enhanced expectations from people on the ground, of the new government's land reform programme that was constitutionally obliged to address the 'land question' at three levels, namely land redistribution, restitution, and tenure

reform. The latter addresses the insecure tenure of rural people residing in the former homelands.

The contemporary case studies of 'communal tenure' in this country generally characterise land tenure in the former bantustans as being both communal and 'individual' in nature (see for example, Cross and Hornby, 2002; Walker, 1997, 2002b; Kepe, 1997, 2002; Ntsebeza, 1999; Turner, 1999; Levin and Mkhabela, 1997; Claassens, 2001; Oomen, 2005). The studies show that while the patriarchal character of the communal areas is still evident, there is no uniform land allocation pattern. For example, the apartheid era PTOs have survived into the post-1994 democratic dispensation, with these certificates still being issued exclusively to male household heads in some rural provinces; this continues to be problematic for rural women. On the other hand, significant changes in the allocation of land to women, especially single women with dependants, have come about. The case studies abound with accounts of the tenacious struggles and contestations of rural women on the ground, coupled with the changing attitudes of the more 'progressive' chiefs, which have resulted in, what Claassens and Mnisi (2009:23, forthcoming) call 'negotiated change' in the gendered land allocation patterns. Analysts agree that the changes on the ground are uneven and slow, but acknowledge that the patriarchal character of the rural landscape is changing.

Formal legal initiatives on the part of the state involved a number of attempts at resolving the contradictory nature of the communal areas, with rural people, as chiefly subjects, having expectations of benefiting from the new democracy that their urban counterparts were enjoying. The 1999 draft Land Rights Bill (LRB), modelled on the pre-colonial land tenure regime, and making provision for individual land rights, of men, women and families, never saw the light of day, and was rejected in favour of the 2003 Communal Land Rights Bill (CLRb). After scrapping the LRB and coming under fire from women's groups for compromising rural women, the new Minister of Land Affairs, Thoko Didiza retorted that, 'women with problems could litigate and use the equality provisions in the Constitution' (Claassens and Ngubane, 2008:180).

The highly controversial CLRB elicited widespread objection from rural communities, civil society NGOs and human rights groups who condemned it as being skewed in favour of apartheid-era tribal authorities which would compromise the land rights of rural people, and rural women in particular.

In 2003, at the height of the controversies around the Communal Land Rights Bill (CLRB), the Chairperson of the National House of Traditional Leaders, Inkosi Mpiyezintombi Mzimela offered this justification for the proposed new legislation:

‘A male member of a community is expected to care not only for his own wife or wives and their children, but also for the families of deceased male members of his family, and they honour that obligation. There are no such obligations in western culture and traditions. Understandably, then, the male will have the dominant property right to go with his greater responsibility’ (Claassens and Ngubane, 2008:179).

Despite the widespread opposition to the bill, which included public hearings by the Parliamentary Portfolio Committee, the government hastily passed into legislation the 2004 Communal Land Rights Act (CLRA), in what was widely regarded as a pre-election deal with traditional leadership. Women’s groups and human rights activists publicly condemned the state for what was regarded as a betrayal of rural women, by imposing on them this Act, together with the 2003 Traditional Leadership and Governance Framework Act (TLGFA), which granted traditional authorities unprecedented powers over rural communities. The strongest display of opposition to this imposed legislation, was the challenge mounted by four rural communities, questioning the constitutionality of these Acts³. After further pressure from human rights activists and women’s and civil society groups, the state added an amendment to the CLRA (2004) that provided for joint titling vested in ‘both spouses’. While this was acknowledged in some quarters, it continues to be problematic since it disregards all rural women who are not ‘spouses’ and renders insecure the tenure of single women, widows, divorcees, daughters, etc. living on family land (Cousins, 2006; Claassens and Mnisi, 2009, forthcoming).

[Chapter 5 deals more fully with recent tenure reform legislation].

³ In October 2009 the North Gauteng High Court ruled that key provisions of the CLRA are unconstitutional (RSA, 2009), thus rendering it unimplementable (Cousins, 2009a).

3.3 Framework for analysis of gendered land rights

3.3.1 *Rights, access, power and control*

Rural women are the undisputed farmers of Africa (WLSA, 2001); in fact, in 1998 the United Nations theme for World Food Day was 'Women feed the world', a recognition of the significant contribution of rural women to agriculture and to food security (Sow Ndiaye, 2008:139). As the primary users and occupiers of rural land, it is crucial that women not only have access to land, but that they have independent rights in land; that means rights that are not formally linked to male ownership and control. Agarwal (1994) makes a compelling case for women's independent rights to land to be effective in practice, in other words, not merely *de jure* rights (in law), but also *de facto* (actual social practice) rights. She further argues that independent property rights are central to women's struggles for equality in gender relations, but that property advantage is gained not only from *ownership*, but also from effective *control* over it. She contextualises her argument thus:

In societies which underwent socialist revolutions, while private property ownership was legally abolished, control over wealth-generating property remained predominantly with men; any positive effects on gender relations that could have stemmed from the change in ownership if accompanied by gender-egalitarian mechanisms of control, thus went unrealised (1994:13).

In order to gain a better understanding of the nature of property rights and in particular how these impact on the lives of rural women, it is necessary to examine a few key concepts such as 'rights', 'access' and 'control'. Okoth-Ogendo (1989) argues that a *right* signifies a power that society allocates to its members to execute a range of functions, i.e. the provision of 'access'. Within the context of land relations, where that power amounts to exclusive control, it would be illustrative of 'ownership' of 'private property'. According to Agarwal (1994:19) access to land 'can be through rights of ownership and use, but it can also be through informal concessions granted by individuals to kin or friends', and *control* of land means 'the ability to decide how the land is used, how its produce is disposed of, whether it can be leased out, mortgaged, bequeathed, or sold'. The importance of effective control, i.e. for purposes of guaranteeing access to power over land for production purposes,

is widely acknowledged in the literature (see particularly Okoth-Ogendo, 1989:11).

In communal tenure regimes access to land is distinct from control of land (through systems of authority and administration). Control is concerned with ensuring access and enforcing rights, regulating the use of common property resources, overseeing mechanisms for redistributing access (e.g. across generations), and settling disputes over land claims. Control is located within nested systems of authority with several functions at local or lower levels (Cousins, 2008a:129).

3.3.2 *Common property as a component of communal tenure*

The development literature contains several attempts at clarifying and defining common pool resources (CPRs). Shackleton et al (1998:4) adapted the definition of common property regimes, as formulated by Bromley and Cernea (1989), and propose the following:

Common property regimes are structured arrangements in which group membership is defined, boundaries are clear, outsiders are excluded, rules are developed and enforced, incentives exist for co-owners to conform, and sanctions work to ensure compliance.

The primary objective of this type of definition is to negate Hardin's (1968) notion of 'the tragedy of the commons', which argues that group management of the commons is bound to result in resource degradation, mismanagement, depletion and over-use of resources. Common property management theorists also advocate institutional control over common resources, to ensure effective common property resource management (Bromley and Cernea, 1989, cited by Shackleton et al, 1998:4).

A further working definition of a CPR, is proposed by Shackleton et al (1998:6):

A CPR is a resource which is co-owned and jointly used (e.g. a forest, a coastal fishing zone) by a defined user group. CPRs are composed of *subtractable* resource units (e.g. trees, bark, fruits, fish), which individuals access and appropriate from the system (Adapted from Ostrom, 1992).

A deviation from the above definitions is the argument that 'there is no such thing as a common property resource; there are only resources managed as common property, as state property, or as private property' (Bromley, 1992, cited by Shackleton et al, 1998:7).

This study will use the term 'common pool resources' (CPRs), which are defined as resources that generate finite quantities of resource units, and one person's use subtracts from the quantity of resource units available to others. Most common pool resources are sufficiently large so that multiple actors can simultaneously use the resource system and efforts to exclude potential beneficiaries are costly (Ostrom, 1992).

An IFAD (1995) summary of the *different property regimes* places the concept of 'common property' in relation to other regimes, in clearer perspective: (a) *open access* is characterised by the absence of any distinct group of owners or users with defined rights or duties; the resource is open to anyone to appropriate; open access systems usually result in over-exploitation and degradation, unless the user groups are very small; (b) *common property*: here rights accrue to specified users; non-members are excluded; rules define the rights; sanctions are in place to ensure compliance; (c) *private property*: rights accrue to an individual or corporate owner; these rights are legally protected by law; private property can be traded through the land market; and (d) *state property*: ownership rights are vested in the state; the state may give others rights of access and/or ownership – specific rules would apply.

Areas of common property are often an important source of natural resources, particularly for groups that are socially and economically vulnerable, such as women, the young and the poor – these groups are afforded access to common pool resources that are held and managed as a public good (see for example, IIED, 1995; Kepe, 1997, 2002; Shackleton et al, 2000). The study on the significance of communal rangelands to rural livelihoods in South Africa (Cousins, 1999a) provides a clear exposition of the immense value of land-based resources within this country's communal areas.

Scoones et al (1992) point out that common pool resources are found in many different sites, for example in settled agricultural systems, field

boundaries, waterways, road or path edges and communal grazing or forest lands may be held in common. The gender dynamics related to the management of natural resources in different locations are illuminating:

Wild foods have different values for different people. For example, in some societies, men tend to concentrate their work on agricultural plots, whereas there may be associated areas such as field edges, contour ridges and pathways that women value highly and manage intensively. These may be the areas where leafy vegetables, rodents or fruits are found and harvested. The value of these marginal areas may not be recognised by the menfolk. Women are more involved than men in wild resource management, harvesting, processing and sale, which means that they value the resources higher than men ... During the 1984-5 famine in Sudan, female-headed households were better off than those headed by men because they were more knowledgeable in the collection and preparation of wild foods (Bell, 1995:4).

While this extract contains a number of generalisations around gender, which are not adequately substantiated, the importance of the 'associated areas' yielding a wealth of diverse resources of high nutritional value, is clearly illustrated. The detailed knowledge that rural women have acquired through this practice, is indicative of their role as primary users of rural land and natural resources (Shackleton, S. et al, 2002).

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3.4 Obstacles to secure tenure rights for women

Women's access to land and property in the communal areas hinges on an intricate tangle of law, practice and 'custom' on the one hand, and on the other, the embedded economic and social relations between men and women and across the generations (Walker, 1997:66; Cousins 2008a, 2008b). The research literature has shown that throughout Africa and in the rest of the developing world, rural women's legal status regarding access to natural resources is governed by a situation of legal pluralism, whereby statutory law, local customary law, and often religious law, all apply equally (Palombi, 2008:119).

Although women constitute a majority of the population in the former homelands and are the primary occupiers and users of land, they do not enjoy direct access in their own right; they have access to 'secondary' rights to land and resources through male kinship, primarily marriage, even though this

institution appears to be in decline among African women (Cousins, 2008:121; Walker, 1997, 2002b; Claassens and Mnisi, 2009, forthcoming). On the whole, unmarried women with children to support are eligible for land allocation, but only through a male relative. In its submission to the Parliamentary Portfolio Committee on Agriculture and Land Affairs, the National House of Traditional Leaders (2003) pronounced itself on women's land rights:

Due to the fact that the determining factor is the question of need, unmarried women do qualify for land allocation whenever they prove, like everyone else, that they have the means to sustain themselves and have dependants to support. Married women enjoy equal access to family allotments as husbands. We accordingly do not object to the registration of allotments in the names of both spouses (2003:3).

As already mentioned, the spousal clause remains contentious as it excludes all women who are not 'spouses'; this is discussed more fully in Chapter 5 that deals with tenure laws and policies, and in particular the Communal Land Rights Act 11 of 2004 (CLRA).

A case study conducted in the former Lebowa 'homeland' revealed that 'concessions' are sometimes made in cases where an unmarried woman living with her parents and is considered by the tribal authorities to be 'too old to get married' – she would then be allocated a stand; this, after being accompanied by a male relative to formally request a stand from the chief (Small, 1997:46-7). Although marital status may determine the initial land grant for single men, they are never threatened with eviction or dispossession if divorced or widowed, as is usually the case with women (Cousins, 2008a; Claassens and Ngubane, 2008).

The position of widows is tenuous. The customary norm (or ideal) in patriarchal societies is that widows enjoy continued lifetime rights in their marital land (both residential and fields), which passes on to the male heirs after their death (Walker, 2002a:18). However, the practical reality is that this ideal is not necessarily adhered to, as Small's (1997) case study bears out:

A Ragwadi woman ... recalls the fate of divorced women whose sons, regardless of their age, had their fathers' property registered in the eldest son's name. When this son married, the property rights were transferred to the younger son. 'If the youngest one

marries, the site belongs to him and his wife. There is no further role for his mother in decisions about the household. She becomes only a parcel. If there are problems, she has no option but to leave and go and stay with a daughter' (Small, 1997:47).

Several other case studies record instances where divorced or widowed mothers were evicted by their sons as a result of domestic conflicts. Claassens (2005) discusses this practice in other communal areas, where women emerging from failed marriages return to their original families, where land allocation is not always guaranteed; when such women are allocated land, they remain vulnerable to the patriarchal pressures by male relatives, usually brothers.

Cross and Friedman (1997) suggest that women are disadvantaged in their access to land under official tenure systems as well as by social assumptions and informal land practices. They assert that tenure is a social and political process, hence their argument that a large part of any tenure system is determined by prevailing power relations, community values, and unspoken assumptions about how people ought to act (1997:17-34). Additionally, Claassens and Ngubane (2008:156) point out that women are often excluded from key traditional institutions where important decisions are taken, for example village councils and tribal courts, and these are usually dominated by (elderly) men who denigrate women or ignore them when they try to speak.

Several local case studies bear evidence of women who inherit land, but face intimidation by male relatives and are often forced to sell it before it is 'stolen' by their aggressors (Cross and Friedman, 1997:25). In South Asia it is not uncommon for women to voluntarily surrender their inheritance to hostile male kin (Agarwal, 1994). South African case studies contain evidence of males resorting to violent behaviour towards women, exhibiting their negative response to changing policies that afford women increased access to resources. Researchers conclude that many rural men are both fearful and resentful of women's economic independence; men who resort to this behaviour also do not accept that their traditional base of power and control over resources is being eroded, as women become empowered (Cross and

Friedman, 1997; Walker, 1997; Small and Kompe, 1992; Cross and Hornby, 2002).

Women are situated within households, which are not homogeneous, unitary, neatly-bound units (Peters, 1986:137), neither are they units of 'congruent interests, among whose members the benefits of available resources are shared equitably, irrespective of gender' (Agarwal, 1994:3). It is evident that within households women and men have potentially different interests, needs and requirements; therefore, women's economic needs require a specific focus, distinct from those of men, particularly in the consideration of women's share in the resource that determines economic well-being and that shapes power relations, namely land (Agarwal, 1994) there are also different relations of *power*, which are determined by the resources that each one commands, controls, or has access to. The more control that any household member has over the productive resources, the greater the power in decision-making over those resources (Agarwal, 1994; Walker, 2002b:27).

Cross and Friedman (1997:26) draw attention to the serious impact of corrupt rural *power relations*, which invariably leads to men's greater access to power and to those in commanding positions of power; this is bound to give them a significant, and unfair advantage over women, particularly in offering bribes and special favours. They argue that the chances of challenging these corrupt practices and changing the power relations are limited, since most of the regulatory systems are informal in nature, and that new legislation is required to alter the balance of forces. Claassens and Mnisi (2009, forthcoming), however maintain that rural women have proven their capacity to challenge and change the power relations particularly within the context of customary law, and that the introduction of new legislation governing communal areas has not facilitated the changes under way, but instead put them at risk (2009:3).

3.5 Conclusion

Land is considered the most fundamental resource to rural communities; it is central to their living conditions, as well as their economic

empowerment. The vast majority of the landless are women, primarily because of the large numbers of women who live in rural areas, and they face an array of discriminatory and oppressive practices, most notably their being rendered invisible by patriarchal practices that generally tie land rights to men – husbands, fathers, brothers, or male relatives.

This chapter focused on the deeply gendered nature of land tenure regimes, as evidenced in South Africa's former homelands. The assessment of the land rights of women residing in the communal areas confirms that they are legally insecure and therefore the focus of tenure reform policies and new legislation. The chapter discussed the pre-colonial, colonial and apartheid, and contemporary systems of land tenure in relation to women's and men's land rights in southern Africa, illustrating how the existing land tenure systems have evolved. Of particular interest is the re-definition of women's land rights, from 'primary' and independent rights during the pre-colonial period, to 'secondary' and subordinate to those of males in all the subsequent historical periods.

The chapter then considered a framework for the analysis of gendered land rights, which included a discussion of key aspects such as rights, access, power and control; it also considered common property as an important component of communal tenure. The focus of the chapter then shifted to examine some of the obstacles encountered by rural women in achieving greater tenure security, as chiefly subjects residing in South Africa's former homelands. It acknowledged the creative ways devised by rural women to instigate positive change and to overcome these obstacles.

I think that the government's lack of political will to deliver on its own constitutional obligations towards the millions of rural people, who have yet to experience the basic freedoms and democracy that they have fought for, is not only a betrayal of those living on the margins, but a violation of their human dignity. The disgraceful history of gendered and unjust land tenure regimes, that shamefully continued into our present-day democracy, is to be deplored. I agree with the analysis of Claassens and Mnisi (2009, forthcoming) that the formal legal initiatives on the part of the state will only serve to jeopardise and put at risk the 'processes of negotiated change underway in rural areas' (2009:23); I believe that the bold rural dwellers, and in particular the courageous rural women, those 'holding the knife on the sharp edge' (Kompe et al, 1994), will ultimately be responsible for their own liberation.

CHAPTER 4

LAND ADMINISTRATION, TRADITIONAL AUTHORITIES AND WOMEN

“They should continue what they’re doing, we appreciate their work,” said one old woman. And when a chief enters a village it is the women who ululate, kicking up sand during traditional dances with brightly coloured feather-dusters, and – if they are lucky – get to say ‘direto’, praises to the chief in high Sepedi: “I see the man who wears the leopard-skin and I stand shivering; before, we were moving through thick bush, now we see light” (Oomen, 2005:189); and

At all the conferences on ‘Traditional Rule and Local Government’ there is always a row of youngsters and rural women at the back, shaking their heads and clicking their tongues as ‘their’ chiefs rage on about how ‘rural people don’t want this democracy’ and ‘it is impossible to have two bulls in a kraal’ (Oomen, 2005:249).

... legal strategies to support women’s land rights cannot evade the customary law arena and instead should engage with it directly, not least because of its impact on power relations at the local level. Rural women have no option but to grapple with issues of rights and custom in local ‘customary law’ arenas. The perils associated with the discourse should not blind us to the democratic and transformative possibilities inherent in the contestations taking place in these arenas. It is these contestations that, when brought to light, are the most effective rebuttal to the distorted versions of custom that dominate the national level discourse (Claassens and Mnisi, 2009:2, forthcoming).

4.1 Introduction

This chapter focuses on the impact of traditional authorities and rural land administration on the lives of rural people in general, and rural women in particular. Firstly, it traces the history, roles and functioning of traditional authorities through several eras in the history of this country, from pre-colonialism to 21st century democracy, and examines the role and practices of their members in relation to rural communities. Secondly, it considers the opinion that traditional authorities have a meaningful role to play as custodians of traditional land and the rural communities that they govern, and that their constitutional recognition by the ANC-led government is justifiable (see for example Nhlapo, 1995). It also considers the argument that this institution of hereditary rulers and chiefs is inherently undemocratic,

unaccountable, oppressive and exploitative, and therefore an anomaly within a democratic dispensation and in violation of the constitution of this country (see for example Mamdani, 1996; van Kessel and Oomen, 1999; Ntsebeza, 1999, 2006, 2008; Turner, 1999; Oomen, 2000, 2005; Murray, 2004; Cousins, 2008a, 2008b; Claassens and Cousins, 2008). It also considers an option that proposes the recognition of the negotiations, contestations and changes spear-headed by rural women in the former homelands (Claassens, 2001, 2008a; Claassens and Ngubane, 2008; Claassens and Mnisi, 2009, forthcoming; Cross and Hornby, 2002). Thirdly, the chapter assesses current debates and controversies, focusing on rural decision-making structures and the implications for women, as well as the empowerment of rural women within the context of 'living customary law'.

4.2 Historical evolution of roles and powers of traditional authorities in relation to land

4.2.1 Pre-colonial period

This period was characterised by low population figures and a relative abundance of land. The acquisition of power and wealth on the part of chiefs depended on their ability to build up large followings; they needed to attract and hold followers. Therefore, chiefs 'who could offer material and military security as well as effective leadership gained followers. Those who were harsh, capricious and incompetent, lost followers' (Delius, 2008:215). It was easy for disgruntled group members to migrate between chiefdoms, as land was plentiful; this was also an important way of placing checks on chiefly abuse of power. Mamdani (1996) and Ntsebeza (1999) also comment on followers 'voting with their feet' and deserting abusive chiefs.

Land was essential for livelihoods, but had low exchange value. Land could therefore not be bought or sold; it was a free commodity that did not change hands commercially. Land yielded an extensive range of resources, which were fully exploited by those living on it (Biebuyck, 1963, cited by Cousins, 2007). Groups of peasants lived together on the basis of shared social, ethnic or political interests, under the authority of independent chiefs and elders. The institution of chieftainship was kin-based and hereditary

(Mamdani, 1996; Ntsebeza, 1999). The chiefs represented their groups' interests in making their claims to land, maintaining peace between the land-using units, defending the integrity of the territory or ensuring its fertility (Cousins, 2007:294).

There is not a uniform position in the literature on whether chiefs were the owners, or merely the allocaters of the land during this era. Ntsebeza is forceful in his assertion that chiefs indeed owned and allocated land, and extracted labour in return; 'commoners possessed the means of production, but did not own them' (1999:22). On the other hand, Schapera (1970) is equally clear that chiefs were not the owners of the land:

Except for the portions reserved for him and his family, on more or less the same basis as everybody else, none of the land is his property: nor can he dispose of it except gratuitously and to members of his own tribe. All members of the tribe are entitled to the use of as much of the land as they need; and the tribal authorities must see to it that their claims are gratuitously satisfied (Schapera, 1970:196, cited by Delius, 2008:220).

4.2.2 Colonial and apartheid period

The increase in population figures meant that land was no longer as plentiful as during the pre-colonial period; land had become a scarce and contested commodity. With colonial conquest, ownership of the land was vested in the state and systems of landholding underwent diverse processes of change. Most of the 'reserves' continued with the pre-existing forms of land tenure into the colonial period, with modifications where these were required. In some areas, notably the Transkei and the Cape Colony, the land allocation function was transferred to magistrates, although headmen generally retained the responsibility of allocation within their locations (Delius, 2008).

The colonial government used the 'reserves' to create a system of indirect rule in which traditional leaders were appointed to perform low-cost administration functions on behalf of the colonial state. Colonialism had, according to Mamdani (1996), turned the country into a 'bifurcated' state with an altered institutional structure that created citizens in the urban sector, and subjects inside the rural homelands. The institution of traditional leadership had been transformed by colonialism, from an earlier system of power and

control over groups of peasants, to a violent state form that Mamdani describes as a 'decentralised despotism' (1996:37).

Chiefs and headmen were receptive to their new role; those who refused to co-operate, 'were replaced by more co-operative brothers or sent to re-education camps' (Oomen, 2005:19). On the whole, they keenly performed their land administration duties, which situated them in an intermediate position between the state and the people, altering their line of accountability from downward to the people, to upward to the state, as Cousins explains:

... the notion of chiefly trusteeship of land, and the linked idea that customary land rights were allocated to subjects by land-holding ruling families, are colonial constructs that underpinned the system of indirect rule and eroded mechanisms that ensured the downward accountability of authority figures such as headmen and chiefs (Cousins, 2009b:425).

Their compliance was well rewarded, and they would not hesitate to resort to drastic and violent means of keeping the peasantry in check. Mamdani (1996) highlights the use of force as one of the distinguishing characteristics of 'customary' power, in his illustration of the positioning of traditional authorities in relation to both the periphery and the core:

... the African colonial experience was marked by force to an unusual degree ... The day-to-day violence of the colonial system was embedded in customary Native Authorities in the local state, not in civil power at the centre. Yet we must not forget that customary local authority was reinforced and backed up by central civil power. Colonial despotism was highly decentralised. (1996:22-3).

The countryside underwent a dramatic change with the implementation of the Native Administration Act of 1927. It meant that Africans would be subjected to chiefly rule, legitimated by 'custom', but still under strict white control from above. Cousins (2007) explains that the Governor General, as "supreme chief of all natives in the provinces of Natal, Transvaal and the Orange Free State" had the authority to recognize or appoint anyone as a chief or headman; the Governor General could also define the boundaries of tribes or locations within his jurisdiction (2007:301).

The apartheid regime continued the process of imposition of laws and practices that provoked major rural revolts (1940s to 1960s), as in Pondoland

and Sekhukhuneland. Most noteworthy was the Bantu Authorities Act of 1951, which involved the establishment of tribal authorities, a version of 'traditional rule', characterised by its highly authoritarian, unaccountable and undemocratic nature (Mamdani, 1996; Ntsebeza, 1999; 2008; Oomen, 2005; Cousins, 2007).

The colonial and apartheid regimes had created 'decentralised despots', rewarding compliance and entrenching dependence. Murray (2004) comments thus:

... from the early 1950s under the apartheid government, the development of legislative and administrative structures in the bantustans saw traditional leadership used in increasingly cynical ways and implicated chiefs ever more deeply in apartheid government. The central government's power of patronage was encapsulated in its power to depose and install chiefs and it was an effective tool in implementing apartheid policies in rural areas. Although there are accounts of leaders who resisted the demands of the central government, most did not. Under the corrupt apartheid system the rewards for compliance could be great. (2004:3).

A number of studies make a clear distinction between 'collaborator chiefs' (see for example, Claassens, 2001) who sold out their communities in support of the colonialist and apartheid regimes, and 'progressive chiefs' (Levin and Mkhabela, 1997) who opposed and challenged the ruling class structures. For example, during research conducted in Rakgwadi, a former 'bantustan' in the former Northern Province, Claassens (2001) found that 'it is not easy to challenge a chief' who had chosen to co-operate with the apartheid state in the forced removals and 'homeland' incorporation or opting for 'independence' at the expense of their communities. However, during the same period, there were traditional leaders, on the side of the people, spearheading the resistance to removal and incorporation:

Just as 'comrades' sheltered in our offices and homes, so too did 'comrade chiefs'. In various communities chiefs and traditional structures played a leading role in resisting the state and the police (Claassens, 2001:vii).

The 'collaborator chiefs' were deeply unpopular within their communities and relied heavily on state support, including backup from the police and army for their personal safety and in order to maintain their positions (Claassens, 2001). The chief's police also performed functions

related to land allocation, but villagers often complained of widespread corruption on the part of the chief's police, reporting cases of bribes being extracted from women, especially widows, while claiming to be checking for defaulters of tribal levy payments (Levin and Mkhabela, 1997:159). The gendered nature of this exploitative behaviour is noteworthy – while it is likely that acts of bribery were perpetrated on both men and women, it is evident that the most vulnerable members of rural society, the women – and in particular widows – were the easiest targets.

In a study conducted in rural Umbumbulu, Kwazulu-Natal, Mathis (2007) records an incident that illustrates the tendency of a chief whose land claim was being challenged (by someone bearing the same name as the chief), to resort to a violent response:

Several speakers at the meeting assumed that M.J. Mkhize, by leading a land claim, must be setting himself up as a rival to the *inkosi*, a perception that Inkosi Mkhize clearly shared. Later in the meeting, Inkosi Mkhize threatened that 'M.J. Mkhize must agree to have his name removed from the papers at Pretoria and if he continues with his nonsense, we will kill him!' (Mathis, 2007:102).

Prior to the uprisings of the 1980s in South Africa, the people living under the jurisdiction of tribal authorities were also subjected to the compulsory payment of levies as well as the performance of free or tribute labour (*mothubo*). For example, in Rakgwadi this involved males ploughing and working the chief's fields, and collecting and delivering firewood to the chief's residence; the women formed work parties to tend and harvest the crops, and also cooked food and cleaned the *mosate* (chief's residence). Additionally, the villagers were required to make cash contributions for buying seeds and hiring a tractor or oxen for ploughing the fields (Claassens, 2001:23-25).

4.2.3 Contemporary period

With the advent of democracy in 1994, the government committed itself to the establishment of a credible and democratic order in South Africa, in both the urban and the rural sectors. Ntsebeza (2005) acknowledges the efforts made within the first decade of democracy:

For most of the first 10 years of South Africa's democracy, the ANC-led government has embarked on the all-important democratisation process. In the rural areas of the former bantustans, this included attempts to dismantle the concentration of powers in Tribal Authorities in the form of reforms in local government and land administration. A new conception of 'developmental local government' introduced the notion of elected local leadership and an emphasis on improving the quality of life of previously disadvantaged sectors. Attempts are also being made to democratise the system of land administration, including the involvement of women in land administration structures. (2005:2).

While these efforts were lauded, serious concerns were surfacing around the tension in the National Constitution between principles of democracy on the one hand and the recognition of an unelected, undemocratic hereditary institution of traditional leadership on the other.

The National Constitution contains the *Bill of Rights*, which enshrines the rights of all South Africans and affirms the 'democratic values of human dignity, equality and freedom' (RSA, 1996a). However, Chapter 12 of the Constitution (RSA, 1996b) makes provision for the recognition of the status and role of the institution of traditional leadership, subject to all the other provisions of the Constitution. Traditional authorities that observe a system of customary law are empowered to function, subject to any legislation and customs. Additionally, customary law is also recognised, once again subject to the Constitution. Furthermore, the Constitution makes provision for the introduction of national legislation which may determine a role for traditional leadership at local government level, as well as for national and provincial legislation that may establish a National House or Provincial Houses of Traditional Leaders (RSA, 1996b).

As far as local government is concerned, Chapter 7 of the Constitution (RSA, 1996c) makes provision for the establishment of democratically-elected local government structures across the country and allocates exclusive and specific functions to municipalities. The objectives of local government include the provision of democratic and accountable government to local communities, ensuring the provision of services to communities in a sustainable manner, and the promotion of social and economic development. Additionally, the specific local government matters over which municipalities have executive authority and the right to administer are clearly stipulated

(RSA, 1996c). There can therefore be no ambiguity: where the Constitution has allocated a function to a municipality, the municipality has sole jurisdiction over that matter.

However, in practice the government's recognition of the status and role of the institution of traditional leaders creates confusion. One of the primary difficulties in the relationship between unelected traditional authorities on the one hand, and elected local government structures on the other, is the overlap in several of the areas of responsibility in the legislation currently on government's books. The overlaps occur in areas such as the issuing of trading licences, environmental conservation, and the formulation and regulation of by-laws. There is lack of clarity around areas of development planning, land-use decisions, service delivery, and by far the most contested area, land allocation and management (NLC et al, 2000).

While the introduction of democratic local government by establishing municipalities countrywide is a key element of the government's programme of deepening democracy, the confusion created by the provision for two institutions at local and community level that operate within the same functional and jurisdictional areas, begs to be clarified. The NLC *et al* are emphatic in their assessment of the situation:

There is urgent need for resolution of this confusion as it has retarded development, service delivery and investment in many rural communities desperately in need of development support (2000:8).

Ntsebeza (2005; 2006; 2008) asserts that traditional authorities have expressed their opposition to the introduction of new democratic structures in no uncertain terms. In 2000, in the run-up to the second democratic election, they demanded that rural municipalities be disbanded in favour of tribal authorities, threatened violence in their areas and also to boycott the elections – this demand was rejected by government (2005:68-9).

Despite government's apparent firm stance on the democratising of local government, it appears that traditional authorities have been greatly placated by the state's passing of two crucial Acts, namely the Traditional Leadership and Governance Framework Act (TLGFA) of 2003 (RSA, 2003), and the Communal Land Rights Act (CLRA) of 2004 (RSA, 2004). Critics (see

for example Turner, 1999; Ntsebeza, 2005, 2006, 2008; Mbatha, 2003; Cousins and Claassens, 2004; Murray, 2004; Oomen, 2005; Claassens, 2008a; Cousins, 2008a, 2008b) argue that the promulgation of these two Acts runs the risk of seriously compromising the government's commitment to the establishment of accountable, democratic and effective governance throughout the country, particularly in the rural areas. Critics assert that the TLGFA establishes traditional councils which are dominated by unelected traditional authorities and their appointees, while the CLRA gives these structures unprecedented powers over land administration and allocation.

The research conducted by Claassens (2001; 2003; 2005) delves deeply into community responses to these Acts, considering the impact of the two Acts on democratic and indigenous accountability mechanisms. She argues that 'the Acts entrench the colonial model of traditional leaders being accountable upwards to the state, as opposed to downward to the people whose land rights they control' (2005:21).

A further concern raised by Claassens (2008a) points to what has been widely perceived as a pre-election deal between the ANC-led government and traditional leaders (see also Walker, 2002b:32). Claassens terms this 'deal' a 'cost-effective alliance ... that looks very similar to the mutually convenient arrangements of indirect rule that characterised colonialism and apartheid' (2008a:378). She argues that this deal enables traditional councils to enforce authoritarian versions of customary law, and also to 'tax' their subjects within the boundaries of jurisdictional areas derived from the apartheid past (Cousins, 2008b:28). Furthermore, according to Claassens (2008a), this arrangement is not dependent on the active implementation of any new laws (like the CLRA); she asserts that 'it will apply by default', regardless of whether or not any communal land is transferred from the state to rural communities (2008a:378). This ominous scenario points to far-reaching consequences for rural communities, who could find themselves deprived of post-apartheid freedoms, and trapped in ethnically delineated 'traditional communities' at the mercy of those who continue to be reliant on a distorted apartheid version of 'custom'.

Notwithstanding this bleak scenario, Claassens continues to engage with the ambiguities around traditional authority and the competing versions of

'proper custom' in this country's communal areas. In this regard, she acknowledges the processes of contestation, negotiation and change that are under way on the ground in the former homelands, and in particular the significant role played by rural women in driving this crucial process. Claassens and Mnisi (2009:2, forthcoming) present a credible argument for the recognition of the changes, however uneven and inconspicuous, and for the celebration of the 'democratic and transformative possibilities inherent in the contestations taking place in (the customary law) arenas' (Claassens and Mnisi, 2009:2).

4.3 Current debates and controversies

4.3.1 Rural women and decision-making structures

The level of women's participation in land management decisions varies across the communal areas. On the whole, women's experience of the tribal authorities (that will become the traditional councils) has hardly been positive (Cross and Hornby, 2002; Cross and Friedman, 1997; Meer, 1997; Small, 1997; Thorp, 1997; Mann, 2000; Walker, 2002b; Oomen, 2005). Case studies reveal that in most instances, women are not represented on decision-making structures; in many communal areas where women are allowed to attend meetings, they are not allowed to speak (HSRC, 2006; Claassens, 2003; Hargreaves and Meer, 2000). In this regard, Oomen (2005) observes that,

In many villages ... they (women) are not allowed to act as adjudicators, and even if they bring a case against someone they have to remain seated on the ground, their head covered and their eyes downcast (2005:188-9).

Claassens and Ngubane (2008) report on the problems experienced by rural women in KwaZulu-Natal:

In many instances, widows in mourning dress are not allowed to speak during tribal court proceedings. In some areas they are required to sit outside the fence of the court and convey their views to a male relative standing on the other side of the fence, who then conveys their views to the court. This puts a widow at a serious disadvantage in family disputes that arise after the death of her husband and may result in her eviction ... (elderly male) councillors often regarded women who raised land problems as troublesome and unruly, and treated their complaints as trivial (2008:174).

The decision-making structure in most of the villages is usually centralized in the *kgotla*, which typically comprises senior members of the tribe (or councilors) and a chief; each village has an appointed headman, usually a relative of the chief; the headman of a village has his own smaller council, which makes decisions for the village and presides over disciplinary hearings; women are generally excluded from these structures (Small, 1997:48).

Rural women are also rendered vulnerable by changing intra-family land relations as a result of demographic shifts, urbanisation and the commodification of land (Cotula and Toulmin, 2007, cited by Cousins, 2008b:19). This has led to decisions on land management being shifted from the extended family towards households and individuals. The absence of males from many rural households as a result of migrant labour has resulted in an increase in the number of female-headed households. This has placed additional burdens on women's shoulders; this usually means that women take on added tasks and responsibilities, without the related decision-making authority, or institutional recognition and support.

Notwithstanding these findings, there is a significant body of research that demonstrates that this is not the only reality governing the lives of rural women, but that there are processes of contestation and change under way in the former homelands, spear-headed by rural women. Claassens and Mnisi (2009:2, forthcoming) assert that these changes are *not* as a result of the implementation of new legislation and are 'only tangentially related to government policy and land reform initiatives'; they emphasize the central role played by women in the local processes of struggle and negotiation that have significant implications for women's land rights.

4.3.2 Empowerment of rural women

The research literature abounds with evidence of rural women challenging the unequal power relations within households and asserting their land use priorities and preferences. It is encouraging that recent research (for example the work of Ntsebeza, cited in Fair Share, 2002) shows that there is indeed concerted action on the part of rural women in different parts of the

country, and in this instance, in parts of the Eastern Cape, challenging chiefly abuses of authority:

The Cala/Xhalanga area has a long history of defying chiefs unlike the case in the Wild Coast. In the Cala area ... women have become more active and uninhibited, judging by their involvement in NGOs, their vocal and uninhibited expressions of opinion in public and their active role in decision-making (Fair Share, 2002:4).

Earlier case studies also show the qualitative development that has taken place in rural women's empowerment. For example, Small and Kompe (1992:13-14) traced the growth in confidence and active participation of rural women in Mogopa in the (then) Western Transvaal over a six-year period. One of the fieldworkers, MamLydia Kompe recalls how the women, when first encountered, were subservient, sitting separately from men in the community meetings, knitting or toying with tufts of grass, never raising their heads or participating in the debates. MamLydia felt that as a woman fieldworker it was her responsibility to challenge the assumption that women have no political opinions or ideas; she believed that the rural women needed mutual support in order to combat their feelings of inadequacy when speaking at meetings, considered to be the domain of men. By engaging women in an active process of struggle, and raising their level of consciousness, the women of Mogopa transformed from being passive observers to fully participating community members:

In community meetings nowadays (1992) in Mogopa the women are extremely vocal. They often heckle speakers if they do not agree, or break into song to drown an unpopular speaker ... Old men try to reassert their power: " ... *in our tradition women are never seen in meetings*". The women challenge such assertions, boldly saying that the traditions are outdated; they have participated in the struggle and have earned their right to have a voice (Small and Kompe, 1992:14).

The many case studies acknowledge every inch that rural women in the former homelands move on their journey towards the attainment of independent land rights, and central to this journey is their ongoing empowerment, which Agarwal (1994:39) defines as:

... a process that enhances the ability of disadvantaged ('powerless') individuals or groups to challenge and change (in their

favour) existing power relationships that place them in subordinate economic, social, and political positions.

The importance of rural women's empowerment is identified by Oomen (2005:251) as a key requisite in the process of bringing about 'real change' on the ground, by means of the provision of crucial resources that will enhance women's education, economic progress, and knowledge of customary law that impacts on their lives.

In addressing the South African rural scenario, Walker (1997:72) asserts that the empowerment of rural women requires tenure reform to pay more attention to women's practical needs, such as clean water, fuel, building material, etc. Additionally, investment in social infrastructure is equally crucial for the empowerment of women, as this will enhance women's self-esteem and their sense of being in control of their environments. Agarwal (1994) maintains that entitling women with land would empower them economically, as well as strengthen their ability to challenge social and political gender inequalities. Support for this view is found in the South African case studies where, additionally, the importance of organising rural women is emphasized.

The degrees of organisation among rural women vary. For instance, Walker (2003:113) comments on the low political priority accorded the implementation of the (former) Department of Land Affairs (DLA) gender policy, attributing this in part to 'weak levels of organisation among rural women'. She does, however acknowledge rural women's display of interest in strengthening their rights in land, and also lauds the efforts of a small but significant number of women whose households have secured land through the land reform programme, as a positive achievement. Meer (1997) reflects on women's lack of access to information because of their lack of involvement in local civic activity; for example, the women in Aberdeen in the Eastern Cape 'were not only not involved in the local civic organisation, they did not even know it existed' (1997:4).

On the other hand, studies of groundbreaking work done in the organisation and empowerment of rural women in different parts of the country serve to illustrate the degree of commitment on the part of these women, as agents of change, to rid themselves of the burdens of rural

patriarchy. Small and Kompe (1992) document the development work done by a rural NGO, organising rural women and facilitating programmes and activities spanning a 6-year period. Working with women whose lives were physically oppressive, largely because of the underdevelopment of the countryside, and also psychologically oppressive, because of their inferior social and economic status, alerted development workers to the lived reality of rural women: oppression caused by patriarchy, apartheid and capitalism (Small and Kompe, 1992:9). The power of organisation is illustrated, as they show how a shift in consciousness allowed women to realise that participation in community structures, previously a male preserve, could serve their own interests. Their empowerment enabled them to demand participation in both traditional and newly-created community structures. Furthermore, their engagement culminated in the formation of the Rural Women's Movement (RWM), which has as one of its aims the demand 'that women have equal rights to land' (Small and Kompe, 1992:19). This process of engagement with rural women has contributed to the following policy suggestions being put forward (summarised by Meer, 1997:1):

- (a) that women be organised and empowered at community level;
- (b) that women's demands be taken up so that their priorities get addressed in community and national decision-making forums; and
- (c) that women participate in decision-making structures from local to national level.

A further noteworthy contribution is the research conducted by Cross and Hornby (2002) in the KwaZulu-Natal area, which highlights the prevailing patriarchal nature of traditional institutions that continues to be an obstacle for rural women, as well as the legal impediments to women's access to resources, namely marriage and inheritance laws. However, the findings of a key case study (Mangete) are of interest, particularly as they pave the way for increased land allocation to single women. The researchers were particularly encouraged by women's knowledge of the procedures for accessing land, and concluded that changes, albeit uneven, were taking place in some rural districts of KwaZulu-Natal (Cross and Hornby, 2002:14).

More recent investigations by Claassens in various parts of this country reveal similar positive trends in land allocation to single mothers; although the

process of change is still very uneven, there are distinct indications that this process has accelerated during the last five years (Claassens and Mnisi, 2009:9, forthcoming).

Jackson (2003) expresses her optimism at the positive strides made, as evidenced in research findings that show 'how women can and do prise open patriarchal control of property when opportunities and subjectivities coincide. One abiding source of optimism I have lies in the contradictory character of patriarchy and the ability of poor women to make use of these contradictions' (2003:478).

The courageous women of Cala, Xhalanga, Mogopa, Mangete and several other rural communities in this country have demonstrated their potential to rise as agents of change, showing their determination and ability to 'prise open patriarchal control of property', making their voices heard and taking control of their lives.

4.3.3 Traditional leadership: Future roles?

Notwithstanding the forceful and compelling arguments against the recognition of traditional leadership structures within a democratic dispensation, there is, however, a significant body of research that presents a credible alternate opinion, namely that traditional structures remain central to the lives of rural communities and that they have a very important role to play at local government level.

Rural communities across the African continent whose very existence is threatened by ongoing political strife and civil war have become reliant on non-state organs that function in an environment of shared authority, devising safety and livelihood strategies. Hansen's (2006) study of the Acholi community in northern Uganda, a region in the grip of ongoing conflict since 1986, illustrates this reality:

Ongoing for the past 20 years, the conflict in northern Uganda has created a unique relationship between the state, civilians, civil society groups, humanitarian and development practitioners. Non-state actors such as traditional authorities, national and international NGOs, religious leaders, and a host of civil society organisations help fill the void, where the state fails to provide adequate support to a region populated by 1.5 million displaced persons. Furthermore, another 4 million persons living in

neighbouring districts are indirectly affected by the conflict, equally finding themselves at the end of the public service provision chain (2006:1).

Hansen's study reveals that as a result of the deaths, as well as the loss of economic development and other unresolved grievances of the Acholi people, their confidence in the Ugandan government has diminished; they question the state's capacity or political will to end the long-standing conflict in the north. On the other hand, they are more trusting of traditional leaders who perform a range of functions that are highly relevant to the stability of that region:

Traditional leaders are often perceived by the population and even by the government as being independent, impartial and trusted. Through their historic roles, known by generations of Acholi, they are also perceived to have a large degree of moral authority ... (their) presence is felt especially when settling family disputes, reconciling parties in conflict and encouraging peaceful co-habitation (2006:4).

In Africa conflict-ridden states have experienced a revival of traditional leadership. Additionally, several states (among them South Africa, Malawi, Mozambique, Uganda, Ghana) have embarked on constitutional recognition of traditional authority. Traditional authorities are given extensive tasks to perform at local government level (Agbese, 2004; Guri, 2006; Hansen, 2006; Lutz and Linder 2004). Among the recognised areas of responsibility, are:

Regulative policies: Conflict and dispute settlement; natural resource management; local development and planning; regulation of the social, economic (and often religious) structures and norms.

Allocative, distributive and re-distributive policies: Allocation of communal land; infrastructure (such as roads, bridges, electricity, water); tax and revenue collection; implementation of other national policies.

Administrative policies: Voter registration; issuance of certificates (birth/death/marriage/divorce); land registration, etc.

Most contemporary South African case studies show overwhelming support among rural people for traditional authorities to remain as key role players in the operation of land tenure systems. This is the case even in contexts where rural dwellers complained most strenuously of abuses and

corruption on the part of traditional authorities. For example, Oomen (2005) gauged women's and men's opinions on traditional leadership in Sekhukhuleni and was amazed at the range of responses received. A staggering 83 per cent of women were more enthusiastic in their support of their traditional leader than their male counterparts. When asked whether this female support for *bogosi* (chief) meant that women feel that the institution does not discriminate against them, the response was mixed: 42 per cent of the women, as opposed to 28 per cent of the men, felt that *bogosi* discriminates against females, but the majority of males and females did not think so. Some of the comments from women were quite revealing: 'Maybe women can't stand up at the *kgoro* (tribunal of elders/chiefs), but that is not discrimination; it's just our culture', and another woman said, '*tsha etwa ke e tshadi pele, diwela ka leopeng* – if a woman leads, the nation goes astray!' (Oomen, 2005:188-9). Oomen's work does, however provide ample evidence of contrasting views on this matter.

The analyses from the various contemporary case studies reveal the nature of the power wielded by traditional authorities as well as the degree of popular support they enjoy. Coupled to this is the range of crucial variables, namely, the degree of external support received from the state, the degree of control that traditional leadership structures have over land rights, and the relative ineffectiveness of the post-1994 structures of democratic local government (Cousins, 2008a:126-7).

It is evident from case studies that the democratisation of land administration, together with accountable structures, are central requirements of attempts to bring about increased security of land rights – of all rural people, but of rural women in particular. To this end, downward accountability would reduce the scope for abuse and corruption (Cousins, 2008a:127).

4.4 Conclusion

The institution of traditional authorities in South Africa, a creation of colonialism, nurtured and developed by apartheid, survived several eras and found its way into present-day democratic South Africa, thanks largely to its dependent relationship on the governing authorities over the different political

eras. This chapter examined the history, structure, roles and functions (past, current and future) of this institution, taking stock of its impact on those residing in the 'periphery' – the most marginalized and most vulnerable members of South African society – the rural poor, and rural women in particular. The chapter also focused on the significant processes of change under way in South Africa's rural sector, with the empowerment of rural women at the core of these changes.

Analysts and scholars offer somewhat divergent alternatives to their assessment of the relationship between traditional authority (statutory law) and customary law ('living' law) in post-apartheid South Africa. The three dominant options are summarised below.

In the first instance, critics of the institution of traditional authorities (notably Ntsebeza, 1999, 2006, 2008; Murray, 2004; Levin and Mkhabela, 1997, Mamdani, 1996), particularly within the context of a hard-won democratic dispensation, are unanimous in their condemnation of the undemocratic nature of its structures and practices, the often tyrannical mode of governance, and the opportunist and greed-driven relationship of reliance and dependence forged with the various ruling regimes, from colonial and apartheid times, into our present-day democracy. These critics also charge that traditional authorities are ill-equipped – at best unskilled, at worst corrupt – to manage the responsibilities of local government (Walker, 2002b:31, citing Ntsebeza, 1999). Harsh criticism is also levelled at the ANC-led government for its betrayal of the rural, impoverished communities, by passing into legislation oppressive and confusing Acts (CLRA and TLGFA), thereby denying rural communities their constitutional rights and freedoms, as citizens to choose their leaders and mode of local governance, relegating them to continued suffering as 'subjects' at the hands of unaccountable, 'decentralised despots', who control the destiny of the rural masses as an iron 'clenched fist' – combining judicial, executive, legislative and administrative functions.

Leading the charge in the condemnation of the government's endorsement of 'the authority of a notorious institution', Ntsebeza (2008) is unforgiving of the ANC for its historical inclination 'towards a strategy of wooing 'progressive' traditional authorities rather than establishing alternative democratic structures to replace them in the rural areas' and for never having

'managed to establish a coherent programme aimed at building alternative democratic structures there' (2008:240). He slams the ANC-led government for having failed to 'dismantle' the 'clenched fist' of tribal authorities, but instead having opted for the co-existence of elected representatives and traditional authorities (2008:258). He expresses his concern about the implementation of the CLRA leading to the imposition of chiefs on 'an unwilling population', and makes a final, impassioned plea:

Policy-makers, politicians and scholars focusing on policy issues must be sensitive to historical and current empirical evidence when defining a role for traditional authorities. Arguments that the institution of traditional leadership is essentially democratic and 'resilient' to changing political contexts should be grounded in real historical contexts (Ntsebeza, 2008:258).

In the second instance, Oomen's (2005) perspective on traditional leadership and customary law emphasises the importance of choice and negotiation in customary matters, on the part of rural communities. She proposes legislation that offers rural people a clear choice to combine the recognition of culture with protection of their human rights, as guaranteed by the Constitution. She argues for the abandonment of the notion that customary law and human rights, or chiefly rule and democracy, are antithetical, and asserts that,

... chiefly subjects should – as the Constitution allows them but practice often does not – have as much access to protection by the wider Bill of Rights as their urban peers. Their adherence to tradition should not rob them of the right to equality, to a fair trial, to secure property. It is of importance therefore that people are not 'locked up' in their culture because of where they live ... (Oomen, 2005:251).

In considering the relation between law, power and culture, Oomen strongly emphasises the 'power of definition', i.e. who defines 'customary law'. It is her contention that the power of defining local 'customary' law should resort with ordinary rural people, not with the state or any of its organs, after all, they best understand the fluctuating, changeable, negotiated nature of culture, tradition and custom, and they are also the creators of 'new customs' as part of their lived reality. Oomen's recommendation is therefore that the government procedurally recognises chieftaincy and customary law, but

leaves the negotiation of local rule to the rural people; the government would have to provide additional resources to empower and support these subaltern voices (2005:247-51).

In the third instance, Claassens (2008a) and Cousins (2007; 2008b) promote an alternative to both individual title and chiefly power over land, and that is modelled on the 1999 draft Land Rights Bill (LRB)⁴, which has the following characteristics:

- the vesting of rights in individuals and families;
- blanket legal protection for basic use and occupation rights;
- rights subject to oversight by others with overlapping entitlements;
- retention of the current layered decision-making processes;
- choice of local institution to manage and administer land rights on right-holder's behalf; and
- provision of locally-based land rights officers.

The draft LRB, which strongly emphasises pre-colonial forms of downward accountability, and regarded by many commentators as a feasible alternative statutory approach to securing land rights and supporting the development of 'living' customary law, was shelved by the ANC-led government, who declared that it was too complex and would require too much state support for local institutions and rights-holders (Cousins, 2006:para 25, 2008b:13; Claassens, 2008a:375-6), and rejected it as an embodiment of the 'nanny state' (Claassens and Ngubani, 2008:180). It was widely believed that the draft LRB became a casualty of the political dynamics within the ANC-led government – in 1999 the 'socialist' Minister of Land Affairs Derek Hanekom was replaced by the 'traditionalist' Thoko Didiza; CONTRALESA was up in arms against the government, and Oomen believes that 'it was the fiery encounters with the chiefs that caused the Bill to be shelved' (Oomen, 2005:71-75).

In considering the three approaches to the nature of custom, culture and tradition outlined above, it is clear that analysts are united in their recognition of the troublesome nature of traditional leadership and the accompanying

⁴ Claassens and Cousins were part of the team that drafted the 1999 Land Rights Bill.

baggage that has persisted from the colonial and apartheid eras, as Oomen's summary shows:

Despite the coming of democracy and the adoption of the new Constitution, traditional leaders managed to retain recognition of their institution, status and role, in the new Bill of Rights, bolstered by the retention of an estimated 10,000 pieces of apartheid legislation, continuing to make them 'decentralised despots' in their areas, with a wide array of functions pertaining to local government, land allocation and dispute settlement. The consequence was that South Africa remained a 'patchwork democracy', far from unified institutionally, in which the place one lived determined the types of rights, the nature of local leadership and – in fact – whether one was a citizen or a subject (Oomen, 2005:236-7).

However, in contemplating the way forward, I think that it is less than constructive to adopt a rigid stance that is inflexible and intolerant of change and development on the ground, and that fails to acknowledge the dynamic nature of the lived reality of rural communities. In this regard, I find Ntsebeza's (2008) position problematic for the following reasons: firstly, his reference to the imposition of chiefs on 'an unwilling population' suggests that rural communities are a homogeneous entity, who are passive receptacles who play no role in the ever-changing rural landscape – in fact, it is disingenuous not to recognise the agency of rural people, and rural women in particular, who are active participants in altering their daily lived reality (see for example Claassens and Mnisi, 2009, forthcoming; Cross and Hornby, 2002). Secondly, his appeal to policy-makers, and in particular to his peers who acknowledge the feasibility of the co-existence of traditional leadership and democracy, to ground their arguments in 'real historical evidence', comes across as being dismissive of the vast body of ethnographic work producing highly credible evidence contrary to his own findings. It also begs the question, who has the power to define 'real historical evidence'? Furthermore, Walker (2002a) adds her voice to those imploring the recognition of the transformation that 'customary law' has undergone through the vastly different historical periods:

... to speak as if there is today a single 'customary law', that is the same as the customary law of the early twentieth century or the pre-colonial period, is to underestimate both the adaptability and the flexibility inherent in these systems, as well as the profound changes that they have undergone in response to their

subordination to larger social and economic forces at the national and global level (Walker, 2002a:40).

In my view, a combination of elements contained in the alternatives proposed by Oomen, Cousins and Claassens are worthy of consideration. I agree that it is crucial to recognise the existing and generally accepted social practices of communities, which are negotiated, fluctuating and liable to constant and subtle change. It is equally important to acknowledge the changes that are taking place outside the statutory law arena, where rural people, and rural women in particular are playing a key role in renegotiating the content of both customs and rights. I support Oomen's (2005:250) call for the abandonment of the false dichotomy of traditional authority and democracy, and her proposal that the state procedurally recognises chieftaincy and customary law, but affords rural people 'the freedom to "opt out" of chiefly rule' and not be 'locked up in their culture because of where they live' (Oomen, 2005:251). In my view, this approach, coupled with the policy option proposed by Cousins (2007; 2009) and Claassens (2008a) would enable holders of rights vested in individuals and families (as opposed to individual title and chiefly power over land) to collectively decide on the exact content of their rights and to exercise their choice of representatives to administer those rights.

It remains to be seen if the state has the political will to heed the voices of both the mediators and 'brokers' (James, 2007:13) – the important stakeholders such as land NGO activists, social movements, human rights lawyers, scholars and policy-makers who play a key role in shaping land reform policy and mediating between its beneficiaries and the state (Walker, 2009:174) – and the voices from the periphery. The latter have demonstrated their resilience and tenacity, not merely to endure their lived reality, but to continue chipping away at the uneven and unjust rural dispensation and to be active agents in bringing about the desired changes on the ground.

CHAPTER 5

RECENT LAND TENURE REFORM LEGISLATION

... the Communal Land Rights Bill does not give effect to the constitutional obligation of the state to respect, protect, promote and fulfil the right to gender equality. On the contrary, it is likely to have the effect of entrenching and aggravating the existing inequality of women with regard to land rights ... (Budlender, 2003: para.66).

If they choose to do so, states can decisively weaken the grip of exploitative social orders ... (t)oo often, however, states continue to act unfairly, helping the strong, not the weak. Democracy is no guarantee against this, for the strong have power beyond their vote (CPRC, 2009:73).

Perhaps the most important point in debating tenure options for a new rural land dispensation is not becoming entrapped in conventional policy wisdom. The idealised opposition of freehold ownership to 'traditional' land tenure probably has limited relevance to the way these systems work on the ground in impoverished communities. The rural tenures at issue are new and not 'traditional' and private ownership has a long record of failing to deliver the benefits claimed (Cross, 1992:305).

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5.1 Introduction

The focus of this chapter is the recent land tenure legislation in South Africa's former homelands and its impact on rural women. The chapter unravels the current legislation, identifies the roles, responsibilities and voices of the different role-players, and draws out the current questions and recent debates, in an attempt to assess the viability and legitimacy of the current legislation. The chapter comprises two sections: tenure laws and policies, and the debates and questions emanating from the tenure legislation.

The first section takes an in-depth look at current legislation governing communal tenure in the former homelands, primarily the Communal Land Rights Act (CLRA) of 2004 and the related Traditional Leadership and Governance Framework Act (TLGFA) of 2003. It explains the link between the two Acts and considers the impact of these new laws on rural women living in this country's communal areas.

The second section identifies the questions that have arisen around the current tenure laws and legislation, and that are being debated in the development literature; here the focus will be primarily on the CLRA (2004). Key questions and areas of debate that have emerged are: (a) the compatibility of 'traditional' systems of governance with the core institutions of democracy; (b) whether or not to try and secure property rights by means of registered title deeds, implying a system of private ownership; (c) 'official' customary law (the legal body of rules) versus 'living' law (the actual social practices on the ground); and (d) the tensions and disputes around boundaries within the communal areas.

5.2 Tenure laws and policies

5.2.1 The draft Communal Land Rights Bill (CLR B) of 2002

The South African government is required by the Constitution to design and implement a land reform programme to redress the imbalances of the past. Sections 25(6) and 25(9) of the Constitution clearly state:

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.

And:

Parliament must enact the legislation referred to in subsection (6).
(RSA Constitution, 1996).

The state initiated a wide-ranging land reform programme that consists of three components, namely (a) *restitution* – the restoration of land lost through dispossession and the payment of compensation where appropriate; (b) *redistribution* – the redistribution of land to achieve greater equity, promote development and reduce poverty; and (c) *tenure reform* – the securing of land rights of people who were previously disadvantaged. Tenure reform has bearing on people living on privately owned land, e.g. farm workers and labour tenants, as well as those living on communal land in the former homelands (DLA, 1997).

In its attempt to address the urgent need for tenure reform in South Africa, the government published the draft *Communal Land Rights Bill (CLR B)*

(RSA, 2002). The bill applies mainly to communally occupied land in the former homelands. It also applies to state land outside the former 'reserves', which has been communally occupied since 1992. It includes the KwaZulu Natal Ingonyama Trust land. Additionally, it applies to land that was transferred to 'tribes' and communities in terms of the Upgrading of Land Tenure Rights Act of 1991. The CLRB excludes restitution land, as well as Communal Property Associations (CPAs), and the 'Coloured rural areas' of the Northern Cape.

The CLRB was published for public comment in August 2002. It also invited interest groups to make submissions on the bill to the Parliamentary Portfolio Committee for Land and Agriculture. Many community groups who responded raised grave objections to the bill, particularly since it seemed to enable traditional leaders to perpetuate patriarchal practice, and also to entrench rather than remove discrimination against women in communal areas:

Women face serious problems in communal areas. Under customary law only men are allocated land. Females can generally access use of, and rights to land via relationships with men. Wives lose everything at divorce because the land is held by the husband and the marital house is attached to the land ... We are concerned that the Bill provides that tribal authorities are deemed to be traditional councils (who may exercise the powers and functions of land administration committees), but women are not represented in the tribal authorities. Tribal authorities are given one year in which to comply with the need to transform to include 30% women ... we think that 30% is too little! (Rural Women's Movement (RWM), 2003:2-3).

The Rural Action Committee (TRAC) (Mpumalanga) echoed this concern:

30% is far short of equality prescribed in the Constitution. In addition, the Bill does not preclude a tribal authority from making female family members of the chief the women representatives. Even with 30% independent women on the committee there is still no guarantee that the rights of other women to access land or to secure their land are going to be recognised. Intimidation, bribery or marginalisation of the women on the committee could continue the situation of gender inequality in tribal areas ... Women-headed households are furthermore discriminated against by the tribal authority insisting on only issuing PTOs (Permission to Occupy rights) to men. These households often have to name a distant (male) relative as the rights holder to access land. (TRAC, 2003:4-5).

The community groups were unanimous in their recommendations:

This Bill is unconstitutional and is not addressing the injustices of the past, it is not gender sensitive, and we feel that not enough consultation has been done. Therefore, this Bill should not be approved, but should be taken back for re-drafting. (Umbumbano Lwabesifazane, 2003:3).

The Bill in its current form is undemocratic, discriminatory and does not provide for legal security of tenure and should, in fact be stopped. (RWM, 2003:4).

Enshrine the principles of gender equality, democracy and public participation in the Bill rather than making the tribal authorities the automatic choice as Land Allocation Committees. Greater space for public debate, participation and decision-making needs to be built into the Bill to protect the interests of the public. (TRAC, 2003:7).

The Bill fails to uphold constitutional rights conferred on the citizens of this country ... we therefore recommend that at best the Bill should be scrapped and be thrown into the dustbin of forgotten history. (Greater Manyeleti Land Rights Group, 2003:3).

Despite the large number of submissions calling for the bill to be scrapped, in February 2004, prior to the elections, the bill was rushed through parliament, ignoring the required procedures (Smith, 2008; Claassens, 2008a; Cousins, 2005a; Terreblanche 2004a, 2004b) and passed as an Act, namely the *Communal Land Rights Act 11 of 2004* (RSA, 2004).

5.2.2 *The TLGFA (2003)*

The Traditional Leadership and Governance Framework Act of 2003 (TLGFA) and the Communal Land Rights Act of 2004 (CLRA) are closely interrelated, as the two laws were designed to be implemented in tandem (Claassens, 2008b, Cousins, 2008b).

The TLGFA was enacted in 2003 and provides for (a) the formal recognition of 'traditional communities'; (b) a role in land administration to traditional leaders; and (c) the establishment of 'traditional councils', with a minimum number of elected and female members. The TLGFA also deems existing apartheid-era Tribal Authorities to be 'traditional councils', provided

that they meet the composition requirements within a year (Cousins, 2005b, 2008b; Kariuki, 2004; Mbatha, 2003; Claassens, 2008b).

In addition to the TLGFA's minimalist requirement of 30% female representation on a traditional council, it permits a provincial premier to establish a lower threshold if insufficient women are available to participate (RSA, 2003: Section 3(d)). An HSRC (2006) study suggests that this loophole was created after pressure from the Congress of Traditional Leaders (CONTRALESA), who, in their submission on the draft bill, had contended that in many locations women did not wish to serve as either traditional leaders or members of traditional councils. However, research in this regard suggests otherwise:

This research consisted of interviews with female members of traditional authorities' families at the time the TLGFA was being considered. Women in all three provinces (North West, Free State, Limpopo) consistently reported that they would be interested in assuming traditional leadership positions. Some were surprised to hear of the CONTRALESA submission, contending that the men in their family did not consult them on this matter. Different women reported openness to the idea of both a widowed royal wife and an elder daughter assuming leadership positions upon the leader's death ... What is more, because of migrant labour, many traditional communities are in fact majority female. Women are thus disproportionately available and, it could be argued, rooted in their communities in the manner that would make for successful leaders and council members (HSRC, 2006:20).

The much publicised case of Phillia Nwamitwa Shulubana, a woman chief of the Valoyi clan in the Limpopo province, who had the Constitutional Court rule in her favour after challenges by a male member of her family to retain power, supports the contention that it is hardly the case that women are not willing to participate in traditional leadership structures, but rather that resistance and intimidatory measures from (male) relatives and existing traditional leaders may try and subvert them (Mbatha, 2005:1; Claassens, 2008a:363-4; HSRC, 2006:15-20; Alcock, 2008:14).

The Shulubana case also illustrates that, despite the TLGFA's requirement that families of traditional authorities recommend successors, taking into account the constitutional imperative of equality, the *de facto* practice is different.

5.2.3 *The CLRA (2004)*

Before the final submission of the draft CLRB (RSA, 2002), last-minute changes had been made, resulting in the CLRA making provision for traditional councils (comprised of traditional leaders) to function as Land Administration Committees (LACs). This was widely perceived to signify a pre-election deal with the Inkatha Freedom Party (IFP) and the traditional leader lobby; at the time, control of KwaZulu-Natal was closely contested between the African National Congress (ANC) and the IFP (Terreblanche, 2004a; LRC, 2005; Claassens, 2008b; Cousins, 2007; Murray, 2004).

The primary objectives of the CLRA are to provide security of tenure for the occupiers of communal land, and to establish 'democratic administration of communal land by communities' (RSA, 2004). The CLRA will govern the land rights of all the inhabitants of the former homelands – conservatively estimated at 16,5 million people (Budlender, 2006), but the Department of Land Affairs (DLA) figure suggests more than 21 million people (Boonzaaier, 2006:21, cited by Claassens, 2008b:264). Recipients of land received through the land reform programme after 1994 will also be affected by this new law.

The central function of this Act is the transfer of title of communal land from the state to a 'traditional community', who must register its rules before it can be recognised as a 'juristic person', legally eligible to own land. The CLRA uses modified tribal authority structures, Land Administration Committees (LACs) to administer the land. These LACs are given wide-ranging powers, allowing them to make most key decisions in relation to land, and to exercise ownership powers on behalf of the 'communities' that they represent. The Act does not require LACs to consult community members on major decisions, for example the disposal of land. The range of powers and duties of the LACs include the allocation of land rights, maintenance of records of rights and transactions, assistance in dispute resolution, liaison with local government bodies with regard to planning and development, and the performance of various other land administration functions (Smith, 2008; Claassens, 2008b; Cousins, 2005b, 2008b).

Analysts (see particularly Claassens, 2008b:266-7) have identified a possible ambiguity in the use of the word 'may' in Section 21(2), pertaining to the powers of traditional councils. This section provides that:

[i]f a community has a recognised traditional council, the powers and duties of the land administration committee of such community may be exercised and performed by such council (RSA, 2004).

It could be interpreted, on the one hand, as authorising these structures, created by another statute, to exercise land administration powers within the ambit of the CLRA, or on the other hand, as introducing a choice for communities between traditional councils and land administration committees.

From the range of interpretations that abound (see for instance Cousins, 2005b:435; Smith, 2008:63-4), it appears unlikely that communities will have a choice. Smith indicates that DLA's Siphon Sibanda 'supports the view that "may" suggests direction rather than denial of choice. He says the provision is not peremptory but permissive. He asserts that the community will exercise its discretion at a community *imbizo* or gathering' (Smith, 2008:64).

There continues to be concern about the interpretation, and implications of Section 21(2) of the CLRA, regarding Land Administration Committees:

If a community has a recognised traditional council, the powers and duties of the LAC of such community may be exercised and performed by such council.

As discussed earlier, the importance is in relation to whether it introduces a choice of land administration structure, also in its impact in imposing existing tribal authority jurisdictional boundaries as the default boundaries for land administration. Cousins (2006) challenges the cynical view of the CONTRALESA leader in this regard:

Inkosi Holomisa's view (is) that it is inconceivable that an LAC could successfully be established if there is a legitimate traditional council ... this attitude demonstrates a typical response on the part of traditional leadership, that even if the Act does permit the element of choice, it will be very difficult for any community to choose a committee other than the traditional council (Cousins, 2006: para 115).

A further, and perhaps of greatest concern, is the extensive administrative powers concentrated in the LACs, with centralised decision-making authority, and a complete absence of accountability mechanisms. Claassens, (2008b:267) argues that both these laws centralise power at the

level of traditional councils and make no provision for localised decision-making and control over land – at the level of the family, the user group, the village and the clan.

At a national level, critics of the CLRB highlighted their opposition to the wide and sweeping power given to the Minister of Land Affairs to make determinations on (a) who has land rights; (b) what these land rights will be; and (c) the boundaries of the ‘community’ that will have ownership of communal land transferred to it, and will be guided by the report of a land rights enquiry. However, the people affected have no right to view or challenge the report that is sent to the Minister, neither do they have an opportunity to accept or reject the decision to transfer title (Cousins and Claassens, 2004:149).

Analysts agree that in order for rural women to challenge the highly unequal power relations within all the decision-making forums that ultimately reinforce their tenure insecurity, it is crucial that they become organised in much more sophisticated ways (see for example, Small and Kompe, 1992; Small, 1997; Meer, 1997; Walker, 2003, 1997; Cross and Hornby, 2002).



5.3 Impact of new laws

The potential impacts of these new laws are far-reaching: firstly, existing rights to occupation of land in communal areas are not adequately recognised and secured in the CLRA – it vests ownership of land in the group, decisively shifting the balance of power in communal areas away from individuals and families, towards the group and its authority structures, and also towards government officials; this is clearly out of harmony with the norms, values and principles that constitute the foundation of communal tenure systems (Cross, 1992; Okoth-Ogendo, 1989, Cousins, 2005b).

Secondly, the two new laws will enhance the powers and status of traditional authorities, with negative impacts on the decision-making powers of rights holders (Cousins, 2005b). This is most evident in the absence of choice available to rural communities in respect of the body that will represent their interests as rights holders; the balance of power is distinctly top-down, instead of bottom-up, particularly since land administration committees are not obliged

to consult with the community members they supposedly represent, usually on crucial issues such as rights in land and disposal of land (Claassens, 2008b).

Thirdly, the demarcation of 'community' boundaries will generate boundary disputes on a large scale (Cousins, 2005b). Most significant in this regard, is that the apartheid-era jurisdictional boundaries of Tribal Authorities are still recognised; additionally, as a result of forced removals and evictions, huge numbers of people were dumped in often hostile environments under the authority and control of chiefs that they had no previous connection with; this invariably led to disputes over jurisdictional authority as well as physical boundaries. Where disputes are very severe and difficult to resolve, the existing use rights of residents could potentially be compromised because of the reduced access and heightened tensions.

Fourthly, and perhaps most crucially, the CLRA does not adequately secure the rights of women to equal access to land (see for example, Claassens, 2003, 2005; Ngubane, 2006; Claassens and Ngubane, 2008; Cousins, 2003, 2005b, 2006, 2008b; WLC, 2003; CGE, 2003; TRAC, 2003; RWM, 2003; Greater Manyeleti Land Rights Group, 2003; Budlender, 2003; Umbumbano Lwabesifazane, 2003). The overwhelming opinion is that the CLRA enhances, rather than reduces tenure insecurity of rural women. Throughout the colonial and apartheid eras women's rights to land were subordinate to those of men, in particular married men. This country's land tenure laws and policies further entrenched gender inequality through quitrent titles, Permission to Occupy certificates (PTOs) and 'betterment' regulations, all of which vested land rights and decision-making power in male household heads (Cross, 1992; Cross and Hornby, 2002; Cross and Friedman, 1997; Walker, 1997; 2003; Meer, 1997; Mann, 2000; Hargreaves and Meer, 2000). Even though the CLRA allows the minister to confer 'new order rights' on women, these new rights are deemed to be held jointly by all spouses in a marriage, effectively disadvantaging all women who are not spouses, e.g. divorcees, widows, unmarried daughters/sisters, with many of them facing eviction from family homes (Cousins, 2005b, 2006; Ngubane, 2006).

Recent case studies show that in several areas unmarried women with dependants are being allocated land (see particularly Cross and Hornby's

(2002) Mangete case study; the HSRC study (2006); Claassens and Mnisi (2009, forthcoming). However, this is not the norm; contemporary evidence reveals that vast numbers of women in communal areas are suffering from severe tenure insecurity. It is ironic that legislation that boasts the lofty ideals of enhancing rural women's tenure security, as directed by Section 25(6) of the Constitution, will be the direct cause of increased poverty, misery and disempowerment of the category of women in this country suffering the worst disadvantage – those 'holding the knife on the sharp edge' (Kompe et al, 1994; Meer, 1997).

Five years after it was adopted, the Act has still not been brought into operation. In February 2008 the DLA advertised draft regulations and invited public comment on them by 8 April 2008. These draft regulations aim to address some of the shortcomings of the CLRA – this can be regarded as the DLA's admission that the Act poses many problems (PLAAS – Umhlaba Wethu Newsletter, No 6, 2008:2).

The government has been forced to postpone its implementation, partially because of capacity problems within the DLA, but primarily due to the strong opposition from rural communities and lobby groups critical of the ill-conceived Act. There is currently a legal challenge to the constitutionality of the CLRA and the TLGFA, mounted by four rural communities, Kalkfontein, Makuleke, Mayaeyane and Dixie, who have asked the court to declare this Act unconstitutional because it does not secure their rights to land as required by Section 25(6) of the Constitution. The key arguments put forward by the litigants include the following: (a) the wrong procedure was followed when the CLRA was rushed through parliament prior to the 2004 general elections; (b) the CLRA breaches Section 25(6) of the Constitution; (c) the CLRA authorises the transfer of property from CPAs and community trusts that received land under land reform; (d) the CLRA discriminates against African property owners – white owners do not have to deal with traditional councils; (e) there is gender discrimination – the CLRA titling and registration processes will disadvantage rural women and exacerbate their tenure insecurity; and (f) the CLRA creates a fourth tier of government – which is not recognised by the Constitution – to regulate the land affairs of nearly half of this country's population (PLAAS – Umhlaba Wethu Newsletter, No 6, 2008:2; LRC, 2006;

Terreblanche, 2006; Claassens and Gilfillan, 2008; Claassens and Hathorn, 2008)⁵.

In contrast to the widespread opposition, traditional leaders have welcomed the CLRA as 'a triumph of tradition and African custom' (Claassens, 2005:1). The head of the Congress of Traditional Leaders of South Africa (CONTRALESA) proclaimed that it gave 'pride of place to traditional leaders and customs' (Holomisa, 2004).

Support for the communities continues to grow; the Alliance of Land and Agrarian Reform Movement (ALARM) confirmed its support and reminded that the CLRA 'will take the rights of 22 million people in the former homelands and hand them over to Land Administration Committees dominated by traditional leaders.' (Terreblanche, 2006).

The government's decision to amend the CLRA, as a result of protests by women's organisations during the parliamentary process, to provide for joint vesting of land rights in all spouses, has heightened, rather than alleviate the tenure insecurity of single women and other vulnerable members of rural society. Section 4(2) of the CLRB states that,

An old order right held by a married person is, despite any law, practice, usage or registration to the contrary, deemed to be held by all spouses in a marriage in which such person is a spouse, jointly in undivided shares irrespective of the matrimonial property regime applicable to such marriage ... (RSA, 2004).

By registering land in which a range of women have particular customary entitlement, exclusively in married men and women, this Act effectively ignores and undermines other women's rights in land; female members of households who are not wives – widows, unmarried women, divorced sisters – are thus rendered particularly vulnerable by the CLRA (Claassens, 2005; Cousins, 2006; Claassens and Mnisi, 2009, forthcoming). Ngubane (2006:para 19-21) points out that because land rights are family-based and deeply embedded in customary law, these women are likely to suffer a significant decline in their social and decision-making position in the household and the community. Additionally, the vastly altered power

⁵ As indicated earlier in this thesis, judgement was handed down by the North Gauteng High Court in October 2009, whereby key provisions of the CLRA were declared unconstitutional; the case has been referred to the Constitutional Court for final ruling.

dynamics within families could lead to these women, in the event of conflict encountered with either of the spouses, being forced to leave the household to seek accommodation elsewhere. Widowed mothers and unmarried sisters would be at risk of being evicted from the natal home by sons and their wives, because of family disputes.

In relation to security of tenure, the paradigm adopted by the CLRA ignores the pervasive phenomenon of the family-based system of property rights and thereby marginalises the status and claims of family members who are neither the household head nor spouse. It also undermines the status and decision-making powers of levels of social organisation that exist and operate below that of the 'traditional community' (Cousins, 2006: para 21).

5.4 Controversies and debates

5.4.1 Property rights by title deeds?

A major criticism of the CLRA's proposed transfer of title approach, which accepts the private ownership paradigm of property rights, suggests that this new law entrenches distortions of 'customary' land tenure, which had been manipulated by colonial and apartheid policies for purposes of decentralized rule in the bantustans by unaccountable, dictatorial tribal authorities (Cousins, 2005b; Claassens, 2005). Since land titling approaches have failed elsewhere in the world – on the African continent the Kenyan experience is worthy of note (Okoth-Ogendo, 1989) - influential global institutions, among these the World Bank, no longer support this option, but rather encourage the recognition of tenure reform on the basis of existing customary values, practices and institutions (Deininger, 2003, cited by Claassens, 2008a:355). There is a widely-held view that current practices in communal areas stem from pre-colonial indigenous systems of shared and relative rights, and that these systems are dynamic, flexible and constantly changing (Bennett, 2004, 2008; Claassens, 2008a; Cousins, 2007; Oomen, 2005).

There is a powerful theory posited by Okoth-Ogendo (1989; 2002; 2006) that despite the past (and present) distortions, particularly on the African continent, the underlying dynamics of indigenous land tenure systems

remain remarkably resilient and that key indigenous concepts continue to govern land relations in practice. There is widespread agreement in the development literature that the principles and values espoused and practiced in communal areas stand in direct opposition to the colonial and apartheid creation of authoritarian chiefly power (Claassens, 2008a, Cousins, 2007; Cross, 1992; Cross and Hornby, 2002).

Analysts warn of the inherent dangers that the transfer and registration of exclusive rights, for individuals or groups, hold for vulnerable categories of people, like women, who are likely to be excluded on the basis of their overlapping 'secondary' entitlements in the land (Platteau, 2000, cited by Claassens, 2008a:356; Cousins, 2007). Titling programmes are likely to increase the vulnerability of those excluded from access to 'primary' rights; the consequences for rural women could be particularly serious.

5.4.2 *Custom vs democracy*

The literature contains competing views on the compatibility between the new laws and South Africa's current democratic dispensation. One of the fiercest critics of the CLRA and the TLGFA, who slams these laws and the unaccountable tribal authorities as a complete betrayal of democracy, is Ntsebeza (1999; 2005; 2006; 2008), who asserts that custom and democracy is inherently contradictory. On the other hand, Nhlapo (1995), while acknowledging the highly patriarchal nature of the customary arena, sees custom and democracy as potentially reconcilable, basing his analysis on the problem-solving 'restorative' approach of customary law. Oomen (2005:86) characterizes this scenario as a 'patchwork democracy', which allows traditional authorities the liberty of selective implementation of the Constitution in the areas under their jurisdiction. This effectively means that an individual's place of residence will determine the rights to be enjoyed, or be deprived of. The arrogant assertion of a prominent state official, Msengana-Ndlela, confirms the bizarre implication of the new 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 (Cousins, 2006: para 48).

Since these new laws apply primarily in the former bantustans and on land reform land, they will have bearing on the lives of only black people; this is highly problematic, racist and unconstitutional. The CLRA and TLGFA clearly strengthen the ability of traditional authorities to impose distorted versions of unfettered and unchecked chiefly power on those regarded as their 'subjects' (Claassens, 2008a; Cousins, 2007).

5.4.3 'Official' law vs 'living' law

All societies have *de jure* (official laws and rules) practices, as well as *de facto* (actual social) practices; there is usually a disjuncture between the two. In South Africa this is significant because of the distortion of 'lived' customary law in the 'official' versions of customary law constructed under colonialism and apartheid. 'Official' customary law is expressed in laws such as the Native Administration Act of 1927 (Cousins, 2008a:130).

The government's focus is on 'official' customary law; however, the customary law at risk from the CLRA, is the 'living' law currently practiced by millions of inhabitants of South Africa's communal areas (Cousins, 2006:para 16).

The South African courts have acknowledged the difference between 'official' and 'living' laws, having made landmark rulings in two prominent cases on male primogeniture – the Shulubana case (see Mbatha, 2005; Claassens, 2008a:363); and on inheritance – the Bhe case (see Bennett, 2008:144; Claassens and Mnisi, 2009, forthcoming). The Constitutional Court has declared that only the 'living' version of customary law is protected by the Constitution; this means that 'official' customary rules would be deemed valid and acceptable only if they are grounded in current social practice (Bennett, 2008:144). The justification for this legal stance adopted is, (a) that a democratic South Africa cannot accommodate any vestige of colonialism and apartheid; and (b) that the same democracy that allowed the formerly disenfranchised their vote, should afford the citizens of this country control over their law (Bennett, 2008:144).

Because 'living' law developments are rooted in current lived realities, they are often better able to make workable and lasting adjustments than 'solutions' introduced by external interventions. For example, in spite of the

established patriarchal land allocation laws, rural women have, in practice, managed to widen the scope of land allocation to include single mothers (see the case studies by Claassens and Ngubane, 2008; Cross and Hornby, 2002; HSRC, 2006; Meer, 1997; Thorp, 1997). In such instances 'living' law developments come to reflect the outcome of processes of negotiation, contestation and change driven by ordinary people that are at odds with the 'official' versions of customary law recorded in precedent and legal text books. These processes of change and contestation that continually reshape 'living' law are pre-empted and restricted by the CLRA and TLGFA. A further concern about the CLRA is that it smothers the development of the 'living' law by the imposition of an inappropriate and rule-bound paradigm which ignores and thereby undermines key features and dynamics of indigenous systems of property rights (Cousins, 2006: para 17-18).

However, Okoth-Ogendo (1989; 2006) proposes that indigenous values concerning land rights are characterised by resilience, and that both variety and ongoing processes of change are intrinsic to these tenure systems.

5.4.4 *Boundary disputes*

The TLGFA confirms old apartheid boundaries and, together with the CLRA, provides chiefs with legislated land administration powers and gives them free reign to apply their interpretation of customary law within imposed jurisdictional boundaries. This is so, because (a) the impact of the CLRA/TLGFA combination is to create a spatial map within which controversial, rule-based versions of chiefly power are unleashed, while counter-balancing views and models concerning land rights and land administration are excluded; and (b) it thereby has a major impact on the power relations within which the day-to-day negotiations and contestations that constitute and change customary law, take place (Cousins, 2006:para 19).

The transfer of ownership of communal land from state to 'communities', with the requirement that outer boundaries be surveyed and registered, is in contradiction with the layered, nested character of land rights

in the former homelands. Implementation of the CLRA is likely to fuel existing boundary disputes and tensions (Cousins, 2007:290-1).

The Land Rights Bill of 1999 had proposed that boundaries remain fluid, expanding or contracting according to the nature of the matter or decision at issue, with the requirement that decision-making on boundaries include those directly affected. This flexibility enabled the continuation of existing layered decision-making processes and nested authority structures (Claassens, 2005; Cousins, 2005b; 2006:para 23).

5.5 Conclusion

It is evident that the CLRA and TLGFA are highly controversial pieces of legislation that, if implemented in their current forms will have profoundly negative implications for people living in communal areas and on land reform land; rural women will be most adversely affected by these highly-problematic laws.

An interview conducted with Robert Ndala, a community leader in Kalkfontein, Mpumalanga, one of the communities engaged in the legal challenge of the CLRA/TLGFA, illustrates a number key criticisms levelled against these laws:

Our predecessors, who were all co-owners (not in a tribal context but communally), bought the farm. Because we had no chief, the land was registered in the name of the former Homeland Minister to hold the land in trust for my community. We elected our own committees, which administered how we used the land and allocated rights to families and individuals in our group. In 1979 the area became a tribal area. Daniel Mahlangu was appointed chief by the previous government but my community wasn't happy. Part of the farm was given to outsiders, who were allocated land by the chief. These decisions were out of our hands. Today some people live in Kalkfontein A but have land in Kalkfontein B and C. Others who live here on farm A were allocated land on another piece of land. If there is a new land administration committee from another area, we will not have a say in our own land. The CLRA will not benefit us (PLAAS, *Umhlaba Wethu*, 2008:3).

As citizens of South Africa, the members of the Kalkfontein community were deprived of a number of rights guaranteed by the Constitution, with their decision-making powers eroded and their tenure rendered insecure. Firstly, they had no say in the imposition of a chief over their community when their

farm was incorporated into a tribal area. Secondly, this chief unilaterally made allocations of their communal land to 'outsiders' (presumably in return for *khonza* fees); this raises fundamental questions about whether allocation decisions and transactions require the involvement and consent of those whose current and future land rights will be directly affected by the allocation or transaction. Thirdly, prior to the imposition of a chief, the Kalkfontein community had exercised their democratic rights, in the first instance to **choose** their land administration body, and in the second instance, to **elect** a committee. The implementation of the CLRA/TLGFA will mean that this community will (a) be stripped of their democratic land administration structure and (b) become subordinate to the new imposed land administration committee, which, as the new land 'owner', will wield centralised decision-making powers and be under no obligation to confer with the community on land-related matters.

A further significant point is that the Kalkfontein community currently has user rights allocated to families and to individuals, along the lines proposed by some analysts (Claassens, 2008b; Cousins, 2007, 2008a). The CLRA/TLGFA will not only deprive them of their constitutional right to more secure tenure, it will also fling them back into the colonial-apartheid abyss. It will indeed be a travesty of justice if this community, providing a modern-day demonstration of the relevance of 'living' law within a democratic dispensation, is forced to succumb to a vestige of the despised colonial and apartheid eras.

In 1992 Cross had commented that:

Land reform in South Africa will require a new rural land system. The models of tenure and land law now being put forward have serious limitations and may be unworkable. What is needed are legal models which take account of what tenure needs to do in rural communities in relation to what it really does ... Supported by international groupings, the present government is laying heavy stress on entrenching private land ownership. Using the argument that no other system can provide for farm productivity, present government planning under the White Paper legislative package has also attempted to eliminate communal tenure with a time horizon of ten years. This approach would appear to be not only rigid and inflexible, but also likely to be counterproductive. There is very little evidence that individual tenure has ever been a requirement for productive agriculture in Africa ... Lacking legitimacy, the tenure institutions put in place by the state have not

been successful. Underlying this entire question is the issue of what the rural African population itself values in regard to land rights (Cross, 1992:305).

Seventeen years down the line, this insightful observation still has relevance, and the ANC-led government seems poised to return to the drawing board ...



CHAPTER 6

CONCLUSION

... the consequence of rural women's lack of access to land, is that women who bear the responsibility of caring for families who are already vulnerable to impoverishment, are likely to fall deeper into the poverty trap (Fair Share, 2002:3).

... rural women still have less access to land, natural resources, infrastructure, financial aid and information and communication technologies (4th World Congress of Rural Women, 2007:1).

Single mothers in Kalkfontein had been allocated residential sites for the last ten years or so. As explained by the chairperson of the trust at the meeting, after 1994 women became more active in the affairs of the community. They started to attend the 'kgotla' meetings and, in time, to challenge the practice of allocating sites only to 'sons' of the community. They argued that as 'daughters and granddaughters', they were just as much 'descendants' of the original purchasers of Kalkfontein as sons were, and that they also needed to be able to house their children. At the meeting, the land allocation committee conceded that daughters were entitled to residential stands, and also that women should be included in their committee (Claassens and Mnisi, 2009:10, forthcoming).

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6.1 Introduction

This country's communal areas are home to an estimated 21 million people, who are the poorest and most vulnerable in South African society. Women constitute more than half (59%) of the former homelands population, and fifteen years into democracy, their tenure security continues to be precarious, as ongoing government attempts at formulating appropriate land tenure reform legislation fail to satisfy their expectations of land reform, for example, securing land for settlement and food garden crops (Walker, 2002b:28). These women have been the focus of this study: their access to and control over land, their livelihood and survival options, their experiences as chiefly subjects, their struggles, contestations, and active participation in the processes of 'negotiated change' (Claassens and Mnisi, 2009:23, forthcoming) under way in this country's rural sector.

In the first chapter I outlined the background and rationale for this study, presented the research questions and objectives, and commented on the

research approach. I also provided an overview of the thesis by means of the chapter outlines.

6.2 Land use and livelihoods in rural South Africa

How important are land and natural resources in rural South Africa within a livelihoods perspective? In Chapter two I outlined the extent and depth of rural poverty in South Africa, assessing the post-apartheid government's poverty-alleviation programmes over the period 1994 to 2008. Then I presented an exposition of rural livelihoods, discussing general concepts and approaches, which included the characteristics of rural livelihoods, notably the diverse and complex nature, as well as the importance of livelihoods 'straddling' the rural-urban divide, and the importance of rural 'safety nets'. I then narrowed the focus down to address the gendered aspects of rural livelihoods, first in global terms, and then I discussed rural women's livelihood issues in South Africa's communal areas. I also concentrated on the character of rural livelihoods in South Africa, with a discussion and analysis of relevant case studies, within the framework of the diverse, complex, and dynamic nature of rural livelihoods; the role of agriculture as a key component of rural livelihoods was highlighted. I then assessed land uses and gendered priorities, based on research findings of South African case studies.

One of the key issues that emerged was that analysts remain divided on the significance of subsistence agriculture in the lives of rural people. While there is an opinion that asserts that local natural resource use has been over-emphasized in the land reform programme, there is overwhelming agreement and evidence from recent South African case studies that the majority of rural households in South Africa derive significant proportions of their livelihoods from land-based activities. However, the value of agriculture – livestock production, crop production, and natural resource harvesting – continues to be overlooked as an important asset of poor rural communities. The importance of these land-based livelihoods sources is even greater for female-headed households, female members of rural households, and the very poor or 'marginalised' members of rural communities, since they tend to be more reliant on land-based livelihoods than those with secure income from pensions, wage-earning activity or remittances from migrant labourers.

Despite the significantly larger amounts of household income derived from remittances, pensions and non-rural earning sources, the local natural resource base remains centrally important in the communal areas, particularly to the poorest rural households, and the many rural women whose livelihoods depend on it.

6.3 Gendered rights in communal land tenure regimes

What are the implications of women having enjoyed primary land rights during the pre-colonial period, to having their land rights re-defined as 'secondary' and subordinate to those of males, in all subsequent historical periods? In this chapter I analysed the historical evolution of the gendered nature of land tenure regimes in this country, tracing it through several eras – from the pre-colonial period, to the colonial and apartheid era, into the contemporary period. I considered a framework for the analysis of gendered land rights, and this included key aspects of rights, access, power and control, as well as common property as one component of communal tenure. I then identified and discussed obstacles to secure tenure rights for women in South Africa's former homelands, as well as a number of creative ways devised by rural women to instigate positive change and to overcome these obstacles.

My analysis shows that central features of African tenure systems, with their origins in the pre-colonial period, include universal access to natural resources for subsistence, exchange relations between neighbours, as well as the deeply rooted value that all families have a claim on the community for land. I then consider the central role of power relations and interest groups in both the changes and continuities in land tenure during the period of colonial transition, demonstrating how the deeply gendered nature of these interests is clearly evident in the colonial response to the new conditions of land shortage, namely the 'adaptation' of customary tenure and the re-definition of women's land rights as 'secondary' and subordinate to those of males.

Within our current context, the contemporary case studies of 'communal tenure' in this country generally characterise land tenure in the former homelands as being both communal and 'individual' in nature – apartheid-era PTOs co-exist alongside allocations of 'customary' land to single women, sometimes with or without dependants. Overall, land rights in the communal

areas continue to be legally insecure and therefore they remain the focus of tenure reform policies. Notwithstanding these difficulties, analysts agree that the patriarchal character of the rural landscape is changing, and acknowledge that the 'negotiated change' on the ground, albeit uneven and slow, is the result of the tenacious struggles and contestations of the rural women, not the implementation of a package of dubious legislation on the part of the state.

6.4 Land administration, traditional authorities and women

What is this animal known as 'traditional authority', that is at the same time an aberration of colonialism/apartheid and an anachronism within our new democracy, but also a crucial and necessary component within the arena of 'living' customary law, and whose 'democratic and transformative' potential is being recognised? To start with, I traced the history and functioning of traditional authorities through several eras in the history of this country, from the pre-colonial period, to colonialism and apartheid, into the 21st century. I examined the role and practices of traditional authorities in relation to rural communities in general, and rural women in particular. I then considered the role played by traditional authorities as custodians of traditional land and the rural communities that they govern, as well as the controversies around their constitutional recognition. In examining the current debates and controversies, I considered why this institution of hereditary rulers and chiefs is regarded by many analysts as inherently undemocratic and unaccountable and therefore out of sync with a democratic dispensation and in violation of the Constitution of this country. In conclusion, I acknowledged the negotiations, contestations and changes spear-headed by rural women in the former homelands focusing on rural decision-making structures and the implications for women.

Analysts offered somewhat divergent alternatives to their assessment of the relationship between traditional authority (statutory law) and customary law ('living' law) in post-apartheid South Africa. The three dominant options that emerged, included the following:

- Firstly, critics of the institution of traditional authorities (notably Ntsebeza, Murray, Levin and Mkhabela, Mamdani), particularly within the context of this country's democratic dispensation, widely condemn and reject the undemocratic nature of its structures and practices, the

often tyrannical mode of governance, and the opportunist relationship of reliance and dependence forged with the various ruling regimes. Severe criticism is also levelled at the ANC-led government for its betrayal of rural communities, by passing into legislation oppressive and confusing Acts (CLRA and TLGFA), thereby denying rural communities their constitutional rights and freedoms.

- Secondly, Oomen's perspective on traditional leadership and customary law emphasises the importance of choice and negotiation in customary matters, on the part of rural communities. She proposes legislation that offers rural people a clear choice to combine the recognition of culture with protection of their human rights, as guaranteed by the Constitution. She recommends that the state returns the power to define 'customary law', to the ordinary people. Additionally, she proposes that the government procedurally recognises chieftaincy and customary law, but leaves the negotiation of local rule to the rural people; the government would have to provide additional resources to empower and support these subaltern voices.
- Thirdly, the alternative proposed by Claassens (2008a) and Cousins (2007; 2008b) is modelled on the 1999 draft Land Rights Bill (LRB), which had been rejected by the government in favour of the CLRB. The LRB proposes the vesting of rights in individuals, blanket legal protection for basic use and occupation rights; the retention of layered decision-making processes; and the choice of local institution to manage and administer land rights on right-holder's behalf;

In contemplating the way forward, I think that it is less than constructive to adopt a rigid stance that is inflexible and intolerant of change and development on the ground, and that fails to acknowledge the dynamic nature of the lived reality of rural communities. It is also important to acknowledge the changes that are taking place outside the statutory law arena, where women are playing a key role in renegotiating the content of both customs and rights. In my view, a combination of elements contained in the alternatives proposed by Oomen, Cousins and Claassens are worthy of

consideration, primarily because of the democratic principle of choice afforded to rural people, but also because of the acknowledgement of the dynamic, ever-changing nature of the rural sector.

6.5 Recent land tenure reform legislation

What is the essence of the recent package of land tenure legislation dealing with the powers of traditional leaders in relation to communal land rights in South Africa's former homelands, and what is the extent of its impact on rural communities in general, and rural women in particular? I unravelled the current legislation, identified the roles, responsibilities and voices of the different role-players, and drew out the current questions and recent debates, in an attempt to assess the viability and legitimacy of the current legislation. I identified two primary sections: tenure laws and policies, and the debates and questions emanating from the tenure legislation.

In the first section, I took an in-depth look at current legislation governing communal tenure in the former homelands, primarily the CLRA of 2004 and the related TLGFA of 2003. I explained the link between the two Acts and considered the impact of those new laws on rural women living in this country's communal areas.

In the second section I identified the questions that have arisen around the current tenure laws and legislation, and that are being debated in the development literature; here the focus was primarily on the CLRA (2004). Key questions and areas of debate that emerged were: (a) the compatibility of 'traditional' systems of governance with the core institutions of democracy; (b) whether or not to try and secure property rights by means of registered title deeds, implying a system of private ownership; and (c) 'official' customary law (the legal body of rules) versus 'living' law (the actual social practices on the ground); and (d) the tensions and disputes around boundaries within the communal areas.

It is evident that the CLRA and TLGFA are highly controversial pieces of legislation that, if implemented in their current forms will have profoundly negative implications for people living in communal areas and on land reform land; rural women will be most adversely affected by these highly-problematic laws. Of significance is the Constitutional challenge of the CLRA by four rural

communities, arguing that their rights to tenure security would be undermined by this Act, and the judgement handed down by the North Gauteng High Court in October 2009: 15 key provisions of the CLRA were declared invalid and unconstitutional. Of particular importance are those providing for the establishment and composition of land administration committees, the transfer and registration of communal land, and the determination of rights by the Minister. Although the final ruling of the Constitutional Court is now being awaited, and even though this Act was not struck down in its entirety, this judgement effectively puts paid to any possibility of the CLRA being implemented in its present form.

Of further significance is the judge's acknowledgement of the arguments related to the nested or 'layered' character of land rights and land administration tenure systems derived from customary norms and principles, which means that vesting overall control in Traditional Councils would have disastrous implications for rural communities.

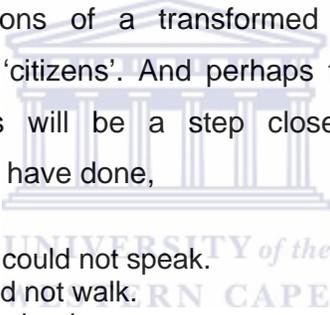
The immediate implication of this ruling is that a fundamental review of its communal tenure reform programme would be required on the part of the government. In the meanwhile, this process is a vivid demonstration of the dynamic nature of the rural reality on the ground, and the result of the changes that emanate from small communities, starting with making small dents in the armour of the larger state machinery ...

6.6 The way forward

The theme of this study, rural women's access to and control of land and productive resources in South Africa's communal areas, has provided the platform for highlighting and foregrounding a number of key issues and debates around the insecure nature of rural communities in general, and rural women in particular. This study has demonstrated that despite the range of ostensibly insurmountable challenges confronting rural people, in the form of counter-productive and discriminatory legislation, or archaic and patriarchal traditional authority, rural communities embody the essence of dynamism and use their agency to *become* the changes that their material objective conditions require. The tenacity of the women on the ground, categorised in academic terms as the 'subalterns', the 'marginalised' and 'the poorest of the

poor', should spur all citizens of the developing world to challenge and conquer adversity, as indeed the four rural communities who went to battle against the state demonstrated, having successfully flexed their collective muscle and starting the demise of an unjust piece of state legislation.

In my view, the state does not have many options, following its beleaguered attempts at formulating appropriate land tenure reform legislation for this country's communal areas. What is clear is that it needs to return to the drawing board. It will stand the state in good stead to revive the shelved draft Land Rights Bill of 1999, engage with the relevant stakeholders, return the 'power of definition' to the people, and to listen to the voices from the periphery. If these preconditions are met, the state could see the reinstatement of the confidence of rural people in a land reform programme that had, perhaps more than other government policies in the new South Africa, created expectations of a transformed status from subordinate 'subjects', to empowered 'citizens'. And perhaps the rural women in South Africa's communal areas will be a step closer to declaring, as their counterparts in South Asia have done,



We had tongues but could not speak.
We had feet but could not walk.
Now that we have the land
We have the strength to speak and walk! (Agarwal, 1994:xvi)

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