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Defining Boundaries: Gender and Property Rights in South Africa's Traditional Courts Bill

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Abstract: In 2008, the Traditional Courts Bill (TCB) was introduced in South Africa's Parliament to regulate customary courts in place of the apartheid-era Black Administration Act. The TCB has come under wide ranging attack from civil society across the country, including from people based in the former homelands where the Bill would have effect, for its perpetuation of colonial and apartheid distortions of customary law, and its continuation of the oppressions justified through these distortions. In this article, I examine some of the major epistemic developments in customary law in South Africa, from colonialism to the present, to highlight key logics and genealogies of power that form the foundation and framework for 'official customary law'. This examination provides the context for analysing the epistemological de-linking from colonial frameworks represented in women's claims to land, and reveals how changes in women's access to land over the years allows for a reading of epistemological shifts and contestations in customary law. I read these developments alongside the content of the TCB to examine different references for custom represented in both colonially rooted knowledges and de-colonial knowledges that challenge the premises of the former.

Keywords: Traditional Courts Bill; South Africa; land rights; women; customary law; gender identity

Abbreviations

ANC: African National Congress; ANCWL: African National Congress Women's League; BAA: Black Administration Act; CONTRALESA: Congress of Traditional Leaders of South Africa; CLRA: Communal Land Rights Act; DOJCD: Department of Justice and Constitutional Development;

DWCPD: Department of Women Children and People with Disabilities; NA: National Assembly; NCOP: National Council of Provinces; NHTL: National House of Traditional Leaders; TCB: Traditional Courts Bill; TLGFA: Traditional Leadership and Governance Framework Act.

1. Introduction

Since South Africa's transition to democracy, with the promise of equality for all people, women across rural parts of the country have increasingly challenged constructions of customary law that deny them land rights [1]. In this resistance to patriarchal framings of land rights, women have drawn on both customary and constitutional law to claim these rights and to reframe them in ways that affirm their material and social interests [2]. Over the past decade, the state has introduced a series of laws related to traditional leadership and governance that threaten these localised developments around women's access to land. This article focuses on one of these pieces of legislation, the Traditional Courts Bill (TCB). I examine some of the major epistemic developments in customary law in South Africa, from colonialism to the present, to highlight key logics and frameworks that form the foundation and framework for 'official customary law'. This examination provides the context for analysing the epistemological de-linking from colonial frameworks represented in women's claims to land, and reveals how changes in women's access to land over the years allows for a reading of epistemological shifts and contestations in customary law. I read these developments alongside the content of the TCB to examine different references for custom represented in both colonially rooted knowledges and de-colonial knowledges that challenge the premises of the former.

The TCB was introduced to Parliament's National Assembly (NA) in March 2008 to replace sections of the 1927 Black Administration Act. The Bill immediately drew widespread opposition from civil society, which argued that it affords traditional leaders extensive, unaccountable powers [3–7]. Much of this opposition argued that these powers undermine the constitutional rights of people who live under traditional leadership, including the right to due process, equality, and freedom of culture. In June 2011, the TCB was withdrawn from the NA, partly because of opposition, but also because of insufficient time to complete required legislative procedures around public consultation. The TCB was reintroduced to Parliament's National Council of Provinces (NCOP) in January 2012. Despite intense public opposition, the Bill was reintroduced unchanged. The TCB is currently in the NCOP.

The TCB's stated objectives include:

Affirm[ing] the values of the traditional justice system, based on restorative justice and reconciliation and to align them with the Constitution... promoting social cohesion, co-existence and peace and harmony in traditional communities... promoting and preserving traditions, customs and cultural practices that promote nation-building, in line with constitutional values... [and] enhance[ing] the effectiveness, efficiency and integrity of the traditional justice system [8].

In contrast to these objectives, a primary critique in the campaign against the TCB is that instead of encouraging customary law to develop in line with the Constitution, if passed, the Bill would perpetuate colonial and apartheid distortions of custom, and in some cases intensify these distortions [9–13]. Land is central to this argument [14]. The TCB would allow traditional leaders to determine the content of customary law and to strip people of customary entitlements, which include

land. Traditional leaders' decisions on land carry extra weight under the TCB because the Bill would make it an offence not to appear before a traditional court when summoned by a traditional leader, would deny people living under traditional authorities the option of using state courts instead of traditional courts, and would give decisions of the traditional courts the legal status of rulings made by the magistrates' courts. The TCB adopts the tribal authority boundaries used under the homeland system as the jurisdiction of traditional authorities today [12,15], and in doing this literally reproduces the previous demarcations of 'tribe'. Opponents of the TCB have consistently argued that the Bill's framing of customary law directly contradicts Constitutional Court jurisprudence on "living customary law" which argues that customary law be directed by practice, and the values that inform this practice, rather than by rigid dictates and imposition of rules [10,11].

To read the ways that women have challenged patriarchal framings of land rights under customary law, in the context of the TCB, I draw on public submissions to Parliament on the TCB in 2008 and 2012. Over this period more than 100 submissions were submitted to Parliament from across the country, and across sectors, including non-governmental organisations, community based organisations, labour unions, government departments and individual citizens. Because of limited advertising of the TCB, many people living in rural areas indicated in their submissions lack of knowledge about the Bill and the public participation process until close to the deadline ([13], pp. 6–13). Many communicated that they were informed about the Bill and opportunities to provide input by civil society sources. The exclusion of people who would be most affected by the TCB sparked outrage about silencing in the submissions and was the most commonly raised theme in both the 2008 and 2012 submissions. The state's poor communication on the Bill meant that many of the submissions are from people who are politically engaged and have some relationship with civil society organisations. This context of the poor public consultation on the TCB created limitations in this article around sample and bias in terms of the people who wrote submissions and whose experiences are captured in this formal body of knowledge on public responses to the TCB. I discuss these limitations and ways that they impact my analysis in this paper in greater detail in the following section. Along with this examination, I also explore the theory that frames my engagement with the submissions and consider insights that these submissions can offer in reading contestations around women's rights to land under customary law and also around the role of different knowledges in informing customary law.

To provide context for understanding the TCB's epistemic roots and the legislative context in which it exists, I begin this article with background on the codification of customary law starting with the colonial and apartheid eras through to democracy. This examination follows key legislative moments that reveal the distortion of traditional leadership and governance, especially with regard to land and women's rights.

Next, I provide context for understanding the more recent political context in which the TCB was introduced and in which it has been debated. To do this, I examine statements by South African President, Jacob Zuma, the Women's League of the ruling party, the African National Congress, and the Department of Women, Children and People with Disabilities. The analysis of these statements highlights competing knowledges on customary law even within the ruling party and national government, and points to the diverse ways that knowledge around custom, identity and rights is being imagined and articulated differently by actors in different social locations.

After examining the historical and political contexts surrounding the TCB, I analyse responses to the TCB from people who would be directly affected by the Bill. This analysis focuses on how women

living under traditional leadership frame and communicate their experiences of land rights and how they imagine the TCB's impact on these current experiences. This section builds on the themes discussed in previous sections to reveal the different historical, political and social influences that shape the ways that people are framing their rights under custom and the Constitution.

I follow the analysis of women's framings of customary law in the submissions with an examination of some of the Constitutional Court's key judgments on customary law. This examination affirms the challenges to patriarchal framings of customary law in the submissions, providing context for understanding the judicial framing of customary law and illustrating how the Constitutional Court has engaged with the distortions of customary law that are represented in official customary law. This analysis of Constitutional Court decisions highlights how the Court has worked to align customary law with the values of the Constitution and the democratic dispensation.

This article's examination of the implications that the centralisation of power in traditional leaders have on women's access to land rights is significant because of the ways that it provides insights into "the specificity of mechanisms of power, to locate the connections and extensions, to build little by little a strategic knowledge ([16], p. 145)." Analysis of local contexts in which women are challenging patriarchal domination in relation to land rights creates opportunities for reading de-colonial constructions of customary law and the rights that these constructions afford different groups of people. The reflections in the submissions of different women's understandings of how and why the TCB would erode their access to land shed light on the conditions and relationships that perpetuate "top down" framings of custom and, in doing this, perpetuate inequality and women's disenfranchisement in the context of traditional governance.

2. Theory and Methodology

As mentioned in the introduction, there are significant limitations to what the submissions to Parliament on the TCB can reveal about women's experiences of claiming land in areas where the TCB would have effect. The poor public consultation on the Bill resulted in significant sample bias, which means that it is not possible to read the experiences communicated in the submissions as representative of women's experiences of interactions with traditional leaders or traditional courts broadly. This reporting bias has potential to influence the types of experiences on traditional courts that are captured in the submissions and to highlight some of the worst cases of abuse. This said, submissions were from across the country, and importantly from across the former homelands. The submissions describe a variety of different understandings of customary law that are informed by diverse historical, political, economic and social contexts and illustrate the heterogeneity of indigenous governance structures that people use. The overwhelming majority of the submissions opposed the Bill. Apart from submissions by traditional leaders, none of the people based in areas where the TCB would have effect wrote in full support of the Bill.

A significant number of submissions discussed the patriarchal norms and practices that shape women's experience of customary law and traditional leadership in many areas. Most of these submissions described the systemic and structural challenges that women face, which focused on macro-level problems rather than specific narratives that allow insights into the ways that people navigate and engage with patriarchal understandings of custom. My engagement in this article is

specifically with submissions that explicitly describe women's claims to land and that go into detail explaining how these claims to land confront and relate to patriarchal understandings of custom. This points to another bias in the selection of submissions to examine, but was necessary for in-depth qualitative analysis of the submissions. These submissions offer insight—in people's own words and voices—into traditional leadership, and experiences of customary law and traditional courts in different locations. Because of the narrative format of these submissions, they allow for readings of different constructions of customary law and of the ways that competing knowledges interact with each other in people's lives. In submissions from across the country, there are striking similarities and continuities in the descriptions of the challenges that women face in accessing rights under customary law. Although I do not explicitly engage with the majority of these submissions, they inform the backdrop on which I read and locate the personal narratives that I rely on in this article.

Because of the limitations in the sample described above and my intentional engagement with narratives related to land rights, I do not attempt to present the submissions examined in this article as fully representative of women's experiences of customary law in the former homelands. Rather, in the context of significant literature describing women's increasing claims and access to land, I seek to examine epistemologies that reveal how people are breaking from patriarchal understandings of custom to rearticulate rights under custom in ways that empower women. Through this reading of the submissions, I am looking to map epistemological routes and to examine the constructions of different norms and framings of legitimacy in discussions of custom. Reading these norms allows for a methodology that provides insights into how power is framed, how different actors construct their relationships to power, and how these actors exercise different types of power. Positioning this reading of epistemologies in the context of women's experiences of seeking land rights affirms the materiality of these epistemic frameworks, locating them historically, politically and socially to give meaning to different expressions of power.

My examination of the departures from dominant patriarchal framing of custom is informed by de-colonial frameworks for imagining knowledge. I draw on Anibal Quijano's thinking that to disrupt the coloniality of power, and the coloniality of knowledge through which this power is exerted, legitimised and normalised, it is imperative to decolonise knowledge [17]. As Walter D. Mignolo describes:

The grammar of de-coloniality (e.g., de-colonization of knowledge and of being and consequently of political theory and political economy) begins at the moment that languages and subjectivities that have denied the possibility of participating in the production, distribution, and organization of knowledge. The colonization of knowledge and of being worked from top down and that is the way it is still working today: looking from economy and politics, corporations and the state down ... On the other hand, the creative work on knowledge and subjectivity comes from the political society, from the institutionally and economically des-enfranchised... In that sense, the grammar of de-coloniality is working, has to work, from bottom up ([18], p. 492).

Through this de-colonial lens I examine the ways that women's claims to land present alternative knowledges to the historically dominant patriarchal framing of custom, and in doing this de-link from colonially ascribed standards of legitimacy within customary law. I read these knowledges against those written into the TCB to examine the different levels at which women's (re)framings of custom illustrate knowledge "from bottom up." This examination of the development and treatment of different

knowledges on customary law forms the basis for understanding power differentials discussed in submissions on the TCB.

Central to my examination of the TCB's impact on women's access to land rights is the recognition that women living under traditional leadership are not a homogenous group ([19], p. 9), and that intersectionality is crucial to engage with because gender intersects with multiple other identities to influence the ways that women experience customary law and land rights [20]. This qualification is echoed by Ben Cousins who notes that women with elite identities, such as being part of a royal family, might have greater access to land than women without such links to powerful institutions ([21], p. 121). This recognition of and engagement with intersectionality informs my use of the term power. I engage with power as a dynamic and relational force ([16], p. 142) and use the term to refer broadly to social, political, cultural, economic and other forms of capital that provide individuals and groups with influence in different relationships. Related to this, I use authority to mean power that is legitimised through various social and political institutions.

In examining the ways that authority is constituted through land, I draw on Christian Lund and Catherine Boone's work in which they argue that "control over land and over political identity does not merely represent or reflect pre-existing authority. It produces it ([22], p. 2)." This understanding of the relationship between land and authority recognises that authority is constantly reconstituted and reasserted to respond to changing contexts and relationships. Shula Marks quotes Barrington Moore who, in explaining the fluidity and dynamism in relationships of power, said:

The assumption of inertia, that cultural and social continuity do not require explanation, obliterates the fact that both have to be recreated anew in each generation, often with great pain and suffering ([23], p. 217).

The constant potential for the redefinition of power relations means that for patriarchal norms to be upheld they need to be constantly reasserted. In the context of women increasingly claiming land rights, patriarchal knowledges must be bolstered and subjugated knowledges challenging patriarchy suppressed to maintain male dominance. Moore's point about the constant recreation of culture and social continuity is central to the analysis in this article because it points to the competition between different knowledges and the ways that specific knowledges gain dominance over others "often with great pain and suffering." According to women writing on their experiences of custom in the submissions, the TCB's centralisation of power in predominantly male traditional leadership would allow for the maintenance and reassertion of patriarchal power relations because of the unequal power relations that the Bill promotes.

3. State Intervention in Customary Law from Colonialism to the Present

To understand why the TCB has evoked such widespread and intense opposition it is important to understand the history of state intervention in customary law and the historical distortion of the institution of traditional leadership through this intervention. This examination highlights the development of official customary law through colonialism and apartheid, analysing the frameworks and logics that these specific political projects propelled and also those that they simultaneously marginalised. Because of the focus in this article on epistemologies, this examination concentrates on a fairly narrow body of literature on colonial and apartheid influences on the institution of traditional

leadership and land, and does not engage extensively with the broad body of literature on the constitution of land rights and ownership in customary law. While I recognise the significance of this literature in understanding the diverse ways that people derive and express rights to land, this examination is beyond the scope of this article.

Peter Delius notes that historically traditional leaders gained legitimacy through the support of their followers, and therefore needed to exert power in ways that could garner approval and not alienate followers. Delius notes that in this context, declarations by traditional leaders that did not align with practice often had little effect [24]. Aninka Claassens and Sizani Ngubane similarly discuss the ways that accountability structures were historically built into governance systems with possibilities for appeal made possible by the multi-levelled adjudication system. Claassens and Ngubane highlight that in many places this layered system of governance continues, with senior traditional leaders serving as part of the governance system and not as the only, or even the most superior, source of power in this system [2]. This layered system of governance ensured accountability through checks and balances and limited traditional leaders' ability to abuse power [10]. This system of different levels offered more opportunities for the protection of women's rights and for protection against arbitrary interpretations of custom that were without the backing of popular support.

The discussions above about sources of knowledge on custom form part of a broad body of literature in which examples of the accountability structures that were historically central to traditional leadership and governance systems are well documented ([15], pp. 25–27). These examinations of the diversity of traditional leadership structures across South Africa and the complex organisation of these structures dramatically disrupt narratives of traditional leadership as homogeneous or as singularly autocratic. Much of this literature illustrates that opposition to the centralisation of power in traditional leaders started with Africans resisting colonial interference in traditional leadership institutions as chiefly power was extended. Opposition to the renewed, and intensified, centralisation of power in traditional leaders under the TCB is therefore not an entirely new phenomenon, but is linked to past resistances to the imposition of colonial understandings of chiefly authority, expressed through the state's distortions of custom in the sanctioning of chiefs' autocratic power.

To provide context for the analysis of women's current struggles in gaining land, I draw on the rich body of literature examining the role that gender played in shaping the ways that the colonial, Union, and apartheid governments manipulated customary law to serve state interests and to tighten control through indirect rule [10,19,23]. My starting point for this analysis builds on Ben Cousins' argument that:

A long history of state interventions means that it is necessary to take into account the impacts of past policies. These are particularly marked in relation to the powers of traditional authorities, but also with regard to women's land rights ([21], p. 109).

While many of the scholars whose work I rely on warn against romanticising pre-colonial customary law, they also state that past governments exaggerated existing patriarchy to consolidate colonial land gains by shrinking the pool of Africans eligible to own land to men [2,10,19,21]. Shula Marks notes the ways that the codification of 'native law' in late 19th and early 20th century Natal tightened patriarchal control over Zulu women to the extent that "unless specifically exempted from

the provisions of 'native law', they were regarded as perpetual minors, without legal status, and they had no independent right to own property... ([23], p. 226)."

Research on changes in women's land rights under customary law indicates that in the late 19th through to the mid 20th century women's land rights came under sharp restriction as pressures for land increased under colonial and apartheid regulation ([24]; [25], pp. 199–200). Tara Weinberg's research details how during the early to mid 20th century, successive pieces of colonial and then apartheid legislation stripped away women's land rights as these regimes exercised tighter control on Africans' movements and decreased the total area of African reserves [26]. As these developments unfolded, "customary' restrictions on women's land rights were more strictly enforced by white officials, and internalized by African men ([10], p. 83)." Claassens quotes Mills and Wilson confirming that, "rights over fields came to be regarded as male property to be inherited by the eldest son ([10], p. 83)." This literature demonstrates the profound impact that state legislation had on shaping understandings of custom and undermining women's land rights. It also illustrates how processes of establishing masculinity as central to the right to land were acts of simultaneous creation and erasure that in consolidating patriarchal values made other values less visible. While all African people suffered with the brutal dispossession of land, women's land rights were further curtailed with this disenfranchisement masked as custom.

These changes around women's rights to land depended on imbuing gendered identities with specific meanings that could find support amongst the most powerful within local groups while furthering state interests. These manipulations had profound material impacts on the ways that gendered understandings of land rights curtailed women's life options. It is important to note that my discussions here of pre-colonial practices are not aimed at suggesting a return to these practices or at commenting on their value or legitimacy. My objective is rather to emphasise how so much of what pre-democratic administrations stressed as African custom was a reflection of colonial constructions of custom and that were developed to further the interests of the minority-led state. From this starting point, I examine how the influences of past approaches to legislating customary law can be seen in the ways that current legislation on customary law adopts structural frameworks from the past. This contextualisation offers insights into how state intervention can influence power dynamics between different actors in the customary law context and shape the terms on which customary law is experienced. It also sets the scene for understanding the structures and relationships that many women are resisting by claiming land rights.

The Union government's passing of the Native Administration Act in 1927 is evidence of the state's manipulation of institutions of traditional leadership and customary law. This Act was established to formalise a model of indirect rule based on a "highly authoritarian understanding of chiefly rule ([24], p. 213)" that created a separate court system for Africans ([27], p. 328). The Administration Act appointed the governor general as the "supreme chiefs of all natives," able to "rule all natives by decree... subject to neither parliamentary nor judicial restraint ([28], p. 71)." As the supreme chief, the governor general had the power to divide or combine tribes and to create new tribes as he saw fit. The Act also gave the governor general the power to appoint chiefs and headmen, and to establish chieftainships, providing the government with direct control over African traditional leadership. Peter Delius notes that this Act was "a significant step in a longer process of the incorporation of

chieftainship and its redefinition as an instrument of administration with power devolved from above ([24], p. 223).”

The state’s rule over Africans through the institution of traditional leadership increased with the advent of apartheid. In 1951 the Bantu Authorities Act was passed. This Act established tribal authorities in areas assigned to chiefs and provided boundaries for these tribal authorities. Describing the coercive measures that the state applied in implementing the Act, Peter Delius explains, “Groups who readily accepted the establishment of tribal authorities were often allocated land claimed by groups who had resisted the system ([24], p. 231).” In line with this moment in which the Bantu Authorities Act afforded to chiefs greater power but resistance against increasingly repressive governance mounted, the “broad tendency was for chiefs to use their enhanced power and reduced popular accountability to attempt to assert greater control over the allocation of land” ([24], p. 232).

Barbara Oomen’s discussion of the significance of land in consolidating the power of apartheid supported chiefs highlights the important role that land played in forcing apartheid sanctioned structures and systems on African people. Oomen notes, “central to the chiefs’ political authority was their authority to allocate land... access to land had been made dependent on accepting the political authority of the traditional leader, with an inevitable insecurity of title as a result. Again, this can hardly be considered a continuation of practices existing at the beginning of the twentieth century ([29], p. 4).”

The Bantustan system, which grew out of the developments described above, was fiercely opposed by political and intellectual leaders of prominent anti-apartheid organisations, and was often referenced as an illustration of apartheid manipulation of African governance systems to further the interests of the minority-led state [30–34]. These thinkers simultaneously challenged the distortion of local governance structures and the material devastation that these distortions wreaked on African people’s lives. Steve Biko said:

Why are we against the bantustan idea? Black people reject this approach for so many reasons, none of which are as fundamental as the fact that it is a solution given to us by the same people who have created the problem... At this stage of our history we cannot have our struggle being tribalised through the creation of Zulu, Xhosa and Tswana politicians by the system ([34], pp. 82–86).

This discussion of resistance to the Bantustan system and its mode of tribalisation is to illustrate consistent resistance to impositions of apartheid constructed knowledge on customary law and African identity. It is also to illustrate the insidiousness of Eurocentric epistemology on institutions of traditional leadership and governance that such resisted boundaries and frameworks could continue to carry currency in the democratic, majority-rule dispensation. I use this specific point to argue that the roots of knowledges must be interrogated to examine whose realities and interests they serve in their reproduction, and what types of power relations they advance. Without such interrogation of the matrices of power that different knowledges feed into, it becomes possible to reproduce the very violence that new systems are aimed at addressing.

In explaining the significance of the TCB, the Department of Justice and Constitutional Development (DOJCD) has been intentional in discussing colonialism’s negative impacts on customary law, including conferring new powers on chiefs and headmen [35], and the necessity of

addressing these impacts in the democratic dispensation. In its August 31, 2009 Report to the Portfolio Committee on Justice and Constitutional Development, the DOJCD argues that:

The original character of administering justice by traditional leaders was distorted by the colonial and apartheid regimes, through the Black Administration Act (BAA), 1929 [sic]. The BAA was the bastion of segregation policy of the Apartheid order. It provided a separate administration dispensation for Africans which was a system designed for second class citizens... Under the Apartheid dispensation the Traditional Courts, as were all other courts, were used to administer unjust and oppressive laws of the government of the day. The Chiefs had arbitrary powers of arrest and detention without trial and meted out corporal punishment in a dehumanising manner. The due process of the law was not observed at the trial of persons suspected of customary law crimes. Women were excluded from the traditional court structures... The objective of... the Traditional Courts Bill is to preserve the African justice value system which has evolved over time, and to ensure the effectiveness and efficiency of the traditional court system in the administration of justice [35].

While it engages with colonialism and apartheid's damaging effects on customary law, the DOJCD's reflection on the BAA does not engage with how the TCB's provisions respond to and address the BAA's legacies. Unlike many other engagements with the BAA in conversations about the TCB [13], the DOJCD's analysis of the need for the repeal of this Act does not substantively address the content of the BAA in relation to that of the TCB. Most submissions on the TCB that discussed the repeal of the BAA underscore that the repeal of apartheid legislation is not significant in itself. Rather, it is made significant through the intentional breaking away from colonial and apartheid knowledges, structures and practices, and through the development of knowledges that are empowering to the people who apply them. This reasoning affirms that the symbolism of the repeal is not the primary goal, but rather the goal is de-colonising the knowledge structures and matrices of power that underpinned the BAA and allowed it to exert violence over Africans.

Much of the criticism of the TCB, and of other recent legislation on traditional leadership, has focused on the relationship between the frameworks of custom and traditional leadership represented in colonial and apartheid legislation and in current legislation [13]. In 2003, Parliament passed the Traditional Leadership and Governance Framework Act (TLGFA). This Act adopted the same boundaries used to define tribal authorities under the Bantu Authorities Act and applied them to traditional councils today. Section 28 of the TLGFA provides for chiefs appointed and 'tribes' created before 1994 to be recognised as senior traditional leaders and traditional councils, provided that they comply with new composition requirements [36]. Section 4(1) (a) of the Act provides for traditional councils to administer the affairs of traditional communities "in accordance with custom and tradition [37]." By affirming pre-existing boundaries for defining areas where customary law is practiced and structures inherited from the pre-democratic era, the TLGFA reaffirms many aspects of the homeland systems.

The Communal Land Rights Act (CLRA) was passed in 2004, but struck down in its entirety by the Constitutional Court in 2010. The CLRA reaffirmed the boundaries of the former homelands by drawing from the definitions set out in the TLGFA. The Act gave traditional councils extensive powers over communal land [38], enabling them to subsume under the 'tribe' communally owned land that fell within the boundaries of the former homelands, and providing them with control over the occupation, use and administration of communal land.

The TCB draws on the TLGFA's definitions and adopts its leadership structures and the boundaries of the former homelands for traditional courts. In addition to reinforcing homeland boundaries the TCB forces people within them to use the traditional courts, blocking the use of magistrates' courts. When read in conjunction, s 11(c) and ss 8–11, enable traditional leaders to unilaterally interpret custom. This provision fundamentally alters power dynamics by denying people the opportunity to challenge traditional leaders' interpretations of custom, exaggerating traditional leaders' roles in shaping custom and weakening bottom up systems that privilege practice. Section 20(c) makes it a criminal offence for people not to appear before a traditional leader if called. Central to this article is s 10(2)(i) which allows traditional leaders to issue an order "depriving the accused person or defendant of any benefits that accrue in terms of customary law and custom [8]." Customary entitlements include land and community membership [11].

Locating the TCB in the context of historical constructions of customary law and governance reveals continuities between the TCB, and other recent legislation on customary law, and colonial and apartheid legislation. The mapping in this section of the genealogy of legislation on customary law highlights the coloniality of knowledge in official custom, the ways that past administrations intentionally constructed tribal identities and authorities, and how these identities were used to justify the denial of land rights to Africans. This denial makes visible the ways that racialised frameworks of law and of rights established the material boundaries that defined which people could claim rights and which people were subjects of tribal authorities and therefore not rights-bearing citizens. This examination also highlights the ways that constructions of gendered identities in official customary law intensified patriarchal relationships, restricting women's land rights and making it difficult to challenge traditional leaders' power. Through these processes, gender became written into customary law in ways that furthered colonial power. This genealogy highlights the ways that the TCB not only perpetuates the structural violence of colonial and apartheid engineering but also the ideological struggles tied to these structures. Because the delineation of land rights in the former homelands was so intrinsically connected to racist, nationalist political projects, it is not possible to reference those boundaries without also referencing the ideological roots that gave them form and meaning.

4. Political Context

As the previous section highlights, traditional leaders and the institution of traditional leadership have played a range of roles in different moments in South African history, and were central to past models of indirect rule. Lungisile Ntsebeza poses the question "how traditional authorities managed to bounce back after independence from colonial rule ([39], p. 18)." In answering this question, he points to the same moment as Ineke Van Kessel and Barbara Oomen ([40], pp. 262–66). This moment was in 1987, when the Congress of Traditional Leaders (CONTRALESAs) was formed and established ties with the ANC. At this time, CONTRALESAs was constituted by traditional leaders who supported progressive causes espoused by the anti-apartheid movement, such as opposition to independent homelands. Because of this identification, certain groups within the ANC read CONTRALESAs as an ally in the struggle and also an ally in growing support in rural areas where ANC influence was weaker ([40], p. 569). Van Kessel and Oomen argue that the ANC saw this alliance with CONTRALESAs as important for broadening its political base in the early 1990s in the lead-up to the

first democratic elections. This relationship between traditional leaders and the ANC, Oomen argues, has continued into successive elections with traditional leaders viewed as being able to “deliver the rural vote” ([29], p. 104).

A crucial moment in South Africa’s understanding of the role and place of custom in the country’s broad legal framework was defined in the negotiations surrounding the development of the Constitution. During this period, major women’s groups challenged traditional leaders who argued for equality to be subject to customary law [41]. As an organised collective, these women’s groups argued that if women’s protection under customary law was not secured in that moment then they would never enjoy the full freedoms promised by democracy and the Constitutional dispensation [41,42]. The guarantee to full protection of and access to citizenship rights was won in section 211(3) of the Constitution, which makes customary law subject to the Bill of Rights. By securing the supremacy of the Bill of Rights, including the equality clause, women’s groups ensured that custom could not be used as a justification for violating the rights that women are entitled to as citizens of the Republic.

While the relationships between traditional leaders and the ruling party continue, and influence the political landscape in which legislation on traditional leadership has been passed [43], there is diversity of views on how to legislate traditional leadership and customary law within the ANC and between government departments, as this section will examine. This diversity complicates the idea of custom as obvious or unchanging and illustrates the ways that different understandings of custom and its content are constantly at play. The political context in which the TCB was introduced is important to understanding the logics central to the Bill’s constitution of power and the interests that these logics serve. As the head of the executive branch of government, the President plays a pivotal role in shaping the political climate and framing the state’s legislative interventions. Such framing of context for understanding the role of customary law in people’s lives was illustrated at a November 2012 gathering of National House of Traditional Leaders (NHTL). On this occasion President Jacob Zuma departed from his prepared speech that discussed flaws identified by civil society and other groups around the Traditional Courts Bill. In impromptu remarks to the NHTL, the President said:

Let us solve African problems the African way, not the white man's way. Even some Africans who become too clever take the position... they become the most eloquent about criticising themselves about their own traditions and everything. It is this institution that must play a role to help all of us not to make ourselves some things so that we cannot understand who we are, because if you are not an African you cannot be a white, then what are you? What are you? You don't know.... And you have a nation that cannot understand who this nation is... freedom gave us an opportunity to re-identify and define ourselves, who we are. We are Africans. We cannot change to be something else [44].

The President’s prepared speech stated, “government has come to a realisation, following public hearings both in Parliament and in local communities, that there are genuine concerns as traditional courts operate outside a proper legislative framework [45].” President Zuma went on to identify critiques such as the centralisation of power in traditional leaders, discrimination against women in many traditional courts, the entrenchment of Bantustan boundaries and the constitutionality of the Bill as having been raised. He followed the listing of these critiques by giving the assurance that “all the concerns raised in respect of the Bill are being addressed as part of the on-going parliamentary process [45].”

When looked at separately, President Zuma's prepared and impromptu sections of his address offer two distinctly different takes on the TCB, its development, and the content that it relates to. The section of his address that reflected the official government position on the TCB took into account the major waves of protest from across the country, and importantly from rural constituencies, that spoke out in opposition to the Bill. By identifying some of the key points of opposition to the Bill and assuring government's commitment to engaging with these concerns, this text reflects an acknowledgement of the significance of the resistance to the TCB.

The impromptu section of this address was defiant and reverted to many of the premises for understanding custom that fuelled protest against the TCB. President Zuma's critique of the 'sort of person' who opposes the TCB constructed opposing identities of people engaged in debate over the TCB. The first identity, with which the President self-identified and aligned other proponents of the Bill, was of an African who is proud of their heritage and history and who is deeply rooted in a traditional understanding of what it means to be African. This framing of traditional leadership and identity is not unrelated to that which the President referenced in a 2009 address to CONTRALESA, in which he argued "(t)he institution of traditional leadership must be strengthened and afforded its rightful place in the hearts and minds of our people [46]."

The second identity discussed in this address was of a self-hating African who has rejected custom and abandoned heritage in pursuit of European ideals and a whiteness that can never be attained. The fact that this speech was delivered to the National House of Traditional Leaders is significant. In this context, the President's statements suggest that the NHTL is the custodian of custom which identifies and determines for others its content. By implicitly condemning critique of the TCB, President Zuma limits the parameters of discussion around custom. The President's dismissal of critiques that challenge the power imbalances that the TCB promotes reinforces the systems that make it difficult for women to challenge patriarchal attitudes to land rights and that promote unaccountable traditional leadership.

The two different approaches to the TCB reflected in President Zuma's address speak to some of the dominant discourses on the TCB. The impromptu section illustrates how proponents of the TCB have anchored their support of the Bill in a discourse of the restoration of African heritage through the increase of powers in traditional leadership structures. These structures are constructed as having been stripped away through European conquest and needing to be restored for African identity to be recaptured. The prepared section of the address communicates discourse from opposition to the TCB, which has rejected the centralised model of customary law, arguing instead for the recognition of diversity and complexity in customary law. This position challenges the very idea of custom that is being advanced in the TCB arguing that this framing and articulation of custom does not reflect the realities of people who have diverse histories and lived realities across rural South Africa.

As alluded to earlier, the ANC does not represent a monolithic entity and different perspectives on the legislating of customary law have come from within the ruling party. This diversity from within the ANC also impacts the political context in which the TCB is read and understood. The ANC Women's League (ANCWL) has come out in strong opposition to the TCB. In a November 2012 statement, the League announced:

We believe that more consultation on the bill should be done with rural women who will be the most affected if the bill comes into effect. The bill fails to ensure equal participation of women at all levels... The bill does

not make allowances for appeals in other courts should women not be satisfied with the “justice” meted out by the traditional courts. The NEC has instructed our Governance sub-committee to interrogate the bill and ensure that the envisaged legislation does not reverse our gains in the struggles for gender equality and the creation of a non-sexist society [47].

The ANCWL’s position on the TCB privileges women’s experiences of customary law and traditional courts and emphasises that the Bill cannot meaningfully serve women without engaging with and being informed by their knowledges on custom. This position makes central the need for bottom-up knowledges in the development of legislation and suggests that the TCB is not informed by such sources of knowledge. The ANCWL’s descriptions of harmful provisions within the Bill along with the discussion about the need for greater consultation on the Bill with women draw the connection between sources of knowledge, power relationships communicated through different knowledges, and the materiality of these power relations in people’s lived realities.

The Minister of the Department of Women Children and People with Disabilities (DWCPD), Lulu Xingwana, has similarly been critical of the TCB and its possible impacts on women. In the DWCPD’s 2012 submission to Parliament on the TCB Xingwana stated:

The Department of Justice and Constitutional Development admitted in the memorandum of the TCB that the Bill was drafted on the basis of the Consultation with Traditional leaders, who are mostly male. The Department does acknowledge that female traditional leaders, who are in the minority were probably included but they still do not have first hand information and lived experiences that ordinary rural women who are on the receiving end of the decisions made by Traditional courts have... The DWCPD would recommend that in the light of the above admission, the views of rural women who constitute approximately 59% of the rural population should have been sought as traditional leaders would not be able to effectively articulate the views, experiences and interests of women... The DWCPD recommends that the Bill be completely overhauled, and re-written in consultation with the rural women themselves [48].

By emphasising the privileging of traditional leaders over other people who live under customary law in the consultation process around the TCB, Xingwana makes central the role and significance of positionality in the construction and communication of knowledges on customary law. In arguing that even female traditional leaders likely do not have the same experiences and insights as “ordinary rural women”, Xingwana highlights the importance of recognising intersectionality in engagements with different sources of knowledge. This qualification that not all women experience traditional courts and customary law in the same ways complicates the idea of bottom up engagements with knowledge by arguing that multiple social, political and economic locations need to be read simultaneously as these different positions all inform the ways that people experience relationships to power. Xingwana’s position that the TCB be “completely overhauled” and rewritten based on more meaningful engagement with different sources of knowledge speaks to the Department’s understanding of the materiality of the different power relationships that are privileged in different knowledges. This position affirms the need to interrogate the interests that are served in the reproduction of different knowledges and to ensure that the interests of marginalised people are upheld in legislating of custom.

Both the ANCWL and the DWCPD challenge the framing of justice put forward in the TCB, arguing that the Bill fails to meaningfully engage with knowledges based on women’s experiences of traditional courts and therefore cannot be expected to reflect or serve women’s interests. This position

illustrates a marked departure from the faulting of processes that listen to people who are “criticising... their own traditions” as President Zuma critiqued dissidents of the TCB. Rather than framing customary law as an unchanging body that should not be challenged because it reflects an essential African identity, the ANCWL and DWCPD present customary law as a body whose function is to meet the needs and serve the interests of the people who practice it. The ANCWL and DWCPD argue that the TCB’s failure to engage with substantive critiques of traditional courts, and to engage with women who use these courts, has led to its failure to offer meaningful protections to women.

5. Land Rights and Gender Relations in the TCB Submissions

The public submissions to Parliament on the TCB highlight links between patriarchal norms that deny women access to land through traditional courts and the social vulnerability that comes with tenure insecurity. These discussions speak to Lund and Boone’s argument, referenced earlier, about the ways that control over land both reflects and reproduces existing authority. In denying women access to control over land, traditional leaders not only assert their existing authority but also (re)declare land as a solely masculine entitlement. Through these interactions, traditional leaders are able to consolidate their institutional power and also the power associated with gendered identities. By exploring the different ways that patriarchal relationships impact women’s property rights, this section illustrates how different people understand the possible impacts of some of the TCB’s provisions, especially in the context of their own experiences of traditional courts and customary law. In the context of the previous section’s examination of historical processes of state intervention in customary law, both in relation to traditional leaders’ powers and the marginalisation of women, this section reflects on the ways that women’s rejection of patriarchal values around rights to land can be read as a de-linking from colonially influenced knowledges on customary law and a representation of bottom-up processes of knowledge production informed by different women’s lived realities.

As discussed earlier, there is significant sample bias represented in the submissions to Parliament, and this article therefore does not attempt to present the experiences communicated through these submissions as the only, or even the dominant, experiences of traditional courts. These submissions are rather being used to examine how specific organisations of power influence the ways that different knowledges on custom are treated, and what the material impacts of the treatment of these different knowledges are on women’s lives. This focus on the materiality of epistemologies is aimed at examining how people believe that the TCB might influence their experiences of customary law and traditional courts if it is passed.

5.1. Land Rights as Masculine

Women writing submissions on access to land repeatedly spoke about the ways that their attempts to gain land were thwarted by traditional leaders who insisted that land be acquired through men. The submissions here illustrate some of the challenges that women face because of these understandings of land rights, and the impacts that they have on their lives. Nikeziwe Dlamini from KwaZulu-Natal demonstrates how land is used to entrench different relationships to power through gender identity:

When I was 21 years old I went to a local traditional leader to ask if I could be allocated land to establish a home for my two children. I was sent away and not allocated land in my own right as a woman. I was advised to look for a male representative. My property is now registered under my sister's spouse's name. This worries me a lot because I fear that should anything happen to me my children would not have a home of their own and might be forcibly evicted. Most traditional councils expect women to be represented by their male relatives. Imagine you are forcibly evicted from your marital home and expected to be represented by the same marital male representatives and having your land registered under the name of the very same male relatives who evicted you from your home. What does that mean?—they could still come back and evict you. Because the property will still be registered under their name [49].

Dlamini, like many other women who wrote submissions, communicates different levels at which she is challenging the patriarchal norms written into the expressions of customary law in her community. She challenges these norms, and the knowledges that underpin them, first in the ways that she frames and articulates the value of land and her right to it, and then in the act of seeking land from a traditional leader despite the status quo that denies women these rights. In doing this, she explicitly describes the ways that existing constructions of rights to land fail to adequately meet her needs and protect her interests. She also explains why, because of this failure, understandings of eligibility for land need to be broadened to include women and why knowledges about rights to land that privilege men and masculinity need to be abandoned. Dlamini illustrates how despite women's challenges to the status quo, traditional leaders work to maintain male dominance and women's dependence on men by asserting the need for male relatives, regardless of the status of these relationships. Dlamini locates these prejudices in the context of broader inequality in traditional leadership institutions and through this discussion describes how and why women experience marginalisation in traditional courts. She explains:

Women in rural areas are often seen as people of a lower social status and without economic power. Therefore, women rarely stand a chance of being part of a traditional council composed mostly of men who are in many instances biased against women and resistant to the notion of sharing real authority with women... I believe that the Bill is likely to further lend legitimacy to the unequal and patriarchal power relations to the further detriment of many women's ability to have access, control and ownership of land as well as justice in the rural areas [49].

Also discussing the ways that the linking of land and masculinity in traditional courts disempowers women, Monica Mkhize explains:

In 2005 my sister and I lost our natal home after our father had passed on: My second eldest brother colluded with a local traditional leader and sold our home without our consent. We reported the matter to the traditional court. The traditional leaders informed us that we need to go outside and talk as a family. My brother nearly attacked us—he was so aggressive. When we went back to the traditional leader in the court he informed us that our brother has a right to inherit our marital home from our parents. This was the most painful experience of my life: My sister and I were coming home for the weekend. And when we arrived late in the evening the gate was locked. We knocked on the door and the house was occupied by another family. We had to look for accommodation somewhere else. After we reported the matter to the traditional court—it did not assist us to re-claim our home, instead, it emphasized that because our brother is a man he has the

right to kick us out of our home built by our parents... by securing rights held by men, the Bill is likely to entrench discrimination against women [50].

By approaching both the traditional leader and the traditional court to request that they acknowledge her right to the family home, Mkhize explicitly challenged knowledges on custom that privileged her brother's rights to the house above her and her sister's rights. In affirming patriarchal understandings of rights to land, and denying Mkhize and her sister's rights, these institutions of traditional leadership rejected Mkhize's knowledge and allowed her brother to act with force in asserting the knowledge on which his exclusive rights to the house were based.

Mkhize demonstrates how patriarchal understandings of customary law create dynamics through which land links women's personal and familial security to their relationships to men. These conditions force women to be bound to male relatives, and in many ways dependant on these relationships for belonging in the broader community and for ability to provide for themselves and their families. Independence becomes constrained *in situations* where women cannot exercise rights in their own capacity and are forced into relationships with men to ensure security. As Mkhize demonstrates, these dynamics make women vulnerable to abuses of power by men, and limit options for recourse against this abuse. The submissions illustrate that beyond enabling abuse, the patriarchal attitudes that influence interpretations of custom and that lock women out of positions of influence in interpreting custom deepen vulnerability by limiting possibilities for change and the recognition of women's needs.

Both Dlamini and Mkhize's statements in their submissions illustrate conflict that arises from different knowledges on women's rights to land confronting each other and competing for dominance. Dlamini and Mkhize both argue for their rights to land and are met with, in some cases violent, opposition to these claims to land rights. In both of these cases, traditional leaders draw from patriarchal understandings of customary rights to land, which the literature examined earlier locates in colonially constructed, or exaggerated, framings of gendered rights to land under customary law. In this context, these women's opposition to epistemologies that deny them rights to land can be read as a departure from this rigid, colonially informed knowledge. Rather than relying on top-down constructions of gendered rights to land, Dlamini and Mkhize discuss their right to land based on their material realities and needs and use this bottom-up knowledge to demand that constructions of land rights reflect and be responsive to their lived realities.

5.2. Reversing Past Gains

Many women's submissions describe how past land rights have been undermined by the exercise of increased, unaccountable power by traditional leaders. These submissions work to challenge constructions of women's social positions and rights as unchanging and illustrate the fluidity of many positions and the potential for loss of rights if the TCB is passed. Funeka Miriam Mateza from the Eastern Cape describes how her experiences of traditional courts and accessing justice in these spaces have fundamentally shaped her identity as a woman. Mateza explains:

I purchased a vast portion of land that was allocated to me. It was transferred to me in 1983. Therefore, I became a title-holder of the land that I was farming. I took over the land and farmed in what was a very prosperous farm... In 1986, the chief Gecelo of the Gcina Tribal Authority expanded his rule and claimed

the land that I was occupying as an owner. I was summoned to the traditional court and they asked me how it was that I owned land when I was a woman. My response was that I had bought the land and therefore that I was a title-holding owner of it. They asked to see the title deed. I showed them the documentation as requested and the response that I received was that the title deed had no bearing on the matter as all land in the area belonged to the chief. Moreover, the traditional court told me that as a woman, I couldn't hold any land in my name. They said that even if the land had been my husband's and he had died, it would have been given to my husband's younger brother or my older brother. Therefore, I was told that I had to vacate the land, as it belonged to the chief, and leave the community... They said that they feared that I would influence their wives into doing bad things such as wanting to take over their lands after their deaths. I couldn't understand how it could happen that even though I had worked so hard to buy the land and held a title as a testimony of my ownership, this had no significance. I was also confused as to why I couldn't have land as a woman as this area did not belong to the chief to begin with [51].

Mateza concludes:

(The TCB) will make the situation worse for women like me because it will give chiefs even more power than they already have... The Traditional Courts Bill will make chiefs seem untouchable. Women will then be even more afraid to challenge chiefs when the chiefs commit crimes against them [51].

Mateza's account of her experiences illustrates how the centralisation of power in traditional leaders allows for narrowly defined gender identities to be imposed on people, regardless of whether their realities fit those constructions. The highly centralised model of traditional leadership that Mateza describes, which concentrates power in traditional leaders and makes them unaccountable to the people that they serve, speaks to similar organisations of power that were critiqued in the historical literature examined earlier as reflecting colonially influenced representations of traditional leadership. In challenging this expression of traditional leadership, and the top-down knowledge on custom imposed through this model, Mateza speaks back to the representations of African governance structures as homogenous and illustrates the ways that her reality does not conform to these representations. By showing how she derived the right to her land from a source outside the traditional leader, Mateza references other sources of authority that govern her life and illustrates the limitations of the traditional leader's power. Through this reference she locates herself as an actor existing and moving through different systems of governance and she rejects the imposition of the Tribal Authority's exclusive authority over her life and land. In rejecting, or at the least challenging, this ascribed tribal identity Mateza communicates an alternative knowledge on identity, specifically the rights derived from her identity as a landowner. This bottom-up knowledge draws from Mateza's experiences and uses them to communicate why top-down, narrowly defined understandings of customary law, and of governance systems that African people draw from more generally, distort historical realities of African people participating in a variety of different governance systems and structures. These narrow definitions fail to capture the complexities at play in the ways that people navigate and draw legitimacy from diverse sources of authority.

The reversing of past gains illustrated in Mateza's experiences demonstrates how this centralisation of power enables the violent disciplining of identities that are constructed as deviant and that disrupt social relations in ways that threaten traditional leaders' power. The implicit power that would be given to traditional leaders to discipline what they perceive as deviance, coupled with the absence of

explicit accountability structures in the TCB, would increase women's vulnerability in traditional courts. This dynamic has the potential to limit opportunities for women to demand their rights and positions of authority in relation to male counterparts.

Jennifer Williams, director of the Women's Legal Centre, further explains how the TCB increases women's vulnerability, saying:

One of the possible ways of abusing power is through the exercise of the coercive powers which are proposed by the Bill. A woman who challenges the exercise of authority is at risk of facing complaints that she has acted inconsistently with custom, and that she has offended those who hold power. She can then be brought before the very persons who hold that power, and be punished. This is unacceptable as a matter of legal principle [52].

Williams' description of the possible impacts of the TCB giving traditional leaders power to interpret custom without any checks and balances means that women's access to justice is dependent on relationships to traditional leaders and the ability to conform to their expectations of custom. This implicit power to define deviance increases women's vulnerability in traditional courts and has the potential to limit opportunities for women gaining rights and recognised positions of authority within their communities and in relation to male counterparts.

The submissions illustrate that the patriarchal relationships that deny women property rights are not uncontested and are not inherent to customary law. Women continue to challenge attitudes and structures that deprive them of the security and stability linked with exercising land rights in their own capacity. It is in this context of contested authority and of women (re)claiming property rights that masculine centred constructions of custom are being reasserted in traditional leadership institutions.

5.3. Customary Entitlements and Constitutional Rights

The submissions show cases of women framing their rights to land through reference to customary law, the Constitution and democratic principles of non-sexism, and often all of these. This range of references to rights demonstrates how women are drawing from a range of legal frameworks in framing their life experiences and locating their political, social and economic rights. Thandiwe Zondi illustrates the interaction between discourses on customary law and constitutionalism saying,

Induna Makhaye said that he could not allocate land to me because I have no son. Furthermore he said that if I had never married he could have allocated the land in the name of my brother on my behalf. However he said that because I was a widow he could allocate land to me only in the name of a male relative of my husband. Because of the fact that my husband's family had evicted me I knew they would not vouch for me. Furthermore I knew that I would not be secure on land allocated in their name... I believe that if enacted the TCB will exacerbate my current tenure insecurity and entrench the problems that I am experiencing in trying to secure land rights for myself and my daughters...In my view the royal family and council is using distorted customary principles to their own material advantage in a way that undermines my rights and those of my daughters to dignity, equality, security of tenure and equitable access to land. By entrenching and increasing the powers of traditional leaders without adequate measure to check abuse of power the TCB is entrenching structural discrimination against rural women [53].

Zondi's argument that the expressions of custom that are used to deny women land rights are actually distortions of custom is echoed in other submissions. This framing of customary law illustrates that custom is not uncontested and that many women understand customary law as a vehicle intended to protect their rights. Zondi's use of a rights based language and framework, often invoked in reference to the Constitution and democratic dispensation [54], suggests that women are drawing from a variety of sources of law to frame their rights and apply this framing in their lives. This referencing of different sources of legal authority demonstrates that people living in the former homelands do not have a singular identity related to traditional council areas or defined by customary law. Rather, they have multiple identities, including those related to South African citizenship, and draw on rights promised through these different identities in navigating different challenges. By engaging with rights linked to multiple identities, Zondi challenges the singular identity that was forced on African people through the narrow construction of tribal identities under colonialism and apartheid, and illustrates the value of drawing on different legal frameworks to speak to different material needs.

The struggles for women's access to land described in Zondi's submission illustrate the central role that land plays in entrenching social positions and power relations. These struggles illuminate the dominant attitudes on gender and other identities that construct people's ability to access land, and the independence, security and sense of belonging that come with land. Centralising power in traditional leaders increases individual leaders' power and with this the chances of arbitrary decision-making in traditional courts. The submissions describe patriarchal attitudes among traditional leaders as especially pervasive and likely to negatively impact women's access to land.

SJ Baloyi invokes discourses on equality and gender representation in her or his¹ discussion of customary law and land rights, arguing that her or his traditional council's discrimination against women with regard to land rights flies in the face of these principles. Baloyi explains,

(T)he chief and his council's conduct in dispossessing the land rights [of] women is discriminatory against women and it [is] due to the fact that Nkhensani Traditional Council comprises of only men who do not have any respect for women... if the bill is passed into law as it is, rural women and poor men will lose all the informal land rights where they are presently making livelihood and able to produce to feed their struggling families while the chief and his councillors sell land to people who can pay them huge amounts that are not even used for the benefit of the community... By making a chief a presiding officer would imply giving the chief powers that he or she never had under Customary law and only had ... when apartheid powers were given to chiefs who were in support of the system while oppressing traditional leaders who did not support the system. So we feel that the bill is bringing back the unwanted laws of the Apartheid era where the new democratic government was supposed to abolish any law that has anything to do with laws and practices of the past [55].

Like many other submissions, Baloyi's links gender discrimination and vulnerability, highlighting that the versions of custom applied in their traditional council are a reflection on the composition of the council. This discussion of custom points to the flexibility inherent in custom, highlighting that it is important who is able to influence the content of customary law as this will likely reflect whose interests it serves. Baloyi demonstrates the frustration communicated in many submissions at the

¹ This submission by signed off by SJ Baloyi on behalf of the Maphanyi Community Development Forum and Baloyi's gender is not clear from the text.

introduction of legislation that continues understandings of custom that were introduced through colonial and apartheid administrations, and in doing this perpetuates the power relations that served these past administrations and not necessarily people who live under customary law. Baloyi's explicit reference to the framework for custom introduced under apartheid illustrates tensions around different knowledges on custom and highlights the organisations of power that perpetuate top down framings of custom, and related to this, the disenfranchisement of marginalised groups.

Many of the submissions from women who would live under the TCB reflect the challenges that women experience in spaces where traditional leaders exert patriarchal power by insisting that land be allocated to women through men. These reflections illustrate how because of the patriarchal values underpinning many experiences of customary law, the TCB's failures to acknowledge gender by substantively discussing ways to ensure protections for women, allows for the possibility of the legitimisation of the discrimination that many women face in traditional courts. The submissions examined here express alternative understandings of customary law, and the power relations that impact women's access to land, to those represented in the TCB. These submissions illustrate how the power relations that the TCB promotes would undermine women's access to land by encouraging the centralisation of power in traditional leaders, and allowing for top-down movements of knowledge on custom, in line with the knowledge architecture set out in colonial and apartheid models of traditional leadership and customary law. By expressing knowledges on custom that are informed by different experiences and realities, these submissions demonstrate "the creative work on knowledge and subjectivity [that] comes from the political society, from the institutionally and economically des-enfranchised" and bring to the fore contestations around the rights that women can claim under custom, and implications that these rights have on women's abilities to live their lives.

6. Living Customary Law and Women's Land Rights

The challenges to patriarchal framings of customary law communicated through the submissions have been affirmed by Constitutional Court judgments on customary law. The Constitutional Court has repeatedly rejected the vision of customary law as static and has sought to recognise "living customary law" which is responsive to changing conditions and reflected in practice. In sharp contrast to the colonial and apartheid distortions of custom embedded in official custom, the Court has repeatedly stressed that customary law is "not a fixed body of formally classified and easily ascertainable rules. By its very nature it evolves as the people who live by its norms change their patterns of life" ([56], p. 52). The Court has broken from historically dominant, codified representations and understandings of custom and moved towards understandings of custom that recognise customary law as dynamic and based on values whose expression through practice depend on context.

The majority of Constitutional Court cases addressing customary law have related to women's rights ([10], p. 73). Repeatedly the Court has upheld women's rights in customary law, acknowledging both the need for customary law to be in line with the Constitution ([57], pp. 321–25) and that customary law itself is flexible and responsive to environment. In *Bhe & others v Magistrate Khayelitsha & others 2005* the Court decided that official customary law is a "poor reflection, if not a distortion of the true customary law" and that "[t]rue customary law will be that which recognises and acknowledges the changes which continually take place ([58], p. 86)". This "living law" jurisprudence

has created space for customary law to be informed by practice, privileging knowledges from the bottom up rather than the top down.

The Constitutional Court's interpretation of living law has been central to challenging discrimination written into codified customary law, such as male primogeniture and restrictions on ownership of family property to men [59,60], which are contained in the Black Administration Act. In *Bhe, Shibi v Sithole and Others 2005*, and *Gumede (born Shange) v President of the Republic of South Africa and Others*, the Court was consistent in challenging the rigid rules applied under codified customary law, warning that through processes of colonial distortion this version of custom often obscured features of customary law that, in their application, provided protections and rights to women [10]. Living customary law is the model of customary law most advocated for in the submissions on the TCB. Rather than relying on state designations of traditional leadership and governance, this model draws legitimacy from the people that it serves and reflects the customary law that is practiced in particular groups. Aninka Claassens and Sindiso Mnisi explain the significance of engaging with living customary law in understanding women's land rights under customary law:

It is because struggles over land rights are inherently bound up with contestation over the content of both custom and rights that the emerging 'living law' jurisprudence in South Africa is so important. It enables us to move beyond the discourse of false dichotomies and the distorted versions of customary law established by apartheid precedents towards an examination of changing practice ([61], p. 515).

In the context of reading the ways that knowledge and power are being decolonised, living customary law provides an important framework for understanding customary law and the ways that it creates space for contestation and change. While the submissions examined in this article illustrate examples of practices of discrimination and abuse, they also point towards critical engagement with the sources of knowledge that inform these practices. It is not possible to know how these practices will change over time, however it is possible to imagine that formally limiting avenues for challenging discriminatory understandings of custom would negatively influence bottom up movements of knowledge and further entrench top down understandings of custom and power relations. The critical framings of custom and of the rights to which women ought to be entitled under custom communicated through the submissions discourage paternalistic impulses to offer prescriptive solutions to problems. They illustrate the sophisticated ways that people are identifying sources of discrimination and abuse and explaining how matrices of power operate in their specific contexts to deny women access to resources necessary to live lives of independence and dignity. Importantly, in the context of this article, the submissions communicate the belief by people living under customary law that the TCB would diminish opportunities for influencing custom and traditional courts in ways that recognise their rights and serve their interests and would likely increase vulnerability.

The rights and protections that women secured in the transition to democracy have had profound impacts around the country on the ways that people articulated and framed gender and rights discourses, at national and local levels. The 2011 research by Community Agency for Social Enquiry (CASE), which surveyed 3000 women in rural areas around the country on custom and land, found that many women identified the democratic dispensation as key to their understandings and claiming of rights. In focus group sessions related to this research, women discussed the ways that equality came to the fore because of expectations of democracy, and how they drew from both customary and

constitutional law in navigating questions of land [1]. These findings on women's increasing access to land rights have been supported by other research, including work by Aninka Claassens and Sizani Ngubane [2], Ben Cousins [21], Stephen Turner [62], Aninka Claassens [10].

This literature illustrates the extent to which women around the country have internalised the values of the Constitution and are acting on its provisions in their interactions under customary law by claiming land rights. This research also revealed the extent to which change towards greater gender equality around land under customary law is being instituted from the bottom-up, with people in rural areas driving transformative practices in their own capacity.

The developments around women's increasing access to land rights cannot be understood as separate from broader political, economic and social dynamics. The framing of land rights is dependent on a variety of external factors and authority in this area is in motion. Ben Cousins refers to Cotula and Toulmin's 2007 work which examines women's increasing vulnerability in the context of land commodification, urbanisation and changing demographics. This work reports that "where there is increased pressure for land, men sometimes reinterpret customary rules in ways that weaken women's land rights" ([21], pp. 19–20). Also affirming the relational nature of land rights, Claassens and Ngubane note:

Just as overstating the land rights of men relative to those of women undermined the bargaining position of women within the family, so exaggerating the powers of traditional leaders in relation to land... undermines land rights exercised at other levels of society, including at the level of the family ([2], p. 173).

The fluidity of land rights points to the need to monitor how they are constituted to understand how power is distributed in different spaces and how this distribution impacts levels of vulnerability.

The different perspectives on customary law explored in this article demonstrate the vastly divergent discourses on customary law in public spaces. It is in this context of contested understandings of custom, and the different actors' interests related to these understandings, that struggles over women's land rights under customary law take place. Christian Lund and Catherine Boone describe the complex terrain shaping the constitution of authority and exercising of rights around land, saying:

Social categories and property regimes must be constituted through practice. Institutions are only as robust, solid and enduring as the power relations that underpin them, and the on-going processes of reproduction or re-enactment that enable them to persist. This means that social boundary institutions and norms of citizenship and belonging are not haphazard constructs. They generally reflect and are invoked to perpetuate (or contest) prevailing power relations ([23], p. 9).

Practice around the country indicates that women are increasingly claiming land in their personal capacity [1,10]. Simultaneously legislation is being introduced and enacted to counteract these developments and cement patriarchal relations where they are prevalent. While the discursive emphasis under the democratic dispensation on equality and on individuals as rights bearing citizens has been affirmed by the Constitutional Court's rulings on living customary law, these positions are being challenged by current policies and rhetoric that rely on stereotypes of custom contained in official custom. In this context, the identities and rights related to custom are in constant (re)definition. With power over this definition being exerted from the bottom as well as the top, legislation that

supports top down interpretations of custom threatens to silence voices that challenge official positions and, with this, influence material inequalities.

7. Conclusions

The challenges to patriarchal framings of land rights captured in women's submissions to Parliament and in the literature on women's increasing access to land illustrate the ways that oppressive, colonially influenced framings of customary law are being publicly contested, both in terms of the ways that they relate to different understandings of the content of custom and in terms of their consistency with the Constitution and the protections that it promises to all citizens. In this paper, I have examined how the descriptions of repression by traditional leaders reveal the ways that patriarchal power relations are reinforced through top down understandings of customary law that vest power to interpret custom in traditional leaders and not in the broader collective who practice customary law. I have used the discussion of epistemologies related to custom and women's rights to land to reflect on the materiality of knowledge. Through this reflection, I argue that just as colonial knowledge was not the end in itself, but was used to orchestrate a system of exploitation and subjugation, decolonial knowledge is similarly not an end in itself but is intended to free a set of relations that allow people to access rights that enable them to live lives of dignity. The challenges to patriarchal framing of custom in the submissions illustrate attempts at influencing such power relations.

While the TCB would legislate within the knowledge architecture established by colonial and apartheid administrations, the submissions present alternative conceptualisations of custom that take the lived experiences of different people who live in the former homelands as their starting point. These articulations of bottom-up knowledges on custom reflect different authors' realities and attempt to satisfy their material, social and other needs. Through this epistemic rupture, the submissions detail how power is framed in relationships between traditional leaders and people living under their leadership, how these actors exercise different types of power in their interactions, and how the organisations of power that the TCB promotes would increase women's vulnerability in terms of accessing land. These discussions about different expressions of, and relationships to, power challenge ideas of custom as static by revealing the constant negotiations between different actors and highlighting the ways that understandings of custom are in motion and responsive to a variety of factors, including legislation.

The Constitutional Court's approach to living customary law broadens the framework for engaging with customary law, empowering the people who live under it and who practice it in their daily lives to adapt it in ways that are most responsive to changing needs and most inclusive in its protections. The women whose submissions are examined in this article demonstrate their need for land by highlighting how land is central to their ability to live independently, both socially and economically, and how it creates greater space for them to shape family and other dynamics in ways that serve their interests. This greater freedom also opens spaces for challenging hegemonic gender relations that privilege masculinity and make women dependent on relationships with men for economic and social security.

The statements by President Zuma, the ANCWL and the DWCPD highlight diversity and competition in knowledges on custom, even within the ruling party and departments within government. The varying understandings of customary law communicated in the political analysis in

this article capture the idea that current power dynamics do not exist in abstraction, but draw on and gain legitimacy from past configurations of power and constructions of identity. The experiences of hostility and opposition to women's knowledges described in the submissions illustrate the connection between epistemic and physical violences and highlight how the privileging of masculine and, chiefly, knowledge is linked to the women's experiences of vulnerability, abuse and social marginalisation because of tenure insecurity. The epistemologies that the TCB draws on are central to the power relations that the submissions argue that it would enable and are crucial to understanding how it shapes the limits of possibility for women claiming rights and exercising power within the customary law framework. The epistemic links between official customary law developed prior to 1994 and the TCB explored in this article reveal that contrary to espousing the ideals of the Constitution and promoting living customary law, the TCB threatens to reproduce past inequalities.

Different women's personal narratives in the submissions offer insights into experiences of traditional courts and understandings of customary law that highlight the harmfulness of the concentration of excessive power in traditional leaders, and that reveal the need for inputs from different voices in the development and interpretation of customary law. These perspectives on customary law and the diversity of needs that traditional courts must serve and respond to, illustrate the ways that understandings of law and governance need to expand to be more inclusive of and responsive to women's rights. The submissions demonstrate how, because of the patriarchal underpinnings of many dominant framings of customary law, the gender neutrality assumed in the TCB could further influence the privileging of men and of masculinity, and the epistemic and material marginalisation of women.

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Conflicts of Interest

The author declares no conflict of interest.

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