4 Cultural Diversity, "Living Law," and Women's Rights in South Africa

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THROUGHOUT SOUTH AFRICA'S HISTORY RACIAL, CULTURAL, ethnic, linguistic and religious differences have been a source of inequality, exclusion, and subordination. Under colonialism and apartheid, race determined political rights, economic opportunities, and social status; Western, Christian norms prescribed moral standards, and legal rights; and ethnicity was manipulated to relegate the majority of black South Africans to "citizenship" of "independent" ethnic homelands. The new democratic Constitution imagines a different country, one that embraces diversity and legal pluralism, and affirms difference as a positive source of individual and collective identities within the new democracy. This idea of diversity in the Constitution takes account of religious, linguistic, and cultural difference. It includes historically marginalized minority religions,[1] recognizes eleven official languages (including all African languages, as well as those of the Indian and Asian community),[2] and acknowledges the variety of cultural

1 In 2012, South African was largely Christian (80 percent), although with a significant number of "traditional" Christian churches (Christianity influenced by African traditions). Islam, the largest minority religion, accounts for about 1.5 percent of the population, and adherents of the Hindu religion account for 1 percent. Judaism is a significant minority, but only accounts for 0.2 percent of the population. Statistics South Africa, Primary Tables South Africa: Census 1996 and 2001 Compared, available at www.**stats**sa.gov.za/**census**01/html/RSA**Primary**.pdf 24 (2004).

2 Section 6 of the Constitution recognizes the former official (colonial) languages of English and Afrikaans (a development of colonial Dutch), as well as nine ethnic

communities within South Africa.[3] Although religion, language, and culture might overlap within particular groups, they also cut across different groups, thus creating pathways of similarity across difference. In addition, commonalities and divisions of gender, class, and urban-rural location contribute to a complex social fabric.

This chapter considers one part of this complex diversity: the constitutional recognition of cultural diversity, especially as it is manifest through the recognition of customary law, and its relationship to the constitutional guarantee of gender equality. As the supreme law, the South African Constitution subjects all law (customary, common, and statutory) to the rights and values of the Constitution, including the primary democratic values of dignity, equality, and freedom. This chapter rejects the idea that the Constitution provides a "liberal democratic" framework that constitutes the basis for a "top-down" universalism that tests culture and custom against irretrievably external, liberal standards. Although the Constitution is capable of this, among other, interpretations, the chapter argues that the best – and most transformative – interpretation of the constitutional text is one that enables a deep respect for cultural identity and diversity and consequent recognition of positive cultural norms and practices, while also addressing crosscutting, intragroup inequalities, such as gender. This interpretation recognizes that transformation under the South African Constitution requires courts to address multiple and intersecting inequalities, and that culture and custom – long ossified in official law – face particular challenges in adapting to contemporary political, economic, and social conditions. Although democratic and cultural values might be rooted in different contexts, South Africa's history of colonialism, apartheid, and political struggles, as well as its

languages. In addition, the Constitution requires the state to promote and show respect for a variety of other languages used by different communities within South Africa.

3 This not only refers to the ethnically based cultures of the black African majority, but also to cultural differences within the white, coloured, and Indian and Asian communities that are linked to places of origin and language.

socioeconomic development, mean that there is considerable common ground within and across communities for harmonizing customary law and the Constitution.

This interpretation starts from the idea that cultures (including the culture of human rights) are contested, flexible, and permeable, capable of varying meanings and of being responsive to socioeconomic changes. So, too, are democratic values of equality and dignity contested and capable of different meanings. Neither operate in silos, and the meanings afforded to culture and custom, in practice, often draw on variable sources to determine what is just in a particular setting. This does not mean that all meanings are possible, nor does it mean that historic and current power relations can be easily overcome. However, once it is recognized that democratic values can extend to indigenous values, and vice versa, and can form a basis for deliberation by all South Africans, then the Constitution can provide a framework for real debates about meaning, justice, diversity, and equality. In the end, the constitutional limits that courts impose on cultural and religious diversity should be ones that seek to balance this diversity with the constitutional need to overcome entrenched power hierarchies and socioeconomic inequalities to "improve the quality of life of all South Africans."[4]

The chapter explores how, and the extent to which, the Constitutional Court has sought to balance the recognition of culture and custom with overarching constitutional rights and values (especially gender equality) by prioritizing an idea of living law and custom that is responsive to change. It explores this jurisprudence (as it relates to culture and customary law) both to emphasize the value of such an approach and to point to its limitations and difficulties. The chapter concludes that the Court has been correct, even innovative, in its overall conclusions on gender within customary law. However, it has perhaps not always drawn sufficiently on positive examples of living law and cultural norms in doing so.

4 South African Constitution, preamble.

This is particularly apparent in its use and understanding of "living law," the tensions between rule making and flexibility, and the choice of civil over more open-ended (and uncertain) customary remedies. As a result, some opportunities for a more robust, albeit open-ended, engagement with custom and culture, or a more sensitive interpretation of cultural norms and living law, have possibly been lost. These possibilities remain and can be enhanced through a more open-ended and deliberative approach in which courts take an active role in mediating all voices within "intracultural" disputes. In the end, however, the fundamental question remains the extent to which a reliance on "living law"can overcome the unequal power relations that subsist in all communities.

1 The Constitutional Context

Turning away from the cultural and religious inequality that characterized South Africa's past, the democratic Constitution envisages a new South Africa that "belongs to all who live in it, united in our diversity"[5] and encompasses a rights-based framework that reflects, protects and nurtures diversity and pluralism.

1.1 The Constitutional Text and a Transformative Constitution

The Bill of Rights recognizes a number of individual rights, including freedom of religion, of belief and conscience,[6] and of association,[7] as well as the "right to use the language and to participate in the cultural life of [one's] choice."[8] Freedom from unfair discrimination based on religion, conscience, culture, ethnic and social origin, language, and belief is also entrenched.[9] In addition, "persons belonging to cultural,

5 *Id*.
6 *Id*., at section 6.
7 *Id*., at section 18.
8 *Id*., at section 30.
9 *Id*., at section 9.

religious and linguistic communities may not be denied the right, with other members of that community," to enjoy and practice their culture, religion and language and to participate in cultural, religious and linguistic associations.[10]

Taken together, these rights both "positively enabl[e] individuals to join with other individuals of their community, and negatively enjoin . . . the state not to deny them the rights collectively to profess and practise their own religion (as well as enjoy their culture and use their language)":[11]

> They underline the constitutional value of acknowledging diversity and pluralism in our society and give a particular texture to the broadly phrased right to freedom of association . . . [T]hey affirm the right of people to be who they are without being forced to subordinate themselves to the cultural and religious norms of others, and highlight the importance of individuals and communities being able to enjoy what has been called the "right to be different." In each case, space has been found for members of communities to depart from a general norm. These provisions collectively and separately acknowledge the rich tapestry constituted by civil society, indicating in particular that language, culture and religion constitute a strong weave in the overall pattern.[12]

The Constitution also enables a legal pluralism that recognizes religious and cultural rules and practices. Section 15(3) of the Constitution permits the South African parliament to enact legislation that recognizes traditional and/or cultural and religious systems of personal and family law. The Constitution acknowledges that customary law is a system of law equivalent to statutory and common law,[13] and recognizes

10 *Id*., at section 31. This includes the right to establish independent educational institutions, as acknowledged in section 29(3).

11 Christian Education of SA v. Minister of Education 2000 (10) BCLR 1051 (CC), at para. 23.

12 *Id*., at para 24.

13 Const. *supra* note 4, at sections 2, 8(1), 39(2), 211(3).

the institution, role and status of traditional leadership.[14] Important, although underutilized, is section 39(3), which recognizes "rights or freedoms that are recognised or conferred by . . . customary law," over and above those conferred in the Bill of Rights.

This detailed recognition of cultural and religious diversity is not absolute but is "subject to the Constitution." In terms of sections 30 and 31, individual rights to participation in collective cultural and religious life "may not be exercised in a manner inconsistent with any provision in the Bill of Rights." In addition, the legal recognition of religious, personal and family law "must be consistent with . . . the Constitution,"[15] and the recognition of traditional leadership and customary law is subject to the Constitution in all respects.[16]

South Africa's constitutional framework thus suggests a cultural and religious diversity and pluralism that is mindful of, and limited by, other constitutional rights and principles. Although the Constitution recognizes the fundamental importance of "the right to be different" according to one's cultural and religious context, and not always to be subject to the general or dominant norm, this is not an untrammeled set of rights. It is clear that the constitutional recognition of cultural and religious diversity neither creates nor protects cultural and religious communities that are insulated from potentially conflicting constitutional rights. Although some traditional and religious leaders rely on rights to cultural and religious freedom and a strongly negative conception of liberty to argue for the right to be left alone as custodians of customary and religious law, this interpretation has not found significant judicial support.[17] Part of the

14 *Id*., at section 211(1).

15 *Id*., at section 15(3)(b). In addition, the recognition of customary rights under section 39(3) must be consistent with the Constitution.

16 *Id*., at section 211(1) in respect of traditional leadership; at sections 2, 8(1), 39(2), and 211(3) in respect of customary law.

17 The right to be different, asserted by Justice Sachs in *Christian Education*, *supra* note 11, is not the same as the right to be left alone, a more liberty-based interpretation of cultural and religious rights. Scholars in South Africa express different views on this and the nature of the "inner core" of religious or cultural freedom. For examples of

reason for this is the early recognition by the Constitutional Court that the Constitution seeks to "transform" South African society from a "past which is disgracefully racist authoritarian, insular and repressive . . . [to] a commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos, expressly articulated in the Constitution."[18] This idea of transformation has a strong element of social justice, committed to redress and restitution, and seeking to address material disadvantage.[19] It is a complex and multifaceted concept, engaging personal and national identity, social and cultural diversity, material conditions and economic justice. It means that the recognition of cultural diversity is one of several constitutional imperatives and must be interpreted within a reading of the overall transformative vision of the Constitution.

In the end, by making cultural and religious rights "subject to the Constitution" (a phrase not used in relation to other rights), the Constitution creates room to affirm cultural identity *and* to address cross-cutting and conflicting rights and values (such as the right to equality based on gender or sexual orientation, and the right to free expression), *and* to be mindful of the reality of disadvantage, poverty, and inequality in many communities. The Constitution envisages a complex tapestry in which cultural and religious rules and norms do not operate in discrete communities, but rather are subject to other claims and rights, and to the

a more or less liberty-based approach to culture or religion, see Patekile Holomisa, *A Traditional Leadership Perspective of Gender, Rights, Culture and the Law*, 48 Agenda Special Focus (2005); Patrick Lenta, *Religious Liberty and Cultural Accommodation*, 122 S. Afr. L.J. 352 (2005). See also Stuart Woolman, *On the Fragility of Associational Life: A Constitutive Liberal's Response to Patrick Lenta* 25 S. Afr. J. Hum. Rts. 280 (2009). For an example of more egalitarian approaches, see Catherine Albertyn, *The Stubborn Persistence of Patriarchy? Gender Equality and Cultural Diversity in South Africa*, 2 Const. Court Rev. 165 (2009); David Bilchitz *Should Religious Associations Be Allowed to Discriminate?*, 27 S. Afr. J. Hum. Rts. 219 (2011).

18 S. v. Makwanyane 1995 (3) SA 391 (CC), at para. 262 (per Mohamed DJP).

19 The Preamble to the Constitution also signals that it is a self-consciously "transformative" document, one that seeks to advance a united, yet diverse, society; "[h]eal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights," and "[i]mprove the quality of life and free the potential of every person." Constitution, *supra* note 4, preamble.

development of common norms and processes that bind – norms that emanate from the Constitution.

2 Between Text and Context – Contested Values and the Possibility of "Indigenous" South African Interpretations

South Africa's Constitution has been described as a "universalist" model that makes customary law subject to a "top-down" liberal framework.[20] Within this framework, scholars debate the extent to which the Constitution does, and should, prioritize liberty (and cultural autonomy) or adopt a more egalitarian approach (across and within cultural groups).[21] However, this description often assumes that the Constitution establishes universal and uncontested "liberal" values that are incompatible with (fixed) customary norms and practice. Discriminatory customary norms will thus always be subject to the test of "liberal equality" and should be struck down when they fail this test (and replaced with civil law). Alternatively, they will be permitted where liberty and freedom of association values are deemed to be more important that egalitarian ones. Although the simple subordination of customary law to liberal values is a possible interpretation of the South African Constitution, this chapter suggests a more nuanced, overlapping, and contested approach to the interpretation of, and relationship between, gender equality and cultural diversity: one that resists the idea that equality and customary law are necessarily incompatible, that customary norms and practices that exclude women are irretrievably discriminatory and that civil standards are the necessary antidote.

The starting point for this argument is a familiar one. Culture is neither monolithic nor preordained, but is contested, permeable,

20 See, for example, Fareda Banda, Women, Law and Human Rights: An African Perspective 34–35 (Hart Publishing 2005); Johan Van der Vyver, *The Right to Self-Determination of Cultural, Religious and Linguistic Communities in South Africa*, 14 Potchefstroom Electr. L.J. 1–12 (2011).

21 See the articles cited *supra* note 17.

flexible, and shaped through practice in response to changing socioeconomic conditions.[22] Cultural communities live in the world. In South Africa, colonialism, Christianity, apartheid, and migrant labor have provided the context for social and economic life. There is significant evidence, for example, of how black South Africans have negotiated and moved between a variety of socioeconomic settings – urban-rural, traditional-modern, work-home – all of which shaped their identity and way of life. Belinda Bozzoli has demonstrated how changing economic relations of migrancy and urbanization allowed women to challenge and resist patriarchal cultural subordination in traditional communities by moving in and out of these communities, and by demonstrating resourcefulness and independence in building lives in urban areas that retained valued parts of their cultural identities (as respectable women), but enabled a degree of freedom from its (negative) patriarchal constraints.[23]

As discussed in more detail in the next section, South Africa has always seen competing versions and interpretations (as well as the use and misuse) of culture and custom in search of different legal, political and economic goals. Although customary law has an "official" status in codified law, there is considerable evidence of a "living" version of custom that is far more responsive to the changed social and economic conditions of contemporary South Africa, including the changed position of women (as discussed in the next section). This living law is rooted in a permeable and flexible idea of culture in which practice is influenced by a

22 Raymond Williams, CULTURE (Fontana 1981); Nira Yuval Davis, GENDER AND NATION (Sage Publications 1997).

23 Belinda Bozzoli (assisted by Mmantho Nkotsoe), WOMEN OF PHOKENG: CONSCIOUSNESS, LIFE, STRATEGY AND MIGRANCY IN SOUTH AFRICA, 1900–1983 (James Curry 1991). There is important evidence about how women managed changing socioeconomic conditions and gender roles in Virginia van der Vliet, *Traditional Husbands, Modern Wives?*, in TRADITION AND TRANSITION IN SOUTHERN AFRICA (Andrew Spiegel and Pat McAllister eds., Wits University Press 1991); David Webster, *Abafazi Bathonga Bafuhlakala: Ethnicity and Gender in a Kwa Zulu Border Community, in* Andrew Spiegel and Pat McAllister, *id*. Anne Kelk Mager, GENDER AND THE MAKING OF A SOUTH AFRICAN BANTUSTAN (David Philip 1999).

variety of norms, including equality,[24] and local understandings of need, reciprocity, and responsibility.[25]

Although the concept of equality has strong liberal roots, South African ideas of equality are also rooted in local political struggles for national liberation and the emancipation of women.[26] As discussed later, contemporary South African equality jurisprudence has moved beyond simple liberal notions of sameness to embrace ideas of context, difference, and purpose that can enable a nuanced approach to discrimination claims and the recognition of women within customary law, thus often affirming emergent or established custom or practice while rejecting out-of-date or inflexible codified law. South African equality jurisprudence does not insist that women are treated the same as men or as each other; it does insist, however (in its best interpretation), that differential treatment should never result in disadvantage and subordination.[27]

This more nuanced and contextual understanding of culture and custom, and of constitutional rights and values, enables a constitutional and jurisprudential framework that develops and affirms "indigenous"[28] and localized understandings of customary law that respect cultural diversity and gender equality. Rather than a "trumping" relationship, one

24 Likhapha Mbatha, *Reforming the Customary Law of Succession*, 18 S. Afr. J. Hum. Rts. 259 (2002); Aninka Claassens and Sizani Ngubane, *Women, Land and Power: The Impact of the Communal Land Rights Act*, in Land, Power and Custom: Controversies Generated by South Africa's Communal Land Rights Act, chapter 7 (Aninka Claassens and Ben Cousins eds., University of Cape Town Press 2008).

25 Claasens and Ngubane, *id.*: Aninka Claassens and Sindiso Mnisi, *Rural Women Redefining Land Rights in the Context of Living Customary Law*, 25 S. Afr. J. Hum. Rts. 491 (2009).

26 Shireen Hassim, Women's Organisations and Democracy in South Africa, chapter 5 (University of KwaZulu-Natal Press 2006).

27 Although this interpretation is reflected in the Constitutional Court's jurisprudence, academics have noted that the Court does not necessarily always follow this "best interpretation." See, for example, Catherine Albertyn, *Substantive Equality and Transformation in South Africa*, 23 S. Afr. J. Hum. Rts. 253 (2007).

28 I use "indigenous" here to refer to a "South African" notion of equality (rather than one solely emanating from indigenous or customary law), one that is rooted in the history and experiences of South Africans.

can strive for an interpretation that is sensitive to practice, to cultural norms and values, and to a more "vernacular"[29] understanding of rights. Arguably, this more nuanced interpretation would draw support from scholars who criticize the "Westernization" of customary law, while recognizing the importance of rights.[30] Constitutional rights are not disputed in South Africa, merely their interpretation and application. Properly understood, therefore, the relationship between equality and customary law is not one of culture versus equality, but one of how best courts can recognize and interpret customary law within a contextual and transformative reading of the Constitution that recognizes the permeable, changing, and intersecting nature of different cultures (including the culture of human rights).[31]

3 Cultural Diversity in the Context of Multiple Inequalities in South Africa

Moseneke has argued that transformative jurisprudence must be grounded in a court's understanding of the actual conditions in which people are living.[32] Thus, case law that addresses cultural and customary issues should take account of the historical, social, and economic context in which cultural diversity is prevented or realized. This section briefly considers the context in which culture and customary law is practiced

29 Sally Engle Merry uses this term to describe how activists translate rights into frameworks that are relevant to the life situations of people at the grass roots. Sally Engle Merry, HUMAN RIGHTS AND GENDER VIOLENCE 216 (University of Chicago Press 2006). She argues that this is more likely to occur in a "top-down" manner. However, there is some evidence of more "bottom-up" processes in South Africa and of rights developed within customary systems. See Claassens and Mnisi, *supra* note 25.

30 See, for example, Chuma Himonga, *The Advancement of African Women's Rights in the First Decade of Democracy in South Africa*, in ADVANCING WOMEN'S RIGHTS 82 (Christina Murray and Michelle O'Sullivan eds., Juta 2005).

31 Banda, *supra* note 20, at 247–62, discusses different views on the overlapping and pluralistic nature of values in culture and human rights.

32 Dikgang Moseneke, *Transformative Adjudication*, 18 S. AFR. J. HUM. RTS. 309, 318–19 (2002).

and the contested and changing nature of custom, especially for women, as well as the gendered forms of power and inequality that shape status, power, and access to resources within and across different cultural communities.

3.1 History, Cultural Inequality, and Constitutional Supremacy

African culture and tradition (as well as the culture and religion of Muslim, Hindu, and other minority groups) were unequally recognized under colonialism and apartheid, with customary and religious marriages accorded an unequal and inferior status as unions.[33] This arose from the idea that such marriages – as potentially polygynous – were "contra bonos mores."[34]

At the same time, culture was "essentialized" as colonial and apartheid governments sought to justify policies of racial inequality and subordination on the basis that racial and cultural differences were fixed, impermeable, and even "God-given."[35] The idea that culture was "distinct, incommensurable and essentially linked to tribal members" also appealed to traditional leaders and male elders, who were able to retain authority over male migrants and the women who remained at home.[36]

33 By contrast, Muslim marriages remained completely outside of the law, with no legal rights or benefits accruing to partners in a marriage concluded according to Muslim rites. This was justified on the basis of the polygynous nature of Muslim marriages. See Ryland v. Edros 1997 (2) SA 690 (C).

34 For the colonial treatment of culture and custom, see Martin Chanock, Law, Custom and Social Order: The Colonial Experience in Malawi and Zambia (Cambridge University Press 1985). See also Thomas W. Bennett, A Sourcebook of African Customary Law for Southern Africa (Juta 1991) for a wider discussion of the status of customary law under colonialism and apartheid.

35 Ultimately, the legitimacy of apartheid rule and its homelands policy was "predicated on denying the complex and shifting nature of cultural identity, both of Black and of White" and of emphasising an "essential and unchanging connection to a particular tribal group, in a limited geographic territory, in a time outside history." Lisa Fishbayn, *Litigating the Right to Culture: Family Law in the New South Africa*, 13 Int'l J.L., Pol'y, & Fam. 147, 155–56 (1999).

36 Fishbayn, *id*. at 154. For a discussion of the status of women, see Chanock, *supra* note 34; Sandra Burman, *Fighting a Two-Pronged Attack: The Changing Legal Status of*

Ethnic segregation in city hostels deepened "tribal" differences at the same time that it provided vital ethnically based social networks.[37] In law, this meant that black South Africans were irretrievably "cultural subjects": both in terms of the fixed application of customary law to many aspects of their lives (regardless of their actual wishes)[38] and, eventually, after 1948, in terms of their "citizenship" in ethnic homelands, rather than of South Africa.[39] Of course, resistance to the fixedness of tribal and racial identity as a source of segregation and exclusion was central to the national liberation struggle, in which black South Africans fought for the right to be citizens of a united South Africa, not tribal subjects tied to "homelands," traditional leaders, and custom.

Customary law (for centuries an unwritten set of rules and practices) was codified by colonial and apartheid authorities – often with the assistance of male elders – to entrench a distorted and inflexible version of custom.[40] One of the consequences of this was that it deepened the inequality of women within customary law. Bennett suggests that this was as much due to the inability of the common law to capture the "sympathetic flexibility" accorded women under customary law as it was to the colonial tendency to endorse the indigenous system of patriarchy.[41] However, the official code relegated women to a lower status and limited access to resources and benefits because of their position as women.[42] Thus, by 1990, women were still minors under customary law, under the guardianship of their husbands, or fathers. In marriage,

Women in Cape Ruled Basutoland, 1872–1884; and Jeff Guy, *Gender Oppression in Southern Africa's Precapitalist Societies*, both in WOMEN AND GENDER IN SOUTHERN AFRICA TO 1945 (Cherryl Walker ed., David Philip and James Curry 1990).

37 Fishbayn, *supra* note 35.

38 For example, in the absence of a will, the estates of all black people were distributed in accordance with customary law.

39 The policy of "separate development" introduced by the National Party government after 1948 envisaged that all black South Africans would eventually lose their South African citizenship and become citizens of ethnic homelands. See John Dugard, HUMAN RIGHTS AND THE SOUTH AFRICAN LEGAL ORDER 89–104 (Juta 1978).

40 Chanock, *supra* note 34; Burman, *supra* note 36; Guy, *supra* note 36.

41 Bennett, *supra* note 34, at 31.

42 Chanock, *supra* note 34; Burman, *supra* note 36; Guy, *supra* note 36.

they had few, if any, rights to property and over children. The entrenchment of the rule of male primogeniture (inheritance by the eldest male heir) meant women had no enforceable rights to inheritance and were often left destitute after the death of their husbands, as male relatives took over property.[43] Women also had little independent access to land (especially under communal tenure), and traditional power was predominantly the preserve of men.

This past – of cultural manipulation and gendered subordination – had several consequences for the development of a democratic Constitution in the early 1990s. Despite a general consensus on the equal status and recognition of culture and customary law as positive attributes of the South African community, different views of the nature and place of culture set the stage for contestation over the relationship among culture, customary law, and the Constitution. Traditional leaders argued for the explicit protection of culture and the insulation of its practices (including its patriarchal forms of law and leadership) from human rights and equality guarantees.[44] The majority of organizations and groups, including women living under customary law, argued that, important as culture is, ideas of equality and democracy should temper, and sometimes override, claims to cultural autonomy.

In the end, the Constitution recognizes all South Africans as equal, rights-bearing citizens under the Constitution, and it subjects all law, including customary law, to the Constitution.[45] However, there remain multiple political and legal interpretations of the relationship between gender equality and cultural diversity. For example, traditionalists continue to argue for a strongly libertarian interpretation of cultural autonomy and thus of the "protection" of customary law from "Western,"

43 Kim Robinson, *The Minority and Subordinate Status of African Women under Customary Law*, 11 S. Afr. J. Hum. Rts. 495 (1995).

44 Catherine Albertyn, *Women and the Transition to Democracy in the New South Africa*, Acta Juridica 39 (1994); Felicity Kaganas and Christina Murray, *The Contest between Culture and Gender Equality under South Africa's Interim Constitution*, 21 J. L. Soc'y 409 (1994).

45 Albertyn, *id.*

human rights values. These arguments are also implicated in struggles by traditional leaders for more power and authority, especially in relation to land, rural development, and traditional courts.[46] They speak to the idea that women are protected by customary law in their traditional roles as wives and mothers. Conversely, scholars concerned with women's rights have argued for greater rights for women living under customary law, albeit in different ways. Some have tended toward a "trumping" relationship that prioritizes equality rights, as found in civil and common law, often because this is the only way to protect vulnerable women and children. Others have sought a different path: one that endorses customary law as an important way of life for many South Africans but recognizes women's changing place within it. This position seeks to understand how women's socioeconomic position has changed and how this has influenced, and should continue to influence, customary practices within the "living law."[47] This is discussed in more detail in the next section.

3.2 Customary Law, Crosscutting Social and Economic Inequalities, and "Living Law"

Communities that practice customary law are predominantly found within the 45 percent of South Africa's population that lives in rural areas, populated largely by women and children as men seek work in urban areas. Many, but not all, of these communities live under traditional leadership and engage in subsistence farming on communal land. Among these communities are the poorest families and areas in South Africa.[48] Crosscutting inequalities within and across these communities

46 Cherryl Walker, *Women, Gender Policy and Land Reform in South Africa*, 32 Politikon 297 (2005); Aninka Claassens, *The Resurgence of Tribal Taxes in the Context of Recent Traditional Leadership Laws in South Africa*, 27 S. Afr. J. Hum. Rts. 522 (2011).

47 Mbatha, *supra* note 24; Claassens and Ngubane, *supra* note 24.

48 Official statistics reveal the poverty and inequality of rural communities. See Ben Cousins, *Contextualising the Controversies: Dilemmas of Communal Tenure Reform*

mean that poverty and economic inequality are also shaped by factors such as class, gender, location, and social origin.

Customary law and culture emphasize the importance of family and community for the individual, as well as family and community relationships. In the past, and today, customary law has retained significant value not only among rural communities but also for many black South Africans. There is positive support for its techniques of social control based on "obligation and reciprocity, mediation, and conciliation"; the "healing force of ritual"; and the importance of family in providing for an individual's "material, social, and emotional needs."[49] Although a patriarchal system (as are most legal systems), there was an expectation that women would be protected and maintained within the family unit (of their father or husband). Customary obligations of maintenance and support meant that women should not be left destitute. The submerging of individual interests to the collective was premised on the notion that the collective would nurture, protect, and sustain the individual. More broadly, the idea that an individual was part of, dependent upon, and responsible for others was captured in the notion of *ubuntu*. In the words of (then) deputy Chief Justice Pius Langa, in the case of *Bhe v. Magistrate Khayalitsha*:

> The positive aspects of customary law have long been neglected. The inherent flexibility of the system is but one of its constructive facets. Customary law places much store in consensus-seeking and naturally provides for family and clan meetings which offer excellent opportunities for the prevention and resolution of disputes and disagreements. Nor are these aspects useful only in the area of disputes. They provide a setting which contributes to the unity of family structures and the fostering of co-operation, a sense of responsibility in and of belonging to its members, as well as the nurturing of healthy

in Post-Apartheid South Africa, in Land, Power and Custom: Controversies Generated by South Africa's Communal Land Rights Act 1 at 8 (Aninka Claassens and Ben Cousins eds. (University of Cape Town Press 2008).

49 Thomas W. Bennett, Human Rights and African Customary Law under the South African Constitution 3–5 (Juta 1995).

> communitarian traditions such as ubuntu. These valuable aspects of customary law more than justify its protection by the Constitution.[50]

Although these were and remain powerful values, it has long been clear that colonialism, capitalism, Christianity, migrant labor, and apartheid have eroded the ability of the family to sustain a customary way of life, at least as practiced under different socioeconomic conditions of precapitalism and early capitalism. The official code of customary law, reflected in judgments, legislation, and regulations, does not match the reality of modern South Africa. In practice, therefore, customary practices have shifted and declined. The payment of *lobola*, or bride-price, is increasingly unaffordable, polygyny has declined, and family property is limited, together with its ability to provide the customary security net for needy family members. Official laws based on male-headed households no longer make sense when the majority of households in rural areas are, in fact, woman headed. The customary idea of women as limited by their roles as wives and mothers, as vulnerable and dependent, requiring protection from men,[51] is not reflected in how people actually live and survive.

The changing shape and form of families, and the changing position of women, has resulted in a range of strategies by women to escape the strictures of official law. This includes movement between different systems of law in search of better protection. There are many examples in Southern Africa of women constantly negotiating civil and customary legal systems to improve their rights and access benefits within marriage (or, put another way, to secure equality).[52] There is also growing evidence that women work within customary law to secure rights through

50 Bhe v. Magistrate Khayalitsha; Shibi v. Sithole; SAHRC v. President of the RSA 2005 1 SA 580 (CC); 2005 1 BCLR 1 (CC), at para. 45.

51 Albertyn, *supra* note 17; Holomisa, *supra* note 17.

52 Likhapha Mbatha's work on marriage showed women moving between the two systems to seek forms that offered most protection – often seeking both customary and civil marriages. Likhapha Mbatha, *Marriage Practices of Black South Africans* (Centre for Applied Legal Studies Research Report 1997). Writing about the kinds of claims that women in a Bakwena village in Botswana are able to make of their male

changed customary practice. This evidence emerges from ethnographic studies of the "living law" – the law that people actually live. This "living law" is influenced by a range of needs and values, including, since 1994, constitutional values.

Likhapha Mbatha's work on inheritance has shown that, contrary to the official rule of male primogeniture, women do inherit in practice: Communities that live a customary life have "no problem" in permitting women to inherit property on the basis of the cultural norms of responsibility and family welfare.[53] There is also evidence that these changes are, at least partly, justified by "external" ideas, values, and rules. Mbatha's work suggests that the introduction of the Constitution has provided an "enabling environment" for the development of customary practices that improve the social and economic position of women.[54] Research by Aninka Claassens and Sizani Ngubane also illustrates how women have drawn on principles of democracy and equality to enhance their ability to negotiate rural power struggles and gain access to customary land and resources.[55] Thus, single mothers and women trying to access or retain land, in the absence of a male relative, have made successful claims based on a combination of equality and custom:

> In many instances, arguments about the values underlying customary systems (in particular the primacy of claims of need) and entitlements of birthright and belonging are woven together with the right to equality and democracy in the claims made.[56]

Celestine Nyamu-Musembi has argued for the realization of women's human rights in Africa within local practice and custom, and not merely

partners, Anne Griffiths reveals how women seek to negotiate the civil and customary systems to achieve fair results. Anne Griffiths, IN THE SHADOW OF MARRIAGE: GENDER AND JUSTICE IN AN AFRICAN COMMUNITY (University of Chicago Press 1997). See also Alice Armstrong, Chaloka Beyani, Chuma Himonga, Janet Kaberi-Macharia, Athaliah Molokomme, Welshman Ncube, Thandabantu Nhlapo, Bart Rwezaura, and Julie Stewart, *Uncovering Reality: Excavating Women's Rights in African Family Law*, 7 INT'L J.L. FAM. 314 (1993).

53 Mbatha, *supra* note 24, at 282.

54 *Id*. at 283.

55 Claassens and Ngubane, *supra* note 24.

56 *Id*.

in national legislation or international human rights regimes.[57] She argues that we should "recognise that local norms and practices . . . produce and refine ideas about human rights, part of the process that Sally Engle Merry has called the 'venacularisation' of human rights."[58] Recent work by Claassens and Sindiso Mnini has explored this in South Africa in relation to land, demonstrating how women secure rights through negotiation and struggle within customary communities, drawing on deeply rooted values to "venacularize" land rights from the "bottom-up."[59]

The "living law" – like culture – is rich, varied, and flexible, changing in response to changing conditions. Nyamu-Musembi argues that its flexibility, its affordability and accessibility for rural communities, the fact that it is within the "control" of community members (not imposed from outside), and the fact that it can grant recognition to moral claims not otherwise recognized as rights, make it a rich source of meaningful cultural transformation in which women's rights can be affirmed.[60] She warns, however, that differences in power and knowledge (especially in terms of gender and socioeconomic status) can reinforce the status quo, in particular within families where "embedded ideas about authority and gender roles" tend to produce outcomes that disadvantage women.[61] In addition, women's participation within decision-making fora is limited.[62]

In South Africa, although the "living law" does not always guarantee egalitarian ends or always benefit women and other vulnerable members of communities (it has its own power dynamics), it must be seen as an important site of change, a place where rights can be won through struggle and negotiation, and even more so in the "new"

57 Celestine Nyamu-Musembi, *Are Local Norms and Practice Fences or Pathways? The Example of Women's Property Rights*, in Cultural Transformation and Human Rights in Africa 126 (Abdullahi A. An-Na'im ed., Zed Books 2002).

58 *Id*. at 127.

59 Claassens and Mnisi, *supra* note 25.

60 *Supra* note 57, at 127.

61 *Id*. at 128.

62 *Id*.

constitutional setting, which provides additional value resources for negotiating, resisting, and justifying customary and cultural practice. An important question is how this can be harnessed further to develop a legal and jurisprudential approach to customary law that is respectful of cultural diversity and cannot be dismissed merely as liberal values or civil law replacing customary norms and rules.

The next section explores the courts' adoption of "living law" and the extent to which this can result in a meaningful recognition of cultural diversity and gender equality.

4 Legal Struggles over and about Culture and Custom: A Complex Jurisprudence of Cultural Diversity Based on "Living Law"

Legal cases that address issues of culture and cultural diversity in South Africa tend come before the courts in two broad overlapping categories. The first set of claims are explicitly "internal" to customary law and seek to rely upon, recognize, or develop a customary right or interest (usually with reference to the Constitution). The second set of claims relate to "external" equality challenges (based directly on constitutional rights) against an allegedly discriminatory customary rule (largely based on gender) or against the discriminatory treatment of a cultural practice (thus based on culture). These cases illustrate the manner in which the courts, especially the Constitutional Court, have given recognition to culture and custom and have sought to reconcile it with constitutional values and rights. They reveal the centrality of the idea of living law (and an underlying idea of culture as permeable, responsive and dynamic) within this jurisprudence.

4.1 Customary Claims

Customary claims are brought within the parameters of customary law and seek to rely on customary law and/or practice to secure rights and interests. Such cases enable the courts to interrogate customary rules and practice in terms of an evolving customary law and constitutional norms.

As stated earlier, customary law is fully recognized by,[63] and subject to,[64] the South African Constitution. In terms of section 39(2) of the Constitution, a court must "promote the spirit, purport and objects of the Bill of Rights" when "developing customary law," and section 211(3) requires courts to apply customary law when it is applicable.

The key questions in customary claims revolve around determining the nature and content of customary law and practice and deciding whether the rule or practice should be recognized or developed in line with the Constitution. Recognition, in this sense, suggests that the rule or practice is already part of customary law (and is endorsed by the courts), whereas "development" is a court-initiated process of making a "new" rule. The distinction is not always clear in the jurisprudence. Nevertheless, the adjudication of these claims is an indicator of the courts' approach to customary law, diversity and pluralism under the democratic Constitution, in particular, how the idea of "living law" has provided a normative platform for affirming custom and culture, while testing and shaping its compliance with overarching constitutional values.

This section briefly considers the leading cases of *Alexkor Ltd. v. Richtersveld Community*,[65] *Mabena v. Letsoale*,[66] and *Shilubana v. Nwamitwa*,[67] and evaluates the manner in which they use the idea of "living law" to reconcile customary norms and practices with constitutional values.

4.1.1 Alexkor Ltd. v. Richtersveld Community*: Recognizing Customary Law as "Living Law" and Opening the Way to Challenge Official Law*

The case of *Alexkor Ltd. v. Richtersveld Community* concerned a claim for restitution of diamond-rich land by the Richtersveld community

63 South African Const., at section 39(3) (rights in customary law recognized, if consistent with Constitution).

64 South African Const., at section 2 (law or conduct inconsistent with the Constitution is invalid); at section 8 (The Bill of Rights applies to all law).

65 2004 (5) SA 460 (CC); 2003 (12) BCLR 1301 (CC) at para. 46.

66 1998 (2) SA 1068 (T).

67 2008 (9) BCLR 914 (CC); 2009 (2) SA 66 (CC).

under the provisions of the Restitution of Land Rights Act 22 of 1994. To succeed, the community had to show that it had been "dispossessed of a right in land after 19 June 1913 as a result of past racially discriminatory laws or practices."[68] One of the core issues in the case was the nature of the community's original right to the land.[69] The Court concluded that the community had originally held a "right of communal ownership under indigenous law," including "the right to exclusive occupation and use of the subject land by members of the Community . . . , the right to use its water, to use its land for grazing and hunting and to exploit its natural resources, above and beneath the surface."[70] The recognition of this customary right or interest was the critical first step that enabled the community to claim restitution.

Alexkor was the first Constitutional Court case that addressed customary law. Other than the significance of recognizing a customary interest in land for the community's successful land claim, the case is important in that the Court sketched out its approach to customary law. This was particularly significant after the judgments of the High Court and the Supreme Court of Appeal (SCA) in *Mthembu v. Letsela*.[71] Both these judgments had accepted the official version of customary inheritance law (and its rule of primogeniture). The courts concluded that limiting inheritance to male heirs was justified by the concurrent customary obligation of the heir to "support and maintain" women and children, "if necessary from their own resources, and not to expel them from their home."[72] This outcome had disappointed advocates for women's rights, especially as the courts had failed to consider that, in reality, women were routinely

68 Section 2(1) of the Act.

69 At issue was, first, the nature of the right to land, and then, whether this right had survived the annexation by the British Crown so that it still existed in 1913 (at para. 46).

70 *Supra* note 65, at para. 46.

71 Mthembu v. Letsela 1997 (2) SA 936 (T); Mthembu v. Letsela, [2003] All SA 219 (A).

72 SCA (2003) judgment, *id.* at para 8. See also the High Court (1997) judgment, *id.* at 945H-946C.

evicted from their homes and had no enforceable right to maintenance under customary law.[73]

In *Alexkor*, a unanimous Constitutional Court noted that customary law was

> a system of law that was known to the community, practised and passed on from generation to generation. It is a system of law that has its own values and norms. Throughout its history it has evolved and developed to meet the changing needs of the community. And it will continue to evolve within the context of its values and norms consistently with the Constitution.[74]

The Court distinguished this "living law" from "the official body of law employed in the courts and by the administration (which . . . diverges most markedly from actual social practice) . . . [and] the law used by academics for teaching purposes,"[75] thus giving it precedence over its official and codified forms. In doing so, the Court also (if indirectly) affirmed the idea that culture and custom are flexible and responsive, adapting to changing circumstances, and rejected a more essentialist and rigid approach. Importantly, the Court emphasized the fact that indigenous, or customary, law generates its own norms and values, and that these would continue to have force and evolve under the overall standard of the Constitution.

At the same time, the Court recognized that customary law was not "a fixed body of formally classified and easily ascertainable rules."[76] It is this characteristic of customary law that is both enabling and limiting in the Court's approach and jurisprudence. On the one hand, it enables the

73 See Mbatha, *supra* note 24. *Mthembu* was never a good test case for customary inheritance. From the start, the marriage was disputed by the heir (even though part of the *lobola* had apparently been paid). In the absence of evidence proving the marriage, the matter eventually turned on whether the illegitimate child of the deceased should be protected. Both courts found no basis in customary law to do so.

74 2003 (12) BCLR 13021 (CC), at para. 53.

75 See footnote 51 of the *Alexkor* judgment, *id.,* citing Thomas W. Bennett, A Sourcebook of African Customary Law for Southern Africa preface, vi (Juta 1991).

76 *Alexkor, supra* note 65, at para. 52.

Court to affirm cultural norms and practices that align with the Constitution, and shape, meld, or even reject those that do not. It does this in two ways: by *recognizing* existing, evolved practices and rules as part of customary law and by *developing* practices and rules to bring them in line with the Constitution.[77] On the other hand, difficulties of proof and the variable nature of practices across communities have meant that the courts have retreated from a full endorsement of "living law" at the recognition and remedial stages (as discussed later). An important underlying reason for this appears to be the inherent inflexibility and thus uncertainty of "living law," which may undermine a more formal approach to the rule of law. In addition, the living law is permeated with gendered inequalities, and courts need to find ways of managing and overcoming these.

4.1.2 Mabena v. Letsoale *and* Shilubana v. Nwamitwa*: Recognizing and Developing Women's Rights within the "Living Law"*

Several cases that have addressed women's rights within customary law have directly or indirectly touched on the "living law" as the basis for the claim. This section briefly addresses issues of family law and traditional leadership.

The question of when a customary marriage can be said to be concluded has arisen in several cases, especially when there is a dispute over inheritance. Here, the male heir and family might seek to argue that the customary requirements of *lobola* or the requisite traditional ceremony have not been concluded and therefore the "wife" and children have no rights. This has given rise to debate about when a customary marriage may be said to be concluded. For example, is part or full payment of *lobola* required? Or is mere agreement on the amount sufficient? Given that the 1998 Recognition of Customary Marriage Act is silent

77 Section 211 recognised customary law. Section 39(2) requires a court to "promote the spirit, purport and objects of the Bill of Rights" when "developing customary law." As discussed later, the difference between recognition and development is not always clear in the judgments.

on this, requiring merely that a marriage be "celebrated according to customary law,"[78] evidence of what customary law is, in practice, is significant. Here, some scholars have argued for full payment of *lobola*, others have argued that customary practices are variable and shifting, and that account should be taken of changing socioeconomic circumstances in which payment of *lobola* is often unaffordable.[79] The Constitutional Court's endorsement of living law suggests that actual practice should dictate and shape judicial outcomes, yet few cases have been able to do this.[80]

One exception to this is the high court case of *Mabena v. Letsoalo*,[81] decided before *Alexkor*. *Mabena* is a positive example of the judicial recognition of "living law." It concerned the issue of whether a customary marriage existed in circumstances where, inter alia, the bride's father had not been involved in *lobola* negotiations. In finding a valid customary marriage, the Court accepted that culture was capable of evolving to reflect changed economic and gender relations (in this case an urban-based, woman-headed household), so that a woman could legitimately consent to customary marriage and negotiate and receive *lobola* on behalf of her family:

> According to traditional customary law the mother of the bride could not be the guardian of her daughter, she herself was under the guardianship of her husband . . . The evidence is that the respondent's father had abandoned the family. The evidence further is that the respondent's mother as a matter of fact functioned as head of the family . . . [T]here are authorities which indicate that their case is not unique. It must therefore be accepted that there are instances in practice where mothers negotiate for and receive lobolo and consent

78 Section 3(1)(b).

79 Mbatha, *supra* note 52, at chapter 6.

80 Bennett argues that the content and meaning of *lobola* should be determined by the legislature. Thomas W. Bennett *The Equality Clause and Customary Law*, 10 S. Afr. J. Hum. Rts. 124 (1994). Likhapha Mbatha finds the paucity of cases a problem and argues strongly for court intervention to give meaning to the living practices of *lobolo*, thus affording women greater certainty and better rights (*id.*).

81 *Supra* note 66.

> to the marriage of their daughters . . . Customary law exists not only in the "official version" as documented by writers, there is also the "living law," denoting "a law actually observed by African communities" . . . [The] courts should accordingly recognise the rule.[82]

There was no explicit reference to gender equality in *Mabena v. Letsoalo*, although the case was a clear recognition of women's changing position in society.

In *Bhe v. Magistrate Khayalitsha*, Justice Ngcobo describes this as the "development of indigenous law by incorporating the changing context in which the system operated," rather than development in compliance with the Constitution.[83] By comparison, the majority judgment noted that when "a principle of living, actually observed law . . . is recognised by the court . . . it would constitute a development in accordance with the 'spirit, purport and objects' of the Bill of Rights contained in the . . . Constitution."[84] Generally, the approach seems to be that the evolved rule or practice required Court recognition (and thus development) before becoming valid. Living law thus seems to require court endorsement.

The case of *Shilubana v. Nwamitwa* is the leading Constitutional Court case on "living law" and the place of gender equality within culture and custom.[85] The case dealt with recognition and/or development of customary law by traditional leaders, communities, and courts. It concerned a dispute between a female and male candidate over chieftainship of the Valoyi traditional community in Limpopo.[86] The appellant, Ms. Shilubana, was a direct descendant within the chiefly lineage. She had been previously passed over in favor of her younger brother,

82 *Id*. at 1073I –1075B.

83 Bhe, *supra* note 50, at para. 217.

84 *Id*. at para. 111. See Mabena, *supra* note 66, at 1075B, where the court notes that [s]uch as *recognition* would constitute a development in accordance with the "spirit, purport and objects" [of the Bill of Rights]" (my emphasis).

85 *Supra* note 67.

86 Limpopo is one of nine provinces in South Africa. It is predominantly rural and poor, situated in the north of the country.

according to the principle of male primogeniture, but was subsequently chosen by the community to succeed her brother. After her brother's death, her appointment was challenged by the respondent, Mr. Nwamitwa, the son of the deceased who wished to be installed as traditional leader. A major point of dispute was sex or gender, as both the respondent and the Congress of Traditional Leaders in South Africa (CONTRALESA) sought to argue that the exclusion of women (and thus the applicant) from chieftainship was required under custom and was fair discrimination under the Constitution.[87] The Court did not engage with the question of discrimination under section 9 of the Constitution, thus avoiding a clear precedent that the exclusion of women from accession to traditional leadership was, in itself, unfair discrimination. Instead, it found that the *de facto* appointment of a woman traditional leader by a majority of the community was a constitutionally compliant development of customary law, bringing "an important aspect of their customs and traditions into line with the values and rights of the Constitution."[88] A number of important points arise from this case.

The first point of significance is that the Court phrased the issue not as a conflict between equality and culture (or between the Constitution and customary law), but as one of the authority of traditional leadership (as representatives of the community) to promote gender equality in the succession to leadership. The simple question was thus whether custom and culture allowed female leadership (not whether the Constitution required it). This directly raised the prospect that gender equality – the possibility of women as traditional leaders – was an internal cultural possibility (within the overall idea of flexible and intersecting cultures) rather than an external imposition.

The second important point concerns the authority to overturn decades or centuries of apparently "male-only" leadership. What does it take to change custom? This deceptively simple question goes to the

87 *Supra* note 76, at paras. 30–31, 40.

88 *Id*. at para. 68.

very heart of what is meant by "living" customary law. Both the High Court and the SCA had found that this single decision to appoint a woman was insufficient to overturn a much older custom of succession of the eldest son.[89] The SCA was particularly concerned with the effect that such an apparently *ad hoc* decision would have on legal certainty and vested rights.[90] The Constitutional Court seemed to endorse a much more flexible understanding of customary law, one that acknowledged the free development of law by the communities that live it and the ability to move away from past practice.[91] However, the Court requires this flexibility to be balanced against legal certainty, vested rights, and constitutional rights:

> The outcome of this balancing act will depend on the facts of each case. 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.[92]

Overall, however, the Constitution must be respected and traditional authorities, while free to develop and change their law, must do so with due regard to section 39(2), and the need to "act so as to bring its customs in line with the norms and values of the Constitution."[93]

The Court thus affirms customary law as an "independent and original source of law"[94] and clearly envisages it as able to generate its own norms and values independent of civil law, although consistent with the Constitution. Yet, as Driscilla Cornell argues, it stops short of a full endorsement of custom's inherent flexibility and responsiveness

89 Nwamitwa v. Phililia 2005 (3) SA 536 (T); Shilubana v. Nwamitwa 2007 (2) SA 432 (SCA).
90 *Supra* note 76, at paras. 50–51.
91 *Id*. at paras. 51–57.
92 *Id*. at para. 47.
93 *Id*. at para. 73.
94 *Id*. at para. 54.

to community needs.[95] This is apparent in the Court's finding that the appointment of a woman traditional leader was a "development" of customary law in line with the Constitution, including its strong commitment to gender equality.[96] The Rural Woman's Movement, an amicus curiae in the case, had argued, correctly in Cornell's view, that this appointment not a new "development" but merely an expression of custom's inherent flexibility, one that had previously recognized women as traditional leaders.[97] The Court had rejected this argument on the basis of insufficient evidence. It thus remains a question as to whether it might have endorsed a more flexible notion of living law that required "recognition" rather than development. Had it done so, it would have been an important recognition of gender equality issues within custom.

This case has significant value in its recognition of the dynamic and adaptable nature of customary law and the power of communities to amend their customs and traditions to reflect changed circumstances. It shows that culture and tradition do not constitute absolute barriers to women's accession to the position of traditional leader. Culture and custom can accept a variety of rules for women in different contexts and according to different needs. *Shilubana* suggests that there is a place for cultural change within communities and that there is no inherent value barrier to what we might call "gender equality" or women's rights. It thus suggests, in line with the work of Nyamu-Musembi, that local norms and practices can be pathways, rather than barriers, to greater justice for women.[98] Rather than eschewing customary law and traditional authorities, it is important to understand and engage the norms and practices of living law and to find ways of deepening conversations about rights, norms, and values in customary law and the Constitution.

95 Drucilla Cornell, *The Significance of the Living Customary Law for an Understanding of Law: Does Custom Allow for a Woman to Be Hosi?* 3 Const. Court Rev. 395 (2009).

96 For example, *supra* note 76, at para. 47.

97 *Id*. at para. 35. Cornell, *supra* note 95, at 403–04.

98 *Supra* note 57.

Cornell highlights the potentially radical nature of this notion of "living law," away from certainty and rule-making power and toward communal determination, to practices, processes, and ethical principles that differ from the "Western" view of law.[99] Much of this is unknown, or, at best, unfolding. To be faithful to cultural diversity, more work needs to be done in understanding the nature and content of living law. This suggests the need for ongoing ethnographic research, as well as engagement of communities, traditional leaders and courts at different levels.

4.1.3 The Living Law in Practice: A Vehicle for Change?

The cases discussed here illustrate how courts can confirm and recognize norms and practices that benefit women and have already developed within communities. Such cases are positive examples of how the "living law" can be less rigid and less defensive of traditional ideas of women's place in society than the official or codified version – although the pattern of this is uneven across the country.[100] They also demonstrate the permeability of cultural norms and values, how culture and custom are influenced by "external" norms, including the Constitution, while simultaneously maintaining cherished "internal" cultural principles and objectives. These cases suggest that the recognition of culture and custom by the Constitutional Court will not inevitably generate a checklist of culture against universal constitutional rights. On the contrary, careful constitutional dialogue is possible, especially one that takes account of a variety of normative sources. The "living law" – in its best interpretation – provides a powerful platform of ongoing change and transformation under the Constitution.

99 Cornell, *supra* note 95.

100 In a fascinating paper, David Webster writes about differing approaches to gender identity arising out of Zulu and Tsonga tradition, in which the latter is more flexible in relating to women's changing roles. David Webster, *Abafazi Bathonga Bafuhlakala: Ethnicity and Gender in a Kwa Zulu Border Community*, in TRADITION AND TRANSITION IN SOUTHERN AFRICA (Andrew Spiegel and Pat McAllister eds., Wits University Press 1991).

4.2 Equality and Other Rights-Based Claims Challenging Inequality within (Codified) Customary Law

In 1994, traditional leaders strongly objected to the application of the equality right (and protection against unfair discrimination) to customary law.[101] They were unsuccessful, and equality has formed the basis for law reform and litigation to secure women's rights within customary law. More often than not, this has been done in a manner that seeks to affirm culture and cultural diversity at the same time that it removes gender discriminatory rules and practices.

In recommending the reform of the law regulating customary marriage, the South African Law Reform Commission (SALRC) noted that the "Constitution has sent a clear message to the country that discrimination will no longer be tolerated and that women . . . can expect the law to be changed in their favour."[102] However, it also endorsed a separate marriage law to rectify the historic inequalities between civil marriages and customary unions (and thus between the dominant "white" culture and African cultures). After a lengthy consultation process, the SALRC and Parliament discounted the objections of traditional leaders to the idea of equality in customary marriage[103] and secured women's equal rights to status, property, decision making, and children in the Recognition of Customary Marriages Act 110 of 1998. At the same time, the law reform process was guided by the notion of "living law," thus leaving the

101 See Albertyn, *supra* note 44.

102 South African Law Reform Commission, *Discussion Paper 74 Customary Marriages* (Project 90, The Harmonisation of the Common Law and Indigenous Law) para. 2.1.1 (August 1997).

103 For example, Likhapha Mbatha argues the following about the submissions of the Houses of Traditional Leaders from the Eastern Cape and Northern Province to the SALRC: "[w]omen who challenged customary practices of marriage as discriminatory were labeled westernized . . . They condemned endeavours to liberate African women from male domination as westernization." Likhapha Mbatha, *The Content and Implementation of the Recognition of Customary Marriages Act 120, 1998: A Social and Legal Analysis*, chapter 3 (unpublished LLM thesis, University of the Witwatersrand, 2006).

cultural forms of entering into marriage undefined,[104] and recognizing polygyny[105] without the formal consent of first wives to polygyny.[106]

However, legislation has also proved an inadequate response to discrimination within customary law, either because law reform itself was subject to delays or because newly enacted legislation did not fully protect women and communities against discriminatory customary practices. This, in turn, was a result of the difficulties of translating complex customary ideas into legal provisions,[107] and because of power struggles among traditional leaders, women, and communities. Although the interests of women were dominant in areas of family law, the interests of traditional leaders have been far more prominent in law reform, affecting the institution of traditional leadership, land ownership, and traditional courts.[108]

In the absence of legislation, or as a result of problems in newly legislated customary law, women and communities have gone to court to secure rights. This section considers the three main cases on these issues: *Bhe v. Magistrate Khayalitsha*,[109] which saw the applicants successfully challenge the customary rule of primogeniture (inheritance by the eldest male relative); *Gumede v. President of the RSA*,[110] a claim of unfair

104 To enable living law in all its diversity to prevail, the Act merely refers that customary marriage is "celebrated in accordance with customary law" (section 3(1)(b) of the Act).

105 The call for the recognition of polygyny was not merely the preserve of traditionalists. Several women's groups supported the legalization of polygyny insofar as it would provide rights to vulnerable women and children in these relationships. See Beth Goldblatt and Likhapha Mbatha, G*ender, Culture and Equality: Reforming Customary Law*, in Engendering the Political Agenda: A South African Case Study 83, 104 (Catherine Albertyn ed., Centre for Applied Legal Studies 1999).

106 "The "living law" suggested that when women were in polygynous marriage, the consent of first wives was not required. South African Law Reform Commission, *supra* note 101. Of course, this is an example of the living law neglecting women's rights.

107 Likhapha Mbatha, *Reflection on the Rights Created by the Recognition of Customary Marriages Act,* Agenda Special Focus (2005); Himonga, *supra* note 30, at 84.

108 Walker, *supra* note 46; Claassens, *supra* note 46.

109 *Supra* note 50.

110 2009 (3) SA 152 (CC).

gender discrimination against provisions of the "old order" customary law (codified in the Kwazulu Act and the Natal Code) and the Recognition of Customary Marriages Act 120 of 1998; and *Tongoane v. National Minister for Land and Agricultural Affairs*,[111] a constitutional challenge to the 2004 Communal Land Rights Act.

4.2.1 Equality Jurisprudence as a Forum for Harmonizing Customary Law and the Constitution

The complex and multiple forms of inequality found in South Africa require a flexible test so that courts may respond to different forms of disadvantage, stigma, and vulnerability; to differing claims of recognition and redistribution; and to competing claims over power, status, and resources.[112] South African equality jurisprudence emphasizes the importance of context, impact, difference, values, and guiding principles.[113] Arguably, this approach enables claims of discrimination and inequality within customary law to be adjudicated in a manner that values cultural diversity and gender equality.

111 2010 (6) SA 214 (CC).

112 Catherine Albertyn, *Equality*, in South African Constitutional Law: The Bill of Rights (Halton Cheadle, Dennis Davis, and Nicholas Haysom eds., Butterworths 2004); Catherine Albertyn and Beth Goldblatt, *Equality,* in Constitutional Law of South Africa chapter 35 (2nd ed., Stuart Woolman, Michael Bishop, and Jason Brickhill, eds., Juta 2007); Henk Botha, *Equality, Plurality and Structural Power*, 25 S. Afr. J. Hum. Rts. 1 (2009).

113 Equality jurisprudence relating to unfair discrimination is distilled in *Harksen v. Lane* (1998) 1 SA 1300 (CC). The equality analysis entails a contextual assessment of the impact of an impugned rule or conduct with due regard to the degree of disadvantage suffered by the complainant and his or her group, the purpose of the act or conduct, and the extent to which the complainant's rights and interests are invaded. These factors are weighed up within an overall assessment of the impairment of human dignity, generally defined as a failure to be treated with equal concern and respect. The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, the primary mechanism for private discrimination, also mandates a contextual inquiry and the assessment of disadvantage, purpose and impairment of dignity, but includes a broader range of factors within a consideration of unfair discrimination (section 14).

Attention to context always insists that account is taken of the actual reality of people's lives; their place within the community; and the power, resources, and interests implicated by the dispute. It requires one to take a close look at the origin and history of a rule or practice, its importance and purpose, and the extent to which it is supported or contested within the group. It also requires a consideration of the effects that outlawing or permitting the disputed practice would have on different members of the group.[114]

In addition, any claim about intragroup inequality arising out of culturally based gender discrimination will require an assessment of competing cultural narratives that speak to conflicting interests and different interpretations of practices within a community. Not only is a contextual approach essential for this, but also a thorough interrogation of the values and purposes underlying the disputed rules or practices and their resonance with constitutional values. Disputes about the status, role, and entitlements of women, although they may present as conflicts between "gender" and "equality," can often be distilled into competing interpretations of principle. In South African courts, this translates into what is fair or unfair: whether the dignity of women is undermined or not, and how different cultural arrangements can achieve just results. Underlying this are different interpretations of gender relations and the place of women and men in society. Opening up the meaning of constitutional and customary values, recognizing competing and overlapping interpretations of the same value, and justifying interpretative choices enable this discussion. This also enables the development of clearer principles to mediate a commitment to gender equality and cultural diversity.

The foundational values of the South African Constitution are dignity, equality, and freedom. The Constitution also recognizes customary values that are not inconsistent with the Constitution. It is possible, within this constitutional framework, to debate and adjudicate a range

114 Albertyn, *supra* note 17.

of values and their competing meanings: to balance individual and community, duty and autonomy, choice, and responsibility, and, importantly, to affirm significant customary and cultural norms in the construction of cultural diversity and solidarity under the Constitution.

This is the theory of equality jurisprudence (in its best interpretation).[115] The next sections consider the actual practice in three cases.

4.2.2 Bhe v. Magistrate Khayalitsha*: The Living Law Contained?*

The official customary law, as codified in the Black Administration Act 38 of 1927 and regulations, reserved the right to inheritance to the eldest male relative of the deceased. In practice, this often led to women and their children being evicted from their homes upon the death their husbands and/or living in penury.[116] The case of *Bhe v. Magistrate Khayalitsha* found the rule of male primogeniture to be unfair gender discrimination.

Following *Alexkor*, then Deputy Chief Justice Langa (writing for the majority) asserted the importance of customary law and of the "living law," noting that

> the fossilisation and codification of customary law . . . led to its marginalisation. This consequently denied it of its opportunity to grow in its own right and to adapt itself to changing circumstances. This no doubt contributed to a situation where . . . '[c]ustomary law was lamentably marginalised and allowed to degenerate into a vitrified set of norms alienated from its roots in the community.'[117]

Langa emphasized that "the constitutional validity of rules and principles of customary law depend on their consistency with the Constitution and the Bill of Rights."[118] He noted the manner in which the official

115 As noted earlier, this is not always followed. *Supra* note 27.
116 Mbatha, *supra* note 24.
117 *Supra* note 50, at para. 43 (footnotes omitted).
118 *Id*. at para. 46.

customary law resisted socioeconomic change and continued to stereotype women, subjecting them to "old notions of patriarchy and male domination,"[119] resulting in a denial of access to property and economic opportunities,[120] and limiting their ability to assert control over their lives.[121]

The Court then turned to the rule of primogeniture in the customary law of succession, noting its concurrent obligations and cultural justifications, namely the "basic social need to sustain the family unit."[122] The Court concluded that although the maintenance of the family remained an important communitarian purpose, the responsibility for this could not be limited to elder males, to the exclusion of women (or younger men and unmarried sons). It found:

> The exclusion of women from heirship and consequently from being able to inherit property was in keeping with a system dominated by a deeply embedded patriarchy which reserved for women a position of subservience and subordination and in which they were regarded as perpetual minors under the tutelage of the fathers, husbands, or the head of the extended family.

It reaching this conclusion, the Court also noted the changed circumstances of modern urban communities and families, and that fact that "the rules of succession in customary law have not been given the space to adapt and to keep pace with changing social conditions and values."[123] It agreed with the observation by Bennett that:

> [a] critical issue in any constitutional litigation about customary law . . . is the question whether a particular rule is a mythical stereotype, which has become ossified in the official code, or whether it continues to enjoy social currency.[124]

119 *Id*. at paras. 90–91.
120 *Id*. at para. 90.
121 *Id*. at paras. 61–68.
122 *Id*. at paras. 84, 89–91.
123 *Id*. at para. 82. See generally paras. 81–87.
124 *Id*. at para. 86.

Although the Court noted evidence that the rule of primogeniture is evolving to meet the needs of changing social patterns, it felt that this reference to "living law" was insufficient to determine with any clarity.[125]

The minority judgment of Justice Ncgobo reveals a closer engagement with customary law and the development, meaning, and purpose of succession and inheritance. Ncgobo notes that "[t]he underlying purpose of indigenous law of succession is . . . to protect the family and ensure that the dependants of the deceased are looked after."[126] This vested in male heirs, because women "were always regarded as persons who would eventually leave their original family on marriage" and could not be heads of their "new" families as "they were more likely to subordinate the interests of the original family to those of their new family."[127] He notes, however, that changing practice has led to some women succeeding to a deceased family head.[128] He concludes that the exclusion of women from succession is unfair and unjustified gender discrimination:[129]

> This rule might have been justified by the traditional social economic structure in which it developed. It has outlived its usefulness. In the present day and age the limitation on the right of women to succeed to the position and status of the family head, cannot be said to be reasonable and justifiable under section 36(1) of the Constitution.[130]

There is little judicial dispute in the finding of unfair discrimination. In both judgments, the idea of "living law"[131] – as a counter to the inflexible codified law and as evidence of changed practice – lends legitimacy

125 *Id*. at para. 85.
126 *Id*. at para. 173
127 *Id*. at para. 174
128 *Id*. at para. 175.
129 *Id*. at paras. 184–86.
130 *Id*. at para. 210.
131 The majority judgment, per DCJ Langa, recognized that "the rule of primogeniture is evolving to meet the needs of changing social patterns . . . [I]n reality different rules may well be developing, such as the replacement of the eldest son with the youngest for purposes of inheritance, and the fact that widows often take over their husbands'

to the finding of constitutional noncompliance. However, the divergence on remedy raises particularly interesting questions about the place of "living law" in constitutional jurisprudence, including the possibilities of allowing an uncertain and flexible "living law" to subsist when the vulnerability of certain community members, such as women or children, is at issue.

The Court faced considerable difficulty in framing a remedy in this case, in particular, in deciding what to put in place once the offending provisions had been struck down. Two options were possible. The civil law of intestate succession, duly amended to take account of polygyny, could be made applicable to customary inheritance. Alternatively, the Court was invited to consider using the living law to frame a remedy within customary law. First, it was suggested that it could develop customary law rules and principles to take account of gender equality that was manifest in the evolved living law. Second, the Court was invited to extract principles from the living law to facilitate the development of customary law within families and communities and with the magistrates' courts that managed the distribution of the estate.[132]

The majority decided that the best remedy was to strike out the impugned provisions and replace them with modified sections of the Intestate Succession Act (which granted inheritance rights to surviving spouses and children, based on the size of the estate). In deciding to provide customary heirs with (civil law–based) statutory rights, the majority concluded that there was "insufficient evidence and material" to "determine the true content of customary law" and test it "against the provisions of the Bill of Rights,"[133] thus enabling it to develop customary law to recognize a new rule. On the second issue, the Court concluded that it was too slow and uncertain a remedy, one that would lead to a lack of uniformity of law. In the end, the Court had

lands and other assets, especially when they have young children to raise." *Id.* at para. 85. See Ncgobo, *id*. at para. 175.

132 *Id*. at paras. 109–10.

133 *Id*. at para. 109.

> serious doubts that leaving the vexed position of customary law of succession to the courts to develop piecemeal would be sufficient to guarantee the constitutional protection of the rights of women and children in the devolution of intestate estates. What is required . . . is more direct action to safeguard the important rights that have been identified.[134]

Justice Ncgobo differs. He proposes that, as required in relation to the common law,[135] "[w]here a rule of indigenous law deviates from the spirit, purport and objects of the Bill of Rights, courts have an obligation to develop it so as to remove such deviation."[136] Here "the Court is not primarily concerned with the changing social context in which indigenous law of succession operates or the practice of the people," but rather with the disjuncture between a customary rule and the Constitution. As a result, the living law is less important:[137]

> [W]e are concerned with the development of the rule of male primogeniture so as to bring it in line with the right to equality. We are not concerned with the law actually lived by the people. The problem of identifying living indigenous law therefore does not arise. At issue here is the rule of male primogeniture . . . It is that rule which must be tested against the right to equality, and if found deficient, as I have found, it must be developed so as to remove such deficiency.[138]

Ncgobo suggests that the unwritten rule of male primogeniture can be developed to allow the eldest daughter to succeed to the deceased estate.[139] Regrettably, he does not include widows, a point that seems to

134 *Id*. at para. 113. As stated in the subsequent case of Shilubana v. Nwamitwa (*supra* note 67), recognition of the living law would be tempered by, inter alia, the need provide adequate protection to women and children. *Id*. at paras. 110–13.

135 In Carmichele v. Minister of Safety and Security 2001 (4) SA 938 (CC), the Court found that there was an obligation on courts always to test the common law against the Constitution and develop it where necessary.

136 *Supra* note 50, at para. 215.

137 *Id*. at para. 218.

138 *Id*. at para. 220.

139 *Id*. at para. 222.

be otherwise justified by his recognition that many women are *de facto* heads of their families.[140] It can only be assumed that the limited development is linked to the facts of the case (concerning children).

Ngcobo seeks to address the consequences of striking down the impugned laws. He disagrees with the use of a civil law remedy based on a nuclear family model for customary communities.[141] Rather, he proposes that the issues should be seen, first, as one of choice of law, in which some might apply the Intestate Succession Act (more likely in urban communities) and others a customary solution (especially in rural communities).[142] He argues that to retain diversity and pluralism, and to respect the fact that customary law still has meaning for many South Africans, intestate deceased estates should be managed in a flexible manner in which the "actual applicability of indigenous law" is determined in the concrete setting of each case, based on

> the respect for our diversity and the right of communities to live and be governed by indigenous law must be balanced against the need to protect the vulnerable members of the family. The overriding consideration must be to do that which is fair, just and equitable.[143]

If this cannot be resolved by family agreements, then the magistrates' courts should decide according to "fairness, justice, and equity." However, Ncgobo gives little content to this beyond the expectation that women could inherit under this system.[144] He, too, is unable or unwilling to draw principles from the "living law."

140 *Id*. at para. 221.

141 *Id*. at paras. 228–233. See also Himonga, *supra* note 30.

142 *Id*. at para. 225.

143 *Id*. at para. 238.

144 All Ncgobo J notes is that "the Magistrate must have regard to, amongst other things, the assets and liabilities of the estate, the widow's contribution to the acquisition of assets, the contribution of family members to such assets, and whether there are minor children or other dependants of the deceased who require support and maintenance. Naturally, this list is not intended to be exhaustive of all the factors that are to be taken into consideration, there may be others too. The ultimate consideration must be to do that which is fair, just and equitable in the circumstances of each case" (*id.* at para. 239).

The two judgments highlight the debate in South Africa on how to simultaneously remedy discrimination within customary law and value cultural diversity. The majority argues that the rights of the vulnerable cannot be left to families and communities that are, themselves, embedded in unequal gender relations. Clear rights are essential (even if this temporarily elides cultural values). The minority places more trust in families and communities to preserve culture and custom, but it risks overlooking the very power relations that will continue to exclude women from access to protection and resources through inheritance. In both instances, the living law is not used to provide a remedy because it is thought to be too uncertain to give rise to overarching principles.

4.2.3 Gumede v. President of the RSA

Gumede[145] concerned a claim of unfair gender discrimination against provisions of the "old order" customary law, codified in the Kwazulu Act and the Natal Code,[146] and against the Recognition of Customary Marriages Act 120 of 1998, a law passed by the democratic parliament to address the inequality faced by women in customary marriage. Although section 7(1) of this Act stipulates that customary marriages entered into after the commencement of the Act are in community of property[147] (thus guaranteeing each spouse one-half of the estate upon divorce), it also states that "the proprietary consequences of a customary marriage entered into before the commencement of the Act continue to be governed by customary law."[148] In this case, the codified "Zulu law" applied. The provisions of this code entrenched male ownership and control of matrimonial property during marriage and upon its dissolution, leaving women with no rights to property upon divorce.

145 2009 3 SA 152 (CC).

146 Kwazulu Act on the Code of Zulu Law 16 of 1985; Natal Code of Zulu Law R 151 of 1987, GG No. 10966.

147 Section 6. Some commentators have criticised the fact that civil law concepts of property were used in the Recognition Act, a fact that undermines customary forms of property. See Mbatha, *supra* note 105; Himonga, *supra* note 30.

148 Section 7(1) of the Act.

The Court found little difficulty in concluding that the provisions discriminated unfairly on the basis of gender. In reaching its conclusion, the Court noted that the official version of customary law produced a "particularly crude and gendered form of inequality, which left women and children singularly marginalised and destitute."[149] It is the particular combination of the unequal systems of customary and civil law that produced the "fossilised rules and codes that displayed little or no understanding of the value system that animated the customary law of marriage":[150]

> Women, who had great influence in the family, held a place of pride and respect within the family. Their influence was subtle although not lightly overridden. Their consent was indispensable to all crucial family decisions. Ownership of family property was never exclusive but resided in the collective and was meant to serve the familial good.[151]

This did not mean that patriarchy was not present, merely that its form was less severe: "It must however be acknowledged that even in idyllic pre-colonial communities group interests were framed in favour of men and often to the grave disadvantage of women and children."[152] Constitutionally inspired reform is necessary, not to return to an older (and "better") times, but rather to overcome the chilling effects of codification and to ensure harmonization with the Constitution.[153] The nub of the inquiry in *Gumede* is the impact on women of the "fossilized" and patriarchal version of law set out in the Kwazulu Act and the Natal Code.

In finding unfair discrimination, the Court concluded that the impact of the law means that

> affected wives in customary marriages are considered incapable or unfit to hold or manage property [and]…are expressly excluded

149 *Supra* note 143, at para. 17.
150 *Id*.
151 *Id*. at para. 18.
152 *Id*. at para. 19.
153 *Id*. at paras. 21–22.

> from meaningful economic activity in the face of an active redefinition of gender roles in relation to income and property.[154]

The Court had a choice about where to go next. It could develop the "living law" and articulate rules of the "old" customary law of marriage, or it could address the matter through section 7 of the Recognition Act. It found that it could not develop codified law, but neither did it have evidence to enable it to develop "living law" into a new rule.[155] Should it do so, it would interfere with a choice made by Parliament to change the proprietary consequences of customary marriage to render them consistent with the Constitution.[156] It thus declares section 7 to be unconstitutional, insofar as it requires marriages entered into before the commencement of the Act to continue to be governed by customary law, to the detriment of women. As a result, all customary marriages entered into before or after the Act are deemed to be in community of property.[157]

The unanimous decision in *Gumede* continues to confirm the consensus within the Court that equality for women within marriage is compatible with customary law, especially in recognition of its need to evolve in response to changing socioeconomic circumstances, including the changed position of women. "Living law" and context continue to be relevant to the legitimacy of change but not to remedy. Perhaps more appropriately, the Court relies on the certainty of newly legislated customary law.

4.1.3 Tongoane v. National Minister for Land and Agricultural Affairs*: Challenging Legislation Based on the "Living Law"*

The case of *Tongoane v. National Minister for Land and Agricultural Affairs* concerned a challenge to the 2004 Communal Land Rights Act

154 *Id*. at para. 35.

155 For the Court's reasoning, see *id.* at paras. 28–31.

156 The RCMA imposes community of property as the default regime for customary marriages.

157 *Supra* note 143, at paras. 50–54.

(CLRA) that sought to regulate the transfer of rural, communal land from the state to communities, and, in some cases, to individuals.[158] This case represents a fascinating example of the use of evidence of "living law" to challenge legislation, passed by the democratic government, as unconstitutional because it is out of step with a more constitutionally compliant and customary living law.

The final form of the CLRA (enacted after several different drafts that were more beneficial for women) reflected a compromise of multiple interest groups, with Traditional Councils[159] responsible for the administration and management of land and with some protection for women in the recognition of joint ownership by spouses and a provision on gender equality stating that women are entitled to the same rights and security of tenure as men (to act as a guiding principle in the implementation of the Act).[160] The Act was widely criticized for its failure to protect the different layered and nested customary land rights of individuals, families, and communities. For example, in relation to women, Aninka Claassens argued that the Act reinforced patriarchal power and entrenched, rather than removed, past discriminatory practices by failing to recognize women's "user" and "occupier" rights. It did so by "upgrading and formalizing old-order rights held by men" and by enhancing the powers of traditional leaders over land.[161] At the root of the problem, according to Claassens, was the manner in which the Act fit into rigid and formal ideas of top-down power, in which gender equality was reduced to quotas on Traditional Councils and statements of principle that have little practical meaning.[162] She argued for an approach that

158 Discussions on the Act include Walker, *supra* note 46; Aninka Claassens, *Women, Customary Law and Discrimination*, in O'Sullivan and Murray 42 (2005), *supra* note 30; Shireen Hassim, *A Virtuous Circle? Gender Equality and Representation in South Africa*, in STATE OF THE NATION. SOUTH AFRICA 2004–2005, 336 (John Daniel, Roger Southall, and Jessica Lutchman eds., HSRC Press 2005).

159 Established under the Traditional Leadership and Governance Framework Act 41 of 2003.

160 Section 4(2) and (3) of the Act.

161 Claassens, *supra* note 155, at 43.

162 *Id*. at 78–79.

strengthened the rights of users and occupiers relative to communities and thus strengthened women's actual access to communal land.[163]

Community members, researchers, and lawyers formulated a constitutional challenge to the Act. The case was based on the failure of the Act to preserve security of tenure (as required in section 25 of the Constitution) as obtained under the indigenous, living law. Given that the case was based on "living law," significant research was undertaken to provide evidence of this law.[164]

In court, the matter rested on two pillars: (1) the substantive challenge on the basis that the provisions of CLRA undermined security of tenure in indigenous law and (2) a procedural challenge that the manner in which CLRA was enacted was incorrect. The High Court agreed that the legislative scheme that vested control of land in Land Administration Boards (dominated by the Traditional Councils) did not recognize and would interfere with the rights of individuals, families, and communities to own, control, and manage the land they occupied. The Court thus recognized and accepted evidence of the layered system of land rights within living, indigenous law.[165] The relevant provisions of the CLRA were declared unconstitutional, and the matter was referred to the Constitutional Court for confirmation.

By the time the matter was heard in the Constitutional Court, the minister had withdrawn the Act as no longer reflecting government policy. As a result, the Court limited the hearing to procedural matters and concluded that the incorrect procedures had been followed in Parliament.[166] As a result, the Act was declared unconstitutional in its entirety.

The withdrawal of the Act effectively prevented the substantive hearing on the case – this despite years of research and preparation. A revised

163 *Id*. at 79–80.

164 This research was published in Claassens and Cousins, *supra* note 24.

165 Tongoane v. National Minister for Land and Agricultural Affairs, Case No. 11678/2006, North Gauteng High Court, Pretoria, October 30, 2009, unreported.

166 This referred to the fact that, in terms of section 76 of the Constitution, the Bill should have been "tagged" as a matter affecting provinces and referred to the National Council of Provinces to be dealt with in accordance with a stipulated procedure.

Act is yet to be formulated. As a result, we have yet to see the impact of the case and whether the volumes of evidence on the living customary law will be used in reformulating the Act.

In the end, however, the case demonstrates that the courts are significant forums for resolving customary disputes. They are places where communities can bring evidence of living customary law – already imbued with rules and practices that address the needs and interest of women – to seek redress. In this lies the possibility that the courts should be recognized and enhanced as "mediating institutions" or institutions that enable democratic dialogue.

5 Courts, Communities, and "Living Law"

The cases discussed in this chapter suggest that the Constitutional Court has been able to lay down a jurisprudential framework for recognizing customary law and constitutional imperatives, such as gender equality. This allows it to manage, to some extent, the complexity of a transformative project that affirms cultural diversity and enables the achievement of social and economic equality.

This approach has resulted in important advances, including the affirmation of cultural diversity and legal pluralism; the recognition of the responsive and evolving nature of living law (and a similar view of culture), in which gender roles can change under changing socioeconomic circumstances and can be recognized within customary law and practice; the recognition of the power of traditional authorities and communities to develop their rules, customs, and practices in line with the Constitution; the idea that the establishment of new norms and standards of women's roles and gender equality are possible *within* customary law (not as externally imposed values); and the establishment of living law as a key legitimating force in constitutional decisions.

Yet the Court's approach is not without difficulties. It is caught between flexibility and certainty, between recognition of living law and development under the Constitution. This results in cautious decisions

and remedies that tend to fix rules rather than set guidelines for community practice and community-led dialogue and change. Here, the Court is correct to be concerned about the fact that women and children are often vulnerable members of communities. Nyamu-Musembi concludes that unequal gender relations are a particular barrier in family matters.[167] However, it is also important to avoid the imposition of remedies that might have little resonance with customary communities and, in the end, offer little protection for women. Himonga argues that this was the case with customary inheritance after the *Bhe* case.[168] The real question is how to engender change from within, how to provide women with fair and just solutions within their communities. These solutions can be more effective than remedies that are perceived to be "imposed," and they are more sensitive to the integrity of customary law and cultural diversity. Importantly, as Claassens and Mnisi point out, many rural women have little choice but to engage customary law and find solutions within it.[169]

Such solutions depend on an idea of living law and enhancing community-led change. There is evidence of change within communities. Communities and individuals are also turning to democratic processes of law reform and litigation, which have become important sites of struggles over the meaning of culture and customary law and the limits of traditional power. This is a positive aspect of South African democracy. However, important questions remain about the extent to which all parties are able to participate in these cultural processes and conversations. Underlying this are issues of gendered power, participation, and agency.

Courts can play a greater role in enhancing these conversations and in helping to steer a process of "transformation" that enables all stakeholders to participate. If customary law is to be affirmed under the Constitution, and if living law is recognized as "the" customary law, then everyone in communities that "live" under that law must be given sufficient voice.

167 *Supra* note 57 at 128.
168 Himonga, *supra* note 30.
169 *Supra* note 25, at 513–16.

This not only requires more ethnographic research to understand practices on the ground and to present these in court; it also requires lawyers to assist with legal strategies that support the agency of individuals and communities, especially women, in seeking rights solutions that resonate with customary and constitutional values. It requires lawyers and courts perhaps to defer more to communities, either through gathering the kind of evidence that was collected for the *Tongoane* case or through remedial action that enables community-led change, shaped by customary and constitutional norms. A useful form of remedial action might be a structural interdict, in which issues are referred back to communities for resolution or interpretation, within a time limit and with a requirement of further reporting to and oversight by courts. For example, if a particular group is excluded from access, resources, or participation, then the community is asked to suggest ways of resolving this in line with constitutional guidelines and cultural imperatives. If, for example, the sex or gender of a traditional leader is a real issue, then that can be referred back for deliberation. If the content of rights is at issue, then that can be deliberated within communities, together with Court-led guidelines for change. Important here is the need to find means of including all voices within communities and not to rely solely on traditional leaders, especially as women's participation in many traditional forums is limited. Such a process must be open to alternative ways of resolving practical and normative disputes.

Underlying this process is a greater faith in the ability and agency of communities to resolve issues and of customary law to adapt to new needs and circumstances, including the Constitution. Perhaps, also, it requires more uncertainty, risking trust in the "difference" of customary law. It also requires an ability to recognize that the answers to women's inequality do not necessarily lie in prescribed international norms or civil rights, and, also, that some of the values underlying international norms and constitutional rights are not necessarily foreign to customary law.