John Comaroff and Jean Comaroff, "Reflections on Liberalism, Policulturalism ID-ology: *Citizenship & Difference in South Africa*"

in Steven L. Robins, editor, *Limits to Liberation after Apartheid: Citizenship, Governance & Culture* (Oxford: James Currey, 2005), pp. 33–56

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Reflections on Liberalism, Policulturalism & ID-ology *Citizenship & Difference in South Africa*

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Prolegomenon

Herewith two fragments from the discourses of the recent South African past.

'...we Blacks (most of us) execrate ethnicity with all our being.'
Desmond Tutu, 1981[1]

For the Archbishop, in short, 'native' cultural identities were little more than an excrescence of colonial racism.

'Our duty is to identify and define the main currents of [African] tradition and to incorporate [them] in the modern, technically advanced political entities that we are seeking to construct.'
Penuell Maduna, 1999[2]

For the Minister of Justice and Constitutional Development, the products of those very identities are a necessary element in the making of the post-colonial nation-state.

The difference? Twenty years or so in the history of difference.

If Kymlicka and Norman (2000: 1) are right, recent debate in political philosophy has been preoccupied by two, typically unconnected, issues: 'minority rights–multiculturalism' and the nature of democratic citizenship. This seems unsurprising in an intellectual endeavour devoted largely to the study of Western polities; after all, the triumphal rise of neo-liberal capitalism, new patterns of mass migration, and emergent ethnic and religious movements have all put pressure on the nation-state in its modernist form. But how salient are these issues outside EuroAmerica? How significant are they in everyday *realpolitik* across the planet? On the face of it, they might appear *not* to be especially pressing in post-apartheid South Africa. Why not? Because this country, lately freed from the ethnically coded rule

[1] The statement, first made in an article written for the African-American Institute, is published in Tutu (1984), p. 121. It has been much quoted; for just two recent examples, see Lijphart (1995: 281) and Oomen (2002: 6).

[2] '"Revisit Cultural Values"', Zandile Nkutha, *Sowetan*, 17 November 1999, p. 2. Maduna made the statement in an address to a conference on constitutionalism; his audience included leaders of the South African Development Community (SADC).

of a racist colonial state, has fashioned for itself a Constitution founded on the most comprehensive, most liberal, most enlightened notions of democratic pluralism. Not only is that Constitution unusually attentive to universal enfranchisement and human rights. It is also quite explicit in its accommodation of the cultural claims of minorities. Indeed, if its own rhetorical construction were a description of its political sociology, South Africa – deeply committed to the rule of law, to the monopoly of the state over the legitimate means of violence, to a conception of citizenship that both transcends and tolerates diversity – would seem to inhabit the very ideal of the Euro-nation in its twenty-first century guise. On one hand, it embodies all the principles on which that nation was founded (cf. Hobsbawm 1992: 3–4); on the other, it has set about confronting the realities of difference in precisely the manner that many philosophers of 'minority-rights multiculturalism' have proposed.

And yet, almost from the start, a 'crisis of culture', a counter-politics of ethnic assertion *against* the jurisdiction of the state, has rumbled beneath the surface of the new polity, threatening to disrupt the founding premises of its Bill of Rights. This has entailed more than just a quest for the recognition of distinctive identities, languages and life-ways, a quest that has become familiar elsewhere in recent years (Taylor 1992). It has also raised fundamental questions of sovereignty: the sovereignty of African traditional governance and the kingdom of custom, in which ethnic subjects claim, and are claimed by, another species of authority. This authority, as we shall see, does not live easily with the hegemony of the liberal modernist state. It sanctions alternative orders of law and justice, of the use of force, of responsibilities and entitlements, even of tribute and taxation. The generic citizen of post-colonial South Africa may be the rights-bearing individual inscribed in the new Constitution; also the rights-bearing individual – typically urban, cosmopolitan – presumed in much mass-mediated discourse. By contrast, ethno-polities and traditional leadership[3] speak the language of subjects and collective being (cf. Mamdani 1996). For many – perhaps most – South Africans, it is the *coexistence* of the two tropes, of citizen and subject, that configures the *practical* terms of national belonging. But that coexistence, despite the Bill of Rights, does not always reduce to an easy, 'flexible' accommodation (cf. Ong 1999): life as national citizen and life as ethnic subject are as likely to run up against one another – often in contradictory ways – thus making political personhood a fractured, fractal experience. It is when they do that the *real*sociology of citizenship in the 'new' South Africa is most put to the test of democratic pluralism: citizenship *not* as it is envisaged in a political philosophy of the normative future, but citizenship in the concrete politics of a lived present.

The question of the post-colonial political subject, then, is not merely *relevant* to the construction of the 'new' South Africa. It is crucial. But what light might this history-in-the-making shed on philosophical debates about citizenship and difference? How might it inflect a discourse that is heavily prescriptive and, as a matter of course, continues to frame the problem of political personhood, *tout court*, in Euromodernist terms? True, it has become a progressive commonplace to insist that 'multiculturalism' has to be interrogated in its *empirical* particularity, that it takes diverse, labile forms, that liberal

[3] Elsewhere (e.g. 1997a) we have sought to problematise the concept of tradition and, by extension, of 'traditional' leadership; we deploy the term here strictly to refer to vernacular usage. 'Traditional leadership' has become a generic label in South Africa for all forms of indigenous African rule.

democracies ought to – some would say, can – be capacious enough to accommodate it (Kymlicka and Norman 2000; Levy 2000; Modood 2000). Still, while this may complicate matters productively, it leaves *un*theorized the most critical issue of all. What happens when a liberal democracy encounters a politics of difference that it cannot embrace ethically or ideologically within its definition of the commonweal, a politics of difference that is *not* satisfied with recognition, tolerance, or even a measure of entitlement – a politics of difference that appeals to the law or to violence to pursue its ends, among them the very terms of its citizenship? Which, to be sure, is occurring more and more across the world in the early years of the new century.

This last question presupposes others: Why *has* citizenship come to capture the imagination, popular as well as academic, at this particular time, a time when the modernist nation-state and the modes of representational politics that it has long presumed are profoundly in question? Like 'civil society' (cf. Comaroff and Comaroff 1999b), which has enjoyed a similar renaissance of attention since the late 1980s, the manner in which the concept is deployed is often as vacuous as it is appealing; indeed, there seems to be a more or less proportional relationship between its vacuity and its mass appeal. Why, more and more, are contests over fractal identities and the terms of national belonging fought out by means of legalities? Might it be here, and in other sites of contestation, rather than in the realm of theory-making or policy prescription, that we may discern the emergence of *pragmatic* resolutions to the paradoxes of citizenship in polities founded on endemic, irreducible difference?

It is these concerns, these questions, that frame our narrative here. Also the argument we seek to make. Briefly stated, it is that, in postcolonies, which are *endemically* heterogeneous, citizenship *always* exists in an immanent tension with *poli*culturalism; note the term, we shall explain it below. As a result, it is a terrain on which increasingly irreconcilable, fractal forms of political being, embodied in self-defined aggregates of persons, may seek to open up possibilities for themselves, possibilities in pursuit of their passions, principles, ideals, interests. Indeed, it is on this terrain that the modernist sense of ideology gives way to ID-ology, the quest for a collective good, and sometimes goods, sanctioned by, and in the name of, a shared identity. And, in the process, *both* the liberal modernist polity and the kingdom of custom are transformed. The term, ID-ology, note, is not ours: it derives from public discourse in South Africa itself. Argue Rapule Tabane and Ferial Haffajee, in a newspaper report,[4] the Age of Ideology, 'of genuinely competing ideas', is over, killed off by a mix of world-historical and local conditions. In its place has arisen a depoliticising kind of 'mongrel politics' in which party platforms tend to converge, in which charismatics crystallise their popularity into 'customised' political brands, in which differences are confined largely to the implementation of policy and the distribution of material advantage (cf. Comaroff and Comaroff 2000). One might add that, in the upshot, political belonging and the contradictions implicit in it become – above all else – a site of ID-ology, in which various sorts of identity struggle to express themselves in the politics of everyday life.

A final note here. While we phrase our argument with respect to South Africa – and, more generally, to postcolonies – what we shall have to say applies, increasingly, to the

[4] 'Ideology is Dead, Long Live ID-ology', Rapule Tabane and Ferial Haffajee, *Mail & Guardian*, 27 June–3 July 2003, p. 6.

nation-state *form*. Why? Because one of the effects of neo-liberal capitalism, and of the kinds of human flow that it generates, is to make polities, with few exceptions, ever more diverse, ever more prone to a politics of difference that, in the end, is likely to run up against the limits of liberal citizenship. Not all in the same ways, of course. But in some or other way. Which is why the postcolony is so often a harbinger of histories yet to happen.

First, though, to histories that have happened. And are happening.

Constituting the problem, problematising the constitution

The rule of law and dangerous cultural practices

The post-colonial state in South Africa, under the African National Congress, has had no option but to take cultural difference – and especially cultural practices deemed 'dangerous' – very seriously indeed. This, as we have intimated, is because it has been confronted, repeatedly, by social practices that fly in the face of its Constitution. Thus the police have been called upon to deal with, among other things, urban vigilante activities conducted in the name of Muslim morality,[5] 'alternative' justice ostensibly exercised under the terms of African customary law,[6] bloody culture wars in the countryside, and witchcraft-related killings, of which there have been many since the early 1990s;[7] to wit, the 'new' South African Police Service has an Occult-Related Crimes Unit that, not long ago, instituted programmes to teach officers how to handle the forensics of crime scenes involving arcane practices.[8] For its part, the Constitutional Court has had to deliberate, for example, on a claim, made in the name of Rastafarian belief, to recognise the use of prohibited drugs for ritual purposes;[9] it may well, in future, have to address such things as indigenous norms of patrilineal inheritance (see below). And the executive has had to respond to constant demands to permit 'traditional' practices now deemed illicit. What is more, a number of Witchcraft Summits have been held since 1994 to discuss rural unrest, and the lethal forms of cultural policing occasioned by it, arising out of an alleged epidemic of *muti* (medicine) murders (Comaroff and Comaroff 1999a); one such meeting, in September 1999, was attended by prominent politicians, lawyers and public

[5] For just one recent account in the print media, see 'Boeremag, Pagad Still Threaten SA Security', Jeremy Michaels, *Cape Times*, 18 June 2003, p. 4. Pagad, 'People Against Guns and Drugs', a Muslim organization, arose in Cape Town in the 1990s to deal with rising levels of violence and alleged police neglect. It has, in turn, been accused of promoting a reign of urban terror.

[6] The most notable case is that of Mapogo a Mathamaga, a large organisation led by Monhle Magolego, about whom much has been written (see Comaroff and Comaroff n.d.: Chapter 9). In an interview with us at Acornhoek on 11 March 2000, Magolego, who has been indicted several times, insisted that the justice carried out by his cadres was 'the African way of stopping crime' and was inflicted 'with the cooperation of local chiefs'.

[7] See Ralushai *et al* (1996: 31) for figures on the early 1990s in the Northern Province, now Limpopo, where witch-burnings were most prevalent. In the first half of 1996 in that province, 676 people were killed; see 'Northern Province Targets "Witch" Killers', *Weekly Mail & Guardian*, 27 September–3 October 1996, electronic edition.

[8] Questions have been raised about the constitutional status of the Unit and its training programs: they appear to presume the *ill*egality, and Satanic inspiration, of the cultural convictions of many citizens. See, e.g. 'Occult-Related Killings on the Rise', *Cape Argus*, 9 September 1998, p. 9; 'Police Devil Busters Under Threat', *Daily Mail & Guardian*, 28 March 1999.

[9] Prince v. The President of the Law Society of the Cape of Good Hope and others, CCT 36/00.

intellectuals, including the then Deputy President, Thabo Mbeki.[10] This high level of attention to the issue is unsurprising. Not only do violent witch-purgings call into question the terms of national law and order. They do so by means taken to be irrational, even savage, by the canons of enlightenment reason. As colonial rulers long ago realised, to condone them, even tacitly, is to grant them a measure of legitimacy.

But herein lies a paradox, *the* paradox, for the liberal modernist state in post-colonial, poli-ethnic times. In an epoch in which cultural rights have come increasingly to substitute for political and economic enfranchisement, no government – least of all one representing African empowerment – can afford to ignore the passions that inflame such forms of collective action, especially on the part of the majority that it strives to represent.[11] In this respect, dramatic acts like witch-burning are merely an extreme instance of the challenge posed everywhere to the sovereignty of the state, and to the laws of the nation, under the sign of ethnic particularity, of religion or regionalism, of the primordial politics of tradition. The African National Congress, to be sure, has been unable to resist, remove or repudiate the affective appeal of cultural difference. Not only is it invoked in the name of ethno-nationalism, most assertively by the Congress of Traditional Leaders of South Africa (CONTRALESA), the Zulu-centric Inkatha Freedom Party, and separatist fractions of the Afrikaner right. It is keenly felt by many ordinary South Africans, for whom 'customary' attachments remain strong. As a result, its mass following notwithstanding, the ANC has had to revise the 'post-ethnic' universalism to which most[12] of its leadership was once fervently committed. Always ambivalent, at best, towards anything associated with 'tribalism', the liberation movements tended, during the struggle years and after (cf. Lijphart 1995: 281), to dismiss culture and custom as instruments of colonial overrule – and to see chieftaincy as highly autocratic.[13] This even as they sought to recruit sympathetic chiefs to their cause. Recall here Desmond Tutu's outburst against ethnicity. Some senior ANC cadres were still openly dismissive of indigenous authority in the late 1990s, Barbara Oomen (2002: 29) reminds us; President Thabo Mbeki's support for it, she adds, continues to seem more strategic than intrinsic. As that support suggests, however, the regime has made audible its public recognition of the Kingdom of Custom as part of the country's 'unique mode of governance', citing Section 12 of the Constitution as proof of its commitment; all of which follows what Kymlicka and Norman (2000: 4) term 'the clear trend throughout the Western democracies towards greater recognition of minority rights'. This *volte face* was particularly noticeable before the 1999 election. Since then, party representatives have taken every opportunity – at events such as royal funerals in the countryside, for instance – to persuade powerful chiefs that they, and the cultural bases of their authority, have a secure future in government.

But the ambiguity persists. When the Local Government Municipal Structures Act

[10] 'Top Politicians for Witchcraft Summit', *Cape Argus*, 7 September 1999, p. 9.

[11] Of course, it *is* easier, politically, for the state to ignore the 'minority' cultural claims of Khoi-San, Coloureds, and Afrikaners.

[12] But not all. Nelson Mandela, for one, has – famously – always shown great respect for traditional leadership and for the political processes associated with it; see his autobiography (Mandela 1994).

[13] Govan Mbeki (1964) once said that, 'when a people have developed to a stage which discards chieftainship ... then to force it on them is ... enslavement'. This statement has been widely quoted; see, e.g. 'The Chieftancy System is Rooted in Apartheid', Lungisile Ntsebeza and Fred Hendricks, Crossfire, *Mail & Guardian*, 18–24 February 2000, p. 33.

(no.117) was passed in 1999, it made provision for the division of the entire country, including chiefly domains, into municipalities. Where their realms fell into these municipalities, traditional leaders were permitted only 10 per cent representation; the Act has been amended and a White Paper on the topic has been drafted,[14] but the role of the chiefs remains tightly restricted. Said to be 'above party politics', they are expected to confine themselves to, among other things, ceremonial activities of various kinds, the administration of customary law, and the coordination of cultural activities, including first fruits, rainmaking, and other ancestral rites. In addition, they are expected to 'perform such functions as may be delegated ... by a municipal council', to 'carry out all orders given... by competent authorities', and to facilitate things like 'the gathering of firewood'.[15] Hardly the stuff, this, of plenipotentiaries. In fact, as critics have been quick to say, there is now 'considerable confusion as to what exactly the[ir] constitutional recognition implies'.[16] Predictably, many of these rulers, seeing themselves as all powerful in their realms, feel betrayed. This was dramatically evident at a conference, organised by the Ministry of Provincial and Local Government in August 2000,[17] to discuss 'traditional leadership and institutions' with a view to producing a White Paper.[18] Assembled royals, led by prominent members of CONTRALESA, declined to take part. Demanding that the Constitution be amended to recognise their sovereignty, they refused to talk to anyone other than the state president. Since then they have ridden a roller coaster. There have been times when they were sure that government had been persuaded to do their bidding. And there have been other times when they have declared – perhaps tactically, in order to rally their followers – that they had 'reached the end of the road', that 'there was never an intention to accommodate [their authority in] the making of the new South Africa'.[19] Such statements typically draw denials from the ANC – which, in turn, adds fuel to the ongoing battle over the future of the Kingdom of Custom.

In playing the heady game of cultural politics, then, the ANC has drummed up a force that it is unable fully to control, a force that vitiates the very conception of nationhood on which the authority of the state rests. In theory, of course, it is just such contradictions that the Constitution – tacking, as it does, between an emphasis on universal human rights, vested in individuals, and the recognition of cultural pluralism – was designed to mediate. Public debate in South Africa, however, has already drawn attention to 'major tensions' between those of its provisions that structure a system of democratically elected

[14] *Traditional Leadership and Governance Draft White Paper* (Gazette 23984, Notice 2103), 29 October 2002. The document can be read at www.gov.za/gazette/whitepaper/2002/23894.pdf.

[15] This is a virtual paraphrase of the Local Government: Municipal Structures Amendment Bill, 2000. It may be read at www.pmg.org.za/bills/municipalstructures2ndamd.htm.

[16] 'The Chieftancy System is Rooted in Apartheid', Lungisile Ntsebeza and Fred Hendricks, Crossfire, *Mail & Guardian*, 18–24 February 2000, p. 33.

[17] *A National Conference on Traditional Leadership*, Eskom Conference Centre, Midrand, 17–18 August 2000, Department of Provincial and Local Government. We attended the conference on the formal invitation of the Minister for Provincial and Local Government, the Hon. F.S. Mufamadi, and wish to thank him and the staff of his Ministry for making our presence possible.

[18] The conference was preceded by, and organised around, a *Draft Discussion Document Towards a White Paper on Traditional Leadership and Institutions* issued by the Department of Provincial and Local Government on 11 April 2000.

[19] These were the words of Mangosuthu Buthelezi, leader of the Inkatha Freedom Party, in a speech made to rally Zulu support in the 'fight for autonomy of the[ir] kingdom'; see 'Unite Against ANC Treachery – Buthelezi', Mawande Jubasi and Thabo Mkhize, *Sunday Times*, 4 August 2002, p. 4.

representatives and those that ascribe legitimacy to the Kingdom of Custom.[20] Let us pause briefly to take a look at how the Constitution itself treats the matter. This, in turn, will provide a frame for what we have to say about the pragmatics of citizenship as a terrain on which political subjects construct various sorts of ID-ology.

The Constitution of Dissent

The Constitution of the Republic of South Africa, adopted in 1996,[21] has been accorded hallowed status in the formation of the post-colonial polity. Translated into all official languages under the legend 'One *law* for One *nation*' – the italics are in the original – the text is shelved, in many homes, alongside the family bible and books of prayer. Yet, almost from the start, there have been doubts about its ability to constitute either *One* Nation or *One* Law; these italics are ours. Even its comprehensibility has been questioned: a mass-circulation black newspaper in Johannesburg, for example, has referred to it as a Tower of Babel, pointing out that its vernacular versions are utterly opaque – and, hence, babble to those whom it was meant to enfranchise.[22]

Culture is dealt with primarily in two sections of Chapter 2 of the Constitution, its Bill of Rights. Section 30, *Language and Culture*, states that 'everyone has the right to use the language and to participate in the cultural life of their choice'; Section 31, *Cultural, Religious, and Linguistic Communities*, adds that nobody belonging to any such community may 'be denied the right, with other members of that community, (a) to enjoy their culture, practise their religion and use their language; and (b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society'. But, in both cases, there is a clear constraint: these rights 'may not be exercised in a manner inconsistent with any [other] provision of the Bill of Rights'; in other words, precedence is given to those provisions that protect the dignity, equality and freedoms – of which a very broad range is stipulated – of all persons, without prejudice or discrimination. Even when the Constitution, in Section 36, acknowledges that some limitations on those freedoms are 'reasonable and justifiable in an open and democratic society', it stresses that any such limitation is to remain bound by the Bill of Rights; as we shall see, protagonists of the sovereignty of popular tradition and traditional authority have sought support for their arguments in this 'justifiable' and 'democratic' limitation of the universal rights of citizenship. Customary authority, note, is *not* embraced in Chapter 2 itself. It appears in Chapter 12, which states, in rather bland, summary terms, that the Constitution recognises 'the institution, status and role of traditional leadership, according to customary law' – but, again, subject to the Bill of Rights and any relevant legislation. In sum, the subservience of cultural particularity and the Kingdom of Custom to the 'One *law* for One *nation*' seems unambiguous.

But is it? After all, the South African Bill of Rights has been lauded, as we have said, precisely because it *does* seem to acknowledge, within appropriate limits, the entitlement of persons bound by culture, religion and language to be governed by their own customs. True, the collective subject invoked here is not a group *per se;* the Constitution is famously

[20] 'The Chieftancy System is Rooted in Apartheid', Lungisile Ntsebeza and Fred Hendricks, Crossfire, *Mail & Guardian*, 18–24 February 2000, p. 33.

[21] Act 108 of 1996 as adopted on 8 May and amended on 11 October by the Constitutional Assembly.

[22] 'Constitutional Tower of Babel', Goloa Moiloa, *Sunday World*, 31 October 1999, p. 16.

silent on group rights. That subject is an aggregate of 'persons.' Nonetheless, the Spirit of the Law, especially Sections 30 and 31, has justified claims to the effect that, in traditional communities where individual rights are alien, customary practice should prevail over the Eurocentric liberalism of the Law, in the upper case; that, when a custom is backed by popular consensus and a clear and present collective interest, the *cultural* subject should take precedence over the *national* citizen. The Supreme Court of Appeal recently made a similar argument: in Mthembu v. Letsela, it decided, in May 2000, that women married under African customary law were subject to the rule of male primogeniture – and, thereby, excluded from inheritance of matrimonial property.[23] The court declared that the 'interests of the community', as expressed in its 'mores and fundamental assumptions', were of paramount importance in the case. Here, in short, one of the highest tribunals in the land found *against* the Bill of Rights, as conventionally interpreted. Or, rather, it found that there *are* situations in which culture ought to limit its provisions. The judgment drew criticism from some quarters, notably feminist. Not only did it prove that 'the idea of equality before the law, regardless of sex or gender, is ... incompatible with certain aspects of customary law', wrote Khadija Magardie in a widely read national newspaper, but it was an 'alarming precedent' for the triumph of 'cultural relativism' over the Constitution.

Magardie was correct: in this decision, the judiciary *had* given culture, and the 'interests' of an ethnic community, priority over other provisions of the Constitution.[24] But did it *really* mean that, thenceforth, cultural difference would amount to a limitation on the Bill of Rights? And what did it *really* prove about the [in]compatibility of custom with those other provisions? The evidence is inconclusive. In June 2003, for instance, application was made to Judge President John Hlophe on behalf of two orphaned girls, whose grandfather had inherited their father's home in Khayelitsha, on the outskirts of Cape Town, under the terms of customary law. He promptly stated his intention to sell the place and evict the children and their mother. Lawyers for the girls sought an order to the effect that primogeniture under African Law and Custom, in this case, be 'interpreted and developed in line with the constitution, particularly the right to dignity and the right to equality', or, if not, that it be declared unconstitutional.[25] Clearly, they doubted that tradition could be rendered compatible with the Bill of Rights – and, if it could not, wished to establish the priority of the latter over the former. The defence, by contrast, asserted baldly that 'customary law was recognized in South African law and protected by the constitution'. Hlophe reserved judgment. In doing so, he repeated the vague and vacuous ANC mantra that tradition could, and should, be suitably updated. 'We promise to develop the law as it should be developed in 2003,' he said.

In 2000, three years before, we had put the question of compatibility to two constitutional court justices and received revealingly different answers. Albie Sachs, legal theorist of the liberation movement and a significant judicial force in the new dispensation, saw no necessary conflict between the Constitution and custom. The first always takes precedence over the second, he said. It provides the frame within which customary

[23] Transcript is from the Supreme Court of Appeal, Mildred Hleziphi Mthembu v. Henryk Letsela, 30 May 2000 (Case No: 71/98), as downloaded from <www.law.wits.ac.za/sca/scadate.html, p. 31–32.

[24] See 'Customary Law Undermines Constitutional Rights', Khadija Magardie, *Mail & Guardian*, 15–22 June 2000, p. 33.

[25] 'Customary Law in the Dock', Fatima Schroeder, *Cape Times*, 19 June 2003, p. 5. Judgment on the case was still pending at the time of writing.

law, to the degree that it remains relevant to everyday life, might sustain itself in a liberal democracy. If conflict *were* to arise – as it did on the question of, say, the traditional right of males to inflict punitive beatings on members of their family – it was to be addressed by means of statutory law; *vide*, in this respect, the Domestic Violence Act of 1999. In a public speech on the topic, Sachs (n.d.: 15–16) put the question in a more nuanced light. The Constitutional Court, he said, had left the 'ever-developing specifics' of customary law to future deliberation and interpretation. This implied that its 'liberation and transfiguration' would occur in 'organic connection with the community'. But its jurisdiction ought never to go far beyond the resolution of family and neighbourhood disputes; even then, traditional authorities would have to act within the limits of the Bill of Rights. In short, there never was, nor is there now, a contradiction between culture and the Constitution. Ethnic subject and national citizen are one and the same legal person.

By contrast, Yvonne Mokgoro, formerly of the law faculty at the University of Bophuthatswana, saw a palpable tension between the terms of the Constitution and the kind of law implemented in traditional tribunals, most notably in such matters as inheritance, succession and domestic relations. In her view, the Constitutional Court operated at a great distance from law-as-lived – and from the policing of everyday life in the countryside. A good deal of local practice continued in defiance of the Bill of Rights, she observed; it was merely a matter of time before cases emerged that contested its Eurocentrism in the name of cultural difference. Meanwhile, these tensions were managed, day in and day out, in variously pragmatic ways, rendering real law in the new South Africa more complex and diverse than most jurists acknowledged.[26]

Just how complex we shall soon see.

Before we address the real-life, pragmatically wrought tensions between the Constitution and the Kingdom of Custom in the 'new' South Africa, however, it is necessary to offer a few general observations about 'the' post-colonial nation-state. For it is only by means of a counterpoint between the general and the particular that we might make sense of the ways in which – here as elsewhere – the law of the land and the cultural lives of its inhabitants vex each other in arguments over sovereignty, citizenship, and the limits of liberal democracy.

Reflections on the postcolony

It became something of a commonplace in the early 1990s to observe that 'postcoloniality' means disparate things to different people (cf. Darian-Smith 1996; McClintock 1992): that, while it denotes temporality, it refers to more than just the time 'after colonialism' (Prakash 1995); that, in its positive voice, it evokes subaltern, 'oppositional consciousness' (Klor De Alva 1995: 245); that it 'foregrounds a politics of ... struggle' (Mishra and Hodge 1991: 399). These sorts of statements have drawn their own criticism, but that is another matter. What is of concern here is that, in all the efforts to stress a *kind* of sensibility built into 'the' post-colonial perspective, there has been a tendency to treat the post-colonial nation-state as something of a theoretical cipher on whose ground arguments about the past, about identity, citizenship, consciousness and other things, may proceed

[26] Justice Mokgoro has written on the topic as well; see Mokgoro (1994) for her early views.

unencumbered by the facts of actual histories, economies or societies. Clearly, this is not the place in which to 'theorise' post-coloniality, *sui generis*, even if it were possible to do so in the abstract. But, if sense is to be made of the emerging forms of government, politics and popular subjectivity in post-apartheid South Africa, or anywhere else, a few general observations are in order.

They have to do, by and large, with hyphe-nation, with the link between nation and state, state and nation. Some of them, perforce, reprise things we have discussed more fully in other places (e.g. 2000, 2001).

The modernist nation – as Benedict Anderson (1983), among others, has pointed out – was an imagined community defined, putatively, by its cultural homogeneity and its deep sense of 'horizontal fraternity'. This imagining, it is often noted, was more aspiration than achievement. The European polity, after Westphalia, was always a work-in-progress: never a singular, definite article, it evinced a great deal of variation across time and space. Further, for all the idea that it was composed of rights-bearing persons equal before the law, it excluded many from its politics and its commonweal – and was, typically, inhospitable to difference. Nonetheless, the fiction of a unity of essence, affect and interest, of common purpose and *civitas*, mandated the legitimacy of the state as sole guarantor of the individual entitlements and collective well-being of its citizens. Hence the hyphe-nation, the indivisibility of nation from state.

Much has been said in recent times of the so-called 'crisis' of the modernist polity under the impact of global capitalism: of its shrinking sovereignty; of its loss of control over economic policy, cultural production and the flow of people, currencies and commodities; of a growing *dis*junction between nation and state (cf. Appadurai 1990). Whether or not 'the' nation-state is alive and well, ailing or metamorphosing – we prefer the third alternative ourselves – one thing is patent. The received notion of polities based on cultural homogeneity and a sense of horizontal fraternity, real or fictive, is rapidly giving way to imagined communities of difference, of multiculturalism, of ID-ology. This is true even in places as long antithetical to heterogeneity as the United Kingdom, which, despite recent race wars on the streets of its northern towns, now projects itself, with apologies to Benetton, as United in its tolerance of Colour and Culture. And in ones like Botswana, long regarded, if not altogether accurately, as relatively homogeneous. To be sure, the rising incidence of cultural struggles and ethnopolitics since 1989 has called forth a torrent of scholarly argument. There is no need to retrace that argument here. For present purposes, we merely need to register the fact.

For most post-colonial nation-states the politics of difference is not new. (Mark, here, the plural: *the* postcolony is not a singular article either; it is a variegated species of historical formation-under-construction.) Heterogeneity has been there from the first. Born of long histories of colonisation, these polities typically entered the new world order with legacies of ethnic diversity invented or exacerbated in the cause of imperial governance. Colonial regimes, intent on the management of racial capitalism, never constituted nations in the Euromodernist sense of the term, even where they gave their 'possessions' many of the ceremonial trappings of nationhood. In their wake, they tended to leave behind them not just an absence of infrastructure, but a heritage of fractious difference. This has been further attenuated, since *fin de siècle*, by some of the cultural and material corollaries of neo-liberalism: the movement across the planet of ever more people in

search of work and opportunities to trade; the transnational mass-mediation of signs, styles and information; the rise of an electronic commons; the growing hegemony of the market and, with it, the distillation of culture into intellectual property, a commodity to be possessed, patented, exchanged-for-profit. In this world, freedom is reduced to choice: choice of commodities, of life-ways and, most of all, of identities. In the upshot, the great irony, the great existential contradiction of our times is that we seem to have entered an age in which identity has become, *simultaneously*, a matter of volition and self-production through consumption *and* a matter of ineluctable essence, of genetics and biology.

As this suggests, postcolonies evince many features common to the modernist polities on which they have had, to a large degree, to model themselves. In coming to terms with the implications of global neo-liberalism, they appear, in fact, to exaggerate – or, more accurately, hyper-extend – those features; all of which makes it seem as if, in their temporal aspect, they are running slightly ahead of the unfolding history of the Euromodern nation-state. Perhaps they are harbingers of the postmodern future. But that is a topic for another time. Our focus here is on two corollaries of the founding of postcolonies, not on homogeneity but on difference, not on deep horizontal fraternity but on a social contract among persons who are at once right-bearing individuals and identity-bearing subjects.

The first corollary has directly to do with the refiguration of citizenship. The explosion of identity politics after 1989, especially in postcolonies, has manifested itself in more than just ethnicity. Difference is also vested, increasingly, in gender, sexuality, generation, race, religion, lifestyle and social class, and in constellations of these things, sometimes deployed in highly contingent, strategic ways. While most human beings continue to live as citizens *in* nation-states, they tend only to be conditionally citizens *of* nation-states: their composite personae may include elements that disregard political borders and/or mandate claims against the commonweal within them. In consequence, identity struggles of one kind or another appear immanent almost everywhere as selfhood is immersed into collective essence, innate substance and primordial destiny (Comaroff and Comaroff 2001). What is more, the assertion of autochthony – which elevates to a first principle the interests, 'natural' rights and moral connectedness that arise from rootedness in a place of birth – has become an ever more significant mode of *ex*clusion with*in* national polities; this, as Americans learned after 9/11, in proportion to the extent to which outsiders are held to undermine the Wealth or Security of Homeland and Nation. It is, putatively, in the name of the latter that the state is becoming a metamanagement enterprise in the neo-liberal world (ibid.):[27] of subjects who, even as they seek to be global citizens in a planetary economy of commodities and cultural flows, demand also to be shareholders in the polity-as-corporation. Herein, then, lies the complexity: the fractal nature of contemporary political personhood, the fact that it is overlaid and undercut by a politics of difference and identity, does not necessarily involve the *negation* of national belonging. Merely its uneasy, unresolved, ambiguous coexistence with other modes of being-in-the-world. It is this inherent ambiguity, we suggest, that makes the ostensible concreteness of concepts like 'citizenship' and 'community' so alluring.

[27] Much the same point was made just before the UK parliamentary elections of 2001: '[W]ith a basically preset macroeconomic framework, government becomes a matter...ultimately of microeconomic management. [Labour] is set to be elected as managers of Her Majesty's Public Sector, plc.' See 'Whatever Happened to Big Economics', Faisal Islam, *The Observer* (London), 3 June 2001, Business Section, p. 3.

Of the modes of being that constitute the twenty-first century political subject, cultural attachments are often taken, popularly, to run deepest. In many postcolonies, they are also the most marked. As we have said, ethnicity, like all ascribed identities, represents itself as grounded at once in blood and sentiment, in a commonality of interest, and, by extension, in 'natural' right. Add to this the fact that culture has increasingly come to be seen, and to be legally protected, as intellectual property (above, p. 43; cf. Coombe 1998) – even more, as a 'naturally' copyrighted collective possession – and what is the result? The dawn of the Age of Ethnicity, Inc. Observe, in this regard, that several ethnic groups have been formally incorporated as limited companies; that a large number of others have established themselves as businesses to market their heritage, their landscape, their knowledge, their religious practices, their artefacts; that yet others have successfully sued for the unremunerated reproduction of their symbols, sacred and secular. Thus it is that identity, in the age of partible, conditional citizenship, is defined, ever more, by the capacity to possess and to consume;[28] that politics is treated, ever more, as a matter of individual or collective entitlement; that social being in general, and social wrongs in particular, are translated, ever more, into the language of 'rights'.

Self-evidently, in this light, the term 'multicultural(ism)' is insufficient to describe the fractious heterogeneity of postcolonies. Rendered banal in popular usage, it evokes images of Disney's 'Small World', of compendia of the *Family of Man*, of ritual calendars respectful of human diversity, and the like; in short, of benign *in*difference to difference. Neither as noun nor as adjective does it make clear the critical limits of liberal pluralism: that notwithstanding the utopian visions of some humanist philosophers, the tolerance afforded to culture in modernist polities falls well short of allowing claims to autonomous political power or legal sovereignty. In postcolonies, in which ethnic assertion plays on the simultaneity of primordial connectedness, natural right and corporate interest, the nation-state is less multicultural than it is *poli*cultural. The prefix, spelled 'poli-', marks two things at once: plurality *and* its politicisation. It does not denote merely appreciation on the part of the national majority for the customs, costumes and cuisine of one or another minority from one or another elsewhere. It is a strong statement, an argument grounded in a cultural ontology, about the very nature of the pluri-nation, about its constitution and the terms of citizenship within it; about the spirit of its laws, about its governance and its hyphe-nation. As we have already seen, in South Africa this takes the form of an ongoing confrontation between Euromodern liberalism and variously expressed, variously formulated notions of 'traditional' authority.

Talk of rights, of culture as intellectual property, of citizenship, constitutions and contestation brings us to the second corollary that flows from the heterogeneous social infrastructure of postcolonies. Whether weak or strong, intrusive or recessive, autocratic or populist, the regimes that rule them share one thing: they speak incessantly of and for themselves in the name of 'the' state. Like those born of Euromodernity, post-colonial African states are *state*ments (cf. Corrigan and Sayer 1985: 30). They give voice to more or less authoritative worldviews, sometimes backed by military might, sometimes by

[28] *Vide*, in this respect, McMichael's (1998: 113) suggestion that the 'citizen state' has been replaced by the 'consumer state'. See also Hegeman (1991: 72), who argues that identity, at all levels, has come to be defined by consumption (see also Vanderbilt 1997: 141); not merely by the consumption of objects, but also by the consumption of the past.

carnivalesque ritual (Mbembe 1992), sometimes by mass-mediated shows of rhetorical force. But their language is not arbitrary.[29] It is the language of the law. The modernist polity, of course, has always been rooted in a culture of legality. Its subject, as Charles Taylor (1989: 11–12) reminds us, was, from the first, an individual whose humanity and dignity were formulated in the argot of rights and legal privilege. The global spread of neo-liberal capitalism has intensified the grounding of citizenship in the jural: this because of its contractarian conception of all relations, its celebration of 'free' markets, and its commodification of virtually everything, much of it heavily inscribed in the language of the law. It has also required that received modes of regulation be redesigned to deal with new forms of property, possession, consumption, exchange and jurisdictional boundaries (cf. Jacobson 1996; Salacuse 1991; Shapiro 1993).

All of this reaches its apotheosis in postcolonies, precisely because their hyphenation is so highly attenuated, because they are built on a foundation of irreducible difference, because they are endemically policultural. In them, the ways and means of the law – constitutions and contracts, rights and remedies, statutory enactments and procedural rituals – are attributed an almost magical capacity to accomplish order, civility, justice and empowerment. And to remove inequities of all kinds. Note, in this respect, how many new national constitutions have been promulgated since 1989. Note also the explosion across the planet of law-related NGOs – Legal Resource Centres, Lawyers for Human Rights, and the like – whose offices are now to be found in the most remote of African villages. In South Africa, the language of legality has become so ubiquitous, the Constitution (in the upper case) so biblical, that virtually every organisation has its own (lower case) analogue. There is even a Law Train that travels around the countryside offering free legal advice; its volunteer lawyers take pains to encourage *all* citizens to pursue their rights, and to address wrongs, by legal means.[30]

But *why* this fetishism of the law? In policultural nation-states, the language of legality affords an ostensibly neutral medium for people of difference to make claims on each other and on the state, to enter into contractual relations, to transact unlike values and to deal with their conflicts. In so doing, it produces an impression of consonance amidst contrast: of the existence of universal standards which, like money, facilitate the negotiation of incommensurables across otherwise intransitive boundaries. Hence its capacity, especially under conditions of social and ethical disarticulation, to make one thing out of many, to carve concrete realities out of fragile fictions. Hence, too, its hegemony, despite the fact that it is hardly a guarantor of equity. As an instrument of governance, it allows the state to represent itself as the custodian of civility against disorder – and, therefore, as mandated to conjure moral community by exercising a monopoly over the construction of a commonweal out of inimical diversities of interest (Harvey 1990: 108). It is this, to return to our point of a moment ago, that is made manifest in the rash of new constitutions written over the past decade or so. Each domesticates the global-speak of universal human rights, an idiom that individuates the citizen and, by treating cultural identity as a private asset rather than a collective possession, seeks to transmute difference into likeness.

[29] The argument summarised in this paragraph was first developed, and is more extensively stated, in Comaroff (1998); it is also to be found, in refined form, in Comaroff and Comaroff (2000).

[30] The train is operated by Legal i, a Section 21 (i.e. a non-profit) Company with a Board of Directors representative of the Law Societies, the Black Lawyers Association, the National Association of Democratic Lawyers and Consumer Agencies.

It is an open question whether or not these constitutions, this obsession with human rights – indeed, the language of legality itself – yield empowerment to those who previously lacked it. They do not, after all, guarantee the right to a living, only to possess, to signify, to consume, to choose. Nonetheless, the alchemy of the law, like all fetishes, lies in an enchanted displacement, one that resists easy demystification: the notion, *not* altogether unfounded, that legal instruments have the wherewithal to orchestrate social harmony and, thus, to manufacture something that was not there before. Its charm also lies in the fact that it *obscures* the most brutal of truths: that power produces rights, not rights power; that law is itself a product of the political, not a prime mover in constructing social worlds; that it, alone, is not what separates order from chaos or an equitable society from a state of savagery.

Put together the fetishism of the law and the policulturalism of the postcolony, and the product seems overdetermined: a polity in which struggles over difference – in particular, struggles over the authority to police everyday life – tend to find their way into the legal domain. Often, indeed, into the dramaturgical setting of the courtroom. But here, surely, there ought to be a rude end to our South African story. To the extent that contestations over the right to police everyday life end up in the realm of the juridical, and to the extent that this realm is dominated by institutions of the state, what chance have claims made under the sign of culture and in the spirit of policulturalism against the hegemony of the Constitution, against the Laws of the Nation, against the ideological dominance of the universal right-bearing citizen? This rephrases, in more general terms, a question we asked earlier. In a world regulated by Eurocentric jurisprudence, should we not expect that any assertion of Afromodernity, any argument for the sovereignty of the Kingdom of Custom, would have little prospect of prevailing? Would not the latter simply fade away of its own accord – or under the pressure of the former? American critical legal theory would probably concur, given its tendency to align the law with the power of the state. Others, like those who contend that multiculturalism is inimical to democracy, would hope that they were correct.[31] As we have implied, however, the matter is not so straightforward. For one thing, phrased thus, it presumes that law and culture – or, more accurately, European liberal legal universalism and appeals to Africanity – exist in a zero-sum equation. This Manichean opposition, it is true, may describe the way the issue is framed in South African popular discourse. But reality is much more complicated. The challenge is to make sense of the ways in which the forces of tradition and those of liberal democracy are confronting one another at the present moment; how, in ongoing, often strident struggles, *both* are being transformed – thereby altering the very shape and substance of post-colonial politics, of citizenship, of democracy.

In order to do so, we appeal to a venerable anthropological device: an extended case. This case is paradigmatic of encounters, in the interstices of post-colonial constitutionalism, between the Rule of Law and the Kingdom of Custom. It concerns a battle, in the North West Province, over the alleged wrongs of a burial rite.

[31] Such critics span the political spectrum from radical (e.g. Dirlik 1990) to conservative. One British 'View from the right', Minette Marrin, *The Guardian* (UK), 29 May 2001, p. 7, puts it thus: '[W]hat we must have to live together in harmony is a tolerant, over-arching common culture.' But the very idea of such a culture is 'denounced by multiculturalists as supremacist and racist'.

From customs of death to the death of custom

Mogaga *meets the Human Rights Commission*

What happens when, as an anonymous local reporter wrote, there is a 'head-on collision between the new South African Constitution and [the] age-old traditions, customs and cultures observed by millions of Blacks'?[32] The answer, in the case between Mrs Kedibone Elizabeth Tumane, of the remote village of Mononono in the North West Province, and Chief Nyalala Pilane of the Bgakgatla-Ba-Kgafela, under whose Tribal Authority the village falls, was a lengthy legal tussle, notable for the complex strategies – and the appeals to culture, the constitution, democracy and rights – on both sides. The dispute centred on Tumane's refusal to perform a burial rite. At issue was a Tswana convention that requires a newly bereaved spouse to sprinkle a herb, *mogaga*, on her path when she walks abroad in communal space. In theory, death pollution (*sefifi*) afflicts men as well as women (Comaroff 1980: 643–4). But ritual prophylaxis is more stringently mandated for females, who are thought to be more open to contamination. In the past, the rite was usually observed for a year; in recent times, some Tribal Authorities[33] have insisted on regulating its performance in the cause of communal well-being. Mrs Tumane, a staunch member of the Watchtower Movement, saw *mogaga* as contrary to the dictates of her faith. She claimed that when she tried to leave home, she was prevented from doing so by the Tribal Authority. What was more, members of the local community, deeming her behavior a deliberate breach of tradition, called for her banishment. After various efforts to settle the matter had failed, Mrs Tumane endeavoured to take Chief Pilane and his Tribal Authority to court. With the support of the South African Human Rights Commission (SAHRC), she complained that her human rights had been violated.

Some background here. Mortuary ritual has been a contentious issue among Tswana since time immemorial; early missionaries were quick to recognise that the space of death was a site of singular sensitivity (Comaroff and Comaroff 1997b: 358; see also Durham and Klaits 2000). It still is. A survey in 2000 of chiefly court records in the North West revealed a score of cases brought against local people, mostly immigrants from other regions, who had refused to perform the proper mourning routines. These are matters of great moment because bereavement rites – the initial seclusion of surviving spouses, then the sprinkling of *mogaga* to cool their polluting footprints – are held to prevent the contagion of death from escaping abroad (Comaroff 1974: 124f). In her affidavit to the High Court,[34] Mrs Tumane affirmed that this *is* a widely shared belief; its breach is said to threaten the lives of local cattle or to withhold the rain. The growing impact of HIV/AIDS in the countryside has heightened such ritual anxieties: inadequately observed mourning practices are thought to play a role in rising mortality rates.

From this vantage, then, the performance of prescribed burial rites is not just a question of personal choice, or even of respect for custom: it is a matter, literally, of life and death for the community at large – and, therefore, the responsibility of its traditional authorities. But not everyone in the rural North West agrees. There has been opposition

[32] 'Clash of Custom, Constitution', *The Mail*, 31 July 1998, p. 17.

[33] Tribal Authorities are officially recognised administrative bodies made up of chiefs and chiefly advisers. Instituted by the apartheid regime as part of the system of 'homeland' governance, they were explicitly modelled on an African political institution that endures in many rural areas.

[34] Case No. 618/98, in the High Court of South Africa (Bophuthatswana Provincial Division), p. 3.

to these ritual demands, most often mounted by women in the name of their right to freedom of belief. Thus, in June 1995, a group of 'concerned' female cadres of the ANC and Pan-African Congress presented a memorandum to the Bafokeng chief, Lebone Motlotlegi. It protested against 'the enforcement of traditional laws' in respect of burial which 'deprived South Africans of their rights to full citizenship'.[35] Citizenship, here, denotes a specific sort of political subjectivity: equal, rights-endowed membership within the liberal nation-state, not subjection to the Kingdom of Custom. There was precedent, in short, for Elizabeth Tumane's application for an interdict to the High Court in Mafikeng in June 1998. She claimed that, because of her refusal to observe *mogaga*, a representative of the Bakgatla-Ba-Kgafela Tribal Authority had ordered her to confine herself to her house and yard, forcing her to 'live ... the life of an outcast'.[36]

Tumane emerges from the story as a woman of uncommon resolve; our informants confirmed that prior religious tensions had sharpened local sensitivities to her ritual infringements and had heightened antagonism towards her.[37] Her eldest son, also a Jehovah's Witness – another son in Mononono is not[38] – had initially taken his mother's grievance to the regional Ombudsman, whose staff tried in vain to intervene with the Tribal Authority. The Human Rights Commission[39] was the next resort. Advocate Pansy Tlakula, a Tswana-speaking commissioner with special responsibility for the North West Province, duly accompanied the complainant to a meeting with Chief Pilane. Tlakula had brought veteran politician Helen Suzman and a senior male colleague with her, suspecting that gender tensions might also be at work in the dispute. The battle between custom and human rights has often been reduced, in the heat of political argument, to a stand-off between self-identifying 'traditional' senior men and constitutionally empowered women and youth; that is, between 'subjects' and 'citizens'.

In an affidavit sworn at Mononono, Tumane notes that, at the meeting in June 1998, Pilane had agreed to end her confinement. By then, six months of seclusion had already elapsed; this, she added, was the prescribed length of time, according to a prior Tribal Authority ruling, for which the sprinkling of *mogaga* was compulsory. The chief had consented then to call a gathering of the community, at which he undertook both to announce his decision to free her and to permit the HRC to inform people of existing constitutional provisions 'relating to customary laws and practices'.[40]

The promised gathering was duly held, although the HRC was *not* invited. But, rather than end Tumane's confinement, the 'tribe' resolved that, because of her transgression, she should be banished from the village and the chiefdom. Pilane kept a low profile, allowing

[35] 'Women Present Memo to the Chief', *The Mail*, 30 June 1995, p. 3.

[36] Case No. 618/98, in the High Court of South Africa (Bophuthatswana Provincial Division), Founding Affidavit, p. 3.

[37] Interviews with Advocate Pansy Tlakula (Human Rights Commission), 19 July 2000; Simon Ruthwane (Department of Traditional Affairs, North West Province), 20 July 2000; Reginald Mpame (Registrar, High Court, Mmabatho), 10 July 2000; and Elizabeth Tlhoaele (House of Traditional Leaders, North West Province), 24 July 2000.

[38] Answering Affidavit, Nyalala Molefe John Pilane, 13 November 1998, Case No. 618/98, in the High Court of South Africa (Bophuthatswana Provincial Division), p. 28.

[39] The HRC is an independent commission set up under the terms of the Constitution to investigate possible violations of its terms.

[40] Case No. 618/98, in the High Court of South Africa (Bophuthatswana Provincial Division), Founding Affidavit, pp. 5–6.

the ruler of a senior branch of the Bakgatla in Botswana[41] to make a strong statement about the perils posed to tradition by the South African Constitution.[42] In challenging the sovereignty of the State and its *One* Law, customary authorities here presumed a political map that transcends national borders. For her part, Tumane said that she was threatened with assault, the volatile crowd vowing that they were ready to expel her by force. 'I really feared for my safety and that of my family,' she attested.[43] Efforts by the HRC to remind the chief and the Tribal Authority of their earlier agreement elicited a letter from Pilane. He was not, he insisted, in a position to end the confinement. Tumane was 'confined by her own custom', he wrote; this could not be changed without the 'consent of the tribe',[44] of which she herself was a member.[45] Her rights had been respected, he went on, save where they were in conflict with Section 36 of the Constitution, 'which [wa]s applicable in all black South African communities'. Section 36, recall, is the clause covering the limitation of rights. Here it was invoked to justify the suspension of a constitutional entitlement where it conflicted with a collectively endorsed custom.

Tumane and the HRC countered that Pilane and the Tribal Authority *had* violated Tumane's constitutional rights: her right to equality (Section 9), dignity (Section 10), security of person (Section 12[1]), freedom of religion, belief and opinion (Section 15), freedom of movement and residence (Section 21), choice of language and culture (Section 30) and just administrative action (Section 33). While the Kgatla were entitled to promote the religion and culture of their community, went the argument, they could do so only in a manner consistent with the Bill of Rights. An urgent court application was made and, on 20 July 1998, the Mmabatho High Court ruled it a violation of the Constitution to compel performance of the *mogaga* rite. Pilane was ordered to lift Tumane's confinement immediately, and to desist from threatening her in any way.

The order was an interim measure, pending a court hearing in November of that year. According to Advocate Tlakula, who litigated on behalf of the HRC, it had no appreciable effect on Tumane's predicament. Meanwhile, the dispute became a *cause célèbre* in the North West. Reporters who travelled to Mononono to interview Tumane wrote that she was relieved at the prospect of being released from 'house arrest'.[46] The case was also debated in the provincial House of Traditional Leaders, where the chiefs came into bitter confrontation with both the MEC[47] for Local Government, a senior ANC politician, and representatives of the HRC; they argued that the challenge to Chief Pilane was part of a general campaign to 'violate' tradition in the name of the Constitution. Why were the

[41] The speaker was introduced as Paramount Chief of the Kgatla; this despite the fact that, while Tswana chiefdoms recognise an order of ritual seniority among their rulers, they have never had paramount chiefs *per se*. Paramountcy has been claimed from time to time, however, for political purposes.

[42] Advocate Pansy Tlakula (personal communication).

[43] Case No. 618/98, in the High Court of South Africa (Bophuthatswana Provincial Division), Founding Affidavit, p. 6.

[44] Pilane's communication, here, is multiply resonant. At this point in his reply, Pilane invoked a hallowed aphorism: *kgosi ke kgosi ka morafe*, a chief is chief by [with] the people.

[45] Letter from Kgosi Nyalala M.J. Pilane to M.C. Moodliar, Human Rights Commission, 29 June 1998. Item B4 attached to the case record of the Bophuthatswana High Court.

[46] 'Clash of Custom, Constitution', *The Mail*, 31 July 1998, p. 17. Other resonances are at work here. House arrest was commonly used by the apartheid government to silence its opponents; its invocation by Mrs Tumane associates the actions of the Tribal Authority with the tactics of the *ancien régime*.

[47] Member of the Executive Council of the House of Representatives of the North West Province. MECs are the heads of provincial government departments.

customary rights of tribes not protected by that Constitution? Why were the rights of individuals put above those of groups? Why was it that this case was being debated in the High Court rather than in the House of Traditional Leaders?[48]

In November, Pilane submitted a long answering affidavit.[49] The text, which repeats some of his earlier arguments, begins with a history of the Bakgatla-Ba-Kgafela, seeking to establish that its leader 'owed [his] position entirely to the support [he] had within [the tribe], inspired by its history, culture and traditions'. Significant among these traditions were rituals of birth, marriage and death; rituals, like the use of *mogaga*, that enjoyed 'almost complete' observance among the Kgatla, irrespective of education or status. In words that might have been written by structural-functionalist anthropologists of the British School, the ruler declared: 'Tradition is the glue that holds the tribe together, gives it a purpose, sustains its identity and allows for co-ordination and co-operation in ... efforts [towards upliftment].' While virtually all Kgatla regarded themselves as Christians, he went on, only a few, notably Jehovah's Witnesses, objected to performing the *mogaga* rite. Efforts to ascertain precisely *which* biblical injunction forbad the custom, so that 'some compromise' could be reached, had been unsuccessful. So had attempts to get those churches that opposed it to produce their constitutions; a clear example, this, of the power of constitutionalism, in the lower case (see above).[50] Pilane, here, gestures towards an accommodation between the Constitution and culture, an accommodation actively encouraged by the HRC, which advocates the 'modernisation and amendment' of traditional practices in line with the Bill of Rights. But, again, the gesture remains entirely rhetorical: what a 'compromise' might actually have meant, in this case, seems not to have been seriously considered by any of the parties.[51]

In addressing Tumane's claims in particular, however, Pilane's affidavit abruptly changed direction, asserting that she had never been threatened or intimidated by his Authority. *Mogaga*, he now insisted, was a 'ritual voluntarily followed ... [T]here has been no compulsion.' The complainant had, by her own choice, dissociated herself from the life of the village. This was her right. But, to the degree that she showed 'contempt for tradition in the language of religious fervor and self-righteous indignation', her actions were 'calculated to cause an affront to [local] dignity'.[52] Tumane was an 'eccentric' who had chosen to marginalise herself; she was now feeling the hostility of 'the tribe as a community' – not least for dragging them into expensive litigation. What is more, the effort of the HRC to turn a 'non-issue' into a 'human rights' case had backfired. The complainants had sought to demonise an unobjectionable rite in the hope of forcing it to 'adapt' under the pretext that it infringed the Constitution. In joining the dispute, the HRC had made

[48] 'Clash of Custom, Constitution', *The Mail*, 31 July 1998, p. 17.

[49] Answering Affidavit, Nyalala Molefe John Pilane, 13 November 1998, Case No. 618/98, in the High Court of South Africa (Bophuthatswana Division); all our citations in this paragraph are from pp. 7–10.

[50] Constitutionalism has been a feature of independent African churches from their inception (Comaroff 1974; Sundkler 1961). But its centrality in the new South Africa to popular notions of organizational legitimacy has given church constitutions new salience.

[51] See the statement made to this effect by Advocate Tlakula during the debate on the case in the North West House of Traditional Leaders; 'Clash of Custom, Constitution', *The Mail*, 31 July 1998, p. 17. According to Tlakula (personal communication), she told the chiefs that the matter rested with them: either they would reform their traditions or the matter would be taken out of their hands.

[52] Answering Affidavit, Nyalala Molefe John Pilane, 13 November 1998, Case No. 618/98, in the High Court of South Africa (Bophuthatswana Division), p. 19.

clear its contempt for the Kgatla and their customs.

Although the thrust of this affidavit was to deny that the *mogaga* rite was binding – or that Mrs Tumane had actually been confined by it – Pilane's conclusions suggested otherwise. For, in closing, he reiterated that he was merely 'chief by virtue of the decision ... of the tribe' and was, therefore, powerless to impose decisions that ran counter to the democratic voice of popular opinion. That opinion, he did not have to repeat, had been strongly in favour of punishing Elizabeth Tumane. Rulers who had defied their people in the past, he reminded the court, had usually come to grief.

This was the last salvo fired by Chief Pilane in the conflict. It was definitive. On 25 February 1999, the High Court dismissed its *decree nisi* of the previous July on the ground that the disputed practice had been declared voluntary. By this time, anyway, the required period of mourning had long elapsed.

Advocate Tlakula told us that the HRC had indeed been interested in the constitutional issues raised by Mrs Tumane's suit. In fact, the Commission regretted that Pilane had *not* stuck to his guns: that he had *not* made the strongest case for the sovereign cultural rights – or prescribed customary rites – of ethnic communities. Tlakula had anticipated an argument to the effect that Tumane lived voluntarily among Bagkgatla and was thus bound by their life-ways. As she noted, there *is* precedent for the judiciary favouring tradition over human rights; the Supreme Court, remember, was to give priority to culture over gender equality in Mthembu v. Letsela. Tlakula said that she had even toyed with the idea of passing on the record of an earlier case of this sort to Pilane's lawyers in the hope that they would mount the most forceful defence possible, thereby ensuring that the matter would be thrashed out in court. The HRC wanted very much to win a landmark ruling that would render it unconstitutional to force anyone to abide by a sectarian cultural practice. To be sure, even this would have been a limited victory: Tlakula had planned to base her counter-argument on Tumane's right to freedom of association rather than her freedom of belief; she sought to avoid pitting 'religion' against 'culture', with all the complexities that this would inevitably have introduced. Above all – and here is clear evidence of how the politics of difference challenges the liberal rule of law – the Commission was anxious not to assert that 'African culture was unconstitutional'. It is one thing to outlaw *compulsion*, quite another to criminalise custom.

But the HRC lost its chance. Rightly or not, the chief's lawyers had told him that – in view of the weight accorded to the Bill of Rights in the 'new' South Africa – he was bound to lose unless he declared that the *mogaga* rite was voluntary; a strategic retreat would, in any case, leave the legal status of custom advantageously murky. This tactical caution might have been justified, albeit for different reasons: Tlakula believed that Kgatla opinion was more divided than Pilane had allowed. Journalists, who interviewed local people, concurred:[53] Tumane had been quietly abetted by many of her neighbours.

As is common in such cases, the public was invoked on all sides, most notably by the chief. Pilane had asserted, early on, that Mrs Tumane was confined by 'her own custom', that it was beyond his power to release her from her duty to follow a popularly mandated tradition. While his disavowal of authority was somewhat disingenuous, the ruler's testimony rested on two broadly endorsed claims: first, that neglect of rites like *mogaga*

[53] 'Clash of Custom, Constitution', *The Mail*, 31 July 1998, p. 17.

is regarded by the majority of rural people as a clear and present danger to their physical and moral well-being; and, second, that the obligation to perform this particular rite had been legitimately affirmed by a *democratic* process, the Kgatla nation (*setshaba*) having voiced unanimous support for it in a public setting. In its discussion of the case, the House of Traditional Leaders in the North West Province had explicitly demanded more recognition for the legitimacy of collectively affirmed traditions and modes of governance. In so doing, it echoed a widespread sentiment in the countryside about the need to 'Africanise' democracy by rescuing it from Eurocentric preoccupations with electoral processes and individual rights.

As we have seen, the chief opted for strategic compromise in his final affidavit. But, in his substantive statements, he returned repeatedly to the affront implied by cases like this to the integrity of Kgatla culture. Tellingly, his argument for the sovereignty – some would say fetishism – of custom reproduced the language of the Constitution: it was framed in terms of rights, freedom, dignity and democracy. However, this language was used to evoke a very different vision of persons, polities and politics, one that distinguishes ethnic subjects from national citizens; this in spite, or maybe because, of the fact that the two visions serve to define and limit one another – and that, in practice, neither is as distinct from the other as is often made out in the heat of dispute.

Little wonder, then, that the '*mogaga* case', as it is now known in the North West, has become exemplary of the entrenched contradiction between the One Law of the Nation and the Kingdom of Custom. Significantly, the conflict had no decisive outcome. The antinomy to which it spoke remains unresolved. And unresolvable. Mrs Tumane lives on in Mononono – released, in the end, not by the court but by the passage of time. Other widows since have either performed the rite or desist less visibly. The dispute to which it gave rise and many others like it make three things clear. The first is the growing relevance, in this post-colonial democracy, of ethnically based arguments about rights and entitlements, arguments that frame local struggles against the authority of the state not merely in cultural terms, but with reference to a form of policulturalism that is making itself felt ever more globally. The second is the likelihood that, whatever pragmatic outcomes might be reached, these arguments will persist in pitting individual against collective rights, liberal universalism against culture, citizens against subjects; if anything, *pace* the utopian impulses of liberal multiculturalism, they are liable to reproduce rather than resolve the paradox of pluralism endemic to *neo*-liberal nationhood. The third is the mounting tendency for stand-offs between the Kingdom of Custom and the Constitution to be pursued by legal means, whether in quarrels over rights among groups or in challenges to the sovereignty of the nation-state and *One* Law (cf. Lazarus-Black and Hirsch 1994).[54]

[54] In this regard it seems clear that, while they have increasingly been drawn into such litigation, traditional rulers feel relatively disadvantaged by its terms. Pilane and other royals publicly expressed the view that the *mogaga* case should have been conducted elsewhere than in the High Court. In their view, African authority, metonymically enshrined in the chiefship and chiefly courts, ought to be constitutionally recognised. Hence the insistence, at the Midrand Conference on Traditional Leadership and Institutions (see above), that the Constitution be amended to recognise their sovereignty.

Inclusions, exclusions, conclusions

The *mogaga* case, in sum, is not in the least exceptional. It is paradigmatic of the way in which a politics of difference runs up against the limits of liberalism. Similar conflicts are occurring more and more frequently across South Africa over initiation ritual and occult beliefs, inheritance and succession, corporal punishment, landholding, and many things besides. Taken together, they point to the fact that a vernacular praxis is beginning to emerge: in the face of the confrontation between the Constitution and Culture, and the values for which they stand, those who seek to assert the sovereignty of things African have arrived at a series of strategic positions. These are founded on the conviction that, in spite of a rhetoric of recognition for 'tradition', in spite of talk about its 'liberation' by accommodation to the common law, the post-colonial state, even more than its colonial forebear, means to reduce the Kingdom of Custom to a shadow of its former self: in the argot of neo-liberal social management, to make chiefs into lower order managers in the dispute processing and rural development sectors. Also in the sphere of ceremonial, although – as revealed by the *mogaga* case, which was concerned with the *limitation* of chiefly rights in the rites business – 'ceremony' tends to be treated nowadays as little more than powerless pomp. The counter-tactics to which this has given rise range from a politics of avoidance, through open confrontation, to overt hybridisation.[55] The first was the strategy used, in the end, by Pilane in order to prevent the court from outlawing *mogaga*, thus, tacitly, allowing 'his people' to insist on its performance in the future; the second, less common, has been resorted to by some traditional leaders in the effort to force the HRC to prosecute them for making cultural conventions compulsory, or for otherwise flouting the law of the land, thereby to challenge the ANC to put its tolerance to the test. The third has involved exertions on the part of other rulers to alter those conventions by 'tribal' legislation, just enough to render them acceptable under the Constitution.[56] This tactic is less of a departure from the past than it may seem. African traditional codes have never been unchanging. Rather, as in the Euro-American sense of 'customary law', they have grown out of an evanescent history of practice – much in the manner espoused for the future by Justice Sachs (above, p. 41).

Elsewhere (Comaroff and Comaroff n.d.) we explore the implications of these and other means of acting on the conflict between liberal governance and the call of custom. What concern us here are the implications for citizenship, political being and democracy that flow from contradictions inherent in the scaffolding of post-colonial polities at this historical moment – contradictions observable in nation-states everywhere, if in locally modulated form. For these contradictions stem, we argue, from disjunctures of hyphenation in the Age of Neo-liberalism: from the ever more problematic relation between the liberal modernist state and the policultural nation. It is this relation, patently, that has not

[55] Contrary to some formulations (cf. Modood 2000: 177), we use 'hybridisation' not as an analytic concept but as a descriptive term for one among many self-conscious strategies deployed to address the paradox of difference here. We do not see the concept, conventionally understood, as providing an adequately theorised account of processes of this nature.

[56] There are, of course, 'traditional' practices that chiefs have themselves banished, on grounds of one or another principle, in order to address social and political transformations. Nor is this a purely post-colonial phenomenon. Schapera (1943, 1970) has documented the history of vernacular legislation and legal innovation among various Tswana groupings; see also Comaroff and Roberts (1977).

been adequately addressed or redressed in contemporary normative philosophy or social policy.

Our objective, by contrast, is to explain why, despite strenuous and thoughtful efforts to resolve it, the antinomy persists, why it resists even the best-intentioned, most capacious politics of tolerance. We have sought, therefore, to make sense of the way in which struggles over culture in post-apartheid South Africa have emerged from a *concrete*, ongoing history of difference, a history that has edged uneasily from Tutu's excoriation of ethnicity to Maduna's plea for the necessity of its recognition. It is a history that sheds light on the generic vicissitudes of the life and times of the nation-state at the turn of the new century. For, as they face the forces of global capital, post-colonial societies like this one have come to replicate features of 'late' liberal polities elsewhere, especially in respect of the challenge posed to democratic rule by activism in the name of identity. But the postcolony also makes evident critical differences in the politics of difference, in struggles that do not merely strive for inclusion *within* state institutions, but contest the very sovereignty of those institutions: their constituent forms of politics, citizenship and democracy, their monopoly over the law and the means of violence. Because of this, these struggles are inadequately grasped by liberal terms like 'minority rights' or 'multiculturalism'. For the policultural activity they embody is born of, and sustained by, the *limits* of liberalism: the limited ability, in South Africa, of the newly democratic state to produce a unified nation amidst the intensifying flow of signs, goods and people across its borders; the limited capacity of its hegemonic discourse to frame an ideology to counter ID-ology and the centrifugal claims of diversity; the limited power of its Constitution to make actual the entitlements it guarantees; the limited capability of its instruments of governance to reconcile the equality it promises its citizens with the stark disparities of life in an increasingly deregulated economy.

It is these limits that reproduce the tensions between the philosophical tenets of universalism and the practical realities of difference, between the abstract language of individual rights and the vernacular sentiments of collective identity, between the truth-claims of citizenship and the true-life experience of ethnic subjecthood; the tensions, that is, which shape the everyday politics of culture, and which erupt intermittently into dramatic confrontations like the one between Elizabeth Tumane and the Kgatla Tribal Authority. The fact that such conflicts are litigated, and that the case brought against the Kingdom of Custom was framed in terms of the plaintiff's rights to citizenship, is no accident. The growing salience of the law – in fact, the legalisation of politics *tout court* – is, for reasons that we have made plain, an integral feature of the neo-liberal moment. Even in contesting the sovereignty of the state, traditional authorities have no choice but to engage it in jural terms: in the idiom of rights, constitutionalism and due process. But, in arguing both with and through the law, advocates of difference are having an impact on its ways and meanings – by, among other things, forcing it to fashion a jurisprudence that can deal with culture without criminalising it.

It is in such cases, too, that the shape of a new popular politics is discernible, a politics that is catching flame as older struggles – under the signs of class, race and partisan ideology – fade away. This may not be the kind of politics, the sort of dialectic, that critical theorists might have chosen; it does not, after all, address some of the more profound moral and material forces shaping the lives of contemporary South Africans. Or others

elsewhere. But it is a politics nonetheless, a politics that is yielding new styles of activism, new forms of subjectivity and new sites of history-in-the-making. In postcolonies and in the world at large.

Acknowledgements

We should like to thank Advocate Pansy Tlakula, of the Human Rights Commission, for generously sharing her insights into the *mogaga* case and, more generally, into the politics of culture and traditional leadership in South Africa. We are also indebted to Constitutional Court Justices Albie Sachs and Yvonne Mokgoro, to Henry Giroux and Susan Searls, and to our editor, Steven Robins, for their thoughtful comments on the topic of the essay. Our research assistant, Maureen Anderson, abetted the project with her usual energy and imagination. This essay began life as one in our series of Jensen Lectures at the University of Frankfurt in May–July 2001; we express our gratitude to our hosts there, the Frobenius Institute and its Director, Professor Karl-Heinz Kohl. The research on which it is based was generously supported by the American Bar Foundation and the Lichtstern Fund for Anthropological Research at the University of Chicago.

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