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# **Gender Inequality, Legal Pluralism & Land Reform in South Africa**

By

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# *Abstract*

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This research examines land tenure reform as a process of social transformation and analyzes the implications of land access for gender equality in South Africa. Feminist theorization of legal pluralism is used to investigate the dynamic between the state and customary law. The ability of the state to deliver to rural Black South African Women (BSAW) formal equality rights, as embodied in the Constitution, is questioned, given the state's lack of political will. A critique of land administration by the customary legal system is also used to expose the challenges that male dominated customary institutions present for women's independent land rights, highlighting in particular the way land exposes gendered power relations and the negative implications for women's social advancement. Consequently, it is contended that there are considerable limitations and challenges to the ability of formal and informal legal institutions to undertake a gender equitable land distribution process.

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## Introduction

Land rights and gender equality is a controversial and thorny issue especially when examined in the context of South Africa. Land ownership was one of the cornerstones of the apartheid policy of racial segregation and was characterized by forced removals, dispossession of lands from non-whites and re-zoning of areas according to racial categorization. The colonial and apartheid-era land policy involved a plethora of laws aimed at social control and racial segregation [see. Figure 1.1]. These land policies left a legacy of over 3 million people being evicted from their homes, 98% of whom were Blacks. As of 1993, it was reported that 87% of the land was owned by whites who constitute 13% of the population (Coles, 1993:701). Recent statistics show that this figure has not changed much. By the end of 2001, less than 2% of land had been transferred from white to black ownership through the land reform project (Thwala, 2003). The link between racial inequality and land ownership in South Africa is therefore glaringly evident and not a hard one to make. The causal link between gender inequality and land rights has however been less analyzed and theorized both within policy formulations and scholastic engagements (Agarwal, 1994). Black women's experiences of dispossession have generally been hidden and are in danger of remaining so because some historians have tended to ignore the difference experiences of men and women.<sup>1</sup> As well, there has been reluctance within customary institutions<sup>2</sup> to facilitate gender equality. Male dominance is weaved within the trappings of the "cultural" and custom is used as the legitimizing idiom to reinforce patriarchy. Lastly, the combination of budgetary constraints and lack of political determination by the state to fully examine the implications of land access for women's empowerment has also been problematic.

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<sup>1</sup> National Land Committee. 'History of Land: South Africa's Racist Legacy. Colonialism and Land dispossession'. Online. <http://www.nlc.co.za/mddisp.htm>

<sup>2</sup> The term 'customary' is used here to refer to institutions, social relations and as discourses of traditional, indigenous African societies that existed in colonial South Africa. see, A Whitehead and D Tsikata, "Policy Discourses on Women's Land Rights in Sub-Saharan Africa: The Implications of the Re-return to the Customary" (2003) 3(1-2) *Journal of Agrarian Change* at 98. For a detailed exploration and characterization of customary law that existed in pre-colonial South Africa. see J Guy *The Destruction of the Zulu Kingdom* (Longman, UK, 1979) and P Bonner, *Kings Commoners and Concessionaires* (Cambridge University Press, Cambridge, 1982). Of particular importance in defining pre-colonial customary society are the following features: a rigid sexualized division of labour, a spatial division of the population into homesteads and age-sets, patriarchy, lineage based kinship. Another feature is the intricate network of administrative officials with centralized power emanating from the King and administration of homestead by male elders.

## Historical & Chronological Order of Land Acts in South Africa

Year	Act	Implication
1913	Native Land Act	This Act formed the legal foundation for South Africa's racially segregated society. It restricted the occupation and lease of land by Africans outside reserve areas. It replaced sharecropping and rent-tenant contracts with labour tenancy. It resulted in 10% of the land area of the country being reserved for Blacks only. This Act established the creation of the Beaumont Commission, which was charged with demarcating the country along racial lines.
1923	Group Areas Act	This Act established separate residential areas according to racial lines in South Africa.
1936	Development Trust and Land Act	This Act established the South African Development Trust (SADT), which was in charge of controlling and allocating all state-owned land set aside for Blacks in reserves and surrounding areas. It increased the land reserve for Blacks to 13% and made squatting illegal.
1937	Native Law Amendment Act	This Act prohibited Blacks from buying land in the urban areas and gave legislative power to remove blacks from rural white land and relocate them to reserves.
1950	Group Areas Act	This Act created and demarcated specific areas of residence and commerce exclusively for ownership and use by particular racial groups: 'Whites', 'Coloureds' and 'Indians'.
1951	Bantu Authorities Act (1951)	The first Act allowed for the creation of separate and independent political 'homelands' or 'reserves' or 'Bantustans' for Blacks. Black South Africans were forcibly moved into these rural reserves, which were administered by rural and regional (puppet) authorities appointed by the government. These acts effectively solidified the Apartheid policy of separate development- (or in Afrikaans "apartheid") in which races were not only physically separate from each other, but also became citizens of distinct and different 'countries.'
1959	Promotion of Bantu Self-Government Act	
1970	Black Homeland Citizenship Act	The Black Homeland Citizenship Act mandated that all Blacks in the Republic of South Africa were to have citizenship in one of the 10 homelands created, even if they had no social ties or family ties to the homelands. The Constitutional Act empowered the government to grant self-government to these homelands, thus becoming independent of the Republic of South Africa.
1971	Black Homeland Constitution Act	

Fig 1.1 Key Land Reform Policies in Colonial and Apartheid South Africa.

Sources: Coles (1993), Thwala,(2003)

Economic and political analysis of the relationship between women and land has tended to concentrate on issues of division of labour and productivity from a political economy perspective, neglecting power relations that shape women's experiences of land access and use (McAuslan, 1998). Anthropological studies on the other hand, have for the most part been fixated on exploring and describing kinship ties and marriage and how these social relations shape women's access to the land (Kevane, and Gray, 1999). Legal analyses on their part often stop short by examining women's de jure rights as established in statutes and case laws. What is missing therefore is a conceptual scrutiny of what independent ownership of land means for women's social status and empowerment in South Africa. Though some literature attempts to do this, the analysis is either limited to Sub-Saharan Africa, particularly Kenya and Tanzania (Tsikata and Whitehead, 2003; Yngstrom, 2002; Manji, 1998) or other continents as in the case of Agarwal, (1994). When gender and land rights have been mentioned in South Africa, it is often with a focus on the legal and policy framework, with gender relations being an addendum, or "add on" category rather than land policy being filtered through a gender analysis (Walker, 1998). There has therefore been very little literature to bridge the gap between the various academic disciplines to provide a nuanced account of what land rights means to women and the implication for their economic, social and political livelihoods.

My argument is thus that women's relationship to the land should be placed within the context of how land shapes their identities, and the ways in which their socio-legal lives are played out. In therefore asking the integral question of: "how has customary and statutory institutions shaped women's access to land and gender equality?" this research places itself between the approaches outlined above to find out how women are negotiating between formal and informal legal institutions to maximize their claims to land ownership. I also

argue that through this process of negotiating between two legal fields, women are demonstrating the fluidity between the customary and the statutory, and in the process empowering themselves. By empowerment, I mean mobilization and resistance as a process by which women, who have been denied the ability to make strategic life choices, re-gain and exercise that ability (Kabeer, 1999). The emphasis on empowerment here is not as an end goal, but as a process of civic education and political activism towards social transformation and gender equality. My focus is on how the processes of contesting the rigidity and legitimacy of social legal frameworks, is enriching for goals of gender equality, but also meaningful for South Africa's transition to democratic rule.

The crux of this research therefore centres on exploring the public/private dimensions of Black South African Women (hereinafter BSAW) lives using customary and statutory law as my focus. The idea of the public/private divide is used here to demonstrate and reflect the ways in which women's lives are played out between formal and non-formal legal structures. The formal legal system which is characterized as the state guarantees equality rights for women, but the states pursues a neo-liberalist land reform agenda geared towards establishing a commercial farming elite and by so doing, excludes women's specific small-scale land use. The traditional system in turn, reinforces a patrilineal land inheritance and value system that is not necessarily beneficial to rural BSAW. The concept of public and private divide as used here reinforces the idea that women by omission and oversight are rendered 'invisible' and excluded from benefiting from land use by both legal spheres. By critiquing the South African Constitution, I expose the contradiction between the legal instruments in place to guarantee women's equality on one hand and customary rights on the other. In so doing, my analysis demonstrates that statutory law is not necessarily gender neutral or women friendly as its language of rights might suggest. As well I point to the fact that while state and

customary law have separate legitimate base, they function in interactive ways. The argument then is not about which socio-legal system is better for women but to highlight the fact that both formal and informal legal systems are mutually constitutive. I am interested in the way the formal and informal legal spheres shapes women's socio-cultural lives and influence the way in which women articulate their land needs. I am even more interested in the ways women are negotiating the formal and non-formal legal systems. In asking: what strategies of resistance or negotiation are BSAW using to articulate claims to land? This research takes the stance of not viewing women as objects of research but subjects of research.<sup>3</sup>

This research and evaluation of rural BSAW's rights, in my opinion, could not have come at a more timely moment in South Africa's history. Almost a decade ago, on May 8<sup>th</sup>, 1996 South Africa unveiled its new Constitution (which was drafted in 1994), befitting the vision of a nation newly emerged from a turbulent and dark past. This Constitution was established on the principles of equality, human dignity and freedom and had as its cornerstone the promotion of racial and gender equality. The unveiling of the Constitution was hailed as a momentous occasion, first and foremost because it awakened a spirit of optimism and a sense that the winds of change were blowing over South Africa; thereby signalling the start of a new era. Secondly, the Constitution, touted as the most democratic and progressive in the world (Andrews, 1998; Albertyn, 1994) is characterized by the expression of rights, equality and social justice to replace discrimination, oppression and injustice especially for marginalized groups of which, Blacks and Women formed a large

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<sup>3</sup> B Agarwal. *A Field of One's Own: Gender and Land Rights in South Asia* (Cambridge University Press, Cambridge, 1994) at 7 critiques literature on land tenure and women as positing women as passive victims of land policies rather than examining the creative ways in which women have sought to articulate themselves and making women the focal point of research.

proportion.<sup>4</sup> Land reform is acknowledged as a necessary process for redressing apartheid's legacy of dispossession and racial discrimination (Walker, 2003; Coles 1993, Davis et al 2004) and therefore an important undertaking in the post-apartheid process of national healing. To this end, a number of policies and commissions were formed (which will be discussed in subsequent chapters) to address land ownership. The prevailing theme of the Constitution has been one of racial and gender equality (amongst others). In line with this theme and in a nation where 52% of the population is made up of women, it is therefore particularly instructive to examine how far women's lives has changed, if at all, in the last decade.

My argument in this thesis is that land plays not only a practical but also a symbolic and strategic function in women's livelihoods and goals of empowerment.<sup>5</sup> Land has significant implications for women's economic independence and security as well as empowerment and plays an integral role in shaping power relations that characterizes gender inequality. Land access is particularly important in rural agrarian and 'traditional' communities. In South Africa where 52% of the population is women and 55% of these are BSAW who live in rural areas and depend on the land in various ways, the implication of land rights for their livelihood cannot be overstated.<sup>6</sup> Women need land in a practical sense to ensure their and their children's welfare and well-being. Access to arable land and control

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<sup>4</sup> Even though Black Women are used here as a broad category, it is important to note that within these categories are other sub-categories of identities that shape women's particular experiences of land and law. See S Jacobs, "Land Reform: Still A Goal Worth Pursuing for Rural Women?" (2002) 14(6) *Journal of International Development* 887, at 888; J Vickers and V Dhruvarajan, *Gender Race and Nation* (University of Toronto Press, Toronto, 2002) and T Mtintso, "Representativity: False sisterhood or Universal Women's interest? The South African Experience" 2003 29(3) *Feminist Studies* 569. The authors mentioned above refer to the concept of Intersectionality as the different axis of oppression based on gender, race, class, ethnicity etc. This concept problematizes the notion of a universal "woman" as a homogeneous and unifying category. Intersectionality in the context of this research presents a framework to analyze how race and gender converge to shape Black women's experiences, access and relations to the law, state and cultural institutions.

<sup>5</sup> See Agarwal, *supra* n. 3 at 27-42 for more discussion on land's practical and strategic role in women's livelihoods and gender power relations and in particular what she regards the key arguments for independent land rights for women: welfare, efficiency and empowerment.

<sup>6</sup> These statistics are based on the 2001 Census as well as a Gender statistics derived from Statistics South Africa at: [www.statssa.gov.za/Publications/womenandmen5yearson/womenandmen5yearson2000.pdf](http://www.statssa.gov.za/Publications/womenandmen5yearson/womenandmen5yearson2000.pdf)

of resources to utilize on the land (e.g. tools, water etc) translates to access to food and non-commodity goods like fuel, as well as financial security. The access to these resources translates into access to power in their relationship with men and therefore better bargaining leverage within their communities.

I argue that land provides a sense of identity and connectedness to a community. A sense of connection and establishing roots is especially vital in the South African context where the Black population's lives during the colonial and Apartheid era were characterized by forced removals and dispossession and population control (Coles, 1993; McEwan, 2000). In a nation struggling to heal itself from a turbulent, dark and emotional past, ownership of lost land is integral to that healing process. My argument is that land is therefore important as a symbol and claim to authoritative ownership. Independent ownership and access to land gives women a sense of identity, and a sense of place, independent of their kinship links and marital status.

The most important aspect that this thesis will emphasize is that land also has a political and strategic importance. Indeed, land ownership has significant resonance for power relations (Agarwal, 1994). The reason behind the importance of land is because land is a scarce resource in the rural political economy. Therefore access to land and most importantly ownership of land confers a degree of social and economic power to the owner. Land is thus of crucial strategic importance for women's claims to social and political equality. Land ownership provides women the security and leverage with which to challenge and contest their legal and economic status and to make strategic life choices. Most importantly, access to land allows women to move from the fringes of society and to make themselves visible actors and contenders in the arena of power relations. In other words, according to Agarwal (1994), land ownership redefines the political power and social status

of the owner, and in a domain which has traditionally been occupied by men, women's land ownership means stepping out of the private realm into the public realm of greater status and inclusion in decision-making.<sup>7</sup>

This research focuses on government policies on land to spell out the gendered impact of land policies, and the fact that most policy developments neglect women's unique experiences and voices. When women have been included in policy formulations, they have been included as "add-ons,"<sup>8</sup> or separate categories rather than as vital and central concerns. This trend is evident in South Africa's land reform policy.

The aim of my thesis is to examine gender relations in post-apartheid South Africa through the lens of land reform to consider the extent to which rural BSAW have been able to experience and access their rights within the new democracy. In other words, I seek to examine whether de jure equality has translated into de facto equality in the context of land reform.

This research is the story of women's struggle not only for access and control of land, but also empowerment.

## **Research Question**

The questions informing my research as I embarked on this project were: to what extent has state and customary law reified gender inequality in South Africa? What are the limitations of using statutory law to change power relations imbedded within gender inequality? How do customary and statutory law shape BSAW's life?

My interest took me to the arena of land reform: in what way can land rights and customary law be seen as an example for the greater gender inequalities that exist in the

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<sup>7</sup> See Agarwal, *supra* n. 3, at 54 for further discussion on the correlation between land ownership and greater bargaining power, within households and community.

<sup>8</sup> Jacobs, *supra* n. 4, at 887 concurs that, "although more attention is now being paid to gender rights, these still tend to be treated as an 'add-on' category."

South African society? More generally, how can rural BSAW skilfully manoeuvre between the two legal realms of state and customary law to maximize their rights and claims under both institutions? These are the inquiries that will guide my thesis in questioning the ability to bring about change through legal channels.

In effect, I am using land as an observation and commentary on the way the apartheid legacy cemented rural African women's marginalized and subordinate socio-economic status. As well, I am problematizing the difficulties of reliance on one form of legal framework over the other.

## **Setting the Scene**

The chapter breakdown of this thesis is as follows:

The first chapter explores feminist engagement with legal pluralism. I will explore the concept of multiple spheres of normative orders (in this case, state law and customary law).<sup>9</sup> I will analyze the power relations that exist between state law and customary law and how these two legal systems shape, the social field within which rural BSAW live. In analyzing the existing literature on women's relationship with the state and traditional institutions, the underlying question I will be asking is: how does feminist legal discourse characterize women's relationship with the multiple legal systems in South Africa as a crucial strategy for advancing women's rights?

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<sup>9</sup>Legal pluralism is not reducible to two forms of socio-legal orders, see E Moosa, "Tensions in Legal and Religious Values in the 1996 South African Constitution" in M Mamdani (ed) *Beyond Rights Talk and Culture Talk* (St. Martin's Press, New York, 2002) at 121-136 and S Merry, "Legal Pluralism" (1988) 22 (5) *Law and Society* 869, at 871 for further discussion on other forms of normative orders, particularly religion.

The second chapter focuses on dissecting the Constitution of South Africa and recognizing its potentials and limitations as a vehicle for ensuring BSAW's equal rights and empowerment. The Constitution's inherent contradictions in recognizing equality rights and patriarchal customary law will also be reviewed. Most importantly, I will critique how "the politics of accommodation and evasion"<sup>10</sup> by the Constitution tends to perpetuate gender bias and undermine genuine reformation of the institutional practices left behind as a legacy of apartheid. This chapter will also focus on South African government's land reform policy, in particular, the three tenets of the land reform policy as outlined by the government: restitution, redistribution, and tenure reform. The importance of this chapter is to demonstrate that formal legal provisions are not necessarily gender neutral and do not necessarily address the unequal power relations inherent in customary law and social relations. Also I contend that there is an alliance of sorts between the state and the customary, which undermines the legitimacy of legal institutions as sites for reinforcing gender-neutral values.

Chapter two will also provide a historical context of land tenure. This will trace the historical importance of land tenure in forming one of the key tenets and legacies of the segregational policies of apartheid. This chapter will also explore the importance of land not only in its utilitarian value as a site of identity, communal bond and self-subsistence but also as a site for women's political activism. It is important to understand the historical foundations of land allocation in South Africa in order to fully appreciate the challenges confronting BSAW's marginalization on the basis of class, race and gender. To this end, the Land Acts enacted during Apartheid will be reviewed tracing the impact of these policies on relegating the Black population into ghettos and overpopulated homelands.

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<sup>10</sup> This phrase is derived from H Rangan and M Gilmartin, "Gender, Traditional Authority, and the Politics of Rural Reform in South Africa" (2002) 33(4) *Development and Change* 633, at 652 who use it to refer to minimal engagement by the state in gendered reform of institutionalized practices that marginalize or negatively impact women.

The third chapter uses the case study of a public demonstration of rural women in Mpumalanga province to examine an avenue for women to press their claims to land. This chapter highlights the difficulties of women's access to land in South Africa. This case study will be explored as an example of the broader context of women's struggle for land rights and historical political activism. It will also show the contradictions and administrative difficulties in negotiating between patriarchal traditional authorities who are custodians of communal lands and the administrative constraints of the Department of Land Affairs (DLA).

The fourth and concluding chapter will summarize my arguments. Apart from summarizing key points and ideas, the main point of this chapter is to envision a way forward for South Africa's newly established democracy and to emphasize the imperative of making gender equality and empowerment meaningful and practical in the lives of South Africa's (Black) Population. I will conclude that focusing on land reform is a beginning, not an end, to re-conceptualizing a more nuanced and strategic articulation of land rights for rural BSAW; one that better links policy to practice.

## **CONCLUSION**

Given the constraints of time, word limit and personal interests, there are obvious limitations and biases that I have to acknowledge in undertaking a research paper on this topic. First of all, my focus is solely based on rural BSAW and not South Africa women in general. This limitation is not only because of the availability and plethora of resources on rural BSAW's experience but also because being at the bottom of the racial, political and power hierarchy for so long, rural BSAW have been and continue to be the most marginalized and affected by rural development and lack of access to land.

Secondly, resource and time constraints mean that I could not undertake first hand, independent research in South Africa. The lack of resource and time has therefore translated into a dependence on mainly secondary resources. It is particularly important to make this acknowledgement for the case study that I use in Chapter three. This case study is derived mainly from one source and relies heavily on the authors' analysis and interpretations, hence the tendency to be admittedly a bit biased. However, the importance of the case study (which I elaborate on in chapter three) is indispensable. The case study reflects my earlier observation and comment on the limited access and exposure to women's narratives and stories, while in the same vein demonstrating women's potential for mobilization and resistance. Therefore the case study is instrumental to dispel any myth or notion of women as passive objects of legal reform.

Also, my focus on land reform is of particular significance because land reform policy is one of the more blatant relics of the legacy of apartheid. Land regulations has shaped not only the demographic allocation of South Africa today, but also had a significant impact on the rural landscape and development, how and where people could live, and the economic resources to which the people had access. The powers given to customary rulers in shaping rural development and fashioning their political and gender-biased agenda is still very much in practice. Understanding the complex relationship between legal authorities is an essential task if law is going to be used as one of the tools for securing greater gender equality.

My analysis will however not include such elements as the impact of kinship and marriage ties to land access or how issues like HIV/AIDS or migration are shaping the land tenure system. To do so will add to an already rich literature available on these topics (Scott, 2003; Mullins, 2001; Cross, 2000) and will indeed broaden the scope of my research beyond the boundaries that I envisioned and indeed is beyond my expertise.

However, despite the criticism and scepticism expressed in this paper of the ability of legal provisions to change institutional practices and discrimination, this research in no way doubts the genuineness of the South African government's vision of a just and fair society. Neither does the analysis expressed in this research trivialize the enormous task of overturning centuries of inequality in a matter of years. Also, this research does not purport to be representative of the whole country's experience or even all rural BSAW's experiences. Indeed, experiences vary on a case by case basis and certainly communities are unique in their customs, traditions and outlook. Rather, this research seeks to bring about valuable critique, debate and points that are noteworthy in conceiving of a citizenship in South Africa that includes rather than precludes women's experiences and in so doing, perhaps open more doors for further research.



# **Chapter I: Theoretical Framework**

The aim of this theoretical review is to analyze how women's 'legal world'<sup>11</sup> determines women's access to resources and the advancement of their social status. I argue that using the paradigm of legal pluralism rather than legal centrism provides a more accurate and holistic view of women's legal world. I am adopting a feminist analysis of public/private spheres, to suggest that the state and the customary law can be characterized as mapping roughly unto the public and private spheres within which women's lives are regulated. However, I argue that the influence of the state and the customary are not limited to the metaphorical spatial sites of public and private domain. I argue that there is a fluidity and constant interaction between the formal and informal legal structures (this is evident for example when colonial administrator used indigenous chieftaincy and élites as local administrators and the chiefs in exchange maintained their roles of influence). More importantly, I stress the need to synthesize this dialectic paradigm, so as to broaden the theoretical platform for women's contestation of rights, and also to provide a better political strategy for women's emancipation.

In analyzing legal pluralism, this chapter will not merely be engaging in a literature review, but aims to place the current liberal legal structure in South Africa within a social framework, which is still based on gender inequality and oppression. I argue that there is a fluid, dynamic interaction between the state and customary law, which reinforces male dominance, women's oppression and marginalization. What is more, I argue that the post-colonial state's legal discourse has evolved and elucidates rights and social justice as its underlying theme. However, it inherited from the colonial state, the core foundation of male

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<sup>11</sup> This phrase is borrowed from A Manji in her work, "Imagining Women's Legal World: Towards a Feminist Theory of Legal Pluralism in Africa" (1999) 8(4) *Social and Legal Studies* at 435-55.

dominance, social control of women and emphasizes capitalist political economy, therefore effectively marginalizing rural women. The layout of this chapter is thus explained as follows:

The first section will focus on the concept the meaning of the public/private divide and the implication for women's land access. The theorization of the public/private divide then sets the groundwork for discussing feminist analysis of legal pluralism in the next section, where the following questions will be addressed: what do feminists perceive as the strategic importance of legal pluralism and what is its implication for rural BSAW's access to land?

The conclusion I will be drawing from the following analytical review, is that legal pluralism (in so far as the state and customary systems perpetuate an ideology of male dominance) is detrimental and unfavourable to women's advocacy for equality rights. From my literature review, I will show that the state is often implied by some feminists as a more favourable vehicle for women's equality claims. However, I argue that the state's formal legal policies are not gender neutral and cannot be considered in isolation from its interactions and impact on customary law. Although I concur with Whitehead and Tsikata "that rural African women will not find it easier to make claims within a climate of anti-state discourse"(2003:102), I also argue that a rejection of customary law is not the way to go either. My argument therefore rests on the premise that for strategic purposes of emancipation, women's claims will find more legitimacy and currency when negotiated through both state and customary law.

# Legal Pluralism

It is important to first establish the definition of legal pluralism and Sally Engle Merry's definition is useful in this regard. Merry defines legal pluralism as "a situation whereby two or more legal systems co-exist in the same social field" (1991:870). She elaborates further in remarking that, "legal pluralism not only posits the existence of multiple legal spheres, but develops hypotheses concerning the relationship between them and the dynamics of change and transformation which [this relationship] implies" (1991:879). She thus presents the notion of legal pluralism as a relationship between mutually constitutive legal spheres that equally shape, influence and reinforce each other. Merry deconstructs the notion of formal law as the only legitimate source of law (thus a departure from legal centrism) and advocates the necessity to theorize the extent to which other forms of regulations and normative orders occur outside 'law.' Her argument is that when the notion of law is decentralized and conceptualized as emanating from plural social fields, rather than one coercive power, the implication of the hegemony of one system of law over another is shattered.<sup>12</sup> Merry's definition of legal pluralism gives way to a more nuanced and holistic understanding of the fluidity and dynamics of power relations between various normative orders.

Merry distinguishes between what she calls "classic legal pluralism" and "new legal pluralism".<sup>13</sup> The former (classic legal pluralism) refers to traditional research on colonized societies that analyzes indigenous and European law. New legal pluralism however shifts the focus to industrial societies examining the relationship between minority and dominant groups. Merry implies that legal pluralism is inherent in all societies, not just colonial ones,

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<sup>12</sup> Merry, *supra* n.9. at 870.

<sup>13</sup> *Ibid*, at p.873.

but also broadens the field of inquiry to include research on systems like culture and religion as constitutive of informal law. These two brands of legal pluralism (“classic” and “new”) are particularly relevant in the case of South Africa, which was historically a colonized society and but is also an industrialized and multicultural society. Though my focus on legal pluralism within the South African context is mainly on customary and state law (hence classic legal pluralism), there are emerging analysis on the other forms of legal pluralism manifested in the South African society, based on religion, racial minorities etc.<sup>14</sup>

The importance of Merry’s analysis of legal pluralism to this thesis lies in her advocacy of examining the historical interaction between the legal entities that exist within a pluralistic model as a determinant of how both have changed and influenced each other (1988:890). This is particularly instructive when discussing the present customary legal system in South Africa, which has undergone tremendous change over the years, especially as a legacy of apartheid. Legal pluralism with its emphasis on inter-mixing, dispels the romanticized portrayal of an ‘untouched’ and ‘pure’ customs put forward by traditionalists to legitimize their claims of special recognition. Lastly, Merry (1988:890) suggests that by exploring the dialectical relationship between normative orders, one is able to observe the limitations of law as an ideological instrument and understand better how people resist its domination.

However, Merry’s concept of legal pluralism is not without its shortcomings. She distinguishes “state law” from “non-state law” by emphasizing “its [state law’s] monopoly of power, its coercive potential and symbolic strength.” (1988:879). By so doing, she presents a hierarchical order of law which privileges statutory law. This contradicts the implication that legal pluralism is a co-existence of various forms of law. Hence the critique by Franz Von

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<sup>14</sup> See Moosa, *supra* n. 9, at121-136.

Benda-Beckman that Merry's legal pluralism is still based on legal centrism.<sup>15</sup> Therein lies the fundamental flaw of some theorist analysis on legal pluralism.<sup>16</sup> That is by trying to decenter and deconstruct analyses that privilege statutory law as the essential legitimate source of law, some proponents of legal pluralism inadvertently still privilege it.

An example of such a proponent is R.S Suttner who falls into the trap of a legal centrist rather than a legal pluralist argument. It is particularly instructive to examine his work as he discusses legal pluralism in the context of South Africa. His analysis of legal pluralism in South Africa distinguishes African customary law from common law. He defines tribal law as "the law of a peasant, cattle herding, agrarian society with a distinctive form of family organization, while the modern Roman-Dutch law is the law of an individualistic, urban, industrial society" (1970:138). He falls into the trap of once again privileging state law over customary law and implies that customary law is a state of transformation and evolution, whereas, state law is portrayed as fully developed, albeit static. He depicts state law as detached from ubiquitous social life unlike customary law, which is inherently linked to every facet of communal life, be it on the grounds of religion or morality (1970:138). The flaw in Suttner's argument is of the notion that state law is the pinnacle of law and that it is static. He fails to account for the ways in which state and customary law are constantly interacting and are dynamic.

How can the notion of legal pluralism be therefore analyzed in a way that presents all legal entities as having equal standing? Brian Tamanaha (2000) advances a notion of legal pluralism that he contends is non-essentialist and non-dichotomous. He asserts that instead of analyzing law as a social construct, legal pluralists attempt to define what law is and thus fall

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<sup>15</sup> F VonBenda-Beckman, "Comment on Merry" (1988) 22 (5) *Law and Society Review* 897 at 901.

<sup>16</sup> See B Tamanaha, "A Non-Essentialist Version of Legal Pluralism" (2000) 27 (2) *Journal of Law and Society* 296 at 296-320 for a detailed essentialist critique of legal pluralism.

into the trap of projecting an essentialist view of law.<sup>17</sup> He maintains that in attempting to construct law, the following questions are pertinent: “*who* (which group in society, which social practices), identifies *what* as ‘customary law’, *why* and under *what* circumstances? What is its [customary law’s] interaction with state law, and what relationship does it have, if any with actual customs, circulating within society?”(2000:318). In this analysis, Tamanaha argues that a more fluid and less rigid concept of legal polycentricity is obtainable. Though he admits the tendency that this approach might give way to a proliferation of various kinds of ‘law’ imbued with various meanings, thus possibly suggesting a law that is ubiquitous and banal. Hence the notion of law being “everywhere and nowhere.”<sup>18</sup>

What is the implication of Tamanaha’s proposal and Merry’s definition of legal pluralism in theorizing feminist analysis of legal pluralism? Most importantly what value does this hold in the South African framework? I argue in the next section, where feminist perception of the state and customary law is discussed, that Tamanaha’s analysis shifts the analysis away from viewing the state law (the constitution and land reform policy for example) and customary law, as static legal fields in tension with one another. Rather, Tamanaha suggests we look, instead, to how these legal sources are constructed and perceived by different groups in society within a specific historical time frame. Thus, in the context of BSAW’s access to land, this could mean examining how BSAW and feminists perceive the tension between state and customary on equality rights and how they conceive of and situate themselves within this contradiction, which is what I will try to illustrate in the case study I use in Chapter three.

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<sup>17</sup> Ibid. at 296-321.

<sup>18</sup> Tamanaha, *supra* n.16, at 298.

## Gender & The State

To highlight how South African women's social agendas are shifting, it is important to historically examine their relationship with the state. In examining this relationship, two key factors emerge: women were more regulated and related differently to the state than men; secondly, the state acted in conjunction with traditional authorities to regulate women. Manicom's (1992) historical account of women's relationship to the South African state is particularly important in this regard. Her standpoint is to reject the essentialist definition of the category "woman" and to move away from the argument of whether gender, race or class is more dominant in state ideology. Instead she proposes looking at the ways in which gender, race and class featured in the construction of "women" by the state within various time frames (1992:457). She gives the example of the colonial South African state, where the discourse was centred heavily on the "African woman" within the context of sexuality and patriarchal property, as opposed to what she terms the mid-century state where the discourse shifted to "African women" in terms of their gendered spatial associations and cultural identities of being native women living in the reserves (1992:458).

What is the value of Manicom's analysis? She moves away from an instrumentalist and economically reductionist way of conceptualizing the relationship between women and the state on the basis of social and capital reproduction. By taking this approach, she proposes a departure from simply analyzing the state's policy on women, but instead to examine how men and women experience the state in different ways and how the state produces particular constructions of 'women' within the private and public realms (1992:457). She gives an interesting example by stating that "measures enacted to regulate the presence of African women in towns in the 1930s were argued for in terms of women as sexual subjects (prostitutes), as racial subjects (anti-miscegenation, bred by the urban proximity of the races),

as economic subjects (whose beer-brewing enterprise was depriving local state authorities of revenue) and as disciplinary subjects (unruly populations requiring policing)” (1992:458). With this example, she shows the various ways in which the state categorizes women and subsequently tailored state laws and controls to target the various constructions and categories of women. Therefore, rather than stating that the state controlled and regulated women, Manicom presents a nuanced analysis of the specific ways in which the state theorized and regulated specific categories of women.

Manicom depicts women as historically negligible in state structures and that the state policies towards women (specifically black women) have been historically oppressive (1992:444). The state’s regulatory monopoly of the multiple constructs of the Black woman is evident in both the public and private sphere, though the state focuses specifically on women’s legitimacy and role in the ‘domestic sphere.’ Furthermore, she asserts that just as the state delimits and assigns gender through construction, so is the state itself being defined by and in relation to the domestic sphere (1992:450).

Manicom thereby presents the possibility of envisioning the relationship between the state and gender as a process of constant renegotiation and transformation. I argue that with the creation of formal legal rights for women, the present state opens up the possibility (at least in theory) of a positive and engaging interaction with BSAW. Formal equality rights presents women with formal recognition before the law as well as a tool for engaging with the state.

## **Gender, State & Customary Law**

To understand, as Manicom suggests, the gendered understanding of South African State formation, it is important to briefly turn to South Africa’s colonial and apartheid history. Historically, the relationship between the state and customary has been characterized

by exploitation and co-option (Mamdani, 1994; Chanock, 1982). Though customary law is sometimes romanticized by neo-traditionalist as encapsulating the essence of African culture and customs in their purity and dignity, devoid of social influence and colonial exploitation, this notion is in itself a false construction (Chanock, 1982, Mamdani, 1996, Ntzebeza, 2000). Mamdani states that “the customary was not opaque but porous, not stagnant but dynamic” (1996:168), showing that customary rule has been significantly influenced and manipulated by the state.

Customary law has evolved as communities have evolved and it has been subjected to change and colonial manipulation. In particular in the South African context, traditional leaders were used as puppet administrators by the government to reinforce the policy of segregation and relegation of Black South Africans into rural, impoverished existence.<sup>19</sup> Mamdani’s analysis is particularly enlightening in this regard. Mamdani suggests that the customary legal framework was a colonial construct, the goal and legacy of which was “the definition of land as a communal customary possession, rather than a private possession, custom became an ideological construct, which was state ordained and state enforced and emphasized the communal, not the individual, and pitted rights against tradition” (1996:225). Mamdani uses the metaphor of a ‘clenched fist’ to explore how the despotic rule of the colonial and apartheid state was decentralized and distilled through the customary leaders:

*Not only did the chief have the right to pass rules (bylaws) governing persons under his domain, he also executed all laws and was the administrator of “his area”, in which he settled all disputes. The authority of the chief thus fused in*

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<sup>19</sup> L Ntzebeza, “Traditional Authorities, Local Government and Land Rights” in B Cousins (ed.) *At the Crossroads: Land and Agrarian Reform in South Africa into the 21st Century* (University of the Western Cape/National Land Committee Programme for Land and Agrarian Studies, Cape Town/Johannesburg, 2000) at 248 indicates however that not all customary chiefs were exploited or cooperated with the Colonial apartheid government –the leaders who were not in league with the state were summarily disposed and replaced with “puppet” rulers, more amendable to state influence.

*a single person all moments of power, judicial, legislative, executive, and administrative. This authority was like a clenched fist, necessary because the chief stood at the intersection of the market economy and the non-market one. The administrative justice and the administrative coercion that were the sum and substance of his authority lay behind a regime of extra-economic coercion, a regime that breathed life into a whole range of compulsions: forced labour, forced crops, forced sales, forced contributions, and forced removals (1996:23).*

Mamdani's key argument is that there is a historical duality of power that exists between the state and the customary, but that the state is the one that holds the reins. Mamdani's analysis does not include a consideration of gender. His analysis is however important to gender relations in that it highlights the fluidity of power that exists in the interactions between customary and state law. One outcome of this fluidity is the reinforcement of women's subordination by both the state and traditional rule. How has this relationship between the state and traditional institutions reinforced gender inequality?

The apartheid government perpetuated a system of racial and gender discrimination, with the cooperation of traditional leaders. "Traditional authorities used their power to maintain patriarchal rule and male privilege by using customary laws to fashion a social order based on gendered privilege, marital status and age based hierarchies"(Rangan & Gilmartin, 2002:641). Men were enthroned as "the only true person in law and sole holders of family property, therefore placing women outside the parameters of law and rendering them invisible" (Mokogoro, 1997). The structure and institution of traditional leadership created further challenges for the assertion of women's rights. This is because, according to Beall et al, "chieftaincy operates in South Africa on principles antithetical to democratic ideals, as the

election of chiefs is not by popular vote, but is [based on male] hereditary and for life; it is hierarchical and exclusionary towards women” (2004:5). Customary law effectively relegates women to the bottom of the social hierarchy and makes them *persona non grata*. In customary law, women are considered to be- *locus standio injudicio*- or lacking the power to bring actions in their own names (Mokogoro, 1997, Bennet, 1981). In other words, women’s proprietary and legal capacity, independent of their fathers and husband is not recognized. They are regarded as minors and wards of their male relatives and could not own land or be entitled to any accumulated property within the course of her life.

During the colonial and apartheid era, traditional leaders were given a lot of power, which helped them consolidate their control of their subjects. According to Beall et al, “in African villages, the administration of the pass book and the running of the labour bureaux, where permits had to be annually renewed were the responsibility of the chief” (2004:563). This meant they had a lot of power over migrant labour and say on who could migrate and access waged employment. This power (as shown in figure 1.1) was consolidated with the 1951 Bantu Act. The Act effectively proclaimed the independence of the homelands from South Africa, therefore making “chiefs coercive agents of the Bantustan regime and essentially civil servants to be hired, fired, paid and if necessary, created by the government” (Van Kessel and Oomen, 1997:564).

Some authors such as Penelope Andrew note that the colonial and apartheid legal orders existed parallel to and not interactively with customary law. Andrews states “the colonial and apartheid legal order perpetuated an inferior role and status for traditional law within the national legal framework” (1998:320). She however acknowledges that traditional authorities and institutions became synonymous with Apartheid because they served a useful purpose in administering apartheid (ibid:321). It was thus no surprise that during the interim

constitution negotiation, traditional leaders lobbied intensively to have customary law outside the purview of constitution or legislative enactments that mandate equality.<sup>20</sup>

Monique Deveux (2003) adds to this analysis by suggesting that customary and state laws in apartheid South Africa colluded to maintain and reinforce a policy of cultural and political divisiveness and separate development of races. Traditional African leaders were enticed, manipulated and co-opted by apartheid administrators, who in turn shored up and underwrote the chiefs' power and authority in return for guarantees of loyalty (1999:165). It was with the tacit cooperation of the rural leaders that Bantustans were set up and used to indirectly enforce apartheid rule and curtail migration and movement. Customary law therefore symbolized an alliance between colonial authorities and African male elders, sealing the status of the state within the patriarchal order of African society (Deveux, 1999:165). Customary law and state law thus formed a mutually beneficial albeit less than altruistic alliance during apartheid, wherein both were able to maintain a measure of political power and social control.

Men and women related differently to the state, but the state apparatus also regulated them differently. The colonial state's emphasis was on the construction of women as biological producers and their social reproductive roles. Whereas for men, the focus was on their labour and how this could be tapped to further the capitalist economy of Apartheid. As Ambreena Manji observes, "while both men and women were exposed to social control, the relative importance of their separate functions within the state demanded that the means of restraint employed by the colonial state in relation to each gender differed" (1999:444).

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<sup>20</sup> P Andrews, "Striking the Rock: Confronting Gender Equality in South Africa" (1998) 3 *Michigan Journal of Race and Law* 307 at 322 attributes this resistance by customary leaders to the following: i. The need for parallel legal status with statutory legal order, ii. they wanted to preserve and ensure the autonomy of traditional leaders and the status quo of traditional rule iii. They regarded traditional rule as sufficiently democratic without the need of state law to meddle in its affairs.

Migration was a key element in highlighting the difference in state regulation of men and women. The colonial and apartheid state needed migrant male workers, who were integral to the capitalist machinery of the state. To this end, the state controlled men's movement in and out of the urban areas with creation of pass laws that restricted the movement of the non-white population in and out of the urban centres. Whilst the state controlled the movement of males who formed the core migrant labourers, and were integral to the capitalist machinery of the state, women's migration was overtly but not solely curtailed through traditional authority. Black women had little or no rights in Apartheid South Africa. They were officially relegated to subsistence living in the homelands and their movements were severely restricted to those confines. African women were initially not required to carry pass books (which became the ultimate symbol of their oppression and were passport-like identification card required by law to curtail and restrict movement of Africans in the urban area) like their male counterparts until the late 1950s when African women started becoming more visible in the urban areas and more politically vocal. The women who made it to the urban areas did they have access to jobs in urban areas like the men, save for a few women who worked mostly as domestic servants in Afrikaner and English homes and a few others in the textile industry.

However, an interesting observation is that (South) African women's relationship with the colonial state has often played out in an indirect way and carried out ironically through the alternative non-traditional sources of law i.e. customary law. The state has really not been the prominent actor at play in dominating and regulating the independence and equality of women's rights, but that the traditional, customary law/apparatus has been more directly influential in Black, rural women's lives (with the legitimation of the state of course). Traditional élites and law were at the forefront of women's domination, with the backing of

the state in providing a framework of impoverished rural homelands for them to enforce patriarchal rules, using the rubric and rhetoric of tradition, morality and culture. Traditional leaders were able to contain women's movement to urban areas and their work was limited to communal land and subsistence agriculture, which worked well with the ideology and the agenda of apartheid reinforcing an urban/rural divide. The urban area, being a temporary resident for African men whose labour was needed in the industries. With the men's wives and families contained in the rural areas, as a permanent home base, this separation of families ensured that African men would not take up a permanent residency in the urban areas, but rather returned to the rural areas at the end of their employment contract.

Perhaps this historical account explains why in the post-apartheid period, during the drafting of the Constitution, South African feminist activists and lobbyists were vehemently opposed to giving cultural rights any kind of legal recognition and power that infringed on their gender equality rights. For these women, the time had come to put a stop to their oppression, particularly in the rural areas, and they identified their oppression as women more with customary leaders rather than the state, which they linked more to their racial oppression.

The aim of the feminist lobbyists in the Constitutional process was three fold: to secure a political voice for women, to reframe political debates about the nature of equality and the ambit of constitutional equality protections and reduce women's subordination that was a result of customary law tightening the lines between public and private spheres (Deveux, 1999:172). Deveux explores an interesting aspect of how customary law shapes and reinforces the public/private divide. She states that "women's groups objected to the way in which customary law places women 'outside the law' in the sense of prohibiting women from holding or inheriting property or entering into contracts and so leaving them vulnerable

to multiple forms of oppression in their private lives” (1999:172). Thus Deveux seems to be suggesting that in clamouring for recognition of their equality rights, the goal of South African feminists was to remove women’s invisibility within formal and non-formal legal systems.

Whilst feminists challenge the recognition and rights of customary law in so far as it infringes on gender equality, statutory law is not without its flaws either. Whitehead and Tsikata (2003) critique the fact that feminist literature has mostly looked towards statutory law as a salvation from discriminatory gender practices vis-à-vis land access by customary law. Whitehead and Tsikata observe that by having absolute faith in statutory law, feminists fail to see the shortcomings and the flaws of statutory law, which are manifested in the political weakness, and lack of will inherent in the way statutory law is administered in post-Apartheid South Africa. Whitehead and Tsikata (2003) observe that the state has employed creative ways in absolving responsibility in the implementation of the equality clauses it guarantees women. Whitehead and Tsikata cite examples of stalling practices by the state like postponing or neutralizing any reforms needed to put the principles reflected in the equality clause into practice. Government’s marginal changes to discriminatory practices or lack of political and financial will to implement legislation aimed at ensuring gender equity also features prominently in Whitehead and Tsikata’s critique, hence casting serious doubt on the state’s ability to bring about change and underscoring the severe limitations of formal law as a vehicle for social change.

The arguments of some feminist writers have favoured changing statutory law and ignoring any hopes of reforming or evolving customary law. However, as I would argue, any resolution aimed at advocating for gender equality has to go beyond reinforcing the dichotomy and duality of state law versus customary law arguments; of siding with one side

or the other. This is because any meaningful hope of reform and advancement of women's rights has to transcend this dichotomous outlook and look at the broader issues of gender inequality, power balance and male resistance.

As Whitehead and Tsikata (2003) argue, "by and large, the sustained faith in formal law leads many feminist lawyers to underestimate the dynamic power relations that underlie inequity in land relations that ultimately limits the effectiveness of campaigning for women's legal literacy" (93). Indeed as they argue further, "empowerment is not enough in itself to counter rural male resistance or to male resistance within legal institutions" (94). Therefore the argument here is that customary law does not work in isolation or in a power vacuum of its own. It is therefore important to examine the way customary law is reflected within Africa's legal pluralistic paradigms because it has immense implications and resonance for women's land claim (Stewart, 1996). The way to envision the relationship between the formal and non-formal legal systems is not as hermetically sealed off (Griffith, 1998) but as mutually constitutive in which women sustain claims to resources and land by using arguments from both the statutory and customary law to meet their ends (Whitehead and Tsikata, 2003:95). One way in which women can negotiate these two terrains is use whichever courts, systems or settlements that best suits them and is to their advantage.

According to Wayne Van Der Meide (1999), the splitting of the reform of customary law by pitting the right to equality against the right to participation in one's culture must be avoided. Reform must instead be thought of as the pursuit of a society in which all people, including African women, are able to realize their dignity and self-worth to their fullest potential. This analysis necessitates that African women must no longer have to choose between culture and equality, for otherwise both rights will be rendered illusory (Van Der Meide, 1999:112).

A pluralistic rather than dualistic approach to conceptualizing the spheres of women's social lives in principle, holds many appeals for the project of social transformation. This approach provides a theoretical way for women to challenge and re-define their interactions with the state and the customary and therefore leaves room for societal change and compromise. In the next section, I will illustrate further, feminist conception and arguments for a dualistic legal framework.

## Gender on the Agenda

Feminists are wary of according state law a far higher status than it merits. Kagnas and Murray (1994) maintain categorically "feminists cannot rely on law and legal method alone to change the systemic oppression of women" (5). This is the view held by other feminists such as Carol Smart (1989) who is of the opinion that it is possible for the legal system to be inclusive of feminist agendas or at least feminist consciousness. Even though Kagnas and Murray acknowledge that feminists in South Africa like elsewhere are looking beyond the formal legal framework to identify new opportunities for women, they are however quick to object to South African feminists vacating the legal arena, as they contend that to do so will not only be strategically unwise for women, but that "law neither emanates from a source free of conflict, nor does it move towards a unified set of goals" (1994:16). Smart though critical of feminist jurisprudence of the state, is not necessarily opposed to it. She feels that the state and law has been held on too high a pedestal and that "in accepting law's terms in order to challenge the law, feminism always concedes too much" (1989:5). Smart does not feel that either the state or law holds the key to unlocking women from their bondage, and she feels that to think so is illusory. Hence she advocates opening up the

state to a feminist consciousness of law but also looking at other alternatives, or what she calls “non-legal strategies” to de-centre law.

She adopts a Foucaultian stance to counter the claims and hegemony of law. She does this by utilizing Foucault’s thesis on power as capillaries emanating from different vessels and not concentrated in one central organ. Hence challenging law’s claim as the ultimate truth and the state’s claim as the ultimate hierarchy, Smart believes that law is no different than any other scientific inquiry, and, indeed that non-legal disciplines like sociology and psychology have the same if not higher claims to truth and knowledge. She therefore proposes that feminists reject law’s hierarchical claim, and, instead focus their energies on studying the processes of power outside legal institutions because the power of legal discourse as she sees it, is diminishing (1989:6).

However, the problem, as evidenced by Smart’s argument, is that feminist jurisprudence has traditionally engaged in debates around the realm of legal centralism rather than pluralism. Manji (1999) has argued that feminist engagement with the law has been focused and concentrated on legal centrism and not enough focus on legal pluralism. Whether it has been in the arguments of feminists who hold an instrumentalist view of law as the tool to bring about gender equality and social change or in the analysis of Carol Smart, who though critical of state and law as centre points of power, the discussion nonetheless always revolves around the given parameters and hierarchy of the state and law. Manji criticizes feminism on the basis that feminist analysis vis-à-vis law and the state has always been within the framework of the state and the law as hierarchical, leaving little room to explore other possibilities and potential concepts, like that of legal pluralism. Hence “feminism gives prominence to legal monism, that is the view, that the state is the sole source of law” (Manji, 1999:439). Little exploration of other sources and forms of law as emanating

from informal sources like lineage, clans, etc has been given as much credence and prominence.

I thus could not agree more with Manji's critique that "while feminist jurisprudence has reflected upon and sought to undermine many of the assumptions of legal theory, it has nonetheless responded to and fortified the ideology of legal centralism"(1999:439). For indeed feminist jurisprudence has been guilty of reinforcing the very framework it has been seeking to deconstruct. Manji's argument however seems flawed in that she seems to suggest that phallocentrism is only inherent in the state law and absent from legal pluralism. She argues that centrist legal discourse is phallocentric because it depicts the legal world as experienced by men. The question thus become: but what about legal pluralism within the context of customary law? Does it not give prominence and centre stage to male actors and male priorities? Is it not a matter of exchanging one known devil for the other? Manji seems to advocate and urge more engagement with legal pluralism, however her arguments are suspect because she fails to realize that it is not only about changing actors, if the script and framework remains the same. It is about changing the platform and basis upon which the relationship between feminist claims and customary claims are re-enacted.

What is the implication of this historical analysis of South Africa's socio-legal structure for women? It shows that through the historical interactions between the state and customary rule, a gendered socio-legal hierarchy was created, featuring women at the lowest rung of the ladder. Customary law has been co-opted and transformed through colonialism and apartheid, into a cultural paradigm which features male dominance. With the historical administration of land access by customary institutions and a cultural system that affords women no legal recognition, women have been placed in a vulnerable economic and socio-political position. The state on the other hand has always maintained its position as the

pinnacle of this racialized and gendered socio-legal paradigm. The colonial state was centralized and despotic, and the apartheid state was equally centralized and authoritarian. What follows from this historical legacy is what Mamdani (1994) calls a “bifurcated” and polarized judicial structure, which the new South African government has inherited. The implication of this bifurcated existence of legal pluralism in South Africa is that it provides a site for African feminists to identify the legal and cultural elements used to perpetuate and reproduce women’s marginalization by the traditional leaders and the state. What is more, it provides the forum for women to be more critical of the way their social marginalization is institutionalized and how their cultural and legal identities are shaped. At the same time, the post-apartheid socio-legal structure gives women creative ways of manipulating and straddling both legal frameworks to their advantage. This however begs the question of how easy is it for BSAW in practice to straddle both legal frameworks? What are the challenges and constraints of doing so?

These questions set the framework for the next chapter which examines the institutionalization of the current socio-legal power hierarchies in South Africa and the challenges and opportunities for rural BSAW in utilizing and resisting these resources to their advantage in their quest for land rights.

## **CHAPTER II: Policy Framework**

By examining the symbolic and material significance of land to women and the legal and cultural apparatuses within which their relationship with land is enacted, this chapter seeks to analyze the institutional and cultural challenges to women's economic and social advancement. This policy analysis however goes beyond merely examining the concept of gender and the significance of land. One of the fundamental elements lacking from policies on gender equality is a failure to account for the way power imbalance is featured and reinforced within socio-political institutions. In other words, how socio-political frameworks reinforce historical power hierarchies and therefore the status quo. This chapter is therefore a critical analysis of the ability of policy and legal apparatuses to bring about social change.

The questions I will be exploring are: what is the significance of land reform to women's advancement? What does access to and control of land mean for women? What constraints are they facing in accessing land? What are the legal avenues open to them in exercising their land rights? What are the recent developments in land reform policy and how do they affect gender relations? What is impeding the substantive realization of women's rights in the Constitution? Most importantly, how does the interplay between the state, traditional leaders and gender inequality function to marginalize and exclude women's access to land?

The analysis in this chapter will be done by first examining the nature of women's property and equality rights as enshrined in the South African Constitution and Bill of Rights. As well, the recognition of customary rights in the Constitution and the influence of traditional leaders in land administration will be problematized. I will take a critical look at the institutional apparatus responsible for land reform and examine its inclusion (if any) of a

gender framework. To look at land reform at work, the process and conditions within which it is being enacted must be thoroughly analyzed and problematized.

Most importantly, this chapter fits into the premise of my overall research in demonstrating that real change to women's socio-political lives will have to move beyond policy rhetoric and come to be backed by greater state enforcement of women's access to land. I will also argue that in order to affect significant change in women's lives, policy has to be filtered through a gendered analysis to anticipate and envision how it impacts women and men within their prescribed social roles.

## **Women, Land & the Legacy of Apartheid**

The legacy of apartheid policies continues to shape and haunt every facet of contemporary South African life. The rights to and accessing of land are no different. Under apartheid, the forced removals of non-whites from urban areas into self-governing homelands or Bantustans,<sup>21</sup> led to what is now a distortion in land ownership: 87% of land was allocated to 15% of the (white) population, leaving a staggering 85% of (most Black) South Africans to make do with 13% of land and languish in rural poverty (Walker, 1998; Cole, 1993). The plethora of laws that was used to effect these dispossessions have been mentioned in the introduction and will not be further rehashed here. This societal dislocation saw a lot of urban-rural migration especially by men seeking work in the mines and industry, while the

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<sup>21</sup>Bantustans (or "native reserves" or "homelands") was institutionalized with the Bantu Act of 1956. This Act was aimed at enforcing the apartheid policy of physically separating the races and creating 10 homelands (Venda, Boputhatswana, Transkei, Qwa-Qwa, Ciskei, KwaZulu, Gazankulu, Lebowa, Swazi and Ndebele) which were to be the home of all non-white South African population and governed by puppet traditional leaders. These homelands were regarded as separate countries and their citizens were denied South African citizenship. See C Coles, "Land Reform for Post Apartheid South Africa" (1993) 20 *B.C. Envtl. Aff. L. Rev.* 699 at 716; O Zirker, "This Land is My Land: The Evolution of Property Rights and Land Reform in South Africa" (2003) 18 *Conn.J.Int'l L.* 621 at 629-631 and L Thompson, *A History of South Africa* 3<sup>rd</sup> ed. (Yale University Press, New Haven, 2000) at 191 for detailed discussions on the creation of the Bantustans.

women, for the most part, stayed in rural areas, and were dependent on wage remittances from spouses who had migrated, together with their own subsistence agriculture.<sup>22</sup> Women stayed in rural areas, not necessarily out of choice, but restricted by state laws on one hand and social customs on the other. The geographical separation of men and women created a whole new social reality for rural BSAW. As Walker remarks “the intricate interplay between indigenous patriarchal structures, reshaped in the interest of the white settler society and the social economic forces unleashed by industrialization, urbanization and racial capitalism is a social category of poor rural women” (Walker, 1998:5). This new social category of women, as defined by Walker is characterized by lack of education, poverty and overrepresentation in the rural areas.<sup>23</sup> How does this categorization shape women’s relationship to land?

According to Walker (1998), for most rural women, land is not regarded as a primary economic resource, but rather as a social resource. Subsistence agriculture is not highly lucrative for women, but land and smallholdings are used for non-commoditized goods such as firewood, medicinal herbs and grazing, and residential land especially means security for women and their families. What is also noteworthy in drawing the links between land, women and apartheid is that women’s specific interest in land is shaped both by their social responsibilities as women, and their marginalization from the formal wage sector (Walker, 1998). Due to low levels of education and skills and due to the racial and gender stratification of the formal economy, rural BSAW found it particularly difficult during the apartheid era to access the formal economy. In addition to this, is the fact that women’s social roles are more pronounced and reinforced by the cultural milieu of their rural setting

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<sup>22</sup> Not all Black South African women stayed in the rural areas, indeed there is literature (though sparse) documenting Black women’s work as domestic servants in urban and in certain industries. Particularly instructive is J Cock, *Maids and Madams: A Study in the Politics of Exploitation* (Ravan Press, Johannesburg, 1980) and C Coquery-Vidrovitch (translated by Beth Gillian Raps), *African Women: A Modern History* (Westview Press, Boulder: Colorado, 1997).

<sup>23</sup> From the Rural Survey of 1999: 12.7 million people lived in rural areas, which constitutes 31.4% of the entire South African population, 54.4% of the rural population are women, 93% of whom are engaged in subsistence farming. This information was obtained from statistics South Africa.

especially as social norms favour male rather than female urban-migration.<sup>24</sup> Thus women become dependent on land in multi-faceted ways as a matter of survival and from a lack of extensive choices. Women use and juggle various economic options for their survival and that of their children and land is a crucial element for this survival.

From the above description of the historical legacy of apartheid and women's dependence on land, it becomes clear that land played a very crucial role in shaping the spatial enactment of people's lives, so much so that it was imperative for any post-apartheid South African government to redress the way land policy has been used to foster racial segregation and inequality as well as urban-rural stratification. More than this, and specifically for the interest of this research, it is important to note that land rights had particular resonance for gender equality and rural development. For a South African government overseeing a non-racial transitional democracy, ignoring the way in which land represented entrenched gender, racial and geographical inequalities, would be a political faux pas. Walker asserts that "this was not only indicative of the special political significance land has carried as a symbol of dispossession under the old order, but is representative of the prospects for restoration and redress under the new" (Walker, 1998:7) The post-apartheid government of Nelson Mandela was astute enough to realize this, and thus embarked on a series of policies to address the land issue.

The next section examines how the African National Congress (ANC) in government since 1994, has sought to tackle the issue of racial and gender inequality in the context of land rights as well as the challenges and constraints it has faced along the way.

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<sup>24</sup> C Walker, "Cornfields, Gender and Land" in S Meer (ed) *Women, Land and Authority: Perspectives from South Africa* (Oxfam, UK, 1998) at 66 is particularly instructive in highlighting the ways in which women are dependent on land and the informal economy by cultural norms on the one hand and the lack of essential skills to access the formal work force on the other hand.

## **The South African Constitution**

As mentioned, the challenge for a South African government of addressing years of racial inequality was enormous. So too was the prospect of redistributing the country's 122 million hectares of land (Thwala, 2003). With constitutional commitment to land reform and a neo-liberalist policy of reconstruction and development (RDP), the state committed itself to a 5-year program of redistributing 30% of the land between 1994 and 1999 (DLA, 1997). Before discussing the specifics of the land reform policy undertaken by the South African state, I first want to outline the Constitution, which provided the foundation of all state policy on land reform and equality and customary rights. Afterwards, I will highlight and critique the policies of land reform, flagging its market-orientated approach and locating the policy changes within the change in government.<sup>25</sup>

The drafting of the Constitution was the site of competing rights claims, which pitted, in one example, women lobbying for equality rights against neo-traditionalists lobbying for autonomous customary rights (Deveux, 2003). Women lobbyists argued that the patriarchal and hierarchal nature of customary law, was in contradictions to principles of gender equality. On the one hand, the rural elites were proponents of the status quo afraid of losing ground under the new socio-political order, and on the other hand, women activists saw the Constitution as a symbolic opportunity to access power and rights claims that had been for so long denied to them and in the process gain legitimacy and recognition through statutory law. The Constitution therefore became one arena for contesting and negotiating right claims. The above reflection ties into my analysis that South African women, in articulating a discourse of rights, are using the constitution as a way of accessing the public sphere of formal,

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<sup>25</sup> In other words contrast the land reform policies under Nelson Mandela's government between 1994-1999 to Thabo Mbeki's government from 1999 to date.

codified legislation and reconciling the public with the private sphere of informal rules and regulations.

In the context of codifying gender equality, two main organizations, the Women's National Coalition (WNC) on the one hand and Congress of Traditional Leaders in South Africa (CONTRALESA)<sup>26</sup> contested the nature of legal recognition of equality rights. The WNC argued against the patriarchy and sexism of customary law. As Mokgoro remarks, "fighting this rearguard battle, the feminist lobby aimed to prevent an outright traditionalist victory" (1997:1287). However, when constitutional protection of traditional law was imminent, they lobbied to ensure that this constitutional recognition would be subject to limitations by a Bill of Rights (Deveux, 2003:167). The traditional leaders, on their part, were fighting to maintain their claims to a "traditional" way of life. The traditional leaders were anxious to maintain their power stronghold and influence, hence they played the cultural rights card to its fullest extent. That is to say, the chiefs projected themselves as custodians of the African custom and simultaneously as pioneers of rural development (Oomen, 1997:562). The government, on their part, recognized that the customary institutions could neither be swept aside nor ignored, as they were already a well-established force in the political organization and structure of the country. Most importantly, the government was astute enough to recognize that the project of national liberation and reconciliation could not be achieved or pursued without the alliance of traditional leaders and without the recognition of the institutions symbolic of African pride, dignity and other forms of assertion (Mokogoro, 1997). Besides, a sizeable amount of Black South African population (12.7million to be

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<sup>26</sup> The WNC and CONTRALESA were not by any means the only interest groups involved in the negotiation process, but they were by far the most prominent and had the most political clout. See C Albertyn, "Women and the Transition to Democracy in South Africa" in C Murray (ed.) *Gender and the New South African Legal Order* (Juta and Co. Ltd, Cape town: South Africa, 1994) at 49 for an in-depth description of the involvement and tension between the WNC and CONTRALESA during the drafting of the interim constitution.

exact)<sup>27</sup> live in the rural areas, thus cooperation and recognition with cultural leaders was not only a matter of political strategy, but also national interest.

On the issue of land reform policy, the tension was between “primarily white agricultural and business interests on one hand and on the other, the advocates of a radical transformation of land dispensation, representing the black majority including the landless, the land-hungry and aspiring commercial farmers” (Walker, 1998:7). The crucial questions became how was the government going to negotiate the tricky terrain between equality rights and cultural rights with the principles of the latter violating the very letter and code that the new Constitution stood for? Were women’s right going to be sufficiently addressed or were they going to be surrendered for the sake of political unity and national interest? Was access to land by dispossessed black populations going to be sacrificed on the altar of neo-liberal capitalist interests?

## **The Bill of Rights**

A compromise of sorts was reached between contemporary law and its recognition of the equality of all citizens of South Africa on the one hand and customary law and its unique sets of codes and principles on the other. The Constitution acknowledges African customary law- with its patrilineal systems of inheritance and political rule and patriarchal customs of family law- as well as offers extensive protection for individual rights and equality, including sex equality (Deveux, 2003). The Constitution accommodates both of these seemingly contradictory position by stating that “persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community to enjoy their

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<sup>27</sup> This is according to the 1999 Rural Survey conducted by statistics South Africa and available at: [www.stassa.gov.za](http://www.stassa.gov.za)

culture, practice their religion and use their language and to form, join and maintain cultural religious and linguistic associations and other organs of civil society.” The implication of this constitutional accommodation means that there is no clear-cut stance or indication of which right (i.e. customary or equality rights) takes precedence over the other. This, I believe is a deliberate political manoeuvre by the government in not isolating their rural, political, electoral base on the one hand, but also making good their guarantee of gender equality.

This compromise is enshrined within the Bill of Rights, which is the main foundation and principle upon which lies the South African constitution. The Bill of Rights highlights and spells out all the categories and principles of human rights guaranteed in the constitution. Similar to the Canadian Charter, the South African Constitution’s Bill of Rights spells out the fundamental rights and freedoms afforded to every citizen. These include the right to culture, equality and freedom from discrimination based on race, gender, class, age, religion and ethnicity, just to name a few. Section 25 of the Bill of Rights refers to the right to property and states that:

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

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

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

The Bill of Rights thus sets the stage for redress of the discrimination wrought by apartheid land policies and paves the way for a new democratic and transparent land access system. The Bill of Rights also binds all the legislative and executive powers and supersedes

all laws including customary laws in its provision of equality and freedom from discrimination.

The state's strategic negotiation between customary and equality rights is further crystallized by the limitation clause of section 33(2)(3) which clearly outlines the fact that fundamental rights and freedom supercedes all else including the recognition of customary law and as such, the latter may not limit fundamental rights. Section 39 also states "when interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport, and objects of the Bill of Rights." By so doing and by allowing for the application of fundamental individual rights within the private sphere (otherwise known as horizontal application of rights), the tension appears reconciled between fundamental rights on one hand and the recognition of customary principles. This does not necessarily mean that equality provisions trump culture because there is a loophole. By leaving the resolution of potential future conflicts arising from this tension to judicial interpretation (be it common law judiciary or customary law adjudication), the government left open the issue of what would happen should custom come into conflict with equality guarantees. One might also suggest that this loophole creates doubts about the seriousness and commitment of the government in advancing gender equality.

As stated by Walker (1998), there is a serious tension between the state's commitment to gender equality on the one hand and its reluctance to alienate traditionalist structures on the other. The recognition and acclaim of traditional leaders by the Constitution has immense implications for women's equality rights and the administration of land reform. First of all, the recognition of traditional institutions show the contradictions and weakness inherent in the Constitution as a product of negotiations undertaken by the incoming African National

Congress (ANC) government in 1994 (Van Kessel and Oomen, 1997; Walker 2003; Ntzebeza 2000). Van Kessel and Oomen (1997) suggest that the government has been particularly ambivalent in its treatment of chiefs because of the ANC's historical rural support base.<sup>28</sup> As well, the ANC needed to woo and cajole radical elements of neo-traditional parties from derailing the transition process and therefore had to make some concessions to the traditional leaders.<sup>29</sup> According to Van Kessel and Oomen (1997), "chiefs had thus assumed a new role: no longer relics of a feudal past, but strategic allies in the conquest of state power" (571). Traditional leaders played a crucial part in the ANC government's political strategy of allying itself with customary heads so as to solidify their rural power base and prevent the leaders from being wooed by the National Party (Kessel & Oomen, 1997). On the part of the chiefs, they were preoccupied with ensuring their political viability and in securing their interests by retaining control of rural and land administration. The end result being that the ANC government's objective "was not so much to democratize traditional institutions as to constitutionalize them."<sup>30</sup> This constitutionalization translated in the establishment of a House of traditional leaders in each province and at the national level. These bodies were charged with the task of advising the provincial and national government on matters dealing with indigenous tradition, customs and laws (Van Kessel and Oomen, 1997:573). It also provided a consultative role for them in rural affairs and development. The White Paper on Local Government (1998), the Traditional Leadership and Governance

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<sup>28</sup> Beall et al "Traditional Authority, Institutional multiplicity and Political Transition in Kwazulu Natal, South Africa" (2004) 48 *Crisis States Programme* at 7 contend that the ANC had in its ranks prominent people like Chief Albert Sisulu and depended on rural support to help sustain its national liberation struggle and subversion of apartheid government, especially during the late 1980s, which were the last volatile years of apartheid regime.

<sup>29</sup> Chief Mangosuthu Buthelezi with his ultra traditionalist values and his Inkatha Freedom Party (IFP) proved to be a formidable force to contend with. He wanted to ensure that traditional leaders were not sidestepped in the new government and that the powers of traditional leaders were not curtailed. With the considerable influence of his party in the volatile region of KwaZulu Natal and the violence that simmered between IFP and ANC supporters in the run up to the 1994 elections, a lot of negotiations and concessions had to be made. For further detailed analysis, see authors like Ibid, at 3; Thompson, *supra* n.26, at 230 and 249.

<sup>30</sup> This was quoted by Albie Sachs and cited in I Van Kessel and B Oomen "One Chief. One Vote: The Revival of Traditional Authorities in Post-Apartheid South Africa" (1997) 96 (385) *African Affairs* 561.

Framework Bill (TLGFB) in 2003 effectively secured their role as “benign overseers of local disputes, adjudicators of traditions and customs and facilitators of matters of development” (Beall et al, 2003:8).

As Meer (1999) also observes, the vacillating middle ground approach of the state and its neo-liberal agenda is therefore evident and reflected in its guarantee of gender equality while simultaneously safeguarding traditional and customary practices, which infringe such rights. The real interest seems to be in maintaining a status quo, hence sacrificing the possibilities of real change with a half-hearted, ambiguous commitment and stance to social mobilization and change. There is a concern that the equality clause in the Constitution seems to be a tokenism of sorts to gender equity, but lacks the bite and the political willingness to see it through. This is clearly manifested in the policy frameworks of the Department of Land Affairs, which is the state department charged with carrying out the land reform program.

## **Post Apartheid Policy on Land Distribution**

The main characteristic of the land reform program has been its neo-liberal outlook. Between 1994 and 1999, the government land reform policy was established under the rubric of Reconstruction and Development Programme (RDP). The RDP, along with the 1997 White paper on Land Reform committed the government to a target of redistributing 30% of agricultural land from white ownership to black and complete all land restitution claims within the first 5 years of government (Thwala, 2003). Poverty reduction, economic growth and redressing racial land dispossession and security of land tenure were therefore the guiding principles for land reform between 1994 and 1999.

## **Land Reform: White Paper Policy**<sup>31</sup>

The white paper policy on Land Reform, which was released on March 12<sup>th</sup>, 1991 and came under the umbrella and management of the Department of Land Affairs (“DLA”), was touted as the most comprehensive statement and symbol of the commitment of the South African government to land reform. According to Meer, “the DLA’s reform objective was to redress the injustices of apartheid, encourage national reconciliation and stability, economic growth and alleviate poverty” (Meer, 1999; DLA 1997). Its mandate is derived from the Property clause in the Bill of Rights, which gives Parliament the right to take legal measures to foster an equitable access to land and by means of an Act of Parliament to redress the legacy of tenure security (Walker, 1998:7). The DLA’s policy on a gender equitable land reform also stems from the spirit of non-sexism and non-racism reflected in the celebrated Bill of Rights and the Constitution. With regards to women, the white paper policy specifically recognizes that:

A key-contributing factor to women's inability to overcome poverty is lack of access to, and rights in, land. Discriminatory customary and social practices are largely responsible for these inequities. Power relations that impede women's attainment of productive and fulfilling lives operate from the domestic to the highest public level. Legal restrictions also impede women's access to land and the financial services to develop it. (Department of Land affairs, 1997).

However, the DLA policy is vague about the specific ways and strategies that will be used to alleviate the issue of land access, as it states:

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<sup>31</sup> “White Paper” is the term given to the published document embodying government policy within government departments.

Specific strategies and procedures must be devised to ensure that women are enabled to participate fully in the planning and implementation of land reform projects. These have yet to be adequately formulated. Because women generally have less power and authority than men, much more attention must be directed to meeting women's needs and concerns.

(Department of Land Affairs, 1997).

In additions to the White paper on land policy, the DLA also created a Gender Policy Framework, which states as its objective, “mechanisms for ensuring women’s full and equal participation in decision making in land reform projects, communication strategies, gender sensitive methodologies in project identification, planning and data collection and legislative reform and training for both beneficiaries and implementers” (Jacobs, 1998 cited in Davis et al. 2003). However, the DLA has not followed through on some of these policies and the invisibility of women in the land reform process is a concern expressed by some advocacy groups.<sup>32</sup>

Also, the focus and target of the government’s land reform seems directed towards rectifying the racial disparity in the ownership of land, rather than bridging any gap in the gendered division of land ownership. Cheryl Walker is direct in her criticism of this policy, as she notes that “land reform is prominently a program of redress aimed at overturning the huge racial disparities and injustices in the land dispensation, and this, not gender has shaped the terms of the political debate” (2003:130). Walker’s analysis of the state’s gender policy is astute and apt.

The main principle underlying the white paper policy is a neo-liberal, capitalist orientation, as the driving impetus for reform. The policy highlights and enumerates access

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<sup>32</sup> Advocacy groups like the PWAL (Promoting Women’s Access to Land Programme) have been the forefront in this regard.

to land as a basic right, which is to be achieved through a market economy of free enterprise and private ownership, otherwise known as “willing-buyer-willing-seller” concept.<sup>33</sup> There is an important emphasis in the policy of no government intervention. That is, the white paper placed a reliance on the market rather than politically motivated forced dispossession of lands by the State, as in the case of Zimbabwe.<sup>34</sup> Hence the state took a “hands off approach” and subsequently distanced its land reform policy from the radical approach of its neighbour, Zimbabwe. The implication of this hand off, neo-liberal land reform policy is that with the household as the basis for land grant allocation, it precludes independent land ownership for women.

The 1997 white paper policy outlines three main components of the Land reform program. These are: *land redistribution, land restitution and land tenure* and I will illustrate each component as follows:

### **Land Restitution**

Land restitution comprises the restoration of land to people dispossessed of it as a result of the racial policies of Apartheid and specifically the forced removals of Black South Africans from their land after the Land Act of 1913. The Restitution of Land Rights Act provides for the establishment of a Commission and a Land Claims Court, and sets out mechanism to resolve claims through negotiation and mediation between claimants and current owners and holders of contested land (Meer, 1999:72) However, it only limits the

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<sup>33</sup> According to E Lahiff and S Rugege, “Land Redistribution: Neglecting the Urban and Rural Poor” (2002) 3(1) *ESR Review*.NP. online. “This programme consists of the provision of grants and other assistance to would-be landowners to acquire land through the market. This so-called ‘willing seller, willing buyer’ approach allows groups to pool their resources to acquire and jointly hold land, as well as offering opportunities to individuals to access grants that will enable them to purchase land.”

<sup>34</sup> For a nuanced and balanced analytical commentary on Zimbabwe’s land reform program, see amongst others: B Kinsey, “Land Reform, Growth and Equity: Emerging Evidence from Zimbabwe’s Resettlement Program” (1999) 25 (2) *Journal of Southern African Studies* 173 and Moyo et al., “Land Reform and Changing Social Relations for Farm Workers in Zimbabwe” (2000b) 84 *Review of African Political Economy* 181.

land restitution claims to apartheid era and not from 1913 because of the dangers of venturing into long, protracted and complicated histories of land claims and dispossession. Nonetheless, it includes various land rights, both registered and unregistered and accommodates customary law “interests” and “beneficial occupation” of a piece of land for 10 or more year (Walker, 1998:13). Thus broadening the scope and categories for which land claims can be made.

### **Land Redistribution**

The goal of land redistribution as claimed by the DLA is to provide access to agrarian and residential land to the disadvantaged and the poor to meet their residential and productive purposes. This policy translates into making available Settlement/Land Acquisition Grants (SLAG) of R 16,000 to households with incomes of less than R1500/month as well as grants for settlement support and planning (Hall, 2004;DLA, 1997).

### **Land Tenure Reform**

Land tenure reform is aimed at providing land security to all South Africans, under diverse forms of locally appropriate tenure systems, as well as secure tenure aimed at preventing arbitrary and unfair evictions (DLA, 1997; Davis et al, 2001; Govender Van Wyk, 1999, Thwala, 2003). Land tenure reform includes provision for legal recognition and formalization of communal land right in rural area as well as securing tenant rights on most white-owned farms.

Between 1994 and 1996, the Reconstruction and Development programme was the macro-economic policy that structured land reform. This macro-economic policy was changed in 1996 to Growth, Employment and Redistribution policy (GEAR). This change in macro-economic policy focused more on economic growth and productivity, which seeks to

alleviate poverty through export oriented industrial expansion and direct foreign investment (Thwala, 2003). Implicit in this policy change was a shift in focus to urban development as opposed to rural development. The change from RDP to GEAR also promoted a change in the land reform focus, which was called the Land Redistribution and Development Program (LRAD) in 2001. This change in land reform was attributed in part to the dismal statistics of the previous policy (see Fig.2.1,3.2a,b). According to Thwala “by the end of 2001, less than 2% of the land had changed hands from white to black ownership; of the 68,878 land restitution claims only 12, 678 had been resolved, benefiting mostly urban households in the form of monetary compensation rather than actual land restoration; Most of all, the 30% goal of the RDP was far from achieved” (2003:14).

The LRAD program concentrates resources into the development of an emerging black élite of commercial farmers, thereby, “limiting the socially transformative impact of land reform to a small number or relative elites” (Thwala, 2003:16). In addition, the new strategy is not pro-poor, will potentially reinforce the urban-rural division and it does not provide rural poor with any means to diversify their sources of economic livelihood and engage in sustainable livelihood strategies.<sup>35</sup> The LRAD policy shifts the beneficiaries of land program to people who have substantial access to cash, and financial assets. As Ruth Hall (2004) comments, “the program was designed for people with capital to invest, preferably those with agricultural diplomas and had the ability to make a contribution to the cost of land of between R5,000 and R400,000, and depending on the level of contribution, would be eligible for a matching grant of between R20,000 and R100,000 (216).

The LRAD program also changed the land redistribution target from 30% over 5 years to 30% over 15 years. This change in policy still features a dismal progress record

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<sup>35</sup> W Thwala “ Land and Agrarian Reform in South Africa” (2003) *Land Research Action Network*. Online. <http://www.landaction.org/display.php?article=60> at 16.

(see tables 2.1 and 3.1a and 3.1b), targets a middle class elite and focused on individual household claims in urban areas. All the above factors, added to the fact that very few rural claims have been settled to date and the government's new Communal Land Bill means that rural black women have been shafted in the land reform program.

### Land redistribution and tenure reform: land transfers 1994–2004

Year	No. of Projects	Households	Female-headed Households	Hectares
1994	4	1 004	12	71 656
1995	11	1 819	24	12 958
1996	45	5 361	199	60 268
1997	87	10 268	1 415	126 548
1998	209	15 664	2 916	234 274
1999	142	28 177	1 718	244 367
2000	236	31 596	2 967	230 155
2001	360	17 179	2 734	214 338
2002	685	18 817	5 193	291 335
*2003 – Feb 2004	427	22 326	1 413	146 260
Unspecified	132	4 899	58	51 115
<b>TOTAL</b>	<b>2 338</b>	<b>157 110</b>	<b>18 649</b>	<b>1 683 275</b>

\*This table reflects calendar years of 1994–2002; the period 2003–February 2004 computes to 14 months only as reflected in official statistics.

**Fig.2.1 Land Redistribution and Tenure Reform.**

### Land Restitution Statistics

Province	Claims	Households	Hectares	Land Cost (Rand)	Total Award (Rand)
Eastern Cape	12 943	26 742	28 338	198 226 881	700 718 857
Free State	2 031	2 718	43 315	13 051 926	48 018 627
Gauteng	9 312	9 304	3 453	30 285 287	413 607 585
KwaZulu-Natal	10 332	22 909	132 379	230 856 845	697 214 240
Limpopo	1 209	12 722	54 575	129 502 792	205 305 629
Mpumalanga	1 354	14 124	240 014	254 640 523	337 172 320
North West	1 237	11 881	71 484	93 992 542	166 806 424
Northern Cape	1 501	5 273	233 634	69 753 602	136 938 547
Western Cape	8 544	11 653	3 100	8 096 187	347 147 021
<b>Total</b>	<b>48 463</b>	<b>117 326</b>	<b>810 292</b>	<b>1 028 406 585</b>	<b>3 052 929 254</b>

**Table 3.1a** Settled Land Restitution Claims, per Provinces (29th February 2004)

### Land Restitution Statistics

Province	Claims	Households	Hectares	Land Cost (Rand)	Total Award (Rand)
Eastern Cape	15 886	40 358	45 738	204 526 881	868 450 250
Free State	1 674	3 442	45 748	16 909 206	55 800 449
Gauteng	11 932	11 748	3 555	62 537 367	616 080 815
KwaZulu-Natal	10 551	26 307	187 583	487 986 253	998 480 348
Limpopo	1 314	19 886	121 466	236 061 308	373 350 135
Mpumalanga	1 546	20 973	97 983	377 785 091	514 597 858
North West	2 498	13 822	71 484	93 992 542	256 158 485
Northern Cape	1 792	5 564	233 634	69 753 602	146 564 827
Western Cape	9 457	12 685	3 101	8 096 187	384 854 965
<b>Total</b>	<b>56 650</b>	<b>154 785</b>	<b>810 292</b>	<b>1 557 648 437</b>	<b>4 214 338 132</b>

**Table 3.1b** *Settled land restitution claims by province as at 31 August 2004*

*Source: Department of Land Affairs (2004) & Plaas Publications: Umhlaba wethu (August 2004)*

## Communal Land Bill

The controversial Communal Land Bill is a further testament of the influence of traditional authorities on state administered land reform. More than that though, this bill throws into question the state's commitment to equitable land distribution. This Bill is the most recent addition to the state land reform policies and was signed into law in 2004 and sheds considerable light on the way state policies are reinforcing the hegemony and patriarchy of traditional leaders.

Drafted in October 2000, the Bill entitles the transfer of land deeds and titles from the state to traditional authorities in administering and distributing land. The implications of this Bill is two-fold: on the one hand it guarantees that the power to grant title deeds are vested in the community but consequently formalizes the rights and tenure of individuals on the land,

to the exclusion of others who many have informally shared the land (Claassens & Ngubane, 2003:10). The Bill provides that land is to be distributed by a land administration committee. The make up of this committee, as stipulated by the bill is to be made up of: 25% traditional council<sup>36</sup> and “the other 75% must comprise traditional leaders and members of the traditional community selected by the principle customary leaders”(2003:11). The function of this committee includes the allocation of new order rights, the establishment and maintenance of registers and records of all transactions (ibid:11). Furthermore, the bill makes leeway for any dispute resolution to be settled according to customary law.

What this Bill in effect means is that it has sealed and consolidated ultimate power of land administration in the hands of traditional leaders and their patriarchal institutions. The land administration committee, though made leeway for women to be included, did not include any mechanisms for ensuring this or imply any sanctions for not complying. This means that traditional leaders have the *carte blanche* to elect whomever they want to the committee and mostly probably this would translate to male dominated, despotic and nepotistic committees.

The Bill further marginalizes women within the rural economy. “The Bill provides for the registration of existing [land]rights, which generally vest in men, without any proviso that women's rights could also be asserted or registered”(Cousins, 2004). The Bill also gives discretionary powers to the Minister of Land Affairs, amongst which are decisions on what constitutes equal land rights for women. This begs the question of how exactly will the Minister administer these land right decisions? Furthermore, by investing considerable power in the Minister and the traditional leaders, what happens to the government's policy on land

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<sup>36</sup> A Claassens and S Ngubane, “Rural Women, Land Rights and the Communal Land Rights Bill.” Draft Paper presented at the Women's Legal Centre Conference, 2003. The traditional councils were a legacy of Tribal Authorities formed by the apartheid inspired 1951 Bantu Authorities Act, but with new provisions under the new ANC government. This provision, in the form of the Traditional Leadership and Governance Framework Bill mandated that 30% of the council's members should include women and 25% should be elected.

rights and redressing the inequality of apartheid? Does not this bill in effect represent a regression from the steps taken in making land reform a more transparent and democratic institution? These are some of the issues and unanswered questions that the bill raises. As Claasen & Ngubane (2003) remark, “it [the Bill] heralds a giant leap backwards for rural people particularly women- not only are they deprived of the right to choose who will administer their land rights, but customary law is re-enforced at the expense of equality and human rights standards” (11). This bill effectively makes a mockery of the constitutional premise of democratic, equality and transparency and accountability of the government and presents a locus to critique the whole land reform process, which will be done in the next section.

## **Critique of Land Reform**

One of the critiques of the land reform policy is based on its market orientation. According to Ruth Hall (2004), “the reliance on the market and on willing sellers to make land available for redistribution, and a relatively ‘hands-off’ state, means that land reform falls short of confronting and transforming entrenched forms of exclusion and marginality” (225). The principle of land redistribution for starters is premised on household rather than individuals, which benefits men more because they are seen as representative of the household and they are more able to match the income level needed to secure a loan than women. The initial advantages of tenure reform for women is the fact that it provided the possibility and framework for them to have individual ownership of land, independent of male relatives and customary regulation. However, this is in principle only and with the Communal Land Bill, which directs the traditional authorities as the key administrators of land allocation, the disadvantage of tenure reform for women is large. Land restitution on its part is based on rights claim and the essential objective of this policy is to return land rights

to those disposed of them in the past. Due to what Walker characterizes as “the patriarchal nature of and holdings in the past,” the result is that the majority of the beneficiaries of this scheme are men.

Another criticism of the South African government’s land reform process lies in the way gender is addressed. The concept of “gender” as theorized in the land reform policy is problematic on several accounts. For starters, it is used in an interchangeable and ambiguous way. Whereas in other cases (like the reference in the white paper policy), “gender” is acknowledged as a conceptual framework and features references to women’s role as beneficiaries of the reform. In other cases, there is more of a sense of gender being used as an addendum rather than as a comprehensive category. As Meer (1999) states, “gender is not a central analytical concern in the policy formulation and tends to be added on to an analysis that hinges on an understanding of race as the main stratifier of social relations and the prime determinant of resource and power imbalances”(73). Walker concurs by stating that “since 1994, the minister for land affairs and the DLA’s senior management have treated the goal of gender equity essentially as an undertaking for formal symbolic occasions when the broader transformatory goals of liberation are explicitly remembered” (2003:129). Therefore, women’s access to and control of resources and how social frameworks enhances or impedes this access are not analytically reviewed on a consistent and day-to-day basis.

The Land Reform’s demand-led, market based, willing-buyer-willing-seller principle, alienates women and promotes the invisibility of women as it uses the “households” rather than the individual as the unit of grant allocation. This principle fails to recognize that poor rural women are at a disadvantage as they have poor access or no financial assets at all to qualify for the grant allocation, as a minimum of R1500 of personal contribution was required, and in most cases women have to rely on a male relative for this. When the grant is

given and considered on an individual basis which feminist groups were lobbying for and which the DLA changed in its post 2000 reform policy, this elevates the woman's status within the household and boosts her bargaining power relative to the male counterpart and provided women with more sense of independence, security and well-being (Agarwal, 1994; Davis et al 2001). Though the shift of focus from household level to the individual did appear in the DLA's policy in 2000, and in theory provided the possibilities for women to acquire land rights and be independent of family and male control, the women who were able to access this were the well educated and better off women who had access to the required minimum contribution, therefore failing to account for class differentials even within the scope of gender (Walker, 1998, Hall 2004).

What is the significance of this in the context of land access for rural South African women and policy analysis of gender equity? Essentially, it means that for all intents and purpose, the DLA's gender policy was lacking a nuanced, multi-layered conception of gender relations that accounted for class and economic differentials, amongst other things (such as education, race, access to resources etc). A thorough assessment of the three tenets of land reform,<sup>37</sup> and their impact on women has yet to be undertaken by the state. As Kgoptso Mokgope reflects, "land policy fails to consider the potential gender impacts of land use as a result of gender neutral or blind assumptions that influence and shape land policy and implementation" (2000:82). Land reform policy supposedly targets the 'poor' and emphasizes the agricultural use of the land. However, in so doing, this policy fails to specify and identify the various categories that exists within the broad confines of 'poor' as well as the many uses of land to sustain rural livelihoods.

This broad-brush approach has an impact on particular women, whose activities are determined by a complex set of socially sanctioned and constructed roles (Mokgope, 2000;

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<sup>37</sup> As mentioned earlier, these are Land restitution, Land redistribution and Land Tenure.

Agarwal, 1994). Indeed, the DLA's policy lends credence to the critique that "gender still remains an annexure, something that implementers find cumbersome" (Govender Van Wyk, 1999). Cheryl Walker echoes this critique in remarking that the DLA's gender equity policy is put on a back burner and only made reference to at symbolic and convenient times- hence not a compass for steering the day-to-day decisions that shape land reform in practice (Walker, 2003:129). In other words, gender as a catch phrase and rhetoric is featured in land reform policy, but what does it mean? How do men and women relate to, access and utilize land? What are women's resource constraints in using land? These are some of the pertinent question that from the onset should be asked and used to guide the land reform process. Without thoroughly researching the answers to these questions, a clear and nuanced notion of how to achieve an effective strategy that will guarantee women's independent rights and access to land will always be elusive.

A gendered analysis of land use is essential in comprehending the importance of land use to women's survival and social status. As it is, Black rural women's dependence on land is not so much on agricultural production, as it is the third most important rural livelihood. The symbolic and strategic importance of land in impoverished former homelands stems not so much in the context of peasant farming, which Walker (1998) remarks, has long ceased to be an economic mainstay, but the land is valuable for cash crops and the non-commoditized resources it offers to poor people like firewood, medicinal herbs, thatches for roofs etc. (7). Thus land is valued as a means of sustainable livelihoods and critically important in articulating the daily struggle for survival. Gender has been mentioned in a superficial ad lib way within the land distribution program, but not supported by any real political commitment nor a clear cut strategy for implementation and progress (Davis et al, 2004; Meer 1999, Walker, 2003).

Women and men's relationship to each other and to the land, the multiple institutional layers that structure this relationship and the power differentials and cultural constraints that shape them are all factors that interact to determine and shape women's social realities and challenge the quality of their livelihoods. Indeed, the issue of land rights cannot be seen in isolation from the diverse dimension of women's multiple, ongoing struggles over resources and meaning and recognition (Agarwal, 1994:421). The understanding of gender relations as deriving from social arrangements and cultural rules which provide men of a given social class greater capacity than women to mobilize a variety of cultural rules and material resources in pursuit of their own interest is crucial (as qtd. in Meer, 1999:75). This is because a gendered analysis offers an analytical paradigm and standpoint from which the role of institutions in reproducing unequal social relations can be understood.

In examining the South African Constitution as it pertains to gender relations, customary law and the DLA's land policy, the intent of this analysis has been to show that gender inequalities are re-affirmed and reproduced by customary and state institutions. Most importantly, although each institution appears to be self-contained, they in reality act on each other and need to be understood in relation to each other (Meer, 1999:75). The state plays an implicit role in maintaining gender inequality and this is demonstrated by its political unwillingness to wade in the murky waters of gender relations. This unwillingness is evidenced in the state's vague approach to guarding women's equality right in the Constitution, leaving it open to judicial interpretation in a language couched in ambiguities. This political hesitancy further trickles down to the DLA, whose white paper policy is a symbol of tokenism to gender equality. Its neo-liberal economic priorities are not hidden as the land reform policy favours commercial farmers over landless people. Further, it appears to occupy a low priority on the government's agenda, as Meer (1999) notes "the paltry

allocation of 0.03% of the national budget to land reform, the shortage of staff and the fragmented, cumbersome bureaucracy within which it operates” (77). The patriarchal agenda of customary law is however more evident and less circumspect in the unwillingness of traditional leaders to share economic and political power base. It is also demonstrated in their reluctance to include women in equal bargaining leverage and self-sustenance by restricting access to land, resources, economic base on the basis of tradition, culture and customs. What is the bigger picture represented by these institutions and what is the implication for rural women in South Africa and their bid for equal access to resources?

These institutions of the state, (the cultural) community right down to the household level testify that patriarchy is an element deeply imbedded in the social, economic and political fabric of South African society. More importantly it serves each institution’s interest to function to reproduce its power base and maintain its status quo. What this means for black rural women in South Africa is that their bargaining power within the state/customary legal paradigms for greater economic and social autonomy is severely limited and curtailed by an economic system that is neo-liberal in intent and purpose, a cultural system that is patriarchal and patrilineal in its outlook and a political system that is vaguely committed to democracy.

The socio-political stage of South African society is therefore crowded and set with actors with competing needs and higher bargaining power, leaving little room for South African women to advance their needs. As Agarwal (1994) points out, “advancing women’s independent land rights means admitting new contenders for a share in a scarce and highly valuable resource which determines economic well being and shapes power relations in the countryside; and it means extending the conflict over land that has existed largely between men, to men and women thus bringing it into the family’s inner courtyard” (3). Thus,

inferring from Agarwal's analysis, if women want to participate and share resources amidst competing political interests and challenge the social norms and practices that are impeding their progress, they will have to make themselves visible, not only from outside the parameters of the state and social institutions which they have been relegated to, but from within it as well and play what Agarwal calls "a significant role as law makers, and not just as law takers"(Agarwal, 1994: 248). In other words, women have to strategically place themselves within the parameters created by legal pluralism by working with traditional authorities and state intuitions to effect a more women-friendly and sensitive framework, but also working outside of these institutions by forming their own grassroots mobilization movements to attend to their needs in ways that neither state nor cultural institutions can.

This therefore sets the scene for the next chapter, which will draw on a case study of women's mobilization for land rights to demonstrate the ways in which women are mounting their resistance and advocating for change. More than that, it will show women's abilities not as passive recipients of false consciousness or passive takers of the law, but as agents of change. The case study will show the basis of women's narrative and realization of their marginalization from equal access to land. Not only does it demonstrate women's ability to be vocal and proactive, but also creative in the ways in which they exercise their demands for change.

### **Chapter III :“We are Women, We are the Land!”**

We come forth from the earth  
 To nurture and feed  
 But the visions of our ancestors call  
 To fight and fight for the land  
 The land that is ours  
 We are the women  
 We are the land

We have come together  
 To celebrate  
 In song and dance  
 we rejoice in our knowledge, our struggle, our land  
 We are the women  
 We are the land

We are in the stream of the landless  
 But our voices resound uniquely, clearly  
 The earth is calling,  
 Women take your rightful places  
 You are the women!  
 You are the land!  
 Lead the masses to the land!<sup>38</sup>

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<sup>38</sup> This poem, as well as the title “We are Women, We are Land” is borrowed from M Festus. “We are women. We are land.” (2003) 3(2) *Partners in Development*. online. [www.interfund.org.za](http://www.interfund.org.za)

*On a cool Sunday in November 1999, rural women marched naked in the streets to make their demands heard. Seventy-year-old Josephine Tsabedza and 27 other rural women spent a week in jail after being arrested for marching naked down the main road of Buffelspruit, in Mpumalanga, in protest against a local chief who allowed cattle to eat their maize crops and refused to recognize their rights to land. They stripped naked as a means of expressing their anger and to show the chief their empty stomachs, as Tsabedze said "We marched all along the streets naked to show the chief we are angry and we wanted to show him our empty stomachs. My main worry is the children. That's why I ended up in jail. I did all this because of hunger. Eight years earlier 200 women and 20 men had reportedly paid R50 each to a local induna for land on which to grow maize. The women argued that the chief promised to give them new land, but when nothing happened they decided to protest."<sup>39</sup>(Shongwe, 2000:18)*

*All the women were charged with public indecency, but the charges were withdrawn in court later. They've since enlisted the help of a land rights NGO, The Rural Action Committee (TRAC), in Nelspruit. "Nothing has changed, however. Most women in this village don't grow crops because each time they do, men let their cattle loose in the fields and threaten to beat them up when they complain," said one member. Lazarus Masuku at TRAC said the organization was dealing with three similar cases elsewhere in the province. Change may be slow, but these cases may just be the spark needed to galvanize more women into insisting on their rights to land. Ten years of*

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<sup>39</sup> This story was reported by N Shongwe, "Women strip naked to show hungry stomachs" (2000) 10 *Land and Rural Digest* but was subsequently quoted and referenced in other articles and journals such as Africa Eye News Service (2001).

*democratic rule has done little to improve the ability of South African women, especially rural women, to own land and have security of tenure.*<sup>40</sup>

The preceding newspaper articles about the plight of a group of women protesting their land rights gained national coverage in South Africa, and forms the backdrop against which this chapter is set. This chapter seeks to use the Buffelspruit women's case study to show and examine the terrains on which women's land rights are being contested. This case study highlights the contradictions between tradition, constitutional rights as well as the power imbalance and struggle inherent in gender relations as manifested in the struggle for land and economic resources. Most importantly, it shows women's resistance and defiance against a system that is discriminatory and ignorant of their needs and survival.

This case study also provides a glaring example of desperation among poor and marginalized rural women, whose vulnerable social status makes their access to land limited and their ability to retain this land, at best, precarious. The first point of departure should be in highlighting the basis for the selection of this case study as well as some of the challenges it presents as a secondary resource.

As noted in the introduction, a first hand field study was an impossible undertaking for this research; the reliance on a secondary material was therefore necessary. Therefore the limitation of this case study as a secondary resource is not lost on the author, as my interpretations and analysis are derived mainly from the research of Haripriya Rangan and Mary Gilmartin's (2002) fieldwork in Mpumalanga. There is therefore an overt reliance on their interpretation and analysis of the social relations in Buffelspruit and the events that transpired. It is also important to acknowledge that the sources of Rangan and Gilmartin's analysis are a combination of gossip, fieldwork and informants, which accounts for some of

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<sup>40</sup> This addendum to the story was by Sizwe sama Yende and Jabu Mhlabane in an undated article titled "Land still a dream for women" from an online new source called Amalungelo.

the vagueness with regards to specific time and date frame. That being said though, I am not dismissing the value of their research and reliance on informal sources of information. Indeed, as they assert, “rather than dismissing gossip and rumour as spurious or unreliable, it is far more worthwhile to see these as rich and versatile sources of information exchange that not only provide insights into the social content of extraordinary events, but also for making sense of the contradictions and conflicts that pervade the everyday concerns and lived dimensions of communities” (2002:644). The reliance on informal sources of information is especially important in the context of rural women’s narrative. As this case study will show, rural women’s experiences within the context of post-apartheid land reform is not always widely documented nor readily available in print as their stories are produced and reproduced, mostly (but not exclusively) using oral medium.<sup>41</sup> Also, there is the issue of trust and suspicion, an outside researcher and non-member of the community, which Gilmartin and Rangan allude to in accounting for their difficulty of gathering information. I am not suggesting this case study is representative of the entire region, country or even plight of all rural women’s struggle to access land, as this varies from community to community. But this case study is important as one example demonstrating some of the challenges of documenting women’s experiences and also the counter-challenge women face in contesting hierarchal and patriarchal allocation of land.

This case study was chosen for a variety of reasons. It started as a localized incident that gained national attention and notoriety, it demonstrated rural women’s plight and limited options for survival on the land. Finally, this case study highlights the entrenched opposition to women’s land rights. As I will discuss later, even in a case such as this, which attracted wide-spread attention, attempts to address women’s access to land is undermined by

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<sup>41</sup> This is not to assert of course that there are no case studies or field research available, see, Walker, *supra* n.24 at 55-73.

entrenched interests unwilling to address the broad based political and economic subordination that structures women's access to land.

To start, let me put the case study in context by examining the historical and political history of Buffelspruit and women's relationship to land there.

## **History & Geography**

Buffelspruit<sup>42</sup> is located in Mpumalanga, one of the newly created provinces in post-1994 South Africa (see Figure 4.1). Mpumalanga is located in North-Eastern part of the country and covers over 6.5% of the country's surface area. It has approximately 3 million people, most of whom are located in peri-rural areas and generates 8% of the country's annual economic output.<sup>43</sup>

Buffelspruit is located within the Nkomazi region, which includes the eastern lowvelds or lowlands of Mpumalanga and is near the popular touristic destination of the Kruger National Park. It shares a border with Mozambique to the east and Swaziland to the south. Its geographical and spatial location has important and historical implications.

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<sup>42</sup> The name Buffelspruit was changed to Mhlambayantsi (which means "where buffaloes used to cross the river) on May 30<sup>th</sup> 2003 by the South African Geographical Names Systems, which is under the auspices of the Department of Arts and Culture. This has accounted in part for the difficulty in obtaining an aerial map pinpointing the specific location of Buffelspruit. Also, because it is a rural area, one is hard pressed to find an official map locating it, as all the government and academic sites researched by this author only showed the locations of major towns and cities. However, it is important to note that because the name changed took effect after the publication of Rangan & Gilmartin's fieldwork (2002) and in the interest of maintaining historical accuracy, Buffelspruit will be the name used throughout this chapter.

<sup>43</sup> Information derived from [www.mpumalanga.com](http://www.mpumalanga.com) [accessed on February 27<sup>th</sup> 2004]

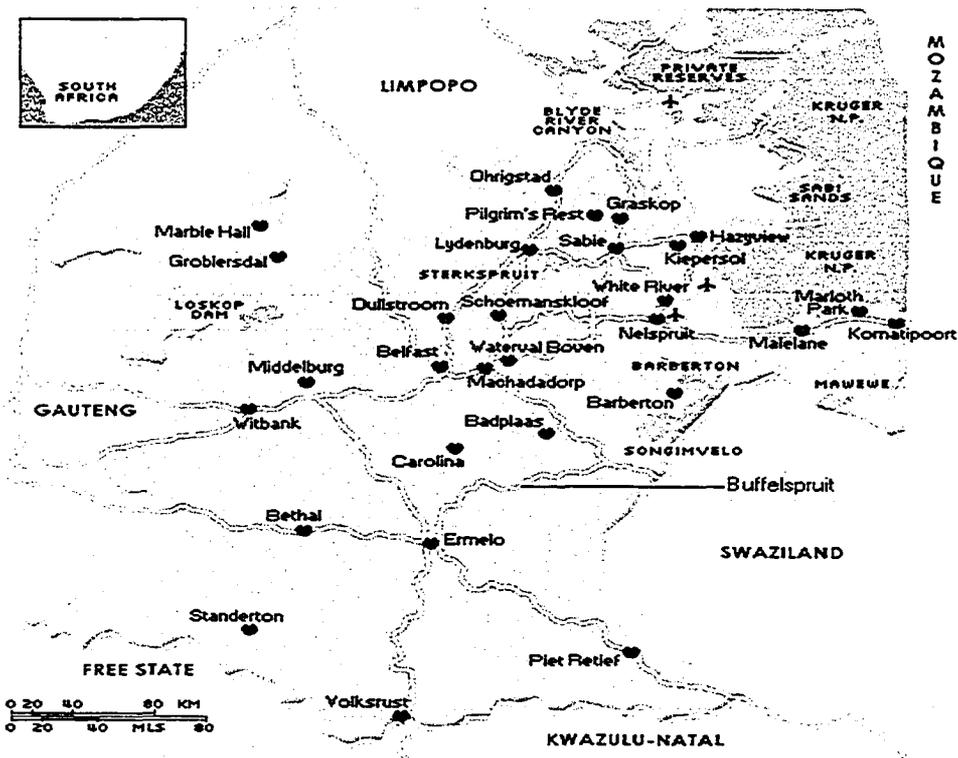


Figure 4.1 Map of Mpumalanga Province showing Buffelspruit.<sup>44</sup>

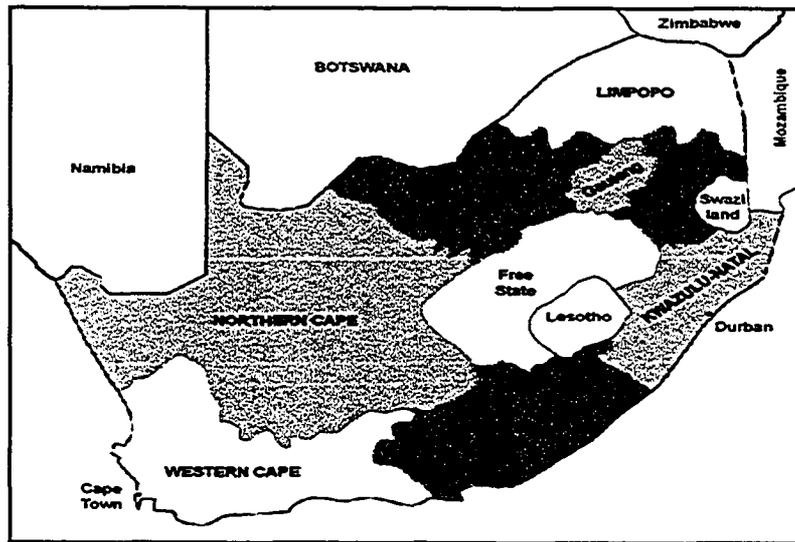


Figure 4.1 South African Map showing the 9 provinces<sup>45</sup>

<sup>44</sup> Map was obtained from [www.sa-venues.com](http://www.sa-venues.com) and modified to show Buffelspruit.

<sup>45</sup> Map was obtained from: <http://www.ruf.rice.edu/~raar/ImagesSAMap.html>

Historically, the lowlands of Mpumalanga as well as the Nkomazi Region have been a hub of activities and competing interests. The Eastern Lowveld has been famous for the seasonal production of tropical and exotic fruits, which have been marketed both domestically and abroad. The harvest of these fruits not only created a lucrative business for white commercial farmers, but relies on cheap labour and thus created seasonal employment for migrant workers from neighbouring Swaziland and Mozambique as well as women and men from the surrounding rural areas.<sup>46</sup>

However, the viability of the tropical fruits market, especially in the 1940s and during the apartheid era meant the dispossession of African communities from their lands, especially the fertile regions of Nkomazi, in favour of commercial and privatized farmlands. Compounding these forced removals is the growth of tourism, with the main attraction been the Kruger National Park. Not only has this translated into an increase in the service related industries that tourism needs, but several white-owned farms and estates adjoining the Park have been converted into private game reserves and lodges that primarily serve wealthy tourists from around the world (Rangan & Gilmartin, 2002: 646).

The building of the Drekoppies dam further complicates the matter. This project, according to Rangan and Gilmartin was in accordance with an agreement between Swaziland and South Africa to provide a secure source of water supply for Swaziland's needs (2002:647). The dam construction however meant the removal and resettlement of households along the site. Population density that led to land scarcity (both for residential purposes as well as for subsistence farming and cattle grazing for the rural communities in the Nkomazi Region) ensued due to this relocation and other factors. The above named factors were namely the historical forced removals that occurred during the apartheid era to

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<sup>46</sup> See Rangan and Gilmartin, supra n.10, at 646.

make way for commercial farming needs, the influx of migrant workers and tourists, as well as natural population growth (2002:647).

## **Competing Interest for Land**

Given these competing interests, access to land becomes a crucial undertaking and in some cases, the lifeline, needed for rural communities in Mpumalanga to survive. Access to land remains the critical factor that provides households with a modicum of security and some degree of flexibility for seeking permanent or seasonal employment in surrounding areas (Rangan & Gilmartin: 2002, 647). What is more, observes Rangan and Gilmartin, “social differentiation within rural settlements of KaNgwane mainly occurs on the basis and extent to which households gain privileged access to traditional authority, land and cattle holdings and are able to mobilize or tap into diverse sources of income from small business and salaried employment” (2002:647). Land therefore is a currency that not only predicts and determines economic survival, but also guarantees social status and mobility.

With this scarcity of land, the federal government intervened to allot state trust lands<sup>47</sup> to dispossessed households and families.<sup>48</sup> State trust land adjoining the settlement and dam sites were given to households living around the proposed dam site, and communal land were put under the jurisdiction of the Matsamo Traditional Authority (Rangan & Gilmartin: 2002, 647). The state demarcated land not only to dislocated households, but for communal land use. According to Rangan and Gilmartin, “the government launched a new policy for promoting commercial agriculture within state trust land which enabled prosperous households in the settlements to obtain Permission To Occupy or PTOs (which were official

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<sup>47</sup> According to Walker, *supra* n.24, at 57 state trust lands are communal land bought from white farmers with state subsidies at market prices.

<sup>48</sup> The time frame for this is not certain, as it was not stated in Rangan & Gilmartin’s work and neither was it verifiable through online search by this author.

land deed documents which granted temporary rights of occupancy to the holder) and begin cultivation of tropical fruits” (2002:648). The rest of the state trust land, which was regarded as communal grazing land, was put under the guardianship/trusteeship of the traditional authorities or the *induna* to allocate as demanded, or as they deem necessary (2002).

Taking advantage of this opportunity to own land to improve their economic survival, an initial group of 17 women in Buffelspruit who were poor, either widowed or without financial support from their migrant spouses and with children to raise approached the *induna* to ask for land from the communal grazing allotment to use for subsistence farming. The *induna* made informal arrangements to grant each household approximately 0.2 hectares of land with the payment of R50 by each household. By 1996, the initial group of 17 expanded to 205, mostly women headed households who occupied a total area of 25hectares, leaving 475 hectares for communal grazing (2002:648). These women subsequently formed an association called Silwanendlala Farmers Unbuntu Association (SFUA) and elected their own head, or *induna*, to help represent them and their interests in the community. This representation became essential as they were up against the more powerful, male dominated and politically favoured Buffelspruit Cattle Owners Association. The cattle owners consisted mostly of men who were Black, male, commercial farmers who had taken advantage of opportunities made available by the State to own their own lucrative tropical fruit farms as well as to seek access to communal grazing land for their cattle, courtesy of the traditional authorities. They took advantage of their newfound status and wealth to increase their cattle holdings.<sup>49</sup>

It is perhaps important to emphasize and highlight the significance of cattle in rural South African communities. Like money, it is a symbolic, fluid currency, used for market exchanges, denoting one’s social status and most importantly for marriage. It is often used as

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<sup>49</sup> Rangan and Gilmartin, *supra* n.10, at 649.

a bride price or “lobola” as it is traditionally known. A man therefore could not marry without ample access to cattle to exchange for his bride and as evidence of his financial security and his ability to provide for his bride and family. To further this, a man’s status within the mostly patrilineal rural communities is enhanced by marriage, as a married man is no longer a boy, but an elder in the community who is included in consultations and decision-making processes. Cattle ownership therefore had a symbolic and practical value.

The catalyst to the women’s dramatic and unconventional protest in November 1999 occurred on the subject of cattle grazing land. A number of traffic incidents involving stray cattle and tourist buses shuttling between Swaziland and the Krueger National Park prompted the Police Authority to approach the Matsamo Traditional Authority in order to come up with a solution to prevent further incidents. With dwindling communal grazing lands and increasing cattle numbers, a new set of tensions rose between the commercial cattle owning farmers and the subsistence landowners.

The fast dwindling communal grazing land became the new battlefield where new lines were drawn and forces aligned- The Bufflespruit Cattle owners Association rallied around the chief of the Mastamo Traditional Authority (MTA) and banded together to find an ‘urgent’ solution to the cattle-problem- which was subsequently transformed into a land-use altercation around ‘grazing’ versus subsistence farming. (2002:649).

By locating the assertion for land within a paradigm of ‘grazing’ versus ‘subsistence’ farming, the MTA was ignoring glaring evidence that communal grazing land had been reduced and two-thirds taken over by commercial farmers with only 25 hectares allocated to the SFUA for subsistence farming (2002:649).

With the political and tacit support of the MTA, the cattle owners blamed the Silwanendlala Farmers Unbuntu Association (SFUA) as the cause of the straying cattle. They argued that the SFUA was encroaching on communal grazing land, leaving the cattle no choice but to stray elsewhere in search of pasture and, ultimately running a foul of Kruger traffic. The tribal authority therefore ruled that subsistence cultivation on what was deemed communal land was the problem and since the lands were given on a temporary basis to the women, cultivation should cease after the final harvest in 1999 and the land returned for use as communal grazing property. The SFUA, justifiably incensed, refused to comply with the demand citing the payment made to secure the plots of land they were given (2002:651). To these women, the money they paid to the induna was a justification of their entitlement to use the land (2002:651).

The women defied the ban on planting and went ahead to cultivate maize during the planting season in the spring planting season of October 1999. In a retaliatory show of strength and will, the cattle owners broke the fencing surrounding the women's plots and allowed the cattle to destroy and graze on the women's lands, subsequently destroying their harvest. In despair and desperation, the women appealed to the Police Authorities, the Traditional Authorities and confronted the Cattle Farmers Association. The police were helpless and came up empty in their investigations, the Traditional Authorities were apathetic and the farmers were callous in their response (2002:651).

As a last resort and ultimate act of defiance and desperation, 27 women members of the SFUA between the ages of 50 and 70 stripped naked in front of the chief and along the major road to draw attention to their plight and demand immediate action. The women were arrested and jailed for a week on grounds of public indecency. Their plight and the death of one of the members in jail (which was as a result of her frailty) caught the attention of a

public defender who was brought in from the provincial capital to defend the women. A Transvaal Rural Action Committee (TRAC) worker within the National Land Council, also became involved, acting as a representative for the women, lobbying the local and provincial council of the Department of Housing and Land Administration (DHLA) on the women's behalf (2002:652).

It took exactly a year after the women's protest for a working committee to be organized by the DHLA, which compromised local and provincial authorities as well as the Matsamo Traditional Authorities and the Cattle owners. Conspicuously absent was the SFUA. They were excluded and no representation was provided for them. The "solution" reached by the ad hoc committee was the allocation of 27 hectares of land allocated to the SFUA for subsistence agriculture. This land was located on the peripheries of the communal grazing area. Once again, the land was given on a temporary basis with no occupancy title or deeds guaranteed. The DHLA was to help the women in their relocation and in clearing the new plot, but the tractors allocated to the women were faulty. Due to bureaucratic and administrative red tape, the women's issues (permanent access to farm land and farming tools to utilize on the land) were once again put on the backburner and forgotten.

The above case study occurred in October 1999. However, six years onwards, there are no reports available or indication as to the final resolution for the women. Neither is there a progress report available (for this particular case) to indicate what has ensued since 1999. As a case study, this study in Buffelspruit nonetheless serves to highlight some key issues concerning women's access to land in Post-Apartheid South Africa.

Perhaps the most glaring observations from the case study is that the real issue at hand was not about cattle grazing versus subsistence farming, but more about how the terms of conflict became written into existing gender inequalities. Given that the majority of the

SFUA members were women, their opposition to ending subsistence farming on communal land was portrayed, according to Rangan and Gilmartin's field research as a 'women problem' (2002:652). The women-problem was not a colloquial reference to gendered problems of unequal access to land or gender bias, inherent in privileging commercial farming over subsistence farming. Rather, the problem was the women themselves who drew attention to gender inequalities and were vocal in their protests. The women were characterized as troublemakers who stood in opposition to the collective welfare of the community. According to the traditional authorities and the BFA, "the cattle problem was proving difficult to resolve because the women were recalcitrant and uninterested in working for a co-operative solution for the collective well-being of the community" (2002:650). In effect, the women were alienated and chastised not because their claims had no merit, but as a technique to ensure their agenda would lack legitimacy and would fail to attract support from the broader community as a whole. By deeming the women recalcitrant and characterizing them as 'women problem', the Cattle Association were essentially playing to existing cultural expectations of 'proper' behaviour of women. The women were expected to comply with the rulings from the traditional authority and when they refused, they were judged as being indignant and going against cultural norms. Any understanding of them as women who had genuine concern was sidelined.

At the heart of this issue was entitlement. The Cattle Owners Association felt threatened by the women's land claim. This is because land was the basis of the men's power and social domination. According to Cross and Friedman, "men's objection to tenure rights for women are rooted partly in the fear of the breakdown of social hierarchy and the perception that women do not share the dominant ideology concerning land use and transfer" (1997: 26). Men often fear that allowing women a voice of their own will result in women

forming a stronger public power bloc, able to take control of land matters and therefore control over the community's all important recruitment process (Cross and Friedman, 1997). In applying this analysis to the case study, one can infer that land in the rural political economy forms the basis of power relations and also 'social fears.' The Cattleowners saw the SFUA's subsistence farming as a threat to men's authority and traditional control over land and resources.

The concept of land as a tool for building networks and allegiances is also relevant for this case study analysis. According to Cross and Friedman, men use land to build networks and underpin social relations especially local leaders who use land in exchange for support and allegiance (1997:26). This implies that through land allocation, there is a strategic interplay of politics and power where male dominance is implied and reinforced. The Matsamo Traditional Authority was therefore unabashed in its support of the Cattle Owners in their claim to grazing land because of the political clout of the cattle owners association. In supporting the claims of the Cattle owners, the traditional authority was essentially securing an implicit future allegiance and power base. It is therefore not surprising that the traditional authorities and the cattle owners closed ranks to effectively shut the SFUA women out of the dispute settlement process.

It is interesting to note that the SFUA did appoint a male *induna* who was their elected representative. However, he lacked the political power base as the overall *induna* from the Matsamo Traditional Authority, he was therefore unable to adequately represent the women or win the struggle for legitimacy. The SFUA representative's lack of political leverage, enabled the MTA *induna* to dismiss him as a mere "spokesman" for the women and not a legitimate representative. Moreover, the gendered nature of the conflict put the SFUA *induna* in an embarrassing position of being seen as representing women, which can

be likened to a betrayal of his manhood and hence eliminate any sympathetic support from the male populace of the community (2002:652). Indeed at this juncture, the lines of popular support had been drawn on gendered lines. With lack of support and lack of adequate representation, the women, in effect, were on their own.

The case study also highlights the difference in the way men and women utilize and prioritize land. Whereas the women's land claim was based on small holding for subsistence agriculture, the men were involved in larger scale use of land to accommodate livestock holding. The gendered use of land lends credence to Cross and Friedman's assertion that "men generally see themselves as managers of the strategies that relate the family to the community in a micro-political context, but also as providers of saving and of cash income; while women are seen as managers of the internal resources of the household, and as providers of food." (1997:27). This gendered prioritization of land use also reinforces the metaphorical and spatial notions of public and private divide. Women are customarily restricted in their relationship to land in a purely economic sense, "they are inclined to treat land as an economic asset, for short-term social reproduction and immediate support of their household and children" (1997:27). By concentrating on small-scale production geared towards the household, the SFUA women can be characterized as operating within the private realm. In contrast, men are able to use land in a broader political and economic context. The cattle owners therefore used the land in an economic and practical sense for larger scale livestock production and in a political sense to reinforce their political power and hierarchy.

Essentially though, the real issue at hand, which was a question of commercial agriculture versus subsistence farming, was never effectively addressed. Nor was any real solution provided. According to Rangan and Gilmartin's critique, "all the working committee had achieved was to 'discipline' the SFUA and its women members, first by

excluding them from the process of negotiation and then by giving them temporary access to marginal plots on the fringe of the settlement and quite literally removing the ‘women-problem’ from its existing location to the geographical periphery and social margins of the settlement” (2002:652). In so doing, both the traditional leaders and the local government and DLA were complacent in this regard. Even though an amicable and seemingly democratic means of resolving the issue was put forward in forming the ad hoc committee, the exclusion of the SFUA and the subsequent portrayal of its members as “women-problem” meant that they were seen as the object of “problem-solving” rather than as “stakeholders” or participants in the process of “dispute resolution” (2002:654). As a popular Nigerian proverb goes, “you cannot shave a person’s head in the person’s absence” implying that an issue of vital importance cannot be discussed without the stakeholders present and this is precisely what happened to the SFUA members. The vital issue of land concerning them was discussed with neither their participation nor consultation. How can women’s emancipation, empowerment and access to land and economic resources be envisioned without their participation?

## **Conclusions**

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It is impossible to base a critique of land reform in South Africa on one case study. However, there are important points and implications for social and rural developments as well as women’s empowerment that emerges from this example. This case study demonstrates how land access and demands differ along gender lines. Not only does this case study highlight the reality that women’s access to land, their priorities and resources are significantly different from their male counterparts, it also shows how bureaucracy, traditional leadership and patriarchy impinges negatively on rural women’s ability to own

land. It demonstrates how policies favour and prioritize land access for men who use it primarily for larger scale economic production, (which falls in line with the government's commitment to neo-liberal policies and development) as opposed to women whose primary utility of the land is for subsistence farming.

This case study also clearly illustrates that women are not fully on the political or land agenda. Not only are they excluded from consultation processes and development initiatives and planning, but their needs are regarded as secondary to men's and in articulating or being vocal about this, they are labelled as "trouble makers". They are thus sidelined in important decisions concerning their livelihoods. Most importantly, illiteracy and ignorance about policy issues weakens rural women's ability to negotiate and bargain on their behalves. As this case study shows, women's voices had to be represented and channelled through a third party, articulating on their behalf, which loses the power and meaning their voice should have had. Women's bargaining powers are significantly more poignant, symbolic, nuanced and effective when articulated and voiced by the women themselves. Most importantly, it is an empowering process for them.

The act of open defiance and courage it took to break social norms and a taboo by stripping naked in front of the chief is important to highlight, as is the underlying cause of the women's action. The women of Buffelsruit did not wait passively for the government to deliver gender equity; they did not expect and neither did they receive any kind of financial assistance. There was a political struggle for the right to occupy and cultivate their original subsistence plots and ensure food security for their households (Rangan & Gilmartin: 2002,645). It was an act of courage and defiance, which pointed to their desperation, their need to be heard and acknowledged, not only by their local authorities, but by larger macro-level frameworks and policies. It brought attention not only to their plight as poor,

uneducated rural women with no other means for survival than their land, but also to their dire economic conditions, which land reform policies are either side stepping or completely ignoring.

Perhaps the lingering lesson that this case study serves to illuminate lies in the fact that these women were able to draw attention to their plight, but the underlying question becomes for how long were they able to sustain the attention to their protest? It took a whole year from the time the women protested in order for the bureaucratic machinery to kick into place in the form of an ad hoc committee. Because of their lack of access to the resources that would help them build strong women's organizations, rural women often become dependent on NGOs and even on government. (Festus, 2003:186) argues that the most effective way for rural women to challenge their marginalization is through building strong organizations of their own, grounded in their socio-political context. This is precisely what the SFUA represented. And yet despite following this strategy advocated by Festus, why then is it that the SFUA women were still excluded from participating in the dispute resolution?

The SFUA's experience is a testament to the strong counter-challenge they face from tribal authorities who feel threatened by their roles. The cattle owner's fear (and implicitly men's) resistant opposition to women's access to land is rooted in the need to maintain the political status quo that guarantees their social dominance. More than that, I would argue that their fear is rooted in an unwillingness to change social norms that subordinates women. This fear is further crystallized by the knowledge that social change is imminent and the acknowledgement of the vulnerability of customary legal institutions. Herein lies the fertile ground for women's activism to breed.

In publicly protesting their land rights, the SFUA women used the public arena as a site of contestation and in so doing, challenge the dichotomous construct of the public/private

divide. In effect, the SFUA women took their grievance beyond their immediate neighbourhood (Bonnin, 2000:311). The women used the public space to highlight their private, ubiquitous struggle of asserting their rights to land, in the face of opposition and challenges they confront from customary social institutions that reinforce patriarchy. The women challenge the boundaries of their socialization and social reproduction by bringing the public space into their private grievances. In so doing, SFUA created a new arena within which to challenge gendered power relations. Furthermore, the women were successful in not only shaming, but also galvanizing the authorities (the Matsamo traditional leaders and the police who had previously ignored their demands) into action.

The SFUA women's protest in both its content and style is reminiscent of South African women's historical political activism and a lot of comparisons can be made in this regard. Historically and like the SFUA protest, "the issues that stirred Black women to political activity were not primarily 'women's issues, but were basic bread and butter issues that affected the entire community-passes, rents, the cost of living and laws that discriminated against Blacks" (1982:25). South African women's political activism has especially been centered on pass laws.<sup>50</sup> The anti-pass campaign was triggered off in 1913 by the Orange Free State government's proposal to mandate that women carry passes. BSAW vehemently protested this law and the protest marked a landmark for women's resistance movement. According to Cheryl Walker, "the anti-pass campaign in the Free State was one of the earliest expressions of discontent by Black women in modern South Africa and as such, it came to

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<sup>50</sup> For a more detailed examination of South African Women's political activism, see J Wells, *We Now Demand! The History of Women's Resistance to Pass laws in South Africa* (Witwatersrand University Press, South Africa, 1993); S Hassim, "A Conspiracy of Women: The Women's Movement in South Africa's Transition to Democracy" (2002) 69(3) *Social Research* at 694-729; D Russell, *Lives of Courage: Women for a New South Africa* (Basic Books, New York, 1989); J Lemon, "Reflections on the Women's Movement in South Africa: Historical and Theoretical Perspectives" (2001) 6(4) *Safundi: The Journal of African and American comparative studies* and H Bernstein, *For their Triumph and for their Tears: Conditions and Resistance of Women in Apartheid South Africa* (International Defence and Aid Fund, Kent: England, 1985).

assume symbolic importance in later years” (1982:27). The movement was instrumental in that it propelled women into the traditionally male dominated arena of political activism, and “challenged stereotyped assumptions about women and their political initiative” (Coquery-Vidrovitch, 1997:196). It also became the foundation for subsequent Anti-pass campaigns in 1952 and again in 1956. More importantly, it paved the way for women’s mobilization with the formation of organizations like the Federation of South African Women (FSAW) in 1954 and its successor, the Women’s National Coalition in 1993, the latter, which was vocal instrumental in promoting women’s civil equality during the drafting of the Constitution in 1994<sup>51</sup>.

Like the SFUA protest, characteristic of women’s movement according to Walker is the “spontaneity, enthusiasm and informal organization of campaigns” (1982:32). In the beginning of their protests in 1913, the women adopted the approach of Ghandi, using tactics of passive resistance and civil disobedience as their modus operandi to press their claims (Walker, 1982:31); This tactic however changed during the 1952 and 1956 anti-pass demonstrations to more innovative and volatile means like being outright indignant, refusing to pay fines, voluntary imprisonment, energetic singing and rallying cries like: “Strijdom, you have tampered with the women, you have struck a rock!” (Coquery-Vidrovitch, 1997:190).<sup>52</sup> The SFUA’s tactics of stripping naked can therefore be regarded as reminiscent of the creativity and boldness that has characterized South African Women’s activism.

Another parallel to be drawn between the SFUA’s movement and historical women’s activism is the reaction of male counterparts. The women’s anti-pass demonstrations won the

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<sup>51</sup> See S Meintjes, “Chartering Women’s Future”(1993) 9(2) *Southern Africa Report* at 9-30; L Hill, “Redefining the Terms: Putting South African Women in Democracy’s Agenda” (2004) 4 (2) *Meridians: Feminism, Race, Transnationalism* at 113-119 for more analysis of the Women’s National Coalition (WNC).

<sup>52</sup> Strijdom refers to the then Prime Minister of South Africa, to whom the women were addressing their protest of proposed pass laws in 1956.

grudging admiration of their male political counterparts as a bold move towards the then ongoing national liberation movement. According to Coquery-Vidrovitch, “whatever women’s motives, political, military, or more often traditional, they began to resist, always passively, often openly, with such disconcerting courage that they gradually won men’s respect in a society ill-prepared to accept women in political roles” (1997:195). However, it also drew the uneasiness and ire of men who felt threatened by the independence and confidence demonstrated by the women, but most importantly by the implications of the women’s activism on African men’s social roles and lifestyles (1997:197). It is therefore not surprising that decades after women’s anti-pass demonstrations, patriarchal attitudes still exists within South Africa’s social fabric and the Buffelspruit Cattle Owner’s felt threatened by women’s land access.

The anti-pass movements did not succeed in preventing the imposition of passes, but merely delaying the implementation of the pass law until 1958 when it became mandatory for all women to carry passes. According to the analysis of Walker (1982) and Coquery-Vidrovitch (1997), the women’s movement lost its momentum and could not be sustained because due to an underestimation of the strength of the political forum of the totalitarian government the women were confronting, the local rather than national scale of the demonstrations and most importantly, the lack of resources (organizational and educational) needed to maintain the momentum. Similarly with the SFUA, though a more localized protest, the women underestimated the determination of the Cattle Owners to regain the women’s lands. The women did not have adequate resources and networks at their disposal to conduct an effective campaign. Lastly, though the protest gained media coverage, this was momentary and fleet.

A key contention and premise in my thesis is that through social activism, rural women have the potential to subvert the land tenure system as the domain of male dominance. As well, their activism can bring about meaningful social transformation, which can translate into women's participation in land affairs. According to Bonnin, "the presence of women's bodies in sites from which they are excluded can in itself become a political act" (2003:311). Therefore I contend that their social activism can be used to challenge the porous socio-legal structures that endorse male dominance. In addition, women can synthesize the public and the private realm, by strategically negotiating and straddling the space between formal legal structures and informal cultural institutions. This is not to say that the process of social transformation is an easy feat, as women are confronted on the one hand by customary institutions fearful of losing their political ground and on the other, by the state's ambivalence in following through formalized equality provisions. I conclude that women's access to rights is a history of women's struggle for rights. Therefore, if this case study is anything to go by, rural women face an arduous task in realizing their land rights. However, it is a moral imperative for women to undertake the challenges for social participation. Using creativity, initiative and multiple spatial sites of contention, to articulate their struggle, I contend that it is a task they are more than are more than equipped to undertake.

## **Chapter IV: Constraints & Challenges?**

The main premise of this research is that land access is key for the process of social transformation and gender equality in post-apartheid South Africa. I argue that land dispossession in South Africa has been historically premised on racial inequality but little theorized on the basis of gender equality. Using the theory of legal pluralism, feminist theory of public/private spheres and a historical analysis of colonial and the apartheid regimes, I suggest that gender has been constructed and manipulated by state and customary institutions to reinforce male domination, and that land reform continues to be a tool reinforcing male hegemony. As well, I argue that women have been excluded and marginalized from fruitful access to land both by formal and non-formal legal institutions.

I suggest that the limitation of a dialectic analysis in which the state and customary law are positioned as separate, in tension is limited. Rather, I argue for a synthetic approach, as a more holistic way of conceiving the ways the two domains interact. State and customary law are not as separate and distinct as is often presumed. They are mutually co-existing and constructed in the course of social struggles and changing material and social relationships (Chanock, 1982 ; Mamdani, 1996).

In analyzing the challenges of placing gender on the political and social agenda of equitable land distribution in South Africa, I expose the political inertia, power dynamics and historical patriarchal hegemony that exists within the cracks and crevices of legal reform initiatives. The government's market oriented land policy and endorsement of customary administration of land perpetuate the marginalization of women. In juxtaposing the equality rights (as enshrined in the South African Constitution on the one hand), with the patriarchal customary institutions that regulate the normative orders of rural political economy I

conclude that women are caught in the middle of cultural institutions and the government's reluctance to challenge these institutions, which constitutes its support and power base.

The end of apartheid presented new opportunities and challenges. On the one hand lies the legacy of racial and gender inequality manifested in one form through land dispossession. On the other hand, the reform of the government and the new legal framework that exists presents material and metaphorical spatial arenas for women's land and equality claims to be realized.

The argument then for advancing women's socio-economic autonomy and empowerment (within the context of land rights) is for strategically negotiating between the two political and cultural institutions, and, one can argue, the public/private domains in which rural BSAW's lives are structured. The language of rights in particular, can be one way to synthesize the public and private domain in which women's lives are enacted. Therefore mobilize for greater recognition and empowerment.

## **Chapter Analysis**

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Chapter one featured the theorization of women's interaction with the state and traditional rule. An emerging analysis was that women's relationship with the state and cultural institutions differed from that of men's. This argument on the one hand is that basis of the customary institution's interest in the social regulation of women was on account of their social reproductive roles, whilst for men, it was on the account of their economic productive roles. Therefore the colonial state, whose interest was in pursuing a racial capitalist economy and the traditional leaders whose interest was in pursuing a male dominated social hierarchy) colluded to created a bifurcated legal paradigm that marginalizes women. I argue for the need to move beyond an essentialist and reductionist view of

women's interaction with state and customary law and look at not what laws are enacted by socio-legal paradigms, but how, where and in what context these socio-legal paradigms construct women's political and social identities. Historically, feminist engagement with the state has been within the state centrism paradigm. However, with emerging theorization of legal pluralism, comes a re-thinking of feminist interactions with statutory and customary law. The conclusion from this chapter is that feminist engagement with legal pluralism is more instructive and beneficial when it examines not just the institutional practices of the state and traditional leaders vis-à-vis women, but how these norms reinforce women's subordination. Understanding these processes of articulation may present creative ways and strategic ways for women to resist and contest the entrenchment of these practices.

Chapter two is a critical examination of the institutionalized frameworks of statutory and customary law and demonstrates that the link between de jure and de facto equality for women is far from being established. The South African Constitution, though proactive in categorically establishing (women's) equality rights in the Bill of Rights, also makes provision for the recognition of cultural rights. This opens the very real possibility that women's formal equality rights may come into conflict with cultural practices. Resolving this tension will require an activist state together with an amenable judiciary. It is not clear that the first of these is possible in South Africa. The dedication and ability of the government to guarantee women's equality rights within the context of land reform is questionable. In examining the directives for land reform from a gendered analysis, the conclusion is that the strongly neo-liberalist market structure of the reform, coupled with lack of adequate financial allocation and laws (like the Communal Land Bill that consolidates the powers of cultural leaders as well as the Ministry of Land Affairs in land administration),

puts in serious doubts, the willingness and ability of the government to ensure equality rights for women.

Finally chapter three features a case study showing women's protest for land rights in Mpumalanga elucidates even more, the entrenched power of traditional leaders and the challenges ahead for women's contestation of the socio-political status quo. It demonstrates the importance of land for rural women as a source of crucial sources of food. At the same time, with lack of land deeds and registered entitlements to land, the case study shows how precarious their access to land is. More than that though, it highlights men's invested interest in land and their refusal to recognize women as equal stakeholders. The crucial importance of this chapter though, lies in revealing women's ability for activism and in being proactive and creative in their fight for equitable access to land. This comes despite the enormous bureaucratic and cultural obstacles that lie in their way. In the incident discussed in this chapter, lies the sense of optimism for the possibility of women's mobilization for change as well as suggestions for policy change and future research.

The case study not only shows a remarkable gap between government's policy and practice, but also between theoretical analysis and documentations of women's experiences of land rights. Though the emerging literature on women's land rights is rich, diverse and insightful, it is not equally matched with availability of concrete case studies and field research. Likewise, though state policy on land reform and rights is voluminous and rhetorical, missing is an in-depth gender analysis, accurate, accessible and up to date statistical information. Most lacking however is the gender sensitization of the implementers of government directives and a need to critically analyze power structures that reinforce gender inequalities. The South African state has its work cut out for it in allocation of more resources and personnel in land reform project and the inclusion of a nuanced gendered and

racial analysis of its policies, as testaments of its genuine commitment to the equality principles embodied by the Constitution.

Indeed, land reform is not the end or panacea to women's attainment of autonomous rights and beneficial economic and social leverage with men. Neither am I suggesting that women's activism is the magic bullet solution, as my case study shows that this is far from the case. If anything, and by all indications, it is just the beginning of the journey for women's advancement. Land, which has been synonymous with dispossession and historically symbolic of racial inequality, is equally symbolic in this regard as an arena for gender equality. It took more than forty-six years to break the bonds of apartheid; it might take longer to overcome the oppression of gender equality, as the road ahead is long and arduous. The challenges are great, but so too are the social and moral imperative for a South Africa founded on the principles of non-racialism and non-sexism.

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