

# **Customary Law and Indigenous Rights in South Africa: From transformative constitutionalism to living law in struggles for rural land rights**

Daniel Huizenga

A Dissertation submitted to the Faculty of Graduate Studies in Partial Fulfillment of the  
Requirements for the Degree of Doctor of Philosophy

Graduate Program in Socio-Legal Studies  
York University  
Toronto, Ontario

July 2019

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## ABSTRACT

South Africa is well known for the country's model of racialized territorial government called apartheid and the successful transition to constitutional democracy in April 1994. The South African Constitution provides a framework for the progressive realization of human rights as a measure of transitional justice. The Constitution guarantees land reform to account for histories of racialized dispossession. However, critics argue that land remains insecure for millions of racialized peoples living in rural areas who remain subject to forms of undemocratic chiefly authority. Existing scholarship argues that rural land insecurity is due in part to a failure to legislate an appropriate post-colonial and emancipatory version of customary law as a basis for collective land rights. A common line of argument is that there are two ways of interpreting customary law – as either codified in law, as it was during colonialism, or as 'living' customary law, referring to an imagined historical evolution of custom in response to a democratic transition and changing social and economic conditions. For example, literature often focuses on traditional leadership in South Africa and argues that this model of governance, while based on cultural rights as protected in the Constitution, relies on ethnic and territorial control reminiscent of the Bantustan reserves under apartheid. In this dissertation I demonstrate that a dichotomous view of customary law, as either codified or living, is inaccurate in contemporary conditions of neoliberalism wherein forms of authority and subjectivity and claims to territorial control are characterized by multiple actors engaged in networked and horizontal relationships of power. In these conditions, I show, an ethic of transformative constitutionalism paired with forms of government characteristic of neoliberalism have opened opportunities for new articulations of human rights, custom and property, that contribute to the emergence of 'living law' and new forms of territorialisation. Moreover, I demonstrate that the transnational indigenous rights movement, and the vernacularization of indigenous rights in South Africa, are unsettling colonial and post-colonial assumptions about customary law in the contemporary period. The characteristics of living law that I identify emerge at the intersection of constitutional law, human rights, customary law, and transnational norms on peasant and indigenous rights through the activities of state agencies, non-governmental organizations, activist lawyers, and corporations who marshal different forms of legitimacy and authority. The dissertation draws from the disciplines of sociolegal studies, legal geography, and legal anthropology, and contributes to work on the topics of human rights, property, neoliberalism, Indigenous Peoples' rights, customary law, and rural land rights.

## ACKNOWLEDGEMENTS

This dissertation would not have been possible without the support of my partner in life, Holly. We met when my interest in research first sparked and she has been with me every step of the way. Thanks to Eli who has forced me to find a balance in life at the park, on our cargo bike, and writing my dissertation. My dissertation committee has influenced and inspired me throughout my doctoral studies. Annie Bunting has provided insight and encouragement on my work since she supervised my master's thesis and I could not have imagined completing this project without her guidance and inspiration. David Szablowski has introduced me to research on the extractive industry, a topic that has become more central in my post-doctoral research. Special thanks to my supervisor, Rosemary Coombe, who offered unwavering support throughout my entire research journey and the twists and turns that it involved. This dissertation would not be what it is without her dedication to seeing me succeed beyond what I thought was possible for myself. Thank-you to the external examining committee members, Renee Sylvain and Daniel Yon, who pushed me to think differently about some key aspects of my work and contributed to an engaging discussion during my exam. Thanks to Chris Beyers who introduced me to socio-legal studies in his third-year undergraduate course, *Law, Rights, and Development*, at Trent University, and who supervised my honours thesis on the Richtersveld judgement. Thanks to my parents, Tina and Peter, for their continuous support and encouragement. My mom homeschooled me for the early years of my life and some of my independence and work ethic was certainly formed during this time. My dad's eccentric energy has been a dependable reminder to find silliness and create adventure in the thick of things. My siblings have all inspired me to carve my own path and to let creativity influence my thinking as much as existing scholarship. Dave, Robyn, Stephen, Christian, Aaron, Ben, Josh, and Will, as well as my siblings-in-law Peter, Jordan, Brittany, and Dawna, you have all contributed immensely to who I am as a person and as a researcher and academic. Thanks to many of my friends who were with me at York – Emily, Katrin, Devin, Matt and Ali, among many others. Connor was often at the center of many of our gatherings and he is dearly missed. Graduating will not be the same without the opportunity to celebrate with him. Finally, my friends and colleagues in South Africa have been a constant source of inspiration for me. Henk Smith, Wilmien Wicomb, Jackie Sunde, Ben Cousins, Johan Lorenzen, among many others. Their energy and persistence at the foot of mountains is something that needs to be witnessed. I remember my conversations with Brendan Boyle fondly; he offered critical discussions and insights as I worked and is missed by many. Thank-you to everyone who took time to tell me about their work. Thank-you to Aninka Claassens for inviting me to be a visiting researcher at the Centre for Law and Society and the Land and Accountability Research Centre and for expressing so clearly the legal challenges at stake in the recognition of living customary law. To everyone above, I look forward to many years of learning and collaboration in the future.

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## LIST OF ACRONYMS

|            |  |
|------------|--|
| BEE        | Black Economic Empowerment   |
| CLARA      | Communal Land Rights Act   |
| CONTRALESA | Congress of Traditional Leaders of South Africa  |
| CPA        | Communal Property Associations   |
| DLA        | Department of Land Affairs   |
| DMR        | Department of Mineral Resources  |
| FPIC       | Free, Prior, and Informed Consent  |
| HLP        | High Level Panel on Assessment of Key Legislation and Acceleration of Fundamental Change |
| ILO 169    | International Labour Organization's Convention 169                                       |
| IPILRA     | Interim Protection of Informal Land Rights Act   |
| LRC        | Legal Resources Centre   |
| MEJCON-SA  | Mining and Environmental Justice Community Network of South Africa                       |
| MRC        | Mineral Commodities Ltd.   |
| MPRDA      | Minerals and Petroleum Resources Development Bill  |
| PMG        | Parliamentary Monitoring Group   |
| RBK        | Royal Bafokeng Nation  |
| RDP        | Reconstruction and Development Program   |
| RLRA       | Restitution of Land Rights Act 22 of 1994  |
| SAHRC      | South African Human Rights Commission  |
| TEM        | Transworld Energy and Mineral Resources  |
| TKLB       | Traditional and Khoi-San Leadership Bill   |
| TLGFA      | Traditional Leadership and Governance Framework Act                                      |
| UNDRIP     | United Nations Declaration on the Rights of Indigenous Peoples                           |
| XolCo      | Xolobeni Empowerment Company   |

# 1 INTRODUCTION: PROPERTY, TERRITORY AND HUMAN RIGHTS IN SOUTH AFRICAN LAND REFORM

## 1.1 Introduction

In March 2015 I attended a two-day training session on land and human rights for paralegals working in the province of Kwa-Zulu Natal, South Africa.<sup>1</sup> During a presentation on the constitutional protection of human rights and security of tenure, the participant I was sitting beside turned to me and said quietly, ‘we don’t have rights here, we have chiefs’. In addition to reminding me of the continuing power of chieftaincy in rural South Africa (Ainslie and Kepe 2016), he evoked two distinct normative worlds, one pertaining to human rights and the other the field of customary law. For the participant and others I met during my research fieldwork, the authority of human rights belongs to the state legal system, while the authority of customary law is held by chiefs or traditional leaders.<sup>2</sup> This dichotomous perspective can be traced back to the European colonial imposition of a ‘universal’ modern law which in effect created a universalised difference – a customary, savage, and pre-modern ‘other’ (Fitzpatrick 2001) - and to the ideological work of colonists who used ‘custom’ as the marker of this difference and a strategy of colonial governance (Mamdani 1996). While this participant’s remark conveyed a perspective commonly held by rural people and activists in South Africa, contemporary rights-based struggles across the country suggest that this historical distinction is far from stable and might in fact, be crumbling. Indeed, the very context that we were in (a workshop on constitutionally protected land rights facilitated by members of a research institute and local non-governmental organizations) illustrates the fact that human rights, traditional authority, customary law, and

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<sup>1</sup> The training session was facilitated by the Centre for Law and Society, where I was a visiting researcher. I attended the session as an observer and researcher.

<sup>2</sup> ‘Chief’ and ‘Traditional Leader’ are used synonymously throughout this dissertation.



property are sites of struggle that simultaneously bear the scars of colonialism and apartheid and shape the promise of land reform for the future.

## 1.2 Colonialism: Law, territory, and rural subjects

Apartheid South Africa created territorial jurisdictions by dividing the country between land owned by settlers and land merely occupied by the colonized. Land area was marked off and divided into reserves, called Bantustans, which were meant to become self-governing and independent from the South African settler state. These areas encompassed thirteen percent of the country's land. Outside of such reserves racialized African peoples had no citizenship rights nor were they permitted to own land. Within these territorial jurisdictions there were also distinct legal geographies constructed through the colonially mandated authority of African chiefs and what was recognized as customary law. Custom was codified in colonial and apartheid statutes to serve the interests of settler governments seeking to control both land and the movement and labour of African subjects.

Colonial state strategy produced rural African subjects under the authority of traditional leaders – a subject position that contrasted with the ‘citizens’ of the state – a form of government that operated principally through ‘recognition’ of customary law as cultural difference. A dichotomous view that pitted custom against modern law and divided African rural subjects from urban citizens was sedimented over centuries of colonization and solidified during half a century of apartheid; conditions famously characterized by Mahmood Mamdani as a bifurcated state (Mamdani 1998). While this bifurcated state certainly existed in law and policy, research based upon ethnographic fieldwork challenges this dichotomy in the lived reality of African peoples, by demonstrating the fluidity of customary authorities, the nature of the historical allegiance

African peoples held for chiefs, and the dynamic and changing practices of customary law in South Africa (Crais 2006, White 2015, see also Englund 2012).

Apartheid, as a legal and political form of rule, ended with the first democratic elections in 1994 and the introduction of a constitutional democracy. As I show in this dissertation, the legal geographies produced through histories of colonialism and apartheid are being re-configured through the integrated effects of constitutionalism -- characterized by a commitment to the progressive realization of land rights for previously dispossessed peoples --and the forces and conditions of neoliberalism. In this conjuncture, contemporary struggles over collective title to rural land are defined by new and emergent forms of indigeneity and customary law and the entangled territorialities they legitimate.

### 1.3 The Constitution, traditional leadership, and collective land rights

The advent of democracy in 1994 introduced a new government and legal framework to facilitate complete structural social and economic transformation of the country. Justiciable constitutionalism was the means by which transition to democracy was to be achieved in South Africa-- the framework through which seemingly unresolvable conflicts between members of the previous apartheid state and the new government could be negotiated (Klug 2000, 18). The 1996 Final Constitution and the Constitutional Court are the foundation on which the commitment to and ethos of progressive change captured in the phrase ‘transformative constitutionalism’ was to be realized (Klare 1998). The globally celebrated 1996 Final Constitution entrenched a Bill of Rights affirming that human rights are indivisible and justiciable in the country.

Democratic South Africa adopted a number of distinct measures of transitional justice, including land reform – a project enshrined in the Constitution (Section 25). Land reform has long been charged with the task of instantiating visions of a new South Africa; it represents a

dream of redrawing the map of South Africa through a process dependent on the legalization and judicialization of land struggles (James 2007). Land reform consists of three distinct projects, land restitution, land redistribution, and land tenure reform, each of which is motivated by an attempt to address histories of race-based discrimination and secure tenure for those previously dispossessed of land rights under colonialism and apartheid. However, twenty-five years after the end of apartheid, land remains insecure for millions of racialized peoples living in rural areas whose livelihoods are dependent upon land tenure relations unrecognized by the state.

Critics explain continued rural land insecurity in South Africa through a set of interlinked arguments. First, they argue that a key issue is the persistence of undemocratic chiefly authority. Chiefly power, they argue, is based on the contemporary legislative protection of traditional territories, governed by traditional leaders and their councils (Claassens 2015). Ironically, however, the boundaries of traditional territories mirror the territorial demarcations created during apartheid. Thus the spatial distribution and jurisdiction of traditional authorities remains entirely unchanged as customary law is codified through legislation in democratic South Africa. This form of rural governance is being challenged, however, by Constitutional Court judgements that have developed a progressive form of customary law now referred to as ‘living customary law’ (Claassens and Budlender 2015).

Living customary law refers to an interpretation of custom that focuses on its evolving and changing character. It is defined as much by what it is as by what it is not: it stands in stark contrast to the version of ‘codified’ customary law protected in legislation. As I show throughout this dissertation, living customary law is used in three primary ways by different sets of actors. First, it is a term used by the Constitutional Court. Second, it is a term adopted by empirical researchers as a way to describe rural tenure relations. Third, it is a term used in social

mobilization, activism, and community organizing. These distinctions do not mean that each of the three uses of living customary law is completely separate from the others. On the contrary, each use of the term by different sets of actors informs its mobilization in other fields. For example, it is precisely the emergence of living customary law in the vocabulary of the Constitutional Court that gave researchers the incentive to adopt this phrasing. Across all contexts in which it is articulated, living customary law is used to affirm a democratic model of (living) customary law in contrast to an autocratic and patriarchal interpretation of (codified) customary law in a new South Africa that emphasizes norms of participatory deliberation and gender equality.

As I argue in this dissertation, however, this dichotomous view of customary law - as either codified or living - is still inaccurate in contemporary conditions of neoliberalism wherein claims to territorial control and forms of authority and subjectivity emerge through the collective work of multiple actors engaged in networked and horizontal relationships of power. The generative nature of these relationships in South Africa is significantly influenced both by the context of transformative constitutionalism and new forms of government characteristic of neoliberal governmentality. In these dynamics I identify the emergence of what is best understood as ‘living law’. Living law refers to an amalgam of state and non-state law initiated by the determination of communities and their advocates to assert renewed land tenure arrangements in the post-apartheid era. The range of actors that populate the narrative of this dissertation contribute to the emergence of living law as they draw from and leverage customary law, constitutionally enshrined human rights standards, Indigenous Peoples’ human rights, Aboriginal title, and transnational human rights norms. Living law emerges in conditions characteristic of what Boaventura de Sousa Santos calls “interlegality”, understood as “legal

porosity... multiple networks of legal orders” that community members, their advocates, and state institutions and actors “transition and trespass between” in efforts to revitalize customary law (Santos 1987, 298). Finally, despite its diverse and transnational influences, living law is localized, and in effect has a transformative and constitutive effect on territorial forms of authority and power in contemporary South Africa.

#### 1.4 Property and territorialization in conditions of neoliberalism

Behind assertions of living customary law there is an unacknowledged assumption: the belief that property reform initiated ‘from the ground up’ will automatically reconfigure territorial authorities and forms of government. This perspective is in part the product of the land reform program which was designed to identify and transfer parcels of property to individual or collective owners. Land reform legislation is premised on a socially and legally positivist fantasy and a modern liberal conception of property focused on exclusive ownership and hierarchical power relations (Smith 2008, 54, van der Walt 2008). These hidden premises were concealed in the early political promise of land reform but have surfaced through the long, difficult, and often painful process of land reform administration and its outcomes for those who expected to be its beneficiaries (James 2007, Nustad 2011, Beyers and Fay 2015). Geographers and political ecologists have long identified a constitutive relationship between territory, government and property. Their insights suggest that any presumption that land reform consists of a transfer of property detached from territorial forms of government and authority needs to be questioned.

To understand the relationship between territory and property, however, we need to begin with land tenure. Land tenure is the most general optic through which to understand relationships between people with respect to the land they use or live upon; from tenure we can identify how

land becomes a subject of human rights, property, and territory. In the context of South African land reform, 'land tenure'

. . . refers to a set of rights which a person or group holds in land. It concerns who can use which resources, for how long and under what conditions. 'Tenure' is the relationship, whether legally or customarily defined, among people as individuals or groups with respect to land and associated natural resources (Smith 2008, 36).

'Tenure reform', explains Henk Smith, "refers to the amendment or reform of particular types of land access and control" (Smith 2008, 36). In democratic South Africa land tenure has become an issue of human rights through land reform, which is a human rights-based system. As explained in the White Paper on Land Reform:

In order to deliver security of tenure a rights-based approach has been adopted... all tenure reform processes must recognize and accommodate the de facto vested rights which exist on the ground. Vested interests would include legal rights, as well as interests which have come to exist without formal legal recognition (DLA 1997, 84).

The rights at stake in land tenure reform processes are multiple and distinctive to each situated example. Rights to land use for agriculture, cattle grazing, fishing, or residency could all be at stake in different contexts. As demonstrated in this dissertation, land reform is far from a technocratic or bureaucratic exercise that can easily be accomplished through title and the transfer of rights; it involves complex social and political negotiations in the specific historical conditions from which they arise (see Verdery 2003, James 2007).

Land becomes an issue of property relations only in specific historical, cultural, and political contexts. Property in this dissertation does not refer to a naturalized 'thing' or even to the proverbial "bundle of rights" but is the result of historically and culturally specific sets of understandings, meanings, and relations. Chris Hann, a prominent anthropologist of property, argues that "[t]he word 'property' is best seen as directing attention to the vast field of cultural as

well as social relations, to the symbolic as well as the material context within which things are recognized and personal as well as collective identities made” (1998, 5). This approach draws attention to both a “cultural sense and power relations” (Hann 1998, 34). As a regime constituted by sets of relationships and processes, property is simultaneously a “cultural system, a set of social relations, and an organization of power” (Verdery 2003, 19).

Land reform in South Africa has necessitated that struggles over land be rendered as property struggles.<sup>3</sup> Political ecologist Scott Prudham argues that property forms are often explained according to concrete abstractions, such as exclusive or transferable, communal, state, public, etc., but while such abstraction may be necessary for classification and general description, “it is also the case that actual property rights are typically much more complex and hybrid in character, and that the more closely we look, sometimes the more complex the situation becomes” (2015, 438). My concern is with the processes, subject-positions, and agencies through which property rights are struggled over. Property forms are negotiated through institutions that both legitimate and guarantee rights, as well as in constitutive claims to authority and/or citizenship (Lund 2011, Lund and Peluso 2011). In South African conditions of constitutionalism and neoliberalism, it is also often necessary (depending on the characteristics of the case study) to consider how property relations are performed, legitimated and stabilized through assemblages of state and non-state actors articulating different forms of formal or informal legality. In such conditions, property can be product of inscriptions made via material objects and cultural practices as well as ideas about boundaries and the interpretation of case law (see Blomley 2013,

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<sup>3</sup> As anthropologist Paul Nasady explains, there is no natural link between land and property. Through his work with Canadian First Nations he argues that starting with the question ‘what is property’ presumes that property, which has its origins in western and European capitalism, is a relevant category in all contexts. He argues that an anthropological study of property should begin by asking why and under what conditions people struggle over property in the first place (Nadasdy, 2002:251). This approach explores how people engage with notions of property and interrogates what is at stake in a particular struggle over propertied relationships.

Heatherington 2011). In this dissertation, spatialization of property relations is a key concern, because property "is an empty formalism unless it is materialized in the world, in part through spatial arrangements" (Blomley 2015, 136). Spatialization of property relations are configured through processes of territorialization.

Existing scholarship in geography and political ecology argues that assertions that property relations exist outside of the broader relations of power and government in which they are constituted misrepresent a more complex political reality. The concept of territory helps us to focus upon changing forms of spatialized government. For example, political ecologists Peter Vandergeest and Nancy Peluso (1994) argue that territoriality is a useful way to understand how states express power over natural resources to regulate people's rights to access and use these. They refer to the 'internal' territorialization of state power through multiple state agencies and technologies of mapping, for example, as a method of controlling land-based resources and people's access to them. In the context of neoliberalism, however, the imagined spatiality of the state as an actor governing vertically is challenged by communities, their advocates, NGOs, and private industry, who transform such state territorialities through transnational activities (Ferguson and Gupta 2002). As anthropologist James Ferguson explains, "[t]he central effect of the new forms of transnational governmentality... is not so much to make states weak (or strong) as to reconfigure the way that states are able to spatialize their authority and stake claims to superior generality and universality" (Ferguson 2006, 112).

A growing body of interdisciplinary scholarship demonstrates how a multiplicity of transnationalized authorities untethered to a single state tend to coalesce in 'global assemblages' and in effect produce emergent forms of governmentality that traverse scales and territories (e.g.: Collier and Ong 2005). Contemporary conditions of neoliberalism have re-configured state



power to the extent that the relationship between territorialization and power needs to be understood in the context of the nation-state's fragmentation and the multiplication of actors engaged in the production of new forms of government (Brenner, Peck and Theodore 2010, Prudham and Coleman 2011). Neoliberalism should be understood, then, as a process of neoliberalization, which has a variegated character and produces geo-institutional differentiation across places, territories, and scales (Brenner, Peck and Theodore 2010, 184). In South Africa, neoliberalization processes encompass both the situated and historically sedimented institutional landscape of apartheid and the new processes of constitutionalism as well as emergent forms of neoliberal governmentality. These are "*patterned and patterning processes... continuous path-dependent collisions between inherited institutional landscapes and emergent, path-(re)shaping programmes of regulatory reorganization*" (Brenner, Peck and Theodore 2010, 202, emphasis in original).

Widely dispersed and fragmented laws and actors may be identified in South African processes of land reform. Literature on post-apartheid land reform demonstrates that land reform legislation has not produced certainty in how to achieve justice for the previously dispossessed, but is the subject of intense and ongoing struggle (see, for example, the many volumes dedicated to property and the legal and policy issues relevant to land reform. E.g: Claassens and Cousins 2008; Cousins and Walker 2015; Hornby et al 2017; James 2007; van der Walt 2009, Klug 2018). As recently as early 2019 there were multiple bills – either newly introduced or amended - related to land reform making their way through the legislative process (see also Humby et al, 2014).<sup>4</sup> State law and policy, moreover, is overlaid and influenced by international treaties,

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<sup>4</sup> The Department of Rural Development and Land Affairs lists in their 2018 annual report seven Bills being processed: The Regulation of Agricultural Land Bill, 2018; Communal Land Tenure Bill, 2018; Rural Development Bill, 2018; Deeds Registries Amendment Bill, 2018; Sectional Titles Amendment Bill, 2018; Land Survey Amendment Bill, 2018. These do not include the Traditional and Khoisan Leadership Bill of 2015 (passed by the

international human rights norms, and transnational norms on indigenous and rural peoples' rights. Such conditions, as I demonstrate in this dissertation, provide new opportunities for advocates asserting their rights to land but also create further complexity by generating competing claims for resources.

Many researchers working in South Africa demonstrate linkages between processes of neoliberalization and new forms of state spatiality; they see these as an outcome of regulatory differentiation and contradictions in the policy process. However, much of the existing work focuses on social service provision in urban and peri-urban settings (Yates and Harris 2018, Narsiah 2013). The particular role of transnational norms, mobilized through actors operating in multiple sites and sectors across different scales, and the production of spatial and regulatory differentiation in rural areas remains understudied. In South Africa, I show how such territorializations are the effect of variegated forms of neoliberal government, whereby traditional leaders and NGOs (including human rights and environmental organizations), corporate actors (in mining and agriculture), and state agencies actively produce and negotiate national and transnational norms in localized struggles for control over rural land. These territorializations have direct consequence for how property relations are made legitimate and authoritative in conditions of neoliberalism (Prudham and Coleman 2011, Sikor and Lund 2010).

Neoliberalism goes hand in hand with new forms of transnational solidarity and mobilization. Indigenous rights struggles in South Africa have emerged in transnational solidarity with NGOs and indigenous activists (Crawhall 2011, Sylvain 2017), as they have elsewhere on the continent (Hodgson 2011, Sapignoli 2018). The role of transnational advocacy networks in rural struggles for land has received less attention (cf. Edelman and Borras 2016, 73)

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National Council of Provinces in January 2019) or the Land Restitution Amendment Bill, which relapsed in February 2019. See Department of Rural Development and Land Reform, 2018, pg 16-17.

but multiple local land activists that I spoke with during my fieldwork had been supported by NGOs to travel and meet with other rural peoples engaged in land struggles in Africa as well as in Asia and South America. These activities encourage an engagement with transnational norms on indigenous and rural land rights that inform most of the land rights struggles I identify throughout this dissertation.

In these conjunctures peoples have sought new forms of recognition for their land and histories of dispossession, and in the process they have begun to make their collective subjectivities and their attachments to land legible in new ways and to new actors. Political scientist James Scott used the trope of ‘making legible’ to refer to the tactics engaged in by the ‘high modern’ state to identify and intervene in social life for the purposes of governing it (Scott 1998). In *Seeing Like a State* Scott analyses the specific tools and technologies developed by modern states to simplify and standardize populations, economies, and territories for the purpose of governmental intervention. He reviews strategies such as maps, surveys, and programs to simplify and standardize names and explains how these state strategies contributed to modern forms of state government. Importantly, however, Scott argues that such technologies for making them legible were never completely accurate or successful in controlling populations. These were as much fictions of state as functions of state. Nonetheless, “[b]acked by state power through records, courts, and ultimately coercion, these state fictions transformed the reality they presumed to observe, although never so thoroughly as to precisely fit the grid” (Scott 1998, 24). Under neoliberal forms of government, technologies and rationalities for making the social legible for intervention emerge from a much wider constellation of actors, NGO’s, and social reformers (Li 2005).<sup>5</sup>

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<sup>5</sup> Tania Li argues that these actors are not motivated by ‘high modernity’ but by a more amorphous ‘will to improve’ (Li 2005). However, her concept of the ‘will to improve’ does not adequately account for the dynamics and

Law provides an impetus and tool in the creation of new technologies of legibility as land reform beneficiaries struggle to secure their land rights through gains in courts. Legal geographer Nicholas Blomley writes, “[l]egibility... has a special relationship to law... Law is centrally concerned with two acts: inscription - the practice of naming and marking - and reading - that is, the determining of meaning... Law, like other forms of state action, entails particular ways of seeing” (2008, 1826). He directs socio-legal scholars to interrogate the forms of legibility that emerge through law; his work invites an analysis of legal and human rights-based struggles and the kinds of legibility emergent in the context of transformative constitutionalism.

The conditions that enable these assertions include community recognition under neoliberalism and the opportunities for such collective subjects to identify themselves to a range of agents beyond the state (Coombe 2011a, 2011b, 2016). Under conditions of neoliberalism ‘communities’ have emerged as responsibilized subjects to replace the ‘social’ as the new mode through which social life is made legible and targeted for intervention by governance strategies (Miller and Rose 2008, 88); an insight elaborated in existing research on community in the context of land reform (Beyers and Fay 2015). This requires, however, moving our inquiries beyond state-based frames of reference to consider how assertions of custom and cultural practices, for example, that may be illegible to the state appeal to a much wider set of authorities and normative frameworks (see Coombe and Weiss 2015). In the conjuncture of transnational Indigenous Peoples’ struggles, neoliberalism, and constitutionalism we can identify new and emerging forms of legitimacy and legibility that are constitutive to land tenure security.

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motivations that mobilize living customary law as a rights-based and democratic version of custom, as described in this dissertation.

## 1.5 Sociolegal Studies and the politics of human rights and indigeneity

This dissertation is informed by interpretivist socio-legal scholarship that approaches law as a lens and means through which people conceive, interpret, interact with, and make sense of the world (Geertz 1973, Coombe 1998, Merry 1990). I examine the constitutive nature of law in society (Hunt 1994) and am inspired by early Marxist humanist scholarship that demonstrates how law can be oppressive as well as a weapon used by the oppressed to hold accountable those in positions of power and transform the conditions in which the marginalized live (Thompson 1975; Hay et al 1975 [2011]): "law is simultaneously a maker of hegemony and a means of resistance" (Lazarus-Black and Hirsch 1994, 9). To this end I draw from more recent scholarship on the anthropology of human rights and thereby approach rights and custom as interpretive resources in ongoing struggles over land tenure.

Legal anthropologists who focus on human rights examine local interpretations and articulations of human rights norms and the performance of rights claims in transnational contexts (e.g. Wilson and Mitchell 2003, Goodale and Merry 2007, Merry 2009). By interrogating how international legal instruments are used in diverse, local contexts, anthropologists show how human rights are mobilized in the 'vernacular' of localized struggle in ways unforeseen and unimagined by lawyers and policy-makers who toil over the drafting of UN human rights instruments. They explore, for example, how international norms influence local identity and subjectivity, and vice versa, particularly in the context of neoliberal globalization and the proliferation of NGOs participating in international struggles (Speed 2008). Moreover, scholars who study the translation of human rights into local contexts do not deal simply with two normative orders (i.e. 'human rights' and the 'customary') but rather focus on processes

through which multiple normative claims may be asserted and leveraged by diverse actors in any given situation (Eckert et al 2012, Englund 2012).

Legal anthropologists focused on human rights in South Africa have, for example, explored the ‘juridification’ of politics through legal struggles (Comaroff and Comaroff 2003), the everyday politics of claiming space through squatting in Cape Town (Makhulu 2015), how the long-term effects of violence are embodied and translated in litigation (Kesselring 2017), and illustrate the limited influence of reconciliatory justice promoted by the Truth and Reconciliation Commission in neighbourhoods where ‘traditional’ forms of retributive justice persist (Wilson 2001). Human rights have been shown to provide an important language through which peoples make claims against the state, asserting and re-articulating their citizenship (Von Schnitzler 2014) and provide a means for marginalized peoples to disrupt governmental orders by re-asserting themselves into legislative processes and policy-making (Salmecezi 2015).

The struggles that I identify can be understood through an approach to citizenship identified by geographer Bottina von Lieres, who argues that in South Africa emergent political subjectivities and struggles for inclusive citizenship

largely define themselves outside of formal state institutions and through highly localized processes of horizontal identification and mobilization. These localized non-state spaces of political representation (eg. community groups and local associations) have emerged as the only viable political arenas for the enactment of citizens’ rights in reaction to an unresponsive state (von Lieres 2016, 207, see also von Lieres and Robins 2008).

It is by focusing on the construction of collective subjectivities in specific legal and political conditions that I study the politics of indigeneity in South Africa. As I show, the transnational indigenous rights movement, and the vernacularization of indigenous rights in South Africa, are unsettling both colonial and post-colonial assumptions about customary law in the contemporary

period. It is through the work of indigeneity that we can begin to identify emergent forms of re-territorialization. To demonstrate this, I adopt a perspective that interrogates the politics of indigeneity, rather than the struggles of so-called indigenous peoples. The politics of indigeneity in South Africa, I will show, emerge through diverse practices that are not unique to post-apartheid indigenous rights.

An indigenous rights movement is growing in Africa generally as groups across the continent identify with international indigenous peoples demanding self-determination and the recognition of their distinct cultures (see generally Blaser et al 2010, Coates 2004, Niezen 2003, Sissons 2005). The role of NGOs and their work and activism in regional and international forums has been key to the mobilization of indigenous rights across the continent (Sylvain 2017, Sapignoli 2018). Anthropologist Dorothy Hodgson showed that Maasai peoples in Tanzania, for an early example, had a history of engaging with the UN Permanent Forum on Indigenous Issues (UNPFII) and working with international NGOs, as well as regional and state-based community organizations, as they advocated for their rights as indigenous rather than pastoral or nomadic peoples (although a pastoralist subject position is finding new adherents). They negotiate for their rights in shifting fields of power that characterize the neoliberal conditions in which they live; they have had to strategically position themselves in efforts to gain state recognition of their rights to resources (Hodgson 2011). Indigenous rights struggles in South Africa have been waged and rights secured through advocacy in international forums such as the UNPFII, the International Working Group on Indigenous Peoples (and the subsequent Expert Mechanism on the Rights of Indigenous Peoples), as well as the regional African Commission on Human and Peoples' Rights and the civil society organization Indigenous Peoples of Africa Coordinating Committee (Crawhall 2011).

Literature on indigenous rights in South Africa largely focuses on the particular struggle of the Khoisan, who are identified by the South African state (to a degree) as well as many civil society groups, as indigenous due to the particular history of colonialism that they suffered and their pastoralist and hunter-gatherer livelihoods. However, wider critical insights may be gleaned by examining how indigenous rights norms and vocabularies inform wider fields of activism, particularly with respect to rural land rights. To this end, the struggles for indigenous and rural land rights in South Africa need to be informed by recent social science literature that makes a critical analytic shift from considering ‘indigenous peoples’ to one focused on the ‘politics of indigeneity’ defined as:

. . . the socio-spatial processes and practices whereby Indigenous people and places are determined as distinct (ontologically, epistemologically, culturally, in sovereignty, etc.) to dominant universals. Historicizing and respatializing subjects through the lens of indigeneity seeks to identify and theorize the relational, historically--and geographically -- contingent positionality of what is (known to be) 'indigenous' (Radcliffe 2017, 221).

This field of research focuses on the "multi-scalar institutional pathways through which Indigenous political demands are devised, shared and create a platform for mobilization" (Radcliffe 2017, 223). In political ecology, Emily T. Yeh and Joe Brian put a similar emphasis upon political processes; rather than asking 'what are indigenous rights?' they draw attention to work that indigeneity does, "as a generative site for research and political struggle" (Yeh and Brian 2015, 531). Their scholarship is "informed by the circulation of the term rather than any fixed definition, its indeterminacy opening a space for self-determination that is often foreclosed in academic and political debates where the term's meaning is assumed or left unexplored" (Yeh and Brian 2015, 531). Moving from ‘indigenous’ to focusing on ‘indigeneity’ mirrors legal and institutional shifts away from identifying ‘indigenous’ peoples and affirms the UN doctrine that indigenous peoples define themselves.



This approach is useful in the context of South Africa where the applicability of indigenous rights is contested. The African Commission Working Group on Indigenous Peoples (ACWGIP) argues that a strict definition of indigenous peoples "is neither necessary nor desirable" (ACWGIP 2003, in Anaya 2009, 33). They affirm that it is more constructive to focus on characteristics of indigenous people's claims; "the issue is that certain marginalized groups are discriminated [against] in particular ways because of their particular culture, mode of production and marginalized position within the state" (ACWGIP 2003, in Anaya 2009, 33). Rather than focusing on aboriginality the emphasis should be on a peoples' or communities' self-definition as indigenous, as well as on:

. . . a special attachment to the use of their traditional land . . . an experience of subjugation, marginalization, dispossession, exclusion or discrimination because these peoples have different cultures, ways of life or modes of production than the national hegemonic and dominant model (ACWGIP 2003, in Anaya 2009, 35).

Thus, even the question of whether or not one group identifies as indigenous is "secondary to the more focused inquiry about what concerns the group may be raising in human rights terms and whether it helps to address those concerns by reference to the indigenous rubric" (Anaya 2009, 36).

Many peoples across the continent of Africa have found that asserting their rights as indigenous peoples in strategic litigation has been helpful in gaining legibility and attention from the state. In an overview of indigenous rights litigation in Africa prominent law scholar Jeremie Gilbert highlights "that the legal category of 'indigenous peoples' has allowed communities (sometimes divided by colonization) to reassert their rights, using the concept of 'indigeneity' as a means of defining themselves as peoples entitled to specific rights" (Gilbert 2017, 284). Similar to Dorothy Hodgson's findings, Gilbert argues that indigeneity is a field of politics wherein

peoples use ‘indigenous rights’ in relation to other stakeholders in an attempt to assert rights in response to the histories of discrimination they have faced. In these conditions we can think of indigenous rights as an emergent discourse of rights assertion.

The South African context provides a particularly complex political and legal environment to study indigenous rights emergence. For example, anthropologist Richard Lee explains that anyone writing about Khoisan peoples today needs to account for centuries of “ideologically saturated discourses” that “form an implicit background of unstated assumptions, predispositions, and prejudices” (Lee 2003, 85). These discourses are characterized by a range of attitudes from historical colonial contempt, a mixture of paternalism and respect, and a contemporary uncritical romanticism and admiration (Lee 2003, 86). Lee’s insights have a wider applicability in land rights struggles, as the case studies in this dissertation will suggest. Traditional leaders, customary communities, indigenous peoples, and their struggles need to be understood in relation to the wider historical, political, and legal context in which they are taking place. Moreover, none of these struggles can be understood in isolation; rather they need to be understood in inter-articulation.

The theory of articulation I use derives from Marxist cultural theory and refers to a unity formed between two different elements that connect within structured relations. One must ask, under what conditions do these elements come together? As cultural studies theorist Lawrence Grossberg explains, “[a]rticulation links this practice to that effect, this text to that meaning, this meaning to that reality, this experience to those politics. And these links are themselves articulated into larger structures, etc.” (Grossberg 1992, 54). The theory of articulation has notably been used to analyse the shifting structural relations between race, class, and nationalism in South Africa (Hall 1980) and more recently to explore how inflections of popular

anger animate reconstructions of race, class, nationalism, gender, and sexuality in South African politics (Hart 2007, 98).

The concept of assemblage, used in combination with articulation, offers a way to interrogate how indigenous rights are in some contexts co-constituted through claims voiced in terms of to customary law as they are asserted and mobilized in specific struggles over property.

I understand assemblage

as a broad descriptor of different historical relations coming together . . . as an ethos oriented to the ‘instability’ of interactions, and the concomitant potential for novelty and spatiotemporal difference . . . and as a concept for thinking the relations between stability and transformation in the production of the social (Anderson et al. 2012, 171–173).

Geographers Anderson et al. (2012) draw from Gilles Deleuze to define assemblage as “both the provisional holding together of a group of entities across differences and a continuous process of movement and transformation as relations and terms change” (2012: 177 citing Deleuze and Parnet 1977). From this perspective, custom and indigenous rights are not approached as ideologies imposed ‘from above’, but rather as emergent in and through relations of power between dispersed actors.

The theory of assemblage perhaps overly accentuates the unwieldy characteristics of neoliberalism and risks emphasizing dispersed power and networked relationships at the expense of identifying structured forms of power (see Brenner, Peck and Theodore 2010, 201). In the context of African land struggles, for example, anthropologist Pauline Peters identifies in scholarship on customary law a tendency amongst post-structuralist researchers to seek the flexible character of custom and to celebrate people’s agency in negotiations over land. This approach has a proclivity to ignore the persistent and structural inequalities characteristic of ‘traditional’ forms of land governance (Peters 2013). I can avoid these pitfalls, however, by

reading processes of articulation within assemblage (Featherstone 2011), which entails examining the relations between actors, the means and technologies through which they aggregate and mobilize, and the wider social, economic, cultural and legal conditions that enable their social and political organizing for justice against perceived inequalities.

One of the significant outcomes of the engagement with indigenous rights in the South African context are the possibilities it has created for new assertions of culturalized rights - rights legitimated through appeals to cultural practices and resources in the context of a global proliferation of 'meaningful difference' (Coombe 2005, 2017). Moreover, Farida Shaheed, United Nations Special Rapporteur in the field of cultural rights, has explained the links between human rights and cultural heritage protection, describing specifically the inter-connected relationship between the protection of cultural heritage rights (including tangible, intangible, and natural heritage), human dignity, identity, and membership in a community and society (Shaheed 2011). Indigenous peoples have historically referred to cultural rights as means to challenge state-based frames of reference and negotiate through and push the boundaries of the existing international human rights system. Asserting their cultural rights, for example, was one means by which indigenous peoples gained recognition as peoples through the UN without having to ascribe to a state personality (Koivurova 2008). In recent years, for example, there has been a turn to culturalized rights claims in international forums as indigenous communities assert their role as stewards of land and resources in what are now referred to as biocultural rights (Bavikatte 2014).

In South Africa, cultural rights are protected in the Constitution and are being re-asserted in new ways in social struggles and jurisprudence. In practice, traditional leaders have used cultural rights provisions to assert their authority over land and, according to critics, to further

entrench traditional territories that mirror apartheid spatializations. Yet, as I show, through litigation as well as through social activism, we also witness the use of cultural rights as a means to legitimate and make legible collective land tenure relations that have otherwise been neglected in land reform law and policy. For example, land tenure is being understood widely as central to local identities, encompassing rights to land and minerals, local self-determined governance practices, and as expressions of a re-vitalized customary law. Such new territorializations challenge apartheid territorialisations and pluralise forms of jurisdiction. In this context the focus is not on whether or not authentic indigenous peoples or communities exist, but rather on the processes through which they are constituted as collectivities with rights and entitlements to land. As legal anthropologist Rosemary Coombe explains,

Indigenous resurgence and culturalized identities are not merely derivative by-products of neoliberalism, but may be accomplishments of political articulation under conditions of globalizing power, diverse markets, and new forms of governmentality that provide distinctive fields of opportunity and instill new aspirations (Coombe 2017, 266).

Transnational Indigenous Peoples' rights and the culturalised assertions of land rights to which they have given rise are transforming territorial governance in South Africa and may have implications for indigent rural peoples elsewhere. Under conditions of neoliberalism, territorial designations shift or are re-created as new actors and institutions interact with prior forms of territory and transform them through new forms of recognition (Hale 2012, Reyes and Kaufman 2011). I demonstrate that the transnational indigenous rights movement, and the vernacularization of rural and indigenous rights in South Africa, are unsettling both long held assumptions and new assertions about customary law and its territorialisations..

## 1.6 Methodology

To identify the diverse relations of power and the territorialized forms of government and subjectivity constructed through them in the South African context, I draw on a wide range of sources, interviews, and observations which might be considered my primary research data. I developed initial relationships with researchers and advocates in South Africa during an internship I completed at the Legal Resources Centre in Cape Town during my Master's research in 2010. This experience led to further collaborations developed during my doctoral research through two trips to South Africa as a visiting researcher at the Centre for Law and Society (CLS) at the University of Cape Town.<sup>6</sup> My work with CLS was motivated by a broader political belief in the importance of collaborating with researchers who have a long and intimate history with the context and conditions that form the basis of my research. I established a connection with an existing research institute with the intention of developing my research questions through discussions with South African researchers who have a long history working in rural land rights struggles and strong relationships with the communities at the centre of these. The first trip lasted 6 weeks (February to April 2015) and the second lasted 3 months (January to April 2017). During these trips I was based in the office and made myself available to assist in research that was being conducted at the Centre, but most of my time was spent pursuing my own doctoral research.

My secondary research data includes news reports, government policy papers, court judgments, submissions to state-organized public consultations on issues related to customary law and indigenous rights, and reports and presentations by South African NGOs. I also had

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<sup>6</sup> In 2016 the Centre for Law and Society that I worked with was re-named the Land and Accountability Research Centre, however the Centre was the same – it had the same director and same employees and was in the same building. The Centre for Law and Society was moved in name only to the Faculty of Law at the University of Cape Town.

access to documentation from the High Level Panel on Assessment of Key Legislation and Acceleration of Fundamental Change which includes Commissioned Reports, Roundtable Reports, Public Hearings Reports and transcripts from every province in the country. I conducted 8 interviews with lawyers, researchers and activists working in the field to supplement my document-based research and clarify my readings of these. I used the qualitative research software Nvivo to organize the material, code for trends across sources, and perform sophisticated text searches to identify the development of norms or discourse in land rights struggles. Nvivo helped to quantify the use of key phrases and terms across material produced by different institutions and actors. Importantly, with Nvivo I could track the development of ideas over time and develop an understanding of their relationship to the unique social and political conditions in South Africa. These findings informed my use of theory to describe ongoing movements, developments, and emergences throughout this dissertation.

The subject matter was approached with an ‘ethnographic imaginary’ (Forsey 2010, in Brady & Lippert 2016) to probe the conjuncture of forces present in my case studies (Li 2014, Wolford 2010). A conjunctural approach attends to how “multiple forces come together in practice to produce particular dynamics and trajectories” (Hart 2004, 97). Such research methods follow emerging trends in social science scholarship on assemblage in that it includes multiple sources to identify how connections are made and sustained between them (Fox and Alldred, 2015).

The method for this research presented a number of significant challenges, due largely to the almost endless amount of resources that I could include in my analysis of assemblages and the spatial and temporal scales through which they operate. For example, a change in temporal period changes your interpretation of events. New actors are introduced, new technologies are

introduced, new opportunities are opened that may have been previously unimagined. Due to the huge amount of available data, and my commitment to allowing myself to respond to the particular needs and activities of South African activists and researchers, during my dissertation fieldwork and writing, I often had a difficult time finding a place to stand in what always seemed like a quickly changing political and legal environment. Every topic that I explored in my research seemed like the tip of an iceberg. My method often felt like a way to identify micro-discussions without accounting for any real trends in land reform. Yet in the end, as I look back on the core chapters that make up this dissertation, I believe that I have developed a narrative that demonstrates some long-term trends in what often feels like a constant onslaught of policy proposals, court judgements, and reports of failed land reform.

By developing and maintaining a view of all the changes going on at once I found myself only marginally interested in what a judgement determined, for example, and much more interested in tracking the diverse politics and practices generated through its use and interpretation and the long-term potential and implications it had for legal change. Courtroom outcomes may represent significant victories, I learned, but they are incremental changes that will be read and re-read as social movements interpret them. Victories are also spatially and temporally defined, but if we can identify the forces, factors, and agencies that link victories, perhaps we will see that it is not in the victories, but in the movements and activities that happen between them that we will find successful social change.

## 1.7 Chapter overview

In the next chapter, Chapter Two, I cover the history of colonialism and apartheid in South Africa, beginning with the arrival of Dutch settlers at the Cape of Good Hope in 1652 and closing with the end of apartheid in 1994. The purpose of the chapter is to demonstrate the



constitutive relationship between law, power, and space, and to chart the history of colonial state formation. I describe the persistence of a racialized division between an assumed Universal modern law and a backward, customary other, a distinction made in law and fundamental to modern understandings of property (Bhandar 2018). I illustrate how this colonial mentality was expressed through constitutive relationships between colonial governmentalities and forced dispossession. The historical overview provided in this chapter raises the following question: can the new constitutional democracy facilitate the racialized spatial and territorial reconfiguration of the country?

In Chapter Three I introduce and describe the post-apartheid constitutional democracy. The 1996 Final Constitution (introduced by the African National Congress after the 1993 Interim Constitution) is explained in relation to global struggles for human rights. The influence of international human rights, I demonstrate, is clearly expressed in the Bill of Rights, which is entrenched in the Constitution. I explain the constitutional protection of land tenure rights and the constitutional imperative to introduce legislation for the purpose of realizing land reform as a measure of transitional justice. After introducing the Property Clause, I explain the link between cultural rights and the protection of customary law and traditional leadership, a relationship made possible by the protection of cultural rights in the Constitution and reconfigured in a transnationalized legal context. I conclude this chapter with a brief discussion of the limits of courts in provoking broad-based social and economic transformation, as argued by classic literature in socio-legal studies. A socio-legal approach to studying law and social change moves beyond legal functionalism to examine the indeterminacy of law and the work of intersecting and interconnected rights claims.

Chapter Four illustrates the indeterminacy of law and its effect on social change by explaining the origins and outcomes of land reform and by describing the construction of collective subjectivities at the conjuncture of law and political economy. I describe two socio-legal subjectivities that are produced, and their qualities defined, through land reform – traditional leaders and communal property associations – and the different collective land tenure relationships that are assumed and performed by each. Both traditional leaders and communal property associations have been plagued by shortcomings that are most clearly expressed in the resistance of rural peoples who challenge the claims of traditional authorities who attempt to assert themselves as owners of the rural lands within their demarcated territories. This resistance might be understood, I argue, as relationships of belonging derivative of the African philosophy of uBuntu, which provides inspiration for new ways of re-imagining property relations.

In Chapter Five I explain the significance of the *Richtersveld* judgement in the Constitutional Court. The judgement is widely regarded as the first judgement on the continent of Africa to refer to common law Aboriginal title as a basis for proving customary land rights. The case is also unique because of its interpretation within a broader movement for the recognition of Indigenous Peoples' rights in South and Southern Africa. This movement, I show, continues to grapple with the definition of the 'indigenous' in African contexts and disagreements over the applicability of indigenous rights continue to inhibit Khoisan peoples' struggles against dispossession while providing new forms of recognition for rural peoples more broadly.

The *Richtersveld* judgement created the conditions of emergence for a new legal category of living customary law which, as I explain in Chapter Six, has been taken up by a range of actors for a variety of different uses. In addition to being used by the Constitutional Court, living

customary law is a concept used by empirical researchers and mobilized in social activism. A defining characteristic of living customary law in these areas of use is its articulation with culturalized rights claims, a significant development that links South African land reform activism with transnational discourses and norms and provides an opportunity to re-define land tenure relationships in ways that are not recognized in existing legislation. In these conditions, I argue, the work of living customary law needs to be understood as one component of the emergence of living law, through which we can identify the development of new means for understanding and characterizing communal land tenure relationships.

In the final Chapter Seven I focus on one struggle over land in the Eastern Cape to demonstrate the importance of the opportunities for rural communities opened up by both Constitutional Court decisions on living customary law and the political context of neoliberalism that contribute to the emergence of living law. The Xolobeni struggle and litigation underscores the qualities and effects of living law in two ways. First, by illustrating the potential role of transnational norms of indigenous rights, particularly the right to free, prior, and informed consent, in the struggles of rural peoples. Second, the struggles of the Xolobeni community against multinational mining interests, I argue, are re-configuring territories in conditions of living law, and are thus representative of new forms of territorialization in the context of neoliberal South African constitutionalism.

In the Conclusion I refer to the details to two different and recent court judgements to illustrate how the arguments in this dissertation help to interpret ongoing social and legal struggles in the country. I summarize each chapter in relation to different details of each respective case. I end by reflecting on one of the significant implications of the arguments presented here: that a recognition of legal pluralism and an emergent living law in contemporary

South Africa necessitates an engagement with forms of territorial pluralism. These overlapping legal geographies, and the social and political processes through which they are constituted, are not going to be erased through positivist visions of democratic constitutionalism. I consider how literature on “entangled territorialities” (Dussart and Poirier 2017) or territorial pluralism (Simeon 2015) might provide a useful means to engage with the ‘overlapping rights’ that have too long been identified as a barrier in land reform. This framework suggests that the future of land reform must include forms and processes through which old and newly constituted subjects can negotiate and deliberate their rights to land and to territorial forms of government.

### 1.8 Conclusion: Property in the margins

In order to fully understand the contours of contemporary struggles for collective land rights, we need not only to move from within the institutional baseline of human rights, we also need to unsettle a ‘centralist’ modern property paradigm (van der Walt 2009). Andre van der Walt, a globally renowned expert on property law, who was tasked with reconceiving property doctrine in post-Apartheid South Africa, explains that a centralist property paradigm privileges and naturalizes vertical and hierarchical sets of relationships. For example, it posits owners against non-owners and rests on the hierarchical nature of rights along an axis that moves from no rights, to some rights, to more rights. van der Walt argues, instead, that claims to justice can and should serve to unravel assumptions about the stability of property:

Justice often requires that property rules and practices be qualified or amended in a certain way, without thereby necessarily undermining or threatening the property regime consisting of rules and practices that constitute and uphold a particular distribution of property holdings. However, certain justice-driven qualifications of and amendments to the property regime are so fundamental that they cannot be accommodated within or explained in terms of the current doctrine – they require a rethink of the system, a reconsideration of the language, the concepts, the rhetoric and the logic in terms of which we explain and justify choices for or against individual security and systemic stability in the property regime (van der Walt 2009, 15)

He uses the example of eviction cases to show that the private property paradigm, while imagined to protect the exclusive rights of owners, is often challenged in court when more substantive issues such as economic inequality and historical injustice are debated in reference to the human rights norms enshrined in South Africa's Constitution. These debates often lead to upholding the right to housing for poor people, against the exclusive right of property owners. In the context of one of the highest levels of income inequality in the world and continued spatial segregation (to name but a few of the lasting scars of apartheid) the property struggles that are the focus of this dissertation may be considered 'marginal' in the sense that they are insignificant in the context of such widespread structural racialized inequality. Yet, as I hope will become clear by the end of this dissertation, such 'marginal' struggles are significant places of power and reform. Returning to van der Walt, marginality in property disputes is not weakness, rather "marginal positions in property can sometimes be quite powerful because of the social and political context" (van der Walt 2009, 24) on which they shed light and the inequities they reveal. Following van der Walt, I am interested in the conditions in which people are able to make claims, affirm property as a right, and the conditions and moments wherein their apparent marginality becomes a position of power. This analysis begins in the next chapter with an examination of colonialism, apartheid, and the nexus between law and space.

## 2 LAW, GOVERNMENTALITY, AND AGRARIAN POLITICAL ECONOMY IN COLONIAL AND APARTHEID HISTORY

### 2.1 Introduction: Spatializing Law in the Colonial and Apartheid Past

Contemporary land struggles in South Africa are the outcome of a history of migration, land occupation, conflict, and racialized control of subjects and territories and forced dispossession dating back over four centuries. Rather than attempting to review this long and complex history in full, I focus in this chapter on key moments in colonial expansion and legislative development. I read South Africa's history through literature on colonial land occupation and the development of racialized forms of governmentality. Most importantly, I illustrate the deeply spatialized character of colonialism and apartheid in South Africa to demonstrate the constitutive relationship between law, power and space (Blomley 1994). The analysis accounts both for the role of law in perpetuating extreme violence through forced dispossession and its role in governing chieftaincy through consent. By highlighting a colonial geography of violence, I demonstrate how law served to both legitimate forms of extreme violence – expressed most clearly in the forced dispossession of upwards of 3.5 million people during the infamous ‘black spot removals’ – and contribute to the emergence of colonial governmentality.

Three forces and their relationship animate the narrative of this chapter: agricultural political economy, colonial governmentality and forced dispossession. The forms of power expressed by colonial actors in South Africa and the political rationalities they constituted produced spatial expressions of power, which produced legal geographies. It was the spatial expression of law that enabled its contradictory character – as both a form of violent oppression and as a form of governmentality. Customary law has a key role in this narrative. Custom is historically bound up with strategies to both govern and to justify dispossession. Custom

emerged at the juncture between dispossession, governmentality, and articulations of race and property.

Colonial governments were principally focused on the control of land; the achievement of which depended on the forced dispossession of racial subjects. The explanation of colonial violence and dispossession by historian Patrick Wolfe is instructive of the fundamental link between land and colonization. He argues that land is central to ongoing processes of colonial dispossession, stating concisely: “[t]erritoriality is settler colonialism’s specific, irreducible element” (2006, 388). Importantly, he understands violence and forced dispossession not as a single event – or particular events isolated from a wider logic of government – but rather as a structure, constituted by, for example, a logic of elimination, the transformation of native title into individual title, and the creation of new forms of native citizenship (*ibid*). Moreover, the logic of colonialism can shift over time, thus narrating the “history involves charting the continuities, discontinuities, adjustments, and departures whereby a logic that initially informed frontier killing transmutes into different modalities, discourses and institutional formations” (Wolfe 2006, 402). Understanding settler colonialism as a structure demands that we then consider how it is constitutive of ongoing forms of violence and government. As I demonstrate in this chapter, colonial dispossession as a form of violence includes the creation and perpetuation of a dichotomized world between the colonised and colonizer wherein the colonized are denied land as well as their own humanity (Mamdani 1996; Fanon 1963 [2004]).<sup>7</sup>

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<sup>7</sup> Fanon’s work on decolonization can be used to illustrate the pervasiveness of colonial violence to the extent that the process of decolonization requires a violent response from the colonized. Only radical violence can overturn the colonial situation. He writes, “The colonized subject discovers reality and transforms it through his praxis, his deployment of violence and his agenda for liberation” (Fanon, 1963:21). Decolonization, therefore, implies nothing less than a total restructuring and reimagining of the colonized world that can be achieved only through a violent and continuous revolt against the colonizers. The return of land is essential to the process of decolonization: “For a colonized people, the most essential value, because it is the most meaningful, is first and foremost the land: the land, which must provide bread and, naturally, dignity” (Fanon 1963, 9).

Colonial dispossession, and the specific state practice of forced removals explained below, were violent expressions of colonial power, and central to the enactment of law. In these conditions, I explain, racialized subjectivities are constituted as the ‘other’ against which the colonizers identified themselves. Modern forms of property function as a key modality of colonialism to the extent that they are asserted as a universal object against which the colonized ‘propertyless’ are imagined. Property is one of the founding objects within what Peter Fitzpatrick calls the mythology of modern law; it is “the foundation of civilization, the very motor-force of the origin and development of society... What is being universalized here is a particular form of Occidental property. What is absent there can only be its precursors or savagery” (1992, 50).

Property laws and racial subjectivities developed in relation to one another in South Africa, as they did in much of the British colonized world (Bhandar 2018). It was through the act of colonial appropriation that modern property laws emerged (Bhandar 2018, 3); through processes of colonial dispossession, property and racial subjectivity were articulated to produce what Brenna Bhandar calls ‘racial regimes of ownership’ (ibid). Race in the settler colonial context, explains Bhandar, “was and remains subtended by property logics that cast certain groups of people, ways of living, producing, and relating to land as having value worthy of legal protection and force” (2018, 8-9). Colonialism thus produced specific kinds of inscribing land as the property of settlers while racialized peoples were imagined as outside of the ambit of property. In South Africa, as explained below, racialized peoples were made landless pariahs on their own territories through legal enactments that protected the private property of white settlers. Throughout the history of colonization and apartheid liberal property laws evolved in dominant centres of colonial settlement, as explained below.



The framework of colonial governmentality is useful for conceptualizing the ongoing processes of colonialism and its dispossessions. Colonial governmentality draws from the study of the rationalities, technologies, and subjects of government as practice (see Inda 2005). It explores the “*targets* of colonial power (the point or points of power’s application; the object or objects it aims at; and the means and instrumentalities it deploys in search of these targets, points, and objects) and the *field* of its operation (the zone that it actively constructs for its functionality)” (Scott 2005, 25). Both the targets of colonial power and the field of its operation are diverse in South Africa and defined more by their spatial heterogeneity than their territorial homogeneity, as is demonstrated below through descriptions of the different strategies used to govern populations in constant flux and movement, and the different subjectivities – chiefs, labourers, migrant workers – illustrate. The history of Dutch and British migration and settlement further explains the diversity of territorial governance. The rise in colonial governmentality, I argue, happened in parallel with a sharp increase in colonial violence, expressed most potently through the forced dispossession and the internal incarceration of racialized people by the apartheid state. As legal geographer Nicholas Blomley explains, violence is constitutive of the relationship between law and property, and plays an important role in the creation of space:

Such violences were not simply a secondary adjunct to the discursive realm (for example, the instrument through which ideology was put into practice), but were of importance in their own right as a vector of colonial power. Again, violence was not only an outcome of law, but its realization. The establishment of a Western liberal property regime was both the point of these violences and the means by which violent forms of regulation were enacted and reproduced. Space, property, and violence were performed simultaneously (Blomley 2003, 129).<sup>8</sup>

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<sup>8</sup> In regards to a western liberal property regime, western here refers to the form of private ownership of property characteristic of British imperialism, liberalism refers to an assumption that violence exists outside of law (thus law is the organized and modern centre), and thus the violence of dispossession is assumed to be a naturalized fact through which the backward other is expelled.

What unfolds through the narrative of this chapter is an iterative progression of colonial governmentality, whereby political rationalities emerge to focus on a multiplicity of points of intervention – from an early focus on land and the control of labour, to the legal and racialized regulation of everyday life of the colonized population under apartheid. Significantly, however, this is a story of the repeated failures of colonial governmentality. As Nikolas Rose and Peter Miller write, “[w]e do not live in a governed world so much as a world traversed by the ‘will to govern’, fuelled by the constant registration of ‘failure’, the discrepancy between ambition and outcome, and the constant injunction to do better next time” (2010, 288). The failure of colonial government leads to the generation of ever more sites of intervention, of control, of attempts to conduct the practices and mould the attitudes of African peoples.

## 2.2 Early Colonial Occupation: Administration of Chiefdoms and Labour (1795-1912)

Colonial settlement in South Africa began in the 17<sup>th</sup> Century. In 1652 Dutch explorers arrived at the Cape of Good Hope and established a post for the Dutch East India Company. When the Dutch settled in the Cape, they came into contact with two main cultural groupings, the Nama (who were referred to as ‘Hottentot’) and the San. The Nama herded cattle, sheep and goats while the San were hunter-gatherers who lived further inland from the coast and in much smaller groupings than the pastoralist Nama. Dutch settlers began calling the San *Bojesman*, which is the origin for the label *bushmen* that is still in use by some today. Both groups spoke a language distinct from the peoples who spoke Bantu languages (such as the languages spoken by Xhosa or Swazi peoples) and is commonly identified by their use of clicks. The names Bushmen and Hottentot are both derogatory, and the names Khoi Khoi and San have replaced each respectively

(Lee 1979, 29-30).<sup>9</sup> It is estimated that when the Dutch arrived in 1652 there were 150,000-300,000 Khoi Khoi and San living within the whole of Southern Africa from the Zambezi Valley to the Cape. The San had occupied this area for an estimated 11,000 years, while some anthropologists relate fossils to the San dating 40,000 years (Lee 1976, 5).

Over the next century settlers came in increasing numbers and impacted the Khoi Khoi and San peoples in increasingly violent ways. They brought in slaves from Asia, Madagascar and Mozambique and built an ever-expanding settlement. White settlers called *trekboers* were pastoral and semi-migrant farmers who moved from the Cape settlement and into the interior, expanding their farmland and taking over territory previously occupied by Khoi Khoi and San peoples who, despite initial and short-lived good relations with the first settlers, were being pushed off their land and overtaken (Thompson 2014, 46). In addition to occupying their land the settlers raided the livestock of the Khoi Khoi pastoralists, who were eventually forced to work on the farms of the trekboers in a form of coercive labour tenancy. The San peoples suffered degrees of violence not experienced by other groups in South Africa. Anthropologist Richard Lee explains:

The San were subjected to genocidal warfare at the hands of the Dutch settlers, the ancestors of the present-day Afrikaaner rulers of South Africa. Decade after decade, from the 1690s to the 1830s, the San were hounded by the settlers and driven to take refuge deep in the desert or high in the mountains. In the eighteenth century the Dutch governor at the Cape regularly sent out vigilante units called commandos, whose task it was to hunt down the San, kill the men, and lead the women and children into slavery on white farms. The commandos were required to file careful reports on the numbers killed and captured, and these reports... grimly document the campaigns of extermination (Lee 1979, 32).

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<sup>9</sup> Both names however have been applied to these groupings and whether or not peoples self-identify as KhoiKhoi or San is another issue. As Richard Lee explains, in the 1970's when he was doing his fieldwork there were more than a dozen self-identified terms used by different groups of people and none of these terms were San (Lee 1979, 30). During my fieldwork, for example, peoples referred to themselves as Khoisan, and others identified as bushmen.

In addition to this genocide Khoi and San peoples suffered disproportionately from new diseases, particularly smallpox; Bantu peoples did not suffer the same fate.

The British captured the Cape from the Dutch in 1795. At this time the value of the Cape Colony was simply the location of the peninsula in relation to Asia and served an expanding global British colonial empire. For the early 1800's the majority of settlers, Dutch and British, remained within the Cape settlement, however, in 1835-40 Voortrekkers (Boer pastoralists) unhappy with British colonial administration left the Cape Colony and moved further into the interior. By 1840 about six thousand Afrikaner men, women, and children had left the Cape looking for land to settle beyond the Cape colony and the control of the British (Thompson 2014, 88). What is now known as the Afrikaner Great Trek lasted until 1854.

Despite hostilities between British and the Dutch settlers the British continued to expand, with a wave of new arrivals in 1820. The British colony of Natal was established in 1843 and five thousand new settlers arrived from Britain and moved to the Natal between the years 1849 and 1851. African peoples also moved to the Natal in large numbers, and it was in the context of quickly changing and expanding settlement that the British introduced measures to 'control' the African population. To this end the Natal colonial government established reserves (which it called *locations*) for Africans and designated the rest of the colony for white settlement. The distribution of land of course was radically unequal. Despite the African population outnumbering the settlers by upwards of 15 to 1, "[b]y 1864, there were forty-two locations, with an area of 2 million acres, and twenty-one mission reserves, with 175,000 acres, out of the total colonial area of 12.5 million acres" (Thompson 2014, 97). It is important to note that at least half of the African population did not live on reserves, however they did live on what was now

‘crown’ land or land owned by white farmers and were forced to pay rent or provide labour for settlers.

Efforts to control territory through Trust tenure marked a significant development in property law, particularly in the Natal province. In Natal the British Crown acquired land for the purported benefit, settlement, and support of African peoples through the *1864 Proclamation* which placed specific territories in Natal under the control of a Trust managed by the Lieutenant-Governor and the Executive Council. The *Natal Native Trust* was used to hold land for the use of identified traditional communities. Importantly, as per the Natal Code and the 1864 Proclamation, trustees were empowered to collect rent from ‘native squatters or occupiers’ on crown lands and remove peoples not deemed acceptable; in effect African people found themselves to be squatters on their own land (Xaba 2016).

Afrikaner farmers continued to live in an area called the highveld and over time established the Orange Free State as a republic. Furthermore, they established the Transvaal in 1870. Both were Boer republics separate from British control. As settlements were founded conflicts between the Dutch and British settlers were common. In 1877 the Transvaal republic was annexed by the British, triggering an internal rebellion, and in 1880 Boers in Transvaal overpowered Britain, leading to the first Anglo-Boer War which lasted from 16 December 1880 until 23 March 1881. Hostilities between Southern Transvaal chiefdoms and white settlers of the Transvaal borderland continued from 1881-1884. The conflict led to migrations of both Bantu peoples and settlers, who encountered Khoi Khoi and San peoples and claimed more of their territories.

Governing through the chieftaincy was a colonial strategy introduced in the late 19<sup>th</sup> Century. Colonists learned that Bantu societies had their own systems of governments, wherein

chieftaincies were one form of authority. Realizing the material inability of the colonial state to impose direct autocratic rule and understanding the conflict that would likely emerge from such an imposition, colonists sought instead to develop a model of “define and rule” (Mamdani 2012). In other words, a form of government that defined already existing authorities and gave them enhanced power to govern over rural populations, thus drawing an existing form of traditional government into the fold of colonial strategy. The first administrative attempts to govern the power of chiefs can be dated back to 1885 when the Deputy Commissioner introduced policy to ‘promote peace and order’ and sought to define, as well as restrict, the power of chiefs in relation to colonial administration (Schapera 1970).

In addition to introducing measures of indirect rule the colonial state began imposing restrictions on a growing African farming economy. During the late 19<sup>th</sup> Century and early 20<sup>th</sup> Century white farmers were struggling to gain an advantage over Black African farmers who were a competitive force in the agricultural economy. In response to growing pressure from Afrikaner farmers, legislators in the Cape began programs of social engineering to undermine the ability of potential labourers to become autonomous and self-supporting peasants while at the same time retaining labourers who could work on the farms of white land owners. They did so by circumscribing their “status so as to transform them from ‘independent’ squatters, lessees, or sharers to dependent, wage-earning servants” (Bundy 1979, 134). In 1894 anti-squatter laws were introduced in the *Glen Grey Act*, which allowed only those working in fields to stay on the land owned by their employers. Fundamentally the law undermined the position of squatter-peasants (Bundy 1979, 135). As historian Colin Bundy explains, “[t]he anti-squatting laws and practices in the Cape had as their most obvious effects first, the evictions of share-croppers and lessees, and secondly, the surrender by thousands of these of their relative independence in the

form of their altered status, as they became wage labourers or labour-tenants" (1979, 137).

Regulating labour functioned concurrently and constitutively with colonial strategies to undercut the property relations of Africans and re-defined territory as the property of white settlers.

In the first decade of the 20<sup>th</sup> Century the speed and scope of white farming increased dramatically, and as an effect land values increased and more market opportunities emerged for farmers (Bundy 1979, 115). The changing political economy led to the introduction of new legislative pressures on the African peasantry. Further restrictions on access to land were imposed, taxes and rents were raised, and various forms of 'squatting' were legally defined and controlled (Bundy 1979, 240). 'Squatting' is a legal term introduced at this time to create a new subject position and regulate previously 'customary' tenure practices, such as sharecropping and tenancy. Restricting the movement of migrant labourers and regulating where they lived went hand in hand with the development of new forms of governmentality directed through the African chieftaincy and focused on regulation of customary law through practices and technologies of reification. By the end of the 19<sup>th</sup> Century the Administration had deprived chiefs of political independence, undermined their judicial authority and required them to perform new duties such as collect taxes for the colonial government (Delius 2008, 229).

Controlling labour did not translate directly into blunt forms of territorial control until the early 20<sup>th</sup> C. In 1905 the South African Native Commission (established in 1903) released a report on 'native affairs' in which 'scheduled areas' for native African settlement were introduced by regions defined in geographic terms in a Schedule of the Act (Robertson 1987, 121). This was the first official report promoting legislated segregation. The South African Act was introduced in 1909, which created a colonial order whereby a pseudo-democratic system operated for the white minority while an authoritarian order of indirect rule was operated through

African ‘chiefs’ – people found to be leaders with authority and legitimacy in rural communities.

Political scientist Clifton Crais describes the strategic use of chieftaincy for the settler colonial government:

Europeans and especially early colonial officials very often found African polities to be exasperating and scarcely intelligible. One thing seemed reasonably comprehensible, that is most easily translatable into their own political epistemologies: that there were some men of elevated status who wore and laid claim to the skins of leopards and lions (2006, 725).

Crais illustrates the unsophisticated colonial logic of government that motivated the development of colonial strategy; however, as will become clear below, the methods and legislation introduced to sustain this model of colonialism was far from simple.

In the early 20<sup>th</sup> Century the idea that African chieftaincies naturally functioned as autocratic regimes began to emerge, due in part to the growth and strength of the Zulu kingdom dating back to the early 19<sup>th</sup> C. During the 19<sup>th</sup> Century the Zulu kingdom in what is now known as KwaZulu-Natal emerged as a centralized and authoritarian political system. The Zulu kingdom rose in power from 1816-1828 with such force that it contributed to a period of migration and upheaval throughout Southern Africa. Under the leadership of Shaka it established its dominance. As historian Peter Delius explains, the political system of centralized autocratic power that characterized the Zulu kingdom was unique to other chiefly systems in other societies (2008, 217). However, the influence of the Zulu kingdom was significant because it became the model of chiefship that white officials and legislators recognized and sought to reproduce across the country through legislation (Delius 2008, 218). The British effectively dissolved the Zulu kingdom in 1879, however its influence as a model of centralized chiefly rule was by then firmly established.



Colonial policy produced a legal geography of political authority by aligning space with chiefly jurisdiction and authority. Early colonists were confronted with dynamic and changing African societies with their own systems of government that had developed over time (Delius 2008, 216). Whereas political boundaries of chiefly authority in pre-colonial South Africa were in constant flux and even overlapped, colonialists found this “political landscape unintelligible and untenable” and in response colonial policy sought to flatten out and simplify the political landscape (Crais 2006, 729). Colonial policy identified and demarcated spaces of chiefly political control and delineated positions of authority between chiefs, sub-chiefs, and headmen. By aligning space and authority colonial state government “presented a new conceptual map of power that dovetailed with the colonial definition of ‘custom’”. It located authority in the body of a person who could be fixed within schematic political diagram” (ibid). Importantly, as state formation produced a simplified and flattened grid of legibility, “other sources of authority entered into the prison house of irrationality, locked into the official discourse of superstition” (ibid). In other words, despite the state efforts to bring the chieftaincy into new forms of colonial government, ‘customary’ forms of authority and law remained the measure against which the universal modern law was enacted (Fitzpatrick 2003).

Attempts to define space and govern chiefly power (as well as the further strategies to control African labour and production, explained in the next section) are examples of colonial material processes contributing to the violent re-spatializations of the country, a process legal geographer Nicholas Blomley persuasively describes through his analysis of how the frontier, the survey, and the grid constituted material expressions of colonial violence (2003). In other words, the materiality of colonial violence is expressed through the introduction of technologies of identifying and making legible subjects and landscapes for appropriation, occupation, and

control (Blomley 2003, 135). As a colonial strategy, territorial government under an elevated chieftaincy was secure when the Union of South Africa was created in 1910. When the Union of South Africa was established those classified as white or European made up about 20% of the total population in South Africa (Bienart and Dubow 1995, 2).

### 2.3 Late colonial occupation: The South African Union and the *Native Land Rights Act*

The Union government established an apparatus to create and naturalize a bifurcated state, whereby the Union Constitution granted parliamentary democracy to the white minority while the black majority were subjugated by authoritarian administrative rule. The Governor General was at the apex of authority in the administrative system, wherein African society was presented as ‘traditional’ and governed by chiefs in a system of feudal hierarchy (Klug 2010, 8-9). The Union produced legislation to restrict the movement of Africans. Under the 1911 Native Labour Regulation Act black workers were denied freedom to move or find employment other than that tied to white farmers on whose land they lived, without first obtaining the permission of state administrators (in the form of a pass) (Southall 1983, 25). These changes emboldened resistance to the colonial government; in 1912 the South African Native National Congress (later the African National Congress), was formed by a black resistance movement.

When the Union Government introduced the *1913 Native Land Rights Act* chiefs, territory and forced dispossession were drawn into a more tightly legislated relationship. As Solomon T. Plaatje (the first Secretary General of the African National Congress) famously wrote, “[a]waking on Friday morning, June 20, 1913, the South African native found himself, not actually a slave, but a pariah in the land of his birth” (Plaatje 1914, in Crais and McClendon 2014, 201). The Act introduced ‘scheduled native reserves’, constituting only 7% of the country,

for African collective landholding. It was illegal for Africans to own land outside of these reserves.

The *1913 Native Land Rights Act* (herein the *Land Act*) set in motion the slow disintegration of African control over land, further impacting where Bantu and Khoisan peoples lived and how they profited from their agricultural labour. As in earlier decades, this legislative change was motivated in part by the political pressure of poor white farmers who feared that African peasants were gaining too strong a foothold in agriculture and wanted not only to undermine their competitive ability but also to create a permanent class of labour tenants (Chanock 2001, 365). The *Land Act* represents a growing desire to stifle this competition and give white farmers a massive advantage in a quickly growing economy (Bundy 1979, 239). As historian Martin Chanock explains, "the debate about tenure (and the *Land Act* in general) was linked to the broader question of what role Africans would have in the market, and how far law and policy would be constructed unequally to structure, and to limit, their market participation" (Chanock 2001, 386). These legal interventions represented a hardening political rationality that targeted on how Africans ought to own and use land and how they ought to participate in the agricultural economy.

The *Land Act* did not result in the full dispossession of black people but rather produced new kinds of dependence upon white farmers. Africans were permitted to remain on land owned by white farmers but only if they supplied labour on these farms. Black farmers were no longer able to lease land, and as a result farms worked on by black sharecroppers became the leased property of poor white farmers (Chanock 2001, 366). In this new context they could work as tenant-labourers or herdsmen. In some cases, sharecroppers were permitted to live on land and cultivate it outside of reserves if they gave half of their annual crops to white landowners

(Southall 1983, 24). Black farmers and sharecroppers were presented with the choice of either becoming servants or moving from their homes to find land elsewhere (Bundy 1979, 230), creating a system of indirect forced labour:

[t]he 1913 Land Act sought to arrest the tendency towards a bipolar stratification (farmers and workers) and to preserve instead an under-developed peasantry: a peasantry whose productive capacity had been so inhibited, whose access to land so confined, whose access to markets rendered so unfavourable, that its members must have recourse to labour for white employers even at the very low wage levels prevailing (Bundy 1979, 242).

Changes in labour and land tenure relations did not occur in all places abruptly, however. The Courts rarely enforced the *Land Act* and even when they did convictions were rare. Historians William Beinart and Peter Delius (2014) argue that the Act was “more an example of enabling legislation and soft power” (2014, 668). Similarly, Michelle Hay explains that “dispossession was cumulative, better understood as a slow loss of rights to land rather than a single, momentous experience of forced removal” (Hay 2014, 747). This was due in part to the limited resources that many colonial governments had. Historian Sara Berry characterizes the quality of colonial rule in sub-Saharan Africa as ‘hegemony on a shoestring’ to illustrate the scarce resources that colonial governments had at their disposal (Berry 1992). Yet the *Land Act* clearly provided new opportunities for white farmers to benefit from the appropriation of land and the exploitation of African labour power and thus facilitated and legitimated further colonial territorializations.

Significantly, the *1913 Land Act* set in motion the development of a legal and administrative framework demarcating territorial jurisdictions for the governance of land in the country. New technologies of government were introduced to define territory and justify dispossession. Colonial expansion included violence and legal measures such as annexations, surveys, privatization of title, and the creation of new governmental authorities to regulate newly

demarcated land parcels (Delius and Beinart 2013, 669). This was the beginning of a new form of colonial governmentality, the introduction of which was possible only because of the previous century of dispossession and efforts to undermine the growth of an African agricultural class. This new form of government, one in which the state developed further strategies to include the African chieftaincy in state projects of taxation and the management of migration, went hand in hand with the development of new forms of dispossession.

New roles and responsibilities for chiefs appointed as authorities in the ‘scheduled native areas’ were introduced in the early 20<sup>th</sup> Century. In 1920 the Native Advisory Council was established and in 1923 the *Urban Areas Act* was introduced to regulate African movement and settlement in urban areas by stipulating that black people could only be in these areas temporarily (the *Urban Areas Act* was amended in 1930 and 1937 to stop the movement of labour tenants to cities (Bundy 1979, 234). In 1927 the *Native Administration Act 38* was introduced as the first unified nation-wide law that legislated the authority of Chiefs by incorporating them into an administrative and legal domain. The *Native Administration Act* set the tone of a new authoritarian and colonial era role for chiefs as authorities over subjects within their territories (Delius 2008, 223). Under the 1927 *Act* the sitting president of the colonial state was appointed as the “Supreme Chief of all blacks in the Republic” (Devenish 1987, 27). While some African subjects welcomed the ‘restoration’ of chiefly authority, many were deeply critical of the lack of democratic principles in the Native Administration Act (Devenish 1987, 29). New laws were introduced in quick succession, creating a legal framework of overlapping legislation, each focusing on different aspects of chiefly authority, movement of labour migrants, and territorial control.

There were significant legislative developments in the 1930's that effectively restrained the power of chiefs in relation to white colonial authorities and strengthened their position over peoples living within the reserve areas. The *1936 Native Trust and Land Act* established the South African Native Trust (SANT) which became the trust for all land reserved or set aside for the so-called 'Natives', as well as all crown land in scheduled areas (Delius 2008, 227). Under trust tenure access to land was distributed to households who had to pay rent or tribal taxes to stay on their land. The *Native Trust and Land Act* also extended the authority of the government by granting the Governor General authority to regulate how and under what conditions Bantu peoples might occupy or use land in the scheduled reserve areas by implementing the new trust system which gave white officials the power to allot, determine the size of, or cancel allotments of land to African peoples (Delius 2008, 228). SANT purchased areas of land bordering the reserves to slightly expand them to create territories for peoples newly dispossessed by the state from elsewhere in the country and forced to live in the reserves. These areas were consolidated with the existing reserves, increasing their size from 7% of land area in the country (as defined in the *1913 Native Land Act*) to 13%. Under the *1936 Act*, like the *1913 Land Act*, Africans were forbidden from owning land outside of scheduled areas. Peoples forced to live in these areas were thus put under the authority of existing chiefs whom they did not identify with or recognize as legitimate leaders.

The constitutive relationship between law and political economy at the time is apparent in the effects of forced dispossession, and the ways that the threat of dispossession was integrated into labour laws. For example, over time more and more people moved (forcibly) to reserves, putting pressure on resources within these demarcated territories. As conditions worsened the pressure on Chiefs became more intense. An effect of these conditions is that Chiefs became

more authoritarian in their effort to retain power, and women and youth in particular began to feel their access to land was undermined in this new context (Delius 2008, 226). These conditions set the stage for the introduction of legislation reinforcing the power of chiefs, described below. Also, in 1936 Labour Tenant Control Boards were created with the power to emend or terminate contracts between farmers and labour tenants, drastically reducing security of tenure for labourers living on farms (Bundy 1979, 234). The threat of forced dispossession was also woven into labour legislation in other ways. For example, the *1932 Native Service Contract Act* introduced new labour tenancy regulations, stipulating that labour obligations applied not only to the father but to the whole household, including children. If anyone in the household failed to fulfill their labour obligations to the farmer on whose land they were residing, the whole household could be evicted (Chanock 2001, 400).

The reserves were not defined by an absence of property. They were the focus of legislative attempts to ‘recognize’ forms of ‘customary’ land title for peoples who had long lived in the areas and for the thousands of displaced peoples who lived in the reserves. After the Union government formed in 1910 the South African Native Affairs Commission considered two different models for ‘recognizing’ property rights within the reserves, a model of individual title (as was practiced in the Cape) and a trust model (as was practiced in Natal). The Union originally decided to focus on realizing individual title by surveying land into individual plots. However, the colonial state decided that surveying land took too much time and resources and moved to legislate a uniform trust model of ownership in the *1936 Land Act* (Robertson 1987, 126). It is difficult to understate the significance of this shift as it marks a move from the widescale institutionalization of individual titles for peoples in scheduled areas (reserves) to the normalization of trust land under the authority of a chieftaincy. It marks a shift from developing

colonial technologies of government that identified individual plots of land as the property of African people to focusing instead on governing the authority of chiefs and determining the nature of property relations through them.

## 2.4 Apartheid

Apartheid was a particularly extreme model of colonial racialized government and represents the further formation of what legal geographer Sandy Kedar calls an ‘ethnocratic settler state’ (Kedar 2006). Ethnocratic settler states, explains Kedar, refers to a context wherein “[e]thnicity, rather than citizenship, constitutes the main criterion for distributing power and resources” (Kedar 2006, 403). Furthermore, “[t]he project of territorial expansion and domination is presented as something ‘taken for granted’ or as an ultimate ‘truth’ upon which society is built” (Kedar 2006, 404). There is an enduring role of law in perpetuating colonial violence in this context. Moreover, the establishment of new land regimes in ethnocratic settler states is a key form of government. Land regimes in ethnocratic settler states are

constructed on a violent dispossession of natives. The violent acquisition is then translated into legal arrangements that represent the ethnocratic power structures and at the same time obscure the dispossession. This legal-cultural order reduces the need for direct force and legitimizes the unequal ordering of space and society (Kedar 2006, 437-438).

Apartheid in South Africa represents a distinctly powerful illustration of the establishment and maintenance of an ethnocratic settler state. It is distinct however for the extent to which ‘tribal’ subjects were folded into colonial government and allotted powers to make decisions over ethnically defined subjects within demarcated territories; moreover, they were made the authors and authorities of custom.

In 1948 the Nationalist Party was elected with a platform to establish a system of racialized segregation called apartheid. Apartheid ideology was based on the purported



‘recognition’ of a ‘mosaic of culturally distinct peoples’, including White (Boer and Britain), and Black i.e. Bantu (Xhosa, Zulu, North and South Sotho, Tswana, Swazi, Shangaan, Venda, and Ndebele). According to some apartheid ideologists, separate development was the only way to recognize this diversity (Southall 1983). The Nationalist Party set out to entrench racial differentiation. The earlier forms of segregation were amplified by making African subjects the ‘citizens’ of ‘self-governing’ bantustans, the administrative and ideological edifice of which were built upon the introduction of ‘scheduled areas’ and the *1913 Land Act* (Gordon 1989, 52).

Chiefs were increasingly allotted more authority under apartheid (Delius 2008, 229). In 1951 the *Bantu Authorities Act* was passed to clearly identify the jurisdiction of Chiefs in the new apartheid state. It stipulated that the Governor General may "with due regard to native law and custom and after consultation with every tribe and community concerned, establish... a Bantu tribal authority" (section 2(1)(a)). The *Bantu Authorities Act* established a hierarchy of authorities that included local, regional, and area jurisdictional authorities. The legislation was, in part, founded on the idea that it was ‘restoring’ the power of Chiefs, and used Bantu customary law as a legitimating source for “bolstered tribalism and tribal authority” (Gordon 1989, 52). The idea that there was an ‘authentic’ custom to be ‘restored’ and ‘protected’ legitimated colonial strategy. In this period a regime of colonial governmentality begins to take a more complete form in which colonial power operated

in such a way as to produce not so much extractive-effects on colonial bodies as governing-effects on colonial conduct. For what was at stake in the governmental redefinition and reordering of the colonial world was... to design institutions such that, following only their self-interest, natives would do what they ought (Scott 2005, 43-44).

In these conditions, chiefs were given specific roles to carry out the work of the colonial state, assuming the legitimacy of the ‘tradition’ that legitimated their ‘customary’ authority.

Chiefs took on wide responsibilities as agents of the state. For example, Bantu authorities were given the power to set up courts to deal with disputes, impose tribal levies (taxes on peoples within their jurisdiction), and participated in the administration of the influx control program - designed to limit Black movement into urban areas - by granting passes to those subject to their control. The discretion to withhold passes - which they exercised with little oversight - granted them incredible power over populations within their jurisdictions (Delius 2008, 230). Thus, chiefs were involved not only in the governance of traditional courts and land matters, they were also key in the governance of movement of Africans. The *1951 Bantu Authorities Act* also gave chiefs unprecedented powers to control land within their territories, although the ownership of land remained with the state.

Under apartheid Chiefly power was justified as maintaining local custom in the context of domination by a foreign power. Chiefship was privileged as a singular, traditional institution, rooted in local histories that legitimated it as a model of rural rule: "Conferred the power to enforce their notion of custom as law, chiefs were assured of backup support from colonial institutions... in the event they encountered opposition or defiance" from their subjects (Mamdani 1996, 122). The authority of chiefs went hand in hand with the increasing role of 'custom'; custom was used as the ultimate legitimating discourse to confirm the jurisdiction of chiefly power.

This intensified emphasis on bringing chieftaincy more centrally into the government of colonized territories came at the same time that forced dispossession became much more widespread, systematic, and violent. In 1958 Hendrik Verwoerd (previously minister of Native Affairs) was elected Prime Minister of the Nationalist Party. During his tenure, which lasted until 1966, he introduced a new brand of segregation: Bantustans. Bantustans, he argued, were less

about racially exclusive apartheid policies and more an example of political decentralization and internal decolonization to encourage a form of ‘separate development’. They institutionalized a new level of colonial violence.

Under the leadership of Verwoerd, a new system of local and regional government was introduced under which Chiefs were again mobilized as key actors in the apartheid state. The *Promotion of Bantu Self-Government Act* was introduced in 1959. This Act elevated local administrative authorities to semi-autonomous governments and transferred costs – such as welfare and unemployment costs – from white areas to ‘homelands’ (the Act transformed the ‘native’ reserves into self-governing homelands). It provided a framework for separate economic development and homeland ‘modernization’. According to this plan, “black residents... were to be domiciled in the ethnic homeland of their supposed ‘origin’ where they were to possess ‘citizenship’. These territories would be guided towards independence by the white South African government” (Evans 2012, 119). These ideas “paved the way for nominal Bantustan independence, granted first to the Transkei in 1976” (Beinart and Dubow 1995, 16). Legal researcher Aninka Claassens explains, “[t]he bantustan policy went together with the denial of South African citizenship and political rights for black people. Once they were consigned to one or other ‘homeland’, people were to be governed by chiefs according to ‘timeless custom’” (Claassens 2014, 764). Custom thus served as a legitimating rhetoric in the Bantustan policy. The ‘protection’ of custom maintained a semblance of recognition of ‘traditional’ governance. Robust legislation determining the power and authority of chieftaincy contributed to an illusion of legitimate rule.

The apartheid state went through its own transformations at this time. For example, a long struggle between key political and legal actors over models of parliamentary sovereignty

and legislative supremacy (effectively between a model of sovereignty vested in the people of the Republic, and the sovereignty of legislature to strike down laws that were not compatible with the Constitution).<sup>10</sup> The eventual achievement of parliamentary sovereignty was fundamental to the success of segregation. The 1961 Republican Constitution secured this form of government. Section 59(1) of the Republic Constitution stated, "Parliament shall be the sovereign legislative authority in and over the Republic, and shall have full power to make laws for the peace, order and good government of the Republic"; thus "the will of a racially exclusive parliament was to be paramount" (Klug 2010, 12). Appointing parliament as the legislative authority allowed for the autocratic introduction of legislation without checks and balances on their power or their effects.

This period saw the forced relocation of millions to the Bantustans. In the 1960's the state labeled black homesteads and communities living outside of the reserves as 'black spots' on 'white' land. Under the *Group Areas Act* (1960) the state forced people out of black urban neighbourhoods, such as Sophiatown in Johannesburg and District Six in Cape Town. Between 1960 and 1983 an estimated 3.5 million people were forcibly dispossessed to live on South African Development Trust (SADT) land created as resettlement areas adjacent to and on the borders of Bantustans (Platzky and Walker 1985).<sup>11</sup> The population of the reserves grew from 4.2 million in 1960 (39% of all Africans) to over eleven million in 1980 (52.7 %) (Beinart and Dubow 1995, 16).

The Bantustan system was premised on enforcing racialized divisions between white, black, Asian and coloured. It relied on a form of colonial governmentality that created multiple

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<sup>10</sup> See Klugg 2010, 11-12, for a review of key moments and court judgements at the turn of the 20<sup>th</sup> C. This struggle can be dated back to the formation of the Union of South Africa in 1910.

<sup>11</sup> The South African Native Trust (SANT) discussed above was converted into the South African Development Trust (SADT), an institution key to carrying out forced removals of peoples living outside of reserves.

racial distinctions. It also promoted divisions within African society by invoking ‘tribalism’ and promoting the entrenchment of ethnic identities such as Zulu, Xhosa, Pedi or Tswana (Beinart and Dubow 1995, 17). “Segregation was, however, more than a panoply of restrictive legislation: it refers as well to a composite ideology and set of practices seeking to legitimize social difference and economic inequality in every aspect of life” (Beinart and Dubow 1995, 4). Segregation, for example, depended on forced compliance with a model of ‘traditional leadership’. The people resettled in Bantustans were put under the leadership of the traditional authorities who were already established in the reserves, even though those dispossessed had no history with these particular leaders or the traditions over which they might preside. The promotion of self-government was for a short time ‘successful’ according to its own measures. Ten ethnic bantustans were identified as self-governing areas and between 1976 and 1981, four of these were granted independent status by South Africa (Transkei, Bophutatswana, Venda, Ciskei). These states, however, were never recognized on the international stage (Evans 2012, 119).

Govan Mbeki (father of South Africa’s second president, Thabo Mbeki) describes the context of these forced dispossessions and the role of chieftaincy in an article titled “The Peasant’s Revolt’. He focuses specifically on how democracy was undermined:

The people of the Transkei had no say in the drafting of their constitution. The elections held in 1963 took place under a state of emergency: which imposed a ban on all meetings of more than ten persons, laid down severe penalties for statements disrespectful to chiefs, and permitted the indefinite detention, without warrant or trial, of political opponents (Mbeki 1964, in Crais and McClendon 2014, 331).

He describes the illegitimate role of the Chieftaincy:

the Transkei scheme, rooted in tribalism and the sway of the Chiefs, is corrupting itself from within... Conservatism is the lifeblood of the chieftainship system, and change threatens the positions of power that the

Chiefs and the government enjoy. Chiefs and government therefore, have common aims: to resist movements advocating multi-racialism and modern social development (Mbeki 1964, in Crais and McClendon 2014, 332).

Mbeki explains that these apartheid initiatives never went smoothly; they often faced violent resistance. The Transkei, for example, erupted into revolt in 1960. The apartheid state declared a state of emergency and didn't repeal it for nearly a decade.

Under apartheid racialized groups were defined in very particular ways with implications for different aspects of life. The *Population Registration Act* (1950) as well as the *Group Areas Act* (1950) stipulated that people be classified by racial group. These classifications regulated where they could live and work, as well as controlled movement and settlement, the right to choose the nature of one's work, education, use of public spaces, social security, and taxation, among other things (Cornell 1960 in Bowker and Star 1999, 196-198). Racial classification divided people into four groups: Europeans, Asiatics, persons of mixed race or coloured, and "natives", referring to Bantu peoples (ibid). Khoi San peoples were included in the 'coloured' category. The issue was, as Bowker and Star (1999) explain, that certainty in race identification was elusive in many cases, particularly in the instance of people who did not appear to be of the racial group to which they were assigned, lived with those of another race, or spoke a different language than those of their assigned group. This uncertainty meant that laws were constantly being amended or new ones introduced to respond to new challenges; by 1985 racial law in South Africa filled over 3,000 pages (Bowker and Star 1999, 201). Rights and entitlements in all dimensions of life were legislated and determined by racial categories and classifications.

## 2.5 Understanding ‘customary law’ as dispossession and governmentality: Legal Anthropology and Legal Geography

How do we understand the emergence and role of customary law through this long history of colonization, apartheid, land dispossession, and colonial governmentality? Central to a theory of customary law is an understanding of how custom constitutes colonial legal geographies through legal techniques of governmentality and dispossession. Understanding colonialism in Africa as instituting a new legal geography is not a new idea, yet the particular manifestations of legal geography and the processes and practices through which it has been, and continues to be, created demands further interrogation.

Customary law and its relationship to colonialism has long been the subject and object of anthropologists and socio-legal researchers and in effect has been the product of research. For example, during apartheid the Nationalist Party funded research by anthropologists to record and register ‘customary law’. The customary law represented in the work of these anthropologists and used to inform legislation and policy at the time was "almost unknowable" by the subjects to whom it applied because "recorded law exists... in a language spoken only by the rulers" (Gordon 1989, 55). Custom, argues anthropologist Robert Gordon (1989), has historically been a tool of the powerful to impose rule on African populations; black students, for example, had no interest in doing research that might reinforce this strategy. There was a “further sense of embarrassment” for anthropologists working in South Africa during the 1980’s, explains anthropologist Adam Kuper, because ethnographic research could be used to reinforce the idea that traditions and tribal identities and institutions were viable political structures that should be respected by the apartheid state (Kuper 1987, 1).

Much can be learned from how ‘custom’ has been recorded and understood through the historical works of key anthropologists. Isaac Schapera famously recorded customary ‘rules’ in

his ethnography on African chieftaincy and negotiations between chiefs and colonial authorities (Schapera 1938). Max Gluckman studied disputes in his work on the relationship between conflict and cohesion in African societies (Gluckman 1955). John Comaroff and Simon Roberts move beyond a rule-focused study to examine dispute processes in two Tswana chiefdoms,<sup>12</sup> showing that rules in Tswana society were not strict, but were better understood as a “loosely constructed repertoire rather than an internally consistent code” (1981, 18). They examined the relationship between rules, processes, and the determination of social action, arguing that a “rule-centred approach” to studying customary law “does violence to our ethnographic data” (ibid.). “The Tswana conceive of their political community as a hierarchy of progressively more inclusive coresidential and administrative groupings: household, local agnatic segments (or, in some places, family groups), wards, and sections” (Comaroff and Roberts 1981, 26). However, this work falls prey to a critique that anthropologist Sara Berry makes of colonial strategies more generally: “[w]hatever conclusions officials reached about the content of customary laws or the boundaries of traditional societies were either challenged by Africans offering a different version of tradition, or outpaced by changing social and economic practices” (Berry 1992, 338).

There is an inherent dualism between ‘customary’ and ‘colonial’ law produced in the above accounts. Anthropologist and legal pluralist Richard Wilson critiques Comaroff and Roberts (as well as Schapera (1938)) by arguing that these studies adopt an intellectual paradigm that does not challenge an imaginary of a dualistic colonial and apartheid legal system and ignores how state law influenced and transformed local adjudicative institutions. This perspective derives from an “entrenched analytical frame which reproduced assumptions of

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<sup>12</sup> The Tswana chiefdoms that are the subject of their research refer specifically to the Kgatla and Barolong Boo Ratshidi, each living on different sides of the border between South Africa and Botswana. Kgatla is in central-east Botswana, while the Barolong has territory on both sides of the border between the countries (see Comaroff and Roberts 1981, 21-23).



isolation and autonomy” (Wilson 2001, 219). Furthermore, he argues that it is implausible that the Tswana did not understand or feel the effects of colonialism, considering that ‘Tswana’ was a category forced upon them in the former ‘homeland’ of Bophuthatswana and was run by a corrupt leader named Lucas Mangope (ibid). Wilson reminds us of the risk of understanding custom as the domain of a ‘local’ community, unimpacted by colonial strategies.

Anthropologist Sally Falk Moore develops a more fluid and dialogic understanding of customary law in her study of Chagga law and custom in Kilimanjaro. Her research illustrates the changing character of Chagga customary law and places it in local, national, and international context, explaining that “[p]re-colonial Chagga customary law was a system of political institutions, social domains, systems of ideas that are both material and mystical (Moore 1986, 50). Congruent with the perspective of Comaroff and Roberts, who argue that no such thing as an institutionally bounded and functionalist thing as a “Tswana legal system” exists (1981, 20), Moore explains that it is inaccurate to assume that there are hard-fast laws ‘externally’ applied into a ‘local’ context:

Rule statements there were, and are, but they are not intelligible out of social context. More appropriate to an understanding of the way things worked is a focus on the asymmetrical relations between groups and individuals, on the nature of transactions between individuals, and conceptions of the micropolitics of the significant groups. Chagga “law” was situated in ongoing arenas of action (Moore 1986, 90-91).

Moore brilliantly illustrates the importance of the processes at stake and the scales at which customary law is negotiated.

These classic texts in legal anthropology explain the different scales at which customary law operates. However, they lack a critical engagement with spatiality beyond the ethnographic sites they are working within. Nigerian historian Mahmood Mamdani develops a now famous description of British colonial Africa that focuses explicitly (and perhaps excessively, as his

critics, below, point out) on the geography of colonialism. Mamdani (1996) famously explains that British colonial strategy in Africa focused on the creation of a bifurcated polity. His analysis introduces a crude geography of colonialism between the rural and the urban. This refers to a form of state governance that constructed two forms of government: civil government and Native Authority. Government worked in relation to two forms of subjects: citizens who lived by civil law and rural peoples who were subject to customary law and chiefly authority. His theory of ‘decentralized despotism’ expressed through traditional leadership, brought together two forms of colonial power, direct rule and indirect rule (Mamdani 1996, 18). He argues that the colonial state was a “double-sided affair. Its’ one side, the state that governed a racially defined citizenry, was bounded by the rule of law and an associated regime of rights. Its’ other side, the state that ruled over subjects, was a regime of extra-economic coercion and administratively driven justice” (Mamdani 1996, 19). This system created a bifurcated state. This “Janus-faced, bifurcated” state, “contained a duality, two forms of power under a single hegemonic authority. Urban power spoke the language of civil society and civil rights, rural power of community and culture. Civil power claimed to protect rights, customary power claimed to enforce tradition” (Mamdani 2012, 18).

It is important to note that Mamdani attempts to acknowledge the agency of African peoples, but he still gives way to a determinative understanding of the colonial state. His argument is not that custom was defined from ‘above’ or ‘invented’ as a colonial construct completely unreflective of local norms and practices. Rather, custom “was a site of struggle. Custom was often the outcome of a contest between various forces, not just those in power or its on-the-scene agents”, however “the terms of the contest, its institutional framework, were heavily skewed in favor of state-appointed customary authorities. It was... a game in which the

dice were loaded” (Mamdani 1996, 22). The chieftaincy, according to Mamdani, is empowered only by the state: “it is nothing more than an extension of the state’s authority” (Williams 2010, 13). The counter-point to this perspective is that chieftaincy is also legitimated at the local level through the people: “Mamdani did not consider the limits of the central state’s control at the local level, or the possibility that traditional leaders needed to respond to community opinions in order to maintain legitimacy” (Williams 2010, 14). Anthropologist Hylton White illustrates through ethnographic fieldwork in South Africa that while Mamdani argues that “colonial histories witnessed the reduction of multiple sources of authority into the singular power of chiefship”, this claim is disputed by the fact that contemporary “life in the former homelands is very much governed by an array of parallel and competing authorities, including, very notably, authorities that can more or less be construed as having religious or spiritual mandates.” (2015, 1006). Mamdani’s attempt to consider African agency, therefore, is much too sparse to save him from these critiques. Moreover, as will be demonstrated in chapters four and five, the dichotomous understanding of ‘citizens’ and ‘subjects’ or a comprehension of custom as derivative of identified centers of power is particularly unsuitable for discerning contemporary articulations of customary law and indigeneity in conditions of neoliberalism.

## 2.6 Conclusion

In this chapter I have described the evolution of a system of colonial governmentality, and the multiple forms of forced dispossession incrementally enabled through emerging logics of colonial control. Law played an important and unique role in colonialism and apartheid to the extent that it was used to create and define subjects and attach these subjects to territorial designations. Law was used as a tool for violent forced dispossession as well as a means to ‘recognize’ custom and the authority of chiefs, thus creating a unique legal geography in the

country. Thus the history of land control and spatialized racial dispossession and governance must inform contemporary struggles over customary law in land reform, as explained in the remaining chapters.

Studies of customary law would do well to heed the advice from Fredrick Cooper who, writing about writing colonial histories, argues:

we must analyze the culture of politics and the politics of culture by constantly shifting the scale of analysis from the most spatially specific (the politics of the clan or the village) to the most spatially diffuse (transatlantic racial politics) and examine the originality and power of political thought by what it appropriated and transformed from its entire range of influences and connections (Cooper 1994, 1539).

Customary law was itself an arena of struggle, one connected to the wider political struggles constituted by diverse subjectivities, the possibilities and constraints that they operated within, and the aspirations to which they worked towards (Cooper 2002). It is an arena of struggle that continues to be waged, as I demonstrate in the remainder of this dissertation. The complexity and variability of colonial efforts in South Africa must be read alongside the bluntness of violence experienced by colonized African peoples, the colonial spaces and subjectivities that were produced, and the role of law in the production of geographies of government, movement and dispossession.

The struggle over customary law must now be positioned within the larger legal transition from apartheid to democracy in the early 1990's. This transition brought into dispute the 'naturalness' of law's role in protecting colonial-era private property and demanded that custom is recognized not as the outside against a universal modern property system but also as a form of democratic and rights-based tenure system. In other words, the democratic transition brought about a shift from a racially-skewed recognition of proprietary norms to the promise of rights regimes that recognize equal citizenship. Can the unequal ordering of space and society,

constituted as it was through a historical regime of colonial governmentality, be overturned via state endorsed and organized legal processes and authorities? What are the opportunities for traditional leadership as an authority in rural government and assertions of customary law? Anthropologist David Scott explains the continued importance of the forms of politics and relationships of power introduced through colonial histories of governmentality:

The crucial point here is not whether natives were included or excluded so much as the introduction of a new game of politics that the colonized would (eventually) be obliged to play if they were to be counted as political. And one of the things the new game of politics came to depend upon was the construction of a legally instituted space where legally defined subjects could exercise rights, however limited they were (Scott 2005, 39).

The transition from apartheid to democracy entailed the production of new legal spaces as well as new legal subjects, the character and emancipatory potential of which I consider in the next chapter.

### 3 LAW AS REVOLUTION: TRANSFORMATIVE CONSTITUTIONALISM AND LOCALIZED STRUGGLE

#### 3.1 Introduction

The violence of the apartheid state was made clear to the international community by the Sharpeville massacre in 1960 and the Soweto student uprising in 1976, provoking international condemnation and further internal instability. International solidarity movements, boycotts of South African products, and widespread criticism helped frame apartheid South Africa as a global pariah. It took both peaceful and militant resistance, as well as periods of civil war (sparked primarily by a series of uprisings in the 1980s), to end the brutal apartheid regime. Those who endured the struggle clung to hope for a better future. The human cost of the resistance should not be understated:

The price of its triumph was paid in blood and broken childhoods. The conviction that all of this suffering would be redeemed was affirmed at every surging funeral and in the sweat, beer, and tears that drew people into each others' arms at the end of every back-street jazz concert. Every teenage struggle poet promised that the blood would water the tree of freedom (Desai 2002, 10).

Democracy triumphantly replaced apartheid with the first open and free democratic elections in 1994 and the introduction of the Final Constitution in 1996. The new democracy and a commitment to a constitutional order was the outcome of intense struggle where competing sides argued over the principles on which the new democratic order would be founded. In the end a model of constitutional supremacy, wherein human rights are enshrined, was adopted to guide the government and the country towards the progressive realization of justice by fundamental structural transformation. These debates were not unique to South Africa. The turn to constitutionalism in South Africa was part of a global trend of countries adopting new constitutional frameworks, a trend coined the 'new constitutionalism' (Hirschl 2007). Emerging

research on apex courts in the Global South<sup>13</sup> and into the more general role of the judiciary in upholding social and economic rights (Gauri and Brinks 2008, Dixon and Roux 2018) has found a critical, but limited, role of courts in social transformation. Nonetheless, the particularities of the South African Constitutional framework inspired a strong belief in the promise of law as a means of transformation that continues to be distinctive in design and context.

In this chapter I explain the uniqueness of the South African Constitution in the global context and outline some of the conditions that have contributed to the model that it embodies. I introduce and explain the constitutional framework, particularly as it relates to property and cultural rights, and illustrate it as generative of a field of rights-based struggle. I place this argument in conversation with literature on transformative constitutionalism and conclude by explaining the insights that can be gained by approaching constitutionalism through the politics of interpretation, and more specifically by understanding human rights struggles as they are articulated in the vernacular of local struggles and how these new articulations are brought back into law through a constitutive relationship between law and social struggle.

### 3.2 The origins of constitutionalism in South Africa

Political negotiations for a new state began in 1990 between the Nationalist Party (NP) and the African National Congress (ANC). Discussions were focused on the need to address the historical legacies of colonialism and apartheid, and to respond to the specific demands for land reform. The very real threat of descending into civil war made it imperative that the negotiations focus on maintaining social stability, a tall order set against the demand for radical social, economic, and legal transformations. Therein is the crux of the challenge: the necessity to maintain political, legal, economic, and social stability while facilitating a regime change which

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<sup>13</sup> See Maldonado (2013) for critical engagements with apex courts in Colombia, India, and South Africa.

included an overhaul of the government and a demand to radically re-distribute resources. During the transition negotiators addressed this challenge, in part, by moving from (legislative) parliamentary sovereignty (the apartheid model) to (judicial) constitutional supremacy. Within this model the two main strategies adopted to achieve material redistribution of resources were affirmative action programs, called Black Economic Empowerment (BEE), and land reform (both arguably administrative matters that would inevitably require judicial oversight). Of these, land reform was the most contentious. As Klug argues, “[i]t was only with the acceptance of the principle of restitution of lands that had been lost due to racially discriminatory law, by all sides in the negotiations, that it became possible to accept that there could be both legal continuity and some redress for the legacies of apartheid” (2010, 17). The question of how the constitutional framework could support land reform was a driving influence in the negotiations leading to the transition, and the success or failure of land reform would later become one of the primary indicators in criticisms of the transformative effect of the Constitution. In the context of the transitional negotiations the first democratic elections were held on April 27<sup>th</sup>, 1994, with the ANC winning by a landslide and Nelson Mandela elected the first black president in South Africa.

### 3.3 The Final Constitution, the Bill of Rights, and the Constitutional Court

The Constitution emerged out of intense struggle and negotiations between the NP and the ANC. Each respective party wanted control over the process. The NP did everything it could to determine the rules under which the transition would take place and advocated to have the existing parliament at the time, controlled by their own party, pass the new Constitution. The ANC and its allies in the liberation movement on the other hand demanded that the Constitution represent a “compact of the people” and thus the constitution-making process be democratic and



inclusive of the emerging 'new' South Africa (Ackerman 2004, 636). As a compromise, the NP and ANC negotiators agreed in November 1993 to a three-part compromise. The agreement included first, a two-stage constitution-making and transition process involving an interim Constitution, second, an agreement on 34 Constitutional Principles, and third, a Constitutional Court to act as an arbitrator (ibid). The interim Constitution acted as a holding measure while the coalition government drafted a new Constitution.

The interim Constitution provided a transitional government that would govern on a coalition basis for the first democratic elections. It also included an interim legislature responsible as a Constitutional Assembly to draft and adopt the text of the new Constitution. In 1996 the legislature introduced the Final Constitution, ushering in what constitutional legal scholar Bruce Ackermann calls a "substantive constitutional revolution" (2006, 643). He explains that the Constitution "establishes an objective normative value system that, as an underlying constitutional value for all areas of the law, acts as a guiding principle and stimulus for the legislature, as well as for the executive and the judiciary" (Ackermann 2006, 646).

The Final Constitution entrenches human rights to facilitate and guide social, economic, and legal transformation. To this extent the Bill of Rights is embedded in the Constitution in the form of the second chapter, coming only after the Founding Provisions; its placement in the text unwaveringly affirms a commitment to human rights in the post-apartheid state. Section 7(1) declares "This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom". The Bill of Rights represents an ongoing commitment to transformation, as opposed to a temporary 'transformation', an ideal that "envision[s] a society that will always be

open to change and contestation, a society that will always be defined by transformation” (Langa 2006, 354).

The Bill of Rights represents a new standard for the global human rights movement because it can be used to hold the state, and in some cases private parties, to account for violations of human rights. It does not posit that all South Africans have rights, rather the Constitution and the Bill of Rights envisions rights as something to be progressively realized through the ongoing work of state and civil society (Klug 2010, 4). The Bill of Rights binds the legislature, the executive, the judiciary, all organs of the state, and natural or juristic persons.

In the Bill of Rights, political, civil, socio-economic and cultural rights are indivisible and enforceable: "these rights are fully justiciable and thus the courts are required to review the practices of government, and in some cases private parties, to ensure that these rights are being protected" (Klug 2010, 4). In this way the transition represents a shift from a “culture of authority” under apartheid to a “culture of justification – a culture in which every exercise of power is expected to be justified” (Mureinik 1994, 10, quoted in Langa 2006, 353). The Bill of Rights puts negative restraints on state interference with liberty. It imposes affirmative duties on the state to address poverty, promote social welfare, and support people’s expression of their constitutional rights and self-realization as equal citizens in a democratic state (Klare 1998, 154). The Final Constitution and the Bill of Rights play an important role in social transformation and poverty reduction; they provide a legal and institutional framework to monitor the state’s progressive realization of its constitutional obligations to the poor (Rosa 2011, 545).

The Constitutional Court has a specific role in facilitating transition in the post-apartheid state. The role of the Constitutional Court is, most generally, to make the Constitution serve the needs of the transition and to build the country on the basis of human rights. It has been called an

‘activist court’, wherein judges are expected to “work with the idea of the Constitution being a living tree that sheltered and promoted an emancipatory vision of democratic rights” (Sachs 2016, 162). James Fowkes (2016), senior researcher at the Institute for International and Comparative Law in Africa, argues that ‘making the Constitution work’ through the Constitutional Court requires three different processes. First, the adjudication of cases. Second, a role in making decisions about how the legal system works and how decisions are made and by whom: "The power to decide who decides, with respect to a new system or mechanism, is often a matter of deciding how the machine should work in the first place" (Fowkes 2016, 31). Finally, it requires bringing the present society into line with the one envisioned by the Constitution: "This is a question of implementation, of making effective", thus encompassing a “full reach of the duty to make the real-world work as the Constitution envisions" (Fowkes 2016, 31). Fowkes’ explanation underscores that the Court is not simply the sum of the judgements that come out of it, but actually a key institution in both regulating the state as well as promoting the purposive and positive fulfillment of human rights.

### 3.4 The Property Clause

Land Reform is embedded in the Constitution in the form of Section 25, known as the Property Clause, strategically positioned within the Bill of Rights. Sections 5-7 of the Property Clause provide the framework for the broader land reform program and are worth including here in full:

25(5) The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.

25(6) A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.

25(7) A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent

provided by an Act of Parliament, either to restitution of that property or to equitable redress.

These three provisions provide the framework and impetus for splitting the land reform program into three different areas, land restitution, land redistribution, and tenure reform. Each area has its own focus as well as specific procedural qualities, as explained below. The land reform program was expected to both facilitate the realization of land rights in line with the Bill of Rights as well as respond to the complexity that is a result of past dispossessions and the ongoing legacy of spatial inequality.<sup>14</sup>

Land restitution is a rights-based program designed to return land to people who were previously dispossessed of it due to racially motivated laws and policies by identifying and transferring specific parcels of land from which applicants were dispossessed. Land redistribution is designed to redistribute land to the black majority. It is application based and is based on the demonstrated need of beneficiaries. Tenure reform focuses on advancing tenure security for people living in communal areas or on private land, such as farm workers, for example. A Land Claims Court was established to adjudicate land restitution cases and the Department of Land Affairs (now the Department of Rural Development and Land Affairs) was created to oversee and report on the progress of land reform. While these three approaches to land reform are directed by the Constitution, the struggle for land rights in contemporary South Africa draw on a much wider ambit of rights, including cultural rights, and within this framing, the recognition of customary law as an expression of culture.

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<sup>14</sup> The design, administration and politics of land reform is explained in much more detail in chapter four.

### 3.5 Culture and Custom in the Constitution

South Africa is a nation of incredible diversity, and the recognition of legal pluralism, as well as religious and cultural practices reflects the commitment to equality across recognized ‘difference’. The democratic Constitution promotes a vision of a new South Africa that “belongs to all who live in it, united in our diversity”, as written in the Preamble. In Section 15(3) the Constitution obliges parliament to enact legislation that recognizes tradition, as well as cultural and religious systems of both personal and family law. Cultural rights are the focus of Section 30 and Section 31. Section 30 on Language and Culture outlines: “Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights”. Section 31 determines that peoples belonging to a cultural, religious and linguistic community will not be denied the right to enjoy their culture, practice their religion or use their language and to participate in creating and maintaining cultural, religious and linguistic groups (31(1)a; b)

‘Customary law’ is recognized and protected in the Constitution as an expression of cultural rights. Section 39(3) on the interpretation of the Bill of Rights, stipulates “The Bill of Rights does not deny the existence of any other rights or freedoms that are recognized or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill”. A further reading reveals that the ‘custom’ of the Constitution relates primarily to the domain of traditional leaders. Section 211(1), on the status of Traditional Leaders, states: “The institution, status and role of traditional leadership, according to customary law, are recognized, subject to the Constitution”. Moreover, “The Courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law” (211(3)). The important point about these provisions is that in the Constitution

customary law is paired directly with traditional authorities; there is an implicit connection made between culture, customary law, and traditional authorities in the Constitution, the significance of which is examined in the next chapter.

Cultural rights in the South African Constitution need to be understood in the context of a long history of resisting ‘minority’ rights, which have referred generally to racial distinctions. In an effort to erase the divisions of apartheid the new democratic model represented a clear and intentional move toward a united South Africa. In this context the racially divisive nature of colonialism and Apartheid contributed to an ideological orientation away from the idea of ‘minority’ rights. This thinking can be traced back to early discussions within the ANC. On April 6, 1959, R.M Sobukwe, the founding leader of the Pan African Congress, a group proposing an ideology of Africanism (focused on the unity of all Africans, including the establishment of a United States of Africa), stated powerfully in his opening address:

To use the term “multi-racialism” implies that there are such basic insuperable differences between the various national groups that the best course is to keep them permanently distinctive in a kind of democratic apartheid. That to us is racialism multiplied, which probably is what the term truly connotes... We guarantee no minority rights, because we think in terms of individuals, not groups (Sobukwe 1959, in Crais and McClendon 2014, 344).

As Crais and McClendon note, this is generally the position adopted by the ANC during the anti-apartheid struggle as it opened itself to white membership and advocated for a non-racial South Africa (2014, 339).

The actual distinctions between ‘minority’ rights and ‘cultural’ rights remain an area of conflict and contestation, whereby ‘cultural’ rights are sometimes assumed to represent a move back to old divisions. Retired Constitutional Court Judge Albie Sachs argues that Oliver Tambo, president of the ANC from 1967-1991, had a vision of unity that significantly influenced the Constitution. His vision dismissed ideas of racial groups living ‘side by side’ and focused instead

on securing “the fundamental rights of all, black and white, in a united, non-racial South Africa” (Sachs 2016, 11). Tambo refused to “introduce constitutionalised markers of identity, culture and historical provenance into the very formal structures of government itself. Instead, people would have their fundamental rights secured, not because they belonged to a majority or a minority, but because they were human beings” (ibid). This perspective provided the impetus for excluding any reference to ‘minority rights’ in the constitution and focusing instead on the rights of cultural, linguistic, and religious communities. The Bill of Rights, argues Sachs, “acknowledges and embraces multiculturalism. But it does so without allowing group rights to become the foundation of the governing structures of our new constitutional order. That was foundational. From a political point of view, our institutions simply had to be non-racial” (2016, 13). As he further explains, “Once the issue of directly constitutionalising group rights in our institutions had been taken off the agenda, then issues of how to respect and balance out different community, traditional and cultural interests could come to the fore” (2016, 14-15). Yet, as critical scholarship on the re-emergence and re-articulation of ‘tradition’ by chiefs in South Africa demonstrates, such distinctions and their place in the new South Africa, continue to constitute a significant site of struggle.<sup>15</sup>

The Constitution responds to diversity by focusing on culture, religion, and language. Section 31 of the Constitution stipulates that “Persons belonging to a cultural, religious or linguistic community may not be denied the right... to enjoy their culture, practice their religion and use their language; and... to form, join and maintain cultural, religious and linguistic associations and other organs of civil society”. Rather than elaborating on these rights in the Constitution, their progressive realization is the focus of a ‘Chapter 9’ institution. Chapter 9

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<sup>15</sup> For example, for two different perspectives on this contemporary emergency of chieftaincy see Claassens 2015 and Comaroff and Comaroff 2018. This literature is further engaged with in chapter four.

institutions are ‘State Institutions Supporting Constitutional Democracy’. They include the Public Protector, the Auditor-General, the Electoral Commission, the South African Human Rights Commission, the Commission for Gender Equality, and the Commission for the Protection of the Rights of Cultural, Religious, and Linguistic Communities (CRL Rights Commission). These institutions are subject only to the Constitution and the law and are thus independent of government. The CRL Rights Commission is mandated to support cultural rights.

Contemporary politics of minority rights in South Africa affirm the fears and sentiment of anti-apartheid activists and drafters of the Constitution. An internet search of ‘minority rights in South Africa’ brings up lively debates about the need for such rights in South Africa, however these debates are not dominated by historically marginalized groups but rather by Afrikaner nationalists. Hyperbolic claims of an ongoing ‘white genocide’ in South Africa are linked with the assertion of international rights protecting minorities. Afrikanerbond, whose membership criteria includes being Afrikaner and 18 years old or older, is at the forefront of this trend. Pieter Vorster, chairperson of Afrikanerbond, argued in a speech at a conference on minority rights in Cape Town, 21 November 2013:

We need the political will to endorse internationally recognised minority rights in South Africa. This can be done in the form of a charter on the rights of minorities as an addendum to the Constitution... The involvement of civil society at this stage is very limited. It is for this reason that the Afrikanerbond, as an organisation within civil society, is becoming increasingly involved in minority groups and the promotion and protection of the rights of such groups in this country. Our programmes and initiatives will henceforth focus on the plights of all South African minority groups (Vorster 2013).

These actors are clearly asserting the model of ‘group rights’ that the drafters of the Final Constitution, discussed above, strategically moved away from. Certainly, the history of legislated distinction under apartheid has left a dark cloud over contemporary struggles over cultural rights, identity, and distinction in the ‘united’ South Africa.



### 3.6 Understanding the Constitution and Social Change: Transformative Constitutionalism and the Interpretation of Rights in Localized Struggle

Property struggles in the context of land reform are emergent through the Constitutional framework but they are far from determined by it. Studying human rights struggles in the context of constitutionalism, and specifically land reform, demands empirical analysis of the translation of law and human rights in local contexts. There is a wide body of literature on constitutionalism that can inform how we understand the dynamic relationship between the Constitution, human rights, and property rights as they are mobilized in particular social, political and economic contexts. There are four aspects of constitutionalism in practice that can be identified in the literature. First, the role of legal culture in South Africa; second, the practice of adjudication; third, social movements and their interaction with the courts; and finally, the politics of interpretation in law and litigation.

First, a conservative legal culture in South Africa has been identified as a barrier to transformation through a model of constitutional supremacy. Karl E. Klare, in a now famous article published in 1998, explains that a deeply entrenched ‘liberal’ legal culture in South Africa could undermine what he calls ‘transformative constitutionalism’:

By transformative constitutionalism I mean a long-term project of constitutional enactment, interpretation, and enforcement committed (not in isolation, of course, but in a historical context of conducive political developments) to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction. Transformative constitutionalism connotes an enterprise of inducing large-scale social change through nonviolent political processes grounded in law (Klare 1998, 150).

What is required to realize this vision, according to Klare, is an intentional break from the classic liberal legal culture that has long been prevalent in South African courts. He argues for a move to what he calls a ‘postliberal’ legal culture that understands the South African Constitution as

“social, redistributive, caring, positive, at least partly horizontal, participatory, multicultural, and self-conscious about its historical setting and transformative role and mission” (1998, 154).

A problem with this approach, according to Theunis Roux (2009), is that Klare’s critique of legal culture and prescription of what is required to facilitate transformation is too narrow and largely uncontested (no judge or lawyer would disagree that the Constitution must be used to facilitate change) and therefore insignificant. Klare’s focus on ‘post-liberal’ interpretations of the Constitution suggest that all judges must share the same ideological perspective of transformation in order to realize the potential of the Constitution. Roux thinks that this puts too much emphasis on the political views of judges and argues on the contrary that it is the actual text and ethos of the Constitution that by design directs judges to make decisions towards the transformation of South African economy and society. In other words, whether a judge is conservative or progressive, and how their interpretive method corresponds with that view, does not determine the effect of transformation under the Constitution. Academics, legal professionals and judges can all contribute to the development of the constitutional democracy, from any critical perspective, "provided only that they respect the fundamental tenets of non-violent, democratic, law-driven social change" (Roux 2009, 285). Roux does not deny the existence of a conservative legal culture, but he does not think that transformation hinges precisely on changing it; the Constitution does that work by design.

A second theme in the literature is that the actual practices of adjudication are identified as significant barriers to the promise of constitutionalism. In an international context, Ron Hirschl argues that constitutionalism represents a form of ‘jurisdocracy’ whereby the power and authority of elected officials is fundamentally usurped by Judges, creating conditions that undermine democracy and restricts the political nimbleness needed to respond to constantly

shifting economic and social conditions, particularly in ‘developing’ nations (Hirschl 2007). There are institutional barriers to transformation in the practices of adjudication. This argument resonates in South Africa, where the institutional structure charged with fulfilling the promise of constitutionalism represented much of the ‘old’ legal structure of apartheid to the extent that the Interim Constitution and the Final Constitution left the judicial structures and judicial officers of the apartheid state intact (Ackermann 2006, 638). Moreover, while the Constitution “contains the hopes and aspirations of the majority of South Africans”, the turn to the rule of law as the primary vehicle for transformation “means that the processes for fulfilling these dreams will be shaped by the encrusted processes and encumbered resources that make up the South African legal tradition” (Klug 2010, 21). This institutional structure, arguably, maintains a liberal dilution of the radical spirit of resistance that motivated the transition to democracy. For example, Sanele argues that transformative constitutionalism is inextricably wedded to liberal democratic constitutionalism making it “ill-suited for achieving the social, economic and political vision it proclaims” (Senele 2011, 486).

The legal system encounters significant hurdles in facilitating transformation by design. Adjudication promotes change through countless incremental victories, thus by design the legal system may be ill-equipped to promote transformation. It is commonly understood that transformation requires significant redistribution of wealth and resources, however, “the incremental judicial process of interstitial development may well be too slow and protracted because it is driven by the logic of doctrinal development and not by the need for change” (van der Walt 2006, 9). Moreover, Constitutional Court judges have been critiqued for deciding judgments in light of the institutional capacity of the state to implement judgments; the Court walks a fine line to preserve its own integrity by engaging with complex social and economic

policy issues and producing judgements that are considerate of the limits of the state (Brand 2013, 420). Jackie Dugard (2013) finds an entrenched elitism in the courts. For example, Judges frequently ‘trivialize’ poverty by failing to engage with the structural history of inequality, serving only those with the resources and ability to engage with the courts in a meaningful way, i.e. by hiring representation or knowing how to navigate a complex legal system (Dugard 2013).

Some criticize the idea that the courts are a site of democracy and inclusion whereby it is in constant dialogue with the state and civil society as they work collectively towards the progressive realization of human rights. This is the third strand of critique I identify. While many of the early anti-apartheid negotiators who advocated for a form of Constitutional supremacy envisioned a Court accessible to all citizens of the country, research has found that South Africans face barriers in unaccommodating courts. Researcher Tshepo Madlingozi reviews contemporary social movements’ engagement with the Courts and finds that

the Court has arguably failed in its mission to facilitate ‘constitutional dialogue’, making it inaccessible, unaccountable and ultimately alien to poor people. Its practice is characterised by thinly - reasoned judgments, a failure to translate and make its judgments widely accessible, and a willingness to engage more with academics, NGOs and English - medium media than with social movements, trade unions, poor people’s organisations and African - language media (Maslingozi 2013, 553).

Pete and du Plessis (2014) similarly find that many of the progressive judgements coming out of the Constitutional Court are rarely implemented because the court has not forced other institutional actors to fulfill its judgements. An effect of an impotent court is that the material outcomes that are realized after considerable resources and time are devoted by advocates to litigation are very difficult to quantify. In this regard, they argue that democratic constitutionalism as well as liberal rights discourse has:

served to pacify grassroots opposition to the gross economic inequalities which continue to bedevil the country. While the enemy of the impoverished masses

was clearly in sight during the apartheid period in South Africa, with the dawning of the new era of constitutional democracy and all the talk of rights and transformation, the poor and the marginalized may be finding it more difficult to identify clear targets for their anger and frustration (Pete and du Plessis 2014, 197).

This critique has large purchase among activist writers and researchers. For example, Julian Brown, in his book ‘insurgent citizenship’, argues that the “[c]ourtroom more often than not is a space of disempowerment” (2015, 146) in South African struggles. However, he admits, the courts, when engaged with by public interest litigators, “open up new possibilities for politics” (Brown 2015, 147). Brown oddly falls into the trap of understanding law to be all that happens in the courtroom rather than looking to the co-constitutive relationship between law and politics. In a direct challenge to this narrow view of law in the courts, scholarship in socio-legal studies and legal anthropology suggest that law informs people’s consciousness and influences how they understand their subjectivities and entitlements in their ‘everyday life’.<sup>16</sup>

The fourth and final area of scholarship on constitutionalism focuses on the politics of interpretation. This critique relies on a vision of the constitution as a dialectical product of “the ever evolving liberal constitutionalist ideal in international political culture and local traditions of political struggle” (Roux 2013, 50, see also Klug 2000). Constitutionalism as a dialectical product refers to the fundamental role of public participation in its constitutive development (Roux 2013, 50). The generative opportunity created by the Constitution is illustrated by Klug in his work on the emerging role of Chapter 9 institutions in promoting good government and accountability – roles that they were not originally designed to fulfill but have adapted to occupy in response to growing corruption and state capture (Klug 2018b). Albertyn takes a similar

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<sup>16</sup> Within the field of socio-legal studies, works on legal consciousness are perhaps the most indicative of a scholarly trend away from studying law in courts to studying law in everyday life. For example, see Ewick and Silbey (1998). Studies of law and culture in legal anthropology also represent key transitional moments in law and society scholarship. See Coombe (1998), Merry (2000), Rosen (2006).

approach to interpreting the Constitutional text. She argues that a transformative interpretation “is one that enables a deep respect for cultural identity and diversity and consequent recognition of positive cultural norms and practices, while also addressing crosscutting, intragroup inequalities” (Albertyn 2013, 164). Her approach examines struggles for transformation within a broader cultural context, emergent from the history of struggle, political transition, and ethnic diversity of the country, wherein human rights “are contested, flexible, and permeable, capable of varying meanings and of being responsive to socioeconomic changes” (Albertyn 2013, 165).

The range of sources available to the courts in adjudicating cases contribute to the ongoing development of human rights norms in South Africa. For example, Section 39 of the Constitution directs courts to uphold the values of democracy, human dignity, equality and freedom, and to consider international law when interpreting the Bill of Rights. These imperatives create a “formal and permanent link between the rights enshrined as a product for the local struggle for democracy in South Africa and the constant evolution of rights in the international environment” (Klug 2010, 46). As Klug powerfully emphasises:

The diversity of legitimate sources provides wide scope for an interpretive practice that must recognize that the Constitution is a living tree whose meaning and application will grow as South African society moves away from its multiple legacies of colonialism, apartheid, deprivation and violence (Klug 2010, 83).

The question of legal interpretation is an important area of critical scholarship on transformative constitutionalism, as the work cited above illustrates. However, these studies are so far concerned with interpretation within the courts, i.e. the role of legal culture and how judges interpret constitutional provisions in their judgements. The question of legal interpretation in a wider field of action is often overlooked in the literature on transformative constitutionalism. Analysis of the politics of interpretation needs to move outside of the courtroom and into social

and political struggles on the ground, around particular rights-based assertions. In his critique of Klare's focus on a 'liberal legal culture', van der Walt argues that law "is not an extraneous and autonomous framework within which judges can be restricted; it is an intellectual and cultural artifact that judges themselves create through their interpretation of legislation and the common-law tradition" (2006, 11). Moreover, understanding law and politics as co-constitutive areas of struggle demands that legal researchers "search for and highlight opportunities for and real instances of dissent and disharmony and emphasise the effect it had on the development of law in its social and political context" (van der Walt 2006, 46). Law and rights are focal points to both mount resistance and legitimate appeals; they exist in a constellation of discourses and practices that provide means to make legible social struggles and collective claims to redress.

Human rights struggles in the context of South African constitutionalism also exist within a transnational field of activism wherein a global culture of human rights is emergent through UN agencies, transnational NGOs, and human rights advocates and doctrinally based in treaties, declarations, and human rights law. Socio-legal researcher Heinz Klug describes the relationship between the national and international struggles against apartheid in South Africa and the importance of the transnational human rights machinery and activism in this national struggle. He argues that the international campaign against apartheid in South Africa marks a key point in the "transformation of human rights from the state-based system of international legal norms to what might more accurately be thought of as a normative and institutional system of transnational human rights" (Klug 2005, 88).<sup>17</sup> If the conditions of transnationalizing human

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<sup>17</sup> Klugg describes the role of the UN General Assembly in condemning apartheid, beginning in 1952, by asserting its jurisdiction to advocate for human rights within particular states. Klugg explains: "This was not merely the construction of a normative framework but rather a globalizing process that only came to prominence through the struggles of national and international social movements, from the civil rights movement in the United States to the mothers of the Plaza de Mayo in Argentina and the international anti-apartheid movement itself. Despite the old formal doctrine that states are the sole or primary subjects of international law, by the end of the twentieth century the reality of a constant renegotiation of state sovereignty was well established, providing a smorgasbord of

rights played an important role in the struggle against apartheid, argues Klug, the final Constitution in South Africa set a ‘high water mark’ in the global movement for human rights (Klug 2010). As demonstrated in the remaining chapters, human rights struggles in South Africa are mobilized through references to the UN Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, the Convention on Biological Diversity, the UN Declaration on the Rights of Indigenous Peoples, as well as numerous soft-law instruments, such as the Food and Agricultural Organization’s Voluntary Guidelines on the Responsible Governance of Tenure. Regional institutions such as the African Commission on Human and Peoples Rights also play a role in legitimating human rights claims.

### 3.7 Conclusion: Approaching struggles over land as property in post-apartheid South Africa

The relationship between constitutional law and social, economic and political transformation is unwieldy and unpredictable. Transformative constitutionalism lends itself to pronouncing visions of equality and glorifying the role of law in fulfilling calls for economic and social justice. Yet the effort to create an institutional framework that both sustains stability while being flexible enough to respond to changing social, economic and political contexts remains a significant challenge. In this context, how do we measure, or understand conceptually and theoretically, the relationship between the constitution and social change?

How constitutional provisions and judgements from the Constitutional Court are mobilized in a wider field of action remains out of the purview of existing literature on South

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subjects—international organizations, nongovernment organizations, transnational corporations and movements, as well as individuals—and a fragmentation of jurisdiction in which the nation-state provides the locus for constant renegotiation, realignment, and reassignment of jurisdictional powers” (Klugg 2005, 91).



African constitutionalism. As explained above, researchers concentrate on the specific work of the court by studying issues such as legal culture, adjudication, the interaction of social movements with the courts, and legal interpretation. If we are to take a different approach and understand the work of the Constitution and Constitutional Court in processes of human rights articulation, and the unique forms of vernacularization of Constitutionally upheld human rights norms in local contexts, then we can begin to understand the work of transformative constitutionalism as practice and process. We can also begin to recognize how mobilization on the ground feeds back into changes in Constitutional law, thus impacting the ethos and process of transformative constitutionalism from the ground up.

The approach that I take to the relationship between law and social change in the remainder of this dissertation draws from a history of critical socio-legal scholarship. American critical legal scholars have long argued the question of whether courts can produce change through progressive human-rights based jurisprudence is an empirical one. In his famous and landmark book “The Hollow Hope: Can courts bring about social change?”, Gerald Rosenberg (1993) argues that, counter to the hopes and assumptions of progressive lawyers and activists focusing on the courts as a means to achieve social justice, longitudinal empirical evidence demonstrates that landmark civil rights cases in the United States, such as *Brown v. Board of Education*, have failed to generate social reform. The failure of courts to spur social reform is due largely to a number of structural constraints, argues Rosenberg, such as a lack of political will to enforce widespread institutional change and lack of implementation powers. Yet there is a deeper problem embedded within this critique: it relies on a functionalist perspective of the relationship between two distinct spheres of ‘law’ and ‘society’ wherein law evolves to respond to the perceived needs of society, an approach (or habit of thought) that reifies history and

assumes either that divergences of the predicted outcome are due to a dysfunction of the system or that a specific outcome is the natural result of a carefully laid plan (Gordon 1984, 70-71). In his seminal paper *Critical Legal Histories*, legal historian Robert Gordon argues that critical legal scholarship can overcome functionalist accounts of legal history by collapsing the law and society distinction, examining how law is constitutive of consciousness, and by arguing that the indeterminacy of law is itself grounded in a legal system founded on contradictions. He explains, “if it turns out to be true that law is founded upon contradictions, it cannot also be true that any particular legal form is required by, or a condition of, any particular set of social practices” (1984, 116).

A focus on the indeterminacy of law and legal change is foundational to a critical legal perspective. As Gordon explains, indeterminacy does not assume that regularities in social outcomes are “necessary consequences of the adoption of a given regime of rules. The rule-system could also have generated a different set of stabilizing conventions leading to exactly the opposite results and may, upon a shift in the direction of political winds, switch to those opposing conventions at any time” (Gordon 1984, 125). Leaving legal functionalism behind and turning instead to focus on indeterminacy in the political and social relations that are constitutive of law, involves approaching law as something that is produced and re-produced in the everyday practice of struggle and understanding law as a central locus of power through which new forms of territorial inscriptions and governmental relations are articulated.

In the remaining chapters of this dissertation I examine the mobilization of rights through the work of actors, state and non-state institutions, and social movements. Contemporary struggles over property, I demonstrate, are not determined by the property clause. Rather, struggles over property are fundamentally struggles over authority, over territory, over who can

make legitimate claims to land; they are struggles that draw on a wide range of intersecting and inter-connected rights claims, including cultural rights, indigenous peoples human rights, transnational norms on rural people's land rights, and rights to the autonomy of communities as self-determined decision-makers. As I show in the next chapter, it is precisely the politics and processes of neoliberal governmentality that have opened up new spaces for the realization of transformative constitutionalism.

## 4 CONSTITUTIONALISM, LAND AND NEOLIBERALISM: GOVERNING AUTHORITY AND COLLECTIVE SUBJECTIVITY

### 4.1 Introduction

There is a jarring disjuncture between the promise of transformative constitutionalism and the realities of South Africa's political economy of inequality (Brand 2013, Dugard 2013). Critics widely argue that beginning in 1994 the apartheid state transformed into a democratic state steeped in neoliberal economic policies which effectively reproduced racial and class-based inequalities (Bond 2000, Desai 2002, Saul 2014). In the years directly following the transition to democracy the ANC "imposed its own structural adjustment program" realized through tax cuts for the rich, the elimination of tariffs protecting unionized South African workers from the impact of low-cost products produced in global sweat shops, and the abandonment of exchange controls (Desai 2002, 10). As journalist Desai describes, "by every measure (life expectancy, morbidity, access to food, water, etc.) the living conditions of the poor rapidly worsened" (Desai 2002, 10) after 1994. Political scientist Patrick Bond explains the influence of a neoliberal global economy in the country: "South Africa has undergone an elite transition from racial to class apartheid. This transition was mediated by the institutions of imperialism and their elegant local collaborators who regularly occupied economic ministries and endorsed the Washington Consensus, giving it local, continental and global legitimacy" (2016, 5). The absence of a constitutional avenue to regulate or dictate what kind of economic decisions could be made, leaving neoliberal economic policy outside the realm of human rights litigation, was arguably a fundamental flaw of constitutional supremacy in South Africa (Baxi 2013).

Land reform has certainly been configured in part by the forces of neoliberalism, as I describe below. However, a brief note on land in South Africa is needed. As I described in

Chapter Two, the imposition of colonial forms of property was one way that the colonists created and defined a sense of universality, in law and property, against the colonized other (Fitzpatrick 2003, Bhandar 2018). It was the control of land and labour that motivated colonial expansion and justified forced dispossession and racialized government through apartheid. Rural land is often the focus of agrarian political economists who understand land for its productive value within a small-scale farming or large-scale capitalist economy (see Bernstein 2006, 2013). But land is about much more than production. In contemporary South Africa, land is an emotive issue for both those previously dispossessed, who consider land rights to be deeply intertwined with citizenship and identity, as well as white South Africans who claim that their farmland is part of their heritage (see Kepe et al 2010). As geographer Thembela Kepe and his collaborating authors explain, “people’s relations with land form the basis of their membership in communities, ethnic groups and nations. Land is not only a productive resource and economic asset; it also denotes a political entity” (Kepe et al 2010, 150).

Land has also been found to be an important resource for the distribution of goods within and between communities and families (rather than just a resource for production) (Fay 2015). James Ferguson (2013) argues that agricultural political economists should move beyond the well-worn perspective of land as a productive resource and consider additionally how land is an important site of non-agricultural distributive activities that enable people to, for example, produce and access food. This requires that researchers adopt a distributive perspective to attend to “the specific institutions and cultural forms through which processes of distribution take place, and not to suppose that these specificities simply follow mechanically or automatically from a given system of production” (Ferguson 2013, 170). Pauline Peters identifies the deep social, culture and historical significance of land across the continent:

Many studies in different parts of Africa show how people identify with certain areas – not just as sources of livelihood but as home, as a place where they belong, where their ancestors are buried, or where they have historical memories of having arrived and settled, or of having struggled mightily to obtain and keep. Many people also express liking, even love, of certain rural places and rural practices (Peters, 2013: 556).

A wide range of sources consistently and affirmatively illustrate the cultural significance of land (as is illustrated throughout this chapter). In a report on land conflicts in relation to extractive industry, for example, the South African Human Rights Commission explains that land is much more than a source of economic production; it “reflects a more deeply entrenched cultural affiliation that grounds social relations in particular localities” (SAHRC 2018, 12). A participant in Eastern Cape hearings explains “Land is of deep significance to African people: key to identity and cultural expression” (2016). However, in law and policy the cultural significance of land in South Africa is often referred to only in very general terms, for example as an expression of ‘African’ cultural identity.

The diverse historical and cultural values attached to land are not included in the Property Clause of the Final Constitution, despite its recognition of diverse forms of tenure relations. Moreover, regardless of the historical, social, political and cultural meanings of land, the South African land reform program sought to implement a ‘classical’ conception of property following four principles (Atuahene 2010, 784). First, an owner must, through their individual efforts, acquire valid legal title to become the sole owner with clearly defined and consolidated rights. Second, the owner possess control over the use and transfer of her property to the extent that it does not cause harm to anyone else. Third, the state has a responsibility to protect the property rights of the owner (while the responsibilities of the owner towards third parties is under emphasized). Fourth, the state or other third parties bear the burden of justifying any actions that weaken the owner’s control of their property (Atuahene 2010, 783-784). In land restitution we

can identify the influence of the classical conception, argues Atuahene, wherein the government gives current owners facing expropriation for land restitution market value of the land being transferred, whereas in cases where land claimants have opted for financial compensation (rather than land restored) the financial amount determined does not reflect market value but is rather ‘symbolic’. This reflects the fact that the state “is working within a conceptual framework that assumes current owners acquire valid legal title through their individual effort to become exclusive, deserving owners” all the while ignoring the rights of the owners unjustly dispossessed and overlooking the duties that present owners might have towards dispossessed peoples making valid ownership claims (Atuahene 2010, 785).

It should come as no surprise that the nature of property rights was hotly debated during the transition to drafting of the new constitution and the transition to democracy. The property clause in the Final Constitution was the result of a long and intense period of negotiation through which powerful actors – including the South African Law Commission, the South African Agricultural Union, and the Democratic Alliance – demanded the continued protection of private property while members of the African National Congress, as well as other activist organizations, asserted the need for a robust legislative agenda to facilitate structural property reform and redistribution (Klug 2018, 14-18). Arguably, the property clause reflects the work and activism of land claiming communities and activists and allows for radical transformation, however it is a lack of political will, as well as Constitutional interpretations influenced by the recent history of land expropriation witnessed in neighbouring Zimbabwe, that have undermined the transformative potential of property reform (Klug 2018, 18). In these conditions we need to pay close attention to how peoples narrate their property rights in changing social and economic conditions. As anthropologist Carol Rose argues, property relations are stabilized as people

persuade others to recognize their distinct and exclusive rights; property is thus an act of communication, the success of which depends on producing and maintaining cooperation among peoples and institutions (Rose 1994). Of particular importance, therefore, is not the distinct model of property introduced, but rather the social, economic, political and legal contexts through which institutions and actors make claims to legitimacy over particular propertied relations, and the kinds of subjectivities that are created in the process (Sikor and Lund 2009).

It is a key contention of this chapter that conditions of neoliberalism have impacted how land is struggled over in contemporary South Africa; at stake is how values over land have been articulated, and how certain actors have been able to legitimate their claims to land as collective property over others. While many understand neoliberalism as a political economic ideology, this is arguably a limited view of a process of governmental regulatory restructuring (Larner 2003). Recent literature develops a conception of neoliberalism that accounts for discursive conditions of fragmented and not always coherent policies, ideologies, and practices that take form through an assemblage of uneven processes of neoliberalisation (Peck and Theodore 2012, Brenner, Peck and Theodore 2010), an approach that I demonstrate is useful for examining the networks of actors and authorities coalescing through struggles over property. These conditions require that the “particular form, contradictions and adaptations of neoliberalism in South Africa” be examined through empirical analysis (Pons-Vignon and Segatti 2013, 509). For example, as illustrated in this chapter, we witness the diverse ways that the political issues of land reform contribute to the production of new subjects and their proprietary relationships. New political rationalities are born through the work of non-state actors (such as non-governmental organizations who take on the responsibility to intervene in struggles over rural peoples rural property arrangements) and land claimants (who take on the responsibility to manage land



collectively), a relationship that demands particular forms of conduct from previously dispossessed land claimants in the democratic era. Land reform is illustrated as a site of “regulated freedom” (Rose and Miller 2010, 272) wherein specific technologies are used to make subjects legible and targets of interventions for the purpose of shaping both behavior and management (Berry et al. 1998). Moreover, the conceptual framework of neoliberal governmentality is used here to investigate “the reformulation of identities, not simply as the outcome of rhetoric or political manipulation, but rather as an integral part of the process of [the] restructuring” of social and economic life (Larner 2003, 19). New subjectivities are understood as the outcome of processes and practices of land reform and the political economic context in which they are applied.

Conditions of neoliberalism involve the responsiblization of subjects and new opportunities for making possessive claims to culture and custom (Coombe 2017). In conditions where governmental rationalities are dispersed between state and non-state actors who are advocating for specific conceptions of customary land holdings and the democratization of land governance through land-holding entities called ‘communal property associations’ (CPA), traditional leaders have new found resources to assert their legitimacy over land, even in cases where their claims are not supported by the Constitutional Court and ambiguously recognized in legislation. This reality speaks to the strength of the political rationalities of collective property that have sedimented in the country. On one hand there is an understanding of ‘collective property’ as the appropriate model of landholding for land claimants organized as ‘communities’, and on the other hand there are traditional leaders, who – through diverse means illustrated below - assert their own form of ‘collective property’ by nature of the fact that they mobilize their claims to culture and custom as a means to legitimate their roles as trustees for

rural peoples. Collective subjectivities are also the constitutive outcome of the work of transnational actors and the norms that are brought to bear through international activities.

In this chapter I demonstrate how collective subjectivities are constructed as legitimate property claimants and holders at the conjuncture of law, policy, and political economies of land reform and resource extraction. The constitutional framework, the unique ethos of transformative constitutionalism, and the model of land reform described in the last chapter, are generative of new subjectivities in conditions of neoliberalism. Newly capacitated citizens, often organized as collectivities, assume the responsibility to not only advocate for themselves but also to manage the means to realize their rights in a transitional state. Yet the opportunities offered through conditions of governmentality, and through legal vehicles of collective land holding, are far from uniform. As I show, despite evidence that communal land holdings can appropriately be understood as an expression of cultural practice in the form of customary law, CPAs have not provided a vehicle that provides room for its members to assert claims to custom and culture as a way of legitimating their property title. The chapter provides a novel intervention into contemporary debates about communal landholding in South Africa by conceptually distinguishing CPAs and Traditional Leaders as constitutive of distinct collective subjectivities.

The chapter is organized as follows. In the first part I explain the land reform program and the Constitutional framework and provide a brief overview of how existing literature explains the role of neoliberalism as economic policy in land reform. In the second section I describe the CPA model in law, policy and practice. In the third section I explain the institutional role of traditional leaders in democratic South Africa and explain some of the conditions that have contributed to their emerging power in the country. In the fourth section I illustrate areas of

rights-based struggle and assertion as emerging at the “limits of governmentality” (Coombe 2007).

## 4.2 Political Economy of Land Reform

The persistence of a form of neoliberal political economic ‘apartheid’ in present-day South Africa is an established argument in existing literature (Clarno 2017). Researchers in the field of agrarian political economy examine the effect of neoliberal ideology and economic policy on land reform (Aliber and Cousins 2013, Hall 2015, Kepe and Hall 2016). The focus of this wide body of scholarship is not confined to restitution, reform or redistribution per se, but rather the literature examines the economic and social context in which land is used as a means of production and a site of important social and economic redistribution. In order to understand the conditions through which legal struggles for land rights are being waged it is important to summarize some of the key points of this literature.

The land reform program in South Africa has not accomplished its objectives of providing land through restitution for those physically displaced under apartheid, redistributing land to the black majority to make land more equitably owned across racial lines, or reforming tenure in the former communal areas of South Africa.<sup>18</sup> Emerging political and social discontent clearly indicates widespread dissatisfaction with land reform. Conditions in which most black South Africans live are dire, as is particularly the case for peoples living without formal tenure, due in part to the failure to introduce tenure reform legislation. Those living with insecure tenure include 17 million in communal areas, 2 million on commercial farms, 3.3 million in informal

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<sup>18</sup> In their 2016/2017 annual report, the Department of Rural Development and Land Reform reports “The Commission for the Restitution of Land Rights is also contributing towards redressing the skewed ownership patterns caused by colonial-apartheid dispossession. The Commission has managed to settle 790 212 of the claims lodged by 31 December 1998, which translates to a total of 3.38million hectares; benefitting 408 231 households. The Commission is currently processing 6 989 outstanding land claims”. It is important to note that the vast majority of these claims have been settled by financial compensation rather than the transfer of land.

settlements, 1.9 million in backyard shacks, 5 million in RDP houses without title deeds, and 1.5 million in state-built housing (known as RDP houses in reference to the Reconstruction and Development Programme) houses with inaccurate title deeds (Cousins 2016, 9-10). Moreover, large scale land acquisitions threaten people without ‘legally legitimate’ claims to land (or the resources to resist dispossession) in the context of what has been termed ‘land grabbing’ in the region of Southern Africa (Alden-Wily 2011, Hall et al 2015).

Land redistribution is found to be a site of ‘deepening’ neoliberalism to the extent that it has historically moved further into a model that demands either contributions from the targeted beneficiaries or demands their participation in the agricultural economy. It has also created new forms of inequality to the extent that people connected to business or politicians access a majority of the benefits. Policy moved away from state-assisted land purchase for redistribution in the mid 1990’s, often realized through the form of small grants to households to buy land, to an approach wherein potential beneficiaries would ‘apply’ to the Department of Rural Development and Land Reform for land reform grants and would have to demonstrate how they would contribute, either in cash or in kind, to the subsidized land (Hebinck 2013, 16). Under president Mbeki the government focused on supporting medium to large scale farms and provided purchase subsidies to people who were already engaging in commercial production and a resource base to expand their business. In 2011 President Zuma introduced the ‘willing buyer, willing seller’ model whereby the state would buy land from ‘willing sellers’ at market value for redistribution. However, this redistributed land remained as state leasehold and did not transfer title to create new land owners. In other words, state leasehold introduced a new form of state landlordism and does not support the production of a new class of smallholders (Hall and Kepe 2016, 123, Hall 2015). Wage labourers remain tenants on farmland owned by the state, while

those who receive the most significant material benefit are black business owners (often well-connected to politicians) who gain a stake in farming operations (Hall and Kepe 2016). To date, land reform has not, in practice, promoted the agency and autonomous decision-making of the people who were meant to benefit from land redistribution.

Geographers Ruth Hall and Thembela Kepe studied land redistribution in one district of the Eastern Cape Province called the Baartman District. Their investigation included examining 11 projects falling under the state leasehold model called the State Land Lease and Disposal Policy (SLLDP), wherein the state black farming households obtain 30-year leases on the precondition that they secure a ‘strategic partner’ – i.e. an agri-business company – with whom they establish a joint venture agreement. The authors find that in the majority of cases the targets of land reform gained little while the strategic partners gained the majority of resources:

Although government policy emphasises the need for tenure security, and aims to achieve this through the provision of long-term leases, we found that beneficiaries did not have leases in any of our case study projects. The only two valid leases among the sample were concluded between government and strategic partners (i.e., agribusiness companies), not the ostensible ‘beneficiaries’. The inability of beneficiaries to pay rent to the state has led officials to institute a practice of issuing ‘caretakership’ agreements (mostly lapsed) in order to absolve beneficiaries of a need to pay for their land. Under such agreements, rather than being rights-holders, they are given a duty to look after state property for a limited period, normally three months, with the state being able to give them 30 days’ notice to vacate the property. In one case, a family was granted permission to occupy a state farm (without a lease), and asked by the DRDLR [Department of Rural Development and Land Affairs] to deliver an informal eviction notice to those already occupying it... Situations in which people either have no documented rights, or have caretakerships or expired leases produce high degrees of uncertainty, leading people to avoid investment in land use, production or maintenance of infrastructure. This means that ‘beneficiaries’ have little or no tenure security” (Kepe and Hall 2017, 123-124).

The above example provides insight into one of the areas of land reform, but the actual practices of implementing land reform policy are incredibly varied across the country. Paul

Hebinck explains that the state has “multiple layers which act according to their own interpretations of the state’s reform discourse, which often turn out to be contrasting interpretations of state policies, directives and objectives. Next to the state there are many other coordinating mechanisms and practices that shape the dynamics and outcomes of land and agrarian reforms” (Hebinck 2013, 18). In this fragmented landscape of policy and implementation land reform beneficiaries often become disenchanted with a complex and slow process and strategically manipulate the process in order to try to make it work for them, “often leading to a particular entanglement of practices and new resource use patterns” (Hebinck 2013, 17).

Under these conditions, two forms of legal subjects, variously supported in law and policy, have emerged: collective property holders and traditional leaders. In her work on the emergence of culturalized property claims in conditions of neoliberal governmentality, legal anthropologist Rosemary Coombe argues for a critical engagement with collective property that acknowledges “the political economies of community construction in order to understand ownership as a process through which property-holders are constituted as social actors and political agents” (Coombe 2011a, 106, see also Coombe 2017). Importantly, through processes of collective identification we can identify new kinds of spatialized and territorialized claims. However, these interact with colonial legal geographies in contradictory ways; as I show, narratives of post-colonial ‘emancipation’ or ‘re-entrenched’ colonial authorities are not generalizable in contemporary South Africa. In the remainder of this chapter I demonstrate not only the political economies via which collective subjectivities emerge but also illustrate the disparate and uneven opportunities offered to property claimants in contemporary conditions of neoliberalisation and its spatial configuration. Many of the struggles that I highlight are

ambiguous and contradictory, and demand nuanced judgements about how they echo colonial forms and subjectivities and how they might be reforming them (du Toit and Neves 2014).

#### 4.3 Legislating ‘Community’ as Collective Property Owners

Under conditions of neoliberalism there has been a shift from focusing on the ‘social’ to targeting the ‘community’ as a subject of governance (Bennett 2000). This is particularly true in the context of ‘development’ where, in some cases, a focus on the ‘collective’ or ‘communal’ landholding subject is ubiquitous, unchallenged, and supported through transnational governmental assemblages focused on the global South (Li 2016). The ‘community’ in South Africa has long been an imagined beneficiary of land reform, despite scholarship that challenges the fallacy of homogeneous property-owning communities (Kepe 1999, James 2007, Beyers 2009).

A policy trend focusing on collective subjects as both the subjects and agents of land reform can be identified across a range of sources, including the *National Development Plan 2030*. ‘Community’ and its stemmed words are used 556 times in the 480-page document, while ‘individual’ was used 132 times and ‘household’ 172 times. ‘Community’ refers to a national community, as well as the subject of ‘community-based programs and community development programs. While it is important not to generalize from quantitative results, the numbers do represent a level of uncritical comfort with the concept of ‘community’ in the national development plan.

A concern about the role of communities in rural development is also pronounced in land reform policy. In the *Green Paper on Land Reform*, published by the Department of Rural Development and Land Reform (DRDLR), it states: “The need to instill national identity, shared citizenship and *autonomy-fostering service delivery* are the primary reasons why the State must

continue to invest in the transformation of land relations” (DRDLR 2011, 3). Moreover, the 2015 *Communal Tenure Policy* (CTP) notes that its effective implementation “requires the mobilisation and organization of rural people into functional groups to effectively take charge of their own development, especially in identifying the most pressing needs of the community and perceived optimal ways to address these” (DRDLA 2013, 12); and further notes that one of the core objectives of the *Comprehensive Rural Development Plan* includes the “self-reliance of rural communities” (DRDLR 2013, 12). Finally, the CTP refers back to the value and requirement of participation in the Constitutional democracy: “in order for rural transformation to occur in communal areas, we need a capable state supported by an active citizenry as South Africa’s democracy is not only representative but participatory in nature” (DRDLR 2013, 23). A focus on citizen participation (a key to transformative constitutionalism as discussed in Chapter Three) as well as a clear focus on making the subjects of land reform autonomous communities for the purpose of realizing service delivery needs, is unambiguously asserted.

In line with these broader policy objectives, peoples seeking redress through land reform often need to create a collective landholding entity. Community subjects are defined both in the land restitution program, which allows claims to be filed as either individual or collective claims to land, and in the context of land reform where tenure rights have historically been imagined to be held and managed collectively. In the *Restitution Act*, for example, 'community' "means any group of persons whose rights in land are derived from shared rules determining access to land held in common by such group, and includes part of any such group" (*Restitution Act* 1994). Communal Property Associations (CPA) were legislated as holders of private property under the *Communal Property Associations Act of 1996*, written to "enable communities to form juristic persons, to be known as communal property associations in order to acquire, hold and manage



property on a basis agreed to by members of a community in terms of a written constitution; and to provide for matters connected therewith." (*CPA Act* 1996). The Act defines a 'community' as a group of persons who have shared rules of land use and occupation, and who have defined their rules through a democratically-written CPA constitution, to be approved by the Minister of Land Affairs. During the process of land restitution claimants would apply to register their CPA, which requires that they convince the Director-General of Land Affairs that they are a 'community' that has been disadvantaged and that it is in the public interest to approve their application (*CPA Act* 2). An application for registration for a provisional CPA must include a list of names, principles for the identification of other peoples who may be added at a later date, procedures for resolving disputes, and a democratically elected interim committee to represent the association (*CPA Act* Section 5). A number of imperatives define these legal entities, including the constitution of a board, the collective writing of a constitution, and frequent meetings of the board to discuss issues in the management of the collective land.

Constituting collective land-owning subjects has been very difficult in practice. This is due in part to the incredible social complexity inherited by the post-apartheid state. In the White Paper on Land Reform, published in 1997, this complexity is clearly acknowledged. The authors of the report argue that the issue of defining legitimate owners constituted as legal communities is a bewildering task due to the long history of forced removals:

Often people were forcibly removed and 'resettled' on land to which others had prior rights. People evicted from white farms were ordered by magistrates to go and settle in black freehold areas. Thus it is commonplace that there are overlapping and competing tenure rights to the same land. One group may claim ownership because they have traditionally owned the land for generations, another because Pretoria awarded the land to them and gave them documents to this effect. In other situations, there are people who were accepted within tenure systems as 'refugees' 60 years ago who now claim independent rights to stay there, while the 'host' owners want to use the land

for the agricultural purposes to which they have always aspired (DLA 1997, 56).

It is on this contested landscape that dispossessed peoples have had to demonstrate their collective solidarities with others whom they would hold land collectively. Thus, they are not only responsible (in land restitution for example) for demonstrating their previous occupation of a particular area of land, but they also need to present themselves as collective land-holding subjects.

Unfortunately, due to issues such as lack of ongoing support and lack of resources, many CPAs failed to operate as intended (Cousins and Hornby 2000, Pienaar 2000). Their failure has been attributed to a number of factors. For example, while CPA constitutions are meant to be organically and democratically written by members, Klug (2006) finds little evidence to suggest that 'communities' organized as CPAs "actively participated in constituting or defining themselves in very specific ways during the constitution-drafting process" (2006, 134). Moreover, some argue that the CPA model was far too bureaucratic and demanded far too many resources to be successful in the long term (Kingwill et al. 2017). Others argue, however, that there is no necessarily inherent flaw in the design and implementation of CPAs, but rather the problem is a lack of government support in their creation and ongoing functioning (Weinberg 2015).

There are significant reasons to have reservations about the assumed cohesiveness of property-owning communities. Thembele Kepe argues that defining the boundaries of 'local communities' for the purpose of land reform is highly problematic. The definition of 'communities' in rural areas is "both complex and ambiguous" (Kepe 1999, 418). Kepe identifies three basic characteristics of community - as a spatial unit, an economic unit, and as a unit of kinship, social and cultural relations - to demonstrate the ways that a 'community' is often

actually one of many different understandings of community relations super-imposed on one another, with each layer emphasized by different kinds of government interventions. He highlights that simplistic and ambiguous understandings of community are not merely theoretical issues, but misunderstandings that can cause conflict if not dealt with properly by state agents working in land reform:

In the gap between policy and implementation, the meaning of 'community' as used or implied by policy makers may easily get confused and blurred by local realities. Unfortunately, the uncertainty around the meaning of 'community' is not only a problem for outsiders, but also for local people engaged in struggles in terms of social and territorial groupings. These local conflicts and uncertainties complicate the work of the implementers of policy (Kepe 1999, 430).

The valorization of collective property in South Africa is informed by what anthropologist Knut Nustad argues is a dichotomy in liberal thinking about property in the country wherein “possessive individualism” is approached as regressive and “communal property systems” are imagined to be the most progressive form of property holding for racialized groups (Nustad 2011, 24). Further, he identifies a shift in thinking from approaching "property as a social relation to property as specific plots of land, and from people with a multitude of histories and experiences to people as members of a 'community'" (Nustad 2011, 24).

This shift is indicative of a trend identified by anthropologist Deborah James: the rights-based assertions of collective property in South Africa have routinely run into barriers when future-oriented rights language is translated into the ‘hard ground’ of property (James 2007). James argues that the land reform program is constituted by two discourses of land reform: one focusing on rights and the other on property. The rights approach echoes the rights talk of the 1980s and seeks to legally secure land for citizens. It appeals to the past in its claims for ownership as reparation for past wrongs. The property approach is more forward looking and

seeks to affirm material and concrete access to land for the purposes of economic development (James, 2007: 43). James asks in response to these approaches: “[d]o the subsequent ideological contestations over the respective merits of restoring citizenship ‘rights’ or securing economically viable ‘property’ affect how different categories of the heterogeneous landless are viewed – and their landlessness addressed – by land reform? (James, 2007: 50). In other words, how has this identified tension between rights and property affected the policy prescriptions and constitutions of collective land holding institutions?

'Communities' are imagined as responsible subjects of land restitution through processes of 'strategic essentialism' in litigation (see Spivak 1987, Huizenga 2014). While this may be a necessary political strategy in order to access resources, it also creates problems. Attorney Wilmien Wilcomb states: “Lawyers are often forced to ‘strategically essentialize’ communities for the purposes of litigation. That means that lawyers must speak about ‘the community’ as an entity with a single view all the while knowing that that is not the case” (2013, 21). She further elaborates that the role of lawyers working with communities is to “learn with and learn from the tensions”, and to “unashamedly inject meaning into these legal concepts before the more powerful forces do so – and re-appropriate those terms already conquered” (ibid). Strategic essentialism is not only a question of whether or not ‘communities’ exist, but rather it raises more specific questions about what ideological constructs, or what values, might make assertions of strategic essentialism successful and in what contexts? Such more nuanced analysis also demands empirical examination of the kinds of conflicts that might emerge within a claimant community despite observed collective solidarity.

Anthropologists Chris Beyers and Derick Fay explain, for example, the conflicts that tend to emerge ‘after restitution’. One of the legacies of the CPA model is that it has directed

problems and conflicts inwards, within and between members who often turn to litigation to deal with disagreements around membership, decision-making powers, and property entitlements.

The nature of these conflicts takes on a particularly neoliberal characteristic, as explained by Beyers and Fay:

Across the South African restitution landscape, we see fracturing of claimant communities... Members of claimant groups are now using the law, not to challenge the state or demand delivery, but to make claims and levy accusation on one another through challenges to the new legal entities created through restitution (2015, 439).

One effect of this streaming of grievances inwards to members of CPAs, is lengthy and resource-heavy litigation, wherein the state stands back as an apparent 'neutral' actor in what is otherwise a 'local' conflict between land claimants (Beyers and Fay 2015). The entity as a responsabilized subject becomes the target of its own members through litigation.

In land reform policy and legislation, we witness a rapid and often uncritically acknowledged shift from land rights to land administration as assumed rights claimants are expected to take on the responsibility of adhering to a strict set of administrative (and legally defined) roles in the management of their own land. In other words, in order to free themselves from being neo-colonial rural subjects of chiefs they must conform to a set of rules that are democratically mandated in a constitutional democracy. For example, the CPA model does not account for the diverse meanings of land, the kinds of relationships that people actually have with the land, for example by recognizing the layered rights between households, kin groups, communities, and traditional territories, and the temporal or spatial character of these rights (Kepe 1999, Kepe et al 2010). Members of CPAs are assumed to conform to a political rationality that demands their own participation in managing this legal entity, however the degree to which they can participate is highly circumscribed by administrative rules. Moreover, the CPA

model of collective ownership is not easily amendable or transferable to wider sets of claims and issues, such as claims to culture and custom as a means to legitimate forms of landholding. It is telling, for example, that the only reference to ‘culture’ in the CPA Act is in reference to prohibitive grounds of discrimination within on the principle of equality of membership (members must not be discriminated against on the basis of culture)(Section 9(1)(b)(i)).

In conditions of legal pluralism, accentuated by fragmented and variegated neoliberal government restructuring, traditional leaders have begun to re-assert their own legitimacy through a variety of means (discussed below), in order to trump the property rights of CPAs. These assertions may also be supported through state agents. As Kingwill et al. explain, “policy makers, since at least 2009, have seen CPAs as being in competition with traditional councils for authority over land” (Kingwill et al 2017, 63). Further, the authors list among the emerging problems with CPAs: “A marked upsurge in contestation between the authority of traditional councils and the governing bodies of CPAs over control of land access and rights” (ibid, see also Weinberg 2015). Ironically, despite the number of issues that have plagued the CPA model and administration, it is CPAs that have provided one of the legal forms that peoples use to assert their own property and autonomy against the assumed authority of traditional leaders. It is to the particular power of traditional leaders in contemporary conditions that I now turn.

#### 4.4 Traditional Leadership

The role of traditional leaders is unique in South Africa compared to most of the continent in that the country has taken specific measures to officially recognize chieftaincy at local and national levels of government (Berry 2018, 92). Traditional leadership relies upon the existence of an imagined traditional community that is the subject of their authority. Moreover, under current legislation, they have effective property rights which they hold on ‘behalf’ of a larger collective.

Thus the 'traditional leader' is itself a legal subject position that perpetuates a political rationality of communal property-holding within horizontal relations of power characteristic of governmentality.

During the early transition to democracy, traditional leaders who had benefitted from enhanced authority under colonial rule began to fear that a democratic system would undermine their rural authority. A 'traditional leadership lobby' formed to advocate for the continuation of customary authority in the new democratic dispensation. In 1987 the Congress of Traditional Leaders of South Africa (CONTRALESA) was formed to lobby for their representation in the new state government, and in 1997 the National House of Traditional Leaders was established to guarantee their inclusion in the new South Africa and establish state budgets for their remuneration.

Significantly, in 2003 the *Traditional Leadership and Governance Framework Act* (TLGFA) was passed. Although it did not outline the statutory powers and authorities of traditional leaders, it provided a framework by specifying, "that the national or provincial governments may enact laws providing a role for traditional councils and leaders on a wide range of issues, including land administration, welfare, the administration of justice, safety and security, economic development, and the management of natural resources" (Claassens 2015, 75-76). Legislation introduced since the Framework Act, such as the (now overturned) *Communal Land Rights Act* (CLARA), and the *Traditional and Khoi-San Leadership Bill* (TKLB), further endorsed the authority of traditional leaders who, in turn, have articulated a particular version of customary law to justify their own proprietary powers. The post-apartheid State, in collaboration with traditional leaders, chose the most expedient way of making customary law: by defining 'traditional' leadership as the historical authors of customary law in a fashion congruent with

African colonial history (Chanock 2005, 343). Moreover, to identify the peoples living under the government of traditional leadership, existing legislation attaches their authority to state-identified ‘traditional territories’ that essentially mirror territorial jurisdictions created through Bantustan legislation, recreating the relations of power that characterized the legal geography of colonialism and apartheid identified in Chapter Two. State recognition has thereby also offered chiefs new opportunities to claim property, as described below.

The powers granted to traditional authorities, and the coercive measures used to protect them, have left many commentators bewildered (Thamm 2015, Mbembe 2014). In recent years, for example, traditional leaders have increasingly partnered with mining companies without consulting impacted peoples (Claassens and Boyle 2015). Aninka Claassens (2014) argues that this amounts to the “double dispossession of the rural poor”, suggesting that rural peoples were first dispossessed of rights under apartheid rule and are again being dispossessed by traditional leaders. Research shows that chiefs have resorted to coercion to suppress dissent and maintain their power as they continue to collect rents from extractive industries (Mnwana and Capps 2015).

In some instances, community members have attempted to stand up to the authority of chiefs to assert their land rights, and the legitimacy of CPAs, as autonomous from traditional leadership. Conflicts between CPAs and traditional leaders have received the attention of the Department of Land Affairs, which in 2015 announced that CPAs would be ‘discouraged’ while the authority of traditional leaders would trump the rights of newly constituted CPAs (Weinberg 2015). This official announcement contrasts with legislation drafted during the transition to democracy. For example, in the early years of democracy in South Africa there was an attempt to sever any legal link between collective land-holding entities and traditional leadership. The



*Restitution Act*, for example, defines ‘communities’ without any reference to traditional leadership or traditional territories. As one NGO explains, “[t]his indicates that at that early stage, the legislature did not understand communities as necessarily represented by traditional leaders” (Spatial Inequality Report 2016). In public forums many participants decry the idea that traditional leaders determine the identity of community and control their landholding (TKLB Public Consultations, 2 February 2016). Moreover, transcripts and reports from public hearings for this research found that participants often complained that traditional leaders have become too powerful in democratic South Africa and that their leadership and control over property and territory mirrors Bantustan law and policy introduced during apartheid.

Conflicts have emerged between the legitimacy of chiefs and rural peoples as they struggle to determine the nature of their political allegiances and property forms. These conflicts were brought to the fore by activists in a legal arena by the 2003 *Communal Land Rights Act* (CLARA). CLARA was introduced in 2003 to fulfill a constitutional imperative to introduce legislation to secure tenure in rural areas, and the former bantustans (now communal areas) in particular. Lawyer Henk Smith describes that at the core of the Act legislates traditional councils or “modified tribal authority structures to administer the land and represent the ‘community’ as owner. Its legal effect is to transform and recast customary law and traditional councils” (Smith 2008, 39). These characteristics continue to be contested today.

CLARA faced significant opposition and was eventually found to be unconstitutional by the Constitutional Court on 11 May 2010. Unfortunately, the Court overturned the legislation on procedural grounds, therefore the substantive arguments submitted and evidence amassed for the courts were never heard. Four communities sought an order declaring all the provisions of CLARA unconstitutional or invalid. The substantive challenge was based on the following

grounds: it undermines the security of tenure on land communities use and occupy, it undermines customary law-based systems of land administration because it introduces a form of land administration under traditional councils, women's rights were not adequately secured as the land rights envisioned in the Act relied on historical forms of ownership that excluded women, and finally, if read together with the TLGFA, CLARA creates a new sphere of government in traditional leaders (Pepeteka 2010, see also Cousins and Claassens 2008). Land rights-activist and researcher Rosalie Kingwill explains the further limits of the act, arguing CLARA "made no attempt to recognize property in terms of familial or kinship relationships, nor did it allow for decentralized relationships of authority to tie in with the layered levels of local authority, building up from families and clans" (Kingwill 2013, 170). Unfortunately, by basing the judgement on procedural grounds, the Court avoided having to deal with any of the substantive issues before it.

Despite the legislative vacuum created when CLARA was struck down, no new legislation securing tenure in communal areas has been introduced to date. Rather, an interim measure, the *Interim Protection of Informal Land Rights Act* (1996), is re-introduced annually. The most recent *Communal Land Tenure Policy* (2012) stipulates that all land in communal areas will be owned and managed by traditional councils, which are headed by traditional leaders. Finally, the TLGFA is on track to be replaced by the TKLB, however many of the concerning aspects of the TLGFA remain in the new version (Custom Contested, 2018).<sup>19</sup>

The efforts of traditional leaders to expand their authority over land as well as in government more broadly in Africa and in post-apartheid South Africa is now the topic of a wide and burgeoning body of work (Oomen 2005, Comaroff and Comaroff 2011, 2018). Some argue

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<sup>19</sup> Also see the website founded by a collectivity of land researchers and activists in late 2018: <https://stopthebantustanbills.org/>

that post-apartheid chieftaincy represents a resurgence or revival of past traditional forms of government (Claassens 2015, Ntsebeza 2008). This view is a 'half truth', argue Comaroff and Comaroff (2018), as Chiefly assertions of power today have only partially to do with a re-assertion of the past, and as much to do with drawing on contemporary conditions of global neoliberalism, including new avenues to establish themselves as brokers between extractive industry, development agencies, and international partners seeking to connect with 'local' communities. In other words, the legitimacy of chieftaincy derives from many sources that are untraditional (Comaroff and Comaroff 2018, 14). The authors emphasize the huge diversity of ways that chiefs assert their authority and aggregate resources to buttress their claims to leadership and trusteeship. They also identify what they believe are interconnected conditions that enable the re-articulation of traditional authority:

(1) the relative capacity of rulers to mobilize the customary as a fungible political resource in order to control flows of wealth and tangible assets, territory, and people; (2) the devolution of the functions of the state and, with it, the dispersal of resources, especially where it is accompanied by an active corporate and NGO presence; and (3) the sedimentation of "local" communities of engagement around an indigenous authority, positioned to claim recognition and rights - material, social, spiritual, territorial - by virtue of inalienable cultural difference (Comaroff and Comaroff 2018, 19).

Certainly, these are conditions in South Africa that facilitate and allow for the power of chieftaincy. However, the idea that local communities of engagement are 'sedimented' is a clear point of contention – countless cases in South Africa demonstrate that local communities are often at odds with, and in conflict with, traditional leaders who are meant to 'represent' them (See Mnwana and Capps 2015, Claassens and Boyle 2015, Mnwana 2016). One such case, where the authority of the traditional leader as protected in the TLGFA came into direct conflict with a CPA, involved the Bakgatla ba Kgefela.

#### 4.4.1 Culture and conflict in Bakgatla-ba-Kgafela

‘Culture’ is a particular site of struggle between rural peoples and traditional leaders. As some critics argue, this interpretation of communal property as being under the sole trusteeship of chiefly authority can “violate the cultural meanings attached to and connections with the land” (Mnwana et al 2016, 13). However, in an extensive government report on the status of traditional leaders in post-apartheid South Africa (the *Status Quo Reports on Traditional Leadership*, which span 6 volumes and were informed by consultations with traditional leaders across the country), traditional leaders argue the opposite – that CPAs undermine the essential role of traditional leaders in sustaining the spiritual and cultural link between people and the land:

The link between traditional leadership and land is irrevocably irreversible. The land and soil is identified as the spiritual home of the ancestors who maintain an interest in the welfare of the living. A traditional leader plays an important role in the propitiation of the ancestors as he is also the religious leader of his community. In short, communal ancestors are domicile in the land (soil) over which the traditional leader, by virtue of the religiosity inherent in him, wields tremendous authority. The CPA's on the other hand seem to be bent on wrenching the land away from traditional leaders. The powers of holding the land in trust for their communities are being eroded. Similarly, the institution of traditional leadership is being put under siege. The traditional leaders point out that the establishment of CPA's seems to be a ploy to abolish the institution by removing its very foundations, namely the land (soil) (Status Quo Report 1996, Volume 6, Section 26.2.3).<sup>20</sup>

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<sup>20</sup> Additional and revealing quotations include: “The traditional system of land administration is cheap simple and effective without any bulky administrative support network. It is also a hands-on control method of which the community forms an integral part. A change in the system will bring about new administrative and financial demands that cannot always be met in practice. Where individual property rights have been introduced the administrative system tended to collapse after the first generation of owners has passed away. Community Property Associations will undermine the authority of traditional leaders and will destroy traditional systems. In rural areas this will create a vacuum that will suck rural communities into a crevasse of landlessness and poverty as land falls into the hands of a few wealthy individuals” (Status Quo Reports 1996, Volume 6, 26.6.6). It is telling that the traditional leaders identified some of the issues with CPA’s identified above, including the administrative burden.

Through the *Status Quo Reports* traditional leaders clearly articulate their disapproval of CPAs.<sup>21</sup> This disapproval is followed by a description of the role of traditional authorities in relationship to land: “In traditional communities land does not belong to a single individual. Land is the property of the whole community and the traditional leaders acts as the "trustee" who must protect and manage this land to the benefit of the community” (Status Quo Report Volume 6, 26.6.1). While these conflicts were identified 20 years ago, contemporary conditions have impacted the power dynamics of fields in which they take place.

'Traditional communities' are made legible as collective property-owning subjects in a transnational field whereby claims to culture and heritage are acknowledged and celebrated by, amongst others, extractive industries. In the context of the an international consensus that extractive industry must respect human rights, as endorsed in the UN Protect, Respect and Remedy Framework (2008) and the UN Guiding Principles on Business and Human Rights (2011), for example, heritage conservation has received attention as an important factor in human rights and in achieving social legitimacy. A commissioned report<sup>22</sup> by Stephen Turner (2012) called *World Heritage Sites and the extractive industry* is one example of a purported concern with protecting heritage within the transnational extractive industry. In South Africa, argues Susan Cook (2018), we are witnessing the rise of ‘traditional-industrial’ complex through the work of chiefs and mining companies, particularly in the platinum belt, where traditional leaders offer mining companies access to land and minerals as well as legitimate their ‘social licence to operate’.<sup>23</sup>

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<sup>21</sup> Coding developed through my analysis of these reports include ‘Traditional Leadership erosion, challenges’, ‘Conflict with CPAs’, ‘US vs Them mentality [ie. Traditional leaders vs CPAs]’, ‘Traditional leaders as custodians of land, culture’.

<sup>22</sup> The report was commissioned by the International Union for the Conservation of Nature, in conjunction with the World Heritage Centre, the International Council on Mining and Minerals, and Royal Dutch Shell.

<sup>23</sup> Lynn Meskell (2012) argues in her book *The Nature of Heritage* that biological and natural heritage have taken precedence over cultural heritage in South Africa, a trend that is linked back to colonists concern for the

Ongoing struggles for the legitimacy to represent the ‘community’ and to determine how ‘community property’ is governed in the Bakgatla-ba-Kgafela (Bakgatla) traditional territory provide an illustration of how cultural heritage is being re-asserted in the context of extractive projects. The Bakgatla traditional territory is located in the North West province on an area which is home to the world’s largest platinum reserves – referred to as the ‘platinum belt’ - making it the potential beneficiary of an unimaginable amount of wealth. While the Bakgatla are often referred to as a ‘community’, this is a misnomer as the use of the term tends to suggest a small, organic group of persons, while in reality upwards of 350,000 people live under the governance of the Bakgatla traditional council, led by Kgosi Nyalala Pilane, thus illustrating the homogenizing tendency of this contested term.

The role and importance of an international audience to the traditional leader and his traditional council is clearly illustrated in a news interview with Pilane. In the interview Pilane clearly directs his message to international investors in the extractive industry by saying that the territory over which he claims legitimate authority as a traditional leader was open for business (SABS News August 2015). Moreover, the Bakgatla traditional council produces promotional materials boasting a ‘master plan’ for the development of the territory as well as a ‘cultural centre’. In a ‘Corporate Brochure’ published to attract investors to the area it is explained:

The newly developed Moruleng Cultural Precinct is also expected to become a hub for cultural activities and will integrate the development of other heritage sites throughout BBK’s 32 villages. A brand new digital archive and library will be developed at the current Bakgatla Primary School. Here the community and visitors will explore Bakgatla’s proud heritage and also discover the tribe’s historical story. The breadth and depth of the project is unusual for a traditional community and may serve as a model for others (BBK Corporate Brochure).

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conservation and preservation of South Africa’s unique biological diversity. Conservation, she argues, is historically and routinely used as a justification for the dispossession of racialized peoples. While she offers a compelling argument, for the purposes of this dissertation, I focus on the conditions that have allowed for the emergence of traditional leaders as custodians of cultural heritage.

Major mining ventures also focus investments in ‘community development’ on cultural institutions and activities. For example, Anglo American - one of the main mining companies in the region - chose to focus its funding on the Department of Art and Culture in the Bakgatla traditional territory, an investment it boasts in its 2015 annual report (Anglo American 2015, 38). These examples illustrate how custom and cultural rights are articulated as means to legitimate assertions of collective property over resources in this new conjuncture.

Claims to heritage are not neutral articulations of a shared sense of past or identity. As Derek Peterson and his collaborating authors (2015) demonstrate in the book *The Politics of Heritage in Africa*, the promotion of cultural heritage across Africa has historically been the work of elites who leverage culture to promote their own interests.<sup>24</sup> Peterson argues that in the contemporary moment, across Africa chiefs and kings are finding new opportunities for commodifying heritage practices: [t]he local and authentic can now be sold, purchased, and consumed in a range of media: as medicine, as food, as literature, as art” (Peterson 2015, 18). Moreover, he argues, “[t]he practice of heritage has allowed certain entrepreneurs to trademark culture, claim it as their exclusive property, naturalize behavioral norms, and sideline minorities, dissidents, and other non-conformists” (Peterson 2015, 19). The statement, however, is not universally applicable. For example, not all peoples living within the Bagkatla territory disavow the new representations of heritage in the cultural centre. However, these assertions of cultural specificity, specifically to the audience of diverse actors – including South African consumers of news and extractive industry actors – have served to delegitimize the protests of communities against their political representation by leaders whose colonial titles gave them a head start and

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<sup>24</sup> Ghana, South Africa, Uganda, and Nigeria are the focus of contributing authors in the book, however the authors argue that their work points to a broader trend in the contentious politics of heritage in Africa. Examples include the entrepreneurial efforts of kings who assert themselves as “the arbiters of custom and the managers of tradition” (Peterson 2015, 26) by partnering with museums abroad to promote their kingdoms.

advantage in defending community custom for their own ends. It is in these conflicts that the power differentials in defining heritage are most apparent.

The promotional material produced by the Bagkatla traditional council, including the website, detailed development plans, the cultural centre and its celebration, demonstrates how the authority of the traditional leader over his territory is legitimated. Here we get no indication of the pressing poverty and social unrest that characterizes the traditional area. Rather, we learn about Pilane's 'commitment' to his community. This work is more than just a smokescreen, it is an emergent field of governmentality wherein claims to collective identity and custom as a basis of social identification are constructed; it is an articulation through which possessive claims to cultural distinction are used to attract investments in the area and as a consequence gain a share in mining profits.

Conflicts have emerged between Pilane and a CPA in the Bagkatla territory. He argues that his authority trumps that of CPAs which have been registered as land holders through the land restitution program. He has been embroiled in court battles as he tries to argue that no one in his area has the right to congregate for meetings without his prior consent. These claims however were overturned in a landmark Constitutional Court decision that recognized that CPAs are property owners whose land ownership cannot be taken over by a traditional leader (Bagkatla-ba-Kgafela 2015). In this example, the CPA has provided an important institutional and legal body through which to challenge Pilane.

This example demonstrates the political economy through which a distinctive 'cultural' community is made legible to a transnational audience and how it comes up against 'communities' legislated through the CPA model. The perception that the Bagkatla people are a cohesive group benefitting from mineral wealth is actively promoted through grandiose public



acts of building a cultural centre and developing a 'Master Plan' replete with discourses and imagery of community participation and community representation. The acts by the Bakgatla traditional council are supported by South African legislative proposals that strengthen the position of traditional leaders and draw from the legitimacy provided by a renewed focus on celebrating cultural heritage. The collective, culturalized subjectivity that is emergent through the work outlined above is tied directly to a regime of transnational law<sup>25</sup> and transnational extractive industry regulation. This is accomplished through the participation of the traditional council in a transnational discourse of heritage and cultural rights as they act as intermediaries between mining companies seeking a 'social licence to operate' and valuable extractive resources (Cook 2018; see Chapter Seven for further explanation). Traditional leadership also attaches and contributes to a transnational discourse on heritage and cultural protection to legitimate their role in relation to extractive industry.

Just as chiefs have been able to strategically mobilize themselves and their 'cultural capital' in order to gain the recognition and collaboration of a variety of actors in conditions of neoliberal globalization, so too, have chiefs drawn the steady and focused gaze of researchers, who have invariably ignored the agency of peoples in this 'renewal' of traditional authority. The strategic efforts of those framed in the literature as the 'subjects' of chiefs, and the ways that they are asserting their own agendas, visions and hopes for the future in the context of the resources - material and 'cultural' - that are available to them, are largely unaccounted for in literature on the

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<sup>25</sup> 'Transnational law' is distinct from 'international law'. The dominant view of international law defines it simply as law that exists between nations; the rules and obligations that govern international legal subjects, which are almost exclusively nation states (Currie 2008). I depart from this positivist view and account for the interplay of laws, standards, and law-like norms in a dynamic network of international legal pluralism (Berman 2012). My use of the concept of transnational law is particularly influenced by the contributions of legal anthropologists and socio-legal researchers who recognize the increasing transnational traffic of legal norms through common law and soft law instruments under neoliberalism (Comaroff and Comaroff 2009, Szablowski 2007, von Benda-Beckmann et al. 2009).

‘complex’ re-emergence of traditional authorities. Comaroff and Comaroff (2018) and their collaborating authors, for example, sustain a perception that chiefs unilaterally control the levers to take advantage of rural peoples to amass wealth for themselves. Indeed, there is no real engagement with the question of how to understand those who operate within the realm of community governance other than as subjects to chiefly authority.

What vocabulary or terminology might be more appropriate today to account for the proprietary relationships assumed to apply to colonial-era ‘chiefs’ and ‘subjects’? How do we understand rural agency in conditions of neoliberal and transnational forms of governmentality without assuming the vertical imposition of power (Ferguson and Gupta 2002)? I turn to public consultations as a site where peoples are articulating critiques of both CPAs and traditional leadership and in the process challenging assumptions about ‘community’ as a subject of government. Public consultations provide a venue through which peoples contest not only the illegitimacy of the CPAs, but also contest the authority of traditional leaders to act as trustees on their behalf. Public consultations offer a place to identify the articulation of subjectivities and their properties at the ‘limits of governmentality’ (Coombe 2007).

#### 4.5 The Performative Enactment of Constitutionalism: Public Consultations and the Limits of Governmentality

Public consultations are a vitally important part of the legislative process in South Africa. The Constitutional Court has determined that it is imperative to conduct appropriate consultations to develop and amend land reform legislation. For example, in July 2016 the *Land Restitution Amendment Act* was declared invalid by the Constitutional Court because it was found that Parliament did not adequately consult impacted parties. According to one researcher in the Department of Rural Development and Land Affairs, this decision - which incurred incredible

costs for the government - sent a strong signal to government authorities that when drafting and introducing new legislation appropriate public consultations were mandatory (Interview #3).

Many argue that transformative constitutionalism signals a commitment to democratic and participatory decision-making. It overlaps with a theory of a democratic developmental state, for example, that “emphasises the collaborative role of all players in society and the empowerment of the poor in the development project. Participation and empowerment are central means and ends in our transformative Constitution” (Rosa 2011, 543). Similarly, law professor Sandra Liebenberg argues that the jurisprudence on social rights is successful to the extent that it serves to “enhance the participatory capabilities of those living in poverty and expose the socially constructed nature of poverty and inequality. At its best it should... facilitate the inclusion of marginalised voices in the debate on what is required to achieve such a society” (Liebenberg 2006, 36). Justice Langa further underscores the importance of dialogue of participation as protected by the Constitution. He suggests that the new Constitutional order promotes “a way of looking at the world that creates a space in which dialogue and contestation are truly possible, in which new ways of being are constantly explored and created, accepted and rejected and in which change is unpredictable but the idea of change is constant ” (Langa 2006, 354). These Constitutional directions, arguably, create spaces and venues where people might contest the political rationalities and forms of governmentality that emerge in land reform.

A striking feature of the discourse that emerges from public consultations is the persistence of verbal articulations of ‘belonging’.<sup>26</sup> Belonging in these forums represents a particular articulation of the African philosophy of uBuntu. The essence of uBuntu, explains

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<sup>26</sup> This section focuses specifically on transcripts from public consultations organized for the ‘High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change’, a panel organized and authorized by Parliament to develop a report on the stated titles ambitions.

historian and professor of human rights Bonny Ibhawoh, “is captured in the famous phrase *umuntu ngumuntu ngabantu* (a person is a person through other people). The humanness of the person who has *ubuntu* comes from knowing that the fate of each person is inextricably intertwined with his or her relationship with others” (2016, 243). Philosopher Magobo Moore explains two aspects of *uBuntu*:

In one sense *ubuntu* is a philosophical concept forming the basis of relationships, especially ethical behaviour. In another sense, it is a traditional politico-ideological concept referring to socio-political action. As a moral or ethical concept, it is a point of view according to which moral practices are founded exclusively on consideration and enhancement of human well-being: a preoccupation with ‘human’” (More 2006, 149 in Cornell and Muvangua 2012, 6).

The philosophy of *uBuntu* infuses assertions of land as a site of social relationships where chiefs function only as mediators, not as owners. For example, in public hearings participants claimed that “the land belongs to the people” and “we belong to the land” (Eastern Cape Public Hearings, 2017).<sup>27</sup> These statements often specifically address chiefs. In Gauteng, a participant asserted

such lands belong to the people. The chief is one of the people. He holds the land in trust for the people. The chiefs’ keep order, allocate and provide access. They are not owners of the land”. In Limpopo a participant states “The land belongs to the people, hence in our custom, we allocate a plot and volunteer to plough on that plot and the plot belongs to the royal house, because a king is like a child to us, we feed him and he must not be greedy now (Gauteng Public Hearings, 2017).

Moreover, dissatisfaction with the CPA model is expressed: CPAs are “the biggest mistake government could have made. Put six people in charge and they are doing it as if it belongs to them [due to the legalistic nature of CPAs]. The land belongs to the people” (Western Cape). Such pronouncements of ‘belonging’ could easily be dismissed as general statements about land

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<sup>27</sup> The transcripts I analyzed were translated to English from a range of Bantu languages (the hearings here held across the country) by a group of graduate students and researchers. Moreover, they are ‘verbatim’ translations, as a result the grammar is often poor. I kept the original grammar to retain the authenticity of the statements.

lost. But the persistence of assertions and pronouncements of ‘belonging’ demands deeper reflection.

Indeed, understandings of property relationships as forms of belonging are described in ethnographic literature. Sociologist Ben Cousins develops a widely cited perspective of how to recognize communal land rights that might be understood as congruent with the politics of belonging. Cousins argues that an approach to tenure relations is needed that emphasizes “making socially legitimate occupation and use rights, as they are currently held and practised, the point of departure for both their recognition in law and for the design of institutional frameworks for mediating competing claims and administering land” (2007, 282). He elaborates a focus on what he calls ‘social tenures’, whereby social relations and identities inform the recognition of tenure rights. These systems are processual systems rather than dominated by well-defined rules, and they have a great deal of flexibility. Cousins explains:

Land and resource rights are directly embedded in a range of social relationships and units, including households and kinship networks; the relevant social identities are often multiple, overlapping and therefore ‘nested’ or layered in character (e.g. individual rights within households, households within kinship networks, kinship networks within wider ‘communities’)... They are thus both ‘communal’ and ‘individual’ in character (Cousins 2007, 293).

An example of such layered rights is found in the rich empirical research conducted by researcher and small-scale fishing rights activist Jackie Sunde who describes resource use in the Dwese-Cwabe community: “Rights to access and use resources in this system are layered and relational; they are vested in each individual, nested within the context of each household, itself nested within largely clan-based clusters of homesteads, further nested within the neighbourhood as a whole” (Sunde 2014, 213). She further explains that the relational sets of rights that characterize her field site are representative of the philosophy of Ubuntu, a philosophy that

“shapes their [the Dwesa-Cwebe community] sense of self in relation to others, as well as their understandings of rights and obligations. This is given expression in their culture through, amongst other processes, their ethic of sharing resources with others in need” (Sunde 2014, 212). Thus we can identify a link between expressions of belonging and the inter-connected relationships that exist within this community over and through their shared resources; in other words, we can identify forms of relationships that are not captured by the legislated and administrative CPAs.

An understanding of landholding as relational use rights mediated through a philosophy of uBuntu relates directly to a concept developed by anthropologist Blair Rutherford. What is useful about his approach is that he does not assume that there is a form of relationality that exists outside of the struggles for rights and access to resources; rather he develops a conception that considers how modes of belonging are constituted through peoples’ engagements with the institutions, discourses, and resources available to them. His research site is on farms in Zimbabwe but is applicable in the South African context. Through his research he develops the concept of ‘mode of belonging’, which refers to the “routinized discourses, social practices and institutional arrangements through which people make claims for resources and rights, the ways through which they become ‘incorporated’ in particular places” (Rutherford 2008, 79). The concept of ‘modes of belonging’ may also capture something of social life at the limits of governmentality – where people resist the generalized political rationalities of ‘collective’ property animating the CPA model and traditional leadership. Modes of belonging, Rutherford explains, “are not reducible to these wider forms of governmentality and hegemony. Rather, modes of belonging emerge from, energize and are entangled with ‘social projects’, which are organized aims and efforts of action” (Rutherford 2008, 80). Finally, he explains:

By examining practices and conflicts through the lens of modes of belonging and their particular cultural politics of recognition, one can avoid assuming that legal categories and social identities actually operate on the ground as they do on paper, or presuming that some actions are caused by improper consciousness on the part of some social actors. Rather, through this heuristic tool one can attend to the varied forms of dependencies and interdependencies and their associated cultural styles, through which power operates in specific localities during particular political economic conjunctures. It is unclear what routinized territorialized modes of belonging will emerge from the current land conflicts, but what is clear is that anyone who will be struggling for the 'rights' of farm workers will have to operate through, if not against, them (Rutherford 2008, 95).

It is through linking uBuntu, nested forms of land tenure relations, and modes of belonging, that we can identify aspects of collective relations constitutive of land tenure use rights unrepresented in existing legislation. These emergent property relations include a sense of stewardship over the land and for the collective relations that define the cultural and social life through which the meanings of land are expressed. An ethic of care in the social relations that define property relations are identified by numerous authors, however they are expressed in different language. Derick Fay, for example, demonstrates the importance of 'holding land for your children' (Fay 2015) while James Ferguson describes the importance of land as a place of social distribution (Ferguson 2013). Such relations over lands can be identified as expressions of stewardship for the resource of land but also for the maintenance of important social ties; it is through these expressions that we can identify an emergence of property relations akin to what lawyer and environmental activist Sanjay Kabir Bavikatte calls biocultural rights (Bavikatte 2014).

#### 4.6 Conclusion

In this chapter I described the general conditions and issues at stake in contemporary struggles over collective property in South Africa. I focused on the legislative development of two subjectivities that are central to the land reform program, communal property associations and

traditional leaders, and the indeterminate ways that they have emerged in conditions of neoliberalism.

CPAs, despite their role as a primary legal vehicle in land reform, have not contributed to a sedimentation of new political rationalities that appear to reflect the natures of social relationships that characterized communal property. CPAs remain a legal, administrative body that is designed to impose procedural conditions on land holding without clarifying the specific substantive rights of members, including the layered rights of individuals, households, kin groups and wider communities, and without allowing space for the articulation for a variety of values that people might attach to land. Traditional leadership, on the other hand, has effectively mobilized to bolster their authority and make new claims to legitimacy in conditions of neoliberal governmentality wherein assertions of custom and cultural specificity are valorized by a range of actors, including, perhaps most importantly in South Africa, extractive industry (Cook 2018). Thus we have two different subjectivities, defined in part in law, that have generated very different outcomes as the opportunities available for strategic positioning have varied considerably. Chiefs who have historical claims to positions of authority, and many of whom are respected for their authority by the peoples who live under their leadership, are interpolated into new, reformed subject positions constructed in contemporary conditions, while collectivities defined from the ‘ground up’ remain nearly illegible outside of the CPA model. In the following chapters I demonstrate how these struggles over propertied subjectivities are being re-articulated, recast, through human rights and strategic litigation. I illustrate how new struggles over authority and territory are influencing the development of new forms of property, albeit in a fragmented landscape of neoliberal restructuring.



In the remainder of the dissertation I argue that while the Constitutional framework has had a significant influence on how political mobilization is organized, and how transformation, including land reform, has emerged as a particular site of struggle, there are many struggles that demonstrate the indeterminacy of legal subjects and the rights they are able to assert. For example, the ongoing articulation of land, culture, and customary rights by community groups and non-state actors is evidence of the opportunities offered by the Constitution beyond the legislation that has been introduced. They are testament to the role of the Constitution as a living document that has the potential to facilitate the realization of communal property rights beyond their initial legal framework. In the next chapter I focus on ‘living customary law’ as a new avenue for peoples to assert a collective subject position in ways not captured by the CPA Act or its model of communal land holding, or traditional authority. Living customary law is emphasized because it provides a way to interpret the values and cultural practices of rural peoples through a legal form that was not previously available to them.

## 5 ALEKKOR V. RICHTERSVELD: ABORIGINAL TITLE, CUSTOMARY LAW, AND INDIGENOUS RIGHTS

### 5.1 Introduction

In 2003, the Constitutional Court of South Africa handed down a landmark land restitution judgment transferring land to the Richtersveld community, marking the first time that common law Aboriginal title was applied in an African court (Barume 2014, Chan 2004, Lehmann 2007, Mostert 2010). The *Richtersveld* decision was significant because of how it was informed by law from other jurisdictions; it also marked the beginning of further South African engagements with transnational policy and international human rights norms in land reform (the significance of which I return to below). The Constitution directs the courts to consider international law when interpreting the Bill of Rights (Section 39), an imperative that "creates a formal and permanent link between the rights enshrined as a product for the local struggle for democracy in South Africa and the constant evolution of rights in the international environment" (Klug 2010, 46). Although it is mandatory for the Court to "address the interpretation of rights given in international documents and by international fora" (Klug 2010, 79), South African courts have generally been hesitant in their application of international law. Kweitel explains that:

One of the reasons for this dearth of reliance may be that reference to international human rights law is often deemed unnecessary, as many of the relevant norms have already seeped into the South African Bill of Rights. Indeed, international human rights law in no small measure inspired the drafting of the South African Constitution, and in particular the Bill of Rights" (2013, 193).

This observation, made a decade after the *Richtersveld* decision, underscores the significance of the judgement, which, I argue, provided an opening to turn to Indigenous Peoples' rights in legal struggles. Contrary to the finds of Kweitel above, we can identify in land rights struggles ongoing productive links to transnational law on indigenous rights.

Common law Aboriginal title has become an important legal tool in the international Indigenous rights movement to the extent that upholding Aboriginal title relies in part on drawing from international norms on indigenous rights. In recent years, courts outside of the common law courts of Canada, Australia, and New Zealand, where the doctrine originated, have applied Aboriginal title (Knafla 2010), extending its use to jurisdictions around the world (McHugh 2011, Tobin 2014). Aboriginal title is part of a spectrum of Aboriginal rights, explains Canadian lawyer and author Jim Reynolds (2018). The potency of Aboriginal title as a challenge to the law introduced by a settler state stems from the fact that it is "based on the pre-existence of Aboriginal peoples" (Reynolds 2018, 92). In other words, it draws its force from the prior occupation of Aboriginal peoples and their pre-existing legal rights to land before British occupation, rather than from "practices integral to a distinctive culture" as a more general rights-based framework for recognizing the human rights of Aboriginal peoples, would do (ibid).

Some critics argue against the applicability of Aboriginal title, and Indigenous Peoples' rights more broadly, in the African context because, they assert, there is no basis to categorize any African peoples as any more 'indigenous' than the majority, who have been marginalized and dispossessed through colonialism just as indigenous peoples elsewhere in the world have (Lehmann, 2004). However, as I will show, the expansive use of Aboriginal title should be understood in relationship to the emerging articulation of Indigenous rights, a "process in connection with norms and values" (Anaya 2004, 6) evolving within a larger political field of

indigenous identification and organization. From this perspective we can acknowledge that the assertion of indigenous subject positions and indigenous rights involve processes of articulation in which norms, values, and histories of dispossession are shared and compared, such that legal forms emerging from one colonial history can be used to address others.

Aboriginal title should be studied as one strategy used by rural peoples' advocates as they maneuver and assert different positions within shifting fields of power characteristic of neoliberal government (Hodgson 2011). Non-state actors, including national, regional, and international NGOs, engaging with international forums (such as the UN Permanent Forum on Indigenous Issues and the International Working Group for Indigenous Affairs), play an essential role in indigenous mobilization in Southern Africa (Sapignoli 2018, Sylvain 2017). As demonstrated in this chapter, the *Richtersveld* decision needs to be read in the context of the history of indigenous peoples in Africa, and, more importantly, as an important judgement within the history of the crafting of the concept of indigeneity in South Africa (Sylvain 2017, 1).

## 5.2 Alexkor v. Richtersveld: Aboriginal title and customary law

The plaintiffs in the case were Nama peoples (an ethnic grouping within the Khiosan), but they identified as 'Richtersvelders' more often than as Nama (Interview #1). The *Richtersveld* dossier includes judgments in the Land Claims Court (LCC), the Supreme Court of Appeal (SCA), and the Constitutional Court. *Alexkor v. Richtersveld* is now part of a growing body of jurisprudence, law, and policy on indigenous and customary land and resource rights in sub-Saharan Africa (Barume, 2014). Before explaining how key findings of the judgement are re-articulated in fields of struggle in South Africa, the particulars of the judgement require review.

The claimant community, who live in a semiarid and mineral rich-area of the Northern Cape province, made a claim for the restitution of lands they historically occupied under the

*Restitution of Land Rights Act* (hereafter the *Restitution Act*). At the time of the claim, the land was occupied by the mining company Alexkor Limited Mining Corporation (hereinafter Alexkor), which was granted the subject land and all mineral rights by a deed of grant by the National Party in 1994 prior to the election of the ANC (*Richtersveld SCA* 2003, para 2). The state was the sole shareholder of Alexkor. The Richtersveld community claimed that it had thereby been “dispossessed of ownership (under common law or indigenous law) or the right to exclusive beneficial occupation and use of the subject land including the exploitation of its natural resources” (*Richtersveld CC* 2003, para 7). It was in response to this claim that the Court began using the phrase ‘indigenous law ownership’ to refer to the ownership of their land under customary law (‘indigenous law’ and ‘customary law’ were synonymous to the court).

Under the *Restitution Act*, claimants need to meet several requirements. First, if the claimant is not an individual, it must represent a ‘claimant community’ defined by shared rules of land use. Second, the claimants must have had a ‘right in land’ prior to dispossession. Under Section 1 of the *Restitution Act*, a ‘right to land’ includes a ‘customary law interest’.<sup>28</sup> Third, dispossession must have happened after June 19, 1913. Fourth, the claimant community’s dispossession must have been due to racially discriminatory laws or practices.

According to the first court, the LCC, the Richtersveld claimants did not meet all of the requirements in the *Restitution Act* above. While the Richtersveld community experienced some forms of dispossession starting in 1925 when their lands were found to be rich with minerals and mining interests began prospecting, the area in which they lived had been annexed by the British long before in 1847. The community needed to prove that their ‘right to land’ survived British

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<sup>28</sup> According to Section one: “any right in land whether registered or unregistered, and may include the interest of a labour tenant and sharecropper, a customary law interest, the interest of a beneficiary under a trust arrangement and beneficial occupation for a continuous period of not less than 10 years prior to the dispossession in question”.

annexation and that their dispossession in the 1900s was due to racially discriminatory laws. The Richtersveld community argued that even after annexation they continued to live on their land according to their indigenous customary law. They referred to the doctrine of Aboriginal title in common law to make this argument. The LCC dismissed the claim, finding instead that their rights did not survive annexation and thus that their dispossession was not due to racially motivated laws (*Richtersveld LCC*, 2001).

The community appealed the decision to the SCA, which overturned the lower court opinion and found that the Richtersveld community had a customary right of ownership that survived annexation by the British crown. This decision was based on the finding that when the British Crown acquired sovereignty over the Cape Colony in 1806 the British Crown recognized the continued rights of the peoples who lived on the land. The Articles of Capitulation of January 1806 provided that “All bona fide private property, whether belonging to the civil or military servants of the Government, to the burghers and inhabitants . . . shall remain free and untouched” (*Richtersveld SCA* 2003, para 47). In the unanimous judgement Judge Vivier concludes: “In my view it is clear from the Articles of Capitulation that when the British Crown acquired sovereignty of the Cape Colony by conquest and cession in 1806 the indigenous land rights of the inhabitants were recognised and respected” (*Richtersveld SCA* 2003, Para 48).<sup>29</sup> Thus the particular history of British annexation provided historical evidence of the applicability of Aboriginal title in the South African context.

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<sup>29</sup> The finding is elaborated further: “Ordinance 50 of 1828 enacted by the Colonial Government is another indication that indigenous land rights were respected. Section 3 of that Ordinance provided as follows: ‘And whereas doubts have arisen as to the competency of Hottentots and other free Persons of colour to purchase or possess Land in this Colony: Be it therefore enacted and declared, That all Grants, Purchases, and Transfers of Land or other Property whatsoever, heretofore made to, or by any Hottentot or other free Person of colour, are, and shall be, and the same are hereby declared to be, of full force and effect, and that it is, and shall, and may be, lawful for any Hottentot, or other free Person of colour, born, or having obtained Deeds of Burghership, in this Colony, to obtain and possess by Grant, Purchase, or other lawful means, any Land or Property therein - any Law, custom, or usage to the contrary notwithstanding.’” (*SCA* 2003, Para 50-51).

The SCA cited Aboriginal title jurisprudence such as *Mabo v. The State of Queensland* and *Delgamuukw v. British Columbia* using “elements of Aboriginal title as precedents for proving elements for a claim of a customary law interest” (Chan 2004, 124). The community’s customary right, argued the court, constituted a “customary law interest under their indigenous customary law entitling them to exclusive occupation and use of the subject land and that its interest was akin to the right of ownership held under common law”, that is, a “right in land” (*Richtersveld SCA* 2003, para 26). Oddly, while the SCA based their decision on common-law Aboriginal title to provide a basis for the ‘customary law interest’, it provided no explanation of the relationship between “customary law” and Aboriginal title, finding it ‘unnecessary’ to decide if the doctrine of Aboriginal title forms part of South African law.<sup>30</sup>

Alexkor appealed the decision in the Constitutional Court, where the decision made in the SCA was upheld and, arguably, strengthened with respect to the application of Aboriginal title. The Constitutional Court argued that the community had rights to land and that these rights were properly determined by reference to ‘indigenous law’ (*Richtersveld CC* 2003, 50). Importantly, ‘indigenous law’ meant the same thing as ‘customary law’ in the judgement, a change in language that arguably served to naturalize and solidify a link between ‘customary law’, which has a long history in South Africa (as explained in Chapter Two), and ‘indigenous law’ with its international human rights connotations.

Taking inspiration from common law principles defining Aboriginal title, the Constitutional Court determined that the subject land was owned communally, that the

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<sup>30</sup> As explained in the judgement: "All the aspects of the doctrine [Aboriginal title] do not fit comfortably into our common law. For instance, the idea that the State or Crown possesses radical title to all land may have its origin in English feudal law and may be foreign to our law. In view of my conclusion that a customary law interest, for which the [Restitution] Act expressly provides, has been established in the present case, it is not necessary to pursue the matter any further and it becomes unnecessary to decide whether the doctrine forms part of our common law or whether our common law should be developed to recognise aboriginal rights." (SCA 2003, Para 43)

community had been historically defined in part by its exclusion of others, that it had exclusive rights to the subject land, and that its rights included prospecting, mining, and using minerals.<sup>31</sup>

The Constitutional Court found that the right to land in question amounted to what it termed ‘indigenous law ownership’, which is akin to common law ownership:

While in the past indigenous law was seen through the common law lens, it must now be seen as an integral part of our law. Like all law it depends for its ultimate force and validity on the Constitution. Its validity must now be determined by reference not to common law, but to the Constitution. The courts are obliged by section 211(3) of the Constitution to apply customary law when it is applicable, subject to the Constitution and any legislation that deals with customary law. In doing so the courts must have regard to the spirit, purport and object of the Bill of Rights... It is clear, therefore that the Constitution acknowledges the originality and distinctiveness of indigenous law as an independent source of norms within the legal system . . . In the result, indigenous law feeds into, nourishes, fuses with and becomes part of the amalgam of South African law (*Alexkor Ltd and Another v. Richtersveld Community and Others* (*Richtersveld CC*, 2003: para 51).

The court explained the concept of ‘indigenous law’ by referring to its evolving nature, “. . . indigenous law is not a fixed body of formally classified and easily ascertainable rules. By its very nature, it evolves as the people who live by its norms change their patterns of life” (*Richtersveld CC* 2003, para 52). The Constitutional Court argued that legal pluralism needed to be taken seriously in South Africa (*Richtersveld CC* 2003, para 45-51). It is from these statements of the evolutionary and changing character of customary law, as well as its place in South African law, that the concept of ‘living customary law’ (which I will explore in greater detail in Chapter Six) was born.

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<sup>31</sup> Through the testimonies of expert witnesses, the SCA found that “This evidence clearly establishes that the Richtersveld community believed that the right to minerals belonged to them and that they acted in a manner consistent with such a belief. They exploited the minerals without requesting permission from anyone to do so and, significantly, strangers respected their rights by obtaining their permission to prospect for minerals and concluding mining and mineral leases with them” (SCA 2003, 87).



It is unclear when and who introduced the terminology of ‘living’ customary law to these descriptions of the evolutionary nature of customary law. In 2004, the Constitutional Court handed down the judgement *Bhe and Others v Magistrate, Khayelisha and Others* in which the Court engages directly with living customary law. For example, judge DCJ Langa writes: “The official rules of customary law are sometimes contrasted with what is referred to as “living customary law,” which is an acknowledgement of the rules that are adapted to fit in with changed circumstances” (Bhe 2004, para 87). What sources DCJ Langa is referring to is unclear, however one can reasonably speculate that it was introduced by the fourth applicant, the progressive human rights NGO the Women’s Legal Centre based in Cape Town. Moreover, in the Constitutional Court decision of *Shilubana* these quotations are referenced as authorities on living customary law (see para 44, 45, 46 in *Shilubana and Others v Nwamitwa* 2009 (2) SA 66 (CC)), where the evolutionary nature of customary law is re-articulated as living customary law. The introduction of living customary law is significant for how it is linked to Aboriginal title and indigenous law.

In *Alexkor v Richtersveld*, the Constitutional Court transitioned from a focus on Aboriginal title to a focus on indigenous law, a shift interpreted differently by different authors. According to T.M. Chan: indigenous law ownership “is substantively identical to Aboriginal title as developed under comparative jurisprudence and is thus a form of Aboriginal title within South African law” (2004, 127). He argues that:

It is clear that the CC meant to formulate ‘indigenous law ownership’ as a South African version of Aboriginal title. Along with native title, indigenous title, Indian title and Aboriginal title, the CC has added ‘indigenous law ownership’ as the South African contribution to the pantheon of names representing this important aboriginal right to land (Chan 2004, 128).

Similarly, Jarome Barume asserts that “[b]oth the indigenous law ownership and the Aboriginal title basically pursue the same purpose.... Both doctrines establish a right of Indigenous Peoples who owned the land before and at the time of annexation” (2014: 131). Hanri Mostert (2010) is less optimistic, arguing that the doctrine of Aboriginal title was “either ignored or even rejected as a means to resolve the dispute” (2010: 227). Mostert concedes, however, that the courts relied on comparative Aboriginal title literature to identify and substantiate the Richtersveld community’s right as a ‘customary law interest in land’ (ibid). I argue that this reiteration of Aboriginal title as indigenous law ownership in the SCA and the Constitutional Court constitutes a significant substantive change in the meaning and applicability of the judgment.

The *Richtersveld* judgment is now cited for its contribution to the indigenous rights movement in South Africa and across the continent. For example, in an overview of the rise of Indigenous rights in Africa, Barume boldly asserts that: “[t]he Constitutional Court of South Africa made in fact a landmark decision that will, for a long time to come, have a major impact on the legal protection of indigenous’ peoples’ rights to lands” (2014: 181). Despite its high profile, there have been no other judicial cases in South Africa involving self-identified indigenous communities that have relied on the precedent set in *Alexkor v Richtersveld*.<sup>32</sup> In response to this curious fact, some have questioned its real force and implications in the African context. Following a brief analysis of the *Richtersveld* judgment, one prominent scholar of Aboriginal title explains:

. . .despite the immense publicity the case received and though seeming to have arrived in South Africa, the doctrine did not take seed . . . The line of jurisprudential development that has ensued has concerned the status of

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<sup>32</sup> This is likely due to the fact that few Khoisan peoples would have been displaced prior to 1913, which remains the cut-off date for land restitution claims and are thus still excluded from even filing a claim. There are also likely very few who had a comparable experience to the Richtersveld community in the sense that they remained on their land and continued to practice their custom and traditions after annexation by the British.

customary law at large and in wider contexts rather than the proprietary paradigm of Aboriginal title (McHugh 2011: 200-201).

Others have argued that the use of Aboriginal title in *Richtersveld* was ‘simply symbolic’ because a legislative land restitution program already exists to return land to those previously dispossessed and thus the application of Aboriginal title was not needed (Knafla 2010, 25; see also Fairweather 2006, 116). Such a dismissive reaction I would suggest, reveals too limited an approach to the influence of the *Richtersveld* judgment and the significance of its recognition of indigenous (and customary) law for broader movements to protect the rights of dispossessed communities. For example, the judgement did not make a distinction between ‘customary’ and ‘indigenous’, which has implications for how the judgement is used to mobilize the concept of living customary law.

The *Richtersveld* judgement also advances Indigenous Peoples’ customary law rights beyond the framework developing in common law jurisdictions elsewhere. Jeremie Gilbert explains that the recognition of possession and customary law as a source of land rights in the case goes beyond its recognition in common law countries such as Australia and Canada where Aboriginal title is subordinated to the power of the state to extinguish it (2017, 671, see also Reynolds 2018, 94). Instead, the court “adopted a less State-centric approach to indigenous peoples’ land rights, emphasizing the power of customary laws” (Gilbert 2017, 671). Thus *Richtersveld* draws from Aboriginal title to contribute to the recognition of Indigenous Peoples’ customary laws (however, as explained in the next chapter, the outcome of this recognition is not necessarily determined by the expansive spirit of *Richtersveld*).

The significance of the *Richtersveld* decision is illustrated by the fact that it is cited repeatedly in key judgments on the development of living customary law and its application in

the communal areas of the former bantustans (reserves) in South Africa.<sup>33</sup> These cases reference the now famous quotation from *Richtersveld* to affirm customary law as an integral part of South African law and an independent source of norms; they repeat the commitment to respecting legal pluralism in the South African legal system.<sup>34</sup> The references to ‘living customary law’ in this jurisprudence is now interpreted by South African legal scholars as a representation of ‘transformative constitutionalism’ in the area of rural land rights (Claassens and Budlender 2013). However, the effect of the *Richtersveld* judgement is not exhausted by these judgments, as contemporary articulations of Aboriginal title in the politics of indigeneity will illustrate. As I explain below, Aboriginal title and Indigenous rights represent human rights norms that develop in both political contexts and international arenas. They have been interpreted and elaborated in transnational spheres of deliberation and translated into local contexts as they are rendered in ‘the vernacular’ (Merry 2009, Goodale 2007, Ibhawoh 2016).

### 5.3 *Richtersveld* in the context of the South African politics of indigeneity

The *Richtersveld* decision, which effectively transferred land and mineral rights back to the Nama community, marked a key moment in the emergence and articulation of indigeneity in Southern Africa. It is through *Alexkor v Richtersveld* that we can identify the first influence of international Indigenous Peoples’ rights as opening up new possibilities for the articulation of ‘social tenure’ as a legible property form in South Africa, although it would take at least another decade and a half for its ramifications to be widely understood. Its impact is only slowly being realized. In the remainder of this chapter I describe the political context in which *Richtersveld*

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<sup>33</sup> See *Bhe and Others v. Magistrate, Khayelistsha and Others*, 2004; *Cala Reserve v. Premier of the Eastern Cape*, 2015; *Shilubana and Others v. Nwamitwa*, 2008; for an analysis of *Bhe* and *Shilubana*, see Claassens, 2011.

<sup>34</sup> *Bhe and Others v. Magistrate, Khayelistsha and Others*, 2004: para 43; *Cala Reserve v. Premier of the Eastern Cape*, 2015: para 31; *Shilubana and Others v. Nwamitwa*, 2008: para 43.

was handed down and describe key developments since this landmark decision (for a longer history of indigenous rights in South Africa see the introductory chapter).

It is important to note that land reform is only one area of indigenous rights struggle. The NGO Natural Justice produced a report on national laws and policies that “support or undermine indigenous peoples and local communities” in South Africa and enumerates and explains law and policy related to marine resources, conserved territories, protected areas, natural resources and the environment, traditional knowledge, intangible heritage and culture, natural resource exploration and extraction, and infrastructure development (Natural Justice 2014). Critical scholarship and research on Khoisan indigenous rights in South Africa focuses on topics such as language revitalization (Brown and Deumert 2017), intellectual property and the protection of traditional knowledge (see Comaroff and Comaroff 2011) and geographical indications in the case of Rooibos tea (Ives 2014, Coombe, Ives and Huizenga 2014). The intersection between land reform and indigenous rights is the specific focus of this chapter.

A defining feature of the *Richtersveld* judgement was the fact that to a significant degree it relied on the international human rights of Indigenous Peoples.<sup>35</sup> This is an important development in a context where the idea of being ‘indigenous’ is considered either redundant (because it applies to all black Africans) or to promote ethnic essentialism and ‘special rights’ (Kuper 2003). The 1996 Constitution makes no specific reference to Indigenous Peoples and there is evidence to suggest that South African governments have historically been uncomfortable with the idea of Indigenous rights. The Bill of Rights has not led to a “robust, respected and resilient regulatory framework” (Humby et al. 2014, 21) for the protection of the

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<sup>35</sup> *Richtersveld* can be read alongside the significant judgement by the African Commission on Human and Peoples Rights in *Endorois*, which also relied significantly on emerging collective rights norms and jurisprudence by national and regional systems and international institutions and networks (Ndahinda 2016). *Centre for Minority Rights Development & Others v Kenya* (2009) AHRLR 75 (ACHPR 2009).

rights of indigenous communities. The Khoisan, who historically comprise five groupings, the San, Griqua, Nama, Koranna, and the Cape Khoi, however, self-identify as indigenous and are widely considered by many academics and civil society to be the Indigenous Peoples of South and Southern Africa. The Khoisan are also referred to as the First Peoples of South Africa by the UN Special Rapporteur on Indigenous Peoples, who in 2005 demanded that the South African government take swift action to uphold their rights as Indigenous Peoples (Stavenhagen, 2005).

Some Khoisan groups argue that they have been marginalized in land reform; the Restitution Act, for example, stipulates that only those peoples who were dispossessed after 1913 (the date of the *Native Land Rights Act*) are entitled to restitution. Many Khoisan were dispossessed long before 1913 and therefore argue that their historical dispossession is not being addressed. The 1913 cut-off date was chosen as a pragmatic compromise to two other dates that were being considered – 1652 and 1948. Indeed, it appears to have been chosen as a way to avoid competing claims between groups of black and Khoisan South Africans (PLAAS 2016, 7). The Department of Land Affairs White Paper on Land Reform indicates that there has been some acknowledgement of the restrictions imposed by the 1913 cut-off date, affirming that claimants who were dispossessed of their land prior to 1913 “will be accorded priority status in the land reform programme”, and that “the Commission is empowered to make recommendations to the Minister on alternative remedies for such claimants” (DLA 1997, 78). However, there is no evidence that this has happened. In recent public hearings Khoisan-identified groups have argued that the Minister of Rural Development and Land Affairs should be able to consider pre-1913 land claims, and that claims dating back to the 1800’s should be included in land restitution (Northern Cape Hearings, 21 September 2016). Not all Khoisan peoples were dispossessed prior to 1913, however, and some have secured land restitution. The Khomani San, for instance, were

successful in a landmark land restitution claim which extended from the Kalahari Dessert to the Kalagadi Transfrontier Park (Ellis 2010, Huizenga 2014).

The state has ignored Indigenous Peoples' demands for statutory recognition. South Africa adopted the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) in 2007 but the country is lagging significantly in the implementation of its provisions (Sapignoli and Hitchcock 2013, 363). There are no specific programs designed for Indigenous Peoples in South Africa and the Khoisan continue to be identified as 'coloured' or 'other' in the South African census. There is a national Khoisan Council created by the state to advocate for the rights of Indigenous Peoples in the country and advise the government, but it has no legislative power (Sapignoli and Hitchcock 2013, 359).

Despite the reluctance to recognize Indigenous Peoples' land rights in South Africa, regional movements demonstrate that indigeneity has emerged as a form of political mobilization across the continent. Since the *Richtersveld* decision there has been a marked increase in mobilizations to recognize and protect indigenous land tenure in South Africa. The African Commission on Human and Peoples Rights, for example, has played an important role in advocating for Indigenous Peoples' rights in Africa generally. The African Charter on Human and Peoples' Rights recognizes three categories of rights: civil and political, social and economic, and peoples' rights. The African Charter is unique for its protection of peoples' rights. Peoples' rights refer to the collective rights and include the rights to self-determination (art. 20), the right to sovereignty over natural resources (art. 21), right to development (art. 22). People's rights, however, are not often linked to distinct self-identified collectivities and remain vaguely understood.

The landmark *Endorois* decision<sup>36</sup> of the African Commission against the Government of Kenya, linked Endorois peoples' rights to their recognition as an indigenous people. The African Commission found specifically that the "Endorois are a "people", a status that entitles them to benefit from provisions of the African Charter that protect collective rights" (Endorois 2011, para 75) and recognized their rights to property, culture, development, free disposal of resources and religion. However, by defining the Endorois as 'indigenous', rather than a more broadly defined 'customary community' that refers to rural peoples whose customary rights have been historically marginalized, the Commission may have too narrowly circumscribed collective rights.<sup>37</sup> 'Customary communities' refer to "communities who regulate their lives, and in particular their tenure rights, in terms of customary law" (Wicomb and Smith 2011, 423). 'Customary communities', argue Wicomb and Smith, ought to be recognized as 'peoples' so that collective rights are not limited to a more narrowly interpreted group of indigenous peoples. Despite the usefulness of the protections offered by the African Commission for indigenous peoples in South Africa, very few peoples actually engage with the African commission as a venue for rights mobilization (Sing'Oei 2012), testifying to a continuing difficulty of making an indigenous identity legible in the African context.

To this end, the African Commission on Human and People's Rights published a report on Indigenous Peoples in Africa, wherein they defined 'indigenous' in the African context by way of reference to a 2007 Report by the International Working Group for Indigenous Affairs:

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<sup>36</sup> Centre for Minority Rights Development & Others v Kenya (2009) AHRLR 75 (ACHPR 2009) (Endorois case).

<sup>37</sup> South African lawyers Wilmein Wicomb and Henk Smith argue that rather than referring to African jurisprudence on the rights of customary communities, the African Commission emphasized their rights in line with the international indigenous rights: "While the Endorois community based their claim to aboriginal title on judgments that mostly protected communities not necessarily identified as 'indigenous', the African Commission was at pains to formulate its entire analysis of the merits in terms of the rights of indigenous (or 'tribal') peoples. This may be the most disheartening aspect of the decision as it could be interpreted to narrow the protection of customary tenure rights to a handful of groups in Africa recognised as 'indigenous' or 'tribal'... leaving half of the continent out to dry" (Wicomb and Smith 2011, 438).



The overall characteristics of groups identifying themselves as Indigenous Peoples are that their cultures and ways of life differ considerably from the dominant society, and that their cultures are under threat, in some cases to the point of extinction. A key characteristic for most of them is that the survival of their particular way of life depends on access and rights to their traditional lands and the natural resources thereon (IWGIA 2007, 10).

The realization of these characteristics in practice has led to a wide and inconsistent application of the term indigenous.

A general recognition of the importance of indigenous rights, and the particular role of land for the protection of indigenous people's cultural practices, is identified in regional policy frameworks however often in vague terms. For example, the Pan-African Land Policy Initiative was established in March 2006 by the African Union, the United Nations Economic Commission for Africa, and the African Development Bank to develop guidelines on land policy development in Africa. In 2010 the Initiative published the *Framework and Guidelines on Land Policy in Africa*, where it is explained that "there are a range of indigenous principles and emerging innovative local practices that can inform sound national land policy development and implementation" (African Union et al. 2010, 23). The Framework encourages countries to "acknowledge the legitimacy of indigenous land rights" and "recognize the role of local and community-based land administration/management institutions and structures, alongside those of the state" (African Union et al. 2010, 14). Similarly, the South African Human Rights Commission, which restricts their definition of indigenous peoples to the Khoisan, explains the significance of cultural rights to the Khoisan and their right to self-determination, specifically the importance of development that is consistent with their own cultural values, customs, and worldviews (SAHRC 2016, 30). However, as a review by Natural Justice (Humby et al. 2014) shows, South African legislation adopting the term 'indigenous' peoples does not clearly define the Khoisan as indigenous peoples. The 'Protection, Promotion, Development and Management

of Indigenous Knowledge Bill’ is a clear example in this regard. While originally titled the ‘Traditional Knowledge Bill’, the title was changed to refer to ‘indigenous knowledge’, with no explanation about whether the shift from ‘traditional knowledge’ to ‘indigenous’ knowledge marked a shift in focus.

Acknowledgement of Khoisan activism has also been inconsistent among civil society actors. While some specific NGOs focus exclusively on Khoisan human rights and engage with the international movement of Indigenous Peoples, there appears to be a reluctance to engage with Indigenous rights, and specifically the rights of Khoisan peoples, in those sectors of South African civil society focused on land and customary rights. Organizations such as the Indigenous Peoples of Africa Coordinating Committee (IPACC), which has an office in Cape Town, focus their advocacy in South Africa on the rights of Khoisan,<sup>38</sup> while NGOs such as the Association for Rural Advancement and research centres such as the Land and Accountability Research Centre and the Institution of Poverty, Land and Agrarian Studies (PLAAS) produce no research that focuses on the rights of Khoisan peoples, despite their deep archives of research and reporting on rural land rights. Some actors recognize that the term ‘indigenous’ may be limiting rather than broadly inclusive and expansive for rural peoples when advocating for the rights of rural peoples. A report published by the Natural Justice includes ‘customary communities’ for the purpose of assessing the laws and policies in South Africa that impact indigenous or local communities (Humby et al. 2014).<sup>39</sup>

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<sup>38</sup> The IPACC has its headquarters in Cape Town; however, it works in 22 countries across the continent with a variety of indigenous groups.

<sup>39</sup> It is important to note that in some forums Natural Justice has advocated for a clear definition of indigenous peoples in reference only to the Khoi and San peoples, arguing that the vague definition of ‘indigenous community’ would lead to the further marginalization of Khoi and San communities (IKSB submission, 2015). This indicates a lack of consistency in the organization’s focus and understanding of indigenous peoples’ rights.

In direct response to international, regional, and local pressure to recognize indigenous rights, the South African state now acknowledges the distinct history of marginalization that Khoisan peoples have experienced and has responded to their advocacy by recognizing their language, land, and cultural rights, but only negligibly. One example is the 2015 introduction of the *Traditional and Khoisan Leadership Bill* (TKLB) which recognizes Khoisan leaders within the wider ambit of recognizing Traditional Leaders more generally. However, the TKLB also refuses Khoisan recognition as Indigenous Peoples, insisting that "[t]he provisions of this Act relating to the recognition of a traditional or Khoi-San community or leader shall not be construed as bestowing upon such a community or leader any special indigenous, first nation or any other similar status" (TKLB, Chapter 1, 1(para 5)), thereby rejecting the relevance of Indigenous Peoples' rights in South Africa (see also Verbuyst 2016, 86).

Anthropologist Alan Barnard's approach to indigenous rights in Southern Africa is perhaps indicative of a belief prevalent in civil society: "Land rights and rights to utilise the resources passed down from the ancestors are human rights. If we want to call them 'Indigenous rights', that is fine; but let us not take these 'Indigenous rights' too literally" (Barnard 2006, 10). International law scholar Karin Lehmann in 2004 expressed an attitude long common in South African land reform when she argues that indigenous rights are unlikely to be strategically useful for people claiming land because it is very difficult for people to 'fit' an 'indigenous' subject position in the South African context.

The wide variation in the use of the term indigenous demonstrates that in practice the Khoisan are not universally recognized as indigenous peoples distinct from peoples who live by customary law. It is apparent that many actors do not consider the forms of colonial dispossession that the Khoisan experienced as distinct and therefore requiring specific

transitional justice measures. In recent years Khoisan activists have begun demanding that they be recognized as First Nations as a way to affirm that they were the first inhabitants of the area (SAHRC, 2018: 38).<sup>40</sup> This is perhaps in response to the ways that the term ‘indigenous’ is being used by such a wide variety of people and in such a diversity of contexts.<sup>41</sup>

#### 5.4 Conclusion

The *Richtersveld* judgement is widely acknowledged for the fact that it represents the first time that Aboriginal title was applied in an African court. It is no surprise that it was the Constitutional Court of South Africa that made this progressive judgement. To date, however, readings of *Richtersveld* have doubted its wide applicability for indigenous peoples in South Africa. These critiques have been far too narrowly focused. In this chapter I demonstrated that the *Richtersveld* judgement is a landmark decision for how it has served to provide a new understanding of customary law as equivalent to Aboriginal title and for its role in facilitating the broader introduction of Indigenous Peoples’ rights into South African land struggles for Khoisan and rural peoples more generally.

The *Richtersveld* judgement must also be read within the recent history of the emergence of indigenous rights in South African land reform. *Richtersveld* not only provides an important historical moment within this history; it also colours the reading of this ongoing history to the extent that indigenous emergence in South Africa can be told as a story of the emergence of customary law, in all of the different ways and different environments in which it is being asserted. In this regard, *Richtersveld* opened space for the introduction of culturalized rights as a constitutive norm in demands for the recognition of living customary law and thus contributed to

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<sup>40</sup> See also the transcripts for the High Level Panel Western Cape Public Hearings.

<sup>41</sup> Khoisan informants that I spoke to during my research expressed concern that indigenous rights were being claimed widely, by non-Khoisan peoples, in South Africa. They felt that the specific experience of colonialism, dispossession and marginalization of Khoisan demanded recognition as indigenous peoples.

the development of living law. In the next chapter I turn to examine the emergence of living customary law as it is articulated in jurisprudence, as a central concept used by researchers to interpret their fieldwork, and in social mobilization. I illustrate why it is more accurate to adopt the concept 'living law' in order to account for the diverse amalgam of rights claims that are mobilized in a variety of different contexts and by a range of actors in struggles over rural land rights.

## 6 THE MAKING OF ‘LIVING CUSTOMARY LAW’ AND THE EMERGENCE OF ‘LIVING LAW’

### 6.1 Introduction

South African land reform was defined by the Constitution to include three key areas: land redistribution, land restitution, and land tenure reform. While land tenure reform refers specifically to the protection and security of communal tenure relations in the former bantustans (now called communal areas), the question of land tenure, and land tenure rights, stretches across all three areas of land reform. Tenure, however, is difficult to define. Key legislation, such as the *Communal Land Rights Act* and the *Communal Land Tenure Bill* don’t provide definitions of ‘tenure’ despite the centrality of the term. The *African Union Framework and Guidelines on Land Policy in Africa* defines land tenure as “the nature of and manner in which rights and interests over various categories of land are created or determined, allocated and enjoyed” (AU 2010, xiii). The Food and Agricultural Organization also provides a definition of tenure:

Land tenure is the relationship, whether legally or customarily defined, among people, as individuals or groups, with respect to land. Land tenure is an institution, i.e., rules invented by societies to regulate behaviour. Rules of tenure define how property rights to land are to be allocated within societies. They define how access is granted to rights to use, control, and transfer land, as well as associated responsibilities and restraints. In simple terms, land tenure systems determine who can use what resources for how long, and under what conditions (FAO 2002).

As South African researchers demonstrate, tenure relationships are “complex, multi-layered, and poorly understood” (Hornby et al. 2017, 3). Important characteristics can, however, be identified: these relationships are often ‘layered’ or ‘nested’ in character, meaning that tenure is mediated between different layers of authority and responsibility held by individuals, families, kin groups, and/or wider ‘communities’. Relationships are flexible and determined to be ‘socially legitimate’

within shifting social and economic contexts (see Cousins 2007, Hornby et al. 2017).<sup>42</sup> How, why, and in what conditions tenure relationships are deemed ‘socially legitimate’ raises significant questions, particularly in a context where ‘land rights’ are the subject of legal and institutional frameworks designed to respond to demands for transitional justice. Moreover, in conditions of neoliberalism, where the actors and authorities advocating for protection of land tenure relationships marshal authority through state and non-state institutions, the processes through which tenure relationships are legitimated, is particularly complex.

The landmark Constitutional Court judgment *Alexkor v Richtersveld and others* (2003), explored in the last chapter, introduced an understanding of customary law as ‘living’. This led to the emergence of the legal concept ‘living customary law’ that has had reverberating effects on land reform in South Africa, not least for the way that it has been articulated in the conjuncture of transformative constitutionalism and neoliberalism to legitimate and make legible characteristics of tenure relations as human rights concerns. This chapter explores the conditions in which living customary law has emerged, with a specific focus on how different actors have adopted the concept as a way to interpret rural tenure relations as a human rights concern; it explains how living customary law has become an ethos of democratic and local rule-making that informs a discourse of collective land rights. Finally, I argue in this chapter that a

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<sup>42</sup> Researcher and community advocate Jackie Sunde provides an example of ‘layered’ tenure systems in a fishing community in the Eastern Cape: “In many traditional authority areas, rights are administered by a subheadman acting at local village level. He is, however, advised by a group of elders from the village and his authority to make decisions is entirely derived from this group of elders. For example, interviews with residents in Ntubeni, Dwesa-Cwebe reveal that the Chief, known as the Nkosi, is merely informed of developments and actions and his permission is not specifically sought. In Kosi Bay, tenure rights have historically been derived from membership of a particular clan, living adjacent to the lake. This clan is part of the larger Tembe-Tsonga people, living under the authority of the Tembe chief. Rights to access and use the fishery resources of the lake are derived from the authority of the Nkosi, which is devolved to the local Induna or headman. In some instances, the administration of rights is located at the level of the users. For example, women harvesting mussels at Dwesa-Cwebe report that they have a system of rules among themselves that relate to how they conduct themselves when they go to harvest mussels. This layer of administration is further embedded in local institutions of tenure that exist at the village level, where membership derives from a combination of kinship and other social ties. The sub-headman and a group of household heads have authority at this level of administration”. (Sunde et al 2014, 128).

dichotomous view of ‘living’ vs ‘codified’ customary law fails to capture contemporary dynamics of rural land struggles, which are better understood as engendering conditions of living law.

There are many different and conflicting understandings of custom, which have in turn required the articulation of a new concept. Living customary law emerged as a way to respond to these conflicting views. Living customary law is a concept and category that is used in three different ways by different groups of actors. First, it is a legal term used by the Constitutional Court.<sup>43</sup> Second, it is a term used by empirical researchers to describe tenure relationships. Third, it is a term used by NGOs as a way to advocate for a democratic and participatory version of customary law that embodies Constitutional commitment to human rights. Across all three of these usages, living customary law is part of a strategic discourse used to legitimate entitlements to property for indigenous and rural peoples. As I show, to understand the political context in which living customary law emerges as a legal concept, a focus of research, and an aspiration in civil society, we need to consider how it articulates with Aboriginal title and the human rights of Indigenous peoples in contemporary conditions. Understanding how living customary law was developed in relation to Aboriginal title and indigenous rights is central to recognizing the emergence of living law, and the significant shift in articulations of property and subjectivity in struggles over land tenure in South Africa that the *Richtersveld* decision prompted. More importantly, these articulations are illustrative of an emergent living law in rural land struggles. This chapter demonstrates the role of living law in South African law and social mobilization

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<sup>43</sup> See for example, *Bhe and Others v. Magistrate, Khayelistsha and Others*, 2004: para 109; *Shilubana and Others v. Nwamitwa*, 2008: para 43, 44. In further affirmation of the use of living customary law in the Constitutional Court, Judge Gutta J. writes: “The Constitutional Court has repeatedly emphasised that the law which is recognised is living customary law, which evolves as the people who live by its norms change their patterns of life” (in *Bafokeng Land Buyers Association and others v. The Royal Bafokeng Nation*, High Court, North West Division, 2018: Para 22).



and explains, first, its role in the re-negotiation of relationships between land-holding collectivities and traditional leaders, and second, how it signals the introduction of culturalized rights as a means of understanding and protecting communal tenure relations.

My analysis of living customary law, as it originated in the Constitutional Court, used in jurisprudence and social mobilization, and contributes to the emergence of living law, is informed by an understanding of neoliberalism not as an ideology but as processes of governmental restructuring whereby a wide range of actors participate in decentered forms of governance, contributing to the intensification of “the uneven development of regulatory forms across places, territories, and scales” (Brenner, Peck and Theodore 2010, 184). The constitution of new legal subjects in these conditions is a key concern. The post-apartheid South African context is described as “a complex terrain of struggle” wherein there are “woven the strands of many smaller struggles by local groupings in specific historical circumstances” (Lee 2003, 80). The political context in which activists are working in South Africa has been further described as “hybrid, provisional, and situational” (Robins 2008, 165) whereby pragmatic activists are “capable of switching registers, repertoires and identities depending on specific contexts, audiences and political objectives” (Robins 2008, 168). Through social, political and legal struggle we can identify the emergence of an ‘insurgent citizenship’ in South Africa (Brown 2015, see also von Lieres 2016) as advocates and activists maneuver to leverage opportunities and overcome structural constraints at the intersection of regional, state, municipal and global institutions and local contingencies (Perelman and White 2011, 6–7).

The conditions described in this chapter contribute to the emergence of living law, of which living customary law is a distinct part. Living customary law is mobilized through the activities of a distinct set of actors, including researchers, advocates, activist lawyers, and

community members, who negotiate in the context of fragmented policy regimes and variegated governmental rationalities. I shall describe two different ways that living customary law has been mobilized in conditions of living law, both of which have different effects on the constitution of collective subjectivities. I show how it is used in jurisprudence to challenge autocratic traditional leaders and demonstrate how it is used in social mobilization as a means to assert tenure relationships expressed in part through rights claimed in the language of culture. The examples used in this chapter illustrate the emergence of living law, whereby multiple human rights norms are vernacularized with revitalized assertions of customary law.

## 6.2 Living customary law as a challenge to autocratic traditional leadership

In Chapter Four I described how the land reform program created and relied upon two subjectivities asserting claims to collective title – communal property associations and traditional leaders. Living customary law has become the primary legal concept through which the relationship between traditional leaders and CPAs is challenged and reconfigured. Indeed, much of the case law that relies on the *Richtersveld* judgement deals precisely with the relationship between traditional leaders and communities, often represented by CPAs.

Many of the judgments that consider living customary law as a concept through which to understand custom deal precisely with the question of chiefly authority, which was, ironically, not an area of dispute in *Richtersveld*. In *Pilane* (2013), the Constitutional Court had to decide if a community, part of the larger Bakgatla-Ba-Kgefela traditional community recognized by the *Traditional Leadership and Governance Framework Act* (TLGFA), could secede from the authority of the traditional leader Nyalala Pilane and appoint their own leader. The majority decision supported the rights of the community to determine their own leader in the name of democracy, thus clarifying the relationship between a state-recognized traditional leader and the

peoples who live within the territory under their jurisdiction. In *Sigcau* (2013), the issue hinged on determining what law ought to be referred to in deciding which of two contending traditional leaders was the legitimate one. In neither case did the Constitutional Court have to deal with any substantive issues relating to defining the content of customary law.<sup>44</sup>

The judgment concerning the Royal Bafokeng (RBK) Nation (2018) in the High Court (North West Division) is insightful for how collective groups have referred to living customary law as a defence for their collective property and autonomy.<sup>45</sup> The applicants in the case wanted to be autonomous from the RBK Nation. They asserted their autonomy by demonstrating that they were common-law owners of land and therefore did not have to submit to the whole of the RBK Nation. They claimed that they were owed the duty to consult on matters impacting their land. Judge Gutta J. wrote

A failure to recognize the duty to consult as legally enforceable, fosters arbitrariness and autocracy, and undermines the participatory democracy which is at the heart of our Constitution and of RBN governance. While the institution of traditional leadership according to customary law is recognized under the Constitution, it is subject to the Constitution. Courts must interpret customary law in light of the Constitution; and if it falls short of constitutional requirements, then the Court has a responsibility to develop the law (RBK Nation 2018, para 48).

The victory represented by this judgement is understood by researchers and legal critics to be another victory for living customary law. Again, however, the issue before the court was one of

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<sup>44</sup> Interestingly, the role of Richtersveld is less direct in this judgment. Rather than citing Richtersveld, the ruling referenced expert evidence provided by the Centre for Law and Society, which was admitted as *amicus curiae* (friend of the court). In their submission they informed the court of emerging jurisprudence on living customary law, starting with Richtersveld, to demonstrate that the procedures for deciding on traditional leadership are amendable to community decision-making, even if it goes against practice legislated in the TLGFA (*Sigcau* 2013, para 18).

<sup>45</sup> The influence of Richtersveld is clearly informative. In para 21 and 22: “[21] The Constitutional Court has pointed out that while customary law is to be understood on its own terms rather than through the lens of the common law, it is subject to the Constitution, and has to be interpreted in the light of its values. In other words, the process of interpretation is informed by the values and ethos of the Constitution, from which customary law draws its force. [22] The Constitutional Court has repeatedly emphasised that the law which is recognised is living customary law, which evolves as the people who live by its norms change their patterns of life.”

determining relationships of authority. The case did not deal with any other issue of custom, however, and thus did not address community cultural rights, which makes its status as part of this field of law questionable.

Another key area of litigation on living customary law focuses on determining women's customary rights. For example, in *Mayelene* (2013), the Constitutional Court had to decide whether a husband needed to obtain the consent of his wife before he married another woman. The court thus had to determine the customary law of the Xitsonga people and the contemporary relevance of a historical patriarchal practice. To determine such practice the courts referred to traditional healers from the community, experts writing on customary law, and individuals from within community to determine that conventions had evolved such that a husband needed permission of his wife before entering another marriage. The judgement potentially contributes to changing patriarchal power relationships that are said to characterize many rural societies adhering to forms of customary law, thus demonstrating a further affirmation of customary law as 'living' in the Court (Ozoemena 2013, 153-154, see also Claassens 2015).

While these judgements should certainly be celebrated, they have also served to solidify an overly narrow interpretation in conditions of living law by distinguishing between codified and living customary law. According to the judgements, codified customary law refers to a construction of colonial government to control the rural populace while living customary law refers to the rules and practices of peoples who access and manage land and resources collectively and who make changes to their customary laws in response to changing social and economic conditions (Claassens 2011). Legal researcher Aninka Claassens and prominent human rights lawyer Geoff Budlender, for example, explain how the Constitutional Court's recognition of customary is distinct from the 'interpretation' of customary law in legislation (such as the

TLGFA). As opposed to a 'codified' customary law that legitimates traditional leaders as the authors of custom, the authors argue that "[t]he source of true customary law is processes, practices and rules on the ground, which change over time" (Claassens and Budlender 2013, 76). They call this 'living customary law'.

Many critical summaries of jurisprudence repeatedly ascribe to the notion that 'living customary law' is a way of thinking about law as sets of horizontal relationships between people, while 'codified' customary law refers to the vertical imposition of power from traditional leaders onto subjected peoples (Diala 2017). Within this vision the 'chiefly' power of traditional leaders is thought to be imposed through legislative fiat and hierarchical power relationships. The problem is that this perspective leaves intact the assumption that traditional authorities impose powers from the top down whereas a flexible living customary law evolves organically to meet the local needs of a defined community. There is no consideration of forces that might contribute to the emergence or articulation of customary law nor is there any recognition of the multiple ways that traditional leaders assert their authority in the context of the new opportunities provided by the neoliberal global economy, including new forms of neoliberal governmentality that target cultural expressions (Comaroff and Comaroff 2018). In these conditions, for example, traditional leaders have been able to draw from an emergent transnational field of cultural rights in order to make themselves legible to the state as well as extractive industry actors (see Chapter Four).

While the authority of traditional authorities may be challenged through a narrative that posits living customary law against codified customary law, the potential of a more encompassing field of living law to legitimate cultural rights of communities remains under-explored in both jurisprudence and critical commentary. This is not atypical of law and policy

scholars who have a tendency to “unduly emphasize state-based frames of reference, and, in the process, overlook significant forces shaping new cultural rights and properties” (Coombe et al, forthcoming, 1). Custom, I contend, can be more descriptively understood as a culturalized assertion informed by transnational trends in indigenous rights and thus a key concept articulated within a field of living law. Below I first identify the relationship between custom and culturalized rights and then explain the effects of the articulation of customary and cultural rights through examples that demonstrate how ‘community’ is being re-asserted in the wake of *Richtersveld*, thus contributing to the emergence of the living law.

### 6.3 Making living customary law legible

The introduction of culturalized rights in rural struggles for land tenure rights represents a shift in how collectivities and their tenure relationships are understood. This shift needs to be placed in a wider international context, wherein Indigenous Peoples’ human rights have historically been articulated in terms of cultural rights.<sup>46</sup> For example, the International Labour Organization Convention No. 169 states that in applying its provisions “the social, cultural, religious and spiritual values and practices of these peoples shall be recognized and protected” (Art. 5(a), in Shaheed 2011 para 42). Moreover, the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) stipulates that “Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions” (Art. 31). In reference to indigenous governance and law UNDRIP affirms that:

indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical

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<sup>46</sup> International forums provide important definitions of cultural rights. The United Nations Economic and Social Council Universal Declaration on Cultural Diversity describes culture as “the set of distinctive spiritual, material, intellectual and emotional features of a society or a social group, [which] encompasses, in addition to art and literature, lifestyles, ways of living together, value systems, traditions and beliefs” (UNESCO 2001, 4).

systems or customs, in accordance with international human rights standards (Art. 34, in Shaheed 2011 para 43).

Cultural rights are used to inform the recognition and protection of indigenous people's laws and governance. In this regard, it is important to understand culture as a 'way of life' as it is affirmed in General Comment 21 of the Committee on Economic, Social and Cultural Rights:

The expression "cultural life" is an explicit reference to culture as a living process, historical, dynamic and evolving, with a past, a present and a future. The concept of culture must be seen not as a series of isolated manifestations or hermetic compartments, but as an interactive process whereby individuals and communities, while preserving their specificities and purposes, give expression to the culture of humanity (CESCR 2009, Para 11-12).

The ICESCR further explains that indigenous people's cultural life has a communal dimension that is "indispensable to their existence" and makes a distinct connection between land and the realization of their cultural rights (CESCR 2009, para 36).

Indigenous activists organizing for their sovereignty and self-determination through the United Nations leveraged cultural rights as a strategy to gain recognition outside of the framework of the state. International law developed as the law between states; in this system indigenous peoples were not recognized as sovereign peoples. This changed when, through a series of cases, indigenous peoples made submissions as collectivities protected under article 27 of the International Covenant on Civil and Political Rights, which provides for the protection of minority cultural, religious, and language rights (Koivurova 2008, 5, see also Cutler 2011). The *Richtersveld* judgement and the contemporary articulations of living customary law emerge in this broader context.

The introduction of culturalized rights is significant for a number of reasons. The articulation of living customary law within a field of living law contributes to making land tenure relationships legible in ways that are not represented in existing legislation, such as the

*Restitution of Land Rights Act 22 of 1994, the Communal Property Associations (CPA) Act 28 of 1996, and the Traditional Leadership and Governance Framework Act* (and others, as discussed in the next chapter). The drafters of land reform policy and legislation did not imagine custom and culture to be an important vocabulary to gain property in land reform because they imagined African culture and custom to be static and already fully represented by ‘chiefs’.

The treatment of customary law in the 1997 White Paper on Land Reform, for example, is striking. Customary law is discussed as something separate from land reform policy generally. For example, “[i]t is recognised that there are many areas in which the system of customary land tenure is popular, functional and relatively democratic. It would be unnecessary and even dangerous to interfere with such functional systems, especially while there is no proven better alternative” (DLA 1997, 89). The Department of Land Affairs argued that human rights-based land reform measures were in ‘conflict’ with customary law (DLA 1997). Here again there is evidence of an understanding of customary law as a separate area of law conflicting with the new Constitutional order, rather than as an expression of Constitutionally protected cultural rights that can inform land reform legislation. Finally, the Commission for the Protection of Cultural, Religious, and Linguistic Communities,<sup>47</sup> has no programming focused on land rights and there is no evidence to suggest that the Commission has ever dealt with the issue of land in any meaningful way.<sup>48</sup> Living customary law however opens up the opportunity to draw on cultural rights to make rural peoples tenure relationships legible in new ways.

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<sup>47</sup> The Commission for the Protection of Cultural, Religious, and Linguistic Communities is established in line with Chapter 9 of the Constitution. As described in Chapter Two of this dissertation, Chapter 9 institutions are ‘State Institutions Supporting Constitutional Democracy’. These institutions are subject only to the Constitution and the law and are thus independent of government. The above Commission is mandated to support cultural rights.

<sup>48</sup> This finding is based on a review of annual reports by the Commission for the Protection of Cultural, Religious, and Linguistic Communities from the years 2007-2018.



The absence of cultural rights in land reform policy and legislation in South Africa contrasts with the re-articulation of cultural rights in heritage management (Meskell 2012), the protection of indigenous knowledge (Comaroff & Comaroff 2009), and the rise of chiefs and chieftaincy (Oomen 2005, Comaroff & Comaroff 2018). The impact of the inclusion of Aboriginal title in *Richtersveld* was effectively to provide a means to bring cultural rights claims and arguments into the field of land reform.

As it emerged in South Africa, living customary law was used in diverse ways by different people for distinctive ends. By understanding these different uses as particular articulations, I provide a perspective that draws out the emergence of living law as a field of rights mobilization and indigenous emergence, whereby indigeneity is understood as “a contingent, structured positioning, one that can be spoken and linked to other indigenous struggles only within particular geographically and historically specific conjunctures” (Yeh and Bryan 2015, 534, see also Radcliffe 2017). In conditions of neoliberalism, articulations of living customary are dispersed in different fields of action, thus they take on different forms for and by different actors. It is to the articulation of living customary law as a means to express the cultural practices of localized communities in arguing for their customary rights that I now turn.

#### 6.4 Re-imagining ‘community’ and legitimating tenure in transnational contexts

To understand the localized and participatory development of customary law as an assertion of culturalized rights one needs to understand the links between human rights and cultural heritage more generally, and to acknowledge the specific links between cultural rights and cultural heritage, specifically. In her report to the United Nations Human Rights Council (2011), the independent expert in the field of cultural rights Farida Shaheed explains two key points. First, she asserts that the protection of cultural rights in the African context is articulated in the Charter

for African Cultural Renaissance (2006), which recognizes that “all cultures emanate from societies, communities, groups and individuals” (Shaheed 2011, Para 29) and that according to Article 15 of the Charter all states are called to “create an enabling environment to enhance the access and participation of all in culture, including marginalized and underprivileged communities” (in Shaheed 2011, Para 29). Second, she explains that, internationally:

the participation of individuals and communities in cultural heritage matters is crucial, fully respecting the freedom of individuals to participate or not in one or several communities, to develop their multiple identities, to access their cultural heritage as well as that of others, and to contribute to the creation of culture, including through the contestation of dominant norms and values within the communities they belong to as well as those of other communities (Shaheed 2011, Para 10).

In the South African context this affirmation challenges the suggestion that ‘culture’ belongs to the distinct domain of traditional leaders and positions culture in local struggles whereby peoples express political agency by defining their cultural identities and practices in their relationships with others.

The concept of community as a collective entity defined by shared rules of access and membership was significantly expanded in *Richtersveld* through ‘indigenous law ownership’ (*Richtersveld* CC 2003, Para 81). As Hanri Mostert explains: “the judiciary entertained evidence about the shared culture, language, religion, social and political structures, customs and lifestyle that proved the existence of customary rules relating to land use, to find that the community could have a sense of legitimate access to the land, to the exclusion of others”.<sup>49</sup> Moreover,

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<sup>49</sup> In the SCA Judgement, for example: “The Richtersveld people shared the same culture, including the same language, religion, social and political structures, customs and lifestyle derived from their Khoi-Nama forefathers. One of the components of the culture of the Richtersveld people was the customary rules relating to their entitlement to and use and occupation of this land. The primary rule was that the land belonged to the Richtersveld community as a whole and that all its people were entitled to the reasonable occupation and use of all land held in common by them and its resources. All members of the community had a sense of legitimate access to the land to the exclusion of all other people. Non-members had no such rights and had to obtain permission to use the land for which they sometimes had to pay” (SCA 2003, Para 18).

Mostert highlighted the “subtle link that was drawn, in the course of the proceedings, between the ‘indigeneity’ of communities and the land rights accruing to them [which] was informed largely by comparative law on Aboriginal title” (Mostet 2010, 229). This goes far beyond the stipulations in section one of *The Restitution Act* which states blandly that communities are defined by shared rules of land use.

New ways of addressing community subjects as property holders are emerging via culturalized customary law. How claimant communities, including customary and indigenous communities, identify themselves has been influenced by the *Richtersveld* judgment through the recognition of ‘indigenous law’. For example, according to the *Land Restitution Act*, initially all members of claimant communities had to be recorded in a membership list, but this stipulation changed by virtue of judgements in the Land Claims Court in the *Kranspoort* case (LCC26/98) and by the Constitutional Court in *Richtersveld* (CCT19/03). These judgements determined that

A community is a dynamic and ever-changing entity, and while some members will leave, others will join. Moreover, this process of renewal is not dictated by lineage alone but also by other forms of association related to culture, location, and livelihoods. For this reason, in the case of community claims, determination of lineage between claimants and those originally dispossessed is futile. (Sjaastad, Derman and Manenzhe 2013, 419).

These changes have had significant impact on how communities are recorded for the purpose of transferring land. By using *Richtersveld* to elaborate on communal ownership, communities make themselves legible as distinct self-determining entities. State attempts to construct communities as legal entities, such as CPAs, are being challenged by rural peoples asserting community self-identity and cultural distinction at the intersection of Indigenous rights and customary law. These claims are in part legitimated by the precedent set in the *Richtersveld* judgment.

Living customary law provides a legal vehicle to interpret and reconfigure relationships between culture, rights, and property; it is an essential ingredient in living law within the broader political economies within which it is being asserted. To see some of the possibilities of living customary law in land reform, and to understand its contribution to a broader context of living law, it is necessary to move beyond the courts to examine how it is taken up in specific contexts and struggles towards specific ends. By looking at the ways in which some communities are articulating living customary law as a form of culturalized right, we will get a clearer sense of the opportunities this concept affords for re-articulating tenure relations, including the layered and nested character of customary 'social tenure' as a subject of human rights. It is here, we will see, that the promise of living law is beginning to be realized for the recognition and protection of land tenure.

*Richtersveld* articulated key issues in the determination of landed property rights that became components of living customary law. The Court held that “[t]he content of the land rights held by the Community must be determined by reference to the history and the usages of the community” (*Richtersveld* CC 2003, 60).<sup>50</sup> Empirical research on the concept of living customary law now informs understandings of tenure relationships that are in line with the *Richtersveld* judgement. In 2011, for example, the Institute of Poverty, Land and Agrarian Studies (PLAAS) at the University of Western Cape in South Africa published a research report on 'living customary law' in Msinga. The report was based on a three-year action research project (beginning June 2007) focused on the Mchunu and Mthembu tribal areas in KwaZulu-Natal.

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<sup>50</sup> Moreover “we are of the view that the real character of the title that the Richtersveld Community possessed in the subject land was a right of communal ownership under indigenous law. The content of that right included the right to exclusive occupation and use of the subject land by members of the Community. The Community had the right to use its water, to use its land for grazing and hunting and to exploit its natural resources, above and beneath the surface. It follows therefore that prior to annexation the Richtersveld Community had a right of ownership in the subject land under indigenous law” (*Richtersveld* 2003, 62).

While the report was published by PLAAS online as part of their open-access research series, the research was carried out by staff from the Mdukutshani Rural Development Programme during a period in which the 2004 *Communal Land Rights Act* was being challenged on the grounds that it misrepresented the nested forms of rural social authority to reinforce a system of chiefly power. The research sought a deeper understanding of customary law to be used to inform legislative development.

The researchers argue that living customary law is best understood as having a nested character. To describe land tenure as having a ‘nested character’ is to show that use and access to land is negotiated through multiple authorities, institutions and collectivities which have varying degrees of legitimacy in decision-making. In the Msinga research these collective actors include izigodi (wards), imihlati (neighbourhoods) and imizi (homesteads), all of which define local boundaries at different scales (Cousins et al. 2011, 85, see also Cousins 2007, Claassens 2008). The authors explain that, “communal land tenure regimes in rural South Africa are best understood as systems of living law, which have the potential to adapt and evolve over time and are sometimes deliberately and consciously adjusted to meet changing circumstances” (Cousins et al 2011, 83).<sup>51</sup> The challenge for researchers and advocates in contemporary South Africa, then, is establishing whose voices are heard in defining the content of living law, and in supporting institutions to hold those in power in check: “A key objective of policy and law should therefore be to establish and support land tenure institutions and decision-making

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<sup>51</sup> The authors make a deliberate shift from ‘living customary law’ to ‘living law’, arguing that “[t]he term ‘customary’ is a misnomer, since this seems to imply that the system is handed down relatively unchanged from the past, and that its content is derived primarily from a discrete and unique set of cultural norms and values” (Cousins et al, 2011, 83). The move from ‘living customary law’ to ‘living law’ is premised however on a (colonial) conception of custom and culture that I challenge in this dissertation. Therefore, my use of the phrase ‘living customary law’ is closely affiliated with the author’s description of living law. Custom, for example, continues to be articulated within the field of living law.

processes which are legitimate, open to popular participation, and accountable to rights holders" (Cousins et al 2011, 84).

The recognition of tenure relationships as part of a wider set of cultural relations is clearly emergent in recent activism for land and resource rights. Furthermore, it is in this activity, described below, that we can identify the role of transnational norms in defining tenure relationships. In a presentation and educational flier produced by four organizations advocating for the customary fishing rights of a community in the Western Cape province, for instance, we can begin to see the articulation of a broader understanding of customary law rights (Environmental Evaluation Unit et al. 2012). Organizations working with community leaders have begun a process of supporting the community in articulating their community rights, documenting their histories of living in the area, describing how their social and cultural lives are intertwined with the river and coastal resources, and recording their local ecological knowledge (Environmental Evaluation Unit et al. 2012). Here we see customary law being understood as a cultural practice embedded within an indigenous cosmovision, a perspective that is echoed through other community presentations (Waldeck and Smith 2011) and community-based proposals for tenure governance (Sunde et al. 2014). The introduction of 'indigenous customary law' as an independent body of law has provided a means for the introduction of a legal understanding of customary law not only as shared rules (which has previously defined community membership) but as a way of life and tenure governance.

The significance of these commitments was highlighted at a litigation workshop on customary law and land tenure held in Johannesburg, where the importance of pan-African guidelines, such as the Framework and Guidelines on Land Policy in Africa, the African Union Commission, is clearly stated in their discussion of *Richtersveld* and customary law in the

postcolonial era (LRC 2011). A consortium of South African community organizations representing movements of small-scale farmers, fishers, forestry workers and rural workers developed a ‘Plan to Act!’ at a national workshop meeting held in Cape Town, 7–11 June 2015. The meeting was held to discuss new national and international guidelines on tenure security, including the Voluntary International Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (VGGT). In their published declaration, they state:

We, women and men who are the historical users and caretakers of the Commons, have a particular relationship with the land, forests, oceans and waters of our territories upon which we depend for our lives and livelihoods. Through our interaction with the Commons we have developed our diverse cultures, knowledge and tenure systems. We have fed ourselves and our communities and continue to do so as well as to provide food and nourishment for the communities around us (Masifundise 2015).

The Plan to Act! engages with transnational norms to link their identities and their particular relationship with the land, which is mediated by diverse cultural systems.

Transnational engagements between small-scale fishing activists and international activists and policy makers were fundamental to the creation of a policy for small-scale fisheries in South Africa: representatives from Masifundise, for example, were instrumental in discussions and negotiations within the FAO to develop the VGGT as well as the Small Scale Fisheries Guidelines (Interview #4). Throughout negotiations over the text of the policy, small-scale fishers “referred to customary practices in demanding recognition of their rights and have taken inspiration from international policy instruments in articulating their vision for a new system of fisheries governance” (Sunde et al. 2014, 121). The policy brings a distinctly transnational character to these movements and challenges dichotomous constructions of ‘global’ and ‘local’ scales in organizing. Community organizations fighting for land and resource rights are engaging

with international policy regimes and asserting their tenure practices within emergent transnational discourses of indigenous and community land rights to practice their own forms of land tenure governance as an expression of their cultural rights.

Beginning with the use of Aboriginal title, *Richtersveld* signaled and legitimated a broader trend among activists and community organizations to approach the rights of indigenous and customary communities through regional and international guidelines on land tenure rights. In this activity, we can identify approaches to living law emergent in ‘translocal assemblages’, which “are not simply a spatial category, output, or resultant formation, but signify doing, performance and events” (McFarlane 2009, 562). These are articulations of neoliberalism(s), which “are more than curious local manifestations of global norms, but sets of theories and practices about the world that are fundamentally the products of local history and experience” (Goldstein 2012, 305). The living law refers to the relationships that exist between people and the land in terms of cultural or spiritual connections, as well as the diverse uses of land in making and sustaining social ties between families for example (Fay 2015), or as sites of important social re-distribution (Ferguson 2013). In other words, the living law of land tenure affirms that rural and Indigenous Peoples own and manage land in a wide variety of ways and through a variety of relationships not captured in existing legislation.

By articulating their own situated identity in relation to international policy developments, these community organizations participate in an emergent transnational dialogue calling for the protection of indigenous and community land rights. In summary, the *Richtersveld* decision and the ensuing assertion of living customary law has opened the door to a broader set of normative and discursive claims to property that are being articulated in civil society, in activism around litigation, and in publications on the importance of living customary law as a



means towards recognizing ‘social tenures’ in land reform; *Richtersveld* has contributed to an emergent amalgam of living law whereby rural peoples are making claims to their land.

The analysis provided in this chapter has implications for how the link between law and legibility is understood. The introduction of culturalized claims to rights introduces new opportunities, as well as requirements, for peoples asserting land tenure rights to make their claims legible. Yet the politics of making legible cannot be imagined as being mobilized by any unified motivation – as either motivated by ‘high modernity’ or ‘the will to improve’ (as Scott 1998 and Li 2005 argue, respectively). Rather, as I identified in this chapter, living customary law is articulated as an issue of cultural rights in different ways by an activist Constitutional Court as well as by activists themselves, and through their work custom is made legible in different ways and for the purposes of advancing new understandings of custom. For example, some activist/researchers argue that living customary law must be understood in contrast to codified customary law, however the reality of any such dichotomous relationship is not illustrated empirically. This is in part the product of conditions of neoliberalism and legal pluralism in South Africa.

In *Alexkor v Richtersveld* the Constitutional Court asserted the need to ‘take legal pluralism seriously’ in democratic South Africa. ‘Taking legal pluralism seriously’ requires paying attention to the generative spaces that are opened up by the recognition of multiple legal orders. Political Scientist Peter Houtzager and Law professor Lucie White, in their conclusion to a collaborative volume on socio-economic rights advocacy in Africa, find that African advocates creatively engage with normative pluralism and “welcome the generative tension that it brings to their work” (2011: 175). From this perspective pluralism is not an end but a context in which struggles are waged, where norms are worked with and against. Rather than see it as a colonial

construction, Houtzager and White approach legal pluralism as producing ‘generative spaces’ which may arise when groups place the triggering ‘event’ in a ‘justice’ frame and enter into redistributive contestation, deliberative engagement and institutional experimentation so as to imagine and even try out previously unimaginable win-win [economic and social rights] delivery strategies” (Houtzager and White 2011, 183-184). Living law, in conditions of neoliberalism and (arguably) augmented legal pluralism, offers new opportunities for articulation with cultural rights in the pragmatic and strategic advocacy of peoples in their struggle for securing tenure.

### 6.5 Conclusion: The emergence of living law in struggles for rural land rights

Living customary law has emerged in contrast with codified customary law and in the process has created a new dichotomous understanding of custom that may itself be unhelpful for recognizing its diverse uses and may in fact ‘entrench’ a simplistic idea of custom void of struggle or conflict. While the concept of living customary law easily matches the ethos of democratic constitutionalism, there is a risk that this understanding is being sedimented as a particular form of ‘custom’ that relies on platitudes about democracy rather than a deep and critical engagement with the diverse forms of struggle and the shifting relations between property, subjectivity and territory in contemporary rural South Africa. Contemporary conditions of rights-based legal struggles over land are better understood as engendering the living law of rural land tenure, whereby claims to land are localized however fundamentally informed by transnational conditions of interlegality.

The promise of living law is realized through jurisprudence and the advocacy through which rights to land are mobilized. The *Richtersveld* decision and its ongoing influence demonstrates how indigenous legal traditions, supported by Aboriginal title as it has been developed in common law, continue to push the presumed boundaries of law, identity, and

subjectivity that might confine indigenous and rural peoples living in customary legal situations. Rather than being representations of static ‘traditions’, indigenous identities are better understood as articulations of “how people interpret their histories and desired futures in contexts in which they encounter new values” (Coombe 2017, 380, see also Speed 2008, Altamirano-Jiménez 2013). Collective subjectivities are made legible in land reform legislation as traditional leaders and as communities’ express cultural attachments to land, and such subjectivities are made anew through the articulation of customary law, indigeneity and cultural rights, contributing to what is best understood as the living law of rural land tenure.

In the next chapter I focus on an area of struggle where communal land rights are articulated outside of the land reform program and community rights are asserted in the context of conflicts with extractive industry. I focus in particular on how mining governance regimes come into conflict with land reform objectives, and how, in these sites of struggle peoples use emergent transnational norms to articulate indigenous and customary land rights in an emergent field of living law. I show how advocates and peoples living in collective tenure relations thereby leverage multiple norms to make legible their localized practices of government to make new demands on the state and legislature in order to influence both land reform and mining reform legislation. I demonstrate the links between property, territory and authority revealed in this context, and argue that a deeper critical engagement with each is needed in order to transcend apartheid territorial authorities vested in the garb of tradition.

## 7 GOVERNING TERRITORY IN CONDITIONS OF LEGAL PLURALISM: LIVING CUSTOMARY LAW AND FREE, PRIOR AND INFORMED CONSENT (FPIC) IN XOLOBENI, SOUTH AFRICA

### 7.1 Introduction

The work of rural peoples, their advocates, and the courts have contributed to the emergence of the living law of land tenure. Such living law must be understood through the transregional and transnational conditions by which it is legitimated. The living law of rural land struggles open a space of opportunity for land claimants to draw on culturalized rights and discourses to contest post-apartheid collectivities that were born out of the land reform program. In the conjuncture of indigenous rights, Aboriginal title, and revitalized assertions of custom, a new form of governmentality is emergent whereby advocates and communities draw on transnational norms of community consent to turn practices of government back on the state and make demands for land rights. One area where this form of governmentality is mobilized is in the context of mining governance reform. Here the living law of rural land is identified through, in part, the range of rights and norms, and their local and transnational links, asserted by peoples against both mining companies and the state. While the struggles identified here are unique, they would not have been realized in the same way had it not been for the gains made in the *Richtersveld* decision and the new politics that this opened up.

What gives this struggle characteristics of governmentality, rather than being a mere reaction against dispossession, is the extent to which it relies on transnational norms requiring community consent that derive from global environmental policy, the international indigenous rights movement and the field of corporate social responsibility which has responded to both. Existing scholarship explains how the mining industry participates in shaping the meaning,

practice and experience of the ‘local community’ by illustrating the "contingent intersections among CSR [corporate social responsibility], neoliberalisation, community, and capital" (Mayes et al. 2014, 410). Here, however, I am interested in understanding how one community draws from within a field of governmental power to hold state actors accountable. Nikolas Rose et al (2006) explain that governmental thought and technique is “contingent and invented (and thus always mutable)”. Moreover,

Government is not assumed to be a by-product or necessary effect of immanent social or economic forces or structures. Rather, it is seen as an attempt by those confronting certain social conditions to make sense of their environment, to imagine ways of improving the state of affairs, and to devise ways of achieving these ends. Human powers of creativity are centered rather than marginalized, even though such creation takes place within certain styles of thought and must perforce make use of available resources, techniques, and so on (Rose et al. 2006, 99).

I will demonstrate that the community subjects who are the actors in this chapter participate in specific power relations and in the process reproduce and transform them (Brockling et al 2011, 14).

One effect of the shifting forms of power and subjectivity that I have identified within the realm of living law are the emergence of overlapping territories (Agnew Oslender 2016, Lund and Boon 2010) as different collectivities make claims for recognition of their territorial authority and their specific role in governing land and resources. It is imperative in this context to “conceive of territory from the perspective of multiple overlapping power relations” (Haesbaert 2013, 149). The empirical challenge is to identify the practices, processes and institutions through which rural and indigenous peoples negotiate land rights in conditions of “entangled territorialities” (Dussart and Poirier 2017). To this end, the chapter focuses on the particular social, political and legal struggles being waged in the Umgungundlovu territory of the Eastern Cape in South Africa.

One community, the Xolobeni community, within the wider Umgungundlovu territory, is centrally engaged in a struggle to protect their land from proposed extractive industries. What is a legal struggle in courts is also a wider social and political struggle against the power and authority of both the state and traditional leaders, as well as against historical discourses of conservation and underdevelopment that have positioned these peoples as in need of development introduced, designed and controlled by others. The pairing of conservation and underdevelopment has a long history in South Africa, where, even after the end of apartheid, there remains an entrenched racialized ideology among state officials and conservation activists that poor black people are a hinderance and threat to biological diversity (for a recent summary of this work, see Kepe 2018). It is in these conditions that the people of Xolobeni are demanding the right to ‘say no’ to imposed development plans and to assert their customary and cultural rights as the basis of their vision for the future.

## 7.2 Mining Governance Reform: FPIC and the right to ‘say no’ in context

Post-apartheid mining governance reform in South Africa has rhetorically promoted the ‘participation’ of communities impacted by mining operations, yet scholarly research finds pervasive poverty and increasing inter-communal violence in mining areas (Mnwana 2015, Mnwana et al 2016). There has been a marked increase in conflicts between local communities, traditional leaders and mining companies as people demand that they be either compensated for damaged environments or gain stakes in mining operations (Manson 2013, Capps and Mnwana 2015). As I will show, these conflicts are characterized by local historical struggles over property, territory, and authority whereby customary laws and practices are articulated with national law and transnational human rights norms in dynamic conditions of legal pluralism.

Reading the advocacy of local communities and their struggles over property, territory and authority is one way to interrogate the complex field of power constituting mining governance reform in post-apartheid South Africa. Moreover, as geographers Scott Prudham and William Coleman argue, "[c]risis in property regimes highlight how a politics of place can challenge existing globalizing processes, build new bases for autonomy, and articulate alternative ways of living" (2012, 2). In this chapter I highlight two areas of struggle in mining-community relations and their territorial dimensions: 1) strategic re-assertions of custom, jurisdiction and subjectivity; 2) practices of self-determined development. While these areas of struggle are inter-related, it is useful to separately delineate these two themes to draw out different aspects and dimensions of community resistance to imposed mining regimes.

One of the ways that communities organize their resistance to imposed mining operations is by demanding that their consent be obtained for the operations which affect them. The right to consent, however, is meaningless unless it includes a right to agree, to disagree, to set terms, and, particularly, the right to say 'no' to mining operations entirely. Community-based assertions of the right to consent are challenging state and industry-led proposals for reform in South Africa to the extent that some mining operations are halted while legal battles are waged in the courts. How these rights are asserted, the language used and the claims made, illuminate shortfalls in post-apartheid mining governance reform that are not captured by broad, top-down analyses of these processes. Moreover, these struggles reveal the highly spatialized characteristics of mining governance in post-apartheid South Africa and how these territorializations are being re-configured under conditions of neoliberal governmentality.

Conflicts between mining companies and communities often involve contestations over jurisdiction and scale that draw on both 'international' and 'local' imaginaries. Geographers and

anthropologists have long challenged the scalar distinctions ‘local’ and ‘global’, highlighting that these designations are socially constructed. Perceived local struggles are often constituted through the transnational circulation of information, strategies, and relations of power. In environmental governance, for example, there has been a rise in governing structures mediating between the domestic and the international, while not determined by either, while transnational institutions and NGOs have become international ‘knowledge brokers’, seeking out ‘local’ knowledges for the realization of ‘global’ agendas (Martello and Jasanoff 2004). In such conditions constructions of the local and global depend “on the production of knowledge and its interaction with power” (Martello and Jasanoff 2004, 5); indicating a need to interrogate perceived ‘local’ accounts through a globalized perspective (ibid).

Legally binding conventions as well as ‘soft-law’ statements (referring to non-binding regulatory governance instruments) are influential means through which norms on indigenous rights and resource governance circulate transnationally. Binding instruments include the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), ILO Convention 169 (the 1989 Indigenous and Tribal Peoples Convention), the Convention on Biological Diversity and the Covenant on Economic, Social, and Cultural Rights. In addition, soft-law norms such as those deriving from the Food and Agricultural Organizations Voluntary Guidelines on the Responsible Governance of Tenure are mobilized in rural land rights struggles. These function to mediate relationships between states and indigenous populations, and in effect demand that we interrogate the oft-presumed role of the state. Anthropologists James Ferguson and Akhil Gupta (2002) argue that in neoliberal political economy, state power, often expressed in modern terms in relations of ‘verticality’ and ‘encompassment’ is reconfigured as transnational organizations confound such historical metaphors of scale and jurisdiction:



Claims of verticality that have historically been monopolized by the state (claims of superior spatial scope, supremacy in a hierarchy of power, and greater generality of interest and moral purpose) are being challenged and undermined by a transnationalized “local” that fuses the grassroots and the global in ways that make a hash of the vertical topography of power on which the legitimization of nation-states has so long depended (2002, 995).

State law, as I demonstrate in this chapter, is similarly being challenged by ‘local’ actors engaging with transnational soft-law standards and transnational legal activism. Territorial, regional, national, and transnational forms of law, politics and government are interwoven. This is not to suggest that each scale of politics does not have its own political effects, but rather to highlight that multiple structures and institutions interact through transnational politics. Just as mining governance is increasingly transnational, community resistance and organizing is informed by transnational human rights norms as they are articulated in the local contexts in which they are being mobilized (Merry 2006).

Focusing on the transnational is important for understanding mining governance reform. Bonnie Campbell (2010) argues that after decades of liberalization in the African mining sector, functions often assumed to be the responsibility of the state have been delegated to actors in the private sphere, thus prompting demands for new means of extra-state or private governance. The transnationalization of mining governance has been articulated in part through the proliferation of transnational standards, including standards of corporate social responsibility. For example, critical development scholars Eduardo Canel et al. (2010) suggest that extractive activity has entered a new phase globally, in part due to the emergence of national and international voluntary codes of corporate conduct, corporate social responsibility and corporate community contracts (Canel et al. 2010, 8). The multiplication of governance regimes under neoliberal reforms have impacted the extractive industry in Africa. Transnational governance critics Hany

Besada and Philip Martin suggest that voluntary transnational initiatives might be understood as a new generation of mining governance in Africa (Besada and Martin 2015).

The role of transnational law in local and national mining governance regimes is far from uniform; some suggest that the indeterminate effects of transnational laws indicate their lack of influence in challenging entrenched political economies. Kojo Busia and Charles Akong argue, for example, that developments in the transnational governance regime have not substantively challenged a structural history of expropriating capital in the form of rents from mineral resources that continues to characterize mining on the continent (2017, 6). Moreover, the aforementioned changes are arguably “limited to mechanisms and instruments” that are unevenly applied in dynamic and contested political and economic environments (Busia and Akong 2017, 6). Nonetheless transnational law and activism have an effect to the extent that they contribute to the development of new discourses and practices in mining governance reform. Moreover, they coalesce with demands for the recognition of living law to provide a new terrain of political-legal struggle. Struggles for the right to community consent represent a site where transnational law has a key role in the negotiation and development of mining governance regimes.

These insights parallel broader themes in studies of transnational law and governance. Neoliberal globalization demands an approach to governance that decenters the state, constitutional and international law, and looks instead “towards a functional characterization of governing activities” (von Benda-Beckman et al. 2009, 1), whereby there can be “a multiplicity of governance agents, who engage in new modes of exercising power, often guided and legitimized by ‘alternative’ legalities” (von Benda-Beckmann et al. 2009, 1-2). As I demonstrate, law plays an important part to the extent that it “constitutes, organizes, and legitimizes positions of authority of governance agents and governance activities” (von Benda-Beckmann et al. 2009,

4). As state responsibilities are relegated to the transnational legal sphere and multilateral negotiations between non-state parties, a critical question emerges: how will the emergent body of norms be locally appropriated, and how will these norms cohere with national policy objectives (Campbell 2010, 210)? This question is pertinent in the context of transnational struggles for the right to free, prior and informed consent (FPIC).

The first recognized assertion of FPIC was in the International Labour Organization's Convention 169.<sup>52</sup> Today references to FPIC often UNDRIP where Article 32 requires that States must consult with indigenous peoples, through their own chosen institutions, in order to "obtain their free and informed consent prior to the approval of any project affecting their land or territories and other resources, particularly in connection with the development, utilization and exploitation of mineral, water or other resources". Advocates in South Africa first began discussing the applicability of FPIC in 2002 in negotiations over mining legislation, but in more recent years the principle has picked up new momentum in social struggles and NGO activism. Due to its origins in the international indigenous movement, whether FPIC applies to rural peoples in South Africa more generally has been questioned. Nonetheless, the use of FPIC in South Africa represents a step towards "reclaiming FPIC" from institutional embeddedness (Franco 2015). In sum, the struggle in Xolobeni, Eastern Cape, reveals how social struggles grounded in territorial claims to the authority of customary law are articulated through local histories, national law and jurisprudence, as well as FPIC and international human rights discourse to oppose state territorial governance legislated through the *Traditional Leadership and Governance Framework Act* (TLGFA) .

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<sup>52</sup> South Africa has not ratified ILO Convention 169, however it is a signatory to the UNDRIP.

A significant characteristic of the struggle in Xolobeni is that these people are not ‘indigenous’ in the dominant use of that term in South Africa; they are not Khoisan peoples and prior to this struggle did not self-identify as indigenous peoples. Yet, to some degree an indigenous identity has been embraced and taken hold: during a Human Rights Day event on 21 March 2017 in the village of Sigidi (next to Xolobeni) many of the speakers referred to their struggle as an Indigenous Peoples’ struggle (Personal notes, 21 March 2017). During the court proceedings on 23 April 2018, Advocate Thembeke Ngcukaitobi (acting for the applicants) declared that “there is no question that the applicants are an indigenous people” to justify drawing upon international Indigenous Peoples’ rights and more specifically, the right to exercise FPIC.<sup>53</sup> The fact that the people of Xolobeni were never dispossessed of their land during apartheid, have a long historical and cultural connection with their land, as well as a history of continued marginalization by the state, appeared to be significant to their indigenous subjectivity being unchallenged.

In the next section of the chapter I provide an overview of the social and political context of mining governance reform in South Africa and describe the unique and rising power of traditional leaders in this context. In the third section I describe key legislative changes and the importance of jurisprudence on living customary law – as a key dynamic in the development of living law - in challenging the current legislative framework and, more specifically, the territorial authority of traditional leaders. In the fourth section I explain my approach to territorial pluralism in the context of mining governance. In sections five and six I introduce the struggles of the Amadiba people against a proposal for open cast mining on their land and explain the importance of integrating the transnational principle of free, prior and informed consent (FPIC)

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<sup>53</sup> See hand held video recording of the proceedings, by John Clarke: <https://www.youtube.com/watch?v=z1geB7fLj74>

and a revitalized conception of customary law to realize their substantive right to consent and to self-determined development. In section seven I conclude.

### 7.3 Community Consent to Mining in South African Context

Mining has long been an important resource in the South African economy. The mining industry provided 455,109 jobs in 2016, representing over 5% of all people formally employed nationally and providing annual employee earnings of R120 billion. In the same year, the mining industry reportedly represented 7.3% of the overall GDP of South Africa (Chamber of Mines, 2017, 15). While the figures are impressive, the industry has fundamentally failed to re-distribute wealth to historically marginalized black and indigenous peoples. This is a startling reality in the context of the post-apartheid promise to reform mining governance in the country. During the colonial and apartheid years mining capital was consolidated in the hands of the white minority. A reserve system was legislated demarcating 13% of the land area, called Bantustans, to the Black majority who made up 87% of the population, whose residents served as labour reserves for the extractive industry. After the first democratic elections in 1994 many believed that wealth produced through mineral extraction would be redistributed to serve an imagined national interest based on principles of democracy, equality, and human rights.

During the transition to democracy the African National Congress (ANC) called for the nationalization of the mining industry and a transfer of all mineral rights to the state, a proposal appealing to millions of black and coloured South Africans who had so far not enjoyed the wealth produced by mining. However, powerful actors in the mining industry vigorously opposed proposals to transfer mineral rights to the state, using their private property rights and constitutional protection against expropriation without compensation as a key point of leverage. After years of negotiation with industry over legislation, starting with the Mineral Development

Bill, which was promulgated in the *Minerals and Petroleum Resources Development Act* (MPRDA), the state response was a skeleton of the initial vision of redistribution. What remains are royalty payments to local communities, Black Economic Empowerment Schemes (BEE)<sup>54</sup>, mine-community partnerships, and social and labour plans as requirements for mining companies (Capps 2012). The 1994 Reconstruction and Development Programme (RDP), for example, indicates that its central objective “is to de-racialize business ownership completely through focused policies of black economic empowerment” (RDP 1994). The primary focus is to increase black participation in the industry by achieving 26% black ownership of mining operations. BEE is enforced through a list of ‘codes’ that measure company success in meeting affirmative action targets and by insisting that all mining companies meet legislated ownership requirements. Mining licences are only guaranteed security if this 26% black ownership benchmark is met and BEE codes are complied with (Capps 2012, 322; Tangri and Southall 2008).

The impact of neglecting community rights has been devastating for people across the country. The legislated reform “above all remained a reform of mining policy designed to accelerate capital accumulation in the mining industry by eliminating the barriers to investment... and control of mineral rights, not least by the mining houses themselves” (Capps 2012, 316). What remains for communities are guaranteed royalty payments, but how these payments are to be used and managed is unclear.

Moreover, there is a suggestion in the policy that such royalties could be converted to equity shares in local mining operations, but too often there have been no opportunities afforded for impacted communities to gain any ownership share in a particular mine. As a consequence

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<sup>54</sup> Black Economic Empowerment is broad-based policy objective introduced by the African National Congress. It is an affirmative action program developed to correct the racially skewed opportunity and wealth distribution – across all sectors of the economy - that was a product of colonialism and apartheid.

the main beneficiaries of mining reform have been well connected black elites and ‘traditional leaders’ who have been propped up as the de-facto representatives of rural communities and legitimate partners in mining, a reality that is now well detailed in case studies from across the country (Capps 2016, Claassens and Boyle 2015, Mnwana et al. 2016). Reform initiatives amount to a South African articulation of ‘corporate social responsibility’ (CSR), a global industry initiative oriented more towards giving gifts and reinforcing structures of patronage and dependency than redistributing profits or respecting the land and territorial rights of peoples impacted by mining (Rajak 2006). The South African Human Rights Commission (SAHRC) describes significant poverty and socio-economic inequality in mining-affected communities, failed community consultation processes, as well as environmental degradation caused by widespread failure of mining companies to comply with environmental protection regulations or social and labour plans (SAHRC 2018).

The failures of reform have recently been highlighted through public submissions to the High Level Panel on Assessment of Key Legislation and Acceleration of Fundamental Change in South Africa, a forum provided by the state to gather public input on the success and failures of the post-apartheid transition (HLP 2017). Public events uncovered an alarming number of stories from rural peoples that illustrated the extent of poverty and exclusion in mining-affected areas. Kgalema Motlanthe, the former South African Interim President and the chair of the forum, explained that the MPRDA disadvantaged communities while empowering traditional leaders to approve projects under the assumption that they represent everyone (Capazorio 2017). These testimonies are reinforced in research by Sonwabile Mnwana et al. (2016), who found that the new legislation has

reproduced apartheid-style interpretation of communal property rights. Now chiefs (of different ranks) in these areas are empowered to become custodians

of communal and other natural resources. Not only does this go against many rural peoples' understanding of the authority of chiefs, it can also violate the cultural meanings attached to and connections with the land (Mnwana et al. 2016, 13).

Fundamentally the racial distribution and political economy of mining in South Africa has been incredibly resistant to change and rural peoples continue to bear the violence of mineral extraction.

State initiatives to engage with communities have failed, often by design and often due to a lack of commitment by state actors to listen to community voices. Despite years of engagement in hearings for a proposed amendment to the MPRDA, submissions from participants remain largely ignored. During public consultations on the *MPRDA Amendment Bill*, stakeholders highlighted that the perspectives of communities, who have voiced their concerns about the legislation for years, have yet to be added to the text of the Bill. In their submissions on 28 June 2017, the Centre for Applied Legal Studies, the Legal Resources Centre, and the Land and Accountability Research Centre, all South African NGOs with a long history of working with rural communities, indicated that the issues raised in previous submissions remain absent from the Bill (PMG 28 June 2017). In the minutes from the meeting it is noted that the international NGO ActionAid was “flabbergasted that none of the contributions and inputs by civil societies had found their way into the Bill” (PMG, 28 June 2017). In addition to these glaring shortfalls, the dates and places of public hearings are routinely advertised only days before they are to take place. In Gauteng, for example, the residents of Blyvooruitzicht Mine Village were told about the hearing just two days earlier and promised transportation to the Johannesburg hearings, but the buses never came (Clements and Routledge 2017). Similar stories have emerged from public consultations regarding the Traditional Courts Bill, which supports forms of autocratic rule and demarcated traditional territories (Karimakwenda and Motala 2018). Public consultation, even in



the context of writing the legislative framework to govern mining in the country, seems more like a symbolic gesture here than a procedural practice mandated to contribute to the post-apartheid legal dispensation. In any case, the MPRDA Amendment Bill was withdrawn in September 2018 to ‘spur investment’ in mining (Roelf 2018). The fact that it was withdrawn arguably further underscores the disregard for public participation in the drafting of new legislation.

Political rhetoric routinely focuses on radical transformation in the mining industry. In June 2017 Minister of Mineral Resources Mosebenzi Zwane introduced a new Mining Charter with the purported purpose of transforming the mining industry. In a statement to the press in May 2017 Zwane declared that the Charter “is going to be one of the (most) revolutionary tools to be ever seen on the South African soil” (Boyle 2017). This is far from the truth in the Mining Charter finally introduced in September 2018. The 2018 Mining Charter states that mining development “requires a balance between mining and the mine community’s socio-economic development needs” (DMR 2018, 24). While including a need to consult with mining affected communities in the identification of development needs, it includes no requirement to obtain community consent.

Under these conditions, communities have not stood idle. They have engaged strategically with reform processes and demanded that their rights be respected. Important gains have been made in litigation through the land restitution program. In the landmark *Richtersveld* decision the Constitutional Court recognized both the land and mineral rights of the Richtersveld community in the Northern Cape by upholding customary law and recognizing its evolving nature as peoples adapt to shifting social and economic conditions. As explained in the last chapter, living customary law articulates with Aboriginal title and indigenous rights to introduce

new norms and values into the land reform program, contributing to the ongoing emergence of the living law of rural land tenure. These developments set the stage for the struggle in Xolobeni.

The ability of traditional leaders to partner with mining companies has been discretely introduced in legislation. The 2015 *Traditional and Khoi-San Leadership Bill*, passed by Parliament on 26 February 2019 and sent to the President for assent, will effectively repeal the 2003 *Traditional Leadership and Governance and Framework Act*, adding a new dimension to the power of Traditional Councils<sup>55</sup> that had not been included in any previous legislation: the ability to enter into ‘partnerships’ with “any person, body or institution” (Section 24(2)(c)). This subtle Section marks a notable addition as no prior legislation or government funded research (including all six volumes of the 1999 Status Quo reports on Traditional Leadership, which are the most elaborate research reports on the status of traditional governance in post-apartheid South Africa), made any mention of the right of Traditional Leaders to enter into such partnerships. Furthermore, and most alarmingly, the right to enter into partnerships is not paralleled by any obligation to gain the consent of rural peoples whose land would be impacted, relying instead on the vague requirement that partnerships be subject to “prior consultation with the relevant community” (Section 24 (3)(c)(i)). This underscores some peoples’ belief that all land belongs to ‘their’ chief as a ‘customary’ right (Huizenga 2017).<sup>56</sup> This addition adds a veneer of legality to the authority of Traditional Councils to partner with mining industry players. In the next section I explain how the authority of Traditional Councils and Traditional

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<sup>55</sup> As per the Traditional and Khoi San Leadership Bill Section 16, traditional councils are established by the traditional leader or traditional community by first, a notice in the Gazette or Provincial Gazette, and second through elections for 40% of the members selected to sit on the Council (for 5 years terms) and appointment of 60% of member in terms of the communities customs. Traditional councils are fundamentally a governing body of which the traditional leader, often referred to as a king or queen, is at the apex.

<sup>56</sup> In the White Paper on Traditional Leadership published by the Department of Provincial and Local Government (2000), it states that “Traditional councils may also enter into partnership and service delivery agreements with government, at all levels, to promote development”, however there is no mention of partnerships with non-state parties.

Leaders is being challenged through competing claims to authority, legitimacy, and territory made by those resisting extractive industry development in Xolobeni.

#### 7.4 Territory and Territorialization in Mining Governance Reform

In South Africa, mining governance is fundamentally territorial. As I have already outlined, white colonizers used territorial designations as a key component of their colonial and apartheid strategy by restricting land ownership to the black and coloured population to the defined bantustans, or homelands, which accounted for 13% of the land area of the country. The governance of these areas was administered through traditional leaders who applied a version of ‘customary law’ created to legitimize colonial power. Some of these leaders had legitimacy through African historical conventions, but their authority was further bolstered through colonial strategies that supported those traditional leaders most willing to serve the colonizers and their economic projects.

Territorial jurisdictions and the role of traditional leaders is legislated through the *Traditional Leadership and Governance Framework Act* (TLGFA), which sets boundaries that are further recognized by the *Mineral and Petroleum Resources Development Act* (MPRDA). This legislation is interpreted in such a way that it has served to entrench geographic boundaries and ascribe ethnic identities (Claassens 2008, 2011). The striking irony is that this post-apartheid legislation directly mirrors apartheid jurisdictions and reinforces the authority of traditional leaders over their rural subjects. Sonwabile Mnwana and Gavin Capps argue that the effect of the post-apartheid legislation, such as the TKLB and MPRDA, “is that chiefs are increasingly controlling the interactions between mining corporations and the ‘traditional communities’ they formally represent... With the state’s support, traditional leaders have become powerful intermediaries of mining deals and mineral-led development in the former homelands” (2015, 6).

This approach has made consultation easier for many mining companies that negotiate with peoples impacted by their mining operations. Mnwana explains that while the strategy of supporting the power and authority of traditional leaders is vigorously resisted by communities across the country, the current conditions work in the favor of mining capital as companies “do not have to engage directly with thousands of rural residents before turning communal grazing and ploughing fields into massive open pits and multiple shafts: they just obtain the approval of the chief and the tribal council” (Mnwana 2015, 502). Civil society actors regularly argue that traditional leaders are again assumed to speak for rural peoples to the benefit of mining companies (see for example, HLP 2017, 266).

How the interpretation of proposed legislation re-creates apartheid tribal boundaries is now well covered in the literature cited above. The relationship between law and territory is understood in this literature as determinative: the jurisdictions created through law directly translate to the landscape. Geographers and anthropologists use the framework of ‘territorial pluralism’ to examine how self-government, equitable forms of recognition, and power sharing arrangements are negotiated with the state (Simeon 2015, 3). They focus on the practices, processes and institutions through which rural and indigenous peoples negotiate land rights in conditions of “entangled territorialities” (Dussart and Poirier 2017) and assert “territories of difference” on cultural grounds (Escobar 2008). These perspectives introduce a more nuanced account of territorialization that illustrates practices, struggles, and institutions through which authority to access, use and make decisions about land and resources is negotiated. Law is approached not only as a means to draw boundaries, but also as a force in the constitution of space. As Nicholas Blomley explains, “[l]aw draws from and organizes space, and in so doing structures power relations in specific and highly consequential ways” (Blomley 2016, 595). As I

show, articulations of the right to collective consent in the context of large-scale development is one place to explore how spatialized and territorialized claims are being made over land to resist state forms of territory that favour powerful state and mining industry actors.

### 7.5 Territory and Jurisdiction in the Amadiba People's Fight Against Mining

A struggle to cancel a mining licence granted in the Amadiba territory of the Eastern Cape province clearly demonstrates the territorial dimensions of mining governance and community resistance to exclusive forms of control over resources. Within the Amadiba territory is the Umgungundlovu area that covers five different villages. These are the villages that will be impacted by the mining project either by forced dispossession or environmental degradation. Xolobeni, the community at the centre of the struggle, has been resisting attempts to mine their land for decades. In contempt of ongoing community protests, a mining license was granted in 2007 to Transworld Energy and Mineral Resources (TEM), a subsidiary of the Australian owned Mineral Commodities Ltd. (MRC). A company set up under a black economic empowerment scheme called the Xolobeni Empowerment Company (XolCo) is a partner in the investment. The license covers an area of land 22 km long and 1.5 km wide along the Eastern Cape coastline, constituting 2867 hectares. The intention of TEM is open-cast mining on roughly 900 hectares of land within the mining area. As highlighted in court papers filed by Duduzile Baleni, “with stockpiles, dumps, treatment plants, pipelines, powerlines, access roads, offices, stores, vehicle parks, accommodation, workshops and other infrastructure taken into account, the physical area that will be disturbed by mining will be much greater than 900 hectares” (Founding Affidavit 2017, para 28).

There are no official reports from TEM that outline which homesteads will have to be displaced should the mining go forward, nor is there any indication of the compensation that will

be given to those impacted by the mining. Studies conducted by the community itself estimate that 70 to 75 households in the Xolobeni village, comprising more than 600 individuals who live within 1.5 KM of the coast, will likely be forced from their land (Founding Affidavit, para 47).

Due to the ongoing activism of community members, as well as ongoing violence in the proposed mining area, culminating in the assassination of a leader in the opposition to the mine in March 2016, MRC divested from the project with the intention to sell its shares to Keyesha investments. Keyesha investments is owned by XolCo, although there is no evidence that the sale had taken place. On 15 September 2016 the Minister of Mineral Resources, Mosebenzi Zwane announced an intention to impose an 18-month moratorium on mining, and the moratorium was officially imposed in June 2017. In August 2018 the moratorium was extended for a two-year period. XolCo continues to advocate for the legitimacy of their licence to mine. Moreover, despite the claim that MRC has divested from the project, in their 2017 Annual Report, MRC Chairman Mark V. Caruso states: “Further development and divestment options are under consideration, noting that the project’s viability has been further enhanced by the commencement of the construction of the N2 Toll highway” (MRC 2018, 8). The involvement of MRC in Xolobeni is likely far from over.<sup>57</sup>

Those against the mine draw inspiration from a long history of rural resistance in the area. The Umgungundlovu community resisted apartheid authorities in the Mpondo Revolts in 1960s, rising up against apartheid-era attempts to govern rural land and institute “betterment planning” through unaccountable chiefs. Geographers Thembela Kepe and Lungisile Ntsebeza

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<sup>57</sup> The N2 Toll Highway constitutes another area of significant struggle (however it remains outside the bounds of this chapter). It is a significant infrastructure development that has begun construction and that is planned to cut across much of the Amadiba territory, displace households, and significantly disrupt people’s ability to graze cattle and travel across the territory. The highway development is facing resistance to an extent on par with their resistance to the mining project. It is widely believed that the N2 highway is motivated to serve mining interests on the coast.

assert that the “Mpondo revolts by far represented the strongest statement by rural people against social, economic, and political forces that came together to deny them of their right to democracy and equality” (Kepe and Ntsebeza 2011, 2). It is beyond the scope of this chapter to cover this celebrated history but it provides a well of memory and motivation for today’s activists.

The people of Xolobeni have long been advocating to stop mining on their land. In 2007 they formed the ‘Amadiba Crisis Committee’ (ACC), which has become the organization representing the resistance in media and local protests. Their advocacy illustrates the dynamics of power relations in a context where the historical political economy of mining in South Africa, as well as transnational trends in mining governance, converge. It provides insights into what a rural community is up against as they struggle to have their fundamental human rights respected in the face of extractive industry.

The recognition of collective rights to land in the context of mining disputes hinges in part on how peoples legitimate their claims to property and authority. Group claims to legitimacy are made by peoples within particular contexts where certain subjectivities and their characteristics may be recognized over others. As Lund and Boon highlight:

[r]ecognition of property, citizenship and authority are mutually constitutive processes... Often, processes of recognition become focal points of contestation among groups in society. They become sites of resistance to the processes by which those wielding state policy, law, coercion and resources seek to gather (and sometimes, to institutionalize) power and control over resources and populations within their jurisdictions (Lund and Boon 2013, 2).

Historical subject positions that influence the struggle in Amadiba include rural colonial subjectivity, indigenous subjectivity, and ‘community’ subjectivity as it has emerged through the land reform program. However, Amadiba peoples not only resist such generalized subjectivities, they re-appropriate them for their own ends.

In Amadiba there are particularly vocal disagreements over the authority of Chief Lunga Baleni which reveal ongoing contestations over jurisdiction, territory, and the right to self-determined development. Under the *Traditional Leadership and Governance Framework Act* the governing body of the Umgungundlovu community is the Amadiba Traditional Council, and Chief Lunga Baleni is the chairperson of the Amadiba Traditional Council and the iNkosi (traditional leader) of the Umgungundlovu Traditional Community. According to ‘official’ records, Duduzile Baleni, while the acting iNkosana (headwoman) of the Umgungundlovu Traditional Community, reports to Chief Lunga Baleni, and therefore cannot act on the Community’s behalf. The Australian mining company TEM, for example, claims that the only body that has the authority to launch an application to challenge the mining rights application is the wider Amadiba Traditional Council (within which the Umgungundlovu community exists) and Chief Lunga Baleni, thus putting Chief Lunga Baleni in a higher status than Duduzile Baleni.

However, in a press statement one of the community leaders, Nonhle Mbuthuma, states that “[t]he government categorizes the Umgungundlovu community as part of the Amadiba tribal authority or Traditional Council under chief Lunga, but the Umgungundlovu community rejects the leadership of chief Lunga insofar as chief Lunga supports the establishment of the titanium mine on the community land of the Umgungundlovu people” (Mbuthuma, 11 February 2016).<sup>58</sup> In an act of defiance against the authority of Lunga, Mbuthuma and members of the Amadiba Crisis Committee (ACC), argue that they reserve the right to choose their leader. Mbuthuma further argues that “the community defines itself as such [Umgungundlovu] and members share the same social values, similar economic interests and aspirations. We are governed by our own

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<sup>58</sup> The authority of Chief Lunga has also been discredited because he is a board member of XolCo, the local partnership corporation with stakes in the proposed mine.



customary law” (Mbuthuma 2016). Here, the reference to their ‘own customary law’ refers to a belief that the mechanisms for electing traditional leaders are not determined by state legislation but are be the product of community negotiation and decision-making. Determining which ‘level’ or jurisdiction of community has the authority to define customary law is a key area of struggle and related conflict.

It is beyond the scope of this chapter to outline the history of conflict in the mining-affected area, however conditions were volatile at the time of writing. On 22 September 2018 the Minister of Mineral Resources Gwede Mantashe visited Xolobeni to discuss the future of mining in the area. The meeting turned violent when police used teargas, stun grenades, and death threats against members of the ACC. Residents believe that people were brought in on buses from surrounding areas to express support for the mine. The ACC claimed that the meeting was rigged to include a speakers list of pro-mining residents; those who would be directly impacted and were against the mine were met with excessive police force and excluded from participating. Attorney Richard Spoor, who is representing the community, was arrested and charged with incitement to commit an offence (see Amnesty International 2018). This example demonstrates why the peoples resisting the mine had to affirm their identity as linked with the specific land and place so as to exclude others from making authoritative claims to being members and standing in as representatives of the ‘community’. Their legal argument responds to this complexity by drawing from customary, national, and international law to assert the right of peoples to participate in decision-making, individually, collectively, and through the leaders of their choice as determined by their lived practices of customary law.

The specifics of the legal argument, outlined below, are important for understanding the dynamic and emergent character of indigenous and rural peoples’ rights. The case was heard in

the High Court of South Africa in Pretoria in April 2018. The Xolobeni community sought a declaratory order from the court on the status of their customary land rights in the context of extractive industry regulations. The claimants asserted their customary land rights as protected by the *Interim Protection of Informal Land Rights Act* (IPILRA). IPILRA was introduced as a temporary measure to protect ‘informal’ or ‘communal’ land rights while the state produced permanent legislation to this effect. Due to the state’s failure to provide a legislative framework, IPILRA has been renewed annually since its introduction in 1997. In their court papers, and specifically in the Heads of Argument (Heads), the applicants argue that IPILRA recognizes land rights to the extent that the land is owned both individually and collectively by the Umgungundlovu community (Heads, para 14), and would thus recognize the layered and nested character of authority and decision-making under customary law whereby individuals, families and kin groups all have rights and responsibilities (see Cousins 2007).

The applicants add content to the right to community consent by asserting South Africa’s obligations to uphold international laws and norms most fully articulated in standards of free, prior and informed consent (FPIC). Moreover, they insist that “FPIC must be obtained in a manner that is in accordance with the indigenous peoples’ customary laws and practices of decision-making” (Heads, para 152), which, they contend denies the practice of majoritarian decision-making in favour of a consensus driven model (Heads, para 241.2). While traditional leadership and customary law are recognized by the South African Constitution, and further realized in the TLGFA, the Xolobeni community argues that other jurisdictions of customary law continue to be practiced despite not being ‘formally’ registered (Heads, para 254). The point that needs to be underscored here is that the litigation draws from emerging transnational norms on consent as well as adds to them in critical ways by affirming living law as the basis of historical

rights. They argue, for example, that customary law is a system of law that has its own values and norms, that it is the law that is practiced by the community, that it develops as the needs of the community change, and, finally, that customary law is determined in reference to the Constitution (Harksis, para 235.1-235.4).<sup>59</sup> By interpreting transnational norms through assertions of a revitalized customary law the applicants unsettle assumptions and generalizations about collective subjectivities. The significance of these arguments needs to be understood in the wider context of contested notions of ‘custom’ and ‘indigeneity’ in the South African context as explained in the last chapter.

Despite its origins in the 1989 Tribal and Indigenous Peoples Convention and UNDRIP, regional trends in the application of FPIC reveal its recent application beyond self-identified indigenous groups to a wider range of collectivities. Emily Greenspan of Oxfam finds that UN treaties are interpreted as providing FPIC protections for rural communities who hold land collectively according to customary law (Greenspan 2014, 22). Significantly, the World Bank Environmental and Social Safeguards in August 2017 included development activities in the lands of “sub-Saharan African Historically Underserved Local Communities” as requiring FPIC (2017, 107). Moreover, the South African Human Rights Commission recommends that the existing principles for consent in South Africa need to be harmonized with the principles of FPIC to uphold inclusive collective decision-making (SAHRC 2018, 66). The advocacy of the Amadiba community parallels these transnational developments by demanding in court that their right to FPIC be respected. This strategic work challenges the view that FPIC only applies to

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<sup>59</sup> These arguments are made in reference to *Alexkor Ltd and Another v Richtersveld Community and Others* 2003 (12) BCLR 1301 (CC), *Bhe and Others v Magistrate, Khayelitsha and Others* 2004 (10) SA 580 (CC), and *Mayelane v Ngwenyama and Another* 2013 (4) SA 415 (CC).

self-identified Indigenous Peoples and further illustrates the creative and iterative development of legal norms towards upholding the right to say no.

Some argue that FPIC is a form of neo-colonial governmentality that defines subjects and assumes their capabilities. For example, anthropologist Tania Li writes, “[b]uilding on the colonial legacies of governing them as collectivities, which is often enshrined in law, neoliberal governing treats Indigenous people as collective subjects or “communities” with a neoliberal twist: they are communities capable of exercising their ‘free, prior and informed consent’” (Li 2016, 90). Li does little to acknowledge that FPIC is the product of indigenous peoples struggles to have customary forms of government recognized and further does not account for how FPIC continues to be a contested practice. While in some cases it is used as a means to govern the construction of community and collective agency, peoples also use it as a way to resist state attempts to define and determine ‘community’ boundaries. For example, unlike the smooth translation between FPIC and indigenous peoples assumed by Li, the application of FPIC is challenged in South Africa and increasingly extended to all rural peoples who mobilize collectively against corporate incursions into historical territories to which they have attachments (Greenspan 2014; FAO 2014, SAHRC 2018). Rural peoples have been able to leverage FPIC because of experiences of colonialism and apartheid that legislated land dispossession and undermined their human and resource rights and are motivated to do so by their continued marginalization in law and policy today. In South Africa the application of FPIC has been a way for rural communities to challenge distinctions between indigenous and rural peoples that are often assumed by those observing from afar and trying to determine the applicability of a particular law or legal category.

The struggles and strategies of the Amadiba community are expressed through broader demands for community rights. For example, the Mining and Environmental Justice Community Network of South Africa (MEJCON-SA) demands that FPIC is made part of the mining legislation, the MPRDA: “In order to transform the mining industry and promote equality, we submit that the MPRDA must be amended to include FPIC if any serious progress is to be made towards redressing past discrimination and power imbalances and to promote equality in the mining sector” (MEJCON-SA 20 June 2017). According to this network of communities and community-based organizations, FPIC demands much more than community engagement; it demands a complete re-arrangement of the relationships between mining companies and impacted communities, a relationship not defined by a top-down imposition of development plans, but one characterized by direct partnerships with impacted peoples. This is a challenge to the reality on the ground: “[i]n our experience, consultation processes are no more than box-ticking exercises for the mining companies... any substantive issues raised by communities do not have any bearing on the ultimate development programs implemented by mining companies and overseen by government” (MEJCON-SA 20 June 2017). MEJCON-SA seeks to fulfill the intention of the legislation, which is to transform the mining sector, by giving communities a stake in the mine. Their approach is to reject conventional approaches to corporate social responsibility wherein the corporations determine the rules of engagement. They appropriate FPIC towards these ends.

In the Amadiba struggle the people demand that the processes for seeking and attaining community consent be determined by the peoples in impacted communities in accordance with their own governance and decision-making practices (Founding Affidavit 2016). Their demands reflect assertions made in UN negotiations over FPIC. As stated in the Report of the International

Workshop on Methodologies Regarding Free Prior and Informed Consent (E/C.19/2005/3), endorsed by the United Nations Permanent Forum on Indigenous Issues in 2005, the process of gaining consent must be directed by indigenous peoples themselves: “procedures concerning free, prior and informed consent should recognize indigenous customary law where it is relevant, and address the issue of who represents indigenous peoples” (UNESCO 2005, Paragraph 15). The workshop participants argued that according to ILO No. 169 “the elements of good faith, representativity, and decision-making through indigenous peoples’ own methodologies were essential to free, prior and informed consent” (UNESCO 2005, Paragraph 24). Finally, it was concluded that “[a]s an important methodology, free, prior and informed consent is an evolving principle and its further development should be adaptable to different realities” (UNESCO, Paragraph 42). Thus it becomes crucial to consider collective assertions of FPIC, to explore how it is used to make legible their positive engagement, political legitimacy. Their claims to FPIC, as a principle of customary law, are resistances against the colonial forms of power and neo-colonial rural subject positions encouraged by the state. They articulate an alternative vision of territorial jurisdiction against the history of imposed territory and the authority of state-backed traditional leaders that asserts a new form of self-determination.

## 7.6 Practices of Self-Determined Development

*“The way I’m being involved to fight against mining is to occupy the land and use the land as much as possible”* (Umgungundlovu villager, in Bennie 2017).

State territorial jurisdictions are challenged by collective material and institutional practices that constitute land and resource use. Legitimizing social relations of production and trade has been an important area of struggle for the Amadiba peoples as they resist discourses from first the conservation industry and second mining interests that label them as impoverished. Christian Lund and Catherine Boon highlight that “[c]ompetition for land may hinge on the interpretation

and significance of social relations that are forged around land use, or upon who has the political power to impose one interpretation at the expense of others” (Lund and Boon 2013, 2-3).

The people of Amadiba resist historical and global conservation discourses that position them as poverty stricken and a threat to an ecologically significant area. It is widely acknowledged among critical scholars that the contemporary conservation industry in South Africa (state agents, many conservation activists who tend to be white and upper-middle class) has sustained an apartheid-era racial ontology that understands black rural peoples and their communities to be an impediment and threat to biodiversity conservation (Kepe 2018, 17). This wider context is relevant in the present case study, as the Umgungundlovu area is situated in what is known as the ‘Wild Coast’ in the Eastern Cape of South Africa. This area is known for its “unique flora” and “its extensive, rolling grasslands, which form as much as 80% of the coastal vegetation” (Kepe 2014, 2149). The region has long been the focus of global and national conservationists, to the extent that it has become subject of a global conservation discourse: “over forty years environmental activists have used their own initiatives, global environmental discourses, and government legislation, as well as shortcomings of the apartheid and post-apartheid governments, to advocate for the conservation of sections of the Wild Coast” (Kepe 2014, 2144). This discursive rendering has not contributed to developing an understanding of the livelihood practices or resource rights of the people who live there but has rather created a perception of them threatening their own ‘vulnerable’ ecology through under-management and destructive land use practices. In this historical context state forms of power, partnered with mining industry proposals, appear to be the only authoritative form of territorialization.

Community members actively contest the prevailing perception that they are poor and that their land is under-used. Many of the residents participate in both subsistence farming and

farming for market sale, and upwards of 90% of households in the proposed mining area sell excess produce. Their agricultural production stands out in a province where nearly 40% of people are found to be food insecure (Legal Resources Centre and Richard Spoor Inc. 2016, para 21-22). In recent years, as protests against mining have intensified, villagers in one of the five villages in Umgungundlovu, Sigidi, decided to amplify their land-based agricultural practices as a means of resistance. They have done this through two ways. First, by increasing the amount of land in the village that is farmed, and second by spreading the areas used for cattle grazing. As Andrew Bennie writes,

In this sense, the Sigidi villagers have deployed agriculture as a tactic of resistance, giving literal expression to the notion that “resistance is fertile”. Tactics like these represent a particular form of stern defiance against the plans of a fledgling business class and state elite that, to them, has long severed itself from their humble desires: to keep their land, to decide what to do with it, to welcome others to appreciate it with them, and to be assisted in a forward-looking approach that seeks to build on it rather than destroy it (Bennie 2017).

Finally, the community asserts that their land is vitally important for the continued traditional medicine practices that are deeply connected to the land, landmarks, watercourses, the ocean, and burial sites that are slated to be moved if mining is to take place. Displacement would break links with their ancestors, links that are important for healing and could cause some to die in the area, according to traditional medicinal practitioners (ACC 2016). The community thus uses arguments characteristics of transnational biocultural rights.

Through their resistance the peoples of Amadiba demonstrate that territories are physically inscribed through their cultural practices. In their work Thomas Sikor and Christian Lund argue that the exercise of authority often relies on territoriality. They argue that, “[b]y making and enforcing boundaries, by creating a turf, a quarter, a parish, a soke, a homeland etc., different socio-political institutions invoke a territorial dimension to their claim of authority and



jurisdiction” (Sikor and Lund 2009, 14). These markers create spaces that have different structuring effects on access and property (Sikor and Lund 2009, 14). The material aspects of jurisdiction have also been highlighted by legal geographer Nicholas Blomley, who finds that, in a much different context, hedges serve as material inscriptions on the landscape (Blomley 2007).

Inscriptions on land need not always be material, however, to have proprietary consequence. In her discussion of community resource rights for aboriginal peoples in Australia, Johanna Gibson (2005) discusses how territory is not identified in relation to a specific place, nor is it understood as an object in relation to a legal subject. Rather it is understood as emerging out of community practice and customary laws. For example, while indigenous peoples may refer to natural features of the landscape to create ‘mental maps’ of a place, these natural features do not define a territory. Rather, territory evolves out of “the becoming of community, producing the site, the location, the “neighbourhood” of culture” (Gibson 2005, 234). The emergent territoriality relies on what geographer Robin Roth (2009) calls ‘dwelling space’, a spatiality distinct from ‘abstract’ space often produced through mapping technologies. Roth explains that abstract space produces ideas of “simple polygons” used to distinguish between forests, agriculture, private, communal, or one household’s plot as completely distinct from another’s. However, the spatiality of community territory is better thought of as a “dynamic arrangement produced through social relations and where each piece of land has multiple attachments to community and to family and to spirit” (Roth 2009, 217). In the case at hand, the material agricultural uses, as well as the daily relations and practices of collective government that are evidence of the living law, are exercises of affirming their own visions of development. The peoples of Xolobeni undermine historical racialized renderings of black people as threats to

biological diversity, and, moreover, challenge the specific discourse that positions the Amadiba people as impoverished and a threat to the ‘vulnerable’ ecology of the Wild Coast.

Another way that the people of Ungungundlovu, as well as their advocates, have resisted narratives about their apparent underdevelopment, is by actively promoting the integrity and legitimacy of their local institutions and customary practices. For example, they consistently articulate the importance of their territory for the maintenance of networked social relations sustained through meetings at the sacred meeting place, or Komkhulu, and the relationship of these to customary law: “Our customary law builds from our dearly held meanings of our shared history, culture, individual and collective interests, together with our shared responsibility to sustain the life of our community” (Baleni 2016, para 68). Moreover, they state the importance of their land to their ongoing survival as a community:

The households in the area engage in exchange relationships around food and food production. This sharing of resources includes the sharing of crops, sea harvests and animal products. The reciprocity also extends to food production and exchange of manure used for fertilizer, cattle used for ploughing of fields, and other similar activities. These inter-linkages are important for community cohesion and would be nearly impossible to reproduce if the community were to be relocated (Legal Resources Centre and Richard Spoor Inc. 2016, para 23).

The community clearly describes in their pleadings that this collective work is itself an expression of their customary law. These multiple community-based practices are all means to challenge state endorsed forms of territorialization and subjectification. Rather than succumbing to apartheid-era ‘traditional territories’ being re-entrenched by legislation such as the Traditional and Khoi-San Leadership Bill and the powerful lobbying of traditional leaders and transnational mining capital, they are demanding that their own practices are recognized as authoritative for the marking of jurisdiction.

Industry and state actors have tried to undermine the legitimacy of the Komkhulu as a decision-making authority by creating other institutional forms to ‘represent’ the community’s views. For example, the Xolobeni Empowerment Company (Xolco) is said to represent the community. However, although it was established in 2003, the community did not know about it until 2007. The board of directors was not elected by the community but rather appointed. The municipality has also attempted to create decision-making authorities to make decisions on its behalf. In March 2017 the leader of the ACC, Nonhle Mbuthuma, was invited to join a board of directors to help negotiate a deal with the mining company. She agreed to attend a meeting but found that she did not know any of the other participants and that none of the members were elected by the community to represent their views. After highlighting that this was an illegitimate board that had no authority to speak on behalf of the community, she left (Mbuthuma 2017). The actual local practices of making decisions collectively at the Komkhulu must be read against these efforts on behalf of the mining industry and the state as the former underscore the fundamental importance of historical, collective and institutional practice in challenging state attempts to assert authority over territory.

In their struggle, the ACC asserts the importance of their livelihood practices and customary law in the context of historical marginalization, emphasizing the importance of keeping remedial justice central to mining governance reform in South Africa. The importance of supporting local community capacity to negotiate mining contracts as a remedial principle has been completely left out of mining governance reform, including the MPRDA. Reforms have instead focused on distributing wealth generated by mining through royalty payments. The importance of community empowerment as a remedial practice is articulated in the Xolobeni opposition to the granting of mining rights based on section 10 of the MPRDA:

The effect of mining on community land will include the loss of communal grazing land and access to natural resources. In respect of individual families it will also involve the loss of ploughing land and physical displacement. Such an impact is particularly intense given that the community's current tenure insecurity is a direct product of colonial and apartheid degradation of the community's rights and of their customary law (Legal Resources Centre and Richard Spoor Inc. 2016, para 83).

The issue of community consent as a remedial practice in light of colonialism is left out of nearly all contemporary discourse and practice of community consent.

The livelihood practices, cultural traditions, and customary governance systems were recognized and affirmed when, on 22 November 2018, High Court Judge Anneli Basson ruled in favour of the people of Xolobeni and the wider Ugunkundlovu community. Judge Basson found that the applicants have the right to be consulted, under the MPRDA, and to consent to development on their land, as required by IPILRA. The judgement highlighted that what is at stake is not only 'land' but the way of life of the Umgungundlovu community, which is realized through the intrinsic link between the land and communal relations between individuals, households (umzi), and the wider community. Moreover, Judge Basson acknowledges that the community's vulnerability is due to the historical marginalization of customary law and the denial of the cultural and religious significance of their territory. The applicants "may not be deprived of their land without their consent" and the community must be allowed to make a decision "in terms of their own custom" before any proposed deprivation of land takes place (Baleni 2018, Para 83). The role of international law, including FPIC, in interpreting the rights of the applicants is affirmed in the High Court Judgment (Baleni 2018, Para 20, 27, 78). While this is certainly a victory, an appeal has already been filed. Due to the nature of the case it is predicted that the arguments will eventually be heard in the Constitutional Court. The outcome of the case will determine how this particular struggle will contribute to the development of

national law and policy on mining governance. Nonetheless, the political and social struggle, articulated in part through the Xolobeni court struggle, has had material effects to the extent that mining has been halted. This stop has opened a space for the declaration of alternative claims to community, property, territory and consent.

## 7.7 Conclusion

I have demonstrated that the right to community consent in the context of mining governance represents a new form of governmentality in post-apartheid land reform. Beyond resisting particular laws that facilitate the participation of a few in mining ownership and management, communities in South Africa are in a position where they must also challenge the legitimacy of the territorial jurisdictions in which they live as well as state authority to make decisions about their land. This often involves resisting imposed chiefly authority. Their elaborated claims to consent include descriptions of their customary processes of decision-making, challenge the assumed sovereignty of the state and promote alternative understandings of community-based territorial jurisdiction. They draw importantly from emerging norms on community consent, including FPIC, in this struggle to protect their land. The articulations of community consent constitute resistance to state territorialities. In neoliberal conditions, wherein scholars have found that non-state actors are playing a significant role in processes of re-territorialization elsewhere on the continent (Corson 2011), communities and their advocates in South Africa are similarly asserting alternative forms of territorial authority and legitimacy against colonial and post-colonial state designations. In this example I have argued that livelihood practices and assertions of customary law in the Amadiba territory are themselves a form of re-territorialization, a re-assertion of the legitimacy and authority of cultural practices and relations of reciprocity over the land.

Mining in South Africa exists in the context of ongoing struggles over territory, which involve struggles over the authority to make decisions over land and resource use. This chapter demonstrates that historical forms of territory, deriving from colonial jurisdictions of chiefly authority, are being challenged by community-based and locally-asserted practices of territorialization. These practices of territorialization include agricultural practices of production and trade, participatory deliberations that respect customary roles and responsibilities, and the right to determine their own customary representatives. In line with transnational trends in the emergence of FPIC, the community demands that they must have the right to determine the processes through which consent is granted, based on their customary law. The living law of rural tenure security is mobilized in a new form of governmentality whereby the state and industry actors are active players both subject to and the subject of this field of government.

## 8 CONCLUSION: THE EXPANDING TERRITORIES OF CUSTOMARY LAW AND INDIGENOUS RIGHTS

### 8.1 Introduction

The introduction of a constitutional democracy in South Africa in 1994 is a triumph celebrated by human rights advocates around the world. However, while the end of racialized segregation in the country was applauded, the post-apartheid state inherited a landscape that bore scars from centuries of colonialism and apartheid that would prove to be very difficult to heal. Twenty-five years after the end of apartheid the histories of forced dispossession, colonial governmentalities and forms of territorial government are far from undone; they are, however, re-configured, but not by law alone. In this dissertation I argue that the racialized territorial distinctions created under apartheid are being reconfigured in contemporary conditions of transformative constitutionalism and neoliberalism. In these conditions, customary law has emerged as a central site of post-colonial struggle – through which I identify the articulation of indigenous rights, chieftaincy, human rights, and property through the courts, NGOs, and state agencies; I illustrate the development of living law in these dynamics. I have delineated the contours of a variegated landscape of neoliberal government and its effect on the constitutive relationship between space and law. I show that assertions of customary law are not exhausted by the Constitutional protection of cultural rights and the specific claims of traditional leaders. Rather than ascribing customary law to the ‘traditional territories’ of apartheid or the product of living localized practice and assertion, customary law – as a site of struggle - is better understood as productive of new legal geographies and collective subjectivities. The dissertation adds a critical perspective to literature on colonial legal geographies (Blomley 2003, Kedar, Amara, Yiftachel 2018) by demonstrating some of the ways that rural peoples in South Africa leverage opportunities in conditions of legal pluralism to expand the possibilities for justice.

In this concluding chapter I recap the arguments made throughout this dissertation by way of an analysis of two recent judgements – the *Maledu* Constitutional Court Judgement decided on 25 of October 2018, and the *Baleni* (Xolobeni) High Court Judgement, decided on 22 November 2018. The judgements are placed in the contexts of the social struggles through which the court proceedings have emerged. Reading the judgements together demonstrates the different ways that customary law is taken up in court and in social movements and illustrates the ongoing constitutive relationship between law and space in conditions of transformative constitutionalism and neoliberalism. I summarize and analyze the judgements in the wider political context of social struggle identified in this dissertation. The summary I provide is thus much more than an analysis of jurisprudence, it is an explanation of emergent norms produced through the relationships between community members, their advocates, NGOs, traditional leaders, and extractive industry interests.

## 8.2 History, informal land rights, and community autonomy in *Maledu* (2018)

In the Constitutional Court judgement, *Maledu v. Itereleng Bakgatla Minerals Resources Limited* (2018) (*Maledu*), AJ Petse began with a citation that surprised many observers and commentators:

The statement by Frantz Fanon in his book titled “The Wretched of the Earth” is, in the context of this case, apt. It neatly sums up what lies at the core of this application. He said that “[f]or a colonised people the most essential value, because the most concrete, is first and foremost the land: the land which will bring them bread and, above all, dignity”. Thus, strip someone of their source of livelihood, and you strip them of their dignity too (*Maledu* 2018, Para 1).

This reference to Franz Fanon was certainly the assertion of what can only be described as an activist court. More significantly, it is a statement that demands an acknowledgement of the relationships between livelihoods and land security and by implication, the work of cultural rights in land reform.



The judgement concerns a collectivity self-identified as the Lesetlheng community. They live on a farm called Wilgespruit in the North West Province. The case dealt specifically with an application for leave to appeal against a judgement in the High Court of South Africa, where it was determined that the applicants were justifiably and lawfully evicted by Itereleng Bakgatla Mineral Resources (Pty) Limited (IBMR) and Pilanesberg Platinum Mines (Pty) Limited (PPM) (the first and second respondents, respectively) who had mining rights to the land.<sup>60</sup> The respondents argued that the community provided their consent to mining in a 2007 meeting, but the Lesetlheng community argued that they were not represented at the meeting and therefore did not and could not consent.

In deciding the case, the court first had to determine the history of land alienation experienced by the applicants. The forebears of the applicants purchased the farm in 1919. However, due to conditions of institutionalized racism under colonial rule, the purchasers were not allowed to own the farm, so they registered the farm in the name of the Minister. Moreover, the deed of the farm indicated that the Minister held the farm on behalf of the wider Bakgatla-ba-Kgafela community. The colonial government did not recognize the community as a separate and autonomous entity from the Bakgatla-ba-Kgafela at the time of purchase. According to the applicants, it was accepted at the time of purchase that it was the Lesetlheng community who contributed to the purchase price and therefore had rights to the land exclusive of the wider Bakgatla-ba-Kgafela community. However, the court chose not to deal with the question of ownership of the farm as the Lesetlheng community had recently applied for a title deed for the farm through the *Land Titles Adjustment Act* and the process to determine ownership was

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<sup>60</sup> The respondents are holders of the rights to mine for platinum group metals and associated minerals on the farm, awarded to them under section 23 of the Minerals and Petroleum Resources Development Act.

ongoing (Maledu 2018, para 83).<sup>61</sup> This is a significant fact of the case because it provided the court the opportunity to deal with the question of informal land rights as protected by the *Interim Protection of Informal Land Rights Act* (IPILRA). The determining issue was if the "the applicants are without a legal remedy simply by virtue of the fact that they constitute a community whose tenure of the farm in issue here is legally insecure as a result of past racially discriminatory laws or practices" (Maledu 2018, para 31).<sup>62</sup> IPILRA stipulates "no person may be deprived of any informal right to land without his or her consent" (IPILRA, Section 2).

The judgement deals precisely with determining the specific history of dispossession experienced by the applicants and the governance relationship between rural communities and the traditional territory within which they reside. In Chapter Two I demonstrated the iterative history through which traditional leaders were made authorities within designated traditional territories throughout colonialism and apartheid. Important pieces of legislation during these periods include the *1913 Native Land Rights Act* and the *1927 Native Administration Act*, and the apartheid-era *1951 Bantu Authorities Act*. This legislation was indicative of the production of a governmental rationality that used racial markers to determine rights and entitlements, including the right to own land and travel within the country. Colonization and apartheid, I argued, relied on the dual role of forced dispossession and racialized government.

While the apartheid government was an extreme representation of a colonial project of divide and rule and the creation of a bifurcated state (between common law citizens and subjects of customary law), legal anthropologists have long demonstrated that customary law is better

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<sup>61</sup> This process has introduced its own tensions within the community, however, as peoples have been asked to produce records and family trees indicating who exactly were the descendants of the original purchasers. In the process, distinctions between the buyers and non-buyers has become a point of contention and inter-communal conflict (Mnwana and Capps 2015, 20).

<sup>62</sup> This is in reference to Section 25(6) of the Constitution: "A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress".

understood through its changing nature within fields of social action and political practice. Significantly, it is best understood not as a system derivative of a singular chief, but rather as deriving from multiple authorities within a sociohistorical context (See Moore 1986, White 2015). In *Maledu* we can identify how the Constitutional Court is untangling colonial assumptions about traditional leadership, traditional territories, and the subjectivity of communities who live within their borders. Rather than dealing with the question of ‘ownership’ through an absolutist property lens (cf. Van der Walt 2009), the judgement focused on the basis of informal land rights, and more precisely on the process that needs to be followed in order to gain the consent of a collectivity threatened by forced dispossession (if mining were to commence on the land that they occupied). By addressing the question of territorial authority, the spatialized and territorialized landscapes of colonialism and apartheid are being unwoven through the social, political, and legal struggles that peoples are waging and through the resulting jurisprudence.

In Chapter Three I explained that the post-apartheid state inherited not only a country divided between racialized territories and extreme inequalities based on racial classifications, but also a form of government reliant on chieftaincy. It is in this context that a model of constitutional democracy was introduced to facilitate structural social and economic transformation. The Constitution included an entrenched Bill of Rights and legislated land reform as a central pillar of transitional justice. Existing literature on South African constitutionalism optimistically forecast the significant role of courts in fostering and achieving wide scale social change, but the opportunities and barriers that characterize the practice of adjudication, social movements and their interaction with the courts, and the politics of interpretation in law and litigation are now recognized as significant impediments. I conclude the

chapter by explaining that while the Constitution and the Constitutional Court are the institutions through which transformation is imagined to be facilitated, sociolegal studies scholars know that courts often have a limited role in achieving wide scale social change. Moreover, an approach to studying transformative constitutionalism must remain attuned to the dialogical relationship between law and social change. An alternative framework that recognizes the indeterminacy of legal struggle and seeks to locate creative advocacy and consider its surprising social consequences is more adequate for understanding struggles for landed justice and livelihood sustainability.

The *Maledu* judgement demonstrates the extent to which social advocacy influences the court's interpretation of history and legislation. The judgement was handed down in the political context of rising discontent among mining affected communities and increasing community resistance to extractive industry (SAHRC 2018). Community resistance to the Bakgatla-ba-Kgafela chief, Nayala Pilane, has been particularly intense and resulted in village-level protests (Mnwana and Capps 2015). It is in these conditions that the rights of communities to have a say in decision-making in the context of extractive industry. AJ Petse determined that IPILRA had to be read in line with the *Mineral and Petroleum Resources Development Act* (MPRDA).<sup>63</sup> He ruled in response to the spirit of the Constitution, asserting the legislation at stake (IPILRA and MPRDA) needs to be interpreted in line with the Constitutional commitment to dealing with histories of racialized deprivation (Maledu 2018, Para 34). The court determined that “the MPRDA must be read, insofar as possible, in consonance with IPILRA... There is no conflict between these two statutes; each statute must be read in a manner that permits each to serve their

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<sup>63</sup> This judgement was handed down a month before the Xolobeni judgement and certainly had a significant role to play in their victory; in Xolobeni the applicants sought a declaratory order on the protection of informal land rights, as per IPILRA, which includes the right to consent, against the lesser right of consultation in MPRDA. Thus, in many ways, this judgement offered the declaration before Xolobeni was decided.

underlying purpose" (Maledu 2018, Para 106). The court finds in this regard that IPILRA and the MPRDA need to be interpreted to afford the fullest possible protection of informal land rights, and the issue that IPILRA seeks to remedy (histories of dispossession) must be held as the primary concern of the court (Maledu 2018, para 63). The judgement protects the right to consent to mining, rather than merely consultation. To support this argument, AJ Petse draws from the African Commission on Human and Peoples Rights and from transnational and regional norms on free, prior and informed consent.<sup>64</sup> After referring to how FPIC and the associated right to development and customary decision-making practices inform customary law in South Africa, AJ Petse ruled that customary law must be understood in line with "the values underpinning our constitutional order such as dignity, the right to participate in the cultural life of one's choice and equality" (Maledu 2018, para 94). In this judgement an understanding of customary law emerges that is informed by the local, regional and transnational struggles of rural and indigenous peoples and their asserted norms and standards for protecting land and livelihoods.

As I explain in Chapter Four, two main collective subjectivities have emerged through the land reform program: collective property-owning subjects as communal property associations and traditional leaders. These subjectivities are often in conflict, to the degree that the Department of Land Affairs now discourages the establishment of CPAs, a policy direction that benefits traditional leaders. I argue that this bias, which pits traditional leaders against collective property holding subjectivities, can be traced back to the narrow interpretation of cultural rights in the context of land reform and the general lack of recognition of the relationship between land

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<sup>64</sup> "The amici also argued that for the consent contemplated in section 2(1) to be effectual it must be free, granted prior to deprivation and be informed. This, the amici argued, is in line with South Africa's international law obligations. Amongst the binding international instruments applicable to determining the nature of consent is the African Charter for Human and Peoples' Rights (African Charter). The African Charter does not expressly provide for the concept of free, prior and informed consent, but it is generally understood that this concept is inherent in certain guarantees such as the right to self-determination (article 20), right to development, (article 22(1)), and even arguably the right to information (article 9)." (Maledu 2018, 72).

and cultural rights. The history of cultural rights in the country is being refracted in contemporary conditions of neoliberalism, however, as both traditional leaders and community groups draw on culturalized rights in diverse struggles and through different means. In these conditions traditional leaders have been able to leverage cultural rights in the context of a global extractive industry that provides opportunities for cultural legitimization through corporate social responsibility initiatives. Extractive industry actors have offered fewer opportunities for smaller self-identified collectivities to enunciate their cultural practices, particularly when these practices are at odds with the interests of traditional leaders partnering in mining agreements. However, *Maledu* provides a promising example in regard to the Constitutional Court's recognition of the link between land and cultural rights. While the Bakgatla-ba-Kgafela has leveraged cultural rights in relation to both state and non-state actors in the extractive industry to legitimate their control of land and territory, the Constitutional Court recognizes the cultural significance of land for the claimants.

In *Maledu* land rights are rendered not as property but as a form of historical cultural practice through the recognition of historical forms of collective decision-making. The judgement is not coloured by assertions of living customary law and/or clearly specified cultural rights,<sup>65</sup> however the logic behind the decision-making represents a clear move away from understanding land as fundamentally a question of property to land as part of a wider cultural context. This is accomplished when A.J. Petse demonstrates that deprivation of land rights are not only about the ownership of a particular plot, but the conditions and processes through which

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<sup>65</sup> The Land Access Movement of South Africa (LAMOSA) and the Land and Accountability Research Centre (LARC) acted as amici curiae and submitted evidence of the character of customary law and decision-making to the court. However their submissions were restricted on the grounds that they were not allowed to submit new evidence nor were they allowed to submit evidence was “incontrovertible or capable of easy verification” (Maledu 2018, para 38).

decisions about the land are made, as asserted through the importance of FPIC cited above. The territorial control of traditional leaders was fractured in this case when the Lesetlheng community were able to assert their rights to the land.

In Chapter Five I explain that the *Richtersveld* decision introduced Aboriginal title as a means to recognize customary law as a form of *sui generis* indigenous law that is legitimated by the fact that it pre-dates colonization and re-articulated in the language of human rights. The judgement is significant for what it has enabled: the entry of more diverse forms of rights claims – in the form of indigenous rights and culturalized claims to land and territory – into legal, political and social struggles for land security. To this end, *Richtersveld* represents a pivotal moment that allowed customary communities to re-articulate indigenous rights in their struggles for the recognition of customary law as a basis for land rights. Moreover, I demonstrated that *Richtersveld* needs to be read in the history and context of indigenous rights activism in South Africa. It provided new opportunities which peoples have leveraged to make themselves legible as collective subjects defined apart from traditional authorities.

In conclusion to this analysis of *Maledu*, the significance of the judgement needs to be read in light of the complex forms of dispossession and deprivation that South Africans experienced under colonialism and apartheid, as well as the ethos of transformative constitutionalism that marked the end of apartheid rule. Finally, it needs to be read in light of the kinds of pressures that rural peoples face in conditions of neoliberal political economy of extraction and opportunities afforded under conditions of neoliberal governmentality. The judgement draws from international norms on community consent and re-articulates them with the standards set out in IPILRA; moreover, it offers its own interpretation of the relevance of international norms in the local context. Its significance is illustrated through a summary reading

of the history of colonialism and apartheid, the advent of Constitutional democracy, the relationship between the development of a land reform program and neoliberalism. It is this judgement that paved the way for the High Court Judgement in the Xolobeni struggle.

### 8.3 Living customary law and culturalized rights in *Baleni* (2018)

The High Court Judgement *Baleni and Others v Minister of Mineral Resources and Others* 2018 on the rights of the Xolobeni community was a landmark case for its recognition of informal land rights and the collective right to community consent in the context of extractive industry. By determining that both IPILRA and the MPRDA need to be read in tandem, *Maledu* set the stage for the *Baleni* judgement. Significantly, the decision illustrates the living history of customary law in the country, beginning with *Richtersveld*.

The history of resistance to dispossession and imposed development in the region and the way that the community asserted their customary practices through litigation is a unique aspect of *Baleni*. As described in Chapter Five, the *Richtersveld* judgement introduced the idea that customary law is ‘living’, meaning that it changes in response to shifting political, economic and social conditions as people govern their own lives. Following the *Richtersveld* judgement, critics and the courts began using the term ‘living customary law’ as a way to make land tenure relations legible as culturalized rights. There are, however, many different kinds of living customary law that are constructed by many different actors in different situated contexts.

In Chapter Six I caution against what I identify as a tendency to generalize about the character of living customary law in critical scholarship. I use a number of empirical examples to demonstrate that living customary law should be approached as a culturalized assertion of custom that has affiliations with a global trend in asserting cultural rights. The articulation between customary law and international Indigenous Peoples’ rights by communities and



advocates, for example, demonstrates the nuances of custom and the extent to which it represents a way of life, form of governance, and claim to territory. Moreover, the variation in uses of living customary law indicate that a dichotomous view of living customary law vs codified customary law is not accurate in contemporary conditions of neoliberalism whereby forms of government are dispersed through assemblages of actors. In these conditions, the state is not the only means through which collective claims to land rights are made nor is it the only audience for community resistance as peoples engage with regional and transnational actors, as well as transnational norms, in order to legitimate and make legible their claims. In this conjuncture of revitalized customary law and rights-based assertion we can identify the generative force of living law.

In Chapter Seven I focus on the Xolobeni struggle and illustrate how the trends that I have identified in the previous chapters coalesce in a particular case study and have the effect of contributing to new forms of territorial assertion that challenge legislated traditional territories. The effects of this convergence on land rights are pronounced in the context of mining governance. The case demonstrates how culturalized rights are being articulated with custom and indigenous rights in novel ways, and, importantly, how such assertions draw on and in turn influence transnational norms, particularly free, prior and informed consent (FPIC). In Xolobeni we can identify the inter-related ways that the applicants – members of the Xolobeni community – identify themselves as an autonomous collectivity defined by their historical, cultural and spiritual connection to land, their local governance practices, and their agricultural production and trade. The case study exemplifies many of the dynamics that I have explained throughout the dissertation – transformative constitutionalism, neoliberal governmentality, and emergent indigenous rights – and their effect on forms of re-territorialization. The case (including the

judgement and community struggle) is used to illustrate how we can begin to identify and conceptualize new forms of territorialization in land reform through collective expressions of customary land governance and rural land-based practices.

#### 8.4 Territories of culturalized rights

The case studies and examples used throughout this dissertation represent the emergence of “property on the margins” as peoples challenge a centralist and hierarchical model of property rights (van der Walt 2009). It is here that we can identify how post-apartheid legal regimes are challenged and reconfigured and new forms of collective subjectivities are emergent. The range of rights made legible through the articulation of customary law and indigenous rights as forms of culturalized rights include far more than property in land, however, and the case studies in this dissertation encourage further explorations. For example, areas where resource rights are a means by which land as territory is claimed include small-scale fishing rights (Sowman and Sunde 2018, Sunde 2014), intellectual property and rooibos tea in the form of a geographical indication (Coombe, Ives and Huizenga 2014, Ives 2014), indigenous knowledge (Comaroff and Comaroff 2011, Suchanandan 2018)<sup>66</sup>, conservation (Kepe 2018), and cultural heritage (Meskell 2012). In these areas of struggle culturalized rights are asserted to express how land is central to livelihoods and identities. These areas of struggle likely push the boundaries of a hierarchical property paradigm and a liberal conception of bounded units of land with clearly identified owners by promoting an ethic and philosophy of stewardship over environmental resources (Bavikatte 2014). Moreover, they challenge the scalar distinctions embedded in interpretations of

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<sup>66</sup> In recent years the South African government has opened Indigenous Knowledge Documentation Centres to assist in the documentation, protection, and management of indigenous knowledge. At the time of writing (April 2019), the Protection, Promotion, Development and Management of Indigenous Knowledge Systems bill had been approved by Parliament to be signed into law by the President. See also the South African submission to the International Committee on Economic, Social and Cultural Rights, where state representatives promote what they call an ‘ambition program’ for the protection of indigenous knowledge in South Africa (2015, Para 162).

‘local’ struggles over land by demonstrating the multi-scalar and multi-sectoral nature of contemporary struggles over land in conditions of neoliberalism.

An emergence of transnational rural and Indigenous Peoples’ rights are identified by lawyer and researcher Sanjay Kabir Bavikatte (2014). Bavikatte focuses on stewardship as a defining characteristic of emergent rights in the context of living law. He identifies the emergence of what he calls biocultural rights through the convergence of three social movements – the post-development movement, the commons movement, and the movement of the rights of indigenous, tribal and traditional communities. Biocultural, he explains, denotes “a way of life that emerges from a holistic dynamic between Nature and culture” (Bavikatte 2014, 2). His definition of biocultural rights parallels the explanations of living law and ubuntu above to the degree that they focus on establishing and maintaining relationships:

Biocultural rights therefore denote all the rights required to secure the stewardship role of communities over their lands and waters. This role represents a way of life where the identity of a community, its culture, spirituality, systems of governance, and traditional occupations are inseparable from its lands and waters. The relationship of the community to its territory is akin to a fiduciary duty of care and protection, rather than an exercise of dominion (Bavikatte 2014, 16-17).

Biocultural rights are emerging through the collective work of international actors, including local community organizations advocating for their stewardship rights, civil society organizations, environmental lawyers, and others, as well as international treaties (including most importantly the Convention on Biological Diversity) and the United Nations Declaration on the Rights of Indigenous Peoples.<sup>67</sup>

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<sup>67</sup> “The discourse on biocultural rights is spilling over from the CBD to other UN and international fora and other environmental conventions such as the World Intellectual Property Organization Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (WIPO-IGC), the Commission on Genetic Resources for Food and Agriculture (CGRFA), the UN Convention on Combating Desertification (UNCCD), and the UN Framework Convention on Climate Change (UNFCCC)” (Bavikatte 2014, 19-20).

The multi-scalar conditions and characteristics of land-based struggle are briefly elaborated here in relation to the South African concept of uBuntu and the global emergence of biocultural rights. The emergence of stewardship rights closely resembles the South African ethic of uBuntu. uBuntu refers to an aspiration, a process of being-together, that is fulfilled not by achieving an end goal, but by the progression inherent in working towards that goal (Cornell 2014: 76). Political philosopher Drucilla Cornell explains its relevance in post-apartheid South Africa: “uBuntu underscores an activist ethic of virtue and responsibility, in which who and how we are as human beings is not only relational but also turns us back to how we can try to create an ethical relationship that was rendered impossible by the brutality of colonialism and apartheid” (Cornell 2014: 67). The arguments that I make in this dissertation add a critical lens to the role and influence of uBuntu and biocultural rights in South Africa, where the emergence of living law and its culturalized assertions are articulated in response to histories of colonization, historical forms of dispossession and property, and the promise of human rights in the context of transformative constitutionalism.

## 8.5 Conclusion: The generative force of living law

In order to properly understand the dynamics of contemporary struggles over land in South Africa, advocates and researchers need to account for the constitutive effects of constitutionalism and neoliberalism, and the diverse actors and relations through which they leverage authority and legitimacy. Variegated neoliberalism produces multiple governmentalities that provide opportunities for peoples to assert legitimacy and re-create their subjectivity in the process. For example, peoples draw from the Constitution, regional and transnational norms on land tenure rights to re-make customary law as a form of culturalized right to communicate and protect land-based traditions and livelihoods, local governance practices, and ways of life. Through

transnationalized struggles constituted by custom and culturalized rights, peoples express a contemporary claim to alternative legalities to challenge historically sedimented colonial governmentality to assert their rights to land.

The constitutive relationship between law, space and territory is a defining feature of rural struggles for land rights. While some critics describe how colonial legal geographies are ‘entrenched’ or neoliberal governmentalities determine the emergence of particular subjectivities, my research demonstrates the indeterminate nature of legalized rural struggle. Moreover, this dissertation illustrates some of the ways that legalities are contributing to re-territorializations in the country and insists upon an engagement with the territorialization of property which we should recognize as “a continuing project, dependent on the continued alignment (and periodic uncoupling) of multiple resources and ways of seeing and doing” (Blomley, 2015, 600). Localized struggles for culturalized rights over territory provoke new forms of legal pluralism and invigorate the constitutive relationship between law and space (von Benda Beckman et al 2014, Griffiths 2013, Coombe 2016, 2017). The articulation of living customary law, indigenous rights and Aboriginal title has provided new opportunities for land claimants to draw on culturalized rights and discourses to contest post-apartheid collective subjectivities that were born out of the land reform program and in effect produce new legal geographies of property and human rights. Transformative constitutionalism paired with neoliberalism have produced the conditions for the birth and generative force of living law in rural struggles for land tenure.

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