

Understanding the Renovation of Public Land Policy - the Case of the Communal Land Rights Act (CLaRA) of South Africa

by

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ABSTRACT

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With the advent of democracy in South Africa in 1994, the newly elected ANC government embarked on an ambitious program of land reform. The land reform programme in South Africa rests on 3 pillars:

- Land redistribution
- Land restitution
- Land tenure reform

Land tenure reform is at the core of this case study and of the 3 pillars, has faced the most challenges during implementation. The renovation of public policy in general, and particularly in land policy, appears in numerous cases to be a priority on national agendas to relieve the numerous challenges rural Africans face: land conflicts, land insecurity, important demographic pressures and weight, high prevalence of poverty in rural areas, to identify just a few of these challenges. By analyzing the development process of the Communal Land Rights Act of 2004 (CLaRA), this case study sought to understand the renovation of public land policy in South Africa.

Review of literature on land tenure reform yielded a dichotomy of views with one side favouring freehold title for landless communities whilst on the other hand, there are proponents of a hybrid tenure system that recognizes the functioning aspects of traditional communal tenure. Those favouring freehold title pointed to the fact that this would increase investments on the land and access of the landowners to capital through formal financial markets. Those who would not be in a position to work the land would be able to sell it and invest the money elsewhere. Contrastingly, communal tenure was seen to have benefits for the wider community and for holders of secondary land rights such as women and children who could be excluded under freehold tenure arrangements. The notion that cash poor landless people could sell the land also raises political issues which might be politically detrimental to the government of the day.

The research was primarily qualitative, interviewing a broad spectrum of stakeholders in the CLaRA development process. Stakeholders included government officials, traditional leadership, communities, legal advisors, land based NGOs, civil society, academia, research institutions, parliamentarians and politicians. The objective of this research was to determine the extent of participation by various stakeholders at the national level in policy development, with CLaRA as a case study. This was done through analyzing the various positions taken by different stakeholders and the extent to which these were included or the extent to which these influenced the content of the final Act.

The outcome of the analysis indicates that to a greater extent, participatory processes seemed to have taken place during the development of the CLaRA, including numerous submissions by various groups to parliamentary portfolio committees, but the final content of the Act reflected predominantly the views of government and not other affected stakeholders. This led to the immediate challenge of the legislation in court by some communities and civil society leading to the eventual nullification of the legislation by the constitutional court.

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LIST OF ABBREVIATIONS AND ACRONYMS

AFRA	Association for Rural Advancement
ANC	African National Congress
ANCRA	Association for Community and Rural Advancement
CALS	Centre for Applied Legal Studies (University of Wits)
CGE	Commission of Gender Equality
CLaRA	Communal Land Rights Act
CLRB	Communal Land Rights Bill
CONTRALESA	Congress of Traditional Leaders of South Africa
COSATU	Congress of South African Trade Unions
CPA	Community Property Association
DA	Democratic Alliance
DFID	Department for International Development (UK)
DG	Director General
DLA	Department of Land Affairs
DPLG	Department of Provincial and Local Government
DSRPs	Document of Strategies to Reduce Poverty
ESTA	Extension of Security of Tenure Act
GEAR	Growth, Employment and Redistribution
IFP	Inkatha Freedom Party
IPILRA	the Interim Protection of Informal Land Rights Act
KZN	Kwazulu Natal Province
LAC	Land Administration Committee
LEAP	Legal Entity Assessment Project
LPM	Landless People's Movement
LRB	Land Rights Bill
LRB	Land Rights Board
LRC	Legal Resources Centre
LRE	Land Rights Enquiry
LSSC	Land Systems and Support Services Colloquium

MP	Member of Parliament
NADECO	National Democratic Convention
NGO	Non Governmental Organisation
NLC	National Land Committee
NLTC	National Land Tenure Conference
NUM	National Union of Mineworkers
PLAAS	Programme for Land and Agrarian Studies (University of Western Cape)
PTO	Permission To Occupy
RDP	Reconstruction and Development Programme
RWM	Rural Women's Movement
SACC	South African Council of churches
SACP	South African Communist Party
SAHRC	South African Human Rights Commission
TCOE	Trust for Community Outreach and Education
TLGFA	Traditional Leadership and Governance Framework Act
TLGFB	Traditional Leadership and Governance Framework Bill
TRAC	Transvaal Rural Action Committee
TRALSO	Transkei Land Service Organisation
TRANCRAA	Transformation of Certain Rural Areas Act of 1998
TRCG	Tenure Reform Core Group
TRIS	Tenure Reform Implementation Systems Department (DLA)
ULTRA	Upgrading of Land Tenure Rights Act
WLC	Women's Legal Centre

CHAPTER 1

INTRODUCTION

1.1 CONTEXTUAL AND HISTORICAL PERSPECTIVES OF COMMUNAL LAND IN RSA

The importance of land reform in South Africa arises from the scale and scope of land dispossession of black people at the hands of the colonisers. Although the black population had already lost the majority of their land by 1913, and could not occupy more land than what was abandoned by whites, the period of the South African Union was marked by the formalisation of race-based spatial segregation in the form of laws. Rights to own rent or even share-crop land in South Africa depended upon a person's racial classification. In this framework, the Land Settlement Act and, above all, the Natives Land Act and the Natives Land and Trust Act were instituted in 1912, 1913 and 1936, respectively. These laws introduced the formal division of South African land between White and Black zones in the proportions of 92% and 8%, and later 87% and 13%, respectively (Letsoalo, 2007).

Millions of black people were forced to leave their ancestral lands and resettle in what quickly became over-crowded and environmentally degraded homelands. The ills of this diminished distribution were intensified by the interdiction of all transfers of land between races and by the appropriation of land reserved for the South African state (Keegan, 1986; Plaatje, 1987). Blacks, therefore, no longer had the right to own their land – even if it was found in a region classified as Black – but were reduced to using land administered by tribal authorities, who were appointed by the government

In addition, these laws were complemented by measures that equally intended to limit the number of Blacks residing on White land (Bundy, 1979). Black families, who occupied land outside the reserves, before 1913, were initially exempt from the provisions of the Natives Land Acts. The result was a number of so-called 'black-spot' communities in farming areas occupied by whites. These were the subject of a second wave of forced removals implemented from the 1950s through to the 1980s (DLA, 2004). The government expelled most of these black farmers to the set aside

homelands, often without compensation for their lost land rights. Dispossession not only forced the few remaining black farmers to seek employment as farm labourers, it also contributed to an increasing population density in the delimited black areas.

These land features persisted until the first democratic elections and the change of government in South Africa in 1994. The previous spatial segregation measures not only engendered extreme inequalities concerning land distribution, they also caused significant inequalities between white and black (farmers). In 1994, about 60 000 white farmers occupied 87 million hectares of privately owned land. Commercial farms contributed 95% of the total agricultural production of the country (World Bank, 1994) and, as far as most agricultural products were concerned, assumed the country's self-sufficiency. They employed between 750 000 and 1 million farm workers (SSA, 2000). On the other hand, the 14 million blacks gathered on the former homelands shared 13% of the total area of the country, i.e. 13 million hectares (Department of Agriculture, 1995). Although the South African Government attempted several times to enhance the socio-economic conditions of these homelands during the transition years¹, the over-exploitation of resources, the impoverishment of the environment and the limited means of production only permitted a small number of Black farmers to subsist in the reserves². The farming production of these areas only represented 16% of their food needs. According to the World Bank's Southern Africa Department, about 13% of farming households occasionally commercialised part of their production (World Bank, 1994); however, only 0,2% of these households could effectively make a sufficient living out of it. For those who had access to land (it was estimated that one third of rural households on these reserves had no access to land), agriculture had been reduced for the large majority to an activity complementing their subsistence.

Land reform was one of the main promises made by the first democratically elected government during its ascension to power in 1994. The government noted in the Reconstruction and Development Programme (RDP) that land reform was necessary

¹ The latter concerned mainly the Betterment Planning programmes, already implemented from the 1930s, these programmes sought to regulate these areas through spatial engineering. It should be recognised that these programmes were not neutral, but were used to stabilise the fragile political situation in the country in the late 1980s. They took place in conjunction with renewed definitions of the power relations between the chieftaincies and the communities.

² The Department of Agriculture estimated the number of non-white farming households at 2 million. Nevertheless, this estimate should be used with caution since the definition of farming household is not certain nor precise.

to redress unjust forced deportations and the denial of land access (ANC, 1994). The land reform process thus not only represents a decisive element of ideological transition, it is also seen as one of the conditions for the political, economic and social stability of the country. This new situation required the implementation of adapted economic policies (Department of Agriculture, 1995): on one hand, they aimed to find a solution to the overpopulation and poverty of the former homelands and, on the other hand, to promote access to residential and farm land. To this end, three major land reform programmes – restitution, redistribution and land tenure reform - were recognised by the Constitution and subsequently implemented (Box 1).

Box 1: Land Reform in South Africa since 1994

Land Restitution (Restitution of Land Rights Act 22 of 1994) enables people or communities dispossessed of their land after the 19th of June 1913 (implementation date of the first Native Land Act) to make a claim for the restitution of their land rights (or the equivalent, i.e. other land or financial compensation). In March 1996, the deadline for claim submission, 68 878 individual or grouped claims were submitted.

Land Redistribution aims to assist, through subsidies, previously disadvantaged populations in purchasing available land at market price. Although it can take different forms (individual, grouped or commonage resettlement), two major programmes exist:

- **SLAG** (Settlement and Land Acquisition Grant) representing a subsidy of 16,000 Rand per household wanting to acquire land (for subsistence, commercial or other reasons).
- **LRAD** (Land Reform for Agricultural Development) sub-programme, implemented in 2000, promotes agricultural development, and supports the transfer of private agricultural land to individuals or limited groups who are able to invest in commercial farm development. The transfer of private title deed is facilitated through LRAD subsidies that increase in value according to the beneficiaries' own investment. Based on increasing own contributions in labour and farm assets (if the beneficiary is not in a position to contribute financially), up to a financial contribution of 400,000 Rand, LRAD will provide proportionally increasing subsidies from 20,000 up to 100,000 Rand (Ministry of Agriculture and Land Affairs, 2000).

Land Tenure Reform, often recognised as the most complex, has the objective to define and institutionalise every existing mode of land tenure and, subsequently, to confer well defined and more equal rights to various landowners and occupants. Although it primarily concerns communal land, it also focuses on resolving other conflict situations (such as those concerning farm workers having worked independently for several years already on properties owned by others, mainly whites) and aims at providing alternatives for people who are displaced in the process.

Source: Department of Land Affairs (DLA), 2008

Regarding restitution and redistribution, the magnitude of land inequality in South Africa led the government to aim at redistributing/restituting 30% of the land during the first five years after the apartheid era. To date, however, only 4.7% has been transferred since the change of regime (Department of Land Affairs, 2008). With

regards to tenure reform, the process started in 1996 but mainly concerned the extension of security of tenure for labour tenants; the issue of reforming the communal lands of the previous homelands has still to be implemented (Box 2).

Box 2: Land Rights Reform in South Africa since 1994

The Interim Protection of Informal Land Rights Act of 1996 (IPILRA) was enacted to secure the position of people with informal rights to land; these people were predominantly located in the former homelands. IPILRA was initially intended as an interim measure whilst more comprehensive legislation was being developed (DLA, 2004); however, it has been renewed annually ever since. IPILRA sought to ensure that holders of informal land rights were recognised as stakeholders in land-based transactions and development projects on the land they occupied. At the time, the hope was that more comprehensive legislation with regards to Communal land tenure would be tabled in Parliament during the course of 1999.

The Communal Property Association Act of 1996 (CPA Act) provides for the establishment of legal entities that enable groups of beneficiaries to acquire, hold and manage property on a communal basis within a supportive legislative framework. The CPA Act requires that the following primary objectives be fulfilled in accordance to a written constitution, embodying the principles of democracy, inclusion, non-discrimination, equality, transparency and accountability (Kariuki, 2004).

The Extension of Security of Tenure Act 62 of 1997 (ESTA) addresses the relationship between land occupiers and landowners. In particular, it defines the circumstances under which evictions can legally take place and the procedures to be followed. The ESTA is underpinned by the following principles: the law should prevent arbitrary and unfair evictions; existing rights of ownership should be recognised and protected; and people who live on land belonging to other people should be guaranteed basic human rights. In essence, this law promotes long-term security on the land where people are currently living (Kariuki, 2004).

The Transformation of Certain Rural Areas Act of 1998 (TRANCRAA) represented the first comprehensive legislation to reform communal land tenure in South Africa (Wisborg & Rohde, 2003). Its aim was to transfer land in 23 former coloured areas to residents or accountable local institutions. The former Bantustans (i.e. black areas as opposed to the coloured ones) were subject to TRANCRAA.

Source: DLA, 2004a

1.2 QUANTITATIVE IMPACTS OF TENURE REFORM

In 1998, the DLA commissioned a study of the economic impact of the proposed land rights legislation (May et al., 1998) which suggested that the main economic benefits of tenure reform derived from:

- the promotion of farm and non-farm household production
- improving delivery of housing and infrastructure in urban and semi-urban areas

- facilitating investment in Spatial Development Initiative projects
- the opportunity costs imposed by the existing situation of tenure insecurity

Valuing these benefits was problematic given the limitations of the available data (see Table 1.1).

Table 1.1: Estimates of the positive economic impacts of tenure reform

Benefit	Economic impact
Household farm production	R344 million per annum
Housing and urban development	R400 million for current projects
Spatial Development Initiatives	R500 million for current projects R40 million estimated return per annum
Opportunity costs	Difficult to estimate

Source: May et al., (1998)

Land-based livelihoods are composed of the following:

- cropping (dryland and irrigated crops, including homestead gardens)
- livestock production (for a variety of products)
- natural resources from the commons (e.g. water, clay, river sand, roots, bulbs, fruits, grass, shrubs, trees, honey, insects, wildlife) are harvested for a range of uses (e.g. as wild foods, fermented beverages, medicines, building materials, craft work materials, fuel, forage, etc).

All of these forms of production involve both direct use for household sustenance and exchange in local and more distant markets. Some outputs supply small or micro-enterprises in rural areas e.g. traders, hawkers, crafts, building, traditional healing practices. (Adams, Cousins and Monama, 1999)

Can effective rural development efforts, including the component of tenure reform, lead to a significant enhancement of land-based livelihoods and associated local economic development? Experience from other African countries such as Zimbabwe shows that it is possible to facilitate significant improvements in yield and incomes in resettlement areas given supportive and conducive governance structures. May et al. (1998) report that econometric models show how marginal returns to land can rise substantially when finance is available. The implications of this are that, given the right kind of support, household-based agriculture would grow substantially. These views lend support to the contention that in South Africa, an incremental

enhancement of land-based livelihoods of the order of 15 to 20% of current values is technically and economically feasible (Adams *et al.*, 1999). This would be complemented by the enactment of other necessary and supportive legislation to ensure success.

Table 1.2 shows that in the former homeland and SADT areas, increases in the aggregate value of these livelihood sources could amount to R2 billion (at 15% enhancement) and R2.66 billion (at 20% enhancement). Incremental enhancement implies that it would take several years before these values were achieved.

Table 1.2: Household and aggregate economic values of land-based livelihoods in communal areas (with a total population of 2.4 million households)

Component	Current value per household per annum	Current aggregate value per annum	Aggregate value enhanced by 15%	Aggregate value enhanced by 20%
1. Cropping	R1543	R3.70 billion	R4.26 billion	R4.44 billion
2. Livestock	R1200	R2.88 billion	R3.31 billion	R3.46 billion
3. Natural resource harvesting	R2792	R6.70 billion	R7.71 billion	R8.04 billion
Total	R5535	R13.28 billion	R15.28 billion	R15.94 billion

Source: Adams et al., 1999

These estimates of the potential economic impact of tenure reform highlighted above are provisional, and only make sense when seen in their full context – that of a coordinated and well targeted rural development programme aimed at enhancing rural livelihoods in a sustainable manner (Adams *et al.*, 1999).

1.3 THE RENEWAL OF PUBLIC (LAND) POLICY

The renovation of public policy in general, and particularly in land policy, appears in numerous cases to be a priority on national agendas to address the many challenges rural Africans face: land conflicts, land insecurity, important demographic pressures and weight, high prevalence of poverty in rural areas, to name just a few of these challenges.

Simultaneously, although at varying paces according to particular situations, the countries of sub-Saharan Africa engaged (at times due to external pressure) in institutional reforms. These reforms concerned, on the one hand, regional integration and, on the other hand, the democratisation of public life, administrative decentralisation and the promotion of new forms of governance that favour, among other principles, transparency in decision making and management, negotiation among actors, responsibilities of decision-makers with regards to other actors. This new politico-institutional context raises questions notably related to the renovation of public policies, not only regarding their contents, but equally about the processes driving their elaboration that are based on the inclusion of a multitude of actors and institutions at different levels (national, provincial and local).

As such, after decades marked by little consultations by States and foreign donors/funders during the definition, development and implementation of policies, increased participation appears in public debates as well in more formal processes. In Africa, such an evolution was observed in different countries with the development of the Document of Strategies to Reduce Poverty (DSRPs) (Sewpaul, 2006), agricultural policies (Senegal, Mali and Kenya are examples (Anseeuw, 2008) and, also, land policies (Senegal and South Africa, for example) (Faye et al., 2007; Claasens and Cousins, 2008).

A wider dialogue involving more actors from different political segments, NGOs, civil society, and private sector, for example, accompanied the formal elaboration process of agricultural policies. These different – more inclusive – processes represented an emerging factor, of reactivation and inclusion of actors and networks, who progressively found their place as privileged interlocutors. These emerging processes and actors reflect, in the African context, a certain evolution particularly in terms of participative democracy compared to preceding policies (Anseeuw, 2006)

The possibility of influencing policies themselves appears. As a result, there is a need to deepen the question of interactions and mechanisms of coordination between a multiplicity of economic and social actors implicated in the construction of markets, institutions as well as of agricultural and land policies. The policies, therefore, can no longer be considered as imposed ‘entities’ (by the State or externally), but as constructs by the different actors. As negotiated entities and not

imposed choices/options, these renewed processes call into question the choices and ideologies of the actors, which before were regarded with certainty. Another result is an awakening by societies, stakeholders and civil society of the need to exceed the normative definition of policies, the handing-over of single ideals and “one size fits all” approaches and the possible elaboration of a diversity of instruments for policies in general, land and other more particularly. It also leads to a redefinition of the roles of the different actors, including the State and private sector (Anseeuw, 2006)

However, in both theory and practice, a lack of knowledge and concrete actions to facilitate these processes is often noted – regarding both the content of these policies as well as their implementation processes. On the one hand, this is linked to the absence of favourable conditions for the putting in place of these new – more inclusive – processes of policy development: strong asymmetries among actors, partial negotiations, imposed agendas and sequences, and weak information dissemination before consultations. On the other hand, a lack of concrete knowledge about these new policy development processes, particularly regarding land policy, is apparent. In a context marked by the multiplication of concerned actors and by the awareness by the African continent of the necessity of developing, in a more autonomous way, their own agricultural policies, the reality becomes increasingly complex. As such, a number of policies developed in a more inclusive manner were not subject to effective implementation, or were even subject to major civil and political objections (CLaRA was to be challenged in the constitutional court) (Anseeuw, 2006).

1.4 PROBLEM STATEMENT

1.4.1 CLaRA as a Renewal of Land Policy Development

As detailed earlier, there was need for more comprehensive legislation that would deal with the insecurity of tenure of the millions of Black South Africans living in the former homeland areas. If the renovation of land tenure policy appears to be a necessity to address the many challenges that rural South African people face, such as overcrowding of communal land; rural poverty; marginalisation and exclusion from public processes, the processes according to which the latter are developed and

Implemented have also to be renewed. The important question is: are participatory land policy development processes genuinely “participatory” to the extent that they take into account the views of various stakeholders?

As such, in 2004, the Government of South Africa enacted the Communal Land Rights Act. *“The purpose of the Act is to give secure land tenure rights to communities and persons who occupy land that the apartheid government had reserved for occupation by African people known as the communal areas. The land tenure rights available to the people living in communal areas are largely based on customary law or insecure permits granted under laws that were applied to African people alone”* (DLA, 2004). According to the framework of more transparent and inclusive policy development and implementation processes, the CLaRA of 2004 has been hailed by its drafters as one of the most participatory pieces of legislation ever drafted within the Department of Land Affairs (DLA, 2004). Regarding its development process, the DLA notes (DLA, 2004):

Box 3: The Public Consultation Process for the Land Bill

“The public consultation on the Bill commenced in May 2001 following the production of third draft of the Bill. The consultation process culminated in the hosting of the National Land Tenure Conference (NTLC) held in Durban at the International convention Centre in November 2001. Two thousand persons representing various stakeholders attended the conference.

Between 14 August 2002 when the Bill was gazetted and 22 September 2003, there was also a thorough public consultation process on the Bill. Stakeholders consulted include:

- Eleven National Departments
- Six Provincial Governments: Eastern Cape, North West, Mpumalanga, Limpopo, Free State and KwaZulu-Natal

Organisations consulted were, amongst others, the Bafokeng Royal Council, Congress of Traditional leaders of South Africa, local and district councillors from the Polokwane and Capricorn districts, councillors and officials from Polokwane municipality, the press, His Majesty King G. Zwelithini, together with Nkosi Mangosuthu Buthelezi and Amakhosi in Ulundi. Over and above the reference group set up by the Minister, communities were consulted widely in the affected provinces”.

Source: DLA, 2008

However, several months after having enacted the Act, CLaRA was accused of non-constitutionality for several reasons³. The court case delayed the implementation of the Act, with DLA officials indicating that the regulations of the Act might only be tabled in Parliament after the next general elections in 2009.⁴ The Act was to be later set aside by the constitutional court.

In March 2010, the Constitutional Court declared that the procedure followed prior to the adoption of the Communal Land Rights Act was inconsistent with the Constitution. The judgment was a victory for the four rural communities who challenged the Communal Land Rights Act of 2004 on the basis that it would undermine their right to tenure security as guaranteed in the South African constitution. The judgment declared invalid and unconstitutional the key provisions of the Act providing for the transfer and registration of communal land, the determination of rights by the Minister and the establishment and composition of land administration committees. The judgment focused on the problems created when traditional councils are imposed on rural communities as land administration committees. It referred to the layered nature of land rights in customary systems including those existing at family, clan, village and group levels, and the problems that arise when these rights are subjected to the control of overarching Traditional Councils.

If the delay of the implementation of the Act is an example of an inherent democratic process, it also leads to questioning the implemented seemingly more inclusive development process. Several questions come to the fore. On one hand, it leads to the necessity to scrutinize the technical and organizational aspects of such more inclusive processes. Indeed, if there seems to be a broader consensus on the need of more transparent and inclusive decision making, there is no overall harmony on how such processes can be developed. What went wrong or what is being criticized? On the other hand, it also leads to questioning the nature of these more inclusive

³ The Legal Resources Centre and Webber Wentzel Bowers Attorneys, acting on behalf of four rural communities, launched a legal challenge to the constitutionality of the Communal Land Rights Act. In their view, the passage of the Act was controversial because of last minute changes that gave far reaching powers over communal land to Traditional Councils. The papers served on the Minister of Land Affairs and others argued that the CLaRA was enacted in terms of the wrong parliamentary procedure and was therefore invalid. Furthermore it was argued that it breached the tenure security and equality provisions in the Bill of Rights, and that the powers given to land administration committees and Traditional Councils constituted a fourth tier of government which is not authorised by the Constitution.

⁴ Discussion with Vuyi Nxasana, Chief Director Tenure Reform.

processes. Are they really inclusive, i.e. reflecting the positions of a large if not entire panel of protagonists, or does it just represent a strategy from Government to legitimize policy reform?

1.5 RESEARCH OBJECTIVES AND HYPOTHESIS

1.5.1 Objectives

The study of “the politics of communal land reform in South Africa” is part of a broader reflection on the renovation of public policy, particularly land policy. As such, on one hand, the democratisation of public life, the participatory approach, the inclusiveness and the promotion of new forms of governance, and on the other hand, the impact the latter has on the content of the specific land policies, are critically investigated in the process of the development of CLaRA.

The main purpose of this study was to determine whether the development of the CLaRA represented a renewal of public policy development which is participatory, inclusive and transparent, including - in the framework of South Africa’s decentralisation process -the different levels of decision making. It investigated and analyzed the extent to which the development process and the contents of CLaRA can be considered innovative. As such, the study’s specific objectives are:

- i) To analyze the development process of CLaRA. As such, it described the different steps but also identified the stakes around which each actor (national government, regional government, agricultural producers and organisations, NGOs and private sector) structured their arguments through the course of the development of CLaRA;
- ii) To identify and characterize the impacts of CLaRA’s drafting process and potential implementation on the choices concerning the effective measures at national level, the perceptions, positions and proposals made by the different actors;
- iii) To determine the extent of democratisation of negotiation and decision-making processes and to formulate proposals concerning the democratisation of negotiation and decision-making processes on the subject of land policies.

As detailed previously, the study focuses solely on the development process of CLaRA and the impact of the process on the content and choices made regarding communal land tenure in South Africa. As such, the objective of the research is not South Africa's 'land tenure system' per se and neither has it the pretension to analyse South Africa's land tenure problems, nor will it propose recommendations to solve the latter. It will neither focus on the effectiveness nor propose to evaluate CLaRA's proposed measures. Land reform options will not be detailed, but more specifically why and how certain options of land reform have been retained.

The study will focus on the policy development process itself and on the unrolling of the processes that permitted the development and validation of CLaRA. The evolution process of the CLaRA will be critically analysed to determine whether it represents a more participatory approach to public policy formulation as is put forward by those who drafted it, and how the latter influences the different policies and policy measures adopted and reflects a democratisation of public policy development.

1.5.2 Hypothesis

The study assumes that CLaRA's development process was not entirely inclusive as observed from the issues challenged during the court case. It is in this regard that this study tests the following hypothesis:

- A large majority of protagonists were excluded or that their positions were not taken into account. The content is therefore not reflecting the overall positions, needs and wants of the South African population, but characterises standpoints of the ruling party and/or agreements of the latter with specific strategic actors.

Ideally, an inclusive approach to public policy development involves all actors who have a stake in the eventual outcome. All actors' participation is encouraged and respected, and the process not dominated by any individual, group, coalition or by a single point of view. However, the reality is often different, especially in lesser developed societies where resources may not permit such inclusivity or the governance structures to ensure this are not present.

Some actors often do not want to participate for various reasons - they may feel it takes too much time or they don't have the skills/capacities needed. Contrastingly, other actors or groups may feel left out and disrespected if they are not invited to participate.

CHAPTER 2

LITERATURE REVIEW

2.1 INTRODUCTION

This Chapter reviews various literature on the topics of tenure reform and public policy analysis. The first part of the chapter deals with tenure reform broadly and then focuses on tenure reform on the African continent, particularly Southern Africa. The second part looks at public policy analysis in the context of land policy and the relevance of process models of public policy making to the development process of CLaRA.

Given the dual agrarian structure inherited by most post colonial states in Africa, particularly in Southern Africa, land tenure reform remains an emotive issue in most of these countries today and thus presents an immediate challenge to policymakers and stakeholders. South Africa is no different as evidenced by the crafting of legislation such as the CLaRA. The sections below look at tenure reform and its impact on the development of public land policies in Africa.

2.2 LAND TENURE REFORM

Land tenure reform remains a key policy issue in Africa, given the large proportion of the population that relies on land and natural resources for their livelihoods and still lives on land with insecure tenure. Rural poverty is strongly associated with poor access to land, either in the form of landlessness or because of insecure and contested land rights. Economic analysis has long recognised the importance of secure property rights for growth, and therefore for the poverty reduction which growth can bring (Cotula, Toulmin and Quan, 2006).

The Economic Commission on Africa notes that inappropriate land policies often hinder economic and social development in two major ways. On one hand, the lack of a functional and clearly defined land tenure and property rights system discourages private investment on the land and this impacts negatively on economic

growth. On the other hand, perpetuation of colonial era patterns of land ownership with little or no social justice creates animosity between landowners and those that were dispossessed. Often, this leads to social unrest, violence and civil conflict (Economic Commission for Africa, 2004).

The main aim of land tenure reform is to protect individual or collective land rights through statutes and laws. This includes the definition of the roles and responsibilities of institutions that administer these laws and statutes so that they function effectively where land conflicts arise (Economic Commission for Africa, 2004).

However, although it is agreed upon that tenure insecurity negatively affects livelihoods, economic growth, social and political stability, there is no consensus on how to implement it.

2.2.1 Land tenure – Some definitions

Land tenure is the relationship, whether legally or customarily defined, among people, as individuals or groups, with respect to land (FAO, 2011). This relationship can be defined either under Western legal statutes or customarily. Land encompasses important natural resources such as water, grazing and forests.

The institution of land tenure can be a set of rules developed by societies to enable the effective management and governance of land resources. These rules determine how property rights to land and its associated resources are to be allocated amongst groups and individuals within a particular society. 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, 2011).

Land tenure forms an integral part of a society's political, economic and social relationships. Of key importance are the legal, technical, political and economic aspects that arise as a result of land tenure. Land tenure relationships may be well-defined and enforceable in a formal court of law or through customary structures in a

community. Alternatively, they may be relatively poorly defined with ambiguities open to exploitation (FAO, 2011).

Common classifications of land tenure (FAO, 2011):

- Private rights to land belong to a private party who may be an individual, a married couple, a group of people, or a corporate body such as a commercial entity or non-profit organization. For example, within a community, individual families may have exclusive rights to residential parcels, agricultural parcels and certain forests. Other members of the community can be excluded from using these resources without the consent of those who hold the rights.
- Communal: a right of commons may exist within a community where each member has a right to use independently the holdings of the community. For example, members of a community may have the right to graze cattle on a common pasture.
- Open access: specific rights are not assigned to anyone and no-one can be excluded. This typically includes marine tenure where access to the high seas is generally open to anyone; it may include rangelands, forests, etc, where there may be free access to the resources for all. (An important difference between open access and communal systems is that under a communal system, non-members of the community are excluded from using the common areas).
- State: property rights are assigned to some authority in the public sector. For example, in some countries, forest lands may fall under the mandate of the state, whether at a central or decentralised level of government.

In practice, groups or individuals often hold multiple types of rights. This is referred to as a “bundle” of rights. A bundle of rights can be shared amongst individuals or groups, for example, between an owner and a tenant leasing the piece of land for a specified period of time. At times it may be useful to simplify the representation of property rights by identifying (FAO, 2011):

- *Use rights*: rights to use the land for grazing, growing subsistence crops, gathering minor forestry products, etc.
- *Control rights*: rights to make decisions how the land should be used including deciding what crops should be planted, and to benefit financially from the sale of crops, etc.

- *Transfer rights*: right to sell or mortgage the land, to convey the land to others through intra-community reallocations, to transmit the land to heirs through inheritance, and to reallocate use and control rights.

2.2.2 Tenure Reform – An On-going Debate

Tenure reform can be defined as the change in land ownership rights. A broader definition for land tenure reform is the transformation of the rural socio-economic structure, and a change in social relations and class structure. It is different to redistributive land reform. Land redistribution programmes aim at providing the rural poor with access to land and promoting efficiency and investment in agriculture (FAO, 2011)

It is commonly recognised that most of the land tenure problems that exist in Africa have their origin in the colonial period (Economic Commission for Africa, 2004). Most colonial administrations held the view that African systems of land management i.e. customary land tenure, did not recognize individual rights to land and consequently all land held by Africans at the time became state land or communal land reserves. From the onset, this was a wrong assumption. Customary land tenure provides for individual land rights over arable and residential land. The aspect of common property only applied to grazing lands and other natural resources (Economic Commission for Africa, 2004).

The colonial State invented and then rigorously applied the notion that African systems of law and tenure did not recognize individual rights to land and that, therefore, all land occupied by Africans was State land. Such land was, thereafter, set aside for occupation and use by Africans, and authority over it was vested in the respective African chiefs (Economic Commission for Africa, 2004).

There is still much conceptual confusion about communal property. The idea of commons as un-owned open access land is still widespread and increasingly self-fulfilling through lack of correct policy and legal support. From a customary perspective, common properties are not un-owned lands at all but the private property of all members of a group or community (UNDP, 2005).

Since the publication of Hernando de Soto's *The Mystery of Capital* in 2000, the major thrust of Western land policy thinking is that providing communal land dwellers with higher and more secure levels of tenure will increase the productivity and investment on the land i.e. by formalising the title to land and allowing it to become a commercial good in the land market (Nyamu-Musembi, 2006).

Without judging the pros and cons (as detailed in Table 2.1), Cotula et al. (2007) acknowledge that in recent decades, major changes have taken place in different countries in Africa, including demographic growth, urbanisation, monetarization of the economy, livelihood diversification, greater integration in the global economy, and cultural change. These changes seem to confirm the basic tenets of the so-called "evolutionary theory of land rights" - whereby demographic growth and agricultural intensification tend to push towards greater individualisation and commercialisation of land rights.

Table 2.1: Positive and negative impacts of tenure security

Positive impacts of tenure security	Negative impacts of tenure security/titling
Secure land rights to avoid unlawful dispossession	Title may provide little extra protection for joint and secondary rights (e.g., those of women) that are often of great relevance to the poor and may even weaken or extinguish them
Precisely define land rights, to overcome overlapping rights and land related conflict	High survey standards and the centralized nature of a title registration system may increase costs beyond what is affordable to most users
Measures to protect women's rights which are often neglected in traditional legislation and/or customary practice;	Land titling efforts may trigger attempts at land grabbing by local elites and bureaucrats and end up disempowering the poor who were expected to benefit from these programs
Individualization of tenure is promoted on the basis that it will promote investment in the land and will enable a farmer incapable of investing in the land to sell it to someone who can, thereby enhancing efficiency	Attempts to replace local institutions that functioned reasonably well with "better" ones that fail to materialize can actually increase conflict
Rural areas are increasingly connected to regional and national markets, and in many cases opportunities to earn income through commercial use of the commons are expanding. This may help rural households improve their	Government policies that encourage commercialization of natural resources, marginalize indigenous and customary institutions, or simply overlap and create confusion among resource users, are all contributing factors to the pressures on

Positive impacts of tenure security	Negative impacts of tenure security/titling
livelihoods by drawing on resources from the commons. Commercialization results in an increase in cash income for rural households	common property regimes.
The integration of traditional smallholder agriculture into the exchange economy is part of a successful development strategy, since the developing world cannot afford the presumed inefficiencies of resource allocation that subsistence agriculture entails	The 'opportunity' to sell land opens up the possibility of land being sold at below the market value as a survival strategy under distress circumstances, resulting in permanent loss of livelihood

Source: Author's analysis

Certain tenure situations lack one or more principles/elements, leading to an absent or weakly manifested tenure regime and undermining the effectiveness and long-term viability of the system (Ostrom, 1990). According to Cousins (2007), however, it is not enough to recognize the socially and politically embedded character of land rights, or the unequal outcomes of contemporary forms of 'enclosure'. Privatization and complete individualization of land are uneven and contested, and in many places the nature and content of land rights remain quite distinct from 'Western-legal' forms of property. In these situations, individual titling of land is not a feasible solution.

Land policy analysts have suggested that the most appropriate approach to tenure reform is to make 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 (Cousins, 2007).

In addition, the overwhelming majority of literature on sustainable livelihood security suggests that, from a food security perspective, the calls for unified, freehold tenure systems are unrealistic. The flexibility of indigenous livelihood strategies has always been one of the means of survival in harsh physical and economic environments. Indeed, indigenous institutions have demonstrated remarkable ability to adapt to population changes, including through the development of land markets under customary tenure, in response to economic or political stimuli. It is, therefore, recommended that they be allowed to remain and evolve as an integral part of a dual

(private freehold/customary) tenure system, serving different purposes under different circumstances (Economic Commission for Africa, 2004).

2.2.3 Land Tenure reform in Southern Africa

The issue of communal tenure has been dealt with differently in independent Africa. To some extent, it has been cyclical and used for different ends in different countries. The sensitivity of the issue arises from historical disadvantage, competition for land and resources, and political strategies (O'Brien, 2010).

In general, the fact remains that communal tenure (and other forms of customary land holdings) are not yet statutorily protected in many cases in southern Africa (and in Africa generally). There is however a trend towards rectifying this reality in some countries. In the past 15 years, several countries in Southern Africa have reformed their communal land tenure in one way or another (O'Brien, 2010). Table 2.2 below outlines the main policies and their core implications for communal land tenure in some countries in Southern Africa.

Table 2.2: Tenure reform policies in Southern Africa

Country	Legislation impacting communal tenure	Description / implications
Zambia	Constitution Land Act 1995 Draft land Policy 2002/6	Land Act recognizes customary tenure in reserves and trust land. Draft Policy allows conversion of customary tenure to leasehold. Includes a clause that reserves 30% of all customary land for women and allows women to have access and right to own land (not enacted yet)
Namibia	Constitution 1990 National Land Policy 1998 Communal Land Reform Act 2002 Proposed Land Bill 2009	Land is vested in the President held in trust for the citizens Communal land is vested in the government to administer on behalf of the traditional communities National Land Policy gives equal status to several types of tenure and categories of holder: “individuals, families that are legally constituted as a family trust... legally constituted bodies and institutions to exercise joint ownership rights; duly constituted cooperatives and the State” qualify as land holders (Odendaal 2006:30). Communal Land Reform Act - allows for the allocation of communal land rights to communal land outside of proclaimed towns. Communal land rights can be for the right to: a farming unit, a residential unit, to any other form of customary tenure recognised by the Minister. - it allows for the recording and registration of customary rights or leasehold in communal areas. PTOs are also used in communal areas. - Introduces Communal Land Boards (CLBs) (based on Botswana) comprised of traditional leaders, farming community, regional councils, women, the public service and conservancies in the CLB's jurisdiction. Proposed Land Bill - Replaces CLBs with Regional Land Boards (RLBs) and mandates them to resolve customary tenure holder disputes in their jurisdiction – but not freehold disputes. - Introduces extended powers for the Minister regarding leaseholds allocated in communal areas (+ 50 ha needs Minister's approval) - Controversially does not introduce any new items on communal grazing areas or other commonages, which are contentious issues.

Botswana	<p>State Land Act 1966</p> <p>Tribal Land Act (1968), amended 1993</p> <p>Tribal Grazing Land Act</p>	<p>State Land Act vests urban land, parks and forest reserves in the central & local government, and provides for allocation to individuals and entities.</p> <p>Tribal Land Act vests tribal land in the citizens of Botswana and establishes Land Boards. 1993 amendments changed the way boards are selected</p> <p>Tribal Grazing Land Act encourages the development of leasehold ranches on communal land and allocates land boards authority to allocate these rights.</p>
Zimbabwe	<p>Land Acquisition Act, 1992 revised 1996;</p> <p>Communal Land Act, 1982;</p> <p>Rural Land Act, Cap 20:18;</p> <p>National Land Policy,</p>	<p>Communal Land Act vested ownership of communal land in the president and the authority to manage and allocate land was removed from customary institutions and vested in elected local government institutions.</p> <p>Zimbabwe's Communal Areas Management Program for Indigenous Resources (CAMPFIRE) seeks to reestablish and support community-based natural resource management. It was initiated in the mid-1980s by the Department of National Parks and Wildlife Management to encourage conservation and sustainable management through incentives.</p>
South Africa	<p>Constitution 1996</p> <p>Interim Protection of Informal Land Rights Act 1996 (IPILRA)</p> <p>Communal Property Association Act 1996 (CPA Act)</p> <p>Traditional Leadership and Governance Framework Act 2004</p>	<p>Constitution recognises the right of a “person or community whose tenure of land is legally insecure as a result of racially discriminatory laws or practices” to legally secure tenure or comparable redress (RSA 1996: S. 25(6) & (9).</p> <p>IPILRA provides temporary, legally enforceable protection to individual and community land rights that were not recognised during colonialism and apartheid. The Act is renewed each year until new appropriate legislation is enacted.</p> <p>CPA Act permits communities to acquire, hold, and manage property communally. Also intends to provide democratic “safeguards to the community as opposed to having traditional communal lands at the hands of unregulated traditional authorities” (Wachira 2008:206)</p> <p>Traditional Leadership and Governance Framework Act Traditional Councils recomposed according to this act can be the legal guardians and decision-makers over communal land on behalf of the community.</p>

Lesotho	<p>Laws of Lerotholi</p> <p>Land Act 1979, amended 1992</p> <p>Constitution 1992</p> <p>Local Government Act 1997</p> <p>Grazing Regulations 1980</p> <p>Proposed Land Bill 2009</p>	<p>The Laws of Lerotholi vested all land in the Basotho Nation; a notion of communal tenure that has been maintained throughout Lesotho's legal history.</p> <p>The Land Act 1979 vested land in the King to be held and managed on behalf of the people; chiefs also played a major role in administration until the 1992 amendment to the Land Act established Village and District Development Committees, which took over chiefs' land allocation roles.</p> <p>The 1997 Local Government Act introduced elected local councils (first implemented in 2005) charged with land allocation (Sekatle n.d.). The proposed Land Bill 2009 proposes to abolish customary land holding through mandatory registration of allocated land and blanket use of leasehold agreements, which does away with the current flexibilities of communal arrangements (Lesotho Council of NGOs 2010).</p>
Mozambique	<p>Constitution</p> <p>National Land Policy, 1996</p> <p>Land Law No. 19, 1997</p>	<p>Constitution vests land in the state</p> <p>Land Policy recognises and protects existing occupation and use of communal land as legal property rights, without requiring their conversion to private ownership</p> <p>Land Law allows for individual or group registration of use and occupation rights with a DUAT to clearly define area and rights in question.</p> <p>Land Law allows for verbal recognition of rights, including communal rights in a court of law</p> <p>Land Law requires consultations between communities and investors wishing to access community land as a way to stimulate locally driven but externally funded development of communal land</p>
Malawi	<p>Decentralization Act 1998</p> <p>National Land Policy 2002</p>	<p>-Decentralization Act devolved land administration functions to local governments.</p> <p>-The National Land Policy protects a community's public land, i.e. land within the boundaries of a traditional authority not exclusively allocated to any group, individual or family. "This designation applies in particular to <i>dambos</i>, dry season communal grazing areas, etc. Such <i>common access</i> or unallocated customary land reserved for the community are regarded as public only to members of that community and will be protected". (Government of Malawi 2002: 4.2.4b, emphasis in original).</p> <p>Individuals, families and groups holding customary rights (in a defined area) can protect their common property interests or <i>dambo</i>, as they are legally recognised and protected as common property (Peters and Kamnewa 2007).</p>

Source: O'Brien, 2010

Although all countries have land tenure legislations, the implementation of the reforms remain partial or are confronted to major obstacles.

2.2.4 Critique of land reform processes in Southern Africa

Empirical evidence from many parts of Africa shows that the picture is often more complex than the linear process described by the “evolutionary theory of land rights” and that titling alone will not solve all the problems linked to land tenure insecurity. Experience has shown that merely titling land does not necessarily mean that there will be increased investment on the land. A lot of things can still go wrong, for example land titling may cause a stampede for land by those in positions of power who then deprive the genuine beneficiaries for whom the policy had been designed.

Another key factor that hinders the successful implementation of land policies in Africa is the lack of resources- both financial and human. Most governments lack the personnel with the right kind of skills to implement the often donor driven acts or policies. Some of the government officials do not even understand the legislation. A case in point is the Communal Land Rights Act of South Africa. Some officials at the provincial level interviewed in the Department of Land Affairs which was tasked with implementing the legislation professed ignorance about most key aspects of the law. Additionally, the Chief Director of the department also highlighted the fact that the money set aside in the national budget for this process was a gross underestimate, partly due to incorrect calculations from officials within the Department itself, but also because there was not enough money in the fiscus to allocate to the implementation of this law.⁵

Toulmin (2008) argues that in most developing countries, central governments have neither the capacity nor the local knowledge to implement a fair national land registration system that would regulate communal land use in a formalized manner. She recommends support to local institutions to undertake intermediate forms of land registration as a more effective way, with checks and balances on potential abuse by local chiefs and elites to the detriment of the users of communal resources.

⁵ Discussion with Vuyi Nxasana, Chief Director Department of Land Affairs.

Monitoring and evaluation of the implementation progress of land reform policies seldom takes place in most African countries. Hence, there is no self correcting mechanism where initial attempts prove to be unworkable. In some countries, Zimbabwe for example, there has been an attempt to carry out a land audit after the fast track land reform programme but lack of funds has put paid to this initiative for now (Economic Commission for Africa, 2004).

Lastly, linked to the latter, several cases show that tenure reform is still not an autonomous and inclusive process. Most land polices tend to favour a decentralized system of implementation i.e. through provincial or district structures. However, due to financial constraints and a lack of political will in most instances, this rarely happens in practice. Under pressure from various interested parties- whether it be international donor agencies, Western governments or political expedience, most African governments have glossed over the consultation phase of policy formulation, leaving civil society and the population at large feeling short changed when the final law is presented to them. It was the case with CLaRA.

2.2.5 The Making of Land Tenure Policies

There was a time when land was seen as an inexhaustible asset in Africa. However, over the years, population growth and the emergence of capitalist societies through colonialism created intense competition for land resources in urban and peri-urban areas and in high value agricultural areas (Toulmin, 2008). Consequently, most liberal capitalist policy frameworks view land as a market commodity rather than as a public good. Resultantly, customary land tenure has come under increasing pressure from proponents of land titling and property rights. However, land policy formulation does not take place free of influence. The legacy of colonial land policies, the development path chosen after independence, the role of donor organisations and the influence of Western governments are all critical in shaping land policies in the developing world and primarily in Africa (Alden and Anseeuw, 2009).

An important aspect of policy formulation is that it should be participatory to be acceptable to the general population or community. The credibility and legitimacy of a policy can only be enhanced through participation by those who will be affected by its implementation. However, the reality is different from this ideal scenario. Most

governments will diligently go through the public consultation process but more often than not, the resultant policy positions seem to reflect the goals and objectives of the state and not the people who were consulted during the “public consultation process.”

There are striking similarities in land policy formulation on the African continent. Firstly, the State always plays a dominant role in land policy formulation, often setting the agenda of what is to be discussed and what not to discuss. Secondly, civil society and NGO groupings almost always advocate for a more decentralized and participatory approach to land policy formulation. Lastly, there is a heavy reliance on donor funding for both the policy formulation and implementation processes.

Consequently, the most dominant method used in the making of public land policy in Africa has been the use of state organs to produce land policy and legal documents. A key feature of land policies in Africa is that the state has always had an overriding interest in access, control and management of rural land, irrespective of the tenure category under which it is held or owned. The parliamentary mode is deemed participatory on the basis of representation of the people by their Parliament members (Economic Commission for Africa, 2004).

In recent years, NGOs have emerged as a powerful force lobbying for access to land in Africa. There is a general recognition by NGOs that the structural causes of poverty in the communities in which they work is lack of access to land as the means of social and economic reproduction. At different forums, NGOs have argued for the land rights of the people and this has forced governments to put issues of land on the agenda. In some countries, legislative debate was set in motion through the drafting of Bills for discussion with and lobbying by interested parties, including NGOs (Economic Commission for Africa, 2004).

Another approach to making of public land policy in Africa has been to rely on expert panels, task forces, investigating teams, or comprehensive commissions of inquiry. In the majority of cases, land policy development and consultation processes have been undertaken within short periods of time. The reports of the various Commissions have often provided the background material for the development of land policies. This was the case with the Presidential Commission of Inquiry on Land

Policy Reforms in Malawi, the Land Commission of Tanzania, and the Land Tenure Commission of Zimbabwe. Input by locals into these policy documents was received through various means that included limited public hearing, workshops and conferences (Economic Commission for Africa, 2004).

Therefore, this case-study on CLaRA's development process is important. Indeed, as emphasized by the department of Land Affairs, CLaRA's development was proclaimed to be innovative and entirely inclusive of the different stakeholders. The analysis of CLaRA's development process will thus allow us to draw conclusions (positive or challenges to be addressed) on more sustainable policy development processes.

2.3 PUBLIC POLICY ANALYSIS

2.3.1 Public Policy Analysis and the Advocacy Coalition Framework to Analyze CLaRA

There are two broad categories of models of public policy- rational models and process models. The first subsection will detail both of them in a broad way. However, as the project analyzes the "participatory process" at a national level during the development of CLaRA, the focus of this thesis is on the process models, and more particularly on the Advocacy Coalition Framework (ACF). This will be detailed in the second subsection.

2.3.2 Public Policy Analysis Theories

A first model of public policy analysis is interchangeably called the linear or rational model. This model outlines policy-making as a problem-solving process which is rational, sequential and analytical. According to this model, decisions are made in a series of phases (Sutton, 1999):

- Recognising and defining the nature of the issue to be dealt with
- Identifying possible courses of action to deal with the issue
- Weighing up the advantages and disadvantages of each of these alternatives
- Choosing the option which offers the best solution implementing the policy
- Possibly evaluating the outcome

This model assumes that policy makers approach the issues rationally, going through each logical stage of the process, and carefully considering all relevant information. If policies do not achieve what they are intended to achieve, blame is often not laid on the policy itself, but rather on political or managerial failure in implementing it (Juma and Clarke, 1995). Failure can be blamed on a lack of political will, poor management or shortage of resources, for example. Several theories form part of this rational model of public policy analysis (for a more extensive list, See Muyanga and Anseeuw, 2006).

Rational choice theory

The rational choice theory assumes that people know what is in their self interest and act accordingly, or at the very least competition will weed out those who make incorrect choices and reward those who make correct choices (Grindle, 1999 in Muyanga and Anseeuw, 2007). In seeking to maximize utility, political actors are assumed to act in a rational manner. Voters are assumed to vote for political parties or political programs that will maximize their self interest. Since politicians and political parties are interested in securing a longer stay in office than a shorter stay, the interest of voters are particularly important in rational choice theory because they constrain the choices available to politicians and compel them to make decisions that are geared toward electoral gains.

Policy science/Rational decision making theories

The focus of policy science is on the use of scientific analysis in the policy process. Policy analysis, professionalism, expertise and evaluative research are considered to be important aspects in policy formulation. The policy science theory is based on the logic that the use of scientific knowledge and expertise will enable decision makers to make rational choices during the policy process. This theory has been criticized for discouraging discussion by citizens due to the over reliance on scientific knowledge. This creates alienation and low levels of citizen participation as they do not possess the required scientific knowledge.

Public choice theory

Public choice theory contends that markets always outperform government and that the public sector should be strictly limited to the few tasks that public choice theory

believes it can perform effectively (Schneider and Ingram, 1997 in Muyanga and Anseeuw, 2007). Markets are viewed as operating in a voluntary manner, where any exchanges occur free of coercion. On the other hand public policy is seen as being more coercive, implying that the only role for public policy is to provide those goods which the private markets cannot deliver. Public choice theorists point to the downsizing of governments, deregulation and privatization as examples of the influence of public choice on real world politics.

Critical theory

Critical theorists contend that public policy in general has led to the disempowerment of citizens and created more inequalities in power, wealth and status. Additionally, public policy encourages a widespread withdrawal of citizens from political participation. Public policy is perceived as being more elitist than commonly acknowledged. Critical theory challenges the notion that scientific knowledge is superior to other forms of knowledge. Unlike public choice and pluralist theories whose goal is to produce new knowledge and unlike policy science whose goal is to improve public policy, the goal of critical theory is to produce social change that will empower, enlighten and emancipate all people (Muyanga and Anseeuw, 2007). This theory argues that a less prominent role for politics and politicians in the policy process will produce a better outcome since policy-makers have interest which could lead them to conceal important findings and exaggerate other less important findings. This theory introduces the need for a participatory policy process.

Statism

Political institutions are taken as the basic units of analysis in statism theory. The state is taken to be the leading institution in society, leading the way in all political processes. The state dominates all other institutions' and can come up and implement its own objectives without undue influence from other quarters. All knowledge and expertise rests with the State.

There is much evidence to suggest that this model is far from reality – and is certainly not applicable in this case study, endeavouring to analyse CLaRA's development process. There has been an ongoing debate whether policy-making is a rational, linear process or a more chaotic procedure, dominated by political, practical and socio-cultural forces (Sutton, 1999). For challengers of the linear

approach, policy implementation is an ongoing, non-linear process (Grindle and Thomas, 1991). Various models have been developed to explain such policy processes – most of them using elements/instruments borrowed from political science and sociological literature. Although some of these theories put more emphasis on ‘narratives and discourses’, others on ‘interest groups, power and authority’, their common point is the focus on an ‘actor-perspective’, accentuating the need to take into account the opinions of individuals and social groups (Sutton, 1999). According to these approaches to public policy analysis, it requires consensus building, participation of key stakeholders, conflict resolution, compromise, contingency planning, resource mobilization and adaptation.

Some examples of process models are:

Pluralist theories

The pluralist theory emphasizes the importance of interest groups in the public policy making process. It posits that society in general is made up of different interest groups which form to represent the interests of their members. This theory assumes political equality in a society, freedom of political participation of groups and individuals and a responsible state whose power is checked by a strong civil society and private market economy participants. Strong institutions are seen as necessary to limit the power of government and to hold government accountable. This ensures that government is responsive to public priorities and not necessarily dominated by strong, individual interest groups.

Class theory

Class theory argues for group or collective action. Class is seen as groups differentiated in certain ways such as common interest groups or groups sharing the same characteristics such as landlessness. In class theory, a capitalist society’s public policy is a mere reflection of the interests of the capitalist class- the structure of capitalism requiring the State to perform certain functions to ensure that capitalism survives. Critics of class theory question the existence in real life of the simplistic, dichotomous definition of class. Also, non-economic factors seem to be ignored in the literature on class theory.

Neo-institutionalism

Institutions are considered to supply actors with certain behavioral norms as opposed to institutions themselves causing particular actions. Institutions influence actors by creating a constrained political space within which actors operate. Therefore, the policy options available to the actors are limited to those that the institutions determine. The individual interests of actors are still there but are severely influenced by institutional structures, norms and rules through which they are pursued. Pluralists understand institutions as “arenas where interest groups politics play itself out” and that institutions do not exercise special role in shaping policy outcomes, the neo-institutionalists, in contrast, seek to show how institutions actually structure the play of the game, often in ways hidden from view (Muyanga and Anseeuw, 2007).

Policy networks

The term ‘network’ is frequently used to describe clusters of different kinds of actor who are linked together in political, social or economic life. Networks may be loosely structured but still capable of spreading information or engaging in collective action. Academic work on networks is often vague or abstract, or both (see Peterson and O’Toole Jr., 2001). But growing interest in network forms of governance reflects how modern society, culture and economy are all increasingly products of relations involving mutuality and interdependence, as opposed to hierarchy and independence. Linkages between organizations, rather than organizations themselves, have become the central analytical focus for many social scientists (Peterson, 2003).

The term policy network connotes ‘a cluster of actors, each of which has an interest, or “stake” in a given policy sector and the capacity to help determine policy success or failure’ (Peterson and Bomberg, 1999). Analysts of modern governance frequently seek to explain policy outcomes by investigating how networks, which facilitate bargaining between stakeholders over policy design and detail, are structured in a particular sector (Peterson, 2003).

2.3.3 Advocacy Coalition Framework

The advocacy coalition framework (ACF) developed by Paul Sabatier in the early 1980s, is part of the process public policy analysis models. It sought to bring together the progressive attributes of the top-down and bottom-up approaches to policy implementation. Additionally, the ACF enhanced the use of technical information in the process of policy formulation to make it more grounded in fact rather than subjective judgment. The use of technical information would lead to a greater understanding of the issues affecting the identification of a policy problem, the policy formulation to address the identified deficiency, policy implementation and policy evaluation.

According to Sabatier (1998) the ACF is founded on five main principles:

- Theories of the policy process need to address the role that technical information concerning the magnitude and facets of the problem, its causes, and the probable impacts (including distributional impacts) of various solutions play in that process. This is what the vast majority of discussion among policy elites is about and, assuming a modicum of rationality on their part, it must be important.
- Understanding the process of policy change - and the role of technical information therein - requires a time perspective of a decade or more. Such a time-span is also necessary to get a reasonable assessment of policy impacts.
- The most useful unit of analysis for understanding the overall policy process in modern industrial societies is not any specific governmental organization or program but rather a policy subsystem or domain. A subsystem consists of actors from a variety of public and private organizations who are actively concerned with a policy problem or issue, such as agriculture, and who regularly seek to influence public policy in that domain. In most policy subsystems there will be numerous laws and policy initiatives at any given point in time.

- In virtually all domains, policy subsystems will involve actors from several levels of government within a country and, increasingly, from international organizations and other countries.
- Public policy encompasses value systems of the different actors, the actors' perceptions of causal relationships, perceptions on the gravity of the policy issue and perceptions about the effectiveness of different policy options. This allows society to evaluate the influence of various actors over time.

In every subsystem, the ACF asserts that the various actors form groups or "advocacy coalitions." Each coalition has actors from the government, private sector and civil society. Members of a coalition share certain beliefs about a particular policy issue and constantly engage in some coordinated activities to try and influence public policy through information gathered by researchers who are part of the coalition.

The value systems of each coalition are organized into 3 tier structure comprising deep core, policy core and secondary aspects of the value systems.

At the highest level, the deep core of the shared value system includes the basic normative values, such as the relative valuation of individual property rights gained under years of apartheid versus the righting of social injustices of the past.

At the next level are the policy core beliefs which represent the coalition's causal perceptions across the policy arena. These represent important value priorities such as the relative importance of commercial agricultural development versus redistributing land to the landless majority. Policy core values are also basic perceptions about the general gravity of the problem, for example, how serious a problem is landlessness in South Africa. What caused the landlessness in the first instance and what should be done to redress this?

Actors sharing the mentality around these policy core values will naturally form one "advocacy coalition framework." The ACF regards the policy core beliefs as the major building block of coalitions because they represent the basic normative and empirical values within a particular policy arena.

At the lowest level are secondary aspects of a coalition's value system. The secondary aspects encompass a larger set of values regarding the gravity of the policy issue, policy alternatives and preferences.

Generally, deep core beliefs are seen as resistant to change. Policy beliefs are not as sacrosanct as deep core beliefs, although they are generally considered normative and difficult to adjust easily. The empirical nature of policy beliefs means that over time they can change if new evidence is presented that challenges a long held belief- this takes time. Values in the secondary aspects are more readily adjusted in light of new data, experience, or changing strategic considerations.

Over time, coalitions adopt various strategies or game-plans in an attempt to influence or change the attitude and behaviour of different government departments as a means to realizing their public policy objectives. Strategies from the different coalitions will inevitably come into conflict at some point in time. These are normally mediated by a different group of actors called policy brokers whose major objective is to find an acceptable compromise that will reduce the conflict (Sabatier, 1998).

Given the entrenchment of a particular coalition's policy core beliefs, the ACF states that these will not change as long as the dominant coalition which instituted that policy remains in power (although the secondary aspects of those programs may well change) (Sabatier, 1998). ACF further asserts that the only way to change the policy core beliefs of government policy, where the dominant coalition subsists, is through some exogenous shock to the subsystem which will significantly change the distribution of political resources or the views of coalitions in a particular subsystem.

2.4 CONCLUSION

As seen in the first part of the chapter, land tenure reform is not an exact science. Although there is an agreement on the necessity of securing of land tenure, there is no consensus on how to do so. There is no ideal solution for each situation. The development and the implementation of land is related to the country's history, the present political situation, its agrarian and land structures.

The policy to implement, as is the case with CLaRA in South Africa, is thus dependent on a development process taking into consideration these aspects. Analyzing the policy will thus be dependent on process model based public analyses. Indeed, the ACF will allow us to analyze how CLaRA's development took into consideration the different stakeholders and their positions, and how this shaped the contents of the policy itself. The methodology applied for this thesis project was based on the ACF.

CHAPTER 3

RESEARCH METHODOLOGY AND CLARA'S MAIN FEATURES

3.1 CONCEPTUAL FRAMEWORK GUIDING METHODOLOGY

Being aware of the importance to integrate grassroots views and stances in a study focusing on inclusiveness and participation, the study made a distinction between public policy making at national and local levels. As such, the overall study was implemented at two levels, focusing on the following research objects:

- The unrolling of the processes at national level that permitted the development and validation of CLaRA,
- The integration of local positions within the policy development process, i.e. analyse the positions at local level (communities and local government) and their participation (or non-participation) in the processes at national level. Local level in this case refers to the communities that made submissions to the portfolio committee during parliamentary hearings.

This study is based on the findings of the processes at a national level. To do so, the research is a description of the evolution of contents, but not a sociology of public policy, although the individual actors were taken as entry points (actors' engagement with the CLaRA development process, contrasts and changes in institutional discourses, etc.), an in-depth sociology of the organisations/actors was not performed. For this the ACF of Sabatier and Jenkins-Smith was used, because it allows for the identification of the different actors engaged and enables us to better understand the positions/ideas/power relations of these various actors. As such, this research does represent an analysis of decision-making, but not at the level of the specific organisations/actors engaged, but at the policy development level (where the various actors presented their different positions and strategies).

3.2 RESEARCH DESIGN AND METHODS

The selection of the type of study to undertake was based on the nature of the research question, the amount of knowledge already available about the research

question and the resources available for the study (Varkevisser *et al*, 2003). Table 3.1 below outlines the different types of study depending on the nature of the research question.

Table 3.1: Classification of investigation according to research strategies

Knowledge of the problem	Type of research question	Type of study
Knowing that a problem exists but knowing little about its characteristics or causes	<ul style="list-style-type: none"> • What is the nature /magnitude of the problem? • Who is affected and how? • What do they know , believe about the problem & its causes/ 	Exploratory studies or descriptive studies: <ul style="list-style-type: none"> • Descriptive case studies • Cross sectional studies
Suspecting certain factors contribute to the problem	<ul style="list-style-type: none"> • Are certain factors indeed associated with the problem? (e.g. is low education related to low productivity related to quality) 	Analytical (comparative) studies: <ul style="list-style-type: none"> • Cross-sectional comparative studies • Case-control studies • Cohort studies
Having established that certain factors are associated with the problem: desiring to establish the extent to which a particular factor causes or contributes to the problem	<ul style="list-style-type: none"> • What is the cause of the problem? • Will the removal of a particular factor prevent or reduce the problem? (e.g. providing training) 	<ul style="list-style-type: none"> • Cohort studies • Experimental or quasi-experimental studies
Having sufficient knowledge about causes(s) to develop and assess an intervention that would prevent, control or solve the problem	<ul style="list-style-type: none"> • What is the effect of a particular intervention/strategy? (e.g. being exposed to a certain training program) • Which of 2 or more alternative strategies is more effective and or efficient 	Experimental or quasi-experimental studies

Source: Adapted from Varkevisser et al., 2003

Analysis of the development process of the CLaRA at a national level used empirical research methodologies. Specifically, this was a case study research that looked at a particular case, that of the CLaRA of 2004.

3.2.1 Description of Overall Research Design

Empirical research was used in this study. Empirical studies refer to research in which the researcher collects new data irrespective of the data collection method used. Primary (textual) and secondary data were mainly used in this study. Primary data was collected through interviews with stakeholders involved (or not) in the formulation of the CLaRA. These included stakeholders from government, civil society, private sector and politicians across the political divide.

The approach to this research was appropriate because the study sought to better understand the processes involved in crafting the CLaRA i.e. the actors involved, their positions, how they ensured that their positions were heard and the extent to which these positions were taken account of in the final drafting of the CLaRA. Therefore, the study sought to analyse the process of drafting this piece of legislation. Interviews were used to stimulate discussions with the respondents to enable the researcher to obtain as much information as possible from the actors involved in formulating this legislation.

This study was an empirical analytical case study which sought to understand and describe the process of drafting the CLaRA. At the national level, the study characterised the positions defended by each actor / stakeholder and analysed the development of the CLaRA through:

Focusing on the analysis of the modalities implemented to obtain compromises through a characterisation of the forms of governance and national political debate (characterisation of the various actors / stakeholders engaged in national level debates, analysis of the strategies of these actors in the development of public policy at national level, etc).

A detailed analysis of the different texts (green and white papers) developed at each phase of the policy development and implementation processes will be carried out. This will be conducted through an analysis of the positioning of different actors at national level, through the use of different political economy approaches and tools as well as a cognitive analysis of public policy.

A detailed analysis of the various versions of the communal land rights bill until it became the final Act. Analysis was done of the changes between drafts and the possible causes of these changes in terms of strategies of the actors or power relations amongst actors.

3.2.2 Sampling

The study targeted the CLaRA specifically as a case study of understanding land policy development in South Africa. Policymakers and influencers of policy at the national level such as Ministers, members of parliament, portfolio committee members, land NGOs, lobby groups, traditional chiefs' councils were some of the national actors who were identified.

An analysis of the deliberations of the portfolio committee on land affairs also gave an insight of the actors involved in supporting or opposing the Bill when it was being debated in Parliament. The study interviewed all these actors to better understand their involvement in the whole policy formulation process.

The research was not based on a fixed population, but on all stakeholders engaged or excluded in CLaRA's development process.

3.2.3 Data Collection

Primary (textual), secondary, verbal and observational data were mainly collected during this study. Data collection was collected according to several modalities:

- Secondary data was obtained from several studies related to CLaRA carried out by academic and civil society institutions;
- Secondary data was also gathered through legal documents,
- Data was also collected from the proceedings of the portfolio committee proceedings that were recorded by the portfolio committee clerk.
- The main data collection methodology that was used was formal discussions/interviews with the identified key actors. This was the major source of primary data.

3.3 SURVEY TOOLS

The primary data collection tool was an open ended questionnaire. This tool was deemed to be the most appropriate to allow respondents to express themselves freely due to the sensitivity of the topic under discussion and also that a court case was imminent some respondents might not have been forthcoming if a closed questionnaire had been used.

Additionally, given that the vast majority of respondents were state officials or politicians and civil society, the research team were of the view that these respondents would not have the patience for a detailed questionnaire or form filling when they did not see an immediate benefit to this exercise. Another major reason for the use of open ended questionnaires was to minimize the instances of no-responses due to the sensitivity of the topic at the time of the research.

3.3.1 Questionnaire Structure

As an enumeration tool, the study questionnaire was designed to capture the following information from all respondents:

- The actor's position in society i.e. government, civil society, political party etc
- The actor's involvement with land tenure reform in South Africa in general
- The actor's involvement with land tenure reform specifically dealing with the Land Rights Bill and the Communal Land Rights Bill
- The actor's participation in the policy development process to date
- The actor's view on the participatory nature of the policy development process
- The actor's submissions to parliamentary committees (if any) and the reasons for their particular position

3.4 CLaRA'S MAIN FEATURES

After the Communal Land Rights Bill was issued for comment in August 2002, there were 11 drafts submitted before President Mbeki finally signed and thus enacted the Communal Land Rights Act 11 of 2004. The need for communal land tenure reform is not a symbolic exercise arising from promises made in the Constitution;

logistically, and from a development standpoint, the DLA posits that reform of communal land tenure is necessary to address issues of:

- overcrowding on communal land,
- under development in the communal areas,
- lack of legally secure tenure rights,
- conflicting rights in land,
- gender inequalities and inequities in the ownership and inheritance of land,
- lack of good and accountable governance around land matters, and
- chaotic land administration systems occasioned by numerous disparate laws and administrative systems (DLA, 2004).

3.4.1 CLaRA's Principles

As such, the CLaRA was designed by the DLA with the objective of providing “... *legal security of tenure by transferring communal land ... to communities, or by awarding comparable address*” (DLA, 2004a). This means that eligible applicants, either communities or individuals depending on the nature of the claim, will be granted rights in or to land that they beneficially occupy;⁶ where transfer of the land in question is not possible, applicants will be awarded comparable redress in the form of land of equal value, financial compensation or a combination of alternative land and financial compensation. CLaRA seeks to do this by transforming an *old order right*, a tenure or other right in communal land which is formal or informal, registered or not derived from or recognised by law, including statutory law, practice or usage, into a *new order right*, a tenure or other right in communal or other land which has been confirmed, converted conferred or validated by the Minister in terms of the CLaRA (DLA, 2004a). This conversion of old to new order rights is “*the demonstration of a new beginning*,” according to the DLA, as these new order rights are “...*not only secure but they are also capable of being registered in the name of a person or a community*” (DLA, 2004a).

Section 2 of the CLaRA describes the land that is eligible to be applied for under its guidelines. These guidelines state:

⁶ Beneficial occupation means “*the occupation of land by a person for a continuous period of not less than five years prior to 31 December 1997 as if that person was the owner, without force, openly and without the permission of the owner*” (CLaRA, 2004a).

“2. (1) *This Act applies to:*

(a) *State land which is beneficially occupied and State land which-*

- (i) *at any time vested in a government contemplated in the Self-governing Territories Constitution Act [21 of] 1971, before its repeal or of the Republics of Transkei, Bophuthatswana, Venda or Ciskei, or in the South African Development Trust established by section 4 of the Development Trust and Land Act [18 of] 1936, but not land which vested in the former South African Development Trust and which has been disposed of in terms of the State Land Disposal Act [48 of] 1961;*
- (ii) *was listed in the schedules of the Black Land Act [27 of] 1913, before its repeal or the schedule of released areas in terms of the Development Trust and Land Act [18 of] 1936, before its repeal;*

(b) *land to which the KwaZulu-Natal Ingonyama Trust Act [3] of 1994 applies, to the extent provided for in Chapter 9 of this Act;*

(c) *land acquired by or for a community whether registered in its name or not; and*

(d) *any other land, including land which provides equitable access to land to a community as contemplated in section 25(5) of the Constitution.”*

The land contemplated in this excerpt is land that is held in trust by the State, on behalf of the communities that reside on and use it. Under the CLaRA, the land transferred will go to the community in a Deed of Transfer (with each member of the community receiving a Deed of Communal Land Rights) or to individuals within the community in the form of a Deed of Transfer. How the land is held depends on the community rules, drafted by the community.

This legacy of State custodianship is a poignant reminder of apartheid logic and control, thus the CLaRA is presented to bring an end to this practice. To accomplish this, the DLA presents the CLaRA, which they (the DLA) claim

...democratises the system of land administration by taking an eclectic approach to institutional development...[which is] evident in the CLaRA's attempt to strike a balance between the African norms and traditions and the democratic ethos and practice in the administration of communal land (DLA, 2004).

In addition to the institutions provided for under the CLaRA, the types of tenure that communities can employ under its provisions also reflect of the amalgamation of customary African practices (secure communal tenure) and more individual forms of secure tenure. The three tenure options provided in the CLaRA are:

- The land can be held communally in title in the name of the community and the individual members of the community will be granted registerable Deeds of Communal Land Rights for the land they occupy and use⁷. This deed is not a title deed but it's a legal document that confirms a person's or family's or a household's exclusive occupation and use of the land allocated to them in terms of the community's community rules. The holders of such a deed will be able to convert it into freehold ownership, subject to the consent of the community.
- Communal Land can also be held in terms of freehold ownership by individuals⁸.
- A hybrid system is also possible, where part of the communal land is held communally and part of the land is held in ownership by members of the community⁹.

How a community intends to own and administer their land is determined in the community rules it drafts. To administer these tenure options, the CLaRA provides for the eclectic institutions mentioned above and developed in the subsequent section.

3.4.2 CLaRA's Institutions

The eclectic approach to institutions in the Communal Land Rights Act calls for the establishment of two integral institutions: the Land Administration Committee (LAC) at local level (s.21-24), and the Land Rights Board (LRB) at regional level (s.25-30). These bodies act at their respective levels to monitor the access and use of land allocated to the community, among other things developed below.

⁷ Section 18 (3) a (CLARA, 2004a)

⁸ Section 18 (3) b

⁹ Section 18 (3) c

The LAC

The Land Administration Committee is comprised at community level and administers the communal land on its behalf. In a community where there is no traditional council, the LAC will be elected democratically according to the community rules and to the Regulations of the CLaRA. The general criteria for the LAC, listed in the CLaRA and its Regulations, are: members must be 18 years or older; one third of the membership must be women and other vulnerable community members and their interests must be represented; and the chairperson, deputy chairperson, secretary and treasurer must be elected. A single term for members of the LAC cannot exceed five years, and each member can only serve two successive terms. In a community with a recognised traditional council¹⁰, there must be a democratic decision made whether the traditional council will perform the functions of the LAC, or “...if the community will establish a land administration committee which is separate and distinct from the recognised traditional council” (DLA, 2007). Where a traditional council is democratically allocated the role of LAC, they must act in one capacity at a time, i.e. they cannot be representing both the traditional council and the LAC simultaneously. The option to have a traditional council act as the LAC has been fodder for intense debate, as will be discussed in subsequent sections.

The functions of the LAC are outlined in sections 21-24 of CLaRA and in its Regulations. In short, the LAC is responsible for all aspects of community land administration, including awarding and registering new order rights to community members; maintaining a community land register that accounts for land transactions in the community; documentation of all LAC activities and meetings; safeguarding and promoting community interests in their land, including inter and intra community cooperation regarding community land and the resolution of community land disputes; and for liaising with the municipality and the Land Rights Board about service delivery and development on community land. All aspects of the LAC’s activities are subject to the community; these rules can assign more roles and responsibilities to the LAC, if necessary. The LAC must call meetings and make news about communal land known to the community they represent.

¹⁰ A recognised traditional council is a re-constituted traditional authority in alignment with the Constitution and section 3 of the Traditional Leadership and Governance Framework Act 41 of 2003 (TLGFA).

Ultimately, the LAC is accountable to the community and to the Land Rights Board (LRB) for their actions. The LRB, DLA, provincial MEC's of agriculture and local government and the municipality(ies) in which the community resides are all considered to be interested parties in the LAC activities and, as such, can each appoint a non-voting member to the LAC as liaisons.

The Land Rights Board

The Land Rights Board (LRB) is a body that is formed and disestablished by the Minister of Land Affairs. The Minister, taking into account the number of communities and communal land areas, decides the area of jurisdiction of an LRB. The Minister appoints the members of the LRB, who – as in the LAC – must be one-third women and whose term can last no longer than five years. When making these appointments, the Minister must include:

- one representative from each organ of state determined to be necessary;
- two members nominated by the Provincial House of Traditional Leaders, who have jurisdiction in the area of the particular LRB;
- one member nominated by the commercial or industrial sector; and
- seven members from the affected communities, among whom the interests of child-headed households, persons with disabilities, youth, and female-headed households must be represented (see s. 26 of CLaRA for more details).

The LRB, in addition to monitoring the constitutionality and application of community rules by the LAC's of individual communities, acts as an advisor to the Minister and to the communities on issues of sustainable land ownership, use and development. Further, it must liaise with the spheres of government, civil society and institutions to enable sustainable development and service delivery on the communal land in its jurisdiction.

In KwaZulu-Natal, the Ingonyama Land Trust, formed by the KwaZulu-Natal Ingonyama Land Trust Act 3 of 1994, will act as the LRB. When CLaRA is implemented, the current members of the Ingonyama Land rights Board will be permitted to sit in office for the remainder of their term; however, once the terms of the respective members expire, the Ingonyama LRB must be constituted in

accordance with the CLaRA (and the Constitution), with the exception of the Ministerial appointments. When the KwaZulu-Natal Ingonyama Land Trust Act is inconsistent with CLaRA, the latter will prevail.

3.4.3 The CLaRA Process

CLaRA can be invoked through application by a community whose land meets the criteria listed in CLaRA s.1 (a-c), or it can be enacted by the Minister of Land Affairs, who can publish notice of land contemplated in section 1(d) in the government *Gazette*; in this notification s/he must specify which provisions of this Act apply to the land. Once the CLaRA is invoked, there are simultaneous activities to be carried out by the Minister and the government, as well as by the applicant community. The Land Rights Enquiry (LRE) and the establishment of community rules are tasks that must be undertaken by the Minister and the community respectively.

The LRE

The CLaRA process begins with a land audit implemented by the Minister of Land Affairs. This land audit, called a Land Rights Enquiry (LRE), determines the validity of the claim (i.e. is the land really beneficially occupied by the claimants who possess old order rights?) and to determine the feasibility of the claim (i.e. if the claim is valid, if it is in the public interest to award land rights, comparable redress (financial or alternative land) or any combination of these options).

To gather the necessary information (including the above rendered or any other the Minister deems necessary to inform his/her determination) the Minister appoints an enquirer. The enquirer can be an officer from the DLA, an external party or a team made up of both the former and the latter. The selection criteria for this important position in the CLaRA are noted in section 14 of the CLaRA, which states, in summary, that the enquirer must possess high-levels of integrity and a commitment to equity; these characteristics must be matched with skills in facilitation, dispute resolution, research, and expertise in land and related topics, development planning, surveying and land registration, and the law.

To begin and LRE, the Minister is required to provide the public with notice of the land and communities in question and must provide the contact details of the

enquirer(s). In this notice the Minister will provide the purpose and scope of the enquiry and invite any interested parties to attend a meeting about the enquiry. This meeting will provide more details about the intention and potential outcomes of the LRE.

Through the LRE process, qualitative information gathered during meetings and interviews allows the enquirer to establish the stakeholders, the relationship of the current land and claim with any other land reform programme, the municipal obligations to the community, the community's relationship with their traditional council and whether community rules, as prescribed by the CLaRA have been established and, if so, what their contents are. In addition to this qualitative information, the enquirer must survey the land in question. This survey establishes the outer boundaries of the community, and informs the enquirer of all interested parties through a deeds search.

Once the LRE is completed, the enquirer submits a report to the Minister. Based on this report, the Minister must make a determination on the land claim. First, s/he needs to ascertain from the report if the claim falls under the criteria set by CLaRA and, therefore, if the claim should proceed. Then s/he must measure the public interest in terms awarding the rights in or to land or the need to award comparable redress in one of the three forms previously described (alternative land, financial compensation, or a combination of the two).

Community Rules

All communities subject to the CLaRA must draft community rules that characterise their community, its land and how they plan to use and administer that land. To begin the process of drafting community rules, the community must notify the land rights enquirer and LRB responsible for its jurisdiction; these parties will assist by convening a community meeting to this end. If the community needs assistance in drafting their rules, they can apply to the Minister who will appoint an officer of the DLA to assist them. The land rights enquirer must attend all meetings concerning the community rules and document these meetings.

The community members must decide upon the content of the rules in an informed and democratic manner during these meetings, although basic content guidelines

are provided in the CLaRA regulations. At minimum, the community rules must cover the administration and use of communal land, the form of tenure to be applied, what new order rights entail in the particular community, who is a community member (including acquisition and disposal of membership), the LAC's functions, in accordance with the Act, procedural rules for the LAC, decision making and dispute resolution processes, land identification, and the management of finances of the community relating to land (CLaRA Regulations Annexure D, 2007). All rules must be compliant with the CLaRA and with the Constitution and are subject to any other applicable law (CLaRA s.19 (1)).

Once the community decides that the rules are complete, they must be forwarded in writing and with the signature of the meeting's chairperson – within 14 days of adoption by the community – to the LRB responsible for the community. The rules must be read and approved by the Director-General of the LRB; if the Director-General finds the rules to be insufficient or inappropriate, s/he must return the rules to the community with comments and instructions for suitable amendments. Once the Director-General of the LRB accepts the community rules, s/he is to respond in writing and refer the rules and any supporting documents to the Registry Office to be officially registered and entered into the public domain.

Once the community rules are complete and approved by the Director-General of the LRB, the community is then a juristic person in terms of s.4 (1) of the CLaRA and is eligible to receive rights in or to land. Whether this happens or not depends on the determination of the Minister, based on the LRE report.

3.4.4 CLaRA's Key Achievements to Date

Once enacted, the years 2004 and 2005 were dedicated to explaining and justifying CLaRA. As such, DLA's Tenure Newsletter published in July 2004 addressed concerns from communities and critics and defended CLaRA. In addition, the DLA responded to an article published about CLaRA and pointed out several misunderstandings. As such, Minister Didiza reassured that land would be transferred to communities as owners and not to traditional leaders and the Director of DLA's Tenure Directorate, Dr. Sibanda responded that the communities have a

choice for LAC and that traditional leadership is an option, but it is the democratic right of the people in the community to choose.

While admitting that CLaRA's implementation will take more than 15 years, the implementation date was set for June 2005 in DLA's December newsletter. However, there was still confusion among community members, civil society and traditional leaders regarding what DLA plans to do under CLaRA. It was during the National Land Summit, organised by the ANC and the SACP, held on July 27-31 2005, that rumours of activists' plan to legally challenge the CLaRA began circulating. Community members from homelands areas and civil society complained that communal land issues were not discussed in the tenure session and that they were very frustrated. The DLA only become aware in January 2006 of the plans to challenge the CLaRA. While collecting information about the challenge, the DLA would defend CLaRA as it was, and continued planning for its implementation. Being motivated to take CLaRA forward and to implement it under any circumstance, it published the Communal Land Rights Act National Implementation document on April 19th, about 10 days after the LRC had announced a Constitutional Court case to challenge CLaRA.

Several months of silence regarding CLaRA followed. This time was characterised – while CLaRA was awaiting its court case – by DLA preparing for implementation. As such it forged ahead and published its framework outlining implementation responsibilities and obstacles:

- CPIs were not working well, which could be linked to their design and establishment
- DLA had inadequate baseline data to plan the implementation of CLaRA. Baseline studies were subsequently implemented.
- Departmental capacities and coordination are not conducive to implementing CLaRA as a national programme.
- Estimated total costs of CLaRA implementation to be R8, 487, 732, 022.00, which was more than presently budgeted for.

On February 8 2008, DLA also published and gazetted the Draft Regulations for CLaRA. Comments were due on April 8 2008. In the meantime, on April 3 and 4, it organised consultation workshops at the overall level on the regulations with

Traditional Leaders and civil society in Durban. It also organised more local consultation workshops, but, however, these were implemented in a more secretive way and included mainly traditional leaders. Unfortunately since the Presidential elections were approaching rapidly (expected for April 2009), the consultation in KZN was cancelled and all legislative debates and processes were postponed in order not to cause any political instabilities and upheavals.

On October 14-17 2008, the first court hearing took place in CLaRA's constitutional challenge. Four communities (Kalkfontein, Makuleke, Makgobistad and Dixie) took part in the process.

3.5 UNDERSTANDING THE NATIONAL DEVELOPMENT PROCESS OF CLaRA

CLaRA was developed at both the national and local levels. The following section describes the development process at the national level, which was the focus of this study.

3.5.1 Reformulation of the Objectives at National Level

This part developed at the national level aims at:

- Describing the policy development processes and at detailing the unrolling of negotiations at national level that permitted the development and validation of CLaRA;
- the identification of the actors, their strategies, their power relations and at understanding of the interactions between the different categories of concerned actors at the national level;
- Assessing the impact the (new) policy development processes have on the content of public policies.

The efficiency, sustainability and innovation of public policies cannot be based on the simple participation of (formal and informal) actors because it assumes that there is a process of compromise at play that will ensure that all the actors' views are considered. Hence, within the context of broader policy development, it is important

to put participation and ‘games’ of the actors involved in the policy development process at the core of the analysis of the renovation of public policy making.

As such, the guiding principle is to reflect on the modalities of the development of renewed public policies, from a point of view of:

- their contents, as they will not represent “one-size-fits-all” or ‘given’ entities anymore but are ‘developed entities’ , including aspects of sustainability, efficiency and equity.
- their development processes, which are more open and engage a diversity of actors.

For the present project dealing analytically with policy issues, one implication from the above observations is to focus not only on conducting a high-quality, technical analysis (on tenure reform alternatives for example), but to develop a good understanding of the political context and processes of the problem. The latter is even more important considering that the policy analysis literature has long recognized that the effectiveness of technical and policy alternatives is often limited because of their inattention to politics (Jenkins-Smith, 1990; Radin, 2000).

As shown in the previous chapter, stakeholder analysis and the advocacy coalition framework help to understand the dynamics of a policy subsystem, mapping the activities of multiple stakeholders employing multiple strategies. It provides a useful conceptual framework that explains the stability and change of policies. It has a focus on the coalitions that share a set of normative and causal beliefs and often act in concert, and understands policy changes as the consequences of coalitions' competition to translate their ideas into official actions. It has thus a broader perspective than political feasibility analysis, which tends to focus on the probability of successfully implementing a particular policy alternative for a particular problem (Weimer and Vining, 2005). This broad perspective is important in this case of the analysis of the politics of communal land and CLARA’s development process, which is open seemingly to multiple participants and different levels, leaving opportunities for actors to confront each other during the policy development and implementation process.

3.5.2 Research Objectives at National Level and Methodology

To do so, the research was conducted through four major phases; each of them linked to different research methods.

- 1) The analysis of policy documents and secondary data sourced from previous studies that focused on CLaRA (at different levels).

Primary sources for the analysis of CLaRA and its policy processes were the different (draft) policy documents, gazetted or unpublished. In addition, although few have focussed on the policies around CLaRA, complementary information is available, particularly from i) academic literature on the implementation of CLaRA, the issues around CLaRA (Kariuki, 2003) and the democratisation and power relations in South Africa (Ntsebeza, 2005) and ii) media information mainly covering CLaRA's court case.

- 2) Description of the elaboration process that led to the drafting of CLaRA, including the different steps and phases and the actors engaged.

Although this was complemented through interviews, it was mainly realised through the review of secondary data such as the Departments of Land Affairs reports and updates, official communications and newspaper articles.

- 3) Analysis of the actors' (engaged and those not engaged¹¹) positions and strategies to bring their standpoint forward and be heard/retained

Analysing the positions necessitated in depth open interviews with the different actors, including questions on their views, the factors determining these views and their strategies to put forward their positions. The interviews were also complemented by the written contributions different actors had sent in during the consultation phases. An analysis of the deliberations of the portfolio committee on land affairs also gave an insight of the actors involved in supporting or opposing the Bill when it was being debated in Parliament.

¹¹ It might be that several actors were not engaged in the process. The fact of not being engaged in the process will influence the policy process and content. These actors, however, have to be included in the research, in order to understand the reasons for their non-participation and the impact the latter has on the policy itself.

- 4) Analysis of the impact of the processes on the content through linking the elaboration process and the positions of the different engaged actors to the evolution of the contents.

To link process and content, an in depth structural and textual analysis was done based on the different versions of the Bill and Act. This was also complemented by specific questions posed in open-ended questionnaires.

Besides the different versions of the Bill and Act and secondary information, this study was based on empirical data gathered through open interviews used to stimulate discussions with the respondents to enable the researcher to obtain as much information as possible from the actors involved in formulating this legislation. The target population for this study is thus the stakeholders involved in formulation of land policy at national level. But, as we assume in the hypotheses that CLaRA's development process was only inclusive in a certain way, the target population was not only the population effectively engaged in CLaRA's development, but also land protagonists and other stakeholders who had been left out of the process.

As such, since the objective is to analyse in detail the unfolding of the CLaRA process, an extensive (all-embracing) sample of respondents was used, including:

- all the protagonists identified during the CLaRA process,
- all the stakeholders who have been left out of the process.

The people engaged were identified through the description of the different phases of the CLaRA development process. Those excluded were identified through interviews of engaged and excluded persons/institutions. The extensiveness of the sample was verified, when none of the respondents identified additional stakeholders.

As detailed in Table 3.2, comprehensive interviews were conducted, including policymakers and (potential) influencers of policy at the national level such as Ministers, members of parliament, portfolio committee members, land NGOs, lobby groups and traditional chiefs' councils.

Table 3.2: Interviewed institutions and persons in the framework of unfolding of the CLaRA process at national level

National Government departments and institutions	National Department of Land Affairs (10x) National Department of Agriculture (2x) South Africa Commission on Human Rights (2x) Commission on gender equality (1x)
Provincial or local Government departments	Limpopo Department of Agriculture (3x)
Local municipalities	Fetakgomo Department of Agriculture (2x) Makapanstad Department of Agriculture (2x)
Tribal authorities	GaSelepe Tribal Authority (5x) Makapanstad Tribal Authority (3x) The Ingonyama Trust (1x) Congress of Traditional Leaders of South Africa (1x)
Political parties	ANC (3x) SACP (1x) DA (1x) NADECO (1x) IFP (1x)
Portfolio committee	Comprising all political parties represented in Parliament, chaired by ANC MP (2x)
Civil society-NGOs	AFRA (3x) Landless People's Movement (1x) Legal Resources Centre (2x) Nkuzi Development Agency (1x) OXFAM (1x) Rural Women's Movement (1x) Transvaal Rural Action Committee (TRAC) – Mpumalanga (1x) SPP (1x)
Trade Unions	COSATU (1x) National Union of Mineworkers (NUM) (1x)
Academic institutions specializing in land policy	PLAAS-University of Western Cape (1x) University of Pretoria (2x) Wits University (1x)
Affected communities in the former homelands	GaSelepe Makapanstad (linked to local level research – See hereafter)
Other	Maruleng and Bushbuckridge Economic Development Initiative (1x) Independent consultants (1x) Independent academics/students (1x)

Source: Author's research

In addition, a large number of original submissions and contributions to the CLaRA process were gathered and analysed. We received:

Traditional authorities: National House of Traditional Leaders, Congress of Traditional Leaders of South Africa, Royal Bafokeng Nation.

Unions – Commission: COSATU, NUM, Commission for Gender Equality, SA Human Rights Commission, South African Council of Churches.

Civil society – NGOs: AFRA, ANCRA, Joint Monitoring Committee on Improvement of Quality of Life and Status of Women, Legal Entity Assessment Project (LEAP), Legal Resources Centre (LRC), LPM, Masifunde, Nkuzi Development Agency, NLC, Rural Women’s Movement, TCOE, Transvaal Rural Action Committee (TRAC), TRALSO, Umbumbano Lwabesifazane, Women’s Legal Centre.

Local municipalities: Marble Hall, Groblersdal, Tubatse, Fetakgomo, Makhuduthamaga.

Local communities: Dwesa-Cwebe, Greater Manyeleti Land rights group (Utha, Dixie, Gottenburg C and Serville B villages), Hlanganani-Polokwane, Kalkfontein, Kgalagadi (15 communities of Northern Cape Province), Madikwe, Mpumalanga Consultative Group on Land (Kangwane, Lebowa and KwaNdebele), Sekhukhuneland Ad Hoc committee on land (five local municipalities: Marble Hall, Groblersdal, Tubatse, Fetakgomo and Makhuduthamaga and their rural communities).

Academics: Centre for Applied Legal Studies (Wits University), PLAAS (University of Western Cape).

Once identified, all of the stakeholders were interviewed, through key informant interviews. All interviews were conducted by the author with the assistance of the Supervisor (where some of the respondents such as DGs of Government departments, required a more senior academic to engage with). Data collection was hampered by the unavailability of some of the actors, especially the politicians. Furthermore, as the Act was facing a court challenge regarding its constitutionality, it was expected that some actors would not be willing to discuss the CLaRA in detail, although this did not however appear as a major issue.

Lastly, as it concerns on-going policy development processes including stakeholders with different views, it was important to verify accuracy and completeness of the data

that was collected during the interviews or detailed in secondary sources. Therefore, particular attention was paid to the interview techniques (reposing certain questions in different ways, for example). Key information was generally cross-checked for quality and rigour through i) interrogating the information with diverse stakeholders, ii) regular presentations of the results to a diversity of stakeholders.

CHAPTER 4

MAJOR POSITIONS REGARDING CLARA

4.1 INTRODUCTION

This Chapter outlines the various stakeholders involved at the national level in the development process of CLaRA and their respective positions. As we will see in this chapter, there were many diverse views presented on the relevance, usefulness and constitutionality of CLaRA creating a policy dilemma for the policymakers. The key areas of concern for stakeholders were the powers of traditional leadership in land administration, the rights of women to land, the consultative process of the Act, the constitutionality of the Act, communal ownership as opposed to private ownership and the discretionary powers of the Minister.

4.1.1 CLaRA - A Review of the Different Actors' Critiques

Patelike Holomisa, ANC MP and president of the Congress of Traditional Leaders of SA (Contralesa) declared at the time of the passing of the Act that: *"The Communal Land Rights Act, 2004 is a progressive piece of legislation that promotes gender inclusively and democracy while giving due recognition to traditional leadership. Opponents of the act are wasting their apparently vast resources if they think the role of traditional leaders over land can ever be diminished."*¹²

Critics of the CLaRA came from various parties, at various stages of its development process. The following criticisms – reproduced as stated by the criticisers - were made:

Procedural Challenge: The Act has a major impact on customary law and the powers of traditional leaders, both of which, in terms of the Constitution, are functions of provincial government. Thus it should have followed the Section 76 parliamentary procedure that enables input by the provinces. Instead it was rushed through parliament using the section 75 procedure. The Constitution

¹² 'South Africa: Africa's Rural Communities Poised to Reap Fruits of Freedom'. Business Day, 20 October 2004.

provides that laws that deal with provincial functions should follow the section 76 procedure and those that deal with national functions should follow the section 75 procedures. Because the wrong parliamentary procedure was followed the Act is invalid.

Section 25 – Tenure and Property rights: An intrinsic feature of systems of property rights is the ability to make decisions about the property. Under customary systems of property rights, decisions are taken at different levels of social organisation, including at the level of the family. By transferring ownership at the level of the “community” and individual only, the CLARA undermines decision-making power and control at other levels. This is particularly serious when disputed tribal authority boundaries are imposed as the “default” boundaries of communities. The end result will be that the CLARA will undermine security of tenure in breach of section 25(6) of the Constitution. Within the boundaries of existing tribal authorities are groups of people with property rights in the land. They are deprived of their property rights when ownership of their land is taken from existing structures and vested by the CLaRA in imposed Traditional Council structures or other structures created by the CLaRA.

Equality: The Act conflicts with the equality clause in relation both to gender and race. It does not provide substantive equality for rural women because it entrenches the patriarchal power relations that render women vulnerable. The 33% quota for women in traditional councils is not sufficient to offset this problem because the women may be selected by the senior traditional leader. Moreover 33% is too low in the context that women make up almost 60% of the rural population. While the Act seeks to secure the tenure rights of married women it undermines the tenure rights of single women, who are a particularly vulnerable category of people. The Act also treats black owners of land differently from white owners of land, who are not subjected to the regulatory regime imposed by the CLaRA. Moreover section 28(1)-(4) of the TLGFA entrenches the power of controversial apartheid era institutions that were imposed only on Black South Africans.

Fourth Tier of Government: The Constitution provides for only three levels of government, national, provincial and local. The powers given to land

administration committees, including traditional councils acting as land administration committees, make them a fourth tier of government in conflict with the Constitution.

The critics against the CLaRA are crystallised in the court challenge it faces for unconstitutionality. Four rural communities represented by the Legal Resource Centre and Weber Wentzel Bowers Attorneys are challenging the act¹³ on notably the ground that the act conflicts with the equality clause in relation both to gender and race and that it does not provide security of tenure for groups of people with property rights regarding the land within the boundaries of existing tribal authorities. They argued that they are deprived of their property rights when ownership of their land is taken from existing structures and vested by the CLaRA in imposed Traditional Council structures or other structures created through the CLaRA (For more on the legal challenge of the CLaRA see annexure).

Besides the critics pushing for the court case, two more issues came up:

Lack of Capacity: CLaRA bestowed many new roles and responsibilities to several departments and levels of government, including the DLA itself. There were concerns, when looking at the National Implementation Framework for the CLaRA (NIF) that the assignment of these roles and responsibilities was made without regard for the capacity levels of the various implementing bodies. A major issue was the complexity of the rights that would be transferred by the CLaRA and the ability of the DLA and its implementing partners to deal with the disputes that would arise from the transfers.¹⁴ At the time, the DLA was awaiting the approval of a new staffing structure that took into account the human resources needed to implement the CLaRA. It was envisaged that after the regulations were tabled in parliament in early 2009, implementation could begin with the setting up of land rights boards in the different provinces.

Budgetary Constraints: There was concern that the costs of implementing the CLaRA would far surpass the budget allocated to the DLA. At the time CLaRA was passed, it did not have an official budget accompanying it; estimates placed

¹³ For more information, see Legal Resource Centre, *Legal Challenge of the Communal Land Rights Act-Overview*, April 2006.

¹⁴ Portfolio Committee on Agriculture and Land Affairs, National Assembly, *Report on public hearings on Communal Land, held on 11-14 November 2003*.

the costs of its implementation at approximately R68 million over five years of implementation (Wisbourg and Rhode, 2005); a figure which excluded the approximately ten years of planning and preparation for the CLaRA. In the National Implementation Framework this figure increased exponentially to R8.48 billion over the five-year implementation period. In 2008, the total budget allocation to the Department of Land Affairs was between 4 and 6 billion rands, including provincial allocations for all its programmes, duties and costs (Parliamentary Monitoring Group (PMG), 2008). Clearly this raised concerns about the ability of the DLA to finance the CLaRA – along with its other programmes and responsibilities.

4.1.2 Issues Rising Regarding CLaRA and the Diverse Positions of the Different Actors

This part details the major issues that arose from the debates around the development of CLaRA and analyses the different positions of the different stakeholders regarding the latter. Based on the total contributions, besides the ANC and the DLA, NADECO, and the portfolio Committee on Agriculture and Land Affairs, which are directly dealing with the Act, about 32 actors engaged directly in CLaRA's consultation process. These included national trade unions, national commissions, traditional representations, academic institutions, councils/movements, NGOs and communities (table 4.1).

Table 4.1: Institutions which contributed directly in CLaRA's consultation process

Type of actor (number of actors)	Actor
National Trade Unions (2)	COSATU, NUM
National Commissions (2)	Commission for Gender Equality, SA Human Rights Commission
Traditional representations (national/regional) (3)	National House of Traditional Leaders, Congress of Traditional Leaders of South Africa, Royal Bafokeng
Academic institutions (2)	Centre for Applied Legal Studies (CALS, Wits University), PLAAS (University of Western Cape)
Councils/Movements (4)	South African Council of Churches, Landless People's Movement, NLC, Rural Women's Movement
NGOs (12)	Legal Entity Assessment Project (LEAP), ANCRA, Joint Monitoring Committee on Improvement of Quality of Life and

Type of actor (number of actors)	Actor
	Status of Women, Legal Resources Centre, Masifunde NGO, Nkuzi Development Association, Umbumbano Lwabesifazane, Transvaal Rural Action Committee (TRAC) Mpumalanga, TRALSO, Women's Legal Centre, AFRA, TCOE
Communities (7 groupings, representing at least 29 communities)	Dwesa-Cwebe, Mpumalanga Consultative Group on Land (Kangwane, Lebowa and KwaNdebele), Hlanganani-Polokwane, Kalkfontein, Kgalagadi (15 communities of Northern Cape Province), Madikwe, Greater Manyeleti Land Rights Group (Utha, Dixie, Gottenburg C and Serville B villages), Sekhukhuneland Ad Hoc Committee on Land (five local municipalities: Marble Hall, Groblersdal, Tubatse, Fetakgomo and Makhuduthamaga and their rural communities)

Source: Author's research and Parliamentary Portfolio Committee on Land Affairs, 2003

Overall, according to the debates and contributions, several controversies appeared (presented in order of importance, identified through recurrence in the contributions):

- 1) Powers of traditional leadership in land administration,
- 2) On the rights of women to land,
- 3) On the consultative process of the Act,
- 4) On the constitutionality of the Act, and, finally,
- 5) On whether communal ownership as opposed to private ownership should be retained
- 6) On the powers of the Minister.

4.2 DIFFERENT POSITIONS ON THE POWERS OF TRADITIONAL LEADERSHIP IN LAND ADMINISTRATION

Considering the discussions around CLaRA, perhaps the most controversial issue raised has been the role of traditional leaders in relation to land and land management. This was the major focus of public debates when the draft law was discussed in parliament in late 2003 and early 2004, and many of the submissions by civil society and community groups emphasized these issues (Claassens & Cousins, 2008). It appeared during the debates that the issue of power as such was not problematic, but CLaRA institutionalising the present powers seems to trouble a majority of actors.

The National House of Traditional Leaders (National and Provincial Houses of Traditional Leaders, the Congress of Traditional Leaders of South Africa and the

Royal Bafokeng Nation) argued that traditional councils are directly accountable to their people, who in turn participate in decision-making on all major matters (including the fundamental bases on which land rights are to be dealt with in the community). They noted that traditional leaders are not entitled to make decisions that are contrary to the will of the people.

More nuanced, few introduced a condition that communal land reform should ensure the democratization of the allocation of land rights at community levels, including the functioning of traditional leadership. They proposed that provision should be made for the Land Rights Board to use its powers to monitor the participation of traditional leaders at community levels. They argued that to avoid confusion, the Bill and later the Act should indicate clearly that it is up to the community to decide who should serve on its land administration committee. There should be no possibility of a traditional council seizing control of land administration, beyond the objections of the community.

However, the large majority, including activists and all the communities who participated in the consultation process, were against the Bill/Act's provisions regarding powers of traditional leadership in land administration. Indeed, from the discussions and contributions, strong contestation appeared around the perceived - increased or institutionalised - powers of traditional leadership in land administration. Opponents felt that the traditional council is an unelected and therefore inherently undemocratic institution, and that therefore, this lack of democratic practice would be carried over to land administration. As such, it was noted that the bill does not provide any checks on the powers of traditional leaders. According to them, democratic means that institutions must be elected by both men and women of the affected community and must be accountable and transparent. Several NGOs confirmed the latter by stating that traditional authority structures as they are now in South Africa, and many other parts of Africa, are a construct of the colonial regimes specifically established to solve the "native problem" through indirect rule. Even where traditional councils function well and in the interests of their communities they remain essentially undemocratic. It emphasizes that CLaRA must provide for democratic institutions to allocate, administer and control communal land.

As such, Section 21(2) states that *"if a community has a recognised traditional council, the powers and duties of the land administration committee of such*

community 'may' (highlighted by researcher) *be exercised and performed by such council*". Most of the activists and all the communities who participated in the consultation process argued that this is against the principle of transferring control of land to its rightful owners.¹⁵ Hence, it is argued that the Bill/Act favours Traditional Leaders, who are said to be fighting democratically established CPA's implemented to administer land in the villages.¹⁶ As such, one of the communities notes that the problem is that the traditional council that will take over the powers and duties of the land administration committee has a composition which is not consistent with the principle of democracy, in that 40% of its members are to be elected members and the majority are to be appointed by the Chief. A further problem highlighted was that the community had no power to replace the council if it was found to be incompetent or corrupt. In addition, the Bill does not give communities choices to say what institutions should administer their land – Section 21(2) read with definitions of Land Administration Committee in Section 1. Lastly, it was mentioned that the Bill/Act would also create problems of traditional councils claiming jurisdiction over communities who historically owned the land and those who bought it for themselves.

¹⁵ "We cannot administer our land since the Bill intends to give powers and functions to chiefs who do not have rights over our land and do not represent our community" (community contribution).

¹⁶ "For now the democratically elected CPA committee have duties to administer the communities' affairs. The Chief is totally against the existence of the CPA and wants full control. Section 39 of this Bill will make this possible. This will go against the wishes of the community which prefers the CPA to have control" (community contribution).

Table 4.2: Major positions on the provisions regarding powers of traditional leadership in land administration

AGAINST	INTERMEDIATE	PRO
<p><u>LPM:</u> - Bill provides no checks on traditional powers - must provide for elected, democratic institutions</p> <p><u>PLAAS:</u> -Democratic and accountable institutions for land administration are not provided for in the Bill. - Bills allows 'traditional councils' in areas where the latter have been recognized or established (defined in the Traditional Leadership and Governance Framework Bill (section 25(3)). - No mechanisms to ensure accountability are provided.</p> <p><u>Nkuzi Development Association:</u> Traditional councils remain undemocratic - the Bill must encourage and strengthen democratic structures.</p> <p><u>Dwesa-Cwebe community:</u> -The Bill will favour traditional leaders who are currently fighting CPA's established to administer land in the villages -The Bill does not give communities choices to say what institutions should administer their land.</p> <p><u>Mpumalanga Consultative Group on Land:</u> -The Bill</p>	<p><u>COSATU and NUM:</u> - Communal land reform, with mechanisms to ensure the democratization of the allocation of land rights at community levels -Provision for a Land Rights Board monitoring the participation of traditional leaders at community levels.</p> <p><u>SACC:</u> - The less rigid approach ("may") is welcomed, but its implications are unclear. - To avoid confusion, clear indication that community should decide who should serve on its land administration committee.</p> <p><u>CGE:</u> - Traditional leadership and traditional communities are not democratic and highly patriarchal. - Their legitimacy and recognition is a contested issue and could lead to further divisions and conflicts</p> <p><u>Masifunde (NGO):</u> - LACs are an extension of apartheid policies, can lead to disputes</p>	<p><u>National House of Traditional Leaders:</u> - Traditional Councils are directly accountable to their people -People participate in decision-making on all major matters (including land) - Traditional leaders are not entitled to make decisions that are contrary to the will of the people</p>

AGAINST	INTERMEDIATE	PRO
<p>gives traditional leaders ownership and administrative powers in communal lands. Traditional leaders will abuse these powers.</p> <p><u>Kalkfontein community:</u> The Bill intends to give powers and functions to chiefs or to existing traditional council who do not have rights over our land and do not represent our community</p> <p><u>Kgalagadi:</u> -The Bill will also create problems of traditional councils claiming jurisdiction over communities who historically owned the land and those who bought it for themselves (Section 39 will further strengthen these claims e.g. the community of Cwaing was recently restituted). -Chiefs are against the existence of the CPA and want full control. Section 39 of this Bill will make this possible.</p> <p><u>Madikwe community:</u> -Traditional councils will take over the powers and duties of the land administration committees (their composition is not consistent with the principle of democracy, in that 40% of its members are to be elected members and the majority are to be appointed by the Chief).</p>		

Source: Author's research

4.2.1 Major Positions on the Rights of Women to Land

Another key controversy generated by the CLaRA during its progression from the CLRB to the CLaRA was the issue on the rights of women to own land as individuals, without having to depend on their spouses, to be represented within the communal representative bodies or, overall, to have recognised rights comparable to the ones enjoyed by their male counterparts.

As in the previous issue, the National House of Traditional Leaders emphasised that the participation of women and the youth in decision-making processes and forums is increasingly becoming a common feature of life in the rural communal areas. According to them, due to the fact that the determining factor is a question of need, unmarried women do qualify for land allocation whenever they prove, like everyone else, that they have the means to sustain themselves and have dependents to support. As such, married women would enjoy equal access to family allotments as husbands. The traditional leaders note that they accordingly do not object to the registration of allotments in the names of both spouses.

Although many contributors nuanced these statements, opposition was not as straightforward as it was in the previous issue (regarding powers of traditional leadership in land administration). Without opposing the provisions regarding women as they agreed that there is reference to women in the Bill, they argued that it does not give unequivocal provisions for women's equality with men in as far as access to land is concerned. They underscored that the Minister may confer new order rights on a woman who is a spouse of a male holder of an old order right, but note that there is no guarantee that the Minister will do so. Once again, the 'may' ("the Minister "may" confer 'new order rights' on women", as stated in the Bill and Act) caused uncertainty.¹⁷

There is, however, a majority feeling amongst women activists that Government has taken a *laissez faire* approach to women's issues in land (SACC for example). They assert that merely passing legislation that states women are equal to men in land

¹⁷ "Women face serious problems under communal tenure. We are concerned that this section of the Bill states that the Minister may confer 'new order rights' on women. The word 'may' gives the impression that this may not be enforced." (Community contribution).

allocation is not enough because the majority of the rural areas still operate in a patriarchal manner that undermines the day to day rights of women's access to and ownership of land. As such, it noted that the Bill tended to address gender equality in form rather than substance. Women's movements and land sector NGOs pointed to the fact that recognition of old order rights would strengthen past discriminatory policies which only recognised male ownership of land. Put forward by many contesters is the example of PTO certificates that were only issued to men during the apartheid era. As such, the main tool envisaged by the Bill was a process of formalising old order rights. They noted that in reality, women were not holders of old order rights (because under customary law, land was only allocated to men), and would thus be marginalised during the implementation of CLaRA. It would lead to a perpetuation of the vestiges of the past i.e. recognition of old order rights perceived to be continuing apartheid era policies and were only given to men. Academic institutions confirmed the latter by stating that measures dealing with gender equality in relation to land rights (e.g. sections 24(3) (a) (1), 19 (4) (d) and 18 (1)) were weak, unconvincing and likely to be overridden by the provision that traditional councils (dominated by traditional leaders) will allocate land, and can do so on the basis of custom¹⁸, which provides that they are to 'administer the affairs of the traditional community in accordance with custom and tradition'.

Contributions also highlighted the Bill's potentially devastating effect on women - termed "double discrimination." The LRC highlighted the fact that the insecure tenure faced by African women is not only because they are women but because they are also African. Oppressive legislation enacted under the apartheid era such as the Black Administration Act, the Development Trust and Land Act and the Black Areas Land Act affected only African women and not other races. Consequently, according to Section 25(6) of the constitution, African women can be described as, "people whose tenure of land is insecure as a result of past racially discriminatory laws or practices." The vesting of land administration in male dominated, unelected structures as well as the recognition of old orders rights, hitherto only given to men, would not provide African women with tenure that is legally secure or with comparable redress. As such, the LRC noted that not only would this Act be

¹⁸ They refer as such to the definition of 'old order rights in section 1, together with section 4 (f) of the TLGFB.

discriminatory towards women, it would also be inconsistent with section 25(6) of the constitution.

Table 4.3: Major positions on the rights of women to land

AGAINST	INTERMEDIATE	PRO
<p><u>CALS:</u> - 'hands-off' approach of government in the Bill renders women vulnerable as they are not likely to access land fairly and in equal manner.</p> <p><u>CGE:</u> - Only right recognized by the law is a derivative or secondary and temporary right. - The legal rights created by CLaRA are therefore highly gendered and discriminate against women.</p> <p><u>Joint Monitoring Committee on Improvement of Quality of Life and Status of Women:</u> - The main tool envisaged by the Bill/Act is a process of confirming old order rights. - Women are not holders of old order rights under customary law, and will thus miss out.</p> <p><u>PLAAS:</u> - Measures dealing with gender equality in relation to land rights are weak and unconvincing - Likely to be overridden by the provision that traditional councils dominated by traditional leaders may administer land.</p> <p><u>SACC:</u> Although Bill states that new order tenure rights may vest in women, the Bill does not guarantee women access to</p>	<p><u>ANCRA:</u> - Although there is reference to women in the Bill it does not give unequivocal provisions for women's equality with men in as far as access to land is concerned. - Rather the rights to be conferred to women are vested in the minister's discretion.</p> <p><u>Masifunde (NGO):</u> The Minister may confer new order rights on a woman who is a spouse of a male holder of an old order right. There is no guarantee that the Minister will do so.</p> <p><u>Kgalagadi:</u> The Bill does not give guarantees to women's access to land</p> <p><u>Madikwe community:</u> -Section 18(4) (b), determination by Minister (Women). Women face serious problems under communal tenure. We are concerned that this section of the Bill states that the Minister <u>may</u> confer 'new order rights' on women. The word 'may' gives the impression that this may not be enforced.</p>	<p><u>National House of Traditional Leaders :</u> - Participation of women and the youth in decision-making processes and forums is increasingly common - Unmarried women do qualify for land allocation if they have the means to sustain themselves and dependents -Married women enjoy equal access to family allotments as husbands</p>

AGAINST	INTERMEDIATE	PRO
<p>land or security of tenure. - As the Bill envisions that land will be administered by traditional authorities, this problem is likely to be perpetuated</p> <p><u>LRC:</u> - Double discrimination of 'African women'. The Bill does not provide African women with legally secure tenure or comparable redress. The Bill is therefore inconsistent with the constitutional requirement.</p> <p><u>Kalkfontein community:</u> The Bill is not redressing the injustices but creating a situation where women do not have secure land rights and reinforcing the customary prohibition of allocating the land to women.</p> <p><u>Sekhukhuneland Ad Hoc Committee on Land:</u> Women, and in particular un-married women, have no access to land rights (see section 24(3)(a)(i))</p>		

Source: Author's research

Also of concern to (women) activists was the notion that strengthening the power of traditional structures over land allocation would be retrogressive since these structures were already undermining women due to their patriarchal nature.¹⁹ The final Act as enacted into law did try to alleviate these concerns by inserting various clauses that strengthened the equality of women in land matters as well as addressing the concern of formalising old order rights. However, the sections dealing with the powers of traditional structures in relation to land allocation and

¹⁹ "The Bill has inherited the injustice of the Past Laws, e.g. the Code of Zulu Law says that women could not own property. The Bill provides for PTO's to be converted into new order rights but the PTO's are issued to men only which is discriminatory against women" (Community contribution).

administration were left largely unchanged. The CLaRA makes provision for 30% representation of women on the land administration committee. This is seen as not being enough. Some women in KwaZulu Natal voiced concerns regarding their participation in traditional decision making structures. According to the head of Rural Women's Movement most women are not aware of what role they are supposed to be playing in these structures and at times they were not even informed when the meetings were taking place.

4.2.2 Positions on the Consultative Process of the Act

The Department of Land Affairs asserts that no Bill in the department's history has been consulted upon as much as the CLRB which led to the CLaRA (DLA, 2004). However, besides traditional authorities, critics of the Act argue that there was very little consultation on the part of Government (except with traditional leaders).

Of interest is the fact that land sector activists do not comment much on the extent of consultation on the Bill prior to the October 2003 version. For their part, the National Land Committee/PLAAS initiative received funding from DFID in July 2002 to embark on a consultation and lobbying exercise which also encompassed extensive use of the media. This culminated in several communities appearing before the portfolio committee during the November 2003 parliamentary process. This being said, major objections to the Government's assertion regarding its extensive consultation appeared, on one hand, after publication of the October 2003 version which had substantial changes relating to the powers of land administration committees in land allocation and, on the other hand, regarding the amendments made just before passing the Bill through Parliament. Critics are three fold: 1) the consultation process was not ideal, 2) consultations were selective and 3) the effective consideration of the consultation process was questioned.

Firstly, land sector activists and local communities assert that the review period given for comments after the publishing of the October 2003 was extremely insufficient (3 weeks). In addition, they noted that the language and communication media used were often inaccessible to local communities.^{20 21}

²⁰ *"The information dissemination process was not rural areas friendly since there are little if no access to the internet or televisions and this also relates to the question of language. Today we are*

Secondly, many felt that some actors were more consulted than others. This was the case particularly with traditional leaders, who were criticised for being predominant in the process.

Substantiating this assertion, many others, especially local communities, indicated not being integrated in the consultation process.²² In addition, in May 2008, a senior DLA official admitted that there had not been sufficient consultation with rural communities but mainly with traditional leaders. Consultations in the provinces were to only take place in June 2008 after the workshop on regulations in Durban in April 2008.²³ The official also highlighted that, as in 2004 before the elections, consultations in the rural communities in KwaZulu Natal had to be stopped until after the 2009 elections on the orders of the ruling party in that province.

Thirdly, many questioned the relevance of the consultations as they felt that their points of view were not taken into consideration²⁴. As such, they pointed to the added sections dealing with the powers of the LAC and see this as a pre-election “pact” between traditional leaders and the ruling ANC party, a concern which links up with the constitutionality of the Bill.

here through short notice and we only had time for preparations on this presentation over the weekend” (Community contribution)

²¹ *“Between 2001 and 30 October 2003, we had never heard anything about the Bill either from government officials or other people in the area where I live. We only got to know about the Bill through PondoCROP on 30 October 2003, an organisation that is working in our area” (Community contribution).*

²² *“There have been no consultations with the communities represented by the Dwesa/Cwebe Land Trust and the 7 CPA’s. We only heard about the Bill for the first time in 2001 at the Tenure Conference in Durban”; “We were not informed or consulted. We heard about the CLRB just recently through our lawyers. The timing was very short and inappropriate. We had to rush from Mpumalanga to Cape Town at short notice to make our presentation” (Community contributions).*

²³ Interview with Senior DLA official in May 2008

²⁴ *Too little time was given for community consultations. Numerous changes were made to the Bill that we the community were not aware of and none of those changes were communicated to us by the DLA” (Community contribution).*

Table 4.4: Positions on the consultative process of the Act

AGAINST	INTERMEDIATE	PRO
<p><u>South African Council of Churches (SACC):</u> The review and consultation period on the current draft too brief to permit parties to develop and explore the implications of potential amendments.</p> <p><u>ANCRA:</u> Insufficient participation of communities. Process was not clear and transparent and the communities remained uninformed about changes in the Bill and due processes to table the Bill.</p> <p><u>CALS:</u> - As the changes required to the Bill are not possible for Parliament to effect, it is recommended that this version of the Bill (which differs in material respects from earlier versions) be subjected to a longer process of consultation. - Consultation excluded women's groups in rural areas.</p> <p><u>CGE:</u> Concerns about the fast tracking of this Bill through the Parliamentary process, about lack of adequate consultation with rural communities, and about a biased process favouring Traditional leaders.</p> <p><u>LPM:</u> No dissemination about the Bill. No real consultation was carried out with the people, or with well-known representatives of the people such as the LPM.</p> <p><u>Masifunde (NGO):</u> The process of developing this Bill has not been democratic</p>		<p><u>National House of Traditional Leaders (National and Provincial Houses of Traditional Leaders, the Congress of Traditional Leaders of South Africa and the Royal Bafokeng Nation):</u> -Consultation were significant and representative</p>

AGAINST	INTERMEDIATE	PRO
<p>and transparent.</p> <p><u>Dwesa-Cwebe community:</u> There have been no consultations with the communities represented by the Dwesa/Cwebe Land Trust and the 7 CPA's.</p> <p><u>Hlanganani-Polokwane community:</u> -Dissemination of information on this Bill leaves much to be desired. -The overwhelming majority of residents are not aware that a Bill of this nature exists.</p> <p><u>Kalkfontein community:</u> -We were not informed or consulted. We heard about the CLRB just recently through our lawyers. - The timing was very short and inappropriate.</p> <p><u>Kgalagadi:</u> -Too little time was given for community consultations. - Numerous changes were made to the Bill that we the community were not aware of and none of those changes were communicated to us by the DLA. -The information dissemination process was not rural areas friendly.</p>		

Source: Author's research

It made activists, civil society and academics conclude that the process was not transparent and not inclusive. Although the consultation process was criticised overall, the lack of inclusion of specific groups, mainly local communities and women groups, was highlighted by several activists.

4.2.3 Positions on the Constitutionality of the Act

Issues concerning the constitutionality of the Act centred on four major aspects:

Firstly, there was the procedural challenge. Here, opponents of the Bill argued that it should have gone through parliament as an s76 Bill (one which affects the provinces since the CLaRA deals with issues of customary law and traditional leadership) and not as an s75 Bill (one which does not affect the provinces). The s75 route allows for a shorter parliamentary process since there is no need for debate in the national council of provinces. There are some who hold the view that this route was used as a way of fast-tracking the Bill through parliament and who, subsequently, deemed the Act invalid. The State argued that the Bill dealt with land matters, and land was reserved for National government only. Issues of customary law and traditional leadership (which must be discussed at provincial level) were considered as secondary aspects in the CLRB and as such did not warrant the Bill being discussed in the provinces.

Secondly, the setting up of duplicate and overlapping decision making structures in the CLRB masked the practical effect of the Bill: this being that new order rights holders would not exercise ownership powers in terms of the determinations made by the Minister but would, in fact, be governed by LACs in terms of community rules. As such, particularly the LRC argued that the CLRB and the TLGFB established a fourth sphere of government, constituted by the administration committees, which are not provided for in the constitution²⁵. Read together, the CLRB and the TLGFB provide for the exercise of public administrative powers and ownership powers by traditional leaders in terms of custom and tradition (LRC submission to portfolio Committee, 2003).

Thirdly, the Act was seen by its opponents as alienating the rights of those who currently have secure individual tenure rights in communal areas by vesting all the rights in the community as represented by the LAC. This violates section 25(6) of the constitution which seeks to provide legally secure tenure.

²⁵ The constitution makes provision for only three i.e. national, provincial and local.

Finally, and linked to the above mentioned issues, the Act does not provide for the equality of men and women in land administration. The rural women's movement asserted that the 33% quota for women on the LAC was inadequate.

Table 4.5: Position scheme on the constitutionality of the Act

AGAINST	INTERMEDIATE	PRO
<p><u>Joint Monitoring Committee on Improvement of Quality of Life and Status of Women</u>: has a concern because the Bill does not address the issue of gender equality in a manner consistent with the provisions of the Constitution.</p> <p><u>LRC</u>: the CLRB and the TLGFB provide powers to traditional leaders in terms of custom and tradition. In this form the Bills create a fourth sphere of government</p> <p><u>PLAAS</u>: The constitutional requirement that tenure legislation provide for <i>comparable redress</i> in the event that land rights cannot be secured due to overlapping rights (see Section 25(6) of the Bill of Rights) is not met in the Bill</p>		<p><u>National House of Traditional Leaders (National and Provincial Houses of Traditional Leaders, the Congress of Traditional Leaders of South Africa and the Royal Bafokeng Nation)</u>:</p>

Source: Author's research

4.2.4 Positions on Communal Ownership as Opposed to Private Ownership

Paradoxically to what is expected from a debate around communal land reform, the issue of opposing tenure reforms seems not the major aspect discussed during CLaRA's development process. This contradiction is probably a result of the fact that the Act offers a certain possibility of choice – although as shown before many consider it as a biased way of manoeuvre by pinpointing traditional powers

predominance²⁶. Another reason is linked – according to several land reform protagonists – to a seemingly accord that private ownership is not a universal solution.

As such, the most common approach to tenure reform in Africa today is one based on the notion of adapting systems of customary land rights to contemporary realities and needs rather than attempting to replace them with Western forms of private ownership such as individual freehold title (Okoth-Ogendo in Claassens and Cousins, 2008). Most submissions shared this view and emphasised that traditional forms of land tenure should be taken into consideration when crafting tenure reform legislation and that there was need to adapt existing practices and institutions rather than attempt to replace them (because replacement of tenure regimes, were more and more considered as a very expensive exercise with only partial results). In addition, it is recognized by many that in South Africa tenure is secured socially as well as legally, so attempting to replace practices and institutions can result in overlapping de facto rights and management structures. A reform could undermine tenure security. Although they still recognise that colonial and apartheid heritage has created a legal dualism that underpins the tenure systems in the country, it appears that many agree on the importance of adaptive interventions acknowledging this dualism and of legal and other mechanisms to connect the systems. Intermediate positions between the two extremes of privatisation and communal tenure are thus emphasised. If many argue that whilst tenure reform was supported, comparative experience in countries such as Kenya indicates that the titling approach has delivered few of the anticipated benefits. According to them, the net effect has been to increase landlessness with poorer families selling up their holdings and moving to the cities. The ongoing fragmentation and subdivision of plots have led to the creation of holdings that are not economically viable and worsen circumstances of overcrowding with the only real benefits accruing to local elites. Private ownership by one individual/group, as established under the Bill, may extinguish existing cropping and grazing rights of another person. According to many, the likely net effect is the repetition of dispossession of land rights, increased landlessness, rural poverty and inequality.

²⁶ While the community is given the power to choose, i.e. accept, reject or impose conditions in respect of applications for conversion to full ownership, this does not in itself provide meaningful protection from powerful local elites and traditional leaders who are likely to dominate and abuse the process.

Another difficulty to implement either the one or other option is linked to the fact that communal tenure systems include rights to land and natural resources that are held at different levels of social organisation. Many argue that these levels of social and/or political organisation constitute different ‘communities’, nested one within the other. As such, PLAAS questions to which level of ‘community’ will title be transferred when the Act is implemented? In addition, rights encompass rights to residential land, forest land and/or grazing land that vary and that exist within the larger context of a tribe, clan or entire village. The privatization of communal land disregards the range/bundle of other communal tenure and land arrangements that fall outside ownership or occupation. These include rights of access to use land for crops, graze animals or for the gathering of fuel or fruits. Many, in particular unions with mixed representations, believe that adequate safeguards should be provided in the Bill to prevent wholesale privatization, entailing distinct measures directed at three possible phases of alienation of land rights. The first relates to the transfer of ownership from the State to communities under clause 16. The second pertains to the community granting an individual community member’s application for conversion of a land tenure right to full ownership under clause 25; (and thereafter the possible transfer by such community member of ownership to a person that is not a part of the community.)

Table 4.6: Positions on communal ownership as opposed to private ownership

AGAINST PRIVATISATION	INTERMEDIATE	PRO PRIVATISATION
<p><u>National House of Traditional Leaders (National and Provincial Houses of Traditional Leaders, the Congress of Traditional Leaders of South Africa and the Royal Bafokeng Nation)</u></p> <p><u>COSATU</u>: While supporting the principle of communal land reform, the introduction of private group and individual ownership is considered problematic.</p>	<p>LEAP: Agrees with the Bill’s attempts to:</p> <ul style="list-style-type: none"> • Secure the tenure of communities, households and individuals. • Give legal recognition to existing communal tenure systems. • Provide for the administration of land rights in communal areas. <p><u>SACC</u>: To confirm and strengthen the existing tenure rights of people living</p>	

<p>PLAAS: Communal tenure systems are <i>nested</i> systems, in which rights to land and natural resources are held at different levels of social organisation. Titling does not correspond to such community structures.</p>	<p>on communally - owned land. To restore communities' control over their own lives and development by allowing them to participate in decisions about land allocation, tenure and use.</p>	
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Source: Author's research

Interesting is the absence of positions of local communities on the issue. An explanation could be that the Bill/Act leaves a choice. Another reason could be the little time and information available, particularly at local level, to establish a well defined position regarding the reform of their lands.

4.2.5 Discretionary Powers of the Minister

There are several clauses in the Act that leave a lot of decisions to the discretion of the Minister, including the initiation of a land rights inquiry, decisions about whether and how to subdivide communal land, on which portions to reserve as state owned and on the extent and boundaries of the land to be transferred after the Minister makes a determination.

Most of the contributions during the consultation phases, particularly those of activists and academics, emphasized that the Bill and later the Act was giving too many powers to the Minister to determine land rights, and did not require adequate consultation with the affected communities. They argued that there was no clear criteria to guide the Minister's decisions and the affected communities have few opportunities, if any, to either participate in making these crucial decisions or to challenge them once the Minister has made a determination.

As it was, there is no obligation on the Minister to secure the consent of the community affected with respect to any of these decisions, nor was the Minister even required to consult the relevant community before making a ruling. A community would have no right to initiate the tenure reform process, to compel a land rights inquiry or to accept or reject the outcome of such an enquiry. Land rights enquirers were not compelled to consult communities prior to making their recommendations. Although general statutes governing administrative justice would presumably apply,

there was no explicit mechanism by which a community could appeal against a decision of the Minister. It would likely be costly and difficult for communities to challenge the Minister's rulings on such matters.

In addition, seeing as it is unlikely that the Minister would be in a position to have extensive knowledge of the land, tenure and old and new order rights in each area, the Minister would have to rely on statements from officials in making final decisions. They however argue that it is unlikely that opposing opinions and conflicting interests would be pointed out to the Minister by officials (often concerned with delivery and their own positions). In such instances, they state that it is possible that the Constitutional Rights of excluded groups would be ignored without any further recourse.

Table 4.7: Positions on the powers of the Minister

AGAINST	INTERMEDIATE	PRO
<p><u>SACC</u>: There is no obligation on the Minister to secure the consent of the community affected with respect to any of these decisions, nor is the Minister even required to consult the relevant community before making a ruling. A community would have no right to initiate the tenure reform process, to compel a land rights inquiry or to accept or reject the outcome of such an enquiry.</p> <p><u>ANCRA</u>: The Bill has given extraordinary powers to the minister and unlimited powers to decide: upon land rights in communal areas and to whom it should go to on the extent and boundaries of the land to be transferred to make determinations based on land rights inquirers report that does not need to be published for public comment upon initiating a land rights inquiry</p>	<p><u>Joint Monitoring Committee on Improvement of Quality of Life and Status of Women</u>: the Bill provides that the Minister MAY confer a new order right on a woman, but this is discretionary.</p> <p><u>National House of Traditional Leaders (National and Provincial Houses of Traditional Leaders, the Congress of Traditional Leaders of South Africa and the Royal Bafokeng Nation)</u>: The powers given to the Minister should relate to process, transparency, and above all, the establishment of the existing rights of members of communities. The Minister should not have the power to change rights.</p> <p><u>Kgalagadi community</u>: n 18(4 – 6) – Many issues are left to the discretion of the Minister. The Bill does not make any reference to: equal allocation of land, upgrading of rights, joint ownership, etc.</p>	

AGAINST	INTERMEDIATE	PRO
<p><u>LPM</u>: it gives too many powers to the Minister to determine land rights, and does not require adequate consultation with the affected communities</p> <p><u>LRC</u>: The difficulty with the Bill is that it makes the realisation of constitutional rights subject to the exercise of official discretion in a manner which does not give constitutionally adequate guidance to those officials as to how they are to exercise that discretion</p> <p><u>PLAAS</u>: The wide discretionary powers given to the Minister to make determinations on a range of issues central to the security of people's land rights are probably unconstitutional, insofar as the Bill of Rights requires the law to define clearly the extent of the land rights to be secured</p> <p><u>Dwesa-Cwebe community</u>: The Bill provides the Minister with wide powers to determine land rights without any provisions on how these powers are to be exercised</p>	<p><u>Greater Manyeleti Land Rights Group</u>: The Bill must not give discretionary powers to a single individual regardless of social standing</p>	

Source: Author's research

CHAPTER 5

CLARA'S POLITICS: GAMES OF ACTORS AND THEIR IMPACT ON CONTENT EVOLUTION

5.1 INTRODUCTION

The previous chapter analyses the different positions of the stakeholders, issued during the development process and after the Act was released. This chapter analyses the influence of the different stakeholders to push through their points of view and safeguard their interests. The analysis of the stakeholders' influence, i.e. positions of the different stakeholders which *in fine* were retained or not in the final version of the Act, has been conducted through 1) close scrutiny of the evolution of the content; and 2) an in depth analysis of the events and strategies of the actors in order to push their interests through. The influence of the different actors engaged in the development of the Act was analysed through linking changes in the different drafts with both preceding events and strategies of the actors.

5.2 CLaRA'S CONTENT EVOLUTION AND ANALYSIS OF THE IMPLYING FACTORS

As detailed previously, the final draft of CLaRA travelled a long way, being shaped and reshaped through different drafts premised on contributions of the various actors engaged in the process. As shown in table 5.1, a first draft was prepared and served as a basis for further development and discussions. As it was based on previous work realised during the development of the LRB, the first CLRB drafts were already well developed (47 pages, ten chapters and three schedules) and presented in broad lines the final structure. The two first drafts were rather voluminous and were said to be less precise – a probably normal evolution for a policy document in the development and discussion phase. The final Act counts 22 pages, subdivided in ten chapters and one schedule.

But contrary to the structure of the document, the content shows more variations. This part analyses the evolution of the content of the different drafts and tries to

relate the latter to different actions and events, in order to be able to retrace which aspects, ideas or lobby groups have had specific impacts on the Act itself. To initiate the analysis, the Land Rights Bill of June 1999 will be detailed; thereafter the evolution of the content and their implying factors through the following major drafts until the final Act is analysed.

Table 5.1: The evolution of the structure of the different CLRБ drafts and CLaRA

	Land Rights Bill	CLRБ draft August 2002	CLRБ draft March 2003	CLRБ draft October 2003	CLaRA draft November 2003	CLaRA No.11 July 2004
Volume (pages)	47 (46 excluding schedules)	89 (88 excluding schedules)	22 (16 excluding schedules)	46 (34 excluding schedules)	21 (15 excluding schedules)	22 (18 excluding schedules)
Overall structure	10 chapters 3 schedules	12 chapters	10 chapters 1 schedule Memorandum on the Objects of the Bill	10 chapters 1 Schedule Memorandum on the Objects of the Bill	10 chapters 1 Schedule Memorandum on the Objects of the Bill	10 chapters 1 schedule
Detailed structure	Preamble 1. Definitions, objects, application and interpretation 2. Protected rights 3. Registration of protected rights 4. Awards to provide security of tenure and comparable redress 5. Transfer of state held land 6. Land rights management 7. Eviction 8. Enforcement of rights and dispute resolution 9. Land rights commissioner 10. General provisions: -Amendment	Preamble 1. Definitions 2. Objects and application 3. Legal security of land tenure under communal land tenure systems 4. Provision of redress where land tenure is insecure 5. Transfer of communal land 6. Alienation of communal land for development and commercial purposes 7. Land administration and NR management in communal land 8. Land rights board 9. Dispute resolution 10. Eviction of persons whose tenure rights have been	1. Definitions and application of the Act 2. Juristic personality and legal security of tenure 3. Transfer and registration of communal land 4. Provision of comparable redress where tenure cannot be legally secured 5. The conduct of land rights enquiry 6. Content, making and registration of community rules 7. Land administration committee 8. Land rights board 9. KwaZulu-Natal Ingonyama Trust land 10. General provisions -Amendment or repeal of laws	Similar 9. Vesting of KwaZulu-Natal Ingonyama Trust land 10. General provisions	Similar 9. KwaZulu-Natal Ingonyama Trust land 10. General provisions	Similar -No memorandum

	Land Rights Bill	CLRB draft August 2002	CLRB draft March 2003	CLRB draft October 2003	CLaRA draft November 2003	CLaRA No.11 July 2004
	of laws -Repeal of laws -Transitional arrangements	terminated 11. The conduct of land rights inquiries 12. Miscellaneous provisions	-Memorandum on the objects of the communal land rights bill			

Source: Author's research

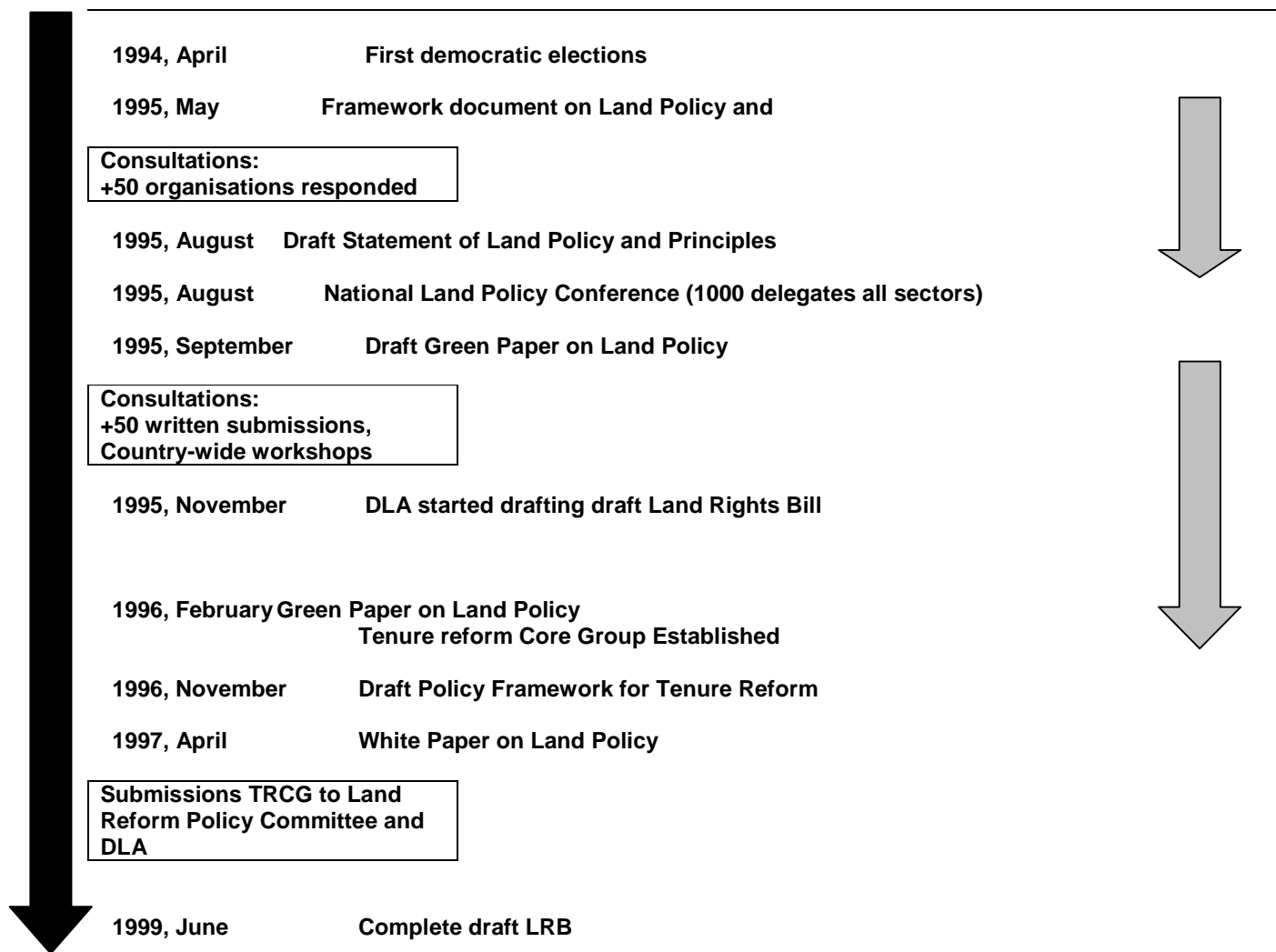
5.2.1 The initial Land Rights Bill (3 June 1999)

The idea of restructuring South Africa's communal land is not recent; it emerged even before the first democratic elections in 1994. As such, as part of the previous regime's political and economic policy to enhance the situation in the homelands, the National Party White Paper on Land Policy (1991) emphasized the idea of divesting the State of Black land. With activists appreciating the issue, in 1991, the NP implemented the Upgrading of Land Tenure Rights Act (ULTRA) promoting the transfer of land rights to tribal communities. This however, was never effectively implemented as – during the transition period of 1993-1994 – the main stakeholders' priorities differed: the NP sought to ensure protection of existing (white) rights to own private property, the ANC was insisting on land reform, but in favour of protecting the right to private property and civil society was pushing hard for land reform and redistribution of white owned land.

After the 1994 democratic election, which saw Nelson Mandela elected as President, the Reconstruction and Development Programme (RDP) Policy document states: “A national land reform programme is the central and driving force of a programme of rural development. Such a programme aims to redress to land. It aims to ensure security of tenure for rural dwellers. And in implementing the national land reform programme, and through the provision of support services, the democratic government will build the economy by generating large-scale employment increasing rural incomes and eliminating overcrowding” (ANC, 1994).²⁷ In the RDP, Land tenure reform was to be addressed through a review of present land policy, administration and legislation to improve the tenure security of all South Africans and to

²⁷ Land reform in the RDP (1994): “Land is the most basic need for rural dwellers. Apartheid policies pushed millions of black South Africans into overcrowded and impoverished reserves, homelands and townships. In addition, capital intensive agricultural policies led to the large-scale eviction of farm dwellers from their land and homes. The abolition of the Land Acts cannot redress inequities in land distribution. Only a tiny minority of black people can afford land on the free market. The RDP must implement a fundamental land reform programme. This programme must be demand-driven and must aim to supply residential and productive land to the poorest section of the rural population and aspirant farmers. As part of a comprehensive rural development policy, it must raise rural incomes and productivity, and must encourage the use of land for agricultural, other productive or residential purposes. The land policy must ensure security of tenure for all South Africans, regardless of their system of land-holding. It must remove all forms of discrimination in women's access to land.” (ANC, 1994).

accommodate diverse forms of land tenure, including types of communal tenure (Figure 5.1).



Source: Author's research

Figure 5.1: Evolution of the development of the Land Rights Bill

This announced the beginning of extensive process of public consultations on land policy issues. Over 50 organisations, including farmers' associations, NGOs, government departments and concerned individuals, responded to an initially prepared Framework Document on Land Policy released in May 1995 by DLA (White Paper, 1997). This resulted in a National Land Policy Conference, held between August 31 and September 1 1995, where a draft Statement of Land Policy and Principles was discussed in detail by over a 1000 delegates who attended the conference and where the initial foundations for the development of a Green Paper were laid.

Following, up to February 1996, over 50 written submissions were received from the public and workshops were held across the country to consult on the contents of the Green Paper. Regarding the reform of the communal lands, many voiced concerns and others fervent support for the role of tribal authorities in tenure reform.

Those in favour of tribal authority involvement insisted that: i) The state should not hold land on behalf of Black people; ii) Chiefs should be issued the title deeds for their tribe's community; iii) Chiefs should be responsible for redistribution of land; iv) Problems would occur if land was bought by subjects and not by tribes as the subjects would be separated from the tribes.

Those against tribal authorities' involvement in land administration the following concerns:

i) communities falling under chiefs should get their own title deeds; ii) government should do away with PTOs; iii) chiefs should not accept bribes; iv) the lack of security of tenure on communal land in urban areas hampered development; v) Centre for Applied Legal studies made a written submission against the role of traditional leaders in tribal land administration; vi) Community members specifically called for policy on the roles and rights of women should be explicitly integrated into the White Paper.

The difficulty and sensitivity of tenure reform had become visible and had pushed the DLA to decide internally to set aside at least two more years for tenure research and strategizing. It was also accepted that – despite the necessity to deliver - the process

of developing communal land policy could last for up to three years. To initiate it, DLA started outlining a first draft of a Land Rights Bill at the end of 1995. In February 1996, a Tenure Reform Core Group (TRCG) was formed, comprising appointments by the Minister of DLA and non-official members considered to be experts (DLA, activists, LRC, Academics from PLAAS, former TRAC members, former RWM members). The group was brought together to strategize on the development of tenure policy. It produced a draft Policy Framework for Tenure Reform in November 1996, much of which was copied verbatim from the draft White Paper (scheduled for publication in June 1997), and which recognised customary practices of land holding and tenure.

In the meantime, two important pieces of legislation dealing with tenure were passed by Parliament in 1996. These were: i) the Interim Protection of Informal Land Rights Act, 31 of 1996 (IPILRA) and ii) the Communal Property Associations Act, 28 of 1996 (CPA). In addition, the Upgrading of Land Tenure Rights Act, 112 of 1991, was amended to bring it in line with tenure policy. IPILRA was a holding mechanism that prevented violation of existing interests in land until new long-term legislation had been put place. The CPA Act provided a means through which people wanting to hold land jointly and in groups could organise their tenure.

Although the KZN provincial government called for provincial autonomy, the Green paper was voted in and published as the white Paper on Land Policy in April 1997. At that time, the primary objective for the Government's land reform was to redress the injustices of apartheid and to alleviate the impoverishment and suffering that it caused. The overall political economic structure during that period was reflected through Government's 1994 Reconstruction and Development (RDP) programme, which sought to redress the past injustices and was mainly based on development through redistribution. As such, the first phase of the land reform policies implemented by the then Minister of Agriculture and Land Affairs Derek Hanekom, concerned the development of subsistence farming. Such an orientation highlighted the importance of the land reform and small-scale agricultural production development impact on the social and economic development of rural areas. Government was prioritizing food security and means of subsistence in a country where resource distribution inequality is extreme and where the link between black

populations and commercial farming was interrupted for several decades (Alden and Anseeuw, 2009).

Providing for three programmes recognised by the constitution (restitution, redistribution and tenure reform (See Box 1, p.3), the White Paper warned of the extreme caution that needed to guide tenure reform. Regarding the latter, it formally recognises customary practices of land holding and tenure and differentiates between “governance” and “ownership” of land, whereas in apartheid government both owned and governed/administered land. This is important because this could translate into a system of ownership where members of a community can be co-owners of land (if they decide to have a communal system), but also in a communal arrangement that they are directly implicated in deciding how they – the co-owners – want the land to be governed and administered. As such, no one should be able to dictate how the land is administered; it must be participatory and involve the community.

In October 1997, the TRCG made submissions to the Land Reform Policy committee noting that rights of individuals in the LRB would be newly created statutory rights, not transferred extant rights. As such, the original LRB was premised on securing the rights of people on communal land through statutory definition rather than titling, leaving the precise definition of the content of such rights and of the boundaries of groups and of representative authority structures, to local processes overseen by Government (Claassens and Cousins, 2008). The TRCG thought this would be best as it makes rights that are theoretically sound, as they would be embedded in statutes. It also thought it would help with boundary disputes. Critics (within DLA and from civil society), however, thought the distinction of an old or new right would only exist on paper, and mean nothing in the community. They thought it was only a strategy for avoiding the overall traditional leader issue (Fortin, 2006).

In 1998, the TRCG began meetings with a tenure drafting team, which led to the LRB. Several failed test cases on transfer of land ownership to groups or

individuals²⁸, resulted in the TRCG and DLA confirming the previous evolutions informing a new LRB. On June 3 1999, a day after the second democratic elections, a first complete LRB draft was published for discussion purposes. The draft, (Claassens and Cousins, 2008):

- Sought to create a category of protected rights covering the majority of those occupying land in the former homelands.
- The Minister of Land Affairs would continue to be the nominal owner of the land, but with legally reduced powers relative to the holders of protected rights
- Protected rights would vest in the individuals who used, occupied or had access to land, but would be relative to those shared with other members, as defined in agreed group rules.

The LRB detailed the major themes for tenure reform as follows:

- To provide for protected rights to occupy, use or have access to certain land,
- The registration of protected rights,
- A protected right means the right to occupy, use or have access to land,
- people whose land rights are diminished or compromised as a result of forced overlapping of rights and interests acquire additional or alternative land,
- The Minister of Land Affairs would continue to be the nominal owner of the land, but with legally reduced powers relative to the holders of protected rights,
- Protected rights would vest in the individuals who used, occupied or had access to land, but would be relative to those shared with other members, as defined in agreed group rules.

Major beneficiaries in terms of power given by the Bill were:

- A rights holder structure, meaning anybody representing protected rights holders in respect of land matters, and where the context so indicates, includes an accredited rights holder structure (i.e. previously marginalised communities from the former homelands),
- Women are highlighted throughout the Bill,

²⁸ Major difficulties with transfer of ownership directly to groups or individuals: boundary conflicts, community membership conflicts, access problems to shared resources for vulnerable groups, lack of participation in decision making, traditional leaders with undue power

- Traditional structures can participate in an ex-officio capacity.

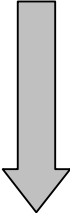
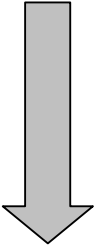
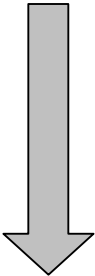
Traditional leaders, largely left out of the process at that time, felt threatened by the proposition.

5.2.2 CLRБ August 2002 Version Compared to the LRB (June 1999)

The first change of orientation, characterised by the change in ideology from the institutionalisation of old order rights to the implementation of new order rights, is mainly linked to the change in the country's overall political economy. As such, although initiated earlier already, the second democratic elections in 1999 and the inauguration of Thabo Mbeki as President initiated a formal change in ANC leadership & policy orientation based on African Renaissance ideologies and more neo-liberal focuses. This resulted in the abandonment of the more development oriented RDP for the neo-liberal Growth, Employment and Redistribution (GEAR) policy framework, which held out the promise of sustainable economic progress through the application of fiscal austerity measures and export-oriented growth (Alden and Anseeuw, 2009). The ground was laid for a rethinking of South Africa's land reform policies, including tenure reform. As such, the first phase of land and agrarian reform, with its emphasis on the most marginalized sectors of the rural community, was clearly out of step with the guiding ethos behind GEAR. Furthermore, it failed to address the broader developmental needs of encouraging investment into the rural areas as a means of improving livelihoods but also to focus on more market oriented production. The approach where only subsistence farming was being promoted was questioned and, as a result, the development of an emergent commercial and small scale farming sector became the priority. Land reform was no longer aimed at promoting self-sufficiency, but at creating a structured small-scale commercial farming sector with a view to improving farm production, revitalising the rural environment and creating employment opportunities. This strategy coincided better with the more liberal orientations of the government and analysts identify the focus on African renaissance embraced by the new President Thabo Mbeki as the overriding factor that influenced the philosophy of the ruling ANC (Cousins, 2004).

Thabo Mbeki, the newly elected President, replaced Derek Hanekom with Thoko Didiza as Minister of Agriculture and Land Affairs. The Minister not only replaced the DG of the DLA and many employees of the DLA, she also put on hold the land reform programmes and reviewed the reform processes to evaluate strategy and policies. Many of the senior staff within the department of land affairs were replaced with those who were viewed as sharing the same philosophy and led AFRA to claim that DLA was now shutting out civil society and NGOs, as well as being less consultative with academics, thus making it less transparent. Those replaced at this time were to later play a major part in opposing this piece of legislation.

As such, although initially land reform programmes were “put on ice” and DLA went through internal review processes to re-evaluate their strategies and policies, these new evolutions had a direct impact on the communal land reforms South Africa was engaged in. Heavily influenced by the new ANC philosophy put forward (and driven predominantly by their President at the time), the new Minister decided that the Land Rights Bill was too complex and involved too much state support for rights holders and local institutions (Claassens and Cousins, 2008). The Land Rights Bill was set aside and the development process of the Communal Land Rights Bill was to follow (Figure 5.2).

	1999, June	Complete draft LRB	
	2000, March	(2 nd) Draft Communal Land Rights Bill	
	2001, May		
	Official start consultations		
	2001, October	Intermediary 3 rd draft CLRБ, internal discussions only	
	2001, November	Official reaction PLAAS/NLC to 3 rd draft CLRБ National Land Tenure conference 2002 Ministerial Reference Group established	
	2002, March	4 rd draft CLRБ, internal discussions only	
	2002, May	5 th draft CLRБ, internal discussions only	
	2002, June	6 th draft CLRБ, internal discussions only	
	Midnet Land Reform Group and LEAP organise workshop in Pietermaritzburg		
	2002, July	7 th draft CLRБ, internal discussions only	
	International Symposium on Communal Tenure Reform, organised by PLAAS and CALS		
	2002, August	8 th draft CLRБ gazetted for public comment	
	Official start consultations (60 days) - Written contributions: - 50 workshops		
	2002, October		
	2003, March	9 th draft CLRБ, internal discussions only	
	2003, July	10 th draft CLRБ published Joint task team established Several secret meetings (Ingonyama Land trust, IFP, Zulu King, informal submission KZN house of TL)	
	2003, September	11 th draft CLRБ, introduced in the National Assembly. Introduction approved and notice published with intention to introduce CLRБ in parliament with call for submissions	
	Official start of public comments (21 days)		
	2003, October	1 st amended 11 th draft CLRБ Notice of intention is withdrawn and new notice of intention to introduce the 1 st amended 11 th draft CLRБ	

2003, November

- Public hearings
- Submissions of various stakeholders

2nd amended 11th draft CLRB

2004

ANC-DLA Study group
Secret meetings IFP
Portfolio Committee meeting

2004, February

3rd amended 11th draft CLRB
Scheduled for second reading in Parliament
Voted unanimously by Parliament

2004, July

CLaRA enacted

Source: Author's research

Figure 5.2: The evolution of the development of the Communal Land Rights Bill

On February 11 2000, Land Affairs announced a new strategic direction mainly focusing on providing opportunities to emergent farmers and speeding up the restitution programme. There was also a first hint that the approach to communal tenure reform established in the LRB was officially abandoned in favour of a “transfer to tribes”. At the initial stage of the Bill’s formulation, the DLA was the central player with no evident undue influence from external quarters (save for the overriding philosophy of the ruling party). Several drafts were developed some of which were for internal use only and were not discussed publicly.

During March 2000, a draft version of the newly entitled bill (Communal Land Rights Bill – CLRB) was published. The new Bill was oriented towards the transfer of title approach. The title of communal land is, according to the draft Bill, to be transferred from the State to a community which must register its rules before it can be recognized as a juristic personality legally capable of owning land. Individual members of the community were to be issued with a deed of communal land right, which can be upgraded to a freehold title if the community agrees (Claassens and Cousins, 2008).

Although criticized for disregarding the difficulties noted by the transfer model in the test cases of 1998-1999 (Claassens, 2000; Ntsebeza, 2003), the draft not only

reflected the new Minister's intentions, but also sparked debates over the role of traditional leaders in local governance made more pertinent by impending local elections nationwide. By threatening to both boycott and fuel violence at polls, traditional leaders were demanding the dismantling of municipalities in rural areas in favour of tribal authorities and the delay of the election date. Government tried to appease them by proposing amendments to the Municipal Structures Act (Increased representation of traditional leaders from 10 to 20% of total local councillors but which was rejected by the traditional leaders since they wanted more representation). After successfully delaying them, the local elections eventually went through with the consent of the traditional leaders; interestingly, without amendments to the Municipal Structures Act, which led people to speculate about a political deal over land tenure legislation (Ntsebeza, 2003).

In May 2001, consultations on this first official draft Communal Land Rights Bill officially commenced. Comments, remarks, additions and other issues were to be sent in before the 26th of November, official date representing the finalization of the consultation on the CLRB.

On the 25th of October, a full month before the stipulated time, an intermediary 3rd draft CLRB was released for departmental discussion purposes only. However, the document leaked from DLA, causing fury from civil society including a significant number of the former employees of the DLA, side-lined in 1999. PLAAS and NLC complemented this by sending an official submission on the 15th of November. On one hand, they were opposed to the proposed shift to the transfer of title approach and on the other; they sought to challenge the draft bill that came out ahead of the official schedule. They claimed that the approach of transferring rights and ownership to communities, positioned individuals and their rights against the community and could have negative consequences for already disadvantaged individuals (in Fortin 2006: 139). In addition, legal experts and civil society criticised the new draft CLRB for echoing the Upgrading of Land Tenure Rights Act of 1991 (issued by the National Party during the previous regime). Furthermore, they expressed dissatisfaction with the lack of wide consultation on the Bill and noted that the consultative process had been selective.

With the consultations finalising on the 26th of November, DLA organised the National Land Tenure Conference in Durban, from the 27th to 30th of November 2001, which would include all major stakeholders. At this occasion, Director of DLA's Tenure Directorate Dr Sibanda presented the new draft CLRБ, emphasising that it was time to "divest" the state of communal land in favour of private ownership. This brought on an emphatic clamour of "anti-privatisation" criticism from both civil society and traditional leaders. Civil society claimed that to enable privatisation under the circumstances proposed in the bill required an ideal type of communal arrangement, which, mainly according to PLAAS, did not exist (Fortin, 2006). Traditional Leaders, on their side, began lobbying in favour of strengthening their land administration positions because they feared a loss of power and eventual irrelevance. The Tenure Conference ended up being a brain storming session on a new approach to CLRБ, with DLA trying to accommodate different, often opposing, positions, and with the different stakeholders mobilising themselves in order to secure their positions and/or interest.

On December 4 2001, one week after the tenure conference, Minister Didiza addressed the National House of Traditional Leaders. She made it explicit that there would be a role for traditional leaders in communal land administration: "*The call to traditional leaders on how to secure communal rights comes at an opportune time; when our President is calling for and championing the African renewal cause. African renewal, ladies and gentlemen, cannot reach its pivotal realization without us going back to our natural leaders, our traditional leaders, who have been custodians of the rich African land*" (Didiza Address 4.12.01, in Fortin, 2006, p.97).

Early 2002, a Ministerial Reference Group was established by the DLA to help with the drafting of the Bill. This resulted in an acceleration of the legal drafting of the Bill so that on March 18, May 24, June 14 and July 2 2002, the DLA released respectively the 4th, 5th, 6th and 7th draft CLRБ. Again, these documents were for Departmental discussion purposes only with no external comments were received or considered. In order to prepare a response to the forthcoming public release of the CLRБ, AFRA together with the Midnet Land Reform Group and LEAP organized a workshop in Pietermaritzburg on June 26th. In mid 2002, PLAAS/NLC received funding from DFID to engage in community consultations and a media campaign

against the CLRB. Predictably, influence from “civil society” started to increase at this time. Finally, in order to learn from others’ experiences, an International Symposium on Communal Tenure Reform titled “Tenure Reform: Lessons for South Africa” was convened on August 12 2002 by CALS, PLAAS and DLA. Inexplicably, the DLA, a major player pulled out a few days before the symposium.

During August 2002, the 8th draft of the CLRB was officially published in the Government gazette for public comment. No one was satisfied with the contents of the Bill, including the traditional leaders who were concerned about their diminishing role in governance. Activists and academics were very concerned about women’s and human rights under traditional land systems whilst the DPLG voiced concerns about service provision on private land (communally, individually or collectively held) because it was not supposed to provide services on private land.

The change of government and, subsequently, of the countries’ political economic orientations, complemented by the influence exerted by the different stakeholders, mainly tribal authorities and civil society, resulted in major changes between the CLRB August 2002 version and the LRB of June 1999. Table 5.2 makes a comparison between the CLRB of 2002 and the LRB of 1999.

Table 5.2: Comparison of the CLRB (version 8th, August 2002) with the LRB (June 1999)

Content & Major Changes	Preceding Events
<p><i>Overall objective has been narrowed:</i> To provide for legal security of tenure by transferring communal land, to communities, or by awarding <i>comparable redress</i></p> <p><i>Differences regarding powers of traditional leaders and recognition of certain rights:</i></p> <ul style="list-style-type: none"> - Traditional leaders are considered in terms of the constitution - Traditional leadership which is recognized by a community as being its legitimate traditional authority may participate in an administrative structure in an ex-officio capacity; provided that the ex-officio membership does not exceed 25% of the total composition of the structure. <p><i>Differences regarding land tenure:</i></p> <ul style="list-style-type: none"> - Provision of land tenure right, not protected right - Transaction and transfer of protected rights sections omitted - Section dealing with the IPILRA is omitted (alienation of communal land for commercial development) - Local record of protected rights (structure) omitted - Omission of access to LRE determination documents <p><i>Women's rights:</i> protection of women's rights section omitted</p> <p><i>Chapter 2 - Application of the Act:</i></p> <ul style="list-style-type: none"> - Ingonyama land is introduced in this draft - Community has to first register its community rules before being recognised as a juristic person - Terminology differs here. Protected right is referred to as "land tenure right" <p><i>Chapter 5 - Transfer of Communal Land:</i></p> <ul style="list-style-type: none"> - Designation of officials to assist communities 	<ul style="list-style-type: none"> *02/04/1999 Change in ANC leadership & policy orientation: African Renaissance/renewal & neo-liberal focus *11/04/1999 New strategic direction for DLA announced – there was a hint to the “transfer to tribes” model of tenure reform *11/04/1999 New direction suggests using existing land administration structures, where they exist *16/06/1999: Minister DLA replaced *?/08/1999 Land reform put on ice *11/02/2000: New strategic direction for land reform: speed up process & promote commercial opportunities for Black farms *?/03/2000: AFRA claims DLA is now exclusive of civil society & NGOs, less transparent *1999-2000 Results of communal land transfer test cases analysed (Claassens 2000), CLRB discussion documents before August 2002 draft were criticised considering test cases (ibid) *11/2000 traditional leaders boycott local elections; attempts to appease through amendment to Municipal Structures Act – rejected * Elections delayed *05/12/2000: Local Elections without amendments to Municipal Structures Act, traditional leaders accept election – speculation about a deal over land tenure legislation (Ntsebeza, 2003) *25/10/2001 Leak of CLRB before tenure conference *15/11/2001 PLAAS/NLC submission against transfer to community *27-30/11/2001 Land Tenure Conference *04/12/2001 Didiza addresses National House of Traditional Leaders – assuring role in land admin

Content & Major Changes	Preceding Events
<p>with applications or projects or requests</p> <p><i>Chapter 6 - Alienation of Communal land for development and commercial purposes</i> -Totally new chapter in this draft.</p> <p><i>Chapter 7 - Land administration and natural resource management in communal land:</i> - Community rules and administrative structure must be adopted first before setting up - Where applicable, the institution of traditional leadership recognized by a community may participate in an administrative structure in an ex-officio capacity; provided that the ex-officio membership does not exceed 25% of the total composition of the structure. - Land rights boards are dealt with in a separate Chapter</p> <p><i>Chapter 11 - The Conduct of Land Rights Enquiries:</i> - Omission of: determinations may be given to any interested party upon payment of fee - Any person aggrieved by it may appeal to LCC within 30 days of seeing such determination</p> <p><i>Chapter 12 - Miscellaneous Provisions:</i> - Expropriations included “under sect 25 of the Constitution and the Expropriation Act, 1975 (Act No. 63 of 1975), the Minister may.</p>	

Source: Author’s research

Although the major theme for communal land reform did not change, with an objective that remained broad “*To provide for legal security of tenure by transferring communal land, to communities, or by awarding comparable redress*”, new orientations were put forward.

Besides several amendments made, major changes in orientation regarding the previous LRB concerned:

- The shift from securing the rights of people on communal land through statutory definition to an approach promoting security of land rights derived through an exclusive title to land, whilst trying to combine this with the recognition of some elements of customary land tenure. As such, new order

rights are defined as a tenure or other right in communal or other land which has been confirmed, converted, conferred or validated by the Minister in terms of Section 18, therefore, terminology differs in this draft: Protected right is referred to as 'land tenure right'.

- The powers of traditional leaders, which in this draft were still defined as stated in Sections 211 and 212 of the Constitution. This draft outlined in greater detail the roles and powers of land administration and natural resource management structures on communal land.

As such, in contrast to the LRB, a community has to first register its community rules before being recognised as a juristic person. In this framework, an administrative structure is defined as any body of persons representing a community and authorized by that community to perform functions in respect of land administration and natural resources management in terms of that community's community rules....., which may include the institution of traditional leadership and other community based institutions. In this process, chiefs were allocated much more responsibility. It is noted that, where applicable, the institution of traditional leadership which is recognized by a community as being its legitimate traditional authority may participate in an administrative structure in an ex-officio capacity; provided that the ex-officio membership does not exceed 25% of the total composition of the structure. Land rights boards are dealt with in a separate Chapter, but are not detailed. Accordingly, under general principles, the section dealing with discrimination against women is omitted in this draft. Reference is made though to respecting the rights enshrined in the constitution. In addition, there are considerable omissions of sections dealing with legal security of tenure, protection against arbitrary deprivation of tenure rights and general principles when compared to the previous draft.

5.2.3 CLR B March 2003 Version Compared to the CLR B August 2002 Version

With the publication of the 8th draft CLR B, it was also announced that comments were to be submitted within 60 days. In addition, DLA organized – according to official statements – 50 workshops at provincial DLA offices, Contralesa, provincial

houses of traditional leaders, local traditional leaders, at the Ingonyama trust and within communities. During these consultations, the overall reaction was rather negative. It seemed the draft's contents and processes did not satisfy any stakeholders. Regarding the contents, traditional leaders were concerned about their diminishing role in governance; activists and academics were worried about women's and human rights under traditional land systems; the DPLG voiced concerns about service provision on private land (communally, individually or collectively held) because it was not supposed to provide services on private land. Regarding the processes, DLA was criticised by civil society for pretending to give a voice to the communities, while meetings were dominated by traditional leaders. In KZN, however, DLA claimed that attempts to have 11 community consultations about the CLRБ were disrupted and disallowed by chiefs, claiming they did not have proper traditional permission.

Consequently, in September 2002, in an attempt to appease opposing forces, the Tenure Reform Implementation Systems Department of the DLA released "A Guide to the Communal Land Rights Bill". On one hand, it attempted to answer some of the legal criticisms of the CLRБ brought by LRC, PLAAS and NLC. It tried to link various clauses about ownership versus administration and connect them to the role played by traditional leaders to prove that the community would have choices about land administration. Although it reiterated the importance of traditional leaders in land administration, it condemned traditional authorities' hunger for power. On the other hand, the guide sought to appease concerns of traditional leaders by saying: "*The Draft Bill's point of departure is the recognition of the gallant role played by the administrative structures and particularly the traditional leadership institutions in channelling the resistance to colonial dispossession of land and upholding the dignity and cohesion of African people, and in retaining access to part of their land...*" (in Fortin, 2006, p.103). Attempts to reassure activists were negated by the quoted section. Criticism continued unabated and increased.

In the meantime, in order to respond to what were seen as destabilizing threats, the Director of DLA's Tenure Directorate presented a paper at a Land Systems and Support Services Colloquium (March 2 2003) in which he claimed that "... *traditional leaders want exclusive control over communal land within the context of existing*

customary structures traditional leadership [sic]. It is difficult to accommodate and embrace the position that is articulated by the traditional leaders given the imperatives of the Constitution and the White Paper on Land Policy to transfer and democratize the structures of governance within the context of a unitary land administration” (in Fortin, 2006, p.112). However, President Mbeki addressed the National House of Traditional Leaders, mentioning the CLRB and its redrafting to incorporate proposals of all stakeholders, including those of the traditional leaders. Mbeki assured traditional leaders that DPLG and DLA were working together on their respective bills and the results would be “coordinated and aligned” (which was denied by the DPLG (Fortin, 2006). Although the initial DPLG proposition to work together and coordinate on TLGFA and CLRB for roles and composition of traditional leadership was rejected by the DLA, Mbeki’s position was nevertheless acknowledged as proven by the reference to traditional leadership through s1 of the Traditional Leadership and Governance Framework Act of 2003 (and not through the Constitution anymore).

These consultations and lobbying initiatives resulted in the 9th draft CLRB, which considered and incorporated - according to DLA - all comments of stakeholders. It was released for Departmental discussion purposes only on March 11 2003; while its public release was not expected before June 2003. In table 5.3, a comparison is made between the March 2003 version and the August 2002 version of the CLRB.

Table 5.3: Comparison of the CLRB March 2003 version with the CLRB August 2002 version

Content & Major Changes	Preceding Events
<p><i>Overall objective has been narrowed: “To provide for legal security of tenure by transferring communal land, including KwaZulu-Natal Ingonyama land, to communities, or by awarding comparable redress”.</i></p> <p><i>Differences regarding powers of traditional leaders and recognition of certain rights:</i></p> <ul style="list-style-type: none"> - traditional leaders are considered in terms of the constitution - Ingonyama Land Trust recognised 	<ul style="list-style-type: none"> *08/2002:DPLG voices concerns about providing services on “private land” *02/03/2003: DLA statement @ LSSC colloquium that the priority of tenure democracy in rural areas (warning to traditional leaders) *09/2002: TRIS report outlining the separation of ownership and administration/governance *02/03/2003: TRIS paper condemning traditional authorities’ hunger for power; reiterates importance of White Paper (1997) *DPLG proposes working together on TLGFA & CLRB for roles & composition of traditional

Content & Major Changes	Preceding Events
<p>- The fact that traditional leaders can be included in LAC as up to 25% ex-officio members of LAC is taken out.</p> <p>- LACs may be exercised and performed by recognised traditional council</p> <p><i>Chapter 8: Land Rights Board:</i></p> <p>- Composition of the board is expanded</p> <p>- Functions of the board are much less detailed in this draft, omitting issues relating to cancellation of rights, awards of comparable redress, leasing of State held land and disputes</p> <p><i>Chapter 9 - KwaZulu-Natal Ingonyama Trust Land: Completely new Chapter</i></p> <p>-Ingonyama Trust board to become Land rights board</p> <p>-to be headed in perpetuity by the Ingonyama</p> <p>-25(a) notes that the Minister does not have the power to constitute the Ingonyama land rights board</p> <p><i>Chapter 10 - General Provisions:</i> This draft adds the section on the application of the Act to other land reform beneficiaries</p> <p><i>Others:</i></p> <p>- The Chapters on Dispute Resolution and Eviction of persons whose tenure rights have been terminated are left out</p> <p>- Significant omissions regarding procedures and local (community) rules to be established: i) the opening of a communal land register and designation of officials to assist communities with applications or projects or requests, ii) consistency with the protection of fundamental human rights, ii) consistency with democratic processes, iii) fair access to the property of the community, iv) accountability and transparency, v) drafting and adopting of community rules</p> <p>- Draft omits all aspects relating to natural resource management</p>	<p>leadership, DLA not cooperative (Fortin, 2006)</p> <p>*** Draft not released publicly until June.</p> <p>-----</p> <p>*08/2002: DLA CLRБ consultations disrupted in KZN by traditional leaders</p> <p>*09/2002: TRIS report reiterates importance of traditional leaders in land administration</p> <p>*06/11/2002: Contralesa voices opposition & warns of possible violence related to CLRБ, positions itself as peacekeeper</p> <p>*04/12/2002: Holomisa urges ANC to seek Contralesa support to prevent violence</p>

Source: Author's research

The period between August 2002 and March 2003 saw the traditional leadership take ownership of the Bill's development. This resulted in the overall objective being narrowed and making reference directly to specific traditional leaders: *"To provide for legal security of tenure by transferring communal land, including KwaZulu-Natal Ingonyama land, to communities, or by awarding comparable redress"*. As such, even if it still focused on new order rights defined as a tenure or other right in communal or other land which has been confirmed, converted, conferred or validated by the Minister in terms of Section 18, it emphasised specific beneficiaries, such as the Ingonyama trust, drawing attention to the influence certain key stakeholders played in the Bill's development process.

Indeed, the CLRB March 2003 version's major changes were strongly aligned to traditional leaders' advantage. These were better defined and allowed them greater responsibilities in this version. Therein, a traditional council was not defined according to the constitution anymore, but as described in Section 1 of the Traditional Leadership and Governance Framework Act of 2003. The version notes regarding LACs - if a community has a recognised traditional council, the powers and duties of the land administration committee of such community may be exercised and performed by such council. Hence, the 25% quota for traditional leadership is dropped in this draft (previously traditional leadership members could represent up to 25% ex-officio members of LAC).

These benefits are even more precise in the case of the Ingonyama Trust board, which is recognised to become a land rights board on its own, is to be headed and constituted in perpetuity by the Ingonyama Trust (and not by the Minister) itself. Although the composition of the land rights boards is expanded, the functions of the board are much less detailed in this draft, omitting issues relating to cancellation of rights, awards of comparable redress, leasing of State held land and disputes.

The new version had considerable omissions compared to the previous draft in sections dealing with the rights of communities. Although the section on security of tenure highlights the issue of women and old order rights ("A woman is entitled to the

same legally secure tenure rights in or to land and benefits from land as is a man...”), many aspects dealing with legal security of tenure, protection against arbitrary deprivation of tenure rights and general principles are not addressed. In addition, the following sections have also been omitted:

Community rules that had to be consistent with the protection of fundamental human rights; opening of a communal land register and designation of officials to assist communities; fair access to the property of the community; democratic processes, accountability and transparency; drafting and adoption of community rules; all aspects relating to community land administration and natural resource management in communal land. Finally, the Chapters on Dispute Resolution and Eviction of persons whose tenure rights have been terminated were completely left out of this draft.

5.2.4 CLRB October 2003 Version Compared to the CLRB March 2003 Version

About a month later on April 1st 2003, President Mbeki again addressed the National House of Traditional Leaders, mentioning the CLRB and its redrafting to incorporate proposals of all stakeholders, including those of the traditional leaders. While reassuring the role of traditional leaders in land administration, Mbeki stressed the need for continued cooperation and non-confrontation.

In July, the DLA – (which had tried to accommodate the eagerness of the traditional leaders to control communal land) - released an intermediary draft CLRB document for comment appealing the Ingonyama Land Trust Act and amending the LAC’s constitution. In this draft, LACs for all communities were limited to a maximum of 25% traditional leaders or their nominees, required a mandatory minimum of 1/3 women membership and it sparked outrage from KZN House of Traditional Leaders and Zulu King Goodwill Zwelithini. They pronounced the CLRB a “recipe for a bloody confrontation”²⁹. While the DLA and DPLG were alarmed that unrest would follow these comments, the ANC sensed rising tension between itself and both the IFP and Contralesa. The potential of conflicts was confirmed, on August 19 2003, when the

²⁹ “New KZN land conflict looms” in *Witness*.

Minister and the DG of DLA met with the Zulu King, Chief Buthelezi and KZN traditional leaders.

In response, the transfer of the Bill to Cabinet was delayed and the ANC who wanted to retain support of the Zulu King³⁰ and Contralesa formed a joint task team, including the DLA and the DPLG, regarding the CLRB, officially in order to “operationalize issues relating to the TLGFB and the white Paper on Land Policy”. In addition the Minister and the DG DLA promised, the meeting, that the Ingonyama Land Trust would not be repealed in later versions of CLRB on condition that the trust membership would be put in line with the CLRB “democratic” vision for the LAC (i.e. would have elected members and women on the Ingonyama Land). Sometime in September, Zuma also met with Buthelezi and Zulu king. The outcomes of that meeting remain unknown. Although the KZN House of Traditional Leaders made a submission on the TLGFB which included a main focus on the CLRB on September 16 2003 portraying both bills as attempts to “*rob traditional leaders of the power of allocating and administering communal land*” (Ntsebeza, 2005) and warning that, “*where stability now reigns, we are soon going to have social disintegration and great upheaval*”³¹, it seemed that after two years of furious contestation of the CLRB and TLGFB, Contralesa supported the two acts leading to a rapprochement to the ANC. This last action raised suspicions among civil society that suspected a deal between the ANC and traditional leaders (Fortin 2006; Ugglä, 2006).

Subsequently, on September 18 2003, an 11th draft CLRB was introduced in the National Assembly as a Section 75 Bill. The introduction was approved by the Minister on September 23 2003. Subsequently, late September 2003, vice President Zuma met secretly with Chief Buthelezi and the Zulu King, while on October 3rd, a notice of intention to introduce the CLRB in Parliament and to invite the public to comment on the Bill within 21 days was released. The CLRB was gazetted and the deadline for comments was set for October 24th. The content of the gazetted draft was similar to the content of the July 4th version (10th draft), except that this version did not repeal Ingonyama Land Trust Act and changed the LAC composition section i) to make a chief, headman/woman or nominee a *mandatory* member of LAC, ii)

³⁰ IFP Bid to Woo King *Mail and Guardian*, April 30 2003.

³¹ Written submission of KZN House TL, 16 Sept 2003.

stating that a maximum 25% of LAC members can be traditional leaders, and that the other elected members cannot have *any* traditional leadership post.

Civil society, land activists and NGOs, in a frenzy to respond within deadlines about changes, engaged in a series of workshops to analyse the new CLRB document and to draft comments. Generally, they opposed the first two changes and supported the third, but overall, they accepted these changes as a necessary compromise. They all agreed on how to counter the Bill (with submissions and through community consultations) but not everyone agreed on the position. AFRA, for example, did not think it was their concern whether traditional leaders were constitutional or not, but stated that their primary concern is to address what will get the communities – in whatever form – secure tenure. This non-alignment of the different actors further weakened an already splintered civil society. Since 2002, Government was indeed very active influencing civil society and NGOs framework to its cause³². If Government imposed financial measures (cancellation of tax exemption, for example), it also intervened directly in NGO structures and decision-making and this was particularly the case with the NLC network, since some of their main figures helped set up the Landless People's Movement. In July 2003, the Board of the NLC dismissed the NLC Director, Zakes Hlatswayo in what has been described as motivated by politics of containment. The board's strategy, probably under governmental pressure, has been to suppress and intimidate the NLC staff members who were most vocal in their support for the Landless People's Movement (LPM) and its activities, such as the march during the World Summit on Sustainable Development (WSSD). Later, in June 2005, the NLC finally decided to close its national office and to restructure its network of affiliates (Alden and Anseeuw, 2009). Table 5.4 below compares the October 2003 and the March 2003 versions of the CLRB.

³² "Govt has taken control of civil society" (Glenda Daniels), Mail & Guardian, 27 March 2002.

Table 5.4: CLRB early October 2003 version compared to the CLRB March 2003 version

Content & Major Changes	Preceding Events
<p><i>Overall:</i> *Bill introduced as a section 76 bill *reference to traditional leaders as LAC reads <i>must</i> (emphasis added) instead of <i>may</i> (s.22(2)) *Ingonyama Land Trust not repealed</p> <p><i>Chapter 2: Juristic Personality and Legal Security of Tenure</i> * Women’s rights: Sections 4(2) and 4(3) on old order right held by a married person are omitted. Also omitted “A woman is entitled to the same legally secure tenure...”. * Omission regarding rights on 9a0 land other than the land to which old order right relates, (b) compensation in money or in any other form.</p> <p><i>Chapter 5 – Land Rights Enquiry (LRE):</i> Sections omitted : *Section 17(2), requiring enquirer to include community inputs into Land rights enquiry (LRE) *17(3) requiring public availability of LRE before submission to Minister *Minister does not need to consider customary law (s.19(1))</p> <p><i>Chapter 7: Land Administration Committee</i> * TL “must” as opposed to “may” (s22(2)), “If a community has a recognized traditional council, the functions and powers of the land administration committee of such a community <u>must</u> be performed and exercised by such traditional council.”</p> <p><i>Chapter 8: Land Rights Board</i> * Women’s rights diminished: “seven members from the affected communities...two must be women” (s27(1)) * New additions in this draft (s42(2)): A magistrate has power to punish for an offence or awarding a new order right to a non-community member without proper consent (s.42(2))</p>	<p>*1/04/2003:Mbeki addresses National House of Traditional Leaders reassures role of traditional leaders in land administration; says DLA & DPLG are coordinating on TLGFA & CLRB *30/04/2003 ANC senses Zulu King drifting towards IFP (IFP Bid to Woo King <i>Mail and Guardian</i> April 30 2003) *04/07/2003: draft of LCRB released for comment – traditional leaders react vehemently; ANC senses rising tension with IFP & Contralesa as Zulu King calls draft a “recipe for bloody conflict” (<i>Witness</i> in Fortin, 2006). *15/07/2003: ANC – Contralesa joint task-team formed to “operationalise issues related to the TLGFB and the White paper on Land Policy *19/08/2003: Minister and DG DLA meet with Zulu King, Chief Buthelezi and KZN traditional leaders *16/09/2003: KZN House of Traditional Leaders make submission on TLGFB, with heavy referencing of the simultaneous CLRB, accused both bills of having the aim “to rob traditional leaders of the power of allocating and administering communal land” (in Uggla, 2006) *?/09/2003: CLRB suddenly gets support of Contralesa and IFP (Fortin 2006; Uggla, 2006) *18/09/2003: 11th draft of CLRB introduced to National Assembly (as s.75 bill) *23/09/2003: CLRB gets approval of Minister *Late/09/2003: Zuma meets with Chief Buthelezi & Zulu King</p>

Source: Author’s research

Although the overall structure and content of the CLRB October version did not vary significantly from the previous version, there appeared to be significant changes regarding the different actors’ rights, introduced to appease conflicting situations and to accommodate requests from the different stakeholders. These largely favoured

traditional and administrative systems, while still neglecting local pleas and civil society at large.

Regarding the LACs, this new draft read “must” as opposed to “may” in previous versions: “If a community has a recognised traditional council, the functions and powers of the land administration committee of such a community *must* (highlighted by author) be performed and exercised by such traditional council.”. It continues by noting that LACs stand for traditional councils in respect of an area where such councils have been established and recognised and, in respect of any other area, mean a land administration committee established in terms of Section 22.

Secondly, the formal administration, and more particularly the Minister’s office, were also attributed more rights and powers. As such, land enquiries no longer had to be presented to the community for comments before going to the Minister, who in addition was now allowed to make determination related to land and to rights regarding matters raised in disputes. In addition, a magistrate now had the power to punish for an offence or award a new order right to a non-community member without proper (community) consent

Accordingly, many rights initially devoted to communities and linked to the democratisation of the process of communal land reform were omitted: i) Rights linked to land other than the land to which the applicable old order right or to compensation in money; ii) Majority of sections regarding to women’s rights and old order rights; iii) Majority of sections linked to the land rights enquiry to ensure that decisions made by a community were, in general, the informed and democratic decisions of the majority of such community. Finally, women’s rights were diminished as their representation in the land boards was reduced to two from the seven people composing a land board.

5.2.5 CLRB November 2003 Version Compared to the CLRB Early October 2003 Version

On October 8 2003, the 11th draft CLRB was amended. This was done quietly; so much so that stakeholders from civil society, academia and even the portfolio

committee chairperson were unaware of it. The amended draft differed materially from the draft published on the 3rd of October as it dropped the 25% quota for traditional leadership representation and provided in clause 22(2) that: “If a community has a recognized traditional council, the functions and powers of the land administration committee of such community must be performed and exercised by such traditional council.” As a new insertion, a traditional council is defined to mean a traditional council as defined in Section 1 of the Traditional Leadership and Governance Framework Act, 2003. On this very same day, Cabinet approved the Bill with those last minute changes.

Although only a few changes were made from the previous version, the way they were implemented caused problems. Indeed, the changes were requested by the DLA, after the Bill had already passed through the National Assembly. Cabinet approved the changes to CLRB. However, a leak from the DLA resulted in activists, academics and NGOs mobilising a furious response through the media and by appealing to the DPLG. Outraged by the changes and particularly irked by the clandestine manner in which they were done, they subsequently claimed the CLRB, as released and in the procedural context, compromised democracy in rural South Africa. Working to oppose the CLRB, they went straight to the media and to the relevant parliamentary portfolio committee to launch complaints. They appealed to the DPLG for support because of the impact changes regarding the TLGFB development had on the CLRB. Amendments in the TLGFB were meant to soften blow of changes to the CLRB – but activists claimed that these changes to the TLGFB (having a majority of members of traditional councils elected) essentially made the LAC and traditional leadership the same institution, and that communities would not understand the important differences between their intended governance roles. In addition, it seemed that the only place available for compromise in the TLGFB was the gender clause in composition requirements, and neither the content of the TLGFB itself nor the composition of the traditional leaderships (Ugгла, 2006).

The TLGFB portfolio committee chair agreed that they did not have land administration in mind when drafting TLFGB, which now had to compensate for actions of DLA in the CLRB. Not only did it show that activists saw the DPLG and TLGFB portfolio committee as being more amenable than the DLA, it also evidenced

that the ANC's approach to the traditional leadership question was not uniform and that there were fractures in ANC policies regarding how to approach the issue. As such, on October 21, a TLGFB Portfolio Committee meeting was organised, which included the DPLG and the ANC. ANC members of the TLGFB portfolio committee informed participants that the changes to CLRB were a surprise to them and they were accusing the DLA of disorganisation and political inability. It raised questions about the ANC's position in the last minute changes (because although the ANC portfolio committee were unaware, their cabinet approved those changes) as many began to see DLA as operating within its own politics and not within party politics.

On October 17th, the notice of 3 October was withdrawn and a new notice of intention to introduce the CLRB draft of October 8th, as a Section 76 Bill, was published in Government Gazette No. 25562. Although civil society and academics went so far as to say that the CLRB compromised the existence of democracy in traditional rural areas and with tensions increasing between stakeholders, the CLRB was introduced in the National Assembly as a Section 75 Bill on October 31 2003.

Between November 10 and 14, 2003, public hearings on CLRB were organised. On one hand, activists wanted to have the bill redrafted in its entirety. Their strategy was to fuel debate within ANC, between the DLA members who made the last minute changes, the cabinet that passed the changes and those who were unaware and unsupportive of changes (e.g. DPLG and communities). Regarding the latter, the DLA accused PLAAS and NLC of "using and manipulating" communities to validate their own concerns about the bill, while not really consulting with them in a way that captured community needs. On the other hand, Contralesa believed DLA was looking out for the interests of chiefs and they thus appeared to be largely unconcerned. The ANC was, undeniably, worried about its re-election in the upcoming national elections scheduled for April 2004 and wanted to appease disgruntled traditional leaders, so the possibility of fast-tracking the bill was often cited in hearings. Some ANC MPs were acutely aware that party lists were being drafted for the election, and were reluctant to become dissidents for the CLRB at the expense of inclusion in the party list (Uggla, 2006). But the hearings served to bring 'new' players in e.g. COSATU wanted the bill to be withdrawn and reconsidered; the coalition/Tripartite Alliance wanted its revision, but was against its being fast-tracked

while the CGE made damning presentations on the gender and democratisation shortcomings (Submissions to the portfolio committee on Land Affairs, 2003).

There was, however, a general feeling, particularly by activists, PLAAS and NLC, that the hearings were of little consequence and that the committees already had their minds made up. They stated that the public hearings and public submissions had “zero impact” (Fortin, 2006: p.222). The latter was also the case on November 17th when the ANC, DLA and the DPLG study groups met. The DLA asked the DPLG to amend composition of traditional leadership in the TLFGB but no agreement was reached. On the 24th of that same month, an ANC-DLA study group meeting conceded that the only way to alter content of the CLRB was to change gender component of LAC; and ultimately, no changes were made in the end.

The consultations led to the release on November 21 2003 of the second amended 11th Draft CLRB with DLA proposed amendments introduced as Section 75 Bill. The Zulu King and Contralesa, on their side, endorse the CLRB. A comparison of the November 2003 version of the CLRB and that of early October 2003 is made in table 5.5 below.

Few amendments appeared between the 2003 October and November versions of the CLRB. They did, however, have important implications for CLaRA as they directly affected the rights and powers of the different stakeholders and the democratic processes in the communities. As such, besides some cutting back on the powers of magistrates, several omissions were made dealing with (Table 14):

- the democratic process in community decision making regarding community rules (s17(2) and 17(3));
- the contents of a land rights enquiry report – where the release of the report to the community is not enforced anymore; and
- the powers of the Minister in making a determination where there is a dispute Section 18(5))

Table 5.5: CLRБ November 2003 version compared to the CLRБ early October 2003 version

Content & Major Changes	Preceding Events
*omission of s. 17(2) & 17(3) concerning democratic decision making processes for community *Omission of section concerning release of LRE findings <i>Chapter 10: General:</i> * omission of: “A magistrate’s court has the power to impose any penalty in terms of this section.” (s43(2)) *omission of magistrate’s power to act on unlawful allocation of community land without proper consent (s.43(2)).	*08/10/2003: Cabinet approves changes to CLRБ *16/10/2003: Leak from DLA about changes to CLRБ – activists, academics and NGOs mobilise a furious response through the media and by appealing to the DPLG *17/10/2003: Civil society and activists claim CLRБ, as released, and in the procedural context, compromised democracy in rural SA *17/10/2003: Zulu King & Contralesa endorse CLRБ *21/10/2003 TLGFB Portfolio Committee meeting: ANC members angered by DLA actions with CLRБ; process of changes questioned; DLA accused of not knowing what they were doing; major concern over
Content & Major Changes	Preceding Events allocation of <i>powers</i> to traditional leaders in CLRБ, terminology acutely avoided in TLGFB which used <i>roles</i> and <i>functions</i> instead to avoid creation of 4 th tier of government *21/10/2003 civil society pressures DPLG to change content of TLGFB and composition of traditional leaderships; only place available for compromise in TLGFB was gender clause in composition requirements

Source: Author’s research

5.2.6 CLRБ July 2004 Version Compared to the CLRБ November 2003 Version

The end of 2003 and beginning of 2004 were characterised by several negotiations and meetings that led to an amended 11th Draft: The Composite draft of the CLRБ prepared by DLA. For this, an ANC-DLA study group meeting was held and discussed the necessity of strengthening women’s positions in the LAC – (the women’s’ representatives however were not included); and at the beginning of January, Zuma had a “high level meeting” with IFP the results of which are again unknown; and, finally, on January 27 2004, the portfolio committee voted and recommended a number of material amendments.

Sibanda wrote an article in the Sunday Times newspaper on the first of February 2004 that angered critics for its flippant tone (see Fortin 2006: 112) and made them conclude that the CLRБ had become too personal to him and that it proved that the bill was not up for discussion anymore. But, the amendments were finally still integrated to the CLRБ, with the most relevant in section 24 – taking away reference to the “ownership” function of LAC and rephrasing to “powers and duties” regarding land.

Zuma reacted with a high level meeting on land affairs with IFP³³, while the CLRБ was passed unanimously by National Assembly in February 2004. On February 26th, it was scheduled for voting in Parliament and was subsequently passed unanimously by the South African National Assembly. On July 14 2004, Thabo Mbeki, who had been reinstated as President for a second term, signed the CLRБ and enacted the CLaRA. In table 5.6 below is the comparison of the July 2004 and the November 2003 CLRБ versions.

Table 5.6: CLRБ July 2004 version compared to the CLRБ November 2003 version

<p><i>Overall:</i> *New insertion reading “to provide for the democratic administration of communal land <i>by communities</i>” *Addition democratic process required for community decision making</p> <p><i>LACs and traditional authorities:</i> *Omission: LAC to be a traditional council where there is a traditional council</p> <p><i>Women’s rights:</i> *Addition: Old order right held by all spouses (s4(2)) deemed to be held by all spouses in a marriage in which such a person is a spouse, jointly in undivided shares irrespective of the matrimonial property regime applicable to such marriage and must, on confirmation or conversion in terms of names of all such section 18(3), be registered in the names of such spouses *Addition: Women’s tenure right is as</p>	<p>*11-14/11/2003: CLRБ public hearings; significant pressure to withdraw bill or to alter content from ANC tripartite alliance; CGE makes damning presentation on gender and democratisation *11-14/11/2003 DLA accuses PLAAS/NLC of using communities to lobby by proxy and manipulating community presenters *17/11/2003: ANC DLA & DPLG study groups meet; DLA asks DPLG to amend composition of traditional leadership in TLFGB but no agreement reached *24/11/2003: ANC DLA study group meeting decided only way to alter content of CLRБ is to change gender component of LAC; no changes made in the end *01/2004: Zuma has high level meeting on land affairs with IFP (Pretoria News 28.01/04, in Fortin 2006: 99) *27/01/2004: Portfolio committee recommends a number of material amendments *01/02/2004: Sibanda writes article in Sunday Times that angered critics for flippant tone (see Fortin 2006: 112); critics of CLRБ say that he was too personal in development of CLRБ and</p>
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³³ Pretoria News 28/01/04 in Fortin (2006, p.99).

<p>secure as a man's, regardless of any rule, law or custom to the contrary (s4(3)).</p> <p><i>Additions:</i></p> <ul style="list-style-type: none"> * different forms an award for comparable redress may take i.e. other land, money or a combination of both (s12(2) and 12(3)) *outlines the contents of the land rights enquiry report as was outlined in the October 2003 draft but somehow omitted in the November 2003 draft (s18(5)) 	<p>could not handle criticism; critics claim it is proof that bill was not up for discussion anymore and that it was secured passing before reaching parliament</p> <ul style="list-style-type: none"> *9/2/2004: amendments made to CLRB, most relevant s.24 – taking away reference to “ownership” function of LAC and rephrasing to be “powers and duties” regarding land 2/2004: CLRB passed unanimously by National Assembly 07/2004: DLA Tenure Newsletter re-enacted – mainly used to discuss CLRB *14/07/2004 Mbeki assents to CLRB *20/07/2004: CLRB becomes CLaRA
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Source: Author's research

Some of the previous omissions were re-inserted, and some re-formulated. These mainly concerned the democratic processes, the land right enquiry procedures, and women and marginalised rights.

A major new insertion was integrated: “... [CLRb] to provide for the democratic administration of communal land by communities (underlined in CLRb)”. Additions were made to ensure that decisions made by a community were informed and democratic made by the majority of members of the community (18 years or older). Consequently, the fact that an LAC had to be a traditional council, in respect of an area where such a council has been established and recognised, was also omitted.

In addition, women's rights were partly reinstated. The CLRb July 2004 version notes that an old order right held by a married person is, despite any law, practice, usage or registration to the contrary, deemed to be held by all spouses in a marriage in which such a person is a spouse, jointly in undivided shares irrespective of the matrimonial property regime applicable to such marriage and must, on confirmation or conversion in terms of names of all such section 18(3), be registered in the names of such spouses. It is complemented through emphasising that a woman is entitled to the same legally secure tenure, rights in or to land and benefits from land as is a man, and no law, community or other rule, practice or usage may discriminate against any person on the ground of the gender of such a person.

Finally, the sections dealing with the different forms an award for comparable redress may take i.e. other land, money or a combination of both, were reinserted. As well as the process of the contents of the land rights enquiry report, as was outlined in the October 2003 draft but omitted in the November 2003 draft.

5.3 EFFECTIVE POLICY INFLUENCE: CONSULTATION, PARTICIPATION OR JUST POLICY LEGITIMISATION?

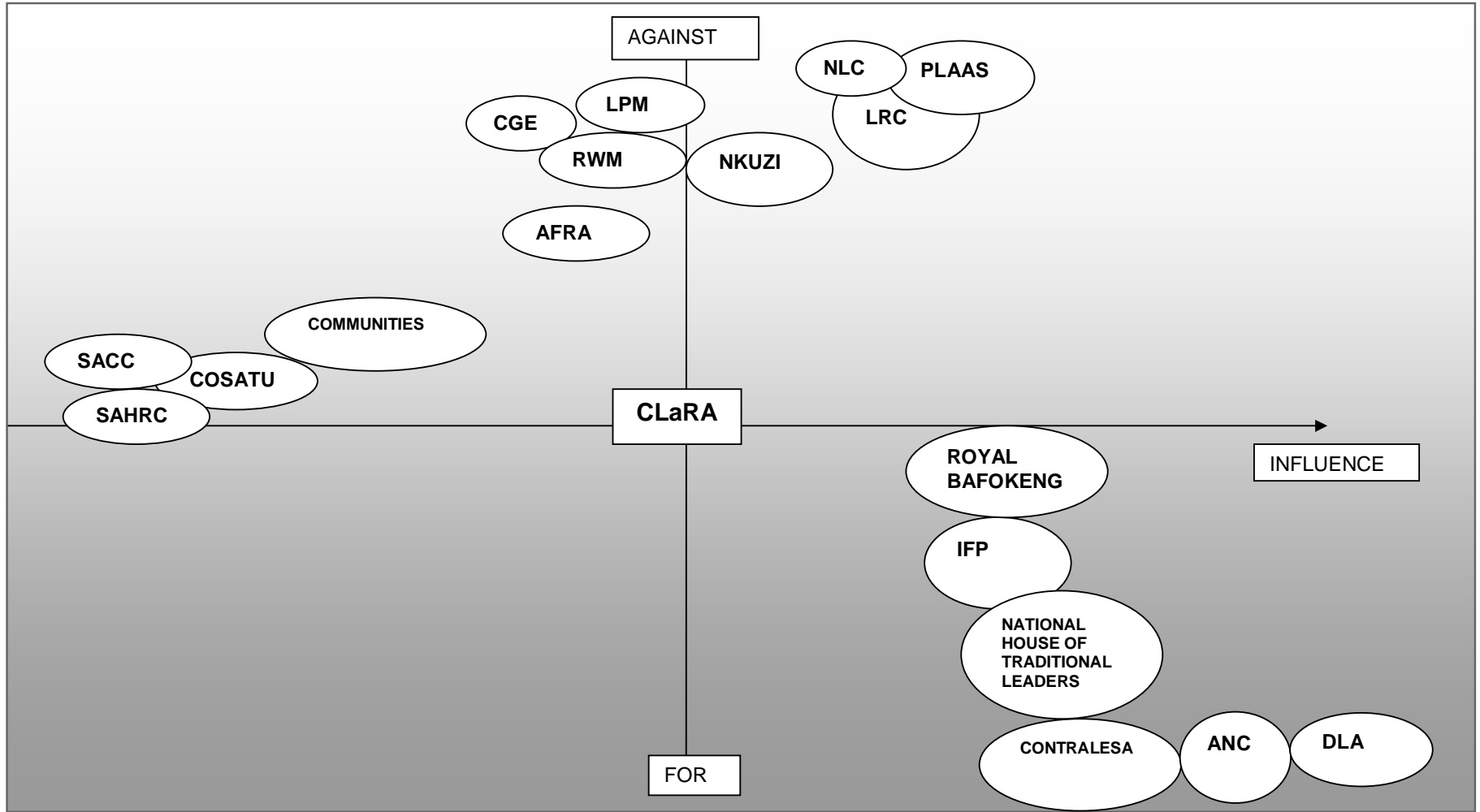
The inclusiveness of public policies cannot be based on the simple participation of (formal and informal) actors. As written before, it supposes the elaboration of compromises. Hence, within the context of broader participation regarding policy development, it seems pertinent to analyse not only participation but also the effective influence certain actors had on the process and content of the act. This section looks at the varying degrees of influence exerted by the different stakeholders during the development process of the CLaRA.

Broadly, as described earlier and as shown in figure 3, three major groups characterised three positions (although varying points of view could be emphasised for specific aspects and could alter during the development process). Major opposition came from what we term the “land sector NGOs/activists” and women’s groups. Major support for the legislation came from the traditional lobby, the ANC and the IFP (eventually). A more neutral group, although when they came forward often slightly negative regarding CLaRA, includes trade unions (Cosatu), commissions (SACC, SAHRC) and the communities. The influence of these diverse actors was however very different – the third group being almost invisible.

In the early stages of the drafting of the legislation (around 2000), the ANC had the most influence on the ideas in the legislation as it pursued policies around the African renaissance championed by then President Thabo Mbeki. With the ANC wielding an absolute majority in the legislature, easing the legislation to pass through Parliament, it is instructive to note though that the Bill was voted for unanimously, including opposition represented in parliament. Parliamentarians are deemed to represent the best interests of the people and such, the ANC parliamentarians can claim to have voted in favour of this legislation in the best interests of the majority.

Although at times seemingly divided during the drafting of this legislation, the ruling party, the ANC, had significant influence on the legislation. Although the influence was subtle and part of the political game most times, the last minute changes when the Bill passed before the National Assembly and the often ‘secret’ meetings with traditional leaders – all this just before Presidential elections – were more direct. Considering the number of secret meetings conducted, it is not clear to what extent DLA (at the centre of the drafting process as they were the responsible arm of Government regarding this matter) is independent of political influence. However, it is safe to say that since the ruling party deploys cadres to various arms and departments of Government; it has a direct influence on policy processes and content. In this instance, Thoko Didiza had been deployed to the DLA and had a major influence on CLaRA.

By far the most influence in terms of content in the final Act was exerted by the traditional lobby comprising of Contralesa, the National House of Traditional Leaders and the KZN house of Traditional leaders amongst others. Starting with no explicit mention of the role of traditional leaders in land administration, through a mere 25% representation on the LAC, the lobby finally managed to give themselves (solely), the role of land administration where a recognised traditional council exists within a community. This represented a major victory for traditional leadership in South Africa and also garnered support for the ruling party in certain areas of the country. Figure 5.3 below shows an analysis of the level of influence of the various stakeholders on the content of CLaRA.



Source: Author's analysis

Figure 5.3: Influence scheme of CLaRA's development process

This also represented the major bone of contention with land sector activists who felt that the LAC was creating a fourth sphere of Government which is not provided for in the Constitution. As the drafters of the abandoned Land Rights Bill saw their ideas being sidelined in the new CLR, they organised themselves into land activists and found new homes in PLAAS, the National Land Coalition (NLC) and a few other land sector NGOs that came into being primarily to oppose the new Bill. This lobby group was well resourced and continues to mount opposition to the Act. With support from abroad they managed, mainly through PLAAS, to initiate a parallel consultation process enabling multiple contributions and the engagement/participation of several – often grassroots based – organisations and communities. Other lobby groups that made some headway in influencing the content of the final Act was the women’s lobby comprising groups such as the Commission for Gender Equality (CGE) and the Rural Women’s Movement (RWM). From no prescribed representation on the land administration committee, the lobby managed to force through changes to the legislation that ensured at least a third of the LAC was composed of women. To what extent this one third will be able to participate meaningfully in the day to day operations of the LAC remains to be seen.

Although some practices during the formulation process of this legislation can be questioned (the last minute changes), this chapter shows however that one cannot say there was no consultation. The formulation process of this legislation begs the questions: What is participatory democracy? What is inclusiveness? There were numerous submissions requesting the legislation to be stopped and fresh consultations to be conducted with a more broader and more equal stakeholders panel (including rural communities), as many were worried about the excessive powers being given to traditional leaders through the land administration committee. Even the ruling party’s partner in the tripartite alliance, COSATU, sounded a word of caution on giving title to rural communities citing failed attempts of this approach in other African countries. In spite of all this, the legislation was enacted anyway. If participation did take place, this shows however that certain stakeholders either did not appear, or did not manage to push their positions forward. Indeed, particularly communities only appeared sparsely at the end of the process. Often not weighing enough within the political battles around the CLaRA, the lack of legitimacy and representation (as they were often seemingly represented and criticized to be represented by NGO’s) of the existing actions led to reduced power to really counter

traditional authorities and factions of the ANC. If indeed, as part of these political games Government pressure did exist to close down certain grassroots movements (the examples of the closures of the NLC and the LPM are relevant here), it leads to questions regarding popular participation in policy development.

The ways in which the different groups sought to influence the contents of the Act were an attempt at legitimizing (or de-legitimizing in the case of the land activists) the outcome of the development process. This is the way parliamentary democracy works and those not satisfied with the outcomes can seek redress in the judiciary; as they have done in the Constitutional Court.

CHAPTER 6

CLARA AND THE RENEWAL OF PUBLIC POLICY

6.1 INTRODUCTION

The renovation of public policy in general, and particularly in (communal) land policy, appears in many cases to be a priority on national agendas to relieve the numerous challenges rural Africans face: land conflicts, land insecurity, important demographic pressures and weight, high prevalence of poverty in rural areas. Simultaneously, although at varying paces according to particular situations, the countries of sub-Saharan Africa engaged (at times due to external pressure) in institutional reforms. These complementary reforms concerned, on the one hand, decentralisation and regional integration, on the other hand, the democratisation of public life and the promotion of new forms of governance that favour, among other principles, transparency in decision making and management, negotiation among actors, and responsibilities of decision-makers with regards to other actors. This new politico-institutional context raises questions notably related to the renovation of public policies, not only regarding their contents, but equally about the processes driving their elaboration that are based on the inclusion of a multitude of actors and institutions at different levels (national, provincial and local).

As such, in 2004, the Government of South Africa enacted the Communal Land Rights Act. *“The purpose of the Act is to give secure land tenure rights to communities and persons who occupy land that the apartheid government had reserved for occupation by African people known as the communal areas. The land tenure rights available to the people living in communal areas are largely based on customary law or insecure permits granted under laws that were applied to African people alone”* (DLA, 2004, p.4). According to the framework of more transparent and inclusive policy development and implementation processes, the CLaRA of 2004 has been hailed by its drafters as one of the most participatory pieces of legislation ever drafted within the Department of Land Affairs (DLA, 2004). Regarding its development process, the DLA (2004, p.4) notes that:

“The public consultation on the Bill commenced in May 2001 following the production of third draft of the Bill. The consultation process culminated in the

hosting of the National Land Tenure Conference (NTLC) held in Durban at the International convention Centre in November 2001. Two thousand persons representing various stakeholders attended the conference.

Between 14 August 2002 when the Bill was gazetted and 22 September 2003, there was also a thorough public consultation process on the Bill. Stakeholders consulted include eleven National Departments and six Provincial Governments: Eastern Cape, North West, Mpumalanga, Limpopo, Free State and KwaZulu-Natal. Organisations consulted were, amongst others, the Bafokeng Royal Council, Congress of Traditional leaders of South Africa, local and district councillors from the Polokwane and Capricorn districts, councillors and officials from Polokwane municipality, the press, His Majesty King G. Zwelithini, together with Inkosi Mangosuthu Buthelezi and Amakhosi in Ulundi. Over and above the reference group set up by the Minister, communities were consulted widely in the affected provinces”.

However, several months after having enacted the Act, CLaRA was accused of non-constitutionality for several reasons (See chapter 2). The court case delayed the implementation of the Act, with DLA officials indicating that the regulations of the Act might only be tabled in Parliament after the next general elections in 2009.³⁴ Several questions come to the fore. On one hand, it leads to the necessity to scrutinize the technical and organizational aspects of such more inclusive processes. Indeed, if there seems to be a broader consensus on the need of more transparent and inclusive decision making, there is no overall harmony on how such processes can be developed. What went wrong or what is being criticized? On the contrary, it also leads to questioning the nature of these more inclusive processes. Are they really inclusive, i.e. reflecting the positions of a large if not entire panel of protagonists, or does it just represent a strategy from Government to legitimize policy reform?

This study was part of a broader reflection on the renovation of public policy, particularly communal land policy. On one hand, the democratization of public life, the participatory approach, the inclusiveness and the promotion of new forms of governance, and on the

³⁴ Discussion with Vuyi Nxasana, Chief Director Tenure Reform.

other hand, the impact the latter had on the content of the specific land policies, are critically investigated in the process of the development of CLaRA. The main purpose of this study is to determine whether the development of the CLARA (Act No.11 of 2004) represents a renewal of public policy development which is participatory, inclusive and transparent, including - in the framework of South Africa's decentralisation process - the different levels of decision making (local, provincial and national). It investigates and analyses to what extent the development process and the contents of CLaRA can be considered innovative. Being aware of the importance to integrate grassroots views and stances in a study focusing on inclusiveness and participation, the overall study made a distinction between public policy making at national and local levels. As such, it was implemented at two levels, focusing on the following research objects:

- the unrolling of the processes at national level that permitted the development and validation of CLaRA,
- The integration of local positions within the policy development process (i.e. analyse the positions at local level and their participation (or non-participation) in the processes at national level.(the focus of this thesis was at the national level, although local communities participated significantly during the portfolio committee hearings. A parallel study focused solely at the local level).

To do so, the ACF was implemented allowing us to identify the different actors engaged and to better understand the positions/ideas/power relations of these actors. Combining aspects of policy networks, power relations and institutional interest, the ACF allowed an in depth analysis of the development process of CLaRA. Few elements related to class bias were evident during the development process.

6.2 A COMPLEX DEVELOPMENT PROCESS ENGAGING SEVERAL ACTORS

The project shows that contrary to what Kariuki (2004) writes, the process was not a simple “communal versus private” debate. As detailed in this study, CLaRA's final draft and Act came a long way, and was shaped and reshaped through different drafts premised on contributions of the various actors engaged in the process. The analysis showed that mainly three broad categories of factors had an influence on CLaRA's development process and subsequently on its content. These non-independent factors are: South

Africa's political economy, its governance practices, and its political games and actors interactions.

Firstly, the shift of orientation regarding the land tenure reform approaches is – as shown in the Chapter – strongly linked to the evolution of the country's political economy. Visible through the change of Government in 1999, it is informed by two very different paradigms. The first one, implemented during the Mandela era, was characterised by a more developmental approach, and the second, more growth oriented paradigm, after Mbeki took over the presidency (but which had already started with replacement of the RDP by GEAR). Accordingly, it influenced the approaches to land tenure reform. The initial Land Rights Bill was premised on securing the rights of people on communal land through statutory definition rather than titling, leaving the precise definition of the content of such rights, of the boundaries of groups, and of representative authority structures to local processes overseen by Government (Claassens and Cousins, 2008). The final CLaRA is founded on the premise that security of land rights derives from the holding of an exclusive title to land, whilst trying to combine this with the recognition of some elements of customary land tenure (Claassens and Cousins, 2008). The Act seeks to transfer land from the State to communities with subsequent deeds for individual members of the community, which may become freehold title if the community agrees.

Secondly, the chapter shows also that the way policy is developed is strongly linked to the governance practices implemented by the country – and, consequently, its leaders. Although, civil influence over (land) policy waned during these years (even more due to the ideological position of the NGO's being against a racially segregated society in general and to the employment of many of the NGO protagonists in government positions) and a certain 'workshop fatigue' also appeared (Cousins, 2004, p.16), it appeared that the governance practices did not allow actors outside of government and the ruling party to effectively influence policy development. As such, the organisations involved run the risk of being used to legitimize the claim of a "consultative" process to justify the government's and ANC's policies. According to Cousins (2004), *"it seems clear that 'participation', although stressed in the rhetoric of the time, was in practice taken to mean 'consultation'. Real decision making power was retained by the ruling party [...]"*.

Cousins – mainly about the overall land reform policy process in South Africa, applicable to the specific case of CLaRA – writes: *“In practice, there was an ‘inner circle’ of trusted groupings and individual, who participated most actively in debates on policy [...], and an ‘outer’ circle’ of stakeholders whose views were solicited but whose actual contributions to policy thinking remained limited”* (2004, p.17).

The willingness to listen to new ideas seemed thus to be weak. This was all the more apparent since 1999 when Thabo Mbeki took over the presidency and the new Minister of Agriculture and Land Affairs, Thoko Didiza, was appointed. A major reason relies on the fact that during Thabo Mbeki’s terms power has been centralised strongly and all kinds of opposition limited (the case of the closing of the NLC is very relevant here). Gumede (2005) described this trend by stating that *“the difference in Mandela’s and Mbeki’s leadership styles has as much to do with their individual personalities and a generation gap as their specific experiences of the ANC”*. Indeed, Mbeki, often described as the stiff, authoritarian intellectual, coming across as uncaring and distant, supports the idea that embarking on reform through consultations with diverse stakeholders may lead to inertia. As a result, the government (or governing party) engages in no (or very little) consultations with opposing political and civic forces to formulate or implement policies. Gumede (2005, p.65) explains, *“Mbeki’s government [...] reforms have tended to be initiated from above, as with GEAR. Thus they are launched by surprise, independently of public opinion and without participation of organized political forces”*. After the second elections in 1999, concerns appeared about the lack of clarity regarding the manner and extent to which the consultations influenced the “final product”, seemingly *“to be drafted by a few experts - in fundamental contradiction to the supposed participatory approach”* (NLC, 2002, p.1). Despite their apparent initial strength, the presence and role of the civil society organisations appears to be limited by the current process. This also explains (partly) why grassroots organisations and local level communities do not appear as major influencing actors.

Thirdly, from the descriptions and the analyses in this chapter, it also appears that the policies (detailed through the different drafts and in the final Act) have been strongly influenced by the political games and the actors’ interactions throughout the elaboration process. As a first element regarding this, the ANC’s political interactions with traditional

authorities should be emphasised. Although the outcomes of a number of some ‘private’ meetings were generally unknown, they were often followed by important changes in the subsequent draft (in favour of the traditional leaders, the KZN House of Traditional Leaders and chief Buthelezi) (Fortin, 2006; Uggla, 2006). The latter was, for example, the case for the CLRB October 2003 version, but was particularly evident just before the 2004 elections, during which the CLRB was amended after it had already been introduced in the National Assembly. These influences sometimes came when the DLA or the DPLG had other measures in mind (but were ‘overruled’, i.e. appeasing the tribal authorities’ desire for communal land control), thus emphasizing that other elements and objectives than those linked to communal land reform were at stake.

A second element concerns the seemingly little or less significant, influence of civil society, academics and other non-government and non-traditional authority linked actors. Indeed, the latter only appeared sparsely at the end of the process, as was the case of local communities and unions. Although civil society was present from the initial phase, particularly through several NGOs, research centres and some academic institutions, their lack of representation was questioned. To this end, the DLA accused PLAAS and NLC of “using and manipulating” communities to validate their own concerns about the bill, while not really consulting with them in a way that captures community needs. According to Fortin, criticisms of the bill emerging from civil society “*constrained the political space in which [the CLRB drafters] were operating...*” and made defending contents of the draft bills difficult (2008, p.82). As such, the drafters viewed a strong offence as the best defence, wherein they questioned, “*the extent to which those critics were representative of ‘people on the ground’ and in turn casting doubt on their legitimacy. People also spoke of such critics being ‘compromised’ and ‘manipulation’ by them of people on the ground’ (ibid)*, in this case the “critics” being community groups advocating against the contents of the bill and the “people on the ground” being researchers and civil society. Often not weighing enough within the political battles around the CLaRA, the lack of legitimacy and representation of the existing actions led to a shortage of instruments and power to really counter traditional authorities and factions of the ANC. If indeed, as part of these political games government pressure did exist to stifle certain grassroots movements (the examples of the closures of the NLC and the LPM are relevant here), it leads to questions regarding popular participation in policy development.

6.3 THE LACK OF INSTITUTIONALISED COMPROMISES AND THE NEED FOR MORE INCLUSIVENESS

As shown, while national debates emphasize inclusion and democratic processes of decision-making in local governance, local discourses mostly emphasize transparency and effectiveness. Obviously, the two focuses are not contradictory. However, the local results might somehow illustrate that the conditions for effective participation of all stakeholders, including women, might not be currently met, and that the demand from below is less grounded on principles and more on outcomes. As such, the analysis of the process shows that it is not the deep core, policy core and secondary aspects of the value systems that were at stake in the process, but the process itself (which in turn could lead to non-recognition of the different value systems).

Indeed, although some aspects during the formulation process of this legislation can be questioned or criticised (e.g. the last minute changes, non-inclusion of local level stakeholders), this study shows that one cannot say there was no consultation or participation. The multiple changes made during the complex process of discussion, debates, consultations and lobbying activities show the engagement of a broad spectrum of actors. The fact that some of these actors had to rely on the constitutional court as a last recourse shows, however, that the resulting policy is not based on a compromise, discrediting (temporarily at least) the Act. Although the majority of the accusations relate to content of the Act, they are strongly related to the process or some part of it. The formulation process of this legislation thus begs the following questions: What is participatory democracy? What is inclusiveness?

There were numerous submissions and critiques (even COSATU, a member of the Governing tripartite alliance) requested the legislation to be stopped and fresh consultations to be conducted with a broader and more equal stakeholders' panel (including rural communities). In spite of all this, the legislation was enacted anyway. It can be judged that this is the way parliamentary democracy works as the parliamentarians (70% ANC) can claim to have voted in favour of this legislation in the best interests of the majority. If participation did take place, it shows however that certain stakeholders either

did not appear, or did not manage to push their positions forward effectively enough. Particularly community representation only appeared sparsely at the end of the process, and those that voiced their opinions did not weigh enough to yield any clout within the political battles around the CLaRA. The communities' perceived lack of self-reliance and resultant legitimacy (as they were often seemingly represented by NGO's and criticized accordingly) led to a lack of the will and power necessary to really counter traditional authorities and factions of the ANC during the development process. This filtered down through to the enactment of the Act during its passage through the National Assembly. If indeed, as part of these political games Government pressure did exist to close down certain grassroots movements (the examples of the closures of the NLC and the LPM are relevant here), it leads to questions regarding real, empowered popular participation in policy development.

The inclusiveness of public policies cannot be based on the simple participation of (formal and informal) actors and is surely not a concept to be defined upfront (in a normative way). As written before, it supposes the elaboration of compromises. Hence, within the context of broader participation regarding policy development, it seems pertinent to analyse not only participation but also the effective influence certain actors had on the process and content of the act. This brings us back to the theoretical basis of this study. Sustainable policies are based on institutionalised compromises, implying agreements between actors in conflict. To enable this, a certain governance structure is needed; one that has to be developed specifically to yield enough authority and sway to effectively influence existing power relations³⁵.

This brings us back to the three above described factors, which are not independent but strongly interlinked. Indeed, the contents of enacted policies are heavily dependent on the policy processes in place. The political games and the actors' interactions contributed greatly to shaping the policy itself. The latter is strongly dependent on the governance structure in place, which is strongly linked to the political economy of the country. These, however, can be influenced similarly by political games and the actors' interactions,

³⁵ It would be simplistic to believe that the State or Government, considered to be an actor between other, would enable these processes voluntarily.

presenting not a vicious circle (as there is no sequence) but a continuous interaction between these three aspects.

This leads to the lack of representation of local communities and movements. Not only were they not in a position to propose, (even less to defend) their positions and influence the policy content during CLaRA's elaboration process, they were also not powerful or representative enough to adapt the policy development process, and governance structure itself. Responding to an often heard statement during this research "*Government does not want to listen to us*", there seems a misconception of policies and policy processes overall, particularly in a renewed governance structure characterised by multi-level policy stratification and pluri-actor engagement (Anseeuw and Wambo, 2008). The latter implies that in such a governance framework, government – although elected – represents an actor similar to the other stakeholders and is not obliged to listen (to use the terms of the above statement). In the case of CLaRA, this shows the importance of local representation and organisation – aspects that are presently strongly lacking. If, indeed, as often suggested, communication and information dissemination are inherent aspects of such a framework, they should not be means but rather results for better participation.

Although there was failure to reach a compromise in developing a land tenure reform policy in the case of CLaRA (is it better to have no policy than one based on biased principles), the research shows that it is not necessarily related to deep values, politicking of certain parties, the traditional leaders and the land reform organizations, the ineptitude of the policy-makers, personalities or competing policy networks. Although these could necessitate additional research in the future, the failure to compromise seems to depend on incomplete policy processes and incomplete governance structures (or at least the perception regarding the governance structures).

* * * * *

This study made valuable contributions to the existing body of knowledge on public (land) policy formulation in South Africa. First, knowledge was developed on the development processes of land policies in terms of negotiated public policies. The study reflected on the importance of institutional compromise, using the light shed on these issues by the CLaRA process, which required the involvement of several levels of decision-making and different

types of actors. Second, the study highlighted factors that influence the compromises at the foundation of new land policy in South Africa. It gave details on the overall political objectives that gave CLaRA momentum and, on the other hand, the concrete conditions which supported or hindered the established compromises, taking into account the interests of the various actors at the national level. Knowledge was generated by paying particular attention to the way in which civil society and traditional leaders were involved in the process and the impact of their involvement on the process's outcomes. There are two further aspects to be investigated. The first one regards the modalities of making policy development processes formally more inclusive, and subsequently, the results more durable. The second could be established by all inclusive policy platforms, which concerns the organisation of local movements and organisation at local level, so that more equitable power sharing structures are established, influencing not only content but also processes.

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