

Equality before custom?

A study of property rights of previously disadvantaged women
under land reform and communal tenure in post-apartheid
South Africa

Ph.D. Dissertation

Annika Rudman

School of Global Studies
University of Gothenburg

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School of Global Studies, Peace and Development Research,
University of Gothenburg
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To my Grandmother, Alice

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Preface

My paternal grandparents spent their lives as farmers in the North Western part of Sweden. My grandfather was a lumberjack and I was, at an early age, told the stories about how my grandfather taught my father the secrets of this hard profession. At one stage my father almost froze to death in the process of guarding a charcoal stack in the darkness of the Scandinavian midwinter. Just a week before my grandfather died, in the summer of 1981, he took me by the hand and brought me outside. He asked me to look around, and said – as long as we have this in the family, we will be all right!

What he showed me was a few hectares of land that he and his wife owned and that was the core of his and his family's existence. It had brought him pasture for the cattle, firewood for cold winters days and charcoal to be sold to make a small income. It was there and then that my interest in land began. In law school I gained interest in the legal side of property and the implications it has on our lives. Later, in writing my first Master's dissertation in Human Rights Law I had the opportunity to spend many months in the Southern part of Kenya learning about the negative side of communal ownership and the exclusion of women from accessing and owning land.

Throughout my childhood and the beginning of my adult life my maternal grandmother was always a source of inspiration. She died in 1997; she is one of the strongest feminists I have ever met and she taught me the importance of the struggle for equal rights. This dissertation is dedicated to her. All in all it was the wisdom of my grandparents and my own curiosity that led me to the starting point of this

dissertation, which is an attempt to combine my deep fascination for land rights with women's struggle for equality and my passion for Southern Africa.

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During the 6 years that it took me to finalise this dissertation I came across a number of wonderful people that in one way or the other contributed to the final product, not all of them are mentioned here. However, a few of them deserve a very special note of gratitude. Most important my husband Charl, without his support, his insight in to the South African society and his ability to persuade me to continue every time I have been ready to give up this dissertation would never have been completed. My parents, Kjell and Karin, for always encouraging me to pursue my goals even if it meant spending most of my time far away from you. My dearest friends Anna and Marcus for being such good friends and for their wonderful support and effort in reading and commenting on my drafts. My supervisor Helena Lindholm –Schultz. And last but not least Mikael Spång for his excellent academic support, calming temperament and invaluable friendship.

Annika Rudman, 8th November 2009,
Stellenbosch, South Africa

List of abbreviations

- ACHPR: African Charter on Human and Peoples' Rights
- ANC: African National Congress
- AU: African Union
- CEDAW: Convention on the Elimination of All Discrimination Against Women
- CLARA: Communal Land Rights Act
- COSATU: Congress of South African Trade Unions
- CPA: Communal Property Association
- CPA Act: Communal Property Association Act
- CPR: Common Property Resource
- DLA: Department of Land Affairs
- DRLR: Department of Rural Development and Land Reform
- ECHR: European Convention on Human Rights
- GAD: Gender and Development
- GDP: Gross Domestic Product
- HDI: Human Development Index
- HRBA: Human Rights Based Approach
- HRC: Human Rights Committee
- ICCPR: International Convention on Civil and Political Rights
- ICESCR: International Covenant on Economic, Social and Cultural Rights
- ICRW: International Centre for Research on Women
- ILD: Institute for Liberty and Democracy
- ILO: International Labour Organisation

- LCC: Land Claims Court
- MDG: Millennium Development Goal
- NGO: Non-Governmental Organisation
- PPP: Purchasing Power Parity
- RDP: Reconstruction and Development Programme
- SACP: South African Communist Party
- UDHR: Universal Declaration on Human Rights
- UN: United Nations
- UNDP: United Nations Development Programme
- UNHCR: United Nations High Commissioner for Refugees
- UNIFEM: United Nations Development Fund for Women
- US: United States of America
- WB: World Bank
- WLSA: Women and Law in Southern Africa Research Project
- ZAR: South African Rand

Introduction

“Women are often denied equal enjoyment of their human rights, in particular by virtue of the lesser status ascribed to them by tradition and custom, or as a result of overt or covert discrimination” (General Comment No. 16 to the ICESCR 2005)

“When a woman’s property rights are violated, the consequence is not just that she loses assets. The repercussions reverberate throughout women’s lives often resulting in poverty, inhumane living conditions, and vulnerability to violence and disease for women and their dependents” (Human Rights Watch 2003: p. 30)

On the 10th of December 1996, President Nelson Mandela signed the new South African constitution (hereinafter referred to as the constitution) into law in the township of Sharpeville, commemorating the memory of the black protestors that died during the Sharpeville massacre in 1960. The constitution came into force on the 4th of February 1997 and with it a whole new dispensation of rights geared towards giving all South Africans the chance of a dignified life. The constitution puts forward a complex property clause protecting individual ownership, but at the same time leading the way towards extensive land reform; as well as an equality clause prohibiting discrimination on no less than 17 different grounds. Furthermore, it sets the framework for the coexistence of customary and common law under the ambit of the constitution and allows traditional leaders to govern communities living under a customary system. Land reform

quickly became one of the most politically charged and cumbersome tasks of the newly elected government and subsequently of the governments to come. It soon became apparent that many different interests collided within the realm of land reform; especially in terms of upholding the delicate balance between protecting the rights of individuals while at the same time giving suitable protection to traditional communities.

In March 2004 the constitutional court (hereinafter referred to as the Court) heard Ms. Bhe and Ms. Shibi in matters relating to gender equality and African women's rights to inherit property under customary law. The question before the Court was whether a law (the Black Administration Act) giving effect to the customary principle of male primogeniture should be considered constitutionally valid or invalid in relation to the equality clause. In *Bhe and Others v The Magistrate, Khayelitsha and Others* (hereinafter referred to as the *Bhe* case), a domestic worker, Nontupheko Bhe and her partner had been living in Khayelitsha, a township in Cape Town, with one of their two daughters. Her partner had obtained a state housing subsidy and bought the property that they were currently living on, as well as building materials for a house. However, Ms. Bhe's partner died before the house was built and the lower court appointed his father as his sole heir, excluding Ms. Bhe and their two daughters. When she realised that her father-in-law was going to sell the property, Ms. Bhe decided to challenge the move and approached the High Court.

In *Shibi v Sithole and Others* (hereinafter referred to as the *Shibi* case), the problems of Charlotte Shibi, an assistant nurse from Mamelodi township near Pretoria, started when her single and childless brother died without leaving a will.

With their parents dead, she believed that she would be the one to inherit his estate. However, in accordance with customary law, two of her male cousins preceded her. One of them was appointed as a representative of the estate. As there were complaints about his handling of the estate the remaining money in the estate was awarded to his bother, the other cousin, leaving Ms. Shibi out once again and forcing her to seek legal advice. In October that same year the Court handed down a landmark case awarding both Ms. Bhe and Ms. Shibi the right to inherit the property left by their partner and brother respectively. This case sparked the discussion about the patriarchal values of customary law such as the principle of male primogeniture and women's property rights under customary law and equal rights under the constitution.

The legal battles fought by Ms. Bhe and Ms. Shibi further highlighted the important relationship between property, poverty and power. As Gutto (1995: p. 3) puts it: "In a world of property the property-less are powerless". Without direct access to property these women, be it as a member of a household or a member of a community had limited access to power; and this powerlessness is one of the causes of long-term poverty. However, the actions taken by these two brave women made visible how important legal reform can take place on a case to case basis and that legal activism is one important factor in changing women's status in relation to property. Law, if carefully drafted and implemented, has the prospect of creating or shifting power to limit the incapacities created by poverty. Law can nevertheless equally, as brought forward in the *Bhe* and *Shibi* cases, and as understood by feminist legal theory, enforce existing powers, reinforcing powerlessness and inequality.

Law however, is but one factor that determines women's position within society. The present research rests on the assumption that law can be a tool, amongst many, in achieving social and structural changes furthering women's rights, but it needs to be carefully aligned with other changes in society, such as changes in the way women are perceived in relation to decision-making, changes in the way abuse and rape/marital rape is perceived in the South African society, changes in infrastructure and changes in the cultural reliance on patriarchy, to mention a few.

The claim brought forward and repeated within the scope of critical legal studies, that law tends to serve the interests of the wealthy and the powerful by protecting them against the demands of the poor and persons from regions and groups outside of the hegemonic power structure such as women and ethnic minorities, is of great importance for the way law is sometimes perceived as a vehicle of less importance for social and structural change. This claim is often coupled with the legal realist argument that what the law says it does and what it actually tends to do are two different things. Many laws, such as the laws examined in the present research, claim to have the objective of protecting the interests of the poor and the outsiders. However, in reality, they may serve different interests like those of power elites. However, this does not have to be the case; there is nothing inherent in law to make it a vehicle of social injustice. What needs to be acknowledged, together with the other factors that are essential to social and structural change, as further discussed in the present research, is how different subjects of the law are positioned differently by the law, and the scale of the reform that needs to be undertaken to realize the objective of social and structural change. This change, as discussed further in the

present research, is usually significantly greater than governments are ready to acknowledge and involves much more than pure legal reform.

The research problems

The idea behind the present research was conceived in an international legal environment and was later developed within the field of social science and the framework of peace and development studies. Consequently, the legal research has largely been motivated by the conceptual framework, further discussed in chapter 1, comprising of theories as generally found outside the legal field. The theme of the present research introduces the legal aspect of women's property rights in South African land reform examined from a pluralistic perspective. However it also strikes at the core of development theory since land reform and in turn land utilisation, are key factors in economic development and poverty reduction.

As brought forward by Ntsebeza and Hall (2007: p. 13) the concept of land reform is broad and it is at its heart political; it is about identity and citizenship as well as security, production and development. Thus, the concept of the right to property is a political and social arrangement that differs from context to context. On the state level as well as the individual level, both previous and more recent studies, have showed that land has the power to empower. In the 1960s and 70s land reform was widely touted as a solution to national development problems and agricultural underdevelopment or stagnation in both Latin America and Africa (see for example Feder 1971, Grindle 1986, and Moyo and Yeros 2005). In Latin America, many land owners were forced to modernize their estates or to sell their holdings to

more entrepreneurially-minded people in order to promote rural development; and as increased food production became a major development priority in the 1970s, rural development through the redistribution of land and economic support of international organisations like the World Bank (hereinafter referred to as the WB) figured prominently in national development plans (Grindle 1986: p. 161).

In the aftermath of colonisation many African countries ventured into state-led modernisation projects aimed at improving the agricultural sector to boost food production and export potentials in order to increase economic development after independence. In the late 1960s and early 70s there was a steady increase of state intervention in land use and ownership in the form of large irrigation projects, state farms and joint ventures with foreign agribusiness capital. Many African countries set up very ambitious spending plans in order to fulfil the commitments of state-led and land-based development (Bernstein 2005: 76ff). However, the cost of reforming the colonial states and their land holding schemes, to bring development to all, together with the rise in oil prices and other strategic imports in the 1970s led to the escalation of foreign lending by many states and subsequently to the heavy debt burden that has plagued the majority of African countries until very recently.

Against this background, specific parts of South Africa's land reform programme are examined in the present research both from a legal and from a development perspective. From the legal perspective the central research problem is to explore the relationship between statutory law (the bill of rights and relevant legislation), and customary law in terms of women's legal abilities to access land through land reform with specific regard to communal ownership in order to pro-

pose possible legal and policy reform. The cultural context and the pluralistic character of the South African legal system, taking its point of departure in a constitutional structure recognising statutory, common and customary law as competent sources of law, makes it complex and difficult to access. The present research is therefore an attempt to further analyse and understand the role of the law in on the one hand upholding women's equal access to land (the equality and property clauses in the bill of rights) and on the other protecting and promoting culture and the development of customary law (the right to culture in the bill of rights and the recognition of customary law as a source of law).

The main objective is to analyse how equal rights and customary rights are understood within South African statutory, common and customary law in terms of the ongoing land reform and the structuring of communal tenure. The bill of rights in the constitution is used as a point of departure for a critical discussion of the challenges to a land reform policy that entail embracing both the principles of equality and non-discrimination and those of communal tenure and customary law.

Reference is also, through the constitutional obligation in the bill of rights, drawn from the extensive pool of information available in relation to the interpretations of the rights of equality, property and non-discrimination under international as well as supranational law. As was spelled out by the Court in *Carmichele v Minister of Safety and Security and another* and described by Botha (2001), the bill of rights, reflecting the underlying principle of the constitution and South African society, is inextricably linked to international law and the values and approaches of the international community and international role players. International law on

the topic is therefore of additional value in examining the legal perspective of the present research.

Added to this primary legal perspective, socio-economic problems related to land, once ignored by the colonisers and the apartheid regime, are becoming increasingly troublesome for the South African government. Still, fifteen years after the fall of the apartheid regime, the overwhelming majority of black South Africans are struggling against poverty and underdevelopment. Issues related to poverty and economic underdevelopment amongst the black population in South Africa is today one of the greatest threats to the fragile democracy. After the recent election not a day goes by in South Africa without the media and various civil rights organisations reiterating poor peoples' quest for service delivery and the ever increasing need for the translation of socio-economic rights (as spelled out in the constitution) into actual poverty reduction. Poor, predominately black South African's are in desperate need of security and this need is by the very nature of us human beings translated into a need of a house, a plot of land, sanitation services, electricity, running water, education, medical services, a job and so on. In relation to these demands the determination of property rights (in the limited scope of the present research, the determination of property rights of women living under customary law in a communal setting) is an important piece of a much bigger puzzle.

As is discussed further in the present research, legal reform of property rights is for many different reasons, a central concept in the building of the new South Africa. In reforming and deciding on how property should be accessed, held and transferred the legislator and ultimately the judges, knowingly (or unknowingly) decide on a number of related

issues such as power relations between men and women (the gender perspective), wealth relations i.e. who should benefit from reform (in South Africa heavily relying on race) (wealth perspective or class perspective) and in the end gender and wealth/class relations (amongst others) set the agenda for an individual or group's possibility to prosper and develop on a personal and economic level (development perspective). Law has in other words the ability to play an active role in social transformation or against it depending on how it is phrased, what values it is based on and ultimately how it is understood by the legislator and judges put in the position to construct, interpret and weigh sometimes conflicting values and ideas against each other. From the conceptual framework of peace and development research, further discussed in chapter 1, an additional research problem can be brought to the fore namely the need to explore the relationship between women's abilities to access, own and transfer property in a customary and communal setting and its possible relation to poverty reduction.

The link between the law and the development perspective in the present research can be formulated as: what role land reform law has played and can play in the future in levelling the battle field of resources (in the form of land) for black women; and if accessing and holding land on an equal footing with men can help women fight the battle against poverty. The objective in the present research is to (from a legal point of departure and with the help of legal methods and theory) establish, through the study of a number of relevant cases how the legislator and ultimately the courts have interpreted and applied the relevant law (more on the legal structure below) and in what position this has put black women in relation to land rights in South Africa today.

If it is possible to highlight examples where the law has been worded, interpreted or applied in such a way that women's access, ownership or transfer rights of land have been weakened i.e. their position vis-à-vis men have been made less favourable, this may in fact also say something about women's actual ability to play an active role in their own and their families' economic development. This argument of course builds on the idea that there is a link between being in a position to access, own and transfer land and some sort of betterment on the personal and/or family level then defined as development. This link will be further outlined in the next chapter in relation to the presentation of de Soto's ideas on the formalisation of property rights and the proclaimed link between this and poverty reduction and the human rights based approach to property presenting an idea of how property rights can be viewed as also strengthening other rights, and the interconnectivity between the protection of human rights and poverty reduction.

Further, for the objectives in this introductory chapter and the initial discussion about the possible link between women being in a position to control property and the possibility of poverty reduction the work of Agarwal is of relevance. For the individual, land is further, as Agarwal (1994: p. xv), describes it, "a critical determinant of economic well-being, social status and political power". Agarwal bases her international quest for stronger land rights for women on a fourfold justification considering land in terms of welfare, efficiency, equality and empowerment (Agarwal 1994). In her account, welfare relates to the direct and indirect benefits that access to land can provide women with. Land can be used to farm for self subsistence or for production for the market, and in line with de Soto's ideas as presented below, land can be

used to create capital in terms of enabling a mortgage or through a sale. From a Southern Africa perspective she has been criticised, on the same grounds as de Soto (later), for focusing too much on individual rights and neglecting the importance of the communal tenure system. In terms of efficiency she points to the possible benefits in terms of production and development that are likely to increase if women's land rights are protected. Agarwal (1994: p. 197) puts forward the idea that women might use resources more efficiently than men in certain given contexts.

Furthermore Agarwal's reference to empowerment and equality is helpful in the conceptualisation of land rights because she highlights a shift from material benefits to status issues related to land. As an example Panda's and Agarwal's research in Kerala, India, has demonstrated that almost half of women, who did not own any property, reported physical violence compared with only 7 per cent who did own property. The same study revealed that women who do not own land are statistically more likely also to be infected with HIV (Panda and Agarwal 2005). Further, research presented by, amongst others, Swaminathan et al. (2007) and Ikdahl et al. (2005) indicates that women who own property or otherwise control assets are better positioned to improve their lives and to handle situations of crisis. By owning their home and land, women directly gained from such benefits as use of the land and higher incomes as well as having a secure place to live. The same studies highlighted that women's ownership of property improved women's social status and their position in the decision-making structure within the community as well as the household; and that it led to improved child nutritional status and the access of girls to higher education. In contrast Swaminathan et al. (2007) present that lack of property gives

women a low social status and increases their vulnerability to poverty. From the results of this research it is therefore assumed that if there is to be any betterment or expansions of freedom on behalf of previously disadvantaged women in South Africa, property must be one of the focal points.

The present research leans heavily towards a gender perspective and strives to understand and to explain land reform and its legal effects on the power relations between men and women qualifying as beneficiaries under land reform. Ultimately some conclusions are presented on whether the actual framing of the law has any bearing on women's ability to move beyond the ambit of poverty. Does the South African land reform make it easier for black women to emerge from of poverty or does it indeed discriminate between men and women in presenting obstacles that women have to battle against in order to access, own and transfer property?

It is of importance at this point to underline that the present research must be viewed and understood as a process involving two steps. The first step entails the examination of the legal structure and constitutes the core of the research. The second step is an attempt to relate (through the theoretical structure presented in chapter 1) the results from the first step to relevant aspects of development and poverty reduction. Phrased differently the outcomes of the legal research, as based on legal primary and secondary sources, carried out by using legal methods (influenced by feminist theory) and by applying feminist legal theory are related to relevant aspects of development theory. This is done through the presentation of a theoretical framework which has been used to outline possible courses of action (legal) having bearing, at least partly, on the possibility of women's economic development i.e. the reduction of poverty.

In dealing with this type of multifaceted and multidisciplinary field (the research questions are further refined and spelled out below) there are a number of intricate problems arising in relation to establishing a proper methodology, a theoretical point of departure and a conceptual framework as well as providing the relevant context in which these methods, theories and related conceptual framework should be applied and understood. This is especially true for a project that takes its absolute point of departure from the wording and understanding of the law and its legal effects but with the further objective to understand at least in part the possible gender and development implications of the law. Is it at all possible to combine legal methodology, as suggested in the present research, with theories of feminism? And how is this legal research then related to poverty reduction through the proposed and presented framework? These issues will certainly be further highlighted below and in the following chapter but initially it is important to point out that the most obvious way of bridging law with the gender and development perspectives is to use theories that has emerged in the sociology of law i.e. the study of the interaction of law with other aspects of society. In this regard legal feminist theory, further discussed below, has been used with this specific purpose in mind.

As highlighted, women's land rights in South Africa exist in a specific and complex context. This context has been limited for the purposes of the discussion in the present research and there is no attempt made to highlight and discuss all the factors in society such as for example class, political affiliation and geographical position that evidentially also influence women's property access and ownership abilities. Hence, with these limitations in mind the discussion of the

context of the present research is firstly concerned with the historical legacy of colonialism and apartheid, as further discussed in chapter 2 in relation to customary land tenure. This has in legal terms been translated into the aim of the constitution in general and land reform in specific to aid previously disadvantaged individuals and groups to achieve a more just and equal position in society. In other words it is possible to establish that colonialism and later apartheid introduced the issue of racially based affirmative action in terms of land reform into the legal ambit of South Africa.

Secondly women's land rights in South Africa operate in a legal pluralistic environment: the constitutionally based system operates alongside or in relation to a customary law system which in turn differs in relation to the large number of different cultural groups of South Africa. The pluralist legal structure of South Africa and the establishment of several "sets" of laws with different instrumental values under the constitution (statutory, customary, common, foreign and international law) presents us not only with the problems of hierarchically structuring and applying the law but also with the benefits of having recourse to a variety of sources in tending to different people's different needs. The presence of customary law (and also common law) and the acknowledgement in the constitution of this system as a recognised system under South African law (legal pluralism) have had dual effects on the present research. Firstly, it has influenced the legal methodology, as further discussed under the heading of *Legal methodology and the jurisprudential review* below, by introducing ideas of legal pluralism and gender studies into the very method of studying law; and secondly by introducing a mainly patriarchal system of laws as working in conjunction with the existing land reform. The issue arises, in relation to

the application of feminist legal theory, of whether a sensitisation of the law is needed in order to weight up for the possible claw back that some versions of customary law or living custom could represent.

Decisively, property, in the form of land, has bearing on most things we do as human beings, whether we like it or not. We live in it and on it, we can grow our food on it, we can sell and buy it, we can invest and speculate on its value and we can in the end be buried in it and make it our last place of rest. In a very simplistic way property (amongst other things) controls what we do and to a certain extent who we are – it can therefore be concluded that the position in which the legal system puts us in terms of our property rights will have bearing on other aspects of our lives as well, as discussed above.

In asking if women are hindered or helped by the wording, interpretation and application of the law in accessing and holding land under the land reform and related legislation, the usage of feminist legal methods and the application of feminist legal theory (discussed in the following chapter) will help us conclude how women's land rights are understood and if they are safeguarded by the law in a just and equitable way. This does not however tell us anything about what consequences this has in the lived realities of the lives of the concerned women. The present research does not have this objective, simply because the research has not been based on any empirical data able to support any conclusion in this regard.

It does however have the objective of drawing some conclusions, purely based on the conceptual framework as outlined in the following chapter, about the position in which the legislation puts previously disadvantaged women living in

a customary context and its possible theoretical effects on the same women's ability to enjoy or effectively participate in any form of economic development having bearing on the overall reduction of poverty. The conceptual framework, established to enable the author to draw specific, theoretical, conclusions about this relationship, is two folded and has been applied to examine different aspects of the potential economic development. Firstly, the theory of formalising ownership (de Soto) based on customary structures (promoted by amongst others the WB and the South African government) claims that poverty would be reduced for all involved (included the specific group of women discussed in the present research) through the formalisation of titles. Does it have this potential for the concerned women? And secondly, if we translate property rights into the language and methods of human rights will the rights achieved through the application of the law lead to development for these women? These questions will be further outlined and discussed in relation to the conceptual framework as presented in the following chapter.

Objectives and research questions

Relating to the two research problems spelled out above, the objectives of the present research are firstly to establish the position of previously disadvantaged women in South Africa in terms of their legal (effective) and direct access to land through land reform; secondly to establish more specifically if and why women are discriminated against in relation to communal ownership established as an attempt to secure land rights of traditional communities regaining dispossessed land through land reform; and thirdly (relating to the additional research problem as spelled out above) to establish the specific relationship between the effective legal ability of

women to access, own and transfer property and the theoretical opportunity for poverty reduction amongst previously disadvantaged women.

For these reasons the present research has been focused on answering and finding substantial factual and theoretical evidence to suggest possible solutions in relation to the following synoptic research question(s): *Does the new communal ownership paradigm as launched under the 1996 constitution promote the rights of women living in a customary context to equal access and ownership of land and how does the way the law positions women influence poverty among women?*

As the motive behind the present research is an aspiration to present further evidence as to the relationship between poverty reduction and equal (gender) land distribution; and the object of the study is the relevant legal entitlement structures and the role that customary law plays in the land reform programme, the results of the present research are important both in the review of relevant development strategies and land reform policies. However, the aspired contribution to the topic of the present research is not mainly in the area of development studies as such but rather in the field of applied law. Hence, to guide the body of research in terms of its multi-disciplinary motives and its legal approach, five essential re-search questions have emerged that are related to the synoptic research question(s) above:

- 1) *What is the position of custom (living) and customary law (official) under current statutory law?*
- 2) *How has gender equality been defined within the ambit of the 1996 constitution?*

- 3) *What are the possible legal effects of formalising customary titles through different forms of communal ownership on previously disadvantaged women considering the plurality of the system?*
- 4) *With reference to section 39 (1) (b) of the Constitution; how are women's property rights understood by the international community and how do the rights put forward in this context relate to women's rights to sustainable development and consequent poverty reduction?*
- 5) *Is there a link between women's legal ability to access, own and transfer property and poverty among women?*

Methodology and sources – some reflections

The research problems, as spelled out above, have naturally guided the choice of methods applied in the present research which in turn have qualified the sources analysed. As was pointed out above, this thesis has been written with the objective of discussing and examining on the one hand a central research problem which is predominately legal in character and therefore has referred the author mainly to legal sources, and on the other hand an additional research problem that by its nature have referred the author in the direction of peace and development studies and their rich source materials in the form of text based secondary sources and secondary data presented by other researchers on the topic. The second research problem could further be a topic for field research. However, this has not been the approach in the present research which focuses rather on the abstract application of the formalisation and human rights theories constituting the conceptual framework. Therefore such methodological considerations relevant

to empirical data from field research have not been further considered or discussed.

Even though the two research problems are closely related, as discussed above and further below, their differences in scope have called for different methods to be applied in relation to the different sources. The majority of sources examined, in relation to the first research problem are primary and secondary legal sources. The primary legal sources can be defined as products of official bodies with the authority to make law and with the power to affect the legal rights of citizens i.e. legislation on different levels such as statutory law, common law, customary law and jurisprudence from relevant courts.

To examine the contents of the primary legal sources, which constitute the bulk of the present research, legal method, as further explored in the next sub-section has been applied. However, in relation to the overall feminist approach, visible in the research problems, legal method has been scrutinised from a feminist angle using the works of Bartlett (1993), Cook and Fonov (1990) Lorde (1997), Albertyn and Bonthuys (2007) and Chamallas (2003) amongst others. The feminist interpretation of legal method has resulted in a refinement of the methods of interpretation applied using a legal method; in other words feminist legal method builds on legal methods but challenges the neutrality and partiality of the law and the subjects positioning under the law. The methodological additions to, or the change in perspective of, the legal method contributed by feminist legal theory, is further discussed in chapter 1, but can for the purposes of this discussion be described as applying legal methods of interpretation but when necessary highlighting the specific positionality of women under the law. In this regard two methods, specifically

labelled feminist, have been used in relation to the primary legal sources, namely feminist practical reasoning and asking the “woman question” (as a specific part of feminist practical reasoning). Feminist practical reasoning can be understood as extending the traditional approach of practical reasoning by adding the values and concerns that are expressed in feminist legal theory and by other feminist methods such as asking the “woman question”. Practical reasoning together with the woman question, questions the authority of the law that claims to be objective and neutral in its application (see further the objective standpoint in evaluating the meaning of the law in the next sub-section).

The secondary legal sources have been used mainly as background resources. Unlike primary legal sources, they do not have the power to affect legal rights, and are referred to instead in the present research, for their instructive value and for the references they provide to relevant primary sources of law. The secondary legal resources used in the present research include legal textbooks, presented by Weisberg (1993) de Waal et al. (2005), van der Walt (1999 and 2005) and van der Walt and Pienaar (2006), legal journals such as the *South African Journal on Human Rights* and *Feminist Legal Studies*, legal encyclopaedias, and case law digests/summaries. Further governmental reports, white papers, green papers and statements from various ministers and heads of departments collected in Pretoria, Cape Town, Johannesburg and Stellenbosch between 2004 and 2009 have also been used. These sources have acted as a point of departure for the research considering the broad overview of the relevant areas of the law that they provide (further discussed in relation to the jurisprudential review below).

Furthermore, literature of a multidisciplinary character have been reviewed and used especially in relation to understanding the legal effects of land reform and the formalisation of customary titles through different forms of communal ownership on women's abilities to access, own and freely transfer property. In researching women's access to land through land reform and gender aspects of the land reform programme the writings of Walker (1998, 2001, 2002 and 2006) have greatly enriched the author's understanding of women's vulnerability in land reform. Her works have been extensively used and quoted in the present research. Further, in terms of the formalisation of customary titles through different forms of communal ownership Claassens (2005) Claassens and Mnisi (forthcoming), Cousin (2002) and Claassens and Cousins (2008) insightful work on the impact of the Communal Land Rights Act of 2004 (hereinafter referred to as CLARA) have greatly furthered the author's understanding of the implications of communal ownership on women's property rights.

As highlighted above customary law is regarded as a primary source of law within the South African legal system and therefore also within the scope of the present research. However customary law is very different in its structure from the other primary legal sources as examined in the present research. Therefore a different approach to customary law in terms of the use of legal and feminist legal methods has had to be established. Firstly, the oral character of customary law and the difficulties experienced by any outsider in trying to extract the contents of the law have been acknowledged. This discussion is highlighted in chapter 2 in relation to the discussion about the concepts and theories of customary law. Secondly, the plurality of the South African legal system and

the position of customary law as one of the sources in the hierarchy of sources and its relationship with gender studies are of importance to the present research. This aspect is further addressed below.

For the purposes of understanding, at least in part, the general aspects of customary land tenure in Southern Africa and women's position in relation to property as determined by customary law the research has relied on secondary sources of customary law involving the works of other researchers in the fields of law, legal anthropology, anthropology and sociology. The works of Bennett (1991, 1996, 2004, 2005 and 2008) in relation to the development and understanding of customary law in South African have been very important to the present research in establishing the rules and structure of customary law as well as how to approach customary law from a theoretical and methodological point of view. Further, the work of Chanock (1989) on customary law in Malawi and Zambia together with Hofmeyr's work (1993) on oral narratives in South African chiefdoms, have been of equal value in understanding the customary approach to land tenure.

The feminist perspective on customary law, i.e. women's position under customary law has been thoroughly examined through extensive research carried out by Women and Law in Southern Africa (WLSA) in relation to marriage, maintenance and inheritance under customary law in Southern Africa. Women's rights under customary law are further brought to the fore by, amongst others, Griffiths (2007) and Pottier (2005), the latter also highlighting the relevance of understanding customary tenure and its effects on women in relation to the formalisation of land rights, as further discussed below. These sources have been important to the present

research in order to establish the scope of the law and its effects on women's property rights.

The historical and political contexts of the research problems as well as the conceptual framework have been explored through an extensive literature review on a variety of topics. The works of other researchers, academics and authors have made it possible to penetrate development theories such as development through formalisation of land rights and the human rights based approach to development, as well as other researchers' ideas on the relationship between gender, land reform and development, and the influence and effects that customary law and customary land tenure allegedly have on these relationships. In relation to the formalisation of land rights, de Soto's work (2000 and 2002) has been important, as well as the critique launched against his theory by amongst others Ikdahl et al (2005), Cousins (2002) and Cousins et al. (2005).

Furthermore, the human rights theory has been explored, departing from the works of Ikdahl et al. (2005) establishing a theory and a method for approaching development and poverty reduction by defining and relying on basic human rights and Cheneval's (2006) discussion on property rights as human rights. In terms of the multitude of relations between gender, custom, land reform and development there is a rich pool of literature within the framework of peace and development studies. The perspective of gender and development is well described by Young (1997) and Mohanty (2003) and their works have been of great help in drawing conclusions about the need for a gender based approach to development and what such an approach should entail, for women to benefit from economic development. Further, as highlighted above, the formulation of Agarwal (1994) of an international

quest for stronger land rights for women on a fourfold justification considering land in terms of welfare, efficiency, equality and empowerment has been crucial to the present research and has been used as a foundation for the discussion about women's land rights and their relation to poverty reduction. The relationship between equality, land rights and empowerment has further been examined (from different angles) by Whitehead and Tsikata (2003), Pottier (2005) and Green (2008), their contributions have also been of importance to the present research.

The majority of the legal materials, both primary and secondary, were collected during a series of visits in South Africa from 2001 to 2009 at the Court in Johannesburg, at the Department of Land Affairs in Pretoria and through colleagues and friends at the Universities of Pretoria, Potchefstroom, Johannesburg (WITZ) and Stellenbosch, Western Cape and UNISA. The relevant literature, articles and research reports were mainly found in the libraries of these universities as well as in governmental archives both in Cape Town and Johannesburg. Valuable information and printed materials were also obtained at international conferences such as the conference on *Gender, Generation and Social Justice in an Urbanizing World* in Maseru, Lesotho in 2005 and the Joint Colloquium on *Mixed Jurisdictions as Models - Perspectives from Southern Africa and Beyond* held in Stellenbosch, South Africa in 2009. The selection and methodological approach to the case law material constituting the jurisprudential review is further discussed separately below.

Understanding and applying legal method

To return to the sources of law, in legal systems influenced by the different legal traditions of their colonisers, the methods of interpretation of the law may be mixed. South Africa has such a mixed legal system of civil law and common law which stems from the mix of Dutch law with influences from Roman-Germanic law and British Anglo-American law. This results in a broader range of sources i.e. including both statutory law and jurisprudence. Added to the European influences on the South African legal system is the presence of customary law relating back to the legal systems that existed before the colonisation, further discussed in chapter 2. The South African constitution indicates, in section 211 (3), that in terms of the sources of law, customary law should be recognised as a source of law under the South African legislative system. Furthermore, the constitution also indicates, in sections 39 (1) (b) and 233 that relevant international law should be used as a framework for interpreting the bill of rights as well as any other legislation. These sources of law, statutory (constitutional and other legislation), common law (as build on case law) and customary law have therefore been included in the present research due to the plural structure of the South African legal system and their importance to the overall analysis of the research problem.

Legal method, as applied in the present research, can be described as including the following instruments for analysis: interpretation i.e. semantic, objective orientated and contextual interpretation, comparison of legal texts, structuring the hierarchy of sources and scrutinising preparatory work and case law. In terms of the jurisprudential review, as presented in chapter 4, the principles of legal method can be distinguished by the following three steps: (1) the characterisation of

the issues of a specific case; (2) the choice of legal precedent and/or legislation to decide the case; and (3) the process of statutory interpretation, especially in determining the effect of statutes to alter common law principles.

Legal method is all about analysing the primary legal sources to understand what the legislator intended, comparing the primary sources to try to establish possible contradictions and studying the legal effects of the application of the law through the help of actual cases in the case law of the higher judicial institutions. The importance of presenting relevant case law is significant with regards to the position of the law in society. In the South African context, given its history, the judges of the courts have a specific role to play in ensuring that attention is given to the eradication of all discriminatory laws. The methods of interpretation and limitations used by the Court in relation to the rights set out in the bill of rights, these are further discussed and outlined in chapter 3.

With regards to the primary sources, a combined interpretation of the semantic, objective orientated and contextual meaning of the law has been applied to all primary data, excluding customary law (refer to next sub-chapter for relevant methods), to be able to examine the actual content of the legal rules and their potential legal effects. This entailed examining the wording of the specific section or paragraph, trying to evaluate the meaning of the sections or paragraphs from an objective stand point (a further discussion about the critique of the “objective standpoint” can be found in relation to feminist legal method in the following sub-section) and putting this information in the context of South African society.

The following extract from the constitution, section 25 (5), can be used as an example of how the legal method works in practice. Section 25 (5) states:

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

The interpretation that follows is not aimed at giving a comprehensive interpretation of the presented section but should rather be viewed as acting as a simplified example of how legal method can be applied in relation to materials as presented in the present research. It further serves to indicate that the researcher, in applying legal method, uses his or her extended (biased) knowledge in general and in the field to fill out the gaps that the legislator, by necessity, have to leave. No law can be written in such a comprehensive way as to cover all possible angles; instead the judge or the researcher has to act to bring together all the possible information as relevant to present one understanding of the law. This further points towards the subjectivity that is inherent in this method, an issue that is further discussed in relation to the feminist theory in chapter 1.

To return to the example, to carry out the semantic interpretation it is easier to analyse the statement in segments:

(a) *The state* is the provider in this section and it has an obligation to undertake an action;

(b) *must take*, indicates that it has a practical responsibility to undertake a certain action. The legislator has not used the weaker versions such as “could” or “may”;

(c) the action that the state has to take is *legislative or other measures* indicating that the state is not bound to law but can also use policy statements;

(d) these measures have to be *reasonable* indicating that whatever measure is taken it has to be in line with the

constitutional goals and in terms of limiting rights to obtain the objective with the specific section of the constitution it has to be in line with, for example section 9, the equality clause and section 36 the limitation clause; but also in terms of their effects applying for example the principle of proportionality;

(e) *available resources*, this wording makes it possible to draw at least two references for further understanding; firstly to the International Convention on Economic Social and Cultural Rights (hereinafter referred to as the ICESCR) that uses the exact same wording and to case law of the Court for example *Soobramoney v Minister of Health* where the limitation of the rights in the bill of rights was discussed in relation to the available recourses of the state;

(f) *foster conditions which enable*, in referring to conditions the legislator indicates that it is the legislation to be put in place that should enact the principles of this section but also draw up other rules that will make the act prescribed possible. This indicates that a broad spectrum of laws have to be put in place to overhaul the social conditions that possibly hinder the necessary action. The state has a positive obligation under this section to make it possible for the subjects of the law to make use of the right;

(g) *citizens*, exclude all but those that have confirmed citizenship status in South Africa

(h) *gain access*, not necessarily prescribing actual ownership but the law rests content with other forms of occupation and access;

(i) *land*, not using the term property indicates an exclusion of movable as well as other immovable property and;

(j) *equitable basis* refers back to the equality clause and the discussion about justice and fairness, further outlined in the following chapter.

By applying this kind of interpretation to the relevant sections it is possible to present a further understanding of the texts and their reference to and relevance for other legislation.

In addition to this interpretation, analysing the wordings from a semantic perspective, it is also important to include the contextual perspective, in the case of land distribution in South Africa the history of racial discrimination, dispossessions and evictions on the grounds of race; and further the present segregation due to gender and poverty. The state wants to rectify the past wrongs and present inequalities by introducing affirmative action levelling out the gap between those who have and those who have not along racial lines. All legislation has to be read in relation to this context and all legal remedies have to be understood in this way. Further, in terms of international law the constitution states in section 39 (1) (b) that international law “must” be used when interpreting the rights in the bill of rights, which entails that the rights in the bill of rights should be interpreted in the light of international law i.e. international law forms part of the context within which the legislation should be interpreted, as further discussed in chapter 6.

The legal method also entails the comparison of legal texts and the scrutiny of preparatory work and case law. The comparisons of texts in the example as presented would possibly entail referring to the ICESCR, as suggested above and cases such as the Soobramoney case alongside other relevant international law. Further, it could also include a scrutiny of the relevant sections of the interim constitution of 1993 (hereinafter referred to as the interim constitution).

Lastly, legal method also takes the hierarchy of sources into consideration. In the example a section of the constitution was introduced indicating that all other national legislation be it common law, customary law or statutory law should embrace and implement the constitutional values. All law must conform to the objectives of the bill of rights as put forward in section 39 (2) and (3).

To conclude, legal method is used to pinpoint the intended meaning and outcome of the law, feminist legal theory, amongst other theories, has been launched in critique of the subjective manner in which our societal structure discriminates against women by the application of legal method. This will be discussed further in the following subsection.

Feminist legal methods

As a point of departure for the discussion of specific feminist legal methods van Marle and Bonthuys (2007: p. 44) challenge the notion that the law is a neutral or objective discourse, as is the point of departure for most legal method as discussed above. They further suggest that what is proclaimed as the objectivity or neutrality of the law is just a manner in which patriarchy expresses male perspectives and experiences. The legal systems along with legal reasoning and the language used have mainly, been based on the life experiences of empowered males. This does not necessarily indicate that the law ignores women but rather that it is a man's understanding of women that is reflected in the law and that there is a need for a feminist perspective on legal methods and the formulation of specific feminist legal methods.

Given the scope of the present research and the sometimes multidisciplinary notion of these feminist legal methods, it is of importance to outline further what this set of methods has to offer in terms of analytical tools and the practicability of applying feminist legal methods to the present research. Further, it is of interest to discuss if there is in fact a distinctively feminist legal method, what this approach consists of; and how legal feminist methods differ from legal methods in general as described above. Mossman (1993: p. 533) further builds on this argument by arguing that legal method is not objective and neutral. She points out that:

Although legal method is characterized by the opportunity for choices as to which precedents are relevant and which approach to statutory interpretation is preferred, the application of legal method is heavily influenced by social and historical context.

Matsuda (1992: p. 297) also puts forward interesting critique of the dominant legal methodological discourse. She claims that the abstraction within this discourse permits legal theorists to discuss concepts such as property and legal rights with no connection to their impact on people's real lives.

It is true that feminist scholars within the legal field have developed extensive tools for criticizing the law as such and legal reform. But it is also of importance to further analyse what feminist legal method means in terms of the practical application to cases or as Bartlett (1993: p. 550) expresses it:

What do feminists mean when they say they are doing the law, and what do they mean when having done the law, they claim to be right?

Feminist lawyers tend to do the same thing as other lawyers do when applying the law: they examine the facts of a

legal dispute, they isolate the essential features of the facts, they decide on the basic legal principles that should lead to the resolution of the dispute and they apply these principles to the facts. However, as discussed by Bartlett, they also resort to additional methods besides these conventional methods such as: asking the “woman question” and applying practical feminist reasoning. These additional methods have been very important in relation to the analysis of the *Bhe*, *Shibi*, *Shilubana* and *Hadebe* cases presented in chapter 4.

Not only in law but across many disciplines female scholars have been asking a question that has become known as the “woman question”. This question has been designed to point out the gender implications of norms and practices which otherwise would appear to be neutral or objective. If a question is asked on a regular basis it has the potential of developing into a method. The “woman question” is by many legal feminist theorists seen as a method of critique as fundamental to legal analysis as for example deciding on what preparatory work will have value in a specific case or determining the precedential value of a particular case. In “doing the law” feminist legal theorists try to look beneath the surface of the law to be able to point out the gender implications of the law and the fundamental assumptions that the law rests upon. When laws that treat women unequally have been identified, through asking the woman question, it is possible to target these laws by insisting on the application of rules that do not support the subordination of women (Chamallas 2003: p. 7).

In practical terms, in the field of law, asking the woman question means analysing how the law fails to account for values or experiences that are more typical of women than men and how present legal principles might disadvantage

women, as is clear in the *Bhe* and *Shibi* cases presented in chapter 4. The “woman question” rests on the assumption, correlating with the core message of feminist legal theory, that the law may not be neutral and further that it may even be “male” orientated in a specific sense. The purpose behind asking the “woman question” is to make these features visible, show how they operate and further recommend how they can be corrected (Chamallas 2003: p. 7).

Asking the question has the potential to expose the ways in which political choice and institutional arrangement contribute to the subordination of women. It reflects how the position of women in society is a matter of organisation rather than an inherent characteristic of women (see as an example of this the *Hadebe* case in chapter 4). In revealing the hidden effects of the law that do not explicitly discriminate against women on the basis of sex, asking the woman question assists in exposing how present social structures represent rules that indirectly treat women differently and therefore contribute to subordination (Bartlett 1993: p. 552).

As a part of the methodological approach of asking the “woman question” practical feminist reasoning has been applied in relation to the analysis of the *Bhe*, *Shibi*, *Shilubana* and *Hadebe* cases, as mentioned above, as well as in relation to the exploration of statutory law. It has been argued by some feminist scholars that feminists approach the legal reasoning process differently than non-feminists. It has further been argued that feminists are more sensitive towards situation and context, that they are less in favour of universal principles and generalisations and that they are more prone to include everyday experiences than abstract justice. It is debatable whether these claims can be empirically sustained but despite this, the process of feminist practical reasoning has taken on

normative significance for many feminist legal practitioners who are lobbying for a more individualized fact-finding process instead of the application of a strict normative approach. They believe, in line with the approach taken in the present research, that reasoning from context tends to tolerate differences better and that it also allows for greater respect for the perspectives of the powerless (Bartlett 1993: p. 553).

Hence, practical reasoning, as a form of legal reasoning, has many different meanings and purposes depending on the context. In line with Bartlett's proposal a version of practical reasoning, by her defined as feminist practical reasoning, will be further presented combining some aspects of the classic Aristotelian model of practical deliberation with a feminist focus on identifying and taking into account the perspectives of the excluded (Bartlett 1993: p. 553).

Feminist practical reasoning extends the traditional approach of practical reasoning by adding the values and concerns that are expressed in feminist theory and by other feminist methods such as the "woman question" discussed above. Practical reasoning, often applied as a method within law, is often fundamentally conservative because the legitimacy of the legislator and the norms it expresses are taken for granted. As a contrast feminist practical reasoning disputes the authority of the norms of those who claim to speak, through the language of rules, for everyone. The idea behind feminist practical reasoning is to try to establish those perspectives that are not embodied in the dominating culture and find reasons that are legitimate within these groups.

Furthermore, it is important to notice that while feminist practical reasoning criticises the deductive model of legal reasoning, it does not hold a completely polar position against it. The deductive model presupposes that for any act

there is a pre-existing set of rules that induce a single correct result. Thus, the deductive model for legal reasoning is somewhat old-fashioned and is hardly used in this strict sense today. In this day and age most forms of legal reasoning include some process of contextualisation and abstraction, sometimes including gender aspects. However, as Bartlett (1993: p. 554) points out:

Feminist methods require the process of abstraction, that is, the separation of the significant from the insignificant. Concrete facts have significance only if they represent some generalizable aspect of a case. Generalizations identify what matters and draw connection to other cases [...] For feminist practical reasoning and asking the women question may make more facts relevant or “essential” to the resolution of a legal case than would more non-feminist legal analysis [...].

Further, one of the main objectives with feminist practical reasoning is to open up the field of legal reasoning to emotional, controversial and intellectual elements to include new situations in the line of reasoning instead of limiting this process with predetermined categories of analysis. As Bartlett (1993: p. 554) concludes:

It is within these revised meanings that feminist method is and must be understood [...] it strives to make more sense of human experience, not less, and is to be judged upon its capacity to do so.

Before going any further, the question of whether the suggested methods of asking the “woman question” and feminist practical reasoning are in fact methods or rather substance in legal reasoning needs to be assessed. The answer to this question is to be found by asking another, namely whether the relationship between these methods and legal substance is a proper one? This in turn is dependent on some crucial assumptions regarding legal decision-making. If it is

assumed that legal methods can and should ignore political and moral factors in legal decision-making, then asking the “woman question” and applying feminist practical reasoning are not appropriate methods of legal analysis. If one, however, is of the opinion that it is neither possible nor desirable to screen out moral or political factors from the process of legal decision-making, as brought forward in the present research, then it would be advisable to apply these methods in order to make these factors more visible to the process.

As is evident from the discussion above, feminist theorists favour the latter alternative and are determined to uncover the so-called neutral methods of deciding what is right in a given case. Instead of trying to cover up the moral and political factors that rule the decision-making procedure, these methods attempt to reveal the sometimes hidden ideologies of the legislator that might have a negative impact on women’s interests. These contextualised methods allow for a change in how we perceive the world, which in turn may lead to an expansion of the context in which legal reasoning is appropriate, which in turn could possibly lead to further changes in perception and so on. This kind of expansion of the area within which legal reasoning takes place is crucial for all legal reform and is therefore one of the objectives of the present research.

Legal pluralism and the significance of gender studies

Against the backdrop of the positivistic and racist outlook on customary law that prevailed in the mid 19th century, where the state, i.e. the colonizers, had monopoly on manifesting legislation, researchers in the fields of anthro-

pology and social sciences later developed different research theories to establish the substance of customary law. Influential schools of thoughts such as evolutionism, structural-functionalism as well as Marxist theories such as the dependency theories and other theories relating to the relationship between customary law and development, paved the way for the new research methods and perspectives popularly used by more contemporary researchers in the study of customary law. These include the case-study method, the rule-centred approach to law, legal pluralism and gender theories.

The case-study method in its different forms has basically been used by researchers working in the field. Since the present research does not include empirical data deriving from fieldwork in relation to the observation of local courts, this set of methods is not further discussed. Further, the idea of a rule centred approach is also not directly relevant to the present research since it is based on the assumption that “normal” behaviour is the result of complying with established normative principles. This assumption disregards the important notion that customary law is flexible and is set out to develop in line with social change in the group that applies it. In focusing on the normal behaviour and classifying this into principles of law, the method excludes the most important behaviour, namely the one that goes against what is commonly known and that in fact could be an indication of the change of the law. However, the theory of legal pluralism and theories of gender are of interest to the present research and are therefore further discussed below.

Legal pluralism is less of a theory and more a way of perceiving customary law and understanding its position and recognition within a formal legal system, as touched upon above. The idea of legal pluralism has been valuable to the

present research in analysing the position of customary law both from a historical perspective and from the perspective of its current role under the constitution. It has also been important in the understanding of the character of customary law and its interaction and close relationship with custom and the social structure of the community. In this sense the idea or theory of legal pluralism has acted both as a method for analysing the law and as a theory for understanding its application and social construct.

When the British Empire began its colonialisation of Southern Africa it simply confirmed Roman-Dutch law as the law governing the Cape Colony. There was no acknowledgement of any indigenous systems of law. The position was however modified when the colonists expanded their territory further inland and along the coastline, because the colony did not have the capacity to force the subject population to observe this alien system of law (Bennett 2005: p. 21). The codification of customary law that later followed could be viewed as a means for the colonists to further confirm their authority in the legal field and to support their intention to govern the indigenous populations directly or indirectly.

However, research has showed, that for most Africans, customary law remained the dominant legal system governing their lives during the whole colonial period. The different legal systems co-existing alongside each other were in the mid 1980's used as a basis for the formation of a theory of legal pluralism. In 1986 Griffiths presented his theory rejecting the idea of legal centralism which dominated during the colonial period and much of the twentieth century. Legal centralism was built around the notion that law could only be the law of the state, that this law was exclusive and should be imposed on all the subjects of the state and that it should be

administered by institutions as indicated by the state. Griffiths (1986: 1f) put forward the idea that there were instead several independent and inter-related legal systems that had to co-exist within a state and that these systems should have equal authority. Furthermore he defined these legal systems as: “modes of self-regulation operative in semi-autonomous social fields” claiming that these normative systems should be regarded as equal to the ones of the state.

In line with the arguments brought forward by Griffiths, any normative system that recognises the regulatory order of a semi-autonomous social field, such as the South African legal system, is acknowledging the inborn pluralistic character of its legal system. However, since the state decides on the extent to which these other systems should be applied, Griffiths labelled this as a weak form of pluralism. In fact weak pluralism could be viewed as a modified version of legal centralism. This reconfirms the superior position of state law, further discussed in chapter two, by firstly giving national legislation overriding authority; secondly by recognizing only certain semi-autonomous social fields; and thirdly by giving the state, through the provisions of choice of law, the preference to decide when the rules of the subordinate legal system should be applied. In the case of the South African legal order all three conditions are prevalent (Bennett 2005: 21f).

Apart from the development of legal pluralism the most important development in the study of customary law in the last twenty years is the increasing awareness of the importance of gender as a factor in the study of customary law. In earlier accounts of customary law the male status was predominantly described and norms relating to females were only mentioned as exceptions. In relation to the problem of

language women have suffered significantly from the prevalent problem of finding words suitable for describing women's status within customary law. Especially when the courts resorted to substituting customary rules with what they regarded as common law equivalents, women's subordinated status was fixed rather than left in the more favourable flexible manner in which it was originally expressed under customary law (Bennett 2005: p. 31).

Nevertheless, the over-all tendency of the colonial and later apartheid governments was to endorse the indigenous systems of patriarchy. In some ways the colonial governments tried to discourage some of the most discriminatory practices such as forced marriages and polygamy through the common law enforced by the local courts. However, it has been pointed out by, amongst others, Burman (1990) that very few women benefited from these common law measures because they did not dare to resort to them. With the commencement of the implementation of segregation laws in South Africa in the 1920's the interest of the government in African women declined. The official version of customary law was given the legitimacy needed to govern fully the lifestyle and social circumstance of black women.

In terms of analysing customary law from a feminist perspective, gender studies (related to legal feminist theory as is further discussed in chapter 1) share common ground with feminist legal method and legal pluralism, discussed above, in rejecting the founding principle of legal centralism: that law is neutral and treats everyone alike. In trying to show what legal centralism neglects, both the pluralist and feminist theories cross disciplinary boundaries.

In line with feminist studies of customary law the present research takes its point of departure in the hypothesis,

that women in a customary setting, seldom have direct access to the law (customary or statutory) and therefore are forced to negotiate solutions in the private or social context. It is the main objective of gender orientated research in this area, as in the present research, to try to make visible what would otherwise have been kept hidden. The most important work in relation to women's position in relation to customary law in Southern African has been carried out by WLSA, further referred to throughout the research and also further discussed below. They have in researching predominately inheritance rights, adopted a position of avoiding treating African women as helpless victims and rather considered them as rational human beings who can and will change their situation by challenging the existence of a gender bias. The legal systems, both customary and statutory are in line with this approach, as further appreciated within the present research, viewed as a process that both influences and is influenced by gendered human actors (Bennett 2004: p. 33).

Jurisprudential review

As was pointed out above, case law has been an important source of information to the present research. The jurisprudential review is presented as a part of the quest for information pertaining to the first research question and the position of custom (living) and customary law (official)¹ under statutory and common law. Case law is examined to bring forward principles of law established by the interpretation and application of the law (statutory and customary) by the Court and the Land Claims Court (hereinafter referred to as the LCC). The judgements of the relevant courts are of high importance in understanding women's position within the law, both in terms of the courts' interpretation of women's

property rights, but also in relation to their views on the contents and development of customary law. This is especially true for countries like South Africa which have (in part) a common law tradition where there are statutes enacted by the legislature and regulations as promulgated by the executive branch agencies of government pursuant to a delegation of rule-making authority from the legislature as well as common law based on precedents i.e., decisions issued by courts where the law is created and refined by the judges themselves. In this regard case law serves an important purpose for anyone with the aspiration to understand the implications of the law.

South Africa is a young democracy and the higher courts have only had a limited period of time to interpret and clarify the relevant constitutional sections and legislation. The Court rendered its first judgment, *S v Zuma*, in 1995 and the LCC was only constituted in 1996. Therefore there are a limited number of judgments to select from when undertaking a jurisprudential review, which to a certain extent limits the information that can be extracted. Furthermore, no judgement has been rendered by the Court or the LCC directly discussing women's position under the legislation establishing communal land ownership (see further *Tongoane and Others* as passed by the North Gauteng High Court discussed in chapter 4, 5 and 7). All in all there are a limited number of cases relating to these important aspects of women's property rights and the position and protection of these rights within a customary setting.

Nevertheless, it is possible to tease out existing legal principles and the views of the courts on issues like the position of customary law under the constitution and its position within land reform, the protection of women's property rights and the right to equality vis-à-vis the principle

of male primogeniture in the succession of property, the meaning of the concept of community in law and the possibility of the development of customary law etc. In the accumulation of information in order to answer the five research questions discussed above, case law has played an important role and has helped to establish the conclusions as presented in the last chapter. To further clarify the relevance of the cases and how they have played a role in answering the research questions as set out above, please refer to Annex I: *Overview of the jurisprudential review*, which outlines the basic structure for the analysis of the cases in chapter 4.

The search for relevant cases started off in 2006 with a search of various law reviews such as the *South African Law Journal*, *Stellenbosch Law Review*, *South Africa Yearbook on International Law* and *Africa Human Rights Journal* to find case notes and case commentaries to help pinpoint cases that could be relevant to the research; 3 of the constitutional cases (not including the *Popela* case that was handed down in June 2007 and the *Shilubana* case which was handed down in June 2008) were referred to in these sources, in case notes and case commentaries.

After an initial review of these cases one of the clerks at the Court was contacted in November 2007. A similar request was forwarded to the LCC which handles all cases relating to restitution under the Restitution of Land Rights Act No. 22 of 1994 (hereinafter referred to as the Restitution Act). The staff at the two courts supplied the author with an initial list of 23 possible cases (on the topics of property rights, gender, women, equality, customary law and restitution of land rights both from the Court and LCC). The topics were chosen to reflect the first research problem and in more detail the first research question as spelled out above. Amongst these cases

were also cases from the Supreme Court of Appeal and Johannesburg and Cape Town High Courts.² 16 of these cases were taken off the list either because they only indirectly referred to the relevant topics through references in footnotes (11 cases) and 6 because they lacked in the customary aspect and only discussed other aspects of restitution not relevant to the present research. An additional 3 cases were taken off the list because they were appeals in higher courts leading to the judgements of the courts already included. The 3 cases left were the *Richtersveld* case, the *Bhe* case and the *Shibi* case, all corresponding with the cases as referred to in the above mentioned law reviews.

To further find and select the cases an initial database search was also undertaken using the Court's electronic search engine with help from the library staff at the Court's information department. In these search engines the same keywords as mentioned above, relevant for the objective of the present research, were entered into the title/subject field in order to find cases of relevance. By combining the keywords the most relevant cases were displayed and after the first round of selection 12 cases were highlighted for further research. By accessing and comparing background material from the respective courts, again referring to comments in law journals, articles and by reading other researchers' reviews of the cases, it was possible to further narrow down the number of cases to 4. These cases together with the initial 3 were then re-examined, in-depth, to determine if they would in fact be suitable for the jurisprudential review in terms of the content, based on whether they could offer further explanation to the first research problem.

All in all 7 cases, 5 from the Court and 2 from the LCC, have been analysed in the present research in order to

highlight the first research question as brought forward above. These cases were selected on their merits and the cases have in common that they include important discussions about topics and principles that can be directly related to the main objectives of the present research.

The first case (in order of presentation in chapter 4), the *Richtersveld* case has its predominate value in the field of native titles and restitution of land where claims of dispossession date back to before 1913. However, the case also presents us with important information about the position of custom and customary law within the constitution and how we should understand and apply customary law in relation to property and other aspects of the constitution.

The second and third cases, the *Bhe* and *Shibi* cases, are landmark cases on the unconstitutionality of the principle of male primogeniture in customary law and the Court, in these two cases, gave an interesting and for the present research, invaluable insight into the relationship between the equality clause and customary law, citing several sources of international human rights law. The fourth case, the *Shilubana* case, was also held as a landmark case by the Court in setting out the standard for the development of customary law and the transformation of customary law to meet the requirements of the equality clause. In the fifth case, the *Hadebe* case, the LCC explored the rights of previously disadvantaged women to obtain ownership of property through the Restitution Act, further discussing the gender discriminatory nature of official customary law.

The sixth case, the *Goedgelegen tropical Fruits* case (commonly known as the *Popela* case), does not, equally with the *Richtersveld* case, present a gender aspect but puts forward important information about the Court's idea of what qualifies

as a community in relation to property, which in turn is of relevance in discussing communality of property, customary tenure and women's positions within the community. And the last case, from the LCC, the *Bataung Ba-Ga Selale* case, equally explores the definition of a community but does so with reference to customary law and its bearing on female members of the community. All in all these 7 cases constitute the core of the Court's and the LCC's jurisprudence relating to the relationship between customary law and women's property rights and other to this related topics.

Definitions and limitations

Traditionally property is viewed as any movable /immovable object, land/real estate and intellectual property i.e. any physical or virtual entity that is owned by an individual or jointly by a group of individuals in a capitalist socio-economic system. The use of the term property in law is complicated by a number of factors. Most political theories incorporate property in to their inflexible structures resulting in the fact that the legal-technical aspects of the concept of property is unavoidable affected by the preferred ideology (Badenhorst et al 2006: p. 206). Furthermore, an exhaustive and accurate definition of the term property is also made difficult by its emotional connotations. Thus, the exact meaning of the term rests almost entirely on the context in which is it used (Badenhorst et al 2006: p. 206). Property can further be divided into public property which is any property that is controlled by a state or by a whole community; and private property which is any property that is not public property. Private property may be under the control of a single individual or of a group of individuals collectively. (Schrems 2004: p.234)

Different research disciplines e.g. law, economics, sociology and anthropology also treat the concept of property more or less systematically and definitions vary within and between fields. As an example researchers within the field of social sciences frequently conceive of property as a bundle of rights; they argue that property is not a relationship between people and things, but a relationship between people with regard to things. A lawyer on the other hand would generally try to decide the value of a property right by referring to the highest legal source on the topic. The lawyer would further compare competing rights and sometimes try to put the rights within a distinct social and economic context, as is further discussed in the present research.

The word property signifies various distinctly different concepts. It may refer to the right of ownership in a legal object. It may also refer to the legal object to which this right refers. In the context of the constitution the term property, in the bill of rights, can also be described as entailing a variety of legal relationships qualifying for protection as such under the constitution even though they might not fall under any of the two previously described categories (Schrems 2004: p. 234).

In the realm of the present research the term property is limited to land, in other words excluding in general movable/immovable property and intellectual property. It further includes both state land and privately owned land. In terms of the present research the terms land and property are used interchangeably. Furthermore, the term property is examined in the contextual reality of South Africa alone. However, the problems discussed here are not exclusive to South Africa as such but variations exist in a majority of sub-Saharan, South-East Asian and Latin American countries. In South Africa land reform was developed with a neo-liberal approach to

property but has lately swung sharply to the left, as is further discussed in relation to the political backdrop to land reform in chapter 5. The strong relationship between property rights and racial equality is further an issue that has to be taken into consideration in the present context of South Africa. Property rights are within the ambit of the current research viewed as part of the problem of inequality as fostered under apartheid; but also a part of the solution as brought forward by the new constitution. Furthermore, the term land reform is used in the present research to indicate a formalisation of land rights through legal reform (a further discussion about formalisation of property rights is found in chapter 1 below).

As the focus in this research is on the female beneficiaries of the different parts of the land reform programme the term “previously disadvantaged women” is used in the present research as indicative of any black South African woman excluding white, coloured, Indian and other Asian women from this definition, that was disadvantaged during apartheid or any female descendant to such a woman. This definition is used for two reasons: firstly because the majority of the cases as presented in the jurisprudential review in chapter 4 relate only to black women and; secondly, the customary law presented in chapter 2 relates predominately to black culture and customs. Further at the 2008 mid-year estimates for South Africa by population group, black women constituted approximately 41 percent of the whole population making them an important group in terms of the overall success or failure of the land reform programme (Statistics South Africa mid-year estimate online 2008 p. 3).

To conclude, it is also worth pointing out that even though the discussion in the present research is mainly focusing on rural and semi-urban land the present land reform

invariably has an equally important position in urban areas, especially, in peri-urban areas of many cities. In the informal areas of many African cities land is distributed by either traditional leaders directly applying customary law or political leaders adhering to the authority of traditional leaders and their application of customary law. Under these circumstances customs are adapted to the urban realities but still have the same implications on equal access to property of women.

Outline of the thesis

The present research is divided into eight chapters with related sub-chapters as outlined in the table of contents. The conceptual framework and the theories applied in the present research are introduced in chapter 1, together with an overview of the analytical approach applied to the research. Further, in order to understand the customary aspect of the research problem, as presented in the first research question, customary law is discussed in chapter 2. The aim is to transcend the concept of customary law in order to obtain a further understanding of the values and rules such as they apply in general in relation to previously disadvantaged women in South Africa.

In analysing the law from a feminist legal perspective, further discussed in chapter 1, matters of equality and non-discrimination naturally takes centre stage. In chapter 3 the concept of equality is discussed. The aim is to answer the second research question about how gender equality is defined under the constitution; and to focus on the procedures for interpreting and possibly limiting the right to equality in section 9. Thereafter, the jurisprudential review analysing the 7 cases from the Court and the LCC is presented in chapter 4.

This review shows how legal reform can take place on a case to case basis and that legal activism is important in changing women's status in relation to land. The analysis takes its point of departure in the first research question building further on the understanding of customary law and the plurality of the system as presented in chapter 2. The cases are presented in order to examine the position of custom (living) and customary law (official) in statutory law; and the principles relevant for the further discussion in the following chapters, are highlighted at the end of each case. The content of chapter 4 further relates to the fifth research question linking women's property rights with questions of development and poverty reduction by discussing the principles of the judgements in the context of the conceptual framework and feminist theory.

In chapter 5 the analysis of the possible legal effects of formalising customary titles through different forms of communal ownership on previously disadvantaged women (the third research question) considering the plurality of the system is carried out. This analysis builds on the discussions in chapter 2, 3 and 4. In this chapter the inconsistency between the constitutional protection of women's rights and the protection of these rights within the formalisation process is explored. The contents of chapter 5 further relates to the fifth research question in presenting some theoretical remarks on the relationship between the formalisation of property rights through the procedure suggested by the legislator and women's empowerment and development potentials.

Thereafter, in chapter 6, a discussion about how women's property rights are understood within the international community is presented. The aim is to examine if and how the rights presented in for example the Convention on the Elimination of all Discrimination against Women (hereinafter

referred to as the CEDAW Convention) can aid in linking women's rights with sustainable development and consequent poverty reduction. In this chapter there is a further analysis of the relationship between the protection of individual rights and rights of cultural groups, as it has been put forward by international human rights law.

The thesis is concluded by chapter 7, entailing a discussion about possible legal and policy reform. In this chapter the principles that were derived from the jurisprudential review in chapter 4 and their importance for the overall development of the South African land reform programme in the future is discussed. In the concluding chapter there is a further theoretical discussion about the position of customary law within the realm of the South African pluralist legal system and possible ways of approaching customary law and traditional leadership in order to gender sensitise them and bring them further in line with the unconditional objectives of gender equality and non-discrimination in the bill of rights. In this chapter some remarks regarding the theoretical relationship between poverty and women's property rights are also made.

¹ There is a difference in terminology in referring to custom or customary law. Custom generally refers to rules and norms that have not been written down and that existed before or without the influence of the colonial and later apartheid authorities. Custom is furthermore referred to by some authors as living customary law. Customary law usually refers to custom that has been written down, usually by the colonial or apartheid authorities. This is also referred to as official customary law.

² After the passing of the Superior Courts Bill the Southern Gauteng and Western Cape High Courts.

Chapter 1: Applied theory and conceptual framework

Presenting multidisciplinary research requires extra care in outlining linking and explaining the theoretical and conceptual approaches taken in the research. Therefore, there is a three-folded objective with this present chapter: the first objective is to outline and discuss feminist legal theory, as this has been the guiding theoretical approach throughout the research. Feminist legal theory helps put the law in a social perspective; it connects it to one aspect of the realities of the world. Further, feminist legal theory also relates to the perspective of the gendered approach to development discussed below, and fits in with the discussion about a human rights based approach to development through the basic notions of equal rights and specific attention to women's rights on the international level.

Feminist legal theory is based on the idea that law is not neutral but rather a social and political product. It further highlights that the application of the law also does not take place in a neutral and accepting world; even though women's specific rights may have been safeguarded in the legislation, the application and implementation of the legislation takes place in a pluralistic, multicultural and economically/socially differentiated world. To further understand the theories and methods presented in relation to feminist legal theory some fundamental ideas about the development of the notion of justice and equality have been included in this chapter. These ideas should not be viewed as having direct application to the research but rather as a supplementary foundation on which feminist arguments can be understood.

The second objective with this chapter is to present the conceptual framework creating a link between the legal research and the development perspective, as highlighted above. A conceptual framework can be described as a tool used in research to outline possible courses of action or to present a preferred approach to an idea or thought. The legal results in the present research are approached by using two different development theories namely de Soto's (and others') theories on development through formalisation of titles (hereinafter referred to as formalisation theory) and the theory of a basic protection of human rights and the interrelationship between different rights as a vehicle for development (hereinafter referred to as human rights theory) as launched in the wider international human rights community. These two theories, acting as the link between the legal effects as explored in the present research and possible poverty reduction, constitute the conceptual framework for the present research and are further discussed below.

The third objective with this chapter is to tie all the knots together and present the analytical structure applied throughout the following chapters. The last sub-section highlights the following: firstly, how feminist legal theory has been applied, secondly how the conceptual framework is to be understood in relation to the different chapters, thirdly, what methods have been used in relation to the different sources and finally, referring back to the research questions, what question(s) have been addressed in relation to which chapter. An overview of the analytical structure can further be found in Annex II.

Some thoughts about law and justice

The land reform programme was a direct consequence of the demand for the redistribution of land, which originated from a profound sense of the injustices of land dispossessions in South Africa (Bennett 1996: p. 507). The ANC's dedication to foster a new land policy can be traced back to the Freedom Charter as well to the Reconstruction and Development Programme (RDP). The RDP specifically committed the ANC to include the right to the restitution of dispossessed land in the constitution (RDP Policy Framework 1994: 2.4 section 13 online). This principle was further outlined in sections 121-123 of the interim constitution which laid the foundation for the restoration of land dispossessed after the 19th of June 1913.

The whole restitution programme rests on the notion of justice and fairness. Women and men being subjected to forced removal have the right to just redress. Further, section 25 (7) of the constitution, spelling out the right to restitution, should be read in conjunction with the equality clause (further discussed in chapter 3) in the bill of rights establishing everyone's right to equality before the law and prohibiting any form of discrimination the basis of race, sex or gender etc. The legal structure of the restitution programme (further discussed in chapter 5), the emphasis on the idea of justice and the feminist approach in the present research makes it essential to explore the theoretical nature of the concepts of law and justice in some greater detail.

For all discussions about the fairness of law the theory of justice is obligatory. This theory is helpful in understanding legal feminist theory, described below. This analysis is intended to highlight some of the different theories of justice from the perspective of defining justice as equality, its

relevance in terms of the protection and distribution of property and to further relate these discussions about justice to the concept of ethics, as far as possible.

To introduce the discussion of defining justice as equality, Aristotle defined justice as: “a virtue which helped man to be a dignified person” (Aristotle Book I: p. 7). For him justice was inherently linked to equality. His notion of justice as a guarantor for human dignity and equality, as brought forward by Rawls (1971: p. 10ff), included the fundamental principle of giving everyone his or her due. This sense of justice would prevent people from gaining advantage for him- or herself by taking what belongs to someone else; i.e. everyone should have the right to whatever belonged to him or her in terms of both property and actions. However, in defining justice as “giving everyone his or hers due”, Aristotle undoubtedly created a pool of related questions. Most importantly, as discussed by Rawls (1971: p. 10), the definition clearly presupposes an account of what belong to a person and what is due to him or her, but what should this account be based on? Rawls presents the idea that a man or woman’s entitlements are in most cases derived from social institutions and the legitimate expectation to which these give rise. He argues that Aristotle would not disagree with this idea and presents his theory of justice, further discussed below, to be applied on the basic structure of society creating these entitlements.

In Aristotle’s definition justice was understood on the important basis that: “equals are to be treated equally and unequals unequally” (Kelly 1993: p. 27). This maxim of treating likes alike and unequals differently is in essence political in tone and substance, because it relates to the distribution of rights and other entitlements in society. Aristotle views justice as being connected to public decision-making. He divides the

domain of justice into corrective justice and distributive justice. Corrective justice entails the correction of a wrong doing i.e. a negative act in the actions of people. Ordinarily, the idea of correcting a wrong inflicted is from a moral point of view irrefutable. The extent of man's potential for selfish and harmful actions against another shows the importance of this form of justice. Corrective justice more or less corresponds to judicial justice for this reason. Corrective justice is concerned with trying to restore the symmetry when one party has, by his wrongful act, disturbed the balance.

Distributive justice, as of special importance for the present research, relates to the just distribution of rights and duties among individuals or groups. The phrase "just" is used to reflect the fact that the distribution may be on an equal or unequal basis depending on whether the members are similar or different. This form of justice can also be referred to as legislative justice. Further, according to Kelly (1993: p. 27) the concept of treating likes similarly and unequals differently is weak and does not fit into the theory of distributive justice. Relying on Hart, Kelly comprehensively illustrates the difficulty of applying this axiom in a society where people have multiple differences and major similarities. With such distinctions and similarities in race, class, religion and gender how are the points of similarities/differences to be determined for the purpose of applying the axiom? Although it may be argued that it is unjust for a distinction like race to form the basis of differences in treatment, the South African experience has shown that this view does not enjoy universal acceptance at all times. Aristotle's axiom does however have significance in the context of the South African land reform because it can be argued that the terms for accessing land by the dispossessed

should be different from the terms for those who benefited from the dispossession.

Furthermore, Hart (1990: p. 158) also advances a theory that seeks to demonstrate the link between equality and justice in the Aristotelian fashion. He confirms the classification of justice into distributive and corrective justice. Thus, Hart attempts to fit a classical judicial redress of a wrong into the mould of the theory of treating like alike (Hart 1990: 161f). In his opinion, where in a state 'A' commits a delict against 'B', he has thereby caused disequilibrium and upset the equality that existed previously between them. A court's judgement requiring A to pay damages restores the equilibrium. Hart's analysis reveals one important feature, namely, that no one concept of justice can function alone to secure an orderly society. Order can only be attained when various theories of justice are used in manners that complement each other.

John Rawls's (1971) work, as touched upon above, has further contributed to the notion of justice.¹ Rawls constructed his theory of justice as critique against the utilitarian theory of urgency of preference. This theory, in Rawls's opinion, leads to the balancing of strong and weak preferences against each other. With the existing inequalities in society and its inbuilt power structures this principle of urgency or preference may discriminate against for example women because certain groups of women (for example the poor and uneducated) often do not aspire to desire for more power, more education or more land for that matter simply because they cannot imagine it possible. Their preferences are weaker and therefore not so urgent but that does not make them less important. Another related utilitarian problem that Rawls criticised was the absence in utilitarian theory of the distinct individual value of every human being. In the struggle for the maximising of

happiness the distinctiveness of every individual is forgotten. This in Rawls's mind could not lead to the fair treatment of all individuals, e.g. men and women.

Rawls developed his theory of justice to target directly the unfair distribution of wealth and power in society in general. In his theory the fundamental principles of society are chosen by rational, moderately unselfish people, ignorant about their social position and their gender identity. The rules of justice are chosen behind a veil of ignorance. In outlining his theory Rawls calls this, the original position where we have the possibility of analysing what rules would be justified without any reference to bargaining strengths or weaknesses (Rawls 1971: 302f).

The outcome of Rawls's analysis of the choices made in the original position can be summarised in two principles and two priority rules, all relevant to how the notion of fairness and equality is understood in the present research. The first principle states that:

Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all.

Further, the second principle states that:

Social and economic inequalities are to be arranged so that they are both to the greatest benefit of the least advantaged, consistent with the just savings principle and attached to offices and positions open to all under conditions of fair equality of opportunity.

In relation to the principles Rawls also outlined how to prioritise between the different rules of justice. The first priority rule states that:

The principles of justice are to be ranked in lexical order and therefore liberty can be restricted only for the sake of liberty.

In this regard two cases are cited:

A less extensive liberty must strengthen the total system of liberty shared by all; and a less than equal liberty must be acceptable to those with the lesser liberty.

The second priority rule spells out that:

The second principle of justice is lexically prior to the principle of efficiency and to that of maximising the sum of advantages; and fair opportunity is prior to the difference principle (Rawls 1971: 302ff).

In this regard there are an additional two cases:

An inequality of opportunity must enhance the opportunities of those with the lesser opportunity; and an excessive rate of saving must on balance mitigate the burden of those bearing this hardship (Rawls 1971: p. 303).

In reality the legislator does not possess a veil of ignorance. What is considered fair in the notion of the law is not always what anyone or everyone would characterise as fair. From a feminist perspective, further discussed below, Rawls's idea about the original position can be seen as supporting gender equal laws and affirmative action, giving someone his or her due. This is not to say that the outcome of the implementation of the rules of justices as a result of the decision made in the original position is equally fair to men and women.

However, the present research is not focused on showing whether Rawls's theory as such leads to an equal society but how his ideas of equality can be used as a point of departure in asking what is fair or unfair in a specific legal structure. The two cases related to the first priority rule

regarding the limitation of liberty are good examples of this. Limitation to freedom is only acceptable if it is for the strengthening of the common freedom of all and the limitation must be accepted by the ones subjected to it. We can use Rawls's original position as one set of fundamental principles to further our understanding of how the legislator handles the conflicting interests between men and women in relation to customary land tenure and to discuss whether the legal rules related to this can be considered fair.

Further, Rawls as well as Aristotle, presents the fundamental principle of fairness where an act or a distribution shall be considered fair if everyone who are concerned by the act are treated in accordance with the principle of "similar cases should be treated similarly". This principle presupposes impartiality on behalf of the legislator but only formally since it doesn't say anything about what makes one case similar to another or on what grounds affirmative action is relevant. However, their notion of justice allows for actions of affirmative nature that would appear to treat similar cases differently based on the idea of giving someone his or her due. Therefore, the law has to spell out the fundamental grounds for similarity between cases and when affirmative action is relevant as well as in which areas of the law these principles should be applied. In doing this the legislator adds material principles of fairness to the formal principles.

The present research rests on the principle of equality before the law and the equal protection of the law as found in section 9 of the constitution. Simply because we are human beings we should be treated equally before the law and the law should award us the same protection. If the law treats us equally the law is in most cases to be considered fair, except when the legislator has made an exception in the form of

affirmative action that could indeed be considered fair on the basis of for example historical grounds in accordance with Rawls's second priority rule.

However, from a legal perspective, where the legislator has beforehand pointed out the material criteria on which no differentiation should be made, it is relevant to consider if this could possibly strengthen the differences instead of equality. Legislation built on the notion of equality of us as human beings, such as Rawls's original position advocates, might be better. Minows (1998: p. 504) describes this as the "dilemma of differences". She argues that pointing out the differences as for example making gender a ground for non-discrimination in a constitution could strengthen the difference. However, to ignore it may have the same effect. With reference to the topic of the present research, for the legislator to ignore the possible impact of customary law in its living and official form on women's access to land could lead to an acceptance of this phenomenon. Hence, the pinpointing of women as discriminated against in relation to property could also support the notion of women as weaker and less equipped to manage property. This form of stigma is based on stereotypical and uninformed impressions of women as property owners and managers. They are created both by the notion of women as inferior in official customary law as codified by the colonial powers as well as the apartheid regime and the practical outcome of the fact that living customs are built on patriarchal structures such as male primogeniture in terms of succession of power and property. These types of social stigmas are difficult to change and the law is only but one aiding tool in such a change. However it is of importance, in relation to the present research to acknowledge the possibility of the dual impact of the law in line with Minow's argument and her

theoretical perspective is an important help in examining the equality clause and its relation to customary tenure rights.

There are many different theories about justice and fairness, only a few of which have been discussed above. Nevertheless, the question that invariably comes to mind when discussing the concept of justice is its interrelationship with ethics. The ethical domain is not open to simple definitions because it deals with moral feelings of individuals and groups, which differ greatly. The distinctions in the appreciation of justice reflect these moral varieties inherent in human society. This is clearly demonstrated by the South African pre- and post-apartheid experience in property administration. The state's perception of what was just before and what is just after the fall of apartheid differs immensely, which further demonstrates the complexity of the property question and the difficulties that the state encounters in dealing with the question of what justice is in relation to land access in post-apartheid South Africa.

The constitutional provisions in section 25, in particular sub-section (5) and (7) dealing with equity in relation to property access and the need for the restitution of dispossessed land in post-apartheid South Africa is for this reason of great interest. These provisions seek to ensure that citizens obtain access to property on an equitable basis; but the question as to what is equitable has to be further analysed. In the constitution, equity is used in the sense of fairness (Friedman 1967: p. 490). For the purpose of this discussion equity can be characterised as a concept that allows for instance judges some discretion to decide cases, guided mainly by their own sense of what is just or appropriate in deciding a case. Equity and justice are, in this context, synonymous and can be used interchangeably. In a system of common law, relying heavily

on the interpretation of legal rules of judges relating to specific cases, it could be argued that the notion of equity, fairness or justice is more arbitrary than in a system of civil law which relies more on the direct wording of the codes. In the present research the examination of relevant case law is therefore crucial to explore the perception of what is just in relation to the position of customary law in land reform and the rights of women in this context.

Undeniably, equity as used both in section 25 of the constitution and in the present research is an instrument to do justice with the aim of ensuring the good of the society. However, the main problem is to find out what is regarded as fair by the law in the specific context and how disputes around conflicting ideas are solved by the courts.

Let's return to Aristotle. He identified the universal nature of law as the reason for law's potential to result in unjust decisions. He argued that since all laws are universal, it is not possible to apply them, i.e. universal rules, to certain specific situations. Equity, in his analysis, was that which ought to be used to correct the omissions created by the generalised nature of law (Aristotle 350 BC in translation by Ross). From an Aristotelian perspective, equity is the law made by judges. The judge is guided in doing so by his or her individual belief of what is right and wrong with regards to the particular case before him or her. Equity demands the exercise of discretion and this discretionary element of equity is particularly relevant to the present research because as a rule, social needs and opinions are in today's dynamic world usually ahead of law; law is static but society is ever changing. Hence, the position that equity is used to fill the gap or remodel the inflexibility of the law poses some serious

problems. Consequently Aristotle (350 BC Book V: paragraph 10) wrote:

It is plain, then, what the equitable is, and that it is just and is better than one kind of justice. It is evident also from this who the equitable man is; the man who chooses and does such acts, and is no stickler for his rights in a bad sense but tends to take less than his share though he has the law on this side, is equitable, and this state of character is equity, which is a sort of justice and not a different state of character.

This Aristotelian conception of equity as equal to justice is informative in the context of section 25 of the constitution. In the present research equity is not viewed as equal to justice but rather as an aspect of justice. This idea that equity or fairness can be viewed as an aspect of justice can conceptually be deduced from the fact that both notions have their organic base in equality. Equality is at the heart of all theories on human rights and justice and it is therefore relevant to the present research. The notion of treating alike similarly and unequals differently originates from the idea of equality. The same is true of the idea that human rights should apply to all without distinction to race, gender or sex and so on.

The position of the equality clause in the constitution will be further discussed in chapter 3 but to conclude the discussion on the relationship between justice and equality a brief discussion on the position of equality within the constitution is entertained. As stated by amongst others Jaichand (1997: P. 23) equality is at the core of the constitutional history of South Africa. Equality enjoys this position because it is the exact opposite of the principles of apartheid. Section 9 (1), as further discussed in chapter 3, states:

That everyone is equal before the law and has the right to equal protection and benefit of the law.

In terms of the injustices of past discriminatory laws section 9 (2) provides that:

Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

The main purpose of the land reform programme is to achieve the objective of substantive equality. From a human rights approach, land reform offers dispossessed people a constitutional right of access to land on the basis of equality and human dignity. It points us in the direction of Aristotelian corrective justice because it restores in the present what was unjustly taken in the past. In this regard, Albertyn and Kentridge (1994: p. 149) both argue for a purposeful contextual interpretation of the constitution to achieve the above presented objectives. South Africa is still today a highly segregated country where the painful history of land dispossession as caused by colonialisation and apartheid is still present. The notion of equality is therefore naturally at the heart of all post-apartheid policy. All in all, the ongoing transformation from a racially based system heavily discriminatory towards women to a multi-racial democracy inclusive of all would be without any substance if substantive equality were not given priority. Hence, aspects of the theories of equality before the law are presented in the next section in relation to the feminist perspective on legal theory.

Feminist legal theory

Feminist legal theory, as discussed in this section, has for the purpose of the present research the useful scope of combining a human rights perspective of equal rights with legal theory and method (as described in the introduction). Feminist legal theory examines the role of law in preserving and maintaining patriarchy. It further analyses methods of removing patriarchy. Theoretically it has two fundamental components. The first is an analysis and critique of the theoretical issues about the interaction between law and gender. The second is the application of a feminist analysis and perspective to concrete areas of law with the objective to bring forward law reform. Both approaches are of interest in the analytical work of the present research but only the latter has been applied as such in the present research. Feminist legal theory is to a great extent formed around the division of the public sphere and the private sphere. It is fundamental to feminist theories that men are dominant in both spheres and that the control of men has often been consolidated by legal means. In the private sphere, law is more often absent than present, and this absence has contributed to the subordination of women (Chamallas 2003: 6ff). Feminist legal theory examines the role of law in preserving and maintaining patriarchy. It further analyses methods of removing patriarchy. Theoretically it has two fundamental components. The first is an analysis and critique of the theoretical issues concerning the interaction between law and gender. The second component is the application of feminist analysis and perspective to concrete areas of law with the objective of bringing forward law reform.

Feminist legal theorists together with feminist social scientists use methodologies that have been labelled distincti-

vely but not uniquely feminine. Within the social sciences these methodologies includes qualitative techniques such as case history, oral history and participatory observation. Feminist legal theorists have, departing from these techniques, developed their own methodologies such as consciousness raising, storytelling and asking the “woman question”; the last-mentioned has been applied in the present research as was discussed in the introduction.

Epistemology, or the theory of knowledge, is the branch of Western philosophy that studies the nature and scope of knowledge and belief. It primarily addresses questions such as: “What is knowledge?”; “How is knowledge acquired?” and “How do people know what they know?” The aim of all legal methods, as discussed above, is to find out what, from a legal perspective is justifiable or right; but how do we know what is right and how do we obtain this knowledge? Depending on the point of departure, what is perceived as right differs. To maintain the critical challenge to existing structures, feminist analysis involves at least four epistemological positions: standpoint epistemology, postmodernism, positionality and rational/empirical position. Standpoint epistemology and positionality or positional understanding both have in common that they in one way or the other rest on the experiences of the involved. The present research primary rests on primary legal sources and therefore does not per se involve the direct lived experiences of women. This in turn makes these theories less relevant to the present research. Further, the postmodern thought on the matter has been important in the reflections on legal validity and justification. However, for the purpose of the present research of legal reform and the strengthening of women’s rights within the legal framework this line of thought is not directly relevant.

Hence, attention is paid to the last theoretical standpoint namely the rational/empirical position to outline the feminist stance taken in the present research.

In an attempt to improve law feminists have, in accordance with the methods further discussed below, tried to use the tools of law to improve law on their own terms. They have challenged the existing assumptions of women within law and argued that laws that are based on these assumptions are not neutral or objective. When feminists are engaged in these types of discussions their point of departure is a rational/empirical position that assumes that the law is in fact not objective but if the assumptions that underlie the law are identified and corrected accordingly, the law could be made “more” objective. This position rests on the principle that knowledge is accessible, contrary to the positions building on the postmodern idea of questioning the overall possibility of knowledge, and that, if obtained, it has the prospect of making the law more objective or rational (Bartlett 1993: p. 558).

The greatest challenge within this position is however to pinpoint the relevant empirical question and to answer this question accordingly. In the present research this involved the investigation into the questions pertaining to the position of custom (living) and customary law (official) in statutory law and the legal effects of the plurality of law on previously disadvantaged women. Hence, the rational/empirical position presumes that the answers to empirical questions, such as the research questions put forward, can be improved through extended knowledge. In other words, that there is a “more” right answer and if this answer is found it has the prospect of improving the law. The quest is therefore to find the most rational, empirically sound and legally supportable inter-

pretation of the law possible by using feminist theories and methods.

The most common critique launched against the rational/empirical position is that it merely contributes to reforming the law but does not have the capacity to change the deep rooted gendered nature of the law. This however, overlooks the great impact that empirical challenge to law has had on changing the notion of women in law. Feminist empiricism in law has been crucial in promoting, amongst others, women's right to vote, to participate in politics as candidates, to become judges, to have a right to abortion and to have a right to be free from domestic violence. It has done this by exposing the assumptions about women that have prevailed in many disciplines where women have been perceived as mentally and morally inferior, psychologically unstable and historically insignificant (Bartlett 1993: p. 558).

Hence, it should be pointed out that the rational/empirical position is inclined to pay less attention to normative accuracy and focus more on factual matters. This may entail putting less focus on the social construction of reality through which factual propositions could mask discriminatory normative constructions (Bartlett 1993:p. 559). Empirical and rational arguments have the ability to expose existing assumptions about reality and specifically assumptions built on the stereotypes of women. However, if reality is not perceived as objective and if it does not stand above politics, this method, focused on correcting defects in the law on behalf of women, have difficulties in providing a basis for understanding and further reconstructing that same reality. The assumption existing within the rational/empirical position that objectivity can question empirical assumptions within existing law fails in the sense that it does not take into consideration that

knowability itself is questionable (Bartlett 1993:p. 559), as discussed above. Having considered this, the rational/empirical position still enables the research to expose areas of the law building on for example customary concepts and to discuss its theoretical effects on previously disadvantaged women's property rights.

Although mainstream feminist theory was mainly developed within Western culture, as described above, other feminist discourses have assisted in broadening the perspective of the predominately white Western dominated feminist theory by including perspectives on gender in a third world, post-colonial context. In feminist legal theory, as in the majority of other theoretical approaches, the dominant or mainstream culture within the field sometime claim to speak for all. White, straight, and socio-economically well off people profess to know the position of all women and produce "truths" that are universally valid. In line with the postmodern approach critique has also been launched towards the dominate culture within feminism claiming there are no universally valid truths and all researchers are influenced by mere fact of their background and the social, economic, political and historical context in which they live and act. The dominate discourse within feminism has according to this critique, forgotten or disregarded the fact that women are not a homogenous group (Harris 1993: p 348). As put forward by Albertyn and Bonthuys (2007: p. 6) in referring to the work of Belinda Bozzoli, South African women live in a patchwork quilt of patriarchies where women's overall subordinate position in society is tempered by inequalities amongst women arising out of class, race, geographic location and ideological position.

However, the position of researchers within a field is not static, they can through experiences outside their ordinary context and literature on general and specific issues gain a further understanding of perspectives other than their own. It is not possible to disregard our background and previous knowledge but it is possible to broaden our perspectives and look into other people's realities to extend our understanding of the social phenomenon focused on in the research. This will prevent the ongoing construction of gender or race essentials that forces women of colour to stand in the cross-roads between two kinds of domination (Harris 1993: p 349). As is put forward by Harris (1993: p 353), essentialism is a matter of convenience; it is easier for a dominant group of white feminists not to have to worry about learning about women of colour or women in the third world.

However, lately it has become easier for all feminists to access the spheres of the "other within" and to further their knowledge about how to theorise about the diversity of women. In the writings of Lorde (1997) and Mohanty (2003) it is possible to find a rich description of the content and construction of "Third World feminism", also referred to as "feminism of colour". Mohanty puts forward the idea that the project of the intellectual and political construction of this theory must relate itself to two different projects at the same time; the internal critique of white, Western feminism; and the formulation of autonomous strategies that are founded on history, geography and culture. She formulates feminism as feminism without borders where all feminist researchers should be aware of the borders but learn to transcend them. The discourse of feminism of colour has been of importance to the present research to possibly extend the perspective of the author to be able to see women as a non-homogenous

group and to be more sensitive to the possible negative outcome of the application of mainstream feminist theory on women of colour.

The conceptual framework – a development perspective

As was highlighted in the introduction, women's land rights can be viewed from many different perspectives and the idea of the conceptual framework presented below is to bridge the legal inquiry, being the main objective of the present research, with the development perspective. Below two such bridges will be discussed. Firstly, de Soto's theory concerning the reduction of poverty through the formalisation of property rights through individual titles and other theories relating to his work suggesting formalisation of property rights building on customary structures (as indicated above referred to as formalisation theory). These theories present an avenue for the results of the formalisation of property rights (legalisation of titles for example through the process of restitution and other related legislation that the present research is concerned with) to be discussed in relation to economic development of the individual or groups concerned.

Secondly a human rights based approach to development (hereinafter referred to as HRBA) is explored presenting relevant ideas of how property rights of women can be translated into equitable development policies (human rights theory). As was indicated by the world community at the Vienna Conference on Human rights in 1993, the existence of widespread extreme poverty inhibits the effective enjoyment of human rights and the non-respect for basic human rights unavoidably also leads to an increase of poverty

i.e. a decrease in development (Vienna Declaration and Plan of Action 1993: paragraph 14). The HRBA is another possible way of bridging women's legally defined property rights with the development perspective. This approach builds on international human rights structures and rights that are further reflected in the South African bill of rights. In the HRBA to development human capabilities and entitlements are translated into a legally binding (national and international) framework where entitlements, as brought forward by Nowak (2005) are defined as rights with corresponding legal obligations for national governments and the international community to respect, protect and fulfil these rights.

Formalisation theory

In relation to the debate on how to lessen the poverty in the developing world it is possible to argue, as has been done by amongst others, de Soto and Cheneval, that the protection of property rights as human rights could have positive effects in terms of lessening poverty and promoting development; Cheneval (2006: p. 16) puts forward that:

The utility of property rights is shown with regard to economic wellbeing and growth, but also to a general sustainable socio-political development.

As for the theory supporting the argument of the economic benefits of formalising or in the words of the WB "securing" titles to land, de Soto, as indicated above, has possibly been the most influential. He presents the idea that extra legal property arrangement could be turned in to official legal arrangements as a means of reducing poverty. In the theories of de Soto the enormous mass of unrealised or dead assets in the form of insecure or undefined property rights and

the lack of a legal framework to realise these rights in the third world states creates and recreates poverty. These insecure or undefined rights are related to the colonial and post-colonial systems of laws giving certain groups the right of ownership, and leaving the majority without. de Soto's ideas of the formalisation of property entails that the official legal order has to interact with extralegal arrangements outside the reach of the state to create a social contract on property and capital. This is, according to de Soto, mainly a legal challenge. The interaction of other disciplines will be necessary but ultimately a national social contract establishing property rights will have to be concluded within the ambit of the law (de Soto 2000: p.142).

When de Soto published the book: *The mystery of capital: Why capitalism triumphs in the West and fails everywhere else* (de Soto 2000) in 2000 it immediately attracted global interest, in particular amongst politicians and development officials. His ideas were however seriously criticised in relation to the experiences in a number of countries, including South Africa (see for example Cousins et al. 2005 and Green 2008) and he further received a lot of critique from the feminist movement as is further discussed in chapter 5. The theory of poverty alleviation through the formalisation of property rights presented by de Soto has been recognised by amongst others the UNDP and the WB; and in December 2008 the UN General Assembly approved a resolution by which it adopted the report of the Commission on Legal Empowerment of the Poor, co-chaired by former US Secretary of State, Madeleine Albright and de Soto, as part of the strategy to eradicate world poverty (ILD online). The overarching objective of poverty eradication is, according to de Soto (ILD online), best achieved by merging the two kinds

of economies i.e. the extralegal and the legal that exist in all developing countries into one inclusive market economy.

In terms of property rights the main cause of poverty, according to formalisation theory, is poor people's lack of access to formal property rights. Hence, poverty is created and recreated by the fact that the majority of poor people are kept in the informal sector outside the legal property system of Western capitalism. The changes needed are principally a legal challenge i.e. the official legal order must interact with extralegal arrangements to establish social contracts on property and capital (de Soto 2000: p. 142). De Soto suggests a process of formalisation of all informal businesses and de facto use of land both in informal settlements and in general to reduce poverty and increase economic development. This transformation is expected to give the poor the possibility of using their property as collateral to obtain loans in banks and of using these funds for further investments (de Soto 2000: p. 142). The well presented and comprehensive message in de Soto's four step formalisation procedure (below) has by many western and third world leaders been received as a blueprint for development. In 2002 former US president Bill Clinton referred to de Soto's approach as "The most promising anti-poverty initiative in the world".² Further, the former president of the United Republic of Tanzania professed that: "[...] our resolve, and the aspirations of all those who are struggling to convert the assets they hold into valuable properties, must not be left in doubt".³

Under the auspices of the Institute for Liberty and Democracy (ILD), a non-profit organisation based in Lima, de Soto has presented a four-stage approach to the transformation of dead capital or underutilised assets into live capital that can work for the people: firstly, diagnosis; secondly institutional

reform; thirdly, implementation; and lastly capital formation and good governance.⁴ The main objectives of the first stage are to classify and evaluate the extralegal sector in the country as well as to determine the costs of extra-legality and of the formalisation process. The methods to be used in this phase are described as: “extensive consultation and participation with all those knowledgeable of the extralegal sector” combined with “rigorous data collection and comprehensive analysis” (ILD online). The second stage of the transformation of dead assets has as its main aim to integrate the informal property arrangements identified into a single system that defines all property rights and that promotes the development of capital. Consequently, this stage relates to institutional reform such as the streamlining of public administration and modernisation of information systems (ILD online). The third phase, the implementation stage, aims at implementing the planned reforms. It necessitates the actual establishment of the indicated systems for institutional reform in order to undertake practically the registration process. The purpose of the last phase is to connect the instituted legalised property to larger national and global markets. According to de Soto (2002: 349f) this process will lead to the generation of capital and the creation of further wealth.

As an addition to or modification of de Soto’s reliance on the individualisation of titles to land in his theory of formalisation, some international actors have launched the idea of supporting customary land tenure systems through different formalisation procedures in the search for a link between economic development and the formalisation of property rights. The methods of formalisation of land rights have historically had a strong international aspect. During the colonial times the push to formalise the ownership and

possession of property came from the colonial powers. At present it is international organisations like the WB and Oxfam⁵ that are among the actors promoting systems of formalised ownership of property linked to customary land tenure with the aim of promoting economic development.

The majority of policy discourses that advocate land reform increasingly envisage that custom can be “modified” through appropriate intervention. A “modified customary system” would then have a role to play in local-level land management. As interpreted by Whitehead and Tsikata (2003) the policy of the WB is put forward to encourage the customary forms of ownership to evolve so that democratically accountable management systems can be introduced building upon what already exists locally. Ownership should be formalised but should still be relevant to the customary structures within which it has to exist. This has a strong bearing on the structuring of communal ownership in South Africa as further analysed in the present research, and the respect for women’s property rights. The ANC has in its 2009 national election manifesto further discussed in chapter 5, clearly highlighted the view of the existence of a link between land reform, carried out by formalising insecure land rights, and rural development.

In relevant literature on the topic of land rights in Southern Africa the term “formal” is unconditionally related to official written documents e.g. a title deed. In relation to this understanding of the term to formalise something would be equal to making it official. For example, according to Bruce (1998), a formal tenure system is a tenure system that is created by statute. In view of this understanding of formalisation the state i.e. both state law and state policy will be in focus. The state is attempting to simplify and/or

standardise the rules of customary tenure systems on the transfer of rights to make the system more “understandable” and easier to watch over. As brought forward by Ikdhahl et al (2005), the projects of simplification and legibility are typical of modern states. According to Scott (1998: p. 4) examples of such processes are:

[...] As disparate as the creation of permanent last names, the standardization of weights and measures, the establishment of cadastral surveys and population registers, the invention of freehold tenure, the standardization of language and legal discourse [...] In each case, officials took exceptionally complex, illegible, and local social practices, such as land tenure customs, and created a standard grid whereby it could be centrally recorded and monitored.

The process of formalisation can be described as a move from “informal” to “formal” rules e.g. from oral to written or unofficial to official. As was put forward by Ikdhahl and et al (2005) such a dichotomous approach can be, and has been, criticised on the basis that it does not take into consideration the complex process whereby statutory and common law interconnect and interrelate with customary law and practices. Consequently, the terms “formal” and “informal” as well as “formalisation” are problematic, but for practical purposes, they are used in relation to the present research as synonymous with the process of increased state engagement in terms of land reform, especially in relation to the formalisation of titles under the Restitution Act, CLARA and Communal Property Associations Act of 1996 (hereinafter referred to as the CPA Act).

Furthermore, in order to understand the legal perspective of how women’s access to land and the protection of women’s land are affected by the formalisation of land rights it is one of the objectives of the present research to examine

the multifaceted interaction between formal and informal rules and practices. As is further discussed below, women's access to land and the protection of their land rights is affected by a wide range of norms. State law and state institutions are far from the only dogmatic authorities (Moore 1999: 33f). As is evident from the *Shilubana* case, traditional communities possess the ability to create and implement their own customary laws in line with the ever changing legal, social and economic conditions of our societies. However, at times customary law is so strong that it overrides or changes statutory law.

The idea of the formalisation of property as a part of the strategy to promote development in third world countries has in the post-colonial era been promoted by a number of international economic institutions such as the UN and the WB, as mentioned above. In its 2003 report on *Land policies for growth and poverty reduction* the WB set the standards for many years to come with regards to the Bank's future lending and support programmes (World Bank report 2003: p. 23). It introduced a neo-liberal approach to economic development supported by the formalisation of titles to create secure tenure. In the report a number of economic arguments were presented to support the legalistic approach to the formalisation of property rights. The report stated that:

Well-defined property rights reduce the need to expend economically valuable resources in defending claims and allow these to be used for productive investment instead (World Bank report 2003: p. 23).

The report addressed women's land rights as a specific topic rather than a general concern. Under the heading of "Strengthen women's land rights" a, for the present research, very important point was stressed pertaining to the relation-

ship between formalisation and women's land rights. The WB report indicated that the same processes that may lead to an increase in the value of land (which is likely to result in an increasing demand for formalisation of titles) could also lead to a weakening, or even the loss of women's rights to land if women's land rights were not purposely protected and strengthened (World Bank report 2003: p. 58). This line of thought together with the ideas presented in formalisation theory as discussed above will be considered further in chapter 5 and 7.

Human rights theory

Building on the ideas of de Soto, the term "formalisation" is used in the present research to describe the process of increased state engagement in terms of legal regulation and registration of land rights; as has been introduced by other researchers in this field such as Hellum, Kaarhus and Ikdahl (Ikdahl et al. 2005). In line with their research, state law and customary law are not, in the present research, viewed as distinct and opposing systems; instead referring to the objective of the above mentioned research the present research aims at demonstrating how women's access to land is affected by the interaction of the two systems (Ikdahl et al. 2005).

In the present research, in trying to demonstrate how these systems do in fact relate and rely on each other and how they both influence women's abilities to translate their entitlement into legal rights with corresponding legal duties and in doing so also affect women's opportunities to economic development, a HRBA to development has been applied. This approach was initiated by the UN and has

gradually been adopted by international and national donor agencies. The HRBA to development is an instrument that has the prospect of balancing the quest for a far reaching formalisation of land rights against the right to equality and the right to livelihood without discrimination and to translate these rights into poverty lessening policies furthering economic development. In other words it is an instrument that will not only help us understand how women's legal rights, as they are understood and implemented by the courts, can relate to poverty and under development, but it can also help us put formalisation theories such as the ones presented above in a different development perspective.

The HRBA to development perspective is essentially presented in chapter 6 in relation to international human rights law. The analysis in chapter 6 is not focusing on establishing South Africa's obligations under international human rights law as such. As is further discussed in chapter 6 these instruments may not be adequate means to achieve respects for these rights on a domestic level; but they may be understood as a tool for analysing the interconnection between the law and its effects on women's abilities to reap the benefits of any potential economic development or to actively participate in it.

If we adopt a human rights based approach to development (as has been done in the present research) and we conclude that property is an important part of economic development (also part of the underlying assumption of the present research) we are forced to ask specific questions about access, such as which individuals within communities have disadvantaged or no access to property? Such an approach could help identify the problems faced by women in a semi modern and semi customary context who are unable to access

and/or own property because of the interaction between the formal legal and the customary system. It would highlight the problems facing the widows and children born out of wedlock (as in the *Bhe* case). It will also point to the fact that poor women living in an semi-urban setting, are particularly vulnerable because on the one hand they are unable to rely on the kind of community support more usual in rural areas and on the other the outcome of the application of customary law outside the customary social constructions would have very negative results on women's property rights (as in the *Shibi* case).

A human rights approach to development is one that is simultaneously a *tool* for analysis which focuses attention on the underlying inequalities and discrimination faced by people living in poverty and social isolation, which impede their development and deny them the opportunity to raise themselves out of poverty; and it is also a *foundation* for a people-centred approach to development, based on a coherent framework of binding legal norms and accountability. This legal framework both refers to the domestic and the international level. A HRBA to development can further be seen as a *process* which is holistic, participatory, inclusive, and multi-sectoral, and lastly as an *outcome* - the empowerment of individuals to achieve their full potential, and the freedom to take up opportunities. In chapter 6 women's theoretical rights to property in international human rights law is examined as a complementary tool and foundation to the rights set out in the bill of rights putting specific focus on women's fragmented and easily disturbed property rights in a context of poverty and possible social isolation. In this chapter international human rights are discussed from the perspective that their

violation or non-fulfilment will lead to the impairment of women's ability to move out of poverty.

There is a growing body of literature integrating development aid with human rights principles and norms (see for example Sengupta et al. 2003 and Nowak 2005). While this theoretical approach to equality and development is still being developed the basic concept and principles of this approach are: firstly the recognition of the mutual dependency and complementarity of sustainable human development and the different human rights; secondly this approach considers the individual to be the central actor in and beneficiary of development: thirdly the HRBA focuses on the rights of individuals rather than needs and; lastly the HRBA, sets out a legally binding framework of individual and group rights, with corresponding obligations for national governments and international community to respect, protect and fulfil these rights (Ikdahl et al 2005: p. xi).

In the present research an attempt has been made to apply the HRBA to development in relation to the second research problem in order to bring the abstract and inter-connected (of the pluralistic system) legal principles constituting women's rights to property into a developmental approach to previously disadvantaged women's concerns in land reform. In relation to the different relevant human rights as existing in the bill of rights (see chapter 3) and various human rights instruments (see chapter 6), the HRBA to development maps out a framework for a gender-equal and non-discriminatory land reform/formalisation process.

The HRBA to development also relates to the idea of the relationship between gender and development (GAD). The GAD stands for a holistic perspective on development where women are seen as agents for change rather than passive

recipients of development assistance. The strengthening of women's freedom to access land is one way of embracing this holistic perspective. A relevant understanding of development, adding a gender perspective for the purposes of the present research, is therefore derived from Young. She defines development in the GAD context as: "A complex process involving the social, economic, political and cultural betterment of individuals and the society itself" (Young 1997: p. 52). The term "betterment" she defines as: "The ability of the society and its members to meet the physical, emotional and creative needs of the population at a historically accepted level" (Young 1997: p. 52). Young further points out that it is essential to analyse the balance of rights and obligations as well as the power and privileges between men and women in relation to the relevant development process, in this case creating secure land tenure.

The underlying motivation to integrate women into development programmes arose from the gender bias that so often characterised previous attempts at economic development and that further ignored women's economic activities and the vulnerable relationship that often exists between the property used for the economic development and the woman relying on it (Tinker 1997: p. 37). Behind the idea of approaching development from a gender perspective was the objective, as initially brought forward on the international arena, to try to ensure that women got a fair stake in economic development. In the early development of this approach, mainly within the UN and US, focus was put on, as presented by Tinker (1997: p. 36) legal equality, education, employment and empowerment. In understanding the feminisation of poverty these areas of focus together with the idea that women need to be relieved of much of their daily struggles to supply

the very basic necessities for their families to actually be able to participate in any form of economic development leading to a reduction of poverty, are important.

The present research focuses on legal equality in land reform and if and how such reform involves the gaining of influences i.e. empowerment in relation to land ownership and management. From a GAD approach (closely related to the feminist legal approach discussed above) it would be possible to problematise land access and ownership, viewing land access and ownership as part of economic development, in terms of asking who will benefit from the reform? Who will lose out? What tradeoffs have been made to make the reform fit in with the pluralist legal system of South Africa? And what is the result in relation to the balance of rights and obligations, power and privilege between men and women within South Africa's land reform programme.

The GAD approach further relates to the role of local communities in providing or hindering support for women's property rights. Since women are frequently impeded from organising even at this level, as brought forward by Young (1997: p. 53), because of constraints located at the level of the family, the GAD approach has to include consideration of the bases of support for women's emancipation within families and kinship groups as well as resistance to it. In this regard it is further of importance to highlight the fact that in this area contradictions between men and women are present but also between generations. Integrating this approach into the present research has made it possible to analyse women's theoretical role in land reform from a development perspective that specifically highlights women's role in the development process and that views women as important role-players in economic development.

Analytical framework

Building on the research problems put forward in the introduction firstly to explore the relationship between statutory law (the bill of rights and relevant legislation) and customary law in terms of women's access to land through land reform with specific regard to communal ownership; and secondly to explore the relationship between women's abilities to access and own land and poverty reduction through economic development, the following synoptic research question(s) was put forward above to guide the research: *Does the new communal ownership paradigm as launched under the 1996 constitution promote the rights of women living in a customary context to equal access and ownership of land and how does the way the law positions women influence poverty among women?* The objective of the present research has been to bring forward answers to the five related research questions, as spelled out in the introduction by trying to combine the interpretations of the legal sources with development theories in a comprehensive and fruitful way. The aim of this outline of the analytical framework is to draw attention to how the different theories (legal feminist, legal pluralism, formalisation and human rights) and methods (legal and feminist legal) have been applied throughout the following chapters and what sources have been relevant in relation to the theories and methods applied. For a detailed overview please refer to Annex II: *Overview of the analytical approach*.

In the first substantial chapter, chapter 2, the point of departure is research question 1: What is the position of custom (living) and customary law (official) under current statutory law? The purpose in this chapter is to give further insight into the concept of customary law. To fulfil this

purpose chapter 2 includes an analysis of secondary legal sources and text based as well as secondary data. Furthermore, customary law is approached from the perspective of understanding legal pluralism and what role gender as a factor has played in interpreting and developing customary law. In order to examine women's position under customary law and what influence the colonial and apartheid legal systems had on the development and application of the law vis-à-vis women feminist legal theory has been used. In this regard official customary law and living custom as different forms of customary law with different implications for women's position under the law as such have been examined.

In chapter 3, the focus is on how gender equality has been defined within the ambit of the constitution (research question 2) and the understanding of women's rights in the new constitutional dispensation. The sources analysed are legal primary and secondary sources. The aim of this chapter is to support the feminist analysis of the case law presented in chapter 4. The content and application of the equality clause in relation to gender is analysed by applying legal feminist methods guided by feminist theory. In chapter 3 there is a further discussion on the approach to the interpretation and limitation of the equality clause of relevance to the methodological approach to the case law in chapter 4.

In chapter 4 cases from the Court and the LCC are examined to highlight the position of custom (living) and customary law (official) under current statutory law (research question 1) and to a certain extent the link between women's legal ability to access, own and transfer property and poverty among women (research question 5). The cases are analysed using legal method constituting the following approach: firstly to characterise the issues of the specific case; secondly to

analyse the legal precedent and/or legislation that decided the case; and thirdly to undertake the process of statutory interpretation, especially to determine the effect of statutes altering common law principles. To enable a further examination of women's specific position in relation to the cases concerned with gender issues (*Bhe*, *Shibi*, *Shilubana*, *Bataung Ba-Ga Selale* and *Hadebe*) legal feminist theory is applied and feminist legal methods (feminist practical reasoning and asking the "woman" question) are used. The outcomes of the cases (all 7) are further analysed from a feminist perspective as well as a peace and development perspective to put forward a presentation of some initial ideas about the relationship between the functions of the law and economic development.

In chapter 5, land reform is discussed in relation to the possible legal effects of formalising customary titles through different forms of communal ownership on previously disadvantaged women considering the plurality of the system; and its possible link to poverty among women (research questions 3 and 5). Feminist legal methods are used to approach the primary legal sources (the legislation) and feminist legal theory is applied to examine women's position before the law. Furthermore, formalisation theory is applied to outline the relevance of the connection between defined property rights and the prospect of development; this theory is further analysed from a feminist perspective highlighting how women's property rights are affected by formalised titling especially in relation to formalisation structures building on customary land tenure concepts such as communal tenure.

In chapter six the focus is on how women's property rights are understood by the international community and how the rights put forward in this context relate to women's rights to sustainable development and poverty reduction (research

question 4). In this chapter the theoretical point of departure is feminist legal theory and human rights theory in analysing the underlying inequalities and discrimination specifically faced by women in relation to property rights and how the issues of vulnerability, poverty and equality have been addressed by the international community. Chapter 6 is based both on international legal primary and secondary sources as well as text based and secondary data. To approach the legal sources feminist legal methods are applied.

In the last chapter, chapter 7, the different perspectives are tied together and the results of the present research are presented in the form of a theoretical discussion about the law in the context of poverty reduction and economic development; and in the form of suggestions as to how legal reform could be designed to promote women's property rights in relation to communal tenure building on the pluralistic approach in the South African constitution and the pragmatic and developmental approach of the Court.

¹ Equally important to Rawls's contributions to the notion of justice is Dworkin's theory of justice. His theory results from an extensive and complex review of reflective equilibrium, social contract and original position. For Dworkin, justice is seen as fairness based on the "assumption of a natural right of all men and women to equality of concern and respect." He contends that all men and women possess this right not by virtue of birth, characteristic, merit or excellence, but simply as human beings (human rights). By not attempting to predicate the basis of this assumption on natural law on which his theory is crucially based, Dworkin avoided the interminable controversies associated with identifying the basis of justice.

² This statement was made at the World Congress on Information Technology in Adelaide on the 27th February 2002. The quote has been taken from:
<http://ild.org.pe/en/home>, accessed on the 11th February 2009.

³ This statement was made at a property formalisation awareness presentation in Dar es Salaam on the 8th September 2003. The quote has been taken from:
<http://ild.org.pe/en/home>, accessed on the 11th February 2009.

⁴ The procedure entails a 5-step transition to the rule of law and an inclusive market economy. The first step "training and team building" has been omitted in the text above. Information available at: <http://ild.org.pe/en/home>, accessed on the 11th February 2009.

⁵ Oxfam have in recent publications (see for example Green 2008) further acknowledged the predicament of relying too heavily on customary land tenure systems in relation to the protection of women's rights.

Chapter 2: Backward or forward?

The development of customary land tenure

The position of customary law in the new constitutional framework of South Africa has been the subject of a good deal of debate both in legal literature and elsewhere. The controversies have much been centred around the questions about the relationship between the previously dominant system of common law and customary law in the context of law reform (Pieterse 2001 and 2000: p. 364); the application of constitutional law on customary law, more specifically whether the bill of rights applies to customary law directly or indirectly (Bennett 2004: 91f); and direct conflicts between constitutional rights such as the equal access to land and customary law. During the twelve years since the constitution came into force the legislature and the courts (see as examples the *Bhe*, *Shibi*, *Hadebe* and *Shilubana* cases in the next chapter) have made several attempts to advance the rights of women under customary law in the areas of land tenure and succession in accordance with the constitution.

The objective in this chapter is to attempt a further discussion about the allocation of power over land rights, in particular control over and the allocation and management of land rights, through customary law. Women's positions in relation to land have been systematically neglected throughout the land reform process, as is discussed in chapter 5. As the position of the majority of rural and peri-urban women in South Africa is determined by customary law it is of importance to analyse the concepts and theories of customary law that relate to property rights.

The position of customary law in the land reform programme of South Africa has been highlighted in the introduction to the present research and it is the objectives of this chapter to define customary law in relation to land tenure; to highlight how different customary relationships such as marriage and succession influence land ownership and the transfer of land rights; and to further discuss how customary law fits within the constitutional framework. This is done in order to contextualise customary law as a legal system existing within the boundaries of the new South Africa and co-existing with the right to equality (discussed in the following chapter); and the potential influence this system has on any legislation produced within the formal legislature. To comprehend the continuing dynamic of present-day claims and counterclaims to land it is also of importance to analyse the course that the concept of customary land tenure has taken since the beginning of colonialism; the history of land tenure and customary law is therefore firstly, briefly, outlined below.

A brief narrative of the history of dispossession

From a historical perspective black South Africans have ever since the 17th century been subjected to racial discrimination in relation to their customary rights to land. During the long period of colonial and later apartheid rule countless black South Africans were dispossessed of their customary land rights. The colonisers introduced new modes of land tenure mainly protecting individual ownership, based on title deeds, replacing or working in duality with the customary systems. The new land-acquiring systems had authority over the customary structure of ownership or possession and would therefore override any customary claim to land. Land was,

during colonial and apartheid rule, regarded an asset exclusively controlled by the white authorities. The minority control over land did not only mean control over the productive resources but also power over people. As put forward by Cousins (2008: p. 3) these historical land policies were closely intertwined with policies concerned with the supply and regulation of labour and further in the apartheid years with political control.

The white leadership did not only discriminate against black Africans by building a hierarchy topped by the minority; it also marginalised all women regardless of colour because of the common colonial notion that women were inferior to men. Many black women experienced a complex form of discrimination on the one hand in terms of gender and race and on the other hand on an institutional as well as personal level by the introduction of discriminatory laws and by being regarded as minors under customary law. The minority control over land either moved the locus of decision-making from the local level to the regional colonial capital or it superimposed colonial decision-making procedures over land on the existing traditional ones. Either way the decision-makers, both the traditional leaders and the colonial administration, were male (Charlton 1997: 8-9).

When the wave of independence swept over the African continent in the late 1950's and early 1960's the apartheid government had already seized power in South Africa, subjecting all South Africans to another four decades of racism and racial laws. The tendency to treat indigenous land rights as non-legal culminated during the apartheid regime in mass evictions of black South Africans. Black Africans were forcibly moved from areas regarded as land of interest to the whites, to land regarded of no value. Land in and around the

major cities was declared white along with other areas of interest such as game-reserves and land rich of natural resources. So-called bantustans or homelands were created for the purposes of holding the black population. Black women were repeatedly subjected to the duality of suppression both as being classified as black and due to the influence of the customary systems continuing to treat women as inferior to men in the new settlements. During the time of the British rule and later apartheid regime, part of customary law was codified and this stereotyped version of the law subsequently left many black women with limited or no birth or succession rights to the land on which they were forced to live. Consequently, the colonial and later apartheid laws, dispossessed millions of people; and black women suffered at the bottom of the hierarchy (Charlton: 1997 8ff).

The apartheid land law was, according to Pienaar, built on the “ownership paradigm” which constituted registered real and limited real rights that suited the political, legal and social expectations of the white population. The black population lacked all of these rights and their property rights were weak, temporary and mostly permit based. Much of the land allocated to black people in the rural areas was regarded as tribal land and the use of this land was exercised in tribal communities. Security was sought within the community structures rather than in relation to rights (personal communication, February 11th 2009). Tribal property rights were embedded in social relationships; and could be characterised as being inclusive rather than exclusive. In the tribal settings overlapping use rights such as grazing and cropping rights were granted by the chiefs. These rights were flexible and negotiable but not secure in the sense of real ownership rights. In addition overpopulation and over farming in the

form of subsistence farming together with the abuse of power by tribal leaders caused an array of problems in relation to property during apartheid. In the urban areas black people's property rights were based on site, residential and hostel permits together with other certificates of occupation, constituting equally weak and insecure rights.

It is impossible to find full accounts for the scale of state sanctioned land dispossession that took place under the racist regimes in South Africa. However, it has been estimated that more than 6 million people were dispossessed between 1913 and 1991.¹ In the first stage of apartheid rule South Africa's land ownership system was centred on the Native Land Act of 1913, which later became known as the Land Act. The Land Act declared the whole of South Africa to be land held exclusively by white South Africans with the provision that specific "scheduled areas" were to be kept in trust for the welfare and benefit of black South Africans. The scheduled areas constituted approximately 13 percent of the total land area and were mainly occupied by tribal communities. In later years the "homelands" were created out of these areas. These homelands were expected, by the apartheid government, to eventually become the permanent residence for all black South Africans.

Before the arrival of the colonisers land was controlled through systems of customary law. The concept of customary law derives from social practices that a group or community accepts as obligatory, and therefore differ from society to society. Customary law, in its pre-colonial form was in general unwritten and its content was based on the interpretation by the traditional leadership and the people concerned. This form of customary law is often referred to as original or living custom or customary law (see for example

Bennett 2008: 138ff) as opposed to the official form of customary law discussed below. Viewed from a historical perspective living customary law was, before colonialism, a family-centred, flexible system of law that preferred the negotiation and settlement of disputes before a rigid state-centred application of a set of rules. The overwhelming majority of customary law in Southern Africa was, and still is, based the tradition of patriarchy. This tradition signifies the authority and special rights of senior males in the community; effectively leaving all women as well as all junior men in a subordinate position (Bennett 2004: p. 248). However, traditionally, the amalgamating value base of customary law was safeguarding the family and therefore protecting women and children. Further-more, under pre-colonial customary law, family property, providing for the whole unit was the norm (Armstrong 1994: p. 69).

Through years of colonialism and later the influence of post-colonial regimes the structures of traditional societies and the content of customary laws have been distorted. After the introduction of colonialism and later apartheid, customary law was reconstructed to serve the purposes of the oppressors (Armstrong 1994: p. 69); and the law was written down to create an official version of the law that could be understood and applied by the foreign and oppressive powers within their imposed legal system. Thus, this “official” version of customary law was developed in the struggle between local, predominately male leaders, colonial powers and post-colonial governments, leaving many women effectively without any or very little decision-making power over their lives and over the land they lived on. The land rights of women living under customary law in South Africa must be understood in the light of the colonial legacy of the plurality of systems of law

distinguished by the existence of several customary and religious systems existing within one hegemonic legal system, the state legal system (Bentzon et al. 1999: p. 33). The so-called official customary law was developed through a combination of the judgments of local male chiefs, colonial administrators, colonial courts, anthropological literature on African customary laws, and textbooks written by colonial administrators (Woodman 1988).

A general characteristic of this official customary law, invoked under colonial and later apartheid powers, was its gender discriminatory character. It was commonly recognised that black women were minors under the guardianship of their fathers, husbands or elder brothers. Consequently, women were excluded from the formal decision-making process regarding distribution and transfer of land, while male chiefs were empowered (Ik Dahl et al. 2005: 6ff). In the official form of customary law formalised customary marriage and divorce rules recognised that the husband held property on behalf of the family, completely opposite to the original idea of customary law protecting property as family property as mentioned above. In the event of a divorce, it was generally held that women had the right to keep what was seen as her property i.e. the lobola and cooking utensils. In relation to women's rights to land in the event of death of the husband, further discussed in relation to the *Bhe* and *Shibi* cases in chapter 4, the official version of customary law principally held that sisters and brothers did not inherit on an equal basis in favour of the male siblings, and that widows could not inherit at all. In referring to Martin Chanock's research (1985), Ik Dahl et al. (2005: p. 7) puts forward that rather than having a substantive and set content, these customary principles were developed by chiefs and colonial administrators

with the purpose of legitimating colonial rule on the one hand, and social and economic control of gender and age relationships on the other.

In its living form, as contrary to the official form, custom possesses an ability to change in line with the changes to the structure and living conditions of the concerned group. Its close relationship to the social structure in which it exists and its oral form renders it an advantage in relation to statutory law in that it can easily adapt to the ever changing realities of the concerned communities, as is evident from the *Shilubana* case, as presented in the jurisprudential review in chapter 4. Customary law puts focus on seeking consensus and provides for family and community meetings which offer opportunities for the prevention and resolution of disputes and disagreements.

The objective of customary law to seek consensus is not only useful in the area of disputes, it further provides a setting which contributes to the unity of family structures and the fostering of co-operation, a sense of responsibility in and of belonging to its members, as well as the nurturing of healthy communitarian traditions such as ubuntu². The rules of custom do not operate in isolation. In the traditional setting they are part of a system which fits in with the community's way of life. They were designed to preserve the cohesion and stability of the extended family unit and ultimately the entire community (Claassens and Mnisi unpublished). Customary law serves various purposes, as for example the maintenance of discipline within the clan or extended family. As discussed by Judge Langa in the *Bhe* and *Shibi* cases³, everyone, man, woman and child have a role and each role, directly or indirectly, is designed to contribute to the communal good and welfare.

As a result of the colonial and apartheid laws many traditional societies have scattered and today consist only of smaller unities referred to in this analysis, as in the relevant legislation, as communities. The majority of these rural and peri-urban communities apply both forms of custom or customary law and have retained some form of the patriarchal decision-making hierarchy as found in the pre-colonial version of customary law. These communities are still governed by traditional leaders and the distribution of communal land is still the basis of power for this leadership. However, customary law is in its nature flexible and has the ability to develop. In terms of the relationship between women's land rights and customary law there are three main challenges to women's secure and stable land rights; firstly, it is not so much the "living version of the law" but rather the "official" and codified version of customary law which discriminates against women and has not developed to fit with the new constitutional goals and the changing realities of these societies.

Secondly, if the official version of customary law is discarded, as has been done, in part, in recent case law of the Court, the power structures it set up still exist and will unavoidably influence the development of the substance of the living customary law. As brought forward by Claassens and Mnisi (Unpublished: p. 3) the struggle over land rights in South Africa is not so much a struggle against customary law as a struggle over the content of customary entitlements to land in the context of the constitution. Even if positive changes to customary law take place in line with the constitution, as for example the change of the succession of chieftainship from only male to also include females in the *Shilubana* case presented in chapter 4, these developments are

jeopardised by the power structures developed under the official version of customary law and new legislation (further discussed in the present research) passed by the South African government enhancing the right of traditional leaders to decide and develop the content of customary law.

Thirdly, the harsh economic and social reality of many rural and semi-urban traditional communities grounded on the dispossession and disintegration of these larger ethnical communities during colonialism and apartheid has partly destroyed the social structures that customary law is traditionally embedded in. Without these structures and with a lesser sense of togetherness and an increasing striving for individualism the results of the application of customary law can have a very negative impact on women's access to land through land reform and communal tenure schemes. Every person is left to fend for him- or herself and it is in these situations that the reliance on patriarchal structures without the acknowledgement of the support structures of customary law will have serious implications on women's livelihood and survival.

Land tenure under customary law

The concept of land tenure under customary law is complex and difficult to penetrate in full. As Bohannan (1969 cited Bennett 2004: p. 374) remarked in relation to the topic of customary land tenure: "[...] no single topic concerning Africa has produced so large a poor literature". The objective of the following sub-sections is not to give a full account of all aspects of customary land tenure but rather to focus on sub-topics of relevance for the present research. Firstly this sub-section deals with the issues of colonial description of

customary tenure, and building on the oral tradition of customary law, the issues of how to apply the notable western concept of ownership in a customary setting. The following sub-section discusses some main characteristics of customary tenure such as the powers of traditional leaders and the position of the individual in customary tenure. Further, relating to the jurisprudential review in chapter 4, transfer of customary rights are discussed in terms of the rules of succession relating to property.

Our understanding of contemporary customary systems of land tenure builds on the colonial and apartheid descriptions of these systems, as mentioned above. It is therefore of interest to analyse some of the misconceptions of customary land tenure stemming from that time, in order to avoid repeating them. The three major misconceptions held by the colonial, and later apartheid authorities were firstly, to assume that the language of ownership was applicable within the customary context; secondly, to believe that a society could only utilise the concept of ownership when civilized enough and thirdly, to perceive all customary tenure as communal (Bennett 2004: p. 376). In perhaps the most infamous decision on customary rights in land the Privy Council in the case *Re Southern Rhodesia*⁴ stated that:

Some tribes are so low in the scale of social organisation that their usage and concept of rights and duties are not to be reconciled with the institutions or the legal ideas of civilized society. Such a gulf cannot be bridged. I would be idle to impute to such people some shadow of the rights known to our law and then to transmute it into the substance of transferable rights of property as we know them.⁵

The whole idea of the colonial annexation of the native land rested on the assumption that the “primitive” societies

already on the land did not know or apply the concept of ownership and therefore the colonial powers were free to annex whatever land they wanted. The wrongfulness in this assumption was further outlined in the *Richtersveld* case discussed in chapter 4, indicating that customary rights in land did indeed exist at the time of colonialisation and that the annexation of land did not render these rights extinct. Customary land tenure cannot be described by using the term ownership in the western sense, excluding everybody else but the owner from enjoying his or hers property. To describe the differences of customary land tenure there has been an attempt to step away from the universality of ownership, introducing the notion of customary land tenure as communal. This concept was firstly introduced in the case, *Amodu Tijani v Secretary, Southern Nigeria* where the Privy Council established the notion that:

Land belongs to the community, the village or the family, never to the individual. All members of the community, village or family have an equal right to the land, but in every case the Chief or Headman of the community or village, or head of the family, has charge of the land, and in loose mode of speech is sometimes called the owner.⁶

The word communal in relation to tenure however suggests something more than just the fact that all members of a community have equal claims to land or that it is the membership of a specific community that is the basis for such a claim. The adjective “communal” used in relation to land tenure could suggest that the communities would also use the land in community and thus farm collectively and share the produce or graze animals without paying attention to whose animals go where and then share the produce of the animals. This is, according to Bennett (2004: p. 378), wrong. Farming or herding had, in the customary settings of Southern Africa

very little to do with communality of property. People seldom co-operated in joint ventures but landholders farmed for their own benefit only reaching out to others for larger projects (see for example Schapera 1943, Kuckertz 1990 and Hamnett 1975).

As is evident from the discussion in chapter 5, the legislator has further chosen to work with the concept of communal property in relation to the CPA and CLARA, in a, to a certain extent, misguided attempt to capture and retain the “customary element” in land tenure. However, as a legal term the meaning of “communal” is very vague. It could indicate that a right is held by a group in common i.e. each person of the group has a separate but the same title or it could indicate that a right is held by a group jointly i.e. the unity has one inseparable title. Neither the first nor the second description would properly describe customary tenure of residential or arable plots. The first notion would possibly describe the rights to natural resources and pasture (Bennett 2004: 378).

Characteristics of customary tenure

Despite the fact that the term “communal” does not define the complex traditional relationship between people and land justice it is of key importance for the present research to examine what exactly is compounded within the term customary land tenure. The reason for this is the fact that customary land tenure is currently used in most contemporary policy debates regarding land reform, including the South African. A, for the present research, relevant definition of customary land tenure has been presented by Pienaar (2008: 260ff) and van der Walt (1999). It outlines the following features of customary land tenure:

- Land rights are embedded in a range of social relationships, including household and kinship networks, and various forms of community membership, often multiple and over-lapping in character.
- Land rights are inclusive rather than exclusive in character, being shared and relative, but generally secure. In a specific community, rights may be individualised (dwelling); communal (grazing, hunting, fishing and trapping) or mixed (seasonal cropping combined with grazing and other activities).
- Access to land is guaranteed by norms and values embodied in the community's land ethic. This implies that access through defined social rights is distinct from control of land by systems of authority and administration.
- The rights are derived from accepted membership of a social unit and can be acquired by birth, affiliation, allegiance or transactions.
- Social and political boundaries, and boundaries demarcating the use of resources, are usually clear, but often flexible and negotiable, and sometimes the source of tension and conflict.
- The balance of power between gender, competing communities, right-holders, land administration authorities and traditional authorities is flexible.
- The inherent flexibility and negotiability of land tenure rights mean that they are adaptable to changing conditions, but susceptible to acquisition by powerful external forces (like the state) or processes (like capital investments).

Much of what is known about customary land tenure has been presented by native courts in the colonial era; courts that were not prepared to deal with the impenetrable range of customary land rights, and the flexibilities embedded in them.

The colonial courts further simplified customary law by removing all reference to the inbuilt flexibilities and vagueness of customary law, and further ignored that negotiation was a key feature of the customary way of allotting and using land. Today, as brought forward by Pottier (2005), contemporary policy arenas also embrace this type of simplification. As an example, in the report of the WB (2003), discussed above, “evolutionary models” of customary land law are advocated. The report spells out:

Given that customary tenure systems have evolved over a long period of time, they are often well adapted to specific conditions and needs. Even in situations where such arrangements reach their limits, building on what already exists is in many cases easier and more appropriate than trying to re-invent the wheel, which can end up creating parallel institutions with all their disadvantages (World Bank report 2003: p. 62).

To find out what customary land tenure means today it is of importance to get an idea of how land tenure was organized before the colonial onset. However, as noted by Pottier (2005: p. 2) caution is advised when using the term rights in relation to customary rules and practices. This issue is of great importance because the whole restitution process, as discussed in chapter 5, rests on agreements made before and during the colonisation of South Africa and apartheid rule. Against this backdrop the issue of to what extent customary law is concerned with rights in the legal sense becomes significant. Therefore in this subsection a reflection on African land rights will also be entertained dating back to pre-colonial times and drawing on the work of Bennett (2004) and Pottier (2005).

Because of the fact that land is the most stable form of property it figures prominently in the structuring of social

relationships. The comprehension of land as socially entrenched puts forward a notion of land as a web of complex, interlocking tenure rights (Bennett 2004: p. 381). Such rights are commonly related to the rights of individuals to particular plots, but also with rights to land held collectively. The existence of burial sites, fields and buildings renders peoples a direct and physical reference to their past. In pre-colonial sub-Saharan Africa, where population densities were low and the movement of the overall population was relatively small, land was a resource that all members of a community had to have access to in order to survive. Community members had a customary relationship to land, and did not differentiate between land for agricultural and other purposes; the land was one entity with many different purposes. Similarly, land use was the concern of the living and the dead, as well as the unborn. Colson and Gluckman (1961: p. 203) quotes a Nigerian chief at the beginning of the twentieth century saying:

I conceive that land belongs to a vast family of which many are dead, few are living and countless members are still unborn.

Further, besides the spiritual aspect of land, land also provides base on which status can be expressed. As brought forward by Bennett (2004: p. 381) not only do the wealthy and powerful generally have more land but they also control the access to land giving them the means of acquiring even more land, attracting followers and fending off potential threats. In this context any account of the substance of customary law has to be related to the powers of traditional leaders over land. However before this discussion is embarked on it is important to point out that in pre-colonial Africa, land was mostly regarded as an abundant resource to be used; not as something that could be measured, allocated, subdivided, leased or sold

(Pottier 2005: p. 57). Using the land, as opposed to holding it under ownership, implied the absence of strict boundaries and landlord-type authorities. Traditional leaders had responsibility for the correct spiritual management of land, but they were mere ritual leaders and not allocators of land or rulers of men (Colson and Gluckman 1961: p. 200). It was only with the colonial influence that the traditional leaders were made into proprietors by reason that they were community leaders and therefore holders of the land of the community.

In colonial and post-colonial sub-Saharan Africa the traditional leader had (and still has) great power over land as a resource of the community. Aside from the spiritual leadership provided by the traditional leader he has a broad range of secular rights.⁷ These rights include the right to a share of the harvest or hunt and further to choose the best land for his fields and home.

With the introduction of the Western concept of private ownership many traditional leaders moved from being spiritual leaders to owners of the land in their own and the colonial leaderships' terminology. Even though customary law has the ability to develop (as further discussed in chapter 4), any claim of a traditional leader that he is the owner of the land is as Bennett (2004: p. 382) puts it: "a calculated misinterpretation" of the general customary principles concerning land. As a general rule, the exercise of customary power should be carried out to benefit all the members of the community.

Traditionally the leader of the community has the right to further allocate the land to the members of the community. However, the chiefdoms of South Africa have been settled for many decades and today most of them are seriously overcrowded. In relation to these communities the issue is not so

much to decide where the royal homestead should be or the zoning of grazing and farm land but rather to allot plots to people of the community to live and farm on. Because of the density of the population in many of these communities in South Africa the role of the traditional leader today is rarely to allocate “new” land to the community members but to oversee and approve transfers of land from one member to another. As has been forwarded by Mackenzie (2003), in her study of the Murang'a district in Kenya, the allocation of customary rights are not necessarily free of struggle. She puts forward that:

Prior to colonialism, security of tenure in Murang'a depended on the resolution of two sets of tensions. The first was between individual and collective rights to land of the (male) kinship group and the second was between women, as wives and producers but non-members of the kin collectively, and men, non-producers (as far as basic crop production was concerned) [...] Rights to land were, in both situations, subject to negotiation. Under colonial rule, customary law provided the means through which individuals or groups, differentiated by race, class, and gender, negotiated access to and control of land. [...] Here, customary law became “an ideological screen of continuity,” a “language of legitimation”. It may have provided the political space through which Africans resisted colonial rule, but the reworking of customary land law by African men privileged not only male rights, but also the interests of wealthier men (Mackenzie cited Pottier 2005: p. 56).

In today's terms concepts like customary law and customary tenure do not refer to a pre-colonial tradition. These concepts have rather been shaped out of colonial encounters and often misunderstandings that promoted politically convenient appropriations of land. In most areas of pre-colonial sub-Saharan Africa land was ample with low population rates and movements, as discussed above. Land

rights were therefore rarely defined since they were rarely questioned.⁸

The absence of clearly defined rights convinced anthropologist Paul Bohannan (1963) that the term “tenure”, a Western colonial concept, could not be applied to pre-colonial Africa. In terms of land access pre-colonial land systems were according to Colson and Gluckman (1961), run on two basic principles: first, that each citizen should have the right of direct access to the resources of the territory controlled by the political unit to which he belonged; and secondly, the individual had a right to anything he had created, be it a house or a field. Such a right could be inherited according to the rules of inheritance (governed by the principle of male primogeniture) of private property.

Customary rules on succession of property rights

One of the most important aspects of customary law in relation to property is its power over succession. The customary system of property can be described as being intestate, universal and onerous. It is intestate because the individual does not have the rights, as under for example common law, to disperse of the property through a will. Further it is universal because the heir assumes not only the rights of the deceased but also the duties. The fact that the responsibilities in relation to the succession of property cannot be declined or passed on to someone else makes the succession of property potentially onerous. Under customary law the successor does not merely succeed to the assets of the deceased; succession is not primarily concerned with the distribution of the estate of the deceased, but with the pre-

servation and perpetuation of the family unit. Property is collectively owned and the family head, who is the supposed keeper of the property, administers it for the benefit of the family unit as a whole. When the heir takes on the role as the family head and acquires all the rights he also becomes subject to all the obligations of the family head. The members of the family that were under the guardianship of the deceased automatically fall under the guardianship of the heir. The latter, in turn, acquires the obligation to maintain and support all the members of the family.

In terms of the property as such the inheritor inherits the property of the deceased mainly in the sense that he assumes control and administration of the property subject to his rights and obligations as head of the family unit. The rules of the customary law of succession are mainly concerned with succession of the position and status of the deceased family head rather than the distribution of his personal assets, as shown in the *Bhe* case. However, the succession of position and power often leads women to assume a subordinate role both within the family and the community; and this role becomes even more evident when customary law is applied outside the traditional context as in the *Bhe* and *Shibi* cases discussed in chapter 4.

According to Bennett (2004: p. 337) the rules of succession from a deceased who had only one wife are the same for all systems of customary law in South Africa. The overarching principle is male primogeniture. Therefore the prime candidate for becoming the heir is the eldest son of the deceased. If he is not available the eldest son's eldest male descendant i.e. the eldest surviving grandson will become the heir. If there is no male heir available in the eldest son's bloodline the succession passes to the second son and so on.

Further if the deceased had no male descendants the father of the deceased becomes the heir; if he is not available the eldest brother of the deceased is in line of succession. If the latter is not available the eldest brother's eldest son or eldest surviving male descendant will be heir. If the eldest brother or his male descendants are not available then the next brother in line will be heir and so on. If there is no male heir in the first order of male descendants the grandfather of the deceased will be heir, if he is deceased the eldest paternal uncle of his male descendants will be heir. And so it goes on until a male heir to the estate is found.

In terms of polygamous households the rule is still male primogeniture but the interests of the different households of each wife must be taken into consideration. In some customary systems like the one of the Tsonga, the heir is the eldest son of the first wife. Bennett, (204: p. 338) calls this a simple system of polygamous succession. Further in the Pedi tribe the ranking of the house depends on the time of the marriage. The first wife is the senior wife and her son takes precedence over the second wife's sons and so on. The eldest son of the first house inherits the status of the deceased along with the family property. The oldest sons in the other houses inherit the livestock of the deceased.

Even though the primogeniture of the male bloodline is the principal rule in relation to the official version of customary succession of property a number of empirical studies carried out by amongst other WLSA has showed that living custom sometimes allows female heirs to maintain the surviving family unit. Studies carried out in Botswana (1992 and 1994), Swaziland (1994), Lesotho (1994), Zimbabwe (1996) showed several noticeable changes in customary law with regards to the principles of male primogeniture. In

Lesotho for instance the widow is usually involved in the family decisions about the estate and in an event of a disagreement the word of the widow prevails (WLSA Lesotho 1994). Further research carried out in Swaziland showed that widows quite often took over the land of the deceased husband if she had small children to bring up. In line with this WLSA's research in Botswana pointed towards succession along the male bloodline only when both parents were deceased. If the husband died before the wife the wife retained the rights of the property and her rights were then passed on in accordance with the principle of male primogeniture to the eldest son (WLSA Botswana 1992). Thus, even though these positive changes have been recorded the base for customary succession is still male primogeniture, as will be further discussed in relation to the South African context in the *Bhe*, *Shibi* and *Shilubana* cases in chapter 4.

Customary law in the constitution

In the Treaty of Capitulaton of 1806 where the Netherlands ceded the Cape colony to Britain it was recognised that Roman Dutch law was the basic law of the Cape colony. No account was taken of any other law such as the different indigenous laws existing at the time. As Britain incorporated further parts of South Africa i.e. Natal, Basutoland, the Transkei and Bechuanaland under its rule it was progressively forced to give limited recognition to the various customary system that existed in the relevant parts (Bennett 2005: p. 21). Historically customary law has been subordinated in the legal order of South Africa. Griffiths (1986: 1ff), as discussed above, describes the relationship between customary laws and the colonial and later apartheid laws as an instance of weak pluralism. However, when the

1996 constitution came into place customary law was given a much more prevalent position. Customary law was placed on the same level as common law and should be applied by the courts if relevant to the matter handled by the courts. Section 211 (3) spells out that:

The courts must apply customary law when that law is applicable, subject to the constitution and any legislation that specifically deals with customary law.

This indicates that a Court may apply customary law if: it is compatible with the constitution, it has not been amended by legislation and if it is applicable in terms of choice of law rules. The two latter issues will not be further discussed since they are not of direct relevance to the research topic. Thus, in terms of the compatibility of customary law with the constitution, customary law has to be subjected to a test against the rights in the bill of rights. Section 211 (3) relates directly to section 39(2) which states that:

When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the bill of rights.

Despite the fact that customary law to the largest extent regulates private and not public relationships it will fall under the realm of the bill of rights. The rights in the bill of rights are applicable horizontally in terms of section 8 (2) which declares that:

A provision of the bill of rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.

As an addition section 9 (4), further discussed in the following chapter, makes the prohibition of sex or gender

discrimination applicable equally horizontally, this is especially important in relation to customary law that reflects patriarchal traditions because it might be rendered invalid in relation to the equality clause in section 9. The position of customary law under the constitution is further strongly related to the protection of the rights to culture under the bill of rights and the role of traditional leaders under the constitution. These issues are further discussed in the next sub-sections.

The right to culture in the bill of rights

The right to culture is in legal terms ambiguous. It is possible to relate at least two different meanings to the term culture for legal purposes. The right to culture might mean the right to engage in intellectual or artistic activities, in this sense the rights to culture would mean to have a freedom to express arts and science in terms of one's cultural beliefs. The other meaning of culture, which is closer to the concept of customary law, is viewing culture as a pool of knowledge, belief, laws, morals and custom i.e. all that we as human being collect just by being members of society. Strydom (1996: 4f) presents a more refined version of this meaning of culture by describing culture as a: "complex of social characteristics that defines groups as unique". Culture is further defined differently within different knowledge fields. However, since the present research focuses primarily on the position of customary law within the constitutional framework, culture will further only be discussed in relation to the relevant sections 30 and 31 of the constitution. Section 30 states the right for everyone:

To use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the bill of rights.

Section 31 (1) and (2) further state that:

Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community [...] to enjoy their culture, practise their religion and use their language; and [...] to form, join and maintain cultural, religious and linguistic associations and other organs of civil society. [...] The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the bill of rights.

The term community has no fixed meaning within South African law but guidance can be found in international law and domestic jurisprudence such as *Bataung Ba Ga Selale*, as discussed in chapter 4. Section 30 spells out the individual right to culture while section 31 protects the communal aspects of culture. As put forward by Thornberry (1993), because the individual's rights to participate in the culture of choice builds on the integrity of the group to which he or she belongs a precondition for the individual rights to culture is the protection of the groups' existence and identity.⁹

In terms of the scope of the right to culture in sections 30 and 31 it is in effect limitless because culture embraces such a wide range of human activity (Bennett 2004: p. 89). Even with this broad scope of the right to culture the interests of the state and the rights of others will unavoidable limit this and other rights as set out within the bill of rights. In terms of customary law as a part of the greater concept of culture the right to equal treatment, as discussed further in the following chapter, poses the greatest challenge to the right to culture and therefore also, as brought forward by Bennett (2004: p. 90), to

the African legal tradition i.e. customary law. It is clear from the case law¹⁰ of the Court that the right to equality supersedes the right to culture on at least two accounts. Firstly, equality is perceived as a core value of the constitution, as is evident in section 1 which states that:

The Republic of South Africa is one, sovereign, democratic state founded on the following values: [...] Human dignity, the achievement of equality and the advancement of human rights and freedoms.

Secondly, the right to culture as it is spelled out in section 31 is to be perceived as a freedom rather than a right; and in principle, as was brought forward in *Kauesa v Minister of Home Affairs and Others*, freedoms may be limited by rights but rights may never be limited by freedoms. The involvement in culture and thus a particular regime of personal law is a classic freedom that includes a more or less limitless variety of social activities. It presupposes the absence of legal regulations within an area where the individual or the group can do what they want to. Hence, this freedom is subordinated to the rights of others especially in terms of the rights set out in the equality clause.

The powers of traditional leaders under the constitution

When the ANC came into power in 1994 the homelands were abolished and incorporated with the rest of the land in South Africa. Between 1994 and 1997, when the constitution came into force, many of the traditional leaders in the homelands retained their positions. Thus, in the constitution, special arrangements were undertaken to preserve the powers of the traditional leadership within the context of the new

constitution, as spelled out in sections 211 (1) and 211 (2). The traditional leadership is still today an important power base; according to Bennett (2004: p.111) there are approximately 800 active chiefs supported by 13.000 headmen in South Africa. About 40 percent of all South Africans or approximately 18 million people are subject to traditional rule.

After the fall of apartheid there was an ambivalent notion about the traditional leadership and its possible place within the new democracy. It was put forward by amongst other Van Kessel and Oomen (1997) that the traditional leadership represented the interests of traditional males rather than the interest of women, children, the landless and farm workers. Many of the traditional leaders had a reputation of having been deeply involved in the apartheid politics and the inclusion of this leadership into the constitution was fiercely opposed by the new democratic organisations such as the United Democratic Front and many civil rights organisations (Bennett 2004: p. 111). However, some traditional leaders such as Albert Luthuli, the groups that later formed the Congress of Traditional Leaders of South Africa (Contralesa) and the Inkatha Freedom Party (IFP) had put up a lot of resistance against the apartheid regime. These groups became central in the in striving to retain the position of traditional leaders within the constitution.

At the end of apartheid rule the need for development and non-discriminatory governmental involvement in the homelands was immense. The chiefs had for a long period of time had the sometimes very contradictory roles of being both the traditional patriarchs and the state bureaucrats in these territories. Many chiefs were regarded as corrupt and lacking in skills to take on the new tasks of delivering the basic services that were so badly needed in the homelands. But

however corrupt or discriminatory, many of the local people in the communities preferred the chiefs as being more in touch with the local sentiments than governmental bureaucrats. As described by Van Nieuwaal van Rouveroy (1987 cited Bennett 2004: p. 113) for most ordinary people living in a customary context the traditional leaders were:

A legal and constitutional horizon, a personification of the moral and political order, protection against injustice, unseemly behaviour, evil and calamity.

The position of the traditional leadership in the constitution had therefore to balance the importance of these leaders to their people with their possible infringement of the basic rights of the same people. Sections 211 (1) and (2) of the constitution reads:

The institution, status and role of traditional leadership, according to customary law, are recognised, subject to the constitution.

A traditional authority that observes a system of customary law may function subject to any applicable legislation and customs, which include amendments to, or repeal of, that legislation or those customs.

The concept of recognising the status and role of the tradition leadership is further outlined in section 212 (1) and (2) which states that:

National legislation may provide for a role of traditional leadership as an institution at local level on matters affecting local communities.

To deal with matters relating to traditional leadership, the role of traditional leaders, customary law and the customs of communities observing a system of customary law - national or provincial legislation may provide for the establishment

of houses of traditional leaders; and national legislation may establish a council of traditional leaders.

In terms of the powers set out in the constitution pertaining to the traditional leadership it is of importance to notice that the wording of section 212 clearly outlines that the powers of the traditional leaders are subjected to national legislation and not to customary law. Relating to section 212 a National House of Traditional Leaders (hereinafter referred to as the National House) was established in 1997. Provincial houses of traditional leaders, (hereinafter referred to as Provincial Houses) have also been established in all six provinces that have traditional leaders, namely the Eastern Cape, KwaZulu-Natal, the Free State, Mpumalanga, Limpopo and North West (NHTL mandate online).

The objectives and functions of the National House are to promote the role of traditional leadership within a democratic constitutional dispensation, enhance unity and understanding among traditional communities and advise national government. The National House is governed by the constitution, the National House of Traditional Leaders Act of 1997 and the Traditional Leadership and Governance Framework Act of 2003 (hereinafter referred to as the Framework Act). It further derives its mandate from CLARA, as further discussed in chapter 5, and the Local Government Municipal Structures Act of 1998 and Disaster Management Act of 2002 (NHTL mandate online). The principal function of the National House is to advise the president and the government on issues relating to customary law, traditional leadership and communities observing customary law, if the advice is required.¹¹

The position of the traditional leadership within the statutory context has been analysed above. Hence, it is also of

further interest in relation to women's property rights under customary law to try to understand the extent of customary power and how power is perceived and used by the traditional leadership in general. In a modern state like South Africa, the power of the government is founded on one of the most fundamental principles of democracy, i.e. accountability. Typically customary law does not cater for such a principle because of the fact that the ruler's power is in fact all-inclusive and his decisions do not have to be accounted for (as discussed above in the sub-chapter on customary tenure). In opposition to the western concept of government the powers of the customary system are vested in one person, i.e. there is no separation of executive, legislative and judicial functions. Bennett (2004: p. 125) describes the powers of the traditional leader as all the functions of the government located in one body: the chief-in-council. During the colonial and apartheid reign the traditional leaders retained the all-encompassing powers of government under customary law without much interference from statutory control (Bennett 2004: p. 125).

Section 211 (1) of the constitution accepted, as spelled out above, the pre-colonial and apartheid position of the traditional leaders in stating that the: "status and role of traditional leadership, according to customary law, are recognised". However, the constitution does this with one important addition: the powers of the traditional leadership are subject to the constitution, most importantly to the bill of rights. According to section 239 of the constitution, traditional leaders fall under the broad scope defining the organs of the state and therefore they have, in accordance with section 8 (1), to respect all the rights set out in the bill of rights.

It is however important to point out that regardless of the constitution and the protection of the bill of rights the

conditions that determine millions of women's land rights are set by a traditional leadership that is, as will be discussed in chapter 4, supposed to lead the way in developing custom to adhere to the constitutional values but that in acting under the main principle of male primogeniture does not have the real incentive to forward women's rights. The consequences of the plural legal system as discussed in this chapter, in terms of accommodating customary law and traditional leadership under the constitution, is that property rights for many women will be determined in accordance with the principles as spelled out above. This may not have such fundamental consequences on women's property rights as to violate section 9, further discussed in the following chapter, if they are implemented in a traditional societal structure. But as becomes evident from the jurisprudential review in chapter 4, women that live in a semi-traditional context, where customary law still applies but the structure of the community has changed, are often subject to discrimination especially when customary law is applied in its official form through pre-constitutional legislation.

¹ The figures of the number of people affected by the racial policies of forced removals vary between different sources. As was mentioned above the Surplus Peoples Project points towards 3.5million people being dispossessed in 1983 with another 1.9 waiting to be removed. The DLA has repeatedly in media brought forward the figure of 6 million people as victims of the apartheid regime's policies to remove the so called black spots.

² Ubuntu is a shortened version of the South African saying that originally comes from the Khoi-San: "Umuntu ngumuntu ngamuntu", meaning that: "I am a person through other people". The concept of ubuntu has played a major role in the forging of a national consciousness and in the process of nation-building. Ubuntu is defined within an intra-governmental context as having four components: the equality and dignity of all people; an emphasis on humanness and brotherhood of mankind and the sacredness of life; and, finally, it is seen as the "most desirable state of human life".

³ Bhe and Others, paragraph 75.

⁴ Re Southern Rhodesia [1919] AC 211 (PC) Paragraphs 233 and 234.

⁵ Ibid. Paragraphs 233 and 234, as quoted in Bennett 2004: p. 376.

⁶ Amodu Tijani v Secretary, Southern Nigeria. Paragraph 404.

⁷ According to customary law women may traditionally not hold political office. There are very few exceptions to this rule, see for example Queen Modjadji of the Ga-Modjadji, a rural community in the Limpopo province. See also the developments in customary law as described in relation to the Shilubana case.

⁸ The exceptions were some densely populated, economically vibrant areas in West Africa, and areas of high agricultural fertility in East and Central Africa (Pottier 2005: p. 58).

⁹ See further the communications of the HRC: Sandra Lovelace v. Canada, CCPR HRC Communication No. R. 6/24 1977 and Kitok v Sweden, Communication No. 197/1985 of the Human Rights Committee, CCPR/C/33/D/197/1985.

¹⁰ See for example Mthembu v Letsela 2000 (3) SA 867 (SCA), S v Makwanyane 1995 (3) SA 391 (CC) and Fraser v Children's Court Pretoria North 1997 (2) SA 261(CC).

¹¹ National House of Traditional Leaders Act section 7 (2) (c).

Chapter 3: No longer second class citizens?

Women in the new constitutional dispensation

In analysing the law from a feminist legal perspective, issues of equality and non-discrimination naturally takes centre stage. As will be highlighted in some of the judgements reviewed in the following chapter, the equality clause in the constitution has been the point of departure for the development of a new approach to women's rights. The Court's view of the application of the right to equality and its methods of interpretation and limitation of this right are important in understanding the legal structure of land reform and the limitations that the constitution outlines in relation to the formalisation of women's property rights in accordance with customary communal tenure.

The objectives of this chapter is firstly, to outline and explain the general interpretation and limitation of the rights in the bill of rights; and secondly, to analyse the technical legal aspects of translating the moral value or idea of equality, as discussed in chapter 1, into a legal framework that creates legal certainty and that has the ability to target both direct and indirect discrimination in relation to women's property rights. The equality clause (section 9 (2) of the constitution) was fundamental in the *Bhe*, *Shibi*, *Shilubana*, *Hadebe* and *Batung Ba-Ga Selale* judgements as will be discussed in the following chapter. The analysis below is presented in order to understand the point from which the Court departed in rendering these important judgements in terms of the equality

clause; and the methods of interpretation and limitation that were applied in order for the Court to deliver these decisions.

The right to equality is relevant for all rights in the bill of rights, including the right to property as will be discussed in relation to the formalisation of property rights in chapter 5 and the right to property as a human right in chapter 6. The right to equality should be held in conjunction with the right to access, own and freely transfer property to ensure that these rights are implemented in equal manner. The relationship between the right to property, as it has been defined in the constitution as well as in land reform and land redistribution, and equality is of special interest to the present research because of the focus on women's rights to access and control property.

The willingness to achieve both formal and substantive equality is deeply rooted in the constitution because of South Africa's discriminatory past. The legal inheritance from the racial discriminatory past has made it impossible for the constitutional framework to focus only on formal equality in terms of property rights i.e. the removal of discriminatory property laws (like section 23 of the Black Administration Act in the *Bhe* and *Shibi* cases) and the reassurance that this kind of law cannot ever again be enacted. This would create a society which is equal on paper but possibly unequal in other ways. In the constitution this is specifically recognised in the equality clause, section 9 (2), advancing disadvantaged people, and in the different parts of land reform further discussed in chapter 5. Section 9 (2) together with the foundation of land reform in section 25 (5-7), provides previously disadvantaged women in South Africa with legal options to achieve equality in property filled with substance. However, as will be further discussed in chapter 5, these legal avenues are often filled with obstacles.

In this chapter the focus is on equality in terms of fair, and unfair discrimination, issues embedded in reforming land access and ownership in South Africa. Equality is in its abstract a moral concept, indicating that people who are similarly situated in relevant ways should be similarly treated. This basic idea raises two important questions, as highlighted in chapter 1: what qualifies as relevant when it comes to determining the similarity of peoples' situations and what qualifies as similar treatment of people who are in the same situation (de Waal et al. 2005: p. 230)?

The concept of equality, in the constitution (a reference to the equality clause, section 9 of the constitution, is found in Annex III), is not limited to a moral commitment based on the sameness of treatment. In this form equality only takes on its formal role, ensuring that law will treat individuals alike without paying any attention to the circumstances. An application of the notion of equality in this way will not necessarily ensure an equal outcome. Equality, being the most important objective of the constitution, should be interpreted as ensuring substantive equality in terms of property where all individual circumstances are taken into consideration. The law will then not only ensure that similarly situated people will be treated in the same way but that the outcome of this treatment will be equal as well. This is the main aim of the land reform i.e. not only awarding equal protection of the law in terms of property but also to redistribute land and reform land ownership to create equality in access to and control over land. The right to equality therefore requires a politically contextual and value based interpretation in accordance with the techniques and principles further described below.

The interpretation of women's rights in the bill of rights

The constitutional protection of equal access to property interconnects several fundamental rights and freedoms protected by the constitution. The right to property, as further discussed in chapter 5, and the right to equality before the law, as further discussed below have to be combined fully to comprehend the gender and socio-economic perspectives of land tenure as put forward by the legislation explored in the present research. The purpose with this and the following subsection is to give an insight into the constitutional context in which the relevant equality and property clauses exist. The methods and procedures of the Court in interpreting and limiting these rights in the bill of rights are therefore further discussed.

When a case of possible violations of fundamental rights is brought to the Court, the Court will, if it accepts that the case has constitutional relevance, proceed with the litigation of the case in three distinctive stages. The first stage is the procedural, where questions of applicability, justiciability and jurisdiction are examined. At this stage the Court has to consider if the bill of rights is applicable between the parties to the dispute, if the claimant has a right to claim and if the respondent has an obligation to fulfil any of the rights under the bill of rights. Further, the Court has to ascertain if the applicant has the right to appear before the Court and has exhausted other available remedies, as well as if the Court has jurisdiction to deliver the relief that the claimant asks for.

The second, substantive stage, is concerned with interpretation and limitation of the constitutional rights and freedoms. The main issue at hand is whether or not a law or conduct of the respondent has infringed on any fundamental

rights of the applicant. To determine a violation, the Court will firstly carry out an interpretation of the scope of the right and secondly an interpretation of the alleged violation to determine whether there has been a breach of the constitutional rights. Thirdly, the Court will examine if the infringement is justifiable and lastly if the infringement is a justifiable limitation of the rights in question according to the criteria set out in the constitution.

At the third and final stage, the Court will examine and present the remedy that will be appropriate to the violation of the fundamental rights. The first and final stages of the Court's proceedings will not be further explored since they fall outside the scope of the present research, being mainly procedural. Hence, in the present chapter the aim is to examine the methods used by the Court during the second stage, to further support the understanding of the judgements rendered by the Court as discussed in the following chapter.

The procedure of interpretation is particularly important in relation to the human rights and freedoms put forward in the bill of rights. These rights are formulated with a high degree of abstraction because they are broadly conceived. In order to establish if a law or a conduct violates the rights, the content has to be defined by using clear strategies of interpretation (Devendish 1998: p. 96).

The process of interpretation is carried out in two steps: first the scope of the rights is determined by interpretation. In doing this the nature of the obligation that the rights put on the actors has to be taken into consideration. A fundamental right can place a negative obligation on the actors to refrain from acting in a certain way or a positive obligation to act, in order to fulfil the scope of the right. Sometimes both negative and positive obligation co-exists in one provision. This has to be

taken into account when carrying out the interpretation in order to arrive at a level of protection that fulfils the constitutional objectives. Secondly, it is decided, through a second interpretation, if the law or conduct challenged, is violating the content of the right as determined under the first step (de Waal et al. 2005: p. 145). Guidelines for the first phase of interpretation are discussed, in this sub-section, both in relation to the interpretation clause in section 39 of the constitution and the principles of interpretation as established by the Court.

Section 39 (1) and (2) of the constitution, also referred to as the interpretation clause, outlines the fundamental guidelines for the interpretation of the bill of rights. Section 39 (1) states that:

When interpreting the bill of rights, a court, tribunal or forum [...] must promote the values that underlie an open and democratic society based on human dignity, equality and freedom [...] must consider international law; and [...] may consider foreign law.

When the Court certified the text of the constitution in 1997 it held that every single provision of the constitution was compatible with the constitutional principles as put forward in the interim constitution.¹ From this it naturally follows that interpretations that are inconsistent with these principles should not be entertained. Conclusively, any interpretation of the constitution must be consistent with these constitutional principles.

The first subsection of the interpretation clause puts forward two fundamental principles for the interpretation of the constitution. Firstly, it spells out that the interpreter should undertake a value-based approach towards the provisions of the constitution. The interim constitution also supported this

view and brought forward that a value-based theory should be applied instead of a purposive theory. The latter theory has limitations in that it sets aside certain important values. One of these values is the overall coherence in the legal system as a whole (Devendish 1998: p. 100). When undertaking an interpretation, the core values described below should prevail over a particular purpose of a specific provision of the constitution. This will render the interpretation compatible with the overall purpose of the constitution instead of with the purpose of a specific constitutional provision.

Section 39 (1) (a) states that the values that should guide the interpretation should be such that underlie: “an open and democratic society based on human dignity, equality and freedom”. Further information about these values is found in the founding provisions of the constitution. The preamble spells out that society should be established on: “democratic values, social justice and fundamental human rights”.² Further, in section 1 it is stated that the state should be founded on the values of: “human dignity, the achievement of equality, the advancement of human rights and freedoms, non-racialism and non-sexism”.³

Section 39 (1) (a) binds the courts to use these values when interpreting the bill of rights. However, the application of these values in relation to a claimed violation of the rights set out in the bill of rights is often very difficult. These values also need interpretation to be applied in the true spirit of the constitution and because this cannot be regulated completely by the constitution, the Court has laid down a number of guidelines for the interpretation of the constitution in general and the bill of rights in particular. These guidelines will be further discussed below.

The second fundamental principle of interpretation, presented in section 39 (1) (b) and (c), is acknowledging the use of international and foreign law when interpreting the bill of rights. The constitution distinguishes between international law and foreign law in that it spells out that applicable international law “shall” be considered while applicable foreign law “may” be considered. Hence, the Court, in *State v Makwanyane* concerning the constitutionality of the death penalty, did elaborate on the use of public international law as a tool for interpreting the bill of rights. The judgement provides that international agreement and international customary law constitutes a framework within which the bill of rights can be evaluated and understood.⁴ This implies that both binding and non-binding public international law can be used for interpretation purposes. Thus, it should be borne in mind that public international law is merely used for determining the scope of existing rights in the bill of rights, not for adding rights.

As described above, the values set forward in the bill of rights are generally formulated and abstract to their nature. Further, section 39 is vague in its instructions regarding the interpretation of the bill of rights. Therefore, the Court has developed different methods to construct the context in which the constitutional values exist. These methods of interpretation often need to be applied alongside each other in order to cover all aspects of the constitutional context. The methods of textual and contextual interpretation are discussed below.

A logical starting point for determining the contents of a provision of the bill of rights is the text itself. The Court has in several cases stressed the importance of the textual interpretation but it has also made it clear that constitutional matters are seldom solved only by using this method. The

textual method is not necessarily conclusive and precautions must be taken when analysing the text. This issue has been discussed in two landmark judgements of the Court: *S v Zuma* and *S v Makwanyane*. In *Zuma*, the very first constitutional judgement, Judge Kentridge demonstrated the importance of the text by making the following statement:

[...] It cannot be too strongly stressed that the constitution does not mean whatever we might wish it to mean. [...] Even a constitution is a legal instrument, the language of which must be respected.⁵

However, in later judgement the Court stresses the importance of making use of other methods of interpretation in relation to the literal one. In *Makwanyane* the Court adopted the following views on the interpretation of the bill of rights:

[...] Whilst paying due regard to the language that has been used, [an interpretation of the bill of rights should [be] generous and purposive and give [...] expression to the underlying values of the constitution.⁶

With this statement the Court adds a multi-methodology to the literal interpretation. The meaning of the text should be respected but it must never go against the fundamental values of the constitution.

Perhaps the most significant method of interpretation of the bill of rights is the re-construction of the context of the constitutional provision at hand, used extensively in the cases presented in the case study in the following chapter. For the Court to be able to make value-based judgements, required by the constitution itself, the establishment of the context becomes crucial. To determine the setting of a specific dispute the Court must try to re-construct the social, historical and/or textual context. With a history such as the South African, the

dramatic changes of government and the process of drafting the new constitution affect the scope of the constitutional provisions. To promote the underlying values of the constitution history should be used as a contextual background to the bill of rights.

The Court has, in a number of cases, made reference to a social and historical contextual method of interpretation. This method is well described in the judgement *Brink v Kitshoff NO*. The Court stated the following in relation to the equality clause:

[...] Section 8 (of the interim constitution, author's comm.) is a product of our own particular history. Perhaps more than any of the other provisions [...] its interpretation must be based on the specific language of section 8 as well as our own constitutional context. Our history is of particular relevance to the concept of equality. The policy of apartheid, in law and in fact, systematically discriminated against black people in all aspects of social life. [...] It is in the light of that history and the enduring legacy that it bequeathed that the equality clause needs to be interpreted.⁷

The atrocious account of the past and the wish not to repeat it become important contextual tools in giving meaning to the bill of rights.⁸

Furthermore, not only the political-historical accounts are of importance when undertaking a contextual interpretation. The preparatory work laid down during the constitutional process should also be taken into consideration during the process of contextual interpretation. This is a well established rule in public international law. The Vienna Convention of the Law of Treaties refers to the *travaux préparatoires* as supplementary means of interpretation.⁹ This rule was also confirmed by the Court in the *Makwanyane* judgement where

the Court relied on the reports of the technical committees advising the parties in the multi-party negotiations leading up to the constitution. Judge Chaskalson held that:

The multi-party negotiating process was advised by technical committees, and the reports of these committees on the drafts are the equivalent of the travaux préparatoires, relied upon by the international tribunals. Such background materials can provide a context for the interpretation of the constitution and, where it serves that purpose, I can see no reason why such evidence should be excluded.¹⁰

To conclude, the political and social historical accounts as well as the history of the drafting of the constitution may be used to understand the context of the bill of rights. But it must be kept in mind that the evidence of the past will only on rare occasions serve to be decisive (de Waal et al. 2005: p. 156).

The social-political and drafting history of the constitution are two forms of contexts used by the Court. A third, a systematic context, can also be added in order to see the full spectra of contextual interpretation. For the interpretation of particular provisions of the bill of rights the Court uses other provisions of the constitution to examine the provisions in their textual setting. This means that the constitution should be viewed as one unit and not as a document made up by separate isolated provisions.

The use of this method can lead to controversial results as in the case of *Soobramoney v Minister of Health, KwaZulu-Natal*. This case concerned the government's responsibility to treat a terminally ill person and his right to life and health under the constitution. The Court concluded, after a systematic interpretation, that the state's positive obligation to provide medical treatment was expressly spelled out in section 27. However, seen in the context of section 11 (the right to

life) the Court could not interpret the right to life to impose additional obligations on the state that would be inconsistent with the content of section 27. The right to life did not stretch as far as to put a positive responsibility on the state to give treatment to all critically ill patients and therefore the death of the patient did not violate the right to life. It is evident from this case that contextual interpretation must be carried out with caution. It should always be borne in mind that contextual interpretation should never be used by the Court to limit the rights set out in the bill of rights but only to give them meaning. Furthermore, it should also be remembered that this method of interpretation must not be used to eliminate possible irrelevant rights from being tested against a challenged law under the rule of constitutional supremacy. The Court has a duty to identify relevant rights under the bill of rights when a law is challenged, whether or not an individual has brought this to the attention of the Court. The contextual interpretation must not circumvent this.

Limitations of women's rights in the bill of rights

The procedure of interpreting the scope of the rights set out in the bill of rights in relation to the law or conduct alleged to violate the rights has been described above. When the Court arrives at the conclusion that a right has been violated, after using the above mentioned methods, it has to proceed to the question of limitation. Even the most fundamental rights and freedoms protected by the bill of rights are not absolute and may under certain circumstances be limited, as further discussed below in relation to the right to equality. The constitution contains a specific limitation clause in section 36. This section reads:

The rights in the bill of rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including: [...] the nature of the right; [...] the importance of the purpose of the limitation; [...] the nature and extent of the limitation; [...] the relation between the limitation and its purpose; and [...] less restrictive means to achieve the purpose.

It further states:

Except as provided in subsection (1) or in any other provision of the constitution, no law may limit any right entrenched in the bill of rights.

A first look at the limitation clause makes it evident that not all infringements of the rights set out in the bill of rights are unconstitutional but that the reasons behind an infringement have to be especially strong. To limit a right under the bill of rights, the limitation has to serve a purpose which supports the public good. Further, it has to be clear that the limitation will achieve this purpose and this could not have been achieved without the limitation. It is of utmost importance that the execution of the procedure of interpretation and limitation of a right are not mixed up.

The issue of limiting a right will always follow after the Court has determined the existence of a violation and the procedure for doing this differs from the previous procedure. The question of whether an infringement of a right is an acceptable limitation usually involves a more factual approach than the interpretation. Evidence needs to be presented in this regard, predominately by the respondent who wishes to invoke that the infringement of the right is legitimate. However, the limitation clause sets up requirements that the evidence

has to be tested against. These requirements are discussed below in the order they are presented in section 36.

The first requirement for a limitation to be accepted as legitimate is that it has to be presented in law and that that law is generally applicable. Two basic questions arise in relation to this: (1) “What is determined as law”; and (2) “What is the general application of that law”? To begin with, the Court has not given a specific definition of what should be determined as law but has under the interim constitution outlined an extensive interpretation of the concept of law.¹¹ This has later been repeated in several judgements under the new constitution.¹² The Court’s interpretation of law is wide and includes all forms of legislation such as: original, delegated, common law and customary law (de Waal et al. 2005: p. 169). This disqualifies policies or practices from being included under the concept of law. The requirement that the law should be generally applicable stems from the basic principle of the rule of law. In relation to the legitimate limitation of fundamental rights the rule of law gives the rule of general applicability three main dimensions: derivation of power, quality of law and equal application of the law.

The government derives all its powers from the law and the government must have lawful authority for all its actions. In relation to limitation of rights, if an action is not authorised by law, there is no possibility of justifying an action that limits rights in terms of section 36. A clear example of this line of reasoning can be found in the case of *August v Electoral Commission*. The merits of this case contained a denial of the right of prisoners to register to vote in the 1999 general election. In its ineffectiveness the Independent Electoral Commission, in charge of administering the common voters’ roll, failed to give prisoners a chance to register. Because of

the fact that this de facto deprivation of the right to vote had not been authorised by any law, but was simply a result of lack of capacity, the Commission had no possibility to invoke justifying reasons for the infringement of the prisoners' right to vote under section 36.¹³

The second component of general applicability is the quality of the law. For a law to be regarded as general it has to be possible for those affected by the law to understand their position under the law i.e. their rights and obligations. This brings about the requirements of clarity, accessibility and precision (de Waal et al. 2005: p. 169). This in turn leads us to the third component, the equal and non-arbitrary application of the law because an unequal and arbitrary application of law could never fulfil the requirements of clarity, accessibility and precision. To qualify under section 36 the law must never apply only to a certain group of individuals. However, the Court has presented one important distinction between unequal application and non-uniform application of law throughout the country. In *S v Makwanyane* the Court had to consider whether the fact that the death sentence had been abolished in a part of South Africa would constitute the Criminal Procedure Act of 1977 to lose its general applicability.¹⁴ The Court rejected this by referring to the purpose of the constitution allowing different legal orders to exist side by side until the process of rationalising the laws had been carried out.¹⁵ The far-reaching consequences of depriving national legislation its general applicability would in turn lead to the fact that provincial laws would never be regarded as generally applicable. This would then exclude the application of section 36 in relation to provincial law something that was not intended by the legislator.

The second part of the limitation clause returns to a value-based consideration. As a second step the Court has to conclude whether the reasons behind a specific limitation can be considered acceptable in an open and democratic society based on human dignity, equality and freedom. The Court has in its jurisprudence presented quite a number of purposes in relation to the legality of limitation such as: the protection of the interest of the administration of justice; the prevention, detection and prosecution of crime in general and specifically in relation to crimes related to drugs; the prevention of possession and publication of pornographic material; the compliance with constitutional obligations; and the protection of children against degradation, violence and indignity.

Further, the Court has to conclude that the legislation at hand does not limit the right in question or any other right more extensively than necessary to achieve the purpose of the law. If the Court comes to the conclusion that the reasons behind a limitation are considered to be acceptable in a democratic society and that the law only puts necessary restrictions on the rights, it has to scrutinise the proportionality between the harm caused by the limitation and the purpose of the law. In undertaking this task the Court can find some guidance in the second half of sub-paragraph (1) of section 36. According to this paragraph the Court has to consider the nature of the right and the limitation, the importance of the purpose behind the limitation and the relation between them.¹⁶ The application of the equality clause and the further understanding of the procedures of interpretation and limitation are further highlighted below and in the in the following chapter presenting the jurisprudential review.

Equality in its essence

Some of the most important judgements regarding the interpretation and application of the equality clause have so far been established under section 8 of the interim constitution, preceding the 1996 constitution. It is therefore helpful to begin any analysis with a comparison of the two equality clauses to establish similarities between them and the validity of the jurisprudence under section 8 for the interpretation of section 9. This discussion can also serve as an introduction to the structure and contents of section 9, further explored below. Both clauses spell out the right to equal protection and benefit of the law and the right to non-discrimination. However, in section 9 (3) the grounds listed for unfair discrimination are more extensive than those in section 8 (2). Added to the list in the interim constitution are the grounds of pregnancy, marital status and birth. The issue of affirmative action is spelled out in both clauses but in different ways. Section 8 (3) (a) formulates this in a negative way by stating that the right to equality should not preclude measures designed to achieve protection and advancement of disadvantaged persons or groups. Section 9 (2) replaces this negative formulation with a positive, stating that equality includes remedial measures. Thus, the outcome of the protection is still very similar and the changes only have the symbolic value of turning affirmative action into a positive remedy (de Waal et al. 2005: p. 235).

Further, in section 8 (3) (b) of the interim constitution the close relationship between equality and property was highlighted. The issue of restitution of land was further dealt with in this section. The issue of inequality of land distribution and the remedies, such as restitution, were later removed from the equality clause and were put under the

property clause in section 25 (7) further discussed in chapter 5.

Another important difference between the interim constitution and the 1996 constitution is the addition of section 9 (4) in the latter; giving the right to non-discrimination a horizontal effect. In the interim constitution the right to non-discrimination could only be applied directly towards the state, a vertical application. The addition in section 9 (4) constitutes that people have a right not to be discriminated against by other people, a horizontal application, and that the Court can hear cases concerning this type of discrimination. This indicates that the state not only has a negative obligation to refrain from discriminatory activities but it also has a positive obligation to prevent people from discriminating against other people. Over all, the changes between the interim constitution and the constitution have been in the form of an addition of protection against discrimination under section 9. Therefore, it is fair to conclude that the interpretation of section 8 of the interim constitution is similar enough for the interpretation to be valid as jurisprudence under section 9 of the constitution.

The Court has in its jurisprudence developed different stages of enquiry into the violation of the equality clause. This is most evident in the landmark judgement of *Harksen v Lane NO*. The process can, according to this judgement, be divided into three different stages to facilitate the enquiry. During the first stage the task of the Court is to determine if the provision differentiates between people or groups of people. Has there been a violation of the right of equality before the law in section 9 (1)? If this is concluded, the Court has to investigate if there is a rational connection between the differentiation and a possible legitimate governmental purpose. If there is no

rational connection the Court can conclude that there has been a violation of this section. However, if there is a rational connection it might nevertheless amount to discrimination.¹⁷

At the second stage the Court has to determine if the discrimination is unfair under section 9 (3) and (4). At this stage of the enquiry the Court has to decide if the differentiation between people or groups of people is to be categorised as unfair discrimination. In *Harksen v Lane NO* the Court put forward a two folded analysis of this issue. Firstly, it has to be determined by the Court if the differentiation amounted to discrimination and if this had been established on a specified ground in section 9 (3). And secondly, if the discriminatory law or conduct did not fall under any of the grounds set out in section 9 (3) the Court had to determine whether it could fall under an additional ground. The additional grounds for discrimination are founded on attributes, which have the potential of violating fundamental human dignity or seriously affecting a person or group of persons, further discussed below. Section 9 (3) is not exhaustive and it is up to the Court to decide if any additional grounds have been violated.¹⁸

However, if the Court has determined that the differentiation amounts to discrimination under one or more of the grounds in section 9 (3) the unfairness is presumed. But if the Court has established that an act of discrimination has taken place under an additional ground, as described above, the complainant has to serve the Court with evidence to establish the unfairness. The Court will, in determining the unfairness, primarily concentrate on the impact of the discriminatory act on the person or the group of persons. If the Court finds that an unfair act of discrimination has taken place it has to determine if the unfair discrimination can be justified

under the limitation clause in section 36, as discussed above. The issue of the relation between section 9 and section 36 and the analysis undertaken at the third stage of the Court's enquiry as brought forward in *Harksen v Lane NO* is discussed further, below.

It is obvious from *Harksen v Lane NO* that the Court put forward a quite systematic and complex approach in determining a possible violation of the equality clause. Firstly, the Court dealt with the issue of equality before the law and when it was determined that this right had not been violated the Court proceeded to investigate it as a case of unfair discrimination. This could lead us to believe that if there is proof of a violation of section 9 (1) the discrimination test in 9 (3) need not be carried out. However, the Court had already stated in *Prinsloo v Van der Linde* that it was neither desirable nor feasible to divide the equal treatment and non-discrimination components of section 9 into separate, watertight compartments.¹⁹ As indicated by de Waal et al. (2005: p. 236) the right to equality should be seen as a composite right. The Court further developed its interpretation in *National Coalition for Gay and Lesbian Equality v Minister of Justice* in stating that the Court had no 'inevitable' obligation to carry out both stages of the enquiry if the first stage was clearly unnecessary. This indicates that when the Court determines that a law or conduct violates sections 9 (3) or (4) it does not have to go through the test of equality before the law under section 9 (1).

From the relevant jurisprudence it can be concluded that the Court has put forward three different ways of how a law or conduct can differentiate between people or groups of people under section 9. Firstly, we have what the Court has classified as mere differentiation. These are cases of

differentiation that do not constitute unfair discrimination. Mere differentiation is valid as long as it does not infringe on the right to equal protection by the law in section 9 (1). In this case a person or a group of persons has been treated differently but it does not amount to discrimination as such. Thus, mere differentiation will violate section 9 (1) unless it can be concluded that there is a rational connection between the differentiation and a legitimate governmental purpose, as for example creating equality based on race in land access and ownership (the basis for all land reform in South Africa).

Secondly, even where there is a rational connection between a differentiation and justifiable governmental purpose the differentiation will still violate the equality clause if it amounts to unfair discrimination under sections 9 (3) and (4). The third category is a differentiation between people or groups of people that discriminates but does not do so unfairly in relation to the impact it has on the person or group of persons.

Further, in relation to the third stage of enquiry developed by the Court, as mentioned above, it is of importance to address the relationship between the limitation clause, as discussed above, and the equality clause as a whole.

During the third stage of the enquiry the Court has to establish if an unfair provision, under sections 9 (3) and (4) can be justified under section 36, following the above mentioned requirements. The defendant, usually the state, has to put forward evidence that the limitation i.e. the discriminatory provision, is justifiable. The criteria for a justifiable limitation, as indicated above, is it that it has to be given in law of general application and it has to be considered reasonable in an open and democratic society based on human dignity, equality and freedom. In relation to equality it is questionable

if section 36 can be applied at all. It is difficult to imagine a case where limitation of the right to equality would be justifiable in an open and democratic society based on human dignity, equality and freedom. The right set out in section 9 is qualified by the same criteria put forward in section 36 to adjudicate the legitimacy of a limitation. However difficult it is to apply section 36 in relation to section 9 the Court has to consider the effects of the limitation clause in every case where they have found a violation of section 9. The main difficulty for the Court has been to determine whether to keep the discussion of limitation under section 9 (4) regarding the unfairness of a certain discriminatory act or to relate it to section 36 (1).²⁰

Furthermore, the equality clause is applicable both vertically²¹, between the state and the individual, group or organisation, and horizontally²² between individual subjects, groups or organisations. The horizontal application of the equality clause requires the Court to protect and balance conflicting rights and interests against the differentiation prescribed in section 9 (3). But all differentiations are not discriminations as was discussed above in relation to mere discrimination. Discrimination is a specific form of differentiation, on grounds that are unlawful. Section 9 (3) contains a list of unlawful grounds. Further, the Court has held that differentiation on grounds corresponding to the listed unlawful grounds will also amount to discrimination. The Court described these corresponding grounds (further discussed below) in *Harksen v Lane NO* as:

[...] based on attributes or characteristics which have the potential to impair the fundamental dignity of persons as human beings, or to affect them seriously in a comparably serious manner.²³

Besides the impact on the victim of the discrimination the Court put forward the following factors to be taken into consideration when determining whether a discriminatory act is fair or unfair: the position of the victim in society, if it is a pattern of long time discrimination, the nature and purpose of the discriminatory law or conduct, the extent to which the rights of the victim has been impaired and if the law or conduct impaired on the victim's fundamental rights. These factors assist the Court in assessing if an act is fair or unfair discrimination; and they are of special interest when establishing the legal effects of laws piggybacking on customary structures, further discussed in the following chapters, because they relate to the concerned women's position in society. It is in this regard, as put forward by the Court, important to conclude if the concerned women are uneducated, illiterate and what status and position they have in the concerned community to establish the impact of a discriminatory law or practice.

It is of further importance to point out that it is only in relation to discrimination on the corresponding grounds that the Court has to carry out the test as to whether the discrimination is fair or unfair. If the Court comes to the conclusion that a differentiation has taken place in relation to the listed grounds it is presumed under section 9 (5) that this amounts to unfair discrimination. Discrimination on a corresponding ground is not included in this section and the applicant must therefore establish that the law or conduct amounts to unfair discrimination. In relation to the listed unlawful grounds the applicant only has to establish that the discrimination is based on one or more of these grounds. However, to presume under section 9 (5) that an act is unfair does not mean that the Court will consider it unfair. It is up to

the respondent to establish that the discrimination is not unfair (de Waal et al. 2005: p. 257).

No less that 17 unlawful grounds for differentiation are listed in the equality clause. Before 1994, South African society was built on discriminatory laws and conducts. The listed grounds of: race, colour, sexual orientation, disability, religion, conscience, culture, belief, language and ethnic or social origin all constituted grounds on which the white minority government discriminated against people. The Court's perception and interpretation of the listed grounds today is affected by the past practices. In *Harksen v Lane NO* the Court made the following statement about the historical relevance of the listed grounds:

What the specified grounds have in common are that they have been used (or misused) in the past (both in South Africa and elsewhere) to categorize, marginalize and often oppress persons who have had, or who have been associated with, these attributes or characteristics. These grounds have the potential, when manipulated, to demean persons of their inherent humanity and dignity.²⁴

The Court also discussed the relationship between the grounds and their interpretation in *Harksen v Lane NO* indicating that:

There is often a complex relationship between these grounds. In some cases they relate to immutable biological attributes or characteristics, in some to the associational life of humans, in some to the intellectual, expressive and religious dimensions of humanity and in some cases to a combination of one or more of these features. The temptation to force them into neatly self-contained categories should be resisted. Section 8 (2) (*corresponding to section 9 (3) authors comm.*) seeks to prevent the unequal treatment of people based on such criteria which may, amongst other things, result in the construction of patterns of disadvantages such has occurred only too visibly in our history.²⁵

In 1995 the new government, led by President Mandela, ratified the CEDAW Convention, further discussed in chapter 6. This had a significant impact on the listed grounds. By ratifying this international treaty the South African government bound itself to a positive obligation to take concrete steps to end individual subjects' discrimination against women. It also took on an obligation to report on the implementation and progress of women's' rights to the Committee on the Elimination of Discrimination against Women.²⁶ The interim constitution contained, in section 8 (2), the two most basic grounds for the protection of women against discrimination: sex and gender. After the ratification of the CEDAW Convention two other important grounds were added to the list in section 9 (3), namely pregnancy and marital status, the latter having important impact on the structure and implementation of inheritance laws. Combined with the first two grounds the equality clause offers a comprehensive protection (on paper) for women against differentiating treatment.

Sex, gender, pregnancy, marital status and race (indirectly) are grounds that are put forward in the listed grounds and that are of relevance to the present research. For the correct and successful application of these grounds it is important to be familiar with their content and the difference between them. Sex, is a biological term that describes the physical differences between women and men. Gender, is not a biological term but a social one, which refers to social and cultural roles ascribed to men and women. Discrimination on the grounds of sex occurs when a woman is indirectly discriminated against on the grounds of for example height, weight or pregnancy. However, pregnancy was considered such an important ground in itself that the legislator, after the

ratification of the CEDAW Convention, chose to add it as a separate ground in the new constitution although it technically could have fallen under the ground of sex. Discrimination on gender occurs when a woman or a man is prejudicially treated on the basis of for example stereotypical roles of parenthood or ability to perform in a workplace. Further, it is possible to claim discrimination on more than one ground. For black women in South Africa it is for example possible to argue that discrimination is not only taking place in relation to gender or sex but that they as a group are facing a combination of gender and race discrimination. In such cases they would have to show that the treatment they are subjected to differs from the treatment of white women, black or white men (de Waal et al. 2005: 249).

As was discussed above, discrimination based on the listed grounds is presumed to be unfair. However, for differentiation on grounds not listed in the equality clause it has to be proven that the grounds correspond to the listed grounds, to constitute unfair discrimination. The Court has in relation to the corresponding grounds made an important statement that the listed grounds relate to attributes or characteristics that have an impact on human dignity. The corresponding grounds will therefore have a comparable relation and a similar impact on the person or group subjected to the discriminatory act. In presenting a case on a corresponding ground the applicant will not have the help of the presumption existing in relation to the listed grounds. It is up to the applicant to prove that the attributes and characteristics correlate with the listed ones and that they will impact negatively on the dignity of the applicant.

It may not always be obvious whether a certain act of differentiation can be categorised as falling under one of the

listed grounds or under a corresponding ground. In such cases the Court has predominantly chosen to deal with the issue under a corresponding ground to avoid watering down the contents of the listed grounds. A good example of this procedure is the judgement, *Hoffmann v South African Airways*. This case concerned the refusal of the airline to employ a HIV-positive person as cabin attendant. The applicant claimed that the refusal amounted to unfair discrimination under the listed ground of disability. The Court avoided placing HIV-status under the ground of disability and treated discrimination based on HIV-status as a corresponding ground. In doing this, the Court had to decide whether discrimination on the ground of HIV-status would amount to unfair discrimination i.e. the impact that this would have on the person's dignity. The Court stated that to deny a person employment for the sole reason that he or she is HIV-positive was a clear violation of human dignity. South African Airways had not considered the applicant's ability to perform the duties of the position and the Court concluded that this was a clear example of the prevailing prejudice against persons infected with HIV and that: "prejudice can never justify unfair discrimination".²⁷ The argument put forward by the airline, that some people infected with HIV would not be able to execute their duties as cabin assistants did not justify an overall policy of not employing HIV-positive individuals.

For most people it is difficult to perceive discrimination as fair. The word discrimination carries with it a meaning that a differentiation has taken place and that this in itself is wrong. However, from a legal point of view the legislator has made a distinction between fair and unfair discrimination. Only the latter should be treated as a violation of section 9. As mentioned above, an act of differentiation based on the listed

grounds is presumed to be unfair until the respondent has proven it to be fair. In the case of the corresponding grounds this presumption does not exist but the applicant has the responsibility to prove that it is unfair in that the differentiation infringes on human dignity in a significant way. To further highlight the concepts of fairness and unfairness and the methods used by the Court to establish this, the case of *President of the Republic of South Africa v Hugo* is used as an example.

In 1994 President Mandela granted reduction of sentence to all imprisoned mothers with children under the age of twelve. Hugo, the applicant, argued that he was discriminated against on the basis of gender because he did not receive a reduction of sentence although he had children under the age of twelve. In its examination the Court found that the act of the President indeed constituted discrimination on two grounds: sex together with parenthood of children below the age of twelve.²⁸

The first ground is one of the listed grounds in section 9 (3) and the differentiation should therefore be treated as unfair until the opposite had been proven. In its analysis the majority of the judges accepted the generalisation that in South Africa mothers are primarily responsible for children (see further dissenting opinion of judges Mokgoro and Kriegler below). This, according to the Court, imposed an enormous burden on women with children and this was presented as one of the reasons behind the unequal position of many women in the South African Society. The Court came to the conclusion, on the basis of this generalisation, that if the President had denied the mothers this opportunity in favour of the fathers it would have been unfair discrimination. But since the President did the opposite the Court could not consider this to be unfair

discrimination. The Court argued that women and children, two vulnerable groups, benefited from this act while male prisoners were only deprived of an early release to which they had no legal entitlement. The male prisoners did not in the Court's opinion, have their sense of human dignity impaired by not being granted the same early release. Further, the Court took into consideration that the president had an important societal goal with the early release of female prisoners with children. The facts that women and children were considered to be vulnerable groups in society, that the majority of the women up for the reduction of sentence were black or coloured and that those groups had suffered injustices in the past led the Court to consider the act of discrimination as fair.

This judgement was not passed unanimously and some interesting information regarding the difficulties in determining whether discrimination is fair or unfair is found in the dissenting opinions. Judge Mokgoro and Judge Kriegler both held, in separated dissenting opinions, that to grant the mothers release on the ground of what they considered a stereotype, the mother's general responsibility for the children, would contradict the essence of the equality clause. The aim of this clause is to end the deeply rooted patterns of inequality in society not to nurture it. Judge Mokgoro further held that the mothers of the young children were not more disadvantaged than the fathers and this could therefore not be a legitimate reason to consider the discrimination as fair.²⁹ Judge Kriegler concluded his dissenting judgement by stating that the act of the President was praiseworthy and likely to benefit some children. However, the benefits to the few children were outweighed by the serious disadvantages of the society as a whole in supporting a negative stereotype. He therefore considered the discrimination unfair. The further

application and interpretation of the equality clause and the relationship between customary practices and gender discrimination is further discussed in the following chapter.

¹ The First Certification Judgement 1996 (4) SA 744 (CC).

² The constitution, in the preamble paragraph 7.

³ The constitution, chapter 1 section 1 (a) and (b).

⁴ S v Makwanyane, paragraphs 36 and 37.

⁵ S v Zuma, paragraph 17.

⁶ S v Makwanyane, paragraph 9.

⁷ Brink v Kitshoff NO, paragraph 40.

⁸ See also the following cases: Pretoria City Council v Walker, paragraphs 45-48, National Coalition for Gay and Lesbian Equality v Minister of Justice, paragraph 60, Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council, paragraph 2.

⁹ Convention of the Law of Treaties, concluded on the 23rd of May 1969, entered into force on the 27th of January 1980, 8 I.L.M 679, article 32

¹⁰ S v Makwanyane, paragraph 17-18.

¹¹ See for example: Du Plessis v De Klerk and President of the Republic of South Africa v Hugo.

¹² For example in Larbi-Odam v MEC for Education (North-West Province).

¹³ August v Electoral Commission, paragraph 23.

¹⁴ The death sentence was abolished by a military decree in the Ciskei Bantustan in 1990.

¹⁵ The interim constitution, section 229.

¹⁶ The procedure of weighing the nature against the purpose to conclude the proportionality of limitations is very well described in the judgement S v Makwanyane.

¹⁷ Harksen v Lane NO, paragraph 53.

¹⁸ Ibid.

¹⁹ Prinsloo v Van der Linde, paragraph 22.

²⁰ For further information regarding this discussion see *President of the Republic of South Africa v Hugo*, *Harksen v Lane NO*, *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs 1999*, *Lotus River, Ottery, Grassy Park Residents Association v South Peninsula Municipality and Pretoria City Council v Walker*.

²¹ The constitution, chapter 2 section 9 (3).

²² *Ibid.* chapter 2 section 9 (4).

²³ *Harksen v Lane NO*, paragraph 46.

²⁴ *Harksen v Lane NO*, paragraph 49.

²⁵ *Ibid.*

²⁶ The CEDAW Convention, article 18.

²⁷ *Hoffmann v South African Airways*, paragraph 37.

²⁸ *President of the Republic of South Africa v Hugo*, paragraph 33.

²⁹ Judge Mokgoro considered that the infringement of the male prisoners to be justifiable under the limitation clause and came to the conclusion that the act of the President was legitimate.

Chapter 4: Jurisprudential review

With the point of departure in the first research question, the following jurisprudential review serves as a further discussion about how gender equality is protected within the constitution. The review in this chapter is an elaboration on what position customary law has under the constitution; and how customary law relates to or conflicts with the right to gender equality.

Furthermore, the objectives of this jurisprudential review, as was discussed in the introductory chapter, are to establish the scope of customary law and how the highest legal institutions of South Africa propose to balance the rights set out above, namely: the right to equality and access to land, and the commitment to accommodate customary law wherever possible. The cases highlight different aspects of customary structures and how customary law applies in relation to land transactions in a customary setting. The important issues of how to integrate customary law with the constitutional values and the methods used by the Court to determine the content of customary law are further analysed together with the discussion about the subsequent development of customary law in the light of the constitution.

The 7 cases that are outlined below relate, as mentioned above, to the first research question. In relation to the question of how previously disadvantaged women's property rights are protected in land reform and communal land tenure structures considering the plurality of the system (research question 3), one of the most interesting cases in relation to the present research is arguably *Tongoane and Others v The National Minister for Agriculture and Land Affairs and*

Others (hereinafter referred to as *Tongoane and Others*). In this case the applicants were seeking to have CLARA, or certain sections thereof declared unconstitutional. One of the issues raised by the claimants, later highlighted in the judgement, was that section 21 (2) of CLARA should be regarded as a violation of the rights to gender equality in section 9 of the constitution. This case was heard by the North Gauteng High Court and the judgement was handed down on the 30th of October 2009. Since this case has not made it through to the higher courts yet and it directly relates to the discussion about the gender effects of CLARA it is further discussed in chapter 5 dealing specifically with communal tenure reform.

The selected cases below, in different ways, highlight principles of law that are important in understanding the position of customary law within the South African legal system and therefore also within the land reform programme. These principles are together with relevant background material further discussed in the subsequent chapters in relation to the various aspects of gender equality and customary land tenure embraced by the present research. References are made where possible to these chapters to facilitate the understanding of the new concepts introduced in the present chapter. The *Bhe* and *Shibi* cases are presented together because of the similarities in the issues dealt with by the Court (the Court heard and passed judgement on these two cases together); the other cases are presented separately initially indicating the relevant issues at hand.

The Richtersveld case

The judgment in the case *Alexkor Ltd v Richtersveld community and Others* (above and below referred to as the *Richtersveld* case) was highly anticipated when it was presented by the Court in October of 2003. The case concerned a claim for restitution of land rights by the Richtersveld community, a claim that was originally turned down by the LCC.

The land in question, the Richtersveld, is a large area of land situated in the north-west corner of the Northern Cape province of South Africa. The claim, as lodged by the community as such, did not relate to the whole of the Richtersveld but only to a narrow stretch of land adjacent to the West coast, from the Orange River in the North to just below Port Nolloth in the South.¹ The area has since the 1920's been well known for its rich mineral resources, amongst which the discovery of diamonds in the mouth of the Orange River.

The discovery of the diamonds was one of the major factors behind the Richtersveld community's loss of land. The land in question was annexed by the British crown in 1847 pursuant to the Annexation Proclamation which incorporated the Richtersveld as part and parcel of the Cape Colony. Later, in the 1920's, after the discovery of diamonds the Parliament adopted a resolution establishing the Richtersveld reserve: "For the use of the Hottentots and the Bastards who are residing therein and of such other coloured people as the Government may decide".² The reserve was established on land that excluded the land in question, but was still a part of the Richtersveld area. However, it was only half the size of the original land that was owned and occupied by the Richtersveld community.

In 1927 the Precious Stone Act came into force. It made provisions for a state alluvial digging to be established by proclamation. Such diggings commenced in 1928 and the area in which they took place was extended as the process went on, until 1963 when it effectively included the whole area in question. The subject land was at this stage identified as unalienated Crown land, indicating that it was state owned land that had not been transferred to any second or third parties. From the late 1920's until 1993 the subject land was effectively out of control of the Richtersveld community both by the interference of the state and by private enterprises. With the new constitution and the possibility of seeking redress for the loss of land, a restitution claim of the subject land was lodged under the Restitution Act (further discussed in chapter 5) claiming the land back from the current owners Alexkor Ltd. Alexkor Ltd is a mining company solely owned by the South African government.

For the over-all respect of customary land rights the case of the Richtersveld is one of the most important cases, both nationally and internationally³ in recent history, because it does not only define customary rights in land but it also effectively reinstates the community's right to the natural resources available on the land. In a ground breaking judgement the Court awarded the Richtersveld community, not only the restitution of the right to ownership of the land lost but also the restitution and the right to ownership to its minerals and precious stones. Four years after the judgment was handed down by the Court the Cabinet approved a settlement reached with the Richtersveld community regarding the land claim against Alexkor and effectively the government for the land in the Northern Cape. It included the transfer of land to the community, the restoration of mineral rights to the community

and the establishment of a pooling sharing joint venture which would be a joint mining venture between Alexkor and the Richtersveld community (Webb Mining weekly 2008).

In terms of the relevance of the case for the protection of customary land rights the Court put forward a number of important aspects of the application and relevance of customary law within the plural constitutional structure of South Africa. It further elaborated on customary land rights in the light of annexation. One of the main arguments from the appellants, Alexkor Ltd. and the South African government, was that the Richtersveld community may have held the customary rights to the land in question before the annexation by the British Crown but that those rights were in fact extinguished by the annexation. If it could be concluded that the indigenous rights to land had been effectively extinguished at annexation in 1847, the appellants claimed that the restitution claim of the Richtersveld community was not valid since their rights had been lost before the cut of date in the constitution and subsequently in the Restitution Act (further discussed in chapter 5).

In analysing the validity of this argument the Court had to determine, firstly the nature and the substance of the land rights that the Richtersveld community held in the subject land prior to annexation; and secondly, whether such rights survived annexation. In relation to the first question posed by the Court an analysis of the legal nature of customary rights in land was carried out. It was firstly stated by the Court that the nature of the rights that the Richtersveld community held in the subject land prior to annexation had to be determined by reference to customary law, that is the law which governed its land rights. Those rights were not to be determined by reference to common law.⁴ In the past, customary law was

commonly viewed through the common law lens but under the new constitution, customary law should be regarded as an integral part of South African law. According to section 211 (3) of the constitution, customary law should be applied when relevant to the issue at hand. Its validity should only be tested by reference to the constitution with regards to the spirit, purport and objectives of the bill of rights as spelled out in section 39 (3). In the words of the Court: “[...] indigenous law feeds into, nourishes, fuses with and becomes part of the amalgam of South African law”.⁵ As a result of the position of customary law within the realm of constitutional law it is of importance for the courts to be able to establish the content of customary law. The point of departure of the development of customary law within the constitutional framework was acknowledged in *Ex Parte Chairperson of the Constitutional Assembly: In recertification of the constitution of the Republic of South Africa*. It was stated in the case that the Constitutional Assembly:

[...] cannot be constitutionally faulted for leaving the complicated, varied and ever-developing specifics of how [...] customary law should develop and be interpreted, to future social evolution, legislative deliberation and judicial interpretation.⁶

This issue has been further elaborated on in the *Bhe*, *Shibi* and *Shilubana* cases, as discussed below, but the Court in the *Richtersveld* case set the parameters in establishing that customary law is not a fixed body of formally classified and easily accessible rules; it evolves and develops in relation to the community that applies the law.

In terms of accessibility, customary law, as was found in the *Richtersveld* case, is mostly non-written. The system and the substance of the law are known by the community and

are passed on from generation to generation. It has the ability to develop so as to cover the ever changing needs of the community. When faced with the difficult task of establishing the contents of customary law, as in the *Richtersveld* case, the Court acknowledged that references may be made to authors on customary law but care must be taken not to view customary law through the lens of foreign legal concepts. In the present case, the system of common law and customary law were developed in different situations, in relation to different cultures and as a response to completely different conditions. The most common mistake made in relation to customary land rights, the Court concluded, was to try to define them through comparing them with individual ownership rights as used in most civil and common law countries. In doing so the communal right of usage of all that belong to the community, for example, is lost.

In establishing the rights of the Richtersveld community to the subject land the Court consulted the people on the substance of customary Nama law. It was established that one of the components of the culture of the Richtersveld people was the customary rules relating to their entitlement to, use of and occupation of this land. The primary rule was that the land belonged to the Richtersveld community as a whole and that all its people were entitled to the reasonable occupation and use of all land held in common by them, and its resources. All members of the community had a sense of legitimate access to the land to the exclusion of all other people. Non-members had no such rights and had to obtain permission to use the land for which they sometimes had to pay.⁷ The Court, based on the evidence presented, found that the Richtersveld community had a right of communal ownership under customary law, before annexation; and that that right included

the right to exclusive occupation and use of the land in question by the members of the community. The relevant issue that then had to be determined was whether or not this right had survived the annexation of the British Crown and could therefore be protected under the present constitution.

Based on evidence, not relevant for the scope of the present research, the Court arrived at the conclusion that the customary rights in land of the Richtersveld people to the land in question did survive annexation. This opened up a way for the Court to apply section 25 (7) of the constitution and the Restitution Act both stipulating that the land had to be lost after 19th June 1913 as a result of past racially discriminatory laws or practices. Furthermore, it concluded that the rights of the Richtersveld community were lost as a result of discriminatory legislation passed from 1926 and onwards, such as the Precious Stone Act. The implementation of this Act led to the fencing off of the subject land and the community members were subsequently not allowed onto it. In relation to the Precious Stone Act, the appellants argued that this specific legislation was not part and parcel of the core body of laws giving effect to “spatial apartheid” and should therefore not be regarded as racially discriminatory. However, the Court argued that even though the wording of the law was not discriminatory the outcome of its implementation was such because it effectively deprived the Richtersveld community of their customary rights to the land while protecting the rights of registered owners, who were at the time predominately white.

The following principles of interest to the present research can conclusively be derived from the Richtersveld case:

- Customary law should be regarded as an integral part of South African law; and customary land rights are protected by the constitution.
- The nature of customary land rights has to be determined by reference to customary law and not by applying foreign legal concepts.
- The substance of customary law must be determined with reference to both the history and the usage of the community concerned.
- Customary law is flexible and has the ability to develop.

The Bhe and Shibi cases

In the *Bhe* and *Shibi* cases the crucial question presented to the Court was the issue of the constitutionality of the principle of male primogenitures, central to customary law on succession. In the first case, the *Bhe* case, the parties Ms. Bhe and Mr. Mgolombane had lived together, as from 1990 and onwards, to Mr. Mgolombane's death in October 2002. They were not married and had not entered into a customary union of marriage. Mr. Mgolombane died intestate⁸ leaving Ms. Bhe and two children. Ms. Bhe, a domestic worker and Mr. Mgolombane, a carpenter were poor and lived in a temporary informal shelter in the Township of Khayelitsha in Cape Town. Mr. Mgolombane managed to obtain state housing grant and with it he purchased a property and building material to build a house. However, he died before the house could be built. Until the death of Mr. Mgolombane, Ms. Bhe and the younger of the two children stayed with him, the other child stayed with the father of the deceased in Berlin in the Eastern Cape. Mr. Mgolombane supported Ms. Bhe and the two children and they were directly dependent on him.

The estate that Mr. Mgolombane left comprised of the temporary informal shelter, the land on which it stood and other miscellaneous items of movable nature that the couple collected over the years. After the death of Mr. Mgolombane, the father of the deceased was appointed as the sole heir of the estate and the representative of the estate by the Magistrate, all in line with section 23 of the Black Administration Act of 1927 and regulations 2, 3 and 4 of the Intestate Succession Act of 1987 drawing on black law and customs, as further discussed below. When the father of the deceased made it clear to Ms. Bhe that he intended to sell the immovable property to cover the expenses he had incurred for the burial of his son, without showing any concern for Ms. Bhe and the children and the fact that they would be rendered homeless. Ms. Bhe approached the Cape High Court challenging the appointment of Mr. Mgolombane's father as heir and representative of the estate. The question before the Court related to the constitutionality of the legislative provisions on which the deceased inherited the property at the cost of Ms. Bhe and her children.

In the second case, the *Shibi* case, Ms. Shibi lost her brother, Daniel Sithole, in 1995. Mr. Sithole, like Mr. Mgolombane, died intestate i.e. without a will. Mr. Sithole was not married and had no children. At the time of his death both his parents were dead and no grandparents were alive. His closest male relatives were his cousins Mantabeni and Jerry Sithole. Since Mr. Daniel Sithole was a black man, his intestate estate fell to be administered under the same Acts as indicated above under the *Bhe* case. Without any notice to Ms. Shibi, Mantabeni Sithole was appointed the sole representative of the estate by the Magistrate. The appointment of Mantabeni Sithole as the representative of the estate resulted

in dismay. Several of his relatives complained that he was misappropriating the funds and the Magistrate later withdrew the appointment and appointed an attorney, Mr. Nkuna, to administer the estate.

Mr. Nkuna distributed the estate according to customary law and left the remaining assets to Mr. Jerry Sithole as the only heir to the estate. In all regards Ms. Shibi, being the sister of the deceased, was precluded from being the heir to the intestate estate of her brother. This was based on customary law enforced through section 23 of the Black Administration Act and the Intestate Succession Act. Ms. Shibi approached the Pretoria High Court with the same type of claims as Ms. Bhe, challenging the decision of the Magistrate and the way in which the estate had been administered.

The legislation in question, section 23 of Black Administration Act and the Intestate Succession Act contains several references to customary law and the relevant sections read as follows:

- (1) All movable property belonging to a Black and allotted by him or accruing under Black law or custom to any woman with whom he lived in a customary union, or to any house, shall upon his death devolve and be administered under Black law and custom.
- (2) All land in a tribal settlement held in individual tenure upon quitrent conditions by a Black shall devolve upon his death upon one male person, to be determined in accordance with tables of succession to be prescribed under subsection (10). [According to the principle of primogeniture, author's comm.]
- (3) All other property of whatsoever kind belonging to a Black shall be capable of being devised by will.

In terms of land outside a tribal settlement as referred to in section 2 of the Black Administration Act and that is not governed by a will, the Interstate Succession Act prescribes the following:

Regulation (2) If a Black dies leaving no valid will, so much of his property, including immovable property, as does not fall within the purview of subsection (1) or subsection (2) of section 23 of the Act shall be distributed in the manner following:

(a) [...]

(b) If the deceased was at the time of his death the holder of a letter of exemption issued under the provisions of section 31 of the Act, exempting him from the operation of the Code of Zulu Law, the property shall devolve as if he had been a European.

(c) If the deceased, at the time of his death was: (i) a partner in a marriage in community of property or under antenuptual contract; or (ii) a widower, widow or divorcee, as the case may be, of a marriage in community of property or under antenuptual contract and was not survived by a partner to a customary union entered into subsequent to the dissolution of such marriage, the property shall devolve as if the deceased had been a European.

(d) When any deceased Black is survived by any partner: (i) with whom he had contracted a marriage which, in terms of subsection (6) of section 22 of the Act, had not produced the legal consequences of a marriage in community of property; or (ii) with whom he had entered into a customary union; or (iii) who was at the time of his death living with him as his putative spouse; [...]

(e) If the deceased does not fall into any of the classes described in paragraphs (b), (c) and (d), the property shall be distributed according to Black law and custom.

The substance of the relevant legislation gives at hand that any immovable property, left by a deceased black man that does not have a will or where the will has been rendered invalid, will be administered under customary law if he was not married or had been married as required by law or custom or had a partner living with him as his reputed wife. Subsequently, as in the *Bhe* case Ms. Bhe and Mr. Mngolombane were not married under any set of laws and Ms. Bhe was not regarded as Mr. Mngolombane's spouse consequently the intestate estate came to be administered under customary law invoking the use of the principle of male primogeniture, and preventing Ms. Bhe from inheriting Mr. Mngolombane's estate. Further in the *Shibi* case Mr. Sithole lacked any immediate family, including a wife, and he also died intestate leaving the estate to be administered under customary law. In the application of the principle of male primogeniture Ms. Shibi, being the sister of the deceased, did not qualify as an heir to the estate. Furthermore, of relevance to the administration of the estate, as is evident in both cases, section 23 (6) states the following:

In connection with any such claim or dispute, the heir, or in case of a minor, his guardian, according to Black law, if no executor has been appointed by a Master of the Supreme Court, shall be regarded as the executor in the estate as if he had been duly appointed as such according to the law governing the appointment of executors.

This indicates that the heir, in the present cases as appointed under the principle of primogeniture, should also be the sole executor of the estate if the Master of the Supreme Court has not appointed an executor, which is more the exception than the rule under South African law.

The *Bhe* and *Shibi* cases raise a number of interesting questions of value to the present research. In the judgment, as presented by Judge Langa, two main issues are put forward: firstly the constitutional validity of section 23 of the Black Administration Act, as mentioned above and secondly the constitutional validity of the principle of male primogeniture in the context of the customary law of succession of property. These two questions are partly interrelated but it is the latter question that is of interest to the present research and this issue is therefore further examined.

In the judgment the views of the Court on the constitutionality of male primogeniture raises a number of additional questions all relevant to how customary law should be applied in relation to land transactions involving women to uphold the constitutional right to equality. It should be pointed out that the Court did not consider at all the constitutionality of the rule of male primogeniture in other contexts within customary law, such as the rules that govern status and traditional leaders. The Court has in a later judgment, *Shilubana and Others v Nwamitwa*, discussed this aspect of male primogeniture. This judgment is further analysed below.

Thus, the Court discussed the approach to customary law and its scope. As highlighted above, in relation to the *Richtersveld* case, the Court has an obligation to give effect to customary law and treat it as a parallel system of law. The constitutional system envisages a place for customary law where customary law should be accommodated, not only tolerated, as a part of South African law.⁹ However, the substance of the law should only be accommodated if it is not in conflict with other parts of the constitution, more importantly, the bill of rights. As was discussed in chapter 2, sections 30 and 31 of the constitution entrench respect for

cultural diversity. Furthermore, section 39 (2) specifically requires a court interpreting customary law to do this within the spirit, purport and objectives of the bill of rights. Section 39 (3) spells out that the bill of rights does not deny the existence of any other rights or freedoms conferred by customary law as long as they do not violate the same. The institutions unique to customary law are further protected under the constitution by section 211.

The conclusion that the Court arrived at after reviewing these sections of the constitution was that customary law had to be interpreted by the courts as first and foremost answering to the content of the constitution; i.e. it is protected by and subjected to the constitution in its own right. This entails that rules of customary law cannot be condemned based on the mere fact that they are different to those of the common law or legislation; at this level of constitutional validity the question is not whether a customary rule offers similar remedies as those offered by the common law or legislation, but the issue at hand is whether such a rule is consistent with the constitution.

The fact that customary law is an integral part of South African law had been established by the *Richtersveld* case, as analysed above. The new approach to customary law as developed in that case was further discussed in *Bhe* and *Shibi* cases. According to the Court customary law is to be interpreted in its own settings and not through the prism of the common law or through other legislation. The interpretation of customary law in the light of the common law or other legislation leads, according to the Court, to the fossilization and codification of customary law, which in turns leads to its marginalization.¹⁰ It is of importance to acknowledge that customary law could be changed in the view of the Court by

the interpretation of the courts, the interference of the Parliament and through the implementation of legislation.

In its discussion about the position of customary law within the constitutional framework and its interpretation, the Court further drew attention to what it called the positive aspects of customary law.¹¹ It reflected on the fact that these aspects of customary law have often been neglected and that it is of importance to acknowledge customary law's inherent flexibility and consensus seeking features. It offers the members of a community, the family or the clan opportunities to prevent and resolve disputes and disagreements. In terms of the family structure it further provides a setting that supports a sense of cooperation and responsibility. These are, amongst other values, the aspects of customary law that justify its protection under the constitution. However, as will be further examined below, the challenge to customary law today is that it does not exist in an environment where the traditional family and community structures are present in the way that they used to be, due to the impact of colonialisation and apartheid in terms of the dispossession of land and dislocation of people.

The second issue put forward by the Court, was the question about the substance of the customary law of succession and male primogeniture. The Court offered interesting insight into the context in which the customary law of succession exists and the effects of the ever changing circumstances in which it exists. The rules of customary law traditionally operated within a system which fitted in with the community's way of life. The system was designed to preserve the cohesion and the stability of the family, extended family and the whole community.

One of the main purposes of the customary system was to uphold discipline within the group and every person in the community had a role directed to the achievement of the communal good and welfare of the community.¹² In terms of succession, the heir to an estate did not merely succeed to the assets of the estate i.e. succession was not primarily concerned with the distribution of the assets but with the preservation of the family unit. As was expressed by Judge Ngcobo in his dissenting opinion to the *Bhe* and *Shibi* judgment:

The successor takes over the powers and responsibilities of the deceased family head. The powers relate to the right to control and administer the family property on behalf of and for the benefit of the family members.¹³

In the traditional customary setting property was collectively owned and it was position and status that were succeeded to, together with a responsibility to acknowledge the interests and wellbeing of everyone dependent on the estate, rather than the mere transfer of an individual ownership right. In other words property and responsibility for the family unit went hand in hand, a concept completely foreign to common statutory law.

A central rule in the customary law of succession is the principle of male primogeniture, and as mentioned above, the constitutionality of this principle is the focal point of the Court's argumentation. The general rule, as was discussed in chapter 2, is that only a male who is related to the deceased qualifies as intestate heir. The Court found in the *Bhe* case that women generally do not participate at all in the succession of intestate estates. In a monogamous setting it will be the eldest son of the family head that will become the heir. If there are no male descendants the father of the deceased will become the heir and if the father is also deceased, an heir is sought

among the father's male descendants related to him through the male line.¹⁴ In the words of Judge Langa, the rule of male primogeniture excludes women from becoming heirs in any intestate estate. He further viewed the customary system as deeply rooted in patriarchy which inferred a position of subservience and subordination on women in that they were regarded as minors under the rule of the fathers, brothers, husbands and heads of the extended family.¹⁵

One of the most important and enlightening discussions in the judgment is Judge Langa's insight into the effects on customary law of change in social conditions. Today, most modern urban families and communities are organised differently and no longer strictly along traditional lines. Applied under these circumstances, customary law of succession simply determines succession of the deceased's estate without having the associated social implications which it traditionally had. Nuclear families have to a great extent replaced traditional extended families. The heir does not automatically live together with the whole extended family which includes the spouse of the deceased as well as other dependants and descendants. He often acquires the estate without assuming, or even being in a position to assume, any of the deceased's responsibilities. Therefore under these circumstances, different to the traditional context, the succession of the heir to the assets of the deceased does not necessarily correspond in practice with an enforceable responsibility to provide support and maintenance to the family and dependants of the deceased.¹⁶ In today's reality of widespread poverty and the mass movement of people from the rural areas to the major cities the sense of the family responsibility is somewhat lost and everyone is left to fend for him- or herself without the support of the customary structures. Under these

circumstances, as was clearly showed in both the *Bhe* and *Shibi* cases, women are likely to draw the shortest stick in terms of inheritance on the one hand because they are not in a position to decide over the property because of the influences of customary law, and on the other because customary structures providing for the support of for example widows have been lost in a hardening social and economic climate.

The main problem with the application of customary law in regards to succession of property is the fact that the rules on succession have not been given the space to adapt to the ever changing social conditions and values of the new South Africa. Judge Ngcobo points out that the customary law handled and discussed by the courts is often the one found in statutes, case law or textbooks on indigenous law. As Bennett (Bennett 1991: preface at 9 (vi)) puts it:

Although customary law is supposed to develop spontaneously in a given jural community, during the colonial and apartheid era it became alienated from its community roots. The result was that the term “customary law” emerged with three quite different meanings: the official body of law employed in the courts and by the administration; the law used by academics for teaching purposes and the law actually lived by the people.

Hence, it is put forward in the judgment that the application of customary law rules of succession under conditions that greatly differ from the traditional pre-colonial settings causes many different problems.

The South African Law Reform Commission described in their report on the harmonisation of common law and indigenous law, also cited in the judgment, three major reasons for the dilemma in which many African widows finds

themselves. The Commission (South African Law reform Commission 1998: p. 6-9) put forward that:

The fact that social conditions frequently do not make living with the heir a realistic or even tolerable proposition; the fact, frequently pointed out by the courts, that the African women do not have a right of ownership; and the prerequisite of a good working relationship with the heir for the effectiveness of the widow's right of ownership.

These are the major contributing factors behind the dire situation many black widows find themselves in. Today the trend reflects a basic social need rather to sustain the surviving family than to adhere to male primogeniture. Judge Langa concluded this discussion by laying down that the true reflection of customary law of succession today is an evolving set of rules meeting the need of the change in social patterns. It was however on the official version of customary law that the case rested and the principle of male primogeniture therefore in that form constituted a clear violation of the right of equality in section 9 of the constitution as well as section 10 spelling out the right to human dignity. The official system of customary law of succession was therefore rendered incompatible with the bill of rights.

In the comprehensive dissenting opinion, as presented by Judge Ngcobo, he stated the following as relating to upholding international law and the constitutionality of the principle male primogeniture:

Having regard to these developments on the continent, the transformation of African communities from rural communities into urban and industrialised communities, and the role that women now play in our society, the exclusion of women from succeeding to the family head can no longer be justified. These developments must also be seen against the international instruments that protect women against discri-

mination, namely: the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the African (Banjul) Charter on Human and Peoples' Rights, and the International Covenant on Civil and Political Rights. In particular, CEDAW requires South Africa to ensure, amongst other things, the practical realization of the principle of equality between men and women and to take all appropriate measures to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against women.¹⁷

Furthermore a, for the interpretation of the substance of customary law, very important discussion evolved around the issue of remedy. The question before the Court was whether the Court was in the position to develop the rule of male primogeniture to promote the spirit, purport and objects of the bill of rights. The majority opinion in the *Bhe* and *Shibi* cases put forward that the Court was prevented from doing so because in doing so it would have to determine the true content of customary law as it manifested itself at present and to give effect to it by court order. The Court found that it had insufficient evidence and material to determine the substance of the "living customary law". It could therefore not test its validity against the bill of rights. Consequently the remedy the Court resorted to rendered section 23 of the Black Administration Act invalid on grounds of being inconsistent with the constitution. It further deemed the rule of male primogeniture as it applied in "official" customary law to the inheritance of property to be inconsistent with the constitution and it was therefore invalid to the extent that it excluded or hindered women from inheriting property.¹⁸

The following principles of interest to the present research can conclusively be derived from the *Bhe* and *Shibi* cases:

- Courts have an obligation to give effect to customary law and treat it as a parallel system of law.
- The constitutional system envisages a place for customary law where customary law should be accommodated, not only tolerated, as a part of South African law.
- Customary law must be interpreted by the courts as first and foremost answering to the contents of the constitution, i.e. it is protected by and subjected to the constitution in its own right.
- Customary law should be interpreted in its own settings and not through the prism of the common law or through other legislation.
- Customary law can be changed by the interpretation of the courts, the interference of the Parliament and through the implementation of legislation.
- The customary law handled and discussed by the courts is often the one found in statutes, case law or textbooks on indigenous law; and
- The main problem with the application of the official version of customary law in regard to succession of property is the fact that the rules on succession have not been given the space to adapt to the ever changing social conditions and values of the new South Africa.
- The application of customary law rules of succession under conditions that greatly differ from the traditional pre-colonial settings causes problems such as the discrimination and marginalisation of black women.
- The rule of male primogeniture as it applies in “official” customary law to the inheritance of property is inconsistent with the constitution and is therefore invalid to the extent that it excludes or hinders women from inheriting property.

The Shilubana case

In the case, *Shilubana and Others v Nwamitwa*, (above and below referred to as the *Shilubana* case) the Court had to consider the question of the authority of a community to develop their customary law to fit in with the constitutional objectives of equality. Further it also had to consider issues regarding the relationship between traditional community structures and the courts of law as established under the constitution. The Court had to consider how courts of law in South Africa are to apply customary law within the realm of the constitution while at the same time recognising and safeguarding the institution and role of the traditional leadership as spelled out in section 211 of the constitution.¹⁹ Furthermore, the case outlines the application of the principles as set out in the *Bhe*, *Shibi* and *Richtersveld* cases, as discussed above.

The background to the case was a dispute about who would have the right to succeed as Hosi (chief) of the Valoyi traditional community in Limpopo, in the North Eastern corner of South Africa. The history behind the dispute between Ms. Shilubana, the daughter of Hosi Fofozwa Nwamitwa (Hosi Fofozwa) and Mr. Nwamitwa, the son of Hosi Malathini Richard Nwamitwa (Hosi Richard) started when Hosi Fofozwa died in February of 1968 without a male heir. At that time the principle of male primogeniture governed the succession order of the Valoyi and therefore the eldest daughter of Hosi Fofozwa, Ms. Shilubana, was not considered as Hosi. Instead the younger brother of the deceased, Richard, became Hosi of the Valoyi. The subsequent dispute between Ms. Shilubana and her cousin Mr. Nwamitwa arose when Hosi Richard died in 2001 and the issue of the right to succeed him as a Hosi became relevant. Prior to the death of Hosi Richard he had, in 1996, participated in a meeting of the Royal Council of the

Valoyi where a resolution governing the succession order of the Valoyis was stipulated. The resolution reads as follows:

Though in the past it was not permissible by the Valoyis that a female child be heir, in terms of democracy and the new Republic of South African constitution it is now permissible that a female child be heir since she is also equal to a male child. [...] The matter of Chieftainship and regency would be conducted according to the constitution of the Republic of South Africa.²⁰

It was not the intention of either Ms. Shilubana or the Royal Council to have Hosi Richard replaced but rather to have him continue his reign until his death when the resolution would then change the order of succession of the Valoyis. Further in July 1997, Hosi Richard declared, in front of the Chief Magistrate and 26 witnesses that Ms. Shilubana was the rightful heir to the chieftainship of the Valoyis. This was later confirmed in a letter sent to Commission of Traditional Leaders of Limpopo. Consequently, in August that same year the Royal Council confirmed that Hosi Richard would transfer his powers to Ms. Shilubana. This was also discussed at a meeting of the Valoyi tribe where the tribe confirmed that it was in accordance with the traditions and customs of the Valoyis to appoint Ms. Shilubana as the next Hosi.

After the death of Hosi Richard in 2001 arguments broke out between supporters of Ms. Shilubana and Mr. Nwamitwa pertaining to who would be the rightful successor. In September 2002 Mr. Nwamitwa instituted proceedings in the Pretoria High Court seeking a declaration of the court that he was the rightful successor as Hosi of the Valoyi. The High Court and later the Supreme Court of Appeal decided in Mr. Nwamitwa's favour, appointing him as successor to Hosi

Richard. The courts argued that even if the customs and traditions of the Valoyis had been changed to allow women to become Hosi, Mr. Nwamitwa still had the right as the eldest child of Hosi Richard to succeed him. In other words Ms. Shilubana was not disqualified to be Hosi because of her gender; she was ineligible because of lineage.²¹

The Court was later asked to pass judgment on these issues and asked the relevant parties to forward information pertaining to the following questions:

Does the Royal Family have the authority to develop the customs and traditions of the Valoyi community so as to outlaw gender discrimination in the succession to traditional leadership? [and] In the course of developing the customs and the traditions of a community, does the Royal Family have the authority to restore the position of traditional leadership to the house from which it was removed by reason of gender discrimination even if this discrimination occurred prior to the coming into operation of the constitution?²²

In the comprehensive analysis of the issues at hand Judge van der Westhuizen made reference to both the *Richtersveld* and the *Bhe* and *Shibi* cases. The principles brought forward in these cases, of the protection of customary law in its own right under the constitution and customary law as an integral part of statutory law were used as a foundation for the argumentation in the *Shilubana* case. As a result of the findings in these cases the inquiry into the substance of a specific customary rule had to be informed by several factors; the Court outlined a three factor test. Firstly, the traditions of the relevant community had to be analysed, which was an expansion of the Court's mandate if compared to the position taken in the *Bhe* case. In exploring the traditions of the Valoyi their customary law had to, in accordance with the *Bhe* case,

be analysed in its own setting rather than in the paradigm of the common law. Further, it was noted by the Court that in examining customary law courts in general should be cautious of historical records, as put forward in the *Richtersveld* case, because of the distorting tendency of older authorities to view customary law through legal concepts foreign to it.²³

Secondly, the Judge in the *Shilubana* case highlighted the importance of respecting the rights of communities that observe customary law to develop their law. Section 211 (2) of the constitution includes the rights of traditional authorities to change and withdraw rules of customary law. As in the *Bhe* case, customary law is viewed as a flexible system of laws. The development of customary law stagnated during colonialism and apartheid and the free development of customary law in the light of the constitution should be respected and facilitated in the new South Africa.²⁴ To meet the need of an ever changing world customary law needs to be given room to develop; and the necessity of examining both the history and the usage of customary law to establish its substance, as pointed out in the *Richtersveld* case, is pivotal in this development according to the Court.

Thirdly, the *Shilubana* case highlights the importance of the courts to consider the fact that customary law, equivalent to any other law, directly affects and regulates the lives of people. This entails a need for the courts to balance the need for flexibility and development against the value of legal certainty and the protection of constitutional rights.²⁵ The results of this balancing act will be directly related to the facts of the individual case; and as put forward by Judge van der Westhuizen, relevant factors in this enquiry will include, but are not limited to:

The nature of the law in question, in particular the implications of change for constitutional and other legal rights; the process by which the alleged change has occurred or is occurring; and the vulnerability of parties affected by the law.²⁶

In this regard it further has to be acknowledged that the development of customary law by the Court is distinct from the development of customary law by the community that applies it; and that a court involved in the arbitration of a customary matter needs to be aware of its responsibilities under section 39 (2) of the constitution to promote the spirit and objectives of the bill of rights.

In contesting the right of Ms. Shilubana to become the Hosi of the Valoyi, Mr. Nwamitwa claimed that he as the eldest son of the previous Hosi had the right to succession according to the laws of the Valoyi which had been practised for the last five generations. Mr. Nwamitwa based his argument on past practices. Further he claimed that the actions taken by the traditional authorities, the Royal Council, while trying to establish Ms. Shilubana as the Hosi, had no legal effect because they had no legal power to appoint any other person than the heir. Hence, the actions of the Royal Council could not change the customary rule of succession. In analysing the arguments brought forward by Mr. Nwamitwa the Court tried to establish whether, as Mr. Nwamitwa argued, reliance on past practice can establish a customary rule with certainty.

The classical test of the existence of custom as a source of law, similar to the test often used within public international law, is whether a practice is certain, reasonable and uniformly observed for a long period of time. The outline for this test can be found in the case *Van Breda v Jacobs*²⁷ and

is therefore often referred to as the *Van Breda* test. The relevance of this test in relation to customary law was discussed in the *Richtersveld* case but the Court only concluded that this test might not be appropriate in relation to this field of law. However, Judge van der Westhuizen took this discussion a step further and concluded that customary law is indeed a source of law recognised by the constitution and its validity is not related to its unbroken antiquity.²⁸ The *Shilubana* case establishes that the legal status of customary rules is not simply dependant on whether it has been consistently applied in the past for the reason that any new developments would by necessity fail such a test. The *Van Breda* test can possibly establish customary law as a source of law but cannot distinguish its applicable rules.

In relation to Mr. Nwamitwa's reliance on past practice the Court concluded that:

Where a norm appears from tradition, and there is no indication that a contemporary development has occurred or is occurring, past practice will be sufficient to establish a rule. But where the contemporary practice of the community suggests that change has occurred, past practice alone is not enough and does not on its own establish a right with certainty [...]²⁹

In relation to the three factor test, discussed above, past practice will consequently not be decisive when the constitution requires the development of customary law to reflect the constitutional values. In this regard it was established by the Court that Mr. Nwamitwa could not base his claim exclusively on past practices and the Court therefore turned to analyse the actions of the Valoyi community. This issue refers back to the two questions set out by the Court in the beginning of the judgment, as mentioned above. The first

issue concerns the right of the Royal Family to develop the customs and traditions of the Valoyi community so as to outlaw gender discrimination in the succession to traditional leadership; and the second relates to the Royal Family's authority to restore the position of traditional leadership to the house from which it was removed by reason of gender discrimination even if this discrimination occurred prior to the coming into operation of the constitution.

The judge in the *Shilubana* case arrived at the conclusion that to say that the traditional authorities, in this case the Royal family, does not have the authority to develop customary law would suggest that nobody within the customary context has the power to make constitutionally driven changes in traditional leadership. This in turn would be contrary to sections 39 (3) and 211 (2) which confers the right on a community to bring its customs in line with the objectives of the bill of rights. In this case the traditional authorities exercised their right to develop the customary law of succession and to sidestep the principle of male primogeniture. The Court consequently exercised its powers as outlined in section 39 (2) in a way that would empower the community to continue this development. Consequently, Ms. Shilubana was awarded the right to succeed Hosi Richard as Hosi of the Valoyi in her capacity as the first born child of Hosi Fofeza.

The following principles of interest to the present research can conclusively be derived from the *Shilubana* case:

- There is a right of communities that observe customary law to develop their law (no corresponding duty is placed on the communities).

- The traditional authorities have a right and a corresponding duty to make constitutionally driven change in traditional leadership.
- The van Breda test cannot be applied to customary law where the development of the living law is at issue. Past practice should only be one amongst other important factors.

The Hadebe case

The *Hadebe v Hadebe* case (above and below referred to as the *Hadebe* case) highlights an important aspect of customary law in its official codified version and its impact on the ability of women to own property and how the restitution mechanism can be applied to rectify gender discrimination. The plaintiff in the case, heard by the LCC, was Ms. Hadebe, a domestic worker from Gauteng. In 1946 she was married, under customary law, to Shadrack Hadebe. The couple lived in Ezakheni Township in Ladysmith, KwaZulu-Natal.

In 1981 Mr. Hadebe suffered a stroke which left him terminally ill. Prior to the death of Ms. Hadebe's husband, in December 1981, she bought, with her own money, a stand at the Ezakheni Township. However, when she wanted to register it with the Ezakheni township manager she was turned down on the ground that as a black women she was prevented by law from acquiring immovable property. Because Ms. Hadebe's husband was terminally ill, the township manager recommended that she register the property in the name of a male nominee other than her husband, in order to avoid the need for a further transfer after his death. Ms. Hadebe accordingly entered into an oral agreement with her son,

Vusimuzi Hadebe, to acquire and hold the property as her nominee.

Ms. Hadebe subsequently entered into an oral agreement with her son which according to her incurred the following terms and conditions: (a) That Ms. Hadebe would purchase the property; (b) That the property would be registered in the name of her son Vusimuzi Hadebe, who would hold the property in a representative capacity as a nominee of hers; (c) That Ms. Hadebe would be entitled to all the rights and benefits of ownership of the property and that she would be responsible for all the maintenance and costs of the property; and (d) That Mr. Vusimuzi Hadebe would not have any rights of ownership over the property and would not be responsible for any of the maintenance and costs of the property.³⁰

The subject property in the Ezakheni Township was subsequently registered in the name of Ms. Hadebe's son in terms of a deed of grant dated the 26th October 1981. Later she built a house on the property that she paid for herself and she has over the years paid all taxes and other charges that were related to the property out of her own pocket. It was presented to the LCC that Ms. Hadebe's son did not in any regard contribute to the building of the house or upkeep of the property. At the end of the 1990's Ms. Hadebe decided that she wanted to regain ownership of the property and have the title transferred back to her. Ms. Hadebe son did not defend this action. The coming into force of new legislation had opened opportunities for Ms. Hadebe to claim back her property but she had to comply with the requirements under section 3 of the Restitution Act. The Act requires a person who wants to claim a title to property held by an appointed nominee to satisfy the LCC that: she was prevented from

obtaining the title of the property because of law that would have been inconsistent with the prohibition of racial discrimination in section 9 (3) of the constitution; and that Ms. Hadebe's son held the title of the property as a result of a transaction between himself and Ms. Hadebe in terms whereof he held the property on her behalf.³¹

In regard of the relevant laws reference was made to the Black Administrations Act, as was discussed in relation to the *Bhe* case above, and the Natal Code of Bantu Law³². The Black Administration Act Provided that:

A black woman [...] who is a partner in a customary union and who is living with her husband, shall be deemed to be a minor and her husband shall be deemed to be her guardian.³³

Further, the Natal Code of Bantu law was very elaborate on the issue of property rights of women at the time. The following sections are provided for the understanding of the codified version of customary law that was applied by the courts at the time:

26: Any Bantu may acquire property, but this right in so far as females, minor sons and kraal³⁴ inmates are concerned, is subject to the provisions of section 35.

27 (2): Subject to the provisions of section 28, a Bantu female is deemed a perpetual minor in law and has no independent powers save as to her own person and as specially provided in this Code.

28 (1): Any unmarried female, widow or divorced woman, who is the owner of immovable property or who by virtue of good character, education, thrifty habits or any other good and sufficient reason is deemed fit to be emancipated, may be freed from the control of her father or guardian by order of the Bantu Affairs Commissioner's court and vested with the full powers of a kraal head or with full rights of ownership in respect of any property she may have acquired

and with full power to contract or to sue or be sued in her own name [...]

35 (1): A kraal head is entitled to the earnings of his minor children and to a reasonable share of the earnings of the other members of his family and of any other kraal inmates. Such earnings are to be utilised by him primarily for the maintenance and benefit of the house providing for them and for general kraal purposes.

36: The kraal head is the owner of all kraal property in his kraal. [...]

44 (3): The natural guardian of a married woman is her husband.

44 (4): The natural guardian of a widow is the head of the kraal to which she belongs.

The key issue of the case was if the legal provisions that prevented Ms. Hadebe from obtaining the title to the property in question were inconsistent with the prohibition against racial discrimination such as it is expressed in section 9 (3) of the constitution. This question in turn brought forward the issue of the application of customary law. In terms of the relevance of customary law, such as it was expressed in the Natal Code of Bantu Law as stated above, the LCC expressed the opinion that the customary values mirrored in the Bantu Laws were most probably the customary law applicable at the time. Under section 211 (3), as discussed above, the courts must apply customary law when it is applicable but only so far as it does not violate the right set out in the bill of rights.³⁵

In discussing the apparent unfairness and discrimination, as expressed in the legislation at the time when Ms. Hadebe bought the property, the LCC made reference to the situation of white women of the same time. It concluded that the discrimination against black women in the legislation

made their position significantly worse than the position of white women. Although a white woman married in community of property could, in 1981, not have property registered in her own name, she would, unlike her black compeer, obtain full legal capacity upon the death of her husband. A white woman would also have full legal capacity if she was an unmarried major, or if she was married out of community of property and with exclusion of the material power.

According to the statement made by Ms. Hadebe to the court she would have waited for her husband to pass away before buying the property had it been possible for a black widow to buy property in her own name. In the view of the LCC there could be no doubt that these legal restrictions on the rights of black women could have violated the constitutional right to equality in section 9 of the bill of rights, had that right existed at the time. Hence, under section 9 (5) of the constitution, racial discrimination is unfair unless it is established that the discrimination is fair, as discussed in the previous chapter. It might have been open to Ms. Hadebe's son, had he appeared before the court, to show that in the context of indigenous law, the discrimination against Ms. Hadebe was not unfair. However, the LCC was never presented with such an argument and therefore deemed the discrimination in this case as unfair.³⁶ It ordered Ms. Hadebe to regain full title of her property under section 3 of the Restitution Act on the basis that the legislation of the time giving effect to customary law violated the right to equality in the constitution. With the previous cases as a background it is evident that the LCC in the Hadebe case only relied on the official, written version of customary law of the time. No references are made to the practised custom in relation to land in the present case.

The following principle of interest to the present research can conclusively be derived from the Hadebe case:

- Legislation that mirrors customary rules contrary to the objectives of the bill of rights is invalid even if they reflect customary rules that are being practised by the communities.

The Popela case

The *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (PTY) LTD* case (commonly known as the *Popela* case and therefore referred to as the *Popela* case above and below) further elaborates on one important aspect of customary rights in land namely the concept of “community”. Most customary rights in land are by the nature of customary law claimed by groups i.e. communities. In the *Popela* case the Court set out to discuss the interpretation of the term community within the scope of the constitution and the Restitution Act. Further aspects of the definition of the term “community” are discussed below in relation to the *Bataung Ba-Ga Selale* case.

The *Popela* case evolved around a dispute as to whether the termination of labour tenancies by private farmers entitled labour tenants to redress under the Restitution Act. The Popela Community claimed restitution of rights under the Restitution Act to land situated within the farm Boomplaats in the Mooketsi area in the Limpopo province. The Popela community acted together in claiming restitution of these land rights. They had organized themselves into a voluntary association known as the Popela Communal Property Association (this concept is further discussed in chapter 5). The individuals of the Popela community shared much in com-

mon, they had the same ethnic lineage and all had kept the Maake surname, except for one claimant. They originated from the same rural district and they were all former labour tenants on the farm Boomplaats. Their claims were rejected by both the LCC and the Supreme Court of Appeal before it was heard by the Court.³⁷

The background to the case can be sketched as follows. The ancestors of the individuals that at the time constituted the Popela community, originally settled on the farm Boomplaats in the 1800s. They trace their uninterrupted family settlement on the Boomplaats land back to the mid-19th century. Their ancestors enjoyed undisturbed customary rights to the land and exercised all the rights that came with it. These rights included living on the land as families; bringing up their children on it; tending the elderly; paying spiritual tribute to their ancestors; and burying their dead. They had the right to cultivate the land and to use it for livestock.³⁸ The families were self-subsistent; the land provided enough for the families to survive. The applicants claimed that these land rights were being passed on to direct descendants and that their ancestors did transmit them to successive generations.³⁹

The farm Boomplaats was registered as privately owned for the first time in 1889 by a Mr. Hattingh and the farm then changed hands numerous times over the years until it came into the hands of the current owners, the Altenroxels, who in 1987 registered the farm in their name. The ownership of Boomplaats was then later, in 1993, transferred to Goedgelegen Tropical Fruits (PTY) LTD, owned by the same family. As is clear from this case the Popela community lost their customary land rights already in 1889 by the first registration of ownership. It was therefore impossible, in line with the *Richtersveld* case, for the community to ask the Court to

restitute their land rights because this claim lay outside the ambit of the restitutionary beneficence of section 25 (7) of the constitution. However, as was indicated in the *Richtersveld* case, this did not mean that the Court could not regard racially discriminatory laws and practices that were in existence or took place before the cut-off date. In the words of the Court in the *Richtersveld* case:

Regard may indeed be had to them if the purpose is to throw light on the nature of a dispossession that took place thereafter or to show that when it so took place it was the result of racially discriminatory laws or practices that were still operative at the time of the dispossession.⁴⁰

In order for the Court to establish the rights of the community it had to examine if the group constituted a community in relation to the Restitution Act. The respondent in the *Popela case* claimed that the Popela community was in fact not a community; it had lost its community status at the first dispossession and could therefore not claim any communal customary land rights to be valid after the dispossession that took place in 1889. Further the respondent held that the individuals in their own capacity had no right to restitution since they had lost their rights as labour tenants, not because of racial discrimination but because their work was not satisfactory or another kind of workforce was needed. From the time the Popela community lost their customary rights in land they gradually either became labour tenants at Boomplaats, and had to work for their right to stay there, or they simply moved to Ga-Sekgopo in the nearby so-called black homeland.⁴¹ The ones that stayed were effectively dispossessed in 1969 when the owners did not want to use them as workers anymore and withdrew their rights to live, graze their livestock and plant the land on the farm.

As will be further discussed in the next chapter, section 25 (7) of the constitution and section 2 (1) (d) of the Restitution Act entitles a community dispossessed of a right in land after 19 June 1913 to claim restitution or other equitable redress. A community is according to section 1 of the Restitution Act, unless the context otherwise indicates:

Any group of persons whose rights in land are derived from shared rules determining access to land held in common by such group.

At the heart of the enquiry was the question whether the occupational rights in the land were derived from shared rules determining access to land held in common. At its core, the question was whether the labour tenants, through shared rules, held the land rights jointly. The community and individual applicants maintained that they did. They supported this argument by pointing to the history of their use and occupation of the land and to the attendant social arrangements.⁴²

In the case in *Re Kranspoort Community*⁴³ section 2 (1) (d) of the Restitution Act was interpreted to entail that the Act requires that there must be a community or part of a community that exists at the time the claim is lodged and that the community must have existed sometime after 19 June 1913 and must have been victim of racial dispossession of rights in land. In that case the judge, Judge Dodson, concluded that in deciding whether a community exists at the time of the claim there must be:

(a) A sufficiently cohesive group of persons to show that there is a community or a part of a community, regard being had to the nature and likely impact of the original dispossession on the group; and (b) some element of commonality between the claiming community and the community as it was at the point of dispossession.⁴⁴

However, it was established in the *Popela case* that there was no justification for limiting the meaning of the word “community” in section 2(1) (d) by inferring a requirement that the group concerned must show an accepted tribal identity and hierarchy. Where it is appropriate, bonds of custom, culture and hierarchical loyalty can be helpful to establish that the group’s shared rules related to access and use of the land. The bonds may also demonstrate the cohesiveness of the group and its commonality with the group at the point of dispossession but it is possible for a group to be classified as a community without the customary or traditional element even though their land rights would have been derived from customary rights to land as a right of the community to begin with. The legislation has set a low threshold as to what constitutes a “community” or any “part of a community”. It does not set any pre-ordained qualities of the group of persons or any part of the group in order to qualify as a community.⁴⁵

This generous notion of what constitutes a community fits in well with the wide scope of the “rights in land” that are capable of restoration. These rights, as defined by the Restitution Act go well beyond the orthodox common law notions of rights in land. They include any right in land, whether registered or not; the interests of labour tenants and sharecroppers; customary law interests; interests of a beneficiary under a trust; and a beneficial occupation for a continuous period of not less than ten years before the dispossession.

The legislative design points to an intention to rectify the wrong doings of racial dispossession of rights or interests in land that continued to take place after 19 June 1913. The threshold set up by section 2(1) (d) is met if the right or interest in land of the group is derived from shared rules

determining access to land that is held in common. This liberal understanding of what constitutes a community is consistent with the retroactive reach of the restitution process back to 19 June 1913. With the passage of time, the composition and consistency of communities who were victims of dispossession would be compromised in that communities would be displaced and alienated from their original homes at huge human and social expense. Furthermore, this generous interpretation supports the purpose of the legislation, which is to provide restitution and equitable redress to as many victims of racial dispossession of land rights, within the time limit, as possible.⁴⁶

In the case of the Popela community the Court arrived at the conclusion that the Maake people did constitute a community at the time they were dispossessed of their indigenous ownership of the Boomplaats land in 1889 and eighty years later, in 1969, when they lost the remnants of their original rights in land in the form of labour tenancy. Even when they submitted the current claim for restitution, they were a community with sufficient communality with their Maake ancestors. The Court further concluded that the Popela community had held on to some communal rights in land after the loss of the customary right in land in 1889; and that in 1969 when they were expelled from the farm they were dispossessed of occupation, ploughing and grazing rights in that land as envisaged in the Restitution Act.⁴⁷ The dispossession was not proven to have been a result of a private decision of the farmers concerned but as a result of past racially discriminatory laws or practices. The Popela community therefore had the right to restitution of their lost land rights.

The following principles of interest to the present research can conclusively be derived from the *Popela* case:

- It is possible for a group to be classified as a community without the customary or traditional element even though their land rights would have been derived from customary rights to land as a right of the community to begin with.
- There is no requirement under the Restitution Act that a group must show an accepted tribal identity and hierarchy to be deemed a community.
- Where it is appropriate, bonds of custom, culture and hierarchical loyalty can be helpful to establish that the group's shared rules related to access and use of the land; and
- These bonds may also demonstrate the cohesiveness of the group and its commonality with the group at the point of dispossession.

The Bataung Ba-Ga Selale case

As explored in the *Popela* case a community is recognised as a legal entity under the Restitution Act and may claim restoration of rights in land. The *Bataung Ba-Ga Selale* case is concerned with another aspect of the definition of a community namely how it is defined in relation to customary law. The interesting question in this case arose during the pre-trial conference of the LCC under which the landowners from which the Bataung Ba-Ga Selale community claimed back its land raised the question of whether the members of the group that lodged the restitution claim did in fact constitute the community of Bataung Ba Ga Selale.

In confirming the identity of the community members the landowners asked the LCC to order the community to forward information regarding, identification-numbers, full names and addresses. In the views of the landowners they needed to present information to the LCC for the court to be able to adjudicate the matter properly. The claimant's response to the request was that it was only willing to provide this information in relation to the community members who were heads of households. In its opinion, as stated at the pre-trial conference, the members of the community consisted of the family heads or the heads of households.⁴⁸ In the written submissions that were handed in after the pre-trial session the claimant limited the information that it was willing to submit further. It was stated that the community was represented by its traditional structure consisting of the Chief and his councillors in their capacity as representatives of the community and the provision of the information requested in respect of the Chief and councillors would suffice.⁴⁹

The LCC in dealing with this matter firstly concluded that the landowners had a right to at least a list of the names and addresses of the community members. But, for the relevance of the present research it went on by discussing the concept of community under customary law. In the statements of the claimant it was firstly suggested that the community consists only of the family head or heads of households. A head of household was then defined by the LCC as:

A black male who has married one or more wives by customary rites, and may and does include the head of a family home, and also the person who is lawfully in control of a family after the death of the head of the family, being his heir or, if the heir is a minor, the legal guardian of the heir until the latter becomes emancipated.⁵⁰

If the Bataung Ba-Ga Selale community were only made up of the family heads, which the claimant indicated at the pre-trial conference, the community would by applying the above definition, as accepted by the representative of the community, only consist of men. The LCC concluded that such a conception of community which discriminates in favour of one gender was not compatible with the Restitution Act. This Act clearly states in section 35 (3) that:

An order contemplated in subsection (2) (c) [an order establishing the manner in which the rights are to be held by the community author's comm.] shall be subject to such conditions as the court considers necessary to ensure that all the members of the dispossessed community shall have access to the land or the compensation in question, on a basis which is fair and non-discriminatory towards any person, including a tenant, and which ensures the accountability of the person who holds the land or compensation on behalf of the community to the members of such community.

The LCC then went on to analyse whether the definition of community within customary law could favour the definition such as it was presented by the representatives of the Bataung Ba-Ga Selale community. In this regard the LCC concluded that customary law in general views the position as the head of the family as representative but not exclusive in the sense that the other members of the community would not count as full members. The LCC outlined the concept of family head as a man who is:

By no means a despot in law as is sometimes supposed: he has control of each house, but its members have a collective interest in its affairs and property. Whenever a family head deals with the property of a house, he should, and usually does, consult the wife of that house, and also the eldest son [...].⁵¹

The LCC concluded the case by ordering the claimant to provide the landowner with information regarding the full names and residential addresses of every member of each household in the alleged community.

The following principle of interest to the present research can conclusively be derived from the *Bataung Ba-Ga Selale* case:

- A definition of community which discriminates in favour of one gender is not compatible with the Restitution Act and therefore not applicable.

Exploring customary law from a feminist perspective

The jurisprudential review indicates the significance of an independent judiciary to secure women's basic rights in situations where the state fails to uphold its obligation to eradicate discrimination through legislation undertaken under the constitution and through international conventions. Cases such as the *Bhe*, *Shibi* and *Shilubana* cases demonstrate the potential of a legal feminist approach and the interaction between a wide range of factors such as a facilitating constitution and civil society organisations with the ability to organise legal resources to challenge discriminatory customary laws. The objectives of the jurisprudential review was to explore what position customary law has under the constitution, how customary law relates to or conflicts with the right to gender equality; and its potential for development in line with the constitutional objectives, as brought forward in the first research question.

Case law in countries with an inherited common law tradition such as South Africa, often demonstrates how individuals and civil society can use litigation to promote legal change. In the *Bhe* and *Shibi* cases the Court decided that the provisions of the Black Administration Act which were based on the principle of male primogeniture were contrary to the principle of gender equality in the constitution. Hence, the effectiveness of judicial activism as a means of protecting women's human rights builds, as displayed in the cases above, on the constitutional interpretation and protection of the right to equality, the existence of an independent judiciary, the prevailing legal culture in the country and lastly the strength of civil society to challenge discriminatory laws, policies and practices.

In regards of the interpretation and protection of the right to equality and the strength of the civil society, South Africa is well off. The Court has during the last decade showed that it takes the issue of equality very seriously, in the beginning with focus mostly on race but lately more and more in relation to sex and gender discrimination. However, in terms of the prevailing legal culture it should be pointed out that the mere acceptance of legal pluralism where the constitutional system envisages a place for customary law, where customary law should be accommodated, not only tolerated, as a part of South African law creates an environment that could be contrary to the constitutional rights which calls for active and independent legal institutions, such as the Court, to act as watchdogs.

The state is the central guarantor of all basic human rights. However, as established in the jurisprudential review, the state is not the only regulator of women's access to land. Local formal and informal institutions such as tribal councils

and chiefs have the capacity to produce norms. These internally-generated rules are sometimes so strong that they take precedence over state law or they are implemented into state law as the official version of customary law. On many occasions discriminatory customary practices overrule equal rights-based statutory laws, as will be further argued in relation to CLARA, as discussed in the following chapter.

The customary law interpreted and applied by the courts is often the one found in statutes, case law or textbooks on customary law and not the “lived” custom. It is very difficult for the courts, as indicated by the Court in the *Bhe* and *Shibi* cases, to determine what exactly forms part of customary law in relation to a specific community because customary law possesses a large portion of subjectivity in the sense that it can be viewed differently by different people within the same group, as further became evident in the *Shilubana* case.

Against this backdrop of the unclear and subjective boundaries between state law and the various forms of customary law existing in South Africa, it is difficult to come to a conclusion regarding the degree of discrimination that women could be subjected to under customary land tenure systems; women’s position under customary law is uncertain. Since colonization and apartheid local customs and practices have been fused and mixed with national laws and state policies creating many forms of local amalgam forms of customary law that are inherently patriarchal. The jurisprudential review clearly demonstrates how this multifaceted and situational amalgamation process continues to influence the debate about women’s land rights on the local, national and international stages; thus simultaneously the political rhetoric highlighting the differences between African and

Western property rights systems and the positive values of communality is also prominent especially in South Africa.

In terms of the communal aspect of land the court has tried to move away from a community concept that could promote inequality of women. The Court has pointed out that there is no requirement under the Restitution Act that a group must show an accepted tribal identity and hierarchy to be deemed a community; and that it is possible for a group to be classified as a community without the customary or traditional element even though their land rights would have been derived from customary rights to land as a right of the community to begin with.

Where it is appropriate, bonds of custom, culture and hierarchical loyalty can be helpful to establish that the group's shared rules related to access and use of the land; but a definition of "community" that discriminates in favour of one gender is not compatible with the constitution and is therefore invalid. These interpretations are of specific significance in relation to the development of customary law, as discussed above, because it allows for the reform of the social entity as such and will with time hopefully give women greater room to manoeuvre. Customary law is formed as a part of the interaction of the group with regards to the social situation of the same. Therefore it will be of importance if and when the dynamics of the group changes because it will allow the rules to change, possibly in line with the principles promoted and governed by the constitution. This argument is further of importance in relation to the creation of communal associations holding communal land on behalf of a community, further discussed in the following chapter, because it is a clear attempt from the government's side to accept the "communality" of customary tenure but not the elements of customary

law that have the effect of excluding women from land management.

Furthermore, even though the Court has been positive towards the protection of customary law, it has, in line with the bill of rights, had to put forward limitations in relation to the application of customary law. The constitution is very clear on the issue of the hierarchy of sources in stating, as was done in the *Bhe*, *Shibi*, *Shilubana* and *Hadebe* cases, that legislation that mirrors customary rules contrary to the objectives of the bill of rights is invalid even if it reflects customary rules that are being practiced by a community. This entails the courts on all levels to promote customary law, including customary land tenure, but only as so far it does not directly or indirectly violate any of the rights as set out in the bill of rights.

In this regard the courts have to entertain a difficult balancing act between protecting the traditional and cultural values of a specific group to prevent assimilation (as protected by the constitution as for example religious and cultural freedoms) and protecting the rights of the individuals existing inside the group from the sometimes discriminatory outcomes of customary law and the internal power structures of the group. (The tension between the need of special protection of cultural groups, such as traditional communities, minorities and indigenous peoples and the protection of the basic rights of the individual are further discussed in chapter 5 in relation to the argument brought forward by Kymlicka and Moller-Okin). All courts within the South African system consequently have an obligation to check the contents and outcome of the application of customary law against all of the above mentioned rights in every case they have before them that involves customary law. In this regard it is clear from the

reasoning in the above mentioned cases that no difference is made between the “lived” version of customary law and the “official” version.

Consequently, if the custom (official or lived) is contrary to any fundamental rights it should be declared invalid. However, to be able to determine the consequences of a specific custom, and this is of relevance for the constitutional protection of any fundamental right, it is of importance for the Court to be able to determine the actual contents of the law. In this regard the common law (*Richtersveld*, *Bhe* and *Shibi* cases) brings forward the principle that the nature of customary land rights has to be determined by reference to customary law only and not through the lens of foreign legal concepts; and that the contents of customary law should be determined with reference to both the history and the contemporary usage of customary law of the community concerned. It is not permitted, as was common during colonial and apartheid times, to prescribe what ought to be the substance, relying only on existing impressions on what customary law is from an outsider’s perspective.

Hence, it is crucial, as was shown in both the *Richtersveld* and the *Shilubana* cases, that the courts are able to ascertain with some sort of certainty what customary rules actually entail in order to, on the one hand, avoid customary rules being rendered invalid on unreasonable grounds, and on the other hand, protect vulnerable groups from rules that indeed violate any basic rights. In terms of limiting any of the rights in the bill of rights as set out in section 36 of the constitution (as outlined in chapter 3) on behalf of any principle, value or right set out in customary law, the approach as recommended by the Court can be described as a centric activity. In the centre are core values, such as the right to non-

discrimination and in terms of such a right there are very few grounds on which it can be limited. As we move away from the core there will be more and more grounds on which a right may be limited. As of importance to the present research, the relationship between equality and customary law is such that hardly any limitation of equality as presented in customary law would be rendered a valid limitation under the constitution.

Consequently, the issue arises as to how customary law is to be merged with the constitutional principles in the bill of rights. The solution favoured by the Court is a pragmatic method of development of customary law, used on a case to case basis, to bring it in line with the constitution. Customary law is flexible, as spelled out in the *Richtersveld* case, and has the ability to develop. The Court has forwarded the idea that communities that observe customary law have a right to develop their law. In line with this, the Court in the *Shilubana* case also put forward the view that traditional authorities have a right and a corresponding duty to make constitutionally driven change in traditional leadership.

The Court has, ever since it was constituted, taken a very practical approach to its objective of a socio-economic transformation of the South African society. It will rather include than exclude and in terms of the legal pluralism of South Africa it has done what it can to preserve the core of the different legal systems while trying to bring them in line with the constitution. One major problem, as pointed out by the Court in the *Bhe* case, is the fact that many customary rules, such as the rules of succession, have not been given the space to adapt to the ever changing social conditions and values of the new South Africa. The application of customary law rules of succession under conditions that greatly differs from the

traditional pre-colonial settings, causes problems such as the discrimination and marginalisation of black women. In the South African society of today there are signs pointing both in the direction of an increase in the development of customary law towards the constitutional goals, which the *Shilubana* case clearly represents, and in the direction of a return to traditional values which is particularly highlighted by the collective view brought forward by the community in the *Bataung Ba-Ga Selale* case, and the strong critique that was voiced when the Court rendered its judgement in the *Shilubana* case.

Exploring the jurisprudential review from a peace and development perspective

It is clear from the jurisprudential review, specifically in the *Richtersveld*, *Bhe* and *Shibi* cases that there is a strong instrumental relationship between economic development and the access to and possession of land as a part of the concept of property. It is also apparent, referring back to the research carried out by Green (2008) Panda and Agarwal (2005) and Ikdahl et al. (2005), that in having access to or being in possession of property, women are more likely to escape the plagues of HIV/AIDS and domestic violence and are more likely to feed and educate their children, which in turn is directly linked to further development of the family and even the community in which they live.

However, there is not necessarily a straight line between individual ownership and poverty reduction through economic development, as is further discussed in the following chapter in relation to the problems of de Soto's theory and its sometimes one eyed look at the reduction of poverty by the formalisation of property rights. It is further

debatable if the alternative to individual titles i.e. communal ownership based on a single title deed being conferred to the community as a whole, is a viable option in terms of the development of the community (as in the *Richtersveld*, *Popela* and *Bataung Ba-Ga Selale* cases). Further, it has also been put forward in the present research that customary structures of decision-making, under certain circumstances i.e. the patriarchal based power without the reference to the social context of customary law (often found in the official codified versions of customary law), can have a negative impact on women's access to and power over communal land. As land is an important denominator in terms of the economic development of every individual, the negative aspects of communal ownership could put further restraints on the overall development of the relevant communities.

Furthermore, there is a strong relationship between the future protection of customary law under the new constitution and the demand for customary law to develop to fit in with the new constitutional values, as expressed in the *Shilubana* case, and further with the new social and economic reality it exists in. As was put forward in chapter 2 and in the *Bhe* and *Shibi* cases, it is mainly the customary law that has either been codified and altered and taken out of context or applied in a foreign context without the social support structures that ultimately discriminates against women land rights. In the first instance the codification needs to be declared invalid on a number of constitutional grounds as was done in the *Bhe* and *Shibi* cases; and in the latter, the law as such has to be developed to fit in with the new society in which it exists and to align itself to the values of equality and power-sharing as inherent in the constitution. This development cannot take place without the further engagement of the state in terms of

promoting the values it would like to see prevail in the customary context but also in terms of promoting the economic and intellectual development of every individual through education and employment.

Further, in terms of giving relevance to law within the field of peace and development studies the most important function of the law, as is shown in the jurisprudential review, is to prevent or mediate in conflicts arising out of the quest for scarce resources and the different entitlement schemes that exist within different groups and legal systems. These cases have proven that under certain circumstances e.g. the dispossession of land, the disintegration of communities, the scarcity of resources, the collapse of customary social structures and poverty, customary interest as represented by traditional leaders and sometimes the male head of the household may conflict with the basic rights of women of the same community or household. In this regard law can be one tool in structuring possible avenues for reconciling opposing interests and determining the most pragmatic ways of avoiding further conflicts. The South African legislation generally offers good support in that it has a progressive and inclusive approach to the diversity of legal systems, sources, interests and rights all embraced by the constitution. However, as is clear from this discussion, it is indeed factors outside the legal field that are the most important in preventing and promoting conflicts endorsed by the shift from a customary structure built around a social context where even though power structures existed, the main focus was on the greater good of the unit rather than the individual.

As is evident from the *Bhe* and *Shibi* cases, when people live in poverty and there is no longer a real sense of community the application of customary law in terms of its

patriarchal preference can have detrimental results for the weaker parties, in these cases the widows. Therefore it is clear, as supported by the majority of the cases, that one of the most important factors in support for traditional communities is an overall increase of the economic and infrastructural development of the relevant communities and then, as an addition, the development of the law as applied by the communities to reflect the new circumstances under which the community lives. The law can in this regard play a supportive role in bringing back, through the restitution process, one of the most fundamental resources to the communities i.e. land that they were dispossessed of during the long colonial and later apartheid rule. Law can also, as touched upon above, act as a mediator and conflict preventer in reflecting and protecting basic rights of all at the same time as it promotes the preservation and development of customary law. However, without the further development in terms of livelihoods, food production, educational institutions, health facilities and basic infrastructure there will be neither a progress in terms of the protection of women's basic rights nor any progress in the development of customary law to further support equality in access and possession of land.

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- ¹ Alexkor Ltd. v Richtersveld community and Others, paragraph 4 and 5.
- ² Ibid. paragraph 84.
- ³ With further reference to Mabo v Queensland and Delgamuukw v. British Columbia.
- ⁴ Alexkor Ltd. v Richtersveld community and Others, paragraph 50.
- ⁵ Ibid. Paragraph 51.
- ⁶ Ex Parte Chairperson of the Constitutional Assembly, paragraph 197.
- ⁷ Alexkor Ltd. v Richtersveld community and Others paragraph 58.
- ⁸ Intestate meaning that a person dies without a will or the will is found invalid. In a person dies intestate the estate is to be administered in terms of the Intestate Succession Act, Act 81 of 1987. Intestate succession is based primarily on blood relationship; Illegitimacy shall not affect the capacity of a blood relation to inherit.
- ⁹ Alexkor Ltd. v Richtersveld community and Others, paragraphs 40 and 41.
- ¹⁰ Ibid. paragraph 43.
- ¹¹ Alexkor Ltd. v Richtersveld community and Others, paragraph 45.
- ¹² Bhe and Others v Khayelitsha Magistrate and Others, paragraph 75.
- ¹³ Ibid. paragraph 169.
- ¹⁴ Bhe and Others v Khayelitsha Magistrate and Others, paragraph 77.
- ¹⁵ Ibid. paragraph 78.
- ¹⁶ Bhe and Others v Khayelitsha Magistrate and Others, paragraph 80.
- ¹⁷ Ibid. paragraph 209.
- ¹⁸ Bhe and Others v Khayelitsha Magistrate and Others, paragraph 136 (2) and (4).
- ¹⁹ Shilubana and Others v Nwamitwa, paragraphs 1 and 2.
- ²⁰ Ibid. paragraph 4.
- ²¹ Shilubana and Others v Nwamitwa, paragraph 23.
- ²² Ibid.
- ²³ Shilubana and Others v Nwamitwa, paragraph 44.

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- ²⁴ Also with reference to *Bhe and Others v Khayelitsha Magistrate and Others*, paragraphs 82 – 87 and 152 – 153.
- ²⁵ *Shilubana and Other v Nwamitwa*, paragraph 47.
- ²⁶ *Ibid.*
- ²⁷ *Van Breda and Others v Jacobs and Others* at 334.
- ²⁸ *Shilubana and other v Nwamitwa*, paragraph 54.
- ²⁹ *Ibid.* paragraph 56.
- ³⁰ *Shilubana and other v Nwamitwa*, paragraph 5.
- ³¹ *Ibid.* paragraph 8.
- ³² Contained in proclamation R195 of 1967, Regulation Gazette 839, 8 September 1967 and made in terms of the Bantu Administration Act, Act 38 of 1927, as amended.
- ³³ The Black Administration Act section 11 (3) (b).
- ³⁴ A Kraal is an enclosure for cattle or other livestock, located within an African homestead or village and surrounded by a palisade, mud wall or other fencing. The term is often used in Codes to indicate the family domain as including both the living areas and the area of the cattle.
- ³⁵ *Hadebe v Hadebe* paragraph 13.
- ³⁶ *Ibid.* paragraph 15.
- ³⁷ *Hadebe v Hadebe* paragraph 2.
- ³⁸ *Ibid.* paragraphs 7 and 8.
- ³⁹ *Hadebe v Hadebe* paragraphs 7 and 8.
- ⁴⁰ *Alexkor Ltd. v Richtersveld community and Others* paragraph 40.
- ⁴¹ *The Department of Land Affairs and Others v Goedgelegen Tropical Fruits* paragraph 45.
- ⁴² *Ibid.* paragraph 35.
- ⁴³ *In Re Kranspoort Community* paragraph 83.
- ⁴⁴ *Ibid.* paragraph 34.

⁴⁵ The Department of Land Affairs and Others v Goedgelegen Tropical Fruits paragraph 40.

⁴⁶ Ibid. paragraph 41.

⁴⁷ The Department of Land Affairs and Others v Goedgelegen Tropical Fruits paragraph 47.

⁴⁸ Bataung Ba-Ga Selale case, paragraph 8.

⁴⁹ Ibid. paragraph 4.

⁵⁰ Bataung Ba-Ga Selale case, paragraph 8, as quoted from Bekker (1989, p. 71).

⁵¹ Bataung Ba-Ga Selale paragraph 9.

Chapter 5: Who benefits from the formalisation of property rights?

As is evident from the present research thus far, the interaction between statutory, common and customary law has the possibility of affecting women's legal land rights in many different ways. In some cases, discriminatory customary laws, which were formalised through colonial and apartheid legislation, have been modified through customary practices as the community becomes accustomed to changing legal, social and economic circumstances. As an example, research carried out by WLSA in Zimbabwe and Lesotho has demonstrated how properties were transferred to daughters and widows in contexts where the formal customary law did not recognize their equal inheritance rights. Further research by WLSA has also indicated how the practice of land reform, which might seem gender-neutral on paper, is in fact dominated by informal rules that favour men (WLSA 1994 Lesotho and 1996 Zimbabwe).

An interesting and for the present chapter relevant issue is further the issue of the so called spill over effect on formalisation. Research carried out by Shipton (1989) in relation to the introduction of registration i.e. formalisation of land possession to private property in various Sub-Saharan countries such as the Belgian Congo in 1886, Togo in 1888, Madagascar in 1897, Uganda in 1900 and Kenya in 1954 suggest some similarities in terms of the beneficiaries. Firstly, the great majority of the original beneficiaries were men, i.e. the title deeds were almost exclusively registered in the names of males. Secondly, rich and influential people benefitted to a greater extent from the formalisation of property rights and

received larger and better situated plots. The most well documented country in Shipton's study is Kenya. Data collected in Kenya suggests that in the formalisation process of property rights as carried out from 1954 and onwards only 7 percent of the registered rights holders were women. The result of Shipton's study can further be put in relation to more recent research carried out in Kenya by amongst others, Nyammu-Musembi (2002) and Whitehead and Tsikata (2003) indicating that customary norms still have a spill-over effect on titling and registration of land today, even though the legal status of women in Kenya has improved over the recent years.

As an indicator of the positive sides of the formalisation of property rights the Property Rights Alliance, in cooperation with de Soto, launched the International Property Rights Index (IPRI) in 2007. The long-term purpose of the IPRI is to amplify the role that private property plays in increasing a nation's economic well-being. In its 2008 report South Africa is placed high on the list, as number 23, out of 115 countries in the same category as Sweden, France and the United States (IPRI report 2008: p. 22 online). However this index only indicates the many different aspects of the protection of individual property rights such as the legal and political environment, the protection of physical property and intellectual property and does not reflect on the question that has been put forward as the main critique against de Soto's ideas, namely: whether the formalisation of informal property relations will be equally beneficial for everyone within groups and communities (Ikdahl et al 2005: p.12). As an example von Benda-Beckmann (2003: 187ff), in his review of de Soto, points to the opportunities that formalisation of property rights offer for new elites and the middle class who are already in a

position to take advantage of the legal system. Ikdahl et al (2005: p.12) further puts forward the argument that:

How international, regional, national and local laws, norms and values come together to situate individuals' and groups' claims to resources in processes of formalisation ought to be understood in the light of power and power relationships.

Further, Griffiths (2007: 217f) concludes that the gendered position of women in differing economic, social and political contexts requires an examination of the power of women to negotiate in the process of formalisation. In relation to this, Peters argues that unequal power relations in terms of gender and class will have far-reaching implications on the ways in which land rights are negotiated. She questions, as relevant to the present research, if and how the projected economic effect of the formalisation of property rights can be achieved without reinforcing existing inequalities (Peters cited Ikdahl et al 2005: p.12). The formalisation of property rights, as for example carried out within the restitution programme under the South African constitution, could, as is further discussed in this chapter, exclude women from accessing land simply because the system is structured around a right based approach, in turn based on historical and customary claims. Before the further discussion about the entitlement structure set up under the Restitution Act and the legislation governing communal ownership, some important aspects of the political context of the land reform programme will be highlighted.

The political context

To understand the challenges facing any strategy that aims at redistributing land on the scale that the South African land reform does it is of importance to be aware of the

historical events that brought us to the present day situation, as discussed in chapter 2. It is further of relevance to understand the relationship between the present day land situation, based on the history of dispossession, and why the government have seemingly turned focus away from the need of gender equality in favour of the focus on customary titles and communal ownership, as further discussed below. In essence the present South African government, after the 2009 elections, wants to redistribute great masses of land at a much higher pace than previously to foster conditions of equal access to land in line with the notion of equality based on race rather than gender.

The reasons behind this strategy are easily understood when scrutinising the statistical data on poverty as presented by the UNDP and UNHCR in 2008 and the South African government in 2007 combined with the amount of land that has been redistributed so far and the ratio in which land is still owned by whites. In the statistics presented by the UNDP on human development, HDI¹, South Africa was placed on the lower half of the scale amongst the countries that were classified as having a medium human development, in the 125th place of 179 countries. The HDI indicates that South Africa is still ahead of its African neighbours; but that in terms of the overall picture of life expectancy, education and being able to award its citizens a decent standard of living South Africa still lags behind the majority of the countries of the world.

In terms of the statistics indicating the standard of living, presented in the statistical data from Statistics South Africa which is a governmentally operated service providing data from surveys carried out annually, South Africa still has major obstacles to overcome. The percentage of households

who live in informal dwellings increased from 12.7 percent in 2002 to 15.4 percent in 2007, indicating that out of the 13.3 million households that were established in the survey in 2007, about 2 million lived in informal dwellings. Further, in 2007, 8 percent of all households had no access to sanitation but used a bucket toilet or no toilet; and 29.1 percent were still dependent on paraffin or wood for the purpose of cooking. In terms of water and electricity supplies 28.7 percent of the households had no access to piped water on site or in the dwelling and 17.5 percent had no access to electricity either through the mains or generator (Statistics South Africa 2007 General Household Survey online: p. 14).

Further in KwaZulu-Natal, the most populous province of South Africa, the UNHCR reported that out of the 10 million people living in the province 1.2 million faced food shortages and were living on less than 200 ZAR a month while the provincial agricultural department reported that 5.3 million people were living in poverty in the province. Between July 2007 and July 2008, food prices increased by an estimated 17.8 percent as stated by the National Agricultural Marketing Council's quarterly food price monitor. This in turn has led to increased levels of poverty. South Africa has in the last 10 years gone from being a net exporter to being an importer of food (UNHCR-IRIN Report: 2008 online).

At the height of apartheid 87 percent of the land in South Africa was owned by the white minority, leaving black people with 13 percent, i.e. the land in the homelands. The pace of transformation of land has been painfully slow. Even though a governmental instigated land audit was carried out in 2008 it is still unclear who owns what in South Africa. The audit indicated that about 18 percent of the land was owned by black people, but this did not include state-owned land and

land in the former homelands. It further did not account for any private land sales after 1994 because since then race is no longer registered in relation to property transfers (Groenewald Mail and Guardian 2009). However, whether this figure is correct or slightly higher as has been indicated in studies published by independent research organisations, the problem that the largest population group in South Africa in terms of race owns far less than the white minority still remains (Groenewald Mail and Guardian 2009). It also shows that fifteen years after independence only 5 percent, or about four million hectares, of the land has been redistributed from white to black hands.

In 1994 the government introduced the land reform programme adopting the “willing seller, willing buyer” model, based on the WB's approach of a market-led land reform to correct the apartheid-era policies under which the white minority held the greater part of the land, as indicated above. The government under Presidents Nelson Mandela and Thabo Mbeki firmly based land reform on the “willingness” principle and on the idea that small scale farming would not be the backbone in the strategy of developing the rural areas but rather the idea of giving people a freedom of choice through land ownership as to how they wanted to develop themselves and their land. President Mandela and to a certain extent President Mbeki, also kept the traditional leadership at arms length in the discussions about the development of the land reform policy.

Since December 2007, after the presidency of the ANC was taken over by Jacob Zuma, this approach has been subjected to increasing critique both within and outside government circles, and further blamed as the reason for the transfer of only 5 percent of white-owned land to black South

Africans by the beginning of 2008. After President Mbeki's second term in office was cut short at the end of 2008, the ANC have, under the leadership of Jacob Zuma, lurched sharply to the left and the Congress of South African Trade Unions (COSATU) and the South African Communist Party (SACP), ANC's alliance partners, have been wielding greater influence over government policy. The ANC under Zuma has also reached out to the traditional leadership for it to play a greater role in the land reform programme. The government has introduced a target of transferring 30 percent of land by 2014 which means that 25 percent of the land in South Africa has to be redistributed within the next five years. This indicates that the same amount of land that the government managed to transfer so far has to be transferred on a yearly basis for the next five years (UNHCR-IRIN Report: 2008 online).

Further, some high profile ANC members have indicated that the "willingness" principle should be scrapped. In October 2008 the ANC secretary general and SACP national chairperson, Gwede Mantashe, was quoted saying that: "land redistribution cannot depend on the willingness of those who own to sell" indicating that land expropriation would come to play a greater role. The ANC as well as COSATU and SACP are placing the apparent failure of the willing seller, willing buyer model firmly at the doorstep of the white farmers, whom they accuse of demanding higher prices for their land so as to stall the redistribution process (UNHCR-IRIN Report: 2008 online).

Contributing to the problem is the fact that only 13 percent of the land in South Africa has a potential for high agricultural output (UNHCR-IRIN Report: 2008 online). As was discussed above, an increase in food prices and apparent

food shortages are becoming major problems for the government. In the past, South Africa's internal food production has, in large, depended on the high scale and advanced technological farming as carried out by predominantly white farmers. The objective of the ANC is to transfer this land to black hands without decreasing the agricultural output and to increase small scale farming in the rural areas to decrease local food shortages. In relation to these objectives the ANC introduced an aggressive approach to the issue of unequal ownership of land along racial lines and the slow pace of land reform in the party's manifest launched in relation to the elections in early 2009. The ideas as presented in this manifesto well describe the political platform on which the land reform rests and further give a good indication about the concern of women's rights within land reform.

In the 2009 national election manifesto, the ANC identified land reform as being one of five priority areas for the coming five years (ANC Manifesto 2009 online). The ANC is, in the manifest, taking a great step away from the liberal market led reform that was introduced in 1994 towards a land strategy based on the devise: "The land shall be shared amongst those who work it!" (ANC Manifesto 2009 online). Further the ANC also made a strong reference to the role of the traditional leadership in land reform by stating that one of its main objectives is to: "Strengthen partnerships between government and the institution of traditional leadership to focus on rural development and fighting poverty" (ANC Manifesto 2009 online). Land reform is to be geared towards poverty alleviation and development of the rural areas mainly through the support of small scale farming (contrary to the approaches of Presidents Mandela and Mbeki previously). In the 2009 national election manifesto it is further stated that:

“The ANC is committed to a comprehensive and clear rural development strategy linked to land and agrarian reform [...]” (ANC Manifesto 2009 online).

The ANC is planning to achieve rural development through the expansion of access to food through production schemes in rural and peri-urban areas, teaching people how to grow their own food; the government (the “ANC” and “government” is used interchangeably!) will also further support existing community schemes which utilise land for food production in schools, health facilities, churches and urban and traditional authority areas.

To make land available for this type of small scale and cooperative farming, the ANC aims at reviewing the appropriateness of the existing land redistribution programme and will introduce measures aimed at speeding up the pace of land reform which will intensify the land reform programme ensuring that more land ends up in the hands of the rural poor. The most important measure, as introduced recently, is the new expropriation law to replace the Expropriation Act of 1975. The current Act allows the Minister of Public Works to expropriate for public purposes only and requires market-related compensation. However, the proposed new legislation as brought forward in the Expropriation Bill² as approved by the Cabinet, gives government far-reaching powers to decide what property should be expropriated in the “public interest” and how much should be paid for it. Many critics have argued that this will limit landowners’ ability to contest such decisions in court and that it would in fact be unconstitutional and contrary to the protection of private property in section 25 (1) (Groenewald Mail and Guardian 2008). The Bill has been tabled for review but is expected to be discussed again by the responsible portfolio committee during the latter half of 2009.

There are many different aspects of the problems that could occur in relation to the new approach of the government (not all discussed further in the present research): firstly it could be argued that the success of any land reform must be grounded on the respect of constitutional rights and the rule of law; secondly it could be put forward that the government has lost focus on the position of women in the land debate in favour of the idea of securing titles to all costs, when further involving traditional entities in land development, further discussed below. Thirdly, it could also be posited that land reform without the proper backing of the “new” owners could lead to a sharp drop in agricultural production and an increase in the already high food prices, affecting those who are already poor the most and slowing down or eliminating any form of development.

Land reform through the restitution of land rights

The coming to an end of the apartheid system and the abolishment of the Land Act and the Group Areas Act in 1991 paved way for land reform and a new system of land law. After the first free elections in 1994, restitution as a way of redressing the massive land dispossessions suffered by black South Africans under the white minority rule, was introduced in section 8 (3) (b) of the interim constitution. The injustices of the racial dispossessions were multidimensional; the consequences were, amongst others, increased gender discrimination in relation to land, landlessness, insecure tenure and inadequate compensation for the value of the property, all contributing factors to the wide-spread poverty that plagues South Africa today.³ The land reform has the potential to heal these rifts but it can also have dramatic and

potentially detrimental results for the existing owners and users of land (van der Walt and Pienaar 2006: p. 334). However, in the view of the history of South Africa it is important that the unequal distribution of land is rectified but the land reform programme has to be implemented within the ambit of sections 9, 25 (a reference to the property clause, section 25 of the constitution, is found in Annex IV) and 36 of the constitution to secure a just and peaceful transformation. Sections 25 (5-9) constitutes the base for land reform and section 25 (7), of specific relevance to the present research, spells out the following:

A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.

The Restitution Act was passed by the newly elected South African Parliament in November 1994. Section 2 of the Restitution Act spells out that a person has the right to restitution if he or she, or a direct descendant to the entitled person, was dispossessed of a right in land after the 19th of June 1913 as a result of past racially discriminatory laws or practices. This section further confers the same right to communities or part of a community dispossessed under the same circumstances. The term “community” has been further outlined in the *Popela* and the *Bataung Ba-Ga Selale* cases, as discussed in chapter 4.

The specific date relates back to the enactment of the Land Act of 1913, limiting indigenous South African’s rights to own land, as discussed above. It could be argued, as done by Roux (1998) that this date is arbitrary because the immense effects of the colonial land deprivation preceded the

promulgation of the Black Land Act and that the arbitrariness of the cut-off date could cause severe hardship amongst claimants that will be excluded, possibly narrowly from seeking restitution.

The Restitution Act provided the victims of forced removals (including the loss of customary rights in land), that took place after the cut-off date, with an opportunity to lodge restitution claims from 2nd December 1994. To begin with the cut-off date for the lodgment of claims was the 1st of May 1998. The parliament later extended this date to 31st December 1998 by adopting the Land Restitution and Reform Laws Amendment Act of 1997. The restitution programme was subsequently closed for further application on this date. By 31st October 2008, a total of 2265794 hectares (ha⁴) of land had been transferred through the restitution programme at a total cost of 8.8 billion rand.⁵ As of the 31st of December 2008 there were 4707 outstanding claims still to be settled and according to the statistics as published by the government, only 4.89 percent of all the claims that had been lodged before the deadline had been settled.⁶

As mentioned, the aim of the Restitution Act is to provide for the restitution of rights in land to persons or communities dispossessed of such rights after the 19th of June 1913 as a result of past racial discriminatory laws or practices. In other words the Restitution Act entitles individuals or their descendants, who have been dispossessed of a right in land to lodge claims with the state.⁷ A right in land is defined in the introduction to the Restitution Act as:

Any right in land whether registered or unregistered, and may include the interest of a labour tenant and sharecropper, a customary law interest, the interest of a beneficiary under a trust arrangement and beneficial occupation for a continuous

period of not less than 10 years prior to the dispossession in question.⁸

As established in the *Richtersveld* and *Popela* cases a right in land is specifically defined to include a customary right in land, however excluding such titles dispossessed before 1913 i.e. excluding so-called aboriginal or native titles as were awarded to indigenous peoples in Australia and Canada respectively in the *Mabo v Australia* and *Delgamuukw v. British Columbia* cases.⁹ The difference between a native title and a customary right in land is basically that a native title involves the recognition of pre-existing, pre-colonial rights and interests of indigenous peoples in relation to land and water resources: while customary land rights generally involve the grant of interests in land under various legislations. The two concepts differ in terms of what areas can be claimed, who can make a claim and the over-all claim process. The Court has, in the *Richtersveld* and the *Popela* cases to a certain extent accommodated historical land claims through a fragmentation of rights where part of the rights in land were kept even though the land were annexed during colonialisation, however this is outside the scope of the present research.

Further, as stated in the Restitution Act the dispossession must have been the result of past racially discriminatory laws or practices; but since many apartheid land dispossessions took place in terms of apparently race neutral laws the dispossession requirement in the Restitution Act was framed widely to also include dispossession that might look race neutral superficially but was indeed a part of furthering the objective of the racial segregation of the apartheid regime (van der Walt 2005: 294f)

The Restitution Act establishes a commission and the LCC to handle cases of persons' or communities' loss of pro-

perty, including customary interest in land. The functions of the commission include the investigation of the merits of claims, the mediation and settling of disputes arising from such claims and the drawing up reports with regard to unsettled claims for submission as evidence before the LCC. It was indicated in the interim constitution that land claims should be settled in an amicable way as far as possible, where the concerned parties enters willingly into the negotiations and the commission take on the role of mediator. However, if this approach is not achievable, section 22 of the Restitution Act spells out the provision for the establishment of a court to handle the matter. Hence, if the parties cannot reach a settlement or the Minister of Land and Agricultural Affairs is not satisfied with the settlement the commission can refer any claim to the LCC.

The LCC was constituted in 1996 and serves as a specialist court with jurisdiction only over disputes arising from the government's land reform programme. The LCC has the same status as the High Courts of South Africa with exclusive powers to determine a right to restitution in accordance with the Restitution Act. It also has the mandate to determine compensation payable in respect of land owned upon expropriation or acquisition of such land. Appeals to the judgments of the LCC can only be lodged with the Supreme Court of Appeal or with the Court as was done in the *Richtersveld* and *Popela* cases, discussed in chapter 4.

According to the Restitution Act, restitution can involve different means of compensation. These include restoration of the land from which claimants were dispossessed; offering the right to alternative land provided by the state and payment of financial compensation. One of overall values set out to guide the commission in the restitution process is the promotion of

gender equality. Further, the mission of the commission is to promote equity for victims of dispossession by the state, particularly the landless and the rural poor and equitable redistribution of land rights (DLA Restitution online). The objective is to implement the Restitution Act in such a way that it will provide support for the vital process of reconciliation, reconstruction and development in South Africa.

The process of restitution has been somewhat standardised over the years although it has gone through major changes in relation to the amendments to the Restitution Act. All restitution cases should be judged on their merits and the claimant has a constitutional right to actively participate in the formulation of a restitution settlement that suits his or her specific needs. However, the highly technical process, the non-implementation of gender specific measures to present women with an effective opportunity to participate in the procedure and the over emphasis on “cheque book restitution” whereby a majority of land claims is settled by cash transactions has moved the whole process away from its initial objectives.¹⁰ Since the year 2000 the commission has moved more and more towards a “standard settlement offer” awarding individual claimants within a group sharing the same history of dispossession equal amounts of compensation.¹¹ The “standard settlement offer” has been used as one way of expediting the process of restitution. However, it has been stated by the Commission that preference should be given to the restoration of land wherever possible (DLA Restitution online).

The restitution programme has clearly taken a right-based approach to level out the injustices in land. The restitution process serves to give back the right to land to its

original occupants, including customary rights in land. This approach will target the racial discrimination that took place in the past but may not favour women's access to land. The relevant land claims date back to 1913 and onward and a large part of the communities claiming land under the Restitution Act are traditional societies governed mainly by customary law. At the time of dispossession, before the introduction of the new constitution, black women did not play a major role as land holders except in exceptional cases; men were the more likely holder of the rights in accordance with the principle of male primogeniture.¹²

The right based approach in the constitution and the Restitution Act aims at transferring land titles back to the original right holders. This may in many cases discriminate against previously disadvantaged women because they were never land holders in the first place. Today's restitution process lacks methods and procedures to ensure the equality of women in the restitution process and to safeguard their rights in relation to access to land. Further, the Restitution Act does not contain any direct reference to any specific protection of women's land rights or prescribe any specific measures to ensure women's effective participation in the governance of land. Focus is primarily on the issue of racial discrimination as the basis for the restitution programme and the protection of women's rights has been left to policy documents and implementing strategies as worked out by the relevant department¹³ and the commission. There is, as Walker (2001: p. 2) suggests a: "persistent, recurring gap between policy and implementation, between principle and practice". While gender equity concerns are considered in a fairly rigorous manner at first tier policy level, these concerns are often not translated into practice because of the failure to determine

how to accommodate customary law without infringing on basic rights.

The DLA's and today the DRLR's strong public commitment to gender equity as a high-level policy goal is not coherently carried through into implementation guidelines or second-tier policy documents such as criteria for project approval, post-settlement plans and training manuals. These are the very documents that operationalise the Restitution Act and the first level policies by translating the broader commitments into practical objectives and methods. It is within the working documents on the strategies for implementation that projects will be approved, funds allocated, experts and consultants appointed and managers and staff rewarded or penalised for their performance (Walker 2001: p. 2). If these documents do not support gender equity and gender assessment strategies the strong protection of gender rights in the constitution and the relevant policy documents will be of no great significance.

Part of the problem of why gender equality is lost in translation from high level policy to lower level guidelines is that the conceptual tools essential to the first tier policy documents, are derived uncritically from existing orthodoxies. This makes them very difficult to translate into implementation strategies and procedures. An example of this is the repeated referral to the negative impact of the traditional patriarchal system in government policy, further discussed below, without any attempt to provide possible solutions and without addressing how this issue could be approached in practice.

The Communal Property Association Act

In all land reform programmes the issue of productivity is at the heart of the reform; the government wants to establish policy not only on how to distribute ownership as is the objective of the restitution process but also on how to hold the land. There are many examples on the African continent where governments have been swift in altering or abolishing customary structures for land governance because of the belief that customary tenure systems are responsible for decreasing land productivity and therefore inhibiting the progress of development. The South African government, however, have been hesitant in prescribing manners for land use and to abandon customary structures. It has instead focused on the matters of restoration of land rights through the restitution programme, as discussed above, and has put forward legal mechanisms for communal ownership built on customary structures.

In 1994, the ANC took the first step towards operationalising its strategy of communal ownership. In relation to the restitution process the government wanted to enable the communities that would have their land claims granted the opportunity of assuming legal personality and co-owning and managing the restituted land. To achieve this objective it had to present some form of formalisation strategy for how to structuralise customary land tenure. The policy response was the introduction the Communal Property Association Act No. 28 of 1996 (hereinafter referred to as the CPA Act).

The setting up of a CPA instituted a way of formalising customary rights in land held by groups under the informal system of customary tenure mainly after receiving land titles under the Restitution Act. In order for these communities to be able to acquire, own and manage the land on behalf of the

individuals that constituted the community they had to be able to form legal entities i.e. juristic persons that could take on juristic responsibilities such as legal ownership. The CPA Act allows a community to constitute itself as an association, commonly referred to as a Communal Property Association (CPA). Under the CPA Act the communities can create trusts or committees with duly elected boards of directors and officers to execute decisions on behalf of the group.

The objective with setting up a CPA is to legally define the relationship between the members of a community and the land they obtain under the restitution process.¹⁴ A community receiving land under the restitution process is legally obliged under section 2 of the CPA Act to form a CPA. The CPA is generally formed either before launching the claim with the commission or during the early stage of the negotiation phase.

In the preamble of the CPA Act three main objectives are listed; the establishment of appropriate legal institutions (CPAs) through which disadvantaged groups may acquire, own and manage property in common; to ensure that the CPAs are established and managed in a manner which is non-discriminatory, equitable and democratic and that the institutions are held accountable to their members; and to ensure the protection of members of a CPA against the power and abuse of other members.

The first step towards forming a CPA is for the community to apply to the director general of Land Affairs (hereinafter referred to as the director general) for the registration of a provisional CPA. The application has to contain the intended name of the CPA, information demonstrating that the community really is a community under the definition of the Act¹⁵, as discussed in relation to the *Bataung Ba-Ga Selale* case in chapter 4, clear identification of the land

intended to be governed by the CPA, a list of names and identity numbers of intended members of the provisional CPA¹⁶ and a list of the names of a democratically elected interim committee that will govern the provisional CPA prior to the registration of the CPA.¹⁷ If the director general is satisfied with the information in the application the matter will be referred to a registration officer at the DLA who will register the provisional CPA. The provisional CPA is prohibited from alienating any right in land under its mandate and is obliged to adopt a constitution for the CPA within 12 months from its registration. The director general has the mandate to extend this period with an additional 12 months if there is a good cause for him or her to do so.¹⁸

The content of the constitution is governed, in general terms, by the CPA Act and it is up to the interim committee and the director general to make sure that these directions are followed. A community wishing to draw up a draft constitution has the right to ask the director general for assistance in negotiating such a document. It is the main responsibility of the interim committee to forward suggestions on a draft constitution to the DLA and the director general can appoint individuals to assist the committee both internally and externally of the DLA.

The CPA Act constitutes five general principles that have to be accommodated within the constitution; four of these are further discussed below. If the constitution is not consistent with these principles the director general can deny registration of the CPA in accordance with the Act.¹⁹ The first principle constitutes “a fair and inclusive decision-making procedure”.²⁰ All members should be afforded a fair opportunity to participate in the decision-making processes of the CPA by having the right to stand for election to the committee

and by having the right to vote in relations to such serious matters of the CPA as the amendment of the constitution, to dissolve the CPA or encumber the property of the CPA.

The second principle governs the “equality of membership”.²¹ Any form of direct or indirect discrimination against a member or prospective member of the CPA is prohibited and clear rules in the constitution must reflect this. The prohibited grounds for discrimination are a direct reflection of the equality clause in section 9 of the bill of rights and contain the grounds of gender and sex. The only limitation which is provided for in the Act is the right for the CPA to determine a certain age of a member to have the right to vote and obtain a right in the communal land. The third principle concerns the democratic process of the CPA.²² It gives the members of the CPA the right to receive an adequate notice of all general meetings of the CPA; to attend, speak and participate in the voting at all general meetings; to have access and opportunity to review all the documentation of the CPA; and to have access to a copy of the constitution of the CPA. The implementation of the right to an adequate notice is of importance since most of communities in the rural areas are scattered over large areas with poor means of communication.

The fourth principle to be translated into the constitution is “fair access to the property of the CPA”.²³ This implies that the CPA must manage the property owned in communion for the benefit of all members in a participatory and non-discriminatory manner. The CPA does not have the right to dispose of any substantial part of the CPA’s property without first calling for a general meeting and getting an affirmative vote from a majority of the members present at the meeting.

When a constitution, embracing the above mentioned principles, has been drafted the director general should be

notified and a meeting convened to adopt the constitution.²⁴ At the general meeting of the CPA an authorized officer of the DLA should make sure that the proper procedures are followed and should take notes on the number of members present at the meeting, the voting scores, any dissenting opinion presented and whether the interests of any individual or groups may be adversely affected by the adoption of the constitution. The constitution has to be accepted by a majority of the members present at the meeting.

If the draft constitution is accepted by the CPA members at the general meeting the provisional CPA may apply to the director general to have the CPA registered. The CPA will qualify for registration if a constitution, fulfilling the principles in section 9 has been adopted in accordance with the rules in the CPA Act. It is of importance to note that in relation to the registration it has to be shown by the official records from the general meeting adopting the constitution that the meeting was attended by a substantial number of members of the provisional CPA and that the constitution was supported by a majority of the members present or represented at the meeting.²⁵ If it is established that the CPA qualifies for registration the CPA will be officially registered and will thereby become a juristic person with a constitution that is a legally binding agreement between the CPA and its members²⁶

The process of setting up a CPA is from a legal perspective a straight forward process. However, the introduction of a formal legal procedure into an informal customary setting has the potential of creating a number of problems for the parties concerned. The communities need to adapt to a foreign structure to be able to negotiate and successfully complete a land claim. The land has to be governed from an alien platform; the CPA structure does not

exist in any traditional context. There have been attempts, from the DLA side, to make this structure more reflective of the traditional context in which it exists by organising committees of elders to advise the CPAs and by reserving the role of heading the CPA committee to the traditional leader. These changes, to the structure put forward by the CPA Act, would reflect the traditional system but are not reflected in the CPA Act as such and could indeed constitute a violation of the equality principle, as spelled out above, as well as the equality clause in the constitution. This will be further explored in the next paragraph together with the discussion about CLARA, an additional instrument focusing on the protection of customary land rights further highlighting the role of traditional leadership in communal land management.

Further, while the constitutions should spell out internal democratic principles of participation and decision-making they are not obliged to make reference to the use and more importantly sustainable use of communal resources. The same is true for individual use rights and allocation of benefits that could be due to the community relating to rent, profits from business enterprises or grants from government. In relying on the ill or non-defined principles of fairness and equity, as discussed above, individual use rights or individual shares of women are left open to abuse. Decisions regarding the allocation and spending of grants from government and profits from business ventures are left to the committees governing the CPAs, to which most women won't have access because they are likely to be reflecting the customary leadership.

Protecting the interests of women under communal tenure

It has been estimated by the Surplus Peoples Project²⁷ that between 1960 and 1983, when the relocation programme was at its peak, 3.5 million black South Africans were made victims of forced removals and dispossession due to racially based legislation and practice. Further, in 1983 another 1.9 million people were under the threat of the same kind of forced removal (Walker 2006: Table 3.7, p. 83). All in all it is estimated that more than 6 million people were dispossessed between 1913 and 1991; it can be assumed that more or less half of them were women.²⁸ In the previous sub-sections, the question of how customary land rights are transformed through the restitution process has been discussed along with the one of the systems set up to govern the land and its relation to customary structures.

In this and the following sub-sections the focus is on the position of previously disadvantaged women and their land rights in this amalgamation of statutory and customary law and their different structures. As was introduced in chapter 2, the social entrenchment of customary law requires an inquiry not only into the position and application of customary law in relation to land rights but also into the power structures that exist, forming an effective part of customary law. In this sub-section an analysis of the structural issues inherent under customary law, as highlighted by the clash between constitutional values and the position that has been awarded to a certain extent to official customary law within statutory law is entertained. The interpretation, application and limitations of customary law in land transactions, as available in relevant jurisprudence of the Court and the LCC, have been discussed in the jurisprudential review in chapter 4.

Already in 1993/1994, in relation to the constitutional negotiations, the Women's National Coalition put focus on the difficult relationship between promoting and upholding equal rights and customary law by succeeding in entrenching the equality clause in the constitution as superseding other rights as well as managing to block an attempt by traditional leaders to leave out customary law from the requirements of that clause. In the year 2000 a National Policy Framework for Women's Empowerment and Gender Equality (the Gender Policy Framework) was adopted by the cabinet. The Gender Policy Framework was prepared by the office on the status on women and was an attempt to ensure that the process of achieving gender equality was at the very centre of the transformation process in South Africa within all the structures, institutions, policies, procedures, practices and programmes of government, its agencies, civil society and the private sector. The aims and goals of the Gender Policy Framework are currently being reviewed to refine them into a policy that would add the weight of current debates, challenges and institutional processes. In December 2008 it was stated by the Minister of the Presidency that:

It [the Gender Policy Framework author's comm.] has been instrumental in advancing the gender agenda in the country; in outlining an integrated package of institutional structures; as well as in identifying the coordination framework through which partners can work in the national gender machinery.²⁹

In relation to land reform the Gender Policy Framework put forward a list of areas in need of further attention of the relevant department. The over-all message from the office on the status on women was that the impact of customary law could have negative effects on the rights of women to access and govern land through land reform. They highlighted that any land right a woman holds under the current legislation

could be threatened by the sometimes negative attitudes of chiefs towards female ownership and access to land, the rules and practices of customary law and by patriarchal households and community relations in general. In the Gender Policy Framework the office on the status on women expressed concern that the ability of many previously disadvantaged women to claim rights in land is unpredictable and depends, to a large extent, on social status and the goodwill of male partners and relatives. They further indicated that power and dominance of traditional systems often deny women their rights to represent themselves in land claims and that the lack of information about land rights further hinders women's ability to access land (National Policy Framework for Women's Empowerment and Gender Equality online 2002: 15-16ff).

The Gender Policy Framework further brought to the attention of the legislator the concern that the inheritance rights of a majority of previously disadvantaged women and their descendants are still limited by customary practices. Laws of inheritance sometimes leave widows and daughters without rights of tenure and even when women can inherit land, they may have to forfeit control of it, usually to male relatives (National Policy Framework for Women's Empowerment and Gender Equality online 2002 15f). Translated into the restitution programme the need to recognise the impact of customary practices on women's capacity to participate effectively in the land reform in general and the restitution process specifically was highlighted. Section 9 of the constitution confers the right to equality before the law and the right to equal protection and benefit of the law on all South Africans, as discussed in chapter 3. It further states that equality includes: "the full and equal enjoyment of all rights

and freedoms". In relation to land matters, like many other matters, this requires positive action by the government (White Paper on Land Reform 1997: chapter 6). The relevant department and the commission are under the constitution obliged to secure the right of equal enjoyment of all rights such as the right to restitution of land and equal access to all post-settlement programmes (see for example the instructions given in the White Paper on Land Reform 1997 and the Land Reform Gender Policy).

It was acknowledged already in the White Paper (1997: chapter 6) that:

Although women play a decisive role in the development of their community, their access to political and economic power is not commensurate with their numbers, needs and contributions.

This initial policy statement further recognised that:

Specific strategies and procedures must be devised to ensure that women are enabled to participate fully in the planning and implementation of land reform projects.

In relation to the restitution programme this translates into ensuring that women are represented in the restitution process and that their opinions and experiences are reflected in the settlement of the claim. This also relates to the post-settlement strategies and the communal government of the land, as discussed above in relation to the CPA Act and below in relation to CLARA.

One of the problems in accounting for the differences between men and women in relation to today's land reform is failing to acknowledge the impact of patriarchal customary structures and that women's position in traditional customary societies has been altered by over 200 years of colonialism

and later by apartheid. In the majority of the legislation concerned with the conditions of tenure, as was discussed above in relation to the CPA Act, the community is indicated as the unit to administer land. However, today there are very few traditional societies that have retained customary law and customary structures to protect every individual of the group as initially intended. To make the process of land restitution more gender equal there is an urgent need for the further discussion on how to support traditional structures to sustain the basic rights of everyone in the concerned group. In this regard the Court in the *Bhe*, *Shibi* and *Shilubana* cases suggested the development of customary law in line with the constitutional values of equality as one avenue of reconciliation. But before any suggestions are made as to the solution of the problem it is important to further examine women's position under communal tenure and its causes.

In the White Paper as well as in the Gender Policy Framework, as was discussed above, it is acknowledged that discriminatory customary law and social values are principally responsible for the existing gender inequalities in land access and ownership. It is required that customary tenure systems adapt to accommodate the rights of women (White Paper on Land Reform 1997: chapter 6). This strong commitment to gender equality in the policy document has to some extent been translated into law within the land reform programme as is evident in the commitments to gender equality in the CPA Act and to a certain extent in CLARA as further discussed below.

Furthermore, in relation to the CPA structure, there are a few indicators on women's position contra the position of customary law worth mentioning. First of all it is essential to point out that the whole CPA Act rests on the notion of non-

discrimination. However it is a well known fact that without positive measures undertaken to protect a possible weaker group, such as women in a customary context, their rights will probably not be upheld. As discussed above, women tend to have a less influential position in relation to land rights in traditional societies. Without any positive measures being introduced in the CPA legislation it is not likely that this legislation will lead to any major changes in this pattern. In order for women to have the opportunity to take on a more active role in the decision-making structure the CPA Act would have to give clearer guidelines on women's representation in the different committees. A female quota could prove to have both positive and negative effects but it would at least be a way to open the door for women into the decision-making bodies governing communal land.

As was briefly discussed above, in relation to the attempt to make the decision-making procedures under the CPA Act less alien to the communities, remedies such as committees of elders to advise the CPAs and the appointment of traditional leaders to head the committees have been implemented. These are ways of strengthening the sense of communality and tradition which could be positive for all parties if it reinforces the traditional structures that tend to attend to the needs of the group rather than the specific needs of the individual. Women could benefit from these structures; however it is very important to promote customary law to develop in line with the constitutional goals on gender equality, further discussed in the concluding chapter; and secondly to make sure that women, that find themselves in a position where customary law is being applied contrary to the basic rights of every individual, have an effective right to seek a legal remedy.

In this regard it is of importance to note that the DLA and later the DRLR has not been able to develop functioning procedures for monitoring the work of the CPA and providing mediation support when needed. The state is not providing institutional support to the CPAs in a functional way. This is not helping to promote the intended development of customary law in terms of the constitution and it lessens the positive impact that the customary structure could have on the land rights of all members of the community. Without any support conflicts could occur when the new structure, the CPA, tries to compete with, or override, the decisions of the traditional one (Walker 2006). It is in these conflicts rather than the direct application of customary law that women's rights to land stand to lose the most. It is important to point out that this conflict is rooted in the disintegration and replacement of governing structures rather than in customary law as such.

The Communal Land Rights Act

The genesis of CLARA is from the provisions of section 25 (6), read together with, section 25 (9) of the constitution, which reads as follows:

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

25 (9): Parliament must enact the legislation referred to in subsection (6).

In 1999, as a complement to the CPA, and as an attempt from the government's side to take the conditions of comm-

unal customary tenure to a new more structured level the government proposed a legislative framework that would allow land to be transferred into the name of a tribe or community occupying a specific portion of land. It would therefore fill an important purpose in formalising tenure in relation to communities without any or with very limited security of tenure. CLARA spells out the obligation of the communities to appoint administrative structures to govern their communal land. Regarding its applicability it is of importance to note that the CPA Act, as discussed above, is applicable to all communal land while CLARA is applicable only to land in the former homelands, as discussed below.

Because of the controversial content of CLARA, in relation to the administrative structures set up under it, it has never been promulgated. Further, as was briefly mentioned in relation to the jurisprudential review above the constitutionality of CLARA has been challenged by four different communities (Kalkfontein, Makuleke, Makgobistad and Dixie) in *Tongoane and Others*. These challenges and Judge Ledwaba's judgement are summarised below.

In relation to the position and application of customary law and structures, CLARA serves as an interesting example, alongside the CPA Act, of the legislators' attempt to merge the relevant constitutional values with the aim of accommodating customary law in legislation to govern the conditions of tenure. CLARA has two major objectives: the transfer of decision-making power over land from the state to the current occupiers, predominantly to communities, as communal land rights, and the structuring of new bodies to govern the land. Both these objectives were successfully challenged in *Tongoane and Others*.

The main aim of CLARA is to provide individuals or communities, living in communal areas in the former homelands, with legally secure tenure.³⁰ It aspires at securing tenure by transferring titles of land held by the state in trust to the relevant individuals or communities. Until CLARA came into force in July 2004 (only in theory since it has not been promulgated) the land in these areas was owned and controlled by the South African government as a result of past racial laws, indicating that black South Africans were not fit to own land. The former homelands constitute approximately 13 percent of the total area of land in South Africa (Walker 2002: p. 82). The former homelands are further the poorest parts of South Africa and women constitute 59 percent of the 17 million people living in these areas (Claassens and Mnisi unpublished: p. 2) This specific Act affects a large number of people. As was put forward by Judge Ledwaba, at least 892 communities will be directly affected by CLARA³¹, and the successful implementation or reformulation of this legislation will be crucial to the success of the overall land reform programme.

CLARA, equally to the CPA Act, offers the possibility for communal land to be owned communally by the communities occupying it. This form of ownership fits well with the traditional way of organising land rights and is a common feature of the communities in the areas targeted by the Act. During the process of designing CLARA there were intensive discussions about the protection of women's rights to land and the problems that many women face in relation to the application of customary laws in relation to land, as has been discussed above. The push for the acknowledgement of women's special needs in the legislation was put forward by, amongst others, the Women's National Coalition, as discussed

above. To ensure the pre-emption of the content of the equality clause in CLARA the following statement was included in section 4 (3):

A woman is entitled to the same legally secure tenure, rights in or to land and benefits from land as is a man, and no law, community or other rule, practice or usage may discriminate against any person on the ground of the gender of such person.

This reconfirms the equality clause in the constitution and also confirms that women in the relevant communities need protection from customary practices violating their fundamental human rights as spelled out in the bill of rights. The fact that this statement was placed in the beginning of the Act also stipulates that it should be applied throughout the Act. Further, it is also stated in the same chapter, chapter 2, that both spouses in a marriage, regardless of if the marriage was confirmed under statutory law or customary law, should have the same legal rights to matrimonial property and that this property should be registered in the name of both spouses when such property is converted into shares of community property under the Act.³²

From a legal perspective the protection, in this part, of women's rights under CLARA seems comprehensive. However, controversy and confusion is created, as highlighted in *Tongoane and Others*, because the legislator, later in the Act, introduces traditional councils as the main governing bodies representing the communities on all issues related to the management of communal land. Even though the provisions dealing with the powers of the traditional leadership were re-drafted after severe critique was launched by various parts of civil society the substance was not substantially changed (Claassens 2005: p. 46).

The major concern is the inclusion of traditional leaders in the procedure of governing the land as transferred under the legislation and their application of customary law and practices (Cousins 2002, Walker 2001 and 2002 and Bohler-Muller 2009). Under CLARA it is stated that the communities to which the land is transferred will assume juristic personality and will be able to hold rights and incur obligations. The community will be able to govern the land by the setting up of a special decision-making body called a land administration committee (similar to the CPA). However, section 21 subsection 2 states that:

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

Of further relevance section 22 subsection 2 which spells out that:

Subject to section 21 (2), the members of a land administration committee must be persons not holding any traditional leadership position and must be elected by the community in the prescribed manner.

As further discussed below in relation to *Tongoane and Others* the words “subject to section 21 (2)” in section 22 (2) may imply that section 21 (2) is a dominate section, i.e. when there is a recognised traditional council section 22 (2) is not applicable. Therefore, traditional leaders will have the right to govern the communal land if such a council of traditional leaders exists in relation to a specific community. This is the case in the majority of communities within the scope of CLARA, even though, as was showed in *Tongoane and Others* it is often far from clear which traditional council should govern over the large number of scattered and

fragmented communities in South Africa. On the official homepage of the National House, as discussed in chapter 2, it is clearly stated that CLARA is one of the Acts from which the National House directly derives its mandate (NHTL mandate online). A recognised traditional council in the context of CLARA is a council defined in section 3 of the Framework Act. This Act requires that a traditional council be comprised of no more than 30 members, a third of which must be women.

If there is no traditional council, as spelled out in section 21 (2), a land administration committee will govern the land. Section 22(3) of CLARA, similarly to section 3 of the Framework Act, provides that one third of the total membership of the land administration committee must consist of women. Even though the number of women on the committees or in the councils is not a guarantee for the protection of women's interests the fact that women only make up one third of the total seats is not a satisfactory solution. If this had been a serious suggestion aiming towards sending a signal of gender equality and the sincere protection of women's rights to secure tenure the legislator, in relation to both Acts, should have opted for the "fifty percent rule".

Even though it is clear from the above sections that women must formally participate in the traditional councils and land administration committees, these provisions do not, according to Bohler-Muller (2009: p. 26) have the effect of freeing women from their oppression and minority status. She argues that rural women will continue to be subjected to patriarchal structures until such time as they have been granted equal representation on such committees and councils, and their voices are heard and valued outside the constraints of traditional stereotypes. To further illustrate the gender imply-

cations within the framework of CLARA Bohler-Muller (2009: p. 27) puts forward the example of section 2(c) (i) of the Framework Act which provides that a senior traditional leader (in most cases a man) will select other traditional leaders to be members of the traditional council and such selection will conform to rules of custom. This senior traditional leader is allowed to select 60 percent of the membership of the council, which will in most cases have the effect that most councils, which are not democratically elected, demonstrate a male majority

A challenge to the constitutionality of CLARA was launched already in 2006 and the judgement by Judge Ledwaba of the North Gauteng High Court, in Pretoria, was handed down in October 2009. In *Tongoane and Others* a number of grounds for disputing the constitutionality of CLARA were brought forward. Of interest to the present research is the fact that the applicant argued that by giving traditional leaders undemocratic and unprecedented powers, CLARA actually undermines security of tenure while section 25 (6) of the bill of rights requires that tenure rights must be strengthened, protected and guaranteed; that CLARA allows traditional councils (that are not democratically elected) to become land administrators and sell land with the permission of the land rights board; and that CLARA therefore will make the tenure of the majority women in the former homelands more insecure. In a judgement that put great focus on the situation in the four communities (Kalkfontein, Makuleke, Makgobistad and Dixie), supported by civil society and leading scholars on land reform in South Africa, the judge after a careful analysis of section 21 (2) of CLARA declared that it infringes on the right of equality as set out in section 9 of the constitution. Judge Ledwaba highlighted the fact that

the Act conferred powers on the traditional council to carry out the functions of the land administration committee and that may undermine the tenure security of the community. In his view some of the existing traditional councils had not been democratically elected and the interest of women may not be represented in such council. He further voiced the unclear relationship between section 21 (2) and 22 (2) and indicated that further clarity is needed on that aspect of the Act. This will be an important issue for the Supreme Court of Appeal and possibly the Constitutional Court to discuss further.

Can formalisation of property rights empower women and reduce poverty? – Some theoretical remarks

Formalisation of property rights as carried out by the South Africa government in terms of the Restitution Act, the CPA Act and CLARA, is carried out for three main reasons in this specific context: firstly to bridge the racial gaps in terms of property ownership (not primarily considered in the present research). Secondly, to create equality, certainty, transparency and overview in the system of ownership; and thirdly, to promote development and poverty reduction. After the discussion above the crucial question arises: will the approach taken by the legislator really have these sought after consequences?

In terms of the formalisation of property rights and its effects the present research basically focuses on two sets of ideas: the formalisation according to de Soto's theory and formalisation relying on customary land tenure systems such as it is taking place in South Africa. International human rights law, as further described in the following chapter,

fosters a strong protection for equal rights in land reform and this undoubtedly puts forward the question of whether there are any real gains for previously disadvantaged women in formalising property rights through moving from the extra legal sphere to the legal sphere by the creation of a social contract in terms of accessing land. Could the formalisation of property rights promote their economic development to reduce poverty and is this model justifiable from a human rights perspective? If not, is the alternative of formalising land ownership through land reform, building on communal customary concepts a better solution?

The first alternative has the apparent advantage of creating legal certainty. Formalising property rights into individual titles will indeed create a stronger legal protection of these rights. However, when formalisation takes place in a customary context where we move from multiple users of the land to the ownership of one single person, this person will in most cases be male. In this context women usually have to choose between being a second-class citizen under customary law or being completely invisible under the formal system. As the second alternative indicates ownership and access to land could also be formalised in line with the customary land tenure systems that exists, as discussed in chapter 2, in terms of establishing communal ownership as put forward in the CPA Act or in terms of communal ownership based on traditional leadership as spelled out in CLARA (it can be disputed, as was discussed in chapter 2 whether customary land rights are indeed communal in their nature but for the sake of this discussion this concept is used).

This discussion is best begun by scrutinising the first line of argument, namely the link between the formalisation of property and the increase of economic development according

to de Soto's theory. Even though the formalisation procedure has other positive aspects such as the creation of structure in the land owning system, creating legal certainty and lessening the risk of disputes over ownership the most appealing part of the theory of formalisation is the promise of economic development, especially for the poor. This is especially relevant to South Africa because the country is still plagued by poverty and inequality regardless of the last fifteen years of government policies and budgetary allocations intended to circumvent the legacies of apartheid and support steady economic growth. Today, South Africa has the second highest level of inequality in the world after Brazil, and the gap between the rich and the poor appears to be widening (Cousins et al. 2005: p. 1).

It has become increasingly clear to all involved parties that growth alone will not reduce poverty and inequality especially with the latest down-turn in the global economy. For some analysts, like de Soto, the main reason behind poverty is the absence of formal property rights to the assets held by the poor. This position has been reiterated in discussion documents of the ANC and it is evident that the government takes a strong stance for protecting the security of tenure through individual and communal ownership. The concept of private property is dominant in the South African context and works well for those South Africans who live in the so-called first economy; but does it work equally well for the women living mainly in the second, informal economy?

Many local (see for example Cousins et al. 2005) as well as international scholars (Green 2008: 70f and Ikdahl et al. 2005) have pointed towards the single minded focus on formalisation of property to secure individual or communal titles in land as solutions to poverty. In de Soto's theory

formalising property rights has the effect of allowing its owners to create new capital i.e. it makes assets interchangeable so that they can be used for other purposes. He prescribes, as discussed in chapter 1, a programme to capitalise the poor by legalising their extra-legal property. However, there is some serious criticism that can, and should, be launched against the idea of formalisation as a “cure” for everything.

The formalisation of property rights is, by many, seen as a means of changing the socio-economic reality in which most of the poor people in South Africa live; however, it can be argued that it is this social and economic context itself that would prevent the desirable change. In 2005, the South African government launched a new housing policy titled “Breaking New Ground”. In this report the government complained that the 1.6 million new houses funded by the state since 1994 had not become “valuable assets” for poor people, and further emphasised the need for improved access to title deeds so that poor people could participate in residential property markets; on the one hand acknowledging the main problem with de Soto’s theory and on the other proposing more of the same.

The central problem with the strategy of formalisation of property is the oversimplification of the informal economy and associated property relations such as customary and gender relations, as established in the present research. Nowhere in the *Mystery of Capital* does de Soto explicitly state that formal property is to be regarded as equivalent to individual, private property, however this is undoubtedly his assumption. The first fundamental problem with this theory is therefore that it fails to acknowledge the different principles that often inform the customary property systems found in

rural areas and urban informal settlements, such as customary law. As was mentioned above, formalisation of property rights in customary settings often means that a portion of land with multiple users (both women and men) becomes the property of a single owner, usually male.

Furthermore, it seems to be only the capital formation function of property that is acknowledged in de Soto's theory and other functions such as securing livelihoods or supporting social identity are ignored. Land rights, especially in rural communities, are closely related to livelihoods. Women in most developing countries grow between 60 to 80 per cent of the food produced, yet own less than 2 per cent of the land (Green 2008: p. 74). Black women all over South Africa are in many cases the primary source of the livelihood of the family. The present formalisation processes have, however, primarily been directed at formalising land rights in terms of secure ownership to land, disregarding the importance of secure (and equal) traditional and informal rights to land and livelihood for many women.

In relation to equality in land ownership, de Soto's theory lacks in understanding, the South African context and that of many other countries in the Third World, with regards to the fact that large areas of land occupied by the poor are already owned by for example private landlords (often from the white minority) or by the state. The issue of redistribution, high on the agenda in South Africa, is not discussed in de Soto's work. According to his theory formalisation is a matter of securing already existing extra legal property rights, not creating new ones in the form of redistribution. Furthermore, as became evident in the *Richtersveld* case, the state is often the owner of key economic resources such as mines and energy resources and the distribution of benefits from these

resources is a key political issue considered by the Court, but not yet considered by de Soto. The challenge is, and this is where it becomes very relevant in terms of the scope of the present research, how the legal system should be adjusted (in his view) to accommodate extra legal systems such as customary tenure systems. Although de Soto advocates the creation of a link between the legal and the customary systems of property, he doesn't seem to want anything more than to convert informal property into private property through systematic titling.

As an alternative to this strict theory of formalisation of property rights into individual titles, with all the problems that that entails, a theory of respect and reliance on customary land tenure system in land reform has emerged as the “politically correct” solution to unsecure and unequal (based on race and ethnicity) access and ownership of property. This theory has been promoted by, amongst others, the WB and Oxfam in promoting economic development at the grass root level by supporting customary land tenure systems in reforming ownership. The effects of these ideas are evident in the Restitution Act, the CPA Act and CLARA.

Furthermore, the Restitution Act could be regarded as discriminatory against women because it relates to historical claims, many based on the official version of customary law, and as such does not recognise women as owners of land. Furthermore, today's restitution process definitely lacks methods and procedures to safeguard women's equal rights in relation to access to land. This is very important because the change in land ownership that is accomplished by the restitution programme today will be an important part of the new land paradigm in South Africa tomorrow. The objective of the implementation of the Restitution Act was to provide

support for the vital process of reconciliation, reconstruction and development in South Africa. This reform was undertaken to put past wrongs right, but what happens to those that were wronged once again?

In terms of the introduction of customary elements into law aimed at securing communal ownership it has been the objective of the legislator to: on the one hand develop customary law through formalising it through legislation; and on the other hand to promote the development of the “lived law” through encouraging social change in line with the constitutional values. However, the problem with the theory of formalisation of property rights based on customary tenure is apparent; putting a concept that by its nature needs to be flexible to function in the social structure into a law is dooming it to failure. Just like the colonisers and the apartheid regime failed to capture the “true” version of the customary law, today’s legislators will face the same problems. In referring to the traditional leadership in CLARA it is not clear who is to be in control of the land. Is it a traditional leadership basing its decisions on patriarchal preference or is it a leadership whose thoughts and ideas have been influenced by the constitutional values of gender equality? The government of South Africa likes to promote the latter vision of traditional leadership. Change is certainly taking place, as is evident in the *Shilubana* case, but it may be argued that this is not enough to secure the right to equality.

The major challenge, as identified by researchers, civil society and human rights treaty bodies discussed in the present research, is the highly dependent nature of women’s land rights. Customary land rights are viewed as being attached to men in their capacity of being husbands, fathers and brothers. This leads to the result that at the moments of

crisis in women's lives such as divorce, separation or the death of a husband, women are left extremely vulnerable to eviction and loss of livelihood resources. The formulation of the tenure reform law in South Africa was a long and contentious process with a lot of input from organisations and groups concerned with the rights and well-being of women. The CPA Act and CLARA were intended to give effect to Section 25(6) of the constitution. However, as has been demonstrated in the present research, CLARA is not living up to the constitutional values. The judgement in the case of *Tongoane and Others* clearly acknowledges that the law fails to meet the constitutional obligations in section 25 (6) to secure the tenure rights of women in communal areas and CLARA is either to be repealed or amended to be brought into conformity with the constitution.

As discussed in the previous sub-section CLARA builds on the communal aspect of ownership but establishes traditional councils in most cases as the bodies that should administer the communal land. The Framework Act, as discussed in chapter 2, requires that 40 percent of the members of the traditional councils be democratically elected and a third should be women. In relation to this Anne Phillip's (1995) ideas, presented in her book: *The Politics of Presence*, are valuable because she discusses the disputed notion that fair representation implies proportionate representation according to social characteristics such as gender or ethnicity. In her work she explores the common objections towards fair representation as equal to proportionate representation such as the notion that if politics are based around differences of for example gender they tend to fractionalise the polity which in turns undermines social cohesion or social alliances (Phillips 1995: p. 22); and further that making representation depen-

dable on a personal characteristics such as gender seems to undermine the basis for political accountability. She argues on the one hand that the politics of ideas is an inadequate vehicle for dealing with political exclusion but on the other hand that it is not enough to just promote and implement a politics of presence (Phillips 1995: p. 25). In her chapter on: *Quotas for women* Phillips outlines the, for the present research, important idea that:

Changing the gender composition of any elected assembly is a major, and necessary, challenge to the social arrangements which have systematically placed women in a subordinate position; and whether we conceive of politics as the representation of interest or need (or both), a close approximation to gender parity is one minimal condition for transforming the political agenda (Phillips 1995: p. 82).

Thus, equality in representation, in terms of number, does not guarantee the consideration of women's needs or interest but, as put forward by Phillips (1995: p. 82) it is highly unlikely that assemblies composed equally of men and women would behave just as an assembly where women only have a very limited position. Hence, representation is dependent upon so much more than just numbers. It depends on the continuous relationship between representatives and the represented; just as with party politics getting the "right" party elected is just the beginning rather than the end of the process. The same goes for the equality in representation of women in committees such as the ones administering land under the CPA Act or CLARA. Thus, the shared experiences of women as women can only serve as a promise of shared concerns, there is, as pointed out by Phillips, no obvious way of establishing strict accountability to women as a group. In other words women's presence in these committees is likely to have an impact, but there is no guarantee.

In terms of the Framework Act, the requirement that a third of the members of traditional councils must be women should be seen as a step in the right direction but not as fulfilling the minimal condition for transforming the sometimes conservative traditional councils. Further, the requirement of allocating a third of the seats to women has been met with considerable resistance from the traditional leaders themselves. When CLARA was first introduced in 2004, traditional leaders and their supporters celebrated the way the Act provided for traditional councils to have the power to manage communal land. As a contrast, many civil society organisations protested that this provision would undermine many of the fundamental democratic rights, such as the right to equality, as set out in the bill of rights and in international law.

The CPA structure as such does not contain any formal gender discriminatory elements. Hence, in relation to the CPA Act, the most problematic issue is the structure of the new bodies to govern the communal land as returned to the communities through the restitution process. The CPAs are to be governed by constitutions resting on the principles of democracy, equality and transparency. As was discussed above, several provisions are made for the land tenure rights of women. It is unambiguously specified that women are entitled to the same legally secure tenure rights in or to land, and benefits from land as men, and no law, community or other rule, practice or usage may discriminate against any person on the ground of gender. However, in many cases the rules and procedures of the CPA, especially with regards to gender equality, will ultimately come into conflict with the customary law of the community.

Furthermore, the procedures and rules in terms of the constitution of the CPAs are often perceived by members of

the association as foreign. They simply do not fit in with the way of communal customary life. The creation of this legal remedy for communal ownership based on the group element was to a too large extent based on a romanticised notion of traditional communal life. In this regard, in line with the notion of the minority or cultural group put forward by Kymlicka (1989), “a community” is often pictured as being unified and harmonious, which grossly underestimates the fragmentation and internal conflicts of many communities and the existence of major social problems in many of the communities due to overpopulation, the change in social context and a severe pressure on the land and resources as a result of previous forced removals under apartheid legislation.

Hence, in relation to the CPA structure, we arrive back at the inherent problem of freedom of choice in terms of religious and cultural beliefs and the underlying differentiation between men and women under customary law. The value of freedom plays an important role in Kymlicka’s argument. A cultural minority should, according to Kymlicka (1989: p. 196), have the freedom to choose how they want to live but must govern itself by recognisably liberal principles that will ensure the basic liberties of its own members by placing internal restrictions that will prevent discrimination against the members on the grounds of for example sex or gender. This argument is of course very important for the justification of the protection of cultural group rights because without this recognition the rights of the individuals would by default be put second to the rights of groups. However, as brought forward in the critique launched by Moller-Okin, a “closed” or discriminatory culture cannot provide the context for individual development that basic human rights law requires.

Kymlicka acknowledges that the requirement of internal liberalism rules out the justification of group rights for such groups that violates the most basic rights of any human being on the basis that these groups: “undermines the very reason we had for being concerned with cultural membership - that it allows for meaningful individual choice” (Kymlicka 1989: p. 172). But as is suggested by Moller-Okin (1999), and further discussed in the present research, culture or customs may appear to be in favour of basic rights of equality but they still operate in relation to a patriarchal structure which in turn supports discriminatory acts such as restraining women from inheriting property and from passing it on to the other women in the family. The arguments put forward by Kymlicka in favour of multiculturalism fail to acknowledge the subordination of women in the informal and private sphere.

Conclusively, the main practical obstacle to the application of these two sets of laws, the CPA Act and CLARA, in relation to the principles of democracy and equality in the constitution, is the question of whether traditional communities will be willing to apply these principles, which are often regarded as alien concepts to their traditional way of living, as discussed in chapter 2. Will they, as Kymlicka suggests, adhere to liberal principles of basic rights and therefore rightfully have their communal cultural rights protected or will discrimination and oppression of women take place regardless of these prerequisites of protection of basic rights which would then speak against the protection of customary land rights.

The only way in which the equality measures as set out to secure women’s rights in the CPA Act and to a certain extent in CLARA will stand a chance to be implemented

successfully is by making sure that every community affected by these laws receives the assistance needed in terms of education and training by the DRLR. In this regard it is further up to the state also to address the social fragmentation of many communities and the social problems that millions of South Africans struggle with on a daily basis. Drug abuse, criminality and domestic violence are part of the majority of South Africans' everyday lives. These are but a few underlying reasons besides poverty and underdevelopment that make the issue of holding and governing land such a difficult issue for these communities. It has to fall under the responsibility of the state to enable people to live in accordance with the prescribed laws. However, to this day this type of educational and social-skills programmes has been profoundly neglected by the government.

Furthermore, even if attention is given to this type of empowerment, it cannot be taken for granted that people want to change their way of life and the rules which govern their life. Based on the principle of equality it is possible to deem this behaviour as contra productive or even wrong in the sense of the law but this in itself has no real purpose. The challenge lies in finding an alternative and based on the research that has been carried out in regards of the present research, the resort to customary elements in easing of the process of formalising property rights is simply not compatible with the right to equality and the equal application and outcome of the law. To include a traditional element in land government and then rest assured that it will handle all land related issues in accordance with the constitution, is not constitutionally sound. There has to be legal certainty as to how land will be governed under the new communal property regimes, i.e. it has to be possible to predict accurately the outcome of the law.

At this point it is again easy to resort to the argument about cultural relativity and the freedom of everyone to choose how he/she wants to live, as discussed above. However, even though this discussion is important, the constitution has made sure that there is no real need to resort to it because, firstly, the freedom to live according to one's culture must never infringe on any basic right; and secondly what these basic rights entail is spelled out in the constitution. Like it or not the bill of rights in the constitution, interpreted in the light of international human rights law, is the framework in which all laws have to exist. In this framework, customary law, as a value, only exists as a secondary right.

In fact, the main problem with the reliance on customary tenure in formalising land access and ownership is that the legislator lacks a bird's eye view in taking all of the aspects of customary tenure into consideration. Most importantly, as been reiterated many times in the present research, it does not take into consideration the price paid by women in terms of possible discrimination in relation to land ownership and possession. The effect of this theory as translated into legislation is that women, by a combination of attitudes, beliefs and legal discrimination in both modern and customary law, are discriminated against and are excluded from owning land, as has been brought forward in the present research. Some possible solutions to these problems will be considered in the concluding remarks on legal reform; but before this is done the value of a human rights based approach to women's property rights, empowerment and development as developed in international law is further discussed in the following chapter.

¹ The human development index (HDI) which looks beyond GDP to a broader definition of well-being. The HDI provides a composite measure of three dimensions of human development: living a long and healthy life (measured by life expectancy), being educated (measured by adult literacy and enrolment at the primary, secondary and tertiary level) and having a decent standard of living (measured by purchasing power parity, PPP, income). The index is not in any sense a comprehensive measure of human development. It does not, for example, include important indicators such as gender or income inequality and more difficult to measure indicators like respect for human rights and political freedoms. What it does provide is a broadened prism for viewing human progress and the complex relationship between income and well-being, information available at: www.undp.org, accessed on the 6th February 2009.

² Government Gazette No 30468 of 13 Nov 2007.

³ Information obtained at: <http://www.land.pwv.gov.za/restitution/background>, accessed on the 11th May 2006.

⁴ 1 hectare is equivalent to 10 000 square meters.

⁵ Statistics of settled restitution claims, cumulative statistics 1995 to 31st October 2008. Available at: <http://land.pwv.gov.za>, accessed on the 22nd February 2009.

⁶ Ibid.

⁷ Section 2 of the Restitution Act.

⁸ The Restitution Act 22, introductory provisions (xi).

⁹ With further reference to the *Mabo v Queensland* and *Delgamuukw v. British Columbia*.

¹⁰ In 2005 33 880 claims constituting 59 percent of the total number of urban claims were settled by financial compensation. Of the rural claims 3283 cases were settled by financial compensation constituting 6 percent of the total number of cases. The total number of case settled by financial compensation is 37163 constituting 65 percent of all cases settled in February 2005. Source: Walker C, *Delivery and disarray: the multiple meaning of land restitution*, Table 3.5, p. 78.

¹¹ The amounts offered under the standard settlement offer vary from 175000 ZAR and upwards depending on the quality of representation and the value of the lost land.

¹² See the *Bhe* and *Shibi* cases in chapter 4.

¹³ The Department of Land and Agricultural Affairs ceased to exist after the restructure of government in 2009 and issues of land reform were taken on by the new Department of Rural Development and Land Reform.

¹⁴ According to section 2 of the CPA Act the Act applies in relation to land received from the state other than that through the restitution process but the main area of application of the Act has been by order of the LCC.

¹⁵ The definition of “community” along with the definitions of other terms used in the Act is found in Section 1 (i-xvii).

¹⁶ If it is not possible to provide the names of all intended members of the provisional CPA the application has to contain principles for the identification of other persons entitled to be members of the provisional CPA. It also needs to include procedures for resolving disputes regarding the right of other persons to be members of the provisional CPA. Section 5 (2) (d) (i) and (ii).

¹⁷ CPA Act, section 5 (2) (a-e).

¹⁸ Ibid. sections 5 (3), (4) (b) and (5).

¹⁹ CPA Act section 8 (2) (c).

²⁰ Ibid. section 9 (1) (a).

²¹ CPA Act section 9 (1) (b).

²² Ibid. section 9 (1) (c).

²³ CPA Act section 9 (1) (d).

²⁴ Ibid. section 7 (1).

²⁵ CPA Act section 8 (2) (e).

²⁶ Ibid. section 8 (6).

²⁷ The Surplus Peoples Project is a South African NGO focusing on the redistribution of resources to the poor, marginalised, women and men, and in transforming power relations in rural and peri-urban areas. The SPP has conducted several studies into the history of dispossession. More information can be found at: <http://www.spp.org.za>, accessed on the 12th May 2006. Of special interest are their publications of forced removals also accessible on the homepage under publications.

²⁸ The figures of the number of people affected by the racial policies of forced removals vary between different sources. As was mentioned in the text the Surplus Peoples Project points towards 3.5 million people being dispossessed in 1983 with another 1.9 waiting to be removed. The DLA has repeatedly in media put forward the figure of 6 million people as victims of the apartheid regime's policies to remove the so called black spots.

²⁹ The National Policy Framework on Women's Empowerment & Gender Equality is being reviewed. Statement issued by the presidency on the 5th December 2008 at the Union Buildings, quote by: Dr. Mantombazana Tshabalala-Msimang, Minister in the Presidency, available at: <http://www.thepresidency.gov.za>, accessed on the 14th January 2009.

³⁰ The Act also applies to the ex- South African Development Trust Areas, the former coloured areas and on-site or off-site in white commercial farming areas respectively as well as to land to which the KwaZulu Ingonyama Trust Act of 1994 applies.

³¹ Tongoane and Others, paragraph 43.

³² Ibid. section 4 (2).

Chapter 6: Women's property rights, empowerment and development under international law

At the annual meeting of the UN Commission on Human Rights in 2002 the world community recognised that laws, policies, customs and traditions that prevent women from accessing, owning and inheriting land, other property and housing and that exclude women from participating fully in development processes are discriminatory and contribute to the feminisation of poverty. It was acknowledged that the full and equal participation of women in all areas of life is essential for the full and complete development of any country (Commission on Human Rights Resolution 2002:49). The UN Commission on Human Rights has since then in a number of resolutions on women's equal ownership, access to and control over land, reiterated these statements and highlighted the centrality of women's property rights in economic development (Commission on Human Rights Resolutions 2003/23, 2004/21 and 2005/25).

Within the international community, poverty, of which the lack of property with which to enhance one's standard of living is one component, has been highlighted as the greatest challenge to all countries in Sub-Saharan Africa. The Millennium Declaration contains, amongst other important commitments, eight so called UN Millennium Development Goals (MDG), to be reached by the member states by 2015. The Declaration forms a blueprint agreed to by all the world's countries and all the world's leading development institutions

to meet the needs of the world's poorest and most vulnerable. The overarching objective with the eight MDGs is to try to put an end to poverty. In relation to the first MDG the UNDP has presented the aim of reducing by half the number of people living under extreme poverty and facing hunger on an everyday basis by 2015. Further, in relation to the third MDG the UNDP aims at promoting gender equality and empowering women through various projects and information campaigns. However, according to the UN Secretary General, Ban Ki-moon, it is not likely that any of the countries in Sub-Saharan Africa will achieve all of the targets set out in the MDGs within the current timeframe; and poverty will still, in the foreseeable future, remain the most widespread problem in Africa (Report UN Secretary-General 2008: p. 3).

The devastating impact of laws and customs that deny women the right to access, own and inherit land, other property and housing was further highlighted in a report of the UN Millennium Project, which included among its recommendations an urgent call for the promotion of women's land and property rights (UN Millennium project Report 2005). Women's effective property rights were in this report pointed out as an inherent part of achieving the first MDG, to eradicate extreme poverty, and the third MDG, to promote gender equality. The UN's Millennium Project has in line with these targets called for the member states to guarantee women's property and land rights as 1 out of 7 strategic priorities to reach the third MDG.

As an addition, the UN published information in February 2005, as part of the Beijing review, indicating that women worldwide only own about two per cent of all land, but produces on average more than half of the food that is grown, as further discussed in the previous chapter. It was

further highlighted that the effective ownership of property can provide one important form of economic and social security for women. Without this right, women generally become more vulnerable to the social tribulations that recurrently stem from social and economic dependency, such as domestic violence and the risk of contracting HIV/AIDS. Women without any property rights often have limited power in relation to household decision-making and most domestic violence against women goes unreported because victims do not have access to shelter apart from the marital home (Beijing at ten 2005: p.1 online). There is prevalent cultural resistance in many countries (including South Africa) to the concept of equal land and property rights of women. While women may enjoy basic civil and political rights, family and marital rights, including the right to own and inherit property, are often neglected. Traditions and practices that discriminate against women often violate domestic statutory law designed to protect women's rights to property (as was brought forward in the *Bhe*, *Shibi* and *Tongoane and Others* cases). In many societies, land and assets are registered in the name of male heads of households. As a consequence, women depend on their husbands and family relations for access to property, housing and inheritance. They are vulnerable to landlessness and extreme poverty, particularly after a divorce or their husband's death (Beijing at ten 2005: p.1 online). According to the UN Special Rapporteur on Adequate Housing:

There is a culture of silence regarding the prevalence of violations across the world of women's right to adequate housing and land (Report by the Special Rapporteur on adequate housing 2006: p. 6).

In his report the Special Rapporteur recommended further protection of women's property rights on the inter-

national level, amongst others the adoption by the Committee on the Elimination of Discrimination against Women (CEDAW Committee) of a general recommendation on women's right to adequate housing and land. Such a recommendation is still outstanding.

As is evident from this discussion women's property rights have been on the agenda of the international community for some time. Therefore, international human rights law can be a useful tool in the analysis of women's right to effective access to land and housing and the problems attached to the non-implementation of these rights. The human rights approach to development, as discussed in chapter 1, is one that is simultaneously a tool for analysis which focuses attention on the underlying inequalities and discrimination faced by people living in poverty and social isolation, which impede their development and deny them the opportunity to raise themselves out of poverty; and a foundation for a people-centred approach to development, based on a coherent framework of binding legal norms and accountability.

The objectives in the present chapter are firstly to examine women's theoretical rights to property (the foundation) in international human rights law and secondly to discuss these rights from the perspective that the violation or non-fulfilment of these rights could lead to impairment of women's ability to move out of poverty (the tool for analysis). Hence, this present chapter entails a discussion on international human rights law relevant to the topic of the present research; but before this discussion takes place its connection with domestic law and the purposes for its inclusion in the present research have to be further explained and cautioned.

The relevance of international human rights law

Any legal research, such as the present, that intends as a part of the study to analyse the relationship between international law and a domestic constitution has to take into consideration the fact that in today's legal environment most legislatures of the world are built on an exchange of information and ideas between domestic and international legal structures. Especially newer, more inclusive and progressive constitutions, such as the South African, are closely related to international human rights law in terms of its interpretation and application. As is posited by du Plessis (2008: p. 128), the rights existing in the South African bill of rights are examples of transnational contextualisation where the constitution is like a miniature lexicon of principles of international law and human rights. Therefore, the interpretation of the relevant rights to equality and property can be guided by how they have been understood on the international level. Importantly, as discussed in the introduction, the constitution spells out that any court interpreting the bill of rights must consider international law, which consequently has made the international interpretation of rights such as the rights to equality and property directly relevant to the present research.

However, having made this connection (as is further spelled out in section 39 (1) (b) of the constitution) the relevance of international law to domestic legislation has to be cautioned and even more so in relation to customary law. States sign and ratify international conventions with the obligation of fulfilling the rights spelled out in them; however it is uncertain what effect these instruments really have on the domestic system. In an African context where neither the international nor the regional human rights instruments tend to

receive much attention by local governments and the issues of underdevelopment (see further below) are painted across the sub-Saharan map, an attempt to point out the non implementation and non-respect of international human rights will be rather pointless. The point of the discussion about international human rights law in this chapter is therefore not to try to prove or disprove whether international law has in fact had any effect on previously disadvantaged women in a customary and communal context (no empirical data have been collected in this regard) but the objective, as was spelled out above, is to investigate further the human rights approach to development and how women's property rights can be understood from this perspective. International human rights obligations may not be a means of achieving respect for these rights on a domestic level but they may be a tool for understanding the interconnection between the law and its effects on women's ability to reap the benefits of any potential economic development or to participate in it actively.

The international community, international organisations together with international NGOs, have ever since the coming into force of the UDHR, tried to establish through numerous projects and agreements (some of them discussed below) how women's rights and lately also women's property rights can be understood from the perspective of combining different rights and also viewing them from the perspective of economic development. A young democracy like the South African with the constitution only in force since 1997, and its pre-1994 laws heavily relying on the apartheid system have not had enough time to develop and consider all these connections. The international human rights law system is far from perfect and often lacks in both directness and detail, but parts of it may be used as a roadmap in understanding some of

the important theoretical connections as explored in the present research.

Therefore, the approach to international human rights law in this chapter is not to, as stated above, conclude whether South Africa has indeed lived up to its obligations under international law or not, but the approach is rather to offer an insight into 60 years of “international know how” on how women’s land rights could be understood and analysed; and then to put these ideas in relation to the approach that has been taken by the South African government and the South African courts to explore if international law has anything to offer in terms of making the connections between the law and economic development any clearer. But before this attempt is made some thoughts concerning the concept of property rights as a human rights and the relationship between property rights and poverty as discussed in the international community are put forward.

Property rights as human rights

To this day there is, unfortunately, no universally accepted definition of the right to property. It could be suggested that the absence of an international agreement on the definition of property rights reflects the differences in the backgrounds of those who advocate these definitions. Further, in the beginning of democracy, political rights were only allocated to those who owned property. Property was a great privilege and was, together with ethnicity, race, and gender, a criterion of the massive exclusion of the majority from political and social involvement (Cheneval 2006: p. 11). Today, several important texts of international law such as the

UDHR, the ECHR and the ACHPR unambiguously state the general right to private property.

According to Cheneval (2006: 12f) there are basically two sorts of arguments in favour of private property rights as human rights. In the first version property rights are understood to be obtained by an act, for example by labour, purchase, or transmission through gift or inheritance. Property rights are therefore viewed as special rights based on an entitlement theory of distributive justice. In this regard, viewing property rights as human rights, therefore means that all human beings are guaranteed not to be excluded from the group of potential property owners for reasons of gender, race, and social status and so on. In this sense the right to property does not give anyone the right to become a property owner; but it has the potential of creating opportunity when compared to the many formal reasons and social barriers of exclusion from property that exists in many societies (Cheneval 2006: p. 13).

In the second version owning property is an inherent component of the independence and moral integrity of the person. Personal possession of property generates feelings of responsibility and dignity. It further enables a person to be autonomous and generous to others. The right to property is consequently a basic right related to the moral value of human personhood. In this sense, in an ideal world, everybody should have access to property. It could further be argued that the body itself is property and that the work of the human body gives rights to justifiable entitlements. From this position it could be put forward that hardly anybody in society would be lacking property under those social orders that present just conditions and legal assurances of property acquisition. The key rationale behind this is that the vibrant human body is at

the centre of both types of arguments. As discussed by Cheneval (2006: p. 13), the special property right is linked to the body, to the space it needs, the place it needs to be at, to the things it uses and the work it constantly executes. In this sense and of relevance for the present research, property rights are as a result naturally linked to housing and land rights. The private property right is therefore universal in its character and offers the possibility of legal empowerment of everybody (Cheneval: 2006 p. 13).

There are not many direct referrals, in a strict legal sense, to land rights under international human rights law (see for example arts 13 and 14 ILO Convention 169). However, the rights to land can be placed under the broader right to property as discussed above. Land in itself is linked to the livelihoods of people in an array of ways; it is important for amongst other life, housing, food and health. It can be viewed as essential for a person's status and identity and could be a source of cash for consumption. In practice, access to land is affected by factors such as gender, ethnicity, and social and economic status, not all which are examined in the present research. Further, equal and protected access to land also rests on a number of civil and political, social, economic and solidarity rights. The civil and political rights include the right to vote, the right of assembly, the rights of participation in public and political life and decision-making, and the right to protection of property. The relevant social, cultural and economic rights include the right to education, the right to an adequate standard of living and the right to work, i.e. the right to livelihood (Krause 2001). The right to livelihood is directly connected to the basic rights to housing, food, water and health. The right to development and environment, as part of the solidarity rights are also relevant for people's access to

land. However, of significance in regard to all these rights related to the right to land and to the current research, is the principle of equality and non-discrimination. The rights of equality and non-discrimination constitute a universal standard that is of relevance in any land reform carried out in any country of the world by establishing equal terms of distribution and secure tenure. The principle of non-discrimination is entrenched in all the main human rights documents, including the UDHR, the ICCPR, the ICESCR, the ACHPR and the CEDAW Convention. Building on this discussion specific gendered instruments targeting women's rights to property and development are further discussed below.

The CEDAW Convention

The CEDAW Convention was adopted by the UN General Assembly on the 18th December 1979. Today 186 states had agreed to be bound by its provisions. South Africa ratified the CEDAW Convention in 1995 (OHCHR online). The Convention is the result of more than thirty years of work carried out by the UN Commission on the Status of Women. This body was established in 1946 to monitor the situation of women and to promote women's rights. The work of the Commission has been pivotal in bringing to attention all the areas in which women are denied equality with men. These efforts of the Commission for the advancement of women have resulted in several declarations and conventions, of which the CEDAW Convention is the central and most comprehensive document, further discussed below.

Among the international human rights treaties the CEDAW Convention played an important role in highlighting the needs of women all over the world. The spirit of the

Convention is deeply rooted in the goals of the UN as affirmed in the UN-Charter and seeks to reaffirm faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women. The CEDAW Convention does not only spell out the meaning of equality but also how it can be achieved in relation to women, which is an important objective in relation to the theoretical feminist approach in the present research. By doing this, it establishes an international bill of rights especially for women and an agenda for implementation to guarantee effectively the enjoyment of these rights.

The CEDAW Convention contains three articles of special relevance to the protection of women's property rights and the advancement of women's rights in terms of poverty reduction and economic development. Article 14 spells out the importance of the particular problems faced by rural women and the significant roles which rural women play in the survival of their families; article 15 grants men and women equality before the law and gives women equal rights to administer property; and article 16 puts an obligation on states parties to eliminate discrimination against women in all matters relating to marriage and family relations particularly ensuring the same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property. In conjunction with article 5, setting out to eliminate customary practices which are based on the on the idea of the inferiority or the superiority of either of the sexes or on stereotyped gender roles of men and women, articles 14, 15 and 16 constitute a comprehensive protection of women's property rights.

Article 14 is of special interest because it is unique in the way it refers directly to the importance of the protection of

rural women and the particular problems faced by these women in their everyday life. It places a responsibility on the member states to undertake appropriate measures to eliminate all discrimination against women in rural areas so that they can participate in and benefit from any form of rural development on an equal footing with men i.e. establishing a direct link between the eradication of discrimination against women in this specific context and poverty reduction through development.

In an attempt to include rural women as an integral part of any form of development the CEDAW Convention points out eight different key areas which states are required to emphasise in order to ensure the rights set out in article 14. In relation to the effective access to land by rural women article 14 (f) and (g) are of particular importance. Sub-paragraph (g) spells out the direct responsibility for the states parties to grant rural women equal treatment in land and agrarian reform as well as in land resettlement schemes. This indicates that the states parties not only have to ensure women's equal status before the law but also in the effective implementation of such laws in the form of resettlement programmes. Further, sub-paragraph (f) ensures all rural women the right to participate in all community activities. In relation to the management of communal property there is a stipulation that rural women should have effective access to the decision-making procedures on the community level, such as the ones discussed in chapter 5.

Further, article 14 spells out the wide range of the concepts included under women's rights, to achieve development and poverty reduction. It relates to the protection of rural women against violence and ensures them equal access to healthcare facilities and adequate housing with the equal

enjoyment of property and safety in their domestic environment. As put forward by the CEDAW Committee, women living in a communal and customary setting are more at risk of gender-based violence because of traditional attitudes relating to the subordinate role of women that persist in many rural communities. Girls from rural communities are further at special risk of experiencing violence and sexual exploitation if they leave their rural communities to seek employment in towns. Strengthening women's property rights is one avenue towards strengthening vulnerable women's powerbase in the community, keeping women safer at home and preventing girls from leaving for an even more uncertain and risky future in the larger towns (CEDAW General Recommendation 1992: No. 19).

Article 14 (2) (b) requires states parties to ensure rural women access to adequate healthcare facilities, including information, counselling and services in family planning, and sub-section (h), obliges states parties to take all appropriate measures to ensure adequate living conditions, particularly housing, sanitation, electricity and water supply, transport and communications, all of which are critical in ensuring at least a minimum standard of living to rural women.

Article 15 spells out the rights of women to equality before the law and sub-paragraph (2) stipulates the rights of women to conclude contracts and to administer property. Article 15 puts an obligation upon the states parties to treat women equally in all stages of procedure in courts and tribunals. If a woman, under national legislation or customary law, cannot enter into a contract at all, or have access to financial credit, or can do so only with her husband or a male relative's concurrence or guarantee, she is effectively denied her legal autonomy. Any such restriction prevents her from

holding property as the sole owner and prevents her from the legal administration of her own business or from entering into any other form of contract. Such restrictions may seriously limit a woman's ability to provide for herself and her dependants, once again hampering her ability to participate effectively in limiting the effects of poverty (CEDAW General Recommendation 1994: No. 21).

Article 16 refers to the important relationship between property management and ownership and family relations and the power relations between the spouses. The first paragraph of the article places a general obligation on the states parties to undertake all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations. Further, sub-paragraph (1) (h) spells out the specific rights for both spouses to enjoy the same rights in relation to ownership, acquisition, management, administration, enjoyment and disposition of property. The rights provided in this article overlap with and complement those in article 15 (1) which guarantee women equality with men before the law and 15 (2) in which an obligation is placed on states to give women an equal right to enter into and conclude contracts and to administer property. The right to own, manage, enjoy and dispose of property as stipulated in article 16 is central to women's right to enjoy financial independence, this is critical to many women's ability to earn a livelihood and to provide adequate housing and nutrition for herself and for her family. This is an extension of the rights in article 15 that purely provides for the law to be fair and grant equal result in its application.

In relation to article 16 and the importance of equality in the relationship between spouses regarding the ownership and management of land the CEDAW Committee has made

several important statements in its General Recommendations. In its General Recommendation No. 21 it observed that in countries that are undergoing a programme of agrarian reform or redistribution of land amongst groups of different ethnic origins, the right of women, regardless of marital status, to share such redistributed land on equal terms with men should be carefully observed by the states parties.

In addition, the CEDAW Committee has put emphasis on the importance of disregarding a woman's marital status when determining her property rights. The CEDAW Committee has acknowledged that in most countries, a significant proportion of women are single or divorced and many have the sole responsibility to support the family. Any form of discrimination in the distribution of property that rests on the principle that the man alone is responsible for the support of the woman (or women) and children of his family and that he can and will respectably discharge this responsibility is clearly unrealistic according to the Committee. As a consequence, any law or custom that grants men a right to a greater share of property at the end of a marriage or a relationship, the death of a spouse or on the death of a relative, is in fact discriminatory under article 16 and will have a serious impact on a woman's practical ability to divorce her husband, to support herself and her family and to live in dignity as an independent person (CEDAW General Recommendation 1994: No. 21).

The CEDAW Committee has further recognised that even though many countries recognise the rights of women to enjoy equal rights to matrimonial property, the practical ability of women to exercise these rights are limited by legal precedent or custom. Even when these legal rights are vested in women, and the courts enforce them, property owned by a woman during marriage or on divorce may be managed by a

man in accordance with customary law. In many states, including those where there is a community-property regime, there is no legal requirement that a woman be consulted when property owned by the parties during marriage or a de facto relationship is sold or otherwise disposed of. This limits women's abilities to take control over the property or the income derived from it because customary laws or traditions either fill in the gaps left open by the legislation or supersede the legislation.

A further problem relating to the ownership and accumulation of property is the view on financial and non-financial contributions made by the spouses during a marriage. In some cultures or social contexts greater emphasis is placed on financial contributions towards property acquired during a marriage than other contributions such as raising children, caring for elderly relatives and discharging household duties. Often such other household related contributions of a non-financial nature by the wife enable the husband to earn an income and increase the assets of the household. However, when the marriage ends many wives find themselves in a situation where they have no rights or access to the property accumulated during the marriage due to the fact that it has been purchased by the husband by using money earned by him, giving him the legal right to ownership. In the views of the CEDAW Committee, under article 16, financial and non-financial contributions should be accorded the same weight and member states should adapt their legislation accordingly.

Further, related to women's access to property are their abilities to access effectively and obtain ownership through inheritance. The CEDAW Committee has pointed out that the status reports submitted by the states parties should include

information about the legal or customary provisions relating to inheritance laws. This obligation has only been fulfilled by a minority of the states parties to the Convention (CEDAW General Recommendation 1994: No. 21). Thus, there are still many countries in which the law and practice concerning inheritance and property result in serious discrimination against women, as was shown in the *Bhe* and *Shibi* cases. As a result, women may receive a smaller share of the husband's or father's property at his death than would widowers and sons. In some instances, women are granted limited and controlled rights and receive income only from the deceased's property. Inheritance rights for widows often do not reflect the principles of equal ownership of property acquired during marriage. This may further limit the ability of the concerned women to aid herself and her dependants out of poverty.

The Protocol to the African Charter on the Rights of Women in Africa

As a regional contribution to women's rights under international human rights law the Protocol to the African Charter on the Rights of Women in Africa (hereinafter referred to as the Women's Protocol) is a recent addition to the protection of women's rights under the ACHPR. Entering into force on 25 November 2005, it provides a more comprehensive and specific protection of women's rights than the rights found in the ACHPR. The Women's Protocol was added to supplement the provisions of the ACHPR under article 66 in accordance with a recommendation by the Assembly of Heads of State and Government of the OAU (today the AU) at a meeting in Addis Ababa in June 1995. As of February 2009, 27 out of the 53 member states of the ACHPR have ratified

the Women's Protocol (African Union online). South Africa ratified the Women's Protocol in 2005.

The Protocol builds on the principle of non-discrimination enshrined in article 2 of the ACHPR and article 18 that calls on all states parties to eliminate all discrimination against women and to ensure the protection of the rights of women as stipulated in international human rights instruments. The implementation of the Women's Protocol is monitored by the African Commission on Human and Peoples' Rights (hereinafter referred to as the African Commission) as stated in article 26, through periodic reports submitted by the states parties under article 62 of the Charter. The states parties undertake to ensure the implementation of the Women's Protocol at national level by adopting all necessary measures and in particular by providing budgetary and other resources for the full and effective realization of the rights therein. From the wording of the Women's Protocol it is evident that periodic reports are the only monitoring mechanisms of the rights in the protocol.

However, as was spelled out in the introductory comments to this chapter, it is not the actual fulfilment of the states' obligations under the relevant international instruments that are in focus but rather the way they can contribute to the way we understand the relationship between women's empowerment and the issues of poverty and underdevelopment. The Women's Protocol contains 5 articles relevant to the protection of women's rights to property. Articles 15 and 19 deal with social and economic rights in the forms of food security and the right to sustainable development while articles 6, 7 and 21 cover women's rights in marriage, divorce and widowhood.

The rights to land and property under articles 19 and 15 correlate and overlap because they both aim at securing an adequate standard of living for all women under the Protocol. Hence, article 19 (c) forms the core of the protection by stating that:

Women shall have the right to fully enjoy their right to sustainable development. In this connection, the States Parties shall take all appropriate measures to: [...] promote women's access to and control over productive resources such as land and guarantee their right to property [...].

This article is of importance because it directly relates women's access to and control over land with the right to fully enjoy the right to sustainable development. Further, article 15 (a) spells out the rights of women to nutritious and adequate food. In this regard, access to land is also brought forward as an important factor in indicating that women need to be provided with access to clean drinking water, sources of domestic fuel and land as the means of producing nutritious food.

As has been discussed, in relation to the CEDAW Convention, the protection of women's rights to property within the household and family settings are of great importance in relation to the influence of customs and traditions and the possible effects of an unequal relationship between the spouses. Article 6 (j) places an obligation on the states parties to ensure that women and men enjoy equal rights and are regarded as equal partners in marriage. To uphold the right of equal rights within a marriage the member states have to enact appropriate national legislative measures to guarantee that, a woman, during her marriage, has the right to acquire her own property and to administer and manage it freely. This gives women a right to their own property separate from the

matrimonial property. However, it should be borne in mind that many women won't have access to the financial means to acquire any property outside the household because of lack of an income. As was discussed above, the work by many women within the household makes it possible for men to work outside the home to earn an income. However, women may not have a proper share in the income to invest in her wants and needs.

The transferral of property is another sensitive issue, as discussed above, related to the protection of women's rights to property. The Women's Protocol covers the two most common situations of transferral of matrimonial property i.e. transfer in case of divorce and widowhood. Article 7 (d) constitutes that women and men should enjoy the same rights in the event of separation, divorce or annulment of marriage. In this regard, the states parties should ensure that women and men shall have the right to an equitable sharing of the joint property deriving from the marriage. The law and the effective implementation of the law have to make sure that women, even though they have not equally contributed financially towards the purchase of the matrimonial property, have the right to a reasonable part of the property in the event of a divorce. The use of the words "equitable sharing", used in the article, has unfortunately not been further interpreted by the African Commission.

The second situation of the transferral of matrimonial property, mentioned in the Women's Protocol, is in the event of widowhood. Article 21 (1) stipulates a woman's rights both to inherit the property of her husband and her parents. It states that:

A widow shall have the right to an equitable share in the inheritance of the property of her husband.

It further gives her the right to continue to live in the matrimonial house and in the event of a remarriage, she retains this right if the house belongs to her or she has inherited it. In regard of the inheritance from a parent, article 21 stipulates that women and men should have the right to inherit, in equitable shares, their parents' properties. All of these rights in terms of matrimonial property and inherited property are critical in building not only a potential powerbase for women but these rights also constitute an important platform for a woman to provide for her own and her dependants' basic needs, further discussed below.

Women's rights or the customary rights of the community – what should prevail?

In relation to the rights explored above there is a need to address the issue of the dichotomy that is sometimes put forward in international human rights law between right to culture/custom and the protection of women's rights. In reality there is no dichotomy between these concepts because these rights overlap to a large extent and are not at all in all instances each other's opposite. Nevertheless it is of interest to highlight this discussion as it has been put forward in relation to international human rights law since it is relevant to the South African context.

As indicated, many of the articles in the instruments referred to above and the interpretations laid down by international human rights bodies such as the CEDAW Committee refer us to the difficult relationship between women's rights to property and customary law. Whether these legally binding rights in the CEDAW and the Women's Protocol have had any direct effect on the relevant women in

the South African context, is outside the scope of the present research but what is of interest is to further discuss the tension that is described in both instruments, namely between the equality interests/rights of the individual (the woman) and the customary rights of the group (the community living under customary law). This discussion takes its point of departure in the arguments put forward by Moller-Okin and Kymlicka. In the discussion entertained above, customary law and culture are easily understood as something negative and not worth protecting and this discussion needs to be nuanced and put in perspective. It is important to note that the special protection of one group has the possibility of infringing on the rights of others (groups and individuals); and it is equally important to note that the rights of peoples to choose to live in accordance with a specific culture are alongside women's rights, protected within international human rights law.

The issue at hand is well reflected by the arguments presented by Moller-Okin (1999) and Kymlicka (1995). They are both, but from different perspectives, concerned with the problem of if /how to protect a group's culture, identity and ethnicity from outer pressure while protecting the individual inside the group from the internal pressure posed by traditional and patriarchal structures. Kymlicka (1995: p. 89) argues that many minority and indigenous groups (in the South African context relevant to traditional communities) have their own "societal cultures" which according to him, provide the members of these groups with a meaningful way of life in relation to all aspects of life, not only cultural. According to Kymlicka these cultures should be protected by special rights i.e. special group rights because societal cultures play such a fundamental role in the lives of the members. If

these rights are not protected these groups will be threatened with extinction.

However, as put forward by Moller-Okin (1999: p. 12) and in line with the feminist approach of the present research: “group rights are potentially, and in many cases actually, antifeminist”. As has been discussed in chapters 2 and 4 of the present research, the culture, traditions and customs of many communities in South Africa substantially limit the actual capacities of women to live with human dignity equal to that of men. Moller-Okin (1999: p. 12) directs critique against the idea of the protection of group rights mainly on the grounds that advocates of group rights fail to acknowledge the differences within the cultural groups and the importance of the private sphere. She presents the argument that the sphere of personal, sexual, and reproductive life provides a central focus of most cultures and is a dominant theme in customary rules and practices.

Further, as has been discussed in the present research, personal law i.e. the laws of succession, division and control of family property, and inheritance are in the centre of attention of the community. As a consequence, according to Moller-Okin (1999: p. 13) the protection of the customary ways of life is likely to have much greater impact on the lives of women than on the lives of men because far more of women’s time and energy goes into preserving and maintaining the personal, familial, and reproductive side of life. Hence, customs and traditions are not solely concerned with domestic arrangements, but undisputedly much of customary law and traditions are centred on the private sphere. A person’s home is the place where most time is spent and naturally also the place where customs and traditions are entertained and passed on to the next generation. In turn, as

discussed by Moller-Okin the allotment of responsibilities and power at home has an important impact on who has the right to participate and who has the influence in the decision-making institutions of the group, where rules and regulations about both public and private life are made.

In connection to this the CEDAW Convention clearly expresses that all member states have an obligation to undertake appropriate measures to modify all customs or practices that discriminate against women. Equally, international and regional human rights law such as the ICCPR and the ACHPR expresses a strong protection of cultural and customary values and the rights for all tribal and indigenous peoples to decide freely on how they want to live. The protection offered is important but the key question here is whether it is possible to combine these rights? A possible solution could be to protect basic rights in terms of women living in a customary context. As long as women's basic rights such as the rights to non-discrimination, life, health and an adequate standard of living are upheld the freedom of cultural and customary practices should be protected and preserved for those women who live within that context. However, as soon as these rights are violated, the state should intervene to help modify or abolish harmful practices and stereotypes to protect the rights of the women concerned.

The arguments in favour of group rights put forward by Kymlicka and the response to this by Moller-Okin questioning the protection of women's basic rights within the group dynamic can be helpful in indentifying the issues that are at hand in the apparent clash between cultural group rights and the basic individual rights of women. This discussion can further be helpful in our quest to understand the apparent

connection between protecting women's property rights and developmental progress such as poverty reduction.

Kymlicka constructs his argument of the importance of the protection of group rights on the rights of individuals. Building on the ideas of Rawls, as discussed in chapter 1, Kymlicka stresses the essential importance of self-respect in every individual's life (1989: p. 166). He argues that cultural membership is a primary good and that equal concern for the well-being and rights of individuals can be taken within this unit. He further argues that the importance of self respect would have been recognised by the parties in Rawl's original position and that the relationship between cultural membership and self-respect gives the parties to the original position a strong reason to award this membership the status of being a primary good (Kymlicka 1989: p. 166). Kymlicka establishes that without self-respect or as Rawls (1971: p. 178) puts it the "sense that one's plan of life is worth carrying out" there is no point in our activities; and without the freedom to examine and confirm our beliefs we cannot achieve self-respect. Kymlicka firmly builds his idea of the cultural rights of groups on the protection of religious and cultural freedoms; and he justifies this by the argument of self-respect and its importance for a person's existence. In essence, cultural minorities need special rights, according to Kymlicka, because their culture may otherwise be threatened with extinction, and cultural extinction would likely undermine the self-respect and freedom of group members. Special rights are needed to put minorities on an equal footing with the majority.

However, as brought forward by Moller-Okin (1999: 21ff), there is very little reassurance of the protection of women's rights within the group due to the fact that most discrimination takes place on the personal level inside the

household. According to Moller-Okin the violation of women's basic rights are actually made possible due to the patriarchal structures and beliefs of the very groups protected by the kind of protection as suggested and advocated by Kymlicka.

If we put this in the context of property rights and we depart from the standpoints of Kymlicka and Moller-Okin, it is a simple exercise to conclude that there are many different rights and claims that exist in the interaction between women's rights, property rights and cultural or customary rights. But how do we conclude what claims should prevail and how does this relate to the issue of development?

There are for obvious reasons a number of ways to approach this issue but if we depart from the feminist legal theories guiding the present research and relate this theory to the idea of the HRBA to development, some suggestions can be made. The overall concerns and principles of the HRBA to development as presented by amongst others Ikdahl et al. (2005) were initially discussed in chapter 1. This strategy acknowledges legal feminist theories and further relates directly to women's property rights. It is further built on the equality clauses as present in the constitution, the CEDAW Convention and in the Women's protocol and the notion that culture is a freedom i.e. secondary to the rights of non-discrimination and equality. In making this distinction between the individual rights of women as preceding the protection of the group, the following guiding principles in structuring and understanding women's property rights are put forward by Ikdahl et al. Firstly, all access to land and protection of land rights have to be non-discriminatory. This indicates that formal and informal laws, norms and practices that formally disadvantage women in comparison to men

constitute direct discrimination (e.g. inheritance laws that deprive widows of property rights as presented in the *Bhe* case discussed in chapter 4). Further, indirect discrimination relates to norms that appear to be gender-neutral but that actually favour male life situations and as such leave women in a disadvantaged position (referred to by Ikdaahl et al. (2005: xif) to as for example tenure regimes based on the assumption of household and community unity resulting in de facto inequality). In this regard it is of importance that measures for distribution, formalisation and registration are carefully assessed to eliminate both direct and indirect discrimination, which is the main objective with the present research.

Secondly, standards for gender-equal and non-discriminatory land reform have to be applied in both the public and the private sphere. As put forward by Ikdaahl et al. (2005: xif) whether land reform, formalisation or registration is based on statutory or customary, individual or communal ownership, mechanisms that protect women against direct and indirect discrimination have to be put in place. Thirdly, equal participation and empowerment of women in land reform and land formalisation processes requires that a wide range of national and international human rights instruments address women's rights to participate on an equal basis with men as a substantive right, not only as a formal right. In this regard issues of feminine poverty have to be addressed alongside measures to empower women such as education. And fourthly, the applied HRBA sets out procedural requirements that have a bearing on land reform and formalisation processes in providing monitoring and accountability procedures in terms of due process and the rule of law. This indicates that rights, such as women's rights in land, must be clear and legally enforceable for individuals. Every state has to provide

access to legal remedies in situations where rights have been violated in redistribution and registration processes (Ik Dahl et al 2005: xif). This approach to women's property rights is a way of understanding how different human rights, as the rights explored in this chapter, can work together in constructing a theoretical framework within which we can understand women's property rights, firstly from a feminist legal perspective and secondly from a development perspective. These guiding principles are also helpful in understanding the positioning of women's rights vis-à-vis the customary aspects of the community. This approach is further discussed in the next, concluding, chapter on theoretical considerations and legal reform.

Chapter 7: Conclusions

Theoretical considerations and legal reform

As was highlighted in the introduction to the present research and reiterated throughout its chapters, law is but one factor constituting possible structural and social change related to women's property rights. In relation to feminist legal theory it has been put forward that law could make positive contributions to the enhancement of equality in relation to women's property rights but that it equally has the capacity to reinforce stereotypes and discriminatory practices. Therefore, we have to be careful in assigning too much importance to the effects of the law in changing how people and power in positioned in society.

The same is true for the relationship between the effects of the law and its influence on poverty among women. Poverty can be related to many different factors and it is not a static condition, but one that may change over time. Many of the factors relevant in understanding the roots of poverty can further be related to as both the product and the cause of poverty. An example of this is the HIV/AIDS epidemic where poverty causes people to, for instance, undertake risky sexual behaviour, and being infected may lead either to poverty or increased poverty by the loss of a breadwinner, the decreased capacity to work or the loss of productive time in spending time caring for the sick. If social and structural change is already taking place, law can play an important role in supporting such change. The complete change of the governing system in South Africa is a good example of this where the change came about on, amongst others, political grounds and law was then drafted to support the new idea on

how the society is to be formed and what values are supposed to prevail.

It is evident that the legislator has envisaged a free and equal South Africa and law can support these values by the phrasing, interpretation and implementation of the law; it cannot however establish all the other conditions that need to be fulfilled for all South Africans to be free and equal. In other words the way law is designed and implemented has a role to play in, for instance, if a stereotype like “women being less capable of managing property” is reinforced; it can equally be important in pointing out that laws that violate the right to equality are to be regarded as null and void. The message of the law can support development already taking place in society, it might even under certain circumstances instigate change, but it is dependent and related to a number of factors such as the level of development. In this regard it is also important to point out that effects of the law to a certain extent, as has been put forward in the present research, can be linked to the potential of development but it is equally important to keep in mind that the level of development will influence how structural and societal changes take place in a society which, in turn, has bearing on the development and possible outcomes of the law.

However, turning to the legal perspective that has been the main focus of the present research, it has been motivated by an aspiration to further substantiate the relationship between statutory law and customary law in terms of women’s access to land through land reform with specific regard to communal ownership; and furthermore to investigate the possible relationship between women’s property rights and poverty reduction. In fulfilling these objectives the present research has explored primary and secondary legal sources as

well as text based and secondary data. Feminist legal theories and methods have been explored in search for a theoretical approach that could help us understand the legal impact the plural South African legal system has on women's property rights. Further, theories on formalisation and human rights have been applied as a conceptual framework to further the discussion about the laws' theoretical connection to issues of poverty and underdevelopment.

Having taken its point of departure in the law, the outcome of the present research is naturally suggestions on possible legal and policy reform i.e. suggestions on how the law can be reformulated and supported in order to increase previously disadvantaged women's legal ability to access, own and transfer land. Changing the way women are perceived and treated by the law would indeed, as been pointed out throughout the present research, have impact on women's lives and livelihoods. This concluding chapter entails a presentation of some relevant theoretical considerations putting the law in the context of poverty and underdevelopment. It further brings forward possible legal solutions mirroring the Court's objectives of changing the economic and social context in which the right to property exists in contemporary South Africa through principles of pragmatism and development. Before the suggested reform is presented the theoretical aspects and the possible links between women's property rights and women's abilities to live healthy and dignified lives are further discussed. Why is it indeed, from a development perspective, of importance that law provides equal access to property and the equal possibility for women to own and inherit property?

As has been put forward in several of the chapters of the present research, property, health, making a living and

development are all linked together. To be able to make a living one needs a place to live and, depending on what you do to stay alive, perhaps on having a piece of land to farm or a place from which to run your business. However, with no legal independent rights to access and own property most women living in poverty in developing countries have to depend on their relationships with husbands or male relatives to provide these things. Therefore the source of living for them and their family is uncertain. What happens if the husband gets sick and dies or if the marriage breaks down, who is then going to care and provide for the family?

Put in the perspective of the HIV/AIDS epidemic in South Africa the number of female headed households directly depending on women having independent property rights is rising, as a result of increasing deaths due HIV/AIDS. With 5.5 million people being infected with HIV/AIDS South Africa has the highest number of infected people in the world (UN AIDS 2007: p. 3). Under these circumstances property rights, and inheritance rights in particular, as discussed in the preset research, are critical for women in South Africa in view of the fact that many women are being widowed at a young or relatively young age. The greater majority of these women have children or other dependants that they are directly responsible for. These children directly rely on their mothers or caregivers for care, food, shelter, healthcare and education. In this context the loss or non access to property will have devastating consequences.

As presented by UNIFEM, gender inequality is a major cause of the HIV pandemic. Efforts to fight HIV/AIDS in South Africa have been ineffective in preventing young women from becoming infected, partly because policy and legislation have failed to understand the need for women to

have control of property if they are ever to be in a position to expand their control over their sex lives. As brought forward by Swaminathan et al. (2007) women who have independent access and control over property have greater bargaining power within their marriage and their extended families. Furthermore, if they are widowed they are more likely to be able to survive outside the sex trade because they have economic assets to fall back and rely on (Swaminathan et al. 2007).

In South Africa thousands and thousands of wives contract the virus from their husbands every year. When the man becomes ill and the income of the family is limited or gone women add the job of caring for the sick and dying to their existing, for most women, already overwhelming workloads. When the husband is gone, wives and children stand a great risk of losing their house and/or their land. This dependency on men makes women and children extremely vulnerable. In this situation many women have to depend on their relationships with others for their rights to housing, food and other basic needs, making them very susceptible to abuse and exploitation. As was put forward in the *Bhe* and *Shibi* cases once crisis strikes people already facing poverty and the fierce struggle over resources, they are forced to prioritise. Under such circumstances customary obligations of an heir towards the extended family may seem less important. Custom will traditionally put men in the position of being in control over property and in a situation of crisis, be it because of disease or a breakdown of a relationship, the collapse of traditional social structures and the impact of poverty and global recession will leave women and their dependants to fend for themselves.

Even without the impact of the HIV/AIDS, pandemic, weak or non-existing property rights of women, as was pointed out in the *Bhe*, *Shibi* and *Hadebe* cases creates this dangerous dependence on the husband or other males in the family, such as the son in the Hadebe case. The effect on women of the denial of their property rights is that they are completely dependent on marriage as well as other relationships with men for access to the means to live. If these relationships do not work women stand to lose everything. Under such circumstances there is no way that a violent husband can be asked to leave. Consequently many women are forced to stay in an abusive and ultimately fatal relationship.

Seen from a development perspective it is apparent that the impact of women lacking secure property rights can have effects on the next generation and ultimately on national development. Development requires, amongst other things, women's equal and secure property rights. Amongst many things women increase agricultural productivity and are more likely to share their earnings from outside the home with the family in order to secure their well being. By improving women's negotiating power within the family setting, in the community and in the traditional context through the promotion of equal property rights using these and other development arguments presented in the present research, may break the viscous circle of women's dependency and challenge the ideas and beliefs that women are inferior in marriage and in land management. Future development will be jeopardized if women's property rights are not certain, enforceable, and within the reach of these women because this will ultimately have an effect on their children's schooling, health and prospects in life.

As has been discussed in the present research, it has become increasingly popular, both on the international arena and in the domestic context, to relate to for example, the social entrenchment and the layered and flexible nature of customary land rights. Even though there are a number of positive aspects of customary land tenure systems, as have been acknowledged in the present research and elsewhere, its puts serious strain on women's equal property rights and its inclusion brings back the fundamental issue of how to merge these systems with basic human rights, as put forward in chapter 6. It is true that property approaches based on a mainly western property regime fail to acknowledge and respond to many of the features held by customary law; and that it would be contra productive (and unconstitutional) of the law to try to eradicate all the positive aspects of customary land tenure in order to protect the equality of women. In the name of plurality of legal sources, customary law has to co-exist with the other legal sources under the ambit of the constitution and under the control of the bill of rights. So how do we merge custom with equality? Will it be custom before equality or should we try to achieve equality before custom? Is it indeed possible to build a legal property rights regime that allows people to hold land in a communal, customary way and at the same time avoid the negative impacts of customary land tenure, especially on women?

As has been highlighted in the present research, customary (informal) and private (formalised) land tenure systems have advantages and disadvantages. Customary systems facilitate social cohesion and the protection and promotion of culture and tradition. In contrast, private land ownership (on an individual or communal basis) can be argued to give users a sense of security which promotes

investment in land. However, from a gender perspective, both systems hold disadvantages for women. The social structure endorsed by custom builds on a patriarchal structure promoting inequality between women and men. Customary systems of property control and ownership are inherently discriminatory against women giving women only secondary property rights. As was pointed out in the jurisprudential review the process of codification of custom into customary law which went on as part of the colonial and apartheid projects made things even worse. In the development from oral to formal, written rights (official customary law) certain interests lost out, especially holders of secondary rights', among them many women.

While customary systems discriminate on grounds of identity, private systems depend on purchasers having sufficient funds or collateral and therefore by definition only benefit the wealthier in society. De Soto argues, as was discussed in chapter 1, that formalised land and property rights are a primary element in capitalist modes of economic development but it can equally be argued, as has been done in the present research, that there is a considerable cost to women in land privatisation using his theory. Women, in South Africa and elsewhere, are disproportionately numbered among the poorest in society, and therefore enter the land and property market on unequal terms. Government policies, building on de Soto's ideas about formalisation of land ownership have been extensively critiqued as leading to growing inequality and poverty as traditional user-rights of marginalised groups are eroded. Economic liberalisation, as promoted in South Africa, has led to increased and intensified competition over land as a resource. The property market, in South Africa, is not gender-neutral, and excludes poor women

by discriminating against them because of their lesser power and resources.

Nevertheless, despite all these issues as made visible in the present research, women and children are best served by formal ownership guaranteed in law. Women need secure independent control over the property, helping them to make a dignified and decent living, and to realise their rights. But how do we go about this in a “legal” way including and promoting the many aspects of the pluralist legal reality of South Africa? Before we get to the more technical details of the law as such, we need to consider the realities of formal law in its reach, application and acceptance in a traditional setting. As has been discussed in the present research, formal law is sometimes unable to provide a coherent response to the issue of women’s rights to property, because such laws are a part of a foreign system of governance which has no real link to the social structure of the society in which it is supposed to work. The crucial point here is not to only rely on a set of norms in changing women’s position in relation to property in a customary setting, much effort needs to be geared toward changing people’s attitudes toward women in general and towards women’s property rights specifically. This will assist in developing customs in line with what is required by the law (as brought forward in the *Shilubana* case further discussed below).

It is further of importance to point out, in line with the legal feminist approach in the present research that neither customary nor, what can be referred to, as modern systems of property law have a genuine concern for women’s equal property rights. They can’t have this concern simply because they were in part designed to serve different ends, such as supporting a predominately wealthy and male elite. Both

customary and modern legal systems are the products of male-dominated systems of governance. Far from providing objective justice these systems preserve recognizable biases against women. While the South African national legal system supports individual rights at the level of the constitution containing rights to equality and non-discrimination, the actual laws often reflect, as has been highlighted in the present research, ideas of communality (CPA Act and CLARA), the household as a unity (the Restitution Act), and approaching rights from a historical perspective (the Restitution Act) even though it has been established, both domestically and internationally, that women are often discriminated against in these contexts.

Furthermore, as has been put forward in the present research, one of the most visible dangers to women's property rights in South Africa is the apparent incoherence created by the existence of parallel systems of jurisdiction over property rights. The inconsistencies exist both within systems as such, and between different systems in places where older systems of common law co-exist with the modern system of law built on the new constitutional dispensation. The very fact that more than one system exists creates the opportunity for a stronger party to choose the system which serves that person's own ends. This is not legal under the existing system so far as the law contradicts the constitution. However, to make this argument one needs access to the modern legal systems (as opposed to the customary one) and it costs money and takes education to be able to use the law, something that many of the women of relevance to the present research have not got.

Let us return to the questions posed above, and indeed to the core of the present research. What possible conclusions can be drawn and what legal reform can be suggested in order

make some sort of positive change in terms of women's property rights in a communal and customary context in South Africa? The first and important conclusion that can be drawn is of course that change cannot be achieved by the law alone. The law needs the assistance of educational programmes, infrastructure improvements and improved health facilities and information about diseases such as HIV/AIDS. Apart from this there are some important changes that can be made to existing legislation and some additions to policy to try to create substantive equality.

From the feminist perspective of the present research, relying on the international and national bill of rights, any such legal measure undertaken to reform ownership and access to land has to take two main principles into consideration: *Firstly* the criteria on which the redistribution process rests must not discriminate directly or indirectly against women; and *secondly*, the criteria for acknowledgment, registration and safeguarding of informal rights should be such as not to discriminate directly or indirectly against women. In discussing possible reform we also have to take into consideration the fact that any solution has to be viable within the wider constitutional framework of South Africa. This means that any alternative solution needs to safeguard both gender equality and the survival and respect for customary law. On the one hand it is not possible to exclude customary law all together from having a position within land reform simply because it is protected under the constitution as a source of law and should be respected as far as it does not violate any fundamental rights as found in the bill of rights. On the other hand it is equally impossible to modify core values of the constitution, such as the rights to equality not only because it is part of the

bill of rights but also because it is a part of both treaty based and customary international law.

In terms of this sensitive relationship between statutory law and customary law in relation to women's property rights, the jurisprudential review brought forward a number of principles from which we can draw some valuable conclusions in terms of how the two are supposed to be amalgamated. For an overview of the most important principles and subsequent conclusions drawn please refer to Annex V: *The principles and conclusions drawn from the jurisprudential review*.

In referring to the above mentioned principles and conclusions, as well as relying on the other findings of the present research, a pragmatic solution that builds on the notion of the protection of basic rights achieved through a multi-dimensional structure and considering the ability for custom to develop, is suggested. A possible middle way between formalisation and custom could be paved by proposing communal ownership with a limitation of the powers of traditional leaders in governing land as well as instituting progressive change of customary law through the respect, support and proper implementation of a wider range of rights, as mentioned above.

Even though it might be tempting, from a feminist perspective, to try to rid the law of any customary element, the solution must be feasible in the legal and cultural pluralistic reality of South Africa as protected by the constitution, as mentioned above. As the Court pointed out in several of the cases reviewed in chapter 4, the constitutional system envisages a place for customary law where customary law should be accommodated not only tolerated as a part of South African law. Further, the Court equally importantly pointed out that legislation that mirrors customary rules contrary to the

objectives of the bill of rights, is invalid even if it reflects customary rules that are being practised by the communities. This clearly gives women a common law remedy to challenge non-written customary practice in court if it is sanctioned by law and believed to be contrary to the bill of rights.

However, it does not clarify the legal avenue for women wishing to raise the issue of discriminatory customary practice not mirrored by legislation. This is one of the crucial problems with the legal solution as put forward by the Court in the *Bhe* and *Shibi* cases as well as in the *Shilubana* case. The principle of male primogeniture in the *Bhe* case was deemed unconstitutional as it was expressed in legislation constituted during the apartheid era and built on official customary law. The community in the *Shilubana* case had a right to develop their customs and therefore it would be unconstitutional to prevent Ms Shilubana from becoming the chief – but not because the rule of male primogeniture in succession of power is regarded as unconstitutional as it is practised by many communities. This clearly indicates the reluctance of the Court to dictate to the various cultural communities in South Africa how they should live i.e. that they have to conform to the constitution. The Court wants the communities themselves to develop, it is even suggested in the *Shilubana* case that the duty to develop their custom is in the hands of the traditional leadership, but will they? And if so, will it be in line with the principles of gender equality?

In terms of a legal solution to the problems concerning communal ownership, the most practicable structure available within the South Africa context is the CPA, resting to a large extent on constitutional principles. However, before discussing the possible reliance upon and revisions to this structure it is important to draw attention to the principles spelt out by the

courts in the *Popela* and *Bataung Ba-Ga Selale* cases concerning the courts' view on what constitutes a community. It is possible from the courts' statements to conclude that a group can qualify as a community without the customary or traditional element and or identity. The courts suggest that where it is helpful (not a necessary requirement) customary law can be used to establish the group's shared rules related to access and use of the land, but it is not an absolute must. As the decision-making structures as set out in CLARA and the CPA Act are based on the community the decisions in *Bataung Ba-Ga Selale* and *Popela* are of importance because they tell us firstly that the community does not have to have and/or apply a traditional structure and secondly that if it has such a structure it may not be invoked if it violates the gender protection as set out in the constitution and the Restitution Act.

Conclusively the model used in the CPA could work as a point of departure for communal ownership, bearing in mind the principles spelt out by the courts. However, it has to be modified. Firstly, on a practical level the legislator needs make sure that all the stakeholders understand the caution that should be taken when promoting land reform and land redistribution built on customary structures. The knowledge of the potential risk that this poses to the upholding of women's rights is important and can in itself act as a means of lessening discrimination. It rests on the state to make sure that if these types of structures are used, measures are undertaken to lessen the discrimination and the gap between men and women as far as possible. These measures include education and training of men and women on issues of equality and the content of the bill of rights, as well as the improvement of infrastructure in and around the communities, as discussed in chapters 4 and 5.

In this regard, especially in relation to the CPA Act, the DLA and the DRLR has failed on all levels whereby communities, after having reached an agreement on a constitution (often written by a lawyer from “town”), are left to fend for themselves. The CPA Act spells out that all members should be afforded a fair opportunity to participate in the decision-making processes of the association but in practice there are no mechanisms built into the system to safeguard this requirement. Once the constitutions of the property associations are drafted and accepted the committees set up to govern the property can take any shape or form as long as they conform to the principles of non-discrimination. However, it has not been established by the DLA or the new DRLR what this actually means and further there are no monitoring mechanisms in place to overview the work of the greater majority of the CPAs set up under the legislation.

Secondly, even if the CPA Act lacks in clarity and monitoring mechanisms there is a great difference in the message sent by the legislator in terms of the CPA Act and CLARA. The first allows for a customary aspect of life in promoting communal ownership in line with the constitutional values. It could easily have been invoked by the DLA and the DRLR that the committees set up to govern the land under the CPA Act needs to cater for men and women and men as well as women needs to be present in these committees, this is a problem that needs to be addressed by the relevant department. However, in terms of the most important decisions to amend the constitution or dissolve the association, or to dispose of or to encumber the property of the association, an inclusive decision-making process is required where all members, men and women, of the community should have the opportunity to participate. The CPA Act does

not mention or intend for a traditional leadership to run the business of the CPAs even though the legislator could have been clearer in this objective.

As a contrast CLARA allows for direct patriarchal structures to govern communal land. It might be argued that the difference in outcome is not very big but in terms of the protection of women's access and ownership to land it is in fact of great importance. CLARA is, according to the findings in the present research, supported by the judgement in *Tongoane and Others*, constitutionally invalid because it violates the right to equality and should therefore be repealed or amended. However much it seems that statutory law is a good vehicle for reforming customary law, the unreserved inclusion of customary decision-making structures into the law is not the answer. Throughout colonial and apartheid times endless attempts were made to mould customary law into the same form as statutory law. This did not work and the consequences were horrible and far reaching as demonstrated in the *Bhe* and *Shibi* cases.

Thirdly, the law must be formed around the rights in the bill of rights to have the power to develop (within its powers as cautioned above) the social context in which it needs to exist and to avoid legal uncertainty. This is well expressed in the CPA Act, and even though not perfect, as discussed in chapter 5, it could with the help of a strong support structure possibly, be an efficient tool in supporting women's rights in land. These features are not found in CLARA. This is not a matter of deeming customary law as unworthy of acting as an organising factor in relation to land ownership and distribution but simply acknowledging the constitutional reality in the hierarchy of sources and the rights as put forward in the constitution reflecting the mutual view of international law.

Examples from all over Africa shows that traditional communities need a way of jointly owning the land i.e. giving room for the communal will of the people concerned in order to maintain the traditional way of life. But under the present constitution there is no justification for allowing a traditional leadership to govern land without legal specification on how they should act in order not to violate basic rights of women.

Building on the findings of the present research national guidelines should be drawn up, indicating how the traditional leadership could implement gender equality into the customary structure and how democratic structures can be built within the community context, building on the view of the Court that it is the traditional leadership that should be in charge of developing customary law in line with the equality clause in the constitution. It cannot be expected of the traditional leadership to, on its own, come up with a feasible structure for how gender issues should be implemented into customary structures – but it is evident from the Court’s argument that it does indeed rest on the traditional leadership to develop customary law in line with the equality clause in the constitution. So therefore, even if changes are made to present ownership structures, and quite a lot has been done in making both the CPA structure and the decision-making structure under CLARA (even though more could have been done) more gender equal, not much will change until it is required legally and more importantly politically by the traditional leadership to conform to gender equality. They hold the power over the communities and they have the communication skills to communicate a message of equality if they so wish.

Lastly, based on the strong notion of legal activism within the civil society in South Africa and the will of the

higher courts to change the law when it is presumed to be unconstitutional, it was highly anticipated that CLARA would be challenged, as discussed above in relation to *Tongoane and Others*. The appeals courts now have an opportunity to provide further guidelines and answer the questions as posed by Judge Ledwaba on how any Act including customary aspects of land tenure in general should be implemented and what responsibilities rests on the state in order to create legal certainty and to guarantee the protection of fundamental rights. If this cases reaches the Court, the Court has an opportunity to indicate what measures should be undertaken in order for customary law to fit within the constitutional scope not only in terms of spelling out a negative right of non-infringement; but also in terms of how, in practical terms, legal pluralism should be promoted and respected on a grass root level in relation to land tenure. Custom is in its nature flexible and ever changing which, if it is not made official through codification, will hopefully lead it to eventually develop in line with the constitutional objectives; and if it does not, it will ultimately cease to exist as a valid source of law under the present constitution. This turn of events will prove to be very problematic because of the important position that customary law has in South Africa today and hopefully will continue to have in the future.

Sammanfattning (Summary in Swedish)

Avhandlingen, *Equality before custom?* är baserad på både primära och sekundära juridiska källor. Målet med avhandlingen är att analysera förhållandet mellan lagstiftning och sedvanerätt i relation till svarta kvinnors äganderätt och de jordreformer som genomförts i Sydafrika sedan 1994. Sydafrikas juridiska system byggde före 1994 till stor del på apartheidprinciper och patriarkala strukturer. När den nya konstitutionen trädde i kraft 1997 kom jordreformen att bli ett av de centrala instrumenten i försöken att komma till rätta med tidigare orättvisor och till viss del kompensera för de kränkningar som majoriteten av svarta sydafrikaner var utsatta för under apartheidtiden. Denna förändrings-process äger idag rum inom det nya juridiska ramverk som skapats för att skydda och uppmuntra jämställdhet baserat på kön och ras men också för att skydda existensen och utvecklingen av den lokala sedvanerätten och det traditionella ledarskapet som är knutet till sedvanerätten.

Med utgångspunkt i den nya konstitutionen så undersöks i avhandlingen sedvanerättens funktion och position inom den sydafrikanska jordreformen liksom de strukturer som skapats för samäganderätt av jord, som tidigare styrts av sedvanerättsliga principer. De problem som många svarta kvinnor i Sydafrika måste hantera när de försöker få tillgång till eller söker äganderätten till jord inom det nya systemet analyseras. Feministiska teorier och metoder används i avhandlingen för att kunna förstå den juridiska inverkan som det pluralistiska sydafrikanska rättssystemet har på svarta kvinnors möjlighet till ägande av jord.

Tillgången till land analyseras dessutom i ett vidare perspektiv av möjligheterna att bekämpa fattigdom och öka kvinnors förmåga att fatta egna beslut. Forskningens resultat presenteras både i form av teoretiska slutsatser vilka sätter den sydafrikanska jordreformen i ett fattigdoms- och utvecklingsperspektiv och förslag till hur lagstiftningen kan förändras för att öka kvinnligt inflytande över tillgången till land i Sydafrika. Forskningsresultaten visar att jämlikhet i ägande mellan könen är en viktig komponent i den ekonomiska utvecklingen och att det traditionella ledarskapet i Sydafrika har en fram-trädande roll att spela i kampen för att öka respekten för jämlikhet mellan kvinnor och män, särskilt på landsbygden. Därför föreslås att nationella riktlinjer presenteras för hur det traditionella ledarskapet i Sydafrika kan närma sig, förstå och implementera jämställdhet i relation till de sedvanerättsliga reglerna och dess struktur. Dessa förslag bygger på den idé som lanserats av den sydafrikanska konstitutionella domstolen, att det är det traditionella ledarskapet som bör vara drivande i frågan om utvecklingen av sedvanerätten i linje med de krav på jämställdhet som finns i konstitutionen. Detta förhållningssätt till jordreform och kvinnlig äganderätt kan möjligen hjälpa till att minska feminiseringen av fattigdomen i Sydafrika, vilken på senare tid har förvärrats genom spridningen av HIV/Aids.

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Annex I: Overview of the jurisprudential review

Case:	Legal questions:	Method and perspective:	Relevance:
<p>The <i>Richtersveld</i> case 2003</p> <p>“ Customary rights based land claims”</p>	<p>The position of customary law as a legal system under the constitution.</p> <p>The flexibility of customary law.</p> <p>The legal point of departure for the development of customary law .The relationship between customary law and statutory / common law.</p>	<p>Legal pluralism</p> <p>Question of hierarchy of legal sources.</p> <p>Question of translating customary concept into modern legal concept.</p> <p>Question of how to handle a legal system inherently different to statutory and common law under the constitution.</p>	<p>It can tell us if customary law is a source to be acknowledged under the constitution – and therefore also in relation to statutory and common law.</p> <p>If it is recognised as a source it can tell us the hierarchy of the sources concerned.</p> <p>It can give us guidance on if and how customary law should be developed.</p>
<p>The <i>Bhe</i> and <i>Shibi</i> cases 2004</p> <p>“The constitutionality of the customary rule of male primogeniture”</p>	<p>The constitutionality of the customary rule of male primogeniture in relation to succession of property.</p> <p>The relation between customary law and the right to equality under the constitution in general.</p> <p>The issues of official v lived customary law.</p>	<p>Legal pluralism</p> <p>Question of lived and official customary law.</p> <p>Feminist legal theory and method</p> <p>What is the position of women under customary laws of succession?</p>	<p>If male primogeniture is found to be un-constitutional, other forms of male domination in relation to customary law in general such as succession of power (the <i>Shilubana</i> case) and decision-making structures over property and other matters can also be questioned.</p>
<p>The <i>Shilubana</i> case 2008</p> <p>“The right of the community</p>	<p>The right of the community to develop customary law to be in line with the constitution.</p>	<p>Legal pluralism</p> <p>Question of the right and duty of the development of customary law.</p>	<p>This case will potentially be able to answer questions like who has the duty to develop customary</p>

<p>to develop customary law in line with the constitution”</p>	<p>The constitutionality of the principle of male primogeniture in succession of power in a customary setting.</p>	<p>Feminist legal theory and method What is the position of women under customary laws of succession of power?</p>	<p>law in line with the constitutional goals as set out in <i>Bhe</i>. And who is responsible to ensure that gender equality is respected in customary law?</p>
<p>The Hadebe case 2000 “ If lived customary law can also be said to have to conform to the bill of rights”</p>	<p>In the <i>Richtersveld</i> and <i>Bhe</i> cases the discussion and conclusions around customary law was focused on the question about the official version of customary law and how it was discriminating (different grounds) and should therefore be regarded as unconstitutional. The Hadebe case poses the question of whether lived customary law that is contrary to the bill of rights has to conform to the same?</p>	<p>Legal pluralism Question of the differences/similarities between lived custom and official customary law in terms of constitutional conformity and validity?</p>	<p>If lived custom also has a duty to conform to the bill of rights it gives women a common law remedy to challenge non-written customary practice in court. This may be important in relation to customary practices relating to property rights such as the de facto exclusion of women in decision-making structures making decisions over communal land where there is a law in place protecting women’s rights to participate but where the customary practice discriminates against female participation.</p>
<p>The Popela case 2007 “The definition of the term community and its relation to customary law”</p>	<p>The concept of a community – what is a community in the eyes of the Court? (Further discussed in the Bataung Ba-Ga Selale case)</p>	<p>Legal pluralism Question of if customary law should be applied to help define legal terms used in relevant legislation?</p>	<p>Can possibly explain whether the customary element is important in establishing a community and therefore if a group of people can qualify as a community under the legislation without reference to</p>

			the customary / traditional element.
<p>The Bataung Ba-Ga Selale case 1999</p> <p>“The legality of a definition of community contrary to the right to equality”</p>	<p>The definition of a community under customary law with reference to the head of the household –is it the heads of the households that make up the community and therefore should head other forms of communal decision-making bodies? Is this accepted under the Restitution Act?</p>	<p>Legal pluralism Question of if customary law should be applied to help define the legal terms used in relevant legislation? Feminist legal theory and method What is the position of women under the customary concept of “a household”?</p>	<p>If it is this terminology that is favoured by the legislator it may well be that this could influence women’s ability to make decisions over communally owned and run properties.</p>

Annex II: Overview of the analytical approach

Chapter	Research question/s	Applied theory/ies	Main sources	Method
2. Backward or forward?	1	Feminist legal theory and legal pluralism	Secondary legal sources and text based and secondary data	Literature review
3. No longer second class citizens	2	Feminist legal theory	Legal primary and secondary sources	Feminist legal methods
4. Jurisprudential review	1 and 5	Feminist legal theory	Legal primary sources (case law) and text based and secondary data	Legal method, Feminist legal methods Literature review
5. Formalisation of property rights	3 and 5	Feminist legal theory and formalisation theory	Legal primary and secondary sources and text based and secondary data (in relation formalisation theory)	Feminist legal methods Literature review
6. What about international law	4	Feminist legal theory and human rights theory	Legal primary and secondary sources and text based and secondary data (in relation to the human rights theory)	Feminist legal methods Literature review

Annex III: Section 9 - the equality clause

(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

Annex IV: Section 25 - the property clause

(1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.

(2) Property may be expropriated only in terms of law of general application

(a) for a public purpose or in the public interest; and

(b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.

(3) The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including

(a) the current use of the property;

(b) the history of the acquisition and use of the property;

(c) the market value of the property;

(d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and

(e) the purpose of the expropriation.

(4) For the purposes of this section

(a) the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources; and

(b) property is not limited to land.

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

(6) 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.

(7) A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.

(8) No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36(1).

(9) Parliament must enact the legislation referred to in subsection (6).

Annex V: Overview of the principles and conclusions drawn from the jurisprudential review

In the opinion of the Court:	Conclusions:
The position of customary law within the constitutional framework:	
<p>The constitutional system envisages a place for customary law where customary law should be accommodated, not only tolerated, as a part of South African law. Legislation that mirrors customary rules contrary to the objectives of the bill of rights, is invalid even if reflects customary rules that are being practised by the communities.</p>	<p>Customary law should be accommodated, not merely tolerated, under statutory law but only as so far as it does not violate the right to equality i.e. discriminates against anyone on the grounds as set out therein. This gives women a common law remedy to challenge non-written customary practice in court if it is sanctioned by law and believed to be contrary to the bill of rights</p>
The interpretation of customary law:	
<p>The nature of customary land rights has to be determined by reference to customary law and not through the lens of foreign legal concepts.</p> <p>The substance of customary law must be determined with reference to both the history and the usage of the community concerned.</p> <p>Customary law is flexible and has the ability to develop.</p> <p>It should be interpreted in its own settings and not through the prism of the common</p>	<p>If we want to try to understand customary law we must not try to interpret it from the point of departure of any other system such as statutory or common law - we need to look at the history and present usage of the law</p> <p>Customary law has a right under the constitution to develop - with its flexible nature it can be developed to fit in to the constitutional structure</p> <p>The context is of outmost importance. Customary law as implemented under</p>

law or through other legislation.	conditions that greatly differ from the traditional pre-colonial settings causes legal effects that will render the customary practice invalid under the constitution
Official customary law and living custom	
<p>The main problem with the application of the official version of customary law is the fact that the rules have not been given the space to adapt to the ever changing social conditions and values of the new South Africa.</p> <p>The application of customary law rules of succession under conditions that greatly differ from the traditional pre-colonial settings, causes problems such as the discrimination and marginalisation of black women.</p>	<p>Caution should be taken in relation to the official version because it has been frozen in time and has not developed in relation to the development of the specific community</p> <p>There is a relationship between the social context of custom and its application in terms of the results of the application of the law.</p>
The principle of male primogeniture	
<p>The rule of male primogeniture as it applies in “official” customary law to the inheritance of property is inconsistent with the constitution and is therefore invalid to the extent that it excludes or hinders women from inheriting property.</p>	<p>The rule of male primogeniture is unconstitutional and may not be applied in customary law anymore.</p> <p>In terms of succession of property it was left to the traditional leadership to develop customary law to be in line with the constitution (legal uncertainty?) Will they develop the law?</p>

