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Strategising Consultation: Government Approaches to Legitimising Land Tenure Reform Policies in Post-apartheid South Africa

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Abstract

This paper considers struggles of legitimation by the South African government over the first ten years of the country's democracy, by focusing on its engagement with policy-making processes in relation to land tenure reform in the former 'homelands' of the country. During such periods of upheaval and change, the achievement of legitimacy by the state will only be achieved through deeply political processes. In exploring the strategies adopted by policy-makers and bureaucrats to legitimise contested political change, it considers how they were influenced by wider ideals of participatory policy-making and consultation. However, in the process, the paper also demonstrates how they were further shaped by the everyday realities determining the practices of governing, as well as the changing extent to which government officials were constrained in their own ability to influence policy. In this context, it is argued, claims of participatory policy-making largely came to constitute strategies of legitimation for policies that had already been formulated.

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Introduction

In 2004, a piece of South African post-apartheid legislation – the Communal Land Rights Act no. 11 of 2004 (CLARA) – that was to reform land tenure of people living in the former 'bantustans' or 'homelands' of the country, was passed unanimously by the South African Parliament. Such apparent unanimity, however, conceals the extent to which the process towards this moment was deeply contested. The draft legislation became a crux around which different groups pitted themselves against each other in this process: government bureaucrats, African National Congress (ANC) politicians, traditional leaders in the former 'homelands', human rights lawyers, land sector NGOs, rural women and gender activists. Other battles were fought through the media, but also in the new formal participatory spaces of the democratic state. The debates revolved around the nature of tradition and custom, customary law, the role of traditional leaders and women's rights. Controversy also focused on the role and legitimacy of the post-apartheid state in these policy and law-making processes of tenure reform. While these conflicts became linked in the minds of many, it is the latter controversies that are the focus of this paper.

Considerable attention has been directed towards the capacity of poor and/or weak states to achieve 'development' (Evans, 1995; Grindle, 1996; Englebert, 2000; Wade, 2004). Others, many of whom have focused on Africa, have recognised the role of the state as a medium through which individual rulers have channelled their personal self-enrichment or survival strategies (Clapham, 1996), thereby contributing to their criminalisation (Bayart, Ellis et al., 1999). While the latter may not depend upon legitimacy for their criminal capacity, 'governmental legitimacy' – 'why the group of people who rule it should have any right to act on behalf of those who are merely its subjects or citizens' (Clapham, 1996: 10) – will be an important factor in the capacity of developmental states. Its achievement, however, will involve deeply political processes, particularly in a time of such upheaval and change as in South Africa at the time of its transition: '[state] capacity can wax and wane over time; authority and legitimacy can be contested and undermined as well as developed' (Grindle, 1996: 14). Recognising the processes through which legitimacy is contested or developed underlines the constructed, negotiated and therefore historically context-bound nature of the concept (Hudson, 2001).[1] Moreover, the line between 'state' and 'society' – the autonomy of one from the other – can hardly continue to be drawn persuasively (Mitchell, 2006). Indeed, in Africa, it has been argued, such boundaries 'are neither clear not consistent' (Berman, 1998: 340) and 'civil society in the sense in which it ostensibly exists in Western liberal democracies does not exist in Africa' (*ibid*; see also Comaroff and Comaroff 1999). Despite the exceptionalism of South Africa's transition in relation to other African countries in terms of its timing, the pervasive reach of the state at that moment and the

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[1] This contrasts with Englebert's assumption that a state is legitimate when its 'structures have evolved endogenously to its own society and there is some level of historical continuity to its institutions' (Englebert, 2000: 4). This begs the question, where does exogeneity end and endogeneity begin? Which again brings to the fore the constructed nature of legitimacy.

long duration of its existence, the similarity of its history of colonialism to that of other African countries constitutes a legacy that in many ways continues to influence its post-apartheid transition (Mamdani, 1996; Alexander, 2003). The confluence of these factors has together shaped, in a variety of ways, the nature of the struggles by those within government in achieving public legitimacy for particular policies that were to change the relations of power in post-apartheid South Africa. The policies that are the focus of this paper were those drawn up to reform and secure land tenure in the 'homelands'. Given the saliency of the debates surrounding those reforms, securing such legitimacy was particularly important.

Between 1994 and 2004, between South Africa's advent of democracy and when CLARA was passed into law, the state, constituted by the everyday practices of its armature of government bureaucrats, underwent significant change. Such change affected relations within and between those bureaucrats and those in the non-governmental land sector (the NGLS). They, in turn, were not isolated from wider change. For example, the political and economic crises around the world in the 1980s brought demands for greater responsiveness by government and enhanced processes of representation and participation in democratic processes (Grindle, 1996; Comaroff and Comaroff, 2001). These ideals chimed with those of anti-apartheid activists in South Africa, who for so long had been fighting for their inclusion as full citizens of the country, and they greatly influenced South Africa's transition. They also influenced the processes through which those implementing contested political change sought to legitimise it. This working paper considers the extent to which such ideals came to shape the strategies adopted by the government to legitimise the particular policies they were formulating to secure land tenure in the 'homelands'. These strategies included undertaking research and consulting with those to be affected by the reforms. The DLA's approach to 'consultation', however, can be seen to have undergone significant change over these first ten years. Such change was shaped both by the everyday realities determining the practices of governing, and by the changing extent to which government officials were constrained, by the influence of more powerful political figures, in their own ability to influence policy. The discussion is divided between 1994 and 1999, when the South Africa's second democratic elections took place, and 1999 to 2004, when CLARA was passed into law. During the pre-1999 period, government officials had arguably more 'room for manoeuvre' in shaping policy (Clay and Schaffer 1984) than in the later period. It draws upon 12 months' qualitative fieldwork undertaken in 2005-06, as well as archival research, considering the engagements of different groups in the policy processes relating to CLARA.

The first section of the working paper situates the subsequent analysis of participatory policy-making processes within a wider theoretical discussion, before going on to describe the historical and political context in which the policy process was unfolding. To this end, it first introduces the sites called 'homelands' that the government was left to

'reform' following the end of apartheid in 1994. This locates the politics aroused by such reforms: the politics of poverty, of tradition, of gender equality, but ultimately the politics of representing people who, due to their particular history, their *habitus,* or 'embodied history' (Bourdieu, 1990: 56), and lack of capital, are utterly marginalised from wider political power relations. It then goes on to contextualise the interactions and changing relationship between the government and non-governmental land sector (NGLS) after 1994 to 2004. This situates the pressure that was brought to bear on the government for greater consultation by those within the NGLS, after the government's plans for tenure reform in the form of the Communal Land Rights Bill were first announced in 2001. Against this context, the following two sections go on to discuss the strategies of legitimation adopted by the government in supporting their particular approaches to tenure reform in the 'homelands'. In problematising such strategic engagements with policy-making, the paper finally interrogates the extent to which the legitimacy that the government was ultimately able to claim in such policy processes was compromised.

Participating in policy processes

In South Africa, the transition from 'bureaucratic despotism' (Berman, 1998: 314) to a liberal democracy is widely considered to have been remarkable. Prior to 1994, due to the state's limited capacity, 'a plethora of multipartite fora' contributed to 'bureaucratic tasks' such as the 'formulat[ion] and implement[ation] of policy documents, proposed legislation and regulations' (Beall, Gelb et al. 2005: 686). But after 1994, former National Party Afrikaner bureaucrats continued in their positions in government. At the same time, however, the doors of the bureaucracy were opened to thousands of former anti-apartheid activists and loyal ANC supporters (Lodge, 2002). Initially, policy-making continued to involve the variety of groups, advisory fora and NGOs, some of which had been hurriedly constituted to facilitate the transition. How did these processes play out in terms of the relations between and the legitimacy attained by those representing the post-apartheid state and those claiming their right to participate in such processes as part of 'civil society'?

Criticism has been levelled at a model of policy-making that sees it as a rational, linear ideal (Fischer, 1998; Keeley and Scoones, 2003) – or the 'stages heuristic' (Sabatier, 1997). It is argued instead that policy processes are frequently distinctly non-linear; they are political, incremental and messy (Lindblom, 1959; Shore and Wright, 1997; Keeley, and Scoones, 2003). Mosse has reminded us of 'the complexity of policy-making' and that 'hegemony has to be *worked out*, not imposed; it is 'a terrain of struggle'' (Mosse, 2004: 644, 646 – quoting Li, 1999: 316). And he has argued convincingly for the need to 'examine the way in which policy ideas are produced socially' (ibid*:* 646). Seeing policy-making in linear terms has been criticised for treating 'the generation of policy as a value-free process' (Harrison, 2002: 587) – that what is planned for at the level of policy is what will unquestionably unfold. Moreover, it has served as an 'ideal' that has often

framed '[w]hat counts as justified belief and valid knowledge which sets limits to the kind of questions and information that are acceptable in the political debate' (Hajer and Wagenaar, 2003: 13) – that is, 'ignore[s] or undervalue[s]' subjective states or subjective values (Keat & Urry, 1982: 162).

In countering these criticisms, following the good governance agendas of the late 1980s and 1990s and in line with the participatory turn in development, 'participation' and the valorisation of 'local' knowledge was widely embraced as a 'functional necessity for improving policy making' (Mohan and Stokke 2000: 252). Concerns have been raised, however, that 'the blanket use of participatory language may hide the complex interaction of history and individual positioning that make the meanings of participation extremely variable' (Harrison, 2002: 593). In this vein, Williams has called for 'a more explicitly political analysis of [the..] impact [of participation]' (2004: 567). To this end, he sees a need to 'focus on uncovering the knowledge and performances required to (re-) negotiate political space' and 'understanding the processes by which cultural capital (in Pierre Bourdieu's sense) is deployed to political ends' (2004: 567).

This working paper responds to these calls in considering the extent to which the government drew upon such notions of participatory policy-making in justifying their particular approach to tenure reform. This had considerable influence on the policy process. Drawing attention to the issues highlighted in criticisms of the ideals of policy-making is particularly relevant to discussion here of the policy and law-making processes relating to CLARA. These processes were often designed to concretise certain understandings of a particular state of affairs as being a 'problem', to be 'solved' by adopting a particular policy and, ultimately, passing a piece of legislation. But such processes involve contestations between individuals and groupings to achieve legitimacy for particular readings of knowledge, which will in turn shape the accepted identities of those they claim to represent. Bourdieu was specifically concerned with exploring the 'struggles … to impose a view of the social world' (Mahar, Harker et al., 1990: 5). In other words, power derives the achievement of 'legitimacy'; when people achieve legitimacy, they hold a form of 'capital' – symbolic capital – that epitomises power. Such legitimacy may be attained through various formal and informal processes that enable and constrain the capacity of different individuals to participate in them (Bourdieu, 1990). The extent to which the government was able to achieve legitimacy to 'impose a view of the social world' in the policy processes of CLARA will be explored below. First, however, in order to give some context to the contestations that came to the fore in such policy processes, the following section briefly introduces the sites called 'homelands' that the government was left to 'reform' following the end of apartheid in 1994.

The 'homelands' and reform

The people who were to be the subjects of post-apartheid land tenure reform policies were living in the so-called 'bantustans' or 'homelands' of the country. Such policies are to be distinguished from the other programmes of land reform embarked on by the government in 1994: redistribution – countering the extreme racial inequality in landholding by the end of apartheid – and restitution – to give land back to those who had been dispossessed of their land as a result of past racially discriminatory laws or practices. Although the 'homelands' make up just 13 percent of the land area of the country, it was estimated that 19,050,159 million[2] lived in 'rural areas'[3] of the country in 2001 (Statistics SA, 2001)[4]. Moreover, in 1997 it was estimated that more than 73 percent of those living in such areas were living in 'poverty' (Ministry for Welfare and Population Development, 1997).

While 1994 bestowed formal citizenship on all South African citizens, up to that point millions had not been considered citizens of the Republic, having been regarded as living in one or another of these ten 'homelands' that were deemed to fall outside the Republic. In 1972, these areas comprised 'a fragmented horseshoe comprising 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 – some 70 percent of the people of South Africa. They also became a 'dumping ground' for the millions of people who were removed from 'black spots'[5] 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

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[2] South Africa's Department of Land Affairs has estimated that over 21 million people are living in the former 'homelands' – Legal Resources Centre (LRC) (2006).
[3] 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).
[4] This figure includes areas outside the former homelands, including those living on commercial farms – some 3 million people: in 2002, there were some 45,818 active commercial farming units (Statistics South Africa, Agricultural Census (Census of Commercial Agriculture) *http://www.statssa.gov.za/publications/statsdownload.asp?PPN=P1101&SCH=3185*), which are likely to overlap with numbers of households. However, black labourers and their families also live on such farms: according to a survey undertaken by Social Surveys and Nkuzi Development Association, 2.9 million black South Africans lived on such farms in 2001 (*http://www.nkuzi.org.za/docs/Evictions_Summary.pdf*).
[5] The term 'black spots' was used to describe areas in white-designated farmland where black people were living.

include those relocated for the implementation of 'betterment'[6] schemes (Platzky and Walker, 1985).

Land in the homelands remained under the ownership of the state or was held in trust by the South African Development Trust, but was classified as 'communal' by the apartheid authorities and administered by chiefs falling within particular tribal authority areas, who were granted jurisdiction over particular areas and communities. With such large numbers of people being moved into the 'bantustans', the complexity of these jurisdictional and permit-based arrangements increased. And many of the statutes delegating powers of land administration and judicial functions continued to remain in place even after the end of apartheid. It was this mishmash of arrangements that was to be reformed by the passing of CLARA. But the legislation also had to contend with the fact that the tribal authorities also remained in place after 1994.

Although, as indicated above, the majority of people living in such areas were poor in terms of their material reality and access to capital, not everyone was. For some, the homeland administration had proved to be 'an important avenue for capital accumulation and upward social mobility' (Maloka, 1996: 175) and, after 1994, it is unsurprising that those who had been benefiting from the *status quo* would endeavour to hold onto what power they had, until then, managed to access. Chiefs, or 'traditional leaders', as they were called in the Constitution under the new dispensation, continued to be paid as bureaucrats by the post-apartheid government. But, adding to the increasingly messy local politics in such areas, with the introduction of local and provincial government, there was an increasingly unplanned overlap of the functions, or at least powers, between such traditional authorities and elected councillors (Oomen, 2005). While there were certainly framings of 'tradition' that supported the continued authority of traditional leaders over land in such areas, after 1994 there was also a groundswell of opinion in activist circles against traditional leaders, who, being unelected, were all tarred with the same undemocratic brush. It was the apparently dry matter of land tenure reform taken on by CLARA that was to run headlong into these related politics.

Civil society and the state post-1994: Changing relations between two indistinct realms

After the South African elections in 1994, black and white people, who had been in leadership positions in an array of different anti-apartheid groups, made the transition from activists to government. The DLA similarly initially recruited extensively from among

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[6] 'Betterment' describes the agricultural schemes that were implemented in order to 'solve' the overcrowding in these areas and move people from their former living arrangements in order to separate areas between dwelling plots, arable plots and grazing land (Letsoalo 1987; Hendricks 1990).

the ranks of those in the NGLS. And so, with many of those recruited being former colleagues, struggle comrades and friends of those remaining in the NGLS, the government also continued to involve those still working for land sector NGOs and the Legal Resources Centre (LRC), a public interest law firm that had been prominent in the anti-apartheid struggle, in its series of consultative Task Teams and Steering Committees working on different strands of policy formulation. In the land sector, rather than being called into question, this extent of overlap of expertise and even function between the government and the so-called NGLS, who saw themselves as 'civil society', fitted with an apparently enlightened 'participatory' approach to policy-making. A progressive Redistribution and Development Programme (RDP) was adopted to address the extensive poverty and massive inequality that was apartheid's legacy and, 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. After 1994, 'civil society' was deemed to be those associations that participated in 'the struggle' and democratisation was seen to be incomplete without them participating in decision-making (Friedman and Reitzes, 1996).

In terms of tenure reform, the activists-cum-bureaucrats in the DLA proceeded to adopt a model of tenure reform for the homelands that was to embody a 'rights-based approach' to what they saw as constituting 'the problem' in those areas: the lack of legal, or *de jure,* recognition of existing *de facto* rights that people had over their land. Prior to 1994, many of those contributing to the development of such a model had been involved in fighting forced removals from 'black spots' to the homelands through legal means – the 'legal struggle grouping'. For them, this 'rights-based approach' also became intimately linked with the legitimacy of law – a legitimacy that was now to be reclaimed by human rights lawyers from the dark days of its illegitimacy under apartheid. By 1998, a 'Land Rights Bill' (LRB) had been drafted 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. And, possibly of equal importance for those who had formulated this model of reform, was that it would avoid the transfer of ownership of the land to the 'chiefs' as leaders of their communities. Given their background as activists in the struggle against apartheid, such a solution was considered to be inherently undemocratic and therefore politically untenable (Ntsebeza, 2005).

In the face of a growing political prominence of certain traditional leaders, however, and a resurgence of discourses of 'tradition' and 'custom', that tapped into others, such as those of the 'African renaissance' and a resurrected black consciousness, the model of reform adopted in the LRB was extremely politically provocative. And then, when the LRB was disseminated to Provincial offices of the DLA, it was met with round opposition. But then, after the country's second democratic elections in 1999 ushered in far-reaching changes, a new Minister of Land and Agriculture, Thoko Didiza, was appointed by the

new President, Thabo Mbeki. She in turn replaced the Director General (DG) of the DLA – the former director of the LRC – and a number of other staff members of the DLA, many of whom had also been involved in that struggle. This instigated a turnover of many other members of its staff – many resigned in support of those who had been deposed, including key players who had been working on tenure reform. Meanwhile, the LRB was 'dropped', the new Minister making it clear that she favoured a solution that would have the backing of traditional leaders.

Many remaining or returning to the NGLS after 1999 spoke with bitterness about the way this turnover was carried out and, 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 inverted racism – many of those who left the Department at that time were white, including the former Minister and DG, while the new Minister and DG were both black – alongside criticisms of the new Minister for her 'lack of experience' and 'incompetence', and that of her new government (see e.g. Cousins (2000)). And, for many within the NGLS, the period post-1999 became defined by their perceived exclusion.

After the changes in the DLA in 1999, it was not until 2001 that the revised plans for tenure reform were made public, rather clumsily when the third draft of the Communal Land Rights Bill (CLRB) was leaked at a government-convened National Tenure Conference. This time, the model adopted was to transfer the ownership of the land to 'African traditional communities'. This model was seen by many of those who had contributed to the formulation of the defunct LRB to be a betrayal of the 'rights-based approach', a betrayal of law's recently reclaimed legitimacy, and a betrayal of the country's fledgling democracy. Aggrieved that they had not even been informed as to the government's plans for tenure reform prior to this, they directed some of their strongest criticisms towards the inadequacy of the Department's consultation exercise. Such exclusion apparently contrasted with the more participatory approach that the government had adopted in the early years of reform, at least in relation to the NGLS. And, after the Bill was formally published for comment in August the following year, it simply met with a 'barrage of criticism' (DLA informant, interview – 19 December 2005) 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 also amongst its most vocal critics, the most prominent 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. 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. 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.

From the euphoria of democracy to the practice of governing: 1994–1999

> 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, former DLA consultant, personal communication, 26 June 2005)

Despite the enthusiasm with which such a participatory approach to policy-making was adopted in the early years of the new democracy, it soon became clear that, although the principles and ideals of participation and democracy were all well and 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,1995: 8).

For those working on tenure in the government in this pre-1999, 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: any legislation to be adopted was to provide 'tenure which is legally secure or … comparable redress'[7]. They certainly lacked neither clarity nor direction in their interpretation of 'the problem'. Nevertheless, it was still essential that the government showed Parliament that proper consultation had been carried out and the energy of Departmental officials and consultants was 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 these problems. Such understandings were then elaborated in the DLA's 1997 White Paper. This

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[7] s. 25(6) of the Constitution of the Republic of South Africa.

understanding of 'consultation', producing research that would contribute to what we might now describe as 'evidence-based policy', fitted with the highly educated *habitus* of many of those contributing to the formulation of such policies. As lawyers, academics and researchers, they thereby endeavoured to translate the production of such research into a form of capital through which they could secure legitimacy for their particular approach to tenure reform, whatever its political implications.

While it is easy to find cases of problems of tenure in the former homelands, what those problems demonstrate is, or should be, an open question. But such 'consultation', or research, carried out on the basis that such problems are caused by a lack of legal security, 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', even 'tenure', may also be pushed out.

As indicated above, policy-makers will have to achieve wider legitimacy for a particular understanding of 'the problem' and its solution. Nevertheless, in recognising the top-down nature of the power conferred through their positions – though somewhat dampening those ideals of participatory democracy – it was Parliament, rather than people on the ground, to whom they were to show that proper 'consultation' had been carried out and that it supported such an interpretation. As a result, participatory processes and consultation with constituents to be affected by particular reforms became a strategy of legitimation in relation to an already-formed policy approach, as opposed to one of the initial steps taken in the formulation of policy. That is, such processes may even be designed to exclude other more problematic understandings of the situation that may fall outside that particular reading of 'the problem'.

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 tenure reform, 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, became deeply contested; the reform of tenure posed a challenge to power relations and forms of capital that formerly had come to be, to a certain extent, unquestioned. The monopoly of 'symbolic capital' or legitimacy for its particular version of reform could by no means be taken for granted and, as here in relation to tenure reform, strategies had to be adopted in order to maintain or even attain such legitimacy. As indicated above, the participatory and consultation processes undertaken by the government pre-1999 culminated in the LRB, which was to provide statutory recognition of such '*de facto* rights'. Given the politically provocative nature of this Bill, 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 (DLA,1998). But, knowing the potential political backlash to the reforms, 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)

Legitimacy can be seen here as a form of power, attained through processes that enable and constrain the capacity of different individuals to participate in them (Bourdieu, 1990). In the first five years of South Africa's democracy, bureaucrats in the DLA trod a difficult path. In a representative democracy, an oft-assumed ideal is that bureaucrats sacrifice their own personal opinions for those of their political masters, being the elected representatives of the people. But after 1994, the new DLA drew extensively upon the knowledge, experience and political loyalties of the NGLS; many new positions in the DLA were peopled with these former NGO activists. In terms of policy direction, those who were most influential were those who had positions within the bureaucracy, those who were most articulate and those considered to have the best grasp of the issues both politically and intellectually. Instead of the bureaucracy being 'both controlled and protected by the decision-makers' (Bourdieu, 2004: 33) – that is their political masters – it often contained the decision-makers within it. As a result, not only did they have to forego the protection that might have been bestowed by such a function, they also had to labour to legitimise, particularly to these political masters, the political policies they were pursuing. Showing the extent to which they had undertaken participatory and consultative exercises in formulating such policies, and obviously designing them so as to ensure they supported them, became strategies in such labour. However, given that the LRB was dropped by the new Minister when she took over the reins of the Department in 1999, they clearly failed in such endeavours. Despite the consultation or research undertaken to legitimise it, the attempt to strategically avoid the political issues

caught by such policies through the formulation of a model of reform that would not transfer ownership of the land to the traditional leaders was unsuccessful.

Caught in the middle: 1999–2004

> 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. (Senior DLA official, interview, 11 January 2006)

In the post-1999 period, in relation to the CLRB – contrasting with the pre-1999 LRB – it was similarly essential that the government showed Parliament that proper consultation had been carried out. Similarly to the LRC lawyer quoted at the beginning of the previous section, one of the consultants on the CLRB's drafting team was confident that the early period of this Bill's history also 'started as broadly inclusive' (DLA consultant, interview, 12 January 2006), 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 January 2006)

Certainly, after 1999 and the growing political prominence of certain traditional leaders, consultation with traditional leaders, who initially also opposed the Bill, shifted up the agenda. But the 'willingness to consult with detractors' may have contributed to an overemphasis on consulting with such 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 the NGLS.

While the latter official perceived the Department to have become more open to criticism in the post-1999 period, 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*)

As indicated above, when the CLRB was 'leaked' at a Tenure Conference convened by the government in November 2001, those in the NGLS directed some of their strongest criticisms towards the Department's consultation processes. Nevertheless, even before that Conference, government officials working on tenure had a good idea of many of the issues that those within the NGLS were concerned about, many of them having been former colleagues of those who had left the government after 1999. For many of those who had been involved in formulating the LRB, that had been dropped by the new Minister after 1999, the big problem with the Bill was that it would transfer ownership of the land to 'traditional African communities', to be administered by a 'land administration committee', which would include at least a number of traditional leaders from 'the community'.[8] Traditional leaders were seen to be inherently undemocratic (Cousins, 2002; Ntsebeza, 2003). These two contrasting models of reform were seen by NGLS detractors of the CLRB – many of them having contributed to the model of reform embodied in the former LRB – as fundamentally incompatible.

After the draft CLRB had been published in August 2002, officials in the national office of the DLA took the issues to the provincial offices 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, 2003a)

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[8] Terms in inverted commas are those defined in CLARA.

Alongside these workshops, a formal 'CLRB communication campaign' was launched in 2002–03. This involved advertisements published in newspapers, as well as radio bulletins on local radio stations, 'to inform individuals, communities and persons residing on communal land in the rural areas of KwaZulu-Natal (KZN) 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, 2003). Of a total of R1,288,308.19 (~ £80,000) spent by both the Department of Agriculture and the DLA in 2002 on advertising in the electronic and print media, 95 percent 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' (DLA, 2003b).

In spite of the 'communication campaign', dissent from this Bill by traditional leaders was also 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 January 2006). 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 January 2006). 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 January 2005).

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.

The consultation processes convened by the Department did not only involve the workshops around the country. 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 furore over CLARA, the government's relationship with their other detractors, those in the NGLS, was 'at an all time low' (former DLA official, interview, 9 December 2005). Nevertheless, even if it did not enable the bureaucrats in the firing line to bypass criticisms from its NGLS critics – less politically prominent, but more professionally awkward, given that a number of the bureaucrats were former colleagues – at least it would justify to them why they could not just 'change the model'. The political spotlight shone elsewhere – towards the precarious relationship between the ANC and traditional leaders, not just in KZN but, thanks to the efforts of organised political bodies of traditional leaders, such as the Congress of Traditional Leaders of South Africa, even in Limpopo – hardly an anti-ANC hotbed of dissent.

Up to 1999, many of those who became the government's strongest critics within the NGLS had actually been the movers and shakers in policy-making, certainly in relation to tenure reform. After 1999, perhaps knowing the extent to which they had been at the forefront of driving policy until that time, they directed their criticisms of policy not towards politicians but towards officials in government. In light of these practices, post-1999 bureaucrats found themselves caught in the middle. But, unlike those working in the DLA pre-1999, who had fairly unrestrained independence in the formulation of policy, after 1999 this was constrained by the strong policy dictates from their political masters. So, while they had to contend with criticism coming from both sides of the political spectrum – here from the pro- and anti-chieftaincy lobbies – they had less 'room for manoeuvre' (Clay and Schaffer, 1984) than their forebears to respond to such criticism in terms of the direction of policy; they were closer to the 'ideal' of a government bureaucrat.

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 January, 2006). However, departmental officials carrying out those presentations are still likely to take away with them a sense of issues of concern to those involved. But 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, will depend on the strength of their own convictions in relation to their superiors, on their position within the hierarchy of the bureaucratic field. After 1994, the immense change and flux created spaces and opportunities within a loosely defined bureaucratic hierarchy, enabling individual bureaucrats immense influence in policy-making. After 1999, however, as its bureaucratic procedures became increasingly fixed, channelling communication, limiting

action and shaping practice, individuals within the bureaucracy were increasingly constrained in their ability to shape the direction of policy. For particular officials who were sufficiently superior, however, the extent to which they were able to do so is likely to have depended on their relationship with their political masters – that is, their position in relation to the wider field of power. Recognising the limited transformatory potential of any 'consultation' or 'participatory' exercises undertaken as part of such policy processes, adds another dose of scepticism to the rosy ideals of 'participation' (Cooke and Kothari, 2001; Hickey and Mohan, 2004).

Nevertheless, 'consultation' and 'participation' continued to be claimed to legitimise the model adopted in both draft Bills formulated prior to 1999 and after 2001 – they were 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: Land Reform Systems and Support Services 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' (Director, Tenure Directorate, 2003: 7). When the 'revamped' Bill was released, however, a number of people referred to the consultation that had gone on prior to 1999 – even the Minister, Thoko Didiza, indicated that 'the process started in 1995. Since then we've had consultations with all stakeholders and interested parties' (Barron, 2004). 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*, July 2004: 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. Not only did 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 also, between the publication of the Bill in August 2002 and the version that proved to be acceptable to high profile traditional leaders in September 2003, there was almost a complete turnaround. Was this turnaround driven by 'consultation' or 'participation'? 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 Group.[9] 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.

Despite the claims of those in government pre- and post-1999, the consultation processes were undertaken in order to legitimise the models adopted by the Bills. However, such legitimacy was not to be granted by the people who were to be affected by them, but by those who had greater political capital in their ability to influence the passage of the Bill through Parliament. Such recognition puts paid to the participatory and democratic ideals embraced in the early years of South Africa's transition from apartheid rule.

Conclusions

Policies adopted to change relations of power will always be controversial. In a time of upheaval and change, however, from an authoritarian to a democratic state, the processes through which public legitimacy for those policies is achieved will be deeply political. Legitimacy does not depend upon objective criteria, but is constructed and negotiated and a historically context-bound concept. In South Africa, the policy and law-making processes that contributed to the adoption of legislation to reform the land tenure of those living in the former 'homelands' of the country, areas in which traditional leaders or chiefs had been given extensive powers by the former apartheid state, played out over ten years. Although such legislation had been adopted unanimously by the South African Parliament, it can hardly be claimed that legitimacy for those policies continuted to be contested by a variety of groups. During the course of the ten years up to the

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[9] 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, 2003).

passing of such legislation, there were concerted attempts by those in government to achieve such legitimacy for their particular model of reform. Such attempts predominantly focused on the policy processes through which the policy and draft legislation was to pass. In line with the spirit of the time, bureaucrats formulating the reforms claimed to have adopted a participatory ideal of policy-making; various consultation exercises with 'local' people, who were to be the very subjects of the policies that were being formulated, were undertaken and their results drawn upon to justify the outcome in the form of the draft legislation. However, because the power conferred on such bureaucrats to formulate policy did not actually derive from those local people, but from those who held power in the political field, such processes became nothing more than strategies of legitimation, for policies that they had already formulated.

In the pre-1999 period, when activists became powerful government officials, bureaucrats had relatively free reign in the formulation of policy. Nevertheless, consultation and participation exercises were seen as an essential political instrument in legitimating their formulation of 'evidence-based' policy, policy that was to avoid the transfer of land to 'chiefs', thereby avoiding enhancing their power in such areas. While such a strategy of policy-making may well have fitted with specific forms of capital they valued, given their background as lawyers, academics and researchers, it hardly had any purchase with those who held power in the political field, whose political spotlight shone elsewhere, to the politics of 'tradition' which could not be avoided whatever model of reform was adopted. After 1999, government officials, in their capacity as less powerful bureaucrats, became caught in the middle, between the dictates of their political masters and criticism from the NGLS. They had less capital to influence, let alone drive, the process in any real way. Being unable to do much else to respond to their vocal critics within the NGLS, such strategies continued to be important as endeavours to retain some credibility against criticisms that were increasingly directed towards their competence in policy and law-making, and which thereby had the potential to undermine the post-apartheid state. Again, however, given the relation of such bureaucrats to the wider field of power, it was those who were actually to be the subjects of such reforms who became unimportant in conferring any political legitimacy on such policy-makers, and who were consequently symbolically excluded from the policy process.

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