The renovation of public policy and the politics of communal land reform in South Africa

The case of the communal land rights act nº 11 of 2004

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"Developing and transition countries have witnessed a global democratic re-awakening since the fall of the Berlin Wall which has led national governments and donor agencies to promote programmes of democratisation and 'good governance', but there is little consensus on relevant key concepts and how to put them into operation."

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AVERTISSEMENT

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Ce volet « recherche » vise à approfondir les connaissances, à travers des travaux empiriques menés par des équipes de recherches du Nord et du Sud, sur deux thèmes :

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List of Abbreviations and acronyms

ANC	African national congress
AFRA	Association for rural advancement
ANCRA	Association for community and rural advancement
CALS	Centre for applied legal studies (University of Wits)
CGE	Commission of gender equality
CPA	Community property association
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
DA	Democratic alliance
DG	Director general
DFID	Department for international development (UK)
DLA	Department of land affairs
DPLG	Department of provincial and local government
ESTA	Extension of security of tenure act
GEAR	Growth, employment and redistribution
IFP	Inkatha freedom party
IPILRA	Interim protection of informal land rights act
KZN	Kwazulu natal province
LAC	Land administration committee
LEAP	Legal entity assessment project
LSSC	Land systems and support services colloquium
LPM	Landless people's movement
LRB	Land rights bill
LRB	Land rights board
LRC	Legal resources centre

LRE	Land rights enquiry
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	Traskei 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

RESUME

En 2004, le parlement de l'Afrique du Sud a promulgué la Loi sur les droits fonciers communautaires (Communal land rights act, CLaRA) : cette loi a pour objectif de sécuriser la tenure foncière des communautés et des individus pour qui l'occupation foncière repose sur le droit coutumier ou des permis précaires (DLA, 2004, p. 4). La réforme de la politique foncière sur les terres coutumières en Afrique du Sud ne représentait pas seulement une priorité de l'agenda politique face aux nombreux défis qui se posent à la population rurale de ce pays. Elle établit également le cadre d'un nouveau régime de réformes institutionnelles affiché par le gouvernement, régime qui promeut la démocratisation de la vie publique à travers de nouvelles formes de gouvernance favorisant, entre autres, la transparence dans la prise de décision et la redevabilité des décideurs. A ce titre, CLaRA a été vantée par ses rédacteurs comme le texte de loi le plus participatif jamais produit par le Département des Affaires Foncières (DLA, 2004). Cependant, quelques mois après sa promulgation, la loi a fait l'objet d'un recours en anti-constitutionnalité par un groupe de communautés, ce qui a eu pour conséquence d'en suspendre la mise en œuvre. Parmi les arguments avancés figurait le caractère non consultatif du processus de rédaction de la loi. Au-delà du jeu rhétorique, cette anecdote nous a semblé révélatrice de la nécessité d'explorer les processus participatifs d'élaboration de CLaRA, et d'interroger la nature de l'inclusion dont ces processus se réclament.

Cette étude s'inscrit dans le cadre plus large d'une réflexion sur la rénovation des politiques publiques. Elle a pour objectif d'évaluer dans quelle mesure le cas de CLaRA représente une rupture dans les conditions d'élaboration des politiques publiques, à travers des processus participatifs, inclusifs et transparents, et ce aux différents échelons pertinents au regard de la décentralisation en vigueur en Afrique du Sud (local, provincial et national). Elle porte plus particulièrement sur les deux objets de recherche suivants :

- le déroulement des différentes phases de négociations, de conception et de rédaction de CLaRA au niveau national

- au niveau local, les positions des membres des communautés sur les questions de sécurité foncière et de gouvernance locale

Le projet montre que le processus ne peut se réduire à un simple débat « propriété coutumière versus propriété privée ». Au-delà du régime des droits, le centre de gravité des controverses s'est porté sur d'autres questions, telles que la légitimité et le périmètre des prérogatives des autorités coutumières, les relations de pouvoir, les processus politiques, ainsi que les infrastructures et services publics. Le texte final de ClaRA est le résultat d'une longue phase de rédaction de versions successives portant la marque des différents acteurs engagés dans le processus. Quand bien même certains aspects du processus ont été critiqués ou remis en question par certains acteurs (concernant notamment l'ajout in extremis de modifications substantielles au projet de loi,

ou encore l'absence d'inclusion des membres des communautés au niveau local), le projet montre qu'on ne peut pas pour autant parler d'une absence de consultation ou de participation. Les multiples modifications apportées au texte tout au long du long processus de discussions, débats, consultations et lobbying, témoignent de l'engagement d'un large éventail d'acteurs (pouvoir politiques, administrations, autorités tribales, communauté académique, société civile) sur plusieurs aspects de la loi (entre autres : les pouvoirs des autorités tribales et du Ministre, le processus de consultation, la constitutionalité de la loi, les positionnements envers la propriété communale, les droits des femmes).

L'étude conduit donc à nuancer les attaques portées contre le gouvernement au motif que le processus d'élaboration de la loi n'aurait pas été inclusif, ni même participatif. Elle montre plutôt la diversité des rôles et des niveaux d'influence exercés par différents types d'acteurs. Elle met notamment en évidence comment certains groupes n'ont pas été en mesure de faire valoir leurs positions afin de faire contrepoids face aux autorités traditionnelles et aux factions de l'ANCA quelques exceptions près, les membres des communautés locales n'ont pas assez pesé dans les débats politiques autour de ClaRA. Des groupes de recherche et des ONG ont certes participé activement aux débats, en faisant valoir qu'elles s'exprimaient au nom des communautés. Cependant, leur légitimité à ce titre a parfois été contestée au motif qu'elles n'avaient pas de mandat explicite de la base communautaire et que leur propre agenda politique, issu des luttes menées contre le précédent régime d'apartheid, ne coïncidait pas nécessairement avec la diversité des problématiques locales des communautés.

L'étude montre par ailleurs qu'il ne suffit pas d'ouvrir le débat et de permettre formellement la participation des acteurs (formels et informels) pour garantir le caractère inclusif des politiques publiques, basé sur la construction de compromis institutionnalisés par des acteurs aux intérêts divergents. En particulier, il est rapidement apparu que l'élaboration de CLaRA ne s'était pas caractérisée par l'inclusion des acteurs au niveau le plus local. Certes, les chefs traditionnels, à travers leurs organisations politiques, ont occupé une place de premier plan dans les négociations et la rédaction des versions successives de la loi. En revanche, les principaux intéressés au niveau local, c'est-à-dire les membres des communautés, qui sont à la fois citoyens Sud-Africains et placés sous l'autorité de leur chef coutumier, n'ont pratiquement pas été consultés. Par ailleurs, les débats au niveau national ont mobilisé des visions largement monolithiques et idéalisée communautés, peu à même de prendre en compte la réalité effective – et plurielle, comme le montre cette étude – du fonctionnement (et des dysfonctionnements) des systèmes fonciers et de la gouvernance au sein des communautés.

L'étude au niveau local montre que la principale préoccupation des membres des communautés ne porte pas sur la tenure de la terre en tant que telle mais plutôt sur le développement de la communauté, particulièrement en matière d'infrastructure. C'est essentiellement par le prisme des infrastructures que les membres des communautés analysent, évaluent interpellent ou remettent en question les structures de gouvernance locale, qu'il s'agisse des autorités traditionnelles ou du gouvernement municipal, et leur articulation avec le régime foncier. L'étude au niveau local montre d'une part que les individus raisonnent les questions de gouvernance et les questions de sécurisation foncière de manière relativement déconnectée, et d'autre part que régime coutumier et régime de droit commun sont perçus comme complémentaires plutôt que comme antagonistes et mutuellement exclusifs. Même si l'option du titre de propriété privée peut être perçue comme

intéressante relativement au système actuellement en vigueur de « petits papiers » visés par le chef coutumier, parce qu'elle élargit le faisceau de droits (en particulier pour l'absusus) et parce qu'elle s'appuie sur un document plus formel, émis par l'Etat, la majorité des personnes enquêtées n'a pas pour autant manifesté un rejet du système foncier et de gouvernance tribal.

I. CONTEXT AND STUDY PRESENTATION – THE RESTRUCTURING OF SOUTH AFRICA'S COMMUNAL LAND IN A RENEWED PUBLIC POLICY DEVELOPMENT CONTEXT

1. Contextual and Historical Perspectives on 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 blacks had already lost the majority of their land in 1913, and could not occupy more land than what was abandoned/forsaken 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. 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 (see Box 1).

Box 1: Chieftaincies in South Africa

Although the focus of this project concerns present policy processes, it is important to situate rural governance in the former bantustans within its historical context.

The traditional leadership is an ancient institution, prevalent across the entire African continent. For centuries the African people experienced no other form of governance. The power of chiefs and their subordinates in the former reserve territories of colonial Africa lies mainly in their power over land allocation. Also in South Africa, rural governance in the former bantustans was, and in certain ways still is, controlled by Tribal Authorities. These structures were dominated by chiefs, headmen, and their appointees.

Although often severely undermined and disintegrated under colonial forces, the institution of traditional leadership, not least in South Africa, was also often used (or misused) by the rulers in place. In South Africa, under the National Party regime a number of laws were formulated to regulate and control traditional leadership, often to the advantage of the racist regime (Nthai, 2005, pg. 1-3). Mahmood Mamdani (1996) has characterized Tribal Authorities as a South African version of decentralized despotism, similar to what countries on the African Continent went through under colonialism. Meanwhile, the apartheid government continued to intervene in the administration of land within the homelands, where

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tribal chiefs were accorded special land-ownership rights and far-reaching powers over land allocation, often beyond those normally sanctioned under customary law. As a result, it is often considered that tribal authorities were imposed[1] and are often considered unaccountable, undemocratic and despotic.

The Constitution of the 'New' South Africa provides for recognition – although limited – of traditional leadership, and Houses of Traditional Leaders at both national and provincial level were established. However, the issue of the institution of traditional leadership proves to be problematic. Much confusion over the scope and degree of traditional authority remains, with traditional law and practices often coming into conflict with those of the new democracy. On one had, for most of the first fifteen years of South Africa's democracy, the ANC-led government has embarked on an overall democratization process. In the rural areas of the former bantustans, this included attempts to dismantle the concentration of powers in Tribal Authorities in the form of reforms in local government and land administration. Through the implementation of elected local leaderships, attempts are being made to democratise the system of land administration, including the involvement of women in land administration structures, and to emphasise the improvement of the quality of life of previously disadvantaged sectors through a new conception of developmental local government (Ntsebeza, 2005). On the other hand, the presence and direct control of the Traditional Authorities remain, and no decision can be made in the rural areas without consulting the tribal authorities. Through their cultural rights and their fundamental role within the rural areas, they claim that they have been excluded from the political arena and, thus, their role in contemporary South Africa has been negated (Meer & Campbell, 2007).

In addition, these laws were completed 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 the population density in the delimitated black areas.

These land features persisted until the first democratic elections and the change of regime in South Africa in 1994. The previous spatial segregation measures not only engendered extreme inequalities concerning land distribution, they also caused important 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-

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[1] For South Africa, see areas such as Phondoland (Mbeki, 1984), Sekhukhuneland (Delius, 1996) and Xhalanga (Ntsebeza, 2002), where the imposition of these institutions led to often bloody conflicts between apartheid state supporters and those in resistance.

economic conditions of these homelands during the transition years.[2] These by then former homelands were characterized by poor conditions. 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 reserves.[3] 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 02% of these households could effectively make a sufficient living out of it. For those who have access to land (it was estimated that one third of rural households on these reserves had no access to land), agriculture has been reduced for the large majority to an activity complementing their subsistence.

Land reform was one of the main promises made by the ANC during its ascension to power in 1994. The ANC noted in the Reconstruction and Development Programme (RDP) that land reform was necessary 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 (see Box 2).

Box 2: 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 19 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 prices. Although it can take different forms (individual, grouped or commonage resettlement), two major programmes exist:

● **SLAG** (Settlement and Land Acquisition Grand) 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), a sub-programme implemented in 2000, promotes agricultural development, and supports the transfer of private agricultural land to individuals or limited

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[2] 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.

[3] 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 a farming household is neither certain nor precise.

groups who are able to invest in commercial farm development. The transfer of private title deeds 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 of defining and institutionalising every existing mode of land tenure and, subsequently, conferring 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 to provide alternatives for people who are displaced in the process.

All three components of South African land reform are lagging. Regarding restitution and redistribution, the magnitude of land inequality in South Africa led the ANC 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 (see Box 3).

Box 3: 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 twenty-three former coloured areas to residents or accountable local institutions. The former bantustans (i.e. black areas as opposed to coloured areas) were subject to TRANCRAA.

2. 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 relieve the numerous challenges rural Africans face: land conflicts, land insecurity, important demographic pressures and weight, and the high prevalence of poverty in rural areas, to identify 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, and the 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 as in more formal processes. In Africa, such an evolution was observed in different countries with the development of the 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 & Cousins, 2008).

A wider dialogue involving more actors from different political segments, NGOs, FOs, civil society, and the private sector, for example, accompanied the formal elaboration process of agricultural policies. These different – more inclusive – processes represented an emerging factor of reactivation and dynamisation 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.

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 and 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 that before were regarded with certainty. Another result is an awakening 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 instruments for policies in general, land and other aspects more particularly. It also leads to a redefinition of the roles of the different actors, including the State and private sector.

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 and their implementation processes. On the one hand, this is linked to the absence of favourable conditions for putting in place 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 (LOASP in Senegal and SRA in Kenya), or were even subject to major civil and political objections (CLaRA has been challenged in court, see below).

3. CLaRA as a Renewal of Land Policy Development? Legitimating the Research question

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 also have to be renewed.

As such, in 2004, the Government of South Africa voted 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, pg. 4). According to the framework of more transparent and inclusive policy development and implementation processes, the 2004 CLaRA 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, pg. 4):

> "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 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 voted the Act, CLaRA was accused of non-constitutionality for several reasons (see Chapter 2). This court case has 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]

If the delay in implementing 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 for 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 one hand, 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 Government strategy to legitimize policy reform?

4. Analysing CLaRA – Research objectives and hypothesis

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 is to determine whether the development of 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 will investigate and analyse to what extent the development process and the contents of CLaRA can be considered innovative. As such, this study is specifically interested in:

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[4] Discussion with Vuyi Nxasana, Chief Director, Tenure Reform

i) PROCESSES: Analysis of the CLaRA development process. As such, it will describe the different steps but will also identify the stakes around which each actor (national government, regional government, agricultural producers and organisations, NGOs and the private sector) structured their argument through the course of the development of CLaRA.

ii) CONTENT: The study will attempt to identify and characterise 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) Finally, INCLUSIVENESS: To determine the extent of the democratisation of negotiation and decision-making processes, and 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 CLaRA development process and the impact it had on the content and choices made regarding communal land tenure in South Africa. As such, the object of the research is not South Africa's 'land tenure system' per say; it does not pretend to analyse South Africa's land tenure problems, nor will it propose recommendations to solve them. It will neither focus on the effectiveness of nor propose to evaluate CLaRA's proposed measures. The land reform options themselves will not be detailed, but it will more specifically examine why and how certain land reform options were retained. The study will thus focus on the policy development process itself, and on the unrolling of the processes that allowed CLaRA to be developed and validated. The CLaRA evolution process will be critically analysed to determine whether it represents a more participatory approach to public policy formulation as is claimed by those who drafted it, and how the approach influences the different policies and policy measures adopted and reflects a democratisation of public policy development.

This being said, we assume that CLaRA's development process was only inclusive in a certain way. Looking at the issues challenged in the court case, it seems that a large majority of protagonists were excluded or that their positions were not taken into account. The content therefore does not reflect the overall positions, needs and wants of the South African population, but characterises standpoints of the ruling party and/or its agreements with specific strategic actors.

5. Conceptual Framework and Methodology

Being aware of the importance of integrating grassroots views and stances in a study focusing on inclusiveness and participation, the study will make a distinction between public policy making at national and local levels. As such, the study will be implemented on two levels, focusing on the following research objects:

- the unrolling of the processes at national level that permitted the development and validation of CLaRA, and

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- 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.

5.1. Understanding the National Development Process for CLaRA

■ **Reformulation of the Objectives at National Level**

This first part developed at a 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;

- identifying the actors, their strategies, their power relations and at understanding of the interactions between the different categories of concerned actors at the national level; and

- examining the impact that the (new) policy development processes have on the content of public policies.

■ **Conceptual Framework**

The global idea 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; and

- their development processes, which are more open and engage a diversity of actors.

However, the efficiency, sustainability and innovation of public policies can not be based on the simple participation of (formal and informal) actors. It supposes the elaboration of compromises guaranteeing their recognisance and stability. Hence, within the context of broader participation regarding policy development, it seems pertinent to put the institutionalised compromises and collective action necessary to the elaboration of public policies at the core of the questions to accompany the renovation of policies towards more equity and social cohesion.

As such, the notion of institutionalised compromise is defined as a "politico-social armistice" (Leborgne & Lipietz, 1992) between actors in conflict conforming to an institutional structure more or less sustainable embracing rules, rights and obligations (André, 1995). In the framework of the project, the notion could be seen as an elaboration and internalisation of agreements, and subsequently of the stabilised and sustainable rules it engages between actors. The more the agreement is based on compromises, the more it will lead to sustainable institutions (including policies). These compromises can thus be analysed as macro-social agreements that can be concretised as public policies at national level (Cf. CLaRA).

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 (of 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).

One theoretical framework to ground the political context and processes is the stakeholder analysis and the advocacy coalition framework (Sabatier, 1988; Sabatier & Jenkins-Smith, 1993, 1999). As noted by Weible (2007), the stakeholder analysis and advocacy coalition framework is frequently used to explain stakeholder behaviour and policy outcomes in intense political conflicts over a certain period regarding specific issues (Sabatier & Weible, 2005). They are defined by identifying opportunities and constraints for analysing the likelihood that a strategy, venue or alternative will be successful in initiating or preventing policy change. To help navigate this political landscape, stakeholder analysis provides a guide to investigate stakeholders' perceptions regarding the severity, causes and proposals of a problem, the distribution of resources among coalitions, and the accessible political venues for influencing policy (Weible, 2007). This allows one to identify roadblocks and strategies for achieving more inclusive collective agreement, and consequently, more sustainable public policies. As such, the following set of questions (Susskind & Thomas-Larmer, 1999; Brugha & Varvasovsky, 2000) need to be addressed: (1) Who are the stakeholders to include in the analysis? (2) What are the stakeholders' interests, positions, and beliefs? (3) Who controls critical resources? (4) With whom do stakeholders form coalitions? (5) What strategies and venues do stakeholders use to achieve their objectives?

The stakeholder analysis and advocacy coalition framework helps 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 policy stability and change. It has a focus on the coalitions that share a set of normative and causal beliefs and often act in concert, and views policy changes as the consequences of coalitions' competition to translate their ideas into official actions. It therefore has 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 & Vining, 2005). This broad perspective is important in this case of the analysis of the politics of communal land and CLaRA's development process, open seemingly to multiple participants and different levels, and where there are opportunities for actors to confront each other during the policy development and implementation process.

■ **Research Objects at National Level and Methodology**

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

   1) Analysis of policy documents and secondary data sourced from previous studies that have 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 (PGSARD, 2008), the issues around CLaRA (Kariuki, 2003) and 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 has 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 Department of Land Affairs reports and updates, official communications, newspaper articles, etc.

3) Analysis of the actors' (engaged and those not engaged[5]) 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 factor determining the latter, their strategies to exteriorise their positions, etc. 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 will also give insight into the actors involved in supporting or opposing the Bill when it was being debated in Parliament.

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

To link process and content, an in depth structural and textual analysis was realised based on the different versions of the Bill and Act. The latter was also complemented by specific questions during the open questionnaires.

In addition to the different versions of the Bill and Act and secondary information, this study is 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 are 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 have 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 has been retained, including:

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[5] It might be that several actors were not engaged in the process (as stated in our hypothesis). 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.

- all the protagonists identified during the CLaRA process; and
- 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 1, sixty-one detailed interviews were conducted. Policymakers and (potential) influencers of policy at the national level such as Ministers, members of parliament, portfolio committee members, land NGOs, lobby groups, traditional chiefs' councils are some of the national actors who were interviewed.

Table 1: Interviewed Institutions and People in the Framework of the 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)

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

- traditional authorities: National House of Traditional Leaders, Congress of Traditional Leaders of South Africa, Royal Bafokeng Nation;

- unions / commissions: 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); and

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

Once identified, all of the identified stakeholders were interviewed through key informant interviews. All interviews were realised by the Masters student with the assistance of the Supervisor (whereas some of the respondents – DGs of Government departments, etc. – require a more senior academic to engage with). Data collection was hampered by the unavailability of some of the actors, especially the politicians. Furthermore, initially, as this particular legislation is facing a court challenge regarding its constitutionality, it was expected that some actors would not be willing to discuss CLaRA in detail. The latter did however not appear as a major issue. Lastly, as it concerns ongoing policy development processes including stakeholders with different views, it was important to verify the accuracy and completeness of the data that is 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) confronting the information to divers stakeholders, and (ii) regular presentations of the results to a diversity of stakeholders.

5.2 The Positions on Communal Land Reform at Local Level

■ Reformulation of the Objectives at Local Level

The aim of this second part is to analyse the different positions on communal land reform at local level and study, through the local elaboration process for CLaRA, if it had been inclusive of the communities and how the debates were framed and formulated at this level. As such, the objective of the project was to confront the positions of people towards communal land reform with CLaRA and its provisions, and to apprehend the relevance of South Africa's communal land reform.

The objective of this component of the project was thus reformulated as follows:

- characterize the perceptions of community members with respect to their bundles of rights under the communal land tenure system (with an aim to providing insights into the extent of *de facto* individualization and commoditization of communal land), and the perceptions of security that are attached to it; and

- identify their positions on the two features of CLaRA that have been identified as salient and controverted, namely the issuance of an individual land title by the State, and the role of the chief and tribal authorities in land matters.

Both objectives imply understanding the local context, the stakes and conflicts around land and power, and the way local people perceive and formulate those stakes.

■ Conceptual Framework

Delimitating Communities and Communal Land

From the project's perspective, communal land is the area where a village or tribe is located and that is managed under a common traditional council, and a community is the people living on that communal land and being under the same traditional council.

These definitions follow the ones provided by CLaRA:

Communal land is "land which is, or is to be, occupied or used by members of a community subject to the rules or custom of that community."[6] Communal land is not exclusively the land in the former homelands but is also :

> *"the land acquired by or for the community whether registered in its name or not and any other land, including land which provides equitable access to land in a community and which is, or is*

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[6] Section 1, Definitions of The Communal Land Rights Act (DLA, 2004a).

to be, occupied or used by members of a community subject to the rules or customs of that community."[7]

A community "is a group of persons whose rights to land are derived from shared rules determining access to land held in common by such group."[8]

There are 892 recognized Traditional Authorities in South Africa, which gives an idea of the smallest possible number of communities. This number is probably greater as more than one community can be under the authority of a single traditional authority.

Disentangling the Bundles of Rights and Defining Security of Tenure

Property rights on communal land are accounted for in this research through the concept of bundles of rights, which include 3 broad categories:

- usufruct rights: refer to the rights of using the land and reaping the benefits of its use;

- abusus rights: refer to the rights of transferring the land through different mechanisms – transfers can be temporary or definitive, they can be market- or non-market-based, etc.; and

- administration rights: refer to the right to define the rights of others. Again, these rights can take many forms: exclusion of non-members, allocation of vacant land, registration of rights and transfers, enforcement, conflict resolution, etc.

In the remainder of the chapter, the concept "security of tenure" will refer to the inverse probability for holders of permanent usufruct rights on a particular piece of land to have these rights challenged by another party, and to lose the possibility to exercise those rights. Note that this definition is irrespective of the scope of rights (usus, fructus, abusus) that are held on a particular piece of land, or the nature of the property right regime (customary, private property, etc.) that prevails.

The effort to disentangle the bundle of rights of community members on communal land needs to be extended to the bundle of prerogatives that the tribal authorities hold under the community regime. Although those prerogatives clearly derive from the initial statement of the authority of the chief over a territory, they should not be assimilated to an outright bundle of individual property rights over the communal land. They, rather, relate to administration rights as defined above. Also, their prerogatives in terms of local governance usually go well beyond land issues to include other aspects of community life (both material, such as service provision, and immaterial, such as a sense of belonging). Accordingly, the opinions of the people about the appropriate roles for the tribal authorities might differ depending on the focus.

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[7] Section 2 (c),(d).
[8] Section 1, Definitions.

A major feature of the communities is the legal pluralism that is displayed with regards to both land rights and local governance. The legal status, content and strength of the bundle of rights on communal land can be diverse and overlapping: they can include mixed and evolutive features inherited from pre-apartheid indigenous regimes, from the apartheid legislations, then from the post-apartheid policies. As a result, collective processes of land allocation and land administration (including the provision of tenure security), as well as individual practices of land use and land transfer, can often rely on several sources of legitimation. With regards to local governance, the respective prerogatives of tribal authorities and municipal authorities (e.g. in terms of infrastructure and service provision, land planning, etc.) usually also lack clear definition.

■ **Research Questions at Local Level**

The two objectives stated in the introduction were translated in the following research questions:

- What are the *de facto* bundles of rights that community members hold over their landholdings? In particular, what is the extent of the *de facto* individualization and commoditization of communal land?

- Do community members consider that a title from the government would make them feel more secure and/or hold a broader scope of rights than they do under the current situation?

- What role do community members consider to be appropriate for traditional structures to play with regards to community matters (including, but not limited to, land matters)? How do they perceive the articulations with local forms of State governance?

These questions thus indirectly address the "demand from below" for communal land reform. Security of tenure is the first justification put forward by CLaRA. According to CLaRA, it seems obvious that people on communal land feel insecure because of the lack of formal titles. There is a growing body of evidence – in South Africa and elsewhere on the African continent – that customary tenure and the lack of formal titles are not necessarily equivalent to tenure insecurity, and that the latter is an empirical question depending on how local tenure systems work in practice. The third question is to be viewed in relation to the act's objective of providing for local democratic governance structures for the administration of land and the criticism that too much power is potentially given to traditional structures under CLaRA.

■ **Fieldwork at the Local Level**

The objectives of the study imply understanding the local context, the stakes and conflicts around land and power, and the way local people perceive and formulate these stakes. Since very little consultation or research has been conducted on communal land reform in South Africa (for a recent overview, see Cousins, 2007), this study mainly relies on first-hand data collection in two communities in South Africa.

Selection of Communities

An overarching hypothesis of this project was that individuals' perceptions and positions towards land tenure issues and local governance issues were likely to be quite diverse, following two main types of heterogeneity: community heterogeneity and individual heterogeneity. The selection of the two different communities was made according to the following criteria, which we assumed might make a difference in local perceptions towards communal land and traditional leadership:[9]

- Rural/Urban Setting: We chose to work with one rural community and a more urban one. The integration in a more urban network might imply (i) less dependency on communal institutions (such as self-help systems, etc.), and (ii) more familiarity with non-traditional modes of local governance, enabling people to make informed comparisons (Cousins, 1999).

- Different Provinces: Communal land and traditional settings have diverse statuses in the different provinces (Keulder, 1998). We chose one community located in the Limpopo province, where traditional leadership is still very powerful, and one located in the North-West province, were it is less prominent.

In the end, the fieldwork was conducted in the following two communities:

- Ga-Selepe (hereinafter "Selepe"), a small rural community in a mining area in the Limpopo province.

  Ga-Selepe is part of the Fetakgomo Municipality. The community is the Baroka-Ba-Selepe Community under Chief Difera Albert Selepe and the Roka Selepe Traditional Council Brakfontein-Ga Selepe. The language spoken is Pedi. Ga-Selepe was part of the former Lebowa homeland. This community was never forcefully removed during apartheid, and their written history claims that they have been here since 1862.

  The Atok Platinum Mine exploited by Anglo Platinum has two mining shafts on the community's territory. The mine's exploratory activities has recently created tension among community members and the chief. The mine is also the main source of local jobs (although the absolute number of jobs is not very high). The total population of Selepe is 6,354 and the total number of households is 1,269.[10]

- Makapanstad, an urbanized community close to Pretoria.

  Makapanstad is part of the Moratele Municipality and Bojanala District. Makapanstad is approximately fifty kilometres north of Pretoria. Although in the North West Province, it is characterized by many links to the urban and industrial environments of Gauteng (mainly Pretoria).

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[9] Initially we had planned to include the criteria of presence/absence of major land or community conflicts. However, access to communities in conflict proved to be difficult (the required authorizations from the tribal councils were denied on several occasions), leading us to cancel the 'community-in-conflict' case-study.

[10] Numbers communicated by the Ga-Selepe Traditional Authority.

The people are living under Chief Motsegwa Hendrick Makapan and the Bakgatla Ba Mosethla Traditional Authority. Chief Makapan has under his authority twenty-eight other towns. Makapanstad was part of the former independent Homeland Bophuthatswana. The language spoken is mainly Tswana. The total population of Makapanstad is about 12,250 and the total number of households is approximately 2,930.[11]

Both communities share the following characteristics: agriculture is not the main source of activity and income, there are no major conflicts around land and/or governance issues, and there was no systematic forceful inward or outward movements of people during apartheid.

Data Collection

Data collection was organized as follows:

- secondary data collection and review, including previous studies, local policy and planning documents, official statistics, etc.;

- zoning and interviews with key informants. The latter were conducted in order to (i) get a broad image of the different communities, their features, their social organization and their issues, or (ii) deepen certain issues identified during the fieldwork (community rules, certain problems, etc.). These interviews were semi-structured, with a variable number of informants. People interviewed were mainly tribal chiefs, tribal council members, ward councillors, community leaders, development workers, local consultancy agencies, etc.; and

- individual questionnaires administered to a sample of ninety community members. We used a semi-open questionnaire which addressed the following topics: bundle of rights, security of tenure, and local governance (the questionnaire is provided in the appendices).

As the objective was to uncover and better understand the diversity of positions and opinions regarding communal land in each community (but not to obtain statistically representative samples), a reasoned sampling method was developed. Households were selected according to the following criteria that might influence people's positions on communal land and tribal institutions:

- wealth and social status (proxied by a ranking of house characteristics);

- age; and

- gender.

In the end, a total of forty-five valid questionnaires were administered in each community.

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[11] Numbers communicated by Naledi development, 2005 census.

Table 2: Sample per Community and Number of Community Member Interviews According to Gender, Age and Occupation

	Selepe	Makapanstad	Total
Total Number of Interviews	45	45	90
Gender			
Women	19	27	46
Men	26	18	44
Age group			
[18-30]	3	10	13
[30-40]	16	5	21
[40-50]	11	6	17
>49	15	24	39
Occupation			
Unemployed	15	19	34
Self-Employed or Wage Earners	19	11	30
Pensioners	11	15	26

Interview Implementation Conditions

Fieldwork was conducted by a team of two masters' degree students[12] between April and June 2008. The two senior project leaders joined the team for a few days at the beginning of the fieldwork to train and assist the students with the on-site application of the semi-structured questionnaire, in order to ensure a good level of relevance and quality of the data collected. The interviews were conducted on an individual basis. Group interviews were avoided as they might easily influence perceptions and positions on sensitive issues such as communal land reform. One interview lasted for about one and a half hours, and on average four interviews were conducted per day per interviewer. Translation was needed in both communities. Two translators from the community were hired in each community. The interviews were not recorded but hand written notes were taken and then transcribed electronically. We chose not to display any people's names, except the names of the chiefs, to keep the questionnaires anonymous. The different types of difficulties that appeared during the implementation of the fieldwork are described in Box 4.

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[12] Lorraine Trickey, from the University of Pretoria, and Marie Kientz, from Supagro Montpellier. Marie Kientz also performed most of the data analyses and wrote the preliminary report.

Box 4: Difficulties Occurring During Field Work

● Working with communities, particularly on such sensitive issues, is a difficult process that is time and resource demanding. As communal land reform, as well as traditional power, present sensitive issues, it was not always easy for people to open up and be straightforward about such subjects. Introduction into the community was thus necessary; our translators were also essential for this matter.
● Linked to the latter, to start working in a community, authorization from the traditional council was necessary. This mainly made it impossible to conduct the research in communities characterized by land and community conflicts. None of the chiefs of conflict-affected communities authorized the research to go on. Consequently, the communities researched only show mild degrees of land and tribal issues.
● Another difficulty had to do with the fact that local people did not know about CLaRA, which made the conducting of the interviews somewhat tricky, as the main issues had to been dealt with indirectly. For the same reason, it was not possible to discuss the deed of communal land rights as such, and it was therefore decided to address the transfer of title by talking of title deeds, which people clearly relate to private property. Therefore, in the rest of the document, "title deed" refers to a title of private property, and not to the deed of communal land rights provided for under CLaRA
● The interviews were not conducted in English and four different translators (two in each community) were used, which introduced a potential bias. Therefore, the final data is not exactly the discourse of the interviewee but a mixed interpretation by the interviewer and translator. For this same reason, discourse analysis was not conducted. Nevertheless the repetitive use of some words or expressions by the interviewee was noted when relevant. Although countered through more random selection, as members of the community, the translators were also a substantial source of potential bias with regards to the selection of households (they might have induced us to visit more family and friends, which might over-represent a specific group in the community, and they might have prevented us from visiting some people with whom they had some issues, even though the issues had nothing to do with the purpose of our study).
● A last bias might be linked to household selection. Although diversity was covered within the communities, (former) inhabitants not residing in the communities (anymore) were not included. People who left the communities for certain (ideological, but also social or professional) reasons and people who were expelled for different reasons (political opposition for example) are absent from the sample.

II.   CLARA – MAIN FEATURES, KEY ACHIEVEMENTS AND CRITICISMS

1.   CLaRA's Main Features

After the Communal Land Rights Bill was issued for comment in August 2002, there were eleven drafts submitted before President Mbeki finally signed, and thus enacted, the Communal Land Rights Act No. 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,

- underdevelopment in the communal areas,

- lack of legally secure tenure rights,

- conflicting land rights,

- gender inequalities and inequities in land ownership and inheritance,

- lack of good and accountable governance around land matters, and

- chaotic land administration systems occasioned by numerous disparate laws and administrative systems (DLA, 2004).

1.1   CLaRA's Principles

As such, 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, CLaRA Preamble). 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;[13] 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 CLaRA (CLaRA, 2004). 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, pg. 12).

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[13] 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, Chapter 1 Definitions)

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

"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 KZ 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 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's rules, drafted by the community.

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

> *"democratises the system of land administration by taking an eclectic approach to institutional development […] [which is] evident in 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 Tenure Newsletter July 2004, pg. 13).*

In addition to the institutions provided for under 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 for in CLaRA are:

1. 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 use.[14] This deed is not a title deed but it's a legal document that confirms a person's or family's or 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.

2. Communal Land can also be held in terms of freehold ownership by individuals.[15]

3. 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 community.[16]

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

1.2 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 as developed below.

■ **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 CLaRA Regulations. The general criteria for the LAC, listed in CLaRA and its Regulations, are: members must be 18 years or older; one third of the membership must be women; 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

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[14] Section 18 (3) a (CLaRA, 2004a).
[15] Section 18 (3) b.
[16] Section 18 (3) c.

council,[17] there must be a democratic decision made whether the traditional council will perform the functions of the LAC, or whether "the community will establish a land administration committee which is separate and distinct from the recognised traditional council" (DLA, 2007, pg. 19; CLaRA Regulations). Where a traditional council is democratically allocated the role of LAC, they must act in one capacity at a time, i.e. they cannot represent 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; documenting 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 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.

Ultimately, the LAC is accountable to the community and to the Land Rights Board (LRB) for its actions. The LRB, DLA, provincial MEC's of agriculture and local government and the municipality (or municipalities) in which the community resides are all considered to be interested parties in the LAC's 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 each 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, youths, and female-headed households must be represented (see §26 of CLaRA for more detail).

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

The LRB, in addition to monitoring the constitutionality and application of community rules by individual communities' LACs, 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 No. 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 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.

1.3 The CLaRA Process

CLaRA can be invoked through application by a community whose land meets the criteria listed in CLaRA §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, she must specify which provisions of this Act apply to the land. Once 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 the feasibility of the claim (i.e. if the claim is valid, is it in the public interest to award land rights, comparable redress (financial or alternative land), or a combination of these options?).

To gather the necessary information (including the above and any other information the Minister thinks necessary to inform 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 CLaRA are noted in section 14 of CLaRA, which states, in summary, that the enquirer must possess a high-level 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 an 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 intent 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 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, she needs to ascertain from the report if the claim falls under the criteria set by CLaRA and, therefore, if the claim should proceed. Then she must measure the public interest in terms of 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 CLaRA must draft community rules that describe 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 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 CLaRA and with the Constitution, and are subject to any other applicable law (CLaRA §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 to the LRB responsible for the community within fourteen days of adoption by 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 §4(1) of 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.

1.4 CLaRA's Key Achievements to Date

Once enacted, the years 2004 and 2005 were devoted to explaining and justifying CLaRA. As such, the DLA's *Tenure Newsletter* published in July 2004 addressed concerns from communities and critics, defending CLaRA with the same arguments as always. In addition, the DLA responded to an article published about CLaRA and pointed out several misunderstandings. As such, Minister Didiza reassured readers that land will be transferred to communities as owners and not to traditional leaders, and 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 is set for June 2005 in DLA's December newsletter. However, there is still confusion among community members, civil society and traditional leaders as to what the DLA plans to do under CLaRA. And it was during the National Land Summit, organised by the ANC and the SACP and held on 27-31 July 2005, that rumours of activists' plans to legally challenge CLaRA began circulating. Community members from homeland areas and civil society complained that communal land issues were not discussed in the tenure session, and they were very frustrated. The DLA had become aware in January 2006 of the plans to challenge CLaRA. While collecting information about the challenge, the DLA would defend CLaRA as it is, and would continue 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 19 April, about ten days after the LRC had announced a Constitutional Court case to challenge CLaRA.

Several months of silence regarding CLaRA followed. These months – while CLaRA was awaiting its court case – were characterised by the DLA preparing for implementation. As such, it published a framework on 19 April, 2006, outlining implementation responsibilities and obstacles:

- CPIs are not working well, which can be linked to their design and establishment.

- The DLA has 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. Reflection regarding the latter are engaged.

- The estimated total cost of implementing CLaRA is 8,487,732,022.00 rand, which is more than the amount presently budgeted.

On 8 February 2008, the DLA also published and gazetted the Draft Regulations for CLaRA. Comments are due on 8 April 2008. In the meantime, on 3 and 4 April, 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, however these were implemented in a more secretive way and included mainly traditional leaders. But since the Presidential elections were approaching rapidly (expected for April 2009), the consultation in KZN was cancelled and all legislative debates and processes were interrupted so as not to cause any political instabilities and upheavals.

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

2. Criticisms and Major Positions Regarding CLaRA

2.1 Criticisms of CLaRA

Patelike Holomisa, ANC MP and president of the Congress of Traditional Leaders of SA (Contralesa), declared when the act was passed 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."[18]

Criticisms of 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 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 procedure. 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, 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 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

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

of their property rights when ownership of their land is taken from existing structures and vested by CLaRA in imposed Traditional Council structures or other structures created by CLaRA.

- *Equality*: The Act conflicts with the equality clause in relation to both 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 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 criticisms against CLaRA are crystallised in the court challenge it faces for unconstitutionality. Four rural communities represented by the Legal Resource Centre and Weber Wetzel Bowens Attorneys are challenging the act[19] notably on the grounds that the act conflicts with the equality clause in relation to both 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 argue that they are deprived of their property rights when ownership of their land is taken from existing structures and vested by CLaRA in imposed Traditional Council structures or other structures created through CLaRA (for more on the legal challenge of CLaRA see the appendices).

Besides the criticisms alimenting the court case, two more issues mushroomed:

- Lack of Capacity: CLaRA bestows many new roles and responsibilities to several departments and levels of government, including the DLA itself. There are concerns, when looking at the National Implementation Framework for 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 is the complexity of the rights that will be transferred by CLaRA and the ability of the DLA and its implementing partners to deal with the disputes that arise from the transfers.20 Currently, the DLA is

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

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

awaiting the approval of a new staffing structure that takes into account the human resources needed to implement CLaRA. It is envisaged that after the regulations are tabled in parliament in early 2009, implementation can begin with the setting up of land rights boards in the different provinces.

- Budgetary Constraints: There is concern that the cost of implementing CLaRA will 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 the cost of its implementation at approximately 68 million rand over five years of implementation (Wisbourg & Rhode, 2005); this excludes the approximately ten years of planning and preparation for CLaRA. In the National Implementation Framework, this figure has increased exponentially to 8.48 billion rand over the five-year implementation period. In 2008, the total budget allocation to the Department of Land Affairs was 4 to 6 billion, including provincial allocations for all its programmes, duties and costs (Parliamentary Monitoring Group (PMG), 2008). Clearly this raises concerns about the ability of the DLA to finance CLaRA – along with its other programmes and responsibilities – if the NIF is accurate.

2.2 Issues Regarding CLaRA and the Divers Positions of the Different Actors

This part details the major issues that mushroomed from the debates around the development of CLaRA, and analyses the different positions of the different stakeholders regarding it. Based on the total contributions, besides the ANC and the DLA, NADECO, and the Portfolio Committee on Agriculture and Land Affairs, which deal directly with the Act, about thirty-two actors are engaged directly in CLaRA's consultation process. The latter included national trade unions, national commissions, traditional representations, academic institutions, councils/movements, NGOs and communities (Table 3).

Table 3: Institutions which Contributed Directly to the CLaRA 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 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 groups, representing at least 29 communities)	Dwesa-Cwebe, Mpumalanga Consultative Group on Land (Kangwane, Lebowa and KwaNdebele), Hlanganani-Polokwane, Kalkfontein, Kgalagadi (fifteen 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)

Overall, according to the debates and contributions, several controversies appeared (presented in order of importance, identified through their re-occurrence in the contributions): (1) the powers of traditional leadership in land administration, (2) the rights of women to land, (3) the consultative process for the Act, (4) the constitutionality of the Act, (5) whether communal ownership as opposed to private ownership should be retained, and finally (6) the powers of the Minister.

■ **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, pg. 20). 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) argues that traditional councils are directly accountable to their people, who in addition 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 note that traditional leaders are not entitled to make decisions that are contrary to the will of the people.

More nuanced, a 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 propose 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 argue 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 over the objections of the community.

However, the large majority, including activists and all the 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. 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 it 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.[21] 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.[22] 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 that 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 is that the community has no power to replace the council if it is 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 the Land Administration Committee in Section 1. Lastly, it is mentioned that the Bill/Act will also create problems of traditional councils claiming jurisdiction over communities who historically owned the land and those who bought it for themselves.

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[21] "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).

[22] "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 who favours the CPA to have control" (community contribution).

Table 4: Major Positions on the Provisions Regarding the Powers of Traditional Leadership in Land Administration

AGAINST	INTERMEDIATE	FOR
LPM: - The Bill has no checks on traditional powers. - It must provide for elected, democratic institutions. PLAAS: - Democratic and accountable institutions for land administration are not provided for in the Bill. - The Bill allows 'traditional councils' in areas where the latter have been recognised or established (defined in the Traditional Leadership and Governance Framework Bill (section 25(3)). - No mechanisms to ensure accountability are provided. Nkuzi Development Association: Traditional councils remain undemocratic – The Bill must encourage and strengthen democratic structures. Dwesa-Cwebe community: - 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. Mpumalanga Consultative Group on Land: - The Bill gives traditional leaders ownership and administrative powers in communal lands. Traditional leaders will abuse these powers. Kalkfontein community: - The Bill intends to give powers	COSATU and NUM: - Communal land reform, with mechanisms to ensure the democratization of the allocation of land rights at community level. - Provision for a Land Rights Board monitoring the participation of traditional leaders at community levels. SACC: - 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. CGE: - Traditional leadership and traditional communities are not democratic and highly patriarchal. - Their legitimacy and recognition is a contested issue could lead to further divisions and conflicts. Masifunde (NGO): - LACs are an extension of apartheid policies, and can lead to disputes.	National House of Traditional Leaders: - Traditional Councils are directly accountable to their people. - People do 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.

and functions to chiefs or to existing traditional council who do not have rights over our land and do not represent our community Kgalagadi: - 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. Madikwe community: - 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).		

- **Major Positions on Women's Rights to Land**

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

As for the previous issue, the National House of Traditional Leaders emphasise that the participation of women and youths 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 nuance these statements, the opposition is not as straightforward as in the previous issue (regarding the powers of traditional leadership in land administration). Without opposing the provisions regarding women as they agree that there is reference to women

in the Bill, they argue that it does not give unequivocal provisions for women's equality with men in as far as access to land is concerned. They underscore 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, emphasis added) causes incertitude.[23]

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 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 is notes that the Bill tends 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 is a process of formalising old order rights. They note that, in reality, women are not holders of old order rights (because under customary law, land was only allocated to men), and will 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 confirm 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)) are weak and unconvincing and are 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 custom,[24] 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 potential devastating effect on women – termed "double discrimination." The LRC highlight 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, will 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 discriminatory towards women, it would also be inconsistent with section 25(6) of the Constitution.

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[23] "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)

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

Table 5: Major Positions on Women's Rights to Land

AGAINST	INTERMEDIATE	FOR
CALS: - The 'hands-off' approach of government in the Bill renders women vulnerable as they are not likely to access land fairly and in equal manner. CGE: - Only right 'derived from or recognized by the law is a derivative or secondary and temporary right. - The legal rights created CLaRA are therefore highly gendered and discriminate against women. Joint Monitoring Committee on Improvement of Quality of Life and Status of Women: - 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. PLAAS: - 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. SACC: - Although Bill states that new order tenure rights may vest in women, the Bill does not guarantee women access to land or security of tenure. - As the Bill envisions that land will be administered by traditional authorities, this problem is likely to be perpetuated. LRC: - Double discrimination of 'African women.' The Bill does not provide	ANCRA: - 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. Masifunde (NGO): - 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. Kgalagadi: - The Bill does not give guarantees as to women's access to land. Madikwe community: - 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.	National House of Traditional Leaders: - 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 means to sustain themselves and dependents. -Married women enjoy equal access to family allotments as husbands.

African women with legally secure tenure or comparable redress. The Bill is therefore inconsistent with the constitutional requirement. Kalkfontein Community: - The Bill does not redress the injustices, but create a situation where women do not have secure land lights and reinforce the customary prohibition of allocating the land to women. Sekhukhuneland Ad Hoc Committee on Land: Women, and in particular un-married women, have no access to land rights (see §24(3)(a)(i)).		

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.[25] 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 address the concern of formalising old order rights. However, the sections dealing with the powers of traditional structures in relation to land allocation and administration were left largely unchanged. 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 have voiced concerns regarding their participation in traditional decision-making structures. They note that most women are not even aware what role they are supposed to be playing in these structures and at times are not even informed when the meetings are taking place.[26]

■ **Positions on the Act's Consultative Process**

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 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

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[25] "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)

[26] Discussion with the head of the Rural Women's Movement.

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. Criticisms are threefold: (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 version was extremely insufficient (3 weeks). In addition, they noted that the language and communication media used were often inaccessible to local communities.[27, 28]

Secondly, many felt that some actors were more consulted than others. This is particularly the case with the traditional leaders, who are criticised of being predominant in the process. The DLA (and the ANC) is accused of favouring them. On contrary, many other, especially local communities, indicated not being integrated in the consultation process.[29] In addition, in May 2008, a senior DLA official admitted that there had not been sufficient consultation with rural communities, but instead 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.[30] 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 point of view was not taken into consideration.[31] 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. This links up with the constitutionality of the Bill.

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[27] "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 here through short notice and we only had time for preparations on this presentation over the weekend." (Community contribution)

[28] "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)

[29] "There have been no consultations with the communities represented by the Dwesa/Cwebe Land Trust and the seven 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)

[30] Interview with Senior DLA official in May 2008.

[31] "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 6: Positions on the Act's Consultative Process

AGAINST	INTERMEDIATE	FOR
South African Council of Churches (SACC): - The review and consultation period on the current draft was too brief to permit one to develop and explore the implications of potential amendments. ANCRA: - 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. CALS: - 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. CGE: - Concerns about the fast tracking of this Bill through the Parliamentary process, about lack of adequate consultation with rural communities, and about a biased processes favouring Traditional leaders. LPM: - 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. Masifunde (NGO): - The process of developing this Bill has not been democratic and transparent.		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): - Consultations were significant and representative.

Dwesa-Cwebe community: - There have been no consultations with the communities represented by the Dwesa/Cwebe Land Trust and the 7 CPA's. Hlanganani-Polokwane Community: - Dissemination of information on this Bill leaves much to be desired. - The overwhelming majority of residents are not aware of the Bill. Kalkfontein community: - We were not informed or consulted. We heard about the CLRB just recently through our lawyers. - The timing was very short and inappropriate. Kgalagadi: -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 area–friendly.		

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

- **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 '§76 Bill' (one which affects the provinces since CLaRA deals with issues of customary law and traditional leadership) and not as an '§75 Bill' (one which does not affect the provinces). The §75 process 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; they 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 masks the fact that the practical effect of the Bill will be that new order right holders will not exercise ownership powers in terms of the determinations made by the Minister, but they will in fact be governed by LACs in terms of community rules. As such, mainly the LRC argued that the CLRB and the TLGFB established a fourth sphere of government, constituted by the administration committees, which is not provided for in the Constitution.[32] 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, Nov. 2003).

Thirdly, the Act is 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.

Fourthly, and linked to the above mentioned issues, the Act does 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 is seen as inadequate.

Table 7: Positions on the Constitutionality of the Act

AGAINST	INTERMEDIATE	FOR
Joint Monitoring Committee on Improvement of Quality of Life and Status of Women: - Is concerned because the Bill does not address the issue of gender equality in a manner consistent with the provisions of the Constitution. LRC: - 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		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): - progressive piece of legislation that promotes gender inclusively and democracy while giving due recognition to traditional leadership

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[32] The Constitution made provision for only three levels: national, provincial and local.

PLAAS: - The constitutional requirement that tenure legislation provide for *comparable redress* in the event that land rights cannot be secured due to overlapping rights (see Section 25(6) of the Bill of Rights). This requirement is not met in the Bill.		

■ **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 to have been 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 margin of manoeuvre by pinpointing the predominance of traditional powers.[33] Another reason is linked – according to several land reform protagonists – to a seeming agreement 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 titles (Okoth-Ogendo in Claassens and Cousins, 2008, p95). 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 a need to adapt existing practices and institutions rather than attempt to replace them because replacement of tenure regimes is more and more seen as a very expensive exercise with only partial results. In addition, it is recognised 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 the 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 indicate 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

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[33] While the community is given the power to chose (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.

the Bill, may extinguish the 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.

Another difficulty in implementing either one or the 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 within each other. As such, PLAAS wonders to which level of 'community' will titles 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 privatisation 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 gather fuel or fruits. Many, in particular unions with mixed representations, believe that adequate safeguards should be provided in the Bill to prevent wholesale privatisation, 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 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 transfer by such community member of ownership to a person that is not a part of the community.

Table 8: Positions on Communal Ownership as Opposed to Private Ownership

AGAINST PRIVATISATION	INTERMEDIATE	FOR PRIVATISATION
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): - privatisation would not recognise traditional leadership COSATU: - While supporting the principle of communal land reform, the introduction of private group and individual ownership is considered problematic. PLAAS: - Communal tenure systems are *nested* 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.	LEAP: Agrees with the Bill's attempts to: • secure the tenure of communities, households and individuals; • give legal recognition to existing communal tenure systems; and • provide for the administration of land rights in communal areas. SACC: - To confirm and strengthen the existing tenure rights of people living 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.	

The absence of local communities' positions on the issue is interesting. 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.

■ **The Minister's Discretionary Powers**

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, which portions to reserve as State-owned, and 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 gives too many powers to determine land rights to the Minister, and does not require adequate consultation with the affected communities. They argue that there are no clear criteria to guide the Minister's decisions, and the affected

communities have few, if any, opportunities to either participate in making these crucial decisions or challenge them once the Minister has made a determination.

As such, there is no obligation for 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, compel a land rights inquiry, or accept or reject the outcome of such an enquiry. Land rights enquirers are not compelled to consult communities prior to making their recommendations. Although general statutes governing administrative justice would presumably apply, there is no explicit mechanism by which a community may appeal a decision by the Minister. It would likely be costly and difficult for communities to challenge the Minister's rulings on such matters.

In addition, although 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. Critics, 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 9: Positions on the Minister's Powers

AGAINST	INTERMEDIATE	FOR
SACC: - There is no obligation for 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, compel a land rights inquiry, or accept or reject the outcome of such an enquiry. ANCRA: - The Bill has given extraordinary powers to the minister and unlimited powers to decide: upon land rights in communal areas and to whom they should go, on the extent and boundaries of the land to be transferred, to make	Joint Monitoring Committee on Improvement of Quality of Life and Status of Women: - The Bill provides that the Minister MAY confer a new order right on a woman, but this is discretionary. 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): - 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.	

determinations based on land rights inquirers' report that does not need to be published for public comment upon initiating a land rights inquiry. LPM: - It gives too many powers to the Minister to determine land rights, and does not require adequate consultation with the affected communities. LRC: - 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. PLAAS: - 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. Dwesa-Cwebe community: - The Bill provides the Minister with wide powers to determine land rights without any provisions on how these powers are to be exercised.	Kgalagadi Community: - 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. Greater Manyeleti Land Rights Group: The Bill must not give discretionary powers to a single individual regardless of social standing.	

III. CLARA'S POLITICS: STAKEHOLDERS' POSITIONS, THE INTERPLAY OF ACTORS, AND THEIR IMPACT ON CONTENT EVOLUTION

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) scrutinizing the evolution of its content; and (2) an in-depth analysis of the events and interplay 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 both changes in the different drafts with preceding events and actions by the actors.

1.   Evolution in CLaRA's Content and Analysis of the Factors Involved

As detailed previously, the final draft of CLaRA came a long way, shaped and reshaped through different drafts premised on contributions from the various actors engaged in the process. As shown in Table 10, 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 pgs., 10 chapters and 3 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 twenty-two 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 and final Act is analysed.

Table 10: The Evolution of the Structure of the Different CLRB Drafts and CLaRA

	Land Rights Bill	**CLRB draft August 2002**	**CLRB draft March 2003**	**CLRB 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 of laws - Repeal of laws - Transitional arrangements	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 terminated 11. The conduct of land rights inquiries 12. Miscellaneous provisions	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 - Memorandum on the objects of the communal land rights bill	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

1.1 The Initial Land Rights Bill (3 June 1999)

The idea of restructuring South Africa's communal land is not recent, it had already emerged 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) emphasises the idea of divesting the State of black land. With activist appreciating this positively, the NP implemented in 1991 the Upgrading of Land Tenure Rights Act (ULTRA) promoting the transfer of land rights to tribal communities. This act was, however, never effectively implemented as – during the transition period of 1993-1994 – the main stakeholders' priorities differed: the NP sought to ensure protection of extant (white) rights to own private property, the ANC was insisting on land reform, but in favour of protecting right to private property, and civil society was pushing hard for land reform and the redistribution of white 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, pg. 19-20).[34] In this document, 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 accommodate diverse forms of land tenure, including types of communal tenure (Figure 1).

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[34] 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, p.19-20)

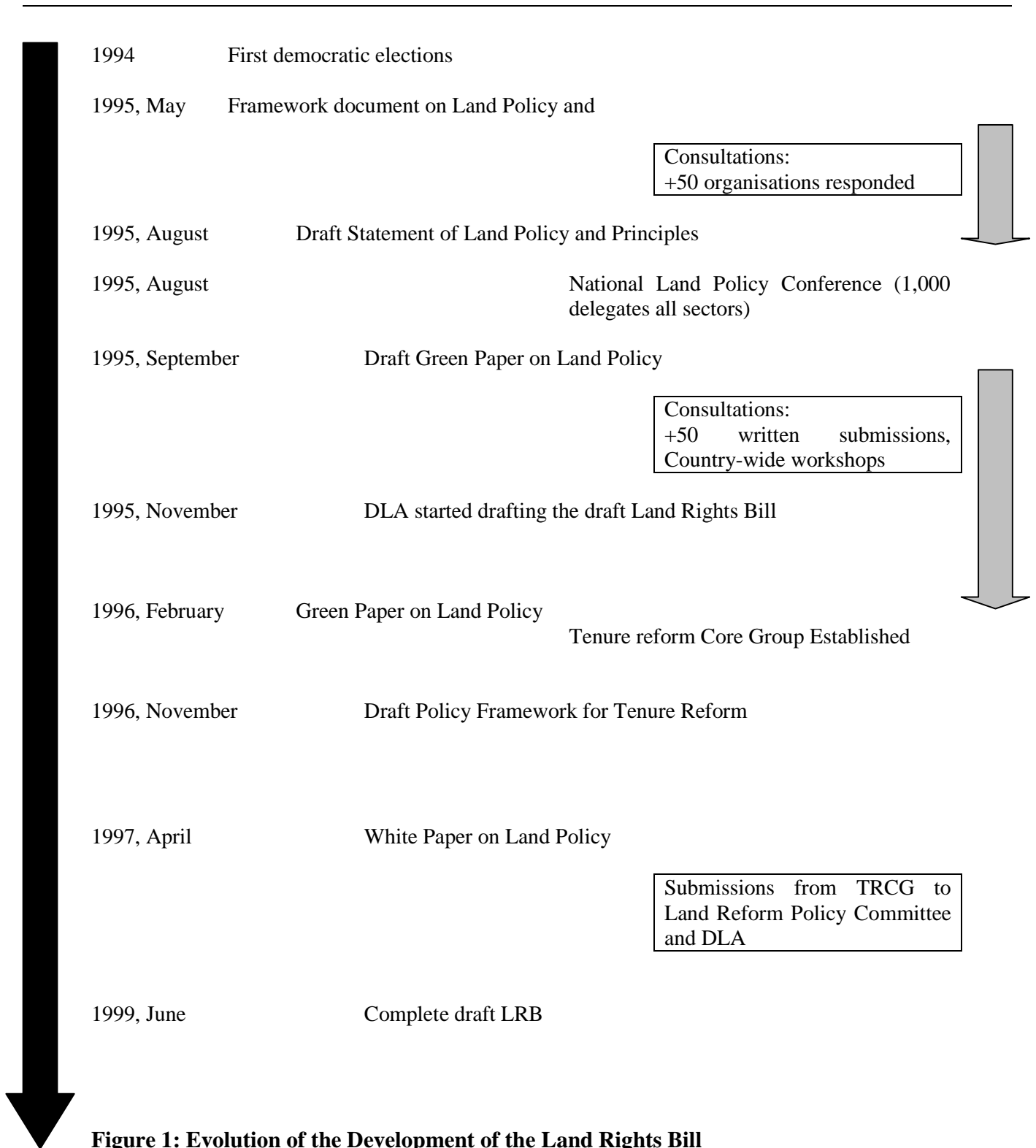|		
1994	First democratic elections	
1995, May	Framework document on Land Policy and	
		Consultations: +50 organisations responded
1995, August	Draft Statement of Land Policy and Principles	
1995, August		National Land Policy Conference (1,000 delegates all sectors)
1995, September	Draft Green Paper on Land Policy	
		Consultations: +50 written submissions, Country-wide workshops
1995, November	DLA started drafting the draft Land Rights Bill	
1996, February	Green Paper on Land Policy	
	Tenure reform Core Group Established	
1996, November	Draft Policy Framework for Tenure Reform	
1997, April	White Paper on Land Policy	
		Submissions from TRCG to Land Reform Policy Committee and DLA
1999, June	Complete draft LRB	

Figure 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 fifty 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 on 31 August – 1 September 1995, where a draft Statement of Land Policy and Principles was discussed in detail by over 1,000 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 fifty 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 concern 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 land redistribution; and (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 the tribal authorities' involvement in land administration expressed 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; and (vi) community members specifically called for policy on the roles and rights of women to 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 strategising. It was also accepted that – despite the need to deliver – the process of developing communal land policy could last for three years. To initiate it, the DLA started drafting a first draft of a Land Rights Bill at the end of 1995. In February 1996, a Tenure Reform Core Group (TRCG) was formed through the appointments by the Minister of DLA and non-official members considered to be experts (DLA, activists, LRC, academics from PLAAS, former TRAC members, and former RWM members). This group was brought together to strategise on the development of tenure policy. It produced a draft Policy Framework for Tenure Reform in November 1996, much of which is copied verbatim in the draft White Paper (published 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 No. 31 of 1996 (IPILRA), and (ii) the Communal Property Associations Act No. 28 of 1996 (CPA). In addition, the Upgrading of Land Tenure Rights Act No. 112 of 1991, was amended to bring it in line with tenure policy. IPILRA was a holding mechanism that prevented the violation of existing interests in land until new long-term legislation had been put in place. The CPA Act provided a means through which people wanting to hold land jointly and in groups could organise their tenure. It allowed for the upgrading and conversion into ownership of rural quitrents and deeds of grant.

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 alleviate the impoverished and suffering that it had 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 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 privileging the security of food 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 & Anseeuw, 2009). Linked to this, the DLA was at that time mainly constituted by what is considered left-wing personnel, representing the equivalent fraction of the ANC and previous-regime land activists (Alden & Anseeuw, 2009).

Providing for three programmes recognised by the constitution (restitution, redistribution and tenure reform (see Box 2, pg. 3), the White Paper warned of the extreme caution that needed to guide tenure reform. Regarding this, 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 could be co-owners of land (if they decide to have a communal system), but also into 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 individuals' rights 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 the boundaries of groups and representative authority structures to local processes overseen by Government (Claassens and Cousins, 2008, pg. 14). 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 between old and new rights 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, pg. 135).

In 1998, the TRCG began meetings with a tenure drafting team; these meetings led to the LRB. Several failed test cases on transferring land ownership to groups or individuals[35] resulted in the TRCG and DLA confirming the previous evolutions informing a new LRB. On 3 June 1999, a day after the second democratic elections, a first complete LRB draft was published for discussion purposes. This draft (Claassens and Cousins, 2008, pg. 12):

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[35] The major difficulties with the transfer of ownership directly to groups or individuals were: boundary conflicts, community membership conflicts, access problems in regard to shared resources for vulnerable groups, lack of participation in decision making, and traditional leaders having undue power.

- 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; and

- 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:

- provide for protected rights to occupy, use or have access to certain tracts of land;

- 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 major beneficiaries in terms of power given by the Bill were:

- rights holder structures, meaning anybody representing protected rights holders in respect to land matters; where the context so indicates, this includes accredited rights holder structures (i.e. previously marginalised communities from the former homelands);

- women are highlighted throughout the Bill; and

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

Traditional leaders, largely left out of the process until then, felt threatened by the proposition.

1.2 CLRB 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 instatement of Thabo Mbeki as President initiated a formal change in ANC leadership and 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 & 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 rural areas as a means of improving livelihoods and focusing on more market-oriented production. The approach whereby 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 no longer aimed at promoting self-sufficiency, but at creating a structured small-scale commercial farming sector with a view to improving farm production, revitalise the rural environment and create employment opportunities. This strategy coincided better with the more liberal orientations of the government. 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 latter not only replaced the DG of the DLA and many DLA employees, she also put the land reform programmes on hold 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 this made the AFRA claim that DLA now excluded civil society and NGOs, making it less transparent. The new Minister's approach was also criticised as being less consultative with academics. 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 the 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 in which South Africa was engaged. 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, pg.13). The Land Rights Bill was set aside and the development process for the Communal Land Rights Bill was to follow (see Figure 2).

1999, June	Complete draft LRB	
2000, March	(2nd) Draft Communal Land Rights Bill	
2001, May		

Official start of consultations

2001, October	Intermediary 3rd draft CLRB, internal discussions only	
2001, November	Official reaction PLAAS/NLC to 3rd draft CLRB	
	National Land Tenure conference	
2002	Ministerial Reference Group established	
2002, March	4th draft CLRB, internal discussions only	
2002, May	5th draft CLRB, internal discussions only	
2002, June	6th draft CLRB, internal discussions only	

Midnet Land Reform Group and LEAP organise a workshop in Pietermaritzburg

2002, July	7th draft CLRB, internal discussions only	

International Symposium on Communal Tenure Reform, organised by PLAAS and CALS

2002, August	8th draft CLRB gazetted for public comment	

Official start of consultations (60 days)
- Written contributions
- 50 workshops

2002, October

2003, March	9th draft CLRB, internal discussions only
2003, July	10th draft CLRB published
	Joint task force established
	Several secret meetings (Ingonyama Land trust, IFP, Zulu King), informal submission KZN house of TL
2003, September	11th draft CLRB, introduced in the National Assembly. Introduction approved and notice published with intention to introduce CLRB in Parliament with a call for submissions

> Official start of public comments (21 days)

2003, October	1st amended 11th draft CLRB
	Notice of intent is withdrawn and new notice of intent to introduce the 1st amended 11th draft CLRB
2003, November	

> - Public hearings
> - Submissions from 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

Figure 2: The Evolution of the Development of the Communal Land Rights Bill

On 11 February 2000, Land Affairs announced 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 them were only for internal use and were not discussed publicly.

As such, during March 2000, a draft version of the newly entitled bill (Communal Land Rights Bill, CLRB) – it is referred to as 2nd draft as seemingly the LRB was used as first draft – 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 are to be issued deeds of communal land rights, which can be upgraded to freehold titles if the community agrees (Claassens and Cousins, 2008, pg. 13).

Although criticised for disregarding the difficulties noted by the transfer model in the test cases of 1998-1999 (Claassens, 2000; Ntsebeza, 2003), the draft reflects the new Minister's statements, as well as the debates over the role of traditional leaders in local governance that appeared towards the end of 2000 with the local elections nationwide. As such, by threatening to boycott and fuel violence at the 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 this was rejected by the traditional leaders since they wanted more representation). But, after having them delayed, the local elections eventually went through with the consent of the traditional leaders and without amendments to the Municipal Structures Act – already leading to speculations about a 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 were to be sent in before 26 November, the official date for the finalization of the consultation on the CLRB.

About six months later, on 25 October, an intermediary 3rd draft CLRB was released for departmental discussion purposes only. However, the document leaked from the DLA, causing fury from civil society, including a significant number of former employees of the DLA, sidelined in 1999. PLAAS and NLC complemented the uproar by sending an official submission on 15 November. They were opposed to the shift to the transfer of title approach, and sought challenge the draft bill. There were claims that the approach of transferring rights and ownership to communities would pit individuals and their rights against the community and could have negative consequences for already disadvantaged individuals (in Fortin, 2006, pg. 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). In

addition, they expressed dissatisfaction with the lack of wide consultation on the Bill, and noted that the consultative process had been selective.

With the consultations ending on 26 November, the DLA organised the National Land Tenure Conference in Durban, from 27 to 30 November 2001, which would include all major stakeholders. On this occasion, Sibanda presented the new draft CLRB, emphasising that it was time to "divest" the State of communal land in favour of private ownership. Again, this brought an entire strain of "anti-privatisation" criticism from civil society *and* traditional leaders. Civil society claimed that to enable privatisation under the circumstances proposed in the bill requires an ideal type of communal arrangement, which – mainly according to PLAAS – does not exist (Fortin, 2006). Traditional Leaders, for their part, began lobbying in favour of strengthening their land administration positions because they feared a loss of power and their eventual irrelevance. The Tenure Conference ended up being a brain storming session on a new approach to CLRB, with the DLA trying to accommodate different, often opposing, positions, and with the different stakeholders mobilising themselves in order to secure their positions and/or interests.

Traditional Leaders began lobbying in favour of strengthening their land administration positions because they feared a loss of power and eventual irrelevance. On 4 December 2001, one week after the tenure conference, Minister Didiza addresses 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 realisation 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, pg. 97).

In early 2002, a Ministerial Reference Group was established by the DLA to help with the drafting of the bill. It was refused by the DPLG as the DLA declined to have the traditional leadership of the TLGFB as a LAC. It resulted in an acceleration of legal drafting: on 18 March, 24 May, 14 June and 2 July 2002, the DLA released respectively the 4th, 5th, 6th and 7th draft CLRBs. Again, these documents were for Departmental discussion purposes only; no external comments were received or considered. In order to prepare a response to the forthcoming public release of the CLRB, AFRA together with the Midnet Land Reform Group and LEAP organized a workshop in Pietermaritzburg on 26 June. In addition, in order to learn from other experiences, an International Symposium on Communal Tenure Reform "Tenure Reform: Lessons for South Africa" was convened on 12 August 2002 by CALS, PLAAS and the DLA. However, the DLA pulled out a few days before the symposium. In addition, in mid 2002, PLAAS/NLC received funding from DFID to engage in community consultations and a media campaign against the CLRB. Influence from "civil society" started to increase at this time.

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 rights 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.

Table 11: Comparison of the CLRB (8th Version, August 2002) with the LRB (June 1999)

Content & Major Changes	Preceding Events
Overall objective was narrowed: to provide for legal security of tenure by transferring communal land to communities, or by awarding *comparable redress*	*02/04/1999 Change in ANC leadership & policy orientation: African Renaissance/renewal & neo-liberal focus
Differences regarding powers of traditional leaders and recognition of certain rights:	*11/04/1999 New strategic direction for DLA announced – there was a hint at the "transfer to tribes" model of tenure reform
- traditional leaders are considered in terms of the constitution	*11/04/1999 New direction suggests using existing land administration structures, where they exist
- 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.	*16/06/1999: Minister DLA replaced *8/1999 Land reform put on ice
Differences regarding land tenure:	*11/02/2000: New strategic direction for land reform: speed up process & promote commercial opportunities for black farms
- provision of land tenure right, not protected right	*03/2000: AFRA claims DLA is now exclusive of civil society & NGOs, less transparent
- transaction and transfer of protected rights sections omitted	
- section dealing with the IPILRA is omitted (alienation of communal land for commercial development)	*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.)
- local record of protected rights (structure) omitted	
- omission of access to LRE determination documents	*11/2000 traditional leaders boycott local elections; attempts to appease them by proposing amendments to the Municipal Structures Act – rejected
Women's rights: protection of women's rights section omitted	* Elections delayed
Chapter 2 - Application of the Act:	*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)
- 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"	*25/10/2001 Leak of CLRB before tenure conference
	*15/11/2001 PLAAS/NLC submission against transfer to community
Chapter 5 - Transfer of Communal Land:	*27-30/11/2001 Land Tenure Conference
- Designation of officials to assist communities with applications or projects or requests	*04/12/2001 Didiza addresses National House of Traditional Leaders – assuring role in land administration

Chapter 6 - Alienation of Communal land for development and commercial purposes -Totally new chapter in this draft. *Chapter 7 - Land administration and natural resource management in communal land*: - community rules and administrative structure must be adopted first before set 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 *Chapter 11 - The Conduct of Land Rights Enquiries*: - omission of: determinations may be given to any interested party upon payment of fee - any person aggrieved by it may appeal to the LCC within 30 days of seeing such a determination	

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. 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, the major changes in orientation regarding the previous LRB concerned (Table 11):

- 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 to communal or other land which has been confirmed, converted, conferred or validated by the Minister in terms of Section 18. As such, terminology differs in this draft: protected right is referred to as 'land tenure right.'

- The powers of traditional leaders, which in this draft are still defined as contemplated in Sections 211 and 212 of the Constitution. This draft outlines in far more detail the roles and powers of land administration and natural resource management structures on communal land.

As such, in opposition 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 are allocated much more responsibility. It is noted that, where applicable, the institution of traditional leadership that 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 were considerable omissions compared to the previous draft of sections dealing with legal security of tenure, protection against arbitrary deprivation of tenure rights, and general principles.

1.3   CLRB March 2003 Version Compared to the CLRB August 2002 Version

With the publication of the 8th draft CLRB (General Notice No. 1423, Gazette No. 23740), it was also announced that comments were to be submitted within sixty days. In addition, the DLA organized – according to official statements – fifty 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 seems that 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; and 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, the DLA was criticised by civil society for pretending to give a voice to the communities, but meetings were dominated by traditional leaders; in KZN, however, the DLA claims that attempts to have eleven community consultations about the CLRB 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, attempting to answer some of the legal criticisms of the CLRB brought by the LRC, PLAAS and NLC, it tried to link various clauses about ownership versus administration and link them to the role traditional leaders to prove that the community will 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, it tried at the same time to appease the traditional leaders' concerns 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, pg. 103). It also stated that the Draft Bill's point

of departure was 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 (Fortin, 2006, pg. 103). (Attempts at reassurance in regard to the criticisms from activists were negated by the quoted section. Criticism continued and increased.)

Not to be outdone, Contralesa released statements at this time voicing opposition to the Bill and warning that violence in areas such as KwaZulu-Natal was possible if certain concerns were not addressed.[36] Contralesa, via Holomisa who claimed to position itself as peacekeeper, was urging the ANC to align the CLRB with traditional leaders' demands so that they could continue dissuading their people from inciting violence.[37]

In the meantime, in order to respond to what was seen as destabilising threats, the Director of DLA's Tenure Directorate presented a paper for a Land Systems and Support Services Colloquium (2 March 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, pg. 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 the 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, pg. 98)). Although the initial DPLG proposition to work together and coordinate on TLGFA and CLRB for the roles and composition of traditional leadership was rejected by the DLA, Mbeki's position nevertheless acknowledged this as proven by the reference to traditional leadership through the section 1 of the Traditional Leadership and Governance Framework Act of 2003 (and not through the Constitution anymore).

The consultations and lobbying initiatives resulted in the 9th draft CLRB, which considered and incorporated – according to the DLA – all comments from stakeholders. It was released for Departmental discussion purposes only on 11 March 2003; a public release was not expected before June 2003.

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[36] ANC Daily News Briefing, 6/11/2002.
[37] ANC News Briefing, 4/12/2002

Table 12: Comparison of the CLRB March 2003 Version with the CLRB August 2002 Version

Content & Major Changes	Preceding Events
Overall objective was narrowed: "to provide for legal security of tenure by transferring communal land, including KwaZulu-Natal Ingonyama land, to communities, or by awarding comparable redress"	*08/2002: the DPLG voices concerns about providing services on "private land" *02/03/2003: the DLA statement @ the LSSC colloquium that the priority was tenure democracy in rural areas (warning to traditional leaders)
Differences regarding powers of traditional leaders and recognition of certain rights: - traditional leaders are considered in terms of the constitution - Ingonyama Land Trust recognised - the fact that traditional leaders can be included in LACs as up to 25% ex-officio members of a LAC was taken out - LACs may be exercised and performed by recognised traditional councils	*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 leadership, DLA not cooperative (Fortin, 2006) *** Draft not released publicly until June. --
Chapter 8: Land Rights Board: - composition of the board is expanded - 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	*08/2002: DLA CLRB consultations disrupted in KZN by traditional leaders *09/2002: TRIS report reiterates importance of traditional leaders in land administration *06/11/2002: Contralesa voices opposition & warns of possible violence related to CLRB, positions itself as peacekeeper
Chapter 9 - KwaZulu-Natal Ingonyama Trust Land: Completely new Chapter - Ingonyama Trust board to become Land rights board - to be headed in perpetuity by the Ingonyama - 25(a) notes that the Minister does not have the power to constitute the Ingonyama land rights board	*04/12/2002: Holomisa urges the ANC to seek Contralesa support to prevent violence
Chapter 10 - General Provisions: This draft adds the section on the application of the Act to other land reform beneficiaries	
Other: - the Chapters on Dispute Resolution and Eviction of	

persons whose tenure rights have been terminated were left out	
- 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, (iii) consistency with democratic processes, (iv) fair access to the property of the community, (v) accountability and transparency, (vi) drafting and adopting of community rules	
- draft omits all aspects relating to natural resource management	

As such, the period between August 2002 and March 2003 saw the traditional leadership take ownership of the Bill's development. Hence, the overall objective was narrowed and made 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, while it still focused on new order rights defined as tenure or other rights 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 some key stakeholders have played in the Bill's development process.

Indeed, the CLRB March 2003 version's major changes were strongly linked to traditional leaders' concerns. They were better defined and given much more responsibility in this version. As such, a traditional council is 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 noted regarding LACs that if a community had a recognised traditional council, the powers and duties of the land administration committee of such community could be exercised and performed by such council. Hence, the 25% quota for traditional leadership was dropped in this draft (previously traditional leadership members could represent up to 25% of ex-officio members of a LAC). However, regarding LACs, if a community had a recognised traditional council, the powers and duties of the LAC of such community could be exercised and performed by such council. These benefits were even more precise in the case of the Ingonyama Trust Board, which was recognised to become a land rights board on its own, 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 was expanded, the functions of the board were much less detailed in this draft, omitting issues relating to cancellation of rights, awards of comparable redress, leasing of State-held land, and disputes.

Accordingly, there were considerable omissions from the previous draft of sections dealing with the rights of communities. Hence, although the section on security of tenure highlighted 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 were omitted. In addition, the following sections were also 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; and all aspects relating to community land administration and natural resource management in communal land. Finally, the chapters on dispute resolution and the eviction of people whose tenure rights had been terminated were left out of this draft completely.

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

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

But, when in July, the DLA – who tried to accommodate in public the willingness 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 (LACs for all communities under the CLRB, of which an absolute maximum of 25% could be traditional leaders or their nominees, with the rest elected by the community, with a 1/3 women membership requirement for LACs), it sparked outrage from KZN House of Traditional Leaders and Zulu King Goodwill. They called the CLRB a "recipe for a bloody confrontation."[38] While the DLA and DPLG were alarmed that unrest will follow these comments, the ANC sensed rising tension with the IFP and Contralesa. The potentiality of conflicts was re-confirmed on 19 August 2003, when the Minister and the DG of the DLA met with the Zulu King, Chief Buthelezi, and KZN traditional leaders.

In response, the transfer of the Bill to the Cabinet was delayed and the ANC – who wanted to retain support of Zulu King[39] – and Contralesa formed a joint task force, including the DLA and the DPLG, regarding the CLRB, officially in order to "operationalise issues relating to the TLGFB and the white Paper on Land Policy." In addition, the Minister and the DG of the DLA met with the Zulu King, Chief Buthelezi, and traditional leaders in KZN and promised, at this meeting, that the Ingonyama Land Trust would not be repealed in later versions of CLRB on the condition that the trust's membership was brought into line with the CLRB "democratic" vision for the LAC (i.e. would have elected members and women on Ingonyama Land). Sometime in September, Zuma also met – this time quietly – with Buthelezi and the Zulu king. The outcomes of the meeting are unknown. Although the KZN House of Traditional Leaders made a submission on the TLGFB which included a main focus on the CLRB on 16 September 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 reins, we are soon

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[38] "New KZN land conflict looms" in *Witness.*
[39] "IFP Bid to Woo King" in *Mail and Guardian,* 30 April 2003.

going to have social disintegration and great upheaval,"[40] it seemed that after two years of furious contestation of the CLRB and TLGFB, Contralesa supported the two acts leading to a rapprochement with the ANC. The latter raised suspicions among civil society that suspected a deal between the ANC and traditional leaders (Fortin, 2006; Uggla, 2006).

Subsequently, on 18 September 2003, an 11th draft CLRB was introduced in the National Assembly as a Section 75 Bill. The introduction was approved by the Minister on 23 September 2003. Subsequently, in late September 2003, Vice-President Zuma met secretly with Chief Buthelezi and the Zulu King, while on 3 October, a notice of intent to introduce the CLRB into Parliament and invite the public to comment on the Bill within twenty-one days is released. The CLRB was gazetted and the deadline for comments was set for 24 October. The content of the gazetted draft was similar to the content as the 4 July version (10th draft), except that this version did not repeal the Ingonyama Land Trust Act and changed the LAC composition section (i) to make a chief, headman/woman or nominee a *mandatory* member of LAC, and (ii) stating that a maximum of 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 the deadline about changes, engaged in a series of workshops to analyse the new CLRB document and 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 was to address what will get the communities – in whatever form – secure tenure. This non-alignment of the different actors further weakened an already affected civil society. Since 2002, the Government had indeed been very active in influencing civil society and NGOs.[41] If the Government imposed financial measures (cancellation of tax exemption, for example), it intervened also directly in NGO structures and decision-making. 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 the politics of containment. The board's strategy, probably under governmental pressure, was to suppress and intimidate the NLC staff who were most vocal in their support for the Landless People's Movement (LPM) and its activities, such as the march during the WSSD. Later, in June 2005, the NLC finally decided to close its national office and restructure its network of affiliates (Alden & Anseeuw, 2009).

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[40] Written submission from KZN House TL, 16 Sept. 2003.

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

Table 13: CLRB Early October 2003 Version Compared to the CLRB March 2003 Version

Content & Major Changes	Preceding Events
Overall: *Bill introduced as a section 76 bill *reference to traditional leaders as LAC reads ***must*** instead of ***may*** (§22(2)) (emphasis added) *Ingonyama Land Trust not repealed *Chapter 2: Juristic Personality and Legal Security of Tenure* * Women's rights: Sections 4(2) and 4(3) on old order rights held by married people were omitted. Also omitted was "A woman is entitled to the same legally secure tenure […]." * Omission regarding rights on (a) land other than the land to which old order right relates, (b) compensation in money or in any other form. *Chapter 5 – Land Rights Enquiry (LRE):* Sections omitted: *Section 17(2), requiring enquirer to include community input into Land Rights Enquiries (LREs) *17(3) requiring public availability of LREs before submission to Minister *Minister does not need to consider customary law (§19(1)) *Chapter 7: Land Administration Committee* * TL "must" as opposed to "may" (§22(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." (emphasis added by researchers) *Chapter 8: Land Rights Board* * Women's rights diminished: "seven members from the affected communities […] two must be women" (§27(1))	*1/04/2003:Mbeki addresses National House of Traditional Leaders reassures them as to the 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, *Mail and Guardian* 30 April 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" (*Witness* in Fortin, 2006). *15/07/2003: ANC – Contralesa joint task force 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 reference to the simultaneous CLRB, accusing both bills of intending "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 the National Assembly (as §75 bill) *23/09/2003: CLRB gets approval of Minister *Late/09/2003: Zuma meets with Chief Buthelezi & Zulu King

* New additions in this draft (§42(2)): a magistrate has power to punish for an offence or awarding a new order right to a non-community member without proper consent (§42(2))	

Although the overall structure and content of the October version of the CLRB did not vary strongly from the previous version, significant changes appeared regarding the different actors' rights, introduced to appease conflictual situations and accommodate requests from the different stakeholders, but which mainly favour traditional and administration systems, generally neglecting civil society and local requests.

Indeed, firstly, regarding the LACs, this new draft read "must" as opposed to "may" in previous versions: "If a community has a recognized traditional council, the functions and powers of the land administration committee of such a community *must* [emphasis added] be performed and exercised by such traditional council." It continued 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. Linked to the latter, although it represents a concrete application of the latter and was strongly criticised, the Ingonyama Land Trust was not repealed.

Secondly, the formal administration, and more particularly the Minister herself, were also attributed more rights and powers. As such, land enquiries did not have to be presented to the community for comments anymore before going to the Minister, who in addition now was allowed to make determination related to land and rights regarding the land concerned by dispute. In addition, a magistrate now had the power to punish for an offence or awarding a new order right to a non-community member without proper 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 on which an old order right or compensation in money was applicable; (ii) the majority of the sections regarding women's rights and old older rights; and (iii) the majority of sections linked to land rights enquiries to ensure that decisions made by a community are 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 from one third to two out of seven land board members.

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

On 8 October 2003, the 11th draft CLRB was amended. This was done quietly; stakeholders from civil society, academia and even the portfolio committee chairperson were unaware. The amended draft differed materially from the draft published on 3 October, as it dropped the 25% quota for traditional leadership representation and provides 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 perfumed and exercised by such traditional council." As a new insertion, a traditional council was defined as meaning a traditional council as defined in Section 1 of the

Traditional Leadership and Governance Framework Act of 2003. On this very same day, the Cabinet approved the Bill with the last minute changes.

Although only few changes had been made since the previous version, the way they were implemented caused problems. Indeed, the changes were requested by the DLA, while the Bill had already been processed through the National Assembly. The Cabinet approved the changes to the CLRB. But a leak from the DLA about the changes tipped off activists and the portfolio committee chairperson and resulted in activists, academics and NGOs mobilising a furious response through the media and appealing to the DPLG. Outraged because of changes and because of the closed-door way in which the changes were made, they subsequently claimed that 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 the portfolio committee to launch complaints. They appealed to the DPLG for support because of the impact of the changes regarding the TLGFB's development had on the CLRB. Changes in the TLGFB were meant to soften blow of changes to the CLRB but activists claimed that the changes to the TLGFB (having a majority of traditional council members elected) essentially made the LAC and TL 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 not the content of the TLGFB itself and the composition of traditional leaderships (Uggla, 2006).

The TLGFB portfolio committee chair agreed that they did not have land administration in mind when drafting the TLGFB, which now had to compensate for the actions of the DLA in the CLRB. Not only did it show that activists saw the DPLG and TLGFB Portfolio Committee as more amenable than the DLA, it also showed that the ANC approaches to issue of traditional leadership were not uniform and that there were fractures in ANC policies regarding how to approach the issue. As such, on 21 October, a TLGFB Portfolio Committee meeting was organised, which included the DPLG and the ANC. The ANC members of the TLGFB portfolio committee stated that the changes to the CLRB were a surprise to them and accused the DLA's disorganisation and political inability. It raised questions about the ANC's position in the last minute changes (because the ANC Portfolio Committee was unaware of the changes, but the Cabinet approved the changes) as many began to see the DLA as operating from its own politics and not within party politics.

On 17 October, the notice of 3 October was withdrawn and a new notice of intent to introduce the CLRB draft of 8 October, 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 31 October 2003.

From 10 to 14 November 2003, public hearings on the CLRB were organised. On one hand, activists wanted to have the bill entirely redrafted. Their strategy was to fuel debate within the 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. the DPLG). Communities were also engaged in the process. Regarding the latter, the DLA accused the 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 that the DLA was looking out for the interests of chiefs. They considered they were not concerned. The ANC was, indeed, worried about its re-election in the upcoming national elections in April 2004, and was appeasing traditional leaders. 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 of the CLRB at the expense of inclusion in the party list (Uggla, 2006). But the hearings also brought 'new' players in: COSATU wanted the bill to be withdrawn and reconsidered; the Coalition/Tripartite Alliance did not want the bill withdrawn, but did not want it to be fast-tracked and perhaps be revised; the CGE made damning a presentation on gender and democratisation.

There was, however, a general feeling, particularly among activists, the PLAAS and the 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, pg. 222). The latter was also the case on 17 November when the ANC, the DLA and the DPLG study groups met. The DLA asked the DPLG to amend the composition of traditional leadership in the TLGFB but no agreement was reached. On the 24th of the same month, an ANC-DLA study group meeting conceded that the only way to alter the content of the CLRB was to change the gender component of LACs; no changes were made in the end.

The consultations led to the release on 21 November 2003 of the second amended 11th Draft CLRB with the DLA's proposed amendments introduced as a Section 75 Bill. The Zulu King and Contralesa, for their part, endorsed the CLRB.

Table 14: CLRB November 2003 Version Compared to the CLRB Early October 2003 Version

Content & Major Changes	Preceding Events
* omission of §17(2) & §17(3) concerning democratic decision-making processes for communities * omission of the section concerning the release of LRE findings *Chapter 10: General:* * omission of: "A magistrate's court has the power to impose any penalty in terms of this section." (§43(2)) * omission of magistrate's power to act on unlawful allocation of community land without proper consent (§43(2)).	*08/10/2003: Cabinet approves changes to CLRB *16/10/2003: leak from the DLA about changes to the CLRB – activists, academics and NGOs mobilise a furious response through the media and appeal to the DPLG *17/10/2003: Civil society and activists claim the CLRB, as released, and in the procedural context, compromised democracy in rural South Africa *17/10/2003: Zulu King & Contralesa endorse CLRB *21/10/2003: TLGFB Portfolio Committee meeting: the ANC members angered by the DLA's actions with the CLRB; process of change questioned; the DLA accused of not knowing what they were doing; major concern over allocation of *powers* to traditional leaders in CLRB, terminology acutely avoided in TLGFB which used *roles* and *functions* instead to avoid the creation of a 4th tier of government

	*21/10/2003: civil society pressures DPLG to change the content of the TLGFB and composition of traditional leadership; the only place available for compromise in the TLGFB was the gender clause in composition requirements

Few amendments appear between the October 2003 and November 2003 versions of the CLRB. They do, however, have important implications for CLaRA as they directly concern the rights and powers of the different stakeholders and the democratic processes in the communities. As such, in addition to 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 (§17(2) and §17(3));

- the contents of a land rights enquiry report: the release of the report to the community was no longer enforced; and

- the powers of the Minister in making a determination when there was a dispute (§18(5))

1.6 CLRB July 2004 Version Compared to the CLRB November 2003 Version

The end of 2003 and beginning of 2004 were characterised by several negotiations and meetings that led to the third amended 11th Draft: the composite draft of the CLRB prepared by the DLA. As such, an ANC DLA study group meeting was held and discussed the need to strengthen women's positions in the LAC. This was, however, not included. In early January, Zuma had a "high level meeting" with the IFP the results of which are unknown; and, finally, on 27 January 2004, the Portfolio Committee voted and recommended a number of material amendments.

Sibanda wrote, however, an article in the *Sunday Times* newspaper on 1 February 2004 that angered critics for its flippant tone (Fortin, 2006, pg. 112) and made them conclude that the CLRB had became too personal for him, and that this proved that the bill was not up for discussion anymore, securing it to pass before reaching parliament. But, the amendments were finally still integrated into the CLRB, with the most relevant in section 24 removing reference to LACs' "*ownership*" function and rephrasing this as their "*powers and duties*" regarding land.

Zuma reacted with a high level meeting on land affairs with the IFP,[42] while the CLRB was passed unanimously by the National Assembly in February 2004. On 26 February, it was scheduled for vote in Parliament and was subsequently passed unanimously by the South African National Assembly. On 14 July 2004, Thabo Mbeki, who had been reinstated as President for the second time, signed the CLRB and enacted CLaRA.

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[42] *Pretoria News* 28/01/04 in Fortin (2006, pg. 99).

Table 15: CLRB July 2004 Version Compared to the CLRB November 2003 Version

Overall: * New insertion reading "to provide for the democratic administration of communal land *by communities*" (emphasis added) * Addition of democratic process required for community decision-making *LACs and traditional authorities*: * Omission: LAC to be a traditional council where there is a traditional council *Women's rights*: *Addition: Old order rights held by all spouses (§4(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 §18(3), be registered in the names of such spouses *Addition: Women's tenure right is as secure as a man's, regardless of any rule, law or custom to the contrary (§4(3)). *Additions:* * different forms that an award for comparable redress may take i.e. other land, money or a combination of both (§12(2) and §12(3)) * outlines the contents of the land rights enquiry report as outlined in the October 2003 draft but somehow omitted in the November 2003 draft (§18(5))	*11-14/11/2003: CLRB public hearings; significant pressure to withdraw bill or to alter content from the ANC tripartite alliance; CGE makes damning presentation on gender and democratisation *11-14/11/2003: the DLA accuses PLAAS/NLC of using communities to lobby by proxy and manipulating community presenters *17/11/2003: ANC DLA & DPLG study groups meet; the DLA asks the DPLG to amend the composition of traditional leadership in the TLGFB but no agreement reached *24/11/2003: ANC DLA study group meeting decided that the only way to alter the content of the CLRB is to change the gender component of LACs; 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, pg. 99) *27/01/2004: Portfolio committee recommends a number of material amendments *01/02/2004: Sibanda writes article in the *Sunday Times* that angered critics with its flippant tone (Fortin, 2006, pg. 112); critics of the CLRB say that he was too personal in development of the CLRB and could not handle criticism; critics claim this is proof that bill was not up for discussion anymore and that it had secured passage before reaching parliament *9/2/2004: amendments made to the CLRB, most relevant §24 taking away reference to the "*ownership*" function of LACs and rephrasing this as "*powers and duties*" regarding land 2/2004: the CLRB passed unanimously by National Assembly 07/2004: DLA Tenure Newsletter re-enacted, mainly used to discuss the CLRB *14/07/2004: Mbeki assents to the CLRB *20/07/2004: the CLRB becomes CLaRA

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

Hence a new major insertion was integrated: "[CLRB] to provide for the democratic administration of communal land *by communities*" (underlined in the CLRB). Additions were

made to ensure that decisions made by a community were informed and democratically made by the majority of members of the community (18 years or older). Consequently, the fact that a LAC had to be a traditional council, in respect of an area where such a council was established and recognised, was also omitted.

In addition, women's rights were partly reinstated. The CLRB July 2004 version noted that an old order right held by a married person was – 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 §18(3), be registered in the names of such spouses. It also emphasised that a woman is entitled to the same legally secure tenure, rights in or to land, and benefits from land as a man, and no law, community or other rule, practice or usage may discriminate against any person on the basis of the gender of such a person.

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

2. Effective Policy Influence: Consultation, Participation, or Just Policy Legitimisation?

The inclusiveness of public policies can not be based on the simple participation by (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 CLaRA development process.

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 shift 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, with 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 unanimously. Parliamentarians are deemed to represent the best interests of the people and, as 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 the Presidential elections – were more direct. It is not clear to what extent the DLA – at the centre of the drafting process as they were the responsible arm of Government regarding this matter – was independent of political influence since many of the ANC meetings were secret, but 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 LACs, 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.
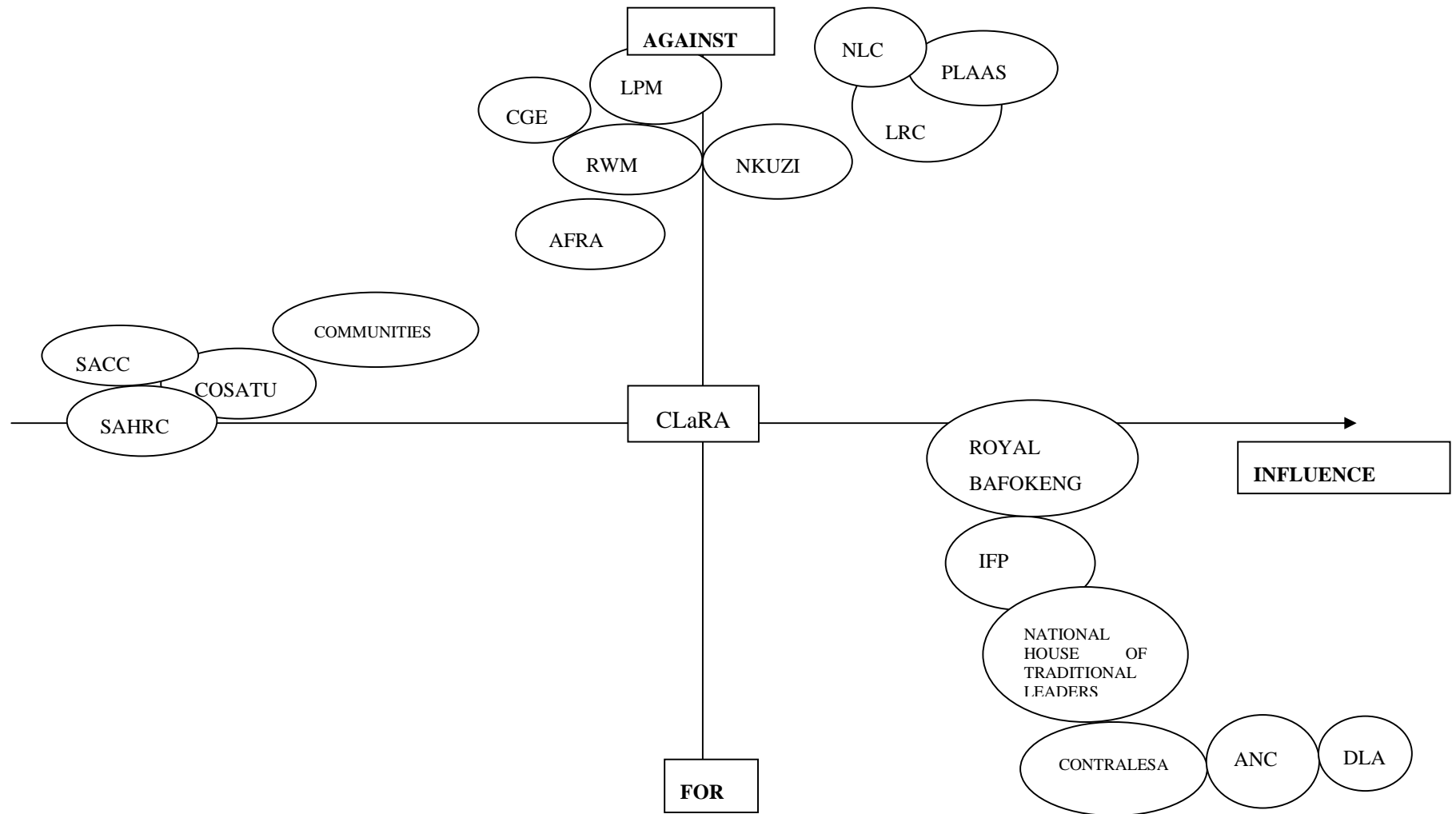
Figure 3: Schema of Influence in CLaRA's Development Process

This also represented the major bone of contention with land sector activists who felt that the LAC created a fourth sphere of Government that was not provided for in the Constitution. As the drafters of the abandoned Land Rights Bill saw their ideas being sidelined in the new CLRB, 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. Another lobby group 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 one third of each LAC would be composed of women. To what extent this one third will be able to participate meaningfully in day to day LAC operations remains to be seen.

Although some practices during the formulation process for this piece of 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 be stopped and fresh consultations be conducted with a more broader and more equal panel of stakeholders (including rural communities), as many were worried about the excessive powers being given to traditional leaders through Land Administration Committees. Even the ruling party's partner in the Tripartite Alliance, COSATU, sounded a word of caution on giving titles to rural communities sighting failed attempts of this approach in other African countries. In spite of all this, the legislation was enacted anyway. While participation did take place, this shows, however, that certain stakeholders either did not appear or did not manage to push their positions forward. Indeed, communities in particular only appeared sparsely at the end of the process. Often not weighing enough within the political battles around CLaRA, the lack of legitimacy and representativity (as they were often seemingly represented and criticized for being represented by NGOs) of the existing actions led to a shortage of power to really counter the traditional authorities and fractions of the ANC. If indeed, as part of these political games, there was Government pressure 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.

IV. ITHE POSITIONS ON COMMUNAL LAND TENURE AND INSTITUTIONS AT THE LOCAL LEVEL

The previous chapter concluded that the main controversies around CLaRA at the national level included several issues, two of which are of particular interest in this chapter: (1) local governance, including the scope and extent of the tribal authorities' prerogatives with regards to land allocation and land administration; and (2) the bundle of communal land rights, including security of tenure (is a title issued by the State an effective material support for tenure security?) and the newly opened channels towards the privatization of communal land.

The aim of this component of the project is to study CLaRA's local elaboration process to see whether and under which conditions it had been inclusive of the communities, and how the debates were framed and formulated at this level. It quickly appeared that CLaRA's elaboration was not characterized by a local inclusive level. Even though the traditional chiefs, through their political organizations, featured as a prominent actor in the negotiations and the elaboration of the successive versions of CLaRA (see previous chapter), there was hardly any consultation of the main local stakeholders – the community members themselves. The debates at the national level also appeared to rely on rather monolithic and idealized (either positive or negative) views of communities. They did not seem to rely on comprehensive and objective data about actual daily individual land practices within the communities defining and shaping the effective, and probably very diverse, communal land and governance systems.

The objectives of this chapter are, thus, reformulated as follows:

1. characterize community members' perceptions with respect to their bundles of rights under the communal land tenure system (with the aim of providing insight into the extent of *de facto* individualization and commoditization of communal land), and the perceptions of security that are attached to it; and

2. identify their positions towards the two features of CLaRA that have been identified as salient and controverted, namely the issuance of individual land titles by the State, and the role of the chief and tribal authorities in land matters.

1. The "Local Theory" on Communal Land Rights

The two communities exhibit common features in terms of local theories on communal land rights: they use similar categories for land classification, and have similar discourses on general rules and practices, including those relative to processes of individualization and commoditization. Whereas *de facto* individualization of land rights appears to be quite under way, the process of commoditization, while noticeable, is still partial. In any case, the reference to the chief remains central in discourse and practice.

1.1 The Communal Land Tenure Regime: Individual and Permanent Usufruct Rights Except for Grazing Areas

The land in the two communities studied is divided into residential stands, arable stands (farmfields), business stands, and communal areas (also called open or grazing areas). Communal areas are used for wood picking and grazing and anyone from the community has a right of access and withdrawal on this area. By contrast, in both communities, the other categories of land are individually appropriated. A clear indication of this is that most of the stands are fenced (or are planned to be fenced) or clearly demarcated. In Makapanstad, the written rules given by the tribal office even make fencing a requirement. They stipulate that, "When your stand is not fenced within 3 weeks, kgoro [a group of elders in each section representing traditional power] will take the stand from you and they will allocate another stand when you are ready to fence it." In other words, fencing is what establishes and materializes individual rights.

People hold individual bundles of rights on residential stands, arable stands and business stands. Those rights include usus and fructus, and some aspects of abusus: according to the local theory, as stated by the tribal office of the two communities as well as by key informants, landholders have the right to transfer land by heritage, but they cannot sell the land (more on this below). The rights are granted indefinitely, and they are registered at the tribal office. The registry takes the form of a list of community members, and duplicates of the receipts for the registration fees charged by the tribal authorities. Any change in the use of the land (e.g. from farmfield to residential stand, or from residential stand to business stand) must be previously notified to the tribal office and is conditioned on the tribal authority's approval.

1.2 Access to Land: Between Entitlement and Interpersonal Arrangements

Community members often refer to the community as a safety net for several reasons, the first of which deals with land access. As the "local theory" states, there is an entitlement to land when a (male) community member becomes an adult and gets married: on communal land "everybody [from the community] can get a piece of land," and "people pay no rent or taxes." At the same time, people expressed signs of a growing shortage of land, suggesting that in practice this entitlement to land is not really holding anymore.[43] In both communities, there is no more unallocated land suitable for individual use; residential stands are being placed in former farmfields; residential stands are being subdivided, with the results that the size of individual stands is tending to diminish; and young people are increasingly having trouble finding residential stands, particularly those who cannot make family arrangements with their parents or grandparents.

In both communities, the "local theory" states that, for a person that needs a piece of land whether for housing, farming or business, there are two ways of proceeding: (1) either you first choose a piece of land by yourself and register it with the traditional authority, or (2) you go straight to them and they allocate a piece of land for you. If you choose your land yourself,

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[43] However, the sense of safety net also derives from the social meanings attached to the fact of belonging to a community. People often compared communal land to townships: in the community, "people help each other." More on this below.

you have to "negotiate" with the owner of the land before you register it with the traditional authority. Although there is little unallocated land left in either community, there is an unspoken rule in both communities that if a stand has been vacated and abandoned for some time and that there is no relative to prove that the stand has an owner, this land can be reallocated to someone. In practice, it was observed that most people choose their stands themselves and then went with the traditional authority for validation.

In both communities, there is a fee to pay for the registration of the (new) stand and a paper is issued by the traditional authority as a proof of payment. This paper is a mere receipt. But it is also the proof that you belong to the community, and it must be produced any time a community member wants something from the tribal office, such as proof of residence, an ID application, a burial order, a business application, etc.

That transfers other than heritage are openly part of the local theory suggests that they are indeed quite common. Some of these transfers are still intergenerational and take place in a non-market arena. However, what is called "negotiation" is sometimes indeed a transaction involving money.

In both communities, although most people refer to the origin of their rights as "an allocation by the chief" (see next section), it appears that the role of the traditional authority with regards to current access to land is now mostly an administrative one. Since most of the land is already individually appropriated, traditional leaders do not get involved directly in land allocation anymore. Sometimes they play a role of mediation/brokering between those who are looking for land and those who are offering it; most of the time they simply register the transfers of the pieces of land in the community, and charge fees for transfer registration.

2. Individual Perceptions and Practices Around Permanent Transfers

Table 16 displays the origin of the rights on communal land as stated by the interviewees. Unfortunately, the first category ("allocation by chief"), although very illustrative of the central reference to the chief that is still being made by community members, does not allow one to differentiate between the cases when the land was affectively allocated by the chief out of the stock of vacant land, and the cases where the land rights were obtained through one of the other three possibilities, and the transfer was validated through the chief. Thus, for the purpose of the analysis, we will only consider whether there are cases of permanent transfers outside inheritance, and will not focus on their absolute or relative frequencies, which are probably underestimated. Table 16 still allows us to conclude that in both communities there are other arrangements to access communal land, including intra-familial arrangements and extra-familiar arrangements that in some (but not all) cases are explicitly referred to as purchases.

Table 16: Origin of Rights on Communal Land

	Makapanstad	Selepe	Total
Residential Stands			
allocation by chief	26	10	36
inheritance	9	16	25
intra-familial arrangement	3	12	15
extra-familiar arrangement	3	4	7
no answer	4	3	7
Total interviewees with residential stands	45	45	90
Farmfields			
allocation by chief	2	0	2
inheritance	1	11	12
intra-familial arrangement	0	7	7
extra-familiar arrangement	1	1	2
no answer	3	7	10
Total interviewees with farmfields	7	26	33

When asked what they were allowed to do on their land, the majority of people (fifty-nine out of ninety, i.e. 66%) replied that there was no constraint on the bundle of rights they enjoyed, as the following quotation illustrates: "I own it [the land]. I can do whatever I want."[44]

When asked more specifically about sales transfers, people gave more qualified answers. The main views concerning sales transfers are summarized in Table 17. The first result is that for seventy-one out of ninety people interviewed, sales of residential stands are allowed, even though twenty-nine of them mention some restrictions: what can be sold is only the house, not the land, and the transfer has to be validated through the chief. This somehow relates to the rationale put forward by the twelve people for whom selling residential stands is impossible because "the land belongs to the chief." Some of these people even said that if you leave the community you have to demolish the house because you cannot sell it.

Table 17 also suggests a somewhat different picture in the rural and the more urban communities. In Selepe, even though two thirds of the interviewees thought that it was possible to sell residential stands, there is still one third that believed that this was absolutely impossible or did not answer the question. In Makapanstad, these two last categories account for less than 10%. However, even in Makapanstad, twenty-four people make a clear

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[44] Interview 5B, Selepe, 03/04/08.

distinction between selling the house and selling the land (even though on practical grounds this does not make much of a difference), and mention the chief as a necessary broker.

Table 17: Perceptions Regarding the Right to Sell Residential Stands

Are you allowed to sell?	Makapanstad	Selepe	Total
Yes	**41**	**30**	**71**
Yes, the house and the stand	8	6	14
Yes, but only the house, and through the chief	24	5	29
Yes, with no precisions	9	19	28
No, because it's the chief's land	**2**	**10**	**12**
Don't know / Did not answer	**2**	**5**	**7**
Total	**45**	**45**	**90**

3. Written Evidence of Land Rights and Perceived Security of Tenure

3.1 Current Written Evidence of Land Rights

Table 18 confirms the "local theory" in the sense that in most cases individual rights are supported by written evidence issued by the traditional authorities. Referring to the apartheid period before 1994, eight people also told us they had to pay levies to the department of Agriculture for their rights on farmfields and their rights on their residential stands, and that the corresponding levy slips (which we would tend to see mostly as a testimony of oppression) were written proof of their land rights on the plot.

Table 18: Written Evidence of Land Rights

	Makapanstad	**Selepe**	**Total**
Residential Stands			
chief receipt	38	37	74
levy slip	0	1	1
no paper	1	7	8
no answer	6	1	7
Total interviewees with residential stands	45	45	90
Farmfields			
chief receipt	2	9	11
levy slip	0	7	7
no paper	1	4	5
no answer	4	6	10
Total interviewees with farmfields	7	26	33

3.2   Perceived Security of Current Tenure and the Role of the Written Receipt

The majority of people consider that their rights on communal land are secure (Table 19). Indeed seventy-three out of ninety (81%) interviewed expressed that they do not think that anyone can take their land away from them. Out of these seventy-three people, sixty-two consider that the traditional authority, i.e. the chief, enforces the rights because the rights are allocated and recognized under the tribal system. Communal land ultimately "belongs to the chief" and he is the safe keeper of the "rights he has given."

Table 19: Opinions on Security of Tenure and the Enforcement of Rights

	Makapanstad	Selepe	Total
Do you consider that your land rights are secure?			
yes	39	34	73
no	2	11	13
Don't know / Did not answer	4	0	4
How are your rights enforced?			
chief (with receipt)	34	40	74
other	3	2	5
Don't know / Did not answer	8	3	11

The sense of tenure security is supported by the holding of a written document, even though this is merely a receipt issued by the chief. Most people consider the receipt they received when the land was allocated to them as sufficient proof that the land is theirs, as one man said "I will prove this is my land by using the receipt."[45] Besides the written receipt, the perception of tenure security also derives from the common knowledge held by the community as a group. As several people told us, "everybody knows this is my plot," "the community knows."

As Table 20 shows, the relationship between holding a written document from the chief and feeling secure on one's land is not totally exclusive. There are six people who consider themselves secure although they do not have a written document, and ten people who consider themselves insecure even though they do hold a paper from the chief. However, as a general trend, holding such a document still appears to make a difference in the feeling of security: the ratio of people that feel secure over those that feel insecure is almost seven to one with a written document, whereas it is only two to one without a written document.

Table 20: Perception of Tenure Security and Written Documents

	Feels secure on his/her land					
	Total		Makapanstad		Selepe	
	yes	no	yes	no	yes	No
Has a paper from the chief						
Yes	65	10	36	2	29	8
No	6	3	1	0	5	3
Total	71	13	37	2	34	11

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[45] Interview 35A, Makapanstad, 05/06/08.

Table 19 shows that thirteen people consider their rights to be insecure, eleven of which are in Selepe and only two of which are in Makapanstad. Table 20 also shows that of the ten people that consider their rights insecure even though they have a written document, eight are from Selepe. The alleged sources of insecurity also separate the two communities in distinct groups.

In Makapanstad, albeit ultra-minority, the perception of insecurity is directly linked to the communal land system as compared to the private property system, materialized by title deeds. One woman considered the chief as being a source of insecurity, because of his alleged monopoly on holding the community title deed (even though there are no such deeds under the current system), and another questioned the power of the receipt to really provide them with security of tenure.

> "The chief is the only one having a title deed, it's easy for him to take the land away from the people. It can happen."[46]
> "Kgoshi might not be here in the future and he is the one who can prove that this land is mine. Other tribes might come and push us out. Receipts don't stay; they are not in the computers."[47]

Their words question the security of tenure as a relative feature in a legal pluralistic environment. As the women say, the receipt has only value inside the tribal system, it cannot be equated to a title deed, and has no value outside the tribal system.

In Selepe, two main sources of insecurity were put forward: the prospecting by mining companies on farmfields without the consent of the owners (six people), and the possibility that a family member who had agreed to give away a piece of land would claim it back (four people). The source of perceived insecurity thus seem to be more linked to specific enforcement issues than to a comparative assessment on the basis of property regime principles. Actually, the Selepe data from Table 19 indicate that the recognition given to the chief and the receipt that he issues as the source of enforcement of one's rights is also shared by some of the people who consider themselves insecure.

The people who see the mine as a threat either had a farmfield taken away by the mine or knew of someone whose farmfield was taken away. People mentioned that Anglo Platinum is pushing people off their land without negotiation and that prospecting companies come and prospect on farmfields without the owners' agreement. People mentioned that the chief had negotiated with the mine without consulting them, and that they did not have any word in the matter. The following words of a young man in Selepe sum up the issue:

> "The Mine does not ask the owner when they need a farm field. They agree with the Kgoshi. The owner of the farm field does not have much to say. The Kgoshi has the final agreement. It's difficult to lodge complaints. [...] The Mine planned to take the farm fields of many people. Anglo Platinum takes advantage because it's State land, so things just happen. There are tensions when the mine just puts a machine on a farm field. It's a take it or leave it situation. We have nothing to say."[48]

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[46] Interview 12A, Makapanstad, 30/05/08.

[47] Interview 27A, Makapanstad, 03/06/08.

[48] Interview 16B, Selepe, 04/04/08.

Between the lines, what initially appeared as an external source of insecurity was associated with some statement about the chief defaulting on his responsibility to protect the security of tenure of his community members, either indirectly (through incapacity) or directly (through organizing himself the activities of the mine, and possibly charging money for that, see Box 4).

Box 5: The Ga-Selepe Tribal Authorities and the Atok Platinum Mine
In the Selepe area, there is an Anglo Platinum platinum mine, which has been mining since the 1970s, and several shafts were open recently.
According to the explanations of the chairman of the Board of Trustees, the mine organized meetings to inform the community about the opening of a shaft on Selepe land. The community was consulted and decided to let the mine build a shaft through a tribal resolution. A lease is to be signed between the mine and the community, according to him. The mine made a donation of two million rand and will pay lease money, a rent, every year. For this matter, a board of trustees was created to manage the money. The trust has still not received any lease money yet, and only 25% of the donation money was unblocked. The reason he gave for this is that the lease has not actually been signed yet by the Department of Land Affairs and the Department of Minerals and Energy.

On a different level, four people in Selepe mentioned family members as being a source of insecurity. They evoked the possibility of a family member claiming their land, the family member being the previous owner of the land. One man also mentioned that he was afraid someone from the community might invade his farmfield.

In summary, the majority of people feel secure on their land under the current tenure system. This sense of security can be explained by the confidence people have in the tribal system to enforce their rights, but also by the fact that in these two communities there has not been pervasive threats to the current land tenure system (although the mine issue in Selepe tends to qualify this). These results therefore come from a particular context and cannot be applied blindly to the overall community system.

The people who mentioned insecurity of tenure in Makapanstad make an explicit comparison between the communal and private property right regimes, focusing notably on the value of the receipt given by the traditional authority, highlighting that it does not have the power of a title deed. In Selepe, people refer to insecurity of tenure in very practical terms, referring to effective situations of threat or encroachment. They do not weigh the relative pros and cons of alternative property rights systems. More specifically, in Selepe, it seems that the chief is either not able or not willing to enforce the rights of the people against the mine's prospecting activities. This questions the chief's power to enforce the rights of the people, and reveals issues relating to a lack of accountability and transparency.

3.3 Comparative Assessment of Community Receipts and Title Deeds

As Table 21 shows, opinions on the ranking of title deeds relative to receipts are quite heterogeneous, with no one position clearly outstripping the others: forty people consider the

title deed as superior, while thirty-one believe the opposite, and nineteen did not answer (usually on the grounds that they lacked information to compare the two).

Table 21: Perceptions of Title Deeds Versus Community Receipts

	Makapanstad	Selepe	Total
Does a title deed bring something more than a receipt?			
yes	23	17	40
no	13	18	31
no answer	9	10	19
Total	45	45	90
Rationales put forward (multiple answers allowed)			
Title deed > receipt			
Title deeds bring more rights (generally speaking)	20	10	34
Title deeds bring more abusus rights (specifically: to sell, to mortgage)	12	2	14
Title deeds mean more security	3	8	11
Title deeds mean less power for the chief	5	0	5
Title deed = receipt			
There is no need for title deeds	11	17	28
Title deeds are incompatible with communal system	2	1	3

The main rationale put forward by those considering that the title deed has more value than the receipt is the broader scope of individual rights that it entails (85% mention this): "with a title deed the land really belongs to me and I can do whatever I want." More specifically, fourteen people mentioned the right to sell, and one person also mentioned the right to mortgage in order to access a loan. Five people (all of them from Makapanstad) also explicitly stated that an advantage of the title deed would be to lower the chief's power. Finally, the security criteria (the more formal the document, the higher the security) was put forward by only eleven people, eight of which in Selepe. This last result strengthens the conclusions reached in the previous section, namely that most people do not deem the current system to be insecure.

On the other hand, for thirty-one people, a title deed would bring no additional benefit compared to the receipt. For three of them, a title deed is even something unconceivable, because it is incompatible with the current customary system ("the land belongs to the chief"). For this minority group, there is a close link between title and governance. Finally, it is noteworthy that a non-negligible number of people (nineteen out of ninety) consider that they are currently unable to answer this question.

At the community level, Makapanstad seems to stand out on three aspects. First, there was a clearer preference for the title deed over the tribal receipt (expressed by two thirds of the people answering the question, as opposed to only half in Selepe). Second, twelve people from Makapanstad referred to the broadening of abusus rights that the title deed would bring, as opposed to only two people from Selepe. We have seen in previous sections that a land market

was presumably already operating in the two communities. The discrepancy appearing in Table 21 might indicate that the land market in Makapanstad is already more active (which would be logical considering its proximity to Pretoria), and that landholders perceive that they could sell their land at a better price under a private property regime. Finally, even though only five people are concerned, only in Makapanstad is the issue of title deed versus receipt framed in terms of an explicit goal to decrease the power of the traditional authority. Next section will come back to the issue of local power and local governance in more depth.

4. Matters of Local Governance: Traditional Bodies and Local Government

Contrasting with how the debate is framed at the national level, most people do not refer to the chief as a principle of local governance. They talk about a flesh and bone person and his specific practices and performance (although several people from Makapanstad do talk about principles). Quite logically, the history of the community, the personality of the chief, and the issues specific to the community influence people's positions and opinions on governance matters.

4.1 Service Delivery and the Articulation Between Traditional Power and the Municipality

Although communal land is often presented as a safety net, it is also criticized as a place with no development, no services, and no opportunities.

As a matter of fact, the main grievance of the people interviewed in both communities was not about land issues but, rather, about the lack of infrastructures. seventy-three people complained about service (electricity, tap water, sewage, etc.) delivery. The two communities are very much underdeveloped infrastructure-wise. In Selepe, only two sections out of five have electricity and there is no running water, sewage or sanitation services, street lights, proper roads, public transportation, or proper infrastructures. In Makapanstad services are slightly more developed, but still the vast majority of the households interviewed had no running water or electricity.

It is interesting to analyze what people think is blocking infrastructure development because it gives some hints on their perceptions about the local governance structure. In both cases the legal pluralism with regards to service provisions seemed to translate into a lack of accountability as regards the community members/service users.

In Makapanstad, many accuse the chief of blocking service delivery because of a power struggle between traditional and municipal authorities. Twenty-two people mentioned that he does not want to develop the land because it means he will lose his power, whereas only one person mentioned this in Selepe. According to these people, the chief has to agree if something is done on his land and he exercises this power by keeping the land from developing. If the municipality enters the chief's land, it means that the chief is no longer in charge. In Makapanstad, corruption (of the ward councillors, contractors) was also mentioned by five people as a reason for the lack of service delivery.

The case of Makapanstad is illustrative of how legal pluralism can sometimes hinder local development, when it translates as confrontation rather than complementarity. Table 22 displays the views of the Makapanstad community members about how the traditional leaders and the municipal government should interact. In more than half of the answers (twenty out of

thirty-three), it is considered that the role of the chief for matters of local services and infrastructures should be subordinated to the local municipal government, or that the chief should have no role at all. Although a minority, five people still consider that the power that the chief derives from being the owner of communal land legitimizes the control he should have over the municipality decisions.

Table 22: Perceptions on the Articulation Between the Chief and the Municipality

	Makapanstad
chief should be under municipality	**15**
chief should have no role at all	5
chief and municipality should work together	8
chief's land, the municipality has to go through him	5
did not answer	12
Total	45

In Selepe for the majority of people (34), service delivery (and the lack thereof) was considered a matter for the municipality: it was the municipality and the ward councillors who were just making promises of service delivery, and they were to blame if nothing was happening. However, four people also mentioned that there were strong political differences between the municipality and the chief, which hindered development.

Table 23: Perceptions on What Is Blocking Service Delivery

	Makapanstad	**Selepe**	**Total**
the chief, he does not want to lose power	**22**	1	23
the chief because he's from a different political party than the municipality	3	1	4
the municipality / ward councillors, they just promise	10	**34**	**44**
corruption / non-transparency	5	0	5
did not answer	5	9	14
Total	45	45	90

The provision of local services is not only a matter of who makes the decisions. It is also a matter of finance. On communal land, there are few sources of income for the municipality. People pay fees which go to the tribal authority, but they do not pay any taxes (such as housing taxes) to the municipality. The municipal budget has to come from State grants and the national government, and can be quite constrained. In Selepe, however, the mine is a source of income for the municipalities and the communities, so the lack of service delivery

also has to be considered through the lens of a global lack of accountability from both traditional and municipal authorities.

In summary, the issue of the respective roles for the customary authorities and local municipal government with regards to the provision of local services and infrastructure appeared as quite conflicted in one of the two communities. In both communities, transparency and accountability appear as key issues, but they were not related to one local governance system in particular. Both customary and municipality bodies were criticised on these grounds.

4.2 Role and Appreciation of Traditional Structures and Power

Table 24 provides the main categories mobilized by interviewees when asked an open question on the role of the chief.

Table 24: Opinions on the Chief's Role

What is the chief's role?	Makapanstad	Selepe	Total
control / cohesion	**14**	**41**	**55**
conflict resolution	7	18	25
culture / tradition	6	8	14
land allocation	11	5	16
no role / useless	6	1	7
did not answer	11	1	12

In both communities, the chief's main role appears to be related to social and political control, which is deemed to provide community cohesion. This answer is particularly frequent in Selepe (forty-one, compared to fourteen in Makapanstad). This is in line with what was expected, Selepe being a more rural and traditional community setting than Makapanstad. The second category is conflict resolution, again more frequently referred to in Selepe than in Makapanstad. A somewhat related, but less frequent, category is the role of chief as a keeper of culture and tradition. Interestingly, although the role of the chief with regards to land matters does appear in the array of answers, it is not by far the most frequent, and it is unexpectedly more cited in Makapanstad than in Selepe. On the opposite side of the spectrum, a few people (7) said that there is no role for the chief anymore, six of them from Makapanstad.

Independently of what is – or what should be – the role of the chief, there were grievances about a lack of transparency in both communities. The issues around the way traditional power was exercised are displayed in Table 25. A first point is that there were more critics in Makapanstad than in Selepe, with the issue of service delivery again standing out. In seven cases, people hinted that the chief might be taking undue personal benefits out of natural

resources from the communities (sand in Makapanstad, minerals in Selepe[49]). The issue of non-transparency surrounding processes of land allocation was also mentioned in sixteen cases (ten in Makapanstad, six in Selepe), although we unfortunately could not dig deeper into the underlying facts.

Table 25: Issues Around Chiefs and Traditional Power

	Makapanstad	Selepe	Total
chief blocking the service delivery	**23**	1	**24**
non-transparency regarding decision making	10	**8**	18
non-transparency regarding allocation of land	10	6	16
non-transparency regarding negotiation with the mine	n/a	5	5
non-transparency regarding the sand issue	2	n/a	2
did not answer	10	**29**	39

In summary, a demand for transparency and accountability mechanisms was expressed by community members. Quite noticeably, this demand was not framed explicitly in terms of inclusiveness and participation in the decision-making processes. Also, even though the questionnaire was mostly oriented towards traditional forms of local governance, criticism was also expressed regarding the local municipality system. A last feature is that people usually make the distinction between the principles behind each governance system and how they perform, and they actually focus much more on the latter aspect, which is of direct practical relevance to them. In other words, criticisms against efficiency and/or accountability of either system of local governance do not necessarily mean a negative opinion of (or any opinion whatsoever on) the political acceptability of either governance principle as such.

5. Linking the Results with CLaRA's Prospects: Opinion Clusters Regarding Land Governance and Title Deeds

In this section, we proceeded to cross the previous results regarding the community members' perceptions of land governance and title deeds. The purpose was to identify clusters of opinions that could inform – albeit indirectly – us as to how community members could receive the notice of CLaRA when it finally comes to grassroots consultation or implementation.[50] The results are shown in Table 26.

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49 From the discussions, it also appeared that only a few people really knew how the chief in Selepe had negotiated with the mine.

50 Although this was not entirely satisfactory methodologically speaking, we were not in a position to ask people their opinions on CLaRA itself. The questionnaire asked whether the interviewee had heard of CLaRA: only six people, five of which in Makapanstad, answered yes (a clear confirmation of the results obtained in the

study at the national level, see previous chapters), and none of them could give an accurate definition of its content (it was generally confused with the redistributive land reform programme).

Table 26: Opinion Clusters Regarding Land Governance and Title Deeds

	Title Deed Yes			Title Deed No			Total
	Makapanstad	**Selepe**	**Total**	**Makapanstad**	**Selepe**	**Total**	
Chief Yes	10	17	**27**	11	17	**28**	**55**
Chief No	10	1	**11**	0	0	**0**	**11**
Total	20	18	**38**	11	17	**28**	**66**

The total results recall the results presented in earlier sections: on the one hand, title deeds are considered to have an advantage over receipts by a majority, but not an overwhelming majority, of interviewees; on the other hand, while the performance of the chief in terms of efficiency and transparency is somewhat contested, it does not translate into a majority expressing the will to get rid of this governance system as such.

Crossing the categories led to the following clusters:
- The "traditionalists," who do not see the point in getting a title deed and consider that the chief has a role to play with regards to land governance because the figure of the chief provides individual tenure security and binds the community's social group together. This is the most numerous group (but only by one unit), with twenty-eight people (42%). Note that the "traditionalists" do not necessarily consider that their bundle of individual land rights are constrained under the current communal land system (and that it should be that way): half of them consider that they have no restrictions and seven believed that they could sell communal land.
- The "modernists," who consider that title deeds bring either broader (including abusus) or more secure rights, and who consider that the traditional structures do not bring anything additional compared to government institutions. Only eleven people (16%) belong to this cluster, ten of which come from Makapanstad.
- The "pragmatists," who, like the "modernists," value the benefits that title deeds could bring them but at the same time, unlike the "modernists," consider that the traditional system need not disappear (even though some may say that there are some flaws in the way traditional power is exercised). This is probably the most interesting group because it illustrates how people are able to deal separately with governance issues and property rights issues, and that they can accommodate the current legal pluralism, trying to make the most benefit out of each system. What also makes this cluster quite relevant is that it represents twenty-seven people (42%), almost as many as the traditionalists, seventeen of which come from Selepe.
- The "nihilists," who want neither the tribal system nor title deeds. We actually did not expect this category to be filled.

6.   Concluding Comments Concerning the Local Level

With regards to governance, the people's main concern is the development of the community, especially in terms of infrastructures. It is mostly trough this problem of development that the community members question governance structures – either traditional authority or local municipal government – or their articulation (since local conflicts between State and tribal authorities can hinder the delivery of public services). A general result with regards to local governance is that people distinguish between systems of governance (State versus traditional) on the one hand, and their performance on the other. The "demand from below" is framed in terms of more transparency, accountability and effectiveness, whatever the institutional framework. Criticisms against effectiveness and/or accountability of either system of local governance (for the purposes of land administration and service delivery) do not necessary mean a negative opinion regarding the political acceptability of either governance principle as such. In particular, we found that the majority of people do not want traditional structures to disappear. Some want them to be reformed or changed, but the traditional system also represents culture, identity, and safety nets (in terms of access to residential land – even though there are signs of shortage – and in terms of social cohesion, particularly in the rural community).

With regards to property rights, in the "local theory," communal land is still referred to as a safety net in the sense of entitlement to land when one becomes an adult and gets married, and the role of the chief is still referred to as an allocative one. However, in practice, there is little vacant communal land left to allocate, access to land is increasingly taking place through interpersonal arrangements (within the family or through the land market), and the role of the chief seems to have shifted towards that of a broker and a validation and registration office for land transfers (charging a fee for this service).

In both communities, individualization of land tenure is almost complete, which does not mean that people consider communal land to be equivalent to private property. People accommodate the seemingly contradictory statements that "the land belongs to the chief" and "I own the land." This is because they do not refer to the same bundles of rights. What is recognized as belonging to the chief is the right of administration, while the usufruct rights are clearly perceived as individual and permanent.

The security of this individual tenure is not an issue under the current system for the two communities, although some problems were reported (particularly in Selepe with respect to the mining activities). The receipts issued by the tribal authorities are considered to be an effective material support for this tenure security. At the same time, private property title deeds can be valued as bringing additional benefits, because they broaden the scope of rights (particularly in terms of abusus) and because it is a more formal, State-issued document. An interesting result is that there is not necessarily an incompatibility between a stated preference for a title deed and the acknowledgement of the relevance of customary leadership, as the "pragmatists" group (which represents 42% of the sample, as much as the "traditionalists," and 3.5 times more than the "modernists") clearly shows. Also note that being a member of the "traditionalists" does not imply an opposition to the title deed as a matter of principle. The majority in this group simply does not see the point of title deeds compared to the current system.

The results also provide some hints at the heterogeneity among communities.[51] As expected, the more urban community displays a more State-oriented vision of local governance and a more privatized vision of land rights. However, this is only a relative feature, which also seems to be fuelled by context-specific resentment with respect to the chief's attitude and practices.

The latter implies certain policy implications.

Deriving policy implications from this study must be done very cautiously, for two reasons. The first is that results from only two communities cannot be safely generalized to the totality of communities in South Africa. The second relates to the fact that CLaRA was not known by most of the people interviewed and its provisions were only alluded to indirectly. This being said, we believe that the study reveals processes, perceptions, discourses and rationales that can be highlighted and provide some guidance for future reflections.

The first point regarding technical and policy discussions is that there is a need to carefully disentangle the issue of land property rights and the issue of local governance (as people themselves do). Some governance problems (lack of accountability, lack of transparency, and even threats to individual tenure security) will neither be resolved nor made worse by CLaRA; they are just another issue. On the other hand, some tenure security problems (such as the threats posed by the mine in Selepe) might not be resolved by any titling programme if there is no effective judiciary system to enforce new order rights against powerful economic interests.

The second point is that the current processes and practices in the two communities seem to bear a fair level of compatibility with the main feature of CLaRA, that is a titling programme under a broader communal property regime. Most people could accommodate in their discourse both the advantages of State-issued land documentation and the advantages of belonging to a community. However, the exact attributions of the traditional bodies need to be carefully worked through. Indeed, a majority of people are not opposed to the chief system with regards to land administration, as long as it is maintained as a minimum role: while there might be no problem if they continue performing as a registration body, there would definitely be problems if the titles were issued in the name of the chief instead of community members, or if new or broader allocation or management rights were given to the chief.

The growing pressure on land that was observed in both communities could trigger a demand for land titling, not so much for people to further secure their rights (since there was no sign of pervasive insecurity in the two communities), but mostly for people to broaden the scope of their rights and improve their conditions of access to the land market to take advantage of the increasing demand for land. If the market access rationale prevails, the logical follow-up would be for some individuals to make use of the new legal opportunity to translate their community deeds into title deeds. There is potential demand from below, but the chiefs might oppose these initiatives (as the tensions in Makapanstad already illustrate), and tensions or conflicts might arise as a consequence.

The results clearly indicate the need to deepen the work on strengthening local governance processes. The study also revealed a major stake that lies in the respective roles and powers

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[51] Although the sample was designed in order to account for possible individual heterogeneity (e.g. according to age, gender, wealth etc.) the results did not allow us to identify clear patterns at the individual level.

for the traditional authorities and municipal governments in terms of infrastructure, services, local development projects, etc. This governance issue is linked to the property right regime since the chiefs derive their power from the control they exercise over community territory. This issue goes beyond the scope of this particular study, but our data indicate that there might be some spillovers in how the leaders and community members perceive and make use of CLaRA. Finally, 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 currently be met, and that the demand from below is less grounded in principles and more in outcomes.

V. FROM (NON-) CONSULTATIONS TO POLICY DEVELOPMENT REGARDING SOUTH AFRICA'S COMMUNAL LAND: CONCLUDING REMARKS ON CLARA AND THE RENEWAL OF PUBLIC POLICY

The renovation of public policy in general, and particularly (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, and the 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 the 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 content, 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 voted 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, pg. 4). According to the framework of more transparent and inclusive policy development and implementation processes, the CLaRA of 2004 was 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, pg. 4):

> "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 voted the Act, CLaRA was accused of non-constitutionality for several reasons (see Chapter 2). The still-ongoing court case has 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.[52] If the delay in implementing 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. 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 for 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? It also leads one to question the nature of these more inclusive processes. Are they really inclusive, i.e. reflecting the positions of a large – if not the entire – panel of protagonists, or does it just represent a Government strategy to legitimize policy reform?

The present report, "The Politics of Communal Land Reform in South Africa," is part of a broader reflection on the renovation of public policy, particularly communal 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 CLaRA's development process. The main purpose of this study is to determine whether the development of 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 CLaRA's development process and contents can be considered innovative. Being aware of the importance of integrating grassroots views and stances in a study focusing on inclusiveness and participation, the study makes 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 CLaRA's development and validation; and

- 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.

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[52] Discussion with Vuyi Nxasana, Chief Director of Tenure Reform.

1. A Complex Development Process Engaging Several (Often Not Communal Land) Factors

The project shows that, contrary to what Kariuki (2004) wrote, the process was not a simple "communal versus private" debate. As detailed in this report, CLaRA's final draft and Act came a long way, and was shaped and reshaped through different drafts premised on the 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 was – as shown in the study – strongly linked to the evolution of the country's political economy. Visible through the change of Government in 1999, it was informed by two very different paradigms. The first, implemented during the Mandela era, was characterised by a more developmental approach, and the second by a more growth-oriented paradigm, since Mbeki took over the presidency (but which had already started with replacement of the RDP by GEAR). Accordingly, they 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, the boundaries of groups, and the representative authority structures to local processes overseen by the Government (Claassens and Cousins, 2008, pg. 14). 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, pg. 13). The Act seeks to transfer land from the State to communities with subsequent deeds for individual members of the community, which may become freehold titles if the community agrees.

Secondly, the study also shows 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 NGOs against a racially-segregated society in general and the employment of many of the NGO protagonists in government positions) and a certain "workshop fatigue" also appeared (Cousins, 2004, pg. 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 legitimise the claim of a "consultative" process to justify the government's and the 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 […]." While it was emphasised that all stakeholders were consulted during the CLaRA process, this was nevertheless practiced given the compromises with established lobbies and the continuing presence of strategic interests of the ruling party. Cousins – mainly about the overall land reform policy process in South Africa, but it is applicable to the specific case of CLaRA – wrote: "In practice, there was an 'inner circle' of trusted groupings and individuals, 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, pg. 17). The willingness to listen to new ideas therefore seemed to

be weak. This has been 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 was centralised strongly and all kinds of opposition limited (the closing of the NLC is very relevant here). Gumede (2005, pg. 58) 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 who came across as uncaring and distant, supported the idea that embarking on reform through consultations with diverse stakeholders could lead to inertia. As a result, the government (or governing party) engaged in no (or very few) consultations with opposing political and civic forces to formulate or implement policies. Gumede (2005, pg. 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, pg. 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 (partly) explains why grassroots organisations and local-level communities do not appear to have been major influencing actors.

Thirdly, from the descriptions and analyses in this study, it also appears that the policies (detailed through the different drafts and in the final Act) were strongly influenced by the political games and the actors' interactions throughout the elaboration process. First, the ANC's political interactions with traditional authorities should be emphasised. Although the outcomes of some "quiet" meetings were generally unknown, they were often followed by important changes in the subsequent drafts (in favour of traditional leaders, the KZN House of Traditional Leaders and Chief Buthelesi) (Fortin, 2006; Uggla, 2006). This was, for example, the case with the CLRB October 2003 version, and 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", e.g. appeasing the tribal authorities' hunger for communal land control), emphasising that other elements and objectives than those linked to communal land reform were at stake. A second element is the seemingly little – or less significant – influence of civil society, academics, and other actors not linked to the government or traditional authorities. Indeed, the latter only appeared sparsely at the end of the process, as was the case for 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. Regarding the latter, the DLA accused the 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. According to Fortin, criticisms of the bill from civil society "constrained the political space in which [the CLRB drafters] were operating […]" and made defending the contents of the draft bills difficult (2008, pg. 82). As such, the drafters saw 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" were community groups advocating against the

contents of the bill and the "people on the ground" were researchers and civil society. Often not weighing enough within the political battles around CLaRA, the lack of legitimacy and representativity of the existing actions led to a shortage of instruments and power to really counter the traditional authorities and the factions of the ANC. If indeed, as part of these political games, government pressure did exist to stifle certain grassroots movements (the closures of the NLC and the LPM are relevant here), it leads one to question popular participation in policy development.

2. Local Positions Towards Communal Land Reform in South Africa and Their Non-Consideration in the Policy Process

It quickly appeared that CLaRA's elaboration was not characterized by local inclusiveness. Even though the traditional chiefs, through their political organizations, featured as a prominent actor in the negotiations and the elaboration of the successive versions of CLaRA, there was hardly any consultation of the main local stakeholders, i.e. the community members themselves. The debates at the national level also appeared to rely on rather monolithic and idealized (either positive or negative) views of communities. They did not seem to rely on comprehensive and objective data about the daily individual land practices that were taking place within the communities, thereby defining and shaping the real, and probably very diverse – as shown by the project – communal land and governance systems and issues.

With regards to governance, the project showed that the main concern of the people is not land tenure *per say,* but the development of the community, especially in terms of infrastructures. It is mostly through this problem of development that the community members question governance structures, either the traditional authority or local municipal government, or their articulation (since local conflicts between the State and tribal authorities can hinder the delivery of public services). With regards to local governance, our research revealed that people distinguish between systems of governance (State versus traditional) and their performance. The "demand from below" is framed in terms of more transparency, accountability and effectiveness, whatever the institutional framework. Criticisms of the effectiveness and/or accountability of either system of local governance (for purposes of land administration and service delivery) do not necessary equal a negative opinion of the political acceptability of either governance principle as such. In particular, it was found that the majority of people do not want traditional structures to disappear. Some want them to be reformed or changed, but the traditional system also represents culture, identity, and safety nets (in terms of access to residential land – even though there are signs of shortage – and in terms of social cohesion, particularly in the rural community).

With regards to property rights, in both communities analysed in the framework of this project, individualisation of land tenure is almost complete, which does not mean that people consider communal land to be equivalent to private property. The security of this individual tenure is not an issue under the current system for the two communities, although some problems were reported (particularly in Selepe with respect to the mining activities). Although, private property title deeds can be valued as bringing additional benefits since they broaden the scope of rights (particularly in terms of abusus) and because they are a more formal, State-issued document, the large majority stated they were satisfied with the tribal

system in place. As such, in the "local theory," communal land under the present system is even still referred to as a safety net in the sense of entitlement to land when, for example, one becomes an adult and gets married, and the role of the chief is still referred to as an allocative one. Ii is important, however, that what is recognized as belonging to the chief is the right of administration, while usufruct rights are clearly seen as individual and permanent. In practice, because there is less and less vacant communal land left to allocate, access to land is increasingly taking place through interpersonal arrangements (within the family or even through the land market), and the role of the chief seems to have shifted towards that of a broker and a validation and registration office for land transfers (charging a fee for this service).

An interesting finding is that a stated preference for title deeds is not necessarily incompatible with an acknowledgement of the relevance of customary leadership and governance, as the "pragmatists"[53] group (which represents 42% of the sample, on par with "traditionalists"[54], and 3.5 times more than "modernists"[55]) clearly shows.

A first point regarding these results is that there is a need to carefully disentangle the issue of land property rights from the issue of local governance (as people themselves do). On one hand, although some of these issues seem even more important in local perceptions (lack of accountability, lack of transparency, service delivery), they will not be affected by CLaRA = they are just another issue. On the other hand, some tenure security problems (such as the threats posed by the mine in Selepe) might not be resolved by any titling programme if there is no effective judiciary system to enforce the new order rights in the face of powerful economic interests. The latter does not even seem to be a major issue at the local level – which makes it relevant to question of CLaRA's pertinence.

A second point is that the current processes and practices in the two communities seem to be fairly compatible with CLaRA's main feature (although it has been shown that tenure rights were not a primordial issue). People could accommodate in their discourse both the advantages of State-issued land documentation and the advantages of belonging to a community. However, the exact attributions of the traditional bodies need to be carefully worked through. Indeed, a majority of people are not opposed to the chief system with regards to land administration, as long as the chief does not abuse his roles. The fact that the large majority of people interviewed are still attached to the tribal system (again proving the need to disentangle rights) highlights people's confidence in the system. This is particularly true, since service delivery has been lacking in both communities, with people accusing either the recently implemented municipal system and agents directly, or the inconsistencies between the traditional and municipal authorities. This contradicts many of the criticisms on which civil society based its actions.

The results clearly indicate a need to deepen the work on strengthening local governance processes. The study also revealed that a major stake is the respective roles and powers of the traditional authorities and the municipal government in terms of infrastructure, services, local

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[53] "Pragmatists" are defined as those who, like "modernists," value the benefits that title deeds could bring them, but at the same time, unlike "modernists," believe that the traditional system does not need to disappear.

[54] Defined as those who do not see the point in getting a title deed and believe that the chief has a role to play with regards to land governance.

[55] Defined as those who consider that title deeds bring either more broad (including abusus) or more secure rights, and who believe that the traditional structures do not bring anything additional compared to government institutions.

development projects, etc. This governance issue is linked to the property rights regime since the chiefs derive their power from the control they exercise over community territory. This issue goes beyond the scope of this particular study, but our data indicate that there might be some spillovers in the way that leaders and community members perceive and make use of CLaRA.

3. The Lack of Institutionalised Compromises Founding CLaRA and the Need for More Effective Local Organisation and Inclusiveness

As shown, while national debates emphasize inclusion and democratic processes in decision-making for 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 by all stakeholders, including women, might not be currently met, and that the demand from below is less grounded on principles and more on outcomes.

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

As such, there were numerous submissions and criticisms (even from COSATU, a member of the governing tripartite alliance) requesting that the legislation be stopped and fresh consultations to be conducted with a broader and more equal panel of stakeholders (including rural communities). In spite of all this, the legislation was enacted anyway. It can be judged that this is the way parliamentarian 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. Indeed, communities in particular only appeared sparsely at the end of the process. Often not weighing enough within the political battles around CLaRA, the lack of legitimacy and representativity (as they were often seemingly represented and criticized as being represented by NGOs) of the existing actions led to a shortage of power to really counter traditional authorities and ANC factions during the development process, and CLaRA's enactment during its passage through the National Assembly. If, as part of these political games, there was indeed Government pressure to close down certain grassroots movements (the closures of the NLC and LPM are relevant here), this raises questions regarding popular participation in policy development.

The inclusiveness of public policies can not 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, inclusiveness implies reaching 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 such agreements, a governance structure is needed. This structure will have to be developed, and requires the necessary balance of power.[56]

This brings us back to the three factors described above, which are not independent but are – on the contrary – strongly interconnected. Indeed, the contents of enacted policies depend heavily on the policy processes in place. The political games and actors' interactions have, as such, shaped the policy itself. This 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, 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 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 to be 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 & Wambo, 2008). The latter implies that in such a governance framework, government – although elected – represent an actor similar to the other stakeholders and is not obliged to listen (to echo 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 the means for but rather the result of better participation.

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The study made valuable contributions to the existing body of knowledge on public (land) policy formulation in South Africa and indeed policy formulation in the broader sense. First, knowledge was developed on the development processes for land policies as 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 gives details on the overall political objectives that gave CLaRA momentum, and the concrete conditions which supported or hindered the established compromises, taking into account the interests of the various actors, particularly at local level. Knowledge was generated by paying particular attention to the way in which civil society and traditional leaders were involved in

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[56] It would be simplistic to believe that the State or Government, considered to be an actor among others, would enable these processes voluntarily.

the process, and the impact of their involvement on the processes' outcomes. The major aspects to be invested further are twofold. The first aspect deals with the modalities of making policy development processes formally more inclusive, and subsequently making the results more durable. This could be established by all-inclusive policy platforms, for example. The second aspect – which is not at all independent of the first aspect – concerns the organisation of local movements and local-level organisation so that more equitable power-sharing structures can be established, influencing not only content but also processes.

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