



## ***Retribalisation in post-apartheid South Africa: new “traditional” laws & their impacts on rural women***

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Public Dialogue: New laws, new oppressions?  
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## **Main argument**

- The rise of traditional leaders
  - in political, economic, governmental, judicial & legislative terms
  - amounts to a modern, post-apartheid retribalisation of the countryside
- Deleterious effect on rights
- Roots of “traditional” power not deleted by Constitution
  - Arguably, Constitution opened door to ongoing contestation that has been used to claw back on rights

## **Outline**

1. Africanist perspectives: Chief Phathekile Holomisa
2. Unresolved tensions in the Constitution
3. Traditional Courts Bill
4. Traditional Leadership & Governance
5. Communal Land Rights Act
6. Alternative African discourses: Nomboniso Gas
7. Changes on the ground
8. Political geography of retribalisation
9. Conclusion

## **Africanist perspectives: Holomisa**

- African system of justice - inclusive, democratic, open and welcoming
- Fosters a spirit of communalism, harmony, reconciliation, compensation to aggrieved, rehabilitation of offender
- Easy & inexpensive access to justice
- Justice within family, clan, neighbourhood, the village, tribe & nation
- Traditional leadership central to organisation & governance of community at all levels

## **Africanist perspectives: Holomisa**

- Traditionally & historically women play a small part in traditional courts
- In family disputes, succession & inheritance, women consulted as expert witnesses
- Nowadays excluding women from courts is being reversed
  - Therefore trials conducted with compassion & understanding for plight of aggrieved & offender
- Jurisdiction of traditional courts should be extended to entire country & all citizens

## **Unresolved tensions in the Constitution**

- Are rural people citizens of a new, united and democratic South Africa or rural subjects?
  - rights, equality, democracy & governance
- Source of traditional leadership: custom & tradition or the constitution or both?
- Governance roles & powers of traditional leaders
  - a 4th tier of government?
- ‘Native courts’ & the administration of justice
- Who makes customary law?
  - supremacy of constitution over customary law
  - how courts interpret customary law?
  - values of equality & non-discrimination against codified customary law

### **Traditional Courts Bill**

- Built on foundations of 1927 Native Administration Act & 1951 Black Authorities Act
- Jurisdiction = apartheid tribal boundaries
  - revived by TLGFA
  - condemned by ConCourt
  - resisted on the ground
- TCB does not allow rural people to choose whether or not they want their matters to be heard by traditional court
  - whether or not boundaries & leader are legitimate

### **Traditional Courts Bill**

- Defines a traditional leader as the presiding officer
  - to singlehandedly run the community-level court
  - excludes headmen's courts, village courts, clan/family courts
- 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
- Significant powers to make judgments
  - 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*
- No right to opt out

### **Traditional Courts Bill**

- No lawyers or legal reps allowed
- Yet Constitution provides that every accused person is entitled to be represented by a lawyer in criminal matters – s35(3)(f)
- Counter argument that lawyers would change nature of customary courts

### **Traditional Courts Bill**

- Empowers senior traditional leader as presiding officer to:
  - Determine the content of customary law
  - Administer the law (in his capacity as traditional leader)
  - Adjudicate disputes arising from his administrative actions (e.g. Disputes arising from land allocation)
- Separation of powers doctrine violated
- Centralises power, trumps all other forums & vests all power in senior traditional leader as presiding officer
- Adopts model of 1927 Black Administration Act

### **Traditional Courts Bill**

- Composition of courts
- Powers & sanctions
- Impact on disputed authority
  - Private owners, Trusts and CPAs
  - Groupings who dispute apartheid tribal boundaries or legitimacy of particular traditional leaders
  - Village structures or local dispute resolution forums
- Civil jurisdiction & exclusions
- Limitations on criminal sanctions
- Appeals & review

### **Traditional Courts Bill - women**

- Key problems put to SA Law Commission
  - Composition of the courts – mostly old men – often biased in favour of men in family disputes
  - Need for women to be included in composition of court
  - Women not allowed to speak or represent themselves in many areas – can only be represented by male relative
  - Women in mourning face particular restrictions
  - Particularly serious for widows facing eviction

## Traditional Courts Bill - women

- 2008 TCB has no direct provision that women must be included in composition of court
- Enables continuation of discrimination by providing that husbands can represent wives just as wives can represent husbands “according to customary law” – clause 9(3)(b)
- Clause 9(2)(a)(i) pays lip service to formal equality but bill as a whole entrenches unequal power relations

## Traditional Leadership & Governance

- Traditional Leadership & Governance Framework Act
- Deems all tribal authorities as traditional councils
  - Entrenches status quo in 1994 ignoring disputes about boundaries, imposed tribal structures, ethnic groups, etc.
  - Same boundaries as apartheid tribal boundaries
  - Applies wall-to-wall in homeland rural areas even where there are freeholders or CPA
- Anti-democratic measures
  - Community authorities disestablished
  - Election of headman outlawed (Eastern Cape)
  - Space opened for tribal levies
  - Traditional secession or opting out near-impossible

## Traditional Leadership & Governance

- Incomplete democratisation
  - 40% of new traditional councils to be elected
  - 60% to be appointed by traditional leader
  - 30% for women (downward variation possible)
- Governmental powers to traditional leaders:
  - “Legislation or other measures may provide a role for traditional councils or traditional leaders
  - arts and culture, **land administration**, agriculture, health, welfare, **the administration of justice, safety and security, the registration of births, deaths and customary marriages**, economic development, the environment, tourism, disaster management, the management of natural resources and the dissemination of information relating to government policies and

## Traditional Leadership & Governance

- New National Traditional Affairs Bill extends governmental powers of TLs
  - rural development added as one more ground
  - transfer of roles not through legislation but through delegation
- Traditional leaders want constitutional amendment to do away with local municipalities in “traditional areas”
  - “and be replaced by Traditional Councils as service providers within traditional communities”

## Communal Land Rights Act

- Same boundaries as apartheid boundaries
- Land Administration Committees = Traditional Councils
  - Limited participation by women
- Failed to secure tenure & competing rights
  - Struck down by ConCourt on procedural grounds
  - Judgment did not deal with substantive issues: security of tenure, definition of community, & control of land by traditional leaders not dealt with
  - Substantive issues remain for contestation

## Alternative African discourses: Gasa

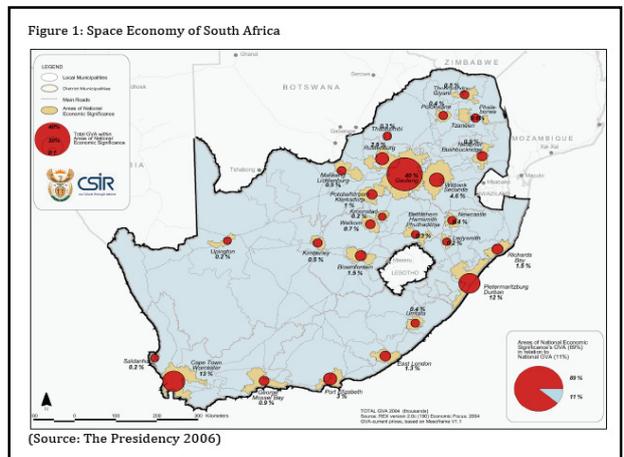
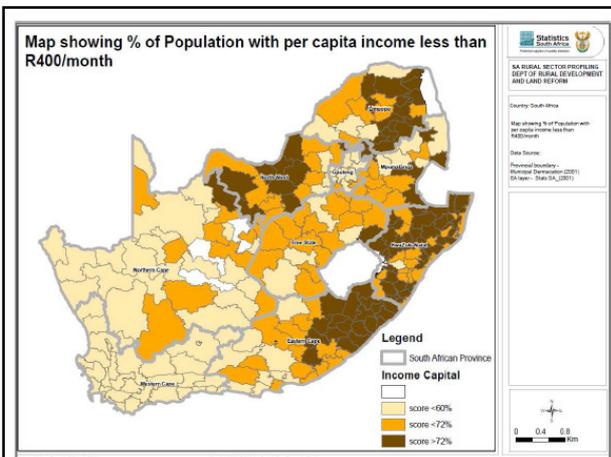
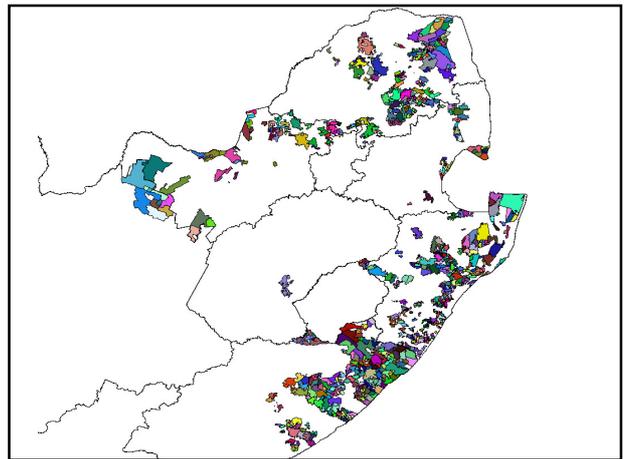
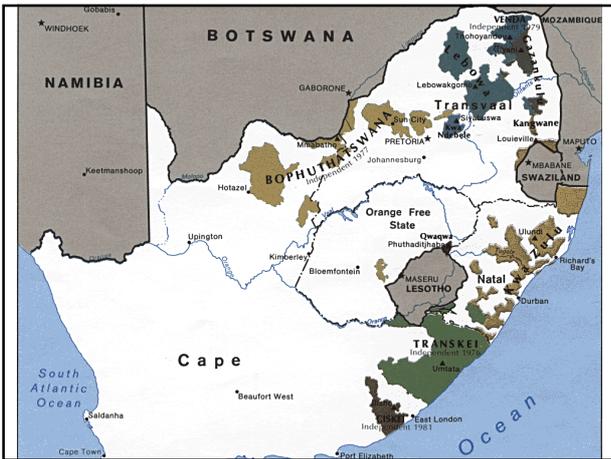
- Culture a fluid pattern of social relations, construction of identities & communal existence
- Umntu ngumntu ngabantu – also affirms importance of the individual
- African cultures value individual rights & choice
- Individual rights integral to each individual being part of a community
- TCB falls within same traps of colonial & apartheid sensibilities, boundary formation & definitions
- Many debates, literature & policy processes to restore dignity fall into essentialist representation, treating dynamic processes as static

## Alternative African discourses: Gasa

- TCB will suffocate dynamism & impose cultural hegemony
  - cultural chauvinism as if it is peaceful coexistence
- We will be paying for traditional courts:
  - we do not know financial implications of traditional courts
- Access to justice also about an enabling environment
  - where all treated with dignity
  - where people feel they are taken seriously, handled with sensitivity & respect
- Recognition of 'traditional' leadership & customary law at expense of freedoms
  - How does restoration take place when the very processes subjugate the people who are supposed to be liberated by this process?

## Changes on the ground

- Single-never married women getting access to land in their own right/name
  - Keiskammahoek & Ramabatlama - "democratic" community processes
  - Msinga - traditional council decision
- Grassroots responses to socio-economic changes & needs
- Local contestations by rural women
- Impact & symbolism of constitution: equality & rights
- Local vernacular marries constitution & custom



## **Conclusion**

- Retribalisation counter to taking gender equality forward in former homelands
- What political geography of ukuthwala?
- What maps of violence against women?
- What geography of socio-economic circumstances of women?
- What space for a bottom-up dialogue between custom & constitution?
- What space for living customary law?
- Best conditions to expand realms of freedom for women?