Women's strategies in accessing land in rural South Africa (working title)

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Introduction

"We need a rights-based system, founded on common values, to establish new criteria for recognizing and enforcing rights to land. We also have to find appropriate forms of permitting shared interests in the same piece of land, loosening up the rigid categories of absolute ownership in relation to agricultural land…In South Africa we also have a variety of systems of ownership, some of which come from Roman-Dutch law, as amended by statute, others from traditional African law. There might be advantages in containing as wide a range as possible within a single national framework of registration and administration."[1]

Writing in the midst of the negotiations process that preceded South Africa's transition to democracy, Albie Sachs' statement quoted above lays out a challenge to those working on how best to recognise and secure land rights. The first part of the challenge is encapsulated in his call for 'a rights-based system founded on common values'. The challenge here is that we need to re-think the criteria used for recognizing and enforcing rights to land, and re-commit ourselves to founding this system on 'common values'. As things currently stand much of the system is informed by a certain set of values, a set of values that prioritise a particular understanding of ownership and rights. These values and understandings inform the national framework and are then forced onto land rights systems which prioritise a different set of values, resulting in misunderstandings and misfits. The second and related part of this challenge is how to capitalize on the 'advantages in containing as wide a range as possible' when it comes to 'ownership systems'. The challenge is for us to identify ways in which we can loosen up the rigid nature of notions of absolute ownership and ownership rights that are enforceable against the world. At the heart of this challenge is the call for innovative solutions and the development of one land rights system for all South Africans. It is with this challenge in mind that this paper approaches the issue of women's land rights.

Land in South Africa is a scarce resource, this scarcity results in mounting pressure around access to land. As this pressure increases it is the vulnerable who find

[1] Albie Sachs *Advancing Human Rights in South Africa* (1992) 71

themselves at a disadvantage. This is especially true for women for whom access to land and securing their land rights continues to be a struggle. Many women constantly face the threat of eviction by their husbands when their marriages break down or by their in-laws should their husbands pass away. Women who return to their parents' homestead upon the dissolution of their marriage must contend with being chased away by their siblings or relatives. Even in cases where women and their children are allowed to stay at the natal homestead tension and conflicts stemming from the treatment of their children or the sharing of resources often arise. Unmarried women struggle to access residential sites of their own because some traditional leaders will not allocate land to women. [2] The normative framework of women accessing land through their husbands is problematic in its own way; wives are often not consulted when decisions around land are taken, this results in decisions that are detrimental to their interests. The normative ideal makes land the property of the husband and his family to the exclusion of wives.

Blindly accepting this normative idea means denying the fact that is threatened by the declining rates of marriage in South Africa. Adhering to the notion that women will have access to land through their husbands assumes, amongst other things, that the category 'married women' is a steadily growing one; research shows that this is not the case. Hosegood[3]as well as Budlender and Mhongo[4] write about how marriage rates have been declining in South Africa since as far back as the 1960's. There are a number of explanations offered for this decline but Budlender et al argue that the changes cannot be attributed to one particular factor, rather that numerous factors influence marriage rates and that at particular points in time certain factors may exercise more influence than others. Amongst the range of factors influencing rates of marriage are the effects of poverty especially in relation to men not being able to afford marriage, specifically the

[2] Aninka Claassens & Sizani Ngubane 'Women, land and power: the impact of the Communal Land Rights Act' in Claassens et al (eds) *Land, Power and Custom: Controversies generated by South Africa's Communal land Rights Act* (2008) 154 – 183 and Ben Cousins 'Women's land rights and social change in rural South Africa: the case of Msinga, KwaZulu-Natal' (2013) *Acta Juridica* 73

[3] Victoria Hosegood 'Women, marriage and domestic arrangements in rural KwaZulu – Natal, South Africa' in Claassens and Smythe (eds) *Marriage, Land and Custom: Essays on Law and Social Change in South Africa* (2013) 143

[4] Christine Mhongo and Debbie Budlender 'Declining rates of marriage in South Africa: what do the numbers and analysts say?' in Claassens and Smythe (eds) *Marriage, Land and Custom: Essays on Law and Social Change in South Africa* (2013) 181

cost of lobola, and the changing ways in which women are able to be financially independent. These realities contribute to a category of unmarried or single women a category of women, it is worth noting, that this not foreign or unknown to communities living under customary law. Existing literature describes the 'idikazi' or 'inkazana' a single woman of status with a homestead of her own.

As a developing country with a history of deep inequality South Africa is faced with the challenge of redressing the systematic inequality that was imposed upon black South Africans. For women especially this means rendering visible what was previously purposefully made invisible. It means recognising that in these changing contexts women should be offered a variety of land holding mechanisms and the ability to access land in their various capacities as mother, sister, married or single. It also means finding ways to improve the position of women when it comes to land rights. This context makes it clear that strategies for securing women's land rights are an essential component in improving the position of women. Debates on how best to do this must ask and answer the question: what strategies would work best for women? What approaches can be used to improve the situation of women? And importantly which of these strategies are effective and why?

Seeking strategies within local practice

In this paper I submit that it is crucial to pay attention to local strategies adopted by women as ways of dealing with their lived reality. It is suggested that a good starting point would be understanding and building on the implications of widespread changes in the rate of single women accessing residential sites in "communal areas" after the transition to democracy in 1994. That is, processes of single women being allocated land independently, or being nominated by their fathers/families to inherit responsibility for their natal homesteads. The recent survey conducted by the Community Agency for Social Enquiry (CASE)[5] in three provinces across the country brought to light evidence of women in rural communities accessing residential sites in their own right. The CASE survey asked women through whom the residential site was acquired. They found that there was an increase in the

[5] D. Budlender, S. Mgweba, K. Motsepe and L. Williams 'Women, Land and Customary Law' (2011) *Community Agency for Social Agency*

number of never married and widowed women who indicated that the site was acquired through them in the post 1994 period when contrasted with the pre 1994 period.[6] There were no significant changes for married women. The CASE findings mirrored evidence that had emerged at consultation meetings on the Communal Land Rights Bill over the time period 2002 – 2004 and again from 2008 – 2010. At these meetings women gave personal accounts of how single women were negotiating access to land for themselves. [7]

The CASE research findings raise interesting questions that call for further investigation and need to be engaged with. These findings present evidence of current practices in rural communities, practices that are not being prompted by any specific legislation or active instruction by members of government but are emerging from the community itself. What reasoning do these communities offer for these changes? In the focus groups held by CASE both men and women spoke of the big change to democracy. While democracy is clearly a contributing factor, the findings can be interpreted as evidence of communities owning and integrating democracy, but they can also be interpreted as more than that. The move to democracy has opened up spaces that were previously closed rendering visible that which was previously invisible.

The research by CASE reveals notable increases in the number of women able to get residential sites in their own right after 1994. The timing of the changes indicate that the values espoused during the transition to democracy and the adoption of the Constitution played a key role in bringing about processes of grass-roots change at scale, which cannot be attributed to the implementation of a particular government policy or law. In fact, rural women are crafting solutions in the absence of an approved legal framework. Changes are being driven not from the high offices of law makers but in the communities themselves. Formerly oppressive legal instruments are being adapted to provide security. The CASE survey findings indicated that often women refer to 'democracy' and the Constitution in explaining the changes underway. They say that the times and the laws have changed, and that discrimination is no longer legal. In many

[6] Ibid at 90
[7] Aninka Claassens 'Recent Changes in Women's Land Rights and Contested Customary Law in South Africa' (2013) 13 *Journal of Agrarian Change*

instances, arguments about the values underlying customary systems (in particular, the primacy of claims of need) and entitlements of birth right and belonging are woven together with the right to equality and democracy in the claims made. This indicates that in practice rural women draw from multiple repertoires as they find ways to reconcile custom and rights. Rural people are rejecting the limits that the dichotomy between rights and custom place on them as citizens of a unified South Africa.

The findings from the CASE survey on women's land rights conducted in the Eastern Cape and in two other provinces are used to ground two submissions: the first is that there is a mismatch between current concepts of 'upgrading' or formalisation and the systems they seek to formalise. This highlights the need to interrogate formalisation as a legal strategy in order to problematize how formalisation interacts with the power relations that it generates and how it conceptualises rights. The second submission is that strategies for improving the position of women should take into consideration the ways in which women are drawing on the repertoires of custom, the language of democracy and rights and how, together with their communities, they are actively debunking the binary of custom versus rights.

Mismatches and misunderstandings

There are long standing debates about the role of the law in presenting answers to the question of what is best for women. The surveyed literature illustrates that many countries have opted to rely on formalisation as a strategy for securing women's land rights.[8] The underlying premise of this approach is that ownership is in the best interests of vulnerable groups, and that part of the challenge faced by these groups is not being able to access the 'benefits' that come with ownership. Formalisation is viewed as a certain route to securing access to those benefits and thus the best strategy. There are challenges with this approach, in this section I discuss two of these challenges; the problematic conceptions of ownership that define the terms of formalisation. As well as the problematic assumptions that formalisation makes. The conceptions of ownership that inform this approach are based on a property system

[8] Ben Cousins and Espen Sjaastad 'Formalisation of land rights in the South: An overview' (2008) 26 *Land Use Policy* 1 – 9 and Julian Quan and Camilla Toulmin 'Formalising and Securing Land rights in Africa' (2004) presented at Land in Africa: Market Asset, or Secure Livelihood? and Leslie Gray and Michael Kevane 'Diminished Access, Diverted Exclusion: Women and Land Tenure in Sub-Saharan Africa' (1999) 42 (2) *African Studies Review* 15

that values exclusive ownership and the right to enforce ownership rights against 'the world' above all else.[9] This is then imposed upon customary tenure systems which value the individual, but also place equal value on the individual as part of a collective. Ben Cousins explains that one of the characteristics of pre-colonial communal tenure was that individual security was balanced with 'respect for the ethical code of the group'. He further explains that administration of land is not centralised, rather rights over land are nested within layers of social organisation.[10] Formalisation imposes rigidity and certainty on a system in which the 'rules' that govern land rights are in flux and are constantly negotiated. Rosalie Kingwill's work in the Eastern Cape also illustrates the awkward fit between the common law conception of ownership and customary law conceptions of relative rights. She asserts that different conceptions of 'family' and 'property' are important to understanding the mismatch with common law.[11]

An additional difficulty with this approach is that formalisation assumes that everyone is able to take advantage of the 'benefits' that it brings. This assumption is based on the further assumption of neutrality and equality during the formalisation process, an assumption that overlooks the ways in which formalisation is often used by elites to entrench existing inequality and create new inequalities.[12] The problem is not the law per se; the problem is the imposition of common law constructs of ownership upon customary land systems. The western understanding of ownership entails the protection of the owners' rights to the exclusion of all others. This understanding does not sit well with customary systems which work on principles of inclusion – the idea of multiple/ layered rights in land built upon principles of inter-dependence and 'ubuntu'. The rights of an individual to grazing land were subject to the needs of others for residential land or land to cultivate food. It is the 'winner takes all' conception of

[9] Wille's Principles of South African Law at 470 defines Ownership as follows: 'Ownership…is potentially the most extensive private right that a person can have with regard to property. In principle, ownership entitles the owner to deal with his or her property as he or she pleases within the limits set by law.'

[10] Cousins Op cit note 2 and Ben Cousins 'Characterising 'communal' tenure: nested systems and flexible boundaries' in *Land, Power and Custom: Controversies generated by South Africa's Communal Land Rights Act* (2008) 109 – 137

[11] Rosalie Kingwill 'Custom-building freehold title: the impact of family values on historical ownership in the Eastern Cape' in Claassens et al (eds) *Land, Power and Custom: Controversies generated by South Africa's Communal Land Rights Act* (2008) 184 – 207 – The result has been substantial mismatches between local property management and the formal system registration. In particular property is regarded as family property. Ownership of land does not imply the conferral of exclusive propriety powers on any one person or set of persons within the family. However, the aim of freehold title is precisely to create such powers in the face of norms and practices that attempt to limit such powers.

[12] Cousins and Sjaastad Op cit note 8

ownership which informs the terms of formalisation and elicits the likelihood of the process being captured by elite groupings. With so much at stake, and the promise of ownership being able to trump all other rights those with resources have every incentive to hijack the system.

Formalisation is more than just the law or registration it embodies a set of assumptions, a way of thinking. In criticising formalisation it is these assumptions that are being problematized. Some of these assumptions include the belief that formal legal rights, as understood through the dominant conceptualisation of ownership, are the solution. This assumption gives credence to the myth of formalisation as a silver bullet.[13] The framework itself, and focused efforts on making it fit blind its proponents to key features of customary land rights, such as layered and overlapping relative rights co-existing in various people in respect of the same land.

Criticisms of formalisation – Who benefits?

The most common conceptions of formalisation construct it as the shift from the 'informal' to the 'formal', from 'extra-legal to legal'. The result is that formalisation focuses on state law, state policy and the role of the state. This conception of formalisation is criticised for not taking into consideration the manner in which state law and local norms or custom exercise influence over one another. The formulation of formalisation as progress, advancement, as linear development is exactly what Ingrid Yngstrom criticizes in her paper.[14] Perceptions of formalisation that fit within what she terms 'evolutionary models of development' are problematic because these models – and therefore these conceptions of formalisation – exclude gender as an analytical category. Her claim is that 'evolutionary models and the policies they generate render women's land claims, and the forms of tenure insecurity that they face, invisible.'[15] These concerns are indeed evident, especially when one considers the impact of individual and joint titling as legal strategies to improve the position of women. Celestine Nyamu-Musembi presents research from Kenya which shows how the low numbers of husbands and wives registering the land jointly, together with the practice

[13] John. W. Bruce 'Simple Solutions to Complex Problems: Land Formalization as a 'Silver Bullet'' in Otto et al (eds) *Fair land governance: How to legalize land rights for rural development* (2012) 31 – 56
[14] Ingrid Yngstrom 'Women, Wives and Land Rights in Africa: Situating Gender Beyond the Household in the Debate over Land Policy and Changing Tenure Systems' (2002) 30 *Oxford Development Studies* 21
[15] Ibid at 22

of registering the land in the name of the household head – who is often a male – has resulted in formalisation weakening women's claims to family property.[16]

Susana Lasterria-Cornhiel writing in the context of titling programmes in Bolivia[17] and Quan and Toulmin writing in Cote d' Ivoire and Niger[18] both identify the numerous ways in which, in spite of titling programmes, women are still at a disadvantage. This disadvantage is visible in the amount and type of land that women get joint or individual title to. Often these plots are residential rather than prime agricultural land. Lasterria-Cornhiel also explains how, what is perceived as acceptable in terms of cultural norms may influence whose name goes on the title. This example speaks to how formalisation alone cannot bring about a process of reimagining what is possible for women. The registration of customary rights to land is aimed at bringing about security; however this is not always the case. These registration processes can reignite dormant conflicts and can result in the erasure of the rights of certain sub-groups thus generating insecurity. Quan et al also point out that groups must contend with the fact that their rights could be re-interpreted in a way that could result in their exclusion.[19] These examples illustrate that in reality the benefits of formalisation do not always trickle down to the intended beneficiaries.

Who has the power?

The part of this debate that is most relevant to the argument pursued here centres around what it is that the law does when it formalises land rights. Put differently, are the outcomes of the formalisation of land rights, best for women? There are two key critiques of formalisation that I wish to engage with here. These are the criticism of how formalisation lends itself to capture by elite groups and the primacy that formalisation gives to certain rights. Processes of formalisation are often captured by patriarchal elites and this places women at a disadvantage. The literature speaks to the ways in which the registration of land rights has privileged men over women. General experiences of titling in African countries shows the emergence of a practice of

[16] Celestine Nyamu-Musembi 'De Soto and Land Relations in Rural Africa: Breathing Life into Dead Theories about Property Rights' (2007) 28 (8) *Third World Quarterly* 1457
[17] Susana Lastarria-Cornhiel 'Gendered Outcomes of Property Formalization in Bolivia and Laos' (2006) *Colloque international 'Les frontieres de la question fonciere – At the frontier of land issues'*
[18] Julian Quan and Camilla Toulmin 'Formalising and Securing Land rights in Africa' (2004) presented at Land in Africa: Market Asset, or Secure Livelihood?
[19] Ibid. at 8

registering land in the name of males over females.[20] This is related to the practice of issuing the title in the name of the head of the household and the wholehearted acceptance that women would access land through men be it their fathers, husbands or brothers.

The disempowerment of women through formalisation is deeply related to the power relations at play in the spaces where rights are negotiated and the power relations within the wider community. Whitehead and Tsikata[21] describe how those who are already powerful in those spaces – traditional leaders and prominent members of society, all men – were able to exert considerable influence over the construction of custom, thereby managing to place men in a favourable position. Formalisation also opens up opportunities for other well placed elites to capture the process. Von Benda-Beckmann writes about how formalisation continues to allow for small pockets of 'political-economic elites' to accumulate resources at national and village levels. [22] The unequal power relations in terms of age, class and gender have serious implications for the ways in which land rights are negotiated and land is distributed. To merely impose formalisation on top of this inequality is not in the best interests of women nor does it improve their position.

Women's rights as secondary rights

Formalisation often results in the prioritization of primary rights over secondary rights. As Yngstrom explains, formalisation through the registration of land rights is only concerned with the exclusive rights held by an individual. This means that the only rights that can be recognised in this process are those of the 'principal landholder' who is, in most cases, male. The rights of women are relegated to the status of 'secondary rights' and are subordinate to those of the principal landholder.[23] Susana Lasterria-Cornhiel uses Bolivia and Laos as case-studies in exploring who benefits from formalisation programmes and whether in fact women fare any better. She explains that the focus of titling programmes is efficiency and technology. The result of this is that

[20] Ibid at 9
[21] Ann Whitehead and Dzodzi Tsikata 'Policy Discourses on Women's Land Rights in Sub-Saharan Africa: The Implications of the Re-turn to the Customary' (2003) 3 *Journal of Agrarian Change* at 75
[22] Franz von Benda-Beckmann 'Mysteries of capital or mystification of legal property?' (2003) 41 *Focaal – European Journal of Anthropology* 187
[23] Yngstrom op cit note 14 at 25

complex customary practices are overlooked, leaving 'secondary' or other rights unrecognised and their holders insecure.[24] An example of how this happens in practice is highlighted in the CASE research report and the preceding and recent workshops and interviews done with women. In all of these forums women spoke about how they were making claims based on need and how these claims were being recognised. It is difficult to conceive of any formalisation mechanism that would seek to understand this claim let alone secure. For women, in particular, formalisation often renders de facto rights and interests in the land invisible.

Yngstrom goes on to explain that under certain customary law systems both men's rights and women's rights were 'legally visible'. Men's rights to allocate were subject to the rights of women to cultivate the land.[25] The problem with the prevailing conceptualisation of women's rights as 'secondary' is twofold. Labelling these rights as 'secondary' makes them subject to the holder of the primary rights. This imposes a false hierarchy on these customary systems in which rights are interdependent. Secondly the danger is that in this conceptualisation it is only certain rights held by women that are visible. Claassens and Ngubane point out that registering the title to family land in the name of the husband and his wife would result in the exclusion of other members of the family with rights in the land as only the wife's rights are recognised. [26] This strategy to secure women's land rights does not take into account the family based nature of systems of land holding. While formalisation in this instance may benefit the wife it would exclude other women in the family. Any unmarried women of this family would be left out in the cold with no security.

Reconceptualising the way forward

The preceding discussion raises the question: how can legal strategy serve the best interests of women? One approach is to problematize formalisation in relation to the power relations that a process of formalisation builds on and brings to the fore. The idea that the process of formalisation is neutral needs to be challenged. One way of achieving this is through interrogating some of the assumptions that underlie the

[24] Ibid.
[25] Yngstrom op cit note 14 at 26
[26] Aninka Claassens & Sizani Ngubane 'Women, land and power: the impact of the Communal Land Rights Act' in Aninka Claassens et al (eds) *Land, Power and Custom: Controversies generated by South Africa's Communal land Rights Act* (2008) 154 – 183

acceptance of formalisation as a strategy. One of these is that an analysis of land through the lens of gender will automatically conclude that land rights for women are the only solution to improving women's positions. There are those who posit that this is not necessarily so; Cecile Jackson is one such scholar. Her position is that there is a need for a greater array of possibilities and she argues for 'detailed ethnographies that focus on social change'. In her view gendered property relations must be considered within the wider context of the social and economic relations that govern women's lives.[27] Jackson warns against the dangers of assuming that land rights for women are a one-size-fits-all solution, or even that independent land rights are the solution that all women want. She states that latching onto land rights as the primary policy solution has its disadvantages.[28]

Changing what we understand rights to be is a constructive and crucial element in determining whether or not land rights are the only strategy. We should pay close attention to the conceptualisation of rights, some authors assert that we need to reconceptualise rights in order to advance the discussion. Claassens and Mnisi propose an approach to rights that focuses on the relationships and power relations that rights mediate.[29] Adopting a move away from rights as securing the 'boundaries of autonomy' could illustrate that the harm may lie less in the legal specifications of titling and other measures, and more in the manner in which they are administered and the impact that this has on power relations.[30] Understanding that rights are informed by values, which are constantly being negotiated draws our attention to those processes of negotiation. In particular Claassens and Mnisi urge that we look at the role that women are playing in the negotiation process.

In their article exploring women's struggles to gain access to land and to counter their exclusion Gray and Kevane identify the manipulation of the meaning underlying a right as a factor in the erosion of women's land rights.[31] By way of example they explain that by changing what is understood to be women's work or women's crops men were able

[27] Cecile Jackson 'Gender Analysis of Land: Beyond Land Rights for Women' (2003) 3 *Journal of Agrarian Change* at 477
[28] Ibid.
[29] Aninka Claassens and Sindiso Mnisi 'Rural Women Redefining Land Rights in the Context of Living Customary Law' (2009) 25 (3) *South African Journal of Human Rights* 491
[30] Ibid.
[31] Leslie Gray and Michael Kevane 'Diminished Access, Diverted Exclusion: Women and Land Tenure in Sub-Saharan Africa' (1999) 42 (2) *African Studies Review* 15

to erode women's rights to certain produce. The possibility of manipulating meaning against women means that there is a possibility of manipulating or negotiating meaning in favour of women. Gray et al identify three strategies that women are using to respond to their exclusion and diminished access. One of these is the manipulation of customary institutions. What Gray et al term "manipulation" could be described as "renegotiation". Women may lose out because the meaning underlying a right is re-negotiated but they respond by re-negotiating the meaning in their favour or by re-negotiating the meaning of customary institutions. Thus the struggle to be heard in those spaces of negotiation and re-negotiation is vital to women's struggles for land rights.

Faced with the difficulties posed by the assumptions inherent in formalisation and the ways in which these prevent women and other vulnerable groups from benefitting from formalisation as a strategy. We can see how important it is that women be able to participate in the spaces, at all levels, in which negotiation takes place. It is here that the references to democracy and changing times highlighted in the CASE survey are important. These references and the symbolism of democracy are a tool that women can and are using to open up spaces that may have existed previously or to open completely new spaces, in which they are slowly being heard. Formalisation does not necessarily foster or assist this struggle; in fact formalisation often does not acknowledge that this is a struggle being waged or that this is a struggle that needs to be waged.

Multiple repertoires and Common values

Interrogating customary law becomes a necessary and important exercise given the manner in which past state interference privileged the voices of patriarchal elites. Much has been written on the construction of versions of 'official' customary law which held that women had no capacity to own land in their own right.[32] This understanding rendered women's land rights legally invisible and resulted in the active erasure of certain pre-colonial customary law repertoires and the dominance of 'official' customary law understandings. These were then erroneously crystallized into static rules and presented as law this was a drastic departure from the flexible nature of customary systems.

[32] Claassens Op cit note 7

The importance of drawing a distinction between official, distorted customary law and 'living' customary is critical to understanding the way in which women have drawn on customary law as a repertoire in claiming rights to land. Tara Weinberg's research presents evidence of the struggles waged by Africans against the interpretation of customary law forced upon them by the colonial and apartheid states. [33] As she tracks the meetings of the Bunga Council, we see that repeated assertions were made that indicated that women accessing land was not contrary to customary law. [34] As the state sought to clamp down on African land access the first people to suffer were women. Weinberg shows how, through the use of gender biased criteria, the state was able to exclude women and single men and then use codified customary law to justify this.

Being able to present evidence of these pre-existing repertoires is important as it counters the notion that equity of any kind in land relations under customary law is completely unknown. Rather than presenting customary law as a system in need of 'fixing' through the introduction of foreign concepts such as women's land rights, it points to customary law being part of the 'solution', as it houses earlier repertoires that can be drawn on rather than 'foreign concepts'. In her paper discussing the possibilities and obstacles inherent in local norms and customs Celestine Nyamu-Musembi encourages women's human rights actors not to adopt an abolitionist approach to cultural practices that appear to go against international human rights principles, but rather to undertake an open-minded evaluation of local practice.[35] Such an evaluation means that whatever 'positive openings' local practice offers can be used to advance social change.

Having regard to these pre-existing repertoires challenges the notion that customary law is inherently undemocratic. This is part of a wider conversation aimed at dismantling the binaries of urban/rural, individual/communal that haunt social and

[33] Tara Weinberg 'Contesting customary law in the Eastern Cape: gender, place and land tenure' (2013) *Acta Juridica* 100
[34] Ibid.
[35] Celestine Nyamu-Musembi 'Are Local Norms and Practices Fences or Pathways? The Example of Women's Property Rights' in Abdullahi A. An-Na'im (ed) *Cultural Transformation and Human Rights in Africa* (2002) at 125 "…the assumption that local practices offer no basis for women's human rights pre-empts an open-minded assessment of local practice, which assessment could lead to the recognition and utilization of whatever positive openings are presented by general principles of fairness and justice in a community's value system…potential opportunities for collaboration with community members committed to social change that would promote human rights principles generally, and gender equality in particular, are forfeited.

political discourse on issues of land rights. Moving beyond these polarising positions reveals how the reality of people's lives are far more cross cutting and that their experiences straddle many spheres. The nature of daily life means that people are creatively finding ways to reconcile custom with the values of society. The literature points to a need to consider actual and developing practices in the communities on their own terms and not through the distorting prism of official customary law.[36]

A response to the challenges faced by women needs to be based on an understanding of those challenges, it should also consider women's own responses to these challenges and what informs their responses. Anne Mager illustrates the importance of this approach; she unpacks the ways in which gender influenced responses to the rehabilitation process in the Eastern Cape.[37] Her analysis highlights the importance of understanding why people responded in the way that they did. She explains that single mothers appeared to support the Trust when contrasted with the men of their communities who were resisting the imposition of the Trust. It is her explanation of why these women chose to respond this way that emphasises the importance of understanding the reasoning behind people's strategies. Mager explains that the Trust allowed single mothers limited access to land, access that was denied to them by the men in their communities.[38] At the heart of this strategy was survival rather than collaboration with the apartheid regime.

Strategies, including legal strategies that seek to serve the best interests of women must not only understand the strategies that women are already using, but also why they are using them. A number of other authors advocate building on existing local practice and creating participatory spaces that reflect the nature of people's realities. Quan et al encourage governments to consider building on evolution within local practice.[39] Cousins, drawing on his research work in KwaZulu Natal, concludes that policy and law should have as their key objectives the establishment and support of the type of land tenure institutions that are legitimate and accountable.[40] Kingwill endorses an approach

[36] ALEXKOR LTD AND ANOTHER v THE RICHTERSVELD COMMUNITY AND OTHERS 2004 (5) SA 460 (CC)
[37] Anne Mager 'The people get fenced: Gender, Rehabilitation and African Nationalism in the Ciskei and Border Region, 1945 – 1955' (1992) 18 (4) *Journal of Southern African Studies* 761
[38] Ibid.
[39] Quan et al op cit note 18 at 11
[40] Cousins op cit note 2

that focuses on the mismatch between law and practice as a means of curbing the male favouring situations that arises when Western practice and official customary law intersect.[41]

A land rights system that is founded on common values is a system in which there are common understandings of what types of claims are viewed as socially acceptable. Values play a role in informing which claims are recognised. Both the CASE survey and recent interviews with rural women in the Eastern Cape bring this to the fore in interesting ways. In the CASE report as well as the recent interviews women spoke about the role played by need based claims in their ability to make claims for residential sites in their own names. Women explained how they were confident that their claims based on need would be successful and how they drew strength from the fact that need was a recognised criteria for getting residential land. The following extract from an interview with a woman in Cata in the Eastern Cape is one such example.

Question: What made you think that this was something that could happen now even though it was something that had never happened before? What triggered in you the belief that this could be possible?

Answer: What made me confident that this could happen was the fact that the announcement was made that there were sites available for people who had no place to live, they could get those sites. That was made me get up and try to get a site. When you are living on your family site (at your natal home) with your brothers and their wives and you have children you do not really have a place there.[42]

In order for the system to be built upon common values it is important to understand all the values that inform the lives of South Africans. If the system is to operate in and align with the practices of a community that values the ideals of 'ubuntu', of interconnected humanity, then those values need to be part of the common values that underlie the system. Formulating a land rights system based on common values will benefit from understanding the multiple basis upon which people make their claims as this speaks to the values held by that community or society. This paper makes the submission that strategies aimed at improving the position of women, should take into account the ways

[41] Kingwill op cit note 11
[42] Transcript of interviews conducted in Cata, Eastern Cape April 2014

in which women draw on multiple repertoires of custom and of rights in making their claims. These claims that combine the language of rights with customary ways are being recognised by communities. This is an indication that a land rights system based on common values is very much part of people's lived realities in some rural communities.

In order to benefit from the advantages of drawing on a wide range of ownership systems we need to begin the conversation of recognising a variety of ownership systems. The critique of formalisation offered in this paper is part of that conversation. Recognising that formalisation is informed by one particular ownership system and grappling with the ill-fitting ways in which current conceptions of formalisation meet customary systems, is a necessary part of responding to the challenge. It is here that the work of academics on the layered nature of customary land rights and on the terminology used in customary land holding systems is so important. This type of research assists us in determining what elements and concepts make up the range of ownership systems that South Africa houses.

Conclusion

More than 20 years after Albie Sachs' statement South Africa still needs to work towards developing mechanisms and protections that make the rights based system one that truly reflects our common values. Going forward it is vital that we foreground the question about what strategies best serve women. Finding answers to this question is a critical part of ensuring that our rights based system is indeed reflective of our common values and that it takes advantage of the various ownerships systems in a positive manner. Any answer to the question of which strategies serve and protect women's interests will be incomplete if does not take into account the value inherent in drawing on local practice. It is hoped that this paper has shown how part of the value of drawing on local practice is that it illustrates the mismatches and misunderstandings at the heart of the current favoured approach. While also showcasing the ways in which the solutions adopted by South Africans reflect the cross cutting nature of their lives and challenge the discourse of binaries. Key to responding to the challenge in Albie Sachs' statement is understanding, understanding our common values and understanding our variety of ownership systems. This is a critical now as it was during the multi-party negotiations process.

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