SEVEN

The violence of the harmony model

Common narratives between women and lower-level traditional leaders

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This chapter is dedicated to 'Nduna Mshushisi' and to the many women who must live with material insecurity and everyday violence.

Introduction

Political and policy discussion about traditional leadership in South Africa often focuses on senior traditional leaders (formerly referred to as 'chiefs') and kings or queens. However, the bulk of the leadership in rural areas is carried out by headmen, with the everyday support of other lower-level traditional leaders such as those formerly known as 'tribal policemen'. Since the completion of a number of extensive studies on the full traditional governance system, carried out in the early to mid-20th century, the lower strata

of the traditional governance system have lost some popularity as a scholarly enterprise, leaving a lacuna in the literature. This lacuna has allowed public discourse to fall back on platitudes about and caricatures of traditional authority that are out of keeping with reality.

Public mischaracterisations of traditional courts, and how they function, have been rhetorically presented as reclamations of pre-colonial conceptions of traditional institutions. Ironically, however, this rhetoric is in fact predominantly formed of colonial and apartheid distortions of traditional leadership. These faulty stereotypes therefore ignore the paradoxes produced and presented by the historical and present-day political economy of rural South Africa. For example, Christine Mhongo and Debbie Budlender (2013) show evidence of a steady decline in marriage rates over the last half-century,[1] which has important consequences for the patriarchal assumptions on which traditional leadership and dispute processes are based. These over-romanticised notions of traditional governance are not innocuous. Rather, these notions are highly political and have tangible consequences for people's lives – to the point of affecting whether people (both ordinary rural residents and those in traditional leadership) live or die. The gendered nature and consequences of these over-romanticised notions – particularly for women – are especially troubling.

This chapter fills part of the lacuna in scholarly and public knowledge of the reality of lower-level leadership and courts in rural South Africa following the end of apartheid.[2] It is based on empirical data, painstakingly recorded over a period of 11 months, about what headmen do on a day-to-day basis, observations of traditional courts at various levels in Msinga, KwaZulu-Natal (see Mnisi Weeks, 2018; Mnisi Weeks, 2016; Mnisi Weeks, 2015a; Mnisi Weeks, 2012) and participant observation in Mbuzini, Mpumalanga (see Mnisi Weeks, 2015b; Mnisi Weeks, 2011; Mnisi Weeks & Claassens, 2011). The chapter argues that national, provincial and local government policies that focus on senior traditional leaders as the primary means of regulating customary law and providing justice and security for its adherents is misguided. Furthermore, such an emphasis in policy making can serve to undermine both the interests of the ordinary

people these leaders purportedly represent (the majority of whom are women), and also the role and efficacy of leaders (the majority of whom are men) operating at lower levels in the customary system.

The argument offered in this chapter might first present as an account of the lived realities of rural[3] women, subject to traditional leadership. It describes the disconnect between these women's experiences, on the one hand, and the laws that seek to regulate the institutions that govern them, on the other. Yet, with closer attention, there is a second layer of argument being presented here. The chapter demonstrates how the same lived realities of women in rural areas that are ignored by legislation, affect and shape the ability of headmen to carry out their responsibilities, especially in the realm of local dispute resolution. Hence, this chapter shows that the sources of vulnerability for women that are ignored by government similarly render the headmen vulnerable and undermine their ability to assist the government in keeping the areas under their leadership justly administered and secure.

The chapter makes this argument, systematically, through several key points:

- Rural people's existences are dependent on access to power, and women have little of it with which to negotiate their security.
- Apartheid distorted customary law, firstly by stripping women of any power they had under pre-colonial customary law, thus making women more vulnerable than they had been pre-colonially. Secondly, it stripped away much territorially based, bottom-up and decentralised customary power from headmen, thus leaving them with less authority than they had pre-colonially.
- The security of people living under customary law is highly embedded in and contingent on the reciprocal relationships that make up customary communities[4] and the rights enjoyed within them. Hence, for women, the loss of power with which to negotiate has resulted in the tremendous absence of security for them; so too has the coincidence of headmen's loss of authority at the same time as the severe degradation of the social fabric in customary communities, due to socioeconomic disadvantages, resulted in tremendous loss of security for headmen.

- The solution to this double challenge is *not*, as South African lawmakers seem to assume, the centralisation of power in senior traditional leaders. Legislation like the Traditional Leadership and Governance Framework Act No. 41 of 2003 (TLGFA), Communal Land Rights Act No. 11 of 2004 (before it was struck down) and the Traditional Courts Bill B15-2008/B1-2012 (and, now, the TCB B1-2017) Act change the balance of power in favour of senior traditional leaders (who are predominantly men), making it even more difficult for women to negotiate physical, social and material security. Fatefully, while strengthening the position of senior traditional leaders, these laws simultaneously weaken the position of lower-level traditional leaders and make it more difficult for them (along with women) to negotiate greater human security for themselves and their communities.

Each of these points is addressed in detail below, with brief narratives used to illustrate key arguments.

The argument advanced is ultimately that the legislation impacts on the power balance crucial for changes that would enhance women's and headmen's security on the ground. But so far, the South African government has failed to recognise the damage it is doing to even lower-level traditional leaders. Perhaps this failure is due to the fact that the debate has so far been presented as one between traditional leaders and ordinary rural people, when the reality defies such oversimplification. The chapter therefore ends with the proposal that government's response should be based on an approach that may seem counter-intuitive at first, but is the only solution that is consistent with preserving the integrity of rural communities and their cultures. The government should foreground the decentralisation of traditional leadership in order to strengthen the everyday social relations within which customary norms and the maintenance of social order are negotiated in very localised spaces.

Power: Women have little with which to negotiate their security

A middle-aged woman, MaNovalo,[5] was repeatedly tormented by her husband, Cijimpi, who would brandish his gun whenever he was drunk, which was not infrequently, and threaten her with it. When her husband used his firearm to threaten a neighbour for harbouring her, the neighbour took the matter to the local dispute management council. The council's decision was insipid: they insisted that Cijimpi should have gathered the family council to help resolve the root issue of his affair with another woman, and would do better to move MaNovalo back to her natal home than shoot at her. The council then concluded by asking that Cijimpi stop harassing his wife while simultaneously instructing MaNovalo to extend respect and patience toward Cijimpi in his affair. MaNovalo, on the other hand, was resolute: she would not leave to another woman the home for which she had worked so hard, even if it meant that her daughter was being visibly traumatised by the ongoing abuse. MaNovalo tearfully accepted the real risk that she herself would leave her home in a body bag.[6]

The first case made by this chapter is that rural women's existences are largely determined by unequal power relations; in this context women have very little power with which to negotiate their security (physical, social and material). The following problems reported by women living in rural areas are well-documented by scholarship on women's vulnerability and insecurity under customary law (Claassens & Ngubane, 2008; Mnisi Weeks, 2011; Weinberg, 2013; Mnisi Weeks, 2013; Thornberry, 2016). Women are often evicted from their marital homes when their marriages fail or when they are widowed (Himonga, 2005; Venter & Nel, 2005; Higgins et al.; 2006). Divorced or widowed women who return to their birth homes when marriages end are often made unwelcome and evicted by their brothers. Unmarried sisters are often evicted from their birth homes by their married brothers after their parents die, as sons assert that they alone should inherit the land, even when the father may have chosen a daughter to be responsible for the family home (Mbatha,

2002; Kingwill, 2008; Mnisi Weeks & Claassens, 2011). Married women are not treated as people with rights to land, which is seen rather as the property of the husband and his birth family. Wives are therefore often not consulted on decisions regarding land use or transactions, and women are still treated as minors in their families and communities (Budlender et al., 2011; Mnisi Weeks, 2015).

Furthermore, women, especially single women, struggle to access residential land because 'traditionally' residential sites in patrilineal areas are allocated only to men (Cousins, 2011). Women are often excluded from traditional institutions, such as traditional and village council meetings, where key decisions about land rights are taken – including the decision that women are not to be represented in traditional councils and courts and are not allowed to address meetings. In fact, women are often denigrated or ignored when trying to speak in these forums. Men generally dominate the traditional courts that decide family and land disputes, and these courts are perceived to favour men over women (Curran & Bonthuys, 2005).

One should not draw the conclusion from this evidence that women are powerless or without authority – indeed, in many respects they hold relatively powerful socio-cultural roles (see, for example, Griffiths, 1998; Redding, 2004). Yet, largely as a consequence of the interventions of formal law, women have less authoritative power in relation to men in the more structured aspects of their status (McClendon, 1995). It is this limited negotiating power that negatively affects their ability to negotiate security for themselves in their often-precarious circumstances (Whitehead & Tsikata, 2003; Mnisi Weeks, 2015). The next two sections discuss how this power asymmetry came into being and how, in practice, it disadvantages women in and through day-to-day outcomes.

Apartheid distorted customary law and stripped women and headmen of power and authority

Women and headmen are most unlikely allies, and there are certainly limits to their commonalities. However, I can show that apartheid

affected their positions in similar ways, albeit to differing degrees. As men and traditional authorities, headmen were regarded by the apartheid government as being superior to women. Nonetheless, apartheid distorted customary law to strip headmen of their authority and power, as well as women. In the case of women, this was achieved by making them perpetual minors and ever subject to the authority of the men in their lives. For headmen, this was achieved by fixing 'tribal' boundaries, inverting the 'bottom-up' nature of the power in customary communities (Okoth-Ogendo, 2008) and centralising power in senior traditional leaders.

Distorted customary law, limited power for women

Make Musha's fiancé, Myeni, had called her to the area in which he worked, where the two got married and acquired a house. When Myeni died, it turned out that he had another wife in the rural areas who he had married before his marriage to Make Musha. In order to claim some of the death benefits through her, Myeni's family resurrected the old wife, Make Mdala, and chased away the new one saying that the man already had a wife. When they went to the Magistrate's Court and Make Musha produced a marriage certificate, the deceased's family turned against the first wife, Make Mdala, who did not have written proof of her marriage, and asked her who had married her and Myeni. In the back and forth, Make Mdala's fate seemed dependent on the interventions of others – Myeni, his family, and the law – thus demonstrating the limits to her power as a consequence of having married Myeni prior to black women's liberation from the perpetual minority status accorded them under apartheid law.[7]

In this section, I show that women's relative disempowerment was not always a fixture of customary law. Pre-colonially, traditional communities were both patriarchal and matriarchal (Mamdani, 1996; Claassens, 2013). This did not necessarily mean that women were equal (Guy, 1990). But, within the context of the delicate balance between those two political poles (matriarchy and patriarchy), women

had some power with which to exercise agency and control over their lives and thus also negotiate their security. For instance, women were able to select their own spouses or draw on customary law to extract themselves from undesirable marriages (Comaroff & Roberts, 1977; McClendon, 1995; Mamdani, 1996). With the distortion of the principles of customary law by colonial and apartheid governments, women lost this negotiating power, which has had devastating long-term consequences for their security.

Readers are probably familiar with this history but, for the sake of completeness, I will summarise it briefly here. The Native Administration Act No. 38 of 1927 (NAA), section 11(3)(b), as inserted by the Native Administration Amendment Act No. 21 of 1943, laid down a new 'customary' law: 'a native woman who is a partner in a customary union and who is living with her husband shall be deemed to be a minor and her husband shall be deemed to be her guardian'. Women (and young people) were disproportionately disadvantaged by a system that privileged 'the adult male members of the tribe', as exemplified by section 3(1) of the NAA, under which men were the only ones who could participate in local decision making.

This is not mentioning laws such as the infamous and pervasive KwaZulu Act 16 on the Code of Zulu Law and Natal Code of Zulu Law.[8] In very similar wording, their respective sections 20 prescribed that:

> The family head is the *owner of all family property* in *his* family home. *He has charge, custody and control of the property* attaching to the houses of his several wives and may *in his discretion* use the same for his personal wants and necessities, or for general family purposes or for the entertainment of visitors. *He may use, exchange, loan or otherwise alienate or deal with such property* for the benefit of or in the interests of the house to which it attaches, but should *he* use property attaching to one house for the benefit or on behalf of any other house in the family home an *obligation rests upon such other house* to return the same or its equivalent in value (emphasis added).[9]

Section 22 of the Natal Code went on to say that '[t]he *inmates* of a family home irrespective of sex or age shall in respect of all family matters be *under the control of and owe obedience to* the family head'.

Of course, historians, social anthropologists and legal ethnographers have shown how (especially in Tswana society) in lived reality, customary norms tended to follow traditional practice which meant that, as demonstrated by John Comaroff and Simon Roberts (1981), women and men negotiated their way around the formal restrictions, despite the overarching colonial legal system. Similarly, Ann Griffiths (1997) shows how fluid the lived reality and the practice of justice under customary law were. And, as seen in this chapter, women were important agents in sustaining and exploiting the negotiability and fluidity of customary law.

In other words, to the extent that (i) formal laws allowed, (ii) distortions of power had not set in too deeply and (iii) the state was absent, people in traditional communities continued to practice customary law and customary relationships as they saw fit, and according to norms that they determined. Yet what they saw as fitting was profoundly shaped by the social and political economy of colonialism, and then apartheid (McClendon, 1995; Hunter, 2005).

While in their negotiations, women even used the new colonial structures to their advantage to the extent possible. Women turned to these external forums for leverage against decisions they deemed problematic in their own traditional settings but felt otherwise powerless to avoid. This is itself a sign of the multifaceted impact of the state's direct and indirect force in these communities.

The Constitutional Court has had opportunity to consider the falsifications of customary law represented in the NAA and has made the following statements on the subject:

> In our pre-colonial past … women, who had a 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

> (*Gumede (born Shange) v President of the Republic of South Africa and Others* 2009 (3) SA 152 (CC), at para 18).
>
> First, it must 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 (*Mayelane v Ngwenyama and Another* 2013 (4) SA 415 (CC), at para 71).

Hence the Court concluded that while customary law must be accorded the respect it deserves, there remains a need to ensure that it develops in accordance with the framework of the Constitution. Such development should take account of the vulnerability of women and ensure that their right to equality is robustly protected. Yet, any development of customary law must take as its starting point the recognition that customary law was fundamentally altered by a colonial government that sought to exploit it to enforce its own indirect rule.

Distorted customary law, limited authority for headmen

Landzela was the apparent heir to the headmanship of his ward, but elected not to take it up. The reason Landzela's aunts (one biological and the other by affinity) gave for supporting his rejection of the office was the preservation of his life. It was repeatedly said that the young man's father, Nduna Cala, had died because of the position; there were allegedly people who were not happy about Nduna Cala being in the position and resorted to supernatural means to remove him. In the estimation of Landzela's aunts, for a job that did not even pay, it just was not worth it for him to risk his life. Nonetheless, they as well as others acknowledged that it is one's duty to serve when one is called by the chieftainship, bukhosi, to do so. Landzela was therefore living with the tension of having violated an acknowledged cultural and social duty on the grounds of what he and his family perceived as a matter of his survival. At the same time, some people in

positions of authority acknowledged the internal tensions surrounding not just the headmanship but bukhosi as well. Groups within the community – like the 'civics' (young people, mostly male, leading the rural resistance in the latter days of apartheid) – were reputed not to wish to be under a chief. Most striking was the explanation given for why the chiefs themselves were not rendered perpetually insecure by this internal resistance; namely, that it had been made evident to these factions that government supports the 'chiefs'. It was broadly understood then that most of the senior traditional leadership's extant power is assigned by govenment.[10]

The argument advanced in this section is that, much like women's roles under customary law were distorted by the dominant legal system, so too were headmen's, which resulted in the undermining and limiting of headmen's customary authority. The NAA was in fact based on preceding legislation passed by the then Transvaal government, Law 4 of 1885, which distorted the authority of headmen by ignoring the lower-level customary dispute resolution forums led by headmen. In fact, legislators considered several cases that revolved around whether or not headmen played a role in the traditional judicial process. Relying upon the Western conception of a court as a forum governed by a single individual in his or her capacity as judge, Law 4 of 1885 recognised only chiefs as being entitled to having courts, and to make decisions in those courts. However, cases were brought to the colonial courts in which people argued for recognition of the fact that headmen were empowered to resolve disputes in their own forums and also to participate in chiefs' forums.

For instance, in the 1923 case of *Makapan v Khope* (1926: 555, 561) decided under Law 4 of 1885, the Appellate Division of the Supreme Court observed that the headman's court was 'recognised by members of the tribe as having authority to hear and decide disputes', but was not recognised by the legislature and, hence, the court found that in terms of the legislation, the chief 'alone' constituted 'a court of justice'.

It is important to observe as the subtext for such decisions that the courts' conclusion that the 'native chiefs' ruled like despots formed

the basis of its rationalisation that 'the Governor-General', as the 'Supreme Chief', was in terms of Law 4 of 1885 permitted to expel native men from their land because '[t]he Government today has the power the old chiefs exercised' (*Mokhatle and Others v Union Government*, 1926: 77). This was the decision delivered three years after *Makapan* (1912), by the same Appellate court in *Mokhatle and Others v Union Government*, where the court implied that the 'native mind' was not particularly suited to democratic process, and it was thus appropriate for the chief to have full discretion to determine such matters, and others need not be consulted (*Mokhatle and Others v Union Government*, 1926: 79).

Following on from Law 4 of 1885, the NAA recognised and regulated traditional courts as forums primarily – if not exclusively – constituted by 'chiefs' (that is, senior traditional leaders). This description of traditional courts can be seen from the titles of the relevant sections of the NAA, namely, 'Settlement of civil disputes by native chiefs' (section 12) and 'Powers of chiefs to try certain offences' (section 20). In terms of the legislation, senior traditional leaders were made both legislators and adjudicators. It was only in 1929 that the NAA's sections 12 and 20 were amended in order to recognise headmen's courts as forums below the level of chiefs' courts.

With respect to traditional governance, the apartheid administration used principles laid down in the NAA to both extend and alter the authoritative power of senior traditional leaders. Furthermore, the systematic preference of 'chiefs' over headmen has continued in the legal system until today. According to section 2 of the Traditional Leadership and Governance Framework Act No. 41 of 2003 (TLGFA): '(1) A community may be recognised as a *traditional community* if it (a) is *subject to* a system of *traditional leadership in terms of* that community's customs; and (b) observes a system of customary law' (emphasis added). Yet, section 28(3) titled, 'transitional measures', says that 'any "tribe" that, immediately before the commencement of this Act, had been established and was still recognised as such is *deemed* to be a *traditional community* contemplated in section 2 ...' (emphasis added).

In terms of the NAA, 'chiefs' (and subsequently headmen too)

were empowered to settle disputes that arose in the areas under their jurisdiction – that is, within the territories over which they had state-sanctioned 'control'. The 'chiefs' (and later headmen) themselves had to satisfy two criteria: first, they had to be formally recognised or appointed by the state and, second, they had to acquire specific authorisation for deciding civil matters, with this permission having to be written in order for 'chiefs' (and later headmen) to legitimately hear criminal cases.

Under section 28(1) of the TLGFA, '(a)ny traditional leader who was *appointed* as such in terms of applicable provincial legislation and was *still recognised* as a traditional leader immediately before the commencement of this Act, is *deemed* to have been recognised as such in terms of section 9 or 11, subject to a decision of the Commission in terms of section 26' (emphasis added). Furthermore, in terms of section 28(4): 'any tribal authority that, immediately before the commencement of this Act, had been *established* and was *still recognised* as such, is *deemed* to be a *traditional council* ...' (emphasis added).

Under apartheid, those communities that were acephalous (literally, 'without a head', and so meaning having no 'chief', king or queen) were not recognised, and therefore could not own land, because they could not become a 'tribe' or have a 'tribal authority' without the construct of a 'chief'. The effect of the legislation cited above is that these same communities are not recognised as traditional communities under the TLGFA. Some such communities were claimants in the Constitutional Court challenge to the Communal Land Rights Act No. 11 of 2004, *Tongoane v National Minister for Agriculture and Land Affairs* 2010 (6) SA 214 (CC). Under the apartheid legislation, there was only one exception for acephalous communities; 'community authorities' were the only (rarely used) model available under the Bantu Authorities Act No. 68 of 1951 for recognising black communities that did not have a 'chief' or exist as a tribe under the NAA.

The 'transitional measures' in section 28 are still in effect 15 years after the TLGFA came into being and, under this section, 'community authorities' are presumed to have all been disestablished in terms of the TLGFA. Hence, there is no provision for acephalous communities.

Besides that, communities in the Eastern Cape that customarily elected their headmen (as opposed to having their headmen appointed by the Royal House or senior traditional leader) have no provision for doing so under either the TLGFA or the Eastern Cape Traditional Leadership and Governance Act of 2005. This is an issue that the Amahlathi community was the first to challenge in court (but not in the numerous provincial and national government commissions constituted to investigate disputes over traditional authority and land). The Amahlathi won their challenge in an order of the Bhisho High Court dated 27 June 2017.

It is evident therefore that apartheid distorted customary law and stripped women of power and headmen of authority. The significance of this distortion of customary law is immense and can be seen through the practical consequences described in the next section.

Hidden in the shadows of 'harmonious' community: Contingency and contestation[11]

The third major point is that the reason women's and headmen's security declines with their loss of power and authority, respectively, is that for both, their security is highly embedded in and contingent on the reciprocal relationships that make up customary communities and their normative frameworks. Moreover, what is presented in South African policy and legislative discourse as an uncontentious relationship between 'senior traditional leaders' and their 'subjects' is rarely that (Mamdani, 1996; Oomen, 2005; Comaroff & Comaroff, 2009; Mnisi Weeks, 2018). In fact, as this section goes on to show, senior traditional leaders are typically engaged in negotiations to protect and enhance their own 'roles and status' (Comaroff & Comaroff, 2009). Making themselves sound more authoritative than they are under existing customary law, or were under pre-colonial norms, aids their endeavours to extend and entrench their powers in and through formal law.

The context in which women and headmen (actually, all people living in customary communities) negotiate for greater rights under

customary law is worth describing in some detail here. This context is one where the law comprises a range of rights and duties and the rule that prevails is negotiated on a case-by-case basis, depending on the needs of the people involved in a particular real-life scenario. This is what scholars (Mbatha, 2002; Himonga, 2005; Bennett, 2008; Claassens & Mnisi, 2009; Mnisi Weeks & Claassens, 2011; Cousins, 2011) and the Constitutional Court refer to as 'living customary law'.

This point has been demonstrated by John Comaroff and Simon Roberts in their work, *Rules and Processes* (1981). In essence, they show that living customary law (in their study, Tswana '*mekgwa le melao*') is made up of a 'normative repertoire', which is a variegated set of norms drawn from a general, undifferentiated repertoire. This means that there is a multitude of norms that exist at different levels of specificity and generality; these norms may even contradict one another but the contradictions are resolved by interpreting some norms figuratively (that is, elevating the norms to the metaphorical or symbolic level as opposed to enforcing them literally). This determination – that is, the differentiation of an otherwise 'undifferentiated repertoire of norms' – is made on the basis of each particular situation (Comaroff & Roberts, 1981).

There are obviously certain norms that enjoy wide social acceptance, and these are typically complied with and regarded as obligatory, but this may change over time as the community's lived reality and demands shift. Thus, the specific weight of most norms is meaningfully determined only in relation to the situation in which the norms are invoked. This means that a particular – even widely held – norm does not *necessarily* determine the outcome of dispute. Of course there are some non-negotiable norms, but these are not determined by any individual but rather are typically evident in practice. Yet it is also true that while norms are generally negotiable and offer some room for manoeuvre to the authorities overseeing dispute resolution, norms are not *completely* non-determinant of outcomes. This is one of the fundamental tensions that must be resolved with the flexibility inherent in the nature of living customary law (Comaroff & Roberts, 1981).

This fundamental negotiability of the norms constituting living customary law is achieved through what the authors describe as the

'paradigm of argument', which they explain operates as follows in the context of cases under Tswana '*mekgwa le melao*'. The process of resolving a dispute is sometimes devoted primarily to debate over precisely the question of competing norms. Disputing parties, and the authorities managing the dispute, organise their utterances (their statements in their argument) with reference to referential principles (the various norms available for them to select from). Disputes are seldom decided by the prescriptive application of norms alone. Rather, the parties will contrive a 'paradigm of argument' that offers a coherent picture of relevant events and actions, in relation to one or more implicit or explicit normative referents (Comaroff & Roberts, 1981).

The 'paradigm' the parties formulate is case specific, not fixed or predetermined. The complainant will establish the paradigm by ordering the facts around normative referents that may or may not be made explicit. In fact, an individual will not typically refer to norms explicitly, except in the anticipation that his or her opponent will question the characterisation of the dispute offered; the individual will try to erode his or her opponent's paradigm in advance. The other party may then either stay within the paradigm that was established by the complainant – thus, arguing the circumstances of the case – or the respondent may choose to present a competing paradigm while accepting the presented facts. In the latter case, an explicit reference to norms seems necessary because the respondent is imposing a different paradigm on the case, and so attempting to assert control over or change the terms on which the debate is proceeding (Comaroff & Roberts, 1981).

It is evident from this account that the power to negotiate is an essential factor in any party being able to win a dispute under living customary law, and in influencing the ways in which living customary law develops in and through the pronouncements made during dispute resolution (see, for example, Mnisi Weeks, 2011). The necessity of the power to negotiate becomes even more evident when one considers the options the dispute resolution forums are given when presented with competing 'paradigms of argument' (Comaroff & Roberts, 1981) and, hence, presented with competing norms.

In such situations, the authority responsible for resolving the dispute and/or the senior men who are observing the case may (a) accept the paradigm agreed to by the parties (if such agreement exists), (b) choose between the competing ones presented by the parties or (c) impose a completely new paradigm on the disputed issues (Comaroff & Roberts, 1981). If the authority goes with option (b) or (c), then he will most often refer to rules explicitly (though usually indirectly, even then) because they are seeking to legitimise the distinction and justify the finding. The dispute resolution authority may also distinguish the issues and thus apply two or more frames to the case (Comaroff & Roberts, 1981).

Under Tswana '*mekgwa le melao*' (Comaroff & Roberts, 1981), legislative pronouncements can sometimes customarily become part of the normative repertoire of the governed communities when they are endorsed by the traditional authority. However, the legitimacy and execution of these pronouncements depend on their:

- reflecting public opinion,
- being delivered by an authority considered legitimate, and
- being of utility to individuals in the circumstances in which they might be raised (Comaroff & Roberts, 1981).

This is fundamentally different from the claim of their being determinative merely at the sovereign's say-so – the latter being the way in which state law is deemed authoritative.

It is therefore significant when customary authorities speak of their legislative rules as 'determinative', in order to advance their claims to institutional legitimacy. This is because the argument that their legislative pronouncements are unconditionally authoritative gives more law-making authority than they have under living customary law, and when they succeed at having it enacted in state legislation it is extremely difficult to overcome. These claims to authority are therefore usually made at the expense of the authority of ordinary rural people to create and observe living customary law based on their values, choices and evolving practices. Again, this is a fundamental disruption of the delicate power balance that is essential to living customary law, and makes living customary law the effective

legal system that it can be when it is honoured in its true essence as described above.[12]

Entwined power and the vulnerability of women

Make Mdala's case was brought by her birth family to the traditional council as a claim against her in-laws for reimbursement of the cows that had lobola'd (that is, paid bridewealth for) Make Mdala's child. The grounds for the claim were articulated as being that Make Mdala had not been lobola'd and yet the deceased's family had made her wear inzilo *(the mourning outfit) for the deceased and taken her through* kumeketa *(the terminal marriage ceremony). The deceased's family objected and said Make Mdala should lobola herself with the money she was earning from her husband's death (through the formal inheritance process of the Magistrate's Court). At the traditional council, the deceased's, Myeni's, family lost the case because, as it was pronounced, a woman does not wear mourning clothes when she has not yet been lobola'd. Moreover, the traditional council said Make Mdala had moved into the marital home as a wife-to-be with permission from her husband's family; she had then not been lobola'd even though she had birthed a (girl) child who was married and lobola'd. The child's (paternal) grandparents had taken the lobolo cows and enjoyed them but the child's mother had not been lobola'd. As one female member of the council definitively pronounced, 'The cows [that had lobola'd Make Mdala's daughter] were supposed to go and lobola [the girl's] mother – this is what the traditional law requires.'*[13]

The case presented in this section is that the balance of power in traditional communities is delicate. Women's security, in particular, is vulnerable to the shifts in this delicate balance because of the fragility and contingency of women's control over the security and strength of their relationships. That is, women's security declines with their loss of power to negotiate, because women's security is highly embedded in and contingent on the reciprocal relationships that make up

customary communities and rights under the normative frameworks that prevail in these groups.

How do we apply the understanding articulated above of the nature of living customary law to women's ability to ensure their livelihoods and their general security within their local communities? The argument has previously been made that women extend their security in their local contexts partly by mobilising 'rights' (both customary and constitutional) (Claassens & Mnisi, 2009) as part of their 'paradigms of argument' (Comaroff & Roberts, 1981). They thereby emphasise the aspects of living customary law that accommodate and address their particular needs as experienced within a particular, contemporary context. In this way, women may also explicitly or implicitly develop the applicability of both living customary law and constitutional rights to their lives (Claassens & Ngubane, 2008; Claassens & Mnisi, 2009; Mnisi Weeks & Claassens, 2011).

Thus, when women mobilise 'human rights' they typically do so in relational ways that emphasise that autonomy is achieved through positive relationships that strengthen them, rather than in the individualist sense in which human rights are typically conceived of in the West (Mamdani, 1990; Nedelsky 1993; Lacey, 2004; Nyamu-Musembi, 2005). Hence, using rights as part of their 'paradigms of argument' within customary law is a coherent approach for them because customary law tends to emphasise relationships over individuals and interdependence over independence (Claassens & Ngubane, 2008; Claassens & Mnisi, 2009; Mnisi Weeks & Claassens, 2011). Yet, at the end of the day, women are only able to negotiate their security effectively in these terms – that is, introduce and defend 'paradigms of argument' that draw on values within customary law that support their wellbeing and security and that of their children and families – if they have the power (recognised as legitimate) with which to do so (McClendon, 1995; Curren & Bonthuys, 2005; Claassens & Mnisi, 2009; Mnisi Weeks, 2016).

As discussed in greater detail below, one observes a difference in rates of participation between lower-level and higher-level vernacular dispute management forums (Mnisi Weeks, 2015a; Mnisi Weeks,

2018). This coincides with the observation made as early as the mid-20th century that increasing formalisation of the forums results in increased alienation from the forums within the community (Hailey, 1953). Hence, the role of ordinary members of the vernacular grouping (customary community) diminishes the higher up one goes in the forum system (Mnisi Weeks, 2015a; Mnisi Weeks, 2018).

As shown, at least in part, initially colonial law deliberately engineered this formalisation in order to centralise authority in the 'chief' (and, to a much lesser degree, the 'chief's council'). Interestingly, what has resulted is a gaping chasm between the processes in the headmen's and the senior traditional leaders' forums (Mnisi Weeks, 2015a; Mnisi Weeks, 2018). One manifestation of this difference is that women have a little bit more ability to participate effectively in the headmen's forums (Mnisi Weeks, 2018). Of course, the membership of vernacular dispute management forums (or traditional courts) is mainly male and a man, who is the key authority figure for the social unit that the forum serves, typically chairs each forum (Mnisi Weeks, 2016; Mnisi Weeks, 2018). In this sense, these forums retain their patriarchal nature and women are still substantially excluded from this process, resulting in their voices not being well represented in the development of the normative repertoire in their communities.

Nonetheless, lower forums typically allow greater independent female involvement due to the forums' less formal Constitution and procedure, though the forums vary in how much female participation they each allow (Mnisi Weeks, 2016; Mnisi Weeks, 2018). Ultimately, these highly significant dimensions of dispute management suggest that interpersonal and professional relationships premised on social trust are critical to the vernacular dispute management system's strengths and weaknesses. They also suggest that such important matters as how much say women have in the development of local norms should not be left to the whims of individual traditional leaders or to the culture of female non-participation that develops in each sub-community, but should be firmly directed by law and policy (Mnisi Weeks, 2015a; Mnisi Weeks, 2016; Mnisi Weeks, 2018).

Entwined authority and the vulnerability of headmen

Nduna Mshushisi presented as very confident and was regarded as authoritative even by other headmen in his traditional community, some of whom consulted him on how they should settle their own confounding matters at times. In disputes before the chief's council, Nduna Mshushisi was often the foremost interrogator. With his powerful voice and above-average height, he cast such an authoritative shadow over proceedings that one might have mistaken him for the chief headman. Or one might have mistaken him for umshushisi *(prosecutor), which is how one chief headman had described the role that the chief headman is required to play in dispute proceedings. Suffice it to say, Nduna Mshushisi was strong. Yet, that did not make him invulnerable. During the 11 months of my team's data collection, he reported the least dispute management incidents of all six headmen concerning whom we were collecting data daily, and most of the matters were minor. Yet two key conflicts that Nduna Mshushisi had managed and did report to us were ones that dealt with intense violence. After the period of our data collection, our NGO partner informed us that, on 13 February 2016, Nduna Mshushisi had been assassinated in broad daylight. According to our NGO partner's annual report, 'he was the third induna [in his traditional community] to be killed in six months, a tally that makes it difficult to find a replacement for the job'.*[14]

To illustrate how headmen's authority and vulnerability are entwined in practice, I delve deeply into the example of headmen in Msinga. The composition of vernacular dispute management forums there and the restraint with which the local headmen conduct themselves must be read against the historical background of traditional male roles in Zulu communities. It is well known that precolonial Zulu society was patriarchal and, moreover, that men were also ranked according to a hierarchy based primarily on age, in terms of which older men received greater respect than those who were younger (Guy, 1990; Hunter, 2005; Carton & Morrell, 2012).

As Benedict Carton and Robert Morrell (2012) describe, emphasis

was placed on patriarchal honour and morality – specifically, 'household honour' entailing 'patience, sobriety and wisdom'. Responsibility to relatives and peers was prized because agrarian Zulu society depended on mutual support within and between households for its survival and health (Carton & Morrell, 2012: 41–42). Carton and Morrell explain that 'guiding idioms of the Zulu kingdom promoted subsistence – not 'man slaying' – with one particular metaphor, *isbuko sikababa*, inspiring herd boys (the proto-stick fighters) 'to mirror' the 'gravitas' of their fathers who oversaw homestead production' (Carton & Morrell, 2012: 41). These authors conclude that, in terms of precolonial ideals, 'all people, young and old, were expected first to uphold life-affirming heroic and householder traditions that preserved domestic security' (Carton & Morrell; 2012: 42).

As these and other authors such as Mark Hunter (2005) observe, with time 'man slaying' (Carton & Morrell, 2012: 41–42) has come to acquire prominence in Zulu communities' dominant conceptions of masculinity. This change co-occurred with two dynamics that manifested almost concurrently. On the one hand, African men were co-opted by the state as it sought to tighten control over women and their sexuality. On the other hand, the changing economy and forced labour migration made it ever more difficult for men to maintain a strong household as required by the Zulu masculine ideal (Hunter, 2005: 394). These factors, along with men's participation in urbanisation due to the circumstances they found themselves in, did not render obsolete traditional beliefs about manhood, which revolved around the centrality of marriage and the establishment of a homestead. However, they did contribute to the development of male practices that presented competing conceptions of masculinity (Hunter, 2005: 397).

The restraint shown by headmen as they approach their role must be understood against this background. The headmen approach their roles both in practice and in speech in ways that hearken back to the traditional values that undergirded Zulu society until the mid-20th century, during which time the headmen were born and raised in the area. Indeed, the headmen came of age before the crisis of Zulu

masculinity hit its peak in the 1980s (Hunter, 2005). They therefore approach their role as that of safeguarding the legacy with which their grandfathers entrusted them.

The challenge is that things have changed more than they are able or willing to recognise and accept (Campbell, 1992; Hunter, 2005; Mnisi Weeks, 2018). Their approach therefore rubs against the reality and demands of the historical moment, which presents a social context that is vastly different from the context in which their grandfathers lived. Nonetheless, the headmen fail to fully confront this challenge and largely behave as though they can take for granted that those in their charge more than notionally share their beliefs about Zulu gender identity – especially masculinity (Mnisi Weeks, 2015a; Mnisi Weeks, 2018). As the headmen attempt to realise the historical vision of Zulu society given to them by their forefathers, using 'time-tested' methods to perform their role, they are falling further and further out of step with the increasingly challenging contemporary circumstances (Mnisi Weeks, 2015a; Mnisi Weeks, 2018).

The result is a tension between the headmen and their sons' generation that mirrors the tension described by scholars between fathers and sons today (Campbell, 1992; Mchunu, 2007). In brief, fathers largely committed to the ways of old (and, likewise, committed to traditional governance institutions) experience alienation (Marx, 1988; Mészáros, 1970) from having been emasculated by the unemployment and poverty that resulted from the oppressive systems of colonialism and apartheid (Campbell, 1992; Hunter, 2005; Mchunu, 2007). They may self-medicate with alcohol, and sometimes seek comfort in multiple sexual partners or relieve their frustration and try to reclaim their agency through violence. Their sons – many illegitimate or raised by their mothers alone – emerge ambivalent about tradition as they too are demoralised by unemployment and lack faith in institutions. They therefore also widely engage in alcohol abuse, extramarital sex, violence and crime (Campbell, 1992; Hunter, 2005; Mchunu, 2007; Mentjes, 2017; Mnisi Weeks, 2018).

Even though they share the experience of alienation due to political economic causes, there is tension between older and younger men in this context (alienation from each other). Specifically, the older

men feel unable to control or even reach the younger generation who they experience as undisciplined. The younger generation feel misunderstood, abandoned and let down by the same older generation who would impose what they perceive as failed notions of masculinity, tradition and order. These younger men also reject the structures that would seek to control – and from their perspective, further repress – them (Campbell, 1992; Hunter, 2005; Mchunu, 2007; Smith, 2015; Mnisi Weeks, 2018).

Symbolising the traditional systems of constraint and the attempts of the older generation to control the younger generation, the headmen are, in many ways, located at the centre of the divide between younger and older men (Mnisi Weeks, 2018). Indeed, the striking symbolism of the generational division in the midst of which the headmen stand is made palpable when one of the young male perpetrators who assassinated a headman shouts the words, '*Babulaleni bonke, bayizinja*!' ('Kill them all, they are dogs!'). This was the case in 2016 when Nduna Mshushisi was killed – reportedly the third headman in six months to be murdered (Mnisi Weeks, 2018).[15]

The fundamental point here is that the internal cultural disparities – shaped by history – between the headmen and the people they serve indicate the necessity for the headmen to re-evaluate their propensity to cater to the 'traditional ideal' of what gender identities should look like in Msinga. Such re-evaluation would hopefully result in a reform of how the headmen carry out their function of leading dispute management in customary communities.

Summary

In essence, then, for both women and headmen, their power or authority and vulnerability are entwined. Women's security is embedded in and contingent on the reciprocal relationships and rights within customary communities. Arguably, to a significant extent, headmen's security is also embedded in and contingent on the reciprocal relationships and rights within customary communities.

Evidently, in contexts such as these, relationships are the seedbed

of both security and vulnerability. For women, the power they possess or have access to is the key determinant of whether their relationships will yield security or vulnerability. The moral authority the headmen possess, which is based on personal affiliation and the strength of the gendered and generational relations within their communities, is essential to the amount of security they are able to ensure for themselves and others. For both women and headmen, outcomes of their negotiations for security are also contingent upon broader socio-economic factors such as social fabric and social trust, which in turn are significantly determined or affected by political economy.

Customary law legislation passed by pre- and post-1994 governments changed the balance of power in favour of male minorities and particularly senior traditional leaders, which does not bode well for rural women and lower-level traditional leaders. If the law were to accept that the dream of harmony is a rarity and its projection highly political (Gluckmann, 1955; Bohannan, 1957; Nader, 1960; Gulliver, 1963; Gibbs, 1963; Aubert, 1969; Abel, 1982; Schweitzer, 1996; Nader, 1996; 1991; 1990), and furthermore that negotiation is the more common and persistent reality, then it would have to embrace the reality that power is central to the nature of customary law, justice and security. Likewise, if the South African legislature were to account for the discrepancies between what it espouses and what it does in practice (or what it says it aspires to achieve and what it actually accomplishes), it would then also have to acknowledge that the interests that serve senior traditional leaders often fail to serve not just ordinary people but also lower-level traditional leaders such as headmen. This reality demands that the government reorients its attention and alliance and makes provision for a redistribution of power and a reorientation of authority in rural communities from top-down to bottom-up (Okoth-Ogendo, 2008).

Put differently, what if the government were to stop legislating on the basis of the illusory presumption that traditional communities are simplistically harmonious and peaceful, with only *minor* conflicts for which reconciliation is sought? What if government were to acknowledge that, at least in some rural communities, the political economy of the last centuries has led to *severe* ruptures in the social

fabric? On the wall of one Msinga home I took a photograph of a plaque displayed that says:

Kubi okwenza kimi;
Ungeke uthole lutho;
Udlala ngesikhathi sakho,
Muntu wakithi.[16]

It roughly translates as follows:

It is terrible, what you are doing to me;
You will not get anything (out of it),
You are wasting your time,
My friend/relative.

What if hidden in the shadows of 'harmonious' rural communities are contestation and serious contingencies that need to be given voice if healthy social conditions are ever to be achieved?

Laws change the balance of power within which women and (head)men negotiate unavoidable changes

When the family of the deceased (Myeni), took his first wife, Make Mdala, to the Magistrate's Court – hoping to receive some death benefits through her – and Make Musha produced a marriage certificate, the deceased's family turned against Make Mdala, who did not have written proof of her marriage, and asked her who had married her and Myeni. With the Recognition of Customary Marriages Act 120 of 1998 in place, Make Mdala was able to receive her due. When her family brought a customary challenge against deceased Myeni's family, the latter objected, saying that Make Mdala should lobola herself with the money she was earning from her husband's death. Evidently, the laws of inheritance were having a significant influence on social interactions in this case and impacting on Make

Mdala's ability to negotiate her material and social security.[17]

This section details the ways in which legislation passed by the post-1994 government of South Africa has affected the ways in which women and headmen navigate the changes that are taking place in their communities. Study participants in Mbuzini who recognised tensions surrounding the roles of senior and lower-level traditional leaders and the internal resistance traditional leadership faced in their community were asked why 'chiefs' themselves were not rendered perpetually insecure by these tensions. The explanation they gave was that it had been made evident to the factions that oppose *bukhosi* (royalty) that government supports *emakhosi* (chiefs/senior traditional leaders). According to these interlocutors, all members of their traditional community generally understood that government power is behind senior traditional leaders.

The overarching political parameters that are enacted in law alter the balance of power that determines how women and men negotiate their norms under living customary law and negotiate changes in their social and material existences (Oomen, 2005; Mnisi Weeks & Claassens, 2011). In most cases, women come out as the losers under these laws. This impact is clearly shown by two laws that the government either enacted (the Communal Land Rights Act No. 11 of 2004, which was struck down in 2010 as unconstitutional by the Constitutional Court) or attempted to pass but met with public resistance (the Traditional Courts Bill B18-2008/B1-2012). These overarching political and legal parameters also delineate the possibilities for headmen to carry out their charge of leading dispute management and limit the prospects of their success.

Women stood to lose under the Communal Land Rights Act (CLRA) in several ways. With radically declining marriage rates in rural areas, single women make up large (and growing) numbers of rural women (Claassens & Ngubane, 2008; Mhongo & Budlender 2013; Claassens, 2013). Yet, they would have been excluded from benefitting in terms of registration of land under the CLRA, which only referred to married women. Furthermore, even though married women were provided for under the CLRA, it was only in the context

of joint registration of property with their husbands, which would mean that even property that the women had on their own would have to be shared with their husbands. This would potentially have had negative consequences for these women's pre-marital children as well (see Mnisi Weeks, 2015b). Women also would not necessarily have been guaranteed a part in decision-making bodies that determined customary land rights under the CLRA since this was not specifically mandated.

Women stood to lose under the Traditional Courts Bill B18-2008/B1-2012 (TCB 2008/2012), and may still do in certain instances under the Traditional Courts Bill B1-2017 (TCB 2017), in the following ways: women were not assured of membership of traditional courts under the TCB 2008/2012 and, now that the Portfolio Committee on Justice and Correctional Services has mandated the Department of Justice and Correctional Services to remove the requirement in the TCB 2017 that women be included as members of traditional courts, there may not even be the single 'token' woman that might otherwise have been included in some courts.[18]

Women were not guaranteed self-representation (or attendance) in courts in the TCB 2008/2012. Regardless of the problems mentioned earlier faced by women in mourning, such as evictions, the TCB 2008/2012 said that husbands could represent wives just as wives could represent husbands 'according to customary law' (clause 9(3)(b)). In other words, men could continue representing women, even in inheritance, and since women have never been permitted to represent men in traditional courts this was a false comparison. Clause 9(2)(a)(i) paid lip service to formal equality but the TCB 2008/2012 as a whole entrenched unequal power relations. The TCB 2008/2012 would therefore have silenced women's voices even where they were beginning to be heard. Moreover, issues affecting women's land rights were not excluded from traditional court jurisdiction (e.g. land matters or succession) under the TCB 2008/2012. The TCB 2017 allows for traditional courts to provide 'advice relating to customary law practices in respect of … (v) succession and inheritance'. However, it is not clear what the parameters for 'advice' are. Without these parameters, it is difficult for women to assess the il/legality of

the traditional courts' conduct in a given succession or inheritance dispute, on which the traditional court has provided 'advice'.

More insidious still, the TCB 2017 is based on the fallacious harmony model (Nader, 1990) – thus assuming voluntariness, consensus and reconciliation within communities that I have shown are not always of that default description. This is in many ways an improvement on the TCB 2008/2012, which largely awarded vernacular dispute management forums similar powers to state courts, but provided nowhere near the same degree of requirements for accountability and safeguards to which the state courts are subject. However, the 2017 bill does not abandon the misguided idea of traditional communities as simplistically harmonious and peaceful, which means that it does not provide for traditional communities' true needs; on the contrary, it denies many of them, especially the security needs of women and headmen. Furthermore, directions given to the Department of Justice by the Portfolio Committee in August 2018 will result in the removal of measures of accountability in the TCB 2017.[19]

Under the TCB 2008/2012, lower courts would not have been recognised – only the courts sitting at the level of 'traditional community', and hence 'chief's courts' (Mnisi Weeks, 2012). Headmen would only have been permitted to 'preside' over that court in the senior traditional leader's absence, and to do so at the bidding of the senior traditional leader and with written permission from the then minister of Justice and Constitutional Development. The TCB 2017 attempts to remedy this by allowing headmen to have their own courts, but it still centralises the 'convening' of traditional courts and prescribes that the 'delegation' of power or authority for decision making is to devolve downwards from the senior traditional leader. It does this by assuming that government will issue credentials.

Presumably to occur under the TLGFA, this credentialing would continue the legacy of apartheid 'tribal leaders' and 'tribal authorities' by relying on section 28. This now-permanent, though still allegedly 'transitional', set of provisions allows the institutions that were invented and/or distorted by apartheid to continue and to pass power and authority downwards to lower institutions like the headmen. In practical terms, this means that lower-level courts could not be

established independently of an existing, recognised 'traditional community' with a formally recognised 'senior traditional leader' presiding over it. In other words, vernacular dispute management forums could not come into being – or be recognised as having done so – (a) if they evolved organically, from the bottom up, in the absence of 'delegation' of authority to manage disputes from the 'senior traditional leader'; or (b) if they developed and functioned in an acephalous customary community.

Furthermore, this grounding of the TCB 2017 on the TLGFA's section 28 amounts to the formalisation of these informal forums. I described above how increased formalisation had a negative impact on the participation of ordinary people, and especially women. Unfortunately, the TCB 2017 would not improve or address this as it is a rather technical document reliant on formalistic procedures and judicial and legal criteria for legitimacy. Additionally, the Portfolio Committee's decision in August 2018 to have 'traditional courts' in the TCB 2017 be recognised as 'courts' under section 166(e) of the Constitution further formalises these forums which are, in reality, mediated spaces for negotiation. More disconcerting still, in late 2018, the TLGFA is expected to be replaced by the Traditional and Khoi-San Leadership Bill (B23-2015) (TKLB), which is even more deeply entrenched in the colonial and apartheid imagination of traditional leadership, further centralising power in traditional communities in senior traditional leaders.

The TCB 2017 assumes jurisdictions based on fixed apartheid boundaries which have similar foundations to 'tribal authorities'. With respect to the re-perpetuation of external 'traditional community' boundaries fixed by the apartheid government in particular, the TLGFA (and, building on it, the TCB 2017) further undermine the authority of headmen and their ability to resolve disputes. This is because much of the conflict that arises locally is due to the fixity and location of these boundaries, which go against the grain of customary communities. The TKLB would not provide any relief here. Moreover, the Portfolio Committee's August 2018 decision to do away with allowing people to opt out of 'traditional court' jurisdiction in the TCB 2017 will only exacerbate local conflict (see Mnisi Weeks, 2015a).

These laws – that is, laws such as the TLGFA (and TKLB), CLRA and TCB – entrench the shifts brought about by apartheid distortions and impositions (as discussed earlier in this chapter). The legislation does this at the expense of the possibility of shifting the balance of power more in favour of women, and enabling bottom-up authority to be imparted to headmen as fitting, both of which would be a corrective for the distortions introduced by colonialism and apartheid. The same laws fail at their stated task of giving effect to the living customary law. As I have described, this law is highly adaptable by nature, and can therefore enable women, subject to a very delicate balance of power, to ensure greater security and potentially allow headmen to respond appropriately to the complex demands of their work in the present age.

Conclusion: Lessons for government regulation

As Ben Cousins and others (2011: 58, 68–69) argue and conclude:

- wider social dynamics in favour of women's equality can have a significant impact on women's ability to negotiate greater equality locally under living customary law,
- women's representation on local traditional decision-making bodies can do the same, and
- space for women to speak, and for their voices to be taken seriously, within local institutions is an important factor in women's ability to achieve greater security under traditional leadership and living customary law.

The argument I have advanced in this chapter is that power lies at the foundation of all three of these preconditions. The wider social dynamics and political symbolism of law can send the signal that women are supported in their local struggles for greater equality and security. Women's representation in local bodies allows women greater roles, power and voice with which to speak in the debates on living customary law, and how it should evolve to respond to changing local needs. This form of legitimacy and power then opens up greater

space for women, situated both inside the traditional institutions and outside of them, to be taken seriously when they speak about their circumstances and needs. Power is therefore at the core of everything that affects women's security in traditional communities.

As shown, the laws passed by South Africa's democratic government undermine the power that women had under customary law. These laws also undermine the power women had been able to acquire through the Constitution's equality clause, which had temporarily made clear that government supported women's equality. These laws shift power dynamics in rural areas so that women are no longer able to use the flexibility and negotiability of living customary law to negotiate greater security for themselves where they are situated. They therefore return women to the disempowerment, disenfranchisement and dispossession they suffered under colonialism and apartheid. By also ignoring women's realities – such as the extent to which marriage rates have declined and are continuing to do so – these laws put women's existences and those of their children and families at risk. In fact, they threaten women's livelihoods directly.

The provisions pertaining to women in laws such as the CLRA and the TCB exemplify the ways in which the law fails to provide for women's need for equality and security. Even when the democratic government's laws on traditional leadership and customary law do try to give a small boost to women's equality – as in the one third quota for traditional councils enunciated by the TLGFA – these provisions are not implemented and are therefore rendered ineffectual.

Changes in legislation, and in implementation, are necessary to address women's side of the equation. These changes include government ensuring women's equal representation in decision-making bodies in traditional communities. I spoke to one young woman and her friend in Mbuzini. Although they had never been inside *libandla* (the chief's council), she was pleased that there are women there to represent her. She noted that:

> there are people chosen to come and listen to cases here and otherwise we don't come. And now they have women too. Before, anyone could come and listen and women could come

> but they could not answer; but now they can listen and answer, and share their views. This helps because if I, being a woman, come into a problem that leads to my appearing here, it may reach a point where I feel intimidated to raise it with only men and, even if I can see that they are oppressing me, I might not be able to say that they are oppressing me, but if there are women there, I, being a woman, gain strength to declare my problem.[20]

Similarly, government should ensure that women – who make up 59 per cent of people living under traditional leadership (Mhongo & Budlender, 2013) – are always robustly consulted in the making of laws for customary communities. Women have not been consulted in the past.

Gender matters are *power* matters. The fact is that, as the Constitutional Court said in *Tongoane v National Minister for Agriculture and Land Affairs* 2010 (6) SA 214 (CC), when government passes legislation regarding customary law, it can safely assume that it is *not* intervening in a vacuum.

> The field that CLARA[21] now seeks to cover is not unoccupied. There is at present a system of law that regulates the use, occupation and administration of communal land. This system also regulates the powers and functions of traditional leaders in relation to communal land. It is this system which CLARA will repeal, replace or amend … CLARA replaces the living indigenous law regime which regulates the occupation, use and administration of communal land. It replaces both the institutions that regulated these matters and their corresponding rules. CLARA also gives traditional councils new wide-ranging powers and functions (see paragraphs 79 and 96).

It is clear, therefore, that the government can assume that it is disturbing whatever power balance is in place right now. Thus the question is always: which constituencies will government engender with power through its laws, and to what degree?

Laws meant to govern traditional communities should be tailored to the reality of the political economy of rural areas wherein women are not just (or even primarily) wives, and headmen are caught in the crosshairs of the generational tensions between older and younger men in their communities. Not only that, it is clear that the casual aggregation of 'traditional leaders' in policy discussions creates the false impression that 'senior traditional leaders' and lower-level 'traditional leaders' like headmen have identical interests. This chapter has rather argued that the headmen's interests are more accurately seen as aligned with those of women and other ordinary members of their communities who are marginalised members of rural society.

The legislative agenda developed by the South African government is an indictment of its lack of commitment to women's full equality. It shows how the government is complicit in perpetuating conditions that deprive women of full and equal citizenship. As this chapter has argued, the government can be said to have similarly failed to show commitment to the equality of headmen. Furthermore, it is not just that the disregard the government shows for women and headmen is similar, but that the source thereof is largely the same and, hence, the forms of neglect shown by the government to both groups are deeply entwined and mutually reinforcing. The proposal here is essentially that the government is looking in the wrong place for solutions to the problems of people living in rural areas. It assumes that the solution is to centralise and formalise power and authority in senior traditional leaders through legislation (Oomen, 2005), but the solution appears to lie elsewhere entirely.

In order to address the issues I have described above, the government – rather than blindly assuming communal harmony exists – should aim to strengthen relationships in customary communities by empowering vulnerable parties to enable effective negotiation. Government should also permit dispute management authority to come into being independently of the existence or formal recognition of a 'senior traditional leader' in law. Again, it is worth noting that such recognition of the bottom-up authority of customary communities and traditional leaders would effectively undo the legacy of colonial decisions like that in *Makapan v Khope* (1912).

Furthermore, my suggestion is that the government can achieve these changes by means of strengthening, firstly, the power of ordinary people (especially women) and, secondly, the ability of headmen to draw upon the bottom-up authority of lower-level traditional institutions (that is, the authority imparted by their constituents). Such interventions would better allow both women and headmen to negotiate greater security within the context of their respective interpersonal and social relationships. Taking this approach requires passing and implementing laws that place women in influential positions, such as traditional councils, and jettisoning the apartheid model of customary communities that is based on externally fixed boundaries and centralised models of traditional leadership concentrated in 'senior traditional leaders'.

References

Abel, R. L. 1982. 'The contradictions of informal justice'. *The Politics of Informal Justice (1st Edition)*. Cambridge: Cambridge University Press, pp. 267–320.

Aubert, C. 1969. *Sociology of Law*. London: Penguin.

Bennett, T. 2008. 'Official vs living customary law: Dilemmas of description and recognition', in Claassens, A. & Cousins, B. (eds.) *Land, Power and Custom: Controversies generated by South Africa's Communal Land Rights Act*. Cape Town: UCT Press, pp. 138–153.

Bohannan, P. 1957. *Judgement and Justice Among the Tiv*. London: Oxford University Press, pp. 491–503.

Budlender, D., Mgweba, S., Motsepe, K. & Williams, L. 2011. 'Women, land and customary law'. *Centre for Law and Society* website: www.cls.uct.ac.za/usr/lrg/downloads/Women_and_Land.pdf, accessed 24 July 2018.

Campbell, C. 1992. 'Learning to kill? Masculinity, the family and violence in Natal'. *Journal of Southern African Studies*, 18 (3), 614–628.

Carton, B. & Morrell, R. 2012. 'Zulu masculinities, warrior culture and stick fighting: Reassessing male violence and virtue in South Africa'. *Journal of Southern African Studies*, 38 (1), 31–53.

Claassens, A. 2013. 'Recent changes in women's land rights and contested customary law in South Africa'. *Journal of Agrarian Change,* 13 (1), 71–92.

Claassens, A. & Mnisi, S. 2009. 'Rural women redefining land rights in

the context of living customary law'. *South African Journal on Human Rights*, 25 (3), 491–516.

Claassens, A. & Ngubane, S. 2008. 'Women, land and power: The impact of the Communal Land Rights Act', in Claassens, A. & Cousins, B. (eds.) *Land, Power and Custom: Controversies generated by South Africa's Communal Land Rights Act*. Cape Town: UCT Press, pp. 154–183.

Clegg, J. 1981. 'Ukubuyisa isidumbu – "bringing back the body": An examination into the ideology of vengeance in the Msinga and Mpofana rural locations (1882–1944)', in Bonner, P. (ed.) *Working Papers in Southern African Studies*: Vol. 2. Johannesburg: Ravan Press, pp. 164–198.

Comaroff, J. L. & Comaroff, J. 2009. *Ethnicity Inc*. Chicago: University of Chicago Press.

Comaroff, J. & Roberts, S. 1977. 'Marriage and extra-marital sexuality: The dialectic of legal change among the Kgatla'. *Journal of African Law*, 21 (1), 97–123.

Comaroff, J. & Roberts, S. 1981. *Rules and Processes: The cultural logic of dispute in an African context*. Chicago: University of Chicago Press.

Comaroff, J. L. & Roberts, S. A. 1986. *Rules and Processes*. Chicago: University of Chicago Press.

Communal Land Rights Act No. 11 of 2004. 20 July 2004, http://www.saflii.org/za/legis/num_act/clra2004207.pdf.

Cousins, B. 2011. 'Imithetho yomhlaba yaseMsinga: The living law of land in Msinga, KwaZulu-Natal'. *Research Report-PLAAS*, 43. *UWC* website: https://repository.uwc.ac.za/bitstream/handle/10566/390/CousinsLandMsinga2011.pdf?sequence=1&isAllowed=y, accessed 15 September 2018.

Curran, E. & Bonthuys, E. 2005. 'Customary law and domestic violence in rural South African communities'. *South African Journal on Human Rights*, 21 (4), 607–635.

Gibbs, J. L. 1963. 'The Kpelle moot: A therapeutic model for the informal settlement of disputes'. *Africa*, 33 (1), 1–11.

Gluckman, M. 1955. 'The peace in the feud'. *Past & Present*, 8, 1–14.

Griffiths, A.M. 1997. *In The Shadow of Marriage: Gender and justice in an African community*. Chicago: University of Chicago Press.

Griffiths, A. 1998. 'Reconfiguring law: An ethnographic perspective from Botswana'. *Law & Social Inquiry*, 23 (3), 587–620.

Gulliver, P. H. 1963. *Social Control in an African Society: A study of the Arusha: Agricultural Masai of Northern Tanganyika*. New York: New York University Press.

Gumede (born Shange) v President of the Republic of South Africa and Others 2009 (3) SA 152 (CC).

Guy, J. 1990. 'Gender oppression in southern Africa's pre-capitalist societies', in Walker, C. (ed.) *Women and Gender in Southern Africa to 1945*. Claremont: David Philip Publishers, pp. 33–48.

Hailey, W. M. 1953. *Native Administration in the British African Territories: The high commission territories: Basutoland, the Bechuanaland protectorate and Swaziland*: Part V. London: Her Majesty's Stationery Office.

Higgins, T. E., Fenrich, J. & Tanzer, Z. 2006. 'Gender equality and customary marriage: Bargaining in the shadow of post-apartheid'. *Fordham International Law Journal Legal Pluralism*, 30 (6) 1, 1653–1708.

Himonga, C. 2005. 'The advancement of African women's rights in the first decade of democracy in South Africa: The reform of the customary law of marriage and succession'. *Acta Juridica,* 1, 82–107.

Hunter, M. 2005. 'Cultural politics and masculinities: Multiple-partners in historical perspective in KwaZulu-Natal'. *Culture, Health & Sexuality*, 7 (3), 209–223.

Kingwill, R. 2008. 'Custom-building freehold title: The impact of family values on historical ownership in the Eastern Cape', in Claassens, A. & Cousins, B. (eds.) *Land, Power and Custom: Controversies generated by South Africa's Communal Land Rights Act*. Cape Town: UCT Press, pp. 184–208.

KwaZulu Act on the Code of Zulu Law No. 16 of 1985.

Lacey, N. 2004. *Feminist Legal Theories and the Rights of Women*: No. XII/2. Oxford: Oxford University Press, pp. 13–56.

Makapan v Khope 1923 AD 551.

Mamdani, M. 1990. 'The social basis of constitutionalism in Africa'. *The Journal of Modern African Studies*, 28 (3), 359–374.

Mamdani, M. 1996. *Citizen and Subject: Contemporary Africa and the legacy of late colonialism*. Princeton: Princeton University Press.

Marx, K. 1988. *Economic and Philosophical Manuscripts of 1844*. New York: Prometheus Books.

Mayelane v Ngwenyama and Another 2013 (4) SA 415 (CC).

Mbatha, L. 2002. 'Reforming the customary law of succession'. *South African Journal on Human Rights*, 18, 259–286.

McClendon, T. V. 1995. 'Tradition and domestic struggle in the courtroom: Customary law and the control of women in segregation-era Natal'. *The International Journal of African Historical Studies*, 28 (3), 527–561.

Mchunu, M. R. 2007. 'Culture change, Zulu masculinity and intergenerational conflict in the context of civil war in Pietermaritzburg (1987–1991)',

in Shefer, T., Ratele, K., Strebel, A., Shabalala, N. & Buikema, R. (eds.) *From Boys to Men: Social constructions of masculinity in contemporary society.* Cape Town: University of Cape Town Press, pp. 225–240.

Meintjes, L. 2017. *Dust of the Zulu: Ngoma aesthetics after apartheid*. Durham: Duke University Press.

Mészáros, I. 1970. *Marx's Theory of Alienation*. London: The Merlin Press.

Mhongo, C. & Budlender, D. 2013. 'Declining rates of marriage in South Africa: What do the numbers and analysts say?' *Acta Juridica*, 1, 181–196.

Mnisi Weeks, S. 2011. 'Securing women's property inheritance in the context of plurality: Negotiations of law and authority in Mbuzini customary courts and beyond'. *Acta Juridica*, 1, 140–173.

Mnisi Weeks, S. 2012. 'Regulating vernacular dispute resolution forums: Controversy concerning the process, substance and implications of South Africa's Traditional Courts Bill'. *Oxford University Commonwealth Law Journal*, 12 (1), 133–155.

Mnisi Weeks, S. 2013. 'Women's eviction in Msinga: The uncertainties of seeking justice'. *Acta Juridica*, 1, 118–142.

Mnisi Weeks, S. 2015a. 'Access to justice? Dispute management processes in Msinga, KwaZulu-Natal, South Africa.' *New York Law School Law Review*, 60, 227–249.

Mnisi Weeks, S. 2015b. 'Customary succession and the development of customary law: The Bhe legacy: Part III: Reflections on themes in Justice Langa's judgments'. *Acta Juridica*, 1, 215–255.

Mnisi Weeks, S. 2016. 'Women seeking justice at the intersections between vernacular and state laws and courts in rural KwaZulu-Natal, South Africa', in Klug, H. & Merry, S. E. (eds.) *The New Legal Realism Vol. 2: Studying law globally*. Cambridge: Cambridge University Press, pp. 113–141.

Mnisi Weeks, S. 2018. *Access to Justice and Human Security: Cultural contradictions in rural South Africa*. Abingdon: Routledge.

Mnisi Weeks, S. & Claassens, A. 2011. 'Tensions between vernacular values that prioritise basic needs and state versions of customary law that contradict them: We love these fields that feed us, but not at the expense of a person'. *Stellenbosch Law Review*, 22 (3), 823–844.

Mokhatle and Others v Union Government (Minister of Native Affairs) 1926 AD 71.

Nader, L. 1969. 'The Zapotec of Oaxaca'. *Handbook of Middle American Indians (Vol. 7 & 8): Ethnology*. Austin: University of Texas Press, pp. 329–359.

Nader, L. 1990. *Harmony Ideology: Justice and control in a Zapotec*

mountain village. Stanford: Stanford University Press.

Nader, L. 1991. 'Harmony models and the construction of law', in Black, P. et al. (eds.) *Reformulating Dispute Resolution*. Sydney: Wakeview Press, pp. 41–59.

Nader, L. 1996. 'Coercive harmony: The political economy of legal models'. *Kroeber Anthropological Society Papers*, 80, 1–13.

Natal Code of Zulu Law, published in Proclamation R151 of 1987, GG No. 10966. 3 September 1987, https://www.ncbi.nlm.nih.gov/pubmed/12289657.

Native Administration Act No. 38 of 1927. 30 June 1927, http://uir.unisa.ac.za/bitstream/handle/10500/6648/ZKM_C3_69.pdf?sequence=1, accessed 28 November 2018.

Nedelsky, J. 1993. 'Reconceiving rights as relationship'. *Review of Constitutional Studies*, 1 (1), 1–26.

Nyamu-Musembi, C. 2002. 'Are local norms and practices fences or pathways? The example of women's property rights', in An-Naim, A. (ed.) *Cultural Transformation and Human Rights in Africa*. London/New York: Zed Books, pp. 126–150.

Nyamu-Musembi, C. 2005. 'Towards an actor-oriented perspective on human rights', in Kabeer, N. (ed.) *Inclusive Citizenship: Meanings and expressions*. London/ New York: Zed Books, pp. 31–50.

Okoth-Ogendo, H. W. 2008. 'The nature of land rights under indigenous law in Africa', in Claassens, A. & Cousins, B. (eds.) *Land, Power and Custom: Controversies generated by South Africa's Communal Land Rights Act*. Cape Town: UCT Press, pp. 95–109.

Oomen, B. 2005. *Chiefs in South Africa: Law, culture, and power in the post-apartheid era*. New York: Springer.

Recognition of Customary Marriages Act No. 120 of 1998. 15 November 2000, http://www.lawlibrary.co.za/professionalupdate/2012/03/justice college_recognitionofcustomarymarriages.pdf.

Redding, S. 2004. 'Death in the family: Domestic violence, witchcraft accusations and political militancy in Transkei, South Africa, 1904–1965'. *Journal of South African Studies*, 30 (3), 519–538.

Schweitzer, M. 1996. 'Harmony ideology works at the mill', in Wolfe, A. & Yang, H. (eds.) *Anthropological Contributions to Conflict Resolution*. Athens/London: The University of Georgia Press, pp. 119–131.

Smith, N. R. 2015. 'Rejecting rights: Vigilantism and violence in post-apartheid South Africa', *African Affairs*, 114 (456), 341–360.

Thornberry, E. 2016. 'Ukuthwala, forced marriage, and the idea of custom in South Africa's Eastern Cape', in Bunting, A., Lawrance, B. N. & Roberts, R. L. (eds.) *Marriage by Force? Contestation over consent and coercion*.

Athens: Ohio University Press, pp. 137–159.
Tongoane v National Minister for Agriculture and Land Affairs 2010 (6) SA 214 (CC).
Traditional and Khoi San Leadership Bill B23-2015. 18 September 2016, http://www.cogta.gov.za/cgta_2016/wp-content/uploads/2016/06/TRADITIONAL-AND-KHOI-SAN-LEADERSHIP-BILL.pdf.
Traditional Courts Bill B18-2008/B1-2012. 13 December 2011, http://www.justice.gov.za/legislation/bills/2012-b01tradcourts.pdf.
Traditional Courts Bill B1-2017. 9 December 2016, http://www.justice.gov.za/legislation/bills/2017-TraditionalCourtsBill.pdf.
Traditional Leadership and Governance Framework Act No. 41 of 2003. 11 December 2003, http://www.cogta.gov.za/cgta_2016/wp-content/uploads/2016/06/TLGFA-Traditional-Leadership-and-Governance-Framework-Act-2003-Act-No-41-of-2003.pdf
Venter, T. & Nel, J. 2005. 'African customary law of intestate succession and gender (in) equality'. *Tydskrif vir die Suid-Afrikaanse Reg*, 1, 86–105.
Walker, C. 2009. 'Elusive equality: Women, property rights and land reform in South Africa'. *South African Journal on Human Rights*, 25 (3), 467–490.
Weinberg, T. 2013. 'Contesting customary law in the Eastern Cape: Gender, place and land tenure'. *Acta Juridica*, 1, 100–117.
Whitehead, A. & Tsikata, D. 2003. 'Policy discourses on women's land rights in sub–Saharan Africa: The implications of the return to the customary'. *Journal of Agrarian Change*, 3 (1–2), 67–112.
Yngstrom, I. 2002. 'Women, wives and land rights in Africa: Situating gender beyond the household in the debate over land policy and changing tenure systems'. *Oxford Development Studies*, 30 (1), 21–40.

Notes

1 Also see Walker (2009), according to whom, in 2004, female-headed households made up 44 per cent of rural households.
2 This article is based on empirical research that formed part of a study I completed in Msinga, KwaZulu-Natal for the Rural Women's Action-Research Project while I was a senior researcher in the Centre for Law and Society at the University of Cape Town. The study was conducted between October 2009 and June 2015, with the bulk of data collected between March 2011 and January 2012 (inclusive). Data collection took the form of daily recording of headmen's activities and day-to-day work, observation of traditional dispute management processes such as

dispute hearings that the headmen participated in managing, follow-up interviews with parties to these disputes and traditional authorities, as well as focus groups with the members of the traditional councils and groups of local men and women. Preliminary interviews and observations were conducted from October 2009 to February 2011, and follow-up interviews, focus groups and report-back sessions were conducted from February 2012 to June 2015. The statements made about Mbuzini, in Mpumalanga, and its members are drawn from data collected over a period of eight months in which I conducted ethnographic research by participant observation within this rural, Swati-speaking South African community that is situated close to the Swaziland and Mozambican borders. This research was initially published as Sindiso Mnisi, *The Interface between Living Customary Law(s) of Succession and South African State Law* (2010) (PhD dissertation, University of Oxford) but has since featured in multiple other academic publications.

3 Primarily, in Mbuzini in Mpumalanga and Msinga in KwaZulu-Natal. However, based on the work of other scholars cited herein, I argue that the analysis largely extends to other areas as well.

4 The concept of community is difficult to define, partly because it is very contested. As shown in this chapter, the South African government defines customary communities in terms of their having a formally recognised traditional leader and externally defined boundaries. However, there is plenty of literature that shows that customary definitions of community are fluid, nested and overlapping (Cousins, 2011; Okoth-Ogendo, 2008). As I have argued elsewhere, I am of the view that customary communities should self-identify on a case-by-case basis, as demanded by the circumstances as the members of the self-defined community see it (Mnisi Weeks, 2018; Mnisi Weeks & Claassens, 2011).

5 The names of all participants in the study have been changed to protect their privacy.

6 Interview with MaNovalo, Msinga, KwaZulu-Natal in July 2011

7 Interview with Make Khansela, Mbuzini, Mpumalanga in September 2007

8 Hereinafter, Natal Code. Published in Proclamation R151 of 1987, GG No. 10966

9 KwaZulu Act on the Code of Zulu Law 16 of 1985

10 Interviews with Ndvuna Tigodzi and Ndvunankulu, Mbuzini, Mpumalanga in August and September 2007

11 Refer to Laura Nader's extensive evaluation of how 'harmony' is a fiction that is exploited by both oppressive (colonial) governments and oppressed groups to advance their own political, and coercive, ends. See

Nader, L. 1990. *Harmony Ideology: Justice and control in a Zapotec mountain village*. Stanford: Stanford University Press; Nader, L. 1991. 'Harmony models and the construction of law', in Black, P. et al. (eds.) *Reformulating Dispute Resolution*. Sydney: Wakeview Press, pp. 41–59; Nader, L. 1996. 'Coercive harmony: The political economy of legal models'. *Kroeber Anthropological Society Papers*, 80, 1–13.

12 For further discussion of this subject, see Comaroff and Roberts (1981, especially at 80–83, 180).

13 Interview with Make Khansela, Mbuzini, Mpumalanga in September 2007

14 From fieldwork conducted in Msinga, March 2011–January 2012, and report from Mdukathsani Rural Development Trust annual report, 2015 (accessible at www.mdukatshani.com/ resources/Annual%20report%20 for%20Mrdp%202015%20final.pdf)

15 Refer again to the Mdukathsani Rural Development Trust annual report, 2015

16 No attribution was given.

17 Interview with Make Khansela, Mbuzini, Mpumalanga in September 2007

18 More can be found on this decision: 'Traditional Courts Bill: Deliberations – Justice and Correctional Services', 21 August 2018 at https://pmg.org.za/committee-meeting/26863/.

19 Refer to the Portfolio Committee on Justice and Correctional Services' deliberations above.

20 Informal interview with anonymous young women in September 2007

21 The Communal Land Rights Act No. 11 of 2004