

**ARENAS OF CONTESTATION: POLICY PROCESSES AND LAND TENURE
REFORM IN POST-APARTHEID SOUTH AFRICA**

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I hereby declare that this thesis has not been and will not be, submitted in whole or in part to another University for the award of any other degree.

Signature:



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SUMMARY

This thesis considers different groupings that have come together in their participation in the policy processes relating to tenure reform in post-apartheid South Africa. It is methodologically and theoretically grounded in Bourdieu's notion of cultural 'fields', spaces of ongoing contestation and struggle, but in which actors develop a shared 'habitus', an embodied history. In these land reform policies and law-making activities, individuals and groups from different fields – the bureaucratic, activist and legal – have interacted in their contestations relating to the legitimation of their forms of knowledge. The resulting compromises are illuminated by a case study of a village in the former Gazankulu 'homeland' – a fourth 'cultural field'. Rather than seeing these fields as bounded, the thesis recognises the influence of wider political discourses and materialities, or the wider 'field of power'. In each of the four very different fields, as a result of a shared history, actors within them have developed practices based upon particular shared discourses, institutions and values. But such practices are constantly negotiated, with different individuals claiming the power and struggling for legitimacy to represent their version of a differentiated messy reality. Interactions between the fields have resulted in contestations around the hierarchy of knowledge to produce particular readings of legitimate knowledge which have often squeezed out that messiness. It concludes that, in the context of huge inequality and difference, there are limitations in consultation and participatory processes that assume particular individuals can be 'representatives' of the whole. Where such contexts contribute to contestations over the meanings, here of land, rights and tenure, it is necessary to interrogate the methodologies adopted for enabling 'representative' individuals to participate in such processes. The assumed inclusivity of policy and law-making processes should therefore be challenged in order to emphasise the importance of conflicts in the production of meaning and knowledge.

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ACRONYMS

African National Congress	ANC
Association for Rural Advancement	AFRA
Banking Council, South Africa	BCSA
Bantu Authorities Act 1951	BAA
Black Economic Empowerment	BEE
Centre for Applied Legal Studies	CALS
Commission for Gender Equality	CGE
Communal Land Rights Bill or Act	CLRB or CLARA
Communal Property Associations	CPAs
Congress of South African Trade Unions	COSATU
Congress of Traditional Leaders of South Africa	CONTRALESA
Convention for a Democratic South Africa	CODESA
Department for International Development	DFID
Department of Agriculture	DOA
Department of Land Affairs	DLA
Director General	DG
District Control Office	DCO
Government of National Unity	GNU
Growth Employment and Redistribution Strategy	GEAR
Human Rights Commission	HRC
Integrated Development Plan	IDP
Inkatha Freedom Party	IFP
Interim Protection of Informal Land Rights Act	IPILRA
KwaZulu-Natal	KZN
Land Administration Committee	LAC
Land Claims Commission	LCC
Land Redistribution for Agricultural Development	LRAD
Land Reform Systems and Support Services	LRSSS
Land Rights Bill	LRB
Landless People's Movement	LPM
Legal Resources Centre	LRC
Mass Democratic Movement	MDM
National Intelligence Agency	NIA
National Land Committee	NLC
National Party	NP
Native Administration Act 1927	NAA
Permission to Occupy	PTO
Programme of Land and Agrarian Studies	PLAAS
Redistribution and Development Programme	RDP
Rural Women's Movement	RWM
South African Communist Party	SACP
South African Development Trust	SADT
South African National Civics Organisation	SANCO
Surplus People's Project	SPP
Tenure Reform Core Group	TRCG
Tenure Reform Implementation Systems	TRIS
Traditional Authority	TA
Traditional Council	TC
Traditional Leadership and Governance Framework Bill or Act	TLGFB or TLGFA
Transvaal Rural Action Committee	TRAC
United Democratic Front	UDF
University of Western Cape	UWC
Women's National Coalition	WNC

INTRODUCTION

1 - Introducing CLARA

The Communal Land Rights Act (CLARA) was passed unanimously by the South African National Assembly in early February 2004, months before the country's third democratic elections. The then Chair of the Parliamentary Portfolio Committee for Land and Agriculture (the Portfolio Committee), Neo Masithela, who had overseen the Bill's public Portfolio Committee hearings, gave a speech to Parliament in which he wholeheartedly endorsed the decision of all parties to support the passing of that legislation:

Madam Speaker; Honourable Members

The debate today is about what I regard as the most transformatory legislation in South Africa, the Communal Land Rights Bill. This bill will contribute in changing the land ownership patterns in this country. For the first time in the history of South Africa people living in the former homelands will no longer feel like outsiders in this country they will also be the owners of the land they use and occupy. ...

[discussion of objections to the Bill and how they have been resolved follows]

Let me conclude by saying, through this bill the dignity of black people in communal areas would be restored. Through this bill people will be proud owners of the land they occupy and use. ... The ANC support the bill. (Masithela - 12.3.04)

Supporting such arguments, Advocate Patekile Holomisa, President of the Congress of Traditional Leaders of South Africa (CONTRALESA) since 1991 and also African National Congress (ANC) Member of Parliament (MP) on the Portfolio Committee, wrote in the national Business Day newspaper:

It would have been an unpardonable negation of the ideal of Africa's renewal if government were to pass a law that sought to strip traditional leaders of SA of their rights, powers and responsibilities over the ancestral lands of the African people, the so-called communal lands.

...

The Communal Land Rights Act, therefore, is a hugely welcome development. ... The bill confirms the long-standing historical fact that African land belongs to the African communities jointly with their African traditional leaders. The three entities – land, people, traditional leaders – are inextricably bound together. At present the land is legally owned by the state. The bill seeks to effect the

transfer of legal ownership and administration of the land to its owners, the people and their traditional leaders, through land administration committees. (Holomisa – *Business Day*, 11.2.04)

The passing of CLARA by Parliament, however, was met with an outcry by many of the non-governmental groupings that had participated critically in the Parliamentary Hearings and, as if we were reading about a completely different piece of legislation, another newspaper article in the Cape Times reads:

The Communal Land Rights Bill is fundamentally flawed. It will undermine rather than strengthen the land rights of the 15 million people who live in the former homelands. Its most controversial aspect is that it makes traditional councils the administrators of land rights in communal areas. ...

Numerous rural community groups and NGOs, the Human Rights Commission, the Commission for Gender Equality, the Legal Resources Centre, the SA Council of Churches, Cosatu, the National Land Committee and the Programme for Land and Agrarian Studies all called for the bill to be withdrawn. The only support it received was from traditional leaders and their organisations. (Claassens – *Cape Times*, 10.2.04)

The legislation pitted different groups against each other in the formal new participatory spaces of the democratic state: government bureaucrats, ANC politicians, traditional leaders in the former 'homelands'¹ (see below), human rights lawyers, land sector and gender activists. Other battles were fought, as seen here, through the media, but also in formal and informal consultation processes organised by the government and land sector activists. A court case, expected to go to the Constitutional Court, is currently being brought against the government in relation to CLARA by a number of different 'communities'² organised and represented by some of the same individuals who organised opposition to the Communal Land Rights Bill (CLRБ, or the Bill)³. The purpose of this doctorate, however, is not to analyse the merit of the legislation, or make a judgement as to which 'side' was or is still 'right'. Instead, in relation to such politicised issues, it considers the changing influence and different positionings of the groupings in those debates, the ways their knowledge has been constructed, and accepted or contested, and the inclusions and exclusions in such processes.

When the CLRБ was finally given the go-ahead by Cabinet in October 2003, those who had been organising opposition to the Bill since it was first leaked in late 2001, felt utterly betrayed. The model of securing tenure adopted by the Bill, and opposed by them, was to transfer the ownership of land previously held by the state to "the community"⁴ living on it. Although many within the ranks of the opposition to the CLRБ

opposed community 'ownership' of land, because it represented a form of privatisation and therefore foresaw the end of state support for its inhabitants, for those leading the opposition and those who have gone on to support the court case being brought against the government, this was not the main problem. For them, the big problem with this model of reform was that, because the whole community could not be expected to then participate in the administration of the land, such administration would be undertaken by a "land administration committee" (LAC) which would include at least a number of traditional leaders from "the community". Prior to the Cabinet-approved version of the CLRB, previous versions envisaged that the composition of this committee could include a combination of individuals elected by the community and traditional leaders, subject to particular limitations (e.g. not less than 75% of the members of the committee were to be elected by the Community, at least a third of those elected were to be women and not more than 25% of the committee were to be traditional leaders⁵). The Cabinet-approved version, however, set out that if a community has a recognised "traditional council" then that must act as the LAC⁶, but if it did not, traditional leaders would not be entitled to be members of that committee. This change was the reason for the uproar. The "recognised traditional council" referred to the recognition granted by the Traditional Leadership and Governance Framework Bill (TLGFB) that had provided for democratic changes to be made to the Tribal Authorities that had been set up under the detested Bantu Authorities Act of 1951 (BAA).

The changes to 'Tribal' Authorities (or 'Traditional' following the wording of the new dispensation in the Constitution)⁷ had been furiously contested by organised lobby groups of traditional leaders, such as CONTRALESA and the Inkatha Freedom Party (IFP). But following ongoing negotiations between the ANC and high profile traditional leaders, there had been some kind of turnaround in September 2003, just prior to the approval of the CLRB by the Cabinet, when traditional leaders finally came round to seeing both the TLGFB and the CLRB as acceptable to them. Holomisa, who had up to that point been vocally opposed to the TLGFB, finally spoke out in support of the TLGFB during its Portfolio Committee hearings in October 2003. And then the Cabinet-approved version of the CLRB was released for comment with its insistence that a recognised reformed "traditional council" must act as an LAC. However, should a Traditional Authority (TA) not have reformed in line with the TLGFA and so be 'recognised' under it, traditional leaders within it would not even be able to participate on such an LAC. The opposition saw this as a 'carrot and stick' approach to politics, buying off the acquiescence of traditional leaders to such democratic reforms, with their control over land as the prize.

Until these final changes to the Cabinet-approved version of the Bill, there were different strands of opposition to the Bill's provisions. The first version that was

released by the government was leaked just prior to the government convening a Tenure Conference in November 2001. A number of lawyers and tenure experts pored over it, reacting with fury to the model adopted. In terms of this model, the Bill had echoes of the approach to land reform legislation adopted by the National Party (NP) government in the early 1990s, the Upgrading of Land Tenure Rights Act 1991, but now with the transfer of land not to 'tribes' but to an 'African traditional community' (Sibanda 2004: 160). This continued a long tradition of apartheid support and manipulation of the chieftaincy system and in a democracy, to progressive human rights lawyers and to former anti-apartheid activists who had both fought the divide and rule 'bantustan' policies of the apartheid government (see below), this was unacceptable (Ntsebeza 2005). Again, the transfer of private property to such communities which would then be administered by an LAC that would include the appointment of non-elected traditional leaders, would lead to their potential empowerment.

The director of the government's Tenure Directorate that was working on the Bill, presented the reforms embodied in the Bill to that conference. He represented such a transfer of land as the state 'divesting' its land in favour of private ownership (Sibanda 2004). This chimes with the 'anti-privatisation' strand of opposition by leftwing land reform lobbies and could not fail to elicit a critical response. However, privatisation in favour of 'individuals, families or communities', as this version of the Bill advocated, complicates an opposition that might otherwise pit the "'ideal-type" communal tenure model' (Chimhowu and Woodhouse 2006: 346) in opposition to 'individualisation' (often considered in the same breath as 'privatisation'). In turn, the rhetoric of 'privatisation' that might align itself with 'modernity', as would 'communal' with 'tradition', becomes mixed up. This had the potential to fracture the opposition. But when the 'communities' in question were referred to as 'African traditional communities', the discourse of privatisation becomes linked to another potentially more powerful political discourse, one that links with a 'pro-chiefs – anti-chiefs' dichotomy. Separately, both privatisation of land and the empowerment of chiefs were opposed. But together they were greeted with dismay by those who thought of themselves as representing a progressive, democratic 'civil society'⁸.

On the other side of the debate, however, were those lobbying for the protection and strengthening of traditional leaders – the traditional leaders represented by CONTRALESA and the IFP, as well as those lobbying for the protection and strengthening of land rights for the purposes of encouraging a market in land – the Banking Council, South Africa (BCSA) (BCSA -Comments to the [Department of Land Affairs (DLA)] on the CLRB – 14.10.02). In the early 2000s, both represented a formidable front facing the government. Until the Cabinet-approved version of the Bill, however, the traditional leaders lobby was also opposed to the 'model' adopted by

earlier versions of the Bill. Without securing greater representation for themselves on the LAC, they were also opposed to the 'privatisation' of land, fearing that 'their' land would then be able to be parcelled up and sold off and so end their authority over land – so central to their political authority. And so the cap laid down in the Bill on the number of traditional leaders entitled to be on the LAC was also opposed. Nevertheless, they were obviously not aligned with the pro-rights, pro-democracy views of those lobbying as representatives from civil society. After the change introduced in the Cabinet-approved version, however, that would enable them unlimited authority over the allocation and administration of land, privatisation would actually give them more power rather than less, provided they introduced the changes mandated in the TLGFB. From this critical moment then, the 'pro-chiefs' discourse is strengthened in its unlikely alliance with *both* 'tradition' *and* 'modernity': 'rural people should be entitled to own their land' (just as white people have for so long) and this law not only enables this, but also enables a form of ownership that respects their 'tradition' in enabling the 'community' or 'African traditional community' to own the land. Moreover, by this time, traditional leaders had consciously and adeptly linked such calls for the support of 'tradition' with wider powerful national discourses of the African Renaissance (Oomen 2005). Moreover, massaging relationships with influential traditional leaders who may have been inclined as a result to vote for the ANC, or at least not to remove their votes – CONTRALESA was traditionally ANC-aligned but was threatening disruption – is likely to have opened up spaces for such possibilities, particularly given that the ANC was going all out to secure a victory over the IFP in the country's third democratic elections to take place in April 2004.

When the Bill was released at the time of the Tenure Conference in 2001, part of the fury from civil society was directed at the DLA's failure to formally release the Bill for comment – it had simply been 'leaked' by a DLA official – and its lack of prior consultation with civil society in relation to its approach. This criticism related to a frustration with the DLA that had been festering for a while. 1999 saw President Mbeki replace the Minister of Land Affairs, Derek Hanekom, with Thoko Didiza, who in turn replaced the Director General (DG) of the DLA. Along with the former DG, many other former employees of the Department left in solidarity, or were unceremoniously 'replaced' by the new Minister – some by an unfilled post (Dolny 2001). After 1999, many of the land reform programmes were put 'on ice' (Director, Tenure Directorate – Discussion paper for Land Reform Systems and Support Services Colloquium [LRSSS], 2.3.02: 7) while the government undertook its own closed review. From 1994, the start of South Africa's democratic transition, the Minister and the DLA had been known for their openness to the inputs from the land sector – many of those who moved into government had formerly been employed by land sector NGOs and close relationships

still existed between former colleagues. The frustration and confusion instigated by the turnaround in the DLA in 1999 was particularly acute in relation to tenure reform. In 1998, after three years' intense work, a Land Rights Bill (LRB) tackling the reform of tenure in the former homelands had been drafted and circulated. After the 1999 elections, however, it had been discarded by the new Minister. Many of those who had been working on the LRB, either as employees in the Department, or as consultants or advisors to the team, were among those who left at that time. And they did not keep their criticisms of such changes to themselves, calling into question the competence of those left behind in the Department, and of the Minister, through public criticism in the media and elsewhere (e.g. Cousins – *Mail and Guardian*, 18-24.8.00). Until this leaked draft, they had been kept in the dark in relation to the government's revised plans for tenure reform. Not only did they object to the model adopted in the draft, but also that they had not been consulted and many of them no doubt smarted at their experience having been so roundly shunned.

Over the next two years, civil society and the government both embarked on consultation exercises in relation to the Bill. A number of civil society actors conceptualised a 'community consultation, advocacy and lobbying project' (the PLAAS/NLC Project), that also included a media strategy, in relation to the CLRB, to be undertaken by the Programme of Land And Agrarian Studies (PLAAS), a small centre of activist researchers based at the University of Western Cape (UWC), together with the National Land Committee (NLC), an umbrella organisation bringing together affiliated land sector NGOs from around the country, and a proposal for funding was drafted. In July 2002, R1million (~£75,500) of funding was secured from the UK government's Department for International Development (DFID). Over the course of the next year, the PLAAS/NLC Project carried out a series of community meetings in 'rural areas'⁹ around the country, as well as two workshops for women, which led to ongoing participation for some attendees who went on to attend Provincial, and then National-level meetings. It culminated, in November 2003, with representatives from communities around the country being brought to Cape Town to make submissions to the Portfolio Committee hearings in November 2004. At these hearings, at least 24 submissions were directly or indirectly inspired by the Project, at least 12 of which were made to the Portfolio Committee by representatives from communities from rural areas who had participated in the workshops. The government, however, criticised these consultations, and submissions, as being "unrepresentative", as being organised by particular people who simply told other, more 'representative', people what to say in criticism of the Bill (DLA official, interview - 11.1.06).

Over the same period, the government also held various consultation exercises. After the Tenure Conference in late 2001, the draft Bill was not published officially in the

Government Gazette for public comment until August 2002, although further drafts had been circulated prior to that. From May 2002, the government convened a number of Reference Group meetings that included the Centre for Applied Legal Studies (CALs), the Coalition of Traditional leaders, the Department of Agriculture (DOA), the Commission for Gender Equality (CGE), the Legal Resources Centre (LRC), the National African Farmers' Union, the National House of Traditional Leaders, the NLC, PLAAS and the South African Law Commission (DLA -Memorandum on the Objects of the CLRb, 2003 - 22.9.03). And after the Bill's publication in August 2002, officials in the Tenure Directorate of the National office of the DLA took the issues to its Provincial Offices and together they held consultation 'workshops' in most of the provinces around the country (DLA official, interview - 11.1.06). According to the Directorate:

The workshops involved traditional leaders and their communities, the national House of Traditional Leaders with representation from the Provincial House of Traditional Leaders, the Coalition of Traditional Leaders and CONTRALESA and the Ingonyama Trust Board. (DLA - Memorandum on the Objects of the CLRb, 2003 - 22.9.03)

The Reference Group meetings, however, were criticised by a number of the civil society opposition for being a way for the government "to pretend to give a voice to civic groups" - "they listened and made some changes but never on the crucial, important issues – definitely not" (Informant, interview - 12.12.05). The government's holding of such workshops, meanwhile, was either disbelieved by critics, or dismissed as merely providing a "talking shop" for chiefs (Informant, personal communication - 12.1.06).

This was therefore the highly politicised context for considering the evolution of CLARA, the contestations surrounding the Act and its interpretation by different groups. These contestations took place a decade after the country's first democratic elections, after the state had wholeheartedly endorsed economic and political liberalism with its emphasis on universality, and its masquerade of equality of opportunity. The sobering reality of the extent of continuing inequality and difference, however, had by then become only too apparent (see Seekings and Natrass 2006). Such difference had been perniciously and zealously constructed by the former apartheid regime through the adoption of thousands of laws setting out the conditions of that difference. Its policy of 'separate development' was pursued principally through the creation and (minimal) sustenance of the former homelands, with their powers of rule and administration of land delegated to chiefs with jurisdiction over particular areas (Hendricks 1990; Evans 1997). Recognising the 'construction' of that difference (Spiegel and Boonzaier 1988), however, neither reduces its reality for the people living there, nor its ongoing political impact (Sharp 1997; Alcott and Mendieta 2003). Even though tenure in the former homelands could be

easily contrasted with the starkly different tenure in the rest of the country, no one – or very few – were arguing that tenure reform should bring the former homelands in line with tenure in the rest of the country, that they should, or could, be 'the same'. However, there was a danger that some would assume that tenure reform would be able simply to 'deconstruct' that difference, a danger that Sharp has recognised is peculiarly, albeit understandably, South African (Sharp 1997). Many wanted such legislation to introduce 'rights' and 'democracy' to those areas, to release the people living there from their subjugated positions as 'subjects' of the chiefs they fell under, and to enable them to be full 'citizens' of the country (Mamdani 1996). While at a political level, the 'right to culture' of those citizens was pitted against this (Comaroff and Comaroff 2005; Oomen 2005), on the ground, everyday practices produced from their apartheid construction remained a day-to-day reality for millions. Legislation to reform tenure in the former homelands was taking on a lot.

2 - Why CLARA?

Both sides had faith that this legislation could mark a significant step towards South Africa's liberation from apartheid and transition to democracy. But CLARA represented a legislative twist to that story. According to both sides of the debate, the identities of people living within these areas were at stake. CLARA would on the one hand, condemn such people to a life of continued oppression, unable as they are to exercise their human rights embodied in the Constitution. On the other hand, according to Holomisa:

[CLARA] is true to the constitutional recognition of the institution of traditional leadership, the customs and cultures of the land. It is true also to the ethos of human rights and equality. (Holomisa – *Business Day*, 2004).

How and why could these issues be seen so differently by different groupings? Exploring this leads to further questions: *What assumptions was the knowledge brought to the debates based upon? How did the different groups legitimise, or try to legitimise their positions? How were the political spaces within which they were trying to achieve this, shaped?* and, ultimately, *What knowledge was excluded in these constructions?*

Many of those involved in the contestations were claiming to have 'consulted' with people living in such areas, to have enabled their voices to be heard, or otherwise, to be speaking on behalf of, or to be representing them. Others based their arguments on their own knowledge and experience, based on a lived reality, or on academic veracity. International wisdom or best practice relating to tenure reform was also drawn upon. And discourses of human rights, privatisation and individualisation shaped the structuring of the debates. CLARA was to reform the tenure of people living in the economically poorest and most marginalised areas of the country. In the midst of so

many claims to representation, given that these people were to be the subjects of the reforms, could their voices be heard, or even articulated in those debates?

This thesis asks: *What have been the policy and law-making processes and practices in relation to CLARA in its evolution, contestation and interpretation?* It explores the extent to which the voices of people living in areas to be reformed by that legislation could be heard in those contestations taking place. This raises questions relating to the hierarchy of knowledge, processes of legitimation and the fault lines between different forms of knowledge. The thesis therefore goes beyond being simply an endeavour to answer the political question, *'Why was CLARA introduced and passed by Parliament?'* considering the motivations and interests of the different parties, although it will contribute to painting a more complete picture of this from which an answer to that question may be drawn. In turn, light is shed on the state's proposed 'solutions' to particular issues – on the face of it 'tenure' – that it deems to be 'problems'¹⁰ and the often antagonistic responses from various groups to those proposals. But this study further considers the knowledge that different individuals and groupings brought to the debates, how that knowledge was shaped by their history and how that in turn was shaped by and shaped their changing influence and positionings in relation to others at a particular time in South Africa's recent history.

3 - CLARA and the homelands

In order to do this, first, it is important to understand the context and history of these sites called homelands, which the democratic government was left to deal with in 1994. By 1994 there were ten so-called self-governing territories in South Africa, four of which had been granted 'independence'. The tenure system in the former homelands was shaped by the passing of laws dictating how much land people living in such rural areas were to be allocated, how they were to live on that land and who was to administer that land – namely chiefs. While the Natives' Land Act passed in 1913 formalised and legalised an inequality in tenure, this inequality has a much longer history (Hendricks 1990). That Act, however, institutionalised a distinction between exclusively white-owned areas and 'reserves' – what became the bantustans or homelands – which today, after 'consolidation' that took place subsequently, make up just 13 percent of the land area of the country. These were comprised of 'a fragmented horseshoe comprising [in 1972] eighty-one large and 200 smaller blocks of land' (Lipton 1972: 3). They were to be the 'homes' of the people who lived there, as well as all the other people living elsewhere in South Africa who were said to derive from the tribe whose 'home' it was – for 70% of the people of South Africa. They also became a 'dumping ground' for the millions of people who were removed from 'black spots'¹¹ in the so-called white South Africa over many years (Hendricks 1990; Murray 1992; James 2007). Others living on

land that was defined as being for a different tribe, that is, in the 'wrong' homeland, were also forcibly removed across the 'border', 'back' into their own proper homeland (Harries 1989). It has been estimated that more than 3.5 million black people were forcibly removed and relocated to these homelands between 1960 and 1983 – this does not include those relocated for the implementation of 'betterment' schemes (see below) (Platzky and Walker 1985). In 1997 it was estimated that more than 73% of those living in such areas were living in 'poverty' (Draft White Paper on Population Policy), and after the census in 2001, it was estimated that 19,050,159 million¹² live in rural areas of the country (Statistics SA 2001)¹³.

Land in these areas predominantly remained under the ownership of the state or was held in trust by the South African Development Trust (SADT), but was classified as 'communal' by the apartheid authorities. There were an assortment of reasons for the apartheid government to create, and perpetuate, these homelands or bantustans: they provided 'homes' for migrant workers to go back to, thereby both supporting the migrant labour system as well as quelling fears in relation to the large scale demographic shift to urban areas of the country (Evans 1997). Evans describes the shift from the more *laissez faire* approach to the more centralised administration of these areas with the adoption of the 'unabashedly tribalist' Native Administration Act of 1927 (NAA) (1997: 168). The NAA extended the system of tribal courts and tribal law, institutionalising the system of customary law and granting chiefs jurisdiction over particular areas (Letsoalo 1987). This authority, however, was qualified with the appointment of the Minister for Native Affairs as the 'Supreme Chief of All Natives', empowering him to 'declare pass areas, amalgamate or dissolve whole 'tribes', banish Africans and impose a variety of discretionary sanctions on Africans suspected of disturbing the peace' (Evans 1997: 170). He was supported by a cadre of 'magistrates' and/or Native Commissioners who acted as the 'judge' and 'jury' over such areas. The 1951 BAA with its 'aggressively interventionist brief' further 'centralised control' (*ibid*: 233), but this time in the form of 'indirect rule' (Mamdani 1996). 'In a bastardized mimicry of tribal government in prequest society ... the act introduced a pyramidal structure' (*ibid*: 251) reinforcing the power of the chiefs with the creation of 'Tribal Authorities' and 'Regional' and 'Territorial Authorities'. This was extended by the Bantu Self-Government Act 1959 that ushered in the separate development of the bantustans, creating nine Territorial Authorities for the then eight ethnic or tribal groups (Letsoalo 1987). The BAA, however, had already 'magnified and politicised longstanding rivalries over the chieftaincy' (Evans 1997: 254) through its extension of authority to a hierarchy of appointed chiefs and 'headmen' who were to have jurisdiction over a particular area and participate in these homeland legislatures.

This reinvigorated form of 'indirect rule', brought about by the passing of the BAA, also enabled many men, who were absent from home and their families due to the migrant labour system, to continue, also indirectly, to control their families, women and land, through the control exercised by the chief (Vail 1989). Ethnicity, according to Vail, can be seen as a mechanism of such control and 'may be interpreted, then, as a form of popular male resistance to the forces that were reshaping African lives' (*ibid*: 24). Other changes taking place beyond the rural areas also contributed to this 'retribalisation' and 'new ethnic consciousness' of black South Africans, not least the forced removals of people back into their 'proper' homelands (Harries 1989). Given the small proportion of the country taken up by the homelands, and the growing numbers of people living there, these areas were overcrowded and have become increasingly so. According to Evans (1997: 243), between 1955 and 1969, the population density increased from 60 to 100 persons per square mile, due to removals from black spots, redundancies amongst labour tenants and unemployment. Moreover, with such large numbers being moved into the homelands, the complexity of the jurisdictional and permit-based arrangements increased.

Instead of recognising the fundamental problem of there being insufficient land, the government saw the problem as being one of 'mismanagement' – 'overstocking' and 'overgrazing' – to be solved, in order that these areas continued to be 'viable reserves' so as to continue support the millions of people living there and quell the numbers moving to urban areas in the country, but without the financial support that would otherwise be required (Letsoalo 1987; Hendricks 1990; Evans 1997). Betterment schemes were envisaged by the Tomlinson Commission to separate the population into two groups, of 'landless' and of 'full-time' farmers – the landless to occupy 'betterment villages' with just a dwelling plot with no farming rights, the farmers also to be entitled to an arable plot and/or grazing rights (Letsoalo 1987; Hendricks 1990). Tomlinson also proposed the individualisation and ownership of land tenure. While neither of these proposals were implemented, partly due to opposition from inhabitants towards such 'development', moderated betterment schemes were implemented, often involving everyone being given a farming plot, but of a much smaller area than that initially proposed. But resistance to such schemes, which led to many rural revolts, 'went hand in hand with opposition to the establishment of Tribal Authorities, which were seen as the first step towards betterment planning' (Letsoalo 1987: 55).¹⁴

Given the chiefs' mediation of access to land, it is unsurprising that many chiefs were extremely unpopular. Their 'room for manoeuvre' for gaining popularity or acceptance by people living within their jurisdiction was circumscribed by their positions as mediators of the apartheid programmes for these areas. For example, it was usually the chiefs who were charged with overseeing the acquiescence of 'their people' to the

betterment schemes introduced in so many areas across the country but which were so unpopular. But, the power that was conferred by the indirect rule of Pretoria, provided opportunities to chiefs and headmen in the homelands, and to others through networks of support and patronage, to bolster their personal power (Vail 1989). Moreover, as Berry (1992: 347) recognised, 'indirect rule affected the management of resources by assigning property rights to social groups whose structures were subject to perennial contest'. But, Beinart (1989: 187) argues:

'Legitimate' chieftaincy did not necessarily die with the conquest of the great African polities of the nineteenth century. The political processes surrounding the institution had always offered some scope for the articulation of popular demands.

Nevertheless, there was an ambiguity in the position of the chief, embodying as they did "both the coercive powers of the state and the consensual authority that once held tribal civil society together" (Evans 1997: 212):

Apartheid administrators looked upon chiefs in mythical terms, regarding them as the people's only accredited and popular representatives. Yet, when discontent swept the reserves, the chief's hut was the first to be razed. (*ibid*: 267)

Evans draws attention to the invention of tradition and myth and the construction of nations on forgeries, but he warns against ignoring, in recognising this, 'the institutional solidity of their effects' (*ibid* 248, quoting Nixon 1993). This is echoed by Vail (1989: 26-7):

Ignoring ['ethnicity and parochial loyalties'] as embarrassing epiphenomena that should have long ago disappeared will do no good. Condemning them as 'reactionary' or 'divisive' will accomplish very little.

Moreover, he recognises that:

For many involved in this struggle, land, and access to land, came to stand at the very centre of their consciousness, being fixed there not only at the beginning of the process of undermining rural autonomy, but also in succeeding decades (*ibid*: 18).

And it was the chiefs who mediated access to land. What was to be reformed through the introduction of legislation further to s. 25(6) of South Africa's new Constitution, that is CLARA, was the tenure, or property relations, of land in the former homelands.

4 - Theorising CLARA

This thesis draws on and builds upon a number of theoretical areas. First, and principally, it relates to the theorisation of policy processes (Clay and Schaffer 1984; Shore and Wright 1997; Fischer 2003; Hajer 2003). While recognising the power of discourses influenced by traditional positivist approaches to policy-making (Lindblom 1959; Simon 1976), I take as a starting point that the 'advance of knowledge ... cannot be understood as a linear process driven by the better experiment' (Fischer 2003: 128). Therefore, this study reveals multifarious voices and representations of truth that have been included or excluded in and by particular processes and practices of reform. The context for such processes is also important. Policy processes are shaped by changing social, economic and political discourses and structures of power and the 'space' or 'room for manoeuvre' in which such policies can be reformed is therefore limited, and is consistently changing (Clay and Schaffer 1984; Grindle and Thomas 1991; McGee 2004; Cornwall 2006). In addition to changes taking place on a global scale that might affect such policy spaces (Kearney 1995: 549), in South Africa alternative or additional challenges may arise from 'traditional' power structures (Comaroff and Comaroff 2005). Theoretical and empirical insights often direct our attention towards the responses to such challenges in terms of policy outcomes (Habermas 1971; Fay 1975; Albrow 1979; Heller 2001). For example, while Koelble and LiPuma (2005) point towards CLARA as being the direct result of both these changes, they rather explain it (away) in arguing that given the global economic constraints imposed on the state's ability to fulfil democratic liberation, traditional leaders have been willingly supported and used to step into the breach. This thesis, however, instead explores 'the 'real' politics of politically constructed agreements' (Von Lieres 2005: 24) that resulted in the 'solution' presented by CLARA.

Debates over CLARA have been played out during a period in South Africa's transition in which new rights and forms of political representation have been, and are still being forged (Morris 2006), but there is also a lot that has remained unchanged. And with such change and constancy in unfolding but historicised trajectories, contestations over the meanings, here of land, rights and tenure, take place in spaces already constructed but still constantly shaped by changing power relations. How do those contestations shape policy processes? Responding to this has to take into account the increasing diversity in interactions between people in policy processes, and how this has shaped practice. Individuals with different backgrounds, immersed in very different contexts of day-to-day reality, understanding different 'rules of engagement', came to interact in policy processes relating to CLARA, each of them differentially influenced by global changes and new power configurations. It is therefore important to consider how the history that each one of them brings to such processes, shapes their interactions and

the practice that develops. This moves beyond current theorisation of policy processes that demands an, albeit important, interrogation of the networks of actors, discourses and institutions shaping those processes (Keeley and Scoones 2003). So while recognition of changing social, economic and political discourses and structures of power shaping policy spaces remains crucial, policy spaces will also have been shaped by those people who inhabit them and the history they bring with them.

This brief discussion of the theorisation of policy processes relates also to theorisation of law-making processes and this thesis also draws upon sociolegal work in this area. Much has been written about the 'fetishism of the law' whereby a 'culture of legality' seems to be infusing the capillaries of everyday life' (Comaroff and Comaroff 2006: 25) and this nowhere less so than 'constitution-obsessed South Africa' (*ibid*: 26), but this thesis interrogates the reality of such statements, shedding light on the contested autonomy of the law in South Africa that in turn raises questions over the appropriateness of legalised 'solutions' to such social 'problems' as those found in the former homelands. What was being negotiated in relation to CLARA, as well as a piece of 'law', was a struggle for legitimacy for a particular version of the social world to be embodied in that legislation (see Chapter 2). This builds upon Moore's view of law:

"the law" is a short term for a very complex aggregation of principles, norms, ideas, rules, practices, and the activities of agencies of legislation, administration, adjudication and enforcement, backed by political power and legitimacy (Moore 1973: 719).

In law-making, in contestations over symbolic power, the 'norms, ideas, rules, practices' of different people participating in such debates may prove to be just as important as the activities of agencies of legislation and administration. Again, considering the individuals participating in such processes, their histories, is significant, particularly in the light of South Africa's emphasis on the law and rights in its transition despite the utter delegitimation of the law under apartheid. This approach is in the same vein as Moore's influential interpretation of 'law as process' (Moore 1978; Moore 1987). She recognised the importance of conflicts in the production of meaning and knowledge, and that the 'persons they involve are interested persons' (1978: 45). Nader similarly considers the way wider processes shape power dynamics that in turn transform particular cultural ideas, and how 'law', in the wider sense, is connected to such change. She recognises that 'law is often not a neutral regulator of power but instead the vehicle by which different parties attempt to gain and maintain control and legitimization of a given social unit' (Nader 2002: 117). This processual approach to law countered more rule-centred approaches of lawyers, inspiring recognition that 'rules governing conflict behaviour were not internally consistent codes of actions ... but were instead negotiable

and internally contradictory repertoires' (Merry 1992: 360). In turn, anthropologists of law came to recognise the centrality of culture in terms of:

"the way legal institutions and actors create meanings, the impact of these meanings on surrounding social relationships, and the effect of the cultural framework on the nature of legal procedures" (*ibid*).

This builds upon Geertz, who similarly saw law as a 'cultural system of meanings' (Geertz 1983) – it involves 'an intellectual process of transforming the specific, or moral and relational, into the general, or legal and rule-governed' (Fuller 1994: 12). This thesis contributes directly to other studies that similarly consider how contestations over meanings and how discursive resources are used for particular purposes, that is those that see the law, or rights, *as* culture (Cowan, Dembour et al. 2001). Contested discursive resources, some of them legal, were brought to bear on the policy and law-making processes over CLARA, but wider political processes also affected those contestations and consequently, the waxing and waning symbolic capital of the law is revealed in interactions between individuals coming from diverse backgrounds (see Chapter 5).

Recognising the importance of considering agency in policy and law-making has also been underlined by scholars working on 'identity'. In the context of South Africa's negotiated transition, the passing of CLARA raises key questions as to the limits of democratic liberalism in relation to culture and citizenship. Throughout the world, in the last twenty years or so, there has been an escalation in the politics of identity. Scholarship on 'identity' recognises the apparent paradox in modern liberalism: while it bestows citizenship based upon universality, it thereby masks difference (Alcoff and Mendieta 2003). Moreover, in postcolonial states, their colonial forbears, founded on the subjection of the majority, actually promoted difference (Mamdani 1996; Comaroff 2001; Comaroff and Comaroff 2006). As recognised by Moore, on independence former colonial states had to ask themselves 'To what extent should there be a unitary system, and to what extent should a multiplicity of local legal systems continue to operate?', a question that 'raises the profound political question of African identity at the national level' (Moore 1992: 26). Many postcolonial states, including South Africa, opted for legal uniformity and greater centralisation (Wilson 2000). Nevertheless, recent scholarship has challenged assumptions about the post-apartheid state ushering in a multicultural 'rainbow nation' (Comaroff and Comaroff 2005; Oomen 2005; Robins 2005). In discussing the strategic deployment of 'constellations' of difference along a multitude of fractures (ethnicity, gender, generation, race, religion, class etc.), the Comaroffs see the 'fractal nature of contemporary political personhood', that calls for interrogation of the solidity of concepts such as 'citizenship' and 'community' (Comaroff

and Comaroff 2005: 43). In this thesis, I have taken this call seriously and have emphasised the importance of recognising and taking into account of difference. This has implications for the theorisation democracy.

On the one hand, South Africa's Constitution has been hailed by lawyers across the globe as representing a beacon for human rights standards, and one which promises to sort out the formal liberal ideal laying down that needs arising from differences in identity 'cannot even be seen as rights so long as they flow from human difference rather than commonality' (Alcoff and Mendieta 2003: 6). On the other, the extent to which it manages to deal with such contradictions in practice is inconsistent (Comaroff and Comaroff 2005). Von Lieres sees a contradiction between South Africa's attempt to construct a political unity at the same time as recognising difference and pluralism. She draws upon the work of Connolly (1995) that attempts to sustain 'the tension between "politics as general action to sustain the economic and cultural conditions of existing plurality and the dissonant politics of pluralisation"' (Von Lieres 2005: 29, quoting Connolly 1995: 97). That is, those dissonant politics, rather than being 'resolved' in a 'manufactured unanimity of consensus' (ibid: 31), are brought to the fore and sustained. Similarly Mouffe argues that the consensual and harmonious ideal of 'deliberative democracy' denies the 'inherently conflictual aspect of pluralism' and that instead, it should be recognised that 'every consensus exists as a temporary result of a provisional hegemony, as a stabilization of power and that always entails some form of exclusion' (Mouffe 1999: 756). In the Conclusion to the thesis, I engage with some of these issues in the light of the politics of CLARA's policy process.

Finally, in considering CLARA, the thesis also relates to a body of work relating to what is nebulously referred to as 'tenure reform', the technical words masking a great deal of disagreement over the formalisation of property rights. Relating to arguments over the limits of the 'social embeddedness' of rights and the nature of customary tenure (Berry 1992; Moore 1998; Juul and Lund 2002; Peters 2002; Peters 2004; Chimhowu and Woodhouse 2006), certain voices have come from within South Africa¹⁵, particularly in response to CLARA. For some years, Cousins has written a considerable number of articles and papers published in international journals and presented at international conferences on the best way to secure the 'negotiability' of tenure in the former homelands of South Africa (Cousins 2002; Cousins 2005; Cousins 2005; Cousins 2007). Similarly to Chimhowu and Woodhouse, he recognises that '[i]n some key respects 'customary' tenure was also a creation of colonial rule' whereby 'stereotyped versions of 'communal tenure'' were encoded with a 'rigidity and hierarchical character' (Cousins 2002: 69 quoting Chanock 1985). Where he disagrees with them, however, is in arguing that although 'this history has involved major modification and adaptation of indigenous land regimes', 'seldom [has it seen] their complete destruction and

replacement' (Cousins 2007: 283). He goes on to set out five 'key underlying principles and characteristics' of African tenure regimes, including first that '[I]and and resource rights are directly embedded in a range of social relationships and units, including households and kinship networks' (*ibid*: 293). While he admits that 'contemporary processes of social, economic and political change' may indicate that 'the distinctive features ... may no longer be present as 'underlying principles'', he maintains that 'the underlying principles ... have proved remarkably resilient in the South African context' and he would like to find 'a way to secure these distinctive forms of land rights without replicating problematic versions of 'custom'' (*ibid*: 308).

For Cousins, the principal problem with CLARA is that it would replicate such a problematic version of 'custom': 'the Act entrenches particular versions of 'customary' land tenure that resulted from colonial and apartheid policies' (*ibid*: 290). Drawing upon Peters (2002, 2004), he argues that the 'social embeddedness' of property should be recognised and secured through law only so far as doing so would not 'replicate' such 'problematic versions'. Instead, the answer is 'to vest land rights in individuals rather than in groups or institutions, and to make socially legitimate existing occupation and use, or *de facto* 'rights'' (*ibid*: 308), to be achieved through 'legal recognition' (*ibid*: 308). In his criticism of CLARA, however, it is not clear whether he sees such 'problematic versions' of tenure to be embodied just in the legislation, or the extent to which they may actually already exist in practice, shaping and defining such *de facto* rights. In either scenario, however, the power of such regressive legislation to change socially embedded practice may be uncertain – for that matter, as may the power of progressive legislation to make 'rights' 'socially legitimate' through granting 'legal recognition' to them, when they are *de facto* shaped and defined by practice. Although Cousins indicates that he 'make[s] use of Okoth-Ogendo's conceptual framework' (*ibid*: 292), his solution appears 'to associate tenure regimes with particular categories of rights or quantum[s] of power' (Okoth-Ogendo 1989: 12) rather than addressing the 'legal character which access to and control of power in respect of land take' (*ibid*: 12). For example, he does not advocate "strengthening institutions for the mediation of ... conflicting interests" which he deems 'not a feasible option in South Africa' (Cousins 2002: 98). The reason why may relate to the reason why transfer to 'African traditional communities' – effectively the course pursued by CLARA – 'was not seen by the drafters of the [LRB] as a viable option for a law to secure tenure rights', namely because it would effectively amount to a sanction, if not an endorsement, of 'The Bifurcated State' (68 - a reference to Mamdani's thesis of 'decentralised despotism' - Mamdani 1996).

Ntsebeza has similarly drawn heavily upon Mamdani in arguing that the interests of traditional leaders and tribal authorities conflict with democracy (Ntsebeza 2003; Ntsebeza 2005). Such leaders were appointed by the former apartheid governments

and seen as 'an extended arm of the state' (Lahiff 2002: 3), a state that was utterly illegitimate. For Ntsebeza and others, the involvement of unelected traditional leaders in local decision-making in the new democratic dispensation, is completely unacceptable (Ntsebeza 2005). Others, however, have argued that 'tenure can only be secured by working with, and adapting, the practices and systems that people living in communal areas are already familiar with' (Alcock and Hornby 2004: 18) and that:

Critiques ... that focus only on the 'unelected' nature of these institutions seem to serve very narrow interests, of establishing particular forms of political hegemony, rather than broader transformation objectives ... (*ibid*: 20).

However, given that tenure reform would change the structure of traditional leaders' involvement with land in one way or another, such highly politicised issues could not be avoided.

Contributing to each of these areas of theory, Pierre Bourdieu's work on the 'Logic of Practice' has been remarkably enriching (Bourdieu 1977; Bourdieu 1990). While I will discuss this further in Chapter 2, it is worth briefly indicating those aspects of his work which prove to be particularly useful in building upon some of the theoretical issues raised here. First, in relation to policy and law-making, attention is directed not just to the networks or coalitions of influential individuals drawn together, in order to influence policy, as a result of shared discourses, but to the individuals themselves. While not ignoring the power of discourses in producing disciplined subjects (Foucault 1980), such discourses are not disembodied; it is social actors who invoke such discourses and their meanings are constituted through them (Moore 1994). In relation to questions of identity and citizenship, Foucault's recognition of 'the constructed, socially contingent and hence mutable elements of identity' (McNay 1999: 96) has been extremely influential for post-colonialist and post-structuralist scholars considering questions of identity and difference. McNay has warned, however, that it can lead to a 'failure to consider fully the recalcitrance of embodied existence to self-fashioning' (*ibid*: 97). Moreover, people invoke their social identities in negotiating their positionality in the world (*ibid*). Bourdieu (1990: 56) conceptualises *habitus* as individuals' 'embodied history' that shapes their dispositions and schemes of perception and resulting legitimate knowledge (or symbolic capital). *Habitus*, is both structuring and structured of and by the 'field' – the objective social circumstances – within which it emerges and is generative of practical action and engagement with the world – thus, Bourdieu's in-depth understanding of 'practice' (Bourdieu 1990). Therefore, materiality matters, and that materiality is embodied; the materiality of a person's (social) existence is constitutive of their very subjectivity. In considering the individuals who participated in the policy processes relating to CLARA, incorporating this recognition into the analysis of

such processes overcomes an overemphasis on disembodied discourses and the constructed nature of identity. These insights are also pertinent to debates over the 'social embeddedness' of tenure and its reform, particularly for those advocating the passing of legislation to 'secure' rights or property.

In post-apartheid South Africa, in many different fields there has been an increasing diversity of individuals from different backgrounds coming together, bringing with them diverse life experiences and embodied histories. In relation to CLARA, they came together to negotiate the policy of tenure reform for the former homelands. In exploring contestations over knowledge, the importance of recognising the historical and located subjectivities of the different actors participating in such processes becomes clear. Such individuals are positioned within specific and different social circumstances that shape their consciousness and the potentialities of action that they contemplate. In this thesis, I explore the state of the different fields within which those people participating in the policy and law-making processes relating to CLARA were positioned and the role of knowledge constructed within and in interactions between them: the 'activist field' made up principally of people working for land sector NGOs, the 'legal field' including those working for or connected to legal institutions, and the 'bureaucratic field' comprising those working for government, specifically the national and provincial offices of the DLA. It also provides a rich case study of a village in the former Gazankulu that brings to the fore the contested nature of knowledge in the former homelands – the 'rural field'¹⁶. And this, in turn, illuminates the power of the knowledge produced within these different fields. The purpose of all this is of course to interrogate the policy and law-making processes and practices in South Africa, what shapes them and the extent to which they are appropriate and answer to the needs of the country's citizens.

Insights from Bourdieu also contribute to a body of theory considering the implications of such diversity for South Africa's democracy. With the country's massive inequality in terms of economic well-being, education, landholding etc., the historical legacy of apartheid is still very real. In the context of such inequality and difference, similarly to Hendricks I argue that consultation and participatory processes assuming formal equality amongst individual rights-bearing citizens should question their assumed inclusivity (Hendricks 2003). But it is also necessary to interrogate the methodologies adopted for enabling 'representative' individuals to participate in such processes. If, as recognised by Moore, policies are developed apart from the reality of the social problems that they are to solve, they will simply be a waste of time (Moore 1978); in their implementation they will come up against a reality that is vastly different from its theoretical convenient summary on paper. Such methodologies should bring to the fore not only the contested nature of knowledge but also the inequality of life-chances

brought to bear on the construction of that knowledge.¹⁷ This would have real implications in rethinking institutions of the state. For example, South Africa's 'participatory' Portfolio Committee hearings are held at a time when proposed legislation has been drafted. Although they are theoretically open to any stakeholder interested in providing their opinions or knowledge to the Parliamentarians tasked with signing off on that legislation, they inevitably privilege legalistic knowledge of that text and thereby adversarial interrogation. Instead, the importance of conflicts in the production of meaning and knowledge should be emphasised so as to enable and recognise the articulation of marginalised and contested voices. The increase in diversity, and therefore complexity, is only likely to result in increased levels of conflict, and if 'participatory' policy-making and consultation exercises – in relation to CLARA these included formal and informal, governmental and non-governmental exercises – are going to be anything more than strategies of legitimation (see Chapter 8), such conflict must be recognised.

The theoretical contributions of the thesis have implications for what I can only hope will be its key contribution in South Africa. Rather than making any kind of technical suggestions for the improvement of the legislation, or providing a solution to the complex issues relating to land and tenure reform in South Africa, the thesis has been written in a moment in these debates during which both sides are effectively holding their breaths. The legislation has not yet been implemented, and the court case being taken against the government in relation to CLARA is not yet underway¹⁸. There have been rumours of the government passing amendments to CLARA and there have been steps taken towards its implementation, but there is at this moment a 'space' which is ideal for enabling participants to be reflective over their roles in constructing the debates. I hope that the criticisms I have sometimes made of the processes will be taken in this spirit and that my doctorate might once again open up a dialogue in which these issues can be debated. In neither casting judgements nor providing solutions to the problems raised by tenure reform in South Africa, this thesis instead represents my own analysis of the often deep reflections that many informants shared with me in relation to their own involvement in the processes. Participants in such processes may have significant insights in relation to the *issues* relating to tenure reform, and also sometimes in relation to their own positioning, but in the battles fought over CLARA, individuals' positions were shaped not just as a response to the policies that were being proposed, but also by the ways other actors participating in debates were arguing about those policies, in mutual attempts to position themselves in positions of greater authority and legitimacy. Therefore, different people had varying capacities for shaping the agendas – the spaces in which those agendas were shaped were also contested –

and in such contestations would adopt different strategies of legitimation, depending on their positioning and on their *habitus*.

4 - Chapter overview

This Introduction has discussed CLARA, the legislation that was introduced in February 2004 and that is the subject of this thesis. It has introduced the contested (mine)field into which I stepped in April 2005 when I embarked on a year's fieldwork in South Africa. Some of the sensitivities involved may already be clear to a South African reader, but the following chapter discusses my own positioning in that field, some of the problems that I encountered and issues that arose. However, it first contextualises this further by elaborating on the theoretical positioning of the research, and the implications this had for methodology. Before going on to this next chapter, a brief chapter overview follows.

Chapter 3: 'Historical and Contextual Overview' further elaborates on this Introduction in considering how the debates in relation to CLARA, both at the level of the state and amongst civil society, were shaped and constrained by wider political and discursive change taking place, and how this also impacted upon the 'new rural spaces' to be created through the implementation of CLARA.

Chapter 4: 'Caught in the middle: politics, bureaucracy and the DLA' is the first of five empirical chapters drawing upon my own research and considers the position of actors within the bureaucratic field. It considers principally those years after 1999 in the government and discusses how government officials' day-to-day practice, and therefore their 'room for manoeuvre', is constrained by the wider 'field of power'¹⁹, by their relations with their critics as well as those within the Department.

Chapter 5: 'A person or community whose tenure of land is legally insecure ...' considers the involvement of actors within the legal field and their involvement with the reform of tenure. Many of them were 'insiders' to government prior to 1999 and were involved in drafting legislation that was dropped when the new Minister of the DLA was then appointed. It discusses their interpretation of the issues, shaped as it is by their history of involvement, often as legal activists in the 'struggle' and why to them CLARA represented an absolute betrayal of democracy.

Chapter 6: 'Struggles with activism: NGO relations and CLARA' considers a particular juncture in NGO relations vis à vis the government, each other and their 'clients' or 'constituents', at exactly the moment that CLARA was being formulated. It recognises the disunity within the activist field at that time and the difficulties in their positioning and how these issues in many ways dislodged attention that should perhaps have been

directed towards CLARA. Nevertheless, it discusses 'the NGO take' on the issues, but distinguishes it from the interpretation of those in 'the legal field'.

Chapter 7: 'A 'Rural Area': Chavani, Limpopo Province' moves on from discussing the 'brokers' (James 2007) of rural knowledge – those intermediaries who figured in the preceding three chapters – to people living in such areas themselves. It considers issues relating to a changing 'chieftaincy', tenure and local government relations and sheds light on the extent to which that knowledge is in itself negotiated and partial.

Chapter 8: 'Democratic consultation and participation: strategies of legitimation' considers some of the criticism that have been made of both the government and its critics in relation to consultation exercises undertaken with respect to CLARA. It considers the political difficulties of drawing upon such knowledge for the purposes of supporting or contesting political reform, without resorting to its use merely as various strategies of legitimation. It goes on to discuss how in any case methodological approaches to researching that knowledge must take into account its negotiated and partial nature.

Finally, the Conclusion draws together the varying insights of the thesis and argues that if we are to take seriously the aspirations of real participatory plural democracy, it is necessary to recognise and take into account the variety in the *habitus* of people within the country and also the diversity in views and opinions and the contested nature of knowledge. It considers what this would mean for some of the formal participatory Parliamentary processes and how the adoption of a model of 'agonistic democracy' might have changed the way people participated in the debates over CLARA.

CHAPTER 2 – POSITIONING CLARA IN THEORY AND PRACTICE

1 - Introduction

While the Introduction considered the context in which CLARA was received and its protagonists and critics, this chapter goes on to discuss some of the sensitivities raised in researching such a highly politicised topic. I discuss below other approaches to researching policy-making, those which in researching 'how?' policy is made, bring the processes and practices of policy-making to the fore. I then go on to consider the contribution of Bourdieu's theory to such research and particular concepts or notions in his theory that are useful for the analysis that follows in the thesis. Such an approach builds upon 'actor-oriented' work that recognises that in its consumption or use, knowledge will be mediated and may even be transformed by different individuals with different 'lifeworlds'. Others who have centred their analysis on practice in explaining the 'how?' are then discussed. Finally, the methodological implications of these theoretical approaches are considered before going on to reflect upon some of the issues and problems I encountered in undertaking the research.

2 - Researching the processes and practices of policy-making

CLARA involved highly politicised issues and ongoing contestations between and amongst individuals involved in the debates. Such contestations are shaped by the ways those individuals frame their knowledge (Laws and Rein 2003), the discourses that they are produced by and positioned within (Foucault 1980) and the coalitions that are built up around those discourses (Hajer and Wagenaar 2003). But they are also, importantly, shaped by those individuals' historical and located positioning which produces particular readings of legitimate knowledge. Recognising their historical and located subjectivities and how this in turn has shaped access to particular forms of power is particularly pertinent to South Africa. While it has seen different groups of individuals coming together, the country's transition has been marked by inequality and difference which has shaped identity and claims to citizenship. How this has shaped the practice of such different groupings is key to this study.

Recent approaches to considering policy within different disciplines, such as political science, sociology and anthropology, have moved away from any kind of linear interpretation of policy, recognising the processes and practices through which individuals have shaped policy (Grindle and Thomas 1991; Shore and Wright 1997; Fischer 2003). While Hajer (2003) has recognised how particular individuals have combined to form coalitions based upon how their conceptualisation of the issues has been shaped by different discourses, Keeley and Scoones (2003) have integrated considerations of such discourses with tracing networks of actors and how those have

been perpetuated in particular institutions. These theoretical approaches have built upon Foucault in directing attention to the discourses shaping policy and how these have in turn shaped particular representations of 'truth' while other voices have been excluded (Foucault 1980; Apthorpe 1997; Hall 1997).

In relation to policy, as recognised by Fischer, the acceptance of knowledge as 'fact' 'depend[s] upon [its] underlying assumptions and meanings' (Fischer 1998: 134). But it also depends upon what assumptions and meanings are accepted as *legitimate*. This is where Bourdieu comes in in arguing that such legitimacy will depend on the practices of different individuals and groupings of individuals. Such practices will also be shaped by their personal and shared historical subjectivities. The extent to which participants in policy processes manage to influence policy in turn shapes the *accepted* identities of those they claim to represent. But rather than tracing different narratives and framings of 'land' and 'land reform' over the post-apartheid period and considering their influence on the processes and practices of policy-making, my research instead considers how and which individuals have been drawn together through shared practice, shaped by their personal and shared historical subjectivities, that in turn, shapes those narratives and framings. In looking at this, while not excluding insights of others studying policy processes, I also draw upon Bourdieu's theorisation of 'practice', combining recognition of the importance of history, as well as politics and power, in shaping such practice.

3 - Policy, practice and Bourdieu: 'What has Bourdieu got to do with South Africa?'

Bourdieu's work has not been widely used for the purposes of empirical research because, wrongly, it has been considered to be principally the work of a theorist. It has also been passed over by many as being overly dense, unclear or too complex. Nevertheless, given its aptness to the empirical research undertaken in this study, it is worth persevering to grasp its depth. However, it is also worth emphasising here that this thesis is primarily about the politics of the policy process of CLARA – it is not a thesis about Bourdieu *per se* – but the extended discussion here of concepts elaborated in his work is for the purposes of understanding the ways that I have drawn upon such concepts in the analysis of the contestations that played out in relation to CLARA. Such analysis has cast new light on some of the irreconcilable faultlines between different groups participating in South Africa's transition

First, the concept of field referred to in the Introduction. Bourdieu sees cultural fields as spaces of ongoing contestation and struggle, in which individuals develop a particular *habitus* (discussed below). The concept of a field structures the space in which the *habitus* operates – it is:

a network, or configuration, of objective relations between positions [that people occupy]. These positions are objectively defined, in their existence and in the determinations *they impose upon their occupants*, agents or institutions, by their [those occupants'] present and potential situation (*situs*) in the structure of the distribution of species [or types] of power (or *capital*) whose possession commands access to the specific profits that are at stake in the field [Such positions are also defined ...] by their objective relation to other positions (Bourdieu and Wacquant 1992: 97 - my italics).

This excerpt reveals that the relationships between agents within a field will depend upon the possession of different types of power – that Bourdieu calls 'capital' – and will therefore be contested. Specific types of power or capital will be different depending upon the different fields and the *habitus* of individuals, or agents, operating within them. Possession of capital will determine the potential positions that such agents can occupy and perceive that they may occupy within the field.

As indicated in the Introduction, this thesis recognises three fields structuring the positions of different individuals participating in such policy and law-making processes: the activist field, the legal field and the bureaucratic field. Depending on the *habitus* of individuals operating within the fields, the forms of capital recognised as being legitimate, and that knowledge that is considered to be valid or legitimate, will be different within each of the three different fields. Having said this, in the thesis I do not begin to look at the operation of the entirety of these fields in South Africa or attempt to delineate the extent of their inclusivity – such a task would be way beyond the ambitions of a doctorate – but consider those individuals interacting within these different fields (recognised through that knowledge considered to be legitimate and the forms of capital drawn upon by such individuals) specifically in relation to CLARA. Perspective is then shed on the capital and legitimate knowledge constructed within such fields by research carried out through a study of a community living in the former Gazankulu homeland. When the purpose of the reforms embodied in CLARA was to change the property relations between people living there, this case study is important. My research of this rural field therefore throws into perspective the extent to which the experiences of people living in such homeland areas have shaped or influenced the contestations over tenure reform that have taken place in the interactions within and between the activist, bureaucratic and legal fields.

In South Africa, the period post 1994 has been a time of turbulence as well as dynamism, characterised by much fluidity as people move across fields. This created a 'space' or potential for influencing and changing the 'distribution of species of power' (Bourdieu 1990: 97) and challenging directly or indirectly the autonomy of the different

fields. In the country's transition, many of the interactions and contestations taking place between those in these different fields with others outside those fields will contribute to what Bourdieu calls, a wider 'field of power'. But Bourdieu gives very few pointers in relation to analysing the relationship between fields or considering their unstable autonomy, that is likely particularly in times of crisis, volatility and change (Naidoo 1999). However, exploring this is important here and, rather than seeing these spaces as bounded or taking for granted the pre-eminence of the land sector in South African politics, my research recognises the influence of wider political power, shaped in turn by its proximity to financial power – both determined by the holding of particular forms of capital, both symbolic and real – and also explores how such interrelationships themselves shape new forms of interaction (see Chapter 3).

People will also struggle against each other within these fields, for hierarchical positions and for the power to construct knowledge that is considered to be legitimate within that field. As Bourdieu recognised, those within a field will 'have in common their knowledge and their acceptance of the rules of the ... game, that is, the written and unwritten laws of the field itself' (Bourdieu 1987: 831). Policy and law-making activities, however, will involve interactions between individuals who participate in different 'games', between those within different fields. While an agent may be excluded from one field – the activist field, for instance, because of their lack of activist credentials based on their past actions or current views – they will nevertheless participate in another field and possess other forms of power, or capital. Moreover, the fluidity and dynamism that characterised South Africa's transition involved people moving into government from former banned groups and with concurrent changes in civil society (see Chapter 3). At the same time, the change that played out was negotiated and contested, and such contestations shape 'new spaces for change' that may both enable and constrain the substantive realisation of democratic citizenship (Cornwall 2006). These struggles within and between the different fields are therefore explored in this thesis.

Bourdieu's 'generative structuralism' thus presents an attempt 'to describe, analyse and to take account of the genesis of the person, and of social structures and groups' (Mahar, Harker et al. 1990: 3). It is specifically concerned with exploring the 'struggles between symbolic systems to impose a view of the social world' through the use of instruments of knowledge and domination that in turn 'define.. the social space within which people construct their lives' (*ibid*: 5). In turn *strategies* are employed by people, but according to the rules of the game, as an 'intuitive product of 'knowing' [them]' (*ibid*: 17). The 'symbolic' relates to the process whereby 'that which is material is not recognised as being such' (*ibid*: 17, see Bourdieu 1990: 112-121) and so legitimises the perpetuation of a particular form of domination. Bourdieu (1990: 126) also sees 'symbolic violence' being perpetrated, and perpetuated, through the denial of power to

particular individuals or groups to define figuratively and practically that social space. Others have argued similarly: '[i]ndividuals and groups struggle for the freedom to define themselves and their relationships with others on their own terms' but that '[c]hanging the self and changing society both require a rejection of the representation of self imposed by relationships with others' (Fisher 1997: 457). This is particularly pertinent to this thesis that involves a study of law-making activities whereby the outcome of contestations over particular readings of reality have determined that which will be raised up and made concrete through legislation to 'reform' that reality. Bourdieu sees the denial of such power being perpetrated through the processes and practices whereby a certain state of affairs gains 'symbolic legitimacy', achieved through wielding 'symbolic capital'. This will come about through the interaction between different fields and, as indicated above, the relationship between them constructing a 'social space' or 'fields of forces' or field of power.

People within the game will have a feel for the game, a competence and mastery of the game that relates to their *habitus* and possession of capital. So if the field is the game, the trump cards – or losing cards – are *habitus* and capital (Bourdieu and Wacquant 1992). With his conceptualisation of capital, Bourdieu has sometimes been criticised for his 'economism', comparing his approach with that of 'rational choice' economists and political scientists (Calhoun 1993). But for Bourdieu, resources that function as capital are not only economic and material resources but include cultural, social and symbolic 'goods' that are *considered to be valuable within the field*. That is, they only *become* forms of capital when they are the objects of social struggles and create *relations* of power *within* a field, structured by *habitus* (Bourdieu 1990; Bourdieu and Wacquant 1992). So, capital is not something that individuals can possess *per se*, but is relational. Moreover, with his concept of *habitus*, 'the individual and collective *history* of agents' precludes such a 'narrow, economic conception of the "rationality" of practices' (Bourdieu and Wacquant 1992: 123).

While Bourdieu rejects the charge of economism, there remains the charge that his theory works less well with action which is 'not consciously or unconsciously strategic' (Calhoun 1993: 71) – that is, 'the motive force of social life is [not] the pursuit of distinction, profit, power, wealth, and so on' (*ibid*: 70). These criticisms seem to be particularly applicable to a field, such as the activist field (see Chapter 6), in which the actors claim to be working outside the state and the market (to a greater or lesser extent) for the 'public good' – whatever the NGO, its donors and actors within it, conceive it to be. Nevertheless, in debates over CLARA, people within NGOs were engaged strategically in positioning themselves, successfully or unsuccessfully, in relation to the politics of the process. Recognising this enriches what might otherwise be a narrowly constructivist interpretation of their knowledge whereby wider relations of

power shaping their positioning are eclipsed. Moreover, Bourdieu's insights contribute to understanding that conceptualisations of such strategies derived from individuals' *habitus*, structuring in turn their conceptions of particular possibilities and limitations as well as shaping the institutional *habitus* of the NGO. However, it is helpful here to complement Bourdieu's insights with the notion of 'investment', first conceived by Holloway but that Moore has elaborated upon (Moore 1994: 63-66). Such an investment is conceived to be 'something between an emotional commitment and a vested interest' and, recognising that 'certain subject positions ... provide pleasure, satisfaction or reward' (*ibid*: 64, 65). This expansion of the notion of capital, and contestation within particular fields for such capital, is fitting in this study particularly as so often it is emotions, rather than necessarily the pursuit of profit or power, that come to the fore in the chapters that follow.

For Bourdieu, power derives from symbolic capital, that is, the achievement of 'legitimacy', and this concept is particularly pertinent in considering policy and law-making in which the official version of the social world is being legislated. 'Symbolic capital' is exercised in naming, representing and creating the 'official version of the social world' (Mahar, Harker et al. 1990: 13). Symbolic capital includes such things as prestige, status and authority as well as material things that can also have symbolic value (*ibid*). Legitimacy is achieved through various formal and informal processes that enable and constrain the capacity of different individuals to participate in them (Bourdieu 1990).

Mediating between a field that defines relations between agents, depending on the capital they possess, is the concept of *habitus*. But, while 'the field structures the *habitus*, which is the product of the embodiment of the immanent necessity of a field', *habitus* also 'contributes to constituting the field as a meaningful world' (Bourdieu and Wacquant 1992: 127); it is both structuring and structured. *Habitus* accounts for the social and historical construction of practice; 'a socialized subjectivity' (*ibid*: 126). Practice is therefore 'to be analysed as the result of the interaction of habitus and the field' (Mahar, Harker et al. 1990: 15). Bourdieu sees *habitus* as 'embodied history' (1990: 56):

a product of history, [that] produces individual and collective practices – more history – in accordance with the schemes generated by history. It ensures the active presence of past experience, which, deposited in each organism in the form of schemes of perception, thought and action, tend to guarantee the 'correctness' of practices and their constancy over time ... (*ibid*: 54).

Bourdieu therefore indicates that 'practices ... can ... only be accounted for by relating the social conditions in which the *habitus* that generated them was constituted, to the social conditions in which it is implemented' (*ibid*: 56).

Drawing upon Bourdieu to consider the historical generation of the *habitus* in any particular field brings to light the possibilities of, and at the same time the limitations in, the freedom of the 'production of all the thoughts, perceptions and actions inherent in the particular conditions of its production' (Bourdieu 1990: 55). Bourdieu's notion of *habitus* was developed in an attempt to move beyond the gap between subjectivism and objectivism:

objectivism ... depends on understandings and orientations it does not make explicit even to itself and ... subjectivism neglects to explore adequately the objective social conditions that produce subjective orientations to action.

... [Instead s]ocial life [is] a mutually constituting interaction of structures, dispositions, and actions whereby social structures and embodied (therefore situated) knowledge of those structures produce enduring orientations to action which, in turn, are constitutive of social structures. (Postone, LiPuma et al. 1993: 3, 4).

Actors often come together as a result of a shared history, and share a particular interpretation of that shared history, and within different fields may create a space for their interaction based upon the discourses that have developed between them, producing practices and an embodied practical understanding. Given the fluidity in South Africa's transition, however, as people with a particular *habitus* moved across fields, new contestations have arisen over the control, or even the meaning, of capital, such contestations in turn renewing and restructuring the *habitus*. The turbulence that many people felt at this time, as new opportunities were created for influencing and changing the 'distribution of species of power' (Bourdieu and Wacquant 1992: 97), is hardly surprising. However, recognising the continuing influence of *habitus*, even in a time of historical crisis and change when those possibilities and limitations are significantly disrupted, contributes to a greater depth of understanding in relation to the extent of reproduction that may nevertheless continue even in the face of struggles against it. This is particularly pertinent when considering South Africa's first decade of democracy.

In law-making activities, the drafting of CLARA, for example, as recognised above, involves interactions between people coming together from very different fields, lawyers and non-lawyers, bureaucrats, activists, each with different practices, shaped by their different *habitus*, and each with different understandings of capital. As in a trial, what is

at stake is 'monopoly of the power to impose a universally recognized principle of knowledge of the social world' (Bourdieu 1987: 837), a monopoly sanctified as 'the sovereign vision of the State' (*ibid*: 838). Bourdieu sees judgements as 'magical acts' of 'performative utterances' with the power to make themselves universally recognised (*ibid*); legislation can be seen in a similar way. The process towards its construction, however, is in no way magical and involves substantive struggles, constrained by particular formal procedural rules and informal practices, to acquire the 'symbolic power of naming that creates the things named' (*ibid*). The process of drafting an actual legal text (meant in its narrow literal sense) similarly involves lawyers and non-lawyers, all of them working for 'control of the legal text' (*ibid*: 817) (meant in its wider sense conceptualised in Bourdieu's 1987 essay and so including the 'structured behaviors and customary procedures characteristic of the field' (Terdiman 1987: 809)). Exploring such struggles here sheds light on the way those agents within, for example, the legal grouping, acting within the legal field, have struggled in the politics surrounding CLARA against those in the government – in the bureaucratic field and, surprisingly, also against those in the activist field, in relation to the acceptance of different forms of knowledge of tenure in the former homelands – agents within each struggling to maintain domination over, or even influence, this process.

As indicated above, Bourdieu likens fields with dynamic games in which, importantly, *not* everything can happen, in that its structure proposes possible questions which orients the activities that occur within the field, and renders others unaskable (Bourdieu 1990: 5):

in what is unthinkable at a given time, there is not only everything that cannot be thought for lack of the ethical or political dispositions which tend to bring it into consideration, but also everything that cannot be thought for lack of instruments of thought such as problematics, concepts, methods and techniques.

That is, a particular *doxa* or common sense exists whereby the structure, within which the material conditions of life are embedded but which is in fact arbitrary, is 'misrecognised' as 'self-evidently correct' (Mahar, Harker et al. 1990: 16). *Doxa* is:

a particular point of view, the point of view of the dominant, when it presents and imposes itself as a universal point of view – the point of view of those who dominate by dominating the state and who have constituted their point of view as universal by constituting the state. (Bourdieu 1994: 15)

Therefore, 'practice', which is 'determined' by the material conditions apprehended by agents endowed with schemes of perception that are themselves determined ... by

these conditions' (Bourdieu 1990: 97), 'never asks because it has no need to ask' (*ibid*: 82).

While, hopefully, this brief excursion into some of the notions and terms deployed by Bourdieu will be helpful in setting the scene for some of the analysis in this thesis, Bourdieu argued, 'my ideas are not a general theory but a method' (Bourdieu, 1985 quoted in Mahar 1990: 36). It is not easy therefore to discuss or analyse his theory apart from empirical work: 'it is only through the study of *particular* practices that a field can be delineated, the forms of capital perceived' (Mahar, Harker et al. 1990: 15). So it is only in the following chapters that a deeper exploration of the meanings and impacts of *habitus*, capital and fields on the practices of the different individuals and groupings that participated in such policy and law-making processes will be undertaken. Such practices have shaped their positioning as activists, lawyers, people living in the homelands, government officials and, together with their conflicts and struggles for legitimacy, influenced perhaps by wider international land reform debates, they have influenced their ongoing involvement in such debates.

4 - An actor-oriented approach to practice

Moving on to think how one would go about undertaking research drawing upon Bourdieu's notions of *habitus*, capital and field to consider practice leads one to other studies that have also insisted also on recognising the agency of individuals, taking seriously 'people's own intentions and interpretations, accessible only if one adopts the perspective of their concerns and their knowledge of the constraints under which they act' (Nuijten 2005: 9). This study therefore builds upon a tradition of 'actor-oriented' analyses that put individuals and their practices, their conflicts and power struggles, at the centre of the analysis (Long 1992). In 2005, Mosse published a groundbreaking ethnography of aid policy and practice that went to the heart of critiquing both the instrumentalist view of policy, falling within the linear tradition, as well as critical studies that recognise the depoliticising effects of development policies and practices. Both analyses fail to interrogate the *how?* – the black box of *how* the 'success' of policy is constructed through myriad and diverse practices. This fits criticisms made of Foucault, or if not Foucault himself that social science work which 'claims to be inspired by Foucault' (Callewaert 2006: 89), that is social constructionist discourse analysis that 'assum[es..] that these official discourses also are the *causal* instruments of action' (*ibid*: 91). Mosse argues that both instrumentalist and critical studies (the latter often in danger of deserving Callewaert's criticism):

divert attention from the complexity of policy as institutional practice, from the social life of projects, organisations and professionals, from the perspectives of

actors themselves and from the diversity of interests behind policy models.
(Mosse 2005: 6)

Mosse considers the heterogeneous practices of individuals involved in development, those working in government, for donors, for state development agencies and NGOs, and how they are together engaged in contesting and 'working out' coherence from that which must be incoherent due to the very multiplicity of interests and experiences involved. Mosse's study adds to influential work considering the importance of a focus on practice, including that forged by Fairhead and Leach (2003) with their ethnography of science and policy grounded in the 'local' practices of individuals in the comparative sites of Trinidad and Guinea. They also see practice as central to their ethnography. They focus on the:

'intermediate' processes operating within national settings: the complex, historically-embedded *relations* between politics, bureaucracies, institutions and research traditions which articulate with and shape the engagement of local and global pressures. (Fairhead and Leach 2003: 3 - my italics)

This study therefore contributes to and builds upon such work in this tradition (see also, Goodale 2007). Such actor-oriented approaches consider 'actors' and their own lifeworlds to be central to such analysis. To quote Long in 1992:

All forms of external intervention necessarily enter the existing life-worlds of the individuals and social groups affected, and in this way are mediated and transformed by these same individuals and structures. (Long 1992: 20)

But Long also recognised the importance of examining:

how individual choices were shaped by larger frames of meaning and action (i.e. by cultural dispositions, or what Bourdieu (1981: 305) calls *habitus* or 'embodied history', and by the distribution of power and resource in the wider arena) (*ibid*: 21).

Keeping subjects central and recognising the importance of contestation in the production of knowledge, in this thesis, without claiming to study emotions as such, I nevertheless argue that it is important to recognise the impact of people's emotions in their interactions with others. In a time of transition, with individuals moving across fields, the gendered or racialised construction of identities stabilised within one field, may become attenuated (McNay 1999). Moreover, in South Africa, emotions are often bound up with notions of race, or accusations of racism, and yet this has been passed over in academic analysis of the ongoing construction and power of such concepts. There has been recent criticism of those bandying about 'the race card' (Maré 2001;

Chipkin 2007), but such criticisms have sometimes been made as if emotional retorts and accusations of racism, deeply bound up with an understandable bitterness towards the ongoing and very real effects of apartheid's racist constructions of difference, can be academically deconstructed and rationalised away. In relation to CLARA, accusations were made of racism by different individuals; discourses of 'tradition' and 'black consciousness' were woven together by some, 'liberalism' and 'whiteness' were dismissed by others – in turn eliciting emotional responses, upset and bitterness. It is therefore important to recognise that such accusations and responses are emotionally grounded in the personal and the contextual, shaped by the historical.

This study of policy processes relating to land builds upon insights from others who have similarly made central analysis of processes and practices in order to consider the *'how?'*. But, in order to hold central the importance of considering historicised practice, I have considered Bourdieu to provide a useful theoretical point of reference. Given that the policies put forward in the form of CLARA related to an attempt to unpick and reform a reality that is deeply bound up with culture and tradition, drawing upon such insights has been particularly useful.

5 - Methodological positioning

Drawing theoretical insights from Bourdieu and other actor-oriented approaches to considering practice has important implications for methodology. When the purpose of my study was to undertake research of the different people involved in the policy and law-making processes, and my aim in the thesis has been to analyse the construction of practice within different fields, it was necessary to pursue this through undertaking in-depth qualitative research. Recognising the importance of vastly different personal and shared histories and upbringings – those from different places and sharing social spaces with similarly different groupings – is a huge challenge in a country with such diversity as South Africa, and with 'race' and 'ethnicity' being understandably ever contested. Nevertheless, recognising such difference is fundamental for the purposes of properly understanding the involvement of those individuals and groupings in the policy process. Therefore, the following questions become important, insofar as they relate to individuals' involvement in the policy process: *What for these individuals may not happen? What questions have been rendered unaskable? What is conceivable within their reality, and in turn what is inconceivable – that is, what is their orthodoxy or doxa²⁰?* The orientation of my questions in interviews and conversations usually centred around land and land reform and the politics of CLARA, but bearing in mind these types of Bourdieu-inspired questions when undertaking research orients it towards considering also the extent to which individuals' involvement in land reform debates has been

historically shaped: how their upbringing, their relationships with family, with politics, their homes and their lifeworlds have shaped such involvement.

The make-up of the fields that orients the practices of different people coming together cannot be taken as given but must to a certain extent be 'discovered' through the research and through analysing the practices of different individuals. Rather than undertaking any kind of mapping exercise in relation to all individuals within a field and their relative structural positions (see e.g. Bourdieu 1996), I limited the research to considering only those individuals who participated in debates around CLARA. But in recognising that they may find themselves within different fields in which different forms of knowledge are legitimate, questions to 'discover' such different fields and forms of capital were to explore, for instance, *What, for them, has material and cultural capital? And what is endowed with symbolic capital? Who else sees such 'truths' to be unquestionable? And who, in another field, does not?* And in a period of such change and fluidity as in South Africa since 1994, the boundaries between the fields and their autonomy, cannot be taken for granted. This insight also chimes with Gupta and Ferguson who argued that 'taking a pre-existing, localized "community" as a given starting point ... fails to examine sufficiently the processes ... that go into the construction of space as place or locality in the first instance' (Gupta and Ferguson 1997: 8). The same can be said of fields.

This leads on to some discussion of the practical implications of the methodology. Marcus conceptualised 'multi-sited ethnography' as involving research that 'moves out from the single sites and local situations of conventional ethnographic research designs to examine the circulation of cultural meanings, objects, and identities in diffuse time-space' (Marcus 1995: 96). He saw that such a study would be focused on 'an initial, baseline conceptual identity' (*ibid*: 106). Rather than tracing 'conceptual' identities, however, undertaking this study practically involved 'following the people' and tracing the networks of individuals that participated in the policy-making processes in relation to CLARA. This ideal, however, had practical limitations in terms of my fieldwork. Limited by my funding to a year, the practical choices I made were influenced by the need to base myself in different locations for sufficient time to carry out ethnographic fieldwork in different sites with different individuals and in the different organisations – places of work, even homes – that together shaped their *habitus*. Given the size of the country, I had to make certain choices in terms of focus and splitting myself between four locations: Cape Town in the Western Cape; Limpopo Province – principally Chavani village and Elim; Pretoria and Johannesburg in Gauteng; and a six-week long visit to KwaZulu-Natal (KZN) – principally Pietermaritzburg. This limited my fieldwork to four of the eight Provinces of the country. I was therefore unable to 'follow the individuals' to the Eastern Cape, the Northern Cape, the Free State and Mpumalanga. Having driven

the length and breadth of the country, however, I have some idea of and respect for the enormous diversity that makes up South Africa in terms of people and landscapes, shaped in turn by changing property relations: private property, homeland areas, betterment planning, and township developments. Although my study is therefore not comprehensive, my practical choice of sites was also influenced by the goal of bringing together the voices of the principal groups that participated in the policy-making processes of CLARA.

Undertaking multi-sited fieldwork involves moving between settings and exploring issues of importance to many people for different reasons. It therefore also involves bringing up and sometimes working through issues and events that are deeply contested. Doing so in itself required me to adopt a certain approach to discussions, conversations and interviews that involved encouraging reflexivity from informants. I tried to emphasise that my role was not to make a judgement about the legislation and its approach but to encourage people to think and talk about their role in the process and their responses to other people and events. I was not trying to deny my own 'power' as researcher, but to emphasise my role in learning from the particular individual I was talking to, from *their* knowledge and experience, whether that be experiential, academic or practical. To a certain extent the ideal would be that the 'interview' became a process of listening and allowing people to talk, and created a space of mutual 'learning', or reflection. Having said this, creating such a space with those in positions of power – so-called 'elite' interviews – was obviously harder, constrained as they were by time and the pressures on them to present to me, an outsider and member of the public, their professional 'face' as a Member of Parliament, DLA official, advocate, etc.

Many people wanted to use the time to convince me of 'their' take on the issues and on other people's involvement in the events but this in itself was important and relevant, particularly given that one of the purposes of the thesis was to consider contestations and how they shaped what was considered legitimate and illegitimate knowledge amongst different groupings. Most of my in-depth interviews lasted about two hours or so, one lasted six hours – its description as an 'interview' becomes a bit of a misnomer. While I would prepare questions on the basis of 'homework' done prior to approaching different interviewees, these became at best a way of structuring the interview and focusing it on the issues that I was initially interested in, although I would always be inspired by and respond to the story told, with the issues referred to always raising new questions.

6 - Changing positionalities – encountering difficulties

As Marcus recognised, following changing identities will consistently involve change in the researcher's own positionality (Marcus 1995); my own identity as a young woman

will always be constructed in relation to the differing perceptions of different individuals. For example, sometimes my status as a woman would take precedence in importance to the particular informant I was talking to, but at other times other aspects of my identity came to the fore: non-South African, British, well-educated, middle class, a student, a researcher, a former lawyer, white, not black. My identity to different people was variously shaped by their *habitus*, their field, their possession and perception of capital. I found many aspects of life in South Africa to have familiar touchstones to my own, particularly when undertaking fieldwork in universities, research centres and offices – of lawyers, non-governmental institutions, government – even in Parliament: places of power. Being most comfortable in such places thereby reflects my own privilege.

Similarities, as well as differences, however, cannot be taken for granted and other aspects of the world I found myself in were completely foreign to me. Needless to say, living and undertaking fieldwork in a village in the former homeland of Gazankulu was a different world from that lived in the UK. But there were other differences that may not be so apparent, including those where similarity might actually be assumed based perhaps upon similarities in class of informants with similarly privileged class backgrounds. For example, the issue of race is ever present. Having grown up in a *relatively* racially mixed South London, and having spent a number of years in similarly mixed (though predominantly middle-class) university settings, I was shocked to arrive in South Africa and hear the constant daily racialised, and sometimes racist²¹, generalised distinctions made about 'blacks', 'coloureds', 'Indians', 'whites'²². When at times I challenged it, the challenge became the object of disbelief, or offence, or amusement. On arrival, I was taken aback when I realised that it had not even occurred to many people, even those in universities, not to use labels such as 'coloured', that there might be less essentialised and racialised – more 'politically correct' even – ways of referring to people. Such was the naivety of a newly arrived non-South African. Old categorisations of apartheid die hard. But rather than making a point here about the nature of South African society today, it is instead to recognise the importance of constantly challenging assumptions about difference and sameness shaping my relationships with informants. Our knowledge is always partial and located, shaped by our *habitus* and changing positionality, and relationships between people with different positionalities cannot be essentialised or assumed. As recognised by Lal, social research 'unavoidably reflects the social world in which it and we are situated' (Lal 1996: 196).

Most of the people that I approached in South Africa were accessible and open and more than willing to share their personal insights and I am overwhelmingly grateful to them – as I am to those at PLAAS and the LRC who gave me fairly unrestricted access to their substantial archival resources. But, because of limitations on time and place, I had to prioritise people that I spoke to. I focused on those who had been key in

participating in the policy processes specifically in relation to land tenure reform over the ten years between 1994 and 2004. While I carried out over 135 in-depth interviews, as well as undertaking archival research and textual analysis, many of my insights were developed through participant observation and observation, often by 'hanging out' at different individuals' places of work, including NGOs, the LRC, PLAAS, Parliament, the DLA.

Having said this, my 'multi-sited positionality' was viewed with suspicion, distrust and even hostility by certain individuals, specifically in the national office of the DLA. After trying repeatedly to gain access to a particular official in a superior position of authority in relation to tenure there (sending in my CV and a letter setting out the substance of my research, speaking even to the DG by phone and subsequently by email in an attempt to assure him of the non-partiality of my research so that he might persuade the relevant person to see me), I was eventually approached by the National Intelligence Agency (NIA) who claimed that, given my approaches to the DLA, they wanted to carry out 'checks' on me. Feeling intimidated and, perhaps over-reacting to their suggestion that they send their officers (presumably from Pretoria) to where I was staying in KZN to collect my documentation, I approached the British Embassy for reassurance, cut up my mobile phone SIM card, stopped sending emails, photocopied my fieldwork and interview notebooks and sent copies of them and dictaphone records back to the UK by registered post. While I did not have grand delusions about the importance of my own research, the NIA had recently been criticised in the media for their illicit 'raids' on a senior politicians' legal files and I did not know how much further they might go in a course of action that already appeared wholly disproportionate to the importance of my study. I had been warned at every turn about the sensitivities involved in relation to land, tenure reform and CLARA but I could only draw the conclusion that the NIA were either utterly misinformed in relation to my research or else they, or those who had instructed them to approach me, were resorting to petty intimidation. One informant, one of the last people I interviewed – luckily, because by this time I was pretty distressed by such a turn of events – told me that they had been approached, prior to my contacting them to ask them for an interview, by the particular official in the DLA 'warning' them about me. Another informant at the DLA had previously indicated that the reason why the particular individual in the DLA was "furious" about me was because they believed me to be undertaking partial research, for or on behalf of the director of PLAAS. The subsequent informant confirmed that this was the reason for the 'warning' he had received. Prior to this incident, three of my informants, without my prompting, claimed to have been approached by the NIA in relation to their land sector activism²³, but it was only after the NIA's approach to me at the very end of my years' fieldwork that I fully appreciated the extent of such

sensitivities. Moreover, it cast new light on the extreme pressure that such officials working within the DLA must be under if they were willing to resort to such courses of action. I also then, fully understood the distress that casting such mistaken aspersions on one's positionality, one's intentions and credibility, might cause.

From the beginning of my time in South Africa I had been made increasingly aware of others seeing my position as based upon, as discussed above, their perceptions of me and also upon my relationships with others. I arrived in Cape Town to begin my year's fieldwork and spent the first month staying in a guesthouse while looking for somewhere else to stay on a cheaper and longer term basis. During that first month I was told by one of my informants, that one of their close friends and colleagues – someone who I pretty quickly came to realise was also absolutely key in organising the 'opposition' to CLARA – was to be going abroad for three months and had a 'cottage' (a converted garage) in their garden that I might be able to rent. Without thinking of the implications of my doing so, or rather the way others might interpret the move, I jumped at the chance, agreeing to pay rent, walk the dog and keep mutual company with their Xhosa-speaking housekeeper and family who were to be staying in the house, all of which I was more than happy to do during this early time in South Africa when I knew very few people. About two months into this arrangement another informant told me that they had heard that I was staying with the family and wanting to know whether I was socialising with them – seeking reassurance that surely I was not enjoying 'Sunday *braais*' (barbecues) with them. On assuring them that this was not the case, and that the family was in any case abroad, they indicated that they were concerned that I was aware of how my living arrangements might be interpreted by others. They expressed disbelief that the arrangement had even been suggested to me in the first place and advised me to keep it quiet because "no one" would trust me if they came to hear about it. They told me that they thought I had been naïve and foolish but, in response to my growing consternation, and indeed feelings of naïvety and foolishness, they tried to reassure me that fieldwork is a learning process and told me their own tale of having stayed at the house of a chief in a village when they had first undertaken fieldwork. Nevertheless, I was taken aback. I was still at that time only just beginning to realise the sensitivities relating to the process, but had failed to recognise the extent to which people were still emotionally upset about the accusations and counter-accusations relating to the process and the personal betrayals that many people keenly felt as being wrapped up in the issues. From that moment on, however, I was even more careful at every point to assert the independence of my research, to refuse to align myself with any particular group and to maintain that the purpose of my work was not to cast judgement on the legislation itself or the 'rightness' of its approach. Although I did 'admit' to a number of other people later in my fieldwork where I had

stayed during much of my time in Cape Town, when the issue arose, for the most part I kept my living arrangements to myself.

Much has been written about unequal power relations between researchers and the researched, and development literature focuses particularly on the vulnerability of many research 'subjects' (Devereux and Hoddinott 1992; Wolf 1996; Brown, Boulton et al. 2004). But all research involves people in varying positions of power; my own included more vulnerable individuals living in areas to-be-reformed by CLARA but also those working for more powerful institutions such as the government, and others, including academic researchers, consultants and lawyers. Some of those in positions of power assert that power in the research situation, sometimes undermining, sometimes supporting, at other times subverting or manipulating the researcher's goal (Lal 1996). One such fieldwork encounter demonstrates this, as well as the importance of interrogating 'the nature of our relationships with those we study and represent ... questioning the nature of our insertion into the research process and its resultant representation' (*ibid*: 100).

As well as the issue of race ever present, it is impossible to spend any time in South Africa without becoming aware of the vulnerability of women. Numerous women I met told me of violence inflicted on them or threatened. Many of the stories involved guns, or brutality, or 'just' everyday beatings. Many others told me personal stories of violence against their wives, friends or relatives. Rape was a violence constantly feared. With stories swimming in my head soon after arriving in South Africa, I had an interview with a man who is well known for holding power on a number of fronts, one of them as a prominent ANC Parliamentarian. He is also apparently well known for other reasons and I had been 'warned' about sexual advances he had made to another researcher by more people than just her. He met all my expectations and went on to control the space and tenor of the interview, fielding my questions in an accomplished way. He opened the interview by asking whether 'they' had told me that he liked women and went on to suggest that I would make a good second wife. Within minutes, however, he invited in and began chatting to a male administrator as though I was not there. At one point he switched on the television connecting to a debate in Parliament that he told me he was missing for me. In response to my telling him how my time in South Africa was to be split and that I was to be going to Limpopo in the next month or so, he responded sarcastically, 'How *very* exotic.'. The next day I received a phonecall from him following up on his original, not so implicit, overtures towards me.

Given the oft-referred to treatment of women in South Africa, and the very issues relating to the vulnerability of women that were the subject of so much upset in relation to the reforms introduced by CLARA, his overtures towards me in this vein were

disturbing. They also raise important issues that many women have to deal with in fieldwork time and again – issues that are rarely referred to in development literature²⁴. Furthermore, this particular fieldwork encounter demonstrates well the *un*-fixity and *un*-predetermined nature of our identity (Lal 1996) and of our informants. As Lal and others have argued, our attention should be directed to 'the micropolitics of research interactions and the macropolitics of societal inequality' (*ibid*: 197). In this encounter, and I might say in others during the course of the year, I felt that due to vast societal gender inequality, shaped by macropolitics but playing out in the micropolitics of the interview, the interview space was being sexually constructed by a male informant beyond my control, and this was disconcerting and intimidating. At the same time, this individual inverted my assumed privileged position as Western middle-class researcher researching 'the poor' of Limpopo by an aspersion to 'the neo-colonial mentality of postcolonials' to exoticise difference and fetishise poverty (Lal 1996: 190). While I felt pretty powerless in this encounter, as recognised by Wolf, patriarchal relations of power may sometimes *support* a researchers' access, as may one's race or class (Wolf 1996). This reminds us that all our knowledge is 'situated' and that we must always as researchers interrogate the 'politics of location' (Haraway 1988: 589). Lal also draws upon Haraway to remind us that all such encounters and interactions will provide only partial access to informants' identities and of the need therefore to ask 'where and how we are located' and admit that 'we are engaged in a *mutual*, though unequal, 'power-charged social relation of 'conversation'' (Lal 1996: 200, quoting Haraway 1988).

The sensitivities involved in the research clearly raised ethical issues in undertaking the research, but also in its 'writing up'. In this thesis, I have decided that it is appropriate to withhold the names of informants. The only exception I have made is where an individual's identity is already public. It has, however, been argued (by a workshop participant at the North Eastern Workshop on Southern Africa in April 2007 at which I presented my research) that many individuals who were involved directly in the politics and processes relating to the formulation of policy will be able to identify others involved in the same processes and that I owe it to academia to reveal my informants' identities. Certainly I believe that ethically I should not reveal the identities of those who asked me to maintain their anonymity. Nevertheless, I have considered whether it would be right for me to reveal the identities of those informants who were explicitly happy for me to do so. However, given that much of my research involved participant observation, it is less easy for informants to give ongoing permission in relation to an ongoing relationship – as opposed to one-off permission in relation to a specific interview. Moreover, the research involved people in varying positions of power, and on reflection I have decided not to reveal informants' names. However, when I draw upon secondary information which is already public (e.g. when referring to a particular article written in

the press), I cite the named author. I have also named institutions and sometimes, where I have considered it important to position an individual in a particular hierarchy given the position they hold, I have referred to that position (e.g. the DG of the DLA, or the Director of the NLC). However, given that I am personally aware of the potential for intimidation in relation to issues raised by CLARA and that a Court case is being taken against the government by a number of communities, not revealing individual names will avoid particular individuals becoming identified definitively as a result of my research – even though maintaining complete anonymity is difficult and there could be some conjecture from readers of my thesis who are themselves within the 'land sector' in South Africa and who may personally know many of the people I refer to and cite. For those readers who do not know the individuals involved, my not naming them is inconsequential and will not detract from the analysis. For those other readers, not identifying them may arguably contribute to their focusing on the analysis – such as the reasons why people have taken particular positions in relation to the issues – rather than their personal knowledge of the individuals involved and their relationships with them.

Some of the 'events' that happened to me during my time of fieldwork throw a stark spotlight on those who are drawing upon particular forms of knowledge in contributing to shaping policy. Indeed, in this thesis I discuss the consultation exercises and participatory projects that others within the government and civil society embarked upon so as to draw upon particular forms of 'representative' knowledge that would shape policy. But in writing up this thesis, to paraphrase Fisher, I have had the freedom to position others in particular ways who have not similarly had the freedom to define themselves and their relationships with others on their own terms (Fisher 1997). Such discussion of 'consultation' and 'participation' is therefore also relevant to all researchers, who all have a responsibility to allow, as far as possible, the voices of informants to be heard, particularly those who do not have that freedom in their everyday lives, structured as they are by a harsh political, economic and social inequality. However, the voices of informants will always be mediated and located, embedded as they are in particular situated subjectivities and therefore, it is the situated nature of all knowledge that I strive to convey.

7 - Conclusion

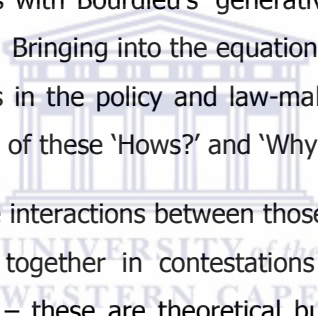
This chapter has discussed in detail the theoretical grounding of my study and the implications such theory had on my methodology. It also discussed some of the practical difficulties that I encountered, which in themselves are important in contextualising the implications of CLARA, of the contestations over it and the issues

that these brought to the fore. The Introduction set out the main question framing this project:

What have been the policy and law-making processes and practices in relation to the Communal Land Rights Act no. 11 of 2004 in its evolution, contestation and interpretation?

In considering this question in the specific contested context generated by CLARA, other questions emerged. These included:

How and why were these issues constructed so differently by different groupings? What assumptions was their knowledge based upon? How did the different groups legitimise, or try to legitimise their positions? How were the political spaces within which they were trying to achieve this, shaped? and, ultimately, What knowledge was excluded in these constructions?

This chapter has considered the appropriateness of drawing upon some of the notions and concepts brought to us with Bourdieu's 'generative structuralism' in attempting to respond to these questions. Bringing into the equation *habitus*, capital and field shaping the practices of participants in the policy and law-making processes relating to CLARA could begin to explain many of these 'Hows?' and 'Whys?'.


In an attempt to explain the interactions between those individuals and groupings within different fields who came together in contestations over CLARA, Bourdieu's theory demands further questions – these are theoretical but they also have methodological implications:

What for these individuals may not happen? What questions have been rendered unaskable? What is conceivable within their reality, and in turn what is inconceivable – that is, what is their orthodoxy or doxa? And, What, for them, has material and cultural 'capital'? And what is endowed with symbolic capital? Who else sees such 'truths' to be unquestionable? And who, in another field, does not?

These are questions that the following chapters of the thesis respond to. First, Chapter 3 introduces the wider context shaping this – it considers the construction of the state and begins to trace the wider field of power that influenced these policy processes, as well as considering those in 'civil society', those outside the state but interacting and thereby shaped by changes going on within it, and contestations within that arena. Contestations taking place both in the wider field of power and within civil society influenced and were sometimes brought to bear on struggles relating specifically to CLARA. In turn, the struggles over CLARA were similarly influenced by and influence those taking place in relation to the former homelands – where CLARA is to be

implemented. This does not constitute a discrete political playing field separate and apart either from the politics over CLARA, nor can it be separated from the local reality in such areas. Chapter 3 therefore goes on to consider the implications of these interactions 'on-the-ground'.



CHAPTER 3 – POWER STRUGGLES IN TRANSITION

1 - Introduction

The previous chapter introduced the theoretical concepts drawn upon in the thesis and also touched on some of the sensitivities raised in relation to CLARA. This chapter builds upon the Introduction in further contextualising, both politically and historically, the backgrounds of different individuals who participated in policy debates around CLARA. This paints a fuller picture that contributes to telling the story of their participation and explaining further those sensitivities. It considers how the transition to democracy affected the groupings that were involved in the politics relating to CLARA as well as those to be the subjects of it. It considers the dynamism that was brought about with the events of 1994 and the dramatic changes that occurred. But it also reflects upon what remained unchanged in the turbulence of that period. Both change and stability affected ongoing contestations between the different actors participating in this story and interactions within and between different spheres that together shaped the development of new practices. This contributes to understanding the development of *habitus* of different actors moving in different fields that are considered in the chapters that follow.

My thesis considers a snapshot – one changing over time – of the legal field, the activist field, the bureaucratic field and the rural field, brought into focus through my research. However, given the movement of people across such fields over this time, they became mutually constituting. And in the relationship between these fields, and other fields of social relations in South Africa, a wider field of power is constructed. These relations of power shape and explain wider political processes; such changing relationships construct this wider field of power and influence changing symbolic capital in terms of what knowledge is considered to be legitimate. The first part of the chapter therefore introduces this wider field of power. According to Bourdieu:

the construction of the state goes hand in hand with the constitution of the field of power understood as the space of play in which holders of various forms of capital struggle *in particular* for power over the state (Bourdieu and Wacquant 1992: 114).

It is therefore important to situate the politics of state-making and struggles for legitimacy in such a context of change. Moreover, this contextualises change in the different fields discussed in subsequent chapters. The following section then goes on to consider 'civil society' over the same period, focusing particularly on those NGOs within the 'land sector'. I look at changing relationships between actors, positioned in particular ways in relation to unfolding change, that have themselves shaped a changing

habitus. This further sets the scene for subsequent chapters considering the effect of such changes on different individuals and groupings in their positioning in debates in relation to CLARA and their strategies of legitimation (see Chapter 8).

Together the struggles over wider relations of power and the struggles for legitimacy within 'civil society' have been mutually constituting in their interactions. Through such contestations, particular conceptualisations of the rural areas of the country are constructed and perpetuated. However, these are spaces that also underwent significant change in the decade since the end of apartheid. In CLARA, varying interpretations of such change become the object of contestations that, in turn, shape contradictory interpretations of how they should be reformed and how property relations within them should be transformed; different versions of reform constructing a different reality. This chapter therefore also goes on to consider that reality, introducing some of the change, and lack of change, in those areas that the transition to democracy brought about. Such a 'context' is itself contested and power is constantly negotiated – a political playing field in itself. Therefore, contestations over its reform cannot be seen simply to have taken place in places apart from that arena, but must contend with such negotiated constructions of reality, supporting and supported by, shaping and shaped by a 'vortex' of power-constructed knowledge (Mendieta 2005: 408).

2 - Introducing the wider field of power: state-making and legitimacy in transition

Everything changed when the ANC won South Africa's first democratic elections on 27th April 1994. The gleaming white buildings housing the former white-only Parliament in Cape Town now saw black politicians walking down the corridors, men and women speaking *isi-Xhosa* in the public chamber and taking their places at the long dark hardwood desks in the wood panelled rooms where decisions had formerly been taken by the aged white men of the ruling NP, decisions that oversaw the imprisonment of many of those who were now sitting there. Although some places had been reserved for some of these men in the new Cabinet of the Government of National Unity (GNU), photographs of the early Cabinet show a group of predominantly black men, beaming and full of enthusiastic energy. Just three years before, many of them had not even been living in South Africa, fighting the apartheid struggle from their places of exile. Many of them had been schooled, gone to university and worked elsewhere, in Zambia, in the UK and the US. Others who had remained in South Africa had been in the thick of the struggle, underground in the ANC or in the leadership of the United Democratic Front (UDF) (Seekings 2000). Many had been imprisoned for their efforts. All of them came together now, finally, under a historical mandate to transform South Africa (Schire

2001). For all the international media hype pronouncing the 1994 elections as 'history-in-the-making', these were the people who were to live up to such a mandate.

Not only did those Parliament buildings in Cape Town see such a change in its corridors, but the bastion of Afrikaner bureaucracy, the greyer government buildings of Pretoria, also saw a transformation. While former NP Afrikaner bureaucrats were not, like their politicians, elected out of office in 1994, but their 'attrition', whether through 'natural wastage' or resignation in response to the opening of the doors of the bureaucracy of government to thousands of the ANC's supporters (Lodge 2002), was protected by so-called 'sunset clauses' (Sparks 1994). Such transformation, however, did not take place similarly across the board. For example, the NP's former Minister for Agriculture retained his position in Mandela's Cabinet and with him his cohorts in government also remained, whose experience, certainly in relation to the implementation of the NP's agricultural 'development' schemes in the former homelands, was unmatched. But generally, accompanying the changes in personnel, so was the rhetoric of government refreshed. The Congress of South African Trade Unions (COSATU) with its socialist rhetoric and class analysis of the economic problems of apartheid, was influential in crafting the first drafts of the Redistribution and Development Programme (RDP), that became so popular, and was then shaped by more inclusive debates, with wider 'civil society' (Lodge 2002). And that so many of those now in government had formerly been involved in the Mass Democratic Movement (MDM), and before that the UDF, both with their emphasis on participatory democracy and non-racialism (Seekings 2000), ensured a changed approach to policy-making. Women too, were recruited *qua* women after the ANC Women's League had so prominently supported the Women's National Coalition (WNC) that came together to lobby the negotiators to incorporate recognition of issues of concern to women in the Bill of Rights (Hassim 2003). Nevertheless, in spite of the flood of people from 'civil society' into government, many positions went unfilled, not only in central government, but also in the provincial and local tiers to which democratic power was supposed now to be decentralised from the formerly highly centralised apartheid machine. But insofar as there were spaces in the bureaucracy to be filled, those in national and provincial NGOs, in the South African National Civics Organisation (SANCO) affiliates, were headhunted and if possible, poached with the appeal of working for those ANC politicians in the new democratic Parliament, contributing to making history, as well as the appeal of stability that a government job held.

South Africa's 'final' 1996 Constitution, can be held up as the foremost achievement of this period. Hailed by lawyers across the globe as representing a beacon of progressive human rights standards, both civil and political rights as well as social and economic, the Constitution has been heralded time and again as symbolising just how much was

achieved in the transitional negotiations. As recognised by Klug (2000), for the ANC and NP, with their conflicting respective insistence on individual rights and group rights, to come to some kind of resolution so as to adopt their Declaration of Intent in support of constitutional democracy at the first meeting of the negotiations – the Convention for a Democratic South Africa (CODESA) – represented a major achievement. And then, to the surprise of many involved, it gradually became clear that the negotiations were to involve the drafting of and agreement of a fully-fledged, albeit 'Interim', Constitution, including a Bill of Rights, prior to the elections in 1994 (Chaskalson 1995; Klug 2000). But, given the extent to which the law had been delegitimised through its part in the destructive social-engineering that was apartheid – achieved through the adoption and implementation of thousands of apartheid laws still on the statute books – it is not only extraordinary that a constitution would be raised to its legal pedestal in 1994, but also that it was unquestioned by many that the apartheid legal tapestry would be undone only by the legislature passing legislation that would unpick, rescind and reform each law, one by one (Klug 2000). But seen against the global backdrop of the resurgence of the good governance agenda and the involvement of the World Bank in the negotiations (Weideman 2004), and given the purchase of liberal legalism in South Africa as the only non-racially based doctrine persuasive amongst all walks of the white elite (Chanock 1996), the power of discourses based upon law and rights is perhaps less extraordinary.

The very negotiations themselves, with their series of Constitutional Committee conferences and meetings with NGOs, human rights lawyers and academics (Klug 2000; Weideman 2004), set the scene for more inclusive policy processes after the elections. The first few years of democracy saw black and white people who had been in leadership positions in an array of different anti-apartheid groups, making the transition from activists to government. Doing so, however, held no inconsistency; their ongoing support for the ANC government in so many ways was the culmination of the struggle in which they had so long been engaged. Aside from the 'development' that was clearly needed to address the needs of 'the poor', 'participation', 'rights' and 'gender' became the buzzwords of the day.

'Gender' had experienced an exciting resurgence over the previous few years after its relative sidelining during the 1980s when discourses of unity and non-racialism within the opposition excluded other more 'divisive' issues (Marx 1992; Meintjes 1998; Hassim 2003). When CODESA began, women had been excluded from the team of 19 delegates (Hassim and Gouws 1998), but uniting in their exclusion, diverse women's groups were galvanised to form the WNC to draft a Women's Charter for inclusion in the Bill of Rights. While this was not achieved, advocates of gender equality achieved more than just rhetoric. With the strong support of the ANC Women's League (ANCWL), who had even threatened to boycott the first democratic elections with the slogan, 'No

Women, No Vote!', women not only secured a third of seats in the national Parliament, and 30 percent quotas for women to be put forward on ANC candidate lists, they also made an impact on the institutional framework conceived, with a 'national gender machinery' being set up, as well as influencing the constitution and the RDP (Waylen 2007: 531). Nevertheless, the women's lobby 'was left "angry at the fact that they received very little support or assistance from the various party leaderships"' (quoted in Walker 1994: 351). Even within the ANC, there was extreme conservatism when it came to gender issues; at the ANC's 1991 Conference at which the ANCWL pushed for a quota system, 'the majority of the 2000 delegates did not support the proposal ... [and] Not a single member of the [National Executive Committee] spoke in favour of the quota' (Meintjes 1996: 58). As recognised by Hassim (2002: 723):

where meeting women's demands would seriously conflict with the interests of other politically organised groupings, or would create the potential for loss of "more important" constituencies – such as the perceived loss of ANC access to and control over rural constituencies as a result of reforms of customary law that might result in backlash from traditional leaders – the negotiators were less keen to concede and, when they did, it was only to defer the conflicts to some future policies. (see further below)

While the changes that were achieved clearly amounted to real triumphs for the women's lobby, the inclusion of provisions protecting formal gender equality did not necessarily instigate changed practices. As Walker vividly describes, in the DLA, the genuine commitments to gender equality amongst key policy-makers in the first five years of democracy, not only had to be squared with the ANC's 'bigger' political intentions, but also had to be translated to changed practices on the ground, and often failed (Walker 2005).

The discourse of 'participation' too contributed to shaping policy-making at that time. In line with the approach taken by the RDP to address the extensive poverty and massive inequality that was apartheid's legacy, jointly forged with the ANC's alliance partners COSATU and the South African Communist Party (SACP), the government set out enthusiastically on its participatory approach, setting up local development forums and involving many in NGOs, principally the former colleagues and comrades of the ranks of activist bureaucrats, as 'stakeholders' in a range of government committees involved in policy-making (Lodge 2002). The expertise of academics and lawyers was also often drawn upon (Hassim 2005). Money from 'donors' (such as the US Agency for International Development (USAID), the European Community and the UK's Overseas Development Administration – transformed in 1997 into DFID), and from private foundations such as the Ford Foundation, that had previously been withheld from the

apartheid government, but had flowed in the millions to the ANC, UDF and then MDM, was redirected back to government. In turn, government began contracting NGOs, calling for tenders for consultants or NGOs, or NGOs-now-cum-development-consultancies, to work alongside them, not only in policy development, but also in 'service delivery' (Nauta 2004; Ballard, Habib et al. 2007). Nevertheless, Zola Skweyiya, the Minister of Public Services and Administration, indicated in 1995 that: 'there is 'more emphasis on representativity within the public service than in changing the way the public service works'' (quoted in Sitas 1998: 40). As recognised by Britton, 'the processes for initiating, drafting, piloting, and debating policy continued as they had before the elections even though the people and parties within parliament had dramatically changed' (Britton 2002: 57).

Klug (2000) recognised that there was one important tension deriving from a discrepancy carried through the negotiations and embodied in the Constitution: between the need for an interventionist democratic state to address the massive inequalities left behind by apartheid – for the ANC once elected to fulfil their 'historical mandate' – and the demand from many liberals and, ironically, also those who were destined to relinquish power in 1994, that any constitution should limit the power of the organs of state and the discretion of its leaders (see also, Price 1991). This tension is still felt today (Southall 2001). Moreover, as others have argued, such a liberal conception of legal uniformity that emphasises rights as a basis of entitlements to equal treatment, is in any case inadequate in the face of extreme inequality and difference along racial, cultural and gendered lines (Chanock 1996); while formal citizenship has been disentangled from race, without also disentangling class from race, the practice of citizenship will not be realised (MacDonald 2006). In 1996, Chanock warned that, when law and rights depend upon an incapacitated state, such rhetoric, unaccompanied by real change, could actually lead to a rejection of the law, and of such liberal discourses. Neither the discourses of law nor of rights, therefore, will trump politics. Nevertheless, such discourses are not just embodied in language, but engender institutions and practice (Hajer and Wagenaar 2003). And the tensions embodied in the Constitution, both between an interventionist state and a pared down liberal state, and between individual rights and group rights (or if not group rights *per se* then the collective right to culture), do not just exist within that document, but reflect tensions that exist, and sometimes erupt, as a result of the limited ability of the state to produce unity (Comaroff and Comaroff 2005). Moreover, the institutions and practices engendered by legal discourses ironically provide a means through which such tensions can be, and are increasingly, arbitrated (*ibid*). So, while the discourse of law, its institutions and practices, will not trump politics, indeed they are its product, the law also mediates the terms on which politics is often fought.

Although COSATU was key in negotiating the terms of the RDP, by 1996 it was complaining that the locus of decision-making on key political issues was not in the Alliance structure but in individual Ministries (Lodge 2002). Even though the ANC had challenged the form of the state as a racially constructed and constructing entity, it had not rejected its basis (Southall 2001). And although activists were now in the business of statecraft, they were learning to be bureaucrats in an already highly liberalised and in many ways advanced capitalist economy. In the face of a lack of faith amongst international investors, the early steps taken by the new government in the economy were tentative, with the appointment of the former NP Derek Keys as Minister of Finance. The pressure internationally for the ANC to moderate its radical aspirations for redistribution and nationalisation was immense and its economic policy soon enough fell into line with a liberal global capitalist economy. Meanwhile, the popularity of membership of the SACP fell, with half of its leadership allowing their membership to lapse (Johnson 2003). In 1996, the Growth, Employment and Redistribution strategy (GEAR), with its neo-liberal economic framework, was drafted in secret by a committee convened by the then Deputy President Thabo Mbeki, and was presented to the ANC's National Executive as a done deal (Lodge 2002). This form of decision-making, while apparently contradictory to the enthusiastic openness and participation that accompanied governmental policy-making after 1994, very much fell into line with the 'democratic centralism, tight internal discipline and strong central co-ordination' that had long marked decision-making within the ANC (Johnson 2003: 333). COSATU and the SACP, however, after their support for the new government and its policies in dismantling apartheid, responded with vocal dismay, with COSATU withdrawing from Parliamentary hearings on the budget, to which President Mandela in turn responded by rounding on the coalition for not falling into line given the global economic realities (Hirsch 2005). So, in the same year as the final Constitution was adopted, so was GEAR, but the gap between the rhetoric of rights upheld in the Constitution and the realities of life for millions of South African citizens was stark and, for many, they were further away from realising the social and economic rights within it, let alone being able to exercise their political rights. From that time, relations between the alliance partners have continued to deteriorate, with some in the ANC leadership, labelled as supporters of the black bourgeoisie, pitting themselves against what they in turn labelled, the 'ultra-leftists' of the SACP and COSATU, the partners pulling back from the 'brink' in 2002 (Jordan 2004: 211).

With his active day-to-day handling of the business of ruling, it became clear that the Deputy President Thabo Mbeki would become the next President. At the ANC's 1997 conference when this decision was announced, the ANC's Black Economic Empowerment (BEE) programme and Mbeki's aspirations for an African Renaissance were also

outlined²⁵. As analysed by Lodge (2002), there are both modernist and cultural versions of the visions embodied in the 'African Renaissance', but it has been the enduring power of this discourse in politics, alongside that of BEE, with its concomitant shift away from the idealistic non-racialism of the UDF and ANC into the transition, that is here more important to recognise. Perhaps the liberal ideal of non-racialism was bound to come up against the programmes of empowerment that were almost inevitably going to be introduced under the historic mandate that the ANC received for far-reaching transformation (Sitas 1998). In the face of massive disempowerment resulting from the extreme poverty in which black people continued to live, focusing on BEE in business, even in land redistribution, is far easier than the pursuit of equality (MacDonald 2006). It does represent an attempt to disentangle class from race, but without threatening the interests of business (Hendricks 2003; MacDonald 2006; Ballard, Habib et al. 2007). Despite this, it has been coupled with a Leninist discourse of the ANC as being the party of the national democratic revolution (Johnson 2003). In line with this discourse, has been its vision of 'the democratic state ... as the only legitimate expression of the interests of the whole nation', the ANC being the vanguards acting on behalf of the 'masses' (*ibid*: 335). Criticisms of that state, or demands for change coming from outside the state, are therefore denoted as illegitimate. Supporting that discourse is, of course, that of the African Renaissance which in turn supports the ideals of those subscribing to the politics of a resurrected black consciousness (Erlank 2005).

In 2004, Pallo Jordan, Minister of Arts and Culture, wrote:

in the past ANC networks linked one to the movers and shakers among organisations representing the disadvantaged, the poor and the disinherited, today they can also give you access to the leading corporate boardrooms, the cabinet, top civil servants and members of the political elite. (Jordan 2004: 209)

That political office opened up 'new circuits of power' (Sitas 1998: 41) after the Afrikaner nepotism of apartheid is unsurprising, and must be welcomed. By the late 1990s, however, NGO groups (see below) increasingly recognised, as did some of the opposition voices in Parliament, the sobering reality that the ongoing division between rich and poor continued to coincide largely with the racial categories cast by apartheid, and criticism mounted of the new state's inability to substantially alleviate such poverty. Given society's racially divided ownership structure, the majority of black people continue to be marginalised from benefiting from any form of black empowerment programme; the political and civil formal 'equality' accomplished by the new Constitution becomes empty without any achievement of social and economic equality (Hendricks 2003). This renders people's experiences of citizenship, at best ambiguous (Comaroff and Comaroff 2005; Von Lieres 2005). But, in the face of such criticism, racial

nationalism becomes a legitimating discourse, fitting with that of the leaders' historical mandate, and somewhat ironically (given the increasingly liberal approach of the government to the economy), liberal ideals of social and economic rights embodied in the Constitution are devalued, and critics are dismissed as 'liberals' or 'racists' (Maré 2001; Schrire 2001). In turn, it facilitates the strengthening of 'the empowerment and accumulation paths of a new power-bloc' (Sitas 1998: 45).

In the 1999 elections, the ANC, led by Thabo Mbeki as President and Jacob Zuma as his Deputy, won by an even greater landslide than in the elections of 1994. Given Mbeki's close involvement with the workings of government up to that time, the changes brought about in government, particularly in the land sector, were dramatic, but not surprising given his clear prior indications of his vision of the work yet to be forged by the ANC. His appointment of a black woman as Minister of the DLA was certainly in line with his championing of the empowerment of women for which he has been applauded. However, appointments of a growing number of women as Cabinet Ministers, alongside the quota system of women MPs, very much reflects a liberal understanding of representation, as an 'equal opportunity' issue. As argued by Hassim (2005: 184), however, 'it has not facilitated the redistribution of resources and power in ways that change the structural forces on which women's oppression rests'. Moreover, while there has been increasing rhetoric around 'gender', this has been limited to the acceptance of the need to eradicate poverty, largely caused by apartheid, and increase the 'productive' opportunities of poor women – a development outcome – as opposed to recognising and committing to change gendered power relations (Erlank 2005). While gendered power relations may well be exacerbated by poverty deriving from apartheid, challenging them would inevitably involve analysis of ongoing patriarchal forms of rule that have persisted *even* after the 'national liberation'. Instead, 'gender' has been dealt with through 'increasingly depoliticized and remote set of policy-making agencies' (Hassim 2005: 191, quoting Banaszak et al 2003), exemplified in the DLA's 'Gender Unit' with its 'weak institutional location and lack of authority' and its 'add-on' approach to women in development (Walker 2003: 125).

After 1999, the changes brought about in the DLA fit very much within the ANC's changed priorities. First, the new Minister dismissed Budlender as DG of the DLA and instigated a turnover of many other members of its staff, many of them who had gone into government from the former land opposition sector. Black faces replaced white, while policies, initiated by many who had been dismissed or replaced, were put on hold while a far-reaching policy review was initiated. Policies were repositioned to respond both to the demands of commercial agriculture as well as to those of aspiring black farmers (Hall 2007; James 2007). The Land Redistribution for Agricultural Development (LRAD) policy was launched and, as recognised by Walker, "[r]ace' and historical

disadvantage, rather than poverty or need (or gender), now became the key criteria for beneficiary selection' (Walker 2005: 302). The mechanism for 'redressing gender imbalances in land access and land ownership' was a 30 percent quota indicating the amount of land that was to go to women (*ibid*: 303).

So, in the political arena, change has been dramatic since the days of Afrikaner control over the power wielded through the national machinery of Parliament and the government bureaucracy. Through positions opening up in this national machinery, 'new circuits of power' have been reconfigured (Sitas 1998: 41). Nevertheless, the continuation and even strengthening of liberal economic policies has ensured that, although access to the thin stratum of power and wealth has been broadened, that very thin stratum of society representing the rich and powerful has not widened; in fact, inequality has worsened since the end of apartheid (Lahiff 2007). There still exists massive inequality between those accessing that stratum, now both black people and white, and 'the rest' – the majority of whom are still living in poverty, the majority of whom are black. But power can also be seen in an analysis of '[w]hat counts as justified belief and valid knowledge [which] set[s] limits to the kind of questions and information that are acceptable in the political debate' (Hajer and Wagenaar 2003: 13). What 'counts' will derive from contestations taking place between actors each bringing with them particular histories in arenas also historically shaped, but also shaped by specific social and economic imperatives (Bourdieu 1987). Meanwhile, discourses forged will interact and 'fit' with others, in turn contributing to the ongoing fluidity of the outcomes of such contestations in terms of what 'counts'. As the discourse of the African Renaissance supports that of the national democratic revolution, so have liberal criticisms been cast as racist, and feminism, as opposed to gender empowerment, has lapsed into a term of awkward disuse in its illegitimacy. In turn, through such processes of negotiation, not only will particular positions be cast as illegitimate, but new spaces for new political manoeuvring and resistance will also be opened up.

3 - 'Civil society'

The separation between the state and 'civil society' has often been criticised for being artificial (Lewis 2002; Nauta 2004; Mitlin, Hickey et al. 2006). Certainly in South Africa after 1994, the state and 'civil society' cannot be separated from one another; with the two spheres closely entwined, the relationship between the government and NGOs was rendered highly ambivalent. But 'civil society', the notion and its promotion, has also been criticised for masking 'stereotypic, idealized Euro-concepts' (Comaroff and Comaroff 1999: 23), that 'whatever is said in its name about universal rights and the equality of persons', even in the West, 'is founded on exclusion and division' (*ibid*: 24,

23 – see also Mamdani 1996). Similarly recognising the inconsistent roots of the concept, Lewis argues that:

[w]hether such efforts can move forward to embrace the political aspects of Gramscian notions of civil society, or whether development projects are necessarily neutralised by the forces which act to maintain Ferguson's (1990) 'anti-politics machine' remains an open question (2002: 583)²⁶.

In the 1980s in South Africa, activists had claimed their own legitimacy as the voice of 'the people', as opposed to the less representative elected councillors and institutions put in place by the apartheid government (Friedman and Reitzes 1996). During that time, such activists had been subjected to harassment by the apartheid authorities and their leaders to 'banning, arrests, detentions without trial, death threats and assassination attempts, and having their homes and cars petrol bombed' (Habib and Taylor 1999: 75). But, after 1994, they saw themselves as partners to the ANC in reconstructing the country; democratisation was seen to be incomplete without 'civil society' – deemed to be those associations that participated in 'the struggle' – participating in decision-making (Friedman and Reitzes 1996). 1994 was to usher in the long-demanded non-racial, unitary and redistributive economy that the ANC had for so long been demanding (Marx 1992). Furthermore, it was to be done through fulfilling the participatory democratic ideals of this 'civil society' that seemed to have been incorporated as key policy-making principles in the RDP. All of the boxes had been ticked – the 1994 elections saw optimism, hope and elation amongst the ANC-aligned former opposition groupings. Nauta describes the time as being characterised by a 'freedom and consultation' discourse amongst NGOs in South Africa and a 'pro-poor' rhetoric (Nauta 2004: 182), a time when 'the NGO sector was almost 'drunk' with hopes for the future' (*ibid*: 171).

Prior to the elections, in the land sector, NGOs, lawyers from the LRC and academics had for a long time worked closely together in fighting forced removals from black spots into the former homeland areas (Nauta 2004; James 2007). A number of dissident academics were also involved as researchers for the Surplus People's Project (SPP) that culminated in its report on forced removals around the country (Platzky and Walker 1985). NGOs were set up, with funding secured from overseas, and, having formed relationships with particular 'communities' that had contested their forced removal, they continued to support the efforts of such 'communities' to reclaim their land. And, although they were often run by these left-leaning white middle class activists, they often employed fieldworkers from the 'communities' with whom they had established linkages (James 2007). And, many of them aligned themselves with the ideals of non-racialism and unity propounded by the UDF and adopted a 'rights-based' approach to

reforms. Similarly, Habib and Taylor (1999: 74-5) position the LRC amongst NGOs 'that more openly associated themselves with the [ANC] and serviced the mass-based people's organisations of the national liberation movement (principally the [UDF] and [COSATU]'. With the National Land Committee (NLC), an umbrella organisation for land NGOs, convening meetings on land issues and in the early 1990s responding to and engaging with proposals for 'reforms' from the NP government, together, they formed a coordinated grouping. Meanwhile, however, ANC capability, even interest, in land reform was thin (Weideman 2004). With the ANC Land and Agriculture Desk that took over from the 'effectively dissolved' ANC Land Commission (*ibid*: 226), consisting initially of just three people, chaired by Derek Hanekom, recourse to this ready-made opposition land sector, with its knowledge and expertise of 'their communities', was an obvious step that was made more concrete after the elections. But before this, the ANC established the Land and Agriculture Policy Centre (LAPC), including within it researchers who had been in this opposition land sector, but also 'establish[ing] strong links with the World Bank' (Weideman 2004: 227). The LAPC was, according to Nauta (2004), officially an independent NGO, but in practice, after 1994, became intertwined with the DLA. In 1994, Hanekom was appointed as Minister who in turn appointed Geoff Budlender, the former director of the LRC, as the DG of the DLA. The new DLA not only recruited extensively from the former opposition land sector, but continued to involve land sector NGOs and the LRC in its series of consultative Task Teams and Steering Committees working on different strands of policy formulation.

A number of those involved in the activist land sector were closely associated with those in groupings such as the Rural Women's Movement (RWM). This had been formed in 1990 by the formidable Mam'Lydia Kompe, a former trade unionist, who was taken on as a fieldworker for the Transvaal Rural Action Committee (TRAC) in order to specifically target rural women. TRAC was a land sector NGO which was established in 1983 by the Black Sash in order to support rural 'communities' to resist forced removals and incorporation into Bantustans (Small and Kompe 1992). The RWM was 'a loose alliance of rural women's groups and projects from across the Transvaal and Northern Cape' (Kompe and Small 1991: 155). In the early 1990s, as the WNC managed to secure a wider audience for issues relating to gender equality in relation to the high level negotiations that were going on, so groups such as the RWM became more vocal as they managed to radicalise their members and make linkages with national networks (Walker 1994). As recognised by deputy Minister Mabandla in 1996,

members of rural women's organisations were "more vocal about the essence of women's liberation, they talk about emancipation from patriarchal control, the traditional system, they talk about equal access to resources ... the struggle

atmosphere in the country enabled women to at least claim the space to talk” (quoted in Geisler 2004: 80).

The RWM with its picketing and workshops (Albertyn and Mbatha 2004), supported by the ‘technical expertise provided by [TRAC] and [CALIS]’ (Hassim 2002: 718), ‘ensured that the Women’s Charter [adopted by the WNC] paid detailed attention to the issue of customary law and that there was follow through on the issue in the constitutional negotiations’ (*ibid*: 718). In the end, due to these concerted efforts, they were successful in ensuring that, in both the Interim and the Final Constitutions, customary law and the right to custom would be subject to the right to equality. As Meintjes noted, ‘[t]hough small in numbers, the RWM has been important in giving voice to the problems and needs of black women’ (Meintjes 1996: 55). After this victory over traditional leaders (see further below), it became politically correct not only for politicians ‘to stress his (or her) commitment not only to a non-racial but also to a non-sexist democracy’ (Walker 1994: 351), but also for activists, to affirm the importance of gender equality.

The collaborative grouping of land sector NGOs, lawyers and academics, who had so readily been included in decision-making for their ‘technical expertise’ in the negotiations, both in relation to gender and to land reform more generally, became confident about their influence amongst democratic policy-makers; many of them, after all, were their former colleagues and comrades. For many, 1994 marked a change for such NGOs from being opposition advocacy-based organisations to ones assisting a democratically elected government. The director of the NLC at that time told me how they had worked with the ANC before 1994, how they had engaged with lawyers to draft the Restitution Act together, and “we even knew that Derek Hanekom was going to become the Minister – that was part of the plan, we wanted a friend” (former NLC director, interview – 22.2.05). In terms of Bourdieu’s notion of *capital*, there was capital to be gained in developing (or even asserting) close relationships, friendships with the elected representatives of the people, particularly those who had achieved such a high status; at that point, such relationships were perceived as valuable. This NLC director recalled that, at one point in those early days, he had proposed a ‘Memorandum of Understanding’ (MOU) between the NLC and the government “to cement an ongoing engagement, a forum for engagement – a direct-line. Government gains from that ... if the NGO sector doesn’t have a direct-line, what are they going to do? Go to press. Start *toyi toyi-ing*.” (*ibid*). For him, the former opposition had ‘grown up’ and were now partners with the now-democratic government in rebuilding the country. Going to press and *toyi toyi-ing*, those things they did before, had less credibility than the contractual, legal, cementation of such close relationships he now boasted with the Minister. While the subsequent director of the NLC was dismissive of the idea of a MOU, when he had

taken over the reins at the NLC he had been similarly positive about the NLC's special relationship with the Minister. And, just as the former director had boasted of his involvement in the plan to have a friend installed as Minister, he boasted of the way he and his comrades had taken part in "strategic scheming behind the scenes" as to which positions in government they would 'take' after the 1999 elections (former NLC Director, interview -7.12.05). By 1999, however, an ideological, perhaps consciously neo-Gramscian, distance between 'civil society' and the state had reinserted itself into his analysis of such relationships and he qualified this by adding, even though "as 'Comrades' we would have to be separate from anything to do with government, but we also thought that perhaps we ought to put our people inside government" (*ibid*).

In 1995, of great significance to the land sector in South Africa, PLAAS (meaning 'farm' in Afrikaans), was set up by the leftwing formerly exiled academic, Ben Cousins. It was established with the help of a Ford Foundation grant at UWC. This 'programme' soon became an institution for both the government and for the non-governmental land sector and many activists in the land sector enrolled on its Masters (MPhil) programme. Directors of NGOs, those in their lower ranks, as well as those claiming positions as radical land activists, all boasted of having passed through the MPhil programme or some kind of PLAAS training programme. With its close linkages to the LRC in Cape Town developed through ongoing personal friendships – the two institutions often convene, or at least attend, joint workshops on the latest bit of controversial land legislation or 'test case' brought by the LRC – land sector activists in South Africa are among the ranks of the best educated in the country. Although PLAAS has provided a supportive environment for its researchers to engage in critical research and to challenge the government's land reform programmes, it has not been granted core funding from UWC other than that generated from student fees. Therefore there has been an ongoing need for the institution and its researchers to continue to secure project and other funding. Meanwhile, it set up training programmes for DLA staff, and PLAAS's director and many of its staff provided consultancy work for the different sub-directorates of the DLA dealing with land reform. Over a period of four years, its director was appointed to the Tenure Reform Core Group (TRCG) that worked on developing the Department's reforms relating to land tenure in the former homelands (see Chapter 5).

The influence of the former opposition land sector on the new government in the first few years of democracy cannot be underestimated. Not only did those in the non-governmental sector provide consultancy services and training to government officials, as well as participating in government policy-making 'task teams' and other fora, but a huge number of people working in NGOs from all sectors actually transferred into government; approximately 70 percent of the DLA's senior staff came from NGOs

(Weideman 2004: 228). Meanwhile, however, according to Nauta (2004: 187), in 1996, in the NGO that formed the basis of his study of the Eastern Cape, staff numbers dropped from 18 to 7, with many of those leaving given government jobs, some after only one year of experience. This mirrored what was happening in many other NGOs across the country – up to 60% had left by 1997 (Habib and Taylor 1999: 79). This ushered in a time of forced reflexivity in the NGO sector. While this was positive insofar as their former colleagues were now the shapers of policy in government, it also left the NGOs weak and understaffed. At the same time, they were to cope with a significant loss of international funding and, further confusing their status as 'independent' 'non-governmental' organisations, both the USAID and DFID adopted policies to ensure that their support was limited only to projects or organisations that worked with or supported government policies. All these changes contributed to a 'deep identity crisis' (Heinrich 2001: 4): 'the ultimate goal of the anti-apartheid and liberal NGOs – that is democracy – had been achieved', replaced by disparate objectives, from development, to lobbying, to holding government accountable, which often meant that 'NGOs suddenly had to place efficiency above consultation or internal democracy' (*ibid*: 4, 5). In this context, many NGOs turned to project work, partly to meet donors' demands, and policy research, many seeking self-sufficiency through government or even corporate contracts (Habib and Taylor 1999). Some have survived as 'advocacy agents', with expertise and having secured sufficient funding to contribute to legal and policy debates and public consultations (Hassim 2005: 184). However, concerns have been raised about such organisations moderating their demands so as to 'fit the discourses of the state' and the inevitability of a growing distance from their constituents with the growing closeness, or 'upward political linkage' with the state that might contribute to their 'elite bias' (*ibid*: 185, 186). And then, in 1997, at the 50th ANC Conference, the same conference at which the BEE and African Renaissance programmes were outlined, President Mandela launched a well-publicised attack on NGOs for their lack of accountability or connection with the masses and for servicing the interests of foreign donors. This was to usher in the start of what Nauta (2006: 187) has described as the 'new realism era' for NGOs.

But, even before 1994, certainly amongst the land sector opposition, there were murmurings of discontent over the way the ANC was negotiating in CODESA and in relation to the property clause. During the negotiations over the Constitution, the World Bank had become increasingly involved, supporting redistribution, but only insofar as it was a market-driven process, and in turn supporting the NP for the inclusion of a property rights clause protecting the rights of existing owners (Klug 2000; Weideman 2004). Unsurprisingly, the opposition land sector were vociferous in their criticism of these concessions, but at a 'strategising meeting' convened at the end of December 1993 and well-attended by NGO representatives, LRC lawyers, academics and ANC

representatives, including Derek Hanekom, accusations were made that 'ANC people have been involved in trickery and traded for other things' (Minutes of the Strategising Meeting – 9.12.93). Moreover, there was a 'need to clarify who our allies within ANC are', and a note that the '[s]pace for protest about land issues [is] likely to close' (*ibid*). While the controversial property clause was accepted in the Interim (and also the Final) Constitution, with the coming of the elections in 1994, such misgivings amongst the former opposition land sector (who had, in any case, according to Weidemann (2004: 225), 'played a key role [in the process]') were for a while cast to one side in their enthusiasm for contributing to making history. Nevertheless, this began to wane after the first few years and, according to Nauta (2004: 207), in the course of 1997 the government's 'inclusive' Task Team and Steering Committee meetings involving the NGO sector 'were progressively badly attended and completely ceased at the end of the year'.

Although the 'new realism era' had to a certain extent been forced on the land sector through decreased funding and a massive loss of staff, had this 'realism' not incorporated a reassessment of the relationship between the state and 'civil society', the second democratic elections in 1999 forced them to do so. Certainly, none of the NLC director's boasted 'behind-the-scene schemes' came to pass. Instead, when Hanekom was replaced by Thoko Didiza, and then Geoff Budlender for Gilingwe Mayende, many people resigned in support. Meanwhile, others working for NGOs, PLAAS and the LRC, who had formerly been consultants to the government, felt increasingly excluded, their contracts coming to an end or their views simply not sought. For example, PLAAS's government training programme was cut. Many spoke with bitterness about the way these changes were carried out. As would be expected, what has been described as a 'purge' (Weideman 2004: 233), was resented most vocally by those who had directly been smarted by the changes, or those whose friends or colleagues had been affected by them. There were bitter accusations of racism alongside criticisms of the new Minister for her lack of experience and 'incompetence', and that of her new government. PLAAS's director, the LRC lawyers and others who had been personally closely involved in the government's land reform programmes, expressed vocal support of colleagues who had been dismissed, and criticisms, in the media and elsewhere, of the new establishment. After 1999, a lot of individuals in the land sector felt the change in policy-making under Didiza's Ministry as being defined by their exclusion (see for example, Interview with the Minister, AFRA News, March 2000). Nevertheless, such changes also brought about more circumspection from some, including the former director of the NLC, about their relationship with the former Minister, recollecting with doubt that, "he certainly *seemed* to listen ..." (former NLC director, interview – 7.12.05). Given the increased pace of land reform under Thoko Didiza, a number of them had

become rather more doubtful about the usefulness of formerly having secured 'coffee meetings' with Derek Hanekom.

For some, however, the change of Minister and make-up of the Department caused a dilemma of a different kind. For many NGOs, helping people often meant co-operating with the programmes set up by government to get land, slotting within them, ceasing to challenge them and often even having government refer difficult cases to them. Many working for NGOs were supportive of the change in the faces of those representing government after 1999 but, with echoes of the dilemmas the former opposition land sector activists may have felt in the face of the post-1994 government ushering in programmes such as GEAR, one interpreted the difficulties that such change had elicited:

Now our former allies are officials in government, so in situations with them we don't resort to those kind of antique responses. But we are faced by a dilemma of engagement – a *new* form of engagement. We need to acknowledge that the legislation [that has been] passed as tools are all characterised by loopholes and contradictions so we need to effect legislative review. We are no longer activists – yes, we can remain comrades, but with less vigour. (Nkuzi employee, Plenary, Strategic Planning Meeting – 22.11.05)

While this person's opinion elicited a healthy debate amongst other NGO staff, some agreeing but others roundly denying such an interpretation, others remained confused: "The DLA is referring so many cases to [us], what is our role?" (*ibid*). So, under the pressures of limited funding, with many NGOs shifting to project work, sometimes responding to government tenders and so contractually bound to fulfil the 'terms of reference' laid down by the government, their compromised 'NGO' positioning was often felt keenly.

Unsurprisingly, the changes were interpreted differently by different actors (James 2007), with splits appearing depending on age, experience, personal histories and sometimes race. For everyone in the activist field, such changes in government represented a shift in their access to different forms of capital. Some labelled the change in government personnel an 'inverted racial purge' of white people from the Department. Apartheid was founded on issues of race, but in the early days of the transition there was a certain euphoria over 'the end of racism' and the realisation of 'equality' between all races. Of course, such a realisation was never really achieved and, before long, issues relating to race re-surfaced as the reality of the lack of economic, geographic and material change in the country began to sink in. But, as these changes made splits between activists in the land sector more marked, 'race' became asserted in struggles amongst them as representing itself something that was

valued, a form of capital, sometimes negative capital. Race had become a card to be played in the game and in struggles to accumulate capital amongst activists, and 'white people' and association with them, often represented negative capital. This in turn wedded with discourses playing out at a national level of the African Renaissance, tapping in as they did with those of a resurrected black consciousness. As the discourse of race interweaved with others, so contradictory discourses were set up in opposition and, as the conflicts between different groupings within the opposition land sector, all supposedly idealists fighting a virtuous struggle, here too, liberals became branded as racist (see below). With such a resurrected racial consciousness undermining the 'legitimacy' of the idealistic non-racialism – talking about race became re-legitimised in a kind of populist anti-political correctness – and with a resurrected black consciousness in discourses of the African Renaissance, 'blackness' gained kudos. 'Gender', however, once again lapsed in importance in the hierarchy of issues of significance. Those older activists, for whom non-racialism had been an undisputed goal to strive towards, talking about race and acknowledging racial difference was not easy; many were white and doing so in any case brought with it uncomfortable questions about their own, continuing privilege.

Towards the end of the 1990s, and certainly after 2000, perhaps to a certain extent inspired by the government denying their former taken-for-granted inclusion in policy-making, concerns relating to the extent to which NGOs were truly representative of their grassroots constituents began to appear more prominently in the minds of many NGO workers and for the NLC. Thinking about such issues raised many others relating to their role and positioning, but this is not to say that such issues had not occupied people's minds for quite some time. In 1993, the NLC drafted a position paper on 'State Strategy on Land Reform' indicating:

[this] once again raises the crucial need to facilitate the emergence of a Rural Social Movement (RSM), as an independent community-based organisation, which can lay some sort of claim to representing a rural constituency. We are not going to have clout as NGOs alone. The government consults us as service organisations, but they equally consult the [South African Agricultural Union] and [National African Farmers' Union]. The implications for NLC in terms of assisting funding of a RSM, and its role (more supportive to a community-based organisation) are far-reaching. (NLC – draft position paper 'State Strategy on Land Reform', 11.93: 9).

The eventual 'launch' of such a movement, however, happened only in 2000, at the World Conference Against Racism in the form of the Landless People's Movement (LPM). The tensions that this created within the NLC, however, led to its eventual collapse.

Although many directors of the NLC's affiliates were not supportive of the organisation having such a close relationship with government up to 1999, whether or not this went as far as envisaging their NGO supporting the emergence of a social movement – for some, this went beyond their radical positioning – real or conjured pressure from funding organisations came to compromise their positions in doing so. For others, the change in government forced exciting dialogues about their own positions in inspiring radical change and trips were organised for people occupying prominent positions in the NLC, to Zimbabwe (at the time of Zimbabwe's first high profile land occupations) and to foster relations with other, more successful, land reform movements such as the Movimento Sem Terra in Brazil (Mngxitama 2006). One person who had been prominent in the NLC over the period was candid in that he "thought that the NGOs need to continue playing a leadership role because the landless people are not really ready to take on that role" and, as an aside, "vehemently opposed ... the discourse about land occupations" (former NLC employee, interview – 7.12.05). Meanwhile, the director of the NLC, as well as many staff members working in the national office strongly supported the emergence of strong, independent voices from the ground:

the only way that we can challenge government is for communities to emerge – and as we [the NGOs] are going [into the background] then the social movements become more visible ... this was a change because what happened before was that social movements were giving voice to the agendas of NGOs ... We believe in the instrumentalism of NGOs – rather than using social movements and communities – we can't just bus them around when we need them. (former DLA Director, interview – 7.12.05)

'Bussing' people around was a reference to those NGOs who had facilitated the direct participation of 'community' representatives in debates over governmental programmes, but the criticism was that they had done so in order to influence policy on their own terms. But for this director, and many of the staff in the national office of the NLC, inspiring the emergence of a social movement and then letting it loose to campaign on its own terms, rather than controlling it, was seen to be more 'radical'.

With the pro-poor stance and gender awareness of activists and government in the first five years of government, poor women had become their representatives of choice. Once the new government began to deny the unquestioned representativeness of NGOs, for those wanting to influence policy, ensuring that the voices of 'the poor' and 'women' were heard by government seemed to be increasingly necessary, particularly, as mentioned above, with the government's substitution of race and historical disadvantage, for poverty, need or gender (Walker 2005). After 1994, the women's movement, with many of its most active members going into government and

Parliament, became what has been described as 'chaotic, unstructured, and defying easy description' (Horn 1995: 72). While the RWM continued to exist, and continued to work on, for example, the reform to customary law of marriage alongside CALS (Albertyn and Mbatha 2004), with its leader also moving into Parliament, it also became a much weaker force for lobbying. Meanwhile, the focus on women's interests and/or gender relations that the transition encouraged had hardly been institutionalised amongst land sector NGOs and as recognised by Meer, 'there was little research or practice to inform attempts to address this issue' (Meer 1999: 80). For example, in KZN, the Association for Rural Advancement (AFRA) that was established in 1979, only in 1995, in a self-avowedly 'tentative' way in the face of a rather ambivalent response within the organisation, that they 'started working on gender issues in communities when a gender specialist was employed' (Kleinenberg 1998). But, following the precedent set by TRAC in the early 1990s, in 1998 AFRA took the decision to similarly 'facilitate a Rural Women's Movement' (*ibid*). Although this organisation now indicates that it is 'the Rural Women's Movement' (www.rwm.org.za – my italics), by 2002, according to (Cross and Hornby 2002: 139), it 'had not addressed land issues with any seriousness'. This was a disappointing contrast with the original Transvaal RWM of the early 1990s that describes itself as having been a 'lobby group on land issues' (www.nmrw.org.za)²⁷. Furthermore, although 'gender' was increasingly incorporated into the land sector's interventions, it was perhaps done so as a bit of an uninterrogated 'add-on' (Meer 1999; Hargreaves and Meer 2000), as Walker's work also reveals in relation to government practice (Walker 2003). And certainly, until the uproar created by the NLC/PLAAS Project in relation to the CLRB in 2003 (discussed in the Introduction, and subsequent chapters), the practices engendered by the land reform programme had not been subject to real scrutiny in terms of their impacts on gender equality. But, with the discourses of the African Renaissance linked with liberation, race became 'superior' in the criteria of those to be empowered and for those who considered themselves to be more 'radical', even this focus on 'women' did not go without contention. During an interview with one of the key drivers of the LPM, s/he began talking about an 'obsession' of certain activists with 'women's voices':

ERAF²⁸: Sorry, you were saying, 'Liberal, feminist ...'.

Yeah this obsession with, – part of the anthropological experimentation, you know – 'All these Africans, they are oppressing each other what, what, what ...'. So my point was – equality amongst African men and women in poverty, in landlessness doesn't particularly interest me. It's kind of, the down spiral kind of thing – common denominator at the lowest level. ...

You see, the ANC and other land organisations were very influenced from a conceptualisation which emerged from the NGOs, Black Sash – I'm sure you've heard about that thing, you know, very welfarist, unashamed kind-of-thing, which does not link the land question to liberation – these are about ameliorating the conditions of people who are not necessarily seen as equals ... (former NLC employee, interview – 13.1.06)

In a climate of penny-pinching for all NGOs in South Africa, the frustrations of both camps within the NLC were inflamed by financial concerns: the withdrawal of funding for a long-standing 'capacity-building' project and the securing of funding for the LPM from War on Want. Ideological accusations were fired in both directions. The LPM became the target or, depending on one's position, the quarry or prize of the opposing camps. People put a great deal of effort to ensure that I heard the full story, but in doing so wanted me to know who was to blame. Many people's views, however, were not put forward in support of their own positions, but in opposition to framings that they did not want to be identified with. For example, if a particular framing is constituted by 'black = radical', in this case such radicalism goes with 'in support of social movements' (and by extension the LPM), and in turn, with 'anti-NGOs', 'anti-government'. The opposition is thereby cast as 'white = liberal' and so 'in opposition to social movements', 'pro-NGOs', and 'pro-government'. Therefore, being accused of subscribing to any one of these categories automatically draws in the other concomitant parts of the frame. So, for example, the accusation - "all of these guys were experts, and these are white guys in the NLC network – as soon as you have an LPM that speaks for itself, their kind of prestige becomes questionable" (former NLC employee, interview – 13.1.06) – immediately explains that the "white guys" have good reason to oppose the LPM. Some accusations were also attempts at undermining the integrality of the frames themselves: the accusation that "the office staff ... were self-serving in that they wanted to continue getting their over-generous salaries" (former NLC board member, interview – 12.1.06) puts the office staff into the 'liberal' camp and thereby undermines their own 'radical' positioning. In turn, the accusation that "those leading the charge towards the rurally-poor-led-social-movements were extreme vanguardists – who were really driving it forward as individuals" (former NLC employee, interview – 7.12.05), undermines the unassailability of the position of those supporting social movements, by casting doubt on their relationship to, and therefore the integrity of the 'social movement' in question (see James 2007: 216-222 for more details about the specific events at this time).

These struggles clearly imply contestations over attempts to claim symbolic capital, the achievement of legitimacy for their version of the 'truth', both through the use of techniques involving accusations of illegality, of racism, of bourgeois interests masked by 'claims' to support 'the poor and landless' and through endeavours to imply a

distance from similar prejudice and instead present the 'objectivity' of situation. Many have expressed scepticism in relation to the achievements of the LPM. Indeed, attention can be drawn to the real weakness of the movement as a national movement in provinces outside of Gauteng and Mpumalanga, with local branches both uninformed about decisions taken at a national level but also caught up and weakened by their own internal politics as well as their lack of resources and weak membership. Moreover, at this time, the environment in the NLC national office was obviously difficult – one person described the conflict as “a political battle – it was – full of vision, of the direction of the NLC” (former NLC employee, interview – 13.1.06), and another as “just war every day” (former NLC employee, personal communication – 19.12.05) and the issues, particularly those relating to race, have clearly generated discomfort amongst activists. But even one of the former NLC board members who had been openly critical of some of the people in the NLC national office, accepted that the emergence of the LPM at that time was important in “creat[ing] a different kind of momentum and elicit[ing] different responses from government” (former NGO director, interview – 12.1.06). While its emergence may not have obviously achieved much that is tangible, it has been important for other reasons relating to the struggle taking place in the activist field, and in South Africa more widely. It created waves that generated debate in wider circles than just the NLC national office. Primarily it has been important in upping the stakes in the activist field, in bringing the struggles over race, identity and even activism to the fore – crucial issues that will continue to challenge South Africa’s transition.

4 - Beyond apartheid: new rural spaces?

Both of the above sections on the effect of change forged in the transition on the wider field of power and on 'civil society' are to a certain extent incomplete without considering how lobbies representing chiefs were received within such arenas and how that response shaped politics in relation to the institution of the chieftaincy. This is of particular relevance when considering the politics that played out between them in relation to the reform of land tenure in the former homelands and specifically politics over CLARA. Politics within the wider field of power shaped more located struggles relating more specifically to changes embodied in the proposals for reform, those relating to gender empowerment and constructions of citizenship and culture. Together these were the terms on which contestations over CLARA must be situated, and are discussed in the next section.

But such contestations also relate to real places - the former homelands – that are to be reformed by CLARA. These places, like the rest of South Africa, have been subject to considerable change since the end of apartheid and the coming of democracy. Many of such changes have had real material effects on the lives of people living there, such as

the provision of electricity. Others relating to the administration, boundaries or political status of the areas have affected the lives of people living there no less fundamentally. However, these changes have been mediated by contested local politics shaped in turn by power relations on the ground. The following section considers this context: how negotiations relating to chieftaincy and tradition at a local level continue to shape power relations amongst the people living in such rural areas of the country. This qualifies any assumptions of change that may otherwise derive from analysis of those changes introduced at national level. Given the case study undertaken for this thesis, of a village called Chavani in Limpopo Province on the edge of the former Gazankulu homeland (see Chapter 7), the focus here is also Gazankulu. This contextualises how such changes unfolding at the end of apartheid came to impinge on that particular place.

4.1 - A political playing field

Although Mbeki's calls for an African Renaissance interwove with and were strengthened by discourses defined by a resurrected black consciousness, Africanist and traditionalist discourses had been shaping politics since long before 1994 (Spiegel and Boonzaier 1988; Walker 1994). With ongoing violence between IFP and ANC supporters in KwaZulu in the early 1990s (between 1990 and 1994 14,211 died, mostly in KwaZulu and Natal (Maré 1996)²⁹), the IFP commanded recognition and, in spite of withdrawing from the negotiations and threatening to boycott the elections, strongly influenced the politics of the transition. Banding together with a variety of rightwing and/or federalist groups, such as the Terreblanche's rightwing Afrikaans party (Sparks 1994: 25) and the Gazankulu Chief Minister's Ximoko Progressive Party, they drew upon 'traditionalist' discourses in having their voices heard (Maré 1996; Allen 2006).

Not only the NP³⁰, but also the ANC saw traditional leaders as potentially important intermediaries in garnering support (Oomen 2000; Ntsebeza 2005) – ironically given the historical failure by the NP in presuming the same since 1948 (Evans 1997) – and in the negotiations over the interim Constitution, the ANC-aligned CONTRALESA were also a vocal lobby. CONTRALESA was formed in 1987 by a number of ANC aligned chiefs, mainly from KwaNdebele, Venda and Gazankulu, then in the Transvaal, many of whom had united in fighting the 'independence' of the KwaNdebele homeland and the incorporation of Moutse into that homeland (Murray 1987; Maloka 1996; Van Kessel and Oomen 1997). On the one hand, they had been brought together through the activities of ANC aligned UDF structures (Maloka 1996) – the Black Sash, TRAC, the National Committee Against Forced Removals and the LRC had all worked to support those fighting these battles in Lebowa and KwaNdebele (Abel 1995) – but on the other, just one year before, in 1986, the National Working Committee of the UDF had resolved in 1986 that 'tribal structures should be replaced with democratic organisations' (Van

Kessel and Oomen 1997: 5). However, the ANC quickly moved to support CONTRALESA, despite criticism from 'old guard ANC activists, intellectuals and rank and file members' (*ibid*: 7). Such support for CONTRALESA proved to be a double edged sword (van Rouvery van Nieuwaal 1996): by 2004 CONTRALESA had some 2000 members, the majority in the Northern Transvaal where the ANC also found its strongest base of support, but at the same time, many of its members 'had a history of bitter conflicts with their own communities' (Maloka 1996: 184) and were using CONTRALESA to support their power and bolster their undermined legitimacy. With the IFP commanding such authority in KwaZulu, the ANC, with its longstanding urban bias, was trying to use CONTRALESA as its own lever into the rural field – or, 'that other world' as described by van Rouvery van Nieuwaal (1996: 54). He also recognised that the chief is positioned in an 'intermediary role between state and people' (van Rouvery van Nieuwaal 1996: 68): 'the chief has been charged with double legitimacies [– 'of traditional phenomena' and 'of state institutions' (*ibid*: 67) –] and double loyalties [between state and people] (*ibid*: 68). And so, with supposedly privileged access to 'traditional' capital, as well as that derived from the 'politico-legal means of power from [a] different world..' such as 'academic titles and various economic activities' (*ibid*: 62), particular chiefs in South Africa began their own crusade to gain symbolic power.

After Buthelezi's IFP refused to participate in CODESA, due to the exclusion of the Zulu King Goodwill Zwelethini, the talks collapsed. In response, so as to counter Buthelezi's demands, the ANC campaigned to open up the negotiations completely so that ANC-aligned groupings could also participate (Maloka 1996). But, when the multi-party negotiating process was reconvened, the IFP, CONTRALESA and representatives of chiefs from the Eastern Cape, the Orange Free State and parts of the Transvaal all participated and, in turn, the attention given to the chieftaincy was bolstered (*ibid*). Then, in the negotiations over the interim Constitution, CONTRALESA spearheaded a campaign over the exemption of customary law from gender equality provisions, and then for customary law to be entrenched as a fundamental right. 'Traditionalist' and 'Africanist' discourses were deployed, not only to legitimise their position, but also in an attempt to set out, and thereby delineate the boundaries of, the terms on which the battle was to be waged (Walker 1994). Although, as indicated in the section above, the 'traditional' lobby were ultimately defeated by a vocal opposition of women's groups, such a victory for women did not receive unqualified political support from the leadership of the main political parties. Moreover, the interim, and subsequently final, Constitution recognises the institution of the chieftaincy and customary law, as well as giving traditional leaders, through the establishment of a National Council and Provincial Houses of Traditional Leaders, advisory powers 'but not to initiate or veto any act' (Walker 1994: 354). That they do not have the Constitutional 'right' to initiate or veto

any act, presumably does not, however, preclude their attaining the power to do so; symbolic power is not so easily delineated.

Two months before the 1994 elections, 40,000 IFP supporters had marched on Durban demanding succession and, with the IFP still threatening to boycott the elections, in April that year, leaders from the ANC, the government and the IFP met for talks and together agreed that the IFP would participate in the elections and 'to recognise and protect the institution, status and role of the constitutional position of the King of the Zulus and the Kingdom of KwaZulu-Natal' (Landsberg 2004: 154). After the elections, Buthelezi was given a Cabinet position in the GNU. It was then revealed that, the same month, the NP had hurriedly and secretly allowed the KwaZulu legislature to pass the Ingonyama Trust Act, whereby the KwaZulu homeland was transferred from the state to the Zulu *Ingonyama* (king), just days before the elections. After an initial outcry by the ANC, it dampened down its opposition in the name of 'tradition' so as not to upset its wooing of the *Ingonyama* Zwelethini away from the IFP (Walker 1994). These backroom negotiations with those in the highest echelons of the political field, set a precedent for the continued bypassing of official policy processes in traditional leaders' ongoing concerted campaigns to achieve their objectives (Ntsebeza 2005). In the ten years that followed, rather than negotiating directly with their opponents in, for example, departmental consultation processes, time and again they have secured their greatest coups through closed-door meetings with the President, the Deputy President, through 'technical committees' and 'task teams', and through other means. For a start, three of their most prominent spokesmen themselves figure prominently in the political field and, from within that playing field, cover all bases: the ANC, IFP and CONTRALESA. Nkosi Phathekile Holomisa, an advocate, has been the President of CONTRALESA since 1991 and since 1994 has also been an ANC Member of the National Assembly. As such, he has chaired the Portfolio Committee for Land and Agriculture and in 2002 was appointed to Chair the Joint Constitutional Review Committee. Meanwhile, Nkosi Mwelo Nonkonyana, the former Secretary General, now Organiser, of CONTRALESA, is also an ANC Member of the National Assembly and has been a member of the Portfolio Committee on Provincial and Local Government. Nkosi Mpiyezintombi Mzimela, an IFP Member of the National Assembly, was the Chairperson of the National House of Traditional Leaders until 2006. In turn, the not-so-subtle political manoeuvrings by the ANC in the face of such a 'traditional' lobby can be traced in the convoluted political paths they have trodden in relation to a number of different legislative attempts at reform (Van Kessel and Oomen 1997; Beall, Mkhize et al. 2005; Ntsebeza 2005).

While there was some kind of Constitutional compromise forged between respecting tradition and gender equality, the resolution of another conflict over provisions for local government, in the face of demands by traditional leaders that they 'continue' to be the

local government in their areas of jurisdiction (as opposed to the devolution of power to a newly constituted democratic local government), was left to a later date. During apartheid, in the homelands where black people were not entitled to any form of democratic local government, they were represented and managed by Tribal Authorities supported by an array of officials and institutions supporting the fulfilment of their responsibilities and their authority; they were the face of a form of 'local government' (Evans 1997; Oomen 2005). Handing over those powers and that authority to elected Local Government, was simply 'politically unattainable' (Oomen 2005: 59).

The 'transitional' arrangements for local government contained in the Interim Constitution, that were to be fleshed out in the final Constitution, were unclear as to what would happen to traditional leaders (Ntsebeza 2005; Oomen 2005), but legislation passed in 1995 to clarify such arrangements was met with outrage by traditional leaders. That legislation provided that they would either only be entitled to *ex officio* membership of local government (the government arguing that *ex officio* meant that they would only have observer status), or be limited to ten percent representation on the transitional councils, along with other 'interest groups', including women. In response, CONTRALESA, uniting with the IFP, threatened legal proceedings against the government, called for a boycott of the local government elections, and also organised a march to Pretoria against the President (Maloka 1996; Ntsebeza 2005). This alliance between a formerly ANC-aligned organisation and the IFP was controversial. In retaliation, the ANC took disciplinary action against Holomisa, ruling, *inter alia*, that 'He be removed from his position as chairperson of the Land Affairs Portfolio Committee' and threatened to suspend him from the ANC for a year (ANC – Disciplinary action against Patekile Holomisa, 11/04/96). While CONTRALESA's National Executive Committee 'gave Holomisa its "unconditional support"' (ANC Daily News Briefing – ANC Action Against its Leader An Attack on CONTRALESA, 24/08/96), the alliance between CONTRALESA and the IFP also precipitated disputes within CONTRALESA. For a while, it appeared that the Transkei faction – Holomisa, Nonkonyana and Winnie Mandela (the organisation's Treasurer) – were turning the organisation into their personal power base (Maloka 1996; Van Kessel and Oomen 1997), and in response to these events, Winnie Mandela was removed and Holomisa was suspended until the 1996 AGM. Such disputes can also be seen as more personal struggles to achieve dominance, or counter existing dominance, within the hierarchy of that organisation.

In 1998, the Municipal Demarcation Act was passed, that was supposed to re-demarcate the former boundaries of 'white' local government so as to deracialise them, that is to incorporate within them former 'black' areas – sometimes vast, rural, former homeland areas that were extremely poor. The intention was that the richer areas both within the municipalities, and within the wider district that they were grouped under, would

subsidise those with insignificant tax bases (Zybrands 2001; Lodge 2002; Ntsebeza 2005). At times, however, it also involved the amalgamation of former TA areas, sometimes with the aim of splitting such areas between two municipalities (Oomen 2005). As it became clear what the demarcation would actually involve, it was greeted with further outrage, spectacular displays of traditional leaders brandishing traditional battle regalia and 'ethnic' violence breaking out over the imposition of new borders in many rural areas. In response to these plans, traditional leaders, once again supported by Holomisa, threatened the first proper Local Government elections in 2000 (Ntsebeza 2005). Oomen (2005) describes the subsequent flurry of behind the scenes meetings between President Mbeki and traditional leaders, the amendment of the Municipal Structures Act to allow them 20 percent, rather than ten percent representation in the municipalities, and the Act's further amendment. But that amendment only went so far as to recognise the largely symbolic 'functions' of traditional leaders. The chiefs were unappeased and continued to threaten the elections. As a result, the government set up a 'Joint Technical Committee', including within it traditional leaders, that recalled Parliament to consider a further amendment to the Bill that would recognise not only their symbolic functions, but also their 'right to administer communal land'³¹. Even though the amendment Bill was not passed in time (such a provision and lack of consultation on it would in any case have been unconstitutional), the elections duly took place on 5th December 2000. In 2000, according to Oomen (2005: 68) 'the prospect of erasing apartheid's institutional borders to make way for universal democratic government seemed further away than ever'.

Around the time of the 1999 general elections, chiefs' salaries were increased, their judicial powers reinstated and, in response to the UDF's 'reported... inroads into the ANC's support base among traditional leaders in the Eastern Cape [,] ... the ANC put Holomisa and Nonkonyana high on its election list of candidates for the National Assembly' (ANC Daily News Briefing – Traditional Leaders Kingmakers in Rural Vote, 18/05/99). And just after the elections, the new Minister for Land and Agriculture, Thoko Didiza, withdrew the Land Rights Bill (LRB) that was supposed to have reformed the land tenure of those living in the former homelands. When it had been tabled in 1998 by Hanekom's TRCG, made up of a number of people whose history of involvement in land struggles positioned them squarely in the 'anti-traditional leader' camp, it had been roundly criticised by Provincial offices of the DLA for 'ignoring' the political reality of traditional leaders. After withdrawing that Bill, the Minister indicated her intentions in relation to communal land:

In the policies of the past governments all tribal land was held in trust by the State. There is a need to redress this. To this effect, transfer of land to tribes and communities will be done. To facilitate the disposal of land to tribes work is

underway to address changes to the legislative framework and the drafting of regulations under the Upgrading of Land Tenure Rights Act of 1991. (Didiza, Media Briefing – 02/00)

Moreover, she proposed that to effect such disposal, a Committee should be established in each Province, comprising: 'the Provincial Department of Land Affairs, Provincial Department of Agriculture, Department of Public Works, Department of Water Affairs and Forestry, Representatives of the traditional leaders; Municipalities and Land Bank.' (Didiza, Policy Statement – 02/00). When in November 2001 the draft CLRB was finally 'leaked' at the Tenure Conference, however, although it was greeted with outrage by a number of activists, it was also opposed by traditional leaders. The President of CONTRALESA was once again vocal in speaking out against it pitting 'democracy' against 'tradition', and women against traditional leaders, who were decried by the opposition (to the Bill) as 'decentralised despots' – and Mamdani was liberally quoted (Ntsebeza 2003, 2005).

While negotiations over CLARA form the basis of this thesis, and liaisons between Parliamentarians and traditional leaders are discussed further in Chapter 4, the context to these is clear: while activists were lobbying the government to 'scrap the CLRB', apart from them 'endless rounds of consultation (largely, but far from exclusively with traditional leaders)' and negotiations with the ANC leadership were also going on in relation to reforms to local government reform and to the continued roles of traditional leaders (Oomen 2005: 68). These were to be embodied in the White Paper on Traditional Leadership finally issued by the Department of Provincial and Local Government in July 2003. It was the TLGFB that was eventually agreed in September 2003 alongside amendments to the CLRB: the provisions of the two Acts were tied together, decried as a 'carrot and stick' to traditional leaders.

In these struggles recounted here, traditional leaders have attempted each time to claim the symbolic capital, the unquestioned legitimacy, to define 'tradition' and to undermine the legitimacy of others to do the same. Although, as recognised by Ndashe, traditional leaders do not speak with one voice (Ndashe 2006), such voices have combined to produce a discourse of 'tradition' that high profile traditional leaders have attempted to draw upon so as to gain traditional capital for wielding in the political field. In such a discourse, 'tradition' in and of itself is held out to be a good thing: it is 'traditional African leaders and the age-old decision-making processes of the traditional African communities' that were to be undermined by 'the colonial powers' (Mzimela 2005: 3). Meanwhile, 'a traditional leader ... was not allowed to be autocratic' and 'retained their positions because of their wisdom and fairness' (*ibid*: 3). And so, being conflated with 'colonial powers', 'westernised norms and values', 'foreign systems' (Nonkonyana 2003)

and, in turn, '[w]hite society' (Holomisa 2007) become delegitimised. And '[w]hite society' is pitted against another society – presumably a united black society, that reclaims and includes all things 'African' and all Africans as inherently good, and that speaks with one voice, here, that of traditional leaders. It is 'white society' that has 'misinterpreted, misunderstood, distorted, manipulated and disfigured *our* culture, customs, traditions and *our* ways of life as Africans generally' (*ibid*: 1 – my italics). Such misinterpretations 'trash African customs' (Holomisa – *Black Electorate.Com*, 16/08/05) and '[castigate..] anything which is not informed by western values ... as variously backward, paternalistic, sexist and undemocratic' (Holomisa – *Business Day*, 05/06/08). 'Custom' is held up as being under assault. In its personified form, it can even be 'offend[ed]' – by women, for instance, in acting according to 'Westernised norms such as equality' (Nonkonyana, quoted in Terreblanche – *The Sunday Tribune*, 06/05/07). On the other hand, 'we', the united society of before, or 'Contralesa', "protects its own tradition and custom" (*ibid*): 'We don't want to interfere with custom ... it would amount to diluting the legitimacy of traditional values and customs' (Holomisa, quoted in Terreblanche – *The Sunday Tribune*, 06/05/07). And so, in an appeal to '[o]ur own educated leaders and policy-makers, males and females', even though complementing them as 'intellectuals' themselves, they are said to have 'imbibed the white man's education' and failed to ask the 'organic intellectuals' the truth behind 'our age-old, African customs' (Holomisa 2007). So here, human rights and gender equality receive a double assault: not only are they undermined because of their 'foreign' derivation, but even if this were not accepted, there must be no questioning, let alone disbelieving, the 'gender equity' that truly exists '[i]n African culture' (*ibid*). It is one thing to criticise 'individual traditional leaders and their [presumably negative] actions', but quite another to criticise 'the institution of traditional leadership' (Holomisa 2007) – *that* is beyond criticism. Comaroff saw the 'political struggle fought ... with "cultural weapons" (rather than unencumbered universal suffrage and individual rights) in a society ... based on the axiom that patterns of identity will never change' happening 'especially before the first democratic election' (Comaroff 1996: 179). However, such a struggle has obviously continued throughout the first decade of South Africa's democracy and beyond.

4.2 - The rural playing field

While the previous section indicates the political contestations over changes to such areas that were to be introduced at National level, this section indicates the extent to which such changes are mediated through local contestations that much more directly shape power relations 'on the ground' in such rural areas. At the end of apartheid, Gazankulu, the homeland for the so-called Tsonga or Shangaan-speaking 'tribe' of the Transvaal, had had the same Chief Minister, Hudson Ntsanwisi, ruling over its Legislative Assembly for over two decades (Schmid 2005). Since 1962, with the establishment of

the Matshangana Territorial Authority made up of the four Regional Authorities³² dominated by Tsonga-speakers (amongst those that were dominated by Venda and North Sotho speakers), political mobilisation along ethnic lines had been pursued by the Territorial Authority and later by the 'self-governing' Gazankulu Bantustan, in defence of Tsonga-speakers' access to resources (Harries 1989). This was in the face of a break-up and distribution of land and power between the formerly heterogeneous, but now competing, Venda, Sotho and Tsonga/Shangaan-speakers (Platzky and Walker 1985). Harries (1989) describes how politically arbitrary borders had been drawn across the countryside, along roads or according to farm boundaries, and thousands of families were forcefully removed across the borders. Hospitals and schools, water and land were fought over as they were to be demarcated as exclusively for the different, now politically ethnic, groups.

In 1981, Ntsanwisi established a political party, 'Ximoko' (later the Ximoko Progressive Party), touting 'tradition' and evoking ethnic customs in its defence of the 'Tsonga people' (Harries 1989). It was modelled on Buthelezi's Inkatha movement. However, support for apartheid in the early 1990s appeared to be a 'taboo' even for the homeland structures of authority including Ntsanwisi (Schmid 2005: 16) and in 1992 the Ximoko Progressive Party participated in CODESA, with demands in tune with the federalism and market economy demanded by the IFP. In a context of extreme deprivation throughout the Gazankulu homeland, whether or not the support of apartheid *per se* – even the homeland system – was taboo, it is unsurprising that those who had been benefiting from the *status quo* would endeavour to support changes that would enable them to hold onto what power they had managed to access. As recognised by Maloka (1996: 175), 'a certain stratum of the African petty bourgeoisie also saw the Bantustan administration as an important avenue for capital accumulation and upward social mobility' (see also, Peires 1992). For example, salaries and benefits were provided via the South African state to the homeland civil servants and traditional leaders, to some for as long as 20 years. In 1983, not only did the Gazankulu government control over half of the jobs in the homeland, but it also provided business loans and a range of licences to its 'citizens' (Harries 1989).

In spite of the political polarisation between the government and traditional leaders over defining their 'respective' roles, the political battles that played out in the 2000 local government elections in any case often reflected former power hierarchies. Given their long standing involvement in politics, many traditional leaders actually stood as candidates. In the former Transvaal, home to the former Venda, Sotho and Tsonga/Shangaan homelands of Venda, Lebowa, Bophutatswana and Gazankulu, ANC candidates included the former Secretary to Chief Patrick Mphahlele's Cabinet in Thoyandou (Venda homeland), the last Venda Head of State in Messina, the former

Minister of Justice in Bophuthatswana, and a former Gazankulu Minister was the candidate for Louis Trichardt's mayor (Lodge 2002). Such candidatures themselves each involve political rivalries that can be seen to go right through different levels of politics. At a Provincial level in Limpopo, rivalries between politicians from the former homelands have entailed accusations of ethnic favouritism at different ranks in different government departments (*ibid*). At a local level, with boundaries of municipalities incorporating, for example, both Shangaan-speaking people living in the former Gazankulu, and Venda-speaking people living in the former Venda homeland, the new demarcations also at times revived ethnic conflicts. The divisions and conflicts between people based upon apartheid-animating ethnic differences have not been expunged with the end of apartheid and continue to exist today.

Even though so much energy is spent in negotiating legislated settlements of contested power relations, in many cases these have very little bearing on ongoing contestations that shape day-to-day reality. So, at a local level, resolutions to power struggles have sometimes been achieved despite, rather than because of, legislative compromises. And even where traditional leaders' and municipal roles do overlap on paper, Oomen (2005) notes that, in practice, through a 'working out' of power relations on the ground, there was often little actual overlap between the operations of such structures. Such a political reality is in many cases bolstered by a sobering financial reality – the two working together to construct a messy reality that in any case represents a huge gap from the ideals for change forged at a national level. So, with such little support given to rural councils, financial and other, even if they were able to politically, they have often been unable to extend their reach into the former homelands or rural areas. And this lack of financial support has had far-reaching effects.

Given the extent of the poverty that many of the new local governments took over, even before the local government elections in 2000, many of the local councils were already bankrupt, with more bankruptcies following on their heels in the next few years (Lodge 2002). Such a financial and political reality often means that plans to foster progressive change in local government, such as the laudable requirement for each municipality to prepare an Integrated Development Plan (IDP) to set out their development goals, how they are to be achieved and their success measured, often remain an ideal. And, in turn, a rural day-to-day reality similarly mars such ideals. For example, the introduction of the Ward Committee system, whereby local 'wards' are to participate in local government through representatives chosen locally, is often marred by the variable pressures imposed on those representatives given the reality of the poverty in which they are living. Moreover, as Lodge (2002) points out, some municipalities include areas that incorporate settlements more than a hundred kilometres apart leaving the question open as to what 'public participation' could

possibly look like in such circumstances. Meanwhile, hangovers from apartheid similarly hinder the implementation of models of change. For example, even though the boundaries have now been formally changed in many areas, some administrative institutions leftover from the homeland administration, such as the old District Control Offices (DCOs) in Gazankulu, continue with their staff on the government payroll and continue fulfilling their duties of oversight over the Tribal Authorities still falling within their ambit. Although they are in fact formally now named Traditional Authorities they are still colloquially referred to as 'the *Tribale*', or 'Tribal Authority', with staff who are also on the government payroll and carry on with their leftover administrative responsibilities. In continuing with practices that have developed over decades and longer, there remains a certain obliviousness of the formal changes wrought by the end of apartheid, practices that no doubt make unquestioned sense to those on the inside. For many concerned with reform, however, change has brought about a chaotic incoherence, with the status of such leftovers existing in a nebulous illegality and illegitimacy.

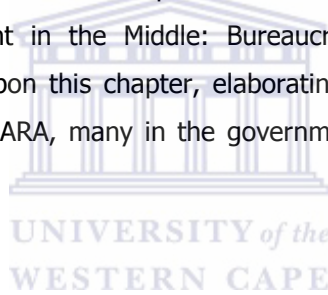
5 - Conclusion

This chapter has considered how power in the former homelands is deeply contested, always negotiated and shaped by wider politics taking place on a bigger political playing field. While reforms to such areas are also deeply contested at the national level, they cannot ignore such a reality. Moreover, such politics and struggles over reform and change are recursively constituted by and through relationships of power that are themselves imbricated in the past. Different actors have struggled to be able to position themselves in particular ways, to legitimise their positions, and in doing so have drawn upon discourses that have emotional resonance because they are shaped by the past. This underlines the importance of remembering that the past affects the future; *habitus*, as Bourdieu reminds us, shapes ongoing practice, as does the materiality of people's everyday lives. Given that politics and 'the state' are constituted through interactions between people, constituted as social beings, with all their messily formed knowledge shaped as much by education as upset, considering how and what particular aspects of the past have affected the politics of knowledge today in South Africa remains crucial. Shifts in discourses, the construction of problems and their solutions, are unlikely to arise spontaneously and nor will they occur without bringing with them their 'emotional baggage' – emotional resonances shaped by the past. Responding to events taking place in the 1980s, those making up the opposition ranks assumed particular identities and positioned themselves in particular ways. However, the roles they played in those days, the identities they assumed and the discourses that had resonance, were not just cast to one side in the negotiations to democracy and in the subsequent transition, but

have continued to shape their subsequent positioning and their leaning towards particular ways of interpreting issues. As recognised by Marx (1992: 257):

many in South Africa have a long standing attachment to symbols ... [for example,] to the ANC's history and leaders ... [that they may have] inherited through family ties and lifetime associations, picked up from friends, and reinforced by organizations, press reports, or a ground swell of popularity from which many do not want to be left out.

It is uncanny the extent to which many of the debates and controversies amongst activists and even within government, taking place today have echoes of those rehearsed before democracy. But this chapter also begins to uncover the extent to which the *practices* of those participating in the transition to democracy are also shaped by the past. The following chapter goes on to further delve into the practices of those in government, in the bureaucratic field. Given the government's positioning between their political masters, directly constrained by the wider field of power, and 'civil society' acting as self-appointed critics and representatives of the subjects of reforms, the chapter is entitled 'Caught in the Middle: Bureaucracy, Politics and the DLA'. It therefore builds directly upon this chapter, elaborating upon these varying pressures, and how, in relation to CLARA, many in the government found themselves impossibly 'caught in the middle'.



CHAPTER 4 - CAUGHT IN THE MIDDLE: BUREAUCRACY, POLITICS AND THE DLA

1 - Introduction

In the following four chapters, the discussion shifts to considering the different 'fields' within which actors participating in debates over CLARA were positioned, this chapter considering the bureaucratic field. The Introduction set out the broad terms on which these debates took place: CLARA was situated within tenure debates that pitted individualisation of land against its communal counterpart, and was caught between contradictory discourses of democracy and tradition, the latter eventually strengthened through an unlikely alliance between both 'tradition' and 'modernity'. Chapter 3 then contextualised the broader political changes that influenced South Africa's transformation. It also discussed the implications of the changing relationship between the state and 'civil society', recognising the responses of non-governmental actors, often emotional – not to be pitted in any way against 'rational' – to their enforced re-alignment due to political change taking place. In this chapter, now the perspective shifts to those working for the government over the same time. It discusses how those drafting the Bill were positioned themselves, and moreover, in their position as bureaucrats, were positioned by others more politically powerful, in relation to those debates. It considers the practices of people working for the DLA in the policy processes that unfolded in relation to the passing of CLARA in February 2004. Changes in the political landscape that took place in the first decade of democracy in South Africa had various effects on the relations between people working for the Department and 'civil society'. The DLA has received extensive criticism focusing predominantly on the actual form of CLARA and for the consultation undertaken by the Department in relation to the Bill. But this chapter contributes to this discussion with an analysis of the processes that have shaped the 'room for manoeuvre' (Clay and Schaffer 1984) in which particular actors within the government have found themselves.

2 - Caught in the middle: tenure and research in the DLA

Having not started my fieldwork in South Africa until May 2005, it was not until the Land Summit in July before I met anyone from the DLA. Apart from a brief road trip up to Limpopo province, the first few months had been spent in Cape Town, shuttling between interviews with politicians who had participated in the Portfolio Committee, those in COSATU, the Human Rights Commission (HRC) and the CGE, those in other NGOs who had made submissions to the Committee, as well as with people at PLAAS and the LRC who had been heavily involved in the advocacy campaign against the CLRB. But when I arrived at the Land Summit in Johannesburg, I felt very 'out of the loop' as a white, non-South African. There were other faces I recognised: the TCOE (Trust for

Community Outreach and Education) ones, the PLAAS ones and Nkuzi (Nkuzi Development Trust) ones. They were chatting, greeting each other, laughing and milling around. But, even though I felt 'out of the loop', I did not know who I *could* talk to. I had been told, even warned, by many people about the politically charged relationships between many of the people I had already met and 'the rest' – the DLA, the LPM. I greeted those people I knew warily, feeling dishonest for my wariness, resulting from my fear of any 'guilt by association' that others who I wanted to meet might cast on me, and uncomfortable with behaving according to my belief that others might judge me if they thought I was 'one of them'. But at the same time I was acutely aware of the incompleteness of my understanding and knowledge of any such dynamics in those early months of fieldwork. I was also aware that my white face stood out, and for the next five days I presumed others were somehow judging me by association, because of my skin colour, because I was on the outside, because of these links that I had already established, the research I had already done. All of these were 'facts' that were politically and sometimes emotionally charged in themselves and also created politically charged relationships. Added into this, I was a researcher, with its own implications in my relationships with people.

The conference hall itself was enormous, the seating split into six, two aisles leading down to the stage, and another leading across, splitting the front seating from the back. Hanging above this middle aisle were a number of screens and three more above the stage, reflecting back massive simultaneous images of the speaker, and also showing the DLA's logo for the Summit. The hall was draped in black with spotlights to the stage with its three screens and coloured banners like ships' sails lit up, brightly dramatic. As we went in to the sound of upbeat *kwaito* (urban pop) music, we were each given a khaki-coloured, logo'd Land Summit bag, a khaki-coloured, logo'd Land Summit cap and bright orange logo'd t-shirt. Looking to the front of the stage, one's eyes swept across a sea of caps to the podium draped in thick garlands of flowers. We were also given headphones that we could plug in to any one of six channels to get simultaneous translation of the speakers. A feeling of upbeat, lively expectation was conjured up, people were singing, some were dancing when Lindiwe Msengana Ndlela, the DG of the Department of Provincial and Local Government began:

We are going to soon welcome our leadership! I would like to request you to provide them with space when they come in from the back, and recognise them by standing up! We will advise you when the leadership comes. The DLA is one of the most progressive Departments – and they have organised that we have interpretation services! (Land Summit - 27.7.05 (Fieldwork notebook))

This was greeted by singing from the LPM, clapping and ululating. She ended by getting each 'Province' (different parts of the hall had signs with the names of the different Provinces on each – for some reason I was sitting amongst people from the Free State) to cheer for their Province: "We need to tell the Minister and the Deputy President who is here!" (*ibid*).



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And then Thoko Didiza spoke. She too started with a song – my neighbour told me that it used to be a hymn, but they had changed the words. People joined in singing, standing up to greet her. She then raised her fist into the air shouting "Amaand-la!" to the instant chorusing cry "Aweh-thu!" (Power! To the people!) before welcoming all. She referred to the words 'A new trajectory' the banner chosen by the DLA for the Summit ... 'What can we do better to deal with issues of inequity so that when we say 'Land belongs to all', then we can mean it?' She referred to Jeffrey Sachs' question, 'Can the rich afford not to help the poor?' and 'Can we afford not to do anything about land reform in South Africa? ... It's not about whether we don't need to do it, but whether we can afford not to do it.' (*ibid*). She talked for some time, ending with a reference to communal land, affirming the government's commitment to the need to implement CLARA fully without the state being a trustee or a 'mother' to people living there. In response to this there was clapping.

In spite of this promising start, the afternoon 'commission' session that was devoted to tenure reform and to which the Director of PLAAS had been invited to make a presentation – to his great surprise given the increasingly icy relations between the DLA and PLAAS over the last few years – was disappointing. The entire session was taken

up with a discussion of issues relating to farmworkers and labour tenants and testimonies about their ill-treatment at the hands of farmers. Many people, including people who had come from the former homeland areas of the country, complained that no time was allocated by the chair to a discussion of issues relating to the security of tenure in those areas, despite the schedule stating otherwise. It was disappointing to me because it would have been the first time that I was to witness the government and their opponents confront each other in public. Nevertheless, during the course of the four day Summit I met the Director of the KZN Provincial office who had participated in the tenure 'commission'. When chatting to him about my research, I asked him if it might be possible to do an unpaid internship with the Tenure Directorate of the Department. He was encouraging and introduced me to his colleague, the director of the Tenure Directorate, who I was aware was key in the Department in terms of CLARA. Both of them appeared friendly and encouraged my application to spend some time in the Department so as to get more of an idea about a more policy-oriented perspective of tenure.

I followed this up, sending the Director a letter setting out my research and my CV. When I spoke to him a number of times over the next few months, he continued to encourage this internship and agreed to a start date of the beginning of December. At some point over that period however, it appeared that he became suspicious as to the authenticity of my research interests and extremely distrustful of me. It gradually dawned on me during the course of December and January that, despite repeated efforts through meetings, phone calls and emails, my hope of an interview with him, let alone an internship, would not be realised. At one point I was told by another DLA official that:

I should not take it personally but X³³ has turned it into this really big thing, s/he didn't know what it was but for some reason he had got it into his head that he really didn't want me around. S/he had never seen him behave like that, he had even left the room yesterday to phone the DG about it. S/he asked whether I had had anything to do with PLAAS.

ERAF: Yes, but as I should have done, when I was in Cape Town, as they were a key player in all of this. But I had also been to UCT, Stellenbosch, as well as organisations like the HRC etc. They were part of my research and that was precisely what I was trying to do, bring together different views, which is why I had thought those of the DLA were important. ...

S/he said that basically CLARA was [the Director], so no one else could do anything about this. (National DLA official, personal communication - 17.1.06 (Fieldwork notebook))

Despite this official's efforts to raise the matter with the DG, and numerous other attempts by me including a phonecall with the DG in which I agreed to send him copies of my interview questions and list of interviewees to date (which I did, bar those who had requested to remain anonymous), I heard nothing further from either of them after the end of January 2006. Instead, as indicated in Chapter 2, I was approached by an official from the NIA who greeted me with "I understand that you have approached the Department of Land Affairs and they want us to carry out some checks on you" (NIA official, phonecall - 10.3.06). Clearly my extensive attempts to be able to research more comprehensively within the Tenure Directorate of the DLA, by spending time openly there on an internship, had touched upon sensitivities.

3 - Post 1994 context

Comaroff (2002) has drawn our attention towards the contradictions of 'the' colonial state and its postcolonial successor: that at the same time it was manufacturing sameness and citizenship, it was also managing and producing difference and subjection, together seen in the 'capillary processes' (Comaroff 2002: 122) of its techniques and 'methods of enumeration, serialization, individuation, identification' (*ibid*: 115). The exercise of such techniques to officially inscribe such identities and differences became the 'business of government' (*ibid*: 117). But he warns us against seeing such techniques as comprising the state as a generic entity. Instead, we must recognise its variety of forms, its complexity, the conflict within and between different ministries and departments and the resistance they encounter and its incomplete mastery over people's lives. The analysis here considers some of those processes and conflicts within government, their less-than-straightforward reality, in their endeavour to inscribe new identities onto those people who have typically been cast as 'subjects' (Mamdani 1996). And it also considers the limitations and incompleteness of fulfilling that task. Bourdieu argued that 'one of the major powers of the state is to produce and impose ... categories of thought that we spontaneously apply to all things of the social world – including the state itself' (Bourdieu 1994: 1) and

it follows that the state, which possesses the means of imposition and inculcation of the durable principles of vision and division that conform to its own structure, is the site par excellence of the concentration and exercise of symbolic power (*ibid*: 9).

But in South Africa, the state was also the site of immense change and upheaval in 1994, and to a lesser extent again in 1999. Certainly in relation to CLARA, after 1999, the attempts by the state to impose such 'principles of vision and division', through the adoption of a piece of legislation that was to change relations of power in the former homelands, was deeply contested; CLARA posed a challenge to power relations and

forms of capital that formerly had come to be, to a certain extent, unquestioned. And within the bureaucracy, officials were similarly experiencing change and upheaval: individuals coming together, each with a different *habitus*, and changes in the hierarchy of the DLA, in turn challenging 'the distribution of the species of power' (Bourdieu and Wacquant 1992: 97). To secure their positions, sometimes their promotions, officials were not only required to continue to respond to the 'needs of the job' with competence and professionalism, but also to 'fit in' with the *habitus* – a form of capital in itself – of those who were dominant within the bureaucratic field and, given their proximity to their political masters, with the *habitus* of those within the wider field of power. As recognised by Bourdieu in his discussion of the construction of the state, 'the question of the legitimacy of the state, and of the order it institutes, does not arise except in crisis situations' (Bourdieu 1994: 15). While 1994-2004 was no longer 'a crisis situation', the state in many ways was still in a state of construction and there continued to be immense struggles and 'dogged confrontations between dominant and dominated groups' to eliminate 'lateral possibilities' and produce 'doxic submission to the established order' (*ibid*: 15). This chapter discusses some of those struggles for legitimacy of those who had been appointed to the government during this period of change, struggles that were, on the one hand, very personal but, on the other, connected to those taking place in the wider field of power.

The new DLA, responsible for a nationwide three-pronged land reform programme, took over the responsibilities of the Department of Regional and Land Affairs, that had succeeded the Department of Development Aid (formerly the Department of Native Affairs), responsible for surveying, registering and keeping the records for the former homelands (Hall and Williams 2003; Weideman 2004). While there was some continuation in terms of personnel fulfilling such day-to-day registration and record-keeping jobs, the formulation of such a progressive programme of reform from scratch required the creation of many entirely new positions for policy-makers. As indicated in the previous chapter, many of those working in land NGOs in 1992-3 had been heavily involved in lobbying the ANC/NP negotiations in relation to land reform and the form it would take and so, after 1994, the new DLA drew extensively upon their knowledge and experience, and their political loyalties. Although 'agriculture' obviously overlapped with the DLA's land reform programme, it fell exclusively within the DOA and, according to Weideman (2004), relations between the two departments was poor. And while new positions in the DLA were peopled with these former NGO activists, there was more of a continuation of personnel in the DOA, including its NP Minister, and therefore its policy focus on commercial agriculture. Meanwhile, with close relationships continuing to exist between those now with positions in the DLA and those remaining in the NGO sector, their mutual involvement and concern with the direction both of policy and of activism

also continued. In the first five years of post-apartheid transition, the DOA hardly influenced the direction of land reform policy. Those who were most influential were those most articulate and those considered to have the best grasp of the issues both politically and intellectually. These forms of cultural capital clearly privileged the privileged; those who had received good education, but also those who had experience of the politics of the issues, perhaps spokespeople who were used to representing the views of others. Vocal activists in the land sector were ideal. Given the disruption of education in many of the black areas of the country as a result of mass boycotts and stayaways of that time, the majority of those receiving such educational credentials were white, or those who had been educated outside South Africa.

Those with intellectual capacity, fostered through education, as opposed to experience 'on-the-ground', were privileged in formulating policy and many lawyers were put to work in "writing policies" (LRC lawyer, interview - 23.06.05). During the first five years of government, this contributed to an institutional separation in place between 'policy' in Pretoria and 'implementation' in the Provinces. This was further supported by a formalised bureaucratic hierarchy between the two, land being a 'national competency' and with Directors of Provincial offices being unable to sign off on particular projects to be carried out by their provincial level staff. Instead, they would have to bow to the superiority of Chief Directors operating out of Pretoria before the DG's or Minister's approval could be given. Nevertheless, the Provincial offices were expected "to 'do' land reform" (former Director of Provincial DLA, interview - 16.2.06), to implement the policies formulated at National level. When speaking to a former director of one Provincial office, he – all but one of the directors of Provincial offices were men – referred to "this army of policy-makers sending it all down for us to read.":

It was that old problem of thinking that policy was one thing and implementation another, but of course when you think about it like that, the moment when policy and implementation converge it becomes chaos. So we [in the Provincial office] were caught in a whole series of policy directives from people in national office who were senior to them ... and when each person sending out this stuff thinks that what they're doing is the most important stuff of all, and sends you emails with this stuff and then wants comments and meanwhile [the people at the Provincial office] are trying to implement. ...

ERAF: Didn't the people formulating the policy seek inputs from the people in Provincial offices.

No, they didn't involve us. It was a very didactic thing. Because it was dogma – 'Believe'. (*ibid*).

While he admitted that he was putting it crudely, but did not want to be 'correct' and spoil the story, he obviously resented the inferior positioning imposed on him. While on the one hand, he denies the existence of a split between policy and implementation – in not granting it recognition he attempts to dissolve the fact of the imposed hierarchy – on the other hand, he asserts the importance of the knowledge and experience of those in the Provincial offices for the purposes of formulating policy. His complaints were further fuelled by the perceived lack of recognition by those in the National offices of the 'capacity' problems that Provincial offices were having due to insufficient staff numbers and difficulties with recruitment. However, his and others' frustrations went deeper than this, with those in Provincial offices complaining that influential policy-makers in Pretoria, former NGO activists, did not necessarily have the experience of implementing policies those "at the coalface" had (Provincial DLA Director, interview - 2.3.06). What made intellectual sense on paper to those formulating policy, did not necessarily coincide with the practice of those in the places where such policies were to be implemented. At the same time, the "activists with soft skills" did not necessarily have the "hard technical skills" required to understand what was required of policy (*ibid*).

Another former employee of the Department at that time similarly complained that these more practical skills had not been carried over into the post-apartheid Department; what was carried over was a rather didactic form of government, experienced here by those in the Provincial offices from the policy-makers in Pretoria. S/he thought that this was due to "a historical mindset that was left over, which was very patriarchal" (former employee of the National DLA, interview - 9.12.05). In a bureaucracy, even when individuals, each with a very different *habitus* move into government, the existence of particular rules and procedures, methods of asserting one's authority within a hierarchy, ensures that acts of authority are guaranteed (Bourdieu 1994). The responses to such authority by the different Provincial departments differed considerably and so shaped their relationships into the future: some were impressively proactive in expanding their own authority, asserting their own competences and developing their own approaches to reform aside from the national policies developed at National office, but others ceded control to the National office.

Although the government's approach to tenure reform policy up to 1999 is discussed in more detail in Chapter 5, what is not discussed there are the perceptions of those in government who were not part of the tightly-knit circles of individuals who were formulating the policies. In terms of policy, the 'rights-based' approach to land reform developed in these first five years was seen by some as neither tackling, or even acknowledging, the limited capacity of the state, nor the economic realities of South Africa's transition, both of which would shape the context in which such policies were to

be implemented and therefore their likelihood of success. A director of one of the Provincial offices gave his analysis of the approach taken during these years:

There are two views of land reform: that land reform is fundamentally a rights-based approach, which is a minimalist view which never looks beyond to development. That's not a development programme, it's a social justice programme. So it's trying to say, there's this injustice that's happened so let's give more black people land. And there's a legislative regime to support it, with ESTA [Extension of Security of Tenure Act 1997] and the LTA [Labour Tenants Act 1997] ... But if you look at the money being spent between 1994 and 2004 it's clear, it's such a minimalist approach. [It's saying,] 'White people are pushing people off farms. How do we respond?' It's coming up with a judicial process that's very cumbersome, so let's make it difficult for people to displace people. But they can still evict them. And to go to court is difficult but there are no resources that were put in place to enable people to go to court. (Provincial DLA director, interview - 2.3.06)

The limited extent to which the rights-based approach to land reform incorporated a wider development agenda and its focus on 'the poor' was also seen by some as not giving sufficient support to black people to achieve economic upliftment. Moreover, in a context of a growing resurgence of black consciousness, such a limited approach was seen to have undertones of racism: "One side wanted to see black people just getting by as opposed to, why shouldn't they have the same quality of life? We don't want to maintain the *status quo*." (*ibid*). Meanwhile, there was a perception by many that "all the intellectuals, the people writing the policies were white people" (*ibid*). This was symbolically, if nothing else, a problem to many. One official in the DLA today, who had been appointed at that time, recalled some of the tensions:

When Derek Hanekom was the first Minister of the Department many of his comrades from NGOs were appointed in the Department and they were white in higher positions and us blacks came into lesser positions. It started a debate, 'Are we going backwards?', 'Has there really been a shift of power?', 'Why are they being appointed and us are in the lower positions?'. The Department went through a rough period ... between 1996-1999. ... Derek Hanekom did not entertain the issue about race relations on the agenda. He had appointed a team to look at transformation and they had all been interviewed, but nothing happened. ... In DH's time they perceived their white colleagues as whites dictating to blacks and they didn't seem to take them seriously when they made suggestions. (National DLA official, interview - 10.1.06)

Although a number of people told me of such racial hierarchical divisions during that period, their ramification ironically may have been felt most only after many of them had left the Department.

4 - Post 1999 context

The 'purge' in the Department has been discussed (in the previous chapter, and will be discussed further in subsequent chapters) in terms of its effects on those smarting from their or their close comrades' treatment. But for those who remained, the arrival of a new Minister had different repercussions. A number of those who had been appointed or retained by the 'new' government in 1999, presumably in an attempt to bolster their own authority and legitimacy, and that of their colleagues, mentioned the fact that Ministers of other Departments similarly appoint 'their own' advisers and DGs. The strikingly obvious replacement of the white faces that the white Minister had surrounded himself with (presumably for the 'rational' and impersonal reasons of their holding particular forms of intellectual capital, for instance), with black faces was powerfully symbolic:

So with the DG going and the minister going it looked like there was an exodus of white people. And then others saw that the environment was not friendly to them so they left themselves. Which I think is a pity, because you are left asking, 'Why were they there if they were so progressive but then couldn't work with black people?' So you just realise that the racial consciousness really affects things. And then of the team that remained, there were some who came in with the new Minister initially, and there were people who talked a lot about race, and who were bitter, and that polarised the situation, with them saying, 'You people are here, you created a white colony.' (DLA consultant, interview - 12.1.06)

Many of those who joined the 'exodus' claimed to have left out of loyalty to those who were dismissed, not because they "couldn't work with black people". Casting such aspersions on them - others spoke about the "sour grapes" of those who had left - again is an attempt to reduce their legitimacy, and raise that of those remaining, identified here as "black people". But this clear racialised interpretation of a change in government, taking place *after* waving good riddance to apartheid, also brings to the fore the emotion and bitterness wrapped up in the *habitus* of so many. Someone who had not experienced institutionalised racism structuring their lives enjoyed a very different *habitus*. Such an embodied history makes it easy to see racialism and racism in any negative change. But *habitus* is both 'structuring and structured', thereby changing the forms of capital different people could access or investments they might make. Social capital built up through fostering relationships and forging networks was

meanwhile lost: the 'situation' aroused "suspicion" on both sides and colleagues, "former comrades", stopped socialising with each other (DLA official, interview – 10.1.06).

Nevertheless, there were changes that were introduced by the new Minister that affronted many people on both sides. For example, the new Minister moved across from the DOA and introduced new policies focused on commercial agriculture. Such change challenged the institutionally shaped *habitus* and cultural capital within the Department that had, until then, developed around a discrete focus on land reform. Furthermore, the 'moratorium' imposed on both the redistribution and tenure arms of the land reform programme did not go down well with many civil servants who had worked so hard to develop them. It inspired many of the departures and, for those who stayed, it created some divisions. One official said that the Minister:

was slated for that [the moratorium] – it was something even we in the Department could not agree on. I remember crossing swords with my Director, because people wanted to kill me when I couldn't give them an answer about getting land. (former Provincial, now National, DLA official, 10.1.06)

Not only did this indicate that their Minister, a black woman who for so many reasons should be aligned with them and who commanded for those reasons a certain loyalty, had not valued their efforts, but also that 'the people' were unhappy. 'The public' ultimately justify and legitimise the positions of public servants, and this statement represents a certain rebellion against the authority of the Minister (Bourdieu 2004): if 'the people' were unhappy, their positions, as well as that of the Minister whose authority they bore but also served, would be delegitimised. As argued by Bourdieu, there are:

very real effects of the obligatory reference to the values of neutrality and disinterested loyalty to the public good. Such values impose themselves with increasing force upon the functionaries of the state as the history of the long work of symbolic construction unfolds whereby the official representation of the state as the site of universality and of service of the general interest is invented and imposed. (Bourdieu 1994: 17)

These changes introduced by the Minister were understandably unpopular, not only because the new policy directions, new appointments and institutional changes threatened the recognition granted to and taken for granted by many of those who stayed; such changes could potentially reduce their bureaucratic capital. But because they had resulted in an acknowledged loss of capacity in the Department due to many posts simply being unfilled, along with a similar loss of experience that had gradually been built up over the first five years, they also allowed the competency of those

remaining, left without the social and cultural capital deriving from that shared experience, to be called into question.

Although criticisms of change introduced are likely if they threaten the positions held by officials within the bureaucratic field, others welcomed some of the changes that were introduced by the new Minister. One former official who had stayed on until 2004 in government contrasted the more inclusive approach to decision-making that existed in the Department prior to 1999 against the strong Ministerial-level decision-making. But for him, the "inclusivity" of 'before' meant that there were "issues that had been *discussed* for 5 years or so – but they had a very abstract view" (former National DLA official, interview - 9.12.05). Now, a strong leadership to a certain extent allowed them to 'get on with the job' and therefore for implementation to progress faster than before, thereby enhancing their bureaucratic legitimacy.

Perhaps in light of criticisms made by those in Provincial offices in relation to the overly centralised decision-making in the first five years of government (referred to above), the new Minister also introduced certain formal changes to decentralise power – or at least take a less centralised view of the distinction between National and Provincial offices in relation to land reform, which remained a national competency. For example, the formal bureaucratic hierarchy between the Provincial and National offices was recognised as a limitation and the status of Provincial directors was changed from Directors to Chief Directors. This enabled them to sign off on projects to be carried out by their Provincial office without deferring to Chief Directors who were formerly to be found only in the National office. Although this would have appealed to Provincial offices, even though they had different levels of capacity as well as priorities, such changes could prove less popular, even be ignored, by those in the National office. For example, one official from the National office who was tasked to coordinate the input of the Provincial offices on a national project, was clearly unhappy that his/her authority had been compromised, complaining that at his/her hierarchical level in National office, s/he was now no longer able to give the Provincial offices "instructions, or even work with them. It makes it difficult for us to function." (National DLA official, personal communication - 17.1.06). S/he said that in the end it would depend on "how you were with them", "on personally how you got on with them" (*ibid*). Resorting to the personal, however, was risky – it entailed a move away from the impersonal bureaucratic 'rationality' that endowed such functionaries with legitimacy (Bourdieu 2004: 31). And those in Provincial offices continued to resent the imposition of authority by those in the National office, now through personal relations rather than official lines. A number of people working for Provincial offices expressed ongoing frustration: of "those in National office jumping on our heads"; "when National office want the Provincial offices to produce something, it's always 'Now', 'For today' and then everyone is running round

manically busy trying to get this thing done but then we don't hear about it for a week" (Provincial DLA official, interview - 6.12.05). So decentralisation of power on paper did not necessarily translate into practice, with officials continuing to compete for places within the bureaucratic hierarchy by competing for recognition and authority.

5 - Tenure reform after 1999: room for manoeuvre?

5.1 - The Bill's political framing

After 1999, as indicated, the LRB was put 'on ice' by the new Minister and was subsequently dropped. A number of people who had been working on the LRB, including some who left the Department at that time, as well as others who remained, spoke to me of the change of direction in relation to tenure reform that came from the new Minister. Many related it to the political change in the relations between the ruling party and traditional leaders:

[w]hen the new Minister came in and said 'I don't want to necessarily adopt what has been done before' ... She thought that in rural areas there is in many cases still a role for traditional leaders, and in recognising that we're in a new dispensation, we should try to tread a middle path. And that has to involve looking at the roles of traditional leaders and acknowledging that municipalities are often not in a position to do it all themselves. (DLA official, interview - 11.1.06)

The media also, in their reporting of the moratorium brought to bear on the LRB, indicated that such a turnaround related to the change in approach vis à vis traditional leaders. At the end of 2001, the government held the national Land Tenure conference that was principally concerned with this issue and at which the CLRBS were leaked. The response, as indicated in the Introduction, from the government's critics, who also successfully managed to alert the media of their concerns, was outrage, principally to the 'transfer of ownership' model adopted in the Bill but also because they had not been consulted.

Tracing the wider political dimensions of the Bill's progress is useful in understanding the 'room for manoeuvre' in which the bureaucrats on the drafting team were operating through this intensive process. Less than a week after the end of the Tenure Conference in 2001, Thoko Didiza addressed the National House of Traditional Leaders, where the overtures she intended to make to traditional leaders through their input on the CLRBS was made explicit:

During the National Land Tenure Conference held from 26-30 November in Durban, the Department of Land Affairs asked the traditional leadership for their perspective on how best to secure rights on communal land.

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 alone, 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)

These were the real politics that were driving the Bill.

When the CLRB was first officially published in August 2002, it did adopt a model of reform that would see the transfer of ownership of land to traditional 'communities', but it envisaged that those who would administer that land would consist of a committee to be made up of elected representatives, and traditional leaders would only appear on it in an *ex officio* capacity. Soon after its publication, and the publication of the draft White Paper on Traditional Leadership and Governance, traditional leaders made it clear to the government through the media and otherwise, that they opposed the proposed reforms. Of principal concern in relation to the CLRB, was its early references to their *ex officio* status and seeing in its 'transfer of ownership' the threat of freehold ownership and consequent land sales by people living on their communal land. In November 2002, Mzimela, the chairperson of the National House of Traditional Leaders and the co-chair of CONTRALESA, pronounced that

Although ["the institution of traditional leadership" ..] are opposed to the draft Communal Land Rights Bill, this however does not mean that the solution to this is through the use of violence. (Mzimela – ANC Daily News Briefing, 6.11.02).

Soon after that, in December 2002, Holomisa, the President of CONTRALESA, spoke at its three-day annual national conference in Kempton Park, indicating that "some of the government's policies diminished the role, powers and functions of traditional leaders in matters of land, development and local governance" and referred to an "impasse on the role of *ubukhosi* (the institution of traditional leadership)" (Holomisa – ANC Daily News Briefing, 4.12.02). Although the President, Thoko Didiza and Sydney Mufamadi, the Minister for Provincial and Local Government, had been invited to the conference, Holomisa indicated that "I don't think it (Contralesa's position [in relation to the CLRB]) is going to change as a result of deliberations from this conference" (*ibid*). He spoke against a background of news briefings in which he warned, in language that sounded like a thinly veiled threat, that "From an insider point of view, it is no exaggeration to

maintain that were it not for Contralesa, violent conflicts will have ... erupted over some of the government's policies." (*ibid*).

Over the next year, there were undoubtedly meetings behind closed doors between the ANC and such representatives of traditional leaders and on 1st April 2003, Thabo Mbeki addressed the annual opening of the National House of Traditional Leaders. In that speech he referred first to the White Paper on Traditional Leadership and Governance before going on to refer again to the CLRB:

In addition, we must, of course also mention the Communal Land Rights Bill which is still being processed. Once more, I would like to thank you and all our traditional leaders for your participation in its discussion. Currently, the Bill is being redrafted to take into account the various observations that have been made, including your own.

When the Bill is tabled in Parliament, there will be a further opportunity to make such additional comments as you may wish. Yet again, I must emphasise that the government seeks a finalisation of this matter through a process of discussion and without unnecessary confrontation.

He went on:

Because the work that the two departments of Provincial and Local Government and Agriculture and Land Affairs are doing is related, we have ensured that the respective Task Teams are now able to co-ordinate and align their work. (Mbeki – Address, 1.4.03)

No other substantive matters are referred to and the rest of the speech is devoted to appeals to traditional leaders to remember the colonial history of their people, and to work together with the government, "without confrontation" (*ibid*).

The DLA drafting team working on the CLRB had by then, April 2003, finished the formal process of incorporating comments to its August 2002 version and this amended version was submitted to Cabinet around the same time. However, before the new version of the Bill was released for comment at the end of June 2003, substantial amendments had been made to it since the drafting team had 'completed' it in March: it had been cut down substantially, including cutting out many of the former provisions referring to the protection of human rights or women. The government indicated that this new version was to go back to Cabinet by 16th July before being timetabled to go to Parliament at the beginning of August (Notes on Reference Group Meeting on CLRB, 1.7.03). As it was, the Cabinet did not approve the CLRB until October, after it had been explicitly

linked to the TLGFB that in September and October was going through Parliamentary hearings and deliberations.

Meanwhile, on July 15th, a joint task team between the ANC and CONTRALESA was established to 'operationalise these issues' relating to the TLGFB and the White Paper (ANC – Statement on meeting with CONTRALESA, 15.7.03). The TLGFB was to reform the powers of traditional leaders and was already high on the ANC's political agenda, with many traditional leaders still strongly opposed to it. As indicated in the Introduction, sometime during the time of the Portfolio Committee deliberations, however, the two Bills became linked and in September traditional leaders finally came round to seeing both the TLGFB and the CLRB as acceptable to them. Holomisa spoke out in support of the TLGFB during its Portfolio Committee process and, in early December 2002, after the CLRB had been subject to hearings in the Portfolio Committee, Mzimela, who had spoken out so readily against the two pieces of legislation a year before, published an article in *Business Day*:

The Communal Land Rights Bill aims to restore to rural communities ownership of the remnants that they occupy of land that the colonial and apartheid governments took from them by force – giving the communities registered title so that it cannot happen again. ... Some of our detractors have a puzzling but sinister motive; they appear to be intent on destroying custom, community, family and African direct democracy. (2.12.03)

According to one reporter, the changes to the Bill 'by the Cabinet only on October 8, shortly after a previous meeting between Zuma, Buthelezi and the Zulu king' and subsequently, in January 2004, the Portfolio Committee passed the Bill following a 'high-level meeting ... between Deputy President Jacob Zuma and the Inkatha Freedom Party leader Mangosuthu Buthelezi' (Terreblanche – *The Pretoria News*, 28.01.04). As indicated in Chapter 3, there had been a history of precedents for such high-level meetings between those representing traditional leaders and leading Parliamentarians.

5.2 - The government's critics

In "a very intensive process with a lot of time spent on it", a drafting team that included two outside consultants, "attend[ed.] hours and hours of meetings" as well as "numerous meetings with government departments" "working through the clauses so as to try and make them reflect what we thought they should say" (DLA consultant, interview - 19.12.05). But when the August 2002 version had been published for comment, it simply met with a "barrage of criticism" (DLA informant, interview – 19.12.05) on everything from the consultation processes the Bill had been through, to its grave implications for human rights and gender equality. Other than traditional

leaders who were then amongst its most vocal critics, the chief critics of the government's approach to reform not only included many of those who had left the Department in 1999 as a result of 'the purge', but also a number of them who had actually been working on the former LRB that had been dropped. Furthermore, one or two of them had already been publicly highly critical of the new Minister and her 'new' department. It is fairly understandable that the response to such criticism and pressure from many of those still in government was to come together in collective defensiveness:

Relations soured with NGOs ... they're always looking at the negative side and always reporting as though the situation is disastrous. It's always 'us versus them' which cripples our interaction a bit ... I remember a meeting that took place in Johannesburg where there were all the same colleagues who had left and all they reported on were the negative findings. They had invited DLA officials and before they had finished the meeting, we had all got up and walked out. (National office DLA official, interview - 10.1.06)

Again, a number of people mentioned "sour grapes", others spoke about attempting to disengage from their critics: "In the end I just forget about them. For me, they don't even exist." (Director of Provincial DLA, interview - 2.3.06). This was not, however, particularly easy to do and some officials continued to feel such ongoing criticisms, sometimes from former colleagues, keenly.

From the legal grouping (see Chapter 5) the Tenure Directorate came under fire on every front, not only in relation to the model of reform adopted, the transfer of ownership 'paradigm', but also in relation to the planning and the IDP process, the role of municipalities, gender and human rights issues, the lack of consultation:

The Bill which was published was roundly condemned by all groups ... it also came under attack from the trade unions, the NGOs, the LRC and PLAAS people, because they were saying that the philosophy underlying the 1999 Bill was the only way – they were saying that that was the way it should be done and any departure from that was troublesome. ... and from the point of view of the LRC and supporters there were just a million technical objections to the Bill ... and of course the criticism was all in writing – we received reams and reams of written material from the LRC people. (DLA consultant, interview - 19.12.05)

In spite of clear signals from key Parliamentary figures that it was the bigger politics that would be driving the political agenda that was to frame the CLR, the team of the government's foremost opposition kept up the pressure, organising an ever-widening circle of critics, and holding to their campaign on the Department to 'change the

paradigm', to relinquish the 'transfer of ownership' model (discussed further in Chapter 5). Someone heavily involved in the process, indicated that:

they were just wanting to block the Bill, end of story. They didn't want the Bill. And it was just impossible to discuss it with them – they just met everything with a barrage of criticism, at every turn, a lot of which I had difficulty in understanding. So it was difficult to deal with them at such a stage. (DLA informant, interview – 19.12.05)

So, the criticisms can be divided broadly into two categories: first, 'change the model', and second, 'the rest'. But so long as the first was not met, the government's critics would not be satisfied and would continue with its "barrage of criticism" on 'the rest'.

It is unlikely, however, that many people in government saw the issues through the same lens as those in the legal grouping (see Chapter 5) and so many simply failed to understand quite how the early versions of the CLRB could be considered to be a 'sell-out' to traditional leaders, nor were they necessarily politically inclined to support any such sell-out, many of them being ANC supporters themselves. One explicitly mentioned a government official whose PAC-aligned political support *for* traditional leaders contrasted with his/her own views and those of his/her colleagues:

I wish you could speak to one of the Provincial Directors ... who would give you some different views [very supportive of ...] traditional leaders – they were opposed to what the rest of us in the government think of traditional leaders. ... Some people think that we have emasculated traditional leaders with CLARA. I think it was X who with the first draft of CLARA had said 'With that we have killed off the traditional leaders!'. (National DLA official, interview - 10.1.06)

When I asked someone in the drafting team how they had responded to such criticisms, he expressed a similar lack of understanding: "With complete bewilderment", saying that "It was difficult to understand it" (DLA consultant, 19.12.06). At the same time, as indicated above, many traditional leaders were themselves expressing their own fury with the approach adopted by the ANC in the CLRB.

While the 'model' could clearly not be changed, the 'rest' of the criticisms could be addressed and these were what the drafting team initially worked hard to tackle. By the time the drafting process that included the efforts of both external consultants, came to an end at the end of March 2003, the team thought that they had managed it:

At that stage, we had prepared and taken into account all the comments, including those of the LRC. We thought we'd done a good job – I remember

when we'd finished – it was 12 o'clock at night and when we left and were in the corridor we'd been giving each other high fives. (*ibid*)

But it was at that point that the political pressure from above narrowed the 'room for manoeuvre' of the bureaucrats who the critics were targeting as policy-makers, constricting the extent to which even 'the rest' of the criticisms could be dealt with, certainly it appears insofar as they related to concerns over human rights or gender. Nevertheless, the extent of the criticisms may well have felt like an assault on their personal credibility, as professionals in their work and, perhaps feeling professionally smarted, with many of those working on the drafting having been former colleagues (if not friends) of the critics, there was a need for the Directorate to defend itself. Given the constrained political space in which they were operating and their inability to 'change the model', working to take into account all the comments in the drafting process was unlikely to constitute an adequate defence. In addition therefore, members of the Department turned to questioning 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. One former official described the mood as:

a real sense of 'distrust' [on the part of the DLA] – maybe that's too strong a word for it – a sense of belief that civil society don't really speak for communities, and they're actually pushing their own agendas. ... this was the first time with land legislation that civil society organisations were at odds with the state and rallied to have their voices heard. But it was said that they were manipulated. (former DLA official, interview – 9.12.05).

The extent of the criticisms could easily be read not only as a challenge to the competence of the bureaucrats involved, but also had the potential to undermine the credibility of the (post-apartheid) state. Parliamentarians who were closely involved in the process therefore also questioned the extent to which the public criticisms, that were made in the later Portfolio Committee hearings on the Bill in November 2003, were representative of 'people on the ground'. Although some of the Portfolio Committee members provided representatives making submissions with the chance to elaborate on their concerns, when it came to questioning the government's chief critics, that is the organisers of the wider PLAAS/NLC Project, some Parliamentarians' comments and questions were more frank:

Chair Masithela responded to Ms X's presentation by explaining that the Committee recognized the right to lobby, but expressed displeasure when lobbying was conducted via proxy, when presentations did not reflect authentic views. Chair Masithela concluded his remarks by explaining that all the

presentations made to the Committee had been heard and would be taken under consideration. ... Chair Masithela noted that the consultation was not intended to be a complaint process but a point for input, and requested presenters concern themselves with the Bill before the Committee, not previous versions. (PMG minutes, 13.11.03)

As well as questioning the authenticity and legitimacy of the critics, even prior to the public Portfolio Committee hearings, the Tenure Directorate had also begun to respond explicitly and publicly to the criticisms, expending time and money on defending itself and its officials. For example, in September 2002, Tenure Reform Implementation Systems (or TRIS) produced 'A Guide to the Communal Land Rights Bill, 2002' in which attempts are made to respond to some of the criticisms from the legal grouping. Using language clearly pitched so as to be legally persuasive – to meet those critics on their own terms – it states:

It is abundantly clear therefore, that in terms of section 16(1)(a) and (b) that the ownership of communal land vests with a community or a similar entity and not with the administrative structures (traditional leadership institutions or any organ of state). ... Sections 2(1), 6(3), 10(1), 22(1), (2), 23(1), 25(4) and (5), 29(4), 30(5), 31(5), 33 and 34 therefore, clarify the position of an administrative structure (traditional leadership institution and other community-based institution) vis-à-vis the position of the owner of communal land as contemplated in section 16(1)(a) and 21(3). (TRIS, 2002: 9)

It goes on:

The continued role of the traditional leadership institutions and other community-based institutions in land administration and natural resources management is subject to sections 2(h)(i), (ii) and (333), 7, 32(3) and 33 of the draft CLRB dealing with the protection of the fundamental human rights ... (*ibid*: 10)

Later however, in the same document, an attempt is made apparently to appease traditional leaders who would object strongly to those very provisions and safeguards:

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 the African people, and in retaining access to parts of their land ... (*ibid*: 22)

Attempting to tread a political middle road is bound to be fraught with difficulties; words that may be reassuring to one party may be unwelcome to the ears of the other, raising levels of antagonism even further. Nevertheless, other similarly strongly worded documents were written and circulated internally and also published externally, many of them both explaining the Bill but also setting out a case supporting, or defending, the approach taken (eg. The A-Z of the Communal Land Rights Bill, 2003). Such publications continued to be produced even after CLARA had been passed into law in 2004.

6 - Working on tenure in the national and provincial offices

In 2000, the Land Rights sub-directorate dealing with the land reform programme relating to rights of people on farms was merged with the Land and Tenure Reform Directorate, to become the Tenure Directorate. After this merger, one director was tasked with overseeing this programme, the programme dealing with Communal Property Associations (CPAs), as well as reforms in relation to communal land, that is the formulation of the CLRB.

For people working on the CLRB, the process was very intensive. People spoke of day-long meetings, and of meetings ending at midnight. Even after the passing of the Act by Parliament, the pressure did not let up for long with the need to draft Regulations and then the announcement of a constitutional challenge to the Act which was launched on 20 April 2006, but had been publicly referred to in the 2005 Land Summit and known about by the government long before that. I went to meet with one official shortly after the Christmas and New Year break in 2006 and when I asked him/her when s/he had started back, s/he said that they had started straight back after the new year break because they were in the process of drafting the Regulations for CLARA and s/he had been involved in intensive drafting meetings. When s/he told me about the constitutional challenge, s/he said that the Director had received a phonecall at 7.30am one morning from the Minister who was in Belgium, to tell him that the LRC were bringing a challenge and that he should get hold of the papers. He referred me to a pile of papers on the table in front of us. It was covered in papers stacked neatly in piles including a pile of the 'Tenure Newsletter', another of the glossy pocket-book sized copy of the Act and another pile of papers, the top one being 'LRC's objections to CLARA' with the LRC's submissions to the Portfolio Committee poking out underneath. He said that they had just been reading the stuff that the LRC had submitted at the time it went through the Portfolio Committee to try and get an idea of what their issues are. Meanwhile, he said that they were having day-long meetings every Thursday and Friday drafting the Regulations for CLARA with people from Legal Services. This was all in addition to other work that they were tasked to do.

The DLA's Strategic Plan of 2001-2 indicated that the directorate was to 'Develop and submit the Communal Land Rights Administration Bill to Cabinet', by June 2001. Such a timetable was not met, but the pressure from on high was intense. The Director of the Tenure Directorate, having been working on this particular programme since his appointment in January 1997 along with those formerly involved in working on the LRB, continued to be heavily involved. A number of people spoke of the Act being the Director's 'baby' (DLA official, personal communication – 17.1.06) or suchlike. Bourdieu speaks about the importance of the genesis of the 'impersonal' in the bureaucracy in contributing to its legitimisation, and the legitimisation of its office bearers, in the name of the 'public good' (see also Osbourne 1994). Bourdieu (2004: 33) quotes Richet (1973) who describes the civil service prior to this 'dissociation of the function from the person':

What we call the "civil service" was so bound up with its occupants that it is impossible to retrace the history of a given council or post without writing the history of the individuals who chaired it or held it. ... The man made the function to an extent that is unthinkable now.

That personal association between the Director with the function, here CLARA – even referred to as his 'baby' – wholly compromised, even displaced, the 'impersonal' ideal that both grants authority to officials, but also protects them from personal criticism. For the Tenure Directorate, at this time of huge political pressure to formulate legislation that would satisfy their political masters – even the President was referring to the Bill in speeches – as well heading off criticisms from one's former colleagues, many of them extremely renowned lawyers claiming to represent 'the people', the pressure on a Director to 'get it right' must have been immense.

Meanwhile, there were institutional politics to contend with: according to one informant, there were competing 'camps' across the Department at the time, those whose allegiances to the Minister and those who were aligned with the DG, support for either granting access to particular avenues of power and authority, but restricting others (former DLA official, personal communication – 9.12.05). While this informant maintained that the Director did not align himself with either 'camp', I heard on more than one occasion that one of his superiors, aligned with the Minister, was referring negatively to the Director's differing background and his position. Although the Director had also made the transition into government from one of South Africa's oldest land sector NGOs, coming from a country outside South Africa appears to have represented a form of negative capital, perhaps casting doubt on his anti-apartheid struggle credentials that were still so important.

This was also at a time, discussed in Chapter 3, in which 'race' became almost a form of positive or negative capital, and being an 'outsider' similarly may have undermined one's social capital. When one's position in the hierarchy, one's job rested on playing the game successfully, on proving that the capital asserted in a superior's differing *habitus* did not matter when compared with one's competence, delegating authority and power might have seemed unthinkable. And such practices, in turn, perpetually shape one's *habitus*. Moreover, contributing to his own cultural capital and therefore authority, the Director's own experience in relation to tenure reform was unmatched in the Department: he had been working on the programme as Director longer than most of his colleagues, and alongside those former colleagues who were now the Bill's foremost critics. Furthermore, working on the CLRB held a certain cachet. The issues were complex and according to one senior official, "A lot of people in the department couldn't follow the debates" (DLA official, interview - 11.1.06). The Director, however, was extremely well educated with an extensive international experience and his holding of a doctorate gave him sufficient credentials to be 'the expert' in the Department on CLARA; with many of his colleagues referring to him using his title, the importance of such a credential was reaffirmed. It was also affirmed by colleagues who worked with him on CLARA, even by two of them who had known him for some ten years and had previously worked with him at the same NGO. However, holding the authority gained from being 'the' expert in the Department close to one's chest, also provoked a feeling amongst many within the Department that "they couldn't feel that they had been consulted" (*ibid*).

To people working on some of the other programmes in the Department, it appeared that much of the energy of the Directorate, certainly among many of those in positions of authority, was overly taken up with the development of the CLRB. One official who had come into the Tenure Directorate from Land Rights, was disappointed that a Bill they had been working on developing in that sub-directorate had stopped in its tracks "because there wasn't any spare energy"; in the end they felt that they "just didn't get the support" (former DLA official, interview – 9.12.05). This lack of capacity because of the (over-)concentration on communal tenure, was exacerbated by bureaucratic hierarchical divisions that meant that there were those in the Directorate who did have capacity but who "because of issues of authority [were ...] not in positions to take something on pro-actively" (*ibid*). It was also exacerbated by what might impersonally be called "bottlenecks in the project cycle", but which actually meant "particular people known not to be terribly efficient or effective, at particular points in the Department's hierarchy" (*ibid*):

We needed the meeting with the Minister about it and full political backing. I had asked the DG's office to set up a meeting but I don't know whether there

was just inertia in the DG's office, but no one set it up. It annoyed me because I knew that X [in his/her Directorate] could have set it up – when an issue about CLARA came up, X would call [the Minister] up on her cellphone. (*ibid*).

In relation to those working in the Provinces, their own potentially much closer relationships with people 'on the ground' than those of officials working from Pretoria could have provided an important source of knowledge that might have contributed to the formulation of policy and law-making. Certainly the changes introduced by the Minister so as to decentralise power to the Provinces provides one potential change that could contribute to this process. However, as discussed above, in and of itself this is unlikely to institutionalise any kind of changed practices, in terms of internal communication or the development of knowledge-sharing processes between the Provincial and National offices.

During my time in Limpopo, when I first contacted the Provincial office in August by phone to arrange an appointment to meet with one of their officials to talk to them about CLARA and their office's involvement with the implementation programme, I was told in no uncertain terms that I was wasting my time, the President had not yet given his assent to the Act and so it was not in force, and in any case the Regulations that would be necessary for its implementation had not been finalised. Subsequently, however, in September 2005, another official from that office gave an enthusiastic presentation of CLARA at a 'Stakeholders' workshop' organised by the Human Sciences Research Council. When I talked to him/her at a later date, s/he expressed disappointment that, whereas some Provincial offices had been already advertising positions dealing with tenure reform, his/her own office was not yet recruiting anyone to take forward the tenure programme. Instead, s/he told me the extent to which people from National office were themselves involved with issues arising in the Province: "Why, if there's an issue at Mashamba [some 400km away from Pretoria], X [from National office] would come down [here] and with people at Provincial to go down [to Mashamba]." (official from Provincial DLA, interview - 29.9.05). Even the consultation workshops had been co-ordinated by National office, with provincial officials accompanying the person from National office charged with running the workshop in question.

Such practices of hands-on control by the National office seemed to have continued even after the CLRБ had passed into law. One official from the Limpopo office expressed a certain amount of frustration that s/he was in the dark as to the plans in relation to the implementation of the Act:

There are plans about it which were developed by National Office and everyone had had to say what staff they would require. ...

ERAF: Have you seen any plans or timetables about the implementation of the Act?

No – I haven't received any emails about it. It might be that a plan has been sent to the head of the office but I haven't seen anything ... if you could see in my email inbox you'd see that there's nothing and that there's been nothing about CLARA for the past year. The Provincial office don't know what's going on with the plans at National office and we need to know why. [S/he seemed to speak with some resentment.] (Provincial DLA official, interview - 6.12.05)

Provincial offices obviously had different experiences, depending on how proactive managers were, but also depending on how valued they felt their inputs were by people at National office. I heard from an official from the National office that, similarly to the experience of some officials in the Limpopo office, the director of the KZN office had also had difficulties with the over-centralisation of power by particular officials in the National office in relation to the CLRB and their overly 'hands-on' approach:

X would always be coming to KZN without informing him [the director of KZN]. He wasn't saying that x needed his permission, just that he wanted to be informed about what he was doing in the Province, but X thought he could do what he liked. (former National DLA official, interview - 9.12.05)

Nevertheless, in KZN, the Ingonyama Trust had been in existence since 1994 and so consequently there were a number of people on the board of Trustees, including the Director of the Provincial DLA, with experience of administering all the communal land within the Trust and dealing with issues arising in relation to it. When I asked this Director to what extent the Provinces were involved in the formulation of the legislation, he said that:

Personally, he said that he'd been very much involved. But he admitted to having had run-ins with X, at times not even being on speaking terms with him. ... Not all the changes were taken into account. In the final analysis, X kept what he wanted. He said that he was more involved than other persons from the Provinces. He felt that his work on the Ingonyama Trust meant that he had knowledge that they didn't have and that they had valued his input. He had been more involved because of the Ingonyama Trust, and he said that he was very assertive. (Provincial Director, interview - 2.3.06)

He was clearly able to assert his greater cultural and social capital, at least in relation to the Ingonyama Trust, so as to maintain his position and continue to assert his influence and authority over the process. He was less positive, however, about his input in

relation to the drafting of the Regulations (happening at the time I spoke to him) that he described as “a very private affair” (*ibid*).

It is not difficult to criticise policy, but not so easy to explore why the policy processes unfolded as they did, why particular bureaucrats acted and (re)acted as they did to shape those processes. With the process still unfolding today, however, it is even more important to try to shed light on the answers. With hindsight one senior official was candid:

I believe that we could have done things differently without the haste, but we were all very much under pressure. But it could have cost the Department a lot of money in litigation and what we are going to do I don't know. We don't have the budget to implement it. I don't think it's a disaster, but it's a near disaster. (National DLA official, interview - 11.1.06).

However, as recognised by Bourdieu (1990: 81): 'because it is entirely immersed in the current of time, practice is inseparable from temporality, not only because it is played out in time, but also because it plays strategically with time and especially with tempo'. The pressure, and the haste with which things were done under that pressure, were a reality in which particular people within the Department were expected to work, produce results and be held responsible for those outputs.

One national DLA official was reflective about his/her role as a civil servant:

I thought hard before joining the Department because it was a hard task whether to make the decision whether to join or not. Sometimes you may not agree with something that comes from the top but you are bound by an oath that you took, so when the appointment letter is sent you have so many days whether to accept the offer. It's a big decision. Sometimes you have to change direction and then a new Minister may come in and say we are not doing this thing that you have been working on any more. (Former Provincial, now National, DLA official, interview - 10.1.06)

In terms of a bureaucracy, this is presumably the ideal, and also presumably not too difficult a path to tread with a “Minster [who] made very strong decisions”: sacrificing one's personal opinions for those of your political masters being the elected representatives of the people. But at the same time, “it's a big decision” because, as recognised by Bourdieu, 'the executant is both controlled and protected by the decision-makers' (Bourdieu 2004: 33): on the one hand, 'they receive their authority and their power' from their superior, on the other hand, 'they are answerable *for* him [sic]' (*ibid*: 32 – my italics) *to* the public. This involves a submission of one's own view of the public good, to that of one's superior, in fact arbitrarily shaped by the politics of the time

within the wider field of power, but symbolically impersonalised in and through the actions of bureaucrats acting to further 'the public good':

As would be revealed by the analysis of the functioning of this strange institution ... officials constantly have to labor, if not to sacrifice their particular point of view on behalf of the "point of view of society", at least to constitute their point of view into a legitimate one, i.e, as universal ... (Bourdieu 1994: 17).

This official justified such contradictions to himself:

I decided to go into government and work to give land back to people rather than to criticise ... [and later] I thought that I'd spent so long *toyi toying* for this government, but then when the ANC government had come into power I had continued *toyi toying* against them and I thought I could start actually working with them, working to give land back to the people. (former Provincial, now National, DLA official, interview - 10.1.06)

Bourdieu, however, was not blind to a 'discrepancy between the official norm as stipulated in administrative law and the reality of bureaucratic practice, with all its violations of the obligation of disinterestedness' (Bourdieu 1994: 17), but he contemplated that such violations would only encompass 'cases of "private use of public services"' (*ibid*: 17). In a time of such great change from an utterly delegitimised apartheid state, a time too of great idealism, many within government may not have lost sight of that idealism and truly have struggled with implementing those superior's orders when they contradicted their ideals and values. In an under-capacitated, newly-formed and still changing government, this presumably was a time in which there was the 'room for manoeuvre' in which those orders could to a certain extent be challenged, or certainly manipulated. But at the same time there still existed inevitable competition over authority and power amongst all officials within government, whether they were retaining idealism or wholly submitting to the will of the 'universal'. As indicated above, alliances formed between people with different loyalties based upon personal relationships as well as progression up through the ranks based upon which 'camp' one was in.

Balancing the inputs of different, contrasting and, in the case of CLARA, politically antagonistic groupings is professionally and personally not an easy path to tread and, as recognised above, a number of people working for the government found the extreme nature of the criticisms very difficult to take. One DLA consultant related the difficulties of being on the inside of the law-making process to his personal position in relation to government and 'civil society':

I came to it as ... a member of NGO structures lobbying to us. ... So I was having to consider inputs from my own people, and I could see how they were seen as a drafter. And we had to ask, 'What are the objectives of the legislation and how do we accommodate them?' Sometimes you have to be quite ruthless. The role of civil society in the law-making process is a difficult one. (DLA consultant, interview - 12.1.06)

Given the formal lines of the bureaucratic hierarchy, however, balancing the need or appropriateness of 'ruthlessness' in relation to the comments of critics, deciding where the boundaries of the 'public good' are drawn, can only be determined by those who are sufficiently senior. But inevitably bureaucrats will breach into the realm of the political, thereby losing their bureaucratic 'independence' and also the protection bestowed on them from their political masters. Treading such a line, however, will come up against criticism, even from one's colleagues, competing for authority and also for bureaucratic capital derived from receiving sanctification, ultimately, from the approval bestowed on their actions by 'the people'. One relatively senior former official, claimed not to accept the 'ideal' of bureaucratic independence and was highly critical of another powerful official who they felt did not take a personal stand on the political decisions that arose:

S/he thought that it [the approach taken at a level of policy] was clearly flawed, but said that X had no principles. For example, s/he thought it was impossible to figure out where X stands on issues – whether there should be democratically elected structures for instance. It always depends on who is pulling the strings, so depending on the instructions from the DG X will just go ahead with whatever that may be. X does not fight for his/her principles ... (former National DLA official, interview - 12.12.05)

Walking the path of bureaucrats – balancing maintaining political independence and following the prescriptions of one's political masters, gaining approval from 'the public', from one's colleagues too, and holding on to particular political ideals, all at the same time as portraying oneself as a figure of competence, professionalism and responsibility – is an ambivalent, contradictory and often difficult one and it may contribute to considerable stress, particularly for those in positions of responsibility. On the other hand, although this may be seen playing itself out in relation to the development of CLARA, such bureaucrats may themselves have contributed to and at times exacerbated such difficulties.

By March 2003, many of the consultation workshops had already taken place. Alongside the obvious criticisms received from traditional leaders and their supporters at many of the workshops, there had also been particular pronouncements, referred to above, widely reported in the media, by high profile traditional leaders threatening violence in

relation to the passing of the CLRB in late 2002. Despite this, in the same month a draft paper was written by the Director of the Tenure Directorate prepared for the Chief Directorate: LRSSS Colloquium, in which he dealt forcefully and strongly with such critics:

Their [traditional leaders'] interpretation of section 31 [which was to grant them *ex officio* status on the LAC] is that it severely limits their participation in the land administration committee. The traditional leaders want exclusive control of communal land within the context of the 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 South African Land Policy to transform and democratize the structures of governance within the context of a unitary land administration. (2003: 54)

This was argued even after recognising earlier in the document that the clause granting powers of administration over land tenure rights to the LACs, on which traditional leaders at that time were only to have *ex officio* status, 'provides the most prized generic powers and duties of a land administration committee in land administration' (*ibid*: 38). However, despite the strong sentiments voiced so forcefully in that paper, effectively putting traditional leaders in their place, CLARA, when it was passed by Parliament in February 2004, did in fact give those traditional leaders who had constituted a Traditional Council pursuant to the TLGFA, exclusive control of the LAC. Nevertheless, and inconsistently with the former position taken in that discussion paper, just before the Bill was passed by Parliament, in a rather triumphant tone, the Director published an article in the Sunday Independent (1.2.04):

The recent brouhaha surrounding the communal Land Rights Bill [sic], now already adopted by the portfolio committee on agriculture and land, has posed two distinct scenarios. Either those who wrongly interpret its contents and lambaste us on those unwarranted grounds are ignorant and stubborn, or they are downright mischievous.

We have said it before, and are all too happy to say it for the umpteenth time: the bill seeks to democratise the system of land ownership and administration by transferring both aspects from what used to be a paternalistic state system to the people. ... Criticism to the contrary are both baseless and legally of an irrelevant nature. ... To ascribe an electioneering motivation to the government in having the bill considered by parliament is disingenuous and insulting and is divorced from the reality of that development process to which a number of the most vociferous critics of the bill were in fact a party.

Whether or not the Director's political masters had directly delegated their authority to pronounce publicly in such a way on these matters, given his ongoing personal association with the Bill, he seemed to have forsaken the concomitant protection that might have been given to him had he maintained the symbolic masquerade of impersonal neutrality. Because ultimately it was not officials such as him who had the power to match their words with action, in the end, such strongly worded albeit inconsistent pronouncements by government officials, came to be considered by their critics as no more than personal rhetoric. In turn, criticisms may have begun to feel increasingly personal. While the official's pronouncements may have continued to: 'portray bureaucracy as a "universal group" endowed with the intuition of, and a will to, universal interest ... and a rational instrument in charge of realizing the general interest' (Bourdieu 1994: 3), and he may even have continued to believe this himself, the *doxa* that 'the state, and ... the order it institutes' is legitimate and '*not* problematic' (*ibid*: 15) had been broken, or forsaken. Instead, the power that was wielded by the state passing such legislation was recognised as being arbitrary. Moreover, given that such rhetoric was made by the most senior official in government working directly on the Bill, such pronouncements, rather than quashing the critics, instead contributed enormously to fuelling their antagonism. Furthermore, rather than successfully defending the credibility of the government and such officials, such pronouncements and the advertisements of support for the Bill, the retorts and responses to such critics contained in glossy government publications, undermined any vestiges of respect that their critics had for them. Perhaps criticism can be made of both the critics for directing their challenge and criticism to such government officials, rather than to the Parliamentarians driving such decisions, but also of particular government officials for inciting the 'barrage of criticism' that it ultimately received. In the end, however, it is obviously those Parliamentarians who should have been answerable to their critics.

7 - Conclusion

CLARA was a piece of legislation introducing potential change to relations of power between traditional leaders and those living in the former homelands. It was inevitably going to be politically controversial and, in relation to the planned reforms, the government came under extensive, strong and public criticism from several groups of critics. On the one hand, they underwent 'a barrage of criticism' from different 'civil society' groupings, including statutory bodies such as the HRC, supported by some of the best human rights lawyers in the country. Amongst these groupings were individuals who were former colleagues of officials on the new drafting team. On the other hand, criticisms also came from traditional leaders, who threatened violence in response to the reforms. These criticisms were set against political gerrymandering between Ministers and high profile traditional leaders in CONTRALESA. These politics

obviously had a longer history, with ongoing violence in KZN between the ANC and IFP (Maré 1996). Meanwhile, the third democratic elections to take place in April 2004 were looming. It was these politics, amongst those in the highest echelons of the political field, which were driving the convoluted path of the Bill. This constrained the 'room for manoeuvre' in which governmental officials were operating and, in turn, limited the extent to which they were able to respond to their other critics. Nevertheless, given the extensive nature of such criticisms, calling into question the competency of some of the officials who were involved in the process, even challenging the credibility of the post-apartheid state, they could not be ignored. The government tried its best to defend itself publicly, but with the agenda being set by others, the strong pronouncements that they made did not retain much legitimacy given the little real influence such officials had over those agendas.

This field is in many ways clearly demarcated, constructed according to institutionalised regulations and hierarchical divisions of the bureaucracy that in turn shapes the forms of capital recognised as being valid within it. However, at the same time, it is defined in relation to other fields, such as the legal field, the political field and the wider field of power. As a result, as we saw here, officials endeavour to meet criticisms from those in other fields on their own terms – such as responding with arguments constructed so as to be legally persuasive. Such attempts, constrained as they are by limitations within the bureaucratic field itself, as well as their position between a variety of other fields – truly 'caught in the middle' – are unlikely to be successful and can hardly be said to have been in relation to CLARA.

The Tenure Directorate was particularly affected by the changes that came about after the second democratic elections in 1999; the officials that remained not only had to cope with a significant loss of experience, but also with extensive public criticisms that, politically, they were unable properly to respond to. Meanwhile, difficult divisions developed within the Department according to varying levels of resistance to change and loyalties and subsequent alliances that formed around them. In some Directorates particularly, fewer people were required to do more and were operating under a great deal of pressure. While this to a certain extent represents a rupture, there were also many continuities with the Department pre-1999. For example, although after 1999, land remained a National competency, the new Minister adopted a less centralised interpretation of administrative power and made changes that were to facilitate decision-making at the Provincial level. Nevertheless, the bureaucratic hierarchy, initially sustained by particular bureaucratic rules, contributed to a particular institutional *habitus* of superiority within the National office. Meanwhile, officials continued to struggle to maintain their positions of authority in the face of change, and criticism and power struggles thereby further contributed to a 'hands on' approach. In the face of

such enormous pressures that those working on the Bill were under, the government responded with an understandable siege mentality.

While this chapter has considered the practices that were built up in the bureaucratic field after 1999, the following chapter goes on to consider some of the government's foremost critics, some of whom had been involved in working for the government on the LRB prior to it being dropped by the new Minister. The chapter is entitled 'A person or community whose tenure of land is legally insecure ...' picking up on the words of the Constitutional provision mandating the government to pass legislation dealing with tenure reform. Many of these critics were lawyers, or moving in the legal field, advocating an alternative 'rights based approach' to tenure. It discusses why they responded with quite such dismay to the 'model' of reform adopted in CLARA, to transfer ownership of the land to 'African Traditional Communities' and how the 'rights based approach' differed from this.



CHAPTER 5 - 'A PERSON OR COMMUNITY WHOSE TENURE OF LAND IS LEGALLY INSECURE ...'

1 - Introduction

The previous chapter considered the uncertain autonomy of the bureaucratic field, particularly since 1999. This chapter goes further back than that, considering the involvement of many individuals in governmental policy-making prior to 1999 and their engagement with tenure reform subsequently to that. Such people make up what I call the 'legal grouping', the leading critics of CLARA, who focused their rage towards the model of reform adopted in the Bill that was to transfer the ownership of the land to 'African traditional communities' (Sibanda 2004: 160). This was seen to be in direct contradiction with a 'rights-based approach' that was to confirm, through statutory recognition, the status of existing *de facto* rights as property rights and thereby to grant people living in those areas legally recognised security of tenure. This chapter considers the influence of this legal grouping made up of a number of prominent lawyers and others moving in a tight circle based upon a shared history of involvement in the 'land struggle' and more broadly, involvement in specifically legal struggles against the policies of apartheid. Many of them continued their involvement in the new democracy, gaining positions within, or as consultants to, the newly created DLA. It includes a number of people who, after 1994, were included in the DLA's 'inner core', a number of white activists who had been actively involved in the former SPP, the LRC and the ANC. The chapter looks at how this shared history shaped their particular approach to tenure reform in general, as well as their opposition to the specific tenure reforms on the table in the form of CLARA. It explores how their model of reform based upon a 'rights-based approach' has been shaped by layers of discourses and it then goes on to consider some of the processes they followed to legitimise this particular approach. At times those processes were challenged by others so as to undermine both the approach as well as particular individuals within the grouping. At other times, they were simply unsuccessful in smoothing over the cracks that emerged at points where their knowledge was incompatible with other forms of knowledge. Struggles emerged over meaning and the hierarchy between particular forms of knowledge.

The focus of this chapter is the interaction between individuals in the legal field in South Africa, often with others outside that field. Many sociolegal scholars and anthropologists of law are familiar with Moore's concept of a 'semi-autonomous field' – a social space that 'can generate rules and customs and symbols internally, but ... is also vulnerable to rules and decisions and other forces emanating from the larger world by which it is surrounded' - (Moore 1973: 720). For her, however, in considering legal pluralism, what was important was the generation of rules and norms within the field. Similarly to

Bourdieu, the extent to which this would be possible, and therefore the extent of the field's 'autonomy', would depend upon the operative 'rules of the game' within the field. Moore's conceptualisation has been extremely influential in contributing to sociolegal scholars' understanding of legal pluralism and their recognition of the 'dialectic, mutually constitutive relation between state law and other normative orders' (Merry 1988). These two conceptualisations of social fields are not incompatible but, Bourdieu's notion of fields extends and elaborates upon how such 'rules of the game' may come into existence through the practices shaped by the *habitus* and material reality of those within a field and the different forms of capital recognised within it, which in turn will be influenced by the wider field of power.

South Africa is a country that also has a highly developed legal system with the apartheid state having been founded upon a legalised form of racial segregation. In South Africa's transition, many of the contestations taking place between those in the legal field and those outside it, contestations that contribute to shaping a wider field of power, involve struggles to reclaim the legitimacy of the law. But within the field people will also struggle against each other for hierarchical positions, and these struggles within the legal field are also explored in this chapter. As Bourdieu recognised, professionals included within the legal field will 'have in common their knowledge and their acceptance of the rules of the legal game, that is, the written and unwritten laws of the field itself' (Bourdieu 1987: 831). Law-making activities, however, will involve actors who participate in the legal 'game' even though they may not have professional recognition or the status of lawyers within the field. Considering law-making therefore brings to the fore interactions with those outside and excluded from the field. Nevertheless, these include those in other fields who nevertheless possess other forms of power, or capital. Moreover, after 1994, along with its legitimacy, the autonomy of the legal field was undermined by its embroilment with the apartheid state. Given this, struggles between those within the legal field and those outside it are particularly intense.

2 - The development of *habitus*: circles of influence over a legal transition

That's why I wanted to be a lawyer as so much of the apartheid state was based on 'law' – and I'd wanted to nail them at their own game. (LRC lawyer, personal communication - 29.5.05)

In post-1994 there was a complete euphoria. You could see it with the numbers of legislation drafted – I looked and it was something like 150 pieces of legislation a year in the first years, and now it was down to 30 or 40 a year. (former DLA lawyer, personal communication – 16.1.06)

Those in the legal grouping, for a long time prior to 1994, had been involved in the struggle against apartheid. Some had been involved as activists and researchers working for land NGOs, others as prominent lawyers in the LRC. Much of the work at that time involved legal struggles against the forced removals of people from black spot areas to the homelands (Abel 1995) – their ‘rights’ unacknowledged or swept aside by the application of swathes of increasingly regressive apartheid legislation. Human rights, therefore, for all of those who had worked together in the dark days of the 1980s – those in the LRC, for members of the Black Sash and CALS, for many in land NGOs at that time – held up not only an ideal, but also a promise to provide both a shield and a sword to limit the power of an unjust state.

Within the legal field, however, symbolic capital, deriving not only from the symbolic acceptance of the apartheid legal system by lawyers, but also from the judicial approval given by jurists to the state in their judgements, was not shared equally. Human rights lawyers, while symbolically accepting the existence of the legal system, pitted themselves consistently against those others, with the aim of subverting the distribution of power within the legal field, as well as that within the wider field of power. Going against the grain of power of the times, what they lacked in terms of social capital because they were not part of particular networks of power, they endeavoured to make up in terms of legal capital – through legal reasoning and superior competence. Their struggle was a struggle against the state, for the recognition of people’s ‘rights’. And then in CODESA and the multi-party negotiating process in the early 1990s, many of them had managed skilfully, and successfully, to contribute to such process. For example, many of them were key in providing ‘technical expertise’ to the women’s movement in their successful campaign for ‘equality to ‘trump’ custom’ (Hassim 2002: 725, 719).

When the subversive intentions of the legal grouping joined with those in the wider field of power in the early 1990s, apartheid was overthrown and all of their hopes were realised; finally the constitution of a new democracy based upon the respect for human rights of all. In 1994, for once, these human rights lawyers enjoyed the euphoric position of playing at the top of the league – they were the ones in the legal field who had spoken the language of human rights all along and in the new democracy this was held up as a mark of respect. In its recognition as valuable, their human rights badge could now be held up and used as a form of capital. And after 1994, it was their voices that would be heard in the new democracy, particularly in relation to land reform. In Nelson Mandela’s new government, many of them, their colleagues and supporters, filled influential positions such as ‘special adviser’ to the Minister of Land Affairs, even the DG of the DLA. In relation to tenure, one of them became key in driving the development of the DLA’s reform policies. They would ensure that their vision of the

new democracy would be realised. There still existed injustice, but this could be overturned so long as the rights that became enshrined in the Constitution were realised. Of course there would still be those with 'vested interests' that would argue against change, but these would be legal battles, and so long as there were basic human rights enshrined in the Constitution, such rights were irrefutable. Not only did legal reform present a substantive response to the plethora of social problems facing the new government – new legislation could be held up as evidence of actual, tangible steps that were being taken to overturn such an abysmal legacy. Furthermore, passing such progressive legislation would also go some way to reclaiming the legitimacy of the law from the dark days of its bastardisation under apartheid. In relation to land, a 'rights-based' approach would therefore be adopted. All those people whose rights had been trampled upon with the wave upon wave of forced removals of millions of people would now know what 'real' rights were. Their security in land would be protected by the recognition of their rights to land; their human rights would be upheld.

In February 1996, even though a director of the Tenure Directorate in the DLA had not yet been appointed, the TRCG was set up. This was a group that operated within the DLA, but also included 'non-official members' to be initially funded by a Ford Foundation grant to the DLA (Minutes of the first TRCG - 13.2.96). Again, those who peopled the group included some of the same names, taken on as consultant 'tenure experts' (*ibid*). One of them was the director of PLAAS. Another of the consultants, who, before becoming a senior researcher at CALS, had formerly worked for TRAC, and continued to be closely linked to the RWM, was subsequently brought inside government with a formal appointment as adviser to the Minister. When the Drafting Team for a new Bill was convened, to be based on the approach developed by the TRCG, it also included this special advisor. In 1998, the culmination of ongoing meetings of first the TRCG and then the Drafting Team, was the LRB that was tabled in early 1999.

On its release, however, the LRB did not receive wholehearted endorsement from the rest of the DLA, receiving particular criticism from the Provincial offices. Then, after the second general elections in April 1999, with Thabo Mbeki succeeding Mandela in the Presidency, the hopes and plans for tenure reform of those within such tightly knit circles were shattered. The new Minister made clear to the Drafting Team that she did not accept that the LRB would provide a suitable model with which to deal with the issues and that the team should come up with an alternative. As discussed in previous chapters, within months of Thoko Didiza's taking office, the appointments of many of those closely involved in the tenure reform process within the DLA came to an end. The positions and influence of others who could be said to be inside the legal grouping, including particular people still working for the LRC, similarly shifted from within the government (or closely connected to it, through consultancies and advisory roles) during

those early post-apartheid years, to falling back upon advocacy from the outside after 1999. It was many of these same individuals who convened the 'civil society' grouping of people in the Western Cape concerned with tenure issues and who went on to secure funding from DFID for the PLAAS/NLC Project.

3 - Defining 'the problem'

The legal grouping for a long time was concerned that the *de jure* situation in the former homelands often did not match up with the *de facto* situation on the ground. This can be demonstrated by their interpretation of the tenure problems in the homelands:

[there], most of the land is nominally owned by the SADT or the homeland governments. In fact, the land is occupied by people who have often dealt with it as if they were full owners, although the applicable regulations do not provide for this. There is thus a conflict between the legal system contained in the regulations and the actual way in which the land is held and used. In addition, many people who in fact are the undisputed occupiers of the land do not even have any form of certificate or permit issued in terms of the regulations. People have exercised and relied on their practical rights in building their homes and investing in the land. (Statement on the White Paper on Land Reform and the Accompanying Bills – undated [estimated date: early 1991], seven signatories [including three key individuals in the legal grouping])

Even though it is recognised here that the applicable legislation and regulations deriving from it in effect mean virtually nothing – the 'virtually' indicates the vestige of symbolic importance that legislation nevertheless retains in their eyes. In this vein, the analysis goes on:

The repeal of the 1936 Development Trust and Land Act inevitably carries with it the abolition of the SADT (the nominal owner of the land), and the repeal of the regulations. This will *remove the legal basis for the rights of the existing occupiers*. The question then is, who will own and occupy the land? (*ibid*: my italics).

While in the one breath the reality as providing a basis for the recognition of people's 'rights' is recognised, in the next that people's rights might only derive from law appears to be asserted. This contradictory analysis effectively deprives people of any rights at all if the legal rights they have been given in no way match up to the rights they have in practice, that is their legal rights are virtually meaningless. Although the recognition of their practice in terms of 'rights', albeit *de facto* ones, implies a fair and progressive interpretation of the reality such people are faced with, such recognition nevertheless

confounds *legal* analysis. This legal conundrum continued to be the basis for their interpretation of 'the problem' that any legislation passed pursuant to the Constitution was to solve.

Twelve years later, the submission regarding the CLRB made by the PLAAS/NLC Project to Parliament with inputs from or drafted by key members of the legal grouping sheds light on the assumptions upon which their particular interpretation of tenure reform is based. While their thinking has developed since the early 1990s, the views expressed in that submission are largely consistent with those held twelve years earlier by many of the same people. The following section analyses the assumptions on which that knowledge has been based and also on which particular models of reform have been constructed. Moreover, it considers the extent to which such views have been shaped by their proponents' particular participation in the struggle against apartheid. This was a struggle determined by the limits of the law and since apartheid, in a struggle to reclaim the legitimacy of the law.

4 - Shaping discourses: layers of complexity

In those areas of South Africa in which the formal legal system worked, people could hold private property rights relating to land that had been immaculately surveyed and which would be recorded in a central Deeds Registry. This provides a stark model against which the 'other' areas of the country could be compared. These 'other' areas, including the homelands, with their contrasting forms of practice, can then quite neatly be described in terms of dichotomies that highlighted the differences: communal as opposed to private; permit in contrast to ownership; informal and formal; legal and non-legal. These could be and were extended in further ways: traditional and modern; subsistence and commercial – all terms which would conveniently support particular arguments for reform. Such overlapping discourses may interact to shape a variety of responses to tenure reform policies and unpicking such complexity is not straightforward. The following sections unpick three key discourses: the law and rights; gender; and modernity and tradition. Each have shaped the dispositions of those in the legal field and the legal grouping's response to the CLRB.

4.1 - The law and rights

In 1996, the final Constitution was adopted, along with its property clause in s. 25, as one of the provisions contained in the Bill of Rights. The adoption of a property clause in the first place was extremely controversial and much has been written about it (Chaskalson and Lewis 1998; Klug 2000; Roux 2002), but rather less attention has been focused on the clause dealing with insecurity of tenure. Section 25(6) reads: 'A person or community whose tenure of land is legally insecure as a result of past racially

discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress' and therefore mandates the government to pass an Act of Parliament to bestow legal security on those persons or communities that do not enjoy such security or to give them comparable redress. CLARA was adopted to meet this Constitutional imperative. In the face of the fame of South Africa's Constitution, widely hailed by lawyers and non-lawyers alike as a 'model' constitution, it is useful to remember that '[n]othing is less "natural" than the "need for the law"' (Bourdieu 1987: 833). There are many forms of insecurity perceived by people living in the former homelands, but the specific nature of the insecurity of tenure envisaged here is clearly narrowed to legal insecurity.

In November 1996, the TRCG produced a draft 'Policy Framework for Tenure Reform'. Much of this document provided the foundation for the tenure sections of the government's 1997 White Paper and is reproduced there verbatim. In this document the 'Broad Principles of the Government's Approach to Tenure Reform' were set out along with their analysis of the problems arising as a result of the 'lack of legally enforceable rights to land', including 'vulnerability to interference or confiscation of rights whether by the state or other people' (*ibid*: 2). To resolve this, the 'rights-based approach' was adopted, set out in more detail in the TRCG's former 'Foundation Document: Land Tenure Reform':

This approach may be likened to the concept of "upgrading rights". Its basic intention is to find legal ways of transforming current *de facto* relationships to land into formal legal rights to land. The aim is to normalise and stabilise land rights by conferring secure tenure rights on those people who, while they are widely recognised as *de facto* owners or rights holders of land, have no legally recognised security of tenure under current law. This process has to start with an understanding and acceptance of current occupation patterns and systems and values in relation to land rights ... (1996: 10).

Although the 'legal' nature of areas in which most white South Africans own land and property negates the merit of questioning the 'security' that that system might not offer to particular individuals or groups of individuals, time and again the 'non-legal' nature of practice in such other areas entails the conclusion that land rights in those other areas are insecure. Although they may indeed be insecure, such insecurity may not derive from their lack of 'legality', nor be solved by their legal recognition. And, while their 'informality' is assumed, in contrast to the formality of the formal system in which such rights are recorded in writing, legally recognised and registered, the extent of formality of *practices* that exist in those areas, a formality that may be tangible for people living there, will not be explored. Moreover, the meaning of that informality, and *per se*

insecurity, is defined by those outside it, those within the 'legal' system – therefore, by extension great value is given to 'real land rights' (Green Paper on Land, 1996: 43). So, although, importantly, people's *de facto* rights *are* recognised, such rights do not and cannot exist apart from the relationships that shape them and practices built up around them.

For actors in the legal field, 'the prevalent dispositions of the legal *habitus* operate like categories of perception and judgement that structure the perception and judgement' (Bourdieu 1987: 833). There appears to be an assumption here, a 'misrecognition' (Bourdieu 1990: 123) that, what such a lack of legal structure and framework means for them (as individuals within the legally defined world) – that there would be a lack of respect for their rights, rights which are not 'real' (in the legal and non-legal sense of the word) and so can be 'arbitrarily' extinguished – can be extended to those living outside the field. Whether or not such extinction may or may not be arbitrary for people living according to these 'other practices' is therefore another aspect of their reality that would not be explored. The approach further assumes that for people living in such areas, statutory rights will be endowed with the same import and meaning that they may well contain for people living within the legal field, within a reality where 'the law governs every tiny little piece of our life' (Litigation lawyer, personal communication - 18.6.05).

It is not hard to find problematic cases exemplifying the conclusion that lack of legality entails insecurity – women who have suffered 'eviction' after separating from their husbands, who have not been able to access land in the first place because of the 'arbitrary' application of a 'deformed' customary law resulting from its interaction with sexist apartheid laws, and such cases also chime in accord with progressive feminist principles – but this approach rests on the assumption that the lack of legality in the former homeland areas causes such cases. However, women endure such evictions and constrained access to land and property all over the world, even in cases where they are living under legalised property arrangements. But, such an assumption entails a particular type of *tenure* reform. High hopes are held out for such reforms:

[Tenure reform] will enable citizens to hold and enjoy the benefits of their land, their homes and other property without fear of arbitrary action by the state, private individuals or other institutions. Tenure security will contribute to personal security and social stability, as well as to higher levels of investment and more sustainable use of land and other natural resources. (Green Paper on Land, 1996: 43)

Tenure reform may well result in such benefits, but the assumption is that people living in such areas do not today hold and enjoy the benefits of their land, homes and other property *because of* the non-legal nature of their land rights.

4.2 - Gender

For those activists who continued to be involved in the ongoing struggle against injustice in the new democracy, the former homelands were areas in which so many of their clients in the 1980s had been fighting against being forcefully removed to (Abel 1995). These were where some of the worst poverty in the country could be found. This in itself justified intervention. For women, only more so. With their poverty and vulnerability only exacerbated because of their sex, they were said to suffer a triple oppression – of class, race *and* sex (Meintjes 1996); and also, as Lydia Kompe, the founder of the RWM, spoke of, 'by husbands, sons and traditional practices' (Small and Kompe 1992). It was the legal grouping's engagements with the RWM, through TRAC and then CALS, that had made this so clear. But after 1994, they made sure that such oppression would be fully recognised. As indicated in the Land White Paper (1997, s. 2.5.1):

Much of the country's most severe poverty is located in rural areas, where the poorest ten per cent of the people are Africans and where women-headed households are particularly impoverished. Three-quarters of the children in rural areas are in households living below the minimum acceptable subsistence level.

It is not surprising that the proposed solutions to such problems follow on smoothly from the discussion in the section above on the law and rights as a discourse of change. Here again, legislative change or legal safeguards are seen as the answer:

All South Africans should enjoy equality in the exercise of land rights without reference to gender. To attain an end to discrimination against women in land allocation, a myriad of laws and customs relating to property rights, marriage and inheritance must be reviewed and amended. (Green Paper on Land, 1996: 47)

There are other examples from that time that represent a similar faith in the law and legal change to effect such positive change on the ground. Nevertheless, there is also a certain realism that the law will not implement itself:

The law will also provide for protections pertaining to equality and rights for women. Any decision which discriminates against women would be invalid. In order for the rights and protections enshrined in the envisaged law to be

effective no transfer of land to group based systems will happen until there has been a process of information sharing and workshopping [sic] with the members of the land holding group. (Draft Policy Framework for Tenure Reform, 29.11.96: 11)

Despite the recognition that passing a law is not sufficient, there appears to be a liberal faith that if people have knowledge of the law, change will be effected. This faith was carried through to 2003, when, in criticisms of the CLRB, a lot of faith was similarly invested in the law being the instrument to change such practices, and legal safeguards were important to fight for:

To the extent that anyone may be available to help women assert their rights, it [is] much easier to intervene when the law is clear and precise. It is more challenging to have to work out the intersection of community rules, law and practice in every case. (NLC/PLAAS Project - 'CLRB and women', undated [relates to CLRB, 8.02])

Although, it was acknowledged that 'many areas of discrimination will not be written down ... they will simply occur as unwritten practice' (*ibid*), such undinted faith in 'the law' to effect change to practice is not surprising if we recall the *habitus* of actors in the legal grouping and their hopes held out for the new Constitutional democracy.

According to a number of members of the legal grouping, the reason for such double injustice meted out to women in the former homelands is that the rights that people do have in such areas are held by men and that this is due to the discriminatory operation of customary law:

The legacy of past discriminatory laws, and the operation of some aspects of customary law, has created a situation where most women in communal areas do not have secure land rights. Their position remains vulnerable and unequal. Not only do they not have land rights, but customary practices restrict (and in some cases completely prohibit) their right to participate in decision making processes under communal tenure. (NLC/PLAAS Project - 'CLRB and women' [later version], 14.11.03)

This response to the CLRB sounds as an uncanny echo to words singing the same tune in the TRCG's Foundation Document years earlier, and analyses undertaken by the RWM that had born out these analyses in the early 1990s (Kompe and Small 1991). But for the legal grouping, while the context of the debates had changed, customary law and 'tradition' continued to be pitted against 'basic human rights'. 'Human rights' were seen to offer the panacea to the fermenting ethnic divisions in the country; conflict would be resolved through the careful application of the Constitution and the balancing of

people's rights that for so long had gone unrespected, through the application of the law with its reclaimed legitimacy. While this kind of argument may provide some consistency to those within the legal field, as indicated above, law-making involves interactions between actors in different social fields and moved by divergent interests competing for 'monopoly of the power to impose a universally recognised principle of knowledge of the social world' (Bourdieu 1987: 837).

For those outside the legal field, that is for those who did not accept or even recognise that "the law governs every tiny little piece of our lives", any support for women challenges and has the potential to unsettle the stability of the relations of power through which discriminatory practices are sustained and perpetuated. While the WNC and RWM had triumphed over traditional leaders in relation to the Constitutional negotiations in terms of culture being subject to equality, as recognised by Hassim (2002: 720):

the political tensions between traditional leaders and the women's movement were not resolved by these mechanisms. Instead, the contestation between [them...] was in effect delayed to be resolved by the new government.

And, by the late 1990s, as indicated in previous chapters, particular high profile traditional leaders threatened the instability of KZN and, with the country's second democratic elections approaching in 1999, that instability would have wider resonance for the political and economic balance of the country. Certainly such issues held a great deal of sway with the ANC, competing, at that time unsuccessfully, with Buthelezi's IFP in KZN. As a result, counter-discourses drawing upon 'customary law' and 'tradition' began to be pitted against, and come to displace, discourses of 'human rights' and 'the law'; the heyday of human rights lawyers' possession of capital *qua* human rights lawyers had passed.

Even if such a challenge to the balance of power relations is framed in terms of human rights law, this will not necessarily determine the field within which such a challenge will be fought. Being no doubt aware of this, efforts were made by those in the legal grouping not only to deny the existence of such a conflict between support for women and maintaining the *status quo* in terms of existing power relations but even to justify such change in the name of 'tradition'. This represents an attempt to meet their contenders on their own terms, that is to bring 'tradition' – or 'customary law' – within the legal field:

The Department of Land Affairs does not believe that the above measures are in conflict with customary law. They provide recognition and protection for indigenous land rights and vest the ultimate ownership and control over the

land with the members of a group as is the case under customary law. The requirement that traditional systems adapt to accommodate the changing position of women is also not fundamentally threatening to customary law. There are many deeply traditional areas where these changes are happening spontaneously. (White Paper on Land Reform 1997, s. 4.19)

Research was even commissioned at the time into such 'spontaneous' changes, presumably in an endeavour to repudiate such powerful counter-discourses with evidence that could not then be denied and that could support the formulation of appropriate 'evidence-based policies'. By 2003, however, while a 'conflict' between these discourses is not quite acknowledged, a 'tension' is, with hope still held out for such change, aided by the setting of 'standards' to which customary systems must conform:

The tension between customary law and human rights is well known ... There are other issues as well to do with transparency, accountability and democracy. One way to handle this tension is to acknowledge it and set standards that require customary systems to conform with human rights standards. That customary systems are flexible and capable of change is evidenced by changes that are already occurring in some areas: for example women with children being allocated land by some chiefs and headmen. (PLAAS/NLC Project - Summary and analysis of the Cabinet-approved CLRB, 20.10.03: 7)

However, such attempts to (re-)interpret 'tradition' by members of the legal grouping, however, served to irk others who thought of themselves as having far greater legitimacy, if anyone was going to, in interpreting African tradition.³⁴ That is, their attempt to bring 'tradition' within the legal field failed. Members of the legal grouping may well have held considerable cultural capital deriving from their recognised competence in legal analysis, but were unable to translate that capital into the symbolic capital that they would have held had they achieved legitimacy of their version of the social world in the wider field of power. Such symbolic power of the law may often be taken for granted in countries where the autonomy of the legal system is a given, but in a country like South Africa, undergoing a transition from a time during which the legitimacy of the law was so thoroughly undermined, such assumptions cannot be made.

As has been seen here, discussion of the conflicts raised by discourses around gender naturally leads on to a discussion of 'modernity' and 'tradition', another key discourse that has shaped the response of the legal grouping in their approach to the tenure reform and response to the CLRB.

4.3 - Modernity and tradition

In 1991 the NP government had passed legislation to upgrade the rights of tribes to ownership (the Upgrading of Land Tenure Rights Act, number 112 of 1991). This was criticised because the:

land vests with the tribe and not the individual, therefore the security of individuals to occupy tribal land is dependent on membership of the tribe and the acceptance of [the] tribal authority. ... this situation lends itself to potential conflict and abuse of authority. (DLA - Workshop on Tenure Reform and Land Administration, 1-2.9.94: 33).

Such arguments in turn tapped into a groundswell of opinion in activist circles against any perpetuation of the support by the government of the chiefs or traditional leaders, who continued to receive government stipends after 1994. Traditional leaders were an easy target of opposition at the time and were all tarred with the same undemocratic brush; they had often wielded what little power they had within their areas of jurisdiction in tribal areas, acted as apartheid government lackeys in thwarting ANC anti-apartheid uprisings and, in many cases, helped by the collusion of customary and apartheid laws, contributed to making the lives of many people living within their jurisdiction, particularly women, a misery. This framing of 'tradition' provided an important dimension to the approach of the legal grouping in their approach to tenure reform, shaping possible solutions to the problem, at the same time as involving its own inconsistencies to be somehow resolved.

On the one hand, land activists generally and the legal grouping in particular were opposed to any support being given to traditional leaders. On the other hand, they continued to support 'communal tenure', albeit reformed, as opposed to individual tenure that would unacceptably amount to privatisation. While theoretically there is a difference between communal and customary tenure, in South Africa's former homelands where communal tenure is sustained by and often messily entangled with traditional systems, politically the two are embroiled; support for one but not the other is likely to be similarly messy. As indicated in the previous section, the legal grouping's opposition to traditional authorities' counter-discourse of 'tradition' initially involved their denying that there was any contradiction between support for women's rights and 'the customary' – a position that is consistent with the legal grouping's continuing support for the retention of communal tenure. Nevertheless, the initial inconsistency continued to have repercussions and entailed subsequent efforts of explanation, for example, when there was evidence that many communal systems were failing vulnerable people. It is understandable that the influence of apartheid laws and policies are referred to as providing one explanation for this:

Historically, communal tenure systems had provided secure access to land for millions of black South African families. However, a variety of government laws and policies have contributed to growing disorder in communal land allocation and management systems throughout the country, resulting in widespread tenure insecurity. (Draft submission to Green Paper on Land, 23.10.95: 3)

This argument acknowledges the debased status of apartheid laws, but pursuing this argument sometimes involves harking back to a golden age in which the customary and communal fulfilled its 'proper' ends, meeting the needs of all prior to its corruption by apartheid legislation³⁵:

Traditional leaders unwilling to implement government policy were often removed from office. They were replaced with leaders more directly accountable to state agencies and distant political authorities, and less accountable to community-level decision-making bodies, such as the *kgotla* and the *pitso* [traditional decision-making body/process]. This politicisation of traditional leadership often had the effect of concentrating more rights over communal land in the hands of traditional authorities than was intended by customary law or practice ... (*ibid*: 3)

By extension, customary law and practice of days gone by was not similarly politicised and did not result in a concentration of rights in the hands of traditional authorities. Apartheid provides an explanation for its subsequent corruption. Such explanations entail particular solutions: here, any solution must not allow any recognition of, or building upon, the reality of the present, involving, as it does, such corruption. However, an approach that recognises people's *de facto* rights, is inconsistent with a framing that disallows an endorsement of the present.

Recognising and building upon the reality of the present was precisely what was advocated in the 'rights-based approach' to the reform of tenure. This would involve the legal recognition of the *de facto* rights that people have on the ground. Such *de facto* rights, however, have been shaped by those very apartheid laws so decried, with many people holding rights over a piece of land unrecognisable from that which they held prior to the betterment planning for example, that was introduced in line with apartheid law. Prior to 1999, this inconsistency was to be resolved by the holding of a 'rights enquiry' further to which people would receive 'comparable redress' for such wrongs. This was to 'adjudicate the content of different rights to land, who the bearers of the right should be, and ... conflicting and overlapping claims to tenure rights' (Foundation Document, 1996: 11). Such adjudication was to be carried out according to particular criteria, or:

guiding principles [to be] used to evaluate current interests and claims [that] must reflect the views and values of the wider society, particularly the people who will be affected. Thus they must incorporate the values intrinsic to the African land ethic³⁶ (*ibid*: 17).

During the course of the next two years, a pilot process of 'test cases' was carried out in various locations around the country where tenure problems had been identified for resolution. It was intended that through this process it would be possible to capture and document in writing such values, including the concept of relative or nested rights, so as to provide criteria against which the varying rights of people could be adjudicated. While the recognition of certain values that have not been corrupted by the application of apartheid laws can be seen as an attempt to iron out such inconsistency, again such an approach is in real danger of falling back upon essentialised notions of frozen 'culture'. For people living in areas to be reformed, policies shaped by such a discourse will have far-reaching consequences. The present involves an ever changing custom in *constant* transition in its interaction with outside influences whether arising from apartheid, capitalism or migration.

On the other hand, traditional leaders provided a tangible example of the corrupt present. Having lived through apartheid as traditional leaders they were bodily, and so, unwieldy, reminders of the illegitimacy of apartheid. Given their embodiment of such wrongs, they could never be 'reformed'. They could not be 'righted' through laws setting out how they must change, nor through their embracing some form of customary law that could be seen to incorporate values that were uncorrupted by apartheid. In terms of tenure reform, when the recognition of people's *de facto* rights may involve transfer of ownership of those rights, transfer of ownership to the tribe with the chief as its leader was simply unacceptable. For that matter, so too was the recognition of practices that were considered to be objectionable, practices that may, however, shape people's *de facto* rights. With the involvement of many legal activists in the legal grouping having been involved in fighting forced removals, this history was important in shaping a collective *habitus*. Given this, the adoption of such an anti-chieftaincy line is understandable and fits with the anti-chiefs position of the ANC/UDF in its struggle against the formation of the homelands (Van Kessel and Oomen 1997; Robins 2001). As a result, many of them continued to hold similar views today and applied their convictions to the issues relating to the reform of land tenure in these areas. Such discourses relating to 'modernity' and 'tradition' shaped the particular approach to policy reform of the legal grouping both during their time as 'insiders' to the government prior to 1999 and in their opposition to CLARA.

5 – Struggles for a legal transition

The struggles that took place over CLARA related to the conceptualisation of a particular version of land and property in the law. Law is recognised by Bourdieu as being one of the most powerful examples of the exercise of 'symbolic power' (Bourdieu 1987). In turn, the outcomes of these struggles involve 'symbolic violence' (*ibid*); just as some things achieve legitimacy, others are dispossessed of that legitimacy, or even of recognition. In the legal field many of the struggles for capital have been played out in terms of competition for hierarchy within the field. They have often involved displays of competency in legal analysis through critiques of draft legislation and its legal fluency. These have also worked as attempts to undermine those others' positions within the hierarchy of the field. But the use of such techniques, that are perfectly acceptable and even to be expected within the legal field, may not have achieved their goals if those involved in drawing up the policies and drafting the legislation are themselves non-lawyers. It is clear that non-lawyers may play the legal game, fully accepting its rules including its fundamental rule that conflicts can only be resolved on legal terms – indeed, a number of players within the legal grouping were non-lawyers, but could nevertheless be said to have been playing the 'legal game'. However, the involvement of such non-lawyers in legal games potentially involves a challenge to the 'boundaries' of the legal field, even, as here, in law-making, an activity which requires to a greater extent the acceptance of such rules. Importantly, it may also involve a challenge to the extent to which the symbolic capital accessed by those within the field retains its symbolism outside the field, in the wider field of power. Here, such impressive displays of legal competence in the techniques of drafting may well not have been endowed with the same value by those sharing an alternative *habitus*. Instead, such attempts may only have served to alienate those reacting defensively in the face of such irrepressible criticism.

5.1 - The legitimacy of law?

Many black tenure systems are characterised by endemic violence. This can be attributed to severe overcrowding, desperate land hunger, the insecure status of most forms of black land rights which then gives rise to disputes and uncertainty ... (White Paper on Land Reform 1997, s. 3.21)

Endemic violence, disputes and uncertainty all caused by severe overcrowding, desperate land hunger and the insecure status of most forms of black land rights are problems that justify change. But, with the nature of change contested, shaped as it was by discourses that tapped into powerful political positions, the legal grouping had to find ways of bringing round others to their way of thinking rather than simply asserting such causation. This section considers the principal strategy of legitimation that those

within the legal grouping followed in order to do this³⁷. In order to explore this further, I go back to the 1990s where these beliefs and knowledge were shaped into a particular policy of tenure reform.

When the NP government published their White Paper on Land in 1991, groups who had for a long time been involved in the land struggle criticised its approach. In a response from the group of legal land activists (referred to above), their principal concern was the 'vast administrative powers', that would be given 'to the State President and his officials' (Statement on the White Paper on Land Reform and the Accompanying Bills – undated: [estimated date: 1991 – seven signatories]: 3). For them, the problem with administrative power, as opposed to legal rule, was that:

the very legislation which will abolish central apartheid laws should recreate this administrative rule, in aggravated form, and in relation to one of the most disputed issues in our country, namely the right to land (*ibid*: 4).

What is at stake here is the legitimacy of the law at the end of the days of the apartheid state. The importance of this is emphasised in the reference to the debasement of the law that would occur, in aggravated form, even than that of apartheid laws, should this White Paper and related legislation be adopted. The irony that this might occur in the passing of legislation to abolish apartheid laws was not lost on its authors.

In the same document, they go on, with true lawyerly erudition, referring to precedent for support:

In a passage which has been approved by the Appellate Division, the eminent legal scholars Schwartz and Wade ('Legal Control of Government') have pointed out:

"Every legal power must have legal limits otherwise there is dictatorship." (*ibid*: 4).

In 1991, the formation of a democratic state out of an apartheid state was balanced on a knife edge (Sparks 1994). Moreover, it was an apartheid state in which 'lowly' human rights lawyers had thrown themselves into an arena shaped by apartheid legislation and by other lawyers and judges who served as the backbone of that state in implementing and upholding such debased legislation. What is also at stake here is the position of those human rights lawyers within the hierarchy of the legal field; as recognised by Bourdieu, 'the relative power of the different kinds of juridical capital ... is related to the general position of the juridical field within the broader field of power' (1987: 823). As with a legal judgement, 'the practical content of the law which emerges ... is the product of a symbolic struggle between professionals possessing unequal technical skills and

social influence' (*ibid*: 827). So, as might be expected, we see here the exercise of techniques that will bolster their legal credentials and in turn their possession of cultural capital in the legal field. Bourdieu actually recognises such techniques may include those intended to produce the 'neutralization effect': 'to mark the impersonality of normative utterances and to establish the speaker as universal subject, at once impartial and objective', and to produce the 'universalization effect': 'designed to express the generality or omnitemporality of the rule of law' (Bourdieu 1987: 820) – both techniques clearly deployed here.

However, operating within the legal field is not something that can be taken for granted when some of the actors within it do not hold the qualifications that endow them with the necessary capital to be able to claim the status of lawyers. But Bourdieu casts the net both wider and narrower than simply including those who have simply gained such qualifications: 'Entry into the juridical field [and by extension the legal field³⁸] implies the tacit acceptance of the field's fundamental law, an essential tautology which requires that, within the field, conflicts can only be resolve *juridically* – that is, according to the rules and conventions of the field itself' (1987: 831). In doing so he recognises that it depends on the acceptance, usually unconscious, of the rules of the legal game. While non-lawyers may operate within the legal field, those who have qualified as lawyers may choose not to operate within it if they consciously do not accept the rules of the game. The passage above clearly demonstrates a faith in the law both to bestow power and to limit power. So, even though such activist human rights lawyers may express hostility to other actors in the legal field operating under apartheid, as recognised by Bourdieu, through 'the complementary exercise of their functions' (1987: 823), they mutually support the relative autonomy of the legal field. On the other hand, the autonomy of the legal field can be called into question in interactions with those operating outside it who do not accept the rules of the game. The following section considers such interactions in relation to the 'rights-based' approach adopted to deal with tenure reform.

5.2 – Will law trump politics?

When the TRCG was convened to decide on the model on which post-apartheid tenure reform should be based, the 'rights-based approach' was adopted. While this was a legal interpretation of the system of tenure in place in the former homeland areas, there remained the crucial decision, to whom should the legally recognised rights be given. This, however, was a political decision but one which, in turn, involves further legal difficulties of balancing individual rights against group rights. Inherent to the rights-based approach is the recognition of individuals' rights, but the recording and the registration of those rights involves making a decision as to whom the legal rights will

be transferred to, in this context that is whether the members of the group are to be the owners or whether the chief or traditional leader is to be the owner on behalf of the tribe or 'community'. Transferring ownership to the chief as the traditional leader would be politically untenable, picking up as it does on the various layers of discourses discussed above. In any case, the legal grouping were acutely aware of the politics involved in this decision and so justification for transferring ownership to the members of the group was sought in the 'customary':

According to customary law there is little doubt that the "land belongs to people" and that the chief or council's (kgotla's) role is that of administering land rights. This view of customary ownership of land is widely held and very few people dispute it. (Foundation Document, 1996: 34).

But, in an attempt to avoid the decision altogether and avoid the inevitable political fall-out, in the end they decided not to transfer ownership at all. Instead, any registration of individuals' rights would involve the *creation* (implying the rights are being newly created, rather than *transfer* which implies that they already exist) of 'protected rights' or:

new individual rights [which] would be statutory rights as opposed to ownership. In other words they would be created by law and not by transfer of ownership [and] ... [t]he individual rights holders would receive a form of title ... which would be registered within the deeds office system. (TRCG Submission to the Land Reform Policy Committee, undated [estimated date: early Oct. 1997]: 19, 20).

Such an approach is theoretically sound:

[t]he law would provide for the immediate confirmation of the legal status of all the land rights described. It would not need to be applied on a case by case basis. Instead all qualifying rights holders will be guaranteed legally enforceable land rights by operation of law. As such the rights are created by statute rather than by transfer of title which would involve a painstaking process of case by case investigation and transfer over many decades. (DLA, SDC Tenure Reform Fund Progress Report No. 3, prepared for the period July-December 1997: 11).

It also deals with the tricky problem of 'fixing boundaries' that the TRCG had come to recognise as having the major potential for sparking boundary disputes. In addition, it was thought that pursuing this approach would obviate the need for either a rights enquiry or for the creation of the 'criteria' against which people's rights can be judged, even though such a rights enquiry might still be necessary in 'next step' cases where

groups or individuals applied for registration or upgrading of their statutory rights to ownership.

However, the thorny issue of the role of traditional leaders was not avoided altogether in the adoption of this 'statutory rights' model. A position on the question of land administration in group situations had to be taken. So as to prevent the unbridled administrative rule of old, separating the rights of administration of land from the rights of use and ownership, enabling the members of the group to choose the body to exercise the former rights and imposing democratic obligations on their exercise of the former, were together seen to provide the answer. Although this may be an important theoretical separation of power to make on paper, it again represents great faith in law as providing 'the answer'. But, such faith was not held by everyone – as one researcher at PLAAS who looked into the potential for these kind of stipulations concluded frankly:

[t]he legal definition of democratic tribal resolutions are likely simply to be ignored. Even for "community resolutions", democratic meetings of the kind envisaged are likely to be unwieldy, impossible to convene, and are no guarantee of informed consent (Memorandum from PLAAS researcher to DLA – marked 'circulated to TRCG' 17.3.1997).

Moreover, in adopting this model, not only was it not possible to entirely avoid the need to tackle the question of the role of traditional leaders – in land administration – but nor did the 'avoidance strategy' work in not attracting opposition to its political approach. When the proposals were taken to be presented in March 1998 to a meeting of 34 people in the Provincial DLA in the Northern (now Limpopo) Province, they were met with round opposition:

The distinction in the draft bill [between owners and people with protected rights] was considered unnecessary and was expected to cause problems between people otherwise living in harmony on tribal land ... What was important was allegiance to the chief. The idea that people, when confirmed as owners would use their rights to evict people was unrealistic ('ethnocentric' in fact). Africans living on tribal land did not treat their fellows in this manner. If the land was transferred to the tribe, they would sort out any problems of entitlement according to customary law and practice. (Draft notes on visit to PDLA, Northern Province to consult on proposed tenure bill, 3.3.98)

Carefully crafting arguments that are theoretically sound relies upon a labour of construction of social reality that may, in turn, contribute to the cultural capital possessed by each actor in the legal field. Possession of cultural capital depends upon the extent of their ability, their competency and the success of their labour (Bourdieu

1987). But in interactions with those outside the legal field, recognition of the holding of such capital will not be automatic and as here, such arguments are unconvincing for those who share a wholly different *habitus*. While the view that rights deriving from statute are more secure than those granted on a case by case basis may amount to *doxa* in the legal field, it does not 'ratif[y..] and sanctif[y..] the *doxic* view of the social world' (Bourdieu 1987: 839) that exists apart from, or despite, the *doxa* within the legal field.

Nor were these the only dissenting views received. Eight months later, in November 1998, the cracks between the views of various members of the TRCG began to show. In detailed draft minutes of comments made at a meeting of the TRCG on 13.11.98, an apparently heated discussion broke out between members of the group on the very issue of the 'transfer of land to tribes'. Although people in the meeting appear to have tried to quell dissent, indicating that 'the topic had been debated before' and warning that 'it was also necessary to recognise that there were strong vested interests at work. The land tenure reform process was being hijacked by tribal leaders', particular members of the Drafting Committee insisted that it should be raised again following the heated opposition the Bill had received in those visits to the Northern Province referred to above. Visits to other provinces were also mentioned. Extracts from the notes of that meeting give a good indication of the tenor of the discussions. The first participant appears to try to employ the 'neutralisation effect', to depersonalise the issues and endow them with greater credibility: by referring to the 'in-depth investigation' and the conclusions formed by 'the TRCG', and to the 'obligation' on him/her to accept the 'legal opinion' of someone else. Not adopting the 'transfer of ownership model' is therefore justified by this superior legal knowledge:

a³⁹: The issue was the subject of in-depth investigation by the TRCG in the period 1995-96. The TRCG had concluded that the transfer of land to tribes was not feasible as the interests of members could neither be protected in the title deed nor in law because it was not possible to codify customary law. ...

...

b: Should ownership vest with the king, the chief or the headman?

a: A tribal custodian was all very well provided he behaved fairly. When he ceased to do so, then there was no recourse outside customary law. Despite all the reservations x had about trusts, x was obliged to accept the legal opinion (by z?) that the only legally secure option for groups taking transfer of land was to hold the land in some form of trust.

Another participant meanwhile refers to understandings that s/he asserted can only be gained from the people on the ground:

c: People see themselves as members of nations. ... It was necessary to understand how these groups operated; how their system worked; how decisions were taken in relation to land.

As the meeting progresses there appears to be a faultline between various participants in the group disagreeing between the two models and a clash between the hierarchy of knowledge asserted; reason is contrasted with mere power. This is then countered with a jibe about inappropriate power being exerted by bureaucrats becoming involved in politics; there is no neutrality in relation to these issues:

a: The department had to persuade people to set out their view in terms of reasoned arguments. It was not enough for them to demand that land be transferred to tribes. These statements arose from the desire to exert power over people. It was not an argument based on an acceptable principle. It was about power.

c: There has been a problem in South Africa of civil servants taking a political positions. However, there is no way that one could be neutral. The issue of power relations had to be factored in.

a: In an attempt to be neutral, a stand had been made on the issue of the transfer of land to tribes.

Finally, the politics inherent in the 'transfer of ownership' model is made explicit as it is linked to the 'African Renaissance' and thereby other discourses of racial politics:

c: It was important to recognise that much of the interest in customary systems arose from the growing interest in the African renaissance and traditional systems of land administration. (Draft minutes of TRCG meeting, 10.11.98).

Contestations around the hierarchy of knowledge also relate to the assertion of status that is linked to the contested delineation of boundaries between 'insiders' and 'outsiders'. Here, an attempt is made to link legal knowledge to that based upon 'reason' and is set against knowledge based upon 'understanding'. When these are bound up with racial politics, the dynamics of the tensions deeply felt in South Africa are clearer. While the politics behind the thinly veiled 'neutral stance' could not be concealed, when such a stance was re-interpreted as being in conflict with the African Renaissance, this also involved a re-positioning of its protagonists as 'outsiders' and therefore unable to know or truly understand the issues. So, just because the focus

here is on the actors in the legal field, those excluded from the legal field are not only defined as being 'outside' it, but are themselves positioned within another field with a different shared *habitus*. They are just as likely as those actors within the legal field to claim monopoly of power to impose their version of the truth of the social world, but on different terms. Recognising this overcomes any kind of unhelpful dichotomy between 'insiders' and 'outsiders', although this is not to say that such categories are not asserted, as they are here, by those actors in attempts at including or excluding others from succeeding in imposing their version of the social world. Sometimes such attempts at positioning were executed in as crude terms as simply referring to relevant actors as 'white liberal lefties' or as members of the 'socks and sandals brigade'. As a result, they are positioned in particular ways and in turn their knowledge, by being linked with such a framing, is cast as being incompatible with the African Renaissance, perhaps even with a more experiential understanding that can only be attained by being an 'insider'.

6 - CLARA: a betrayal of democracy

When the CLRB was first leaked in 2001, it clearly adopted the 'transfer of ownership' model, stating its intention to transfer ownership to 'African traditional communities' that would, moreover, be elevated to the status of 'juristic personas' (in other words, able to pledge and sell land owned by them) (Sibandana 2004). In response, the legal grouping were no longer able to continue with their stance of neutrality. In the adoption of the 'transfer of ownership' model, the 'rights-based approach' was seen to have been dropped. As indicated above, this approach, embodied in the LRB, was seen to be intimately linked with the legitimacy of law, a legitimacy that many in the legal grouping cared passionately about – after all, many of them had devoted their lives to using the law, prior to 1994 to "nail them at their own game" and then, after 1994, to build a new country, a constitutional democracy founded upon human rights for all. The tone of the reactions of one member of the legal grouping who became one of the key NLC/PLAAS Project organisers can be felt in the 'Comments on the CLRB' circulated to others:

The CLRB differs fundamentally from the previous LRB in this respect. The LRB confirmed the status of existing *de facto* rights as property rights. It was on the basis of their status as rights holders that rural people were guaranteed the right to participate in all decisions pertaining to future changes in the status of the land. The CLRB changes this around entirely. Undefined communities, led by undefined rights holders structures make all the decisions pertaining to the land, and to changes in the status of the underlying rights of the individuals who use and occupy the land. Any person or group who objects to this on the basis that the 'community' or 'structure' does not have the right to make decisions pertaining to their land rights, runs the risk of being told that, by

virtue of denying the group, they no longer have any land rights. (Comments re Communal Land Rights Bill' - 15.11.01: 1)

This interpretation of the Bill demonstrates the redefinition of ordinary experience proceeding from existing in the legal field. The legal facts described here have been produced by a legal construction that has involved the retranslation of all aspects of the situation. In the juridical context, as recognised by Bourdieu, the purpose of such retranslation is to '*ponere causam* (to "put" the case), that is to institute the controversy as a *lawsuit*, as a juridical problem that can become the object of juridically regulated debate' (Bourdieu 1987: 832). While what was being done here was not, at that stage, in order to institute a lawsuit⁴⁰, putting the case as a legal problem that can become the object of legally regulated debate is an entirely natural act by those within the legal field. The CLRB is being judged according to criteria defined by the legal interpretation of 'the problem' discussed above, and in turn compared with the LRB that provided 'the solution' to 'the problem'. That it did not fulfil such criteria and did not even accept 'the problem' as a starting point, is therefore seen in this light as the other extreme, in terms of a dichotomy. It would not be an exaggeration to say that it was seen by members of the legal grouping as amounting to an utterly base betrayal. But this dichotomy can only be pursued if the initial interpretation of 'the problem' is accepted.

Law-making through legislative processes will involve the 'confrontation of antagonistic rights' between which a choice must be made (Bourdieu 1987: 826), but an analysis of that confrontation cannot only be reduced to an analysis of the technical application of particular theoretical reasoning but must also acknowledge that it involves a struggle to acquire symbolic capital perpetuated by individuals with different levels of competency and cultural and social capital (Bourdieu 1987). Going through the Bill, there were obvious legal and technical weaknesses in the drafting and every one of them was used by the legal grouping to undermine it. It is not just the role of 'the opposition' in politics to criticise, it is the everyday work of lawyers going through any legal document, with a toothpick, looking for inconsistencies of language and of intent within the document, but also inconsistencies in relation to wider related issues. A document might be considered to be 'perfect' in terms of its internal consistency and legal intent, but when the starting point is fundamental disagreement with the approach, there will always be criticisms to be made. After the CLRB had been formally published, the LRC produced 76 pages of annotated comments of the Bill, the annotations being about three times the length of the Bill itself (LRC – Annotated comments per clauses of the CLRB, 25.10.02). The annotations present a critical comment on nearly every clause in the Bill, and are dense and intimidating.

As indicated above, the PLAAS/NLC Project was supported by a number of renowned lawyers, some still working for the LRC, who applied their legal minds wholeheartedly to the analysis and criticism of the Bill. A number of extremely well-renowned advocates drafted legal opinions that sufficiently impressed quasi-legal organisations such as the CGE and HRC that they agreed to put their own names to them. In the context of a trial, 'granting the status of *judgement* to a legal decision ... the rationalization process provides the decision with the *symbolic effectiveness* possessed by any action which, assuming one ignores its arbitrariness, is recognised as legitimate' (Bourdieu 1987: 828). Similar to a judgement, in law-making an advocate drafting a legal opinion is one of the steps towards such symbolic effectiveness and grants symbolic capital to those relying on it so as to grant weight to and even shape their arguments.

Many of the legal minds within the legal grouping identified here were well known in South Africa and abroad as eminent human rights lawyers. Having such esteemed lawyers supporting the project relates to points made above referring to contestations over the hierarchy of knowledge, and status that is linked to that knowledge. Not only were the comments on the Bill intimidating, but the calibre of those on board was noted, even by a representative from the Parliamentary office of the HRC whose job description included making submissions to Parliament:

So, on the CLRB, for a few months, I will become an expert, write something, present something and then move back to another piece of legislation. As an aside, one never feels confident because I never have time to be able to immerse yourself so fully in a piece of legislation so as to really feel comfortable with it, and I must say, particularly with CLARA, I mean people we worked with ... I came from a land background as well so, I know a lot of people, but there were some very, very good legal academic brains in this country working on this piece of legislation ... just some *wonderful* [people] (HRC official, interview - 30.6.05).

As Bourdieu recognised, even though many other actors 'may find themselves in the middle of [the game', they] are in fact excluded by their inability to accomplish the conversion of mental space ... which is presumed by entry into this social space' (Bourdieu 1987: 828). So although 'one of the functions of ... juridical labor ... is to contribute to binding laypeople to the fundamental principle of the jurists' professional ideology' (*ibid*: 844), in contestations in the interactions between those included within the field and those excluded, such exclusivity is a double-edged sword. In contestations that also involve the legitimacy of the law, those excluded or even those unequal in technical skills may deny or refuse to acknowledge that legitimacy⁴¹. Nor may they accept the field's fundamental law that 'conflicts can only be resolved juridically' (*ibid*:

831). In doing so, they thereby deny also the symbolic power of those in the legal field. As Bourdieu recognises, '[t]he specific property of symbolic power is that it can be exercised only through the complicity of those who are dominated by it' (*ibid*: 844). The irony here is that those in the legal grouping involved in such disputes will deny that their attempts to stop the passing of the CLRB into law were attempts at 'domination', and that instead CLARA itself legitimises particular forms of domination. Indeed, such a denial of the symbolic power of those in the legal field was in essence a denial of the power of a grouping of people working to subvert the power relations and established order in the wider field of power. In 2004, the South African Parliament passed CLARA into law, unopposed by any party in Parliament. In the context of the contestation over CLARA in South Africa, it was the structure of the power relations in the wider field of power that ensured its dominance over any efforts by lawyers operating in a legal field whose autonomy was limited.

7 - Conclusion

This chapter has considered the way the legal grouping has engaged in tenure debates during the ten years and more that policies relating to tenure reform were on the agenda in South Africa. Their influence in shaping the approach adopted by the Constitution and early land reform policies has been significant. This chapter has discussed how their particular interpretation of tenure in the former homelands in South Africa – as being marked by illegal informal chaos – led to their assumption that it is this that has led to problems existing in the former homeland areas, and that it is this that must be reformed by way of legislation. They united in their adoption of a 'rights-based approach' to reform and an opposition of a 'transfer of ownership' model. The legal grouping's adoption of this model and their opposition to the model embodied in the form of CLARA, were shaped by wider discourses such as those relating to human rights, gender, 'modernity' and 'tradition'. Struggles emerged over meaning and the hierarchy between particular forms of knowledge. Their adoption of a 'rights-based approach' linked to their fundamental opposition to apartheid, shaped in turn their opposition of 'reforms' that represented to them an endorsement of evidence existing today of wrongs introduced by apartheid. Importantly, such evidence was starkly provided by the continuing existence of chiefs. Arguing against chiefs, however, tapped into groundswells of opinion and political currents supporting an 'African Renaissance' or resurrected 'black consciousness' movements. So as to distance themselves from any aspersions that cast doubt on their non-racial credentials, they sought justification for their approach in a 'tradition' and in a 'customary tenure' that pre-dated the wrongs of apartheid. Rather than achieving this, however, such attempts to (re-)interpret 'tradition' antagonised many others who thought of themselves as having far greater legitimacy due to their background and history, in interpreting African 'tradition'.

In seeking social and ultimately symbolic capital so as to be able to grant legitimacy to their 'version of the social world', the legal grouping also adopted particular strategies of legitimation for their approach. Their arguments were supported by legal opinions based upon legally sound theoretical arguments and their critiques of the draft legislation displayed impressive technical critique. In law-making, however, when it might be thought that it is the legal field setting out the 'rules of the game', many contestations involve interactions with actors outside the legal field. Considering such interactions sheds light on faultlines that emerged at points where particular forms of knowledge were incompatible with others and on the extent to which the processes of legitimation pursued were successful, or not, in smoothing over some of these cracks.

When the autonomy of the law is *not* a given, as in post-apartheid South Africa, the effect of wider political change affecting the legal field and the extent of its autonomy will have more resonance. While many have noted that the state in South Africa, and the apartheid state before 1994, is highly 'legalised', the contested autonomy of the law in South Africa's transition has not been sufficiently explored. This is important, particularly for those 'heretical, anti-institutional, subversive' lawyers (Bourdieu 1987: 839) struggling to re-ground the law in its proper legitimacy. As Bourdieu reminds us, the law '*creates* the social world, but only if we remember that it is this world which first creates the law' (*ibid*: 839). Strategies of legitimation are unlikely to be successful if they fail to acknowledge the influence of the wider field of power that ensures that 'society cannot be transformed by decree' alone (Bourdieu 1987: 840, referring to Montesquieu). Moreover, that wider field of power also shapes the hierarchy within the legal field; contestations both within the legal field and with other fields will shape the extent to which complicity is granted to the exercise of symbolic power. In the end, the political struggles that played out in the wider field of power was what determined whether or not the CLRB would be passed into law. And so, the energy and commitment of everyone in drawing up legal opinions and analysing particular clauses of the legislation hardly made any significant changes to the Bill that was to serve other political ends. The following chapter goes on to consider the influence and involvement of land sector activists who were outside the legal field, but many of whom nevertheless joined forces with the legal grouping in opposing the legislation. Rather than uniting in opposition to CLARA, however, the activist field were split on many fronts, such splits often overriding their unity in opposition.

CHAPTER 6 - STRUGGLES WITH ACTIVISM: NGO RELATIONS AND CLARA

1 - Introduction

The previous chapter considered the involvement of the legal grouping in organising opposition to CLARA and the way they interpreted the 'model' for reform. Although many land sector NGOs participated in that organised 'coalition' of opposition, many of them interpreted the issues differently. Nevertheless, many of the same discourses identified in the previous chapter have similarly structured the debates and networks and coalitions have formed around these. This chapter considers the extent to which particular discourses shaping NGOs' engagements with policy-makers in relation to CLARA, have enabled differential, more nuanced understandings of tenure to filter through. It also considers how they have shaped the ways individuals working for NGOs have consequently positioned themselves in relation to their constituents. Over the time that NGOs engaged with government in relation to CLARA, as outlined in Chapter 3, there were changes unfolding in the relations between those NGOs, amongst people working within them, and between them and their constituents. These were shaped by reduced amounts of funding for NGOs and an increasingly ambivalent relationship between 'civil society' and government. Debates concerning the positioning of NGOs in relation to their constituents and the LPM, were brought to the fore by ongoing and public debates going on within the NLC. In 2001, the LPM was launched with the support of the NLC, but the atmosphere at the NLC offices at the time was structured by the differing visions of activism held by different individuals. Splits appeared between actors depending on age, experience, personal histories and sometimes race – which came to be seen as a form of capital to be played in the activist field, interweaving in turn with discourses playing out at a national level. At the same time, NGOs were forced to reposition themselves following the 1999 elections as a result of changes that took place in the government and in its approach to its own relations with 'civil society'. This affected relationships between those working for or affiliated to the NLC and their engagements with government and other policy-makers. With such changes playing out in the hierarchy of the activist field, the time was characterised by conflict, between individuals within it struggling to maintain their position and influence.

All of these changes have had various effects on actors' personal responses and ongoing relationships with current, and former, friends and colleagues. At times people's engagements with policy, or with others within the activist field, the ways they have consequently positioned themselves or been positioned, have been shaped by assumed affiliations, and by their personal and emotional responses to these. For fieldworkers working in particular localities, discourses shaping the positions particular NGOs have taken in relation to tenure reform have sometimes also shaped their engagements with

their constituents. At other times, it has not proved easy for their work to fit so neatly within them. This chapter considers how particular discourses have shaped and been shaped by the practices of individuals working for NGOs, discourses that have in turn 'produced' particular identities and marginalised others (Ferguson 1994; Robins 2001).

2 - Chiefs, democracy and tenure – a collective *habitus*?

Around the time of the CLRB going through the Portfolio Committee, the media widely reported on 'civil society' organisations strategically combining to form a 'coalition' to speak out with one voice in opposition to the CLRB:

A coalition of land-rights organisations launched a national campaign in Cape Town yesterday to scrap the controversial CLRB and threatened to take to the streets if their demands were not met.

Campaign co-ordinator, the National Land Committee (NLC), has accused the government of making last-minute changes to the Bill which it says gives chiefs in the former homelands 'unprecedented powers'.

Representatives from 18 land rights NGOs formulated a national strategy in Cape Town yesterday.

The representatives will publicise the amendments in the provinces at parliamentary hearings on the Bill, which are likely in November.

...

Their campaign is backed by the Black Sash and the South African Council of Churches. (Hofstatter – *This Day*, 23.10.03).

Over the next few weeks, newspapers from the Sunday Independent to IOL news online, from the Mail & Guardian to This Day conjured up a picture of 'the coalition's' outrage at the betrayal of democracy by government as a result of the Bill's transfer of unprecedented power to traditional leaders to the detriment of women. But this picture of a coherent coalition all speaking with one voice conceals a much more heterogeneous grouping – hardly surprising given that they were bringing together experiences from as diverse a country as South Africa. To a certain extent, however, such a misleading picture was not the fault of the media, but was the result of a strategic compromise by land sector NGOs to come together in their opposition to the Bill. But nor was this really to blame in displacing other voices in the debates and concealing the messier reality. Instead, the discourse that came to frame the coalition's opposition to the Bill largely contributed to squeezing out more nuanced, differential readings of legitimate knowledge.

Nkuzi was one of the NGOs that joined the 'coalition' opposing CLARA. It made a submission to Parliament's Portfolio Committee and called for the Bill's rejection. Nkuzi's submission begins by setting out its central thesis:

... Mamdani shows in his book *Citizen and Subject* (Mamdani, 1996) that the 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 and what Mamdani describes as 'decentralised despotism'. ... An essential characteristic of the decentralised despotism is the 'clenched fist' of the chief who combines legislative, judicial, administrative and policing powers in one institution and even in one person.

Building democracy in South Africa requires the dismantling of the bifurcated state, overcoming the tribalisation of rural citizens, and ending the subjugation of rural people to the 'clenched fist' rule of chiefs and farm owners. Rural people need to be allowed to participate as full citizens in the modern democratic state with the separation of the legislative, judicial and executive powers, just as the Constitution requires (Constitution, 1996, p. 89). A key test of any new tenure legislation must be the extent to which it contributes to this process. (Nkuzi – Submission, 14.11.03).

Although the Portfolio Committee hearings did attract quite an audience of non-Parliamentarians, many of whom may well also have been similarly highly educated elite activists (see Chapter 3), these did not make up the audience to be persuaded by quoting Mamdani, the renowned historian of Africa's colonial history (see Mamdani 1996). Instead, those to be impressed or convinced by submissions opposing CLARA were Parliamentarians from diverse backgrounds who had all come to be sitting on the Portfolio Committee for Land and Agriculture. Nevertheless, even though the pitch of this submission may have come across as somewhat obscure for a non-academic audience of Parliamentarians who may not have read Mamdani or heard of him, it is non-compromising in its view of the chieftaincy. From this starting point, however, traditional leaders are *per se* undemocratic – only elected leaders are democratic – and so any recognition of their current role in land administration, and support of that role in legislation is a non-starter, being automatically tarnished with an anti-democratic stamp. The unassailability of the Constitution is brought in here to support further the legitimacy of these views. This approach renders the issues black and white (using the words critically), the undemocratic chiefs in the former homeland areas and the democratic elected leaders in the rest of the country⁴². But in doing so, it pushes out questions of nuance about the status of 'subjects'. As Oomen argues:

What Mamdani's dualistic analysis fails to recognise is the wide variety of local power configurations, structures of rule and degrees of democratisation that occurred as a result of segregationist policies ... While traditional leaders were given large powers on paper, these, in practice, had to be exercised within the confines drawn by the bureaucracy. This created differences in the degree of popular political participation in traditional authority areas, and thus in the degree to which people were citizens or subjects. (Oomen 2005: 39)⁴³.

So when it comes to reform, it is a question of 'away with the old' and 'in with the new', anything less being unacceptable. This approach, while not being identical with that of the legal grouping, is no more nuanced, if less complex, in the basis for its critique. It also pushes out questions of nuance about the nature and extent of the form of democracy that is to be created in its place, that it is to be supplanted by. Democracy here seems to derive its legitimacy from merely elections (other sources of legitimacy could, however, be seen to derive from real participation in policy-making processes, for example). Although the submission prepared by Nkuzi goes on to present a textured understanding of 'Current tenure arrangements in Communal Areas', it concludes the section in accordance with the Mamdani 'model' with the statement that 'the system is inherently undemocratic and strengthening this runs counter to the need for democratisation and empowerment of people as citizens with full citizenship rights'⁴⁴.

Questions can be asked of such systems in both the former homeland areas *and* in the accepted institutions of the state operating in the rest of the country. Bourdieu saw *doxa* as being 'the relationship of immediated adherence that is established in practice between a *habitus* and a field to which it is attuned, the pre-verbal taking-for-granted of the world that flows from practical sense' (Bourdieu 1990: 68). Combining 'legislative, judicial, administrative and policing powers in one institution and even in one person' is counterposed with the 'separation of powers', the pillar of a democratic state, here accepted as common sense or *doxa*. But such clear-cut political models *also* limit the questions that can be asked that might challenge the extent of democracy that the current formal and legalised political and even democratically legitimised land system achieves. There are, moreover, other rarely challenged aspects of the 'democratic state' relating to property ownership, such as racially defined and gendered inequality institutionalised through property and upheld in the 'rule of law' that CLARA, that was to meet the Constitutional imperative of dealing discretely with 'tenure reform', was not to address⁴⁵. Other more mundane aspects can be seen operating in the bureaucracy of the land registry and the imposition of particular monetary charges that disallow the participation of huge numbers of people whose level of financial well-being is below a particular threshold. To be fair to Nkuzi's submission, it does call for 'a national debate' that 'should not be limited to dealing with communal areas, but deal with land tenure

for the country as a whole'. Nevertheless, as seen in the newspaper extract quoted above, as well as in many, many others around the time, the undemocratic chieftaincy model, while being apparently radical and progressive, accepts a particular *doxa* and is thereby powerful in limiting the questions that can be asked.

Such an opposition to the chieftaincy, as indicated in the previous chapter, had a long history with land sector activists and also with many ANC supporters. When speaking to a former director of another prominent land NGO, his views of the chieftaincy were clearly generated through his shared history, growing up in a particular time and place:

I was from a rural area but at a young age I left and went to live in the township where I was brainwashed – I was one of the student activists so I disliked traditional leaders. I felt that they were part of the old order instruments that were used by apartheid – if you talk of struggle politics, traditional leaders were just manipulated and those who tried to defy were killed, or sent away to jail ... (Former director of land NGO, interview - 3.3.06).

While this individual's *habitus* had been shaped by his upbringing living as an activist in a township, many others were shaped by their former involvement in the land struggle. Prior to 1994, many individuals working for NGOs participated in the countrywide SPP, undertaking research so as to bolster legal challenges against forced removals of people from 'black spots' in the former 'white areas' into the homelands. Many of them then went on to fight the state's imposition of chiefs and Tribal Authorities on such 'communities'. Amongst NGOs in the early-1990s, knowledge of the homelands and the nature of the 'insecurity' of tenure within such areas was relatively thin on the ground⁴⁶. Knowledge such as there was, derived from NGOs' work with communities who had been forcefully removed from blackspots into the homelands. Some had also formed linkages with people fighting the independence of KwaNdebele in the 1980s. There were of course some working for NGOs who were themselves from such rural areas, but few of these people secured policy-making positions in government after 1994. This manifested itself both in the government and in NGOs. Understanding tenure in the former homelands for those whose *habitus* was not shaped by growing up in such a context was not easy; a former prominent land activist said of redistribution and restitution:

that was easy land reform. But it hadn't taken off. We hadn't had to deal with common ownership of land – that nightmare ... that's what brought to the fore some of the tensions because both us and the government realised what a difficult fucking process it is. *What is our role here?* – because all our resources could be swallowed in one community. Then it would be better used in focusing

on advocacy but how can you shout about something if you don't know what is happening on the ground. (former NLC Director, interview – 22.2.06)

Moreover, the politics relating to the stark inequalities in land holding and the restoration of stolen land rights as a result of the forced removals, dealt with in the redistribution and restitution programmes respectively, were easier to grasp politically. He went on to tell me that “back then” it was easy to be radical but that the reform of tenure in the former homelands was a different ball game. Nevertheless, tenure reform had been incorporated into the Constitution and, as a result, the government became constitutionally mandated to adopt legislation that would provide ‘tenure which is legally secure or ... comparable redress’ and so NGOs had to respond to whatever it came up with.

One of the first calls from the LPM after its launch, was for the government to hold a Land Summit. “Instead”, in November 2001, a Tenure Conference took place in Durban: “a big flashy conference with landless ‘representatives’ at this beachfront hotel, and everyone ‘living well’” (former NLC employee, interview – 19.12.05). It was here that the Director of the Tenure Directorate briefed the audience on the first details of the new plans for a ‘CLRB’. The conference itself was a turning point for a number of reasons. But for the NGO network, the ‘turning point’ did not relate to tenure at all. It was at the Conference that “the fissures started to grow more obvious” – the conflicts between different individuals and factions of individuals within the activist field became more pronounced. In addition to the ‘black=radical’ vs. ‘white=liberal’ framings discussed in Chapter 3, people’s political affiliations also became more prominent and, in turn, were interpreted as motives for their opposition to, or support of, a more or less ‘radical’ approach towards social movements. While the stamps ‘pro-ANC’ vs. ‘anti-ANC’ do not neatly fall into those ‘black=radical’ vs. ‘white=liberal’ framings, interests based upon political affiliation were used by some as a useful explanatory tool, or additional ammunition, in the fight to support the LPM.

To the proposed CLRB, however, according to the now director of the Association for Rural Advancement (AFRA), an NLC affiliate based in KZN, the response from NGOs “was just nothing. No reaction.” (AFRA director, interview - 28.02.06). The importance of the government setting out its proposals, for the first time since the LRB had been dropped by Thoko Didiza, had somehow been displaced by these other politics structuring positions held within the activist field. And so it was PLAAS, not the NLC, that put together the funding proposal to support the PLAAS/NLC Project, even though the NLC was strategically included as a non-academic partner – and one that was not obviously aligned with the drafters of the pre-1999 Land Rights Bill (who were in fact running the project). But with tensions over other issues already high at the NLC, the

PLAAS/NLC 'Community Consultation' project soon ran into predictable difficulties with different people holding onto strong different opinions over the nature of consultation, the role of advocacy, of NGOs and competition between the two organisations as to what the project should involve.

3 – The failure of strategic positioning in the activist field

Although land sector internal politics in 2002-3 to a certain extent displaced the issues of tenure reform from their agenda, many land sector NGOs were involved in the PLAAS/NLC Project, and many did end up rallying around the 'coalition' of opposition to CLARA that so impressed the media at that time. But the adoption of the 'anti-chieftaincy' model to frame the debate was not uncontested. Furthermore, its adoption marked the end of a progression away from the nuance with which different groups within the coalition approached the issues earlier in the debates. As time progressed towards the CLRB's passage through Parliament, and the threat of losing the struggle with government increased, and with it authority to represent and name the issues to be dealt with by the reforms, so people and groups participating in the coalition approached their opposition to the Bill with increasing urgency and passion. In turn, the debates became framed in increasingly dichotomous terms and people became less able to choose their own positioning. Some groups did not subscribe to the model at all but, because it had come to frame the issues relating to the reforms, their opposition to the legislation, even if for other more nuanced reasons, was interpreted by others as automatically assuming the anti-chieftaincy model. PE

The Association for Rural Advancement (AFRA) based in KZN had been undertaking a tenure project since 1998, focusing all the time on Ekuthuleni, a village outside the Ingonyama Trust land. Even though AFRA participated in the coalition ("in the end, we did all agree on 'How do we go to Parliament to stop this Bill going through?'" (AFRA director, interview – 28.2.06)), the organisation did not actively adopt the undemocratic chieftaincy model:

the fundamental one [bone of contention] was the issue of the Traditional Authorities. The issue of whether they are democratic or not, for us, is not the issue. The issues are about what gives people secure tenure and one of the things that does that is a well functioning tenure committee which is made up of a body of people who are constant, and the rules are clear so that they can administer it. If you're going to re-elect them every few years you can't expect that they will administer it well. If you compare it to something like the Deeds office, why would you want to re-elect them. Yes, we understand the issue of abuse, but that's a governance issue. (*ibid*).

In the height of the passion in the build up to the Portfolio Committee hearings, holding to such a position was not easy; former allies fell out over it – those wanting to challenge the assumptions about traditional leaders were branded as ‘conservative’ – and with activists, many of whom were white, some of whom were at the forefront in planning ‘the coalition’s’ full frontal attack, not accepting positions outside the model, racial sensitivities and anger were inflamed. When it came to the Parliamentary hearings, AFRA did not in the end present its submission – a move that was explained away by various rumours amongst those in other NGOs that in any case shed bad light on the ‘decision’.

Ongoing contestations between and amongst NGOs have shaped their practices that in turn have produced particular readings of legitimate knowledge and shaped accepted identities of those they claim to represent. The word ‘claim’ is not used to undermine the perspectives of actors within NGOs, but to draw attention to the way that such representation is in itself a strategic action. Here, attention is drawn to the difficulties encountered in an attempt to represent issues that individuals at AFRA believed were most important to their constituents; doing so would have positioned them in a particular way. But not doing so, similarly positioned them negatively precisely because the issues they wished to represent posited knowledge that was not considered to be legitimate, and identities that were not acceptable within the terms of the debates.

In their relations with their constituents, NGOs may not have to act ‘strategically’, but in relation to the politics of CLARA they could not avoid it. This draws attention towards the contradiction inherent in this field. The label ‘activist field’ is not ironic. Rather than simply distinguishing a realm apart from the state and the market – that might be labelled ‘the field of civil society’ – ‘activist’ instead implies a particular role for such supposedly, perhaps idealistically, non-state, non-market actors, but a role that is constantly negotiated and contested by those operating within the field. So the activist field lies between the ‘local’ and the ‘national’, engaging with both; strategies and practices are conceived on the basis of its mediating position. To a certain extent, NGOs within the activist field act as bridges between those people who are often marginalised in terms of their material reality and in their access to information about political and policy changes that are to affect their lives, and those in the government and in wider policy-making spheres. In this mediating position they have access to knowledge conceived within these two very different fields and claim to use it in order to improve the lives of those who are marginalised. And this is where the contradiction lies, and where the root of so much anguish and conflicts within the field lies: how to strategise positioning themselves in relation to the wider field of power at the same time as representing honestly the voices of its marginalised constituents? Responding to this involves ongoing contestations, but such contestations sometimes displace the

knowledge of people 'on the ground'. So while NGOs are uniquely positioned to fulfil this potential – 'to add real insight to local grassroots *and* political strategies' (Mitlin, Hickey et al. 2006: 35 - my italics) – whether or not they are able to do so will depend on the strategies they adopt, the relationships they choose to build with politicians, bureaucrats, other NGOs, people in social movements etc. and the extent to which they manage to 'help[...] people see things differently' (Mitlin, Hickey et al. 2006: 35). Their engagement with people 'on the ground' is essential to their role.

After the changes in government in 1999, the extent to which different individuals and NGOs could position themselves, or found themselves to be positioned by others, sometimes unfavourably, was not only called into question in relation to CLARA. As recognised in Chapter 3, the extent to which individuals, maybe even NGOs could claim 'activist capital' depended upon how 'radical' or 'liberal' they were seen to be, linked variously how to they managed to position themselves in terms of class, politics, race, gender etc. But the changes in actors' and NGOs' positioning after 1999, did not play out consistently within the activist field. Many were competing with each other to change their position, and that of their NGO, in the 'hierarchy' of the field, in order (and I am taking their assertions seriously) to be able to exercise greater political sway over the outcome of the political process – here in relation to CLARA – for the benefit of their constituents. But that hierarchy is closely, albeit paradoxically, connected with relations to the wider field of power; as activists they are on the one hand working to subvert, or at least change, power relations within the wider field of power, but at the same time they often rely on those positioned within it to secure government contracts or donor funding. They therefore need to secure recognition from those within that wider field so as to bolster their own legitimacy. Not managing to do so, however, may involve a certain amount of personal anguish.

While individuals work to position their NGO strategically in particular ways, in turn, and sometimes as a result, they are seen and positioned by others in other ways, often ways that they would not choose. Before going to either KZN or to Limpopo to carry out fieldwork with NGOs operating in those Provinces, I was warned that I should be careful about letting the DLA know that I was planning to spend any time with AFRA, because:

it is seen in a certain kind of way – unjustifiably – in national circles but it [the DLA] seems to be taking a funny position. But AFRA in relation to CLARA, out of all the NGOs, has been trying to accommodate CLARA (NGO consultant, interview – 21.7.05).

The prelude to this person's understanding of the positioning of AFRA by the DLA was her experience of changes that happened in the Department since 1999:

When Hanekom got kicked out as Minister there was a huge backlash against lefty white intellectuals in the DLA and it was the same time as the first attempt to draft the Land Rights Act, and X and Y were centrally involved in that, with Z ... None of us escaped the label. ... we were seen to be part of people who were thought to be a thorn in the flesh of the new power strata and our opinions thereafter were not sought. It was as simple as that. Even people like me in a very marginal role ... (*ibid*).

This had affected her in a project that she was working on that was funded by DFID which had an international policy of insisting on working with governments in whatever country their projects were based:

I didn't want to be seen in any particular light ... but what we hadn't bargained for was the hellish climate at the time [2003] that we were all in. As co-ordinator, a top brass at the DLA refused to talk to me. X whom I knew very well in the old days, refused to give me an interview. ... He never said he won't talk to me but then he said 'We should have been consulted'. And then eventually he came out explicitly, and I got hold of DFID and said 'You will have to talk to them'. ... What they did, they called the DLA and tried to have a meeting to patch things up, but I didn't go, I didn't want to go ... (*ibid*).

Many people during the course of the year similarly told me how personally hurt they felt that they had been excluded from former relationships with 'comrades', friends and colleagues. They read such exclusions as arising from people perceiving their affiliation with others in particular ways, in many cases depending upon their political affiliation or race. And the 'strategies' that actors pursued in relation to the politics over CLARA were to a certain extent determined by their appreciation of their own position within the field and in relation to the wider field of power. However, while their strategies were conditional upon their *perceptions* of particular possibilities and limitations, the likelihood of their success was also objectively defined by relations of power determined according to differentiation along multiple (race, gender, class etc.) axes.

The ambivalence in NGOs' relationship with government after 1994 created spaces in which struggles were fought between actors for maintaining their positions within the hierarchical relations of the activist field, struggles around the value claimed for both new and old resources and the generation of capital. The meanings of, and even the perceived need for, 'consultation' and 'engagement' as opposed to 'protest' and 'struggle' changed significantly over that time, each one up for negotiation as different actors claimed different constructions of reality. But the struggles going on within the activist field also relate to the *habitus* of individuals competing for positions within it, and in South Africa, where race still largely structures the vast inequalities in economic

well-being and education, vast differences also in the *habitus* of individuals coming together in different fields cannot be ignored. Furthermore, differences in financial, social and cultural capital in turn structure the potential positions, subjectively and objectively structured, of individuals within society. In the activist field, no less so. Jobs in Limpopo province are scarce for young people qualified with diplomas and degrees, and jobs in an NGO are sought after, perhaps not as sought after as jobs in government in terms of the security offered, but in areas that have unemployment reaching levels of nearly 80%, the realities of the alternative, with responsibilities of children, of sickness, of rural poverty, are pressing. I attended many meetings and interviews with NGO workers at their homes contrasting between 'four-rooms' in townships with corrugated iron roofs and beautifully designed, spacious suburban homes with grassy gardens and swimming pools. These activists come together in their work in NGOs, all of them expressing a commitment to the improvement of people's lives whose poverty resulted from such obvious and ongoing injustice. Such objective social conditions, historically generated structural properties based upon the interrelationship between class and race, will undoubtedly influence the individual (and collective) *habitus* of different actors (and groups of actors) in the field and the struggle for positions in it.

Furthermore, such inconsistencies and differences in the activist *habitus* are also likely to contribute to inconsistencies in the practices generated through the activist field (Bourdieu 1990: 58). Therefore, it is important to consider how such access shapes relations of power within the activist field. In light of the harsh reality of the alternative, it is not surprising that many of Nkuzi's fieldworkers expressed ongoing concerns about the NGO's funding and about their monetary 'incentives'. Moreover, many admitted that they were consistently looking for jobs elsewhere. Amongst many of those working for NGOs, at this time, the instinct to 'protest against' was not automatic; sometimes it was replaced by a choice to 'work with', at other times it was displaced by other actors or groupings positioning them in particular ways. In the context of a lack of state capacity in the implementation of its own programmes, NGOs were cast sometimes as 'programme implementers', at other times as 'mediators' to smooth things over between the landless and government.

As discussed in Chapter 3, during this same post-1999 period, questioning the 'representativeness' of NGOs was one of the key preoccupations of many of those self-named activists I spoke to. With the launch of the LPM in 2001, and perhaps to a certain extent inspired by the government denying their former taken-for-granted inclusion in policy-making, concerns relating to the legitimacy of 'speaking for the oppressed' began to appear more prominently amongst many working for NGOs and for the NLC, and contributed to the crisis that led to the closing of its national office in 2005 (Mngxitama 2006; James 2007). The staff member from Nkuzi who had worked on the

PLAAS/NLC Project workshops had left the organisation by the time I came there, but was remembered warmly by one participant of the workshops that I spoke to – he was from a village not far from Chavani, where I had been doing my research – and was not difficult to track down. When I arrived in Y's office in Polokwane, it was a small room with three desks and four people in it. I was the fifth, and we brought in an extra chair and pulled it up to his crowded desk. He had moved away from working exclusively on land issues and was now pursuing government grants for small-scale tourism and development projects in the rural areas he had previously been working in. He talked to me about his involvement in the workshops that he had participated in and expressed concerns about the extent to which those actually attending them were 'representative' of 'the community', being predominantly those involved in formal ANC politics and teachers. While this is a criticism relating to the linkages forged between NGOs and 'their communities' and representatives of the communities, and reflect criticisms made elsewhere (Nauta 2004; James 2007), he went on to criticise the attitude of the organisers that he perceived to amount to a dismissal of the knowledge and experience of those who attended the workshops, based upon their 'racial' superiority (again, these were his perceptions of the way the organisers related to those who attended the workshops). But his concerns here, also clearly related to his own perceptions of the way he felt that he had also been positioned by the organisers:

The people at the forefront of this thing [...] – they're white. It's the only way they see these things: 'They cannot think for themselves'. I assure you that those racial politics were at play. To just criticise just one thing – that characterised the whole thing. When I went to a meeting and suggested certain things they were ignored. And I expect these suggestions to be taken as the meeting was of the CLR group. But the leadership, mainly because it was white, were feeling that the leadership should take responsibility. But that feeling came from the leadership. A specific report came out that I feel personally does not represent me personally. ... But after that report, we waited 8 months for the Department to come up with a new draft – and they started criticising them again. The leadership were thinking the black members were becoming unreasonable – you sit with people and disagree on certain things and people will think you're being too unreasonable. (Former NGO employee, interview – 13.1.06)

I apologised that I seemed to have made him angry and he rejoined that he *was* angry. He had conveyed to me the almost personal slight he felt in response to what he perceived to be endless, but not constructive, criticisms by the white project leaders of black people in government and his feeling that, in publishing a report that did not represent his own interpretation of the situation, the white leaders were riding

roughshod over his views. Again, he was reacting against others in the field positioning him in particular ways, compromising the extent to which his voice was heard or even listened to.

There are understandably deep-rooted sensitivities relating to race in South Africa and even though inequality drawn along racial lines is increasingly differentiated in terms of class, such inequality remains stark for the majority of people in the country. Furthermore, access to different forms of capital is similarly structured and, as indicated above, in turn shapes vast differences in terms of *habitus*. In many aspects of life in South Africa, individuals with such different embodied histories rarely come together, but in fields such as the activist field, they do. And when they do, the two examples of how sensitivities arising from such differences and inequalities can be brought to bear on individuals' personal relationships with colleagues or (former) friends underline the impossibility of ignoring them. Just as that participant who had been so hurt by the way former colleagues and friends had assumed her affiliations based upon perhaps her age, her gender and the colour of her skin, when so far as she was concerned she had done nothing to promote such an assumption, Y similarly felt undervalued, that he had not been listened to, that his knowledge was undervalued – a knowledge that he felt should have been accepted, being based as it was from his own experiences of living and growing up in such an area. The result for both of them was a build-up of resentment and anger, and they both reacted against it, reacting against their positioning by other actors in the activist and other fields; even in talking to me they again endeavoured to re-position themselves again. As Fisher has argued, '[i]ndividuals and groups struggle for the freedom to define themselves and their relationships with others on their own terms' but that '[c]hanging the self and changing society both require a rejection of the representation of self imposed by relationships with others' (Fisher 1997: 457). Both of these individuals, however, were in a position to attempt to do this. However, the extent to which these very struggles, for positions in the activist field through the assertion of particular representations of 'truth', may displace the knowledge of those who they undertake or claim to represent, and even the freedom that they have to define themselves on their own terms, remains the key question.

4 – From mediating politics to the politics of mediation

As indicated in the previous section, NGOs' engagements with people 'on the ground' are essential to their role: in shaping the knowledge that will inform the organisation's positioning in policy debates, but also in legitimising their claimed position as mediating the 'local' and the 'national' and influencing those debates. So while there are individuals working for NGOs who are working to strategically position themselves, and the NGO, in relation to the wider field of power, there are also many whose everyday

work is relatively unconnected with (albeit not unaffected by) the wider 'field of power'. While through their employment they are positioned squarely within the activist field, their day-to-day relations with their constituents relate more to the relations of power that structure the rural field. Perhaps because they are not really involved in mediating the wider politics of positioning the NGO – they are more involved with the politics of mediating the day-to-day conflicts and disputes that arise in their everyday work as fieldworkers – most of these individuals are relatively low in the 'pecking order' of NGOs, their cultural capital and knowledge of rural areas not valued as much as that of those individuals who have made themselves essential to positioning the NGO, successfully or unsuccessfully, within the hierarchy of the activist field or even in relation to the wider field of power. Nevertheless, their positioning within the NGO will also be structured by their qualifications, their personal relations, their career aspirations, structured in turn by their *habitus*. This section, however, discusses how NGOs' engagements with people 'on the ground' became more important as a means to legitimise their claimed position as mediating the 'local' and the 'national' and influencing policy debates, than shaping the knowledge that informed the organisations' positioning in those debates. Rather than such knowledge filtering up from engagements between fieldworkers and people living in rural areas, instead particular readings of legitimate knowledge and accepted identities that were deployed by NGOs in relation to their strategic positioning in policy debates, shaped the practices of fieldworkers working in such areas with consequent contradictions left to be resolved at a personal level.

Nkuzi was set up in 1998 and grew from just three people to having over 25 employees in 2005. Its 'head' office was in Polokwane, but it had three other offices, one in Elim on the edge of the former Gazankulu and Venda homelands, dealing principally with restitution matters, one in Modimolle dealing principally with farm worker and labour tenant issues, and one in Pretoria dealing with 'policy'. I first came into contact with Nkuzi's former director because it was due to be undertaking a joint project with IDS shortly before I was due to fly out to South Africa and he indicated that I could get in touch with the organisation if I wanted to undertake any local-level fieldwork in Limpopo. I followed up on this offer and secured accommodation with a family known to him, who were living in a village next to the village of Chavani where I undertook research. During my time spent living with the family, carrying out my research everyday, I used the Nkuzi office at Elim as a 'base'. It was good to have somewhere to come back to, to plan interviews, write up fieldnotes and chat to the administrator and those employed as fieldworkers on the projects based in the surrounding areas. I accompanied many of them in their work, learning a lot from seeing them at work as they went out to local villages to meet their clients, members of land claims committees of local communities, CPAs and the Provincial LPM. They were generous in inviting me

along to local community meetings that they knew were being held and even allowed me to attend the NGO's week-long 'Strategic Planning Meeting' at the end of my time there.

Nkuzi had no tenure project as such. Nevertheless, many of its staff were from nearby rural areas – all of them working for Nkuzi's Elim branch came from villages in the surrounding areas – and therefore had an ongoing experiential knowledge of tenure in those areas. But in their capacity as Nkuzi staff, their contact with people living in those villages arose largely from those groups who had lodged land claims under the Restitution Act⁴⁷, as well as people who had heard that there was a lawyer at Nkuzi offering free legal advice for anything from employment claims, to eviction cases.

'A' had been involved in Nkuzi since the outset in 1997 and proudly regaled me with tales of early sit-ins at the Minister's office, protests against evictions – at one he had been wrongfully arrested – and stories of being 'tailed by the NIA'. Not only did he assert such post-apartheid activist struggle credentials that were clearly important within the activist field, but he was also well-versed in the discourse of democracy and the law, often acting as a spokesperson for Nkuzi in contacting and relaying local stories to the national media – television and the press. Despite his activist credentials, with the support of Nkuzi, he had gone back to studying law and he took seriously his advocacy training, or 'articles', and dreamed of opening up his own practice in one of the villages nearby where he lived. He often turned up to work in a suit despite frequent trips along dusty unpaved roads to visit clients and sort out disputes. When I arrived at Nkuzi and told him what I was interested in, he made sure to tell me about the 'Communal Land Rights Act cases' that he was dealing with. Knowing that CLARA had not yet been implemented I was unsure as to what these might be and accompanied him to a meeting to resolve 'a Communal Land Rights Act case'. The meeting was with the *Hosi* and *induna* of Bungeni, the next village along from Chavani, and a woman from the village. When I talked to the woman as we were waiting for the meeting to start, she scarcely held back tears as she told me of the decision by the *induna* to allocate a stand for a garage between her shop and the road thereby blocking access for any potential customers to her shop. The meeting itself was resolved in her favour due to A's knowledge of a bye-law that, in any case, forbade building at the proposed proximity to the road. But this was a 'Communal Land Rights Act case' - showing that "the Communal Land Rights Act would be a terrible thing if left to the Chief" (Nkuzi employee, personal communication - 2.11.05).

When we were talking about CLARA itself another time, however, A seemed to support the idea of some sort of committee comprising of chiefs and elected community members, so long as there were clear rules devolving more power to the community

and setting out clearly the obligations and rules that should govern them (Nkuzi employee, interview – 28.10.05). Given that both an “LAC” and “Community Rules” were provisions of CLARA, it was therefore somewhat strange then that he seemed so opposed to it. So that they would be easily translatable to the media, even to those working in the policy unit in Pretoria, A was used to fitting the details of his everyday encounters within the wider discourses and politics shaping high profile issues and cases that Nkuzi was engaged with. But such wider discourses also had the potential to shape his approach to mediating tenure problems. Furthermore, granting recognition only to those tenure problems arising from the actions of corrupt or wayward chiefs could limit the extent to which the complexity of tenure problems are brought to light.

The NLC/PLAAS project carried out its first workshop in Mashamba, a village next to Chavani (see Chapter 7). But while Chavani was well known to Nkuzi because of its involvement in working with people there on a number of land claims, when I asked A about Mashamba, he claimed not to know much about it – it was not one of Nkuzi’s ‘communities’. However, according to the PLAAS Research Report, ‘Community views on the Communal Land Rights Bill’ (8.03: 28), there were specific reasons for choosing Mashamba as a location for the first workshop:

Mashamba village was chosen for the consultation site because of a serious tenure problem – a headman had entered into a contract with an investor in terms of which a large area of communal land had been fenced off as a potential game farm. This has restricted the community’s rights to grazing, hunting and water on the land ... However, apparently neither the chief nor the community were adequately consulted about the contract, nor has any benefit emerged in the form of rent or jobs.

During my time in the area, this story had become a bit of a legend, many people were aware of it, but its key protagonists and story changed depending on the teller – the person selling the land was not a headman but a rich businessman living in Mashamba, or the person was indeed a headman but the sale had not been completed. The tenure problems in the area were complex, as were the changing dynamics of the chieftaincy (see Chapter 7). Apparently, however, it was not this problem that produced the ‘teething problems’ experienced in that workshop (*ibid*). The people invited to the Mashamba workshop included people under both Mashamba Tribal Authority⁴⁸ and Chavani Traditional Authority (TA), but Nkuzi had only before had contact with Chavani, through supporting its land claims. One of those claims involved a group of people living in Chavani, under *Hosi X*, who were claiming land falling within the area governed by Mashamba TA. Some seven or eight years since submitting the claim, according to the claimants, the Land Claims Commission (LCC) had hardly yet embarked on the case

and tensions between the two groups had heightened over this time. Since claiming the land, the PLAAS/NLC Project workshop meeting was the first involvement of all interested parties and there was confusion amongst those people present as to what the meeting was for. I spoke in depth to three people who had attended the meeting, two of whom had gone on to attend subsequent national meetings convened under the project. One of them told me about the confusion that was stirred up by the holding of the meeting:

they [the participants] accused the facilitators for being involved in settling the claim and x, the uncle of *Hosi* x ... said to the facilitators 'You people! Why don't you stop those people from Mashamba to plough?' There was a lot of tension. ... Some of the things people were putting as comments were 'We don't need this Bill because that land [where Mashamba is] belongs to us!' and 'Only our chiefs our governing us.' – because with the committee which must be nominated, people felt that it was going to take away their powers [of the chiefs]. ... When they talked about 'Why now?', we thought that the government were trying to run away from giving us land – how could they facilitate the [CLRB] without facilitating our claim? ... So the tension was in the whole workshop. (Workshop participant, interview - 20.11.05)

Much of this tension had clearly been generated simply by the convening of a meeting that included people from two villages, one that had an unresolved restitution claim over the land of the other. This was a tenure problem that was certainly relevant to any tenure reform and even to an enquiry convened so to look into the existing *de facto* rights to be secured pursuant to tenure reform: any confirmation of people's current rights pursuant to land reform legislation, when it is in fact former rights that they are actively seeking to re-secure, would not be welcome. But the 'anti-chieftaincy' approach of progressive activists had somewhat eclipsed these other complexities that were not only paramount in the minds of the workshop participants but actually threatened to disrupt the whole proceedings, and understandably so, given the misunderstandings that arose.

A number of people I met working for Nkuzi similarly strongly articulated the anti-chieftaincy discourse, manifesting in a variety of practices in their encounters with local people but also in contradictions in their personal sense of identity. One individual working at Nkuzi, 'B', had secured employment after becoming involved in facilitating the Mashamba workshop. Although he now worked at the Polokwane office, I went to visit him at his family's stand beyond Bungeni – he told me to stop and ask anyone if I got lost on the way, just ask for the stand of the headman. B was known for being a bit of a talker, and certainly when I spoke to him he was confident and forthright in telling

me what he thought, regaling me with the ins and outs of the ANC's neo-liberal turn, his disapproval of GEAR which "was not an ANC policy, it was drawn up by a neoliberal leadership that has taken over the ANC" and his anti-chieftaincy approach to tenure reform (Nkuzi employee, interview – 19.9.05). But he also wanted people to be given more land, and he thought that whatever secure tenure rights they were to be given, they should not be allowed to sell their land. In the end I asked him whether his father, the headman, knew of his views, and what he thought of them. He told me that his father not only knew of them but supported him. He surprised me further when he told me that he had been involved in the anti-chiefs' uprisings in the area in the early 1990s, and by way of explanation he told me that he had been living in Soweto at the time and the ANC had been fighting with IFP supporters there. It had been messy. But he added, so far as there were still chiefs and headmen here, his father was a good one and was progressive and popular with his people – it wasn't his father who the uprising had been against. His father had even refused to take up the post of *induna* until there was a democracy. So while in his day-to-day reality, B was able to reconcile the contradictions between his 'anti-chieftaincy' line and his family's position within the community, doing so was perhaps not as necessary when working for an NGO that itself espoused such a discourse.

Another of the individuals who had attended the Mashamba workshop, 'C', had gone on to participate in subsequent Provincial and National meetings and was proud to have been the one chosen to fly to Cape Town to participate in drawing up submissions to be made to Parliament. C was a teacher, and proudly lent me a copy of his thesis that he had submitted towards his degree. It was on the history of the chieftaincy in his village of Mashamba – a history that was strongly contested by those villagers in Bokisi whose land claim was over much of the territory now making up Mashamba. He was softly spoken and thoughtful about the workshops and Parliamentary process, and told me that he himself had been unhappy with the submission that they had made that was so strongly against the chiefs. The reason why C had agreed to the submission, however, was because he had felt that in a group, you have to compromise – there had been one person in the group (it happened to be B), who spoke very strongly and cared very deeply about these things. He had gone along with this. But he reflected:

There were a *lot* of these NGOs in Cape Town, and somehow they were all speaking with one voice. And they were very extreme. Maybe it is that where you have grown up somehow shapes you.

ERAF: Like growing up in Cape Town?

Yes! And like me, growing up here – maybe is somehow brainwashes you to think in some ways. (Mashamba informant, personal communication – 18.11.06).

Although the tangible repercussions on B's specific engagements with policy in relation to CLARA happened to be traceable here, C's personal difficulties in reconciling the stand he took participating in drawing up the submission to Parliament are perhaps, here, less important than simply recognising the extent to which the 'anti-chieftaincy' discourse pushed out more nuanced understandings of the chieftaincy in such areas. However, B's practical acceptance of, or realism towards the existence of the chieftaincy, chimes with that of other employees at Nkuzi.

I spent quite a lot of time with 'D', attending a number of meetings between him and groups of constituents during the time that I spent in Limpopo. He was conscientious in his work, often stepping in to mediate tense situations, and was thoughtful about the starkly different 'worlds' he often found himself engaging with. He was from a village in the former Venda, from a fairly wealthy family, but through his work with Nkuzi found himself engaging with politicians, government officials, land commissioners, activist academics, traditional leaders and village women's groups – seemingly equally at ease with them all. But he grappled with the incongruities arising from the introduction of a law, like IPILRA (the Interim Protection of Informal Land Rights Act 1996) that was so progressive at one level, but that then meant nothing to people on the ground:

You find that TAs didn't know a thing about it. ... the structures involved in land administration didn't know about it. For example, a family went to bury their family in the graveyard and the TA decided not to let them. But they said, it goes against our norms and our family. With IPILRA, there has to be a process of consultation and people have to agree. So we took IPILRA and they said 'What is that? You are bringing division to the Community.' (Nkuzi employee, interview – 19.9.05)

For D, the problem with CLARA was not the chiefs – they could potentially be a problem if they were corrupt and took bribes and that of course needed to be dealt with – but the main problem was defining a community and territory in the first place. He had ample experience of dealing with restitution cases in which ongoing disputes, sometimes years-long, had been rumbling on between 'communities' over defining their territorial boundaries that did not reflect those boundaries of property registered in the Deeds office. But adhering to an 'anti-chieftaincy' line in this context was just not possible; such a line failed to grapple with a reality that could not be ignored:

The TA is there. It has been there and is performing a role. You need to be careful about establishing structures. You currently have CPAs where TAs are involved ... That's what I see as a challenge – linkage with structures that existed before. (*ibid*)

Such knowledge contrasts with the 'anti-chieftaincy', Mamdani-inspired discourse that was adopted by his NGO to try to further its strategic positioning in debates in relation to CLARA. Rather than knowledge based upon engagements between fieldworkers and constituents 'on the ground' shaping its position in those debates, such a discourse has instead shaped the 'everyday' relations between some fieldworkers and their constituents. This section has indicated the extent to which unthinking deployment of such a discourse can re-inscribe narrow readings of knowledge considered to be legitimate and accepted identities. As recognised by Robins, 'tradition, community and ethnicity, like nationalism, can be either emancipatory and progressive, or reactionary and exclusionary' (Robins 2003: 275), but positioning 'tradition' within such a binary of 'undemocratic chiefs' versus their 'democratic other' will exclude more nuanced understandings of an everyday, negotiated, often contested, reality that is unequal and messy in its democratic and undemocratic reach.

5 - Conclusion

Although the adoption of the 'anti-chieftaincy' discourse by NGOs in order to position themselves strategically in relation to CLARA enabled them to present themselves as a coalition speaking with one voice against the government, it also displaced more nuanced knowledge of the tenure of people living in such rural areas. Their adoption of such a discourse in their engagements with policy-makers was at a time characterised by immense conflict in the activist field, with actors struggling, often unsuccessfully, to position themselves within a changing hierarchy of the field. That hierarchy is structured by the different forms of capital brought by individuals coming together in the field, each also bringing a different background and *habitus*. Such conflicts often brought to the fore issues relating to race, gender, class, politics, etc, striking to the heart of individuals' identities, and affected their personal responses and ongoing relationships with current and former friends and colleagues. Strategies they adopted in relation to the politics over CLARA were also shaped by this, as well as by their position within the activist field and in relation to the wider field of power. In the end, rather than more nuanced understandings of a messier reality of people living in such rural areas informing NGOs' engagements with policy, engagements with people 'on the ground' were simply used to legitimise their positions and the 'anti-chieftaincy' discourse instead came to shape particular readings of legitimate knowledge that then played out in the interactions of fieldworkers and their rural constituents.

This raises the key challenge of the activist field: to enable the articulation of different ways of thinking by people who share a different *habitus*. But there is a paradoxical tension in achieving this. Individuals within the activist field are relatively powerful in holding sufficient capital to participate in policy debates in South Africa, but enabling the articulation of such different ways of thinking may also challenge their legitimacy, as people struggling to represent the 'official version of the social world'. Individuals within the activist field are struggling with others both within and outside the field for symbolic capital to make such representations. Raising questions that are as yet un-askable so as to challenge *doxa* may also challenge that power held by actors operating within the field. However, even if we were to deny this challenge, as recognised by Bourdieu:

undertakings of collective mobilization cannot succeed without a minimum of concordance between the *habitus* of the mobilizing agents ... and the dispositions of those who recognise themselves in their practices or words (Bourdieu 1990: 59).

In the formulation of reforms that are to improve the lives of millions of South Africans living in areas 'to be reformed', enabling such an articulation of an 'alternative' knowledge of tenure, that will itself be contested, may be the only way of shaping solutions that are likely to have any purchase in shaping positive change in such areas. The following chapter homes in on the case study of Chavani in the former Gazankulu homeland, considering the *habitus* of those living in such an area, and how this shapes their lived reality, the chieftaincy and notions of 'tenure' and 'ownership' there.

CHAPTER 7: A 'RURAL AREA': CHAVANI, LIMPOPO PROVINCE (FORMER GAZANKULU)

1 - Introduction

The previous chapters have considered the ways different groupings have engaged with each other in relation to CLARA and the discourses and politics that have shaped that engagement. They have each constructed different versions of the rural field. This chapter now moves into a particular place that is to be reformed by CLARA – Chavani, a village in the Limpopo Province – and the relations of power 'on the ground' that shape notions of 'tenure', 'ownership' and the chieftaincy. It considers change that has taken place since 1994, but also the continuity in practices that have built up in response to its particular history. People living there can be said to be positioned within the rural field but, as in the other chapters, this chapter only considers a slice of those positioned within this field. However, this slice is also complemented by the discussion in other chapters of the voices of all of those who, in contestations over CLARA, have claimed to have the authority, if not legitimacy, to 'speak for' those in the rural field. Some of them, such as those in the RWM as well as high profile IFP or CONTRALESA MPs, have endeavoured to claim such authority from their own experiential knowledge of the rural field. The extent to which they have achieved this, however, has depended upon their power within the hierarchy in the wider field of power (see Chapters 3 and 8).

This chapter presents information that I gathered from a range of participants in a case-study undertaken in Chavani between August and November 2005⁴⁹. The many participants living there whom I talked to and interviewed over that time will be the 'subjects' of any reform of tenure and so their voices should arguably be some of those at the core of any such reform. So this chapter will explore 'what is to be reformed?' based upon my interactions with people over this period of my fieldwork. Although the obvious answer to the question 'What is to be reformed?' is 'tenure', the purpose of this chapter is not simply to hold up an alternative, more 'correct' reading of tenure in the former homelands with which to criticise other representations of tenure. Instead, its purpose is to reveal the extent to which understandings of tenure, in one such 'rural area', are messy and negotiated and, moreover, shaped by practice. This builds on the previous chapters that demonstrated, in contrast, how particular models of tenure and discourses of reform constructed by those with the power to represent 'the problem' existing in the former homelands, have actually displaced such messiness, and in turn the identities of people living in such places and their knowledge have been displaced from such framings of 'the truth'. Many of such discourses have pitted different understandings of 'tradition' against each other, for example, those of high profile and politically powerful traditional leaders claiming to speak for people living in such areas

(Chapter 3) against lawyers and their views of what is to be reformed and how (Chapter 5). In doing so, however, any more nuanced understandings that they have had, of the interrelationships between land, authority and identity, have been replaced by increasingly polarised pro/anti views of the chieftaincy. It is these that have come to define the terms on which the debates have been fought. Although this chapter does not present a grounded ethnography of land tenure in Chavani, it does represent an attempt to withdraw from interpretations of land and tenure shaped by such powerful discourses, and to underline the importance of re-grounding such an understanding in practice; understandings of tenure in the rural field are shaped by practice, which is ever contested, always messy and not easily defined.

For people living in Chavani, different notions and concepts have meanings that relate to people's everyday lives. And so, in this chapter, I have tried to build up a picture of aspects of life in such areas so as to convey that practical reality, which has also entailed delving into the practices that have built up around the chieftaincy. Since 1994, these have been influenced by change taking place in the institutional landscape. Such practices have shaped a collective *habitus* of people living in Chavani, which has also been shaped by the personal and collective histories specific to them. Where necessary to gain a deeper understanding of concepts such as 'tradition' or 'authority' or 'ownership', I have therefore also endeavoured to explore aspects of people's 'lived history', that is, the history that for them is uppermost in their minds in explaining their present. In undertaking the fieldwork for this chapter, it was therefore useful to try to find out what assumptions, based upon a collective *habitus*, make some questions, and their answers, obvious, and others even ridiculous. Doing so is revealing in casting light upon meanings constructed within this rural field and between differences in different fields that have been explored in previous chapters. In the last section, dealing with 'tenure' and 'ownership', I have also gone beyond Chavani to consider one example of a restitution case in which such concepts were taken 'outside' such a rural field and interpreted elsewhere. I consider the effect of forcing a particular reality into meanings and interpretations drawn up by people outside the rural field, rather than relating it to the reality of those who experienced the wrong. In this particular example, it has resulted in unforeseen outcomes, some of which have involved re-inflaming old rivalries based upon the chieftaincy and ethnicity. Such an outcome is discouraging given its purpose of redressing a wrong that was perpetuated under apartheid.

2 - Introducing Chavani

Until 1994, Chavani was classified as a 'Shangaan' area and lay within the former Gazankulu, the homeland for the so-called Shangaan or Tsonga-speaking tribe. While Tsonga traders had settled amongst societies in the then Eastern Transvaal from the

middle of the eighteenth century (Delius 1984), in the 1880s and 1890s larger numbers of diverse Tsonga-speaking groups fled from the Luzo-Gaza wars in Portuguese East Africa to what is now known as Limpopo and Mpumalanga (Niehaus 2001). And, after decades of movement, migration and assimilation with different groups (Delius 1984), the arbitrary carving out of Gazankulu from the landscape, with thousands of Shangaan-speaking people being forcefully removed 'back' into the homeland so as to be settled within its borders, was particularly brutal (Harries 1989). Meanwhile, the ongoing removal of thousands of people living in areas that had been demarcated as 'white' farms, and others who were made 'redundant' as farm labourers on those increasingly profitable, productive and mechanised Transvaal farms, contributed to increasing overcrowding in these areas. This did not mark the beginning of such a process but was the culmination of 'an intense struggle for control over resources and human labour' that had been going on since before the passing of the Natives Land Act in 1913 (Keegan 1985: 391). But while such struggles have always been racially defined, they have also always involved gendered struggles 'with women and men of a particular race or class experiencing differential access and control over resources, power and authority because of the way gender relations are constructed' (Meer 1999:75)⁵⁰.

Delius (1984) has described the extent to which, in the nineteenth century, many white people secured titles to land that was already settled by Africans, and such ownership was then used, with greater or lesser success, to demand payment in labour, in kind, or in taxes from their 'tenants'. Subsequently, the Land Acts of 1913 and 1936 were passed, prohibiting Africans from owning land outside the reserves. However, as indicated in the Introduction, even within many of the reserves, the land was formally 'owned' by the state. Instead, Permissions To Occupy (PTOs) were distributed, but only to men; women were considered to be minors and therefore not entitled to have such PTOs registered in their names. The 1913 Act also prohibited any payment of rent in kind, that is, share-cropping tenancies (whereby the black tenant farmers paid half or less of their crop to the white landowner). Its passing marked a point at the height of tensions between white landowners and black tenants. While there was an ongoing demand for the labour of those black people living on the land, share-cropping not only failed to satisfy these demands, but also provided black tenants with opportunities for their own capital accumulation and, in turn, their own diminished dependency, other than for land (Keegan 1985; van Onselen 1997). Labour tenancy, on the other hand, provided white farmers with labour, and commonly also the use of their draught animals, for a particular number of months each year; a number of elderly people living in the area told me of having to provide such labour on the farms around for no payment, or for salt. However, while the passing of the 1913 Act resulted in a rash of evictions, it was not that Act but the tractor that eventually put an end to share-

cropping (Keegan 1985). Such mechanisation, as well as the increasing forestry undertaken in the area, contributed to the ongoing evictions from 'white' farms and the dumping of people into, and subsequent overcrowding in villages such as Chavani. However, these evictions and 'redundancies' have continued through the 1990s and into the 2000s, not least due to the recent influx of Zimbabwean farm workers in this Northern part of Limpopo (Rutherford and Addison 2007).

The brutal and widespread 'mix-up' of people took place alongside widespread 'betterment' schemes and the appointment of large numbers of chiefs – *hosis* – and headmen – *indunas* – to rule over villages in the area. Echoing some of my more elderly informants living in Chavani, Niehaus (2005) similarly describes the residential pattern in the Setlhare chiefdom of the South African lowveld as being of 'scattered *metse*' with '[f]ields ... as large as households could cultivate' (Niehaus 2005: 194). Betterment relocations of families in that area, however, redefined the nature of the '*metse*', comprising of 'the homesteads, fields, and ancestral graves of a co-resident agnatic cluster [whose ...] inhabitants were typically a grandfather, his sons, their wives, unmarried daughters, children, and grandchildren' (*ibid*: 194), to 'a heterogeneous collection of unrelated households' (Niehaus 2001: 30). Such individualisation 'destroyed networks of reciprocal co-operation that had been built up between neighbours over decades' (*ibid*: 30). Moreover, it also had:

a profound effect on gender and generational relations. It placed women in a powerless and precarious position. Through working in the fields, women had made the most important contribution to household diets, but after relocation they came to rely, almost completely, upon the remittances of migrant men. (*ibid*: 140-1).⁵¹

However, given the former reliance on the land of these families, such migrant men 'carry with them, in their desperate search for urban employment, the enduring disadvantages of very little education, relative illiteracy and the non-transferability of limited skills' (Murray 1987: 319). And further changes were also wrought by such social engineering. After the boundaries around 'Gazankulu' were drawn, gradually ethnicity came to be more important to people as it became a form of capital to be wielded in the struggle for access to resources, and land, in the area and Shangaan-speaking people came also to refer to cultural and traditional practices as constituting their identity as 'Shangaans' as opposed to 'Vendas' (Harries 1989). Nevertheless, unlike other areas in the Transvaal, according to Kirkcaldy (quoted in Schmid 2005: 4), politically, Gazankulu was considered in the 1980s to be 'almost the sleepest of the bantustans'.

After the release of Mandela in 1990, however, political feeling was awakened and, as in other places in Limpopo (Niehaus 1998), the 'youth', or ANC 'Comrades', were pitted against chiefs; after political 'stayaways', demanding the resignation of its Chief Minister, were organised by the youth, the South African Defence Force and the South African Police were sent in, with ensuing violence resulting in a number of deaths and mass detentions (Schmid 2005). People were threatened and intimidated against going back to work, huts were burned and tyres set fire to so as to block the main roads (*ibid*; Personal communication - 11.05). Although the youth organisations were fulfilling the ANC's calls for 'ungovernability' in the bantustans, there appears to have been very little control exerted by the ANC over them at that time. And, for many of the youth, 'apartheid' was too vague a notion to fight against. Living in such an area where people's daily lives were constructed and controlled not by white people, but by other visible structures of authority and control, 'parents, teachers and chiefs' became those to rebel against – chiefs, particularly, all of whom as *ex officio* members of the Legislative Assembly 'represented undemocratic structures' (*ibid* 17; Personal communication – 19.9.05). That is not to say that there was no awareness of the wider national politics, but such a stance also 'fitted' with the anti-chiefs 'conscientising' undertaken by a number of UDF activists who developed linkages with people in those areas, or by NGO development interventions (Personal communication - 7.05, and see Nauta 2004; Schmid 2005).

Chavani now falls under the newly established Makhado Municipality, situated some 30 miles away in Makhado. The establishment of the Municipality has transformed the former all-white Louis Trichardt Local Council and it now includes many villages falling under the jurisdiction of chiefs in the former Venda and Gazankulu 'independent' homelands, or 'rural areas' as they are often referred to, within the Municipal boundaries. On the road from Makhado to these homeland areas, there is a distinct line in the landscape between open veld, apparently uninhabited and thick with scrubby bushes, but fenced off from the road with barbed wire, and the suddenly crowded roads and densely packed stands of the villages in the former homelands, such as Chavani. Children are everywhere, goats plentiful, and shared taxis with their cracked windcreens and creaking rusty shells full to bursting point, shuttle between the villages and Makhado – the trip taking at least 30 minutes. While people living in villages like Chavani often make the 30-minute shared taxi ride into Makhado, *mulungus*, or white people, rarely transgress such boundaries into these villages. I spent the time that I was there living in the area with a family in 'Shirley' – the village just next to Chavani – a former Swiss Mission station whose chief had only been appointed in 1993. Although many people claiming to be 'Venda' continued to live there, Shirley was thought of as a Shangaan area. During most of my stay I secured the help of a local research assistant

from the area, Musa Kotane, a fluent Shangaan and Venda speaker and highly involved in community issues. Musa helped me tremendously, to plan the logistics of arranging interviews and discussion groups, finding out about local community meetings and sometimes facilitating access to particular individuals. She also acted as an invaluable interpreter, and teacher of language and cultural 'do's and don'ts'.



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The village of Chavani lies on the lower Southern slopes of the Ribolla Mountain, the dry ground dotted with small scrubby bushes. Cattle often graze next to the one tarred road now forming the contested boundary between Chavani and Mashamba; as I was told time and again, "there is not enough land" and many people have no access to grazing land. People live close together on square plots of land called 'stands', or *bantustands*, as many older people referred to. These were first demarcated in the 1960s as 50 x 50 yard plots, some as 75 x 75 yards – usually ones that are higher up the sides of the mountain and filled with huge boulders and rocks – but more recently they are just 35 x 35 metres. Wooden and wire fences often run between them, and between a number of such plots lead paths like streets set out in a clearly planned, grid-like fashion. Many of the paths have been eroded into ditches, particularly on those paths on the grid that head straight down the slopes of the hilly ground at the foot of the mountain.

Many of the plots have a number of dwellings within them, often joined together by low walls, sometimes painted in peeling patterns with pinks and greens and yellows that I was told were "the colours of the Shangaans", and one or two painted in the earthy dark red and ochres "of the Vendas". The area inside these low walls forms a 'terrace'

between the dwellings which is often immaculately swept in the early hours of the morning. The houses themselves range from the immeasurably poor small square or round mud-brick dwellings with roofs of thatch or scrap metal, to larger cement-brick houses, their roofs sheets of corrugated iron. But not everyone is so poor in Chavani; there are some larger houses, brick built with tiled roofs, sometimes with garages. Some even have gates, and bars at the windows – but they stand out in their wealth. Only those who can afford it have electricity. Few have phones – though cell phones are common. Very few houses have running water or anything more than a dug-out drop toilet in the yard and most rely on women in the family fetching the family's water, carrying containers on their heads from standpoints that are only turned on for a few hours each day. Although the nearest river, the Klein Letaba, in the dry season only contains a trickle of brackish water, a few cattle are taken there to drink and some women from the area take their washing there, rather than having to deal with the headaches after carrying water in the searing Limpopo sun.

3 – The contested legitimacy of the chieftaincy

Chavani and a number of other neighbouring villages all fall under Nkhensani Traditional Authority (TA) – *nkhensani* meaning 'thanks'. The TA was established in the late 1960s when the chief (*hosi*) of Chavani was appointed as the only *hosi* over the TA, with authority over the headmen (*indunas*) of the other villages within its jurisdiction. The establishment of the TA took place in the midst of extensive forced removals in the area (Platzky and Walker 1985): countless numbers of people were forced to abandon their former homes situated in the Venda homeland (separated from Gazankulu arbitrarily by the only now-tarred road in the area) before being rounded up by government forces and made to walk with their possessions, or were driven by 'GGs' – General Government trucks – to new villages miles away but in Gazankulu; families already living in the area were similarly ordered to abandon their former homes and their land, before being moved into rows of newly demarcated stands; and others were thrown off farms owned by white farmers (*boers*) or *mulungus*. Meanwhile, Vendas, former neighbours, were moved out of the area. There was a constant arrival to the village of more and more families, and the sizes of stands gradually decreased. With such a historical context, the legitimacy of the TA and the *hosi* and *indunas* making up Nkhensani Traditional Council (TC), being one contested outcome of the clumsy implementation of the Bantu Authorities Act 1951, continues to be challenged by those who feel grievances and bitterness that they now fall under the jurisdiction of a *hosi* who, in their eyes, is not the 'real' one.

On *the* one hand, *people* time and again told me that a fundamental tenet of the chieftaincy is that "a *hosi* is not chosen, he only becomes a *hosi* because of inheritance,

and the older son is the one chosen to be a *hosi*, from the first wife." (N'wa-Xinyamani *Induna*, interview - 1.9.05). On the other, *hosis* had clearly been 'chosen' by apartheid leaders, appointments that were often subject to great local contestation in terms of their legitimacy⁵²: "a lot were afraid to become a *hosi* because there was a risk. You could become bewitched because of that." (*ibid*). Becoming bewitched during a time when witch hunts and witch killings were prolific in the homelands of the former Northern Transvaal⁵³, was not a matter of little concern. Even in October 2005, some 20 people in Chavani were arrested for an incident of stoning a man for carrying out witchcraft and accusations that he used *tokoloshi*⁵⁴ to carry out his evil deeds for him. Niehaus (2001: 195) describes the extent to which '[f]ears of bewitchment escalated as population removals and migrant labour generated new inequalities and tensions'. As discussed above, Chavani had also undergone a huge influx of people as a village lying on the Gazankulu/Venda border. Moreover, in the Northern Transvaal, as the youth or Comrades assumed the forefront in the struggle against structures they perceived to be undemocratic, such as the chiefs, they also assumed the mantle in conducting 'witchcraft-eradication campaigns to cleanse the countryside of immorality, misfortune, and evil' (*ibid*: 195). While formal statements of what might be accepted as an ideal – that a *hosi* is not chosen but born into the chieftaincy – and in the same manner legislation, might describe clear-cut social relations, practice always deviates from such an ideal and in turn, is shaped by local contestations over legitimacy.

Stories abound around the chieftaincy in all of these areas: I was told of bribery that went on between the Native Commissioner and a headman who 'bought' land and became a chief; a chief who obtained more land after handing over a cow or some goats; a layman who was appointed as a chief because he had particular skills of ruling (or was known for treating people badly) having been a foreman of a powerful white farmer in the area; and a man, who was thought to have been a layman, who was appointed as a Shangaan chief in Gazankulu because he was known to have Royal blood as a result of secret trysts between his Shangaan mother and the 'true' Venda *Nkosi*. Nevertheless, chiefs were appointed and, whether or not their royal lineage or the boundaries of their land were disputed, such appointments contributed to the unfolding of a practical reality in the lives of people living within their jurisdiction. This reality has given birth to a collective *habitus* that has in turn shaped the way contrasting and contradictory views and interpretations of the chieftaincy are granted legitimacy. While some argued that the true genealogy of the chief remained important – perhaps those whose family had in some way been undermined by the arrangements put into place when they were 'stabilised' in the institution of Nkhensani TA in the 1960s – others were more concerned about the extent to which those in such positions of authority were *deserving* of their respect. However, the extent to which people can influence the

legitimacy granted to those meanings, depends on their holding of symbolic capital within such a rural field. This in turn depends on their access to other kinds of capital, such as financial, cultural, and social capital, which is in turn, shaped by gender and age.

Despite their formally held positions of authority in the hierarchy of the village, supported by the bureaucratisation and support of the chieftaincy granted by the state under apartheid, those in conferred positions of authority, such as chiefs and headmen, have also had to struggle to maintain their practical authority over the villagers. Some commanded approval for their inclusion of the community in their decisions. Some seemed genuinely concerned to help sort out daily problems arising in the village with their time taken up by villagers who would come to them to seek their advice. Others, however, attracted rumours, gossip and mocking laughter for their drunkenness, or for their improper behaviour with other men's wives. In spite of their formally recognised bureaucratic authority granted by the state, in the day-to-day politics unfolding in the villages, whether *hosis* and *indunas* were granted 'respect', or *hlonipho*, and thereby legitimacy, to a certain extent also determined the extent of their authority and power over the villagers.

4 - Bureaucratic practices: a 'new democratic dispensation'?

The impact of poverty shaping the lives of people living in Chavani has very real effects on local governance structures. Today, Chavani is very isolated in terms of the extent to which such structures are supported by, or even fall under the radar of, local government and the state. So, while there are other institutions in addition to the chieftaincy that contribute to the governance of the village, the reach of their power is limited and, importantly, ambiguous. After 1994, significant changes were introduced into the playing field of local politics in such 'rural areas'. For example, in 1995 a Transitional Local Council was created, followed in 2000 by a fully fledged Municipality. These new institutions opened up new opportunities for changing the relations of power in the area (Niehaus 1998), but there was also remarkable continuity (Oomen 2005). Not only were the web of laws and regulations governing the TAs in such areas in the main not repealed in 1994, or since, but the bureaucratic practices, and in some cases institutional support for such practices, that built up around them have continued. Nevertheless, the more pluralised institutional landscape existing today, in many ways enables contestations over the extent to which each exercises power over local politics in the rural field and provides opportunities for different actors to participate in changing the local relations of power.

In 1987, a group of women who had formed a care group in the village were supported by the Department of Health and obtained a large field in Chavani. They had farmed

there until recently. They had built a small reservoir on some unused land to which they had pumped water from a borehole in the village to the field. They told me that recently both pipes to and from the reservoir had been cut through, one by some Municipal workers building a much larger reservoir for use by the whole village, and the other by someone on a stand which had been demarcated right next to the reservoir who had cut through the pipe when building the foundations of their home. They claimed that neither the Municipality, the family, nor the chief had done anything to remedy the damage they had caused or compensate them for the loss.

ERAF: Would the Municipality do anything for you?

We are still trying to get access to the Municipality but there's no way. I don't understand how to get to the Municipality.

ERAF: Could you ask your Councillor?

They just say they'll fix it but even in the village there's no water. ... The water is there, the problem is, it can't come out of the taps.

ERAF: Could you approach the SANCO?

[She laughed seemingly without much humour.]

In this village there are still difficulties because even the SANCOs, these things need money, but without money they can't do anything. We are trying to plough but SANCO says they need funds, so nothing happens.

ERAF: [I persisted] What about the Chief?

We have not yet tried approaching the *hosi* because we have not ever heard of him talk anything about water. I don't want to lie, we don't have a problem with the *hosi* because water *was* there, so we won't say that there's a problem with the *hosi*, so don't write that I said that. Even the Department of Health came and wrote like this [she gesticulated towards Musa and me, sitting in her home writing in a notebook] but we don't see anything. Even you, you come to write ...

...

If the Municipality can get involved in water maybe something will happen. ... The standpipes stopped a long time ago. There are taps at the road which they only switch on at certain times. There's not enough water so they switch it off. (Chavani informant, interview - 5.9.05 (translation))

Because of the lack of water, the group were simply no longer farming there, but some animals were grazing on the plot. This was one of the last remaining centrally situated fields in Chavani and, with the pressure of people wanting stands, the group was worried that, like the other fields that had been in the village as opposed to being on the lower slopes of the Ribolla Mountain, it would be needed by people for stands and so taken back and re-demarcated by the TA. Clearly, the extent to which different people – women, youth, men, those within the Royal Council, school teachers, SANCO members etc. – may be able to grasp opportunities provided by a more pluralised institutional landscape to participate in changing local relations of power depends on the extent to which they can access capital. In this case, those within the group seemed effectively powerless in holding anyone to account for their woes.

There were many who felt equally let down by post-1994 promises of 'development', but in her disillusion the spokesperson of this group was also realistic about the impact of poverty on local governance structures such as the SANCO, and of their isolation in terms of the extent to which they are supported by, or even fall under the radar of, local government and the state. As she acknowledged, there are other institutions in addition to the chieftaincy that contribute to the governance of the village. Chavani falls under Ward 17 of Makhado Municipality⁵⁵ and so its Ward Councillor and team of volunteer Ward Committee members have the responsibility of taking local people's concerns to the Municipality and in turn updating them on local government developments affecting them. There is also the SANCO with its ANC affiliation and locally elected committee members who claim to take it upon themselves to act as a "champion of development" and work as intermediaries, taking the voice of the people to the Traditional Leaders, or to the Municipality, or to Eskom the electricity company, or to Provincial structures (SANCO Committee member, Bokisi, interview - 3.11.05). Other groups such as the ANC Women's League, involve themselves in local politics and are supported by an ANC constituency office based at the nearby village of Elim. There is also the District Control Office (referred to by everyone as the 'DCO'), a 'leftover' apartheid institution (discussed below), also situated just outside Elim, with oversight functions of 16 TAs, its power now delegated from the District Council and the Office of the Premier at a Provincial level.

4.1 - The Traditional Authority bureaucracy

The Senior Administrator of the TA has worked in the TA's offices for 22 years. There is also a Treasurer, the 'police' or 'securities' of the TA and a couple of other people working at the office carrying out odd-jobs as and when they were needed. Collecting money from villagers for tribal levies, for fines, for registering a birth or death and for stands, recording debts and accounting for credits is key to the administration of the TA

and the administrators seemed efficient with their books, receipt slips and records of transactions. The Senior Administrator obligingly showed me a copy of a ruled A4 exercise ledger book in which "they keep all the records ... the ID number, the stand number ..." (Senior Administrator TA, interview – 18.8.05 (translated)). It had pages and pages recording the names of people, stands allocated, amount paid, and another book with offences recorded against the person, the stand number and the amount they were fined – not building a toilet on their stand was the most frequent offence recorded.

Tax collection in the village began under the NP and then continued after the formation of the Gazankulu government, acting as both a carrot and a stick to its 'citizens' (see below). Today, the rates are set by the TA, and I was given a photocopy of Nkhensani TA headed paper with a list of administrative procedures and their costs. When I asked how much they charged people, the answer from the Treasurer was clear and immediate:

60R per stand holder but R25 for pensioners. These amounts have not changed unless the chief and [traditional] councillors discuss it. Big businesses are charged R750 and small ones is R350. The big business is a general shop or café or bottle store. A small one is a spaza shop or someone selling something next to the road – they have to get permission. (TA Treasurer, interview - 26.8.05 (translated))

In practice, however, there is some discretion in the hands of the administrators as to how strict they will be with particular individuals. In a time of uncertainty and change, there is likely also to be a change of political awareness and the creation of different identities (Cornwall and Gaventa 2001) and, in this case, the status of the chieftaincy, even though it is supported by particular bureaucratic procedures, is not unassailable or unchanging. While the TA used to be supported in its wielding of power by the state, the Senior Administrator admitted that in the face of rebellious behaviour, or struggles against undemocratic or unaccountable practices by members of the community – such as "striking ... for 'Freedom time'" – "we don't have that much power, we just leave it" (Senior Administrator, interview – 18.8.05 (translated)). Nevertheless, both the *Hosi* and *Indunas* roundly asserted to me their ability to use money as a way of aggressively exercising power over people falling under their jurisdiction.

Where legitimacy is contested, the successful exercise of power and authority often depends upon the extent to which an assertion of that power is accepted. Here the successful exercise of that power also depends on the continuation of the TA's bureaucratic practices that in turn depend upon the extent to which it can continue to charge people for carrying out those practices. So there is a paradoxical need for the TA to continue paying the administrators' salaries, which relies upon the collection of the

unpopular tribal levies and fines. These days such charges are sometimes challenged, and often simply remain unpaid. This challenge to the legitimacy of the chieftaincy has been facilitated by the withdrawal of the state from such areas in 1994. But this withdrawal has not been wholesale and the amounts collected from villagers are also supplemented by the payment of 'stipends' by the Office of the Premier via the local DCO. Nevertheless, for the two permanent bureaucrats employed by the TA, changes introduced in 1994 have had very little effect on their working lives. The only real change since 1994 to their roles was that it now employs fewer staff so they have a heavier workload with no increase in pay. And they recognise that the 'new' democratic state does not continue to support them in the same way as before – they 'still' do not receive proper 'salaries' because they have not yet registered with the state as working: "They don't want to register us because we were under the Chief" (TA Treasurer, interview - 26.8.05 (translated)). Whether or not it is the contested politics of the chieftaincy at a national level has influenced this oversight, the relationship between the state and the TA is ambivalent. This also highlights the difficult relationship that often exists between the TA and other institutions.

Other institutions participating in the governance of Chavani often appear to be in competition with the chieftaincy, sometimes creating mutual antagonism between them, but they nevertheless often also support the chieftaincy in unpredictable ways. Oomen similarly recognised such 'fluidity of local rule' and 'constant debate and negotiations surrounding it', seeing in it what Chabal and Daloz argued is the "political instrumentalisation of disorder", in which political actors seek to maximise their returns on the state of confusion' (2005: 163 quoting Chabal and Daloz 1999: xviii, 155). Political actors in the rural field, those who are contesting the balance of power in such areas, indeed seek to maximise the extent to which they can successfully exercise symbolic capital over the field that has changed since 1994. The 'disorder', however, that happens to exist in such areas no doubt derives from their extreme marginalisation from the wider field of power in South Africa; impoverishment goes with that. Further disorder has been introduced with the introduction of 'new' but also marginalised institutions such as the Municipality, whose own lack of capital – not only financial but also other forms of locally recognised capital and therefore legitimacy – has complicated the reach of its authority in such areas. Meanwhile, the continuing existence of former apartheid institutions, such as the DCO, that in the past exerted some authority over TAs such as Nkhensani, means that it continues to influence the contestations over capital that take place in the field.

4.2 - The 'DCO'

After 1994 and a scaling back of particular apartheid government structures operating under the Gazankulu homeland and elsewhere, apart from the District Control Office – or DCO – other structures appear no longer to be active in the governance of Chavani. Since the time of the first demarcations of fields and stands in Chavani, the hated 'rangers' or 'Springboks', working for the DOA under the Gazankulu government and formerly under the apartheid government, worked with the 'securities' or 'police' of the TA in allocating stands, marking them with a number and receiving money for them. Although the DOA may still from time to time provide extension services in the area, and the DLA through the Land Claims Commission (LCC) may get involved with communities who have claimed land under the land reform programme, there appears to be no other regular contact between Chavani's TA, and provincial or national government offices. The DCO is the exception.

The DCO is an apartheid-era bureaucratic structure, formerly falling under the Gazankulu authorities, which has continued its existence under the Provincial Office of the Premier, its responsibilities delegated by Vhembe District Council. Its role is to oversee the financial affairs of the TAs under its ambit, but since 1994 its capacity has been significantly scaled back: its staff have gone from 16 to five but it has meanwhile increased the number of TAs under its authority so as to include two additional villages that used to be in the former Venda homeland. Nevertheless, it is the one institution that both the administrators of the TA and the TC (made up of the *Hosi* and *Indunas* falling under Nkhensani TA) referred to as exercising authority and control over them. The manager of the DCO also saw her role as one of 'control' in terms of the money spent by TAs and the 'crowning' of chiefs. She later admitted, however, that the DCO's exercise of authority over the TAs was limited and when I asked about the nature of that authority it soon became clear that the DCO fulfils more of an oversight role rather than the exercise of any substantive authority; both the fines and taxes charged by TAs are decided by the TAs having indicated that the decision has been taken by the TC.

The Senior Administrator and the Accountant of the TA had both raised the failure of the DCO, and in turn the Office of the Premier, to register them as working for the state. When I raised this with the Office Manager of the DCO, she clearly did not believe that her office should be held accountable when it was merely implementing the instructions handed down by the Office of the Premier. Although the power delegated to the DCO by that Office is circumscribed to an oversight role, which itself is limited - "The auditors go around, but they never come here this year from Petersberg." (Ms. N, personal communication - 9.05) – both the staff of the DCO and the administrators of Nkhensani TA continue to recognise its authority which contributes to shaping their ongoing

practices. Now that the DCO no longer sends cars to the TA to pick up the reports and the money collected, the administrators feel obligated to dip into their own funds and time in order to fulfil their roles in terms of the filing of reports and the banking of money. Meanwhile, the fines imposed and charges for land remain unpopular but are essential to the bureaucracy of the TA. The TC, however, which today has the power to decide on how much such fines and charges will be without the intervention from the Gazankulu government in Giyani, refers to the DCO's authority as the source of the its own 'delegated' authority:

We don't have the power to change anything, even if we want something to be changed because there are DCOs where the laws are coming from. The laws come from the House of Traditional Leaders who call all the Chiefs who then give them the law. (Chavani TC, interview - 6.9.05 (translated)).

With its now ambivalent relationship with the state, that in some ways has the potential to tip the balance of power in Chavani away from the TA, those on the TC presumably see it as useful to employ such references to wider spheres of authority in the implementation of such unpopular 'laws', in order to bolster its own legitimacy.

4.3 - The Municipality: a new democratic local government?

Unlike the DCO, the Municipality only came into existence in 2000, after the replacement of the Transitional Local Council that transformed the formerly all-white apartheid Local Authority of Louis Trichardt, incorporating within it the 'rural areas' of Nzhelele (formerly under Venda), Vuwani and Hlanganani (formerly under Gazankulu). By 2005, one Municipal Manager had already been replaced with another after such severe financial difficulties that the Municipality nearly went into insolvency. When I asked the Municipal Manager what the Municipality's role was in relation to the TAs within the area, she admitted that:

We don't have any role. We are seated with a problem. The TAs are demarcating sites without involving us. On behalf of the Minister of Land Affairs, they are continuing to demarcate sites without involving us and then will start to complain that we did not include it in the IDP [Integrated Development Plan]. That is because we didn't know they would extend so much. The TAs have no obligation to consult us. It's their land, and they don't consult us. And then the Traditional Leadership and Governance Framework Act doesn't include us. It's silent. It's an issue. But it's a controversy, because it gives them rights as TAs and then gives them the rights again [but] if we have to develop them as a Municipality, we can't.

ERAF: Do the Councillors link the Municipality to those areas?

The Councillors don't have a say. ... There are a lot of villages that have to consult us – and that are not in our IDP (Municipal Manager, Makhado Municipality, interview - 19.09.05)

An IDP is a document which every Municipality should have adopted showing its development policies relating to every village and town and township falling under the jurisdiction of that Municipality. Indeed the IDP document said very little of any substance about land in villages like Chavani.

As might be expected, and as the Municipal Manager implied, there was an understandable reticence on the side of the *Hosi* in relation to the involvement of the Municipality in the decision-making of the TA. While the TA has not been unused to organs of the state, such as the DCO and the DOA, collaborating with them in their functions, the Municipality is an entirely new creation. Under apartheid, the DOA had participated in decisions closely with the TC and even used one of the offices in the TA. The Municipality, however, is situated some 30 minutes away in Makhado and its only contact with Chavani is through its Ward Councillor and Ward Committee. But the introduction of the Municipality still has the potential to threaten the relations of power that are in existence in the area, bringing with it change, uncertainty and sometimes, as above, criticism, that in turn threatens their successful assertion of symbolic capital.

The *Hosi* expressed his wariness about the Municipality's involvement, for the reason, he said, that he was worried that it would introduce increased taxes for people living there. The possibility of the Municipality introducing taxes into such an area, where the majority of its inhabitants are poor and that has a history of the introduction of draconian apartheid taxes, was indeed a concern of many. But while the success of the integration of 'rural areas' with local government depends upon the willingness of the TA to involve representatives from the Municipality in decision-making, it also depends on the level of engagement of those representatives and the quality of the work carried out within the bureaucracy of the Municipality. The Municipal Manager of the Municipality felt excluded, seeing the problem as deriving from a lack of co-operation of the TAs with the Municipality and the Councillor, who had been Councillor over Ward 17 already for four years, agreed. He referred to numerous examples where the TA had acted without consulting the Municipality and problems had ensued. But he had good reason for deflecting attention from his own role in relation to the problems arising between the Municipality and the TA.

Many people living in Chavani expressed frustration and even anger at the ineffectiveness of the Councillor and at him being paid for "doing nothing" during the

four years of his tenure. For many living in such areas, 'the Municipality' and 'the Councillor' amount to the same thing. And so, if a village has an ineffective Councillor, so will people's perceptions of the effectiveness of the Municipality be poor. Even the Ward Committee members have limited contact with the Municipality and rely on the Councillor for outlining their appropriate role. Ward Committee members are at the lowest rung of the recognised formal political structures in the village and the extent to which they are likely to be able to hold the Councillor, if not the Municipality, directly to account is very limited. Moreover, many of them expressed frustration that they are not remunerated by the government, such frustration contributing in turn to undermining their willingness to cooperate in fulfilling their intended roles. Furthermore, when there are as many as five rural villages in some Wards, Ward Committee members are elected to represent the views of villagers from outlying parts of the Ward. But their waning commitment can mean simply that those living in villages at a distance from the Councillor's own, rarely see any sign of 'the Municipality'. While the mandate granted to Councillors from their constituents to make political decisions affecting them depends upon their ongoing legitimacy and acceptance by those constituents, particularly in a small village where a Councillor is a visible member of the community, poor gravel roads and communication links between the villages also hinder the accountability of the Municipality to villagers living in outlying villages. The successful involvement of Municipalities in such rural areas clearly depends to a large extent on the commitment, and the sensitivity, of the Councillors and Ward Committee members. It also depends on the extent to which they hold cultural and social capital within their villages, and obviously the financial capital that can be drawn upon by the Municipality.

5 – Constructing democratic change in the rural field

The day-to-day lives of people in Chavani have been shaped by the changing laws and regulations of apartheid which imposed strictures on their way of life. While many of the 'laws, regulations, proclamations and decrees defining TAs and their functions remained in force after the advent of democracy' (Oomen 2005: 137), reforms introduced since 1994 have changed the way governance happens in such places. But, as Oomen reminds us, the ways those laws and regulations have influenced peoples lives is by no means obvious: 'Legal categorisations impact, in a multitude of ways and in conjunction with a myriad of other forces, on the way people ... constitute themselves and their relations with others.' (2005: 241, and see Keegan 1985). In turn, nor may the 'implementation' of reforms happen quite as envisaged by policy-makers. Instead, it is just as likely that change may be introduced through people living in such areas coming to know about it – maybe information is heard on the radio or spread through political networks – and individuals, who are sufficiently powerful to do so, deploying such knowledge for particular purposes at particular times. For many people living in

Chavani, their lived reality does not relate directly to those changing laws, and nor are they aware of them. So governance practices in Chavani and the surrounding villages have also been shaped by a mishmash of 'leftovers' of pre-1994, deriving from the bureaucratic practices that have been shaped by the laws and regulations implemented through the Gazankulu homeland, and 'reforms' introduced since then.

The following section considers the meaning of notions such as 'gender equality' and 'democracy' within the rural field. Such concepts may sometimes be influenced by information coming from outside the field (such as from the television) or through actors coming from outside the field with a different *habitus*, bringing with them their own interpretations of such words (such as family members living in Johannesburg, or NGO fieldworkers). And their meanings are then shaped by contestations within the rural field, shaped by the *habitus* of and capital wielded by different participants in such struggles, which in turn will be influenced by those interactions between actors within and outside the field. This discussion therefore challenges assumptions that are often made about the universal meaning of such notions

5.1 – 'Participation and 'gender equality'

Nkhensani TA has its own offices housing a courtroom complete with a raised wooden witness (or judge's) box, the office of the *Hosi*, the Senior Administrator's office, that of the Treasurer, and a public space and counter where people arrive to attend to various bureaucratic procedures. There are also a number of other rooms which have at one time been used as meeting rooms or offices – the administrator showed me some of the DOA's dusty files left to one side since their last visit years before. In the heat of the Limpopo sun, villagers – who often mill around sharing gossip in the shade of the veranda – move into these other outer rooms of the building, deeper into the cooler shadows. Most of the walls are painted a cream colour but it is dirty and dull. The few posters taped up, announcing their messages of post-apartheid modernism, appear incongruous. Outside is a huge tree providing shade under its branches spread wide for community meetings (*khorhos*) which take place approximately every month enabling community members to raise issues or problems with the *Hosi* and Royal Council. *Hosi* X told me about about two committees that advise him: "a Tribal Council and a Royal Council. Some things would only go to the Royal Council, for example, how to co-ordinate the land." (*Hosi* X, interview - 18.8.05 (translated)). A *hosi* is surrounded by a contingent of advisers, many of whom are related to him, in the 'Royal Family' (Oomen 2005): the chief's brothers, uncle and maybe a few others who manage to negotiate their positions into such structures. The 'Tribal Council' is part of the Tribal Authorities system introduced under apartheid and includes the other *indunas* appointed to the Tribal Authority, but the 'Royal Council' is based more upon kinship relations, often not

only advising the chief, but acting as a buffer between the decisions of the chief – pre-1994 often passed down from Pretoria – and the community: “if someone in the Tribal Council has a dispute with the *hosi* ... they must go to the Royal Council ...” (*Hosi X*, interview - 18.8.05 (translated)). On the other hand, *khorhos* are held in order to “consult the community in making decisions”. When I told the *Hosi* about CLARA he was interested, but assured me: “The community, they don’t have a problem about the land because we currently call them for a meeting under the tree about land.” (*ibid*).

Khorhos are often held monthly on Sunday mornings under the tree outside the TA. Problems that cannot be resolved by the *indunas* over the other villages will be referred on to the *hosi* and raised here. The exact dates of the meetings are decided upon by the Royal Council. Musa and I were invited to Nkhensani’s September *Khorho*, but when we arrived at the appointed hour we found the space outside the TA under the tree deserted. There were the obvious difficulties in finding times for community meetings that were appropriate for everyone – funerals are big community events taking place most Saturdays, otherwise on Sundays many people attend church, or like Musa, have household and childcare responsibilities during the weekend when they are not working at home. Such work was onerous. At the homestead where I lived, apart from the occasional help secured from a couple of young village boys, all of the household labour was undertaken by the woman household head, her daughter-in-law and her daughter, from earlier than five in the morning, every day: chopping the wood for the fire, lighting and keeping the fire stoked, boiling water for bathing, washing and cooking – no small task involving the lifting of a 100-litre container and pouring it into a cooking pot over the fire, – sweeping, collecting water and wood, ploughing, sowing and weeding, childcare, cooking, cleaning, and washing of clothes, pots, children and selves. All of these day-to-day, sometimes seasonal, tasks involved in running a household in the rural field had to take priority over attendance at community meetings.

The times of the meetings, however, were not the only thing hindering the participation of women and other community members. There have been changes since the end of apartheid, but many older people remembered vividly how the implementation of decisions coming “from Pretoria” was carried out by some chiefs and headmen. One group of fairly elderly women who had teamed together in the hope of starting a poultry project and raising some income had been asked to pay the price of R750 for a ‘business’ stand. They had indeed paid over the money, but they were now next to destitute and critical of the *Tribale*. But when I asked whether they could raise it at a *khorho*, one woman responded:

We know about *khorhos*, but we didn't raise it. We are afraid. We will try to raise it at one of the structures of the Ward Committee and SANCOs – those structures will take it to the *khorho*.

... The chiefs used to pressurise the people and they are still pressurising the people now. [Sometimes] there is a place and you can see that stand, and the chief won't allow you to have that stand [because] he has reserved that place for his own relatives [and] he won't give it to you, [or] he will charge you more price. (Chavani informant, group discussion - 8.9.05 (translation))

A *khoro* has, along with other practices, changed over time. But the extent of that change does not simply depend on rules being passed from above governing how it is to be run and who is to attend. For one thing, its public nature will limit what can be spoken about. Moreover, as recognised by Bloch (1975: 23), successful oratorical speaking, 'often seen as an innate skill' will only be achieved by a person who is practiced in being in authority:

In other words, only somebody with high standing and who has found himself again and again in positions of authority is likely to succeed in any large gathering, because only such a man will have gained the essential practice.

Furthermore, Kompe and Small (1991: 144) write of *kgotlas* – the equivalent Setswana term: '[w]omen are not allowed to attend *kgotla* meetings unless called to give "evidence" at a disciplinary hearing ... But she may only speak when asked to do so by the men'. While women might nowadays be entitled to attend the *khoro* – "[given] that we are living in a new democracy" (Mashamba *Khoro* – 23.8.05), – such entitlement will not on its own change practice.

The wife of a headman in the neighbouring village of Mashamba spoke about the reductions in the power enjoyed by those in the TC since the Venda government ceased to exist. She told me that now, "They are given laws to follow. Before, they could do anything." (Mashamba *induna's* wife, interview – 29.8.05 (translation)). She spoke with regret of this loss to her husband's authority, that now they were no longer able to take away people's land, to detain people; she told me openly of the force and whippings they used to inflict on people and the strong men at the tribal office they got "to frighten them" (*ibid*). In the light of such practices, spoken about by her with such candour, it is not surprising that a number of people, particularly older women who could remember such practices, spoke of their trepidation in raising issues in a *khoro*. But in the *khoros* that I attended, those women who did attend were usually middle-aged, were very much outnumbered by men and hardly ever spoke. And this, in itself, may be self-perpetuating in so far as it fuels the view, which I often heard, that because

women do not participate, they have nothing to contribute. As a result, women's interests, knowledge and experience will become invisible in relation to the issues raised and decisions made in the formal public decisions of the community (Meer 1997).

Even though relatively few women attend *khorhos*, they sometimes do manage to participate in and influence community decision-making in other, often more private, ways. During the time I carried out the research in Chavani, as indicated, the family I lived with could be described as a 'female-headed household', the expression masking the variety within such homes. The household head had a paid job as a cleaner at Elim Hospital, but neither her eldest son nor his pregnant wife, despite a secretarial qualification, had work. They also lived in the homestead, as did her youngest daughter, who was in the final class at school, and, from time to time, her other son and daughter, her granddaughters, her mother and her husband would come to stay – the matriarch was his third wife and he did not often turn up at the homestead. In all of the informal chats that I observed at the home where I was living – that seemed to attract a stream of meetings of groups of women participating in traditional dancing, church politics, credit schemes and just chats – women were not afraid to assertively share their views on the chief, the *Tribale* and local politics, often in rumbustious ways. This was also the case in most of the all-women group discussions and individual interviews I had with women. I once observed the matriarch's brother, the Chairman of the *Tribale*, being harangued by her and three other village women about decisions that the *Tribale* was making about the payment of tribal dues for funerals. So while people working for NGOs, such as Nkuzi, complained about the difficulties of even 'getting women to speak in public', women's participation in community decisions may be more complex than may first appear visually evident from attending public *khorhos*.

But for all the stories of successful informal haranguing by particular women, there are countless numbers of others which counter such a rosy picture of the success that women may achieve in equalising gender relations in the private, as opposed to public, sphere. One day I arranged to meet a woman at an agreed time and place in the village. Having waited for half an hour for her, I decided to go to her home to find her. There was a big stand on the corner, with well-ploughed earth stretching back to the river. Although there was an old-looking, white-painted, cement-brick house, there was another half-built brick structure on the same stand. We were greeted by a man who loped towards us without a smile before disappearing round the back. We followed and the woman we had arranged to meet emerged from the darkened doorway of another tumble-down dwelling, smoke filtering out behind her. She was looking tired, her clothes scruffy and a little boy in a torn t-shirt with a big tummy poking through clinging to her skirt. She told us that she couldn't speak to us because her husband had come home unexpectedly from the city and she had to cook for him. Her husband said that

he would speak to me instead. After this episode I went on to have another encounter that was the complete contrast to this one, but had depressing reverberations of the ongoing existence of practices based upon gender inequality. It was with a man I had met before, really warm, open and enthusiastic to talk to me, and when I arrived at his house he was openly affectionate with his wife and children who were shyly crowding into the living room to meet me. But when I told him what had happened before, he agreed that her husband should have spoken to us because "in our culture the husband will know things and have to speak for the wife" (Mashamba informant, personal communication – 25.8.05). In spite of the informal haranguing that some women, who have sufficient cultural and social capital in the rural field, may be able to enter into with men to change the inequalities in gendered relations of power within the rural field, or even in the home, such words simply reaffirm the ongoing, and as yet unsuccessfully challenged, legitimacy of such patriarchal practices.

5.2 - 'Democracy'

As some changes introduced after 1994 slowly have an impact upon relations of power, the meaning of 'new' words like 'democracy' become contested, their meaning gradually incorporated into, and in turn changed by, practice. We met the *Hosi* over Bokisi⁵⁶ on his steeply sloping stand. He pulled over three rickety metal chairs into the shade of the cleanly swept mud 'terrace' forming the living space between a very old looking *rondavula* (a round mud brick, straw roofed, single roomed building), a 'two-room'⁵⁷, its blue paint peeling, and a slightly larger but no less shabby main building built on a level higher up the hill. As indicated in Chapter 6, the *Hosi* and some of his people had been waiting some seven or eight years for the resolution of a land claim after having been forcefully removed from Mashamba in Venda, across the road into the Gazankulu homeland. The view from here was striking; it was of Mashamba's land stretching, expansive, over the flatter plains across the road that now separated it from the steeper, rocky slopes of the Ribolla mountain to where they had been moved. It could only serve as an ever bitter reminder of this forced removal. In relation to the *Hosi's* views of tradition and democracy, he claimed that the way he carried out his chiefly responsibilities had changed little in the new dispensation:

When it comes to democracy, in my 'family', democracy doesn't work – they use *my* democracy. When they leave my gate, they can have democracy. What I'm saying, for people, they have voted three times, but when it comes to the chief, there's no *hosi* [who] is politically minded – when it comes to the law of the chief, it does not change. (Bokisi *Hosi*, interview - 14.9.05 (translated))

In a group discussion in which the uncle of the *Hosi* stridently participated, I raised CLARA and with it the prospect of the establishment of a 'committee' which would

include members of the community alongside the members of the TC, to be involved in making decisions about land. He responded immediately:

The *Hosi* will call the community and tell the community what they want to do. We won't change anything from what the *Hosi* is doing at the moment. They won't be like 'boers' who used to say 'You must do this'. ... We didn't want those laws of apartheid, we wanted to be ruled by democracy. We must be the same. We must not do anything in the country without informing the *Hosi* and the *Hosi* must not do anything without the community. (Bokisi group discussion - 26.09.05 (translated))

While on the one hand, discourses of one-nation democracy had clearly influenced this old man and the *Hosi*, on the other, their interpretations of 'democracy' lay rather uncomfortably with practices and expectations that had built up around the chieftaincy and that could fall under the umbrella 'tradition'. However, some informants did grant that things were changing for the better in the way the *Hosi* was governing. M was a very old woman, some of whose grandchildren in their twenties were living with her:

We can agree with the *Hosi*. The *Hosi* now has less power. Now the community can argue with the *Hosi*, whereas in the past people couldn't argue with the *hosi*. ... Even if he's not happy, there's nothing he can do [now] because we have powers, like the dispute at Shividuli – if we didn't argue with the chief we would have lost our land. Before the *Hosi* was above us and we didn't have these rights to speak to the chief. (Chavani informant, interview - 1.9.05 (translated))

Whether or not such change can be said to be a result of the advent of 'democracy' that now means that the villagers feel more able to challenge decisions of the TA, it exemplifies the extent to which change affects the relations between the *Hosi*, the *Tribale* and the people living within its jurisdiction, but also the extent to which those relations are negotiated. When I went on to ask M whether she was happy with the way decisions are taken by the Royal Council and TC, Musa said to me:

This question of decision-making – she doesn't understand. She doesn't know what to answer – she just said, "We will listen to the decision that they take at the office, but [referring again to the appointment in the 1960s of one *hosi* over the other *indunas*] we were not used to the decision of that *Hosi* – we want our own. (*ibid*).

Sometimes, no amount of change will endow *legitimacy* on a *hosi* who has been imposed on people by the implementation of apartheid engineering. However, what someone with M's extremely limited access to capital can do about this, is limited.

6 - Land and tenure

The land where the villages of three of the five villages under Nkhensani TA, Chavani, Bokisi and N'waXinyamani, are situated has been surveyed and the 'farms' have been registered in the Deeds Registry as: Zeekoegat to the West comprising some of the land where Bokisi is situated, Middelfontein comprising most of Chavani, and Dreifontein comprising most of the land where N'wa-Xinyamani lies. All of the land is legally owned by the SADT⁵⁸. But this vague correlation between the farms that have been surveyed and the villages under Nkhensani TA is purely coincidental. The harshly straight lines drawn on the map would cut through the landscape without any relation to the natural boundaries of the mountain on one side and sometimes the river, sometimes the fields, on the other, that people would gesture towards as marking the boundaries of the *sava*, their 'country'. The meaning of 'ownership' too is not as clear as those documents in the Deeds Registry would have us believe.

6.1 - 'Just a piece of land'

Three families were using the land – there is my father's grave up on the hill. They lived there before the Group Areas Act was implemented – the Mashele family, the Kubayi family and the Baloyi family. Then everyone could just open a place and plough without any documents. Mr. Liam bought the farm and called it Middelfontein. Then it was bought by the government. We used to pay R1 for the site and R2 [tax]. Before, we used the land with no documents – it was not a [commercial] farming area. [When] Mr. Liam [bought] the land ... we were just given the documents, but we were already using the land. (Chavani informant, personal communication - 8.05)

This story resonated with the tales of many others. In the past, I was told by many people, they used to live 'in a scattered way' on homestead plots that were spaced far apart from one another (see Niehaus 2001). The plots were large enough both for agriculture and for numerous buildings, including a cooking hut and sleeping quarters for different generations of the same family who would continue to live there after marriage. In the early 1960s, people were forced from their homes into demarcated plots of land, *bantustands* – "just a piece of land" (Chavani informant, interview – 13.9.05 (translated)), in the now 'village'. As the village became increasingly crowded, the boundaries between the *sava* or 'countries' of different chiefs came under pressure with increasing contestations between the chieftaincies and consequent uncertainty and insecurity for people falling within them. One group of women who had been trying to start a poultry project, but had spent all their savings on paying twice for a 'business stand', told me of having had a plot allocated to them before a dispute with the

neighbouring chief meant that they had to move to the other side of the village, and pay for another stand.

Towards the end of my fieldwork, when discussing the meaning of 'tenure' with a town planner who has worked as a consultant to the DLA, he told me, "Tenure is not just about how people relate to the land, it is also about what they can do with the land" (DLA consultant, interview - 6.3.06). So, as Archer and Meer recognised in a different context is also relevant here: '[the] link between access to resources and authority should not be oversimplified ... [and] having ownership of land, in itself, has not necessarily meant an improved status' (Archer and Meer 1997: 94). Status, as seen in the discussion above, is mediated by a whole host of factors including gender, age, access to finance, to social networks, to educational capital. However, while secure access to 'just a piece of land' in a village such as Chavani is unlikely to confer much status in and of itself, lack of access to land, or insecurity in relation to that access land, can be extremely harmful. Such security and insecurity is also mediated by unequal power relations, and practices that have built up around them. Therefore, although someone may be said to have formal 'rights to land' or a registered 'permission to occupy' land in Chavani, this does not necessarily translate to security in practice. In the rural field, how people relate to the land today is deeply bound to their history. What people can do with the 'piece of land' they have been allocated and are living on today have been regulated by some forty years of bureaucratic practices that have built up around people's relationship to Nkhensani TA. Such historicised practices are further shaped by everyday materialities of life in the village, such as the size of the plots and the numbers of people living in the village.

6.2 - Land Administration

Many people's accounts of the procedures to be followed in order to access land concurred with those of the *Hosi*: business people have to approach the offices of the TA with the required money for a stand and a letter to the *Hosi* that has to be approved by the District, residential stands of 35 x 35 metres are allocated for a smaller fee to 'insiders' than 'outsiders', 'outsiders' applying for residential stands need a *trekpas* – a letter of recommendation from the chief on the land where they formerly lived. As with the practices relating to tribal levies and fines, such definite assertions of rules can be seen to become shaped by some discretion in practice. Such discretion is shaped, in turn, by the changing material realities of increasing pressure on land in Chavani, as well as the relative power of those seeking to access land in relation to those in the TA. The TA, in contrast, derive their power from their position as gatekeepers to the village, their legitimacy in such roles supported by decades of apartheid practices bolstered by ongoing state sanction and support by the post-apartheid state. So while the

procedures that insiders and outsiders, men and women have followed in order to have a stand allocated to them, and the practices relating to land that have built up around them, are changing over time, the extent of that change is limited by that practical historicised reality.

One example of such limitations can be drawn from the example of differences between men and women and their ability to access a stand. Until marriage, it is usual for both men and women to continue living with their parents; the cost of building or even maintaining a home on one's own stand is onerous. There are, however, undoubtedly times – on divorce, on falling out with one's family, on having children unsupported by one's partner, or even should someone simply want their own home – when either men or women may want to have a stand allocated to them in their own right. The *Hosi* asserted that "we don't give a stand to a woman if she is not married" (*Hosi*X, interview - 8.8.05 (translated)). He later indicated, however, that the same rule would apply to men. Those on the TC also supported this statement, but with regards to men, in the next breath said, "but if ever there is no marriage ... we give it to him if we know he will marry" (TC, interview - 6.9.05 (translated)). None of them gave a clear response about women. While they acknowledged that it was quite possible for a woman to be allocated a stand in a male relative's name, they discussed at some length that it was children that was important rather than marriage: a woman is supposed to be childbearing and so, if they do not give her a stand unless she has children and is married, this will apparently be a negative incentive for her to have children. However, financial independence – a prohibitively onerous barrier to obtaining a stand in itself, particularly for women with unemployment being higher amongst women than men – does not appear to be a sufficient condition for obtaining a stand. Nevertheless, a number of women in the village told me that their stand was registered in their own names; clearly some women have sufficient capital, aside from financial capital, such as social capital, through her connection to networks of political or perhaps genealogical (for example, being born within the Royal family) power, or cultural capital through her education or employment, to negotiate access to a stand. Achieving access to a stand, however, depends upon her successful translation of that capital in the space of uncertainty deriving from interaction between rules and the varying notions of men on the TC of what it means to be 'a Shangaan woman'. While these may change over time – demonstrated by anomalous cases such as one elderly woman's stand being registered in her son's name but her daughter's stand being registered in her own – any such change will be constrained by a highly patriarchal collective *habitus* that continues to shape practice. In contrast, the task of an unmarried man to be able to persuade the TC that he is likely to have children does not seem to be particularly difficult.

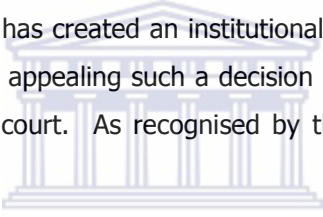
Another example of such limitations can be drawn from recognising the significance of the material reality of life in Chavani. While the sizes of the stands have over time been reduced to just 35 x 35 metres, there is still some element of choice in relation to where someone may live. People would be shown to one of the new stands that had been demarcated and if someone did not like a particular site, then they would be shown to another. Today, however, this 'choice' is largely prescribed by the reality that there is very little suitable land left that is available for more stands. So, although Chavani has for a long time accepted "a lot of people coming from the side of Makhado, from farms, and ... from the mountain" and it seems to be a place full of people from somewhere else, today "[t]hey sometimes do not allow people from outside because there's no longer space" (TA Senior Administrator, interview - 18.8.05 (translated)). In the face of pressure for land from both within and from outside the area, there are good reasons for the assertion of rules. Not only will their successful assertion bolster the legitimacy of the chieftaincy, but the material realities of the limitations of space in Chavani curtails the extent to which such success is likely. Such materialities have been determined by a history of vastly unequal property relations in South Africa, a history that, for people living in Chavani and elsewhere in the rural field, has in no way been overturned since the end of apartheid despite the government's land redistribution or restitution programmes.

6.3 - 'Tenure'

What people can do with the land has also been shaped by changes in laws and regulations that have been differentially appropriated and which in turn have resulted in changing local practices. As argued by Oomen: '[legal] categories were accepted, rejected or redefined in line with both local values and interests and as such did not determine the local power landscape, even if they did have an effect on it' (2005: 243). After people in the village were forced into *bantustands* and graveyards were introduced, people were prohibited from burying their dead on their stands; the linkage between 'ownership' of land by families and their ancestors was *officially* broken. Instead, people were given documents, PTOs – Permissions to Occupy – that officially recognised their rights to the land. Such documents, however, simply confirmed that they had paid their taxes due annually to the apartheid, and then Gazankulu, governments for their stands, for their fields and for the numbers of animals they kept. Unlike a title deed that formally recognises one's rights over registered land, rights that may be abrogated only by other registered 'real' rights over the same land (meant in the legal sense of the term), and sometimes by legislation, the meaning of these documents not only related to people's 'rights' over their stand, but also to the recognition of their 'rights' by apartheid institutions of governance, the extent of which always depending upon their payment of taxes and fines to those institutions. So while the fines and taxes

were unpopular, people recognised that if they did not pay them, the extent of the recognition of their 'rights' would be diminished or even extinguished.

People living in the bantustans also had their 'rights' abrogated on another front. Living under the jurisdiction of a TA meant that they also had to comply with particular standards of behaviour set down by it; not doing so would also curtail their 'citizenship' of the village. The documents, however, bore no relation to any such compliance other than to the payment of taxes obliged under laws laid down by the apartheid and Gazankulu authorities. Moreover, a number of people bemoaned that "documents do not mean anything to the chief – it was only meaning something for problems that happened from other people" (Chavani informant, interview - 5.9.05). Therefore, in terms of the reality of those 'rights' and the security they endowed on the holder, this was, and is, also curtailed by the extent of the endorsement and support received from the wider institutions of state, such as providing people with recourse to appeal against unjust decisions by a traditional leader. Although this would be *permitted* today, the withdrawal of institutions linking the chieftaincy and other state institutions supporting or overseeing its decisions, has created an institutional vacuum and, for people living in the area, the only option in appealing such a decision is to take or threaten to take the case to (a non-traditional) court. As recognised by the *Hosi*, however, this would be unlikely:



They might have the power if they have money for a lawyer. If we explain why we've moved them out and then the person can move .. out, but without a lawyer ... It is not very easy to go to the police station. (*Hosi X*, interview - 18.8.05 (translated)).

So, realistically, whether or not, as asserted by a lawyer working for local land sector NGO, such documents *could* be used as evidence in asserting that a particular person 'owned' a stand in a court case, in practice, in an area such as Chavani, any such dispute is unlikely to be resolved by an institution other than the TA.

The position with regards to fields appears to be even more uncertain than in relation to stands. With pressure coming from both insiders and outsiders for residential stands, many people who had had fields in the past had since had them taken away from them and re-allocated as stands. Those who still had fields seemed aware of this threat and conscious of a certain pressure to prove that the field belonged to them. They either referred to continuously cultivating crops (apparently, keeping animals in the fields was not sufficient to prevent the chief taking back the land, or was not allowed on such land) or, again, to 'documents'. For many, a 'deed of grant' or 'title deed', rather than a PTO seemed like a panacea to such problems. Similarly, people often referred to documents that they had been given for their land, knowing that they confirm their

'rights' to that land. The ongoing importance of documents in the face of difficulties in asserting one's rights is ironic, given their oppressive symbolism, but somewhat unsurprising; at some point the meaning of such documents became normalised. Such a normalisation of particular practices contains within it its own paradox. While people's 'rights' may now be asserted through the use of such documents, such potential avenues of action also frame within them '[w]hat counts as justified belief and valid knowledge' and so in turn circumscribe the opportunities for future actions by hiding the kind of questions that can be asked (Hajer and Wagenaar 2003: 13), here about their 'ownership' of the land and what that means. As Bourdieu argued, *doxa* is 'the point of view of the dominant, when it presents and imposes itself as a universal point of view' (Bourdieu 1994: 15). The domination unseen in that 'universal point of view' is in fact arbitrary, but is 'misconstrued as self-evidently correct' (Mahar, Harker et al. 1990: 16).

Since 1994, other things have also changed. While people are still charged annual tribal levies and given receipts for them, this is now undertaken by the TA which is no longer supported in this by the Gazankulu authorities; the wider institutional state support of the linkage between the recognition of their rights to the land and those payments has been broken. This has very real but also unpredictable consequences for the chieftaincy. Today, people are very aware that they no longer have to go to the magistrates' offices in Giyani to pay their taxes and many people are not bothering to pay their tribal dues. Nevertheless, they still look to the TA for support and protection in case of problems or disputes. Such a breakdown in compliance, however, has uncertain outcomes, particularly in terms of the extent to which people can call on the support of the TA in times of need. While a stand will almost certainly not be taken away from someone who has not paid, the TA might not offer support to those people should they need it. This is also likely to be the case, even if a family had simply failed to pay their dues into the communal fund to be distributed in the cases of funerals. As discussed above, there is clearly some discretion that is applied by those working for the TA in such cases but such discretion goes hand in hand with uncertainty; those in positions of weakness and those affected by such hardship, are less likely to be able to negotiate successful outcomes.

On the one hand, while the documents that people have been given as receipts by the TA for their annual tribal dues do not amount to PTOs, in the eyes of many people living in the village they continue to retain some importance in the face of uncertainty and pressure on the land. On the other hand, although the introduction of graveyards officially broke the link between formally recognised 'ownership' of land by families and their ancestors, in the minds of many, not even documents extinguish those ancestral 'rights' – or if not 'rights', at least ongoing understandings of 'ownership':

If you have a document for a field, it means no one can take that place. But you would not take that place 100 years ago even if you didn't have a document because people used to know their places by their graves. The things of the graveyards, it's for nowadays. If you have to plough in the field and you find that there's a grave there, what would happen? Even if you don't have a document you can claim that land because of that grave. (Chavani informant, group discussion - 28.10.05 (translated)).

So even though official changes that have been introduced through laws and regulations may have changed what people can and cannot do, until those changes have gained legitimacy, the meanings of terms like 'ownership' will not automatically change alongside them. And so long as those in positions of authority fail to achieve symbolic capital over such meanings, their legitimacy, and in turn the extent of the power that may be exercised over people living in such areas by those introducing such change, will continue to be contested. This leads on to a fuller discussion of the meaning of 'ownership'.

6.4 - 'Ownership'

People already know they 'own' the land. ... the aged ones are the ones who 'own' the land – most of us do not 'own' the land – I have said 'own' in quotes because it in fact belongs to the Chiefs. ... most people if you ask them will say 'It is ok – we live here. We own here.' (Chavani informant, interview - 31.10.05).

In relation to the land people are living on today, the stands they have been allocated since the prohibition of burying one's dead within a stand, the meaning of 'ownership' is more complicated. For the rest of this section I refer to 'practical notions of 'ownership'' to denote those notions of ownership of people living in Chavani. This is not to imply that such notions are uncontested; practices that have built up around them are shaped by contestations between people struggling to claim symbolic capital in defining such notions, in turn shaped by the collective *habitus* of people living in such areas. That *habitus* embodies the violence that people lived through in the forced removals into their *bantustands*. Although the exercise of one's rights over such a small stand – "just a piece of land" – can never really be described as a 'freedom' (van Krieken 2001), it has become a reality. So while living in such stands for many might never amount to *doxa*, in that it will not be accepted, let alone 'misrecognised' as being 'self-evidently correct' (Mahar, Harker et al. 1990: 16), nevertheless, particular practices and the structure of the field have built up around the existence of a particular reality and the orthodoxy accepted within the field, albeit externally imposed. In turn, the *habitus* of people within the field will propose possible questions which orient the activities that

occur within the field, and renders others unaskable (Bourdieu 1990). And, even though people have rebelled against some of the practices that have built up around that reality in myriad ways before 1994, and probably more manifestly after 1994, for people sharing that *habitus* many other practices have become to a certain extent unquestioned.

When I first went to the area in July 2005, someone took me to Waterval, a location (or township) close to Elim, and contrasted it with a village like Chavani under a TA in a so-called 'communal' area. But the label 'communal' is misleading and does not point towards the difference between such similar areas. While there were visual differences between the two – many of the houses in Waterval were bigger and smarter than those in Chavani and there were some tarred roads between them rather than just unmade up gravel roads and rutted dirt paths – there seemed to be many more similarities. People told me of other differences:

In Pretoria and Waterval – they pay tax every month – here we pay once a year. They pay for electricity, water, roads, sanitation and bins. We [have] big holes [dug on stands for the rubbish] which we burn and then the ashes stay in our stands. (Bokisi informant, group discussion - 26.9.05 (translated)).

And, "in Waterval, people have 'Deeds of Grant'⁵⁹ over their stands - but in Chavani they just have 'PTOs'" (*ibid*). The most fundamental difference between the two areas, however, is that in Waterval there is no chief, but in Chavani there is. This chapter has gone to some length to describe just some of the practices that have built up around the chieftaincy and how these have been shaped by, and shape, the *habitus* of people living in such areas. Importantly, they have also shaped practices surrounding land and tenure.

When I asked S, who lived on her own stand, the last stand demarcated, fenced off from the veld and first fields on the lower slopes of the mountain, what she was allowed to do on the land, she responded:

I can plough. And if I want to move away from this stand I can also sell it. But I must go to the chief and say that I am moving away and then I can only sell the house and the trees, not the land. (Chavani informant, interview - 22.8.05 (translated)).

I had come to predict the pat phrase that people would respond with: "I can build a house, I can plough, I can grow trees, I can do anything I want on it ...". But people's ability to fulfil these ideals is also curbed by the fact that the stands today are "just a piece of land". Moreover, as indicated above, in Chavani, 'ownership' is not unconditional and depends on their "follow[ing] the rules of the chief, plough[ing] and

liv[ing] well within the community" (*Hosi X*, interview - 18.8.05 (translated)). There were also particular things people must not do on their stands, such as cutting down trees. The punishment for doing things not allowed, is often a fine. But any decision as to whether or not someone acted within the rules of the chief, will ultimately depend on their relative power in negotiating with those in the TA. Although people claimed that no one had received a *trekpas*, or eviction order for them to leave Chavani for many years, people had lost their fields when land has been reclaimed by the chief for demarcating more stands. Furthermore, although many people talked about 'ownership' and had successfully managed to have a stand allocated to them in the face of potential difficulties, I also heard many stories of systems breaking down and of the consequences that could have in obstructing their access to other services. While they did not explicitly talk about the need for institutional recognition of their property, I nevertheless heard of the stress of such problems and of trying to withstand an unfair decision without recourse to other authorities that could offer support. As Berry recognises, 'Contests over land involve contests over authority as well as resources: they draw on and reshape relations of power as well as property' (Berry 2002: 656).

6.5 – (Mis)understanding practical notions of 'ownership'

Questions that can be asked of 'ownership' might be very different for people living outside Chavani, outside the former Gazankulu, outside the rural field, but opportunities that exist for asking them are few and far between. Although there were some living in Chavani who were concerned that institutional recognition be given to the 'ownership' that they already had over their stands, usually because they wanted banks to accept their house as security for a loan, those who mentioned this unsurprisingly tended to be richer, better educated and had been turned away by a financial institution for a loan, or realised that they would be, because the smart house that they had built was considered to have 'no market value' and so could not be accepted as security. Another instance when practical notions of 'ownership' would require some kind of wider institutional recognition would be cases, as indicated above, in which someone wanted to appeal against a particular decision made by the TA.

Since 1998, practical notions of 'ownership' have also been brought to the fore by the restitution leg of the land reform programme which has enabled groups to claim back their 'rights in land' having been 'dispossessed ... as a result of past racially discriminatory laws or practices' (Restitution Act 1994). According to a local land sector NGO, at the time I was undertaking my research there were 56 key claims in Makhado Municipality's area, covering 90 percent of the land⁶⁰. I spoke to people from three groups, or 'communities', currently falling under Nkhensani TA that were claiming land. But, just as the lines that are demarcated and registered in the Deeds Registry in the

area of Chavani bear no relation to how people live today, nor do those farms that are registered and being claimed back bear any relation (probably even less) to how groups of claimants lived prior to their dispossession. In many cases, there were a number of groups under different chiefs living in an area demarcated and registered as one 'farm'.

One of the meetings held by the LCC that I attended involved claims by five communities over one 'farm' that had been grouped together. It was held in an area of privately owned prime agricultural land (most of which was also, ironically, under land claim). Four groups were present: three of the four groups there were 'Vendas', one group were 'Shangaans'. The official from the LCC running the meeting spoke in English with another from the Commission translating into Venda. The principal issue of contention between the communities was over internal 'boundaries', the portions they were claiming, counter-claiming and arguing about. The meeting lasted some four hours.

On the way to the meeting, a Project Officer with NGO explained to me the difficulties caused by the imposition of a (re-)interpretation of practical notions of 'ownership' by the Act as 'rights in land':

the way people used to live before, it was not easy to define the rights they had. They had overlapping rights and were living in one place but submitting to the authority of another chief. ... For example, say there's a road and one chief has jurisdiction over one side of the road and another over the other side but one person lives on the other side of the road from their chief so will not submit to the jurisdiction of the other chief and so will say they just came to stay there ... so for the sake of progress, for the sake of rights and restoration of people's rights, they have to compromise. But it's not easy. Maybe I am staying deep inside the other's land, how do I restore that right? And with the farm boundaries, you will find that they just cut that land where they were living and you will take a long time to re-survey all that land. (Nkuzi Project Officer, personal communication – 4.11.05)

This turned out to be the main factor in instigating conflict between the communities. It was further exacerbated because the resolution of the restitution case was not going to involve re-demarcating the land so as to re-draw those straight lines of farm boundaries on the map to something more resembling how people used to be living there, it would simply involve a re-registration of the names of the owners of the 'new' farms. And, rather than resolving or remedying a brutal forced removal that had been perpetuated on such people in the name of apartheid, it inspired new disputes over the chieftaincy and over ethnicity. By the end of the meeting, tempers were frayed and the groups of 'Vendas' accused the studiously English-speaking (but 'Shangaan') Commission official of

being biased towards the 'Shangaans'. The Commission official made a final desperate bid to inspire people to resolve the irresolvable:

We know very well that it might be true that the chief might have had jurisdiction over that area but this is the Restitution Act and ... it doesn't talk about jurisdiction it talks about rights – we don't know the rights ... (Commission official, LCC meeting, Levubu – 4.11.05 (Fieldwork notebook)).

But practical notions of 'ownership' as multi-dimensional, relating land to the relationships between people and groups living there, are inadequately captured in the description of a one-dimensional right between a person and a piece of land.

7 - Conclusion

This chapter has discussed some of the contestations over legitimacy, land and authority in Chavani, one rural area in South Africa. Through a snapshot of this slice of the rural field, it has become clear that how people relate to their land and what they can do with it is shaped by the legitimacy and the governance of the chieftaincy and practices that have built up around it. Therefore, understanding 'tenure' in the rural field requires an understanding of practices shaped by the chieftaincy that, in turn, is both structuring and structured by the *habitus* of people living in such areas. The process of the construction of a practical reality is a continuous one, built upon an ongoing process of adaptation, negotiation and contestation in response to change coming from the outside and from within. Such processes have produced ambiguities and inconsistencies that can be and have been exploited by different constituencies depending on their relative power. In Chavani, this has also been influenced by change and constancy: laws have been reformed and others have been revoked, but people's lives cannot be assumed to be relate directly to the changing laws and regulations that are passed at national or regional levels. Meanwhile, a highly patriarchal collective *habitus* continues to shape practice, as do the increasing pressure for land in Chavani and the decreasing support received from the state by the chieftaincy.

In the controversy surrounding CLARA, both the government and its critics banded about terms like the 'new democratic dispensation', 'tenure' and 'security', and binaries became politically constructed, such as those between 'tradition' and 'human rights' and between 'traditional leaders' and 'women'. While particular high profile political leaders attempted to claim a monopoly on the ability to define 'tradition' due to their 'supposedly privileged access to 'traditional' capital' (van Rouvery van Nieuwaal 1996: 67) (see Chapter 3), they were doing so, not in the rural field, where most of the (less high-profile) traditional leaders and laypeople were unlikely to have even been aware of such contestations over CLARA, but in the political field. Meanwhile, others struggled to

delegitimise such versions (see Chapters 5 and 6). However, in the process, together, in arenas beyond the rural field, they contributed to a greater polarisation between such concepts. However, in the everyday practices of those living within the rural field, such concepts are much more messily intertwined, and consistently negotiated. But in the contestations taking place elsewhere, both sides claimed to be presenting 'the truth' and, in doing so, turned to 'representatives' from villages in 'rural areas' around the country to provide evidence of that truth depending on the discourses that shaped it. Robins recognised that: '[many post-development critics] tend to valorise peasant cultural autonomy and authenticity as part of a radical (and romantic) commitment to subaltern popular resistance to development, capitalism and modernity' (Robins 2001: 267). So did many of those participating in these debates do the same, particularly in relation to women's authenticity.

Neither the government nor its critics acknowledged that the meanings of such words are different to different people in different places, shaped by a practical reality, relating to a shared *habitus*. But when particular words alone, and in turn versions of reality, are taken outside a particular field, they do not automatically take with them the meanings that are embodied in those practices. If policy processes are to become more inclusive, more based upon knowledge that derives from those who are to be subjected to 'reforms' – which after all should be a goal of a progressive post-apartheid democratic dispensation – then recognition of such a messy reality in which different concepts are negotiated and intertwined *somehow* needs to be taken seriously. Otherwise, introducing policies that ignore the negotiated meanings of such notions will simply fail to achieve the 'security' or 'gender equality' that are envisaged by either policy reformers, or their critics. But the 'somehow' therefore will have to be considered. The following chapter considers these questions when looking at the 'strategies of legitimation' of different groupings participating in such policy processes.

CHAPTER 8 - CONSULTATION AND PARTICIPATION: STRATEGIES OF LEGITIMATION

1 - Introduction

This chapter considers the interactions between individuals and groupings within different fields coming together in debates over CLARA. In the contestations that arose, what was at stake was the 'monopoly of the power to impose a universally recognized principle of knowledge of the social world' (Bourdieu 1987: 837), but knowledge of tenure in the former homelands was shaped by the *habitus* of those engaging in the debates, as well as the demands and constraints of the fields that they were positioned within. Their relationships with other actors in that field were also shaped by their *habitus*, and so were their engagements in relation to CLARA. And, in order to influence those debates, they adopted strategies to legitimise their particular take on what was to be reformed and how. Therefore, although they were all focused on the reform of tenure in the former homelands, the differences between the fields in which they were positioned and the differences in *habitus* that each person brought to the table shaped the strategies that they adopted in relation to those debates. This chapter is therefore important in understanding the extent to which those strategies were successful or not, but, more importantly, the extent to which they enabled the plurality of voices shaping knowledge in the rural field – the field to be reformed – to shape the debates.

As indicated in previous chapters, both the government and those in civil society undertook extensive consultation exercises in relation to CLARA, both apparently supporting their particular framings of the issues. This chapter considers first the bureaucratic field between 1994 and 2004 and the ways those positioned within it viewed their engagements with others in relation to tenure, the consultation exercises they embarked upon and the awareness-raising they undertook. Given that those within this field had very little 'room for manoeuvre' in either shaping CLARA or in responding to their critics, the following section then considers the extent to which those engagements, rather than feeding into the process of formulating legislation to reform tenure, instead became adopted as a strategy for legitimating their position. The chapter then considers those within civil society, made up of more differentiated organisations and groupings, but many of whom had come together as a result of particular shared backgrounds, those in the legal grouping, as well those within organisations that united in their activism or opposition to government. For the purposes of uniting as one against CLARA, to a greater or lesser extent they overcame those differences and participated together under the NLC/PLAAS Project. For the organisers, the run-up to CLARA's Portfolio Committee hearings was an extremely tense time and they had very little control over, or information in relation to, the way things

were unfolding in relation to the Bill's political passage through the networks of power. In the excitement and stress of that time, the importance of designing consultation processes that were to be anything more than a strategy of legitimisation – keenly understood at the time of designing the Project by those who ran it and by those NGOs participating in it – was cast to one side. Lastly, the chapter discusses the Portfolio Committee: a formal participatory space in which members of the public, as well as the various groups lobbying for change to the legislation, were able to bring their objections directly to Members of Parliament (MPs) overseeing the passage of the Bill through Parliament. These hearings really did bring together those positioned within different fields, but in the end, in this process too, those participating simply ended up talking across each other – all of them apparently utterly committed to the reform of tenure in the former homelands.

2 – The bureaucratic field in transition: From the euphoria of democracy to the practice of governing

We were affected by the pre-occupation of consultation and participation, and giving ear to local process – I suppose our current pre-occupation is from then. It's not simply a matter of good governance but it's the principles of understanding decision-making processes.

...

I wrote a lot of policy – we had to write policies. The farmworker policy I wrote late one night – because we had a meeting the next day. [Reference to the early days of democracy] (LRC Lawyer, personal communication - 26.6.05)

When the ANC won the elections in 1994, there was elation; the new government had not only replaced the draconian apartheid state, but it was finally going to be inclusive and participatory, respecting the rights of the poorest people in society, bringing their voices to the table. 'Consultation' was considered to be one of the fundamental tenets of the new democracy and was even embodied in the Constitution. But, in the early years of the new democracy, it soon became clear that, although the principles and ideals of participation and democracy were all very good, there were practical limitations to governmental consultation processes. Time pressures, resource constraints and capacity limitations all meant that in the end, those people who were sufficiently experienced, competent and appeared to understand the complexities of the issues, often requiring legal expertise just as much as knowledge of the realities 'on the ground', ended up being the ones who 'wrote policies'. Moreover, it was acknowledged by members of the Tenure Directorate, therefore, that 'consultation' should be focused on those problems that lacked 'clarity' and 'direction' (DLA – Discussion Paper, 7.8.95:

8). Nevertheless, for those working in government, it was still essential that the government showed Parliament that proper consultation had been carried out. Their energy was therefore directed into pilot studies looking at solutions to the tenure problems in particular 'test cases' around the country so as to contribute to a greater understanding of that problem. This was then elaborated in the White Paper. In relation to the consultation process designed for the LRB, when it was first released to the Cabinet in 1998, it was made clear to the Drafting Team that it was extremely important that they were seen to have consulted widely (Minutes of Drafting Meeting – 13.3.98). But, knowing the potential political backlash that could be generated by the reforms that they had formulated to deal with the problem of tenure in the former homelands, a problem that lacked neither clarity nor direction, the team responded accordingly:

X noted that the format of the consultative meetings and how they were planned and organised was absolutely critical to the success of the consultation process. X warned of the danger of it being hi-jacked by self-defined interest groups. It was important to think through how a topic was to be presented and dissenting views addressed in advance of the meeting. (*ibid*: 2).

In relation to CLARA, it was similarly essential that the government showed Parliament that proper consultation had been carried out. Furthermore, as indicated in previous chapters, land NGOs and those within the 'legal grouping' directed some of their strongest criticisms towards the Department's consultation processes. But, after the Bill had eventually been leaked at the Tenure Conference, government officials working on tenure had a good idea of many of the issues that civil society was concerned about. And, similar to the LRC lawyer above, one of the consultants on the drafting team was confident that the early, and important, period of the Bill's history "started as broadly inclusive" (DLA consultant, interview - 12.1.06), with "a whole range of issues that came out of the Land Summit [Tenure Conference] in 2001" (*ibid*) for them to deal with. Another official in the DLA who had been closely involved with both the pre- and post-1999 processes thought that the government's external openness in the latter period could be seen in their willingness to consult with their detractors:

We thought, 'Let's not limit who we can interact with'. He speculated that in the former group [they had thought] in order to consult you had to have something as a basis of what to consult with. ... [Later,] we thought, 'Let's be open about the contesting views of traditional leaders. We had no problems saying, 'We've drafted this, criticise us.' We were more open. There were varied sets of ideas so we thought, 'Let's get all of them'. (former DLA official, interview - 18.1.06)

While this official indicates that in the latter period the department was more open to criticism, when I asked him/her about the relationship between the Department and NGOs, s/he responded with a little more ambivalence:

There was a change in the relationship between the DLA and NGOs but they were not fully supportive of some of the changes proposed. ... The important point is that, at the end of the day, you've got to find a product that is satisfactory to all. Traditional leaders would say 'Just give us the land' and NGOs would emphasise you need to bring in elements of democracy ... the question is, how to balance this. (*ibid*)

After the draft Bill had been published in August 2002, officials in the National office took the issues to the Provincial offices of the DLA and together they held consultation workshops in most of the provinces around the country. According to the Directorate:

a total of 50 workshops were organized at the national, provincial and community levels. These workshops were conducted in consultation with civil society. The workshops involved traditional leaders and their communities, the national House of Traditional Leaders with representation from the Provincial House of Traditional Leaders, the Coalition of Traditional Leaders and CONTRALESA and the Ingonyama Trust Board. (DLA - Memorandum on the Objects of the CLRB, 22.9.03)

Alongside these workshops, a formal 'CLRB Communication Campaign' was launched in 2002/3. This involved advertisements published in newspapers as well as radio bulletins put out on local radio stations 'to inform individuals, communities and persons residing on communal land in the rural areas of KZN I about the objects and purpose of the Communal Land Rights Bill and to direct them to where additional information can be obtained queries forwarded [sic]' (National Assembly - Written Reply, Question 1247, 8.8.03). Of a total of R1,288,308.19 (~ £80,000) spent by both the DOA and the DLA in 2002 on advertising in the electronic and print media, 95% was spent on the CLRB Campaign (*ibid*). Such 'advertisements' were bolstered by various Departmental publications such as 'The A-Z of the Communal Land Rights Bill, 2003'. In spite of the 'communication campaign', dissent from traditional leaders to the Bill was strong. In the now infamous consultations that were to take place in KZN, the departmental officials were 'chased away': they had arranged buses to transport people but "the buses were stopped and people were pulled out of the busses by the IFP!" (DLA official, interview - 11.1.06). However, even without managing to undertake actual 'consultation' on the Bill there, this would have conveyed a strong impression of the unpopularity of the Bill amongst particular constituencies. These mirrored the response given to the Bill in Limpopo province, where consultations were successfully held. I spoke to a number of

DLA officials from both the Provincial and National Offices, who had participated in them. One of them referred to the “terrible debate” that the Bill caused, particularly amongst the “older people” – “when I would explain the same thing to them, they would say, ‘We don’t want this’ – all their allegiance is to the chief” (Provincial DLA official, interview - 31.1.06). According to him/her, only “those who are business or developmentally minded would understand what we wanted to do. People who are with PTOs – and they would apply for full title.” (*ibid*). Another Provincial DLA official similarly acknowledged that:

It’s common knowledge that chiefs were not happy around the way it was introduced and that they were feeling that there was not enough consultation done with them. And also the way it was done – it was felt that it was done after the document was drafted rather than consulting them before that about how to do the reforms. (Provincial DLA official, interview - 6.12.05).

Given the strength of the views received through the consultation workshops that did (and did not) take place around the country, these may well have contributed to shaping the views of those within the Tenure Directorate who were closely involved in the CLRB policy-making processes, perhaps because it was not possible to ignore them. Moreover, the ‘willingness to consult with detractors’ may have contributed to an overemphasis on consulting with the obvious detractors, in order to defend the approach taken. After all, there was heavy political pressure to quell the criticisms of those detractors. And overemphasising consultation with such obvious, and politically prominent, detractors also perhaps made it easier to hold them up as some kind of counterweight to the endless criticism received from civil society. If doing so did not enable the bureaucrats in the firing line to bypass such criticisms from these detractors – less politically prominent, but more professionally awkward – at least it would justify to them why they could not just ‘change the model’.

Nevertheless, the consultation processes convened by the Department did not only involve the workshops around the country. And from May 2002, the government also convened a number of ‘Reference Group’ meetings inviting all of their detractors to formally come together and discuss the proposed CLRB. Convening these meetings might have managed to quell criticisms and defend the approach taken, but at this time, and not just because of the furor over CLARA, the government’s relationship with these other detractors was “at an all time low” (former DLA official, interview - 9.12.05). And the bureaucrats working on CLARA were simply unable to really do much to appease their less politically prominent detractors. The political spotlight shone elsewhere – towards the precarious relationship between the ANC and traditional leaders, not just in

KZN but, thanks to CONTRALESA, even in Limpopo – hardly an anti-ANC hotbed of dissent.

Even though one former Provincial official admitted that the 'consultations' undertaken by government may have been more of an exercise in 'communication', involving the DLA officials "present[ing] whatever [draft of the] Bill was drafted" (former Provincial official, interview - 31.1.06), Departmental officials carrying out those presentations, are still likely to take away with them a sense of issues of concern to those involved. The extent to which such bureaucrats are able, or willing, to feed those issues into shaping the Bill, or even prior to drafting a Bill, however, will not only depend on the strength of their own convictions in relation to their superiors, but also on their position within the hierarchy of the bureaucratic field. But, within that field, such a position is determined to a large extent by the tightly prescribed structure of the bureaucratic hierarchy that constrains the extent of an individual's influence through the imposition of set procedures channelling communication and limiting action. For particular officials who are sufficiently superior, however, it might also depend on their relationship with their political masters, that is, their position in relation to the wider field of power.

3 – 'Consultation' as a strategy of legitimation

It is easy to find cases of problems of tenure in the former homelands, but what those problems demonstrate is, or should be, an open question. In relation to CLARA, however, one senior official in the DLA frankly told me:

On the policy development process, that's one area that we can learn from – how was the agenda set in the process? The agenda-setting process in a democratic country must be one that is coming from the people. And once that has happened, then you have to ask how you can communicate that with the people? How can you communicate externally and internally? And when there are changes, how can you speak with one voice? Also the communication process is also communicating what the legislative process is all about. (DLA official, interview - 11.1.06)

And for those working on tenure in the government in those early days of democracy, what 'the problem' demonstrated, that there was a *lacuna* between people's *de facto* 'rights' and their *de jure* rights, had already been decided upon as far back as 1991, and that was the problem that became concretised in the Constitution. As indicated above, the energy of Departmental officials and consultants at this time was therefore directed into pilot studies looking at solutions to the tenure problems in particular 'test cases' around the country, so as to contribute to a greater understanding of that problem. It was then elaborated in the White Paper. But, rather than being designed so as to find

out the extent to which such problems support or undermine this 'model' of interpreting 'the problem', the research was designed to support it. Certainly such research, or 'consultation', carried out on that basis, is unlikely to elicit information that conflicts with such a framing of the problem, partly because it will in turn be interpreted through the same lens and shaped by layers of discourses that further shape the non-negotiability of particular reforms that fall outside the model adopted. And on that basis, solutions formulated according to such research are likely to write themselves, particularly when they also are structured by the same discourses. And so, the possibility of more pluralistic notions of core concepts such as 'democracy' and 'accountability' may also be pushed out.

Both of the teams working on the reforms prior to 1999 and after 2001 claimed that their Bill was what was wanted by 'communities'. In relation to the 2001 model, a draft paper written by the Director of the Tenure Directorate prepared for the Chief Directorate: LRSSS Colloquium in March 2003, makes it clear that the draft Bill that the Department had been working on since January 2001, had been 'fundamentally revamped' after the LRB had been put 'on ice ... following the Minister's direction concerning what had to be done' (2.3.03: 7). When the 'revamped' Bill was released, however, a number of people referred to the consultation that had gone on prior to 1999 – even Thoko Didiza indicated that 'the process started in 1995. Since then we've had consultations with all stakeholders and interested parties' (Barron – *Sunday Times*, 22.2.04). But the 'model' of reform had changed dramatically between 1999 and 2001, and could be said to have changed again in 2003. According to the 'Frequently Asked Questions' section on CLARA in the Department's Tenure Newsletter published in July 2004, in response to 'Has there been adequate public consultation on the CLRA?' it states:

The answer to the question is affirmative. The public consultation process on the Bill commenced in May 2001 following the production of third draft [sic] of the Bill. ... Between 14 August 2002 when the Bill was gazetted and 22 September 2003, there was also a thorough consultation process on the Bill.

It ends:

Never in the history of the Department of Land Affairs has a single Bill been so widely and extensively consulted on. It is abundantly clear that the National Government has made special effort to accommodate the interests of the various stakeholders in the consultation process. (Tenure Newsletter, 7.04: 14)

In the case of both Bills, however, the form of consultation, the people who were consulted and the extent to which different views of those consulted, rather than those

of the policy-makers, drafters or politicians, shaped the outcome in the form of a Bill, can be called into question.

Although consultation should of course be taking place during the agenda-setting process, even after that, once that agenda has been incorporated into a draft Bill, consultation should presumably continue, at least until it has received Parliamentary approval during the so-called 'communication' process. However, the consultation process adopted by the government began *after* the third draft of a Bill had been drafted, after the agenda-setting stage, after the 'model' of reform had been decided upon. But, between the publication of the Bill in August 2002 and the version that proved to be acceptable to CONTRALESA and Mzimela in September 2003, there was almost a complete turnaround. Was this turnaround driven by 'consultation'? Although the Reference Group meetings might well have been useful to DLA officials in gauging the response of these different groupings to the Bill, at the times that the substantial re-drafting of the Bill was done, this was not after referral to the Reference Group⁶¹. And, although government bureaucrats may have gained a strong impression through the consultation workshops undertaken around the country of the antagonism of many groups, particularly traditional leaders and older people, to the Bill, they hardly seemed responsible for shaping, let alone driving, the reforms beyond the directions laid down by their political masters. Instead, the drafts had fully shifted so as to fully reflect the comments made by those more vocal groups of traditional leaders through lobbying directly to influential ANC Parliamentarians and Ministers. As a result, such consultation processes came to be nothing more than a strategy for legitimisation, a shield to ward off criticism from the government's less politically prominent critics within civil society.

4 - Strategising 'representation' by civil society

As indicated above, land sector NGOs, perhaps aware of their own weakness in relations with the government, and aggrieved that they had not been informed even as to the government's plans for tenure reform prior to their being embodied in a Bill, directed some of their strongest criticisms towards the inadequacy of the Department's consultation exercise. When the model of reform taken by the Bill came out, the 'legal grouping' was also furious that they had also not been consulted. As described in the earlier chapters, together these two groups of critics combined to rally round, alerting communities of the contents of the Bill in the hope that, given their deteriorating relationship with the DLA, even if they could not influence the government, people to be affected by the reforms might manage to do so.

4.1 - Enlisting voices from below

As indicated in previous chapters, the NLC/PLAAS Project seemed to have been so successful: it enabled some 24 submissions to be made in the hearings of the Bill by the Portfolio Committee, at least 12 of which were made by representatives from 'communities' around the country who had participated in the workshops over the previous year. Moreover, one of those submissions was from the KZN Rural Women's Movement. Given the relative weakness of the women's movement as a lobbying force at the time of the NLC/PLAAS Project, relative to its strength during the negotiations over the Interim Constitution, when women had triumphed against traditional leaders, if the Project was to mobilise those voices to support the coalition, it fell on the Project to unite them behind it. As indicated in Chapter 3, by the late 1990s, AFRA had facilitated the formation of a KZN RWM. However, even though one of AFRA's own project leaders had in 2000 taken over the mantle in directing this movement, and was a prominent exponent of women's rights in relation to land (see e.g. Ngubane 1999), by 2002, the movement itself was not seen to have 'addressed land issues with any seriousness' (Cross and Hornby 2002: 139). However, given the potential for CLARA to resolve, albeit controversially, the contestation between the claims for equality and cultural rights, the triumphal precedent set in the early 1990s of what the mobilisation of rural women could achieve, and the feminist convictions of the Project's organisers, they were obviously not going to pass up the challenge. The outcome of their efforts was the holding of two Provincial workshops with women by NGO partners AFRA⁶² and TRALSO, the writing of a joint paper by the director of the KZN RWM and one of the organisers of the NLC/PLAAS Project and, as indicated above, the KZN RWM's submission to the Portfolio Committee. The Transvaal RWM (which by then had changed its name to the National Movement for Rural Women), that had been so successful in driving such campaigns in the early 1990s, did not make such a submission. In addition to women and other representatives from the rural areas, once the Community Consultation part of the project was up and running, the project team worked hard to widen the grouping of 'stakeholders' and in March 2003 a 'Stakeholders' Workshop' was held, including representatives from COSATU, the HRC, the CGE, the SACC and the Black Sash (NLC/PLAAS Project – 3rd Quarter Report, 2-4.03: 7). All of these organisations also went on to make submissions to the Portfolio Committee against the Bill, some supporting them with legal opinions drafted by lawyers from the LRC. The project team had also put some effort into raising awareness of the issues with the South African Local Government Association that in turn became actively and independently involved. This all gave them potentially more opportunities for influencing MPs than just the few with whom those within the legal grouping had personal contact. Furthermore, COSATU, being one of the ANC's tripartite alliance

partners, would be included in ANC study group meetings – an inside lead to influence the real movers and the shakers in the ANC.

Although rumours abounded, those in the legal grouping and their contacts remained in the dark as to the intentions for the Parliamentary process. Nevertheless, in March 2003 and again in June, further drafts of the Bill had been leaked. According to the NLC/PLAAS Project's '3rd Quarter Report':

Following a flurry of behind-the-scenes meetings, the most recent draft of the Bill was rejected by both the Department of Provincial and Local Government and the South African Local Government Association. It is rumoured that serious objections had also been raised by certain cabinet ministers. The short of it is that the drafting process was sent back to the Department of Land Affairs where two alternative versions of the bill are now being prepared to be put before the land Minister. This was announced late May 2003 by [X] of the tenure reform directorate. (*ibid*: 2)

The report goes on to state that 'the framework [of the March version of the Bill] remained the same – ie. transfer of large tracts of land from nominal state ownership to "communities".' (*ibid*: 1). However, the June version represented a much bigger disappointment for those who had been working for over a year on influencing the government. The project team had been working hard to sensitise stakeholders and community representatives to the gender implications of the Bill and given the lack of acceptance by Departmental representatives of invitations to attend project sessions and their ongoing lack of clarity on the intended timeframes for the Bill, this setback was hugely frustrating. Nevertheless, helped by emails from contacts working in NGOs and other organisations around the country, the legal grouping was informed of a meeting that took place in Durban at which the Minister made clear that she had every intention of pushing through the Bill 'this year'.

The project team pulled together a timetable of activities on the basis that the Bill would go to the Cabinet in July and through the Portfolio Committee in August. In a burst of activity, a 'media strategy' was drawn up, a request was sent to the Minister to hear views from the community representatives, the report of the community consultation meetings was published and plans were made to bring community representatives to Cape Town for the Portfolio Committee hearings. With the approach of the national elections to be held in April the following year, the team anticipated growing political pressure influencing the passage of the Bill with the wider political issues that they were so aware were caught by the Bill.

At the beginning of June 2003 ten people from each of the communities that had participated in the local meetings were invited to attend a national meeting in Johannesburg, bringing together people and their insights from around the country (NLC/PLAAS project - '4th Quarter Report, 5-7.03). Then in July, the project team secured a meeting with the deputy Minister, for community representatives to express their views in relation to the Bill. At another two-day meeting convened prior to the meeting with the Deputy Minister, summaries of the June version of the Bill were circulated for participants and it was summarised in the plenary session (*ibid*). The organisers were utterly committed to this being a success – according to one participant, “A and B didn’t go to sleep because they had to type all the suggested issues so each and every community had made some representation” (Bokisi informant, interview - 20.11.05). One of the participants gave me a copy of the summary he had received. The frustration on the part of those who prepared it is clear. The ‘Introduction’ sets the tone:

... all the provisions requiring or providing community consultation have been scrapped. The community is no longer consulted, or their views established about whether or how they want their land transferred, or what form they want their rights to take. The land rights enquirer makes recommendations to the Minister, and the Minister decides ... the chapter dealing with “comparable redress” has been drastically shortened. The bill no longer sets out human rights standards governing land administration. (NLC/PLAAS Project – June 2003 draft of the CLRB: 1).

The section on ‘Problems women face in communal areas’ continues:

... The tenure system, together with racially specific laws, condemns women, particularly rural women, to unequal and subservient land and property rights.

Not only does the bill ignore this serious problem, it makes it worse. It provides that (male only) PTOs will be upgraded to registered land tenure rights, without any provision that they must be registered in both the name of husband and wife. It provides for the registration of existing rights (which generally vest in men) without any proviso that women’s rights must be asserted or registered. The bill’s reference to the option of registering family rights is useless, because nowhere does it prescribe when and how existing individual rights must be converted to, or registered as family rights. ... (*ibid*).

With the project team’s infuriation with the Department and their unflinching resolve to have their voices heard, the meeting with the Deputy Minister presented an unprecedented opportunity for community representatives to make representations

before him. When the project documents were first drafted, great care was taken and, in the document setting out a 'Summary of the Bill', attention was given so as not to include within it any analysis or criticism of the Bill that would influence the participants' responses to it. Analysis was to be set out in a separate document. Although the issues set out in this first 'Summary' are still complex and not easy to grasp, it is certainly easier to read than would be a draft Bill. By the time the Bill had been reissued in June 2003, however, the significantly shortened version, that omitted so many of those provisions that had, at least until then, dampened their concerns relating to human rights and participation (CLRB, 6.03), had been circulated. The project team's concerns relating to unduly influencing the participants with their own analysis of the issues, however, were this time clearly overlooked.

Prior to the TLGFB's passage through Parliament there were reports of the government 'cozying up' to traditional leaders with 'the promise of a possible constitutional amendment to restore their powers' (Terreblanche – draft article circulated to the legal grouping, to be published on 8.10.03). At the same time, the legal grouping was aware that the CLRB was going through Cabinet. Information was then leaked to them that the Cabinet had approved a version that had 'changed significantly' from the version of the Bill that had been gazetted. Meanwhile, the legal grouping had not yet accessed a copy of the cabinet-approved CLRB that was rumoured to be 'significantly different' and were kept completely in the dark as to its timing through Parliament. When they did so, it became clear that the TLGFB was much more significant than anticipated:

[W]here traditional councils currently exist, these *must* become the land administration committee responsible for representing the community and carrying out ownership and allocation functions in respect of the land. ... Tribal Authorities were created by the Bantu Authorities Act, which sparked rural rebellions and mass arrests throughout South Africa when it was enacted. The TLGFB gives Tribal Authorities perpetual life and the CLRB gives them powers over land that surpass any that they previously enjoyed. (NLC/PLAAS - Summary and Analysis of the Cabinet approved version of the CLRB, 20.10.03 (emphasis in original): 6).

The tenor of this final version of the 'Summary [this time] *and* Analysis' (- my italics) clearly conveys the dismay and fury felt by those who wrote it.

4.2 Playing with the media: a double-edged sword

Weak leadership by Minister of Agriculture and Land Affairs Thoko Didiza, with lack of clarity on key policy issues and a de facto takeover of the leadership of land reform by the Department of Agriculture, have led to a loss of morale

throughout the department, and a large number of key staff members have resigned. This has undermined the capacity of the government to implement effective land reform, and constitutes an irresponsible waste of taxpayers' and donors' monies.

...

Why has the minister chosen instead to alienate committed staff with long experience of land reform, run a vibrant department into the ground and led South Africa a long way down the road already trodden by Zimbabwe?

...

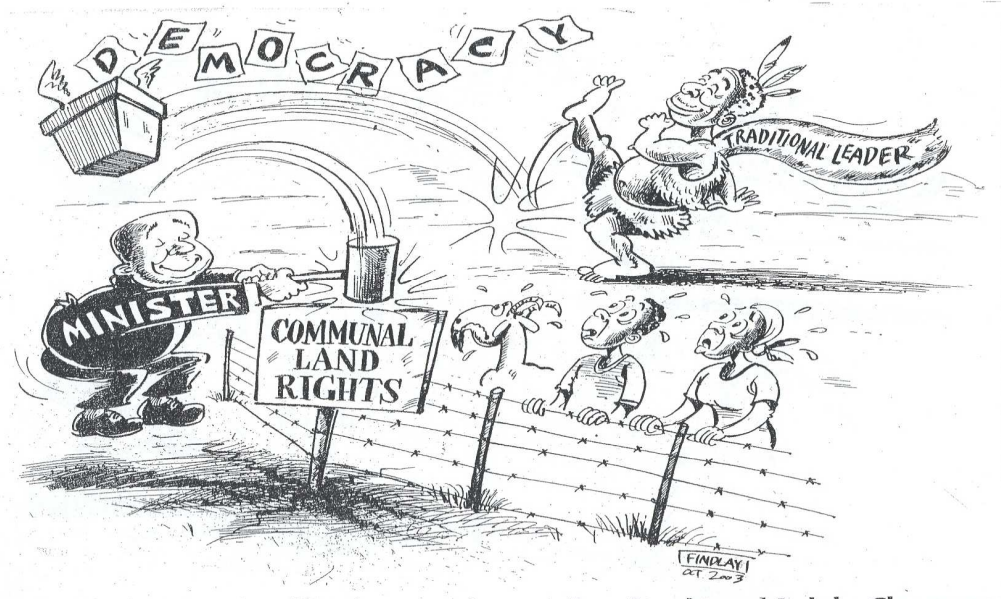
One clue may lie in the quality of the new senior officials and advisers the minister has appointed. Many in the sector express deep concerns over their administrative skills, experience and capacity. It may be that Didiza is more concerned to surround herself with "yes-people" than with real expertise and skills – perhaps because she is insecure about her own lack of experience. (Cousins – *Mail & Guardian*, 18-24.8.00)

Well, after 1999, after X and Y were 'out', if you were to read the *Mail & Guardian*, and so on, you would think that there was ... almost 'vengeance'. A lot of public debate characterised the post-Hanekom period, but it was the general impression it gave ... there was a lot of ... dialogue – perhaps that's too modest a word – it was acrimonious ... But ... the policies they were trying to achieve under Hanekom, they were problematic in themselves. And they received criticism, but that criticism was never really taken seriously, even within PLAAS. But then Hanekom was removed and the debates all moved into the public arena. And the DLA also attacked them. But in PLAAS, there was very close monitoring of the CLRA process. Each draft that was produced for internal discussion, PLAAS got copies of. But it seemed to be done by people who felt that their project had been undermined. (Informant, interview - 6.5.05).

As indicated in previous chapters, in response to the leaking of a draft of the government's plans for tenure reform in the former homelands prior to the Tenure Conference in 2001, lawyers and others in the legal grouping reacted with fury to the model adopted, its lack of formal release and lack of consultation in relation to its approach. As indicated in Chapter 5, the TRCG's careful formulation of its model of statutorily protected rights rather than 'transfer of ownership', had been turned on its head; the CLRB unashamedly adopted the 'transfer of ownership' model, pulling no punches in its stated intention of transfer of ownership to 'African traditional

communities' (Sibanda 2004: 160). So, meeting this attack head on, an article for the Mail & Guardian was promptly drafted, pitting 'a democratic and rights based system' against the re-creation of 'the 'neo-feudalism' of the apartheid era?' (Cousins – *Mail & Guardian*, 23.11.01). From that moment on, the battle lines had been drawn and the two sides, or at least those on this side, were unlikely to be able to recapture a differentiated or nuanced middle ground between them. Unsurprisingly, after the Tenure Conference, other media stories presented the draft legislation as 'provid[ing] for the handover of land to chiefs' (Ministerial Report Cards for 2001 – *Mail & Guardian* - 22.12.01) leading to the conclusion that 'there can be no compromise between the land interests of traditional rulers and the rural masses, and no middle way between constitutional democracy and hereditary rule' (*ibid*). Meanwhile, fuelling the hostilities, CONTRALESA was reported as being "happy' with proposed new legislation ...' and its chairperson, Holomisa, quoted as saying "'The key improvement proposed in the bill, is the restoration of communal property rights and the fact that the bill recognises the role of traditional authorities'" (Cook – *Business Day*, 3.12.01). In a counter-attack, given that many within the legal grouping and within the activist field were well connected with a number of journalists, they managed to have the pronouncements of 'their' representative – the Director of PLAAS, or if not him personally, PLAAS – similarly quoted: '[PLAAS] has voiced its concern about the latest draft and warned about the transfer of ground to 'powerful and unaccountable traditional leaders' and how it will impact on the rights of individual land ownership' (Leader - *Farmer's Weekly*, 7.12.01).

When the linkage was made between the TLGFB and the CLRB by those organising the Project, they were dismayed. It represented an unacceptable betrayal, '[f]or rural people, ... an unmitigated disaster' (Cousins and Claassens - *Mail & Guardian*, 31.10-6.11.03). There was a scramble for lawyers to re-draft legal opinions, for press releases and newspaper articles to be written, journalists to be contacted and organisational arrangements to be put in place for the community representatives to come to Cape Town to be briefed on the new version of the Bill and helped to draft their submissions for the Portfolio Committee hearings. Particular journalists became key contacts and, given the subject matter, perhaps a surprising number of articles were published in the run-up to the hearings in supposedly 'blue-chip' newspapers.



Findlay Cartoon accompanying Cousins and Claassens - 'Looming Land Disaster', *Mail & Guardian*, 31.10-6.11.03

With the released dates for Portfolio Committee hearings scheduled for the beginning of November, there was not long for the group to strategise but the commitment of the grouping had been re-galvanised by these final outrageous developments. After a meeting of wider stakeholders on the 21st and 22nd October 2003, it was agreed that civil society would unite in calling for the Bill to be scrapped. On the day before the hearings started, the 10th October 2003, an advertisement was placed in the national daily *Business Day* headed by the NLC and PLAAS, under the banner 'STOP THE CLRБ' beginning 'We, a group of civil society organizations concerned with the land rights of people living in communal areas, call for the shelving of the CLRБ ...'.

5 - Representing knowledge

At the first planning meeting of the PLAAS/NLC Project, participants from NGOs around the country gathered in Johannesburg, all bringing with them wide ranging tenure issues and problems that they saw arising in communities they worked in and that they wanted to be resolved in any forthcoming tenure legislation. Potentially problematic issues were discussed, including the difficulty of reconciling: 'problem solving (ie. analysing and understanding people's problems) and engagement with what the Bill provides', and the difficulty of 'balanc[ing] the desire to focus consultation through pre-identification of issues and problems, and the need to capture experiences and understandings' (NLC/PLAAS Project - Minutes CLRБ Planning Meeting, 14.8.02 (Draft)). Nevertheless, amongst the key 'Expectations of participants' was the resolution '[t]hat the outcome of the consultation process is a legitimate record of community demand for

tenure reform' (*ibid*). Meanwhile, it was admitted that 'project consultants need to assist local partners (and communities) to understand approach and content of the Bill' (*ibid*). As recognised by one of the project consultants, this is not an easy thing to do:

to tell people what the Bill was about, and to get their views on the issues ... –
to get people's views is difficult, it takes time, although you can get their views
by holding workshops, but doing it like that ends up influencing them.
(PLAAS/NLC Project Consultant, interview - 6.5.05)

Inherent in any 'consultation' or 'participation' exercise these are all valid concerns and real difficulties that need to be acknowledged and attempts made to tackle them in order for there to be any hope of overcoming them. The members of the project team were very aware of these issues requiring subtlety of approach, discussing what might be the appropriate format of a summary of the Bill for the PLAAS/NLC project workshops. On the one hand, it was argued that it was important to include analysis within such a summary so that the full significance of the Bill's approach would not be lost, but on the other, it was thought that raising questions, instead of presenting their analysis of its significance, would facilitate a diversity of inputs, as well as countering potential accusations of 'manipulation'. But whether or not analysis and criticism is set out in the same document as a plain summary, albeit clearly separated through the use of colour coding or otherwise, or in another document, to begin with a presentation of either the proposed changes or the analysis of those changes as a starting point for consultation, is likely to influence people's views on the issues. This, to a certain extent, builds on the comments above in relation to designing a consultation exercise so as not to frame one's interpretation of 'the problem' in a particular way. But it goes beyond this in grappling with an appropriate methodology for eliciting knowledge that responds to and relates to changes that have already been proposed. Here, indeed the agenda has already been set by the government, but in order to carry out real consultation, it would, arguably, first be necessary to go back one step, to leave that agenda aside so as to elicit the kinds of questions that I referred to in Chapter 2 when discussing what I would need to find out, as a researcher bringing with me a particular *habitus* that is different from that of those whom I am researching:

What, for individuals being consulted, is their orthodoxy or doxa? What for these actors may not happen? What questions have been rendered unaskable? What is conceivable within their reality? and, in turn, What is inconceivable? And, What is considered to shape the legitimacy of that orthodoxy, to determine whether or not a particular state of affairs is considered to be legitimate?

These questions cannot be answered without recognising that power is contested, that there will always be a diversity in responses to analysing problems, and in such diversity

there will also be conflict. There is also recognition that people will see issues differently, depending upon their different *habitus*. Only after considering such questions would it then be appropriate to introduce the agenda, an agenda which would challenge that *orthodoxy*, even *doxa*, and be likely therefore to raise further contestation.

Contestations over the hierarchy of knowledge are also relevant here. Those involved in the PLAAS/NLC project were also acutely aware of the intricate legal and academic complexity of many of the issues involving the reform of tenure. The subject is undeniably complex and any attempt at legislative reform will be difficult to understand. As discussed in Chapter 5, this influenced the project team's engagement with the wider stakeholders, but it is also likely to have influenced their engagement with the 'community' participants. As indicated in Chapter 6, I spoke in depth to three people who had attended the Mashamba meeting, two of whom had gone on to attend subsequent national meetings convened under the project, one of whom was a school teacher who lived in Mashamba and the other an ex-university student from Bokisi who had failed to complete his studies because of financial difficulties. Prior to the Johannesburg meeting, the potential for people having trouble understanding the issues was acknowledged; participants from the area were told by Nkuzi that "they are expecting people to be able to read and write, and also to hear what was being said – because they were going to be using all 11 languages they cannot translate." (Participant of Mashamba and National workshops, interview - 20.11.05). The result was that "some said, 'No, they can't make it', so ... all these people [were] youth ... and able to read and write" (*ibid*). Others, who had come to the meeting because of their link to Nkuzi through their land claim, understandably said "If we are not talking about when we are getting our land, we are not going." (*ibid*). Although, based on the write-up of the meeting that took place in Johannesburg, it sounds like it was a very dynamic and exciting meeting with real engagement from participants with the issues (NLC/PLAAS Project – 3rd Quarter Report, 2-4.03), this calls into question who is considered to be 'representative' of a particular 'community'. Here, the approach of Nkuzi, probably necessarily for the purposes of the project, automatically 'filtered' out particular people's voices from being heard. However, it also calls into question whether it is possible, when we know that knowledge and authority is consistently negotiated, to have 'representatives' presenting that knowledge at all. The project organisers were criticised of bias, of selectivity, of racism and indeed, one of the project organisers reflected frankly and self-critically to me:

Why are white South Africans speaking about these issues? ... The question of 'whose voices are being represented?' raises key issues. That's a key question. (PLAAS/NLC Project organiser, interview - 18.4.05)

But interrogating the extent to which individuals within particular groupings living in a particular village might represent 'the' authentic voice of 'the community' goes beyond asking whether it was appropriate to have those organising the project, whether or not they were white, as spokespeople for those whose voices they are supposedly representing. While development academics have for a long time been critical of using the term 'community' to depict a heterogeneous conflictual grouping who happen to live in the same area, there is an ongoing practice by many, as recognised in the conclusion of Chapter 7, to valorise the authenticity of 'the marginalised' and 'women' (Robins 2001). As a result, consultation processes, and the legislation or policy, or critique of that policy, that they are designed to support, become legitimised as long as 'the poor' and 'women' are consulted. They are to speak as authentic voices of 'the poor' and 'women' and particular problems they might be experiencing are held up as representing the authentic problems experienced by all 'the poor' and all women, and in turn to exemplify a particular framing of 'the problem' and its proposed solution, or critique of it. Similarly, apparently ignoring power relations that are shaped through ongoing local contestation, "LACs" set up by CLARA are to have 'representatives' on them from among the women, the youth and the disabled⁶³. And such practices have enabled both the government and those in civil society to claim that their consultation exercises supported their opposing framings of the issues relating to CLARA.

6 - The Portfolio Committee process: Bringing the fields together?

After a Bill has been approved by the Cabinet, it is subject to interrogation by members of all parties who hold seats in the Portfolio Committee in proportion to those held by the ruling party. Such interrogation takes place in formal public hearings of the Portfolio Committees to which members of the public are entitled to make submissions. Following such hearings, MPs can either accept a Bill as drafted, or send it back to the relevant government department for amendment or redrafting. Although many decisions and much lobbying takes place in other arenas, such as the ANC 'study groups', the Portfolio Committee hearings are nevertheless viewed as an important public forum, often attended by journalists.

For the organisers of the PLAAS/NLC Project, the Portfolio Committee hearings represented a formal space in which their voices would be heard by influential members of the political establishment. They had garnered sufficient interest and support from the press, they had put so much effort into organising the Project, this was to be its final moment when the Bill would be publicly held up as the betrayal of democracy that it was – and the government, as the drafter of the poorly drafted and shoddy Bill, for its weakness and incompetence. With their own superior lawyers, with community representatives from around the country on their side, they could hardly fail.

For many participating, making their submissions to the Portfolio Committee was an intimidating experience. This is understandable given that many of them were coming from vastly different fields and were likely never before to have stepped foot in a place defined by such power. Someone working for an NGO that contributed to the process of helping people draw up and rehearse their submissions, indicated:

For a lot of people that [- to go to Cape Town and appear in Parliament] can be quite scary. Some people don't want to speak in public even if they are put forward, and they really have to be encouraged. ... And if you've seen the Old Assembly Building, it's a dingy dark old building and I was sitting at a desk, with a plaque on it saying 'Prime Minister' and I realised, 'This is where Verwoerd must have sat.' (NGO employee, interview - 13.5.05)

Even a participant working for one of the 'Chapter 9' institutions⁶⁴ who was practised at making submissions to Parliament expressed her dislike of the practice:

We were asked questions – I hate questions in Parliament because you never quite know. Politicians asking questions and you don't get asked them in a straightforward manner and often I do not understand the questions. Because it's like, they're making statements and I'm left trying to work out how that relates to what I said. And they're sitting there with their own agendas and also they want us to say certain things and are trying to set us up. (Chapter 9 institution employee, interview - 30.5.05).

For many people, speaking in public, even in contexts and amongst people that are familiar, is daunting, but the community representatives making submissions in relation to CLARA were from places a world away from Cape Town and Parliament with a different *habitus* and lacking the cultural capital – the education and intellectual training – enjoyed by those circulating in such places of power. Nevertheless, they were supposed to engage with a draft piece of legislation, probably never having seen one before, in a language that was not their first, and relate to erudite MPs and convince them of their points. Moreover, those Parliamentarians were able to define the terms of the debate, to respond to whatever points made on their own terms, such as asking participants to exemplify their points by reference to particular sections of legislation, or asking for suggestions for improvements to the wording of the Bill, or additional clauses (PMG Minutes, 11-14.11.03).

Recognising these aspects of the Portfolio Committee procedure that would constrain the extent to which people coming from a rural field could really engage with and influence the passage of such a complex piece of draft legislation through Parliament, this stage of the Consultation Project focused on helping them draft their submissions.

Although now they were to engage directly with the Bill, those who made it to Cape Town had already participated in a number of workshops and meetings with the organisers and the issues were at least familiar to them. Some of the women there had also participated in one of the two Provincial workshops with women. The purpose of these were:

to concretise the general problems concerning women's land rights with clear case studies and examples. These examples would a) be a way of bringing the problem 'to life' for the broader public (many of whom don't understand the problem, or its extent, and b) prove that the general points made in the meetings are founded on concrete, real life situations. (PLAAS/NLC project document, undated [estimated date 8.03]: 1).

Effort was made in organising these workshops to ensure that the issues raised at the community consultation meetings in relation to the Bill remained the focus:

[T]he examples and case studies should relate to the problems that have been raised in the consultation so far. For example the practice that women are not allocated land rights on the same basis as men, the fact that land is owned by the husband – not jointly by husband and wife, the problems women face at divorce, or on the death of their husbands (inheritance issues). The restrictions on women being able to attend or speak at customary meetings – or being adequately represented in decision making structures. Examples of women being evicted from land, or deprived of their inheritance would be very relevant, as would examples of women being thwarted in their attempts to access land (whether for personal residential sites, or for income generation projects) (*ibid*: 2).

According to one of the project organisers, 'the examples were horrific, but common' (Minutes of CLRB Teleconference meeting - 29.8.03). The women participating were then to draw upon these examples 'to prepare for the final submission to the Bill' (*ibid*). Reading the submissions of the community representatives, each of them draws upon their specific tenure situation and refers also to particular provisions of the Bill. In many of them, 'gender' is unsurprisingly pitted against 'tradition'. Given their involvement in the NLC/PLAAS Project, again it is unsurprising that many of them pick up the same points as those brought to their attention. To take one example from the submission made by the RWM under 'Vesting of Rights in Women':

Section 18(4)(b) provides that the Minister may vest land rights jointly in men and women ... *However this like so many provisions of the Bill is discretionary. There is no guarantee that the Minister will do so, nor a requirement that the*

land administration committee must allocate new order rights to women. This Bill fails to include criteria to guide those who allocate new order rights as to when, and on what basis, women's rights to land must be asserted and protected.

For example there is no provision requiring the joint registration of rights in the names of both spouses. Nor is there a provision that requires that women must be allocated land on an equal basis to men. (RWM Submission, 10.11.03).

The italics indicate where the language is identical, bar the omission of one or two words, to that used in the NLC/PLAAS Project document, 'Summary and Analysis of the Cabinet approved version of the CLRB' (20.10.03: 6).

A number of people expressed anger in telling me how particular women who went on to tell their sometimes very personal stories to the Portfolio Committee were challenged by some of its members and that some government officials had accused some of the women, including the director of the RWM, of being round wounding the little fingers of the white organisers. Not only did they see such challenges to be belittling, but they also saw in them a denial of those experiences and in turn their experiential knowledge deriving from them. While such a denial of any knowledge expressed by those women based upon their lived experiences of problems that in many cases have involved 'horrific' abuse, would clearly be unfair, there were Parliamentarians who, rather than denying their experiences, instead disputed the meanings given to that knowledge and the model it was put forward to support. The President of CONTRALESA, who, according to another member of the Portfolio Committee "lobbied over this" (ANC Portfolio Committee member, interview - 22.6.05), was also on the Portfolio Committee. During the course of my interview with him, I asked him why so many people were unhappy with the Bill:

It was ideological. They hate the idea of traditional authorities.

ERAF: Do you think they don't understand the institutions of traditional authorities?

They understand them, but they organised many of the submissions to support them. They understand, but they go against their ideology that they espouse.

ERAF: What ideology is that?

Of classless societies. They think that African culture is a way of bestowing authority on people who have not been elected. He said that they were the ones who organised the submissions.

ERAF: Why do you think that people had been organised?

There were similarities in the way the submissions were written, and I think that the people who then made the submissions were beholden to those in a position to assist them. (President of CONTRALESA, interview - 22.6.05)

In addition to the questions raised above in relation to the possibility of 'representatives' from particular communities positing the authentic voice of the people, the challenges directed towards the meanings of such stories also raise ethical questions about using 'representation' as a strategy of legitimation, and even about the 'use' of knowledge. It also demonstrates the cracks that were visible between the framings of such knowledge that this challenge brought to the fore and so demands an interrogation of the assumptions that such meanings are based on and of the discourses shaping them.

The other side of the story is told by those who, like the President of CONTRALESA, are positioned within the hierarchy of the political field. I spoke to many members of the Committee and, even within the ANC, people had very different interpretations of the hearings and subsequent process. A number thought that the whole process was unfair. Someone working for one of the ANC alliance partners told me that she thought particular members of the Portfolio Committee, those supporting COSATU's opposition to the Bill:

just weren't given a say. It was clear that several members on the Portfolio Committee supported the points we were making, were listening to us, but they just didn't have a chance. I think it was just a higher authority that had just decided that politically it had to go through. So members of the Portfolio Committee were unhappy but quietly. That's what was so frustrating, because we knew they supported us, but it had already been decided ... (COSATU official, interview - 31.5.05).

Even within the Portfolio Committee, power is obviously contested, with people positioned differently depending on different forms of capital distributed within the political field – so closely linked to the wider field of power. Perhaps their political party might be more powerful than others, but even those positioned within the ruling party will have access to varying distributions of social capital, with networks of relations of support with others more powerful and influential than them. One member of the Portfolio Committee, who asked to remain anonymous but who may well have been described as one of the members who was "unhappy but quietly", spoke frankly about the whole process. I asked, given the criticism the Bill received at the Portfolio Committee hearings and in the media, how people in the Portfolio Committee reacted to that:

Well, that's what happens with a Bill. The meetings are held and everyone is allowed to say their own minds. But when you're in a party that's in power, you can say what's on your mind in a study group, but not with other parties there. If you have issues, you can't talk about it in public. It's like that, you can't. Well you can but you get into trouble for it. We were saying things in the Portfolio Committee. If, you see, it was about women, that they have not been given enough power. They are still seen like minors. But in the group you can say your own mind. But even there ...

ERAF: Even with all this criticism the Bill got passed. Why do you think that it did?

There was public criticism and people spoke, but in Parliament, the majority rules. And it got passed. And if the ruling party says we have to pass this law ... (ANC Portfolio Committee member, interview - 24.5.05)

One member admitted his own limited knowledge of tenure in the former homelands and the difficulties of participating in the hearings as a member of the Portfolio Committee: "When the Act came to the study group, and the Committee, I knew that here, I knew too little, but not knowing all the nuances, the Committee will still be observed, so it still has to play a role." He went on:

I would like to see land being more equitable in terms of ownership and tenure security. And so I was just assisting the process. But when it comes to traditional systems, honestly, you and I are outsiders and won't understand, and sometimes I don't understand. We had traditional leaders, like x, coming to Committees, saying traditional leadership is completely democratic, and that it's always recognised women's rights, but women were climbing up the wall at that. But you and I can't say he's generalising or are there exceptions where rights have been ignored. Women's rights across Africa are the result of centuries of oppression, and we can say that as a result of observation. (ANC Portfolio Committee member, interview - 22.6.05)

Despite these limitations, he went on to speak about the reality of the changing political pressures relating to the Bill:

... if you look at the original White Paper it took a much harder line against traditional leaders. And also the ANC policy in the RDP document. Was it opposed to it? Well it was not much in favour of traditional leadership. But there was a school of thought then that traditional leadership had to be phased out. But then you look at KZN and it was an absolute hotbed pre-1994 when there was a struggle between a more traditional faction of Zulus supporting the

IFP and a more enlightened ANC, and although that has subsided, it still rears its ugly head, and I think the change of heart has much to do with consoling traditional leadership in KZN and successfully. And neutralising Buthelezi. KZN was regarded as a prize, which was won after 2004, after the election when they gained the majority there. (*ibid*)

After the hearings, various amendments were made to the Bill that then went back to the Portfolio Committee at the end of November and again in January. Finally, the Portfolio Committee 'considered the CLRB and amendments and voted to adopt both.' (PMG Minutes, 27.1.04). The Bill was passed by Parliament unanimously in February 2004.

Many of those who organised the PLAAS/NLC Project expressed bitterness in relation to the whole Parliamentary process:

We actually believed that the Parliamentary process would be meaningful and if we played the game right they would actually listen to us. It became more evident as we went through that we were wrong. And at the last minute there were fundamental changes. But the Parliamentarians actually complimented us on how well we'd done. And everyone was writing their own submissions – it was just beautiful to watch. But it had zero impact. (PLAAS/NLC Project organiser, interview - 7.12.05)

Although, thanks largely to all of the submissions organised by the PLAAS/NLC Project, some changes to the Bill were made subsequent to the Portfolio Committee hearings – principally those that strengthened the rights of women – the 'model' was not changed. Nor was the linkage between CLARA and the TLGFA broken. So far as they were concerned, they had failed.

7 - Conclusion

Both government bureaucrats and those in civil society went to great lengths in undertaking consultation exercises in relation to CLARA, both claiming such consultation supported their particular framings of the issues. None of them, however, in the end had sufficient capital in relation to the wider field of power to influence, let alone drive, the process in any real way. As a result, such consultation processes came to be nothing more than strategies of legitimation, for the government, an attempt to ward off criticism from those within civil society, and for civil society, to support those criticisms. While criticism from civil society may have been professionally embarrassing to government bureaucrats, such non-governmental actors, nevertheless, lacked sufficient political influence over those who *were* driving the political process, and in any case failed to focus their attacks in that direction. With their growing frustration

directed towards those in the Department, the care that they had initially taken in designing the PLAAS/NLC Project so as to try and reduce their influence on the participants, fell by the wayside. Instead, in their unflinching resolve to have their voices heard, the Project became a way of enlisting voices 'from below' – from 'the poor' and 'women' who had clearly been marginalised in the government's own consultation processes. Meanwhile, the debates, fuelled by their on-side media contacts, became increasingly framed in the simplified binary of 'tradition' against 'democracy'. As a result, it became decreasingly likely that the differentiated knowledge and nuanced understanding of tenure of many within civil society would be heard.

In the Portfolio Committee hearings, the government, which had supposedly been driving the policy processes through prior consultation exercises and workshops, rather fell out of the picture, to be replaced by those in the political field. More closely connected with the wider field of power than those in the bureaucratic field, many of the members of the Portfolio Committee had in fact been involved in driving CLARA all along. Others on the Committee, who may have been sympathetic to the critics of the Bill, would only have lost political capital by not aligning themselves with those who were positioned higher up the hierarchy of the field and, given the proportional representation system in place, may even have lost their positions as MPs had they not adhered to the party line (see Hassim 2005). So the Portfolio Committee process became yet another strategy of legitimisation for CLARA, a spectacle of participation, for members of the public to vent their criticisms or grievances with the Bill that was going to be passed whatever issues or complaints were raised by them. Even if double the number of submissions had been inspired by the PLAAS/NLC Project, those who made them lacked the symbolic capital to 'impose a universally recognized principle of knowledge of the social world' (Bourdieu 1987: 837). Many of those organising the submissions would claim that their knowledge instead should have been that which was accepted and embodied into law to become universally recognised. But, as argued in previous chapters, their framings of 'the problem' pushed out other more nuanced, negotiated understandings of tenure, as did in turn 'the solution' that was its corollary. 'Symbolic violence' (Bourdieu 1990: 126), however, was committed by those in the wider field of power who pushed the Bill through Parliament, in denying the power to particular individuals or groups to define figuratively and practically that social space – even if they failed to impose a 'universally recognised' principle of knowledge of the social world.

CONCLUSION

The conclusion of the previous chapter was disheartening: that the new formal participatory space of South Africa's new democracy, the Portfolio Committee hearings, that held so much promise for inclusivity, actually became nothing more than a spectacle of participation, here for the legitimisation of CLARA. But this does not really go far enough. As indicated in the Introduction, the purpose of the thesis was to go beyond answering the political question, *Why was CLARA introduced and passed by Parliament?* It was not simply to hold up an alternative, more 'correct' reading of tenure in the former homelands with which to criticise other representations of tenure – although it is important that the contested and negotiated understandings of tenure in the former homelands were often pushed out in the debates over its reform. It is important because the purpose of the thesis has been to explore how and why the issues were constructed and represented so differently by different groupings. In doing so, further questions were raised: *What assumptions was their knowledge based upon? How did the different groupings legitimise, or try to legitimise their positions? How were the political spaces within which they were trying to achieve this, shaped?* and these questions lead to the ultimate question, which the previous two chapters have responded to: *What knowledge was excluded in these constructions?* In responding to these questions, multiple stories have been told in the different chapters of this thesis, about all of those participating in such debates, the different ways they framed their knowledge of the former homelands in the political contestations over CLARA, the various attempts to position themselves in relation to others in the debates and the strategies they adopted to legitimise their knowledge.

Between 1994-2004 the South African state was no longer in crisis, but it was still very much in a state of construction and change, with people from very different backgrounds coming together, sometimes for the first time, but competing for legitimacy in order to influence the transition. It was a time of excitement and dynamism, but also of turbulence, as new networks of power were forged and new spaces of power and change were opened up. And with every change introduced over that period – changes in political appointments, or to decision-making procedures, for example – the recognition, formerly granted to and taken for granted by people in particular positions of power, was challenged. With many reacting against such change in order to maintain the relations of power that they had previously enjoyed, the formal changes on paper could not be read as corresponding to the personally negotiated changes in practice. This was seen in the former homelands, where there was often a huge gap between the ideals of change introduced at a national level, and the

negotiated local political reality, on the one hand, and a sobering financial reality, on the other, conspiring together to produce a much messier, contested practice. But it was also seen even in the bureaucracy, that is defined by formal and regulated decision-making procedures, but is also a field, like any other, containing within it, or rather constructed by contestation and negotiation.

In responding to the questions posed above, the thesis has held as central that the processes and practices of policy and law-making are constituted through interactions between *people*, constituted as social beings, their knowledge shaped as much by background and education, as by emotions. Many people have been passionate about CLARA, about their knowledge of the areas to be reformed by that legislation and the changes that they see it to be introducing. Previous research and theorisation of policy processes, however, with its focus on rather disembodied 'actors', albeit positioned within particular networks or coalitions, has somewhat eclipsed the implications of 'real people' participating in such processes. This is relevant when considering the extent to which policies actually relate to their 'subjects', but also when considering policy-making and the growth in complexity changing the context in which such policies are being formulated. In drawing upon Bourdieu, who recognised the importance of such different backgrounds and shared historical subjectivities, or *habitus*, in shaping the objective relations and potential relations between people, shaped in turn by their perceptions, this thesis has brought to the fore the importance of agency and of taking seriously the social identities people invoke in negotiating their positionality.

The stories in this thesis have told of how people with very different social backgrounds have participated in the policy and law-making processes of CLARA, invoking through their arguments, through the discourses that shaped them, their *habitus*, practices and meanings invested in them, in order to influence the policies that were to change the property relations of people living in the former homelands. For example, Chapter 5 indicated the extent to which, for the legal grouping, their professional standing and personal repute was inseparable from the legitimacy of the law, a legitimacy that was, in turn, bound up with the 'rights based approach' to reforming tenure. For them, and those involved in such processes, participating in the debates often involved challenging the representations others invoked and, in turn, many were challenged in doing so. At times such challenges went to the heart of their identities, as reputable and legitimate lawyers, as women, or as activists, and in turn caused upset and hurt. In attempts to counter and deflect such challenges, accusations and recriminations were made, often resulting in damaged relations and bitterness. As Moore recognises, 'social identities are fully engaged in the processes of bargaining and negotiation' (Moore 1994: 104). She argues that this has implications for where actors are positioned advantageously or

disadvantageously in such processes, for example 'as black people, women, or workers' (*ibid*: 97).

The stories in this thesis indicate the extent to which that positionality, or locality, cannot be taken for granted. Indeed, individuals may be positioned and repositioned⁶⁵, responding accordingly, sometimes inconsistently and always partially, depending on who is capable of influencing that positionality, who may challenge it, what is being challenged, how, even where. For such challenges will often draw upon discursive resources that were hierarchically constructed, linked as they are to change taking place in wider politics. For example, the thesis has drawn attention to contestations amongst activists over the meaning of activism, the extent of radicalism, the implications of race in such conflicts, its linkage to discourses of the African Renaissance playing out at a national level, and the 'superiority' of 'race' over discourses of 'gender'. In the different stories told here, a conjuncture of political factors came to bear in multiple ways on how people in those stories managed to position themselves, and were positioned, in their struggles to achieve legitimacy for their version of land and property relations in the former homelands. That is, all of the conjunctural political factors coming together at the time CLARA was being debated, discussed in Chapter 3, shaped the weight and legitimacy of the discursive resources brought to bear in those debates. Such legitimacy, however, was also shaped by those who participated in those debates, the extent of symbolic capital that they held as lawyers, as activists, as bureaucrats, as women, as 'whites', as 'blacks', as 'lefties', as fieldworkers or as people living in the former homelands – with all their indefinability and their multiple and category-defying intersections – that always depended on their positionality.

Individuals, through their work or lived experiences shaping their day-to-day reality, have often shared a particular understanding of the terms according to which the legitimacy of their knowledge would be contested and accepted. Bourdieu's concept of 'field' has been useful in understanding difference, in relation to individuals' and groupings of individuals' differential understandings of such terms, or 'rules of the game' in which they were participating. People were often competing for the power to define legitimate knowledge, but, positioned within different fields of struggle, they can be seen to have been competing according to the terms of debate understood by them. On one level, they were *coming together* in the policy processes relating to CLARA, but on another, because the rules of the game were defined differently by others, there was often a failure of understanding, with people speaking across each other, and becoming increasingly disillusioned. In the contestations over CLARA, people within different fields came together all competing to name, represent and create the official version of the social world, or at least the world in the rural areas of South Africa. But whether or not the terms of the games being played within such different fields were understood,

whether or not attempts were made to understand the deeply different *habitus* of the different individuals, or players, contestations arose between them. All of them were competing to position themselves within a hierarchy, at least the hierarchy that they understood – that of the field in which they were positioned – so that their version would be accepted as legitimate. And that is where the faultlines came to the surface. For example, knowledge based upon ‘reason’ was pitted against that based upon ‘understanding’, ‘rights’ against ‘culture’, ‘gender’ against ‘tradition’. So, while the actors in these stories, the players in the games, have all come together in and through those processes, all the stories have been discouragingly separate.

In the contestations over CLARA, what was being negotiated, as well as a piece of legislation, was a struggle for symbolic power, that is legitimacy for a particular version of the social world to be embodied in that legislation. During the first ten years of South Africa’s transition, the extent of legitimacy garnered by different individuals and groupings was in a state of flux with actors moving across and within different fields, so that the autonomy of the different fields, that of the legal field in particular, could not be taken for granted. The law, however, continued to hold the convincing promise, certainly to all those within the legal grouping, as well as to many outside it, that it:

embrace[d..] heterogeneity within the language of universal rights – dissolving groups of people with distinctive identities into aggregates of person who may enjoy the same entitlements and enact their difference under the sovereignty of a shared Bill of Rights (Comaroff and Comaroff 2006: 32).

Chapter 5 discussed the extent to which, in this context of change, the discursive legal resources brought to bear in the debates were accepted as providing the medium that would be granted the symbolic power to resolve them. Certainly, the dissolution of ‘groups of people with distinctive identities into aggregates of person’ was contested by traditional leaders having constructed a space for themselves to participate in national politics, speaking of ‘tradition’ instead of ‘rights’ and thereby ignoring, or defying, the law’s promise of universality, and refusing its mediation. And this indicates the extent to which, in relation to the politics of CLARA, the limited autonomy of the legal field became important in dissolving this promise; as Chanock warned us, politics had indeed trumped law (Chanock 1996). The jury is out, however, as to the outcome of the Constitutional Court case contesting both CLARA and the TLGFA that has been instituted against the government and the Minister of Land and Agriculture by the LRC on behalf of a number of different of ‘its communities’. In that context, however, it will be the law and rights that will mediate the terms on which the case is heard.

The stories told in this thesis, make the contested nature of power unavoidable. Moreover, they underline why its recognition is essential. The reason for such

contestation lies in the diversity in views, responses and knowledge depending upon the variety of different actors participating in policy processes relating to CLARA, and the *habitus* that each brought to the table. In processes that are supposed to bring together such diversity in the formulation of policy – diversity in experiences, wealth of knowledge, experiential, academic, legal and bureaucratic – recognising and taking into account what that diversity really means, in terms of the *habitus* of different individuals, is crucial. In any country, but certainly in a country with such obvious diversity as South Africa, it is the wealth of that diversity that should enrich the policy process. Instead, here, in relation to CLARA, it simply contributed to confusion as to why one's voice was not being heard, or the delusion that it was, and bitterness.

Having said that the purpose of the thesis has not been to hold up a more 'correct' reading of tenure in the former homelands with which to criticise other representations of tenure, the purpose of revealing a messy and negotiated understanding of tenure in one such 'rural area' was to highlight the extent to which those with the power to represent 'the problem' existing in the former homelands have done so in ways that have displaced identities of people and knowledge that lies outside their framings of 'the truth'. The exclusion that has come about through the contestations that took place over CLARA, and through the strategies of legitimation different groupings invoked to influence their outcome, has been crucial. While of course no one was physically excluded, indeed many were included in all kinds of consultation exercises, and some were even included in the Portfolio Committee hearings, those who were included, were included as 'representatives' speaking for a community. While I am not arguing that any of them were pawns in such processes, the knowledge that they were brought there to represent, and seen to represent, excluded a more contested, messier, understanding of the issues. And so I have questioned whether it may actually be impossible for one such 'representative' to invoke such an understanding.

In colonial times, chiefs became the favoured spokesmen. Post-development critics, in well-meaning attempts to take seriously Foucault's espousal of the '*insurrection of subjugated knowledges*' (Foucault 1980: 81 - his italics), tend to favour representatives from amongst 'the poor' and 'women'. The search for 'representatives' assumes a unity that does not exist in and of itself (Waldman 2007) and ignores the contested, negotiated and relational construction of knowledge. Moreover, such representatives may not even speak *as* 'the poor' or *as* 'women', or at least not 'the poor' or 'women' constructed within the framings delineated in opposition to that 'tradition' constructed in relation to CLARA. And they too invoke through their arguments, constructed in response to, by and through their positioning, through the discourses that shape them, their *habitus* and thereby meanings invested within them. The problem is that such discourses, meanings and knowledge may have very little authority, even recognition, in

arenas that are instead defined by other discourses of power. And that is presumably why so many others were claiming to speak for them and/or were framing the terms within which they were supposed to be speaking 'as women'. But, as recognised in this thesis, the discursive space into which they were entering and the terms on which it was debated were defined by elite actors: politicians, lawyers, those in the bureaucracy, in NGOs. A strategy to enable representation in a political space such as the Portfolio Committee, defined by the elite, is in line with a history of 'liberal/inclusionary feminism [that] emphasises upward linkages to power brokers' in South Africa (Hassim 2005: 178). As Hassim recognises, however, such strategies are likely to 'reinforce the elite bias of this level of politics' (*ibid*: 186). The key challenge is that recognised by Stuart Hall in 1989 writing about black politics in Britain:

to conceive of how a politics can be constructed which works with and through difference, which is able to build those forms of solidarity and identification which make common struggle and resistance possible but without suppressing the real heterogeneity of interests and identities, and which can effectively draw the political boundary lines without which political contestation is impossible, without fixing those boundaries for eternity. (Hall 1989, reprinted in 2003: 92)

If the goal is to take seriously the aspirations of real participatory democracy, even if it is merely to pass legislation that will have any chance of making a real impact, a positive impact, on the lives of people living in such areas, it is crucial first, to *recognise* and second, to *take into account* not only their different *habitus*, but also the diversity in views and opinions and the contested nature of local knowledge. In South Africa, a country that lives with the ongoing effects of apartheid categorisations defining the minutiae of everyday life, this is not necessarily an easy thing to do, for government officials or for anyone else (Waldman 2007).

Taking seriously the diversity in the *habitus* of different actors, shaping in turn their views, responses and knowledge brought to bear in shaping policy, raises questions about democracy and citizenship, governance and activism. While it raises more questions than can be answered here, in South Africa, formal participatory spaces in Parliamentary procedures have been designed to enable the participation of people from different backgrounds in politics. And so it would be necessary to ask what those spaces might look like if they were going to take seriously that diversity and fulfil those ideals. For example, questions can be raised as to the appropriate forum in which procedures for democratic decision-making, such as the Portfolio Committee hearings, might take place – probably not the wood-panelled rooms in the Parliamentary buildings in Cape Town. And for that matter, probably not even in Cape Town. Decentralised decision-making is presumably preferable, but it also comes with its own dangers of lack

of accountability and representativity, undemocratic rules of engagement – the list goes on (Ribot 2004; Swyngedouw 2005). And there are other issues that immediately relate to policy-making in the South African context. Morris has held the spotlight up to the seemingly innocuous issue of language in a country with such diversity as South Africa (2006). She argues that 'when political subjectivity is contingent upon one's ability to speak and to be understood' (Morris 2006: 88), there is a democratic deficit in a country in which 'true multilingualism' has not been attained (*ibid*: 90). Just as important, perhaps more so, the same can be said of the current lack of countenance given within such fora to the inequality of life-chances brought to bear in contestations over, and the ongoing construction of, knowledge. In privileging legal and textual contestations over knowledge in the critique of a piece of legislation, such Parliamentary processes assume the *habitus* of the elite constitutes the only proper criterion of suitable knowledge, and thereby continues to privilege the knowledge of the elite.

The questions raised about making more democratic the formal participatory spaces in Parliament, were not premised on an ideal of 'deliberative democracy' whereby 'processes of collective deliberation conducted rationally and fairly among free and equal individuals' will arrive at agreed conceptions of 'the common good' (Mouffe 1999: 747). As recognised by Mouffe, such an ideal denies 'the dimension of power and antagonism' and 'the central role in politics of the conflictual dimension and its crucial role in the formation of collective identities' (*ibid*: 752). Swyngedouw similarly celebrates 'real politics' that recognises and accepts conflict, as opposed to 'consensual postpolitics ... that either eliminates fundamental conflict ... or elevates it to antithetical ultrapolitics' (2007: 25). As discussed in the Introduction, others have brought to light the limits of liberal democracy at the same time as recognising difference and pluralism (e.g. Comaroff and Comaroff 2005) and Von Lieres (2005) has theorised how such challenges may be met in constructing a new model of democratic politics. As recognised by Mouffe, 'social objectivity is constituted through acts of power' (1999: 752). Similarly to Bourdieu, she sees 'the link between legitimacy and power' to be crucial, and 'precisely what the deliberative model is unable to recognise' (*ibid*: 753). This view corresponds with Bourdieu's notion of 'symbolic capital' that is held by those with legitimacy to represent, not necessarily the 'correct', but the *accepted*, version of the social world, that is the *doxic* version. Mouffe, however, sees the *democratic* society as existing when 'no limited social actor can attribute to herself the representation of the totality [... and] that any social objectivity ... has to show the traces of exclusion that governs its constitution' (*ibid* – my italics). In debates over CLARA, *everyone* who participated in them was claiming to represent a 'correct' version of the social world. And, if the politics of CLARA were to happen again, it would be worth bearing in mind Mouffe's proposal that:

the “other” is no longer seen as an enemy to be destroyed, but as an “adversary”, i.e., somebody with whose ideas we are going to struggle but whose right to defend those ideas we will not put into question (*ibid*: 755).

This involves ‘distinguishing between two types of political relations: one of *antagonism* between enemies, and one of *agonism* between adversaries’ (*ibid*: 755). Making room for dissent in a pluralist democracy, is not to say that ‘pluralism’ should become ‘an end in itself’, whereby ‘[e]verything is politicised, can be discussed, but only in a non-committal way and as a non-conflict’ (Swyngedouw 2007: 25, quoting Diken and Laustsen 2004). Such ‘non-conflict’ may happen when ‘the problems’, ‘the questions’, are already agreed upon (see Ashforth 1990) and the politicised discussions centre instead around various technical solutions to those problems. Instead, Swyngedouw (*ibid*: 36) argues that what it requires is:

foregrounding and naming different ... futures, making the new and impossible enter the realm of politics and democracy, and recognizing conflict, difference, and struggle over the naming and trajectories of these futures.

Of course, this thesis has demonstrated quite how far South African democracy is to annulling ‘dissensus’ (*ibid*: 26), but nevertheless there were many moves and endeavours by different groupings to frame ‘the problem’ in such a way as to attempt to exclude conflict from their framing. While this may be seen as a desperate appeal to have their voices heard, it is a far cry from meeting the ‘urgent need for different stories and fictions [to ...] be mobilized for realization’ (*ibid*: 36). Before we will be able to bring forth or even imagine different stories and futures, however, it is worth remembering the call by Wacquant, one of Bourdieu’s translators and authority on Bourdieu, for ‘critical thought ... that which gives us the means to *think the world* as it is and *as it could be*’ (Wacquant 2004: 97), arguing:

the primary historical mission of critical thought, which is to serve as a *solvent of doxa*, to perpetually question the obviousness and the very frames of civic debate so as to give ourselves a chance to think the world, rather than being *thought by* it, to take apart and understand its mechanisms, and thus to reappropriate it intellectually and materially. (*ibid*: 101).

This is what I have tried to do in undertaking the research for, and then in writing, this thesis.

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ENDNOTES

¹ Inverted commas have been used in this thesis for four reasons: 1) to refer to defined terms including South African specific terms e.g. 'homeland', the 'rural field'; 2) to refer to frequently used terms, slang, or terms that do not require definition e.g. 'task team'; 3) to refer to terms to highlight contested discourses e.g. 'tradition', 'custom' etc.; and 4) where I specifically question the appropriateness of using the term e.g. 'participatory' Portfolio Committee hearings, or as a way of acknowledging that such questions have been raised by others e.g. 'civil society', 'race'. In the first instance, I have only used inverted commas for its first usage which has been explained either within the body of the text or in a footnote. In the other instances, I have continued to use inverted commas throughout the thesis. Here, 'homeland' is discussed subsequently but has been put into inverted commas to highlight its South African specific nature, and the historical and racialised connotations that it has.

² The word 'community' is widely used in South Africa by academics, DLA officials, NGO workers and people living in such areas; Nauta (2004) recognises its centrality amongst the land sector during what he dubbed as the 'freedom and consultation era' – the first half of the 1990s. Although it becomes in its use a euphemism, it has repercussions – as seen in the definitions in CLARA. See also, (Berry 1992; Kepe 1998).

³ At the time of writing, the first hearings of the Constitutional Court case were scheduled to take place in October 2008.

⁴ All terms in double inverted commas relating to CLARA are those defined by the Act, set out in Appendix 1 of the thesis.

⁵ See the previous version of the CLRB dated 26.6.03, section 30.

⁶ This "must" was changed to "may" in the final Bill approved by Parliament, now CLARA.

⁷ The words 'tribe' and 'tribal' are considered pejorative for their pre-modern connotations – 'traditional community' and 'traditional' are considered more appropriate, hence 'traditional leader' rather than 'chief', 'traditional authority' etc.

⁸ This term is in inverted commas in acknowledgement of its academically contested nature. Such contestations are discussed further in Chapter 3.

⁹ This euphemistically describes the former 'homeland' areas in South Africa (Oomen 2005)), even though many of them have been described more accurately as encompassing a form of "displaced urbanisation" (Murray 1992)).

¹⁰ See (Ashforth 1990) for an excellent analysis of the 'problematism' of social 'questions' in South Africa.

¹¹ The term 'black spots' was used to describe areas in white-designated farmland where black people were living.

¹² This has been estimated as being over 21 million people by the DLA – LRC: Press Statement (20.4.06)

¹³ This figure includes areas outside the former homelands.

¹⁴ See also (de Wet 1989; McAllister 1989).

¹⁵ Due to the limitations of space, I have been unable to discuss a huge body of work looking at land reform more generally - see e.g. (Bernstein 2002) (Borras 2003), and in relation to South Africa – see e.g. (Hall 2004) (Lahiff 2003) (Ntsebeza and Hall 2007) and (Cousins 2000). Recently, one important study that my work complements has brought together the voices and perceptions of different groups of actors interacting in relation to specific land reform projects (James 2007). In relation to tenure, see e.g. (Adams, Cousins et al. 2000) and (Claassens 2000).

¹⁶ These terms are in inverted commas here, to denote that they are terms chosen by me to describe the Bourdieuan fields that are the object of the research in this thesis. Bourdieu also talks about the 'political field' and the wider 'field of power' – these are discussed further in Chapters 2, 3, 4 and elsewhere in the thesis.

¹⁷ In the field of education, Bourdieu argued that “The assumption that the habitus of the dominant or élite group constitutes the only proper criterion of scholastic success gives *de facto* sanction to initial cultural inequalities by ignoring them, and treating all pupils, however unequal they may be in reality, as equal in rights and duties” referred to in (Harker 1990: 92).

¹⁸ The first hearings of the Constitutional Court case are scheduled to take place in October 2008.

¹⁹ See FN. xvi above.

²⁰ Such orthodoxy within different fields, as long as it is externally imposed, may not amount to *doxa*, “that which appears self-evident, transparently normal” (Terdiman 1987: 812). Whether it does is likely to depend upon where in the hierarchy of the wider field of power those who claim symbolic capital within any particular field are positioned.

²¹ (Maré 2001).

²² Society in the UK of course has its own contradictions with distinctions and splits based upon race, class and multiple other axes that are just as real, though perhaps less obvious to someone who has lived there most of her life.

²³ Weideman (2004: 229) quoted the Deputy Director of the NLC as saying “An indication of where things are at [in terms of the relationship between the NLC and the DLA], is that we are now getting visits from the [NIA]”.

²⁴ Within anthropology, however, many of these issues are well-discussed and I am grateful to Linda Waldman for discussions in relation to them. See for instance, (Bell, Caplan et al. 1993) and (Wolf 1996)

²⁵ It was also at this conference that the ANC adopted a resolution on traditional leaders envisaging “a full and constructive role in consultative processes on local development matters” (Beall, Mkhize et al. 2005: 762)

²⁶ Based upon a liberal tradition, NGOs, by default, fall within the realm of ‘civil society’, to be protected and promoted. The Gramscian tradition sees the sphere as being that where the hegemonic ideology is contested - following on from this comes the concern and focus on ‘social movements’. Ferguson has argued that if ‘civil society’ is conceived as a “set of development NGOs, most of which are funded by bilateral or multilateral development donors or by international NGOs” some of which are taking over the state’s functions in areas such as health and education, the term ‘civil society’ clouds the fact that “these NGOs do not actually challenge the state ‘from below’ but are instead ‘horizontal contemporaries’ of wider institutions of transnational governmentality” (Lewis 2002: 577-8, referring to Ferguson 1990).

²⁷ The original Transvaal RWM has meanwhile changed its name to the ‘National Movement of Rural Women’.

²⁸ ERAF refers to me.

²⁹ Violence occurred in other areas in South Africa as well – the Thokoza and Katlehong townships on the East Rand near Johannesburg have been described as “urban killing fields” (Meintjes 1998: 102)

³⁰ The NP’s cynical ploys in supporting the IFP militarily and in supporting a ‘third force’ are now well known (Worden 1994).

³¹ Local Government: Municipal Structures Second Amendment Bill. B71-2000, quoted in (Oomen 2005: 68).

³² Tribal Authorities in the northern Transvaal reserves were grouped administratively in Regional Authorities.

³³ X has been used so as to anonymise the person being talked about. Elsewhere, in quotations, people have similarly been referred to as X, Y, Z etc.

³⁴ The “absolute privileging of experience as the sole arbiter of knowledge” (Hassim and Walker 1992: 82) had long been contested, as had the ability or the appropriateness of people “speaking for” those who could and should speak for themselves” (ibid: 82, see also Meintjes 2003). For example, even in the WNC’s engagements with the multi-party negotiating process of the early 1990s, “[t]he link with technical experts and academics was not always welcome” (Hassim 2002: 725).

³⁵ Ironically, the other interest group that has similarly contended that custom has been corrupted by colonialism and apartheid are traditional leaders. As recognised by Costa, “[a]rguments for equality share one important attribute with those for tradition: the corruption thesis.” (Costa 1998: 533).

³⁶ This reference to “the African land ethic” is a reference to the work of Catherine Cross, a researcher now at the HSRC, whose views on this were influential at this time amongst actors in the legal grouping (Cross 1992). See also, (Cousins and Claassens 2006: 6) who has similarly referred to Cross’s work in relation to an ‘African land ethic’.

³⁷ The word ‘strategy’ implies a manoeuvre to attain a particular goal. However, particular manoeuvres shaped by practice are not adopted as a conscious ‘strategy’ but developed from a person’s dispositions deriving from *habitus*, shaping their beliefs, their ideology (Mahar, Harker et al. 1990: 18). So ‘strategy’ implies instead the use of their knowledge, shaped by *habitus*, in order to attain particular goals – but those goals could not have included the conscious goal to legitimate their unconscious practice.

³⁸ In another context in relation to the application of Foucault to sociolegal studies, Munro has argued that an “assumption of an assimilation between the legal and the juridical, and therefore between law and sovereign command” is “inappropriate” (Munro 2001: 558). While I understand this distinction, it does not undermine the parallels drawn here between the operation of the legal field to that of the ‘juridical field’ discussed in (Bourdieu 1987).

³⁹ The ‘a’, ‘b’, ‘c’ etc indicates different people speaking.

⁴⁰ As indicated in the Introduction, a court case and constitutional challenge has been launched against the Act – those spearheading the challenge fall squarely within the ‘legal grouping’.

⁴¹ Obviously they cannot continue to deny this if they are challenged to its juridical resolution, as here, in the Constitutional Court.

⁴² The dualistic nature of this Mamdani-inspired discourse is ironic, given Mamdani’s stated aims of overcoming analysis “by analogy” and “view[ing] social reality through a series of binary opposites” (1996: 9).

⁴³ See also (Mathis 2007).

⁴⁴ In an interesting cyclical twist, Derick Fay has traced this discourse to a critical report on the role of TAs in relation to tenure in the former Transkei by Andre Terblanche in 1991, which Mamdani then used as the basis for his analysis in the Transkei (personal communication, 4.07).

⁴⁵ See (Harris 2003) for a fascinating historical account of such institutionalisation of racial inequality in the US.

⁴⁶ There were, of course, exceptions - see e.g. (Cross 1991).

⁴⁷ The 1994 Act was amended in 1999 in the Land Restitution and Reform Laws Amendment Act 18 of 1999.

⁴⁸ The smart new green road sign erected presumably by the District Council during the course of my time undertaking research there, pointing to ‘Mashamba Tribal Authority’ belied the more politically correct version embodied in the TLGFA and references to ‘Traditional Authorities’ and Leaders in the Constitution. Ironically, Robins noticed the same in the village of Makuleke in 1998 (Robins 2003).

⁴⁹ The fieldwork involved 31 semi-structured open-ended interviews, including four with Councillors within the Makhado Municipality constituency (one of whom represented Chavani and other villages falling under Nkhensani Traditional Authority), two with Municipality officials, four with local NGO employees (one of them an ex-employee) and four with individuals within the Traditional Authority governance structures of the village. In addition, seven group discussions were held with groups of individuals falling under Nkhensani Traditional Authority representing both the formal and informal structures in the village, men and women, and different age groups. 14 further in-depth interviews and seven further focus groups were held with individuals and groups, including four with traditional leaders from neighbouring villages. The study also involved an unrecorded number of informal interviews and (participant) observation including attendance at community and administrative meetings.

⁵⁰ The gendered nature of such struggles was under-researched and had received very little attention prior to the research undertaken for Meer's 1997 edited volume 'Women, Land and Authority'.

⁵¹ See (Hofmeyr 1993) who tells of changes in village practices, such as the disappearance of the *kgoro*, resulting from a 'betterment' scheme in the Northern Transvaal.

⁵² See (Comaroff 1975: 150) who similarly describes a distinction between 'formal statements' which "are adopted for the purposes of stating shared values and ideals", while 'evaluative statements' are "employed to discuss actual people, their actions and events in the real world".

⁵³ In the 1980s and 1990s, witch killings were prolific in the former Lebowa, also in the Northern Transvaal (now Limpopo Province) - (Delius 1996; Niehaus 2001; Oomen 2005)

⁵⁴ According to my informants in the area, *Tokoloshi* are little people who are bad; witches can turn people into *tokoloshi* and then use them as workers to carry out bad deeds. These are, however, more analogous to what Niehaus (2001, 2005) describes as 'Zombies'.

⁵⁵ At the time I undertook my research – although there were plans afoot to re-demarcate the wards in the area.

⁵⁶ Bokisi was a ward falling under Nkhensani TA. *Hosi* Bokisi was officially an *induna* over his people, but claimed that he had been deposed as a *hosi* when they were moved from 'Mashamba'. People under him referred to him as the *hosi* and I also used that title when I was there, and am using it accordingly here.

⁵⁷ Housing built by the state both during apartheid was basic, often from kiln fired cement and mud bricks with a corrugated iron roof. Many of them were just two rooms – hence the name 'two room', others were lucky enough to get a 'four room'.

⁵⁸ They are registered in the Deeds Registry as being owned by the Suid-Afrikaanse Ontwikkelingstrust, the South African Development Trust, the South African Native Trust and the Government of Gazankulu. The situation is unclear as these entities are supposedly obsolete.

⁵⁹ Thanks to Peter Rutsch, a land lawyer, who explained to me what a Deed of Grant is: "In the urban areas, people had to qualify to stay there and were given Certificates of Occupation. In the late 1980s things began to change and in the urban areas, Certificates of Occupation were slowly converted to Deeds of Grant or Rights of Leasehold, under neither of which did the holder own the land, but the rights held were progressively entrenched."

⁶⁰ Nkuzi Development Association, Workshop – Area Based and Territorial Approaches to Land Reform, 8.11.05

⁶¹ Even though substantial changes were made to the draft Bill between March and the end of June 2003, many of those involved in the Reference Group did not receive notice of such changes before the draft was circulated the day before their meeting on 1 July (LRC – Notes on Reference Group Meeting on CLRB, 1.7.03).

⁶² I do not claim to know the details, but it appears that the workshop organised through AFRA, in tandem with the RWM, generated extensive controversy, accusations of misuse of funds and the subsequent dismissal of one of its organisers. The timing of this controversy coincided with the furore at the NLC in relation to the dismissal of its director, each relating to and amplifying the storm surrounding the other.

⁶³ s. 22(4) CLARA – see appendix.

⁶⁴ Those institutions, such as the HRC and CGE, set up under Chapter 9 of the Constitution.

⁶⁵ This thesis once again demonstrates the difficulty of discussing Bourdieu's theory apart from empirical work and counters Moore's criticism of Bourdieu's concept of positionality for being "devoid of any notion of a multiple subjectivity constituted through multiple positions" (Moore 1994): 79.

⁶⁶ Documents marked 'LRC Archive' can be found in the LRC library, Cape Town.



Government Gazette

REPUBLIC OF SOUTH AFRICA

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No. 861

20 July 2004

It is hereby notified that the President has assented to the following Act, which is hereby published for general information:—

No. 11 of 2004: Communal Land Rights Act, 2004.



AIDS HELPLINE: 0800-123-22 Prevention is the cure

GENERAL EXPLANATORY NOTE:

- [] Words in bold type in square brackets indicate omissions from existing enactments.
- Words underlined with a solid line indicate insertions in existing enactments.

(English text signed by the President.)
(Assented to 14 July 2004.)

ACT

To provide for legal security of tenure by transferring communal land, including KwaZulu-Natal Ingonyama land, to communities, or by awarding comparable redress; to provide for the conduct of a land rights enquiry to determine the transition from old order rights to new order rights; to provide for the democratic administration of communal land by communities; to provide for Land Rights Boards; to provide for the co-operative performance of municipal functions on communal land; to amend or repeal certain laws; and to provide for matters incidental thereto.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

ARRANGEMENT OF ACT*Sections*

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SCHEDULE

CHAPTER 1

DEFINITIONS AND APPLICATION OF ACT 20

Definitions

1. In this Act, unless the context indicates otherwise—
 “**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, and “**beneficially occupied**” has a corresponding meaning; 25
 “**Board**” except in Chapter 9, means a Land Rights Board established in terms of section 25;
 “**communal land**” means land contemplated in section 2 which is, or is to be, occupied or used by members of a community subject to the rules or custom of that community; 30
 “**community**” means a group of persons whose rights to land are derived from shared rules determining access to land held in common by such group;
 “**community rules**” means the rules registered in terms of section 19(1);
 “**comparable redress**” means the redress contemplated in Chapter 4; 35
 “**Constitution**” means the Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996);
 “**Deed of Communal Land Right**” means a deed in terms of which a new order right is registered in the name of a person as contemplated in section 6;
 “**Deeds Registries Act**” means the Deeds Registries Act, 1937 (Act No. 47 of 1937); 40
 “**Department**” means the Department of Land Affairs;
 “**Director-General**” means the Director-General of Land Affairs;
 “**land administration committee**” means a land administration committee established in terms of section 21; 45
 “**land rights enquirer**” means a land rights enquirer designated or appointed in terms of section 15;
 “**Minister**” means the Minister responsible for Land Affairs;

“**new order right**” means a tenure or other right in communal or other land which has been confirmed, converted, conferred or validated by the Minister in terms of section 18;

“**old order right**” means a tenure or other right in or to communal land which—

- (a) is formal or informal; 5
- (b) is registered or unregistered;
- (c) derives from or is recognised by law, including customary law, practice or usage; and
- (d) exists immediately prior to a determination by the Minister in terms of section 18, but does not include— 10
 - (i) any right or interest of a tenant, labour tenant, sharecropper or employee if such right or interest is purely of a contractual nature; and
 - (ii) any right or interest based purely on temporary permission granted by the owner or lawful occupier of the land in question, on the basis that such permission may at any time be withdrawn by such owner or lawful occupier; 15

“**prescribed**” means prescribed by regulation in terms of this Act;

“**this Act**” includes any regulations made under this Act; and

“**traditional council**” means a traditional council as defined in section 1 of the Traditional Leadership and Governance Framework Act, 2003. 20

Application of Act

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, 1971 (Act No. 21 of 1971), before its repeal or of the former 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, 1936 (Act No. 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, 1961 (Act No. 48 of 1961); 25 30
 - (ii) was listed in the schedules to the Black Land Act, 1913 (Act No. 27 of 1913), before its repeal or the schedule of released areas in terms of the Development Trust and Land Act, 1936 (Act No. 18 of 1936), before its repeal; 35
- (b) land to which the KwaZulu-Natal Ingonyama Trust Act, 1994 (Act No. 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. 40

(2) The Minister may, by notice in the *Gazette*, determine land contemplated in subsection (1)(d) and may in such notice specify which provisions of this Act apply to such land.

CHAPTER 2**JURISTIC PERSONALITY AND LEGAL SECURITY OF TENURE****Juristic personality of community**

3. Upon the registration of its rules in terms of section 19(1), a community acquires juristic personality with perpetual succession regardless of changes in its membership and it may, subject to such rules, this Act and any other law, in its own name— 5
- (a) acquire and hold rights and incur obligations; and
 - (b) own, encumber by mortgage, servitude or otherwise and dispose of movable and immovable property and otherwise deal with such property subject to any title or other conditions. 10

Security of tenure

4. (1) A community or person is entitled to the extent and in the manner provided for in this Act and within the available resources of the State, either to tenure which is legally secure or to comparable redress if the tenure of land of such community or person is legally insecure as a result of past racially discriminatory laws or practices. 15
- (2) An old order right held by a married person is, despite any law, practice, usage or registration to the contrary, deemed to be held by all spouses in a marriage in which such 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 section 18(3), be registered in the names of all such spouses. 20
- (3) A woman is entitled to the same legally secure tenure, rights in or to land and benefits from land as is a man, and no law, community or other rule, practice or usage may discriminate against any person on the ground of the gender of such person.

CHAPTER 3**TRANSFER AND REGISTRATION OF COMMUNAL LAND 25****Registration of communal land and new order rights**

5. (1) Communal land and new order rights are capable of being and must be registered in the name of the community or person, including a woman, entitled to such land or right in terms of this Act and the relevant community rules. 30
- (2) Despite any other law— 30
- (a) on the making of a determination by the Minister in terms of section 18, the ownership of communal land which is not State land but which is registered in the name of—
 - (i) a person;
 - (ii) a traditional leader or traditional leadership whether recognised in terms of law or not; 35
 - (iii) a communal property association contemplated in the Communal Property Associations Act, 1996 (Act No. 28 of 1996); or

- (iv) a trust or other legal entity, vests in the community on whose behalf such land is held or in whose interest such registration was effected, and such land remains subject to limitations and restrictions in relation to and rights or entitlements to such land;
- (b) the community referred to in paragraph (a) succeeds in all respects as the successor in title to such person, traditional leader or traditional leadership, communal property association, trust or other legal entity; 5
- (c) the title deed relating to land contemplated in paragraph (a) and any mortgage bond or other deed registered in respect of such land must, in the prescribed manner, be endorsed by the Registrar of Deeds to reflect the community as the registered owner of such land; and 10
- (d) the provisions of this Act must apply with the necessary changes to land contemplated in paragraph (a).
- (3) (a) A document evidencing an old order right which is cancelled or replaced by a new order right in terms of this Act, must be lodged with the Registrar of Deeds, who must endorse such document as having been cancelled. 15
- (b) If a document contemplated in paragraph (a) cannot be lodged, the Registrar must accept an appropriate affidavit to that effect by the holder of such right or the Minister.

Transfer of communal land

6. After making a determination in terms of section 18, the Minister must— 20
- (a) transfer the entire communal land determined by her or him to be the land to which a community is entitled, to such community subject to the conditions contemplated in section 18(4) which are applicable to such land;
- (b) despite any other law to the contrary, on behalf of such community and in respect of such land— 25
- (i) have a communal general plan prepared and approved in terms of the Land Survey Act, 1997 (Act No. 8 of 1997);
- (ii) have such plan registered and have a communal land register opened in terms of the Deeds Registries Act;
- (iii) transfer, by means of a Deed of Communal Land Right or other appropriate deed, the new order rights to the person or persons entitled to such rights; and 30
- (c) do any other things necessary to give effect to that determination and this section.

Functions of conveyancer

35

7. A suitably qualified official of the Department may perform the functions of a conveyancer required in terms of the Deeds Registries Act.

Registration of subsequent transactions

8. Registrable transactions in respect of communal land, including new allocations of rights in such land, arising after the opening of a communal land register, must be registered in terms of this Act and the Deeds Registries Act. 40

Conversion of registered new order right into freehold ownership

9. (1) The holder of a registered new order right may apply to the community owning the land to which such right relates for the conversion of such right into freehold ownership. 45

(2) After considering an application referred to in subsection (1), such community must, subject to its community rules and any applicable title conditions, approve or reject such application.

(3) If a community approves an application in terms of subsection (2), it may impose any condition or reserve any right in favour of the community. 5

(4) On application by the holder referred to in subsection (1), the Registrar of Deeds must in the prescribed manner record the conversion contemplated in this section.

Transfer costs and stamp duties

10. Transfer duty, value-added tax, stamp duty and deeds registration fees of office are not payable in respect of any registration required to give effect to sections 5 and 6. 10

Surveying and registration costs

11. The Minister may, from money appropriated by Parliament for this purpose, pay the costs of surveying and registration required to give effect to sections 5 and 6.

CHAPTER 4

PROVISION OF COMPARABLE REDRESS WHERE TENURE CANNOT BE LEGALLY SECURED 15

Award of comparable redress

12. (1) The Minister may, on application by the holder of an old order right which is insecure as contemplated in section 25(6) of the Constitution and which cannot be made legally secure, determine an award of comparable redress to such holder. 20

(2) An award in terms of subsection (1) may comprise—

(a) land other than the land to which the applicable old order right relates or a right in such other land;

(b) compensation in money or in any other form; or

(c) a combination of land or a right in land contemplated in paragraph (a) and compensation contemplated in paragraph (b). 25

(3) The provisions of section 18, read with the necessary changes, apply to a determination in terms of this section.

Cancellation of old order right

13. For the purposes of this Act the Minister may, with the written agreement of the holder of an old order right and on such conditions as may be agreed to, cancel such right. 30

CHAPTER 5

THE CONDUCT OF LAND RIGHTS ENQUIRY

Land rights enquiry 35

14. (1) Prior to securing an old order right in terms of section 4 or transferring communal land to a community or person in terms of section 6 or determining comparable redress in terms of section 12, the Minister must institute a land rights enquiry.

- (2) A land rights enquiry must enquire into—
- (a) the nature and extent of all—
 - (i) constitutional and human;
 - (ii) old order and other land and tenure; and
 - (iii) competing or conflicting, 5
- rights, interests and tenure of land, whether legally secure or not which are or may be affected by such enquiry;
- (b) the interests of the State;
 - (c) the options available for legally securing any legally insecure rights;
 - (d) the provision of access to land on an equitable basis; 10
 - (e) spatial planning and land use management, land development, and the necessity for conducting a development or a de-densification or other land reform programme, and the nature of such programme;
 - (f) the need for comparable redress and the nature and extent of such redress;
 - (g) the measures required to ensure compliance with section 4 and to promote 15 gender equality in the allocation, registration and exercise of new order rights;
 - (h) any matter relevant to a determination to be made by the Minister in terms of section 18;
 - (i) any other matter as prescribed or as instructed by the Minister,
- and must endeavour to resolve any dispute relating to land and rights in, or to, land and a report on such matters must be submitted to the Minister. 20

Designation or appointment of land rights enquirer

15. (1) The Minister may in the prescribed manner designate an officer of the Department or appoint a suitable person who is not such an officer to conduct a land rights enquiry. 25

(2) The Minister may, with the concurrence of the Minister of Finance, remunerate and pay allowances to a land rights enquirer who is not a State official.

Notice of land rights enquiry

16. The Minister must, in the appropriate national, regional and local media and in the prescribed manner, publish— 30

- (a) a notice of an enquiry inviting interested parties to participate in such enquiry; and
- (b) a notice regarding the determinations made consequent upon a completed land rights enquiry.

Powers and duties of land rights enquirer 35

17. (1) A land rights enquirer must conduct a land rights enquiry in the prescribed manner, which must be open and transparent and must afford the communities and persons who may be affected by such enquiry an opportunity to participate in such enquiry.

(2) A land rights enquirer must adopt measures to ensure that decisions made by a community are in general the informed and democratic decisions of the majority of the members of such community who are 18 years of age or older and are present or represented by a proxy at a community meeting of which adequate notice of not less than 21 days was given. 40

(3) A land rights enquiry report contemplated in section 14(2) must— 45

- (a) include recommendations in respect of the matters which require determinations to be made by the Minister;

- (b) prior to being submitted to the Minister, be made available on adequate notice for inspection by any interested community or person who must be afforded an opportunity to make representations in relation to any matter relevant to such enquiry; and
- (c) be submitted to the Minister together with any such representations and supporting documents for his or her consideration. 5
- (4) Whenever relevant to an enquiry, a land rights enquirer and any person assisting such enquirer, may in the prescribed manner and having regard to the constitutional rights of affected persons—
- (a) compel the provision of written and verbal evidence; 10
- (b) enter and search premises and take possession of documents and articles; and
- (c) convene and attend meetings of interested persons.
- (5) A land rights enquirer has all other powers and duties which the Minister determines are necessary for the effective conduct of such enquiry.

Determination by Minister 15

18. (1) If the Minister, having received a report by a land rights enquirer, is satisfied that the requirements of this Act have been met, he or she must, subject to subsections (4) and (5) and having regard to—
- (a) such report;
- (b) all relevant law, including customary law and law governing spatial planning, local government and agriculture; 20
- (c) the old order rights of all affected right holders;
- (d) the need to provide access to land on an equitable basis; and
- (e) the need to promote gender equality in respect of land,
- make a determination as contemplated in subsections (2) and (3). 25
- (2) The Minister must, where applicable, determine the location and extent of the land to be transferred to a community or person.
- (3) The Minister must, subject to subsections (4) and (5), determine that—
- (a) the whole of an area of communal land which is, or is to be, surveyed must be registered or remain registered in the name of a specified community; 30
- (b) the whole of an area contemplated in paragraph (a) is to be subdivided into portions of land, each of which must be registered in the name of a person and not a community;
- (c) a part of an area contemplated in paragraph (a)—
- (i) must be registered or remain registered in the name of a specified community, and part of such land must be subdivided and registered as contemplated in paragraph (b); and 35
- (ii) is reserved to the State; and
- (d) an old order right is to be—
- (i) confirmed; 40
- (ii) converted into ownership or into a comparable new order right, and the Minister must determine the nature and extent of such right; or
- (iii) cancelled in accordance with Chapter 4 and—
- (aa) the land to which such right relates must be incorporated into land held or to be held by a community; and 45
- (bb) the holder of such right must be awarded specified comparable redress as contemplated in Chapter 4.
- (4) In making a determination in terms of this section, the Minister must take into account the Integrated Development Plan of each municipality having jurisdiction and, after consultation with the Minister responsible for local government, each municipality and other land-use regulator having jurisdiction may—
- (a) reserve a right to the State, including a municipality, and stipulate any land-use or other condition which in her or his opinion is necessary—
- (i) for a public purpose or which is in the public interest; 50

- (ii) to protect the affected land, rights in such land, an owner of such land and a holder of such rights; or
 - (iii) to give effect to this Act;
 - (b) confer a new order right on a woman—
 - (i) who is a spouse of a male holder of an old order right, to be held jointly with her spouse; 5
 - (ii) who is the widow of a male holder of an old order right, or who otherwise succeeds to such right, to be held solely by such woman; or
 - (iii) in her own right; and
 - (c) validate a putative old order right which was acquired in good faith and declare invalid such a right which was not acquired in good faith, and must determine the holder or holders of a new order right. 10
- (5) The Minister may not make a determination in terms of this section which relates to land and a right in, or to, land which is directly affected by a dispute until such dispute is resolved by mediation, other alternative traditional or non-traditional dispute resolution mechanism or by a court, and must adopt measures to ensure that such dispute is resolved. 15

CHAPTER 6

CONTENT, MAKING AND REGISTRATION OF COMMUNITY RULES

- Content, making and registration of community rules** 20
- 19.** (1) A community whose communal land is, or is to be, registered in its name must in the prescribed manner, to which the provisions of section 17(1) and (2) read with the necessary changes apply, make and adopt its community rules and have them registered.
- (2) Community rules must, subject to any other applicable laws, regulate—
- (a) the administration and use of communal land by the community as land owner within the framework of law governing spatial planning and local government; 25
 - (b) such matters as may be prescribed; and
 - (c) any matter considered by the community to be necessary.
- (3) Community rules are binding on the community and its members and must be accessible to the public and are on registration deemed to be a matter of public knowledge. 30
- (4) (a) A community must apply to the Director-General for the registration of its adopted rules and he or she must refer such application to the Board having jurisdiction in the area for a report on the suitability of such rules. 35
- (b) The Director-General must consider the adopted community rules, any information submitted and the report of the Land Rights Board having jurisdiction in the area.
- (c) If the Director-General is satisfied that the adopted community rules comply with the requirements of the Constitution and this Act, a Registration Officer in the Department designated by her or him for that purpose must, in the prescribed manner, register such rules. 40
- (d) If the Director-General is not satisfied that community rules comply with the requirements and intention of the Constitution and this Act, she or he must notify the community of the steps to be taken to make such rules so comply.
- (5) Should a community fail to adopt and have community rules registered, the standard rules prescribed by regulation as adapted by the Minister to such community, are deemed to be the rules of such community and must be registered as the rules of such community. 45

Amendment of community rules

20. (1) A community may, in a general meeting and in the manner applicable to the adoption of community rules, amend or revoke any community rule.

(2) An amendment or revocation contemplated in subsection (1) must be registered and only becomes effective on registration.

5

CHAPTER 7**LAND ADMINISTRATION COMMITTEE****Establishment of land administration committee**

21. (1) A community must establish a land administration committee which may only be disestablished if its existence is no longer required in terms of this Act.

10

(2) If a community has a recognised traditional council, the powers and duties of the land administration committee of such community may be exercised and performed by such council.

(3) In the exercise of the powers and the performance of the duties of a land administration committee as contemplated in subsection (2), a traditional council must ensure that the composition of its membership satisfies the requirements of section 22(4) and (5).

15

(4) When a traditional council acts as a land administration committee as contemplated in this section, its functional area of competence is the administration of land affairs and not traditional leadership as contemplated in Schedule 4 to the Constitution.

20

(5) Any provision in this Act which refers, or is applicable, to a traditional council is intended to establish norms and standards and a national policy with regard to communal land rights, to effect uniformity across the nation.

Composition

25

22. (1) A land administration committee must consist of a total number of members as determined by the applicable community rules and must comply with this section.

(2) Subject to section 21(2), the members of a land administration committee must be persons not holding any traditional leadership position and must be elected by the community in the prescribed manner.

30

(3) At least one third of the total membership of a land administration committee must be women.

(4) One member of a land administration committee must represent the interests of vulnerable community members, including women, children and the youth, the elderly and the disabled.

35

(5) Each of—

- (a) the Minister, in respect of the Department;
- (b) the chairperson of the relevant Land Rights Board;
- (c) the relevant provincial Member of the Executive Council responsible for agriculture;
- (d) the relevant provincial Member of the Executive Council responsible for local government matters; and
- (e) every municipality in whose area of jurisdiction a land administration committee functions,

40

may designate a person to be a non-voting member of a land administration committee.

45

Term of office

23. The term of office of the members of a land administration committee is determined by community rules but may not exceed a period of five years.

Powers and duties

24. (1) To the extent provided by this Act and subject to any other applicable law, a land administration committee represents a community owning communal land and has the powers and duties conferred on it by this Act and the rules of such community.

(2) A decision by a land administration committee which has the effect of disposing of communal land or a right in communal land to any person, including a community member, does not have force and effect until ratified in writing by the Board having jurisdiction. 5

(3) In the exercise of its powers and the performance of its duties a land administration committee must— 10

- (a) take measures towards ensuring—
 - (i) the allocation by such committee, after a determination by the Minister in terms of section 18, of new order rights to persons, including women, the disabled and the youth, in accordance with the law; and
 - (ii) the registration of communal land and of new order rights; 15
- (b) establish and maintain registers and records of all new order rights and transactions affecting such rights as may be prescribed or as may be required by the rules;
- (c) promote and safeguard the interests of the community and its members in their land; 20
- (d) endeavour to promote co-operation among community members and with any other person in dealing with matters pertaining to land;
- (e) assist in the resolution of land disputes;
- (f) continuously liaise with the relevant municipality, Board and any other institution concerning the provision of services and the planning and development of the communal land of the community; 25
- (g) perform any other duty prescribed by or under this Act or any other law; and
- (h) generally deal with all matters necessary for or incidental to the exercise of its powers and the performance of its duties. 30

CHAPTER 8**LAND RIGHTS BOARD**UNIVERSITY of the
WESTERN CAPE**Establishment of Land Rights Board**

25. The Minister may, by notice in the *Gazette*—

- (a) establish one or more Land Rights Boards having jurisdiction in such areas as she or he may determine; and 35
- (b) disestablish a Board or amend its area of jurisdiction.

Composition

26. (1) Members of a Board must be appointed by the Minister in accordance with the prescribed nomination and selection processes.

(2) A Board consists of— 40

- (a) one representative from each of the organs of State determined by the Minister;
- (b) two members nominated by each Provincial House of Traditional Leaders contemplated in section 212(2)(a) of the Constitution having jurisdiction in the area of that Board; 45
- (c) one member nominated by institutions or persons in the commercial or industrial sector;
- (d) seven members from the affected communities, of whom at least—
 - (i) one must represent the interests of child-headed households;
 - (ii) one must represent the interests of persons with disabilities; 50

- (iii) one must represent the interests of the youth as defined in section 1 of the National Youth Commission Act, 1996 (Act No. 19 of 1996); and
- (iv) one must represent the interests of female-headed households.
- (3) In appointing members of a Board, the Minister must—
- (a) have due regard to the required knowledge of land, land tenure, old and new order rights and the required capabilities, including relevant skills, expertise and experience; and 5
- (b) ensure that at least a third of the Board members are women.
- (4) A member of a Board is appointed for a period of five years but the Minister may in her or his discretion extend such term of office by a further period not exceeding six months until a new Board member has been appointed. 10
- (5) (a) The Minister must, after consultation with the appointed Board members, appoint a chairperson and a deputy chairperson from among such members.
- (b) When a chairperson is unable to perform her or his duties, the deputy chairperson must perform such duties. 15
- (6) The Minister must publish in the *Gazette* the names of, and position held by, each appointee to a Board, the date on which each appointment takes effect and such other information as may be prescribed.
- (7) If a member of a Board dies or vacates her or his office before the expiry of her or his term of office, the Minister may appoint a person to fill the vacancy for the remaining portion of such term. 20

Disqualification as Board member

27. (1) The Minister must not appoint as a member of a Board a person who—
- (a) is not a South African citizen or a permanent resident and is not ordinarily resident in the Republic; 25
- (b) is an unrehabilitated insolvent;
- (c) is declared by a court of law to be mentally incompetent or is detained under the Mental Health Act, 1973 (Act No. 18 of 1973), or any other applicable law;
- (d) has been removed from an office of trust on account of improper conduct; 30
- (e) has had his or her name removed from any professional register on account of misconduct and who has not been reinstated;
- (f) has been determined by a court, tribunal or forum as contemplated by the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (Act No. 4 of 2000), to have contravened section 7 or any other provision of that Act; or 35
- (g) is an elected political representative in the national, provincial or local sphere of government.
- (2) A member of a Board must vacate her or his office if she or he—
- (a) becomes disqualified in terms of subsection (1) from being appointed as a member of a Board; 40
- (b) resigns by written notice addressed to the Minister;
- (c) is removed from office by the Minister on reasonable grounds, after consultation with the Board; or
- (d) has, without the leave of the Board, been absent from two or more meetings of the Board during a continuous twelve-month period. 45

Powers and duties of Board

28. (1) A Board must, in the prescribed manner and in respect of any matter contemplated by or incidental to this Act—
- (a) advise the Minister and advise and assist a community generally and in particular with regard to matters concerning sustainable land ownership and use, the development of land and the provision of access to land on an equitable basis; 50
- (b) liaise with all spheres of government, civil institutions and other institutions;

- (c) monitor compliance with the Constitution and this Act; and
 - (d) exercise any other power and perform any other duty in terms of this Act or assigned to such Board by the Minister.
- (2) A Board and any Board member acting in her or his official capacity may, in the exercise of a power or in the performance of a duty of a Board— 5
- (a) at any time enter upon any communal land;
 - (b) enquire into any relevant matter;
 - (c) inspect any document in the possession of any land administration committee or any rights holder concerning old and new order rights and make copies of such document; and 10
 - (d) convene and attend meetings of a community or land administration committee.
- (3) A Board has all powers necessary or incidental to the performance of its duties.

Resources of Board

29. The Department must, from monies appropriated by Parliament for this purpose, provide a Board with the staff, accommodation and financial and other resources required by such Board. 15

Service conditions of Board members

30. The Minister must, in terms of the Public Finance Management Act, 1999 (Act No. 1 of 1999), determine — 20

- (a) the conditions of service of Board members; and
- (b) with the concurrence of the Minister of Finance, the remuneration and allowances payable to Board members who are not employed by the State from monies appropriated by Parliament for this purpose.

CHAPTER 9 25

KWAZULU-NATAL INGONYAMA TRUST LAND

Laws governing KwaZulu-Natal Ingonyama Trust Land of the 30

31. Communal land to which the KwaZulu-Natal Ingonyama Trust Act, 1994 (Act No. 3 KZ of 1994), applies is, from the date of commencement of this Act, governed by the provisions of that Act as amended by this Act and, to the extent provided for in this Chapter, by the provisions of this Act. 30

Ingonyama Land Rights Board for KwaZulu-Natal

32. From the date of commencement of this Act, the KwaZulu-Natal Ingonyama Trust Board established by section 2A of the KwaZulu-Natal Ingonyama Trust Act, 1994 (Act No. 3 KZ of 1994)— 35

- (a) is known as the Ingonyama Land Rights Board for KwaZulu-Natal;
- (b) constitutes both the Board so established by that Act and, despite the provisions of sections 25, 26 and 27 of this Act, the Land Rights Board for KwaZulu-Natal as contemplated in Chapter 8, with all the powers and duties provided for in both the KwaZulu-Natal Ingonyama Trust Act, 1994, and in this Act; 40
- (c) is headed in perpetuity by the Ingonyama referred to in section 13 of the KwaZulu Amakhosi and Iziphakanyiswa Act, 1990 (Act No. 9 KZ of 1990), or its successors in title or nominee as the chairperson and member of the Ingonyama Land Rights Board; and 45

- (d) continues to be constituted by the Ingonyama and the members appointed by the Minister in terms of section 2A of the KwaZulu-Natal Ingonyama Trust Act, 1994, until it is reconstituted in terms of section 33 of this Act.

Reconstitution of KwaZulu-Natal Land Rights Board

33. (1) Upon the termination of the term of office of the appointed members of the KwaZulu-Natal Ingonyama Land Rights Board immediately after the date of commencement of this Act, the Board must be reconstituted in terms of sections 26 and 27. 5
- (2) From the date of such termination all the provisions of Chapter 8, with the exception of section 25(a), apply to such Board.

Powers and duties in relation to Ingonyama land

34. From the date of commencement of this Act, the powers and duties provided for in relation to land to which the KwaZulu-Natal Ingonyama Trust Act, 1994 (Act No. 3 KZ of 1994), applies, must be exercised or performed by—
- (a) such Board, when communal land is transferred to a community or person in terms of section 6; 15
 - (b) the Minister, after consultation with such Board, when cancelling an old order right in terms of section 13;
 - (c) the Minister or such Board, when a land rights enquiry is instituted in terms of section 14(1);
 - (d) the Minister, in relation to the designation of an officer of the Department or such Board in relation to the appointment of a suitable person who is not such an officer, when a land rights enquirer is designated or appointed in terms of section 15; and 20
 - (e) the Minister or such Board, when a notice of a land rights enquiry or a determination is published in terms of section 16. 25

Inconsistency in laws

35. In the event of any inconsistency between this Act and the KwaZulu-Natal Ingonyama Trust Act, 1994 (Act No. 3 KZ of 1994), this Act prevails.

CHAPTER 10

GENERAL PROVISIONS

Provision of assistance to community

36. The Minister may designate an officer of the Department to assist a community or person to give effect to the implementation of this Act.

Provision of municipal services and development infrastructure on communal land

37. Despite the other provisions of this Act and the provisions of any other law, no law must prohibit a municipality from providing services and development infrastructure and from performing its constitutional functions on communal land however held or owned. 35

Acquisition of land by Minister

38. (1) The Minister may, for the purposes of this Act, purchase, acquire in any other manner or, consistent with section 3 of the Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000), expropriate land, a portion of land or a right in land.

(2) The Expropriation Act, 1975 (Act No. 63 of 1975), must, with the necessary changes, apply to an expropriation under this Act, and any reference to the Minister of Public Works in that Act must be construed as a reference to the Minister for the purpose of such expropriation. 5

(3) Where the Minister expropriates land, a portion of land or a right in land under this Act, the amount of compensation and the time and manner of payment must be determined either by agreement or by a court in accordance with section 25(3) of the Constitution. 10

Application of Act to other land-reform beneficiaries

39. This Act, read with the necessary changes, applies to beneficiaries of communal land or land tenure rights in terms of other land-reform laws. 15

Extension of access to courts

40. The Minister and a Board, in their capacities as such and on behalf of any community or person, each has the legal capacity to institute or intervene in any legal proceedings arising from, or related to, this Act.

Offences 20

41. (1) A person who—

(a) hinders, obstructs or unduly influences any other person in the exercise of the powers or the performance of the duties conferred on or vested in such other person in terms of this Act;

(b) unlawfully requires any other person to refrain from exercising a right in terms of this Act; or 25

(c) in any manner prevents any other person from exercising such a right, is guilty of an offence.

(2) Any person who grants or purports to grant to any other person, other than a member of a community, a new order right in communal land— 30

(a) in contravention of, or without complying with, a community rule;

(b) without the prior consent of the community or its land administration committee or, in the case of State land, the consent of the Minister,

is guilty of an offence.

(3) A person who, without good cause— 35

(a) having been subpoenaed to appear before a land rights enquirer, does not attend at the time and place stated in the subpoena;

(b) having appeared in response to a subpoena by a land rights enquirer, fails to remain in attendance until excused;

(c) refuses to take an oath or affirmation as a witness when a land rights enquirer so requires; 40

(d) refuses to answer any question fully and to the best of her or his knowledge and belief;

(e) fails to produce any book, document or object when required to do so; or

(f) does or says anything in relation to a land rights enquirer which if said or done in relation to a court of law, would be contempt of court, 45

is guilty of an offence.

Act No. 11, 2004**COMMUNAL LAND RIGHTS ACT, 2004****Penalties**

42. A person convicted of an offence in terms of this Act is liable on conviction—
- (a) in the case of an offence referred to in section 41(1) or (2), to a fine or imprisonment for a period not exceeding two years, or to both a fine and such imprisonment; and
 - (b) in the case of an offence referred to in section 41(3), to the penalty applicable to a similar offence in a magistrate's court.

5

Delegation of powers

43. The Minister and the Director-General may delegate any power, except the power to expropriate land, a portion of land or a right in land, which has been conferred upon the Minister or the Director-General, respectively, in terms of this Act.

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Regulations

44. (1) The Minister may make any regulation with regard to any matter which is governed by or incidental to the objects or implementation of this Act.
- (2) Any regulations made under this section must be tabled in Parliament.

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Act binds State

45. This Act binds the State.

Amendment and repeal of laws

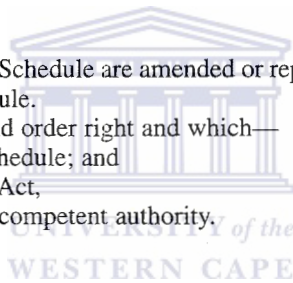
46. (1) The laws mentioned in the Schedule are amended or repealed to the extent set out in the third column of the Schedule.
- (2) Any law which regulates an old order right and which—
- (a) is not mentioned in the Schedule; and
 - (b) is not in conflict with this Act,
- remains in force until repealed by a competent authority.

20

Short title and commencement

47. This Act is called the Communal Land Rights Act, 2004, and comes into operation on a date to be determined by the President by proclamation in the *Gazette*.

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Schedule

Amendment or repeal of laws

(Section 46)

Part 1: Laws enacted by Parliament

No. and year of law	Short title	Extent of amendment or repeal	5
Act No. 38 of 1927	Black Administration Act, 1927	Repeal of sections 6 and 7.	
Act No. 47 of 1937	Deeds Registries Act, 1937	<p>1. Amendment of section 3 by the insertion in subsection (1) after paragraph (d)bis of the following paragraphs:</p> <p>“(d)ter register deeds of communal land rights as contemplated in the Communal Land Rights Act, 2004;</p> <p>(d)ter(1A) register the conversion to full ownership of old and new order rights as contemplated in the Communal Land Rights Act, 2004;</p> <p>(d)ter(1B) register the cancellation of old order rights as contemplated in the Communal Land Rights Act, 2004.”</p> <p>2. Insertion after section 16B of the following section: “Registration of new order rights 16C. New order rights shall be transferred by means of a Deed of Communal Land Right as contemplated in the Communal Land Rights Act, 2004.”</p> <p>3. Amendment of section 102—</p> <p>(a) by the insertion after the definition of “court” of the following definition: “Deed of Communal Land Right’ means a deed of communal land right as defined in section 1 of the Communal Land Rights Act, 2004;”;</p> <p>(b) by the substitution for the definition of “general plan” of the following definition: “general plan’ means a plan which represents the relative positions and dimensions of two or more pieces of land and has been signed by a person recognized by law as a land surveyor, and which has been approved, provisionally approved or certified as a general plan by a surveyor-general or other officer empowered under any law so to approve, provisionally approve or certify a general plan, and includes a general plan or copy thereof prepared in a surveyor-general’s office and approved, provisionally approved or certified as aforesaid, or a general plan which has at any time, prior to the commencement of this Act, been accepted for registration in a deeds registry or surveyor-general’s office; and includes a communal general plan as contemplated in the Communal Land Rights Act, 2004;”;</p> <p>(c) by the addition to the definition of “immovable property” of the following paragraph: “(e) new order rights as contemplated in the Communal Land Rights Act, 2004;”; and</p> <p>(d) by the substitution for the definition of “person” of the following definition: “person’, for the purpose of [the registration of immovable trust property only] any registration in terms of this Act, includes a trust and, for the purpose of the Communal Land Rights Act, 2004, includes a community;”</p>	<p>10</p> <p>15</p> <p>20</p> <p>25</p> <p>30</p> <p>35</p> <p>40</p> <p>45</p> <p>50</p> <p>55</p> <p>60</p>

Act No. 11, 2004

COMMUNAL LAND RIGHTS ACT, 2004

No. and year of law	Short title	Extent of amendment or repeal	
Act No. 112 of 1991	Upgrading of Land Tenure Rights Act, 1991	1. Repeal of section 20. 2. Substitution for section 25A of the following section: <u>“25A. As from the coming into operation of the Communal Land Rights Act, 2004, this Act shall apply throughout the Republic.”</u> 3. Amendment of Schedule 1 by the insertion of the following items before item 1, items 1 to 6 becoming items 3 to 8: <u>“1. Any quitrent title referred to in Proclamation 196 of 1920.</u> <u>2. Any quitrent title referred to in Proclamation 170 of 1922.”</u>	5 10 15
Act No. 31 of 1996	Interim Protection of Informal Land Rights Act, 1996	Amendment of section 5 by the deletion of subsection (2).	
Act No. 8 of 1997	Land Survey Act, 1997	Amendment of section 1 by the substitution for the definition of “general plan” of the following definition: <u>“‘general plan’ means a plan which, representing the relative positions and dimensions of two or more pieces of land, has been signed by a person recognised under any law then in force as a land surveyor, or which has been approved or certified as a general plan by a Surveyor-General and includes a general plan or a copy thereof prepared in a Surveyor-General’s office and approved or certified as such or a general plan which has, prior to the commencement of this Act, been lodged for registration in a deeds registry or Surveyor-General’s office in the Republic or any area which became part of the Republic at the commencement of the Constitution, 1993 and, for the purposes of the Communal Land Rights Act, 2004, includes a communal general plan contemplated in that Act;”</u>	20 25 30 35

Part 2 : Laws of the former KwaZulu

No. and year of law	Short title	Extent of amendment or repeal	
Act No. 3 KZ of 1994	KwaZulu-Natal Ingonyama Trust Act, 1994	<p>1. Amendment of section 2 —</p> <p>(a) by the substitution for subsection (2) of the following subsection:</p> <p>“(2) The Trust shall, in a manner not inconsistent with the provisions of this Act, be administered for the benefit, material welfare and social well-being of the members of the tribes and communities as contemplated in the KwaZulu Amakhosi and Iziphakanyiswa Act, 1990 (Act No. 9 KZ of 1990), referred to in the second column of the Schedule, established in a district referred to in the first column of the Schedule, and the residents of such a district to whom the land referred to in section 3 and the real rights and other rights in such land must, subject to this Act and any other law, be transferred.”.</p> <p>(b) by the substitution for subsection (5) of the following subsection:</p> <p>“(5) The Ingonyama shall not encumber, pledge, lease, alienate or otherwise dispose of any of the said land or any interest or real right in the land, unless he has obtained the prior written consent of the [traditional authority or community authority,] community concerned, and otherwise than in accordance with the provisions of any applicable law.”.</p>	<p>5</p> <p>10</p> <p>15</p> <p>20</p> <p>25</p> <p>30</p>

Part 3: Laws of the former Bophuthatswana

No. and year of law	Short title	Extent of amendment or repeal	
Act No. 39 of 1979	Bophuthatswana Land Control Act, 1979	Repeal of the whole.	35

Part 4: Laws of the former Venda

No. and year of law	Short title	Extent of amendment or repeal	
Act No. 16 of 1986	Venda Land Control Act, 1986	Repeal of the whole.	40
Proclamation 45 of 1990	Venda Land Affairs Proclamation, 1990	Repeal of sections 1 to 5, 8 to 13, 20 to 43 and so much of sections 6, 7 and 14 to 19 as has not been assigned to the government of Limpopo province under section 235(8) of the Constitution of the Republic of South Africa, 1993 (Act No. 200 of 1993).	45

Part 5: Laws of the former Ciskei

No. and year of law	Short title	Extent of amendment or repeal	
Act No. 14 of 1982	Ciskei Land Regulation Act, 1982	Repeal of the whole with effect from the date of registration of a community's community rules under section 19(1) of "this Act", but only within the area comprised of that community's communal land and with effect from the date on which Proclamation No. R. 188 of 1969 is repealed in that area.	5 10

Part 6: Laws of the former Qwaqwa

No. and year of law	Short title	Extent of amendment or repeal	
Act No. 15 of 1989	Qwaqwa Land Act, 1989	Repeal of the whole with effect from the date of registration of a community's community rules under section 19(1) of "this Act", but only within the area comprised of that community's communal land.	15

Part 7: Laws of the former KwaNdebele

No. and year of law	Short title	Extent of amendment or repeal	
Act No. 11 of 1992	KwaNdebele Land Tenure Act, 1992	So much as has not been repealed.	20

Part 8: Other laws

No. and year of law	Short title or description	Extent of amendment or repeal	
Proclamation 26 of 1936	Administrative Area Regulations — Unsurveyed Districts: Transkeian Territories	Repeal of the whole with effect from the date of registration of a community's community rules under section 19(1) of "this Act", but only within the area comprised of that community's communal land.	25 30