

# *Women's land rights and social change in rural South Africa: the case of Msinga, KwaZulu-Natal\**

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Changing marriage practices and a continuing decline in marriage rates are generating tensions in rural South Africa and prompting innovations in the character of women's rights to land. Empirical evidence of changing practices in relation to land access and marriage in Msinga, a conservative area in KwaZulu-Natal, is presented. Such processes have been characterised in recent scholarship in terms of 'living customary law, or 'living law' but this concept can obscure the underlying social dynamics that produce discrepancies between rules, practices and emergent social realities. An alternative model with greater explanatory power is Moore's analytical framework for understanding 'law as process', suggesting attention to processes of regularisation and situational adjustment, within a fundamental condition of indeterminacy. This framework is utilised to help make sense of data from Msinga on marriage practices and women's access to land, and to draw some lessons for policy.

## I INTRODUCTION

Given the social embeddedness of land tenure regimes derived from customary norms and values, it is unsurprising that changes in social organisation profoundly influence the character of rights to land, and *vice versa*. In pre-colonial societies in Southern Africa the homestead was the primary unit of both production and reproduction, and the social and ritual processes through which homesteads came into being tied together marriage and access to productive resources, like land. Close connections between land rights and marriage have been eroded by centuries of social, economic and political change, involving the incorporation and subordination of African societies and polities within a wider capitalist economy. Nevertheless, they remain important in many parts of rural South Africa where land is held in terms of so-called 'communal tenure', and strongly-held ideas about these connections continue to influence household formation, as well as land governance. But changing marriage practices, as well as a continuing decline in marriage rates, are generating tensions

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within rural society and prompting innovations in the character of women's rights to land.

In this article I report empirical findings on marriage and access to land in research sites in Msinga municipality, KwaZulu-Natal. The data discussed here are largely qualitative in nature and complement recent research findings based on large-scale, quantitative surveys.<sup>1</sup> I also describe the recent decision by a traditional authority structure in Msinga, the Mchunu Traditional Council, to allocate land to single women, and contrast it with the very different response of its neighbour, the Mthembu Traditional Council, which is resisting the demand of single women for land in their own right.

Processes of change in relation to marriage practices, land tenure and traditional authority have been characterised in recent scholarship in terms of 'living customary law, or 'living law'.<sup>2</sup> In this article I argue that this concept, despite its emphasis on the processual dimensions of customary law, can nevertheless obscure the underlying social and political dynamics that produce discrepancies between 'rules', practices and emergent social realities. An alternative model with greater explanatory power is Sally Falk Moore's<sup>3</sup> analytical framework for understanding 'law as process', suggesting attention to processes of *regularisation* and *situational adjustment*, within a fundamental condition of *indeterminacy*. It is utilised here to help make sense of Msinga data on marriage practices and women's access to land.

## II MARRIAGE AND LAND RIGHTS IN RURAL SOUTH AFRICA: WHAT DOES THE RECENT LITERATURE SAY?

Marriage practices and land tenure systems in rural South Africa, and the connections between them, are in flux. Hosegood et al report the findings of a study in Umkhanyakude district in northern KwaZulu-Natal, which collected longitudinal, population-based demographic surveillance data between 2000 and 2006. They show that the proportion of the adult population ever married continued to decline in this period. The perceived costs of marriage outweighed the benefits for many young couples, despite marriage remaining a 'highly prized life-event'.<sup>4</sup> Many couples

<sup>1</sup> See for example D Budlender, S Mgweba, K Motsepe and L Williams *Women, Land and Customary Law* (2011); V Hosegood, N McGrath and T Moultrie 'Dispensing with marriage: marital and partnership trends in rural KwaZulu-Natal, South Africa 2000–2006' (2009) 20 *Demographic Research* 279–312.

<sup>2</sup> I myself have done so, as in B Cousins with others *Imithetho yomhlaba yaseMsinga: the living law of land in Msinga, KwaZulu-Natal*. Institute for Poverty, Land and Agrarian Studies, University of the Western Cape Research Report 43 (2011). This article asks questions about the usefulness of the notion of 'living law' as an analytical tool, and explores a possible alternative approach.

<sup>3</sup> S Falk Moore *Law as Process: An Anthropological Approach* (1978).

<sup>4</sup> See Hosegood et al (n 1).

become engaged and embark on the process of *lobolo* marriage, but only around half of all women and men, who are 45 years or older, have been married. A key background condition is limited sanctions for extra-marital childbearing. Declines in marriage have not initiated a transition towards non-marital cohabiting unions; a history of labour migration means cohabitation is not seen as necessary to either a marital or non-marital partnership.

Mhongo and Budlender discuss the wide range of explanations offered for declining marriage rates amongst Africans in South Africa.<sup>5</sup> Some scholars emphasise growing female economic independence through increased employment opportunities, social grants and other forms of support from government, and growing numbers of men who feel that they are unable to act as family providers, because of limited employment and other income-earning activities. Other influences include the perception of many women that men are irresponsible with money; men's growing inability to pay bridewealth (*lobolo*), in part because their lineages are less able to assist in making such payments; men being able to claim children as theirs through the payment of 'damages', whilst avoiding the higher costs and obligations of marriage; and the fact that many women value childbearing or control over their own fertility more than they do marriage. Other arguments link declines in marriage to the negative impacts of the migrant labour system on family life.

Budlender et al report findings from a large-scale survey of 3 000 households in three different research sites that focused on women, land rights and customary law.<sup>6</sup> The three sites were Msinga in KwaZulu-Natal, Keiskammahoeck in the Eastern Cape and Ramatlabama in North West Province. There were significant differences between the three sites, as well as some commonalities, illustrating clearly that generalisations about 'communal areas' are hazardous.<sup>7</sup> For example, there was a much higher marriage rate in Msinga (46 per cent) than in the other two sites (in Keiskammahoeck it was 38 per cent, at Ramatlabama 26 per cent) and a higher rate of co-habitation without marriage in Ramatlabama (5 per cent) than elsewhere.<sup>8</sup> High proportions of unmarried women had given birth to at least one child, ranging from 18 per cent in Msinga, to 26 per cent in Keiskammahoeck and as high as 45 per cent in Ramatlabama.<sup>9</sup> In all three sites there was clear evidence of major shifts in marriage practices. In Msinga, for example, completion of full customary procedures, or *gidile*

<sup>5</sup> C Mhongo and D Budlender in this volume.

<sup>6</sup> Budlender et al (n 1).

<sup>7</sup> Due to limitations of space only a few of the research findings of this richly detailed study can be listed here. Also see Mhongo and Budlender in this volume.

<sup>8</sup> Budlender et al (n 1) at 62 and 63.

<sup>9</sup> Ibid at 71.

marriage, is in decline and an incomplete form, *ganile* marriage, is becoming the norm.

In relation to land tenure, each site has had a markedly different history, and this affects the degree to which 'customary' land tenure systems remain in force. For example, 45 per cent of households in Keiskammahoek gained access to land as a result of relocations through betterment planning in the apartheid era, compared to Msinga, where 91 per cent of households gained access through a customary land allocation.<sup>10</sup> The survey revealed clear changes over time in relation to the person through whom the residential plot was acquired. Much greater numbers of never-married women and widows reported the acquisition of such land through them as applicants in the period after 1994 compared to the period before. Again, there were differences between sites in the numbers of such acquisitions, but the authors conclude that it is clear that single women are beginning to gain access to land on a significant scale.

Aninka Claassens argues that the content of custom is negotiated at local level and reflects the changing practices and values of ordinary people, but is also shaped by wider socio-economic and political realities that alter the power relations within which claims to resources such as land are made.<sup>11</sup> She focuses in particular on the emerging practice of single women acquiring residential sites. She explains this as the result of two wider shifts: the continuing decline of rates of marriage amongst African women, as noted in a number of studies, together with the 'symbolic victory of equality and democracy' in 1994, which 'emboldened women' to press claims for land in their own right and made men receptive to such claims.<sup>12</sup>

Claassens also argues that rule-bound stereotypes and legal constructs of both land rights and marriage have obstructed our understanding of pre-colonial realities, with negative impacts on women during the colonial and apartheid eras. Official versions of custom rendered invisible women's primary rights to fields, their claims to 'house' property within polygynous households, female inheritance of parents' property, and the allocation of land to unmarried women. In relation to marriage, Claassens argues that the ethnographic literature contains contrasts between a 'jural' view of marriage as an 'either/or' status, in common with Western

<sup>10</sup> Ibid at 84.

<sup>11</sup> A Claassens 'Recent changes in women's land rights and contested customary law in South Africa' (2013) 13(1) Special Issue *Journal of Agrarian Change* 71–92.

<sup>12</sup> See also A Claassens and S Ngubane 'Women, land and power: the impact of the Communal Land Rights Act' in A Claassens and B Cousins (eds) *Land, Power and Custom. Controversies generated by South Africa's Communal Land Rights Act* (2008) 154–83; and A Claassens 'Customary law and zones of chiefly sovereignty: The impact of government policy on whose voices prevail in the making and changing of customary law' in A Claassens and B Cousins (eds) *Land, Power and Custom. Controversies generated by South Africa's Communal Land Rights Act* (2008) 355–82.

constructs, and an alternative view of marriage as negotiable, ambiguous, and a 'jural potentiality'.<sup>13</sup> Chanock describes how colonial officials were uncomfortable with such flexibility and ambiguity and tried to make it both monogamous and 'unbreakable'.<sup>14</sup> Shepstone, for example, incorporated regulations requiring the full payment of bridewealth into the Natal Code of Native Law.<sup>15</sup> Obscured were less expensive, less onerous and formal forms of marriage such as *ukuthwala*,<sup>16</sup> and a category of mature and 'free' women who had never married.

Paradoxically, official attempts to shore up 'customary' marriage and make it less equivocal may have had the opposite effect to that which was intended.<sup>17</sup> The migrant labour system transformed the pre-colonial economy and its social organisation, and women and marriage alliances were no longer as pivotal to rural society as they had been before. Large numbers of young women left South Africa's rural areas from the 1950s onwards in search of alternative sources of livelihood, but they were seen as troublesome by both government officials and traditional authorities. The former attempted to exclude them from urban areas, and the latter sought to exert control by imposing a rigid version of customary marriage.

Such marriages were increasingly rejected by women, however, with 'going it alone' seen as a better option by many. The viability of customary marriage was further undermined as unemployment soared in the 1980s and 1990s, fewer men having access to the wages that had become the main source of bridewealth payments. Over the past decade-and-a-half, social grants have replaced migrant remittances as key sources of income, and women are their main recipients.

For Claassens, debates on law and policy in relation to women's land rights in communal areas today should be grounded in a recognition of custom as 'the changing practices and values of ordinary people', as shaped by wider realities, and as 'the outcome of interactions involving a range of people, of claims and counter-arguments, of different people grappling with difficult shared realities'. She sees this as consistent with the living law approach adopted by the Constitutional Court in several key judgments.<sup>18</sup>

<sup>13</sup> J Comaroff and S Roberts *Rules and Processes: the Cultural Logic of Dispute in an African Context* (1981).

<sup>14</sup> M Chanock *Law, Custom and Social Order: The Colonial Experience in Malawi* (1985) 146.

<sup>15</sup> See Claassens (n 11) at 85.

<sup>16</sup> *Ukuthwala* (agreed upon abductions) were a means to pre-empt lengthy pre-marriage negotiations and large bridewealth payments; see Claassens (n 11).

<sup>17</sup> Claassens (n 11) at 87.

<sup>18</sup> *Ibid* at 89.

### III LIVING LAW, LAW AS PROCESS?

Do notions of ‘living law’ help us to understand the shifts in marriage and land rights described in the literature? Tom Bennett distinguishes between ‘official’ customary law, that version created by the state and the legal profession, and ‘living customary law’, those social practices considered obligatory and actually observed by the people living within its ambit.<sup>19</sup> He points to a wide gap between the two: the living law is flexible and open-ended, which facilitates adaptive change, but the courts find these qualities difficult to work with. They have always preferred codified and rule-based versions, written in English and Afrikaans rather than the vernacular. When first recorded these official versions were generally highly selective; ‘many of the rules . . . owed less to ancient practice than to the interests of officialdom’.<sup>20</sup> Recent Constitutional Court judgments question the legitimacy of the official versions created under colonial and apartheid rule, and indicate a preference for the living law. This creates new problems, still unresolved, as to what evidence courts will accept as adequate proof of living customs, since these are ‘subject to almost infinite variation, and it is impossible to take account of such variety without proving each new custom as it is asserted’.<sup>21</sup>

Barbara Oomen prefers the notion of ‘living law’ to ‘living customary law’, given that customary norms are not the only ones that people in rural South Africa invoke within processes of dispute resolution. These involve ‘mixing and matching rules that refer to culture, common sense, state regulations, the Constitution, precedent and a variety of other sources.’<sup>22</sup> Rules provide the language in which disputes are framed, but they do not determine outcomes. For Oomen, living law is ‘negotiated within ever-fluctuating social and political settings, which it simultaneously reflects and shapes’.<sup>23</sup> These settings are constantly changing, and notions of ‘rules’ and ‘rights’ must be continuously renegotiated and adapted. This creates a legal culture that is ‘much more processual than the common law’.<sup>24</sup>

Sally Falk Moore focuses on law as such, not only customary law. In her view, the making, but also the unmaking, of social and symbolic order is an active and never-ending set of processes. Rule-orders, which include but are not limited to state law, may be in conflict or competition with

<sup>19</sup> T Bennett ‘“Official” vs “living” customary law: dilemmas of description and recognition’ in A Claassens and B Cousins (eds) *Land, Power and Custom: Controversies generated by South Africa’s Communal Land Rights Act* (2008) 138–153.

<sup>20</sup> *Ibid* at 141.

<sup>21</sup> *Ibid* at 145.

<sup>22</sup> B Oomen *Chiefs in South Africa: Law, Power and Culture in the Post-Apartheid Era* (2005) at 210.

<sup>23</sup> *Ibid* at 203.

<sup>24</sup> *Ibid*.

each other, and invariably include ambiguities, inconsistencies, gaps and conflicts. And social reality comprises a mix of actions that are congruent with rules, and others that are 'choice-making, discretionary, manipulative, sometimes inconsistent, and sometimes conflictual'.<sup>25</sup>

Society is thus necessarily only partially ordered and controlled, and rule-bound and normative orders must be seen in the context of 'the whole complex of action, which certainly includes much more than conformity to or deviance from the normative rules'.<sup>26</sup> Social arenas involve 'an ever-shifting set of persons, changing moments in time, altering situations, and partially improvised interactions' resulting in 'areas of indeterminacy, or ambiguity, of uncertainty and manipulability'.<sup>27</sup> Yet society is not totally amorphous, subject to limitless innovation and reinterpretation. Social interactions contain elements that are regular *and* elements that are indeterminate, a paradoxical mix of attempts to both recognise and deny mutability, but the balance of determinate and indeterminate varies from situation to situation and person to person.<sup>28</sup>

Moore distinguishes between processes of regularisation, processes of situational adjustment and the ever-present factor of indeterminacy. *Indeterminacy* is an underlying quality of all social life, given the fact that culture and organised social life create arenas of interaction that are temporary and incomplete and contain elements of contradiction, paradox and conflict. *Processes of regularisation* represent the struggle against indeterminacy, attempts by people to crystallise and concretise social reality and give it form, order and predictability. *Processes of situational adjustment* involve people arranging their immediate situation 'by exploiting the indeterminacies in the situation, or by generating such indeterminacies', as well as by reinterpreting or redefining rules and relationships in which there may be areas of inconsistency, ambiguity and contradiction.<sup>29</sup> They actively and continuously 're-inject' elements of indeterminacy and plasticity in social arrangements.

This analytical model focuses attention on the increase or decrease of the determinate and fixed in social and cultural life, and on the degree of fit between symbolic systems/ideologies and on-the-ground realities. The model thus helps us account for variability in relation to stabilisation and change, and understand better the complex relationship between social realities and cultural representations.

<sup>25</sup> Falk Moore (n 3) at 3.

<sup>26</sup> *Ibid.*

<sup>27</sup> *Ibid* at 39.

<sup>28</sup> *Ibid* at 40 and 41.

<sup>29</sup> *Ibid* at 50.

Large-scale shifts in social, economic and political life also need to be taken into account.<sup>30</sup> Examples from Moore's own fieldwork amongst the Chagga of Mount Kilimanjaro include unplanned changes, such as the emergence of coffee as a major cash crop, and reduced availability of land as a result of an explosive population increase, as well as deliberate efforts by government to steer social change, such as land tenure reform policies.<sup>31</sup> Larger-scale changes such as these, which are 'background conditions' for local actors, constrain local-level decisions and choices, while generating new kinds of opportunities and indeterminacies, thus shaping the context within which processes of regularisation or situational adjustment occur.

#### IV THE MSINGA RESEARCH PROJECT

Field research was undertaken in the Mchunu and Mthembu 'tribal'<sup>32</sup> areas of Msinga in KwaZulu-Natal, by staff of the Mdukutshani Rural Development Programme (MRDP).<sup>33</sup> Launched in 2007, at a time when implementation of the Communal Land Rights Act 11 of 2004 (CLRA) appeared imminent, *Imiithetho yomhlaba yaseMsinga* ('the land laws of Msinga')<sup>34</sup> was an action-research project that aimed to gain a detailed understanding of land tenure, facilitate local-level discussion of potential solutions to emerging problems around land rights, provide information on the CLRA to residents and authority structures, and help generate ideas on how local people could engage with the new law should implementation occur in the area.<sup>35</sup>

In this part of KwaZulu-Natal, former labour tenants live on privately-owned farms, located on land that had originally formed part of tribal territory, and some have been transferred to their occupants through land

<sup>30</sup> S Falk Moore 'Explaining the present: theoretical dilemmas in processual ethnography' (1987) 14(4) *American Ethnologist* 727–36 at 731.

<sup>31</sup> Moore (n 3) at 66.

<sup>32</sup> The term 'tribe' has fallen out of favour with scholars in recent decades in part because of the use of the term by colonial and apartheid regimes, along with notions of race and ethnicity, to help construct and justify a range of oppressive policies, but also because of doubts over its usefulness as an analytical category; see P Skalnik 'Tribe as a colonial category' in E Boonzaaier and J Sharp (eds) *South African Keywords: The Uses and Abuses of Political Concepts* (1988) 68–78. The term *isizwe*, or nation, sometimes used in translation, is problematic given that South Africa is a unified nation-state. The term 'tribe' continues to be used by many people, in Msinga as elsewhere in South Africa, to denote groups or 'communities' under the authority of traditional leaders, with the implication that it refers to a political not a cultural entity.

<sup>33</sup> A non-governmental organisation formerly known as the Church Agricultural Project (CAP).

<sup>34</sup> *Imiithetho* is the Zulu word for laws, customs and statutes. In this project the term is used to refer to local 'laws' or rules around land, as distinct from statutory laws.

<sup>35</sup> The project was funded by the Joseph Rowntree Charitable Trust, UK. Members of the research team included Rauri Alcock, Mphethethi Msondo, Gugu Mbatha and Ngididi Dladla, Makhosi Mveli, and Donna Hornby. I acted as research advisor and wrote up the research findings; see B Cousins with others (n 2).



reform. Labour tenants in these areas have always been regarded as full members of their tribes, in this case the Mchunu and the Mthembu. Two *izigodi*<sup>36</sup> in each of the two tribal areas were selected as field sites. In both areas the field sites comprised one *isigodi* within the core tribal territory and one on a former labour tenant farm: in the Mchunu area, these were Kwaguqa and its neighbor, Ncunjane, respectively; in the core Mthembu tribal area, Ngubo and Nkaseni. This allowed for the investigation of local variations in land tenure practices within a broad 'traditional community', as defined by the CLRA.

The *Imithetho* project collected qualitative data, using a broadly ethnographic approach, exploring key concepts and terms and local understandings of changing norms, values and practices. Diverse research methods were employed, including meetings with traditional authority structures, individual interviews, focus group discussions, transect walks, time-lines of significant events, mapping exercises, and feedback workshops. In total, 65 individual interviews were undertaken and 12 focus groups were convened between January 2007 and December 2009.

Msinga is reputed to be one of the most 'traditional' areas in KwaZulu-Natal. The adjoining municipality of Weenen is made up largely of white-owned commercial farms, with some of these now transferred to former labour tenants, land restitution claimants, or beneficiaries of land redistribution. The Traditional Leadership and Governance Framework Act 41 of 2003 (TLGFA) has been implemented in KwaZulu-Natal through a provincial version of the national framework Act. Traditional councils, supposedly 'transformed' versions of the old Tribal Authorities, established under the infamous Bantu Authorities Act 68 of 1951, were established in the Mchunu and Mthembu areas in 2006.<sup>37</sup>

## V CUSTOMARY LAND TENURE IN MSINGA: THE NORMATIVE IDEAL

Before examining evidence of changing land access and marriage practices in Msinga, a summary of the normative version of land tenure is required. A variety of rules and roles for allocating, using and administering land and other natural resources together constitute a coherent regime of rights and obligations that most local residents can explain. The regime is underpinned by ideas, values and organising principles, derived from pre-colonial forms of social, economic and political organisation that continue to inform relationships, identities and strategies. Rights and obligations are defined primarily through social relationships and mem-

<sup>36</sup> An *isigodi* is a local ward within a larger 'tribal' community and is under the authority of an *induna* or headman.

<sup>37</sup> 'Transformation' means that 40 per cent of the members of the council must be elected and one-third must be women.

bership of a variety of social units, including families, households, kinship groups, neighbourhoods and 'communities'.

The underlying principle is that married people with children should be allocated land so that they can (a) gain access to the natural resources required to support their families, and (b) have a site on which to establish a homestead (*umuzi*). Single people cannot be allocated land, and must reside with either their parents or other family members. Land is allocated to a household, under the authority of the household head, rather than to individuals, and the household head is understood to be a senior male (*umnumzane*). If fields are not being used, they can be re-allocated to a household in need. There is thus a strong association between land holding and the necessity of supporting a family from land-based livelihoods, which in the pre-colonial agrarian economy would have been the main source of livelihoods for most people.<sup>38</sup>

The primary unit of social organisation is the homestead (*umuzi*) headed by a man, who might have several wives, although it is accepted that polygyny is now in decline. In polygynous marriages, wives live in separate residential structures within the homestead and each constitutes a 'house-property complex'.<sup>39</sup> As part of this complex, each wife is entitled to a site on which to build a home and hearth for herself and her children, a granary and a field or fields of her own, which she cultivates to provide food for herself, her children and her husband when he is eating with her.

Married men and their wives and their children may continue to live in their parents' homestead for many years before establishing their own homesteads, giving rise to large, three or four generation-strong 'compound' homesteads, composed of several marital units. Central to the homestead is the cattle kraal, made up of livestock independently owned by husbands and fathers, as well as cattle from *lobolo* that belongs to the house-property complex of each wife. The kraal, a specific geographical space from which women are generally excluded, is also the site on which ritual slaughter for the ancestors is performed, which thus binds a particular family to a particular site through the inter-generational bonds, both social and material, embodied in livestock, and cattle in particular.<sup>40</sup>

The family, meaning here an extended family of patrilineally-linked relatives and not a nuclear family of a man and his wife or wives and their children, is the most basic unit of social organisation. Marriage establishes important relationships between two families or descent groups, symbolised by payments of bridewealth (*lobolo*) that transfer the rights to women's

<sup>38</sup> J Guy 'Ecological factors in the rise of Shaka and the Zulu kingdom' in S Marks and A Atmore (eds) *Economy and Society in Pre-Industrial South Africa* (1980) 102–119.

<sup>39</sup> E Preston-Whyte 'Kinship and marriage' in WD Hammond-Tooke (ed) *The Bantu-Speaking Peoples of Southern Africa* (1974) 177–210.

<sup>40</sup> D Hammond-Tooke 'Cattle in Zulu life' in M Poland, D Hammond-Tooke and L Voigt *The Abundant Herds: A Celebration of the Nguni Cattle of the Zulu People* (2003) 14–33.

reproductive capacity to her husband's family and by ancestral rituals that inform the ancestors (*amadlozi*) that a new wife has joined the family. Descent is patrilineal and there is a central concern with preserving the identity of the male lineage, and its connection to past generations, as symbolised by its surname.<sup>41</sup>

Marriage is virilocal and children belong to the husband's family. Together with gender, family membership is a primary determinant of social identity; it forms the basis of a complex web of kinship relationships and associated obligations. Familial obligations, if not membership, can also be extended to the wife's natal family and can include the allocation of temporary residential sites and garden space in times of need.

Every member of the 'tribe' and their descendants are entitled to land. People from other areas or tribes can also be allocated land and settle in the area if the correct procedures are followed, approval is granted, and they become fully-fledged members of the tribe. Rights to land thus derive most fundamentally from accepted membership of the community. Equally important, however, is the idea that rights to land enable a family unit to produce a livelihood for themselves, and thus that only adults who have children to support are entitled to land. The family, in this case an extended family that includes a wide network of kin-related individuals, is thus the immediate social context within which land rights are exercised. Between the tribe as a whole and the family are other social units that influence how land is held and used, most notably the *isigodi* or ward, often comprising several hundred households. Land rights are thus viewed as being nested within layers of social organisation, as is common across Southern Africa.<sup>42</sup>

Land rights provide for three kinds of land use: land for residential purposes (where an *umuzi* or homestead can be built), for crop production (arable fields or *amasimu*), and as common property (shared access to natural resources that support livelihoods, such as grazing land). There are established procedures for demarcating residential and arable plots, accepting outsiders, recording landholdings, and resolving disputes.

'Allocation' here refers to the demarcation of land on which to establish an *umuzi* and of fields for crop production purposes. If a male member of the tribe is married, has children and wishes to establish a new *umuzi* for himself and his family, he must approach his future neighbours and seek their approval and agreement on the location of the residential site and

<sup>41</sup> R Alcock and D Hornby *Traditional Land Matters: A Look into Land Administration in Tribal Areas in KwaZulu-Natal* (2004) 14–15.

<sup>42</sup> B Cousins 'More than socially embedded: the distinctive character of "communal tenure" regimes in South Africa and its implications for land policy' (2007) 7(3) *Journal of Agrarian Change* 281–315; B Cousins 'Characterising "communal" tenure: nested systems and flexible boundaries' in A Claassens and B Cousins (eds) *Land, Power and Custom: Controversies Generated by South Africa's Communal Land Rights Act* (2008) 109–137.

fields. The *Induna* (headman) oversees this process, together with the *ibandla* (a local assembly of older men). The prospective homestead head must pay a *khonza* ('homage') fee to the *Inkosi* (chief) at the tribal office, which issues a letter of approval, and outstanding debts to the tribal office for fees or fines to be paid before the letter is issued may be required. If a married man takes another wife, the homestead will need more land, both residential and arable. If land is plentiful then the homestead can expand without asking anyone's permission, but if land is scarce then the neighbours must be consulted, and possibly the *Induna* and *ibandla* as well. No *khonza* fee is paid in such cases.

These procedures are informal in that they are not required by statute, and are similar across Msinga, although there are some important differences between the core tribal areas and former labour tenant farms transferred to their occupants through land reform. Most land administration takes place at the level of the ward (*isigodi*), but groups of neighbours also play a key role in agreeing to the allocation and demarcation of new plots and the acceptance of outsiders. Local processes are nested within a layered system of land administration, with only some functions being the responsibility of institutions at the apex of the system – the *Inkosi*, the tribal office and the tribal court.

## VI CUSTOMARY LAND TENURE IN PRACTICE

Field research revealed key discrepancies between the normative ideal described above and how local residents accessed, used and administered land in practice, within and between *izigodi* in both the Mchunu and Mthembu areas.<sup>43</sup> It was evident that practice in relation to land is often inconsistent with rules. For example, men are supposed to pay a fine of R30 for living with a woman to whom he is not married, but many men do not pay these fines. There is also a good deal of latitude in the degree to which even foundational elements of the normative ideal, such as community membership, apply in practice. Case 1<sup>44</sup> below well illustrates this.

### Case 1: Sisizwe Khumalo<sup>45</sup>

Sisizwe Khumalo is a 37 year-old woman who lives in a homestead in Mathintha with her two children. Her husband comes home on weekends. They are not fully married (*gidile*)<sup>46</sup> but some cattle have been paid as damages and some goats have been slaughtered and she is *ganile*.<sup>47</sup> Her husband's

<sup>43</sup> See Cousins with others (n 2) chs 5, 6 and 7, for a more detailed description.

<sup>44</sup> Names of key respondents in this and all other Cases in this paper have been altered.

<sup>45</sup> Cousins with others (n 2) at 33.

<sup>46</sup> The full number of cattle required for *lobolo* is being paid and all the required ceremonies have been performed.

<sup>47</sup> *Uganile* marriage is a truncated form of marriage that involves the payment of some livestock by the male partner's family to the female partner's family as damages or *inhlawulo*.

homestead is in the Mthembu tribal area, and she moved there as her husband's second wife after he had paid 'damages' to her family (for making her pregnant). Her husband owns livestock, but grazing land is scarce in the Mthembu area, so he recently suggested that they move to Mathintha in the Mchunu tribal area, where grazing is more plentiful. They then approached a former neighbour of hers in Mathintha and went together to the *Induna* and asked for land to establish a homestead. The *Induna* told them that her husband would not be given land in the Mchunu area unless he was prepared to move there together with his whole family. Her husband did not want to do so, however, because he cultivates irrigated plots in the Mtateni Irrigation Scheme in the Mthembu area and earns good money from cash cropping. The *Induna* then asked them if they had a son, and on being told they had, said she could ask for land in the name of her son.

Sisizwe then went to the tribal court together with her former neighbour and asked for land in her son's name, without mentioning the fact that she had a husband. She was then allowed to establish a homestead. She does not regard herself as the holder of this land on behalf of her son, but believes that it is her husband's land, as it is registered in his surname. When the *Induna* and the *ibandla* came to settle them on this land, her husband was part of the process and the neighbours see the homestead as belonging to her husband, not to her.

Another discrepancy between social reality and the normative ideal is in relation to women's land rights. Increasing numbers of unmarried women with children are asking for land to be allocated to them in their own name, mostly to establish a homestead (an *umuzi*), but some for arable land as well. This is true even in the *izigodi* settled by former labour tenants, who see themselves as 'very strict' traditionalists, as compared to residents of the core tribal areas. The reasons for the increasing demand for land by unmarried women are explored further below.

In meetings to discuss the project's research findings, traditional leaders and traditional council members in both tribes responded to evidence of local variability in two contrasting ways: (a) disapproval of practices which might imply the weakening of their authority (eg, non-payment of *khonza* fees), combined with attempts to restore such practices; and (b) pragmatic acceptance of variability in relation to local practices of land allocation, land use, and sanctions such as fines. It became clear that traditional authorities lack the capacity to impose a common set of rules or centralised solutions to local problems, should they desire to do so. In practice they usually discuss or negotiate potential solutions to problems with key actors within *izigodi*, often over lengthy periods of time.

In relation to the increase in the demand for plots by single women with children, these involve profound shifts in social relationships and identities. The normative ideal of land tenure involves *gidile* forms of customary marriage, patrilineal descent and virilocal residence, but these are in tension with changing social realities. The increasing desire of

unmarried women to hold land themselves is being expressed in the context of profound shifts in marriage practices, as discussed next.

## VII CUSTOMARY MARRIAGE IN MSINGA: THE NORMATIVE IDEAL AND CHANGING PRACTICE

Changing economic realities (such as the decline of migrant employment and the availability of child support grants) are contributing to profound shifts in social relationships and identities in Msinga. The two changes that are most commented on are: (a) the increasing number of women living within their father's (or brother's) homesteads who bear and raise children outside of a stable, co-residential relationship; and (b) changes in marital practices that are resulting in increasing numbers of co-habiting couples being only 'partially' married in terms of custom, along with a shift to registration of marriage as a more important priority than completion of customary marital rituals and practices.

Along with these changes is a small but significant increase in the number of female relatives being accommodated within the homestead, outside of the patrilineal system. These include unmarried, divorced or separated sisters, aunts and great-aunts on either the husband or the wife's side, together with their descendants. Because the surnames of these women, and/or the names of their children, may differ from the household surname, they are usually not viewed as fully-fledged members of the family, but are provided with a site for building a home within the outer boundary of the homestead, and may sometimes be given fields or portions of fields to cultivate.

In focus group discussions and interviews with women in all four research sites, the extent of the changes currently taking place were described by many respondents as follows: very few marriages are now completed with full payment of *lobolo* (*gidile* marriage). Significant numbers of women now become pregnant and move to the home of their husbands after some damages (*inhlawulo*) have been paid, but full payment of *lobolo* does not take place (*ganile* marriage). Increasing numbers of women in this category are beginning to register their marriages, since this makes it possible for them to claim pension or life insurance payouts should their husbands die. Many respondents said that most young girls today become pregnant outside of marriage, and remain at their father's homestead, receiving child support grants. Also discussed was the situation of women who returned to their natal (ie, their father's) homesteads after becoming a widow or after divorce or separation, and instances of women acquiring land of their own.

In practice, however, the distinction between 'married' and 'unmarried' women is not always so clear-cut. This is because of increasing number of *uganile* marriages that involve the payment of *some* livestock by

the male partner's family to the female partner's family as damages. This leads to a blurring of the distinctions between the categories of *iqhikiza* (an unmarried woman in a relationship with a man, possibly with a child) and *umakoti* (a young wife). There is little shame attached to bearing children outside of marriage.

The reasons for these shifts in marriage practice in Msinga were discussed with traditional councillors and local residents in a number of meetings, focus groups and interviews. This question often led to lively debate, and a range of possible reasons was proposed. Some recurring arguments were:

- 'From a male perspective, if a women has already moved in with a man there is no need for him to marry her; his sons will bear his surname in any case, and there is no need for him to *lobolo*';
- 'Fewer people own cattle for *lobolo* payments these days, and cattle are very expensive';
- 'High levels of unemployment mean that there is a shortage of jobs to earn the cash required to buy cattle for *lobolo* payments';
- 'Child support grants now provide a guaranteed income for women with children, so they are less dependent on men as husbands';
- 'Values are changing: children no longer respect their elders; boys are not governed by their fathers; mothers support their sons no matter what they do, even if they make a girl pregnant'.

## VIII WOMEN'S LAND RIGHTS IN MSINGA IN A CONTEXT OF RAPID SOCIAL CHANGE

This section contrasts the normative ideal of land tenure in Msinga with emerging realities in relation to married women, widows, women whose relationship or marriage has broken down, and single women with children.

### (1) *Married women*

The normative ideal of customary marriage in Msinga is consistent with that described by Vilikazi and Preston Whyte for Zulu speaking areas more widely.<sup>48</sup> The husband, seen as manager of household assets, allocates his wife or, in the case of polygyny, each of his wives, a site on which to build residential structures, which include a living area, hearth and granary. He also allocates fields for cropping, and in polygynous households these form part of the 'house-property complex'. Some young wives move into a large, compound homestead under her husband's father (or his elder brother, if the father has died) rather than into a

<sup>48</sup> A Vilikazi *Zulu Transformations: A Study of the Dynamics of Social Change* (1962); Preston Whyte (n 39).

new homestead established together with her husband. A newly married woman (*umakoti*) will often work on her mother-in-law's fields, seen as house property, for some years before being allocated fields of her own. A newly married wife in a compound homestead thus has little direct control over land. Such women sometimes state that that they were 'given' their fields by their mother's-in-law when the latter became too old to engage in crop production. A woman who is fully married through customary processes has the most protection of her rights to land and property – in theory, but not always in practice. Today, a customary marriage that has been officially registered is seen as additionally secure, since registration will help secure a widows' access to pension and life insurance benefits.

However, very few marriages today conform to this normative ideal. Many women are married *ganile*, which leaves her more vulnerable to eviction by her spouse's family. One respondent explained: 'I was married *ganile*. When my husband died I came back home because my mother-in-law evicted me after accusing me of trying to finish off his left-over possessions when I am not even properly married to him'. In practice, even women who are seen as fully married may feel insecure after widowhood (see below).

## (2) *Divorced or abandoned women*

Norms around the breakdown of a marriage derive from the cultural ideal of families entering into reciprocal relationships, embodied in the payment of bridewealth in the form of cattle. Different outcomes are possible, in part dependent on the cause of the breakdown. When a woman who has completed a full customary marriage is 'chased away' (*xoshiwe*) and returns to her father's home, her brothers, who have benefited or will benefit from the *lobolo* cattle paid to the family when she was married, have to ascertain from the husband's family the cause of the problems.

If the woman has committed adultery, her family will pay a fine and she will return to her husband; if she has performed witchcraft then she will often remain with her family of origin but her *lobolo* cattle will have to be returned; if she has defied the authority of her husband then she can be disciplined by her brothers. If she has been falsely accused of these misdemeanours then she cannot be sanctioned. If her return to her father's home is permanent, she might be allocated land by the family, or she can be allocated land for an *umuzi* of her own (see Case 2 below). She might also remain in her husband's *isigodi* and be allocated land there in the name of her son.



Case 2: Magongo Duma<sup>49</sup>

Magongo is a niece of the *Induna* in Ncunjane, and married to a man in Mathintha. After being abandoned by him she returned to her father's *umuzi*. Anticipating tension with the wives of her brothers living at the homestead, she asked the *Induna* for land in her own right in order to construct her own *umuzi*. She is proud of her independence. She says:

. . . there is no way I will allow my husband to come and live here. I built this place myself! I went to a farm and cut some firewood, and exchanged it for a goat, which gave birth to other goats. Some of these I exchanged for a cow. I now own 13 goats and 7 cattle. I would be ploughing crops by now as well if some people from outside Ncunjane had not stolen the thorn trees that I cut to fence my fields.

If the wife runs away (*baleka*) from her husband, her brothers must ascertain the reason; if she has left as a result of abuse by the husband, they will demand an apology, but if the abuse continues she can return to her father's home and the *lobolo* cattle do not have to be returned (unless she remarries). A third possibility is when the wife is 'rejected', for example, when her husband refuses to sleep with her. This is known as *ukwaliwa*. She may decide to stay, or she can leave her husband and return to her father's home. Such an outcome is legitimate, but a ceremony must be held to end the bond between the two families. If no *lobolo* payments have been made, then the woman can leave the man's home and return to her family of origin at any point and her brothers will not be involved at all.

A view expressed by some informants was that the question of which spouse leaves the homestead depends on who is to blame for the breakdown of the marriage; if the husband is deemed responsible, he might have to move and ask for more land elsewhere. There are cases where adult or older children take their mother's side in a dispute and put pressure on their father to leave. The normative ideal is that the wronged party in a marital break-up is not punished. If a marriage begins to break up, the reasons for the problems are determined by the husband's relatives and the wife's father or brothers. Depending on who is the 'wrong-doer', *lobolo* may have to be repaid to the husband's family and a wife may or may not be supported by her brothers.

In theory it is possible for a woman whose husband has rejected her to remain in her husband's relatives' household, while her husband is made to go and live elsewhere. However, many respondents suggested a different reality. One said:

If conflicts occur within a marriage, it is always the wife who must leave, even if the husband is to blame, since he cannot leave his home. At best, she can be

<sup>49</sup> Cousins with others (n 2) at 46.

given a stand on the land belonging to the family, but outside the fence of the *umuzi*, and in the surname of the family.

### (3) *Widows*

There are several options for widows: (a) she can remain on her deceased husband's land, holding it for her oldest son; (b) she can be taken as a wife by one of her deceased husband's brothers, a practice known as *ukunghena*;<sup>50</sup> (c) she can return to her father's home (which might be now headed by one of her brothers); (d) for women in compound homesteads, she can continue to reside with her husband's family; or (e) she can ask for land in her own right in her ex-husband's home area.

In the normative ideal, a widow does not inherit the house's land, livestock and other forms of property in her own name but holds these for her children and in particular for the male heir, the eldest son. She is supposed to have decision-making powers over the house property while she is alive, but in many cases members of her deceased husband's family begin to use these resources. This might include using cattle for rituals related to unveiling ceremonies, particularly where previously deceased relatives have not undertaken these ceremonies, or taking cattle to pay *lobolo* for a man getting married.

When a husband dies, he must be buried. Cattle and/or goats must be slaughtered. After the wife's mourning period, she must be cleansed and more livestock must be slaughtered. However, if her father-in-law or husband's older brother died before her husband died, and ceremonies for cleansing them had not been performed, these would now have to be carried out before her own cleansing ceremony could take place. In this situation, her husband's relatives might now use her livestock in order to perform these ceremonies.

A widow is particularly vulnerable to losing property during the period of mourning, often two or three years in duration (see Case 3). In this period male relatives make decisions on her behalf, since her behaviour is expected to be subdued and submissive. This is a major cause of disputes in Msinga, with many cases ending up in the tribal court. Widows who were not married with payment of *lobolo* (ie, *uganile*) are particularly vulnerable to loss of property, since her brothers will not intervene to protect her.

#### Case 3: Sindiswe Mthembu<sup>51</sup>

My husband passed away in 1990. I used to live at his homestead, but after he died, my in-laws abused me. They did not allow my relatives to visit and at some point they plotted to kill me because they wanted to inherit my

<sup>50</sup> Anthropologists term this arrangement 'the levirate'.

<sup>51</sup> Cousins with others (n 2) at 66.

husband's money as he was employed in Johannesburg. They seized my husband's livestock. I mourned for him for two years, and in the third year I was cleansed out of mourning. At this time my father and mother-in-law and brothers-in-law told me that I had to move out of the homestead. I was told to give them my husband's pension money and leave the homestead and find myself another man to marry. I had two children, a boy and a girl. I was not fully married to my husband, but even if I had been, I don't feel it would have made any difference.

It would appear that many women today, whether or not they were fully married, refuse the option of *ukungena*. Some informants speculated that this might be because of the risk of being infected with HIV. Other reasons for not remaining in her deceased husband's homestead include her brother-in-law refusing to *ngena* her, her husband's relatives accusing her of causing the husband's death, his relatives evicting her, or other *omakoti* in the compound homestead making her life so miserable that she chooses to leave.

Widows with children can be allocated land in the names of their sons if they are not able to remain in their deceased husband's households. If a widow has no children, or does not wish to access land in her own right, she will usually be able to be given a residential site in her father's household, which may now be under the authority of a brother. Her position within this household is somewhat ambiguous, however. She is not a member of the household, since she 'belongs' to her husband's family, but her home is within the homestead's boundaries.

#### (4) *Unmarried women*

A key feature of the normative ideal of land tenure in Msinga is the principle that a married man is entitled to ask for land in order to build a homestead and enable the production of food to support his family. With so many young women now having children outside of marriage, this principle is under stress. The broader principle is that land is needed in order to provide for families, which is what single women with children are invoking when asking for land. A common practice in Msinga today is that unmarried women with children are allocated building sites within their father's or brother's *umuzi*, and sometimes also a garden to cultivate crops, or part of a field. Some people were of the view that unmarried women with children could also apply for land in their own right, and be allocated residential plots and arable land through the usual procedures, and a few such cases were identified, as shown in Case 4:

Case 4: Bawinile Mnisi<sup>52</sup>

Bawinile Mnisi is aged 49 and lives in her own homestead with her younger son. She used to live with her parents, but moved out because she wanted a homestead where the surname of the father of her children could be established. She works for two days a week on a road construction project and the rest of the time in her fields and hawking her vegetables. She owns three cattle that were paid as *lobolo* for her daughter, but her parents look after them for her. She can't speak to the ancestors (the *amadlozi*) herself, so if she needs to slaughter an animal for the ancestors she will have to call a male relative to do so on her behalf. She said:

When I was looking for a stand of my own, I spoke to the neighbours in the area. After I was accepted by them, I went to the *Induna* and he allocated this stand for me; he was accompanied by the *ibandla*. I paid the *Induna* an allocation fee of R100. I'm not married and it was important for me to have my own homestead since I have grown up children. In terms of decision making, I'm responsible for everything since I'm the head of the family. It doesn't bother me that I'm not *ganile*, because I don't see the difference. Whatever *ganile* women do, I can do.

Some respondents suggested that unmarried women could also ask for land at the home of the children's father. In most cases it was said that an unmarried woman asking for land must have sons (who carry the surname of the lineage) before she can be allocated land, but some women said that even women with daughters should be allocated land, and indeed that even single women and men without children should, under some conditions, be allocated land. In Ncunjane one or two young women with children have been given residential land and fields but these were in their respective father's surname. Respondents said that if their children are sons from different fathers, and therefore do not share her surname, the sons can approach the *ibandla* and *Induna* in either their mother's or their father's *isigodi* if they want land.

Some unmarried mothers in Ncunjane remain in their father's homesteads, but are allocated a site on which to build a home where they can cook separately for themselves and their children. This is seen as a partial solution to the problem of sharing resources with other *omakoti*. This is the only solution available to unmarried mothers in Nkaseni, where the community firmly holds to the rule that only married men with children can be allocated land. However, this is not always a happy solution (see Case 5).

Case 5: Thandiwe Majola<sup>53</sup>

Thandiwe Majola is 35 years old and lives at her father's homestead together with her father, her mother, three brothers, four young wives (*omakoti*) and

<sup>52</sup> Ibid at 67.

<sup>53</sup> Ibid at 68.

fourteen children. She is not married, but has a boyfriend. She has two children of her own, aged ten and two, the younger one by her current boyfriend, who paid three cattle as damages. At one point she moved to her boyfriend's homestead, but her father called her back home because her boyfriend was not paying *lobolo*. A year ago she started cooking separately from the rest of the homestead because there was constant conflict between her and the *omakoti*, who complained that their husbands should buy food for them and their children, but not for her and her children. When she started to earn an income from selling chickens, she approached her father and said she wanted to cook separately from the other women. She then built two dwellings at her father's homestead, one with financial assistance from her mother. Thandiwe wants her own land on which to build a house because of this on-going conflict with her brothers and their wives. She does not know if she will ever be properly married. She does not want to move in with the father of her child, because if she does, she fears he would never pay *lobolo* for her. She approached her father, but he told her that single women in Nkaseni are not allowed to have their own homestead, even if they have children. She knows two other single women in the area who also want land, but the community does not allow a woman to obtain land on her own.

There is clear evidence in Msinga of a pent-up demand from unmarried women for residential and small plots of adjacent arable land in their own names. While this appears to be inconsistent with key principles of the patrilineal system of descent, it seems such claims can be asserted in terms of another principle – that adults with dependents need to be provided with a material base for social reproduction.

## IX TRADITIONAL COUNCIL RESPONSES TO THE DEMAND FOR LAND BY SINGLE WOMEN

As part of the action-research design of the *Imithetho* project, the research team reported its findings on changing patterns of marriage and the demand for land by unmarried women to the Mchunu and Mthembu traditional councils. Councillors expressed concern over declining rates of marriage, and offered a variety of explanations, including the availability of child support grants from government. Older councillors in particular focused on changing morality – in their view, members of the younger generation no longer respect their parents, the authority of fathers over sons has declined, and young men and women have become much more promiscuous than in the past. At a report-back meeting with the Mthembu traditional council in 2008, the *Mntwana*, Ndaba Mthembu, suggested that perhaps an older 'law' could be resurrected in which a fine of R150 is levied on couples who live together without getting married.

The two traditional councils have adopted starkly contrasting stances on the question of whether or not land should be allocated to unmarried women. Members of the Mthembu Traditional Council strongly

opposed the allocation of land to unmarried women with children for the establishment of separate homesteads. One argued that this would lead to boyfriends visiting such women, and the inevitable result would be fighting. ‘Some of these boyfriends are also stock thieves’, he said. The only solution supported by the council was to encourage families to allocate a place within the boundaries of the *umuzi* for single mothers on which to build their own houses – already a widespread practice.

In contrast, the Mchunu Traditional Council decided in 2009 that land for the establishment of a homestead can be allocated to single people, male or female, who are genuinely in need.<sup>54</sup> They qualified this right by requiring that neighbours give their approval, and that the *ibandla* and the *Induna* oversee the allocation process. According to the *Inkosi*, by the end of 2009 the council had not yet informed members of the Mchunu tribe of this decision, ‘in case it encourages bad behaviour’. The way in which the new law will be implemented is that if someone has a problem and approaches traditional leaders to ask for land, they will be offered such land. This, he said, was an adaptation of the old laws of the Mchunu, and not something completely new.

At a research findings workshop held in October 2009, the vice-chairman of the Mchunu traditional council said that land allocated to unmarried people would generally be located near their father’s homestead.<sup>55</sup> This is to provide women with protection and security, while allowing them some independence. He said that this practice was not unknown in the area, but it had never been a ‘law’ before. Other members of the council suggested that they were worried about the consequences of this decision, particularly in relation to the possibility that it would be seen as condoning ‘immoral behaviour’. This concern informed the idea that land for a new *umuzi* should be located close-by to that of the *umuzi* of the woman’s father or brother, so that the family could watch over the behaviour of the young people establishing the *umuzi*.

In 2010, the Mchunu traditional council also decided that people who live together, but are not married, would be given letters to enable them to register their ‘marriages’ at the Department of Home Affairs. This decision was motivated in part by the requirement of the Recognition of Customary Marriages Act 120 of 1998 that all customary marriages be registered, but more importantly, by the need of rural women with male partners in urban employment to be able to claim death benefits or insurance pay outs in the event of their partner’s death. This they can do only if they have a marriage certificate.

What explains the difference between the two councils’ responses to changing social realities? One key factor may be the relative stability and

<sup>54</sup> Ibid at 2.

<sup>55</sup> Ibid at 2.

legitimacy of traditional leadership institutions. The Mchunu Traditional Council is characterised by strong leadership, openness to debate, and space for a range of voices, including those of women, to speak and be heard. The *Inkosi*, Simukade Mchunu, has been chief since 1944 and appears to be a popular leader. In contrast, the Mthembu Traditional Council, from the time of its establishment in 2006, has been pre-occupied with an uncertain process of succession to the chieftainship. A conservative politics of tradition, centred on support for the acting *Inkosi*, has emerged within the council, and there has been little sympathy for the idea that single women should be allocated land.

## X INDETERMINACIES, PROCESSES AND SOCIAL CHANGE IN MSINGA

Sally Falk Moore's analytical model of law as process helps us make sense of the underlying dynamics at work in Msinga. Here, the cultural ideal of marriage as a relationship between two descent groups, symbolised by payments of bridewealth (*lobolo*), remains a powerful and important point of reference in social life. There are many occasions where the values, principles and norms surrounding marriage are re-affirmed, such as during inter-familial negotiations over payment of damages or bridewealth, and at weddings, funerals and 'cleansing' ceremonies. These all take place at homesteads (*imizî*), established on land allocated to a married couple so that they can communicate with patrilineal ancestors (the *amadlozi*) from specific, ritualised places within the homestead. Land also provides the young family with key livelihood resources with which it can support itself. Ceremonies, rituals and homestead establishment and the norms and values that are invoked on these occasions can all be seen as *processes of regularisation*, which seek to maintain social order and predictability.

However, *indeterminacies* abound in Msinga in relation to both customary marriage and land rights. Both are arenas of social life fraught with ambiguities, inconsistencies and the potential for conflict. Marriage is inherently negotiable in relation to both status and terms, and a variety of choices are available. Men and women in relationships can choose whether or not to 'marry', may decide to do so whether or not they have had a child together, and may co-habit or not. They can decide to embark on the (potentially long-winded) journey that is *gidile* marriage, or they can decide that payment of damages is sufficient, ie, choose a *ganile* marriage. Others may choose to embark on a *gidile* marriage, but find it difficult to complete *lobolo* payments, and then accept a *ganile* marriage. The precise status of *ganile* marriage, relative to *gidile* marriage, is unclear.

Indeterminacies also exist when marriages end, for example after the breakdown of the marital relationship or the death of one of the spouses. In the case of breakdown, who stays in the marital home and who leaves

depends on a hard-to-determine apportionment of responsibility. If the wife returns to her natal home, she may be allocated a place for a dwelling within the family homestead, or she can be allocated land for an *umuzi* of her own. She might also remain in her husband's *isigodi* and be allocated land there in the name of her son. In relation to widows, ambiguities are rife in respect of whether or not the levirate (*ukungena*) will be offered or accepted, where they will reside, and how much control they will have of family resources, including livestock.

A variety of *processes of situational adjustment* are also evident in the Msinga material, with women, men and families exploiting the array of possibilities open to them by interpreting the ambiguities of current-day marriage 'customs' in ways that suit their interests. In doing so, they invoke aspects of the normative ideals as a means to legitimise their arguments and claims. For example, in relation to asking for land, the idea that the surname of the father of a son will be established at the new homestead is often invoked, as is the principle that families need resources to support themselves. Another common element is women following the generally acceptable procedure of first consulting with neighbours and then asking the *ibandla* and *Induna* to oversee the allocation of a plot. But these situational adjustments also contribute to on-going social change by undermining the stability of the normative ideal still further, creating the enabling conditions for single women's claims for land.

The emergence of *ganile* marriage can perhaps be understood as the outcome of processes of situational adjustment, making use of an existing degree of indeterminacy in relation to 'customary marriage', that have then injected even higher degrees of indeterminacy into current practices. Wider socio-economic shifts, such as declining employment opportunities for migrant men and new income sources for women, shape both need and opportunity for the emergence of a range of flexible arrangements for unions, including non-marriage. Political change and the new language of rights and gender equality accompanying it has also played a role in helping to legitimise claims by unmarried women for land in their own right, thereby increasing the degree of indeterminacy.

The differential responses of Msinga traditional authority structures to social change can also be interpreted through the lens of Moore's model. The Mthembu council's conservative backlash against the decline of marriage and the demand for land by single women is a regularisation strategy, which is unlikely to succeed in staunching the tide of change, but may win the acting *Inkosi* and his council some support from older generations of residents and buttress their legitimacy, in the short-term at least. The Mchunu council's decisions to allocate land to women and to allow all unions to be registered as 'customary marriages' can be seen as a situational adjustment of rules to social realities, but are also, paradoxical-



cally, a re-affirmation of norms and principles that might ensure a degree of continuity and order, such as oversight of land allocation by neighbours and local-level traditional structures.

## XI POLICY IMPLICATIONS

What are the policy implications of the research findings reported here, in particular in relation to the debates and controversies provoked by the CLRA of 2004, which was struck down by the Constitutional Court<sup>56</sup> in 2010? The approach to tenure reform adopted by the CLRA involved the transfer of ownership of land from the state to 'communities' represented by traditional councils, which would administer registered 'community rules' and oversee a process of recording and registering individual rights in a community land register. The CLRA provided for centralised control of large areas of land by traditional councils under chiefs, within apartheid-era boundaries, and through the administration of 'community rules'. Critics of the Act argued that centralised control within fixed territories constitutes a colonial and apartheid-era distortion of land relations, and that in pre-colonial systems 'the interplay of power between different layered levels of authority . . . mediate(d) potential abuse of authority by tribal authorities', boundaries between groups were often 'in flux and overlapping', and land rights were therefore 'layered and relative'.<sup>57</sup>

In this view, the CLRA would build on and cement into law a version of customary land tenure and authority that had suited the authoritarian regimes of the past, as well as the interests of the elite at local level, at the expense of the interest of ordinary group members. Key policy questions that arise are thus: whose voices and interests count in processes of regularisation and of situational adjustment? What institutional arrangements will allow for the voices and interests of the majority, as opposed to those of the powerful with vested interests, such as those of traditional elites, to be decisive? Should the emphasis be on enabling effective and appropriate processes of discussion and negotiation, rather than rule-making?

One interpretation of the Msinga material is that so-called communal land tenure regimes in rural South Africa are best understood as systems of *living law*, which have the potential to adapt and evolve over time and are sometimes deliberately and consciously adjusted to meet changing circumstances. This implies that the term 'customary law' is a misnomer, since it seems to imply the existence of a system handed down relatively unchanged from the past, its content derived primarily from a discrete and

<sup>56</sup> *Tongoane and Others v National Minister for Agriculture and Land Affairs and Others* 2010 (6) SA 214 (CC).

<sup>57</sup> Claassens (n 12) at 281 and 282.

unique set of cultural norms and values. Even in Msinga district, widely seen as a prime example of a culturally conservative rural area, there is much evidence of the influence of normative change in the wider society, for example, in relation to notions of gender equality. Barbara Oomen's conception of living law, discussed above, is thus highly relevant.

These research findings suggest that codified versions of customary law are indeed problematic. But they also suggest that a focus on the 'customary' dimensions of local law is too narrow. Residents in Msinga do not see South African citizenship and attendant rights as contradicting their membership of the Mchunu or Mthembu tribe, and they draw on constitutional values (such as gender equality) and other normative frameworks (such as the state's commitment to rural development and land reform) in processes of situational adjustment. Others, such as members of the Mthembu traditional council, appeal to 'true custom' in processes of regularisation, which attempt to push back against wider socio-political changes, sometimes in pursuit of their own interests, which is another reason to be wary of the term 'customary'. The question of whose voices are heard in processes of regularisation and situational adjustment becomes critically important.<sup>58</sup>

A key policy issue is thus the nature of the institutions and processes within which conversations, negotiations and decisions over the content of 'custom' take place, and in particular on how participatory such processes are. As illustrated by the example of the Mchunu traditional council's decision to allocate land to single women, institutional contexts which are characterised by strong leadership, an openness to debate, and the space for a range of voices to speak and be heard, are more likely to be able to engage with processes of social change than those open to only a narrow range of voices and interests. A key objective of policy and law should therefore be to establish and support land tenure institutions and decision-making processes that are legitimate, open to popular participation, and accountable to rights holders.

## XII CONCLUSION

In the research report from which these research findings are drawn, it was suggested that the flexibility and variability of customary land tenure as practiced in Msinga could be explained in terms of the concept of 'living law'. The notion is clearly very useful for purposes of contrasting codified and distorted versions of customary law and current realities on the ground. It can also be used to support arguments that local institutional spaces need to be opened up for a variety of voices to be heard on

<sup>58</sup> Ibid.

the content of land tenure rights, and thus avoid the pitfall of attempting to design and legislate land tenure rules entirely from above.

But what gives rise to discrepancies between rules and social reality in the first place? Does the notion of 'living law' close the gap between normative orders and practice? Sally Falk Moore's conceptual model of law as process, as applied to case material from Msinga, suggests that it cannot. Discrepancies will inevitably arise between this form of 'law' and social reality too, as much as for any other normative order. To the extent that it is 'living *law*', it is the result of processes of regularisation, but it will always be undermined by situational adjustments that both draw from but also re-enforce the underlying indeterminacy inherent in social and cultural life.