

Law, Race and Gender Research Unit, University of
Cape Town



Oral Submission on the Black Authorities Act Repeal Bill

Portfolio Committee on Rural Development and Land
Reform, Tuesday, 20 July 2010





Overview of Submission

- ▶ **Introduction**
 - ▶ LRG welcomes BAA repeal
 - ▶ BAA Legacy & Recent Policy Pronouncements
- ▶ **The BAA, 1951 and the TLGFA, 2003**
 - ▶ Boundaries of Territory & Jurisdiction
 - ▶ Tribal Levies
 - ▶ Electoral Procedures
- ▶ **The BAA, 1951 and the CLRA, 2004**
 - ▶ Boundaries, Authority & Power
 - ▶ Public Participation & Customary Law Development
- ▶ **The BAA, 1951 and the TCB, 2008**
 - ▶ Jurisdictional Boundaries & Denial of Right to Choose
 - ▶ Centralised Power & Severe Sanctions
 - ▶ Lack of Public Participation
- ▶ **Conclusion: Requests of Committee**



Introduction: LRG Welcomes BAA Repeal



- ▶ LRG: “Repeal of BAA is an important step in moving away from our apartheid past.”
- ▶ Agrees with Black Authorities Act Repeal Bill, clause 1.2, which states:
 - ‘The Act was a legislative cornerstone of apartheid by means of which Black people were controlled and dehumanized, and is reminiscent of past divisions and discrimination. It is both obsolete and repugnant to the values and human rights enshrined in our Constitution.’
- ▶ Argues, however, that repeal on its own is insufficient to undo legacy of BAA.





Introduction: Welcome Repeal But ...

- ▶ **Problematic and controversial post-apartheid legislative developments entrench the legacy:**
 - ▶ Traditional Leadership and Governance Framework Act, 2003;
 - ▶ Communal Land Rights Act, 2004 (declared unconstitutional by Constitutional Court on 11 May 2010);
 - ▶ Traditional Courts Bill, 2008 (presently before PC on Justice & Constitutional Development).
- ▶ **Therefore, the aspects of the BAA that made it dehumanising, divisive and discriminatory, as well as inconsistent with the Constitution, are resuscitated by the named laws.**





Introduction: BAA Legacy

- ▶ BAA sections 2 and 3: State President permitted to establish ‘tribal authorities’ to govern over mixed and matched ‘tribes’.
- ▶ BAA sections 4, 8 and 9:
 - ▶ tribal authority responsible for ‘generally administer[ing] the affairs of the tribes and communities in respect of which it has been established’;
 - ▶ tribal authority to assist tribal leader in performance of ‘powers, functions or duties conferred or imposed upon’ it (including broad power of taxation).
- ▶ Section 28 of the TLGFA entrenches **imposed boundaries of these former homelands** as part of wall-to-wall government;
- ▶ Also allows **imposed and untransformed apartheid-era tribal authorities** to become ‘traditional councils’;
- ▶ Very same **unaccountable governance powers** assigned to tribal authorities by BAA reaffirmed by new legislation.





Introduction: Recent Policy I

- ▶ ‘The Department of Traditional Affairs is about to release proposed guidelines on the allocation of roles and delegation of functions to traditional leaders and traditional councils by organs of state in terms of the Traditional Leadership and Governance Framework Act. All the affected Departments will have a chance to align their plans with what the guidelines intend to achieve.’
(President Zuma’s speech to the National House of Traditional Leaders: 20 April 2010)





Introduction: Recent Policy II

- ▶ ‘National and provincial government departments may also allocate to traditional councils roles in land administration; agriculture; administration of justice; safety and security; health; welfare; arts and culture; tourism; registration of births, deaths and customary marriages; and the management of natural resources.’

(Deputy Minister Carrim’s speech to the Traditional Councils, Local Government & Rural Local Governance Summit, eThekweni: 5 May 2010)





BAA & TLGFA



BAA & TLGFA: Territorial Boundaries



▶ **Section 28(1) of the TLGFA:**

Any **traditional leader** who was appointed as such in terms of applicable provincial legislation and was still recognised as a traditional leader immediately before the commencement of this Act, is **deemed to have been recognised as such in terms of section 9 or 11**, subject to a decision of the Commission in terms of section 26.

▶ **Section 28(3):**

any “**tribe**” that, immediately before the commencement of this Act, had been established and was still recognised as such is **deemed to be a traditional community contemplated in section 2 ...**’

▶ **Section 28(4):**

any ‘**tribal authority**’ that, immediately before the commencement of this Act, had been established and was still recognised as such, is **deemed to be a traditional council ...**’

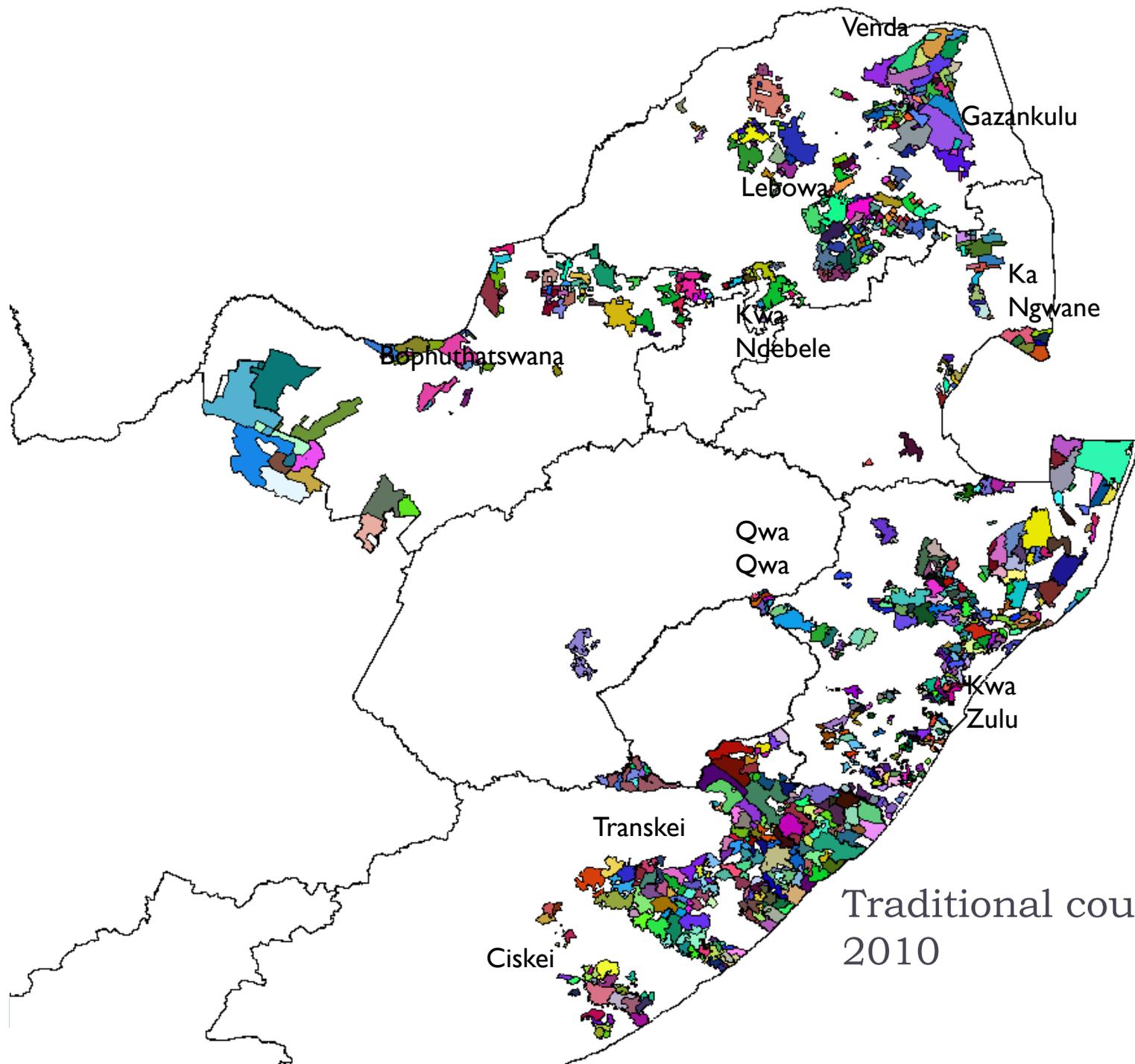




BAA & TLGFA: Territorial Boundaries

- ▶ Near-impossible for subgroup to withdraw in terms of section 7;
- ▶ Community authorities disestablished in terms of section 28(5);
- ▶ No results announced re: investigations of legitimate/illegitimate boundaries and traditional authorities from either Ralushai and Nhlapo Commission.





Traditional council map –
2010

BAA & TLGFA: (Imposed) Jurisdictional Boundaries I



- ▶ **BAA section 4(1)(d):**

A tribal authority shall, subject to the provisions of this Act – generally exercise such powers and perform such functions and duties as within the opinion of the Governor-General fall within the sphere of tribal administration and as he may assign to that tribal authority.



BAA & TLGFA: (False) Jurisdictional Boundaries II



- ▶ ‘The modes of government proposed are a caricature. They are neither democratic nor African. The Act makes our chiefs, quite straightforwardly and simply, into minor puppets and agents of the Big Dictator. They are answerable to him and to him only, never to their people. The whites have made a mockery of the type of rule we knew. Their attempts to substitute dictatorship for what they have efficiently destroyed do not deceive us.’
(Albert Luthuli, *Let My People Go*, 1962)
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BAA & TLGFA: (Unaccountability & Jurisdictional Boundaries III)



- ▶ ‘Many Chiefs and headmen found that once they had committed themselves to supporting Bantu Authorities, an immense chasm developed between them and the people. Gone was the old give-and-take of tribal consultation, and in its place there was now the autocratic power bestowed on the more ambitious Chiefs, who became arrogant in the knowledge that government might was behind them.’

(Govan Mbeki, *The Peasants Revolt*, 1964)





BAA & TLGFA: Tribal Levies I

- ▶ White Paper on Traditional Leadership and Governance, July 2003 states:

The authority to impose statutory taxes and levies lies with municipalities. Duplication of this responsibility and double taxation of people must be avoided. Traditional leadership structures should no longer impose statutory taxes and levies on communities.

- ▶ But, section 4(2) of the TLGFA prescribes that:

Applicable provincial legislation must regulate the performance of functions by a traditional council by at least requiring a traditional council to —(a) keep proper records; (b) have its financial statements audited; (c) disclose the receipt of **gifts**; ...

- ▶ Section 4(3) says:

A traditional council must — ...(b) meet at least once a year with its traditional community to give account of the activities and finances of the traditional council and **levies** received by the traditional council.





BAA & TLGFA: Tribal Levies II

- ▶ Some provincial TLGFAs also provide for levies – e.g. Limpopo, section 25(I):

A traditional council may, with the approval of the Premier, levy a traditional council rate upon every taxpayer of the traditional area concerned.

- ▶ Others provide for *involuntary* ‘voluntary gifts’.
- ▶ In practice, levies are still widespread;
- ▶ Disproportionately disadvantage women who:
 - ▶ Make up overwhelming majority of rural residents,
 - ▶ Have to pay maintenance of their chiefs’ lifestyles from their modest social security grants or even if they have no income,
 - ▶ Also pay VAT to government coffers (from which traditional leader salaries are paid).





BAA & TLGFA: Electoral Procedures

- ▶ Deeming provisions in section 28 depend on compliance with section 3(2) to change the composition of tribal authorities:
 - ▶ Elections of 40% of members of TC, other 60% traditional leader-appointed;
 - ▶ 30% of council women.
- ▶ TLGFA Amendment, 2009 extended transitional period for tribal authorities to comply until 24 September 2011;
- ▶ Thus, presently, many TCs = untransformed tribal authorities.





BAA & TLGFA: Electoral Procedures

- ▶ **And, where elections conducted – unsuccessful:**
 - ▶ **Eastern Cape:**
Communities were not informed of elections or call for nominations;
and
No evidence that requisite community meetings held.
 - ▶ **North West:**
Provincial House of Traditional Leaders supervised elections;
People not permitted to nominate candidates not on pre-determined list
 - ▶ **KwaZulu Natal:**
IEC boxes were “borrowed” and used to create impression that
elections were monitored when, in fact, there was insufficient funds to
hire IEC.
- ▶ **Concern about 40% being insufficient to render the councils democratic.**





BAA & CLRA



BAA & CLRA: Boundaries, Authority & Power I



- ▶ Section 20(1)(b) of the TLGFA gives land administration powers to traditional councils;
- ▶ In terms of CLARA: ‘traditional leaders, through traditional councils, will now have wide-ranging powers in relation to the administration of communal land.’ – Constitutional Court in *Tongoane*.
- ▶ Same boundaries established by TLGFA (and BAA before that) apply; rural people subject to same authorities also
- ▶ ‘To use the Black Authorities Act of 1951 as a platform for land reform after 1994 is simply incredible’.

(Deputy Chief Justice Moseneke, in *Tongoane* hearing, 2 March 2010)



BAA & CLRA:

Boundaries, Authority & Power II



- ▶ ‘The Black Authorities Act gave the State President the authority to establish “with due regard to native law and custom” tribal authorities for African “tribes” as the basic unit of administration in the areas to which the provisions of CLARA apply. ... It is these tribal authorities that have now been transformed into traditional councils for the purposes of section 28(4) of the Traditional Leadership and Governance Framework Act, 2003 (the Traditional Leadership Act). And in terms of section 21 of CLARA, these traditional councils may exercise powers and perform functions relating to the administration of communal land.’

(Chief Justice Ngcobo on behalf of unanimous court in *Tongoane* (CLARA case), 11 May 2010 judgment)



BAA & CLRA:

Public Participation & Customary Law



- ▶ CLARA struck down on grounds of using wrong parliamentary procedure (of section 75) to enact it, and thus excluding provincial public participation built into section 76 procedure.
- ▶ Court emphasised again the constitutional duty of government to facilitate public involvement in its legislative processes.
- ▶ Method of legislation that excludes ordinary rural people and does not take their living customary law seriously is one that was used by colonial and apartheid government;
- ▶ In BAA, 'native/black law and custom' meant whatever served the state at the time; what served it most was power centralised in a tribal ruler who controlled the land.



BAA & CLRA: Customary Law Development



- ▶ Court therefore re-emphasised the importance of considering and respecting customary law which has its own systems of land administration:

‘the field that CLARA now seeks to cover is not unoccupied. There is at present a system of law that regulates the use, occupation and administration of communal land. This system also regulates the powers and functions of traditional leaders in relation to communal land. It is this system which CLARA will repeal, replace or amend.’

(Chief Justice Ngcobo on behalf of unanimous court in *Tongoane* (CLARA case), 11 May 2010 judgment)





BAA & TCB



BAA & TCB:

Jurisdictional Boundaries & Lack of Chc



- ▶ The jurisdictional boundaries imposed by the BAA, revived by the TLGFA and condemned by the Constitutional Court, are relied upon by the TCB;
 - ▶ These imposed apartheid boundaries define the current jurisdiction of the traditional court.
 - ▶ Clauses 5(1) & 6 of TCB then also does not allow rural people to choose whether or not they want their matters to be heard by the traditional court (this is whether or not the traditional boundaries and leader are legitimate).
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BAA & TCB:



Centralised Power & Severe Sanctions

- ▶ The TCB centralises power to the senior traditional leader who is to singlehandedly run the community-level court; it excludes headmen's courts, village courts, clan/family courts.
- ▶ It therefore gives the senior traditional leader (who also would have extensive land administration powers in terms of CLARA) the power to decide what is customary law.
- ▶ In civil cases, he may also impose sanctions such as forced labour (on anyone, not just the parties to the case), the loss of customary rights (which may include land rights and community membership).
- ▶ He may compel anyone who commits an offence in his jurisdiction to appear before his court, *without a lawyer*.



BAA & TCB: Lack of Public Participation

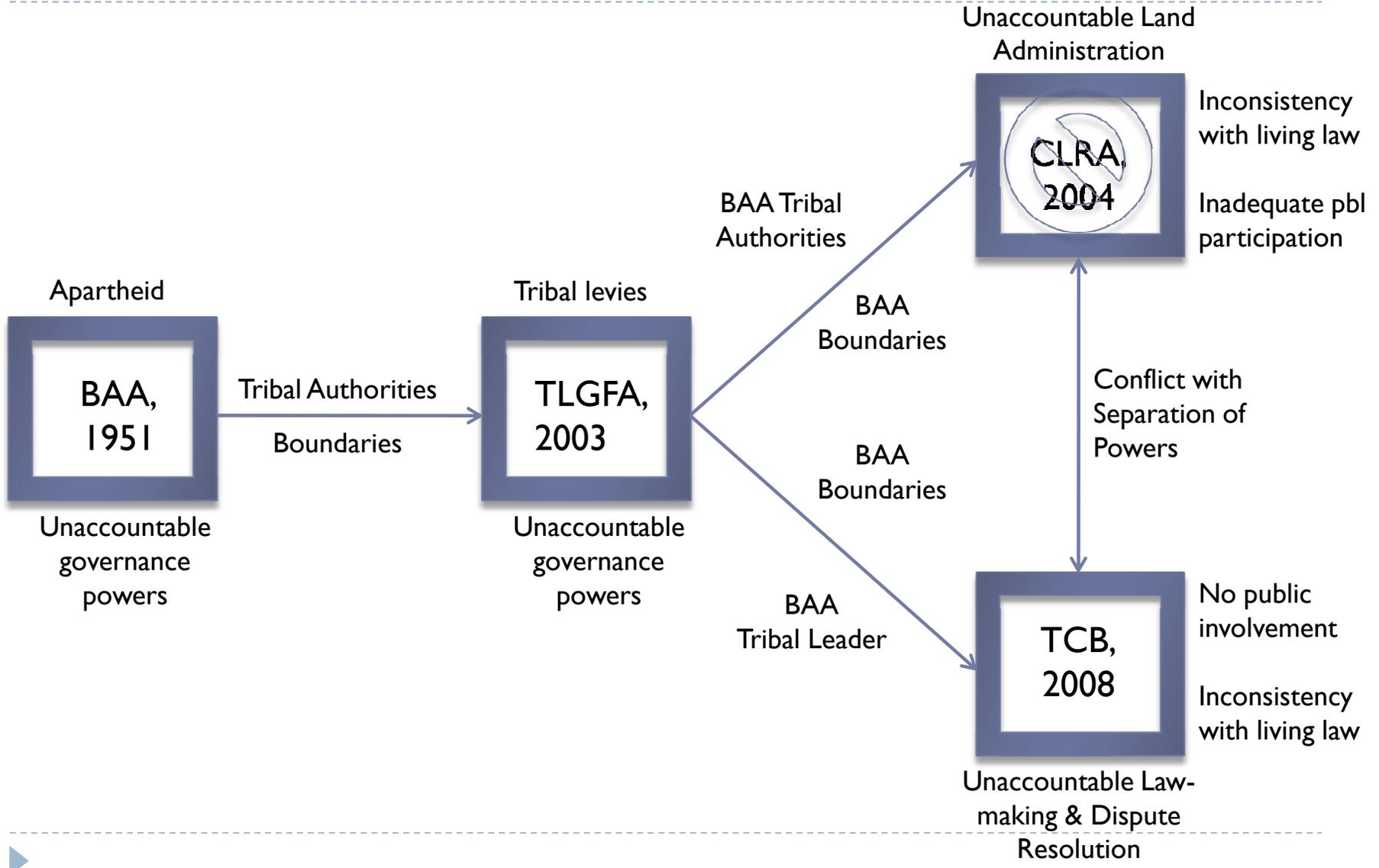


- ▶ **In court proceedings:**
 - ▶ the traditional court is conceived of as a one-man show;
 - ▶ ordinary people are not allowed to participate in the way that they would usually do in terms of living customary law.
- ▶ **In the drafting of the Bill:**
 - ▶ the memorandum to the TCB says that traditional leaders were the only major stakeholders consulted; and
 - ▶ while women face particular problems in customary courts, the TCB does not address those because they were not consulted.





BAA => TLGFA => CLRA & TCB





Conclusion: Requests of Committee

- ▶ Official notice of irony of repealing BAA when NB provisions all live on in new legislation – re:
 - ▶ imposed tribal boundaries,
 - ▶ imposed tribal authorities,
 - ▶ unaccountable governance powers e.g. tribal levies, land administration & dispute resolution,
 - ▶ lack of public consultation and participation, and
 - ▶ undermining living customary law.
- ▶ Official notice of the concerns of the Constitutional Court re: use of BAA's tribal authorities and boundaries as basis for post-apartheid land reform, as per CLARA.
- ▶ Engagement of all parliamentary committees and structures to *effectively* eliminate the legacy of the BAA.
- ▶ Provision of the KZN legislation mentioned in clause 1.6.





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Thank you

