

VOICES IN THE LEGISLATIVE PROCESS: A REPORT ON THE PUBLIC SUBMISSIONS ON THE TRADITIONAL COURTS BILL (2008 AND 2012)

Thuto Thipe

Researcher, Rural Women's Action Research Programme
Centre for Law and Society, University of Cape Town

Introduction

The Traditional Courts Bill (TCB) has drawn national attention since its introduction to the National Assembly (NA) in 2008, much of which influenced the Bill's withdrawal in 2011 and re-emerged with the Bill's reintroduction to the National Council of Provinces (NCOP) in December 2011. Strong criticism of the TCB has come from civil society groups, which have argued that the Bill is unconstitutional because it would violate the rights of millions of people and fundamentally challenge the basic tenets of common citizenship in South Africa. Proponents of the TCB have mostly argued that the Bill is necessary to preserve, restore and legislate customary law, often characterising opponents to the TCB as opposed to customary law and traditional leadership. This report examines the submissions on the TCB made to Parliament in 2008 and 2012. This examination reflects on the dominant themes and reactions to the TCB communicated through the submissions, analysing responses to both the content of the TCB and the processes surrounding its development.

Many of the criticisms of the TCB are directed at the shortcomings of the public consultation process. The Bill was published in the Government Gazette on 27 March 2008 and introduced to the NA. The Portfolio Committee on Justice and Constitutional Development issued a call for submissions on 21 April, with 6 May as the deadline for submissions. During this 16-day period there were three public holidays and two weekends, leaving nine working days for the preparation of submissions for the hearings. Over this period fewer than 20 submissions were received, suggesting inadequate advertising and information on the Bill – criticised by the majority of these submissions. Several calls for an extension of the period to allow for greater participation were not heeded. The hearings following the submissions were held on 13, 14 and 20 May 2008.

On 2 June 2011, the TCB was withdrawn from the NA, partly because of opposition, but also because of insufficient time to complete the legislative procedures required by section 76 of the Constitution, which relates to legislation that affects the provinces and mandates a longer consultative process. On 13 December the Department of Justice and Constitutional Development (DOJCD) issued a general notice in the Government Gazette announcing the reintroduction of an unchanged TCB to Parliament in January 2012. The notice was published during the December vacation period and took many people by surprise at a time when business slows down and many are on holiday. Interested parties were invited to submit comments by 15 February, allowing only 20 days between the Bill's introduction in the NCOP on 26 January 2012 and the deadline.

Provincial public hearings for the TCB were held between 18 April and 18 May in all nine provinces. Following these hearings, the provinces voted on the Bill. The North West, Gauteng, the Eastern Cape and the Western Cape rejected the bill. KwaZulu-Natal, Limpopo, the Free State and the Northern Cape proposed a series of irreconcilable amendments to the Bill, and Mpumalanga requested a three-month extension to allow it to formulate its negotiating mandate. Controversially, the NCOP's Select Committee on Security and Constitutional Development decided not to consider the provincial mandates but rather hold another round of hearings.

The national public hearings were held from 18 to 21 September in Cape Town. Over 20 oral submissions were made to the Select Committee during this period, the majority of these coming from rural community members. Despite the wealth of experiences and views on customary law and the TCB, the DOJCD presented a document that only summarised two submissions when the committee met on 24 October to table its report on the hearings. The submissions were those of the South African Human Rights Commission and the Department of Women, Children and People with Disabilities. Responding to this omission, one committee member noted that an account of the hearings that failed to represent the overwhelming opposition to the TCB would be an inaccurate reflection and could not qualify as a summary of the process. The committee chairperson justified the exclusion of the 20 submissions from the summary, arguing that they were 'irrelevant' as only two submissions addressed clauses in the Bill. The chairperson indicated that the DOJCD drafted this document upon his instruction.

In its final meeting of the year on the TCB, on 28 November 2012, the committee adopted its new report, rewritten to incorporate all of the submissions made at the hearings. In doing so, the committee demonstrated responsiveness to criticism of the earlier exclusions and acknowledged the significance of all the submissions. Following this report there has been no further communication on the status of the Bill.

The submissions discussed in this report offer insight -in people's own words and voices- of traditional leadership, realities of customary law and traditional courts across the country. The submissions communicate diverse understandings of vernacular jurisprudence and the ways that the TCB would influence these structures and systems on the ground. This diversity of submissions offers perspectives into how different sectors of society have experienced the development of the Bill and reacted to its content. Submissions from government departments, civil society organisations and research and monitoring bodies based outside areas where the Bill would apply offer insights into its structural elements and tackle the expected macro-level impacts on affected communities. While the submissions from individuals, groups, and institutions based in areas that would be affected by the Bill also engage with the TCB's broader structural impacts, they often also offer more intimate discussions of current and past experiences of living under customary law. Based on these experiences, these submissions explain how people believe the TCB would affect their lives and communities.

The overwhelming majority of submissions across sectors and geographic regions opposed the Bill. Many argued that the TCB should be withdrawn in its entirety while others wanted it be amended in specific ways and redeveloped with input from communities that would fall under the Bill's jurisdiction. Significantly, apart from

submissions by traditional leaders, none of the people based in areas affected by the TCB wrote in full support of the Bill.

While critiquing the TCB, most submissions emphasise that opposition to the Bill does not imply a rejection of custom or tradition. As the South African Human Rights Commission notes:¹

[T]he current debates around the Bill are thus not about the integrity and/or legitimacy of the traditional court system but rather to determine the manner in which this recognition should be reflected in legislation within our constitutional democracy.²

Rather than devaluing or undermining the significance of customary law, the majority of submissions highlight the harmful impact that the TCB would likely have, based on people's currently experiences of customary law systems and structures.

A common thread in the submissions is the locating of customary law in the context of South Africa's constitutional democracy and the expectation that customary law comply with the letter and spirit of the Constitution. Most submissions, especially those from people living under customary law, argued that customary law and traditional courts need to respect and protect individual and group rights, particularly in line with the protections guaranteed to all citizens. Generally, these submissions are in line with the view from Jennifer Williams at the Women's Legal Centre:

All the provisions in the Constitution recognising customary laws, the exercise of the rights to culture and powers of traditional leadership recognise these only to the extent that they are not inconsistent with other rights in the Constitution. No other right is limited in this manner throughout the Constitution. The limitation of these rights by definition was deliberate and is indicative of an attempt to eliminate competing interests between the right to culture and other rights in the Constitution.... The Constitution posited the achievement of equality, freedom and dignity as paramount to the pursuit of an equalitarian society.³

Democracy and the expectations associated with liberation from apartheid featured prominently in submissions. Many authors juxtaposed experiences of life in the Bantustans with hopes about the freedoms, protections and rights promised by the end of apartheid. This thread in the submissions highlights the value that many place on living in a democratic dispensation characterised by a Constitution and a Bill of Rights that they can draw on to demand rights, freedoms and protections previously denied to Africans. The dominant sentiment across sectors was that customary law and constitutional rights need to inform each other and work together in shaping experiences of justice in traditional courts, rather than being framed as oppositional. Many people living under customary law shared challenges that they currently experience in traditional courts and that the TCB would undermine existing forums for more democratic and responsive processes of justice.

¹ All public submissions are quoted in their original form with only minor editorial changes.

² J Cohen. South African Human Rights Commission. Gauteng. 2012.

³ Jennifer Williams. Women's Legal Centre. Western Cape. 2008.

This report is divided into seven themes that represent areas and discussions that appear most frequently in the submissions. These seven themes are:

- the broader body of recent legislation regulating customary law;
- the consultation process carried out in the development of the TCB;
- the centralisation of power in traditional leaders in the TCB;
- the TCB's relationship to existing practices and understandings of customary law;
- the significance of the TCB's geographic boundaries;
- land rights under the TCB;
- and the Bill's impact on women and other marginalised groups.

Although there is significant overlap between these themes and many of them are deeply interconnected, they have been separated here in an effort to most clearly communicate the major consistencies in arguments raised through the submissions and to highlight the ways that different submissions speak to each other around specific areas. Because it is not possible to capture and communicate all of the voices from the submissions in this report, the focus is on dominant issues and conversations, with often one source standing in for many others that communicated similar sentiments. The analysis within each of the themes draws from the larger body of voices that contribute different insights, allowing the broader diversity from the submissions to colour the report.

Lack of consultation outside privileged groupings

Public consultation during the drafting of the TCB emerged as the most frequently raised concern in both the 2008 and 2012 submissions by the public. Only those voices that are heard are able to influence the direction, principles and content of legislation. Consultation paints the landscape for legislators and reflects different power relationships and dynamics within that landscape. The underlying argument in submissions is that the consultation processes demonstrate whose interests the state privileges in the development of legislation. With the TCB, exclusive consultation with traditional leaders resulted in legislation that grossly skews relations in favour of traditional leaders at the expense of the people they serve. When the TCB was reintroduced to Parliament in 2012 without changes to its 2008 version, submissions charged that people who would be affected by the Bill were again not informed or consulted about it before its re-tabling in Parliament.

Parliament's Joint Monitoring Committee on the Improvement of Quality of Life and Status of Women argues that, '[t]he Bill has been drafted in consultation with traditional leaders but opinions and feelings of rural communities has not been captured anywhere.⁴' Bafana Khumalo and Cherith Sanger from Sonke Gender Justice Network support the Joint Monitoring Committee's view:

The people who will disproportionately be affected by the Bill were not consulted prior to its drafting. Reflecting this unequal process, the Bill entrenches the rights and power of men in general and the traditional leaders

⁴ Joint Monitoring Committee on the Improvement of Quality of Life and Status of Women. Parliament of South Africa. Western Cape. 2008.

in power specifically, and does little to nothing to address the specific needs of women and children and to rectify their current disempowerment.⁵

These two submissions communicate a common theme that the exclusion of the majority of people who live under customary law in the drafting of the TCB is central to the Bill's content and values. This problem cannot be overlooked or minimised. These submissions highlight representation and voice, arguing that the silencing of the voices of the majority in public participation processes has resulted in a Bill that cannot speak to or for the majority.

M S Baloyi from Mahuntsi Traditional Community in Rotterdam Village, Limpopo, talks in his critique about the public's expectations of democratic processes of public participation:

There is an intrinsic connection between who is consulted when legislation is drafted and whom it benefits. When the bill was being considered in 2008 rural people were not consulted about the empowered traditional councils to administer and control their land. The principle of 'People shall govern' never exist[ed], hence the apartheid era is coming back and with a full basket of benefits to the 'already recognised' traditional leaders by the apartheid government.⁶

These submissions confront the idea that the TCB is harmful to the majority of people living under customary law because they were excluded in its development. Because traditional leaders' interests are elevated above all other stakeholders, the vulnerability of people living under customary law increases.

Submissions draw attention to rural people's exclusion from the consultation process through the withholding of information about the provincial hearings. The state also failed to make resources available to people in rural areas to attend and participate in the hearings, despite such means being made available to traditional leaders. Many people simply did not know about the TCB. Charlotte Mokgosi from the Makgobistad Community Committee in Makgobistad, North West explained,

[T]he new bill came as a real surprise to us[.] [A]s the Makgobistad community we've never heard about it before.⁷

Mokgosi represents a common experience communicated in the submissions of people who would be affected by the Bill not knowing about its existence, let alone its content and likely impact on their lives.

Another common experience highlighted in the submissions was of information about the TCB hearing being made available almost immediately before the hearings took place, therefore not giving people enough time to make arrangements to attend. Simangele Zungu from KwaZulu-Natal expresses his frustration at this situation:

⁵ Bafana Khumalo and Cherith Sanger. Sonke Gender Justice Network. Gauteng. 2012.

⁶ M S Baloyi. Mahuntsi Traditional Community. Rotterdam Village, Vuyani, Limpopo. 2012.

⁷ Charlotte Mokgosi. Makgobistad Community Committee. Makgobistad, North-West. 2008.

The advert about the Public Hearings in Parliament was on the newspapers a week ago and within a week as rural communities we are expected to have organised ourselves and developed submissions and select members of our communities to represent us at National Parliament in Cape Town???? [sic.] How fair is this? All we could see through all of this is that the government is just conducting these hearings for the sake of conducting it and not expecting to listen to our voice as rural communities who will be impacted negatively by this Bill. I must say that we are very disappointed about our government's attitude to issues of critical concern to poor rural women and girls.⁸

Like the authors of many submissions, Zungu reads the poor communication as a deliberate move to exclude rural voices. These voices could challenge traditional leaders and force government to engage with what people might highlight as urgent in the legislating of custom. This is a common view, which treats the exclusion from participation on the part of the state as politically motivated. Submissions locate this move as being part of a broader trend in the legislating of custom that places the focus on the interests of traditional leaders as a constituency.

SJ Mabuza from Silwanendlala Ubuntu Farmers Agricultural Co-Operative in Shongwe Mission, Mpumalanga, also questions the government's motives in making the hearings inaccessible to most people living in rural areas. Mabuza explains,

We heard about the TCB back in July 2010 and we thought government would come to us and talk about it. But we were surprised to hear that government put a notice calling for submissions during December holidays how can that be? How can the government put a notice in December?... We also need to be part... During the making of laws when they wrote their traditional court bill they did not consult rural people but at the end of the day they want to use it to the people. The system that they are using on ruling (leading) us [it's] taking us back to the past orders [B]antustan days where the law was undemocratic...⁹

Professors Thandabantu Nhlapo and Tom Bennett from the University of Cape Town similarly protest at Parliament's poor efforts at promoting public participation:

It cannot be said that a deadline for submissions which follows immediately upon a spate of public holidays a few days after announcement of the hearing provides the public with a meaningful opportunity to participate. The University of Cape Town has a number of academics who are interested in this area of the law and yet even colleagues here only got to hear of the hearings a few days ago. It is fair to conclude that many rural people, who will be the most directly affected by the legislation, would not have heard at all.¹⁰

Indeed, as Nhlapo and Bennett argued, many people living in rural areas indicate their lack of knowledge about the Bill and the public participation process until close to the deadline. They usually gained the information from civil society sources. The exclusion of people who would be most affected by the TCB sparked outrage about silencing, as illustrated in submissions.

⁸ Simangele Zungu. KwaZulu-Natal. 2012.

⁹ S J Mabuza. Silwanendlala Ubuntu Farmers Agricultural Co-Operative. Shongwe Mission, Mpumalanga. 2012.

¹⁰ Thandabantu Nhlapo and Tom Bennett. University of Cape Town. Western Cape. 2008.

Also critiquing the TCB's consultation process, C Baloyi from the Phaphazela Development Committee in Malamulele, Limpopo, explicitly spells out the measures necessary to enable public participation in rural areas. Baloyi explains,

We need these consultations to take place in venues that are accessible to ordinary people even if this means that multiple consultations may take place. Transport to the venues to enables ordinary people to attendance should be provided particularly in poor rural areas... We need a local workshop to explain the traditional court bill properly to members of our communities. We need the consultations to take place nearby. We need to be provided with the resource to enable people of all types in our community to attend the consultations.¹¹

Baloyi argues that, if the government does not structure public participation in ways that are enabling to people with limited resources, people cannot access these spaces to input on legislation that regulates their lives. While discussing the material and logistical factors involved in public participation, his submission points out the government's politicisation of public participation. He draws attention to the negotiations of power between different groups, with the government either enabling or blocking the exercise of rights of civic engagement on issues that affect people's lives.

Nhlapo and Bennett also note that the consultation process was substantively inferior to past processes affecting customary law. Referencing the South African Law Reform Commission's work, they argue:

As people who worked directly on producing the original draft bill on Traditional Courts that was attached to the Report of the Law Commission, we are aware that the present Bill bears little resemblance to that original draft. The problem with this is that no parliamentary hearing process could match the Law Commission consultation process that was undertaken in 1999 for depth of debate or width of geographical coverage. On principle, it seems wrong to ignore almost totally the results of such national buy-in in favour of a totally new product, moreover one which is passed through Parliament at a pace which does not offer an opportunity for ordinary people to contribute...¹²

Nhlapo and Bennett discuss the complexity and multiplicity of the SALRC's options for the organisation of traditional courts to suit different environments, in contrast to the reductionism and lack of nuance in the TCB. They draw attention to the TCB's lack of sensitivity to context and diversity and, like many other submissions, link the TCB's crude representations of customary law to the poor consultation process. Significantly, this submission reflects how the SALRC specifically met with women. Women numerically account for the majority of rural people but their voices are often silenced in public participation processes, either actively or through failure to provide safe and accessible spaces. Meetings with women are crucial to gaining perspectives on how patriarchy influences people's ability to use and benefit from customary law and

¹¹ C Baloyi. Phaphazela Development Committee. Limpopo. 2012.

¹² Thandabantu Nhlapo and Tom Bennett. University of Cape Town. Western Cape. 2008.

traditional courts. However, the TCB consultation process did not include meetings with women.

Submissions also highlight that consultation on legislation is not only legally mandated, but central to the practice of customary law. The failure to consult affected communities therefore violates both state law and the very customary law that the Bill is intended to preserve. J Cohen from the South African Human Rights Commission illustrates that the TCB undermines consultation procedurally as well as in its content, which extinguishes existing customary consultative processes. The Bill moves power from the people who live under customary law to the state or state appointed leaders. Cohen explains:

The system of customary law in its very nature is consultative. It appears from the Bill that the consultation with the community is lacking. In a system such as this, the absence of due regard to the interests of community integration is alarming. The Bill diminishes the involvement of the community by stipulating that the Minister, after consultation with the Premier of the Province, designate a senior traditional leader and the Minister may after consultation with the President, designate a King or Queen recognised by the President.¹³

Cohen shows that the exclusion from consultation is part of a broader trend in the TCB, not limited to the drafting process but extending to its content, which denies the majority influence in shaping the law that governs their lives and societies.

Indicative of the widespread critique of the consultation process, a popular response in the submissions was a call for the withdrawal of the Bill and for its redevelopment through consultation with excluded groups. The Department of Women, Children and People with Disabilities states boldly that it ‘recommends that the Bill be completely overhauled, and re-written in consultation with the rural women themselves.’¹⁴ N Somdyala writing on behalf of Vulamasango Singene, representing 109 villages in the Eastern Cape, supports this position:

We as the community request that this Bill be withdrawn... We were not given the opportunity to express our views, we did not get to say what we desire before this law which would impact on us was drafted. We as the community see it as something that has come to destroy the ways that existed before for the discussing and resolving of cases and disputes of the village.¹⁵

Thandabantu Nhlapo and Tom Bennett also urge that:

Parliament should see its way clear to extending the deadline for submissions, and to seek a way to solicit a wide range of views on the Bill, especially those of the rural people whose lives are lived under customary law. The current process appears to be rushed, and the consultation perfunctory, and if this perception persists any final Act that results will be robbed of much of its legitimacy.¹⁶

¹³ J Cohen. South African Human Rights Commission. 2012.

¹⁴ Lulu Xingwana. Department of Women, Children and People with Disabilities. 2012.

¹⁵ N Somdyala. Vulamasango Singene. Intsika Yethu District, Eastern Cape. 2012.

¹⁶ Thandabantu Nhlapo and Tom Bennett. University of Cape Town. Western Cape. 2008.

However, the consultation process in 2008 was not broadened, as the majority of submissions that year called for. When the TCB was reintroduced in 2012 in the same form as in 2008, again without consultation, submissions reflected many of the same concerns as in 2008. This consistency between 2008 and 2012 indicate the state's failure to engage with the 2008 submissions, both in terms of content and the inadequate consultation processes repeated in 2012.

Linkages with colonial and apartheid laws

Many submissions put forward the argument that the TCB cannot be understood in isolation from a broader set of legislation on traditional governance and customary law that has been passed in recent years. This argument references the Traditional Leadership and Governance Framework Act (TLGFA) and the provincial laws related to the TLGFA, noting the ways that this legislation provides the frameworks applied in the TCB and the Communal Land Rights Act (CLRA). Submissions in this area argue that many of the frameworks and boundaries central to the TLGFA, and by extension also to the TCB, are drawn from the colonial and apartheid-era Black Administration Act of 1927 and Bantu Authority Act of 1951 that legislated 'tribal' governance and boundaries. These submissions draw links between the TLGFA, the TCB and apartheid and colonial legislation to examine the ways that the TCB perpetuates many apartheid and colonial oppressions that were framed and justified in terms of 'tribal' governance, leadership and identity.

These discussions draw attention to current trends in legislating customary law, revealing the ways that the TCB's principles are not anomalies but are rather part of systematic structural approaches to the legislating of customary law and traditional courts. This contextualisation offers insights into the ways that state intervention influences power dynamics between different actors in the customary law context and shapes the terms on which customary law is experienced.

Speaking to historical context around the legislating of customary law, Lamson Maluleke from the Limpopo Provincial Community Task Team draws the links between the TCB and colonial and apartheid legislation on customary law:

It is worth mentioning that the Bill is being justified as urgently necessary so that the provisions of the discriminatory 1927 Bantu Administration Act dealing with the tribal courts can finally be repealed. Be that as it may... losing sight of the reasons that some sections of the Bantu Authority Act of 1951 [require repeal] would be the worst thing to do. According to this Bill, courts' jurisdiction and boundaries are the same as those of the TLGFA boundaries i.e. old tribal authorities established in terms of Bantu authority... We are of the view that the Bill centralises power by vesting all powers to the senior traditional leader as the presiding officer, adopting the model of the 1927 Black Administration Act.¹⁷

Maluleke's examination draws attention to questions about the purpose of repealing legislation. Failing to challenge and reverse the content of the 1927 and 1951 legislation undercuts the value of repealing the legislation. Maluleke's argument focuses attention

¹⁷ Lamson Maluleke. Provincial Liaison Officer of communities affected by the TCB. Limpopo. 2012.

on the relationship between the ways power was organised before democracy as opposed to under the TCB. This challenging of the TCB's role in legislating customary law in relation to the BAA draws attention to the failure to break away from the colonial and apartheid models.

Thabo Manyathi from the Association for Rural Advancement similarly draws the connections between the TCB and colonial legislation. Manyathi discusses the Bill's impacts on community formations:

The bill uses the Traditional Leadership Framework Act, which in turn builds from the Black Administration Act, no 38 of 1927 in terms of traditional boundaries and determination of traditional communities. Many of rural communities were forced into tribal communities they do not belong to because of this act and many of the genuine traditional leaders were deposed and other chiefs installed in their place. With this history in mind, to simply base this bill on such a problematic legislative history is to condemn people to apartheid.¹⁸

Manyathi's discussion suggests that breaking away from systems, structures and relationships that produced violence and oppression demands an epistemic rupture from apartheid knowledge structures. Failure to fulfil such a rupture results in the perpetuation of this historic violence and oppression for people living under customary law.

The Rural People's Movement (RPM) described reactions from people in several villages in the Eastern Cape when they met to share information on the TCB:

People were shocked that government is coming with another bill. When we shared with them the contents of the bill, they remembered the Traditional Leadership and Governance Framework Act together with the Black Authority Act and they said this Bill is linked with those two and they think that it is the child of the two, yet they remembered the time when they were under chiefs during the apartheid era. They had one clear voice that they don't want to have anything to do with the Traditional Courts as it violates the human rights.¹⁹

Expressing frustration at the continuation of apartheid frameworks and boundaries in legislation developed in the democratic era, M.E. Nkanyane from the Nkanyani Traditional Community from Vongani, Limpopo, argues:

[T]he 1927 Black Administration Act and 1951 Bantu Authority Act should be unconditionally abolished and their demarcated boundaries by the then Apartheid government that are presently recognised by the Traditional Leadership Governance and Framework Act of 2003 should be unconditionally abolished.²⁰

Responding to the links between past legislation on customary law and proposed legislating under the TCB, Tsholofelo Zebulun Molwantwa from the Baralokgadi Communal Property Association in the North West adds:

¹⁸ Thabo Manyathi. Association for Rural Advancement (AFRA). Pietermaritzburg, KwaZulu-Natal. 2012.

¹⁹ Rural People's Movement. Grahamstown, Eastern Cape. 2012.

²⁰ M.E. Nkanyane. Nkanyani Traditional Community. Vongani, Limpopo. 2012.

Our community expected better from the new laws under our constitution. The wrongs done under the Bantu Authorities Act must be undone. We could get our land back but we cannot get our community back... The TLGFA and TCB should be reviewed so as to ensure that they are not a repetition of the Black Authorities Act in disguise. We cannot go backwards!²¹

The links that submissions draw between the TCB and the BAA reveal people's understanding of the epistemic connections between colonial and apartheid imaginings of 'tribal' leadership and post-apartheid traditional authorities. People who are governed by or work with customary law understand the TCB as drawing from pre-democratic conceptualisations of traditional governance frameworks and boundaries, and imposing colonial and apartheid imaginings of African governance, law and identity. This locating of the TCB in the context of historical constructions of customary law and governance highlights continuity between the TCB, and other new legislation on customary law, and colonial and apartheid legislation. The drawing out of these continuities illustrates that instead of breaking from inaccurate, oppressive and restricting conceptualisations of customary law, and allowing space for the development of systems and structures more reflective of and responsive to people's lives, many people living under customary law understand current legislation as perpetuating past (mis)categorisations.

The Department of Justice and Constitutional Development also frames the TCB within the historical context of apartheid legislation on customary law and traditional leadership. Its report to the Portfolio Committee on Justice and Constitutional Development argued that the TCB is necessary to allow for the repeal of the BAA. The DOJCD describes the role and character of the BAA in South African history, saying:

The original character of administering justice by traditional leaders was distorted by the colonial and apartheid regimes, through the Black Administration Act [BAA], 1929. The BAA was the bastion of segregation policy of the Apartheid order. It provided a separate administration dispensation for Africans which was a system designed for second class citizens. The BAA, conferred on chiefs and headmen, the jurisdiction to –

- (a) hear and determine civil claims arising out of customary law and custom brought by Blacks against Blacks resident in the area of jurisdiction of a traditional leader;
- (b) try and punish any Black person who has committed, in the area under the control of the traditional leader, any common law or statutory offence or any offence arising from customary law and custom, other than the serious offences listed in the schedule in the legislation.²²

The department's reflection on the BAA differs from the dominant discussions in the submissions because it does not engage with the relationship between the content of the BAA and that of the TCB. The department, like other participants in the hearings,

²¹ Tsholofelo Zebulon Molwantwa. Baralokgadi Communal Property Association. North West. 2012.

²² Department of Justice and Constitutional Development. Report to the Portfolio Committee on Justice and Constitutional Development. 2009.

critiques the BAA and argues for its repeal. However, it does not substantively address how the state perpetuates or challenges the BAA's legacy.

The quotations from civil society submissions cited above underscore that the repeal of apartheid legislation is not significant in itself. It is made significant through the intentional breaking away from colonial and apartheid knowledges, structures and practices. The symbolism of the repeal therefore cannot stand in for the material outcomes of this repeal and the ways that new legislation ought to free people from the oppressions of the past to support the realisation of human dignity.

Reading the TCB in conjunction with the TLGFA and CLARA reveals the logics and values underpinning legislative developments in this field and highlights continuities in knowledge architecture. It reveals that different pieces of legislation build on each other to increase the power of traditional leaders at the expense of the communities that they are intended to serve. When viewed in this context, the TCB can be read as part of a conscious trend towards a rigidly formulated conception of customary law, which has epistemic roots in colonial and apartheid imaginings of 'tribal' identity, organisation and governance. The result is legislation that ossifies customary law and defines boundaries, both physical and social, in terms of colonial and apartheid constructions and representations of 'tribal' identity and governance. These trends in legislating customary law have consistently come head to head with the Constitution, constructing people governed by customary law as subjects and denying the entitlements of rights bearing citizens, as mandated by the Constitution.

Re-imposition of apartheid spatial dynamics through boundaries

The submissions discuss the significance of the TCB's boundaries from multiple angles, addressing their material, political, social and economic implications and showing how these are interconnected. The boundaries maintain and sometimes reinstitute damaging divisions between people living in the former Bantustans and those living in the rest of the country. Objections to the TCB's boundaries centre on:

- the denial of opting-out of traditional courts in favour of state courts;
- the solidification of communities that were forcefully combined under apartheid;
- and the political separation from the rest of the country.

Sindiso Mnisi Weeks demonstrates the relationship between the TLGFA and the BAA by highlighting the provisions in the Framework Act that link it to the BAA. She explains:

The jurisdictional boundaries of the traditional courts envisioned by the TCB rely on those of traditional leaders and traditional communities, as demarcated by the Traditional Leadership and Governance Framework Act 41 of 2003 (TLGFA). The TLGFA, however, simply resuscitates old apartheid boundaries. Section 28(1) of the TLGFA states the following:

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. Section 28(3) goes on to deem any "tribe" that, immediately before the commencement of this Act, had been established and was still recognised as

such is deemed to be a traditional community contemplated in section 2...' Section 28(4) continues in this same vein, stating that 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...'²³

Most submissions attacked the TCB's boundaries because of their relationship to apartheid boundaries. The TCB's boundaries reinforce and reproduce historical, material and ideological oppressions. These critiques largely focus on the boundaries as distorted and politically motivated apartheid constructions of communities and customary governance structures that have no basis in lived realities. These critiques make the argument that by relying on apartheid imaginings of the relationships between land, ethnicity, boundaries and customary governance, the TCB reinforces skewed paradigms that were designed to serve the political interests of the apartheid state. As the Legal Resources Centre explains, 'the Bill entrenches false (and in some instances fraudulent) colonial and apartheid-era boundaries and jurisdictions that were determined on the basis of often-illusory ethnic differences and distinctions.'²⁴

Providing historical contextualisation and discussing the boundaries' origins and political purpose, Lawson Naidoo from the Council for the Advancement of the South African Constitution (CASAC) argues:

The proposed location of the traditional courts within geographical boundaries reproduces the distortions and injustice of apartheid spatial design and manipulation of identity through geo-political design... the geographical design and boundaries upon which the TCB is based reintroduces segregation and undermines the principle of common citizenship.... provisions of the Bill are in contradiction with the constitution and the principle of one law for one nation. In giving such extensive powers to traditional leaders, the TCB in its current form denies full citizenship for more than 18 million South Africans, 53% of them being women.²⁵

Naidoo's critique of the TCB's boundaries highlights some of the motivations behind the original construction of the BAA boundaries and the effect of this on the lives and possibilities of people living within these boundaries. Also critiquing the political and social significance and impact of the TCB's boundaries, Thabo Manyathi from the Association for Rural Advancement argues:

If the same boundaries are used, this will compel communities who do not see themselves as part of the specific traditional communities and therefore this will result into imposition of traditional leaders to communities. Most of the communities who have acquired land through land reform have their own land administration structures like trusts and CPAs and these structures have their own rules of managing land and other resources. We submit that the bill should categorically state that such communities are exempted from the bill since they live in privately own land.²⁶

²³ Sindiso Mnisi Weeks. Law Race and Gender Research Unit, University of Cape Town. Western Cape. 2012.

²⁴ Janet Love. Legal Resource Centre. Gauteng. 2008.

²⁵ Lawson Naidoo. Council for the Advancement of the South African Constitution. 2012.

²⁶ Thabo Manyathi. Association for Rural Advancement. KwaZulu-Natal. 2012.

While Manyathi's argument focuses on the boundaries' impact on private land, the point that it makes can be read more broadly to include all people who will be forced under leadership and structures that they do not recognise or identify with. Several submissions highlight that these restrictions undermine people's rights to freedom of association and movement, denying them the protections and freedoms to which they are entitled as citizens. As the Makuleke Communal Property Association argues: 'passing this Bill to become the Act of Parliament, this country will in one way cementing what the former apartheid government have done with us.'²⁷

The experiences of some communities being separated from each other and others being forced together illustrate how boundaries were used to create new identities for people and to formally separate them from previous historically rooted identities. Tsholofelo Zebulon Molwantwa from the Baralokgadi Communal Property Association describes this process:

The changing of boundaries and clustering of these communities... brought about tensions, which have escalated to date...One of the reasons is that they do not share any traditional values with these tribal authorities and are forced to observe and practice the traditions and value systems of this tribe. They feel they have been made second-class subjects under this authority... We believe that the issues caused by the clustering of these communities will only be made worse by the Traditional Courts Bill. This is because the bill does not allow for the ability to 'opt into' the Traditional court.²⁸

The experiences that Molwantwa relates illustrate that, beyond the physical violence of forced removals, the boundaries of the former homelands inflicted social violence on groups by forcing identities on people whether they identified with these categories or not. The state violence of ascribing identities through the imposition of boundaries risks being reproduced through the TCB, as groups would find their democratic rights to self-identification and freedom of association limited by the boundaries that they fall under and that many fought against before democracy.

Bifurcating the legal system and citizenship

Molwantwa concurs with a central argument in the submissions that the TCB is unconstitutional in forcing people to use traditional courts and prohibiting the use of state courts. The TCB enforces unequal access to justice between the former homelands and other parts of the country because rights enshrined in the Constitution, such as the right to legal representation, would be denied within the TCB boundaries. Nakedi Mogale from Limpopo Legal Advice Centre argues that, by denying people the option to opt-out, the Bill is

preventing access to alternative forms of justice and circumventing the authority of the constitution. The very essence of our democracy is the protection of vulnerable people. This bill if enacted would effectively remove that protection for millions of [S]outh Africans, particularly women, gays,

²⁷ L Maluleke. Makuleke Communal Property Association. Limpopo. 2012.

²⁸ Tsholofelo Zebulon Molwantwa. Baralokgadi Communal Property Association. North West. 2012.

lesbians and transgender people. The protection of the bill of rights is necessary armour against the traditional authority.²⁹

Lawson Naidoo presents a similar criticism of the TCB:

Forcing citizens who fall within these geographical boundaries into this system and denying them the choice to 'opt out' is to treat them differently and unequally from their compatriots... We submit that it introduces 'tiers of citizenship' and forces those who live in the areas designated as 'traditional communities' into the status of 'tribal subjects'. This is against the spirit of common citizenship enshrined in the constitution.³⁰

W Mnyandu from the Melmoth Black Farmers Association shares Mogale and Naidoo's position:

Rural people are facing critical times when all [other] people are free. These are the only people who will not be allowed to take the case to the higher level of authority. Facing a chain of taxation [and] being in the position of losing rights of land without compensation, put on the street as wild animals, treated not as South Africans, faced with custom which come from apartheid boundaries, women are not encouraged to participate in all matters freely. The Bill which is not in line with other laws is set for rural people...³¹

Thus submissions argue that the inability to opt-out of traditional courts binds people who live in the former homelands to separate legal and political systems. This separation works to create different levels of citizenship, with people living in the former homelands unable to claim all of the rights, services and protections enjoyed by citizens in the rest of the country. Repeatedly, submissions refer to the concept of one, united country with equal status for all citizens under democracy, the principle adopted during the transition. It means all citizens are held to the same standard and can claim the same rights and protections from the state. The submissions consistently critique the ways that the TCB undermines this vision by (re)dividing the country along racial and geographical lines.

Lulu Xingwana, Minister of Women, Children and People with Disabilities, confronts the TCB's inconsistencies with the Constitution and argues that the Constitution takes precedence: '[t]he Constitution of the RSA and its Bill of Rights would certainly allow people to opt out if they so want as it is their right to choose.'³² Because of the assumptions in the TCB about how customary law functions, it allows traditional leaders to impose sanctions such as forced labour without remuneration and denial of customary entitlements. These judgments can be imposed without the option of appealing cases or applying national legislation developed around specific, sensitive situations. J Cohen argues that these contradictions allow traditional courts to have many of the powers of state courts without offering the protections and rights that state courts offer people. Cohen says,

²⁹ Nakedi Mogale. Limpopo Legal Advice Centre. Limpopo. 2012

³⁰ Lawson Naidoo. Council for the Advancement of the South African Constitution. 2012.

³¹ W Mnyandu. Melmoth Black Farmers Association. Melmoth, KwaZulu-Natal. 2012.

³² Lulu Xingwana. Department of Women, Children and People with Disabilities. 2012.

[T]he Bill seems to be an imposition of Western values on a traditional system. The language throughout the Bill, such as referring to 'traditional courts'; 'criminal and civil disputes' etc. is cause for concern. If the legislator intends that this traditional system be a fully-fledged court structure then regard should be had to issues such as the constitutional guarantee of having legal representation especially so if the court has the ability to issue sanctions and whether these courts have powers to set precedence.³³

Cohen's critique shows how the TCB is incompatible with customary and civil law, while claiming both as reference points. These inconsistencies make the status and structure of traditional courts unclear within the broader legal framing in South Africa while enabling traditional courts to claim many of the powers of courts with defined status, structure and procedure that allow for transparency and accountability. These contradictions would subject people within the borders of the former homelands 'to a questionable form of justice and, in our opinion, an inferior form of justice,'³⁴ as the Border Rural Committee argues.

In line with arguments supporting a single, united legal system for all South Africans, W Aroun, writing on behalf of the National Union of Metal Workers of South Africa, argues that the TCB works to ghettoise customary law:

Customary law must find its place right inside the country's court system. The Bill as it stands; particularly the link that it makes in the section on the objectives of the proposed legislation between 'enhancement of customary law' with regulation of the traditional court system, may provide an escape valve for those who refuse to see customary law as a branch of our legal system.³⁵

While Aroun's submission affirms the value and significance of customary law as a legal system, the TCB's framing of customary law constructs traditional courts as 'other' rather than as a parallel system within South Africa's legal system.

Also speaking to the harmfulness of the TCB's reconstitution of apartheid spatial dynamics, Sizani Ngubane from the Rural Women's Movement argues that it is part of an intentional and systematic effort:

[T]he institutional arrangements in the Bill have been shaped largely by a desire to protect the interests of traditional leaders. The traditional leaders complained to the Law Commission investigation on traditional courts that it would undermine their authority if people were allowed to 'opt-out' of their jurisdiction. The ultimate success of the traditional leader lobby in ensuring that rural people are unable to 'opt-out' of their jurisdiction is reflected in the package of controversial laws enacted prior to the 2004 elections: The Traditional Leadership and Governance Framework Act of 2003 ('the TLGFA'); the Communal Land Rights Act of 2004; and the provincial laws enacted pursuant to the TLGFA.³⁶

³³ J Cohen. South African Human Rights Commission. 2012.

³⁴ P Grootboom. Border Rural Committee. Eastern Cape. 2012.

³⁵ W Aroun. National Union of Metal Workers of South Africa (NUMSA). 2012

³⁶ Sizani Ngubane. Rural Women's Movement. KwaZulu-Natal. 2012

Ngubane's argument represents a broader discussion in the submissions of the TCB securing traditional leaders' protection at the expense of the people that they govern. Analyses in the submissions of the processes surrounding the development of the TCB often point out that traditional leaders' interests are central to the framing of the TCB. These discussions understand the TCB as an instrument that is not intended to serve the majority's needs and interests.

In line with these critiques, many submissions challenge the Bill's conflation of boundaries and jurisdictions. This conflation raises problems regarding the possible violations of due process arising from traditional courts hearing cases that they are not equipped to hear. The Joint Monitoring Committee on the Improvement of Quality of Life and Status of Women challenged the broad jurisdiction:

The court will also be designated to hear cases on domestic violence raising the question as to whether presiding officers and other court staff will have a complete and working understanding of domestic violence legislation so as to adequately address these issues in keeping with the Constitution, and have the necessary sensitivity and requisite gender sensitivity training for dealing with matters of this nature.³⁷

Jennifer Williams and Judith Klusener from the Women's Legal Centre support the Committee's observation:

[T]here is a glaring absence of crimes committed against women, including those that are already identified in national legislation. Besides domestic violence, issues such as but not limited to; conjugal rape, incest, and statutory rape do not appear in the schedule of the Bill. Thus they cannot be heard in the customary courts and yet they cannot go elsewhere because they fall within the 'traditional community' ...³⁸

Williams and Klusener argue that the TCB adopts a flawed understanding of the function of boundaries and territory in customary law, and from this flawed premise develops content that is inconsistent with customary law. They explain:

Traditional leaders gain their authority and legitimacy from the people whom they lead. Their authority inevitably has a territorial element, because it covers the area where those who support them live. However, their authority derives from the people who support them rather than from the land on which they live... The Bill, however, starts from the opposite premise. Its premise is that traditional authority is based on territory, rather than on people. From this it concludes that everyone within that territory, and any relevant act or omission within that territory, must be subject to the jurisdiction of the traditional Court functioning in that territory... the Bill is fundamentally flawed in placing people under the jurisdiction of a traditional Court simply because they happen to live or be in a particular locality. The jurisdiction of a traditional Court should be limited to those who recognise its authority.³⁹

³⁷ Joint Monitoring Committee on the Improvement of Quality of Life and Status of Women. Parliament of South Africa. Western Cape 2008

³⁸ Jennifer Williams and Judith Klusener. Women's Legal Centre. Western Cape. 2012.

³⁹ Jennifer Williams and Judith Klusener. Women's Legal Centre. Western Cape. 2012.

Supporting Williams and Klusener's argument, Sindiso Mnisi Weeks explains:

The essentially democratic and participatory nature of customary law is destroyed when it is imposed on people who do not choose to use it. This problem is reinforced when the jurisdictional areas of the court are not determined by self identification and affiliation but by contested apartheid boundaries... the recognition of customary law and courts must be contingent upon people being given the right to choose, or to opt out of the jurisdiction of, customary courts on the basis of their right to choose their own culture and identity. For group identities and arrangements to remain a viable choice, they must be supported and improved in ways that make them an attractive option. Moreover, 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 social and institutional arrangements.⁴⁰

The submissions illustrate the complexity of protecting people's rights in different justice systems. Many submissions argued that the TCB fails to engage with legislation that protects rights and thus denies people living in the former homelands the same levels of protection as those living in other parts of the country. As evidence of this many submissions referenced the frequency of with which women who live under customary law bring cases to magistrate courts, especially when they relate to divorce, child maintenance, and domestic violence where progressive legislation offers options and rights. Many of these submissions argued that domestic and sexual offences be excluded from the TCB.

Other submissions discussed the necessity of reforming traditional courts to make them spaces where women's rights are protected and their needs and interests given the attention that they deserve so as to substantively promote access to justice. These submissions point to the discrimination that women and vulnerable groups such as children face in using traditional courts for dispute resolution and as recourse for violations. Referencing practices such as the payment of damages in response to domestic violence and sexual offences, these submissions argue that harmful practices are currently being carried out within traditional courts. Remedying this demands engagement with the attitudes, processes, and rules of these courts to bring them in line with the Constitution. Broadly, these submissions do not construct the reform of traditional courts and access to magistrate's courts as mutually exclusive. Rather the dominant message is that the option of using magistrate's courts cannot replace the need for sensitivity and responsiveness to different people's needs in traditional courts. These discussions argue that the continued use of traditional courts to respond to diverse needs and challenges is a testament to their impact in people's lives and their importance in affirming people's dignity and rights.

Inconsistencies with customary law

Many of the objections to the TCB challenged its interpretation of customary law and traditional leadership, on the basis that customary law is democratic and consultative and consequently responsive to changing needs and contexts. Submissions reveal that the democratic elements in customary law, which survived impositions of more

⁴⁰ Sindiso Mnisi Weeks. Law Race and Gender Research Unit, University of Cape Town. Western Cape. 2012.

autocratic, state-backed models of customary law, are under threat because of the TCB's rigid interpretation. By taking the process of interpreting custom away from the wider collective and putting it into the hands of senior traditional leaders, the Bill does not reflect custom as it has existed historically or in practice.

Many submissions also actively challenge characterisations of opposition to the TCB as opposition to custom. Such submissions frame opposition to the TCB as support for customary law in the many different ways that it exists, while communicating rejection of distorted interpretations of custom.

Ncebakazi Manzi from the September National Imbizo, a non-partisan pan-African body, locates the TCB's conceptualisation of customary law historically in manipulations of custom aimed at engineering state political control. Manzi explains,

During colonial times and under apartheid the recognition of customary courts was argued by the powers that were to be justifiable as it afforded those living under its system the ability to be subject to laws and processes to which they were accustomed. The reality was of course different with these courts being manipulated and used to serve the elitist and racist interests of colonial and subsequent apartheid governments. The 'officialisation' of customary courts was thus politically expedient from the point of view that it allowed for the exercise of governmental influence and control in rural and far lying areas that would not have been easily controlled otherwise due to a lack of manpower on the part of government. It is therefore with great concern that we observe that the Traditional Courts Bill seeks to reproduce a court structure that is strikingly similar to that of a tainted bygone era.⁴¹

Manzi's critique of the origins of the officialised version of customary law promoted in the TCB examines its politicised nature and the narrow sets of interests that it promotes. It challenges the claim that the TCB restores and preserves customary law. Instead, Manzi reveals the ways that the TCB adopts and reproduces distorted constructions of customary law that have their origins in the colonial and then the apartheid state, rather than in the histories of the communities that practise customary law.

Offering a more localised perspective on the effects of colonial and apartheid interventions in customary law, law firm Webber Wentzel Bowens, representing the Makuleke Traditional Community and Communal Property Association, describes the following,

The Makuleke community had so occupied Makuleke in accordance with our customary laws from the 1820s or 1830s prior to colonisation by European settlers. We had established an independent political, social, and economic lifestyle in Old Makuleke... We have retained our indigenous system at Ntlhaveni, in spite of the process of cultural change to which we have been subjected in the course of history, and in spite of the fact that we were under the administrative control of the colonial and apartheid regimes and authorities for many years... The [forced] removal had disastrous consequences for the Makuleke community. We were moved into the area of jurisdiction of another tribe and another chief... Despite having been recognised as a separate tribe

⁴¹ Ncebakazi Manzi. September National Imbizo. 2012

with a separate chief by the authorities as early as 1905 in the Native Locations Commission report, our traditional leader was effectively stripped of his status as chief and the Makuleke community was stripped of our status as an independent traditional community and of our entitlement as an independent traditional community to be led by our hereditary chief... The forced removal completely disrupted the settled and successful existence we had had at Old Makuleke. It was a removal motivated by and implemented in terms of the racist and discriminatory laws and policies of the time. To a substantial degree, it reduced us to poverty and dependency on cheap wage labour in industrial Johannesburg in the period following the removal. The prosperous way of life that we had had at Old Makuleke was destroyed.⁴²

This submission details colonial and apartheid imposition of artificial structures to manipulate custom for the state's benefit at different moments in history. While the Makuleke community was able to resist many earlier onslaughts, the weight of apartheid violence forced the community into a new form and under leadership contrary to custom. The TCB threatens the living conceptions of custom that survived previous assaults as it relies on 'official' understandings of customary law, which was often forged through devastating violence, as the submission above illustrates. Living custom again has to be defended against misrepresentations backed by state intervention. Based on the submission above, the TCB's protection of these political distortions cannot be read as protection of custom or a representation of the will of the people.

Also discussing the effects of the state's construction of false communities and imposition of unrecognised traditional leaders, Marikoe Rodney Maodi from the Sehokho Communal Property Association in Mpumalanga explains:

We are members, descendants and successors in [title] of the co-buyers of the farm Roodekopies [sic.] portion 2B that consists of various ethnic groups from various tribes, namely, Bakwena, Bapedi, Bakgatla and Barolong. We are recognised by the neighbouring communities as an independent community with independent control in its own right over our farm. The previous apartheid government had imposed a traditional leader/chief over our land under our protest. The bill is relevant to us as private land owners who do not want anything do with chiefs and do not want chiefs to interfere in our dealings with the land that our forefathers bought from their resources.⁴³

Maodi reveals how, historically, the state's conceptualisation of African people's organisation, governance and identity took precedence over how different groups of Africans identified, organised and governed themselves. Although the Sehokho CPA's predecessors came from different groups and were organised and united around private landownership, the state imposed a model of leadership and identity that conformed with apartheid understandings of African organisation and leadership as 'tribalised'. By removing the regulation of customary law from the communities governed by custom, the apartheid state gave itself the power to define and 'tribalise' groups, regardless of

⁴² Webber Wentzel Bowens on behalf of L Maluleke. Makuleke Traditional Community and Communal Property Association. Limpopo. 2012.

⁴³ Marikoe Rodney Maodi. Sehokho Communal Property Association. Mpumalanga. 2012

how those groupings existed in reality. Moadi condemns the TCB for maintaining these flaws.

Challenging the TCB's rigid assumptions of sameness among Africans, SS Tongoane from the Kalkfontein B & C Trust in Mpumalanga explains,

The bill states that where two or more systems of customary law are applicable to a dispute before a traditional court the court must apply a system of law that the parties expressly agree should apply and in the absence of an agreement, the traditional court must decide which system of law to apply... We submit that this is very problematic and will prejudice our community because when there is no agreement on which system of customary law is applicable the traditional leader is given the discretion to decide which system of law is applicable in the area of jurisdiction of the court... in our community the original co-purchasers and their heirs originated from a variety of ethnic groupings, including Ndebele, Northern Sotho and Tswana. Also if one system of customary law is picked over another and one of the parties is unaware of that particular customary law they will be severely prejudiced if they have to represent themselves or if the person chosen to assist them is not knowledgeable on that particular system of law.⁴⁴

Tongoane's submission highlights multiple levels at which the TCB fails to reflect the realities of his community. The diverse origins of people who live in his community speak to the complexity that shapes many communities around the country. It sheds light on how many different groups of people live together, and have lived together for generations, without adopting a singular 'tribal' identity. In contrast to the myths of segregation and cultural purity propagated by colonial and apartheid regimes, Tongoane illustrates how people practically resisted standardised understandings of custom based on where they lived. They retained differences and formed communities based on diverse interests and commonalities with people who adhered to a variety of practices of customary law. Underlying this description by Tongoane is the point that Africans living in rural areas did not live a culturally static existence uninfluenced by outside forces. Deeply affected by dynamics at play throughout the country, they migrated and, in cases like his, became landowners with other people who similarly left their homes to create new ones. The TCB's model of a singular expression of custom ignores this reality and undermines the living form(s) of customary law practised in spaces like those described by Tongoane.

Offering the perspective of a headman who provides central leadership in his community and who experienced demotion under apartheid, Risenga Samuel Baloyi from Ribungwani Dynasty Tiyani Settlement in Vongani, Limpopo, describes the leadership structure in his community and how the TCB would impact this position. Baloyi explains,

I am an independent headman who has been made to settle at Tiyani Village in 1963. I have been forcibly removed by the then apartheid regime under the so called the Bantu Authorities Act of 1951... I lost three (3) farms... I was the sole ruler with no one above my chieftainship, except the apartheid regime. My rank has been changed to an independent headman status after the dispossession of 1963...Though compensated in the year 2010 by the

⁴⁴ SS Tongoane. Kalkfontein B & C Trust. Mpumalanga. 2008

department of Rural development and land reform, my Tribal Authority/council with the clan name of Ribungwani Traditional Authority or council has not yet been reinstated and I am still mourning for it and my rank as a senior traditional leader. I am presently an independent headman with five hundred (500) households and I am a sole ruler in my area... [Under the TCB] all court proceedings and sentences are vested in the hands and powers of the senior Traditional leaders, what in my case with no senior Traditional leader? Does it mean there will be imposition of senior traditional leader just like what the colonial masters and the apartheid regime did to others?⁴⁵

Baloyi's description of the loss of his official position under apartheid and his continued struggles for recognition illustrate the vulnerability of leaders whose cases for reinstatement remain unresolved. His submission illustrates how even though he maintains primary leadership in his community, under the TCB he would not be recognised as the leader of the community because of his position as a headman. Although Baloyi reinforces the top-down vision of leadership that is criticised in most submissions, his case illustrates how the TCB's approach of dictating custom to communities fails to reflect structures existing in practice.

Patrick Mashego from Letebejane Village in Limpopo describes his experience of a traditional leader imposed on his community by the apartheid government. Although this traditional leader's appointment was the result of loyalty to the apartheid government, his position would be strengthened by the TCB. Mashego explains,

He [the kgosi] also demanded R20 to cover the costs of the 50 year celebration of the tribe arriving at Rakgwadi. This one is very painful because when the Sekhukhunes refused to co-operate with the Bantu Authorities system, the apartheid government approached Matlala's father and he agreed to form the Matlala Bantu Authority. He was rewarded with 23 rich SADT farms near Marble Hall. This is the land which the tribe moved to in 1957. And it was to celebrate this sell-out that we are required to pay the additional R20 levy.⁴⁶

The situation that Mashego describes illustrates how the TCB would not engage with the history of dispossession and illegitimate leadership but rather offer legitimacy, protection and increased power to such leaders. This not only contradicts custom but supports past distortions and injustices that perpetuate oppression, as described by Mashego.

As an alternative to the 'official' versions of customary law promoted in the TCB, J Williams from the Women's Legal Centre argues for the adoption of living customary law, which reflects the ways that people practise customary law and traditional leadership in their daily lives. Williams explains that 'as opposed to 'official' customary law which has been tainted by its interaction with colonialism and apartheid and its exclusion of women, living customary law takes into account the current social context and is more in touch with the customs of the people.'⁴⁷ Living customary law is the model of customary law most advocated for in the submissions. Rather than relying on state designations of traditional leadership and governance, this model draws legitimacy

⁴⁵ RS Baloyi. Ribungwani Dynasty Tiyani Settlement. Vongani, Limpopo. 2012.

⁴⁶ Patrick Mashego. Letebejane Village, Limpopo. 2008

⁴⁷ Jennifer Williams. Women's Legal Centre. Western Cape. 2008

from the people that it serves and reflects the customary law that is practiced in particular groups. National Research Foundation Chair of Customary Law Chuma Himonga describes the problem of imposing fixed structures on customary law, saying:

[I]mportant to the search for a workable legal framework for traditional courts is the need to recognise the problem associated with legislating upon a living, flexible and evolving system of customary law and thereby codifying or ossifying this system of law, contrary to its nature... the ossification [of] living customary law through legislation is contrary to the spirit of the Constitution and the new constitutional dispensation... the problem under consideration calls for a complete paradigm shift in the methods of reforming customary law. What is required are methods that recognise that legislation may not be used to reform customary law in a way that codifies... Instead, it should be used to facilitate the development or evolution of living customary law, taking into account the relevant constitutional imperatives.⁴⁸

TCB's negation of existing multi-layered leadership

In line with this challenge to recognise customary law as practised, many submissions discuss the different levels of leadership in customary law and juxtapose this with the TCB's recognition of only senior traditional leaders. The submissions describe existing customary law structures as multi-layered, complex governance systems. Different types of disputes are heard and headmen often resolve cases before they reach the senior traditional leader. Henk Smith and Wilmien Wicomb from the Legal Resources Centre discuss this complexity in governance:

The Bill fails to recognise the social reality of the resilient customary structures that continue to exist outside of approved and imposed colonial and apartheid-era structures and fails to recognise that customary dispute resolution commonly occurs at the level of village councils or headmen's courts... It is submitted that these other levels of dispute resolution, which act as a valuable tool of ensuring separation of powers by ameliorating the concentration of power and allowing for a division of labour, will be undermined relative to the official status of those courts that are officially recognised.⁴⁹

Smith and Wicomb illustrate the ways that the TCB goes against its objectives of preserving customary law. Instead, it corrupts and forces a manifestation of custom that is alien to the people who practise it and out of line with the values that guide the interpretation of custom. Smith and Wicomb represent a common argument in the submissions that the TCB's model of narrowly defined, rigid custom forces sameness in traditional communities that distorts custom's dynamic flows and undermines the different levels that give it accountability and rigour.

Patrick Mashego from Letebejane Village in Limpopo supports this view of traditional governance as layered and more complex than the TCB allows, saying:

The Bill ignores all the customary courts that exist at village level and concentrates power in the hands of the senior traditional leader...This is

⁴⁸ Chuma Himonga. University of Cape Town. Western Cape. 2012

⁴⁹ Henk Smith and Wilmien Wicomb. Legal Resources Centre. Cape Town, Western Cape. 2012

completely different from existing customary practice in the villages of Rakgwadi where villagers and councillors participate in localised dispute resolution forums in the villages. Through their active participation they manage to develop and adapt customary law to reflect the views and values of all the people engaged in the process.⁵⁰

Mashego's description of customary law as multi-layered and not concentrated at the senior traditional leader level, like many other submissions, challenges the narrow and limiting understanding contained in the TCB. This critique confirms that the TCB is out of touch with the ways that custom is practised in daily life.

Speaking to the TCB's erasure of central governance roles and structures, Sindiso Mnisi Weeks argues that 'the motivation of the drafters to enhance the powers of traditional leaders has resulted in a Bill that is inconsistent with customary precedents and would undermine the intrinsic character and accountability of existing customary dispute resolution processes.'⁵¹ Mnisi Weeks' critique illustrates that not only is the TCB inconsistent with customary law, but it actively undermines key mechanisms within traditional courts that ensure that they protect and meet the needs of the people that they are intended to serve.

Also arguing for a more layered and nuanced reading of traditional leadership, Ben Cousins shares his research from KwaZulu-Natal in which he explains:

Day-to-day land administration, as well as resolution of disputes in relation to customary law and practice, is mostly carried out at the local level, either within the extended family, or between neighbours, or in the wards (*izigodi*) that constitute key governance sub-units within the larger 'tribe' (or nation, *isizwe*). It is a largely decentralised system, and the chief (*nkosi*) and his council, as well as the chief's court, or 'tribal court', play a central role only in certain well defined instances. A key role for the tribal court is to act as a higher 'court of appeal' when disputes cannot be resolved at more local levels.⁵²

Cousins' research illustrates the many different levels of governance that the TCB ignores, and would undermine, through its sole recognition of senior traditional leaders. The dynamic relations communicated through Cousins' submission are not reflected in the TCB, indicating the TCB's failure to account for diversity within traditional leadership systems and structures, and demonstrating the TCB's ill fit with customary law.

Further opening the conversation around traditional leadership, Lawson Naidoo from the Council for the Advancement of the South African Constitution (CASAC) challenges the TCB's conceptualisation of customary law as inherently bound to hierarchy. He explains:

Customary law does not have to be tied to traditional leadership. It is based on a systematic understanding of social relations, laws and cultural principles that

⁵⁰ Patrick Mashego. Letebejane Village, Limpopo. 2008

⁵¹ Sindiso Mnisi Weeks. Law Race and Gender Research Unit. University of Cape Town, Western Cape. 2012

⁵² Ben Cousins. School of Government, University of the Western Cape. 2008

evolve over time. Often, its practice is independent of regulatory process and governance issues, be they through traditional leaders or otherwise.⁵³

Naidoo challenges rigid understandings of customary law, such as the TCB's static framing, because custom does not always take the same form and also adapts to respond to particular needs arising from different contexts. Naidoo illustrates how the TCB cuts away at the dynamism inherent in many customary law systems, fundamentally altering the nature of customary law and traditional leadership.

These submissions challenge the TCB's inaccurate representation of customary law that interferes with existing decision-making processes, governance structures and hierarchies for dispute resolution. The TCB ossifies colonial and apartheid distortions of customary law and leadership structures and forces a singular framework for customary law that does not account for the diversity of traditional governance structures across the country. By reflecting a wide cross-section of experiences of customary law, the submissions offer a diversity of insights into the functioning of customary law in different contexts. On a more nuanced level, the submissions speak to the localised experiences of customary law informed by vernacular knowledges and histories. They highlight the TCB's failure to engage with this rich texture of diversity as it rather standardises customary law systems and structures to the extent of making them unrecognisable.

Discussions on cultural diversity in the submissions largely locate this complexity in a historical context. These discussions disrupt ideas of communities as homogeneous and of people within communities as having a singular identity. Many submissions even problematise the very idea of community, as articulated in the TCB, illustrating the many diverse ways in which people organise and form collectives of many different sorts under different conditions. Private ownership of land, migration related to labour and forced removals are a few of the many forces that the submissions highlight as disrupting homogeneity and timelessness, as reflected in the TCB. The submissions support the view of customary law as having various expressions in distinct spaces that have been shaped over the years by multiple economic, social, political and other forces. Because of this diversity they disrupt assumptions in the TCB of sameness that can be legislated uniformly.

Centralisation of power in traditional leaders' hands

The submissions address centralisation of power in traditional leaders, with most of them speaking to the powers currently available to senior traditional leaders and the ways that the Bill would allow traditional leaders greater access to power with fewer checks and balances. These discussions largely examine traditional leaders' abuse of power and how the TCB undermines existing accountability structures. In so doing, it allows people less, if any, recourse. Submissions address how the increased powers afforded traditional leaders fundamentally contradict the intrinsically democratic nature of customary law, undermining public participation in contexts of functional and accountable traditional court structures and increasing the vulnerability of people governed by customary law, especially in contexts where traditional leaders that abuse power hold sway.

⁵³ Lawson Naidoo. The Council for the Advancement of the South African Constitution (CASAC). 2012.

SJ Baloyi from the Maphanyi Community Development Forum in Maphanyi village, Limpopo, contextualises the centralisation of power in traditional leaders historically to demonstrate the harmfulness of such developments in the TCB. Baloyi explains:

By making a chief a presiding officer would imply giving the chief powers that he or she never had under Customary law and only had such powers in terms of the Black Administration Act of 1927 and the Bantu Authority Act of 1951 when apartheid powers were given to chiefs who were in support of the system while oppressing traditional leaders who did not support the system. So we feel that the bill is bringing back the unwanted laws of the Apartheid era where the new democratic government was supposed to abolish any law that has anything to do with laws and practices of the past.⁵⁴

Supporting Baloyi's argument that the centralisation of power is inconsistent with customary law, Monoko Thomas Moshitoa from Bakone Development Forum in Rakgwadi, Limpopo, explains the ways that traditional leaders gain power under effective traditional courts, saying:

It is only chiefs who do not enjoy the support of their people who need the government to prop them up with laws like this. This law will add nothing to the proper functioning of good customary courts (of which there are many). Instead it props up unpopular and autocratic chiefs and will take us back to the abuses of the apartheid era.⁵⁵

Similarly, Jennifer Williams from the Women's Legal Centre argues:

Traditional leaders gain their authority and legitimacy from the people whom they lead. Their authority inevitably has a territorial element, because it covers the area where those who support them live. However, their authority derives from the people who support them rather than from the land on which they live.⁵⁶

These two submissions illustrate some of the dominant conceptualisations of power negotiations in the submissions. They reveal the ways that power is shared among different actors in 'good customary courts' and the ways that people under the leadership of the traditional leaders are able to exert power over the direction of customary law and community governance. These submissions challenge the premises upon which the TCB understands traditional leaders' power, arguing that this power comes from the bottom up, rather than the top down, as the TCB dictates. This change in the way that traditional leaders' power is understood is significant because of its potential impact on how traditional leaders relate to their communities and understand their roles in administering justice.

Underscoring a fundamental flaw in the TCB's conception of power relations under customary law, reflected in its centralisation of power in traditional leaders, Patrick Mashego of the Letebejane Village explains:

⁵⁴ SJ Baloyi. Maphanyi Community Development Forum. Limpopo. 2012.

⁵⁵ Monoko Thomas Moshitoa. Bakone Development Forum. Rakgwadi, Limpopo. 2008

⁵⁶ Jennifer Williams. Women's Legal Centre. Western Cape. 2008

There are lots of questions about who decides about what the laws and customs of the community are. Instead of those being debated in village level forums and dispute resolution processes as they have been since time immemorial, they will now simply be decided by the chief as presiding officer.⁵⁷

M S Baloyi from Mahuntsi Traditional Community also challenges the TCB's rigid and centralised conceptualisation of power saying:

Throughout the bill there is reference to customary law and customary practices but there is nothing in the definition section of the bill defining customary law or customary practices. There is an assumption that the presiding officer, the so called 'senior traditional leader' shall remain an expert on customary law and customary practices and this implies the enhancement of the traditional versions of authoritarian and patriarchal customary law.⁵⁸

Also critiquing the centralised model of decision-making, Henk Smith and Wilmien Wicomb examine positionality, arguing that traditional leaders are not neutral actors but, like all other actors, have their own interests that can lead to distortions in custom in the absence of checks and balances. They explain:

[T]he Bill fails to recognise that the content of customary law is contested in many areas, particularly between traditional leaders and ordinary people. By centralising power in the hands of traditional leaders, the Bill enables traditional leaders to enforce controversial versions of customary law that favour their interests and downplay the customary entitlements of subjects.⁵⁹

These three submissions highlight the role that contestation plays in customary law, arguing that answers to questions about customary law are not predetermined or unchanging but are shaped on the ground through exchanges between different individuals. These submissions ground this idea of responsiveness by framing customary law as consultative, and in doing this highlights how the many voices that help shape customary law ensure its relevance in daily life and people's ability to push for justice in traditional courts.

Challenging the idea of neutral traditional leaders, Constance Mogale from the Land Access Movement of South Africa argues that the TCB makes unrealistic assumptions about traditional leaders. It does not provide for accountability structures or alternatives if traditional leaders show bias or discrimination. Mogale argues:

The TCB makes a romantic assumption of impartiality and munificence on the part of traditional leaders unseen anywhere else in legislation. It is assumed that once Presiding Officers have taken a (yet to be drafted) oath, and have (maybe) received some training, they will be fit to make fair, equitable and just decisions on the cases brought before them.⁶⁰

⁵⁷ Patrick Mashego. Limpopo. 2008.

⁵⁸ MS Baloyi. Mahuntsi Traditional Community. Rotterdam Village, Vuyani, Limpopo. 2012.

⁵⁹ Henk Smith and Wilmien Wicomb. Legal Resources Centre. Cape Town, Western Cape. 2012.

⁶⁰ Constance Mogale. Land Access Movement of South Africa (LAMOSA). 2012.

Echoing Mogale's concerns around the absence of checks and balances and the centralisation of power in traditional leaders, P Grootboom from the Border Rural Committee argues:

The fact that all functions are centralised in one person – the chief or his nominee – means that the person who essentially makes/interprets customary is the same person who administers justice and executes the provisions of customary law. This is clearly in conflict with the very important democratic principle of the separation of powers, and is in conflict with our Constitution.⁶¹

Sindiso Mnisi Weeks discusses some of the unaccountable powers that the TCB would afford traditional leaders:

Having centralised power to the individual senior traditional leader and granted him broad substantive jurisdiction, the TCB extends this individual's powers to allow him to determine and impose heavy sanctions. The sanctions available are, in the first place, inconsistent with what the Bill suggests is a non-punitive and, instead, restorative system of dispute resolution. They are coercive whereas restorative justice does not comport with coercive sanctions.⁶²

These submissions show that the TCB offers traditional leaders unaccountable powers not found in other legal systems and the consequent dangers that arise. In addition to the above analyses of the inconsistency of the centralisation of power with customary law, these submissions argue that such centralisation is inconsistent with approaches to governance in the rest of the country where the separation of powers to promote accountability applies. This critique highlights the ways that the TCB favours traditional leaders in ways that are possibly harmful to the people that they govern and that undermine basic norms of governance throughout the country. This lack of protection for people living under customary law increases the vulnerability of often already vulnerable groups, compounded by lack of recourse for addressing grievances.

Many of the submissions addressing centralisation of power come from individuals and groups living under power-abusing traditional leaders. These people fear that the TCB would worsen circumstances for them, removing the avenues currently available for challenging these abuses and seeking alternative forms of justice outside the traditional leader's control. SJ Mabuza, writing on behalf of the Silwanendlala Ubuntu Farmers Agricultural Co-Operative, explains:

We write to you as small farmers who are abused by the tribal authority. The TCB gives the same tribal authority judicial powers to hear cases, how will our tribal authority be fair when it hear(s) our cases. The cases that we have are against the Tribal authority.⁶³

Common in the submissions was the critique that the TCB would hinder challenges to power abuses. Cases described in submissions reveal that in communities around the

⁶¹ P Grootboom. Border Rural Committee. Eastern Cape. 2012.

⁶² Sindiso Mnisi Weeks. Law Race and Gender Research Unit, University of Cape Town. Western Cape. 2012.

⁶³ SJ Mabuza. Silwanendlala Ubuntu Farmers Agricultural Co-Operative. Shongwe Mission, Mpumalanga. 2012.

country people are using democratic mechanisms to hold leaders to account. Othuitsitse Rapoo from the Bafokeng Land Buyers Association explains that, in his context,

There are currently a number of disputes lodged in the Mafikeng High Court and other statutory bodies against the Bafokeng chief... The chief's territorial and traditional authority over communities that lodged land claims is in dispute. For various reasons, many of our members believe the chief is himself not fit nor competent to preside over the Tribal Court as the bill proposes.⁶⁴

In this submission, Rapoo references Mary Mokgaetsi Pilane and Mmuthi Pilane's submission to Parliament on the Repeal of the Black Administration Act in which they argue:

We believe in our customs - in fact, that is what we are trying to protect. But chiefs like Nyalala are protected by laws that give them top-down state-power so that no matter what mistakes they make, the community can never correct them. We have gone to commission after commission, only to find that the Traditional Leadership and Governance Framework Act confirms the wrong boundaries created by apartheid. Now chiefs believe they can even ban us from meeting to try to hold them to account and prove our own separate status. That is not only contrary to custom but to the Constitution. Nyalala is putting forward versions of custom that props up his power to steal our land and mineral resources. We have a duty to our ancestors to fix this problem during our lifetimes⁶⁵.

Supporting Rapoo's argument that traditional leadership is not inherently uncontested, Pilane and Pilane highlight the fraught nature of many traditional leadership disputes and the ways that continued reference to apartheid iterations of custom allow for abuse of power by recognised traditional leaders.

Many submissions argued that challenges to traditional leaders through courts would become more difficult due to the TCB's lack of separation of powers and of recourse to challenge traditional leaders' power or rulings in cases. Cases that have been brought against traditional leaders in state courts might also be in jeopardy because of the clauses in the TCB prohibiting the option of challenging abuses by traditional leaders in spaces outside traditional courts. This combined limitation of options to challenge traditional leaders increases individuals and groups' vulnerability by making traditional leaders' powers absolute.

The Nhangwini Traditional Council offers an alternative view, as it commends the TCB for firmly legislating customary law and offers suggestions on how to strengthen the Bill to ensure 'the restoration of the dignity of the traditional court... giving it more teeth in law to provide for a proper recourse on those disrespecting its honourable forum.'⁶⁶ This understanding of justice and accountability differs from most of the submissions from individuals living under customary law. It moves from the viewpoint that increasing the power of traditional courts and leaders would ensure compliance with

⁶⁴ Othuitsitse Rapoo. Bafokeng Land Buyers Association. North West. 2012.

⁶⁵ Mary Mokgaetsi Pilane and Mmuthi Pilane of Bakgatla baKautlwale, North West. Repeal of the Black Authorities Act Bill. 2010.

⁶⁶ Nhangwini Traditional Council. KwaZulu-Natal. 2008.

customary law, while the majority of submissions argue for improved access to justice by enhancing public participation in the administering of customary law. There exists a fundamental difference between customary law as a means to discipline deviance and customary law as a means to broadening and ensuring the protection of rights. The conflation of increased power for traditional leaders with more effective customary law opens the door to power abuses, as the Johannesburg Bar's Alan Dodson argues:

The sanctions are punitive in nature and are open-ended – see in this regard the reference to 'any appropriate order' and 'any other order that the traditional court may deem appropriate and which is consistent with the provisions of this Act.' These provisions create a strong potential for abuse of power. In this regard it must be remembered that it is very difficult for members of remote rural communities to challenge abuses of power.⁶⁷

The majority of submissions are more in line with Dodson's concern of protecting people living under customary law and limiting the potential for the abuse of power by those who oversee the administering of customary law.

Use of levies

Examining some of the practices enabled by centralising power in traditional leaders' hands, Bafana Khumalo and Cherith Sanger from Sonke Gender Justice argue that the TCB would make it more difficult to challenge traditional leaders while confining people to the jurisdiction of the traditional courts. They explain:

[A]lthough the Bill does not legalise traditional levies, its silence on the issue tacitly allows for the introduction of more and heavier levies. Despite the strong argument that the Constitution does not permit levying by traditional institutions, levying practices continue by traditional leaders resulting in 'double taxation' for many living in rural South Africa. This is in addition to annual levies, tribal levies including ad hoc levies. Those citizens who can or will not pay such levies would be subjected to punishment decided by the traditional leader. Testimony from rural inhabitants attests to the fact that ad hoc levies are used to pay for personal niceties of traditional leaders.⁶⁸

Sizani Ngubane from the Rural Women's Movement supports Khumalo and Sanger's position on the potential for illegitimate levies created through this centralisation of power. She offers an example:

In one of the meetings on women's human rights issues, I asked a group of 75 women a question about where the money for the levies is coming from since the community has a high rate of unemployment and they informed me that they use the grandmothers' social grant and child grant. And I asked what would happen if as the Rural Women's Movement we stop paying these levies? I was told a family who does not pay their levies or penalties get sidelined: they cannot have, for example, a wedding or a party in their own homes without settling these outstanding levies.⁶⁹

⁶⁷Alan Dodson. Johannesburg Bar. Gauteng. 2008.

⁶⁸Bafana Khumalo and Cherith Sanger. Sonke Gender Justice Network. 2012.

⁶⁹Sizani Ngubane. Rural Women's Movement. KwaZulu-Natal. 2012.

Patrick Mashego relates intimate knowledge of the abuse of power by traditional leaders demanding levies:

[I]magine our surprise when suddenly our kgosi demanded a R50 levy to buy himself a car... To add insult to injury our kgosi began to use the kombi he had bought with the levies he managed to collect as a taxi.⁷⁰

Simangele Zungu from KwaZulu-Natal relays her experience of how traditional leaders use proof of residence letters and other documents required to gain access to state services as leverage to demand levies. Ability to access state services is tied to the ability to pay traditional leaders. She explains:

I lost my father a couple of years ago and was denied the right to bury him by a local traditional leader who claimed that my father had not paid his *uKhandampondwe*: As a normal process I went to the chief to report the loss and requested a proof of residential address so that I could go to the Department of Home Affairs to make an application for a death certificate. It is at this time when I learned about this shocking news. The family did not have any money. We were only able to bury my father after three (3) months. We borrowed the money from a neighbour who received ilobolo for their daughter. If it was not for that ilobolo we would not have buried our father... I was not provided with a proof of residential address because the local traditional leader demanded that I pay the so-called *Khandampondwe* before he provides a proof of residential address to enable me to make an application with the Department of Home Affairs for a Death Certificate.⁷¹

The frequency with which submissions discuss levies as an abuse of power suggests that it is not an isolated practice but is present in many traditional communities. The submissions addressing levies also suggest that the abuse of power, in different forms, is pervasive and needs to be guarded against. Unlike the TCB's assumption that the regulation of leadership comes from leadership itself, these submissions illustrate that the absence of checks and balances can lead to abuse and exploitation of power. The submissions suggest that the extent to which levies impact people's ability to access and participate in economic, social and civic life within and outside their communities varies from community to community. The presence of levies in areas where they are not protected by the law suggests that these practices could worsen with the increased powers that the TCB accords traditional leaders.

The centralisation of power also brings to the surface questions of individuals and groups' ability to have a voice in issues of governance, the administration of law and communities' development. Writing for the Democratic Left Front, Mazibuko K Jara argues,

In our analysis, the Bill embodies an autocratic and patriarchal approach which turns rural dwellers into powerless and voiceless people who require mediation through the agency of unelected and unaccountable traditional

⁷⁰ Patrick Mashego. Letebejane Village, Limpopo. 2008.

leaders. This virtually makes it impossible for rural people to be heard in their own right and diversity.⁷²

Jara's position engages with the ways that the TCB shuts down spaces for people to challenge power and to influence customary law. Under the TCB, the diversity of voices within collectives is reduced to the singular voice of the traditional leader who alone has the authority to define custom, decide on cases and impose punishments in traditional courts. Through the TCB, the different branches of governance are united under one unelected individual who the community cannot remove. Jara communicates the consequences for people's ability to raise opposition, arguing that the TCB effectively silences communities.

The discussions show understandings of justice that are conceptualised from the top down do not always take into account what people want and need and why they engage in customary law structures. Because traditional courts are rooted in localised contexts, practices and structures informed by these contexts enable courts to develop in ways that are responsive to the realities of the people that they serve.

Discussions about the centralisation of power in traditional leaders highlight different levels of power relations and interactions in traditional courts and in the administering of customary law more broadly. These discussions bring questions of positionality to the fore, as individuals' different interests and locations in the community influence their priorities in the legislating of customary law and their understandings of effective traditional courts. The majority of submissions are critical of the centralisation of power in traditional leaders because it makes individual traditional leaders' power absolute and undermines existing checks and balances, rendering people vulnerable to power excesses.

Land and tenure insecurity

Land emerges as a focal issue in the submissions and is treated from multiple angles that reveal its material, social and political significance in people's lives. These discussions explore the ways that the TCB's positions on land would affect people's security and stability. Different histories shaped experiences of land and tenure security across the country, and diverse expressions of land rights by individuals and groups in the former homelands. The overwhelming majority of submissions discussing land reject the TCB's provision that allows traditional leaders to withhold customary entitlements- which include land. Even in communities where traditional leaders play a central role in allocating land, submissions argue that land belongs to the collective and not to an individual traditional leader. This rejection of land being decided on by chiefs forms the starting point for most discussions of land in the submissions. Different submissions go on to explain why the TCB contradicts the rights that they have held historically or have (re)gained since 1994, and how the Bill exacerbates vulnerability in situations of existing tenure insecurity.

A significant number of submissions came from private landowners whose land falls within TCB boundaries and who would therefore lose their land rights to traditional

⁷²Mazibuko K Jara. Democratic Left Front. 2012

leaders. SS Tongoane from Kalkfontein B & C Trust in Mpumalanga describes his community's long historical claim to their land, and the ways that these private land ownership rights were undermined by colonial and apartheid governments because of racist legislation, and are now under threat again because of the TCB. Tongoane explains:

Our forefathers, a group of co-purchases from diverse ethnic backgrounds grouped together to purchase land in 1921 and 1923 in terms of an exemption in the Natives Land Act, which meant that the Minister of Native Affairs as he was at the time, held the title to the farm on our behalf and denied us ownership over the land by deed of title, bought by our forefathers... This enabled the Apartheid Government to include the farm Kalkfontein in the now defunct homeland of KwaNdebele without our knowledge or any consultation ignoring out rights of ownership to the farm... Apartheid legislation has imposed on us a tribal authority against our will... Imposing on us a tribal authority through Apartheid legislation has had devastating effects on our security of tenure and property rights and we do not recognise the legitimacy or authority of the Ndundza Pungutsha Tribal Authority.⁷³

Tongoane's submission highlights intentionally constructed tribal identities and authorities and the ways that these identities were used to justify the denial of land rights to Africans. This denial makes visible the ways that racialised imaginings of law and of rights established the material boundaries that defined which people could claim rights and which people were subjects of tribal authorities and therefore not rights-bearing citizens. Tongoane highlights the ways that the TCB not only perpetuates the structural violence of colonial and apartheid engineering but also the ideological struggles tied to these structures. Because the delineation of land rights in the former Bantustans was so intrinsically connected to racist, nationalist political projects, it is not possible to reference those boundaries without also referencing the ideological roots that gave them form and meaning. Many submissions from private landowners stress dismay at the fact that their land ownership was in jeopardy when that of their white neighbours was not. They frame their critiques in terms of the continued relationship between race and citizenship: because white landowners are not read as tribal subjects, their property and citizenship rights are protected while black landowners can be forced under traditional leadership that they do not recognise and to which they have no relation.

As with discussions of other sections of the TCB, the submissions examine the ways that traditional leaders' increased power over land increases opportunities for the abuse of power. Andries Sihlangu from Manyeleti Community Land Claim Committee in Mpumalanga offers an example of this centralised power's negative effect:

We are beneficiaries of a Restitution land claim and residents within the jurisdiction of chief Mnisi and the Mnisi Traditional Authority. Chief Mnisi, however is not a beneficiary to the claimed land. The beneficiaries... have been forcefully removed from land that was turned into Manyeleti game reserve in 1963 by the Apartheid government and forced us into the jurisdiction of chief Mnisi and his traditional authority. Before forceful removal we stayed in our ancestral land long time ago and we had no traditional leadership or authority

⁷³ SS Tongoane. Kalkfontein B & C Trust. Mpumalanga. 2008

there. After forceful removal it's when we started being under Chief Mnisi. During the removal process we lost our land rights and our belongings... While we were still waiting for Commissioner's officials to come, we were surprised that Chief Mnisi and tribal council had already formed a trust called Manyeleti Conservation Trust secretly. The formed trust had the Chief as a founder and Chairperson of the Trust and his traditional council occupied executive position of the trust. The way we found out was from the *Noseweek* (newspaper article) whereby a developer of the Thunderstrike Holding Company and the Trust were in loggerheads about the agreements they entered into in the High Court of Pretoria, without the knowledge of the claimants. We had to fight nail and toes to get the claim back to the land claimants from the traditional leadership.⁷⁴

Sihlangu's critique highlights the ways that traditional leaders' access to power in spaces within and outside traditional communities enables them to undermine other groups' interests. In the situation described by Sihlangu, this power allowed the traditional leader to undermine the Manyeleti Community Land Claim Committee's land rights. It warns of the increased potential for abuse and fraud for such traditional leaders under the TCB. The case also highlights the enormous power that control over land offers traditional leaders. Their authority moves from being implied or coming from the community to having explicit material power over how people's security in their broader community.

Private landowners are not the only group who face losing their land rights. Monoko Thomas Moshitoa from the Bakone Development Forum in Rakgwadi, Limpopo, argues that by empowering traditional leaders to be the interpreters of custom and allowing them to deny customary entitlements as a form of punishment, the Bill threatens the land rights and tenure security of people who claim land through custom:

This provision is worse than anything we had under apartheid. The big stick of Bantustan chiefs was always the threat of eviction. But under proper customary law no-one can be evicted or deprived of land unless a pitso of the whole community agrees. That central protection which is at the heart of the democratic nature of customary law is changed by this bill, now a chief, as presiding officer of a traditional court can strip people of their customary entitlements to land and other resources.⁷⁵

Moshitoa, like many other authors of submissions, argues that democratic values inhere in customary law. Rather than unilateral imposition, as authorised by the TCB, land cannot be denied without broader consultation under custom, a measure that protects people's tenure security. Moshitoa's discussion speaks to how the TCB distorts custom and imposes a set of practices and identities foreign to those in circulation. It alters the ways that individuals and groups relate to each other and threatens the security and democratic forums on offer to community members. Land anchors so much of communal relations, social belonging and material security that it is central to the identity, development and grounding of a community.

⁷⁴ Andries Sihlangu. Manyeleti Community Land Claim Committee. Mpumalanga. 2012

⁷⁵ Moshitoa, Monoko Thomas. Bakone Development Forum. Rakgwadi, Limpopo. 2008.

Ndlunkulu Thandiwe Zondi from KwaZulu-Natal offers an example of her struggles with abuses of chiefly power in her effort to acquire land:

I believe that if enacted the TCB will exacerbate my current tenure insecurity and entrench the problems that I am experiencing in trying to secure land rights for myself and my daughters... In my view the royal family and council is using distorted customary principles to their own material advantage in a way that undermines my rights and those of my daughters to dignity, equality, security of tenure and equitable access to land. By entrenching and increasing the powers of traditional leaders without adequate measure to check abuse of power the TCB is entrenching structural discrimination against rural women.⁷⁶

Zondi's analysis of women's increased tenure insecurity under the TCB is supported by Monica Mkhize who argues that 'by securing rights held by men, the Bill is likely to entrench discrimination against women and this practice is seen by many as feminisation of poverty caused by landlessness.'⁷⁷ The struggles for women's access to land illustrate the central role that land plays in entrenching social positions and power relations. These struggles illuminate the dominant attitudes on gender and other identities that construct people's ability to access land, and the independence, security and sense of belonging that come with land. Centralising power in traditional leaders increases individuals' power and with this the chances of arbitrary decision-making in traditional courts. The submissions describe patriarchal attitudes among traditional leaders as especially pervasive and likely to negatively impact women's access to land. Although gender discrimination is most often described, it is also possible to imagine such discrimination applying to sexuality, age, disability and other factors.

Providing context for challenging the neutrality and objectivity of traditional leaders, Constance Mogale argues that land rights cannot be read in an economic or political vacuum, but need to be understood in a broader context. They are deeply related to external factors, especially when concentrated in the hands of one person. Mogale explains:

[T]raditional courts will become the de facto governance system on land matters arising in rural communities... Because traditional customs are prone to selective/biased and even arbitrary interpretation, there will be no other reference point that would be able to assist in ensuring fair and impartial judgments in land cases. In a situation where communal land is coming under increased pressure from mining, tourism, agribusiness and other powerful interests, the traditional leaders (themselves interested parties in how land is allocated) would be the party, judge and jury where there is dissatisfaction within communities about how land is allocated.⁷⁸

Nkomazi Community Advice Office in Shongwe Mission, Mpumalanga, offers examples of how some traditional leaders already use their positions as land administrators to gain personal wealth at the expense of the community:

⁷⁶ Ndlunkulu Thandiwe Zondi. KwaZulu-Natal. 2012

⁷⁷ Monica Mkhize. Colenso, KwaZulu-Natal. 2012

⁷⁸ Constance Mogale. Land Access Movement of South Africa (LAMOSA). 2012.

People who do not have legal documents to be in South-Africa are able to access land because they have money to buy no matter how much they are requested even if they want more than one stand. There's a high rate of crime due to that and it is difficult for our police to arrest them because they cannot find their finger prints since they do not have S.A. Identity... The traditional leaders are selling the stands at an abnormal price. Even if people have R.T.O. they resell it to the (one) who has money... without consulting with the people who already own the place.⁷⁹

Andries Sihlangu similarly relates how the traditional leader in his area disrupts community organisation and relations to accumulate personal wealth:

[The] chief also has a tendency of giving the same plot of land to various people, collecting money ending up causing conflicts between people and leaving without... (any) other remedy to relay their grievances. The chiefs thus cause chaos and the Bill says they are the ones who are supposed to settle chaotic matters to begin with. To us this is a contradiction.⁸⁰

SJ Baloyi describes the process through which a traditional leader sold people's land for his own benefit:

The dispossession started in 2011 when the traditional council embarked on an operation called 'Operation Vhakacha' wherein the traditional council move around villages under its authority, explaining an imposed law to people about the chief's absolute power to take people's plough fields and land allocated for community projects for demarcation of residential sites without compensation the loss of such rights to land rights holder... if the bill is passed into law as it is, rural women and poor men will lose all the informal land rights where they are presently making livelihood and able to produce to feed their struggling families while the chief and his councillors sell land to people who can pay them huge amounts that are not even used for the benefit of the community.⁸¹

These submissions suggest the possibility of intensified abuses due to increased powers afforded to traditional leaders through the TCB.

Land as social relation

Many submissions discussing land emphasise that land not only affects people's material situation but their social relations, being a key element of belonging and identity formation. Without access to land, or with the threat of being stripped of land, people's community networks and support structures become dependent on the will of an individual traditional leader. P Grootboom from the Border Rural Committee explains:

The provision of the bill that gives one man the right to strip members of his community of their rights to land and, further, their membership of the

⁷⁹ Nkomazi Community Advice Office. Mpumalanga. 2012.

⁸⁰ Andries Sihlangu. Manyeleti Community Land Claim Committee. Mpumalanga. 2012.

⁸¹ S J Baloyi. Maphanyi Community Development Forum. Limpopo. 2012

community itself, is for us, completely untenable. The provision is open to abuse and misuse, and is vulnerable to arbitrary implementation.⁸²

Grootboom illustrates how the power to deprive people of their land is also the power to exclude people from their communities. The social impacts centralising claims to land in an individual extend beyond individuals and groups' material wellbeing to communities' cohesion and social wellbeing.

The submissions on land reveal the ways that land and social relations weave in and out of each other to form the fabric that shapes communities. Social relations cannot be divorced from land, and vice versa. The diversity of claims to land represented in the submissions further complicate narratives of sameness or common 'tribal' history, which underlies the TCB's approach to land rights. They reveal the complex histories surrounding different groups' relationships to land and highlight the dangers and historical inconsistencies in centralising land ownership in traditional leaders. Like many submissions from private landowners argued, this centralisation of land ownership in traditional leaders is based on undemocratic and racially constructed understandings of land rights and the ways that individuals and groups claim these rights. Submissions from people who claim land through customary entitlement also maintained that the TCB's land model is inconsistent, and even at odds, with dominant understandings of land rights under customary law.

Women and other marginalised groups

Discussions of gender, age and sexuality in the submissions highlight the TCB's potential violation of women, children and lesbian, gay, bisexual, transgender and intersex (LGBTI) people's rights, both in terms of the harmful practices and structures that it promotes and also those that it fails to prohibit. These submissions draw on the experiences that people who live under customary law have reported in traditional courts and other customary law bodies. Power relations between traditional leaders and the people under their leadership are mediated by different identities, which impact individuals and groups' ability to access justice in these spaces.

Many submissions discussing gender argue that because of the patriarchal values underpinning much of customary law, the TCB's failure to substantively ensure protections for women effectively legitimises the discrimination that women face in traditional courts. Funeka Miriam Mateza from the Eastern Cape describes how her experience of traditional courts was fundamentally connected to her status as a woman:

In 1986, the chief Gecelo of the Gcina Tribal Authority expanded his rule and claimed the land that I was occupying as an owner. I was summoned to the traditional court and they asked me how it was that I owned land when I was a woman. My response was that I had bought the land and therefore that I was a title-holding owner of it. They asked to see the title deed. I showed them the documentation as requested and the response that I received was that the title deed had no bearing on the matter as all land in the area belonged to the chief. Moreover, the traditional court told me that as a woman, I couldn't hold any land in my name. They said that even if the land had been my husband's and he

⁸² P Grootboom. Border Rural Committee. Eastern Cape. 2012

had died, it would have been given to my husband's younger brother or my older brother. Therefore, I was told that I had to vacate the land, as it belonged to the chief, and leave the community. They said that they feared that I would influence their wives into doing bad things such as wanting to take over their lands after their deaths. I couldn't understand how it could happen that even though I had worked so hard to buy the land and held a title as a testimony of my ownership, this had no significance. I was also confused as to why I couldn't have land as a woman as this area did not belong to the chief to begin with.⁸³

Mateza concludes that the TCB 'will make the situation worse for women like me because it will give chiefs even more power than they already have... The Traditional Courts Bill will make chiefs seem untouchable. Women will then be even more afraid to challenge chiefs when the chiefs commit crimes against them.' Her account illustrates how tenure insecurity and abuse of power by traditional leaders are intimately linked to gender identity. Her rights were denied solely on the basis of her sex and the traditional leaders' expectations of women. By conferring even more power to traditional leaders, empowering them to administer punishment, and making it more difficult to challenge their authority, the TCB increases the vulnerability of women who use traditional courts. It offers no recourse for challenging the often socially sanctioned discrimination against women.

Mateza's story also illustrates how allowing traditional leaders to interpret custom enables them to discipline expressions of gender identity, whether this is consistent with custom and broader law in South Africa or not. Jennifer Williams and Judith Klusener from the Women's Legal Centre explain:

One of the possible ways of abusing power is through the exercise of the coercive powers which are proposed by the Bill. A woman who challenges the exercise of authority is at risk of facing complaints that she has acted inconsistently with custom, and that she has offended those who hold power. She can then be brought before the very persons who hold that power, and be punished. This is unacceptable as a matter of legal principle.⁸⁴

The implicit power given to traditional leaders to discipline what they perceive as deviance, coupled with the absence of checks and balances, increases women's vulnerability in traditional courts. It has the potential to limit opportunities for women to demand their rights and positions of authority in relation to male counterparts.

The Concerned Residents of Herschel argue that the TCB's failure to define protections for women creates the space to violate women's rights:

The Bill simply pays lip-service to the question of protection of women. The Traditional Courts Bill painted a beautiful picture in its introduction, highlighting in particular women and disabled as if they will be protected according to the South African Constitution, but when you reach the content of the bill, it is contradictory, it doesn't state clearly how women are protected in their access to land and its ownership, women's participation in talks of

⁸³ Funeka Miriam Mateza. Eastern Cape. 2012.

⁸⁴ Jennifer Williams and Judith Klusener. Women's Legal Centre. Western Cape. 2012.

customary law which is already oppressive to women and also cultural issues that force women to go to traditional courts.⁸⁵

Offering examples of how the TCB fails to include and protect women in traditional courts, Sizani Ngubane explains:

The Bill does not guarantee women participation in traditional courts — neither as members of the body of people who make decisions in the courts, nor as litigants. Rural women are most often marginalised from traditional courts. They are commonly refused self-representation and even attendance of some traditional courts. This leads to their further exploitation and economic vulnerability. For example, widows are not permitted to enter the ‘sacred spaces’ that are traditional courts whilst in mourning and are often required to be represented by the male family members who seek to dispossess them of their inheritance/property. They are therefore unable to defend themselves in the traditional courts and are consequently evicted from their homes. The Traditional Courts Bill does not require that this customary law practice change but instead permits that women may continue being represented by husbands, in accordance with customary law.⁸⁶

Describing the hurdles that women have to overcome to access traditional courts under the TCB, Sindiso Mnisi Weeks says:

Instead of the Bill providing specific protections for women to address the particular problems that they often face, the Bill puts the onus on the senior traditional leader to ensure the participation of women. This means that rural women would have to challenge the actions of the senior traditional leader to invoke their rights – a daunting task, given prevailing power relations in rural areas.⁸⁷

Given that many traditional courts are predominantly made up of older men, as many submissions reference, women often struggle to gain access to these courts or to challenge leaders in these spaces to access their rights. Many submissions discuss how the courts’ gender composition also often results in cases that women bring to courts being treated as private or domestic matters which ought to be resolved in the home rather than in a court. Trivialising cases of violence, dispossession of property and child maintenance, among others, as ‘domestic’ has material, social and emotional consequences for women’s wellness, safety and security.

Submissions also critique the Bill’s silence on how legislation applied in magistrates’ courts to protect children would be applied in traditional courts. Current legislation that recognises children’s particular vulnerability in courts takes active steps to create safe spaces for them. Samantha Waterhouse from the Community Law Centre, University of the Western Cape, argues that the TCB does not adequately provide for children’s protection in courts:

⁸⁵ Concerned Residents of Herschel. Eastern Cape. 2012.

⁸⁶ Sizani Ngubane. Rural Women’s Movement. KwaZulu-Natal. 2012

⁸⁷ Sindiso Mnisi Weeks. Law Race and Gender Research Unit, University of Cape Town. Western Cape. 2012

[T]he traditional courts are required to work within the legislative framework created by the Constitution, the Children's Act and the Child Justice Act. However the capacity of these courts to provide adequate protection and promote and respect children's rights in the context of children's lower status in many families and communities is questionable... the traditional courts will have jurisdiction over a wide range of issues affecting children including certain criminal offences committed by children. These potentially include matters relating to decisions regarding some forms of child abuse; the property and certain living arrangements of children who are orphaned; issues relating to potentially harmful religious and cultural practices such as virginity testing, circumcision, and female genital mutilation; excessive child labour; and many others... The Child Justice Act recognises the particular vulnerability of children in conflict with the law and the importance of a strong coordinated response to this. While allowing for diversion, it requires the engagement of state prosecutors, probation officers, defence lawyers and magistrates on all cases, including less serious matters. The Traditional Courts Bill provides for none of this for children accused of crimes in the areas affected by this Bill. It thus creates a lower standard.⁸⁸

The Bill assumes impartiality, fairness and sensitivity towards vulnerable groups without providing measures to ensure this. These good-faith assumptions mean that vulnerable people, such as children, would likely not have recourse for challenging abuses of power against them. This is especially true in the context of power relations that often make it difficult for people in vulnerable positions to approach courts and challenge people in more powerful positions. The submissions highlight that the absence of safe spaces for children fails to facilitate their participation in the courts.

Concerns around the TCB's silences with regard to vulnerable people's rights in traditional courts are also raised in relation to LGBTI rights. The Triangle Project explains the context of homophobia where same-sex relationships are often not recognised and people are punished for expressing their gender and sexuality outside of socially prescribed norms. Against this background, silence about the protections and rights of LGBTI people in traditional courts is dangerous. The Triangle Project explains:

[D]ecisions relating to family law, personal disputes, disputes about land use and property, will all potentially come before the traditional courts. But customary law rules do not recognise, let alone respect or protect, same-sex intimate relationships and the rights and duties that flow from them. Neither do these rules respect or protect the personal liberty and freedom of gay men, lesbians, and transgender and intersex people to live their lives as they choose in accordance with their sexual orientation or gender identity choices. Unlike the common law and statute law, which – under the guidance of South Africa's Constitutional Court – has developed legal protections for same-sex couples as well as LGBTI individuals, customary law provides no similar protections.⁸⁹

The TCB's silence about LGBTI rights and protections under customary law increases the vulnerability of people who identify, or are identified by their community, as not conforming to gender, sexuality and/or sex norms. This situation is exacerbated by the Bill's denial of the option of engaging in court systems that have legislated protections

⁸⁸ Samantha Waterhouse. Community Law Centre, University of the Western Cape. 2012.

⁸⁹ Jayne Arnott. Triangle Project. Western Cape. 2012

while it forces participation in courts that offer no such protections. These discussions highlight traditional courts as spaces for policing identity and disciplining what traditional leaders may understand as deviance from customary constructions of identity. This makes justice dependent on the ability to conform to identities consistent with traditional leaders' interpretations.

Challenging a dominant view of customary law as inherently patriarchal, Sindiso Mnisi Weeks argues that customary law and the protection of vulnerable people's rights are not always at odds in practice:

There are indications that decentralised power enables women greater possibilities for influencing the living customary law... While women and children are often denied voice under patriarchal traditional structures, they are more empowered to express their voice by being able to exploit the opportunities provided by diverse forums and processes of change underway in the context of a fluid, living customary law. The centralisation of power to traditional leaders without providing ordinary people with sufficient protections or agency in the TCB will serve to close down the few avenues that women have for improving their circumstances and obtaining greater security for themselves within community structures. The Bill's present formulation even precludes strong women councillors from emerging through participation and experience in co-existing decentralised dispute resolution forums.⁹⁰

Supporting Mnisi Weeks' view, J Williams argues that custom and the rights of vulnerable groups do not exist in a zero-sum situation, but can both flourish if allowed to inform each other:

The committee need not view the right to equality and the application of customary law as mutually exclusive rights. The legal position is such that customary law forms part of our legal system, to the extent that it does not conflict with the rights in the Bill of Rights. The living customary law is capable of development which recognises women's right to equality. This Bill is an opportunity to develop a court system that will be capable of developing customary law in a manner consistent with the Constitution.⁹¹

Submissions' discussions about the privileges and vulnerabilities of different identities highlight the multiple ways that failure to mediate power relations increases the vulnerability of those with the least access to power. Several submissions show how the TCB's allocation of increased, unaccountable power to traditional leaders particularly limits access to justice for women, children and LGBTI people within customary law structures. These limitations violate the rights and protections that the Constitution guarantees for each of these groups.

The submissions challenge the privileging of masculine, adult, heterosexual identity in many traditional courts. It argues that the TCB's conception of the rural subject as a gender-neutral subject is an inaccurate reflection of lived experiences in the areas where the Bill would take effect. Similarly, the submissions reveal that the assumption

⁹⁰ Sindiso Mnisi Weeks. Law Race and Gender Research Unit, University of Cape Town. Western Cape. 2012

⁹¹ Jennifer Williams. Women's Legal Centre. Western Cape. 2008.

that traditional leaders are inherently able to separate themselves from patriarchal structures or narrow self-interest when ruling in traditional courts betrays reality.

The submissions show that gender neutrality results in the privileging of masculinity because of the patriarchal underpinnings of dominant framings of customary law. These challenges to the identity premises of the TCB demonstrate women's rejection of the patriarchal understandings of custom and traditional courts that it promotes. Women's personal narratives in submissions detailing their experiences and understandings offer alternative perspectives of customary law. These narratives show the diversity of needs that traditional courts need to serve and respond to. They also reveal how understandings of law and governance need to expand to be more inclusive and to respond adequately to women's rights.

Importantly, many of these examples illustrate that what is not explicitly prohibited is implicitly permitted. The submissions expose the necessity for explicit protection for marginalised groups and the complex ways that dominant social attitudes towards different groups can have profound impacts on their experiences of courts. These all underscore the point that in cases where power relations are unequal, active measures are necessary to enable a diversity of people to access justice through traditional courts.

Conclusion

South Africa consists of complicated and multi-layered histories of migration and artificial borders, the imposition of traditional leaders by colonial and apartheid governments, and the distortion of customary law to fit the objectives of colonial and apartheid administrations more broadly. Individuals and groups migrated around the country due to colonial and apartheid race-spatial restrictions, forced removal or other forces that moved them from their places of origin, and through this created new, geographically diverse and ethnically heterogeneous communities.

The submissions offer an opportunity to interrogate the different struggles and histories that inform people's experiences of customary law and of traditional courts around the country. As Lawson Naidoo explains,

The point of departure of the Bill is the assumption that the communities defined as 'traditional' are homogenous. This creates enormous problems both at legal and social levels. This point of departure reinforces inequality and discriminatory hierarchies. It renders people vulnerable.⁹²

The submissions challenge narratives of sameness or an essential identity, heritage or custom and reveal the complex experiences of governance, identity and custom in areas where the TCB would take effect. These in-depth discussions of different experiences from around the country communicate many levels at which the TCB fails to speak to people's realities in the former Bantustans. The inputs show how the Bill would in fact worsen conditions and increase people's vulnerability.

Significantly, the submissions show that, while the justification of the repeal of the BAA suggests that the TCB would address injustices and oppressions committed against

⁹² Lawson Naidoo. Council for the Advancement of the South African Constitution. Gauteng. 2012

Africans under colonialism and apartheid, it fails to do so. Rather, the TCB builds on colonial and apartheid distortions of customary law, both in terms of its interpretations of custom and in its adoption of the physical boundaries used to demarcate areas under traditional leadership. In some instances the TCB goes further than colonial and apartheid legislation in limiting the rights of people living under customary law, offering traditional leaders more power and greater ability to enforce sanctions than ever before. Based on these limitations on people's rights, many submissions argue that the TCB is unconstitutional and should be amended or withdrawn and redrafted, based on consultations with groups that would be affected by the Bill.

The diverse experiences captured in the submissions highlight that there is no singular tradition or custom among Africans that can be reduced to one conception of hierarchy, governance and organisation, as put forward in the TCB. There is no one way through which groups and individuals have practised customary law or configured traditional leadership and governance structures. Rather, there are complex, historically rooted conceptions of traditional leadership and governance around the country that correspond to the diverse ways that Africans were organised, forced apart, or moved and claimed different identities at different moments in South African history, under different sets of power relations, as political, social and economic conditions changed. These multiple, complex sets of conditions demand similarly complex and imaginative responses. Such responses should take into account localised histories and intersecting oppressions to engage with the dynamism that continues to shape the South African landscape.

Public submissions cited

- Aroun, W. National Union of Metal Workers of South Africa (NUMSA). Western Cape. 2012.
- Arnott, Jayne. Triangle Project. Western Cape. 2012
- Baloyi, C. Phaphazela Development Committee. Malamulele, Limpopo. 2012.
- Baloyi, M S. Mahuntsi Traditional Community. Rotterdam Village, Vuyani, Limpopo. 2012.
- Baloyi, RS. Ribungwani Dynasty Tiyani Settlement. Vongani, Limpopo. 2012.
- Baloyi, SJ. Maphanyi Community Development Forum. Limpopo. 2012.
- Burger, Lizette. Law Society of South Africa. Pretoria, Gauteng. 2012.
- Cohen, J. South African Human Rights Commission. Gauteng. 2012.
- Concerned Residents of Herschel. Eastern Cape. 2012.
- Cousins, Ben. School of Government, University of the Western Cape. Western Cape. 2008.
- Department of Justice and Constitutional Development. Report to the Portfolio Comm. on Justice and Constitutional Development. 2009.
- Dodson , Alan. Johannesburg Bar. Gauteng. 2008.
- Grootboom, P. Border Rural Committee. Eastern Cape. 2012.
- Himonga, Chuma. University of Cape Town. Cape Town. Western Cape. 2012
- Jara, Mazibuko K. Democratic Left Front. Gauteng. 2012.
- Joint Monitoring Comm. on the Improvement of Quality of Life and Status of Women. Parliament of South Africa. Western Cape. 2008.
- Khumalo, Bafana and Cherith Sanger. Sonke Gender Justice Network. Gauteng. 2012.
- Love, Janet. Legal Resource Centre. Gauteng. 2008.
- Mabuza, SJ. Silwanendlala Ubuntu Farmers Agricultural Co-Operative. Shongwe Mission, Mpumalanga. 2012.
- Maluleke, Lamson. Provincial Liaison Officer of communities affected by the TCB. Limpopo. 2012.
- Maluleke, Lamson. Makuleke Communal Property Association. Limpopo. 2012.
- Maodi, Marikoe Rodney. Sehokho CPA. Mpumalanga. 2012.
- Manyathi, Thabo. Association for Rural Advancement. KwaZulu-Natal. 2012.
- Manzi, Ncebakazi. September National Imbizo. 2012
- Mashego, Patrick. Letetbejane Village, Limpopo. 2008.
- Mateza, Funeka Miriam. Eastern Cape. 2012.
- Mkhize, Monica. Colenso, KwaZulu-Natal. 2012.
- Mnyandu, W. Melmoth Black Farmers Association. Melmoth, KwaZulu-Natal. 2012.
- Mogale, Constance. Land Access Movement of South Africa. North West. 2012.
- Mogale, Nakedi. Limpopo Legal Advice Centre. Limpopo. 2012.
- Mokgosi, Charlotte. Makgobistad Community Committee. Makgobistad, North-West. 2008.

Molwantwa, Tsholofelo Zebulon. Baralokgadi Communal Property Association. Mogale City. North West. 2012.

Moshitoa , Monoko Thomas. Bakone Development Forum. Rakgwadi, Limpopo. 2008.

Naidoo, Lawson. The Council for the Advancement of the South African Constitution. Gauteng. 2012.

Ngubane, Sizani. Rural Women's Movement. KwaZulu-Natal. 2012.

Nhlangwini Traditional Council. KwaZulu-Natal. 2008.

Nhlapo, Thandabantu and Tom Bennett. University of Cape Town. Western Cape. 2008.

Nkanyane, M.E. Nkanyani Traditional Community. Vongani, Limpopo. 2012.

Nkomazi Community Advice Office. Mpumalanga. 2012.

Pilane, Mary Mokgaetsi and Mmuthi Pilane of Bakgatla baKautlwale, North West. Repeal of the Black Authorities Act Bill. North West. 2010.

Rapoo, Othuitsitse. Bafokeng Land Buyers Association. North West Province. 2012.

Rural People's Movement. Grahamstown, Eastern Cape. 2012.

Sihlangu, Andries. Manyeleti Community Land Claim Committee. Mpumalanga. 2012.

Smith, Henk and Wilmien Wicomb. Legal Resources Centre. Cape Town, Western Cape. 2012.

Somdyala, N. Vulamasango Singene. Intsika Yethu District, Eastern Cape. 2012.

Tongoane, SS. Kalkfontein B & C Trust. Mpumalanga. 2008.

Waterhouse, Samantha. Community Law Centre, University of the Western Cape. 2012.

Webber Wentzel Bowens, on behalf of L Maluleke. Makuleke Traditional Community and CPA. Limpopo. 2012.

Weeks, Sindiso Mnisi. Law Race and Gender Research Unit, University of Cape Town. Western Cape. 2012.

Williams, Jennifer. Women's Legal Centre. Western Cape. 2008.

Williams, Jennifer and Judith Klusener. Women's Legal Centre. Western Cape. 2012.

Xingwana, Lulu. Department of Women Children and People with Disabilities. Gauteng. 2012.

Zondi, Ndlunkulu Thandiwe. KwaZulu-Natal. 2012.

Zungu, Simangele. KwaZulu-Natal. 2012.