Layers of Authority, Boundaries of Decision-Making: Controversies around the Traditional Courts Bill

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ABSTRACT

This paper focuses on traditional courts and the impact of imposing fixed jurisdictional boundaries for them within the context of deeper disagreement about the nature of traditional identity, boundaries and authority, particularly as this relates to dispute resolution. It describes the Traditional Courts Bill of 2008 and controversies over its key provisions.

The imposition of territorial boundaries by colonial and apartheid governments, and complementary legislation of distorted and oppressive powers assigned to traditional leaders, had many negative consequences for rural people. But this approach appears to be perpetuated by the present government. Policies and legislation that entrench fixed boundaries and authoritarian notions of traditional leadership continue attempts to define social identity, dictate jurisdictional limits and map a centralised system of dispute resolution onto the indigenous systems in operation. By giving primacy to controversial territorial boundaries (especially macro-communal ones) and refusing people the right to 'opt out', the Bill distorts the flexible, layered and nested social organisations and dispute resolution processes prevalent in customary communities. It also undermines means by which traditional institutions might be kept accountable. Put differently, contests over institutionally supported definitions of boundaries signify similarly deep concerns about power relations, and the tensions around authority and accountability – particularly in dispute resolution – brought about thereby.

Drawing from commons literature on locally designed rule systems, layered jurisdictional boundaries and the politics thereof, and the centrality of dispute resolution in the building of authority, this paper interrogates these governance issues relative to the Bill and living customary law: Who can make the rules that govern the commons? Who has power to decide disputes arising from non-compliance? Who else can participate in dispute resolution? Whose disputes are they empowered to decide?

Key words: boundaries, authority, law-making, dispute resolution, governance, customary communities

INTRODUCTION

Deep disagreement presently exists about traditional identity, boundaries and authority in so-called 'communal areas'as they survive in modern day South Africa.Given the unhelpful role that it has played in attempting to settle

thedisagreement, my argument is that the present democratic government is significantly to blame for its in fact deepening. In this paper, I therefore articulatethe potential and already observed impact of the government'selection to perpetuateapartheid-imposed territorial boundaries on traditional communities. These territorial boundaries, which translate into jurisdictional boundaries for often-imposed traditional authorities in general and traditional courtsin particular, maroon and disempower ordinary rural people in ways that contradict both the democratic Constitution and their own customs.

The Traditional Courts Bill (B15-2008) – by which the application of these problematicjurisdictional boundaries to traditional courts will be accomplished – forms the primary focus of this paper. In particular, it is the controversies that surround its key provisionson which I concentrate. These relate particularly to three issues. First is whether ordinary rural people are entitled to choose the cultural and legal authority under which they will live. Second is whether they can participate in the governance of their own persons and the property resources they share with others. And, third is the broader question of where the locus of law-making, dispute-resolution and general governance power lies: concentrated in an individual leader or distributed amongst the people who assign it upward and at various levels of social organisation.

Customary land administration and dispute resolution over land are now well-known to take place at multiple levels of nested and layered authority (that align with people's social identities).[1] Many scholars also recognise that these land rights and authority systems are 'relatively stable, [but] also flexible and negotiable'.[2] While the latter means that they can therefore be responsively amended to meet the circumstances and needs of the community as they arise, it can also permit self-interested distortion and abuse by those who have the economic and socio-political means to achieve it.[3]

In South Africa, we cannot disregard the impact of distorting colonial and apartheid policies on indigenous communities. These mostly tampered with indigenous laws of authority and power, especially pertaining to land, but also dispute resolution. These distortions triggered varied responses and adaptations from the communities they affected but have largely resulted in an imbalance of power between ordinary rural people and those forming part of traditional authorities, as well as between women and men.[4]This paper therefore begins by briefly showing that the imposition of territorial boundaries by colonial and apartheid governments, and complementary legislation of

[1] Cousins, Ben (2008). 'Characterising "Communal" Tenure: Nested Systems and Flexible Boundaries'. Land, Power & Custom: Controversies Generated by South Africa's Communal Land Rights Act. Claassens, Aninka and Ben Cousins (eds.) Cape Town, UCT Press: 109-137 at 129

[2] Ibid; Okoth-Ogendo, HWO (2008). 'The Nature of Land Rights Under Indigenous Law in Africa'. Land, Power & Custom: Controversies Generated by South Africa's Communal Land Rights Act. Claassens, Aninka and Ben Cousins (eds.) Cape Town, UCT Press: 95-108 at 98. Also see Cousins above n 1 at 118.

[3] Cousins above n 1 at 130

[4] According to Debbie Budlender's analysis, women form 58.9% of those living in rural areas. See Claassens, Aninka and Sizani Ngubane (2008) 'Women, Land and Power: The Impact of the Communal Land Rights Act'. Land, Power & Custom: Controversies Generated by South Africa's Communal Land Rights Act. Claassens, Aninka and Ben Cousins (eds.) Cape Town, UCT Press: 154-183 at 168 fn 22.

distorted and oppressive powers assigned to traditional leaders, had the negative result ofthoroughly disempoweringordinary rural people.

I go on to demonstrate how the present government perpetuates the approach adopted by colonial and apartheid regimes. Colonial and apartheid governments entrenched a centralist model of customary authority and power. They sometimes succeeded (to varying degrees) at thereby flipping the 'inverted pyramid' of land management and control described by Okoth-Ogendo.[5] They therefore put the chiefs at the top as the ones who devolve power downwards. But, even where it has taken root, this model exists with, puts pressure on and is challenged by customary ways, which defy top-down notions of law and authority. However, under the current regime, traditional authorities continue to experience significant strengthening of their power by government,[6] and mostly to the detriment of the people they serve.Current policies and legislation that entrench fixed boundaries and authoritarian notions of traditional leadership continue attempts to define social identity and dictate jurisdictional limits from above. Specifically, these policies and statutes reinforce the prior mapping of a centralised system of authority – particularly that over dispute resolution – onto the indigenous systems of authority and accountability in operation. This undermines the customary ability of the communities to require accountability and therefore ensure justice from their leaders through their reciprocal relationships.[7]

The legislation at issue is the Traditional Leadership and Governance Framework Act 41 of 2003 and the Traditional Courts Bill.This legislation is supposed to reframe relations between traditional authorities and ordinary rural people, as well as bring clarity and stability to the tensions that exist between them on the ground. Instead, it reinforces traditional authority and powers of the colonial and apartheid kind to further destabilise and corrupt delicate surviving customary accountability relationships.Together these statutes are shown to give primacy to controversial territorial boundaries (especially macro-communal ones) and refuse people the right to either choose to be part of traditional communities or 'opt out' of traditional court jurisdiction. By this, they distort the flexible, layered and nested social organisation and dispute resolution processes prevalent in customary communities. They also undermine the means by which traditional institutions might be kept accountable.

A summary and analysis of how customary courts in fact operate and are used by customary law adherents highlights the dissonance between practice and legislated policy. This shows that these statutes cannot be viewed independently of how they might interface with (that is, affect and compromise) sometimes progressive or positively evolving versions of living customary law. This is because the interface highlights what forms contested territory: Who can make the rules that govern the commons? Who has power

[5] Okoth-Ogendo above n 2 at 101. Compare the Black Administration Act 38 of 1927 and Black Authorities Act 68 of 1951 to the Traditional Leadership and Governance Framework Act 41 of 2003 and Traditional Courts Bill (B15-2008).
[6] Cousins above n 1 at 127. Also see Claassens, Aninka and Sindiso Mnisi. (2009) 'Rural Women Redefining Land Rights in the Context of Living Customary Law'. *South African Journal on Human Rights* 25:491.
[7] Cousins above n 1 at 127

to decide disputes arising from non-compliance? Who else can participate in dispute resolution? And, whose disputes are they empowered to decide?Through exploring answers to these questions surfaces the fact that contests over institutionally supported definitions of territorial and jurisdictional boundaries signify similarly deep concerns about power relations, and the tensions around authority and accountability brought about thereby. This is particularlythe case as these contests and tensions relate to dispute resolution as a central aspect of governance powers.

This paper ultimately draws from the body of commons literature on locally designed rule systems, layered jurisdictional boundaries and the politics thereof, and the centrality of dispute resolution in the building of authority, to interrogate the governance issues raised above.In this scholarship, it discovers general agreement on principles that clearly discredit the policy choices made by government and reflected in recent legislation. The same principles are then used as a basis upon which to suggest what are the necessary conditions for thriving customary communities and their effective governance. The conclusion is that power distributed at multiple layers of a community, boundaries chosen by agreement among community members, and institutions developed internally – all in order to be able to meet and adapt to community needs – are necessary. Moreover, participation by community members in law-making, dispute-resolution, governance more generally and ensuring mutual accountability is necessary. Finally, community members' ability to shop for forums is found to be arguably useful.

HISTORICAL BACKGROUND: REMOVING LAYERS OF AUTHORITY, SETTING NEW BOUNDARIES OF DECISION-MAKING

The vexed history of integrating traditional authorities into state law institutions dates back to the early 19th century. Not at all particular to South Africa,[8] the principle of indirect rule was the primary mechanism for this. By this means, the colonial government was able to use indigenous law as the means for enforcing its own policies of control over the African population. Therein, customary forms of authority and power were a foundational aspect of what the government adapted to its purposes.

Until Frederick Lugard articulated and formalised it in Nigeria, in the early 1800s, the principle of indirect rule was informal in British ruled states.[9] As

[8] Benton, Lauren A. (2002). Law and Colonial Cultures: Legal Regimes in World History, 1400-1900. Cambridge, Cambridge University Press; Chanock, Martin (1985). Law, Custom, and Social Order: The Colonial Experience in Malawi and Zambia. Cambridge, Cambridge University Press; Lugard, Frederick John Dealtry (1922). The Dual Mandate in British Tropical Africa. Edinburgh, William Blackwood and Sons; Mamdani, Mahmood (1996). Citizen and Subject. Princeton, Princeton University Press; Mann, Kristin and Richard Roberts (1991). Law in Colonial Africa. Portsmouth, N.H and London, Heinemann; James Currey; Ranger, T. O. (1992). "The Invention of Tradition in Colonial Africa". The Invention of Tradition. E. J. Hobsbawm and T. O. Ranger (eds.). Cambridge, Cambridge University Press: 211-62

[9] Mann and Roberts above n 8 at 20; Mamdani above n 8 at 62. See Lugard above n 8 at 193-213 for his articulation of this policy. Lugard above n 8 at 211:

> I have throughout these pages continually emphasised the necessity of recognising, as a cardinal principle of British policy in dealing with native races, that institutions and methods … must be deep-rooted in their traditions and prejudices. Obviously, in no sphere of administration is this more essential than in that under discussion, and a slavish adherence

set out, the policy was embodied by three specific institutional reforms: namely, the recognition of traditional leaders as comprising Native Administration, institution of a system of Native Courts, and establishment of Native Treasuries to which the 'native' leaders would collect taxes from their subjects.[10] This policy took root in South Africa in the late 19th century.[11] In 1846, TheophilusShepstone introduced the policy in Natal.[12]

It is often presumed that there was a distinct break between colonialism and apartheid. Yet, I find accounts such as Mamdani's, which suggest that it is not so, to be compelling. During the period after 1910's formation of the Republic of South Africa from the four former colonies (two British-controlled, and two Afrikaner-ruled) indirect rule only flourished. The same is true of post-1948 when the Nationalist Party took complete control and began fully formalising their policy of apartheid. The policy developed into what would ultimately become the fiction of 'separate development' etched into the landscape of South Africa by means of the homeland (Bantustan) system. A number of significant pieces of legislation demonstrate (even in just their titles) the continuation and development of the colonial policy of indirect rule during this period and beyond. These include the Natives Land Act 27 of 1913, Black Administration Act 38 of 1927,[13] Native Taxation and Development Act 41 of 1925, Native Trust and Land Act 18 of 1936,[14] Bantu Authorities Act 68 of 1951, Native Taxation and Development Act 38 of 1958 and Bantu Taxation Act 92 of 1969.[15]

In brief, these pieces of legislation cover some of the most significant elements of colonial and apartheid policy and, through them,the continuity with Lugard's threefold model of 'native' administration, taxation and courts is palpable. First was land ownership for the whites, restricting the majority black population to reservations that occupied only 13% of South African territory. The reservations were later farcically called 'independent

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> to any particular type, however successful it may have proved elsewhere, may, if unadapted to the local environment, be as ill-suited and as foreign to its conceptions as direct British rule would be.

[10] Mann and Roberts above n 8 at 20:

> In the face of African resistance to direct intervention and in the interest of containing administrative costs, indirect rule retreated from aggressive legal and governmental reform … The task of the British colonial administrator was now to reform indigenous administration from within indigenous institutions.

Also see Mamdani above n 8 at 53

[11] Mann and Roberts above n 8 at 20; Mamdani above n 8 at 62. For instance, after the annexation of Natal in 1843, an 1846 British commission recommended

> aggregating the natives in separate locations and administering their day-to-day activities under a 'system of justice' that 'should conform as much to their own law as is compatible within the principle of ours.' ({Mamdani, 1996 #146} at 63, 115-6)

[12] Church, J. (2005). "The Place of Indigenous Law in a Mixed Legal System and a Society in Transformation: A South African Experience". Australia and New Zealand Law and History E-Journal: 94 at 98

[13] According to its preamble, intended '[t]o provide for the better control and management of Black affairs.'

[14] And, the Bantu Areas Land Regulations, Proclamation R188, GG2486, 11 July 1969.

[15] See discussion of some of these laws in *Tongoane and Others v National Minister for Agriculture and Land Affairs and others* 2010 (6) SA 214 (CC) at para 10-29.

homelands' and the necessary structures to maintain that farce established: tribal authorities. An essential component of this was the conversion of personal affiliations to territorial ones.[16] Thus, firm territorial boundaries were established for indigenous people that confined them to a single locale that had a narrowly defined cultural identity and put them under the jurisdiction of a government-elected or -endorsed leader chosen for them.[17]

Second, therefore, was administration and authority, the latter of which was assigned to pseudo-traditional persons and structures. The legitimacy of some authorities was manipulated and/or completely manufactured[18] by the government whilst it was said to be sourced from custom and tradition. The institutionalisation of even those authorities who were traditionally legitimate was necessary to enable the government to use them optimally for its own purposes. Thus, all traditional authorities were incorporated into government administrative structures to that end. If they resisted, they were demoted or displaced in terms of section 2(7) of the Black Administration Act.

Effectively, the question of the legitimacy of a chief's authority was moved from one of personal association and recognition by the community members to one of the technical nature of recognition revolving around land and power to administer it. The latter depended uponassignment and approval thereof from government.[19] If the last requirement was met, the community was subjected to the recognised person's authority without being consulted. The fortunate individual who was promoted to chief, at the government's whim, gained significant (often unilateral) powers of control and administration, over the community and its resources, that they may not have been due.

The taxation of the indigenous population to service the established administration (and homeland system) was the third component of government's policy of indirect rule or 'separate development'. Government collected, through the traditional authorities it had established, legislated taxes from traditional constituents to its coffers and permitted the traditional authorities themselves to sometimes determine and collect ad hoc – and thus unregulated – taxes and levies (called 'special rates'). It is not surprising that,

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[16] See section 5 of the Black Administration Act which reshuffled tribes. The amendment of section 12(1) (by the Native Administration Amendment Act 21 of 1943) also solidified this as it now converted an authority over people affiliated with his tribe (prescribed in the original iteration of the section) into an authority that applied to the territorial jurisdiction over which the traditional leader had been given charge. The amended section 12(1) now read:

> The Governor-General may confer upon any native chief or headman jurisdiction to try and punish according to native law and custom, any Native who has committed, in the area under the control of the chief or headman concerned, any offence specified by the Governor-General, which is punishable under native law and custom.

[17] Section 2(7) permitted the Governor-General to 'recognise or appoint any person as a chief or headman in charge of a tribe or of a location, and … to make regulations prescribing the duties, powers and privileges of such chiefs or headmen' as well as to 'depose any chief so recognized or appointed.'

[18] See section 1 of the Black Administration Act which makes the Governor-General the 'supreme chief' of all Natives in three provinces: Natal, Transvaal, Orange Free State.

[19] See *Matope v Day* 1923 AD 397, and see especially at 404. In this case, the court's decision to recognise as chief of a man who was officially registered as a headman turned on how the state had interacted with him in allowing him to purchase land on behalf of his tribe, not on recognition as such by his supposed tribe.

since government's oversight of these powers was limited, the often exploitative powers it had granted to levy were themselves abused.[20]

Finally, while courts did not get their own independent Act, they were central. The Black Administration Act dealt with numerous substantive law issues such as marriage and succession, as well as policing. However, its most significant tasks with regard to courts[21] were the creation of native commissioners' courts[22] and the explicit recognition and regulation of traditional courts. Sections 12[23] and 20[24] of the Black Administration Act regulated traditional courts under the respective titles, 'Settlement of civil disputes by native chiefs' and 'Powers of chiefs to try certain offences'.[25] The provisions show the centralisation of the figure of 'senior traditional leader' in the model of traditional courts that the Act imposed, as both customary law-maker (except as limited by statute) and arbiter. This is in contrast with the various ethnographic accounts of customary courts and the arguments that were presented by contesting litigants before the civil courts. Appeals to the native commissioners' courts in civil matters and to magistrates in criminal cases were provided for.

While there did exist chiefs who refused to cooperate with the state and forfeited their birthright because of their resistance, there were also opportunists available to replace them. This corrupted the indigenous system of traditional leadership and dislocated it from the community legitimation in which it had been rooted. It also distorted culture and contributed to the unravelling of strong community socialties upon which customary law and authority depended.Traditional leaders simultaneously obtained assurance of power from the government and, by abandoning acceptance and legitimacy

[20] While this is beyond the scope of the present paper, the door to the continuation of tribal levying by traditional authorities seemed to be left open by subsections 4(2) and (3) of the TLGFA in ways that are arguably contrary to sections 43 and 104, as well as Chapter 13, of the Constitution.

[21] Another of the Black Administration Act's significant tasks under its goal of 'tribal organization and control' (per Chapter II) was the provision for the 'Constitution or adjustment of Black tribes and removal of Blacks' (section 5).

[22] In terms of section 10(1). The infamous choice of laws provision in section 11(1) complements the creation of the Native Commissioners' Courts.

[23] Section 12 originally read:

(1) The Governor-General may authorize any native chief recognised or appointed … to hear and determine civil claims arising out of native law and custom by Natives against Natives resident within his area of jurisdiction brought before him …

(2) The judgment of such chief shall be executed in accordance with such procedure as may be prescribed by regulation under sub-section (5). …

[24] Section 20 originally read:

(1) The Governor-General may grant to any native chief jurisdiction over members of his own tribe resident or being upon tribal land or in a tribal location within his area in respect of offences punishable under native law and custom. …

(3) In the exercise of jurisdiction conferred upon him under sub-section (1), a chief may impose a fine not exceeding two head of cattle or five pounds upon any person convicted by him of any such offence.

(4) The procedure at the trial of any offence under this section the manner of execution of any penalty imposed in respect of such offence, and the appropriation of fines shall, save in so far as the same may be specified by regulation which the Minister is hereby authorised to make, be in accordance with native law and custom. …

[25] These were the original titles of these sections. The amended titles (pursuant to the Native Administration Amendment Act 9 of 1929 and the Native Administration Amendment Act 21 of 1943) were 'Settlement of civil disputes by Black chiefs, headmen and chiefs' deputies' and 'Powers of chiefs, headmen and chiefs' deputies to try certain offences', respectively.

afforded to them by their communities, lost assurance of the authority on which the indigenous form of traditional leadership relied.[26]

Women (and young people) were disproportionately disadvantaged by a system that privileged 'the adult male members of the tribe', as exemplified by section 3(1) of the BAA – the latter Act being later amended to render women perpetual minors.[27] What essentially lay at the heart of the disputes that ensued in the communities in which the government had so interfered was who had the biggest say over what constituted customary law. The government etched a system of patriarchy that left it to men (and ultimately a single man in the position of chief) to determine what was traditional. It therefore eroded the existing accountability mechanisms couched in reciprocal living arrangements and multilayered, symbiotic social organisation. It did so whilst itself imposing ever-increasingly oppressive versions of substantive custom. The already vulnerable were left at the mercy of power-hungry or abusive chiefs who had their power – and the repressive laws and distortions that they applied – insured by the government and thus did not depend on their people's approval andconferral of authority.

Where communities or their members felt that they had no other recourse, they used the civil courts.[28] The cases therein represent people's competing interests and ideas of what constituted custom, as well as people's struggle over power: who had it, and over whom else. Interestingly, what the courtsperceived to be a problem of disagreement and lack of clarity in the varying, competing testimonies presented before them (according to the state's top-down, univocal concept of law) was, in fact, an expression of the essence of living customary law and customary accountability mechanisms: that is,multivocality and negotiation.

PRESENT LEGISLATIVE CONTEXT: REINFORCING CENTRALISED AUTHORITY, REASSERTING COLONIALLY-INVENTED BOUNDARIES OF DECISION-MAKING

In the 1950s, Lord Hailey wrote:

> 'Those governments … which have relied in principle on the use of traditional institutions are seen to have so transformed them in the process that Africans of a past generation might find it difficult to recognise them … .*Even though they*

[26] Bronstein, V. (1998). "Reconceptualizing the Customary Law Debate in South Africa." South African Journal on Human Rights **14**: 388-410 at 397; Chirayath, L., C. Sage, et al. (2005). Customary Law and Policy Reform: Engaging with the Plurality of Justice Systems. World Development Report 2006: Equity and Development**:** 1-31 at 8

[27] Section 11(3)(b), as inserted by the Native Administration Amendment Act 21 of 1943, stated a new 'customary' law that said that:

> a native woman who is a partner in a customary union and who is living with her husband, shall be deemed to be a minor and her husband shall be deemed to be her guardian.

Also see Mann and Roberts above n 8 at 41; Chanock, M. (2001). The Making of South African legal culture, 1902-1936 : fear, favour and prejudice. Cambridge, Cambridge University Press at 262, 267. Mamdani above n 8 at 81 describes the British native commissioner's horror in finding that Ndebele women were liberated enough to choose who they desired to marry, without restriction, and his recommendation that the Natal Code of 1891 be applied to the Ndebele, as a restrictive solution.

[28] Chanock above n 27 at 22, 331. See also Mamdani above n 8.

> *may continue some appeal as recalling established custom, the community is constantly made aware that the sanction on which the institutions rests is no longer tradition or religion but the authority of the government.*'[29] (emphasis added)

The significance of this reality isnot merely in historical causation that leads into contemporary and perpetual consequences, but the continuing adoption of such old (and few new) strategies by the modern day government.

Old institutions not made new: the Traditional Leadership and Governance Framework Act 41 of 2003

It is difficult to discuss the Traditional Courts Bill without foregrounding that discussion with a description of the Traditional Leadership and Governance Framework Act, 2003 (TLGFA), which sets the boundaries on which the Traditional Courts Bill is mainly premised. The TLGFA was intended to reform governance of the former homelands in accordance with the Constitution by undoing the legacy of the Black Administration Act, Black Authorities Act and other legislation that formed the legal basis for apartheid. The legislation has several innocuous provisions, especially at its beginning, that indicated that communities would have the option of being part of a traditional community and, similarly, have the option of withdrawing from it.

Section 2 suggests an opt-in system of recognition as a traditional community under traditional authority when it states that:

> (1) A community may be recognised as a traditional community if it –
> (a) is subject to a system of traditional leadership in terms of that community's customs; and
> (b) observes a system of customary law.
> …
> (2) (b) Provincial legislation … must –
> (i) provide for a process that will allow for reasonably adequate consultation with the community concerned; and
> (ii) prescribe a fixed period within which the Premier of the province concerned must reach a decision regarding the recognition of a community envisaged in subsection (1) as a traditional community.

This section is complemented by section 7, which provides for 'withdrawal of recognition of traditional communities' at the community's request to the Premier. It provides also for the 'review [of] the position of a community or communities that was or were divided or merged prior to 1994 in terms of applicable legislation'[30](i.e. the legislation discussed above). This review is to be doneby the provincial government concerned when requested to do so in order to withdraw the recognition of a community as a traditional community.[31]

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[29] Hailey Native Administration in the British African Territories (1950-53) Vol. IV 36, as cited in Reyntjens, Filip (1993) 'The Future of Customary Law in Africa'. The Future of Indigenous Law in Southern Africa: A Collection of Papers and Comments Presented at a Conference Held under the Auspices of the Centre for Indigenous Law, UNISA and Vista University at UNISA on 21-22 October 1991. Joan Church (ed.). Pretoria, Centre for Indigenous Law, UNISA: 3-23 at 9.

[30] Section 7(1)(b)

[31] As it happens, communities that have applied have met with grave resistance from government. An example is the Nkaipaa community which applied to the Premier in the North West but was denied relief, after the legitimacy of the problems that gave rise to their withdrawal request was formally acknowledged, on the grounds that granting them relief would open up the floodgates. (This is according to a document titled,

The same could be done for the sake of the merger of two or more communities as permitted by section 7(1)(c).

The provisions in the early parts of the TLGFA are deceptive. If one looks at the back of the Act one finds section 28 spuriously titled, 'transitional arrangements'. Section 28(1) states that:

> Any traditional leader who was appointed as such in terms of applicable provincial legislation and was still recognised as a traditional leader immediately before the commencement of this Act, is deemed to have been recognised as such in terms of section 9 or 11, subject to a decision of the Commission in terms of section 26.[32]

Section 28(3) deems '[a]ny "tribe" that, immediately before the commencement of this Act, had been established and was still recognised as such … to be a traditional community contemplated in section 2 ...'

In terms of section 28(4), any

> tribal authority that, immediately before the commencement of this Act, had been established and was still recognised as such, is deemed to be a traditional council contemplated in section 3 and *must* perform the functions referred to in section 4; Provided that such a tribal authority must comply with section 3(2) within one year of the commencement of this Act.[33]

Section 3(2) requires the traditional council to comprise 40% elected persons[34] and 60% people appointed by the chief, and it requires that 30% of the entire council be women (though exemption can be sought from the Premier where 'an insufficient number of women are available to participate in a traditional council').[35]

The significance of all of these provisions is that the TLGFA permits the continuation of the pre-democratic institutions. Particularly, it enables the perpetuation of tribal authorities established by apartheid legislation under the guise of democratic change. Section 28(4) initially limited the period of compliance (and hence continuation) of tribal authorities to one year[36] – that is, until 24 September 2005. This created a presumption in favour of the tribal

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'Communication by the Office of the Premier, The Director: Traditional Leadership and Institutions' dating 10 September 2004).

[32] Note that the Commission on Traditional Leadership Disputes and Claims has only just completed investigations of Paramountcies and has issued a controversial decision on these. It is an incredibly long way from determining the legitimacy of the existences of senior traditional leaders (that is, chiefs). The controversial Commission Report, titled 'Determinations on the Position of the Paramount Chiefs', is obtainable at http://www.info.gov.za/view/DownloadFileAction?id=129114.

[33] Emphasis added.

[34] Elections, in as far as they have been carried out in the Eastern Cape, KZN, North West and Mpumalanga, have been a failure: people have been notified of them too late or rejected them as procedurally flawed, and not free or fair; chiefs have boycotted them because they want to appoint all council members (or they feel their authority is being undermined) or they have hijacked them and put in their own people anyway. At best, they have occurred in a perfunctory manner that has left people less than convinced of the constitutionality or legitimacy of their outcomes – that is, if their results have even been announced (which the Mpumalanga House of Traditional Leaders claimed, in a parliamentary submission, that they have not been in their province, albeit now years after they were held).

[35] Section 3(2)(d)

[36] Section 28(4) read '… Provided that such a tribal authority must comply with section 3(2) within one year of the commencement of this Act.'

authorities continuing as traditional councils that runs contrary to the suggestion in the early sections of the Act (sections 2 and 3) cited above. More than that, however, now the Traditional Leadership and Governance Framework Amendment Act 23 of 2009 (TLGFA Amendment) has extended the transitional period and thus converted them into traditional councils until 24 September 2011. This means that today the former tribal authorities have effectively become traditional councils under the TLGFA (whether transformed or not).[37]

This point is acknowledged by the Constitutional Court in a recent case which struck down the Communal Land Rights Act 11 of 2004 (CLARA) as unconstitutional.[38] In *Tongoane and Others v Minister for Agriculture and Land Affairs and Others*,[39] the Chief Justice notes that:

> The Black Authorities Act gave the State President the authority to *establish* "with due regard to native law and custom" tribal authorities for African "tribes" as the basic unit of administration in the areas to which the provisions of CLARA apply. … *It is these tribal authorities that have now been transformed into traditional councils for the purposes of section 28(4) of the Traditional Leadership and Governance Framework Act*, 2003….And in terms of section 21 of CLARA, these traditional councils may exercise powers and perform functions relating to the administration of communal land.[40] (emphasis added)

The Court concludes this statement with the words, '[u]nder apartheid, these steps were a necessary prelude to the assignment of African people to ethnically-based homelands.'[41] This suggests the obvious difficulty that the TLGFA presents. By it, the legislature asks us to believe that these structures forming the foundation of such an oppressive regime as apartheid can be reformed without more fundamental changes to them and the flawed (top-down and centralised) framework of rural governance that they represent.

In light of the presumption in favour of established apartheid territorial and jurisdictional boundaries, section 7 requires a new reading also. It requires the whole recognised traditional community (formerly 'tribe') to apply to the Premier for the withdrawal of its recognition. This traps subgroups that were wrongly incorporated under traditional authorities that they did not recognise or have relationship with, as well as those who would simply wish to secede.Hence, the section is biased in favour of traditional councils and puts an unfair burden on sub-groups of communities to show why they ought to be permitted to be independent. It forces them to fight to opt out rather than allowing them to voluntarily opt-in. The section is also unfair because the request for independence will only be 'considered' in a very limited set of circumstancess, as specified in section 7(1)(a)-(c). These subsections permit (a) an *entire* community to have its recognition as a traditional community withdrawn, (b) the review of 'a community or communities that was or were

[37] Factually, only a small minority of traditional councils have complied with section 3(2). The problems range from elections not having been held, to their having been held under very flawed processes that do not comply with the Act or Constitution.
[38] See Claassens and Cousins above n 1 for discussion of the problems with CLARA.
[39] Above, n 15
[40] Ibid at para 24
[41] Ibid at para 25

divided or merged prior to 1994', and (c) the merger of two or more recognised communities.

Originally, traditional authority was not based on territorial boundaries and people were able to hold their leader accountable by dissociating from or leaving his realm if they so wished (secede), or ousting him. Given this, the present situation under the TLGFA holds people hostage within apartheid boundaries in ways that are consistent with neither democracy nor custom. They serve to benefit traditional leader elites who are embedded in the formalised system of traditional leadership that is of illegitimate origins.

Perpetuating colonial imagination: the Traditional Courts Bill (B15-2008)

The ways in which the TLGFA follows in the footsteps of its apartheid legislative predecessors show that it is not unusual for living customary law to be inappropriately provided for in legislation. However, what it speaks to, moreover, is that this is true even in the context of attempts to bring it in line with the Constitution and harmonise it with the rest of state law and its institutions. It may be because of true misunderstanding or because of government's attempt to pass the buck of responsibility for the 17 million South Africans living in the former homelands by governing them through the tried and tested partnership with traditional authorities. Regardless, evidently,the assumption persistently at work is that top-down, centralised government is the way to go.

The Traditional Courts Bill (TCB) is but another example of this. It attempts to provide for the regulation of customary courts as part of the state justice system.[42] The TCB is meant to replace sections 12 and 20 of the Black Administration Act, which presently regulate this area, by bringing the courts in line with the Constitution. However, in adopting a model that is very much in keeping with the centralised and patriarchal framework that the Black Administration Act ingrained, it rather entrenches the flaws that these courts developed under apartheid.

There are many problems with the TCB but here I will focus on only three. Firstly, it is premised on the apartheid territorial and jurisdictional boundaries objected to with reference to the TLGFA. Likewise, it additionallydeniesordinary rural citizens choicein that opting out of traditional court jurisdiction is not permitted. Clause 20(c), along with clauses 5(1) and 6, of the TCB denies rural residents the entitlement to choose their forum by preventing them from opting-out of their local traditional courts' jurisdiction. In fact, clause 20(c) makes it an offence for anyone within the jurisdiction of a traditional court, even a passer-by, not to appear before it, if summoned.

The TCBconsequently undermines the consensual character of customary law. It also denies the living practice of 'forum-shopping' which enables

[42] Beyond the scope of this paper is the important discussion of how government failed to consult with ordinary rural people in formulating this legislation. The details of who was consulted (namely, traditional leaders) in the drafting process are set out in clause 3.1 of the 'Memorandum on the Objects of the Traditional Courts Bill, 2008'.

people to source for themselves the forum with the greatest legitimacy and which they perceive to give them the best chance of obtaining justice. By removing this flexibility, the TCB also removes a significant power by which customary law adherents hold their leaders accountable. In other words, if a leader were illegitimate or exercised his power in illegitimate ways, people would no longer be able to show their disapproval by ignoring his court until he remedied his conduct.

Secondly, in the TCB,law-making and dispute resolution power is centralised to the 'senior traditional leader' (namely, chief), extending the powers of an essentially undemocratic court even to the point of also permitting oppressive sanctions.[43] The Bill makes no provision for the role of traditional councils. And, by centralising all decision-making powers to the 'senior traditional leader', it distorts customary practices on the ground which most often involve members of the community actively participating in dispute resolution by asking questions and assisting in the deliberations toward a solution.

The TCB approach to this is consistent with the Black Administration Act model of centralisation that recognised only a nominal role for the councillors, at best. Moreover, the TCB does not recognise customary courts at any level lower than the community-wide chief's court, which is also inconsistent with the more layered practice on the ground. Incidentally, this policy decision particularly disadvantages women asthere are indications that decentralised power enables women greater possibilities for influencing the living customary law because women are better able to participate at lower levels of traditional courts.[44]

Thirdly, any order of the traditional court is final but for its being appealed to or reviewed by the Magistrate's Court. However, appeals[45] and reviews[46] are very limited. Incidentally, the terms upon which one can have the senior traditional leader's status as presiding officer revoked by the Minister, and the process by which it must be done, as set out in section 16, make it a difficult

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[43] For example, according to clause 10(2)(g), the traditional court may issue:

> an order that one of the parties to the dispute, both parties or any other person performs some form of service without remuneration for the benefit of the community under the supervision or control of a specified person or group of persons identified by the traditional court.

This provision permits that even a person who is not a party to the dispute before the court can be ordered to provide 'free labour'.

[44] Claassens and Mnisi above n 6; Nyamu Musembi, Celestine (2002) 'Are local norms and practices fences or pathways? The example of women's property rights'. Cultural transformation and human rights in Africa. A. A. An-Na'im (ed.). London, New York, Zed Books Ltd: 126-50. Also see Mnisi Weeks, Sindiso (2010) '"Take Your Rights Then and Sleep Outside, on the Street': Rights, Fora and the Significance of Rural South African Women's Choices'. Wisconsin International Law Journal (forthcoming).

[45] Section 13(1) of the TCB. Appeals exclude such things as an order of prohibition (i.e. an interdict) and 'any other order that the traditional court may deem fit' (as issued under section 10(2)(l)).

[46] Section 14(1)(a)-(d) of the TCB. Reviews are allowed only on the basis of a traditional court's having acted outside of the scope of the Act, lacked jurisdiction, proceeded with gross irregularity and been biased / acted with malice. Alternative, section 16(3)(a) of the TCB permits reviews on the basis of incapacity, gross incompetence or misconduct of the presiding officer; and section 16(3)(b) of the TCB, allows that in the case of the presiding officer's wilful or gross violation of the code established in terms of the Traditional Leadership and Governance Framework Act 41 of 2003, any person can request that the Minister revoke the senior traditional leader's status as presiding officer.

course for rural people (especially women) to follow. It compels one to go head-to-head with one's leader, which is a difficult feat, given the nature of power differences between them. This sets up structural obstacles for rural people to hold their leaders accountable, even by formal means. It also gives the courts powers that are inconsistent with both those powers assigned by living law and those powers permitted by a Constitution premised on democracy and individual freedom. It therefore entrenches traditional institutions (in terms of the Act, led solely by elites) as near-autocrats in their communities.

CUSTOMARY COURTS IN REALITY

Ethnographic perspectives on how customary courts function and how people use them[47]

David Hammond-Tooke notes that, despite 'the establishment of magistracies, the informal moot courts and courts of headmen still function'.[48] He was writing about the Transkei (regarding the late 19th Century till the 1970s) but numerous other scholars researching communities throughout Southern Africa (from the early 1900s) reiterate his point. Colonialism and apartheid, and their policies, did not manage to do away with customary courts. These courts continued to exist and scholars who studied them help us to understand what they looked like and how they functioned – both independently of and in conversation with the imposed regimes. Consequently, ethnographic research on customary forms of law and dispute resolution has provided wide-ranging evidence to say that customary courts display three major characteristics that are immediately relevant to the topics of layers of authority and the boundaries of their decision-making.

Firstly, they are shown to have multiple levels. Monica Wilsonwrote in 1952 about the area of Keiskammahoek(Ciskei). She said that social convention was that disputes were to be solved within the family, and only if they were unable to be settled did they proceed to the highest local court. She refers to the 'lineage remnant' council (which comprises the adult male kinsmen of that lineage remnant) as the family dispute resolution mechanism wherein private family matters are discussed and resolved. This includes civil wrongs, which are primarily considered to be family or inter-family matters which are to be resolved either by the lineage remnant council of the family or the combined councils of both families involved in a dispute. As well as agnates, other male relatives and friends may attend this on invitation. If this fails, they might go to the local village section council comprising the men of the area and the subheadman. They may then appeal to the headman's court.[49]

Observing the Pedi, H.O. Mönnig noted in 1967 that there the internal hierarchy of the courts was very strictly observed. It began with family and proceeded up through two levels to the chief's court, which was the final court

[47] I am grateful to Karli Baumgardner and Paula Jackson for their contributions to this section.
[48] Hammond-Tooke, W. D. (1975) Command or Consensus: The Development of Transkeian Local Government. Cape Town, D. Phillip at 3
[49] Wilson, Monica, S. Kaplan, T. Maki, and E. M. Walton (1952) Keiskammahoek rural survey vol 3: social structure. Pietermaritzburg, Shuter and Shooter.

of appeal within the community.[50] Adjudication in subordinate courts had to be sought before litigants could proceed to the chief's court, and (since the court's duty was to reconcile the parties) it was not unusual for a court to send a case back to the families involved to have it resolved by them.[51] The suggestion here seems that the resolution of disputes by lower customary courts was preferred. In fact, according to Hammond-Tooke, although in theory appeals from lower courts could go to chief's courts in the Transkei, 'it seems this was rare in practice.'[52] He goes on to quote a regent named Isaac Matiwane as saying that:

> Subjects of the *isiduna* were allowed to take their cases on appeal to the chief's court if they were not satisfied with the *isiduna's*verdict. But such cases were very rare. In fact this was not encouraged.

Regarding the Swazi, Hilda Kuper agrees with other writers on customary courts in other areas and says that there is a multi-levelled court system. What she adds is that there is an informal dispute resolution forum that involved the neighbours informally banding together to resolve an issue arising in their area. They will often identify a respected, neutral third party to solve their disagreements.[53] Also, the King and Queen both had a court – the Queen's court being the second-highest in the land, after that of her son.[54]As it happens, among the Pedi, women had their own system of dispute resolution whereby, if they had disputes with other women, they could bring their cases to the superior wife of the headman or the principal wife of the chief.These forums were strictly mediatory and depended on the parties' agreement as they had no powers of enforcement.[55]

Similarly, customary courtsare shown to most often be the first ports of call in the case of a disagreement,though people do also go to the state courts, if they are not satisfied. Monica Wilson observes that it was widely practiced that the matters should go to the village authorities first. If there were delays in appealing to the headman's court or dissatisfaction with the traditional law solutions, people might take their matters directly to the Native Commissioner's Court first.[56] D.H. Reader, who wrote on the Makhanya of Southern Natal in 1966, also observed a multilayered court system which culminated in the chief's court hearing an appeal. He observed that when the chief's verdict failed to express the opinions of those present at the court, the matter must simply be taken to the Native Commissioner.[57]

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[50] Mönnig, H. O. (1967) The Pedi. Pretoria, Van Schaik
[51] Ibid at 308
[52] Hammond-Tooke above n 48 at 64
[53] Hilda Kuper. (1947) An African aristocracy: rank among the Swazi of Bechuanaland London, New York, International African Institute, Oxford University Press at 65
[54] Ibid at 54-55
[55] Mönnig above n 50
[56] Wilson above n 49
[57] Reader, D. H. (1966) Zulu tribe in transition: the Makhanya of Southern Natal. Manchester, Manchester University Press at 259-60. His fieldwork having been done pre-1951, Reader observes that 'in no aspect of Makhanya life has the South African Administration intervened more decisively than in the judicial sphere'. He says that the legal system there is a complex of European and tribal judicial institutions which have gradually come together over a period of more than 100 years. With consideration to the Black Authorities Act and Natal Code, this can scarcely be denied.

Mönnig also reflects on the impact of the Black Administration Act and says that few people took cases to the Native Commissioner of their own accord, and only chiefs appointed by the central government actually referred cases to them.[58] Hammond-Tooke observes that in his area of study, appeals now went directly from the courts of headmen 'to that of the Resident Magistrate (later styled Native Commissioner)'.[59] Thus people could actually 'by-pass the chiefs' courts entirely'.[60]Interestingly, in 1970, Isaac Schapera considered the impact of British interventions and laws on customary court systems and laws in Botswana. He noted that the law imposed major changes in the hierarchy of the courts around 1934-35– namely, the lower ward courts were no longer recognised, despite the fact that they did most of the work. However, he observed that, despite this, these lower courts continued to operate without legal recognition, and in practice, most parties accepted their decisions.[61]

Finally, customary courts are shown generally to be inclusive of the general community, and traditional leaders' powers are circumscribed by customary law and tradition. In other words, chiefs and headmen are not powers unto themselves.[62] Hammond-Tooke references this point in a remarkable claim that the 'chiefship is sacred and, as such, must be above criticism or reproach. This is achieved by effectively withdrawing the chief from the decision-making process.'[63] Thus, decisions are made by the 'community-in-council'.[64] Indeed, as an informant told him, law-making was deeply consultative and '"[a] chief who dared to go against the wishes of his people ran the risk of losing their support, and perhaps his chieftainship." … Consensus was all important.'[65]This is not dissimilar to the comment by Reader vis-à-vis the Zulu, above.[66]Peter Alan Wilson Cook writes of the Bomvana in 1931 that, when matters went to the chief, the decision he would make would have to be based on the traditions of the tribe, the decisions of the old chiefs, and the general opinion of the men gathered at court.[67]Mönnig repeatedly notes that, among Bapedi, any initiated man was expected to attend the courts at various levels as often as they can.[68] One should also note the similar claims of Major E.A.T. Dutton regarding the Basotho:

> Anyone can ask questions and there is no unseemly hurry; … Then the smaller fry among the men of the lekhotla give their opinion, the more important people next, and finally the headman gives his decision, which is generally the summing

[58] Mönnig above n 50 at 313
[59] Hammond-Tooke above n 48 at 78
[60] Ibid
[61] Schapera, Isaac (1970) 'Tribal innovators: Tswana chiefs and social change, 1795-1940'. London School of Economics Monographs on Social Anthropology no 43. London, Athlone Press at 92
[62] Of course, women were generally excluded, but the general community was otherwise included in the courts' processes of hearing and deciding the case; these structures were not elite institutions nor ones centralised to an individual in power.
[63] Hammond-Tooke above n 48 at 68
[64] Hammond-Tooke above n 48 at 74 fn 13: 'by "consensus" I do not mean unanimity or absence of conflict, but merely legitimation of commands by the majority decision of a broad-based body…[a] 'community-in-council (Kuper, 1971:14)'.
[65] Hammond-Tooke above n 48 at 67; also see Hammond-Tooke above n 63.
[66] Reader above n *57* at 259-60
[67] Cook, Peter Alan Wilson. (1931) Social Organisation and ceremonial institutions of the Bomvana. Cape Town and Johannesburg, Juta & Co. Ltd at 146.
[68] Mönnig above n 50 at 309.

> up of the views of the majority. In theory, he can give any decision he likes, but in practice, … the final verdict is really the general opinion of all present.[69]

The listed attributes of the customary court system observed by mid-20th century scholars remain true. There is evidence of this regarding the Tswana[70] and Zulu.[71] Recent studies that I have conducted among Swati-speaking communities in Mpumalanga[72] and Zulu-speaking communities in KwaZulu-Natal also confirm them. Moreover, in consultation meetings held on the TCB in multiple provinces of South Africa, participants have referred to these aspects.[73]

In summary, customary courts are essentially multilayered and inclusive (of multiple voices) in their dispute resolution processes, rather thanuni-levelled and uni-vocal (that is, centralised). They proved resilient and thus retained this form, even after the introduction of colonialism and apartheid, though more strongly at lower levels than in the chief's court. Customary courts remained the primary forum for dispute resolution but met with some competition in the existence of an alternative court system. The latter afforded people a tool by which to hold the customary courts accountable by avoiding them if they did not perform in the manner desired.

Implications for the Traditional Courts Bill

From the evidence above, we can conclude that some of the features and faults of the approach taken by the TCB are as follows. Firstly, customary courts do not and have never existed on only the chief's court level. Historically, colonial and apartheid governments have tried to ignore and even do away with the lower courts (family, clan and headmen's courts) but failed. These courts are embedded in the communities; they are often formed by members of the local communities meeting to, as they might say, 'resolve problems'. They do the bulk of the work of dispute resolution so that most cases do not even reach the chief's court, which can be located far away from most community members.

Due to this, lower courts are almost impossible to do away with and should form the core emphasis of any model of customary courts recognised by government. The Black Administration Act had initially ignored them but, due to necessity, it was later amended so as to include their specific recognition, albeit inadequately still.[74] This was because – regardless of the Act's ignoring these village and family courts – they continued to exist outside of the law.

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[69] Dutton, Major E.A.T. (1923) The Basuto of Basutoland. London, Jonathan Cape at 59-60

[70] See Comaroff, John and Simon Roberts (1981) Rules and Processes: The Cultural Logic of Dispute in an African Context. Chicago and London, University of Chicago and Oomen, Barbara (2005) Chiefs in South Africa: Law, Power and Culture in the Post-Apartheid Era. Oxford, James Currey Ltd.

[71] See Alcock, Rauri and Donna Hornby. (2004) 'Traditional Land Matters: A Look into Land Administration in Tribal Areas in KwaZulu-Natal'. Pietermaritzburg, Legal Entity Assessment Project.

[72] See Mnisi, Sindiso. (2010) The Interface between Living Customary Law(s) of Succession and South African State Law. DPhil thesis, University of Oxford.

[73] See Claassens and Mnisi above n 6.

[74] See, for example, the amended section 12(1) above n 16.

This means that, by not recognising the courts at lower levels than the chief's court, the TCB again centralises power to the chief in a way that is fundamentally inconsistent with customary practices. It ignores the customary courts in which most administration of justice in customary communities in fact takes place. It thereby effectively does away with an indispensible segment of customary forms of justice, which attempt has been proven over the last century and a half to be neither desirable nor likely to succeed.

Secondly, people's attendance of customary courts was generally elective. Thus people's choice to recognise a particular court served the function of defining the customary court's jurisdiction. It was a show of the recognition of the legitimacy of a leader and served as an important check on the leader's authority. Indeed, it was also partly what made leaders lead well: they knew that if they did not rule justly or make fair decisions their people would defect. Therefore, leaders were often bound to decide in accordance with the decision of the general meeting that heard the case.

Defection as acheck on power was only partly disrupted by apartheid legislation that forced limiting boundaries on people. Even with the existence of imposed jurisdictional boundaries for customary courts, the alternative system of courts made available to them (that is, the state court system) served as an important alternate accountability mechanism. The possibility of electing to avoid customary courts where they were unjust therefore served an important function (particularly for women). This is so especially due to the colonial and apartheid governments' entrenching of patriarchy in traditional communities. People would turn to the state courts to defend them against, or simply to avoid, their unjust rulers' actions, laws and judgments. In other words, the introduction of state courts alongside customary courts served as a lifeline. In a modest but important way, this caused the customary courts to remain (in part) dependent on their accountability to their people for their legitimacy, relevance and use.To deny rural people ability to choose whether or not to attend customary courts is to undermine a significant aspect of their ability to secure their own justice and hold their institutions accountable.

In constitutional terms, by refusing people the right to opt out of customary courts, and use the civil courts that all other South Africans are permitted to use) as an alternative to, escape from and check to the power of customary courts, the TCB strips rural people of several rights.Section 166(e) of the Constitution establishes the national courts. The Department of Justice and Constitutional Development has argued that customary courts are to be exempted from it. It says that customary courts are given recognition in terms of section 34, *instead*, and that this therefore allows for the exclusion from them of the right to legal representation in section 35(3)(f).[75]

However, section 34 and the forums it provides for are subject to the rest of the Bill of Rights and Constitution – including the right to legal representation – as are other rights and institutions. And, section 34 is a right primarily to

[75] See PMG report, http://www.pmg.org.za/report/20090901-department-justice-constitutional-development-traditional-courts-bill

have one's case heard in a court as established in terms of section 166(e).[76] Moreover, in terms of section 34, if it is established that it is appropriate that the matter be heard in an alternative tribunal or forum, that alternative to the court must be independent and impartial in the way in which state courts are required to be.[77]

Customary courts generally are not independent and impartial; they therefore must exist outside of section 34. Thus, if people are to use customary courts, they must use them as people use professional negotiators and arbitrators: by opting into them, specifically. Put differently, if they are to make use of customary courts, people have to *choose* to abandon the forums required by sections 166(e) and 34. They cannot be forced to use forums other than the state courts or comparable tribunals and forums. Furthermore, this choice to abandon the state courts is the only way in which the denial of the right to legal representation in the practice of these courts can be constitutionally justified.

To summarise this point, therefore, first, the TCB deprives rural people of their right to freely choose to associate with their courts and authorities, and forces them to abandon their right to legal representation. Second, it denies them an escape from illegitimate and/or dysfunctional and unjust customary courts (where these are the conditions of their local courts). And, third, it refuses them one of their instruments for holding these institutions accountable.

Thirdly, customary courts are essentially non-professional institutions. Rather, they are community forums in which mature members of the community participate.The notion of a presiding officer who acts as a judge and is the single decision-maker has no real place in these forums as they are shared discussion spaces in which all present can participate in the hearing, questioning, deliberation and decision. Also, the variability between different communities (even within a single cultural group or locality) in the extent of the chief's participation in the court – ranging from non-participation to active participation – makes that of presiding officer an untenable notion to adopt and impose on all communities. The notion of a presiding officer, taken from western court systems, also is misleading in the context of these forums. This is due to the evidence shown that, even where the chief formulates and pronounces the decision in a customary court, he is bound by what the council and/or community has found in hearing that case.

The implications of this are that, by acknowledging and empowering a single actor as constituting the traditional court and having power to make law and decisions in traditional courts, the TCB centralises and professionalises the customary courts. The TCB thereby violates awell-documented aspect of the nature of customary courts – namely, broad community involvement in all cases.The TCB also imposes this false model on all customary communities and thus undermines the localised nature and consequent variability between

[76] See *Barkhuizen v Napier* 2007 (5) SA 323 (CC) at paras 31-35; *Giddey NO v JC Barnard and Partners* 2007 (5) SA 525 (CC) at para 15; *Engelbrecht v Road Accident Fund and Another* 2007 (6) SA 96 (CC) at paras 30 and 40
[77] Ibid.

communities themselves and the functioning of their respective courts. It therefore compromises their ability to operate in a manner that meets the needs created by the communities' immediate contexts.

To the extent that women were traditionally excluded from participating in customary courts,[78] the TCB is constitutionally bound[79] to attempt to correct this. Therefore, by failing to specifically provide for women in the constitution and operation of customary courts (except as litigants, and even then without the protections they need), the TCB reinforces the widespread problem of women's continued exclusion from customary courts.

THEORETICAL OBSERVATIONS: THE NECESSITY OF LAYERS OF AUTHORITY AND UNIMPOSED BOUNDARIES OF DECISION-MAKING

Design principles shared by long-enduring Common Pool Resources (CPRs)

ElinorOstrom identifies eight design principles shared by long-enduring common pool resource (CPR) institutions. I will only note the ones relevant to customary communities as CPR appropriators here. Ostrom first notes the importance that clear boundaries have.[80] One might say that this clarity of who is entitled to benefit from the shared resources is what the state is attempting to accomplish by imposing them. Yet, it is quite clear from Ostrom's analysis of example cases that she is referring to internal definition, not external imposition. That is, the dependents on the shared resources themselves come to agreement as to where the boundaries stand. This is implicit even in the fact that she sets, as another one of the design principles, that state authorities must recognise the right of the CPR users to develop their own institutions without being challenged by the external authorities.[81]

The first is connected to another of the principles: that those who benefit from the CPR and are thus subject to its shared rules of governance are also participants in developing and adapting the rules to render them suitable to situational changes.[82] Additionally, these same people either actively hold those tasked with monitoring compliance with shared rules accountable or are themselves the ones who monitor compliance.[83] In fact, these monitoring and sanctioning functions are substantially invested in where CPRs are successful in a long-term sense.[84] Yet, that it is the participants themselves who monitor and sanction rather than 'external authorities' permits mutual accountability.[85] This means that 'some redundancy is built into the monitoring and sanctioning system.'[86] But that is valuable in as far as '[f]ailure to deter rule-breaking by

[78] Except in cultural systems where they had their own systems of courts (as in Pedi culture) or, as in the case of the Swazi, where the Queen would hear appeals in the court immediately beneath that of the King who was her son or where, as in the Lovhedu, a woman was the figurehead in the court, as chief.
[79] Section 9(3) of the Constitution
[80] Ostrom, Elinor (1990) Governing the Commons: The Evolution of Institutions for Collective Action. Cambridge, Cambridge University Press at 90, 91
[81] Ibid at 90, 101
[82] Ibid at 90, 93
[83] Ibid at 90, 94
[84] Ibid at 94
[85] Ibid at 94-100
[86] Ibid at 96

one mechanism does not trigger a cascading process of rule infractions, because other mechanisms are in place.'[87]

This participant monitoring also keeps the costs low,[88] which we will see momentarily is highly desirable, however it does not mean that there are no costs. In fact, it is common for the monitors or local officials to keep (a portion of) the fine.[89]Yet, this assumes that fines are graduated and thus kept more-or-less reasonable to the degree of infraction.[90] It also assumes that there are other rewards that monitors derive from their task in that they can be sure that they are not being suckered (everyone else is complying to the rules) and that they will not be suckered (even those who break the rules will be restored to order).[91]

Another principle is that 'low-cost local arenas to resolve conflicts' are readily available.[92] Of course, rules are never unambiguous when it comes to their application, even when developed by those subject to them.[93] Therefore, agreed means for resolving disagreements over them or infractions of them – whether by those who are elected as monitors or a separate system of courts – is essential. This is also to settle the disputes (assure compliant members that they will not be suckered) and clarify the rules quickly.[94]Ostromnotes that the possibility for external authorities to be approached to overturn locally agreed rules would threaten the security of the CPR in the long-term.[95]

Ostrom identifies that, with CPRs that are part of larger systems, all of the above take place at levels that range between very micro and macro. That is, 'appropriation, provision, monitoring, enforcement, conflict resolution, and governance activities are organized in multiple layers of nested enterprises.'[96] This allows for development of rules and systems that are nuanced enough to deal with the variegated concerns at the different levels of organisation.[97]

Regulating customary communities as CPR appropriators

I have shown in this paper that the first design principle set out by Ostrom is violated in the present South African regulation of customary communities. Who sets the boundaries is at the core of problems experience by communities. In South Africa the present government has entrenched boundaries established by the apartheid government, which rarely bore any resemblance to those observed by the people who formed the groups

[87] Ibid at 96
[88] Ibid at 95
[89] Ibid at 96
[90] Ibid at 94, 97-98: 'Graduated punishments ranging from insignificant fines all the way to banishment, applied in settings in which the sanctioners know a great deal about the personal circumstances of the other appropriators and the potential harm that could be created by excessive sanctions, may be far more effective than a major fine imposed on a first offender.'
[91] Ibid at 95-96, 98: 'the appropriator-monitor has up-to-date information about compliance and sanctioning behavior on which to base future decisions about personal compliance.'
[92] Ibid at 90, 100
[93] Ibid at 100
[94] Ibid at 100-101
[95] Ibid at 101
[96] Ibid at 90, 101
[97] Ibid at 102

themselves. As this is a foundational principle its violation arguably results in the compromise of the rest of the principles. In fact, I understand Ostrom to mean that boundaries thoroughly relate to authority. Thus,it is difficult not to see the corruption of these communities' boundaries and failure to respect the communities' autonomy to establish (opt into) their own groupings and institutions as an essential failure of the systems of their regulation. This includes their inability to establish institutions at multiple levels of their social organisation to meet the governance and social needs at each level.

Layers of authority within indigenous African communities are central to its social organisation and distribution of power.Okoth-Ogendo is cited as describing the inverted triangle of authority in the introduction of this paper to illustrate. These layers, together, with flexible (nested, layered) boundaries, also present a way by which ordinary people can hold the authorities they choose to recognise accountable. This assumes that the authorities' power is always dependent on the communities' giving it, and that the mechanisms by which the latter hold the former accountable are not corrupted. The inability of customary communities to participate in making and adapting the laws that will govern them,compromises the quality of their regulatory systems. And, their not being able to actively participate in monitoring compliance with their shared rules – or holding those who do accountable – cripples the delicate balance of power in, and sheer functionality of, their governance systems.

Ben Cousins, drawing from Jeff Peires, notes the challenges to rural land rights justice posed by 'breakdowns in administrative systems, abuses by some traditional leaders, the continued insecurity of many women, and lack of clarity over the role of traditional authorities and local government bodies'.[98]The power imbalance between traditional leaders and their constituentsis noted in his analysis.

A large source of the power of traditional leaders is in the recognition and status that they are given by government, allegedly in their role as custodians of culture and those who control the large section of the population who live in traditional areas. This cannot be judged separately from the level of organisation and official recognition that traditional leaders have attained.[99] They have secured an extensive amount of cachet, and are permitted to speak authoritatively on behalf of the poor, rural public in ways that seem most often to benefit themselves by ever strengthening their imposed authority. Policy pronouncements embrace'the institution of traditional leadership' as a fully-fledged partner of the state.Government's assumption is not that traditional authorities exist at the behest of those who entrust them with the responsibility to lead them (based on the mutual dependency that founds notions of law, governance and security in customary communities). Government assumesthat they are naturally entitled to existence.[100]This

[98] Cousins above n 1 at 118

[99] Oomen above n 70; Ntsebeza, L. (2006) Democracy Compromised: Chiefs and the Politics of Land in South Africa. Cape Town, HSRC Press

[100] The common phrases used include: 'recognition and promotion … of the institution'. President Jacob Zuma referenced these in his speech at the opening of the National House of Traditional Leaders on 23 February 2010. He noted that government has 'passed several laws since the founding of our democratic republic, to give effect to [the] constitutional *recognition* of *the institution* of traditional leadership.' (Address by

disregards the brutal history of deposed and imposed traditional leaders in terms of apartheid legislation such as the Black Administration Act and Black Authorities Act. This puts in question the legitimacy of many a traditional leader officially recognised today, and their jurisdiction.[101]

Historicising Decentralised Governance in South Africa

The growing power imbalance isindicative of government's poor choice of governance strategy. In *Citizen and Subject,*MahmoodMamdani writes:

> … the Africa of free peasants is trapped in a nonracial version of apartheid. What we have before us is a bifurcated world, no longer simply racially organized, but a world in which the dividing line between those human and the rest less human is a line between those who labor on the land and those who do not. This divided world is inhabited by subjects on one side and citizens on the other; their life is regulated by customary law on one side and modern law on the other; … in sum, the world of the 'savages' barricaded, in deed as in word, from the world of the 'civilized'.
> Does not this divided world – on one side free peasants closeted in separate ethnic containers, each with a customary shell guarded over by a Native Authority, on the other a civil society bounded by the modern laws of the modern state – reflect the general contours of apartheid? Was not the colonial state the basic form of the apartheid state? Has not the deracialization of that state structure through independence failed to come to terms fully with *the institutional legacy* of colonialism? It is in this sense that independent Africa shows apartheid South Africa one possible outcome of a reformed state structure, *deracialized but not democratized* …[102] (emphasis added)

What is perhaps most significant in Mamdani'swords is the illumination of the fact that what might seem a unique moment or process of what I refer to as bad governance of customary communities now is actually the mark of continuity. Namely, Mamdani captures in poignant terms that the barricading of the poorest black South Africans[103] in enclaves of legal isolation wherein special and often imposed authorities rule indeed indicates a progression from counter-democratic colonial and apartheid policy into today's.

This historicisation of the trends that we see in present government approaches choosing traditional leadership as the preferred form of governance of 'their subjects'is accurate. It depicts government as tendentiously entrenching the despotic powers of traditional institutions, rather than democratising them to permit the diffusion of power that both democracy

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the South African President at the opening of the National House of Traditional Leaders, Cape Town, 23 February 2010. Accessible at http://www.polity.org.za/article/sa-zuma-address-by-the-south-african-president-at-the-opening-of-the-national-house-of-traditional-leaders-23022010-2010-02-23.) The Cooperative Governance and Traditional Affairs budget vote document repeatedly mentions 'reinforcing' or '*promoting* the role and place of *the institution* of traditional leadership' as its objective but only once mentions 'supporting the vulnerable' and once 'empowering communities'. (Vote 3, Cooperative Governance and Traditional Affairs, Estimates of National Expenditure 2010. 17 February 2010. Department of National Treasury. Accessible at http://www.treasury.gov.za/documents/national%20budget/2010/enebooklets/bookletvote03.pdf at 2, 3 and 23.) It thus makes it clear that the establishment of the new department of traditional leadership is mostly about, quote, '*institutionalising* traditional leadership' and thus widening the power and influence gap between traditional leaders and their constituents.

[101] Section 28(1) and (3) of the TLGFA extends the recognition of any apartheid-recognised traditional leader or community.

[102] Mamdani above n 8 at 61

[103] People living in the former homelands remain the poorest South Africans according to the Stats SA poverty map.

and indigenous law have in common. In the words in which Albert Luthuli rejected the 'traditional' governance system that the Black Authorities Act invented:

> 'The modes of government proposed are a caricature. They are neither democratic nor African. The Act makes our chiefs, quite straightforwardly and simply, into minor puppets and agents of the Big Dictator. They are answerable to him and to him only, never to their people. The whites have made a mockery of the type of rule we knew. Their attempts to substitute dictatorship for what they have efficiently destroyed do not deceive us.'[104]

These sentiments resonate with some of what is captured in recent scholarship on governance.

Franz and Keebet Von Benda-Beckmann and Julia Eckert, in their edited collection on the interconnectedness of governance and law as mutually structuring,help situate the government approach in South Africa within global trends by arguing that de-centralisation is often a front for centralising power. They write that

> '[t]he centralizing drive by state agencies has been redirected to incorporate new (and old) alternatives or additional agencies of governance. More precisely, states rather than governing directly, now attempt to determine the shape of the constellations of governance. As Santos stressed: "The centrality of the state lies to a significant extent in the way the state organises its own decentring …"'.[105]

In this vein, it might be argued that government's approach is no different from that of colonial and apartheid government: 'de-centralised despotism',[106] otherwise known as 'indirect rule' – from the top, down.

Scott Burris, Michael Kempa and Clifford Shearingcapture the challenge created by decentralised government in that it can privilege elites at the expense of the unorganised, marginalised poor, denying the latter stakeholders voice and participation.[107] Von Benda-Beckmann et al. also point out that '[s]ome of these stakeholders, the less well organized and least endowed, are virtually excluded from the decision-making processes and are governed over, rather than being participants to governance.'[108] This ties back to the relative inequality suffered by those who are not deemed 'citizens' as is suggested by Mamdani above.

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[104] Luthuli, Albert (1962) Let My People Go: An Autobiography. London, Collins.

[105] Von Benda-Beckmann, Franz, Keebet Von Benda-Beckmann and Julia Eckert. (2009). 'Introduction'. Rules of Law and Laws of Ruling: On the Governance of Law. Von Benda-Beckmann, Franz, Keebet Von Benda-Beckmann and Julia Eckert (eds). Surrey, Ashgate at 5. Also see Burris, Scott, Michael Kempa and Clifford Shearing (2008) 'Changes in Governance: A Cross-Disciplinary Review of Current Scholarship'. 41 Akron Law Review 1 at 4.

[106] Mamdani at 109; McClendon, Thomas V. (2003). "Coercion and Conversation: African Voices in the Making of Customary Law in Natal". The Culture of Power in Southern Africa: Essays on State Formation and the Political Imagination. C. C. Crais (ed.) Portsmouth, NH, Heinemann: 49-63 at 53

[107] Burris et al. above n 105 at 14, 24, 28-29, 33, 57

[108] (2009) at 10: They also point to the fact that the decentralised and fractured oganisation of the state can have 'problematic consequences, especially for marginalized, poorly organized and poor sections of the population. The organization of these new governance structures is often highly unequal and dominated by powerful actors, while others are excluded. …'

The reality of exclusion remains true for those deemed 'subjects' in South Africa, because they are denied powers of self-government, despite the existence of a democratic Constitution. As a solution, Burris, Kempa and Shearing observe the need for all to have '"substantial and equal opportunities to participate directly in decisions that affect them"'.[109]The Constitution provides the opportunity for this shift in South Africa's politics but has been shown to be an opportunity wasted whereby Mamdani's fear of 'deracialisation without democratisation' is realised.

I tend to agree with Pierre Bourdieu on the nature of the institutional form of law and its predisposition to silencing and oppressing those who lack the 'capital' the possession of which law is built around.[110]Barbara Oomen calls this capital, 'the power of definition', which enables South African traditional leaders to largely determine the form of custom that becomes crystallised as law.[111]Burris, Kempa and Shearing stateits exclusionary potential well: 'policy networks, as they have so far developed, … tend to take seriously the "voices" (and by extension, the forms of knowledge of their members) [and] serve the policy interests of those members.'[112]

Notwithstanding the limitations of law by its nature, my view remains that, in large part, the undemocratic nature of decentralised governance in South Africa can be attributed to government's failure of imagination. Namely, its choice to rely on partnerships from the past only gives those partners greater power than even before. This means that the state does two regressive and undesirable things simultaneously. Firstly, it is trapped in a kind of 'institutional fetishism' whereby it presumes that the only means of effective governance are those used formerly, albeit by oppressive regimes.[113] And, secondly, in its purported bid to 'empower communities', it devolves increased power to those in the highest stratum of those communities who already possess it and often use it at the expense of those who are weak.[114]

Dispute resolution as a central governance tool

Dispute resolution forums are crucial spaces. As Ostrom accounts above, they play a central role in the successful management of CPRs.They are a primary sphere in which resource and authority claims are made.[115]Indeed, as Simon Roberts (drawing on Turner)[116] notes, 'claims about "wrongdoing" are closely interwoven with struggles for political ascendancy and competition for resources.'[117] Christian Lund too is well-known to have observed that

[109] Burris et al. above n 105 at 28, 57. This phrase is quoted from Burris, Drahos and Shearing *Nodal Governance* 30 Australian Journal of Legal Philosophy 30 (2005).
[110] Bourdieu, Pierre (1987). "The Force of Law: Toward a Sociology of the Juridical Field". Hastings Journal of Law 38: 814-53 at 817: 'the juridical field' is 'the site of a competition for monopoly of the right to determine the law'.
[111] Oomen above n 70 at 88-89
[112] Burris et al. above n 105 at 24
[113] Burris et al. above n 105 at 3
[114] Burris et al. above n 105 at 63, 65
[115] Mnisi Weeks, Sindiso (2010) 'Securing Women's Property Inheritance in the Context of Plurality: Negotiations of Law and Authority in Mbuzini Customary Courts and Beyond'. Acta Juridica (forthcoming)
[116] Turner, Victor (1957) Schism and Continuity in an African Society: A Study of Ndembu Village Life. Manchester, Manchester University Press.
[117] Roberts, Simon (1994). "Law and Dispute Processes". Companion Encyclopaedia of Anthropology: Humanity, Culture and Social Life. T. Ingold (ed.) London, Routledge: 962-82 at 972. Also see Burris et al.

'[s]truggles over property are as much about the scope and constitution of authority as about access to resources'.[118] One context in which these struggles patently occur and are settled is in that of dispute resolution.[119]

> 'Because of the nature of African systems of land rights and the fact that land rights derive from social relations and exist relative to the claims and needs of others …, the forum in which land rights are negotiated and disputes resolved has a direct impact on security of tenure. The processes and institutions that negotiate land rights determine who gets land and who is able to retain it in the face of competing claims …'[120]

This reality that AninkaClaassens and SizaniNgubanedescribe points to the importance of dispute resolution as a tool available to the different institutions that coexist in the competitive landscape of attributing, ensuring and contesting property rights and authority over them.

In her insightful paper on forum-shopping, Keebet Von Benda Beckmann describes the multilayered and nested levels that form the Minangkabau village social organisation and dispute resolution. I draw from it principles that apply to South African communities also, on the basis that strong similarities exist between the adatmanner of dispute resolution and forum-shopping and customary South African systems and practices.

Firstly, in terms of the adat procedure, forums can be formed of a single lineage or neighbourhood, or of different lineages combined, or be a 'higher forum at the more inclusive level' of community.[121] Thus, Von Benda-Beckmann describes that '[s]olutions for problems must be found at the lowest level of authority, and if no solution is found the case must be taken higher up, step by step, until a solution is found.'[122] This means significant authority to resolve disputes is situated at the lower levels of organisation and the authority of the higher levels depends on the failure of lower level courts to settle matters. Indeed, as Von Benda-Beckmann describes it, '[h]igheradat institutions have only as much authority as has been conceded by the lineages and is necessary to sustain a common government'.[123] She observes too that the lineages (lower levels of social organisation) try to remain autonomous and this is secured by their having their own property,[124] which they manage. My suggestion here is that much of the same can be said to be true of South African communities, as described above.

Being, as they were, in competition with colonial government and its institutions, Von Benda-Beckmann describes how '[d]ealing with disputes …

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above n 105 at 3: 'Governance is about how people exercise power to achieve the ends they desire, so disputes about ends are tied inextricably to assessments of governance means.'

[118] Lund, Christian (2002) 'Negotiating Property Institutions: On the Symbiosis of Property and Authority in Africa'. Negotiating Property in Africa. Juul, Kristine and Christian Lund (eds.) Portsmouth, NH, Heinemann: 11-44 at 11

[119] See Lund (2002) at 17-19; Von Benda-Beckmann, Keebet. (1981) 'Forum shopping and shopping forums: Dispute processing in a Minangkabau village in West Sumatra'. Journal of Legal Pluralism 19:117-160 at 137-139

[120] Claassens and Ngubane above n 4 at 173

[121] Von Benda-Beckmann above n 119 at 137

[122] Ibid at 137

[123] Ibid at 138

[124] Ibid at 138

became an important instrument in the struggle for power at local level.'[125]In that context, the principle of 'joint deliberation' was also important.[126] It even provideda tool by which the local authorities maintained their legitimacy through their discourse in the context of their discussions of disputes. This is because they (as a forum) were engaged in the exercise of 'shopping'[127]– that is, they were 'negotiating' legitimacy in their subjects' eyes.[128]Though external forums may have presented a threat as Ostrom notes that they do,[129] in this particular case, they also helped to keep the internal forums accountable. This is because theymade respecting the 'joint deliberation' principle and other rules or values importantas a bid to maintain their authority over local people's cases.I have already argued that the South African case also suggests that the availability (and viability) of multiple dispute resolution forums can be a useful tool for keeping intra-community courts accountable. This potentially outweighs the risk of external courts undermining the continued functioning of the customary courts. I have also demonstrated the centrality of inclusive participation in dispute resolution as a form of law-makingin South African communities.

Belgian scholar, Reyntjens, has contended that informal dispute settlement is the most important judicial forum, and that '[i]n Africa, the introduction of modern judicial institutions has resulted in a marked reduction of access to justice for most people. Accessibility declines in proportion to the increase of professionalisation and westernisation of the court system.'[130] I partly disagree with him in that my view is that modern courts as alternative forums have come to serve as important options for people, and a means by which they can hold their courts accountable. However, I agree with the point that professionalisation of customary courts themselves is negative for their accessibility to their users. To the extent that the TCB attempts to professionalise and centralise these courts, it is likely to reduce ordinary rural people's ability to use them for effective access to justice.[131]

CONCLUSION

Dispute resolution evidently plays a central role in governance. Yet, the vision of governance imposed on customary communities is diametrically opposed to that which the communities have developed and owned themselves, as well as that endorsed by scholars. In this paper, I have demonstrated this distinct contrast between the answers to the multiple questions asked given by the state in its current legislation and those given by communities (and the weight of theory on effective CPR management and good governance).

The answers follow, in short. Who can make the rules that govern the commons? While the state says it is traditional authorities, the communities

[125] Ibid at 139
[126] Ibid at 137-138
[127] Ibid at 138-139
[128] See discussion of these negotiations that take place in Mnisi Weeks above n 115.
[129] Von Benda-Beckmann above n 119 at 142
[130] Reyntjens n 29 at 15
[131] See Mnisi Weeks above n 115 for discussion of the tensions that already arise around the different kinds of discourse (formal and value-based. respectively) that traditional authorities and the people they serve use in their claims and arguments in local dispute resolution forums.

say that it is and should be a process that is more inclusive of ordinary community members. Who has power to decide disputes arising from non-compliance and who else can participate in dispute resolution? The state answer is that it is the 'senior traditional leader' appointed under apartheid laws who, at the level of chief's court, can decide matters, potentially with the help of a council of elders (who are most likely to be all male). This is while most South African customary communities would respond that it is a community-appointed or -legitimated leader or council, bound by the questioning and deliberations of the community members present to assist in resolving the dispute. The latter occurs first at the family level, then at the ward level until it is perhaps escalated up to the chief's council, or perhaps even outside of the community entirely. And, to the extent that deliberations would often exclude women, the state has a duty to support women's growing involvement in customary decision-making forums and their processes. Whose disputes are they empowered to decide? The state has resolved that jurisdiction will continue to be defined according to territory (without permitting people to opt out). This is regardless of all indications that jurisdiction should rather be a matter of people opting into a grouping that together chooses to live according to community-evolved,shared rules. In all of these answers, the state has elected to perpetuate colonial and apartheid policy that confined black people to rural enclaves as 'subjects' of 'native-' then 'tribal authorities'.

My argument is that this is a poor policy and governance choice, as well as an undemocratic and contra-customary one. What the evidence in this paper speaks to is the importance of the flexibility and self-selected nature of customary community boundaries. It also evinces the centrality of layeredand inclusive authority for local law-making, accountability and decision-making over shared resources and the rules that govern them. It shows that forum-shopping is not a pure good and certainly can undermine CPR systems. Yet, it more strongly suggests that people's ability to avoid local decision-making forums– and to challenge the decisions of these forums further– can play an instrumental role in keeping the institutions themselves accountable and enabling them to escape local injustices.

If the state were seeking to employ a new imagination of rural governance in a new and democratic South Africa, there are a handful of proposals that the evidence in this paper suggests that it ought to use as a core basis – particularly in drafting legislation to replace the TCB. Primarily, regulation of customary courts should be minimalist. This means, firstly, that it should be lighter on assigning power to traditional institutions (especially the centralised 'authorities' of the past). Secondly, it should be heavier on recognising their responsibility (emphasising limits to their colonial/apartheid powers). Thirdly, it should provide for traditional institutions' accountability directly to the communities the courts serve, first and foremost, and to the state second.

Furthermore, regulatory legislation should be founded on recognition of the fact that individual choice is the primary means by which the government might both protect group identity and culture, and yet not do so at the expense of the individual. This means recognising group identity and culture, and thus giving customary communities some freedom to develop their own institutions

and self-regulate. Yet it demands also allowing individuals within those communities to choose or reject membership of those communities and their sub-groupings for themselves – not imposing these and their institutions on them. Put simply, this means that an opt-in system should be employed instead of a compulsory confinement. As part thereof, socio-legal boundaries should be left to the communities themselves to determine as they will. Finally, having secured individual choice, for group identities and customary legal arrangements to remain a viable choice, they must be supported and improved in ways that make them an attractive option. Mostly, this means assisting them to become more inclusive (not less) in their permitting the participation of all ordinary members, including women. Yet, with this, people must be resourced with the necessary information and means to effect their choices, whether in favour of or away from the group and its institutions.

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