POLICY Brief 32

Reconciling Living Customary Law and Democratic Decentralisation to Ensure Women's Land Rights Security

Sindiso Mnisi, Law, Race and Gender Research Unit, University of Cape Town

Abstract

The recent Constitutional Court judgment rendering the Communal Land Rights Act (CLARA) unconstitutional (*Tongoane and Others v Minister for Agriculture and Land Affairs and Others*) must not be allowed to throw decentralisation policy making into disarray. Decentralisation holds much potential for lively, participatory democratic law making and enforcement, through which rural women can gain greater power and secure more rights. However, there are many challenges in the often fraught context of decentralised law and power.

While the South African Constitution seeks to move South African law away from 'despotic decentralisation' (Mamdani 1996; McClendon & Thomas 2003:53) towards decentralised democracy, recent government legislation (e.g. *Traditional Leadership and Governance Framework Act* 41 of 2003, *Communal Land Rights Act* 11 of 2004 and the *Traditional Courts Bill* B15-2008) seems to revert to the old model by giving extensive, state-endorsed powers to (usually male) 'senior traditional leaders' in rural communities. In this form, decentralisation could allow arcane oppressive practices to go undetected, unmonitored and undefeated.

Therefore, it is essential that all decentralisation policy be guided by constitutional principles. As the Constitutional Court reiterated in its recent ruling, the democratic process is integral to law making and democracy might be legitimately realised by using non-repressive indigenous law in land reform solutions. In this policy brief, we explore the guiding principles necessary to safeguard democratic decentralisation, and how state law and living customary law can be better woven together so that women can build on existing successes to secure rights and gain access to land.

Introduction

Democratic decentralisation is still in the process of being worked out in South Africa; the real-life relationships between the state, traditional authority and governance structures form the backdrop to the process. Real tensions arise between the different structures, since the Constitution establishes a state-governed and constitutionally determined legal and institutional order and simultaneously accommodates traditional laws and institutions. The troubling collaborative relationship between 'the institution of traditional leadership' and former colonial and apartheid governments also creates tension, given that, as Mamdani (1996: 109) describes:

> *[…] the decentralisation, from and by the* [former colonial and apartheid] *state, of despotic power centralised to individual chiefs within sometimes manufactured indigenous communities for purposes of achieving state control over the members of that community.*

UNIVERSITY of the WESTERN CAPE
PLAAS
Institute for Poverty, Land and Agrarian Studies
School of Government • EMS Faculty

In such systems, direct rule was not only about institutional arrangements; it was also about state distortion, exploiting decentralised (i.e. local, indigenous) laws, inventing new official 'customary' law, and enabling government-empowered despotic chiefs to enforce repressive laws. Although the Constitution sought to address some of these problems, recent laws have reverted to the earlier model, giving the (usually male) traditional leaders power to administer land, make laws, resolve disputes and enforce law. Such powers have all been conferred on traditional leaders without adequately consulting rural constituents in drafting the laws. Moreover, the new laws depend mostly on artificial boundaries demarcated by the *Bantu Authorities Act* 68 of 1951, yet deny rural people the right to opt out of a traditional leader's jurisdiction.

In declaring CLARA unconstitutional, the Constitutional Court confirmed the reading of recent laws as reinforcing decentralised despotism, but also highlighted opportunities for women's land rights security that exist amidst the challenges. Since the state does not generally have the power, resources and access to customary communities to secure women's rights for them, recognising, encouraging and supporting healthy decentralisation is necessary, at least as an interim measure.

This means observing and facilitating the democratisation of customary institutions and laws internally. Though living customary law and the institutions that affect it are often regarded as inimical and detrimental to human rights – especially women's rights – recent scholarship (e.g. Nyamu Musembi 2002, 2005) has persuasively argued that living customary law offers spaces and opportunities for women to gain rights security.

This policy brief explores how such spaces and opportunities can be used to guide decentralised policy making in the future.

Living customary law as a site for contesting women's rights

Scholarship which challenges the notion of custom and rights as oppositional makes room for the view that rural women weave customs and rights together, while articulating claims and struggling for greater recognition of their rights in their communities. Therefore, the notion of rights as trumps has been rejected in favour of more nuanced conceptions of relational rights (Nedelsky 1993, 2008), conceived through the contests of the people to whom they apply (Mamdani 1990; Merry 1996, 2001; Nyamu Musembi 2005). So rights are not about protecting individuals or enabling their autonomy from one another, but instead facilitate an autonomy enabled and supported by the relationships on which individuals depend, through their connectedness and mutual reliance (Nedelsky 1993).

Thus the process by which rights come into being is as important to rights protection as the substance of such rights. Processes which determine rights are integral to their defence. So when women take part in rights struggles in their communities, it is important to pay attention to the terms in which struggles are conducted, the language of culture they employ, and the lens through which rights are mobilised (Nyamu Musembi 2002).

Women employ languages of both rights and culture, often simultaneously, to claim and advance their rights in their communities, as shown in accounts of single and widowed women in some communities who have made successful claims at family, headmen's and chiefs' councils and courts to extend their land rights beyond the confines of marriage and family. Specifically, these women have claimed that they – like their male counterparts – are children of their communities and need land on which to raise their own children. Recognising this, councils have granted them access to land as children of the community, and thus also as legitimate rights holders. In other situations, councils and courts have slowly and less explicitly broadened women's rights and access in answer to practical needs. For example, a council might recognise that discord can be caused in families when women who bear children outside of marriage are forced to live in their birth home or their brothers' homes with their children. Therefore, some traditional councils allow women plots of land on which to raise their children, although sometimes these plots are in their son's or an older male relative's name.

Women's rights are not entirely secure in this decentralised matrix of law and authority. Progressive changes are variable and women are still very oppressed in some places, either because they do not have ready or equal access to land, or because they may not take part in customary forums and structures, or speak for themselves even when they do. However, rights exist and can be realised in the context of custom. Women have the scope to (successfully) mobilise for change and gain support from their male counterparts in doing so – in their local communities and within the confines of living customary law.

Conventional rights discourse which sees rights and customs in opposition does not leave space for such rights-oriented change to occur on the ground. A relational understanding of rights, however, allows for the possibility of reconciling state and customary law in legislative frameworks, so as to better support women's struggles for rights and thereby improve the prospects of making women's rights a reality.

Reconciliation between state and living customary law can be achieved by broadening women's involvement in formulating solutions and ensuring that women participate in the spaces where critical decisions are made on legal matters that affect them.

CLARA and the Constitutional Court decision

Recent legislation on traditional law and decentralisation tends not to support women's rights contestations, or the rights they have secured through such contestations. The *Traditional Leadership and Governance Framework* Act (TLGFA) gave the impression of being progressive and transforming the institution of traditional leadership, but it has instead reinforced the despotic powers created by apartheid government legislation, for example by simply converting former traditional authorities, defined by the Bantu Authorities Act, into traditional councils.

While TLGFA provisions on the composition of traditional councils set quotas of 40% elected councillors and 30% women, the TLGFA also permits the Premier of the relevant province to exempt a traditional council where there are insufficient female candidates to appoint. This solution to the lack of women candidates does nothing to address the deep inequalities in experience and confidence resulting from a patriarchal system of authority that automatically disqualified women, or conditioned them to self-deselect, and may thus have rendered them ineligible for participation.

The TLGFA also allows traditional councils to get involved in various administrative areas, including land. Depending on each TLGFA's boundaries, CLARA permits a traditional council to administer land in terms of community rules. However, allowing these centralised structures to make decisions about land rights in communal areas at the macro level runs counter to culture, which provides for a more inclusive decision-making model for land to take place at multiple community levels, depending on who uses the land. Therefore, CLARA assigned most decision-making power to structures in which women may have the most limited participation (compared to the greater participation they might enjoy in forums at lower, less intimidating levels of authority). Therefore, women might not have an equal say in how land rights are determined and structured.

CLARA requires that a land rights enquiry be done that might convert old order rights into new order rights. In CLARA, land rights can be attributed to either the community or the individual ('the community' being in most cases defined according to TLGFA boundaries), but not to family units. Such rules are problematic if one considers that many women's land rights are embedded in the rights held by their families. When specific provision is made for women's rights to land, CLARA anticipates married women but makes no provision for single women. By ignoring the layered and nested nature of customary communities, therefore, CLARA undermines single women's land rights.

This is only a sample of CLARA's provisions. More detail is rendered unnecessary by the Constitutional Court finding the Act unconstitutional.

The Constitutional Court's decision was reached on purely procedural grounds, as CLARA had been passed by an incorrect procedure in Parliament (i.e. *section 76* instead of *section 75* of the Constitution). The process excluded provinces from playing the significant role assigned to them by the Constitution in passing legislation that affects their constituents. According to Paragraph 66 of the ruling:

> *These procedural safeguards are designed to give more weight to the voices of the provinces in legislation substantially affecting them. But they are more than just procedural safeguards; they are fundamental to the role of the NCOP* [National Council of Provinces] *in ensuring 'that provincial interests are taken into account in the national sphere of government', and for 'providing a national forum for public consideration of issues affecting the provinces'. They also provide citizens within each province with the opportunity to express their views to their respective provincial legislatures on the legislation under consideration. They do this through the public involvement process that provincial legislatures, in terms of section 118(1)(a) of the Constitution, must facilitate.*

Therefore, in *Paragraph 106* of the ruling the Court emphasised that:

> *[…] our Constitution manifestly contemplated public participation in the legislative and other processes of the National Council of Provinces, including those of its committees.*

Although the ruling was made on procedural grounds, some comments

made in the ruling are significant. For example, the Court is alarmed by the continuity between CLARA and the Black Authorities Act, noting that this extends powers to apartheid-established bodies. *Paragraph 25* of the ruling notes:

> *Under apartheid, these steps were a necessary prelude to the assignment of African people to ethnically-based homelands.* […] *Section 5(1)(b) of the Black Administration Act became the most powerful tool to effect the removal of African people from 'white' South Africa into areas reserved for them under this Act and the Development Trust and Land Act. And as we noted in DVB Behuising (Pty) Ltd v North West Provincial Government and Another 2001 (1) SA 500 (CC); 2000 (4) BCLR 347 (CC)], '[t]hese removals resulted in untold suffering'. The forced removals of African people from the land which they occupied to the limited amount of land reserved for them by the apartheid state resulted in the majority of African people being dispossessed of their land. It also left a majority of them without legally secure tenure in land.*

Objectors to TLGFA, CLARA and the Traditional Courts Bill (TCB) (currently before Parliament) have repeatedly drawn the government's attention to this fault, to no avail. In retelling the history of the formation of the former homelands, the Court situates the undemocratic (and thus unconstitutional) nature of CLARA's promulgation process in the context of the undemocratic policy move of basing the TLGFA on the Black Authorities Act. Since our Constitution is based on democracy, freedom and public participation, no law-making process should deviate from these values.

Reaffirming sentiments of previous decisions, the Court duly recognises customary law as a legitimate source of South African law in terms of the Constitution. It points out in *Paragraph 90* that the existence of living customary law as a form of regulation on the ground does not constitute a legal vacuum but a real presence that must be treated with due respect, even when state law interferes with some aspects of it:

> […] *whether the community rules adopted under the provisions of CLARA replicate, record or codify indigenous law or represent an entirely new set of rules which replace the indigenous-law-based system of land administration, the result is the same: a substantial impact on the indigenous law that regulates communal land in a particular community.*

Therefore, the Court recognises public participation as important, not just in the process of promulgating law, but also in implementation and/or ongoing development of complementary living laws. This indicates that the Court has genuinely begun to think through how customs and rights might be reconciled even in the formal state law sphere, and how rights might be given expression in the context of living law.

These comments lay the groundwork for the type of legislation Parliament must pass to replace CLARA. They also problematise any other laws, such as the TCB, which:

- are founded on jurisdictional boundaries established by the Bantu Authorities Act
- are drafted without consulting ordinary rural citizens (who are therefore forcibly confined to arbitrary apartheid jurisdictions), but only traditional leaders, and
- do not respect living customary law practices that exist on the ground.

Conclusion: Seeing opportunities amid challenges

Decentralisation is not a problem in the context of South African constitutional law. Indeed, democratic decentralisation is desirable in that it creates opportunities for lively, participatory and even unconventional law making and enforcement. However, the process of decentralisation can be problematic when it tends towards despotic decentralisation, as is the trend in current legislation on 'traditional law'.

Therefore, law making on 'traditional law' must include participatory processes that pay particular attention to how women articulate their rights in systems of living customary law. Rural women have been successful in exploiting various avenues open to them – in living customary law and state law – to gain greater power and secure more rights. These practices of weaving together a rights discourse with living customary law can inform national legislative processes. In turn, national legislative processes can then be used to secure women's access to land and ensure their participation in traditional structures.

Clearly, decentralisation is not a panacea and problems arise – women can and often do still suffer – even under more desirable forms of decentralised government, as these do not always guarantee the most ideal legal outcomes. However, decentralised democracy should always be preferred to decentralised despotism.

Where government has failed to abandon undemocratic structures, genuinely incorporate public participation, and cater for living customary

law's ongoing role – as in the TLGFA, CLARA and the TCB – the policy trend is contrary to the aims of our Constitution. The Constitutional Court judgment reinforces the 'democratic' element of democratic decentralisation (decentralised democracy) and must be taken seriously by government as mandated by the Constitution.

References

Constitutional Court (2010) Tongoane and Others v Minister for Agriculture and Land Affairs and Others. CCT 100-09, judgment delivered on 11 May 2010.

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

Mamdani, M 1996. *Citizen and subject*. Princeton: Princeton University Press.

McClendon, T and Thomas, V 2003. Coercion and conversation: African voices in the making of customary law, in *The culture of power in southern Africa: Essays on state formation and the political imagination*, edited by CC Crais. Portsmouth, New Hampshire: Heinemann, 49–63.

Merry, SE 1996. Legal vernacularization and *Ka Ho'okolokolonui* Kanaka Maoli, the People's International Tribunal, Hawai'i 1993. Political and Legal Anthropology *Review*, 19(1):67.

Merry, SE 2001. Changing rights, changing culture, in *Culture and rights: Anthropological perspectives*, edited by JK Cowan, M-B Dembour and RA Wilson. Cambridge: Cambridge University Press:31–55.

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

Nedelsky, J 2008. Reconceiving rights and constitutionalism. *Journal of Human Rights*, 7(2):139.

Nyamu Musembi, C 2002. Are local norms and practices fences or pathways? The example of women's property rights, in *Cultural transformation and human rights in Africa*, edited by AA An-Na'im. London: Zed Books:126–50.

Nyamu Musembi, C 2005. Towards an actor-oriented perspective on human rights, in *Inclusive citizenship: Meanings and expressions*, edited by N Kabeer. London: Zed Books:31–49.

Recommendations

- Rural women must be actively involved in national law making on traditional law.
- Human (especially women's) rights must be woven together with living customary law in national law making on traditional law.
- National law making on traditional law should not use apartheid laws to define boundaries, but should instead let communities define their own boundaries in a participatory process.
- Individuals should be able to opt out of a community governed by traditional law.
- Law making in South Africa should never deviate from the values of freedom, public participation and democracy.

UNIVERSITY of the WESTERN CAPE

PLAAS
Institute for Poverty, Land and Agrarian Studies
School of Government • EMS Faculty

financed by
Austrian Development Cooperation

School of Government, University of the Western Cape, Private Bag X17, Bellville, 7535, Cape Town, South Africa
Tel: +27 21 959 3733 Fax: +27 21 959 3732
plaas@uwc.ac.za
www.plaas.org.za

We are happy to announce the opening of a new space for democratic debate on policies and other key aspects of the politics and economics of land and agrarian change in southern Africa.

The Institute for Poverty, Land and Agrarian Studies (PLAAS) has launched its blog:

http://anothercountryside.wordpress.com

We have created this space where we – and you – can speak and argue and debate about key issues relating to land and agrarian change in the subcontinent. Let us all imagine another countryside.

PLAAS engages in research, policy support, post-graduate teaching, training and advisory and evaluation services in relation to land and agrarian reform, community-based natural resource management and rural development.