Chiefs
in South Africa
Law, Power & Culture
in the Post-Apartheid Era

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CONTENTS

List of Acronyms
Acknowledgements Photographs

1. Introduction
Reawakenings

1. The dawning of the dawn 1
2. A new world 1
   The nation-state – New politics – Renegotiating the culture card –
   The rise of “rights to roots” – The renaissance of the traditional leaders
3. Past nightmares
   Culture and colonialism – The creation of customary law –
   The character of bureaucratic chauvinists
4. Theoretical challenges
   Law, power, culture – The constitutive effects of cultural rights
   legislation – The resurgence of traditional leadership
5. An approach to the study
   ‘The locality’ – Traditional leaders, living law – A place – Methods
6. Outline of the study

2. The Patchwork Democracy
Boundary Politics after 1994

1. Introduction 37
2. The legacy 37
3. Imagining the future: constitutional negotiations
   Constitution – 1994-1996: Drafting the final Constitution
4. Towards a Traditional Authorities Act
5. Two bulls in a kraal?; the local government discussion
   The Local Government Transition Act – The White Paper and new
   municipal legislation – The 2000 local government crisis
6. Keeping control over land
   Hereros: the sandlot years – Ondinas: back to traditional communities
7. The customary law debates
   Relations: customary law and the Bill of Rights – Rules:
   the Law Commission’s harmonisation project – Governing the
   customary courts
8. Conclusion 85
3. The Power of Definition
Struggling for the Soul of Custom

1. Introduction 87
2. Who did the defining? The actors 87
   The African National Congress — The IFP and some unlikely allies —
   Contradictions: chiefs in politics — The civic: a wiling counterweight —
   The Traditional Affairs officials
3. Why could they? Signs of the times 102
   Party-political power — Path dependency — The quest for an
   African identity — Transformations of the state — The rise of group rights
4. The assumptions 115
   Rural-urban difference — Community-think — Coherent systems of
customary law — Chiefly legitimacy
5. Conclusion 121

4. Sekhukhuneland
The Institutional Landscape

1. Introduction 123
2. From Bopedi to Lebowa 125
3. Traditional leadership and its spheres 132
   Palace politics — Bureaucracy — Party politics
4. The institutional landscape 143
   Elected local government — Government departments — The civic — Mapogo a
   Madamaga — The churches — Organisations of business and migrants
5. Asserting control 156
   Control over resources — Control over boundaries —
   Control over people — Control over meaning
6. Conclusion 162

5. 'Walking in the middle of the road'
People’s Perspectives on the Legitimacy of Traditional Leadership 164

1. Chieftaincy and legitimacy 164
2. How do people support chiefs? 168
   Within limits — Issue-related — Not exclusive — Dynamic
3. Support at community level 175
   Koppies van der Merwe — Ga-Macha: one step away from riches —
   Manzoni: re-traditionalisation in a fast-changing world
4. Support dependent on chiefly characteristics 182
   Supporting chiefs, supporting chieftaincy — Virtues and vices of traditional leaders
5. Support at the individual level 186
   'This is a thing of our parents': the youth and the elders —
   The paradox of the women — Moving up, moving out: education and income
6. Why do people support traditional leaders? 193
   'These are our roots': traditional legitimacy — 'They do good things for us';
   performance as a source of legitimisation — 'They guard us for the government' —
   'What else is there?': default legitimisation
7. Conclusion 198

6. Negotiated Laws, Relational Rights
Power, Authority & the Creation of Local Law 200

1. Introduction 200
2. Living law and legal culture in Sekhukhuneland 204
   Plurality of forums — Negotiated law — State law as a resource —
   Relational rights — A processual legal culture
3. Stories of succession 218
   Succession: the official version — Living law — Interactions — Illustrations
4. The Commission on the Tribal Constitution 229
5. Conclusion 233

7. Conclusion
Categories have Consequences
The Constitutive Effects of Cultural Rights Legislation 235

1. Introduction 235
2. Definitions and struggles 236
3. The constitutive effects of cultural rights legislation 240
   Sekhukhune subjects — Political formations — Material
   implications — Categories and chiefly resurgence
4. Law, power and culture 246
5. Alternatives 249

References
253
Index
267
1. Introduction

Reawakenings

1. The dawning of the dawn

Sekhukhune, 19 December 1998 – 'The time has come to go back to our history', declares Mr Manalo as he helps himself to another chunk of maize porridge. We are guests of a 'VIP dinner' celebrating the coronation of Mamome traditional leader Billy Sekwati Rampuru III. Outside the party tent the pounding of cowhite drums and shrieking of children echo the excitement of the day. In front of us, the young chief – in pink suit, leopard pelt – sits on display behind a long table decorated with a crocheted table-cloth and silk flowers. He is surrounded by dignitaries: government officials, politicians and the traditional leader who earlier in the day greeted me 'in the name of the African Renaissance'. With a deprecatory look at my salmon and white wine – the dinner has been sponsored and flown in by helicopter by the mining company where many Bapedi work – my table companion continues, 'We have to re-visit our traditional customs, re-erect the customary court. For a long time, our lives were mixed up and we were like pieces of paper flying in the wind. Watch us, this young king will make us get together again...'

This call for retraditionalisation, uttered far from the public eye in an often forgotten dusty corner of South Africa, seemed to foreshadow the words spoken by another leader at his inauguration, six months later. In contrast to Sekwati's coronation, Thabo Mbeki's ascent to the presidency was world news, with press, presidents and royalty gathered to see how the newcomer would take over from his already historic predecessor, Nelson Mandela. While Air Force jets drew the red, yellow, blue and green of South Africa's flag in the clear blue sky above Pretoria's Union Buildings, once symbols of apartheid, thousands listened breathlessly to the new President's understanding of the challenges facing South Africa.

Our country is in that period of time which the seRwana-speaking people of Southern Africa graphically describe as 'mashabe a moke tso la hone' – the dawning of the dawn, when only the tips of the horns of the cattle can be seen etched against the morning sky.... We have to keep pace with the rising sun, progressing from despair to hope.... As Africans we are the children of the abyss, who have sustained a backward march for half a millennium.... As South Africans, whatever the difficulties, we are moving forward in the effort to combine ourselves into one nation of many colours, many cultures and divergent origins. No longer capable of being falsely defined as a European outpost in Africa, we are an African nation in the complex process simultaneously of formation and renewal.1

For this, the new President assured his captive audience. South Africa needed to

1 Speech of President Thabo Mbeki at his Inauguration as President of the Republic of South Africa: Union Buildings, Pretoria. 16 June 1999.
rediscover and claim the African heritage. Being certain that not always were we the children of the abyss, we will do what we have to do to achieve our own Renaissance.' When he concluded with 'Pula! Nala!' (may the rains fall) a wave of applause washed through the audience, into television sets throughout the country and the world.

This book is about the surprising resurgence of traditional authority and customary law in post-apartheid South Africa. It grapples with three questions: what was the relation between the changing legal and socio-political positions of traditional authority and customary law in the new South Africa, why was this so and what does this teach us about the interrelation between laws, politics and culture in the post-modern world?

The lavish coercion of one of South Africa’s 787 traditional leaders and Thabo Mbeki’s emphasis on returning to the roots were hardly aberrations, symptoms of a dying order as democracy dawned. Rather, they captured the mood of the times, marked by vicious political fights over the return of a Bushman skeleton; the enthusiastic introduction of ‘heritage studies’ in the official school curriculum; televised debates on ‘Who is an African?’ and a fashion bringing ethnic shirts, Zulu beadwork and tribal art to Johannesburg’s shopping malls. Identities long dormant were dusted off as the Griqua moved to the political centre stage, clamouring for museums, minerals and land, and as South Africa adopted a coat of arms in a dying language: the isiXhosa he Khoisan for ‘Unity in Diversity.’ The notion of E Pluribus Unum also informed the call to participate in writing South Africa’s new Constitution: ‘20 million systems, 18 million men, 8 religions, 25 churches, 31 cultures, 14 languages, 9 ethnic groups, one country; please feel free to help us write some rules that will make this work.’ Those rules, collected in one of the most modern constitutions in the world, would be written in eleven languages and would call for the protection of culture and the recognition of the ‘status, institution and role of traditional leadership.’

The Constitution would not only allow for the recognition of ‘customary marriages’ – polygamy and bridewealth included – but also make room for a National Council of Traditional Leaders, a Khoisan Forum, a Zulu Kingdom and an Afrikaner Volksstaat. If South Africa was grasping for a post-apartheid identity, it seemed to have found two central elements in tradition and cultural diversity.

This enthusiastic embracing of diversity and emphasis on tradition were, in the light of South Africa’s past, somewhat surprising. For was not South Africa, the country in which legal recognition of cultural diversity had led to the terrible injustices of apartheid? Where racial contradictions had been turned into ethnic ones with the introduction of ten homelands to actualise apartheid’s central ideology: that each race and nation had a unique destiny and cultural contribution to make to the world and that they should be kept apart so that each could develop along its own inherent lines? Where the triad of ‘culture, tribe and chiefsdom’ had been used to deny Africans access to democracy (Bennett, 1997:7): ‘They, after all, already had their own system of governance.’ Was it not Thabo Mbeki’s own father, Govan, who had written in the 1960s: “If Africans have had chiefs, it was because all human societies have had them at one stage or another. But when a people have developed to a stage which discards chieftainship...then force to implement it is not liberation but alienation” (Mbeki, 1964:47)? The struggle against apartheid had been mainly against this imposition of cultural diversity, which had caused even the even-tempered Bishop Tutu to fulminate, in the 1980s: ‘We blacks – most of us – execrable ethnicity with all our being.’ If the whole fight had been about attaining a nation in which all citizens would be equal, with ‘one man, one vote’, why were chiefs, customs and cultural diversity once again so important, once democracy had dawned?

There seems to be a contradiction between the abuse of such notions as ‘chief, culture and customs’ in South Africa’s not-too-distant past and their enthusiastic embracing within the new, democratic order. The starkness of this contradiction makes South Africa an extremely interesting case for studying the relations between law, politics and culture in a changing world. It is a central contention of this book that the events in South Africa cannot be understood without looking at global developments: the fragmentation of the nation-state, the embracing of culture, the applauding of group rights. When even South Africa, just stepping out of a nightmare scenario as regards the abuse of culture, chose to make diversity a founding stone of its new order, what does this teach us about this world on what questions does it pose to students of law, politics and culture? What does the resurgence of traditional leadership and customary law in South Africa, of all places, teach us about the relations between nations and chiefdoms, the global, the national and the local?

This introduction serves to outline the changing world in which South Africa’s democracy dawned, the questions it poses to those concerned with the relations between law, politics and culture; and the relevance of ethnic identities in the modern world. It thus seeks to sketch some of the general debates in which this study is located and from which it draws its inspiration. First, in section 2, we need to look at the general features of the world at the end of the twentieth century, when South Africa finally became democratic. This world, which (for want of a better or at least less worn-out term) I shall call post-modern, had undergone drastic changes since the 1960s, both in fact and in the way in which it was understood. For one, the nation-state, still in the 1960s the shiny vehicle in which to embark on the path to progress, had fallen out of favour, its powers contested by a variety of sub- and supranational politics. One way in which this scramble for legitimacy in an increasingly interconnected, globalising world was played out was through the culture card: reviving traditional systems of governance, emphasising autochthony in politics, granting ‘group rights’ to...
indigenous peoples or 'first nations'. The legal recognition of cultural diversity 
was the distinguishing feature of politics worldwide in the 1990s.

Suddenly, a new world order had emerged in which tribes were trendy, 
culture was cool, and of which chiefs could be central constituents. Nevertheless, 
this celebration of cultural diversity, enthusiastically embraced in the new South 
Africa, was at times oddly reminiscent of what had been considered a nightmare 
ot long before. It is therefore worthwhile to consider, in section 3, seemingly 
forgotten lessons of 'customary law studies'. These concern the malleability of 
culture and the dangers inherent in fixing it in the 'austerity of tabulated 
legalism' (D'Engelbreuner-Kolff, 2001:71). They stipulate how customary law 
was, above all, a historic formation created for certain reasons within a particular 
socio-political context that set it at the cutting edge of colonialism' (Chanock, 
1985-4). Traditional leaders played a central role as bureaucratised representa 
tives of forcibly created tribes, enjoying more legitimacy within the state than 
with the people they claimed to represent.

It is at the juncture of these two sets of givens – the enthusiastic embracing 
of chiefs, custom and culture in a new world and the lessons customary law 
studies hold about their artificial origins – that a set of key theoretical challenges 
arise. These are discussed in section 4. First, now that states derive part of their 
legitimacy from associations with traditional leaders and other polities – chief 
doms, first nations – and rely on 'cultural difference' to attain independence from 
that same state, there is a need to rethink the relation between law, power and 
culture. What is law in these situations, what does it reflect? A second question 
concerns the constitutive effects of cultural rights legislation: what does state 
recognition of chiefs and customs do locally? Finally, and related to all this, there 
is a challenge in rethinking the connections between state recognition of trad 
tional leadership and its resurgence which, as we shall see, took place all over 
Africa, not only in constitutions and parliaments but also in villages like Mamone, 
far from the wider world. What legitimacy do these chiefs have? Is their revival 
merely the local adoption of a bureaucratic myth, the embracing of an imposed 
reality, as deconstructivists would have us believe, or does it go further than that?

This study is therefore an explicit attempt to link the local to the national and 
even the global, and to focus on the interaction between these polities. Although 
a large part of it is concerned with describing the position of chiefs and 
customary law in one place, Sekukhune in South Africa's Northern Province, 
it concerned is with the complex dialogue between this locality and the wider 
world. This calls for a specific methodology that combines extensive and in-depth 
'field work' with a more multi-sited ethnographic approach. Section 5 looks 
briefer at the choice of methods used and the theoretical assumptions that 
they rest upon, this introductory chapter not only outlines the theoretical con 
cepts which shaped this study on chiefdoms and custom in the new South 
Africa, but also presents some of the tools used to approach its central questions.

2. A new world

Sekukhune, 10 September 1999: A meeting at the Hlatulaneng (Let's Help Each 
Other) Community Centre about the return of a mineral-rich plot of land to the 
Masha community. Beneath the faded posters in the hall – Be Wise: Condomize;

There's No Milk like Mother's Milk: Let's Build our Nation – sit the 'stakeholders': 
the Land and Mineral Affairs officials and their lawyers in jeans, sleeves rolled up 
for this 'field trip', three chiefs and their delegations in worn-out suits, the 
community representatives in ANC T-shirts. A braided NGO representative gives 
the chiefs a flyer on 'Aboriginal Community and Mining Company Relations', which 
she received during training by Canadians a few weeks ago. This aboriginal thing 
is interesting', ponders King Masha as he gives me a lift after the meeting. Would I 
know more? I promise to check on the Internet...

If one single event symbolises the birth of the new South Africa, it is Nelson 
Mandela's release from prison – eyes squinting in the February sun, fist clenched 
in exultant victory. There, in front of the roaring masses, he repeated the words 
spoken at his last public appearance, his trial twenty-six years earlier:

I have fought against white domination and I have fought against black domination. 
I have cherished the ideal of a democratic and free society in which all persons live 
together in harmony and with equal opportunities. It is an ideal which I hope to live 
for and to achieve. But if needs be, it is an ideal for which I am prepared to die.

However true those words were for Nelson Mandela, the concept of the 
unitary nation-state as a central building block of the world order had undergone 
a watershed transformation during the three decades he had spent in prison. In 
the 1960s, the countries around South Africa throwing off the shackles of 
colonialism had adopted the nation-state with all its symbols – flags, anthems, 
constitutions – as the ideal vehicle in which to undertake the great and 
unstoppable journey towards progress and modernisation. By the early 1990s, 
however, their dreams had grown rather thin and had been replaced by new ones 
– modernisation through authenticity and development through ownership – as 
the state came to be considered as just another actor in an increasingly complex 
and interwoven global order. It is precisely because of these changes that it seems 
fit to start our investigation with a sketch – however elementary – of the world 
in which the 'new South Africa' saw the light of day.

Renegotiating the nation-state

With the benefit of hindsight, the fall of the Berlin Wall can be seen as an epilogue 
to the Cold War of the previous decades, while the subsequent implosion of the 
Soviet Union into a multitude of ethnic polities was a premonition of the times 
to come. W.B. Yeats' prophetic words, 'Things fall apart; the centre cannot hold', 
were dusted off by journalists to describe a plethora of ethnic conflicts, from 
Indonesia to the Balkans, from Rwanda to countries in Latin America. The attack 
on the nation-state came from many sides and took many forms: international 
organisations taking over its central functions; citizens challenging its capacity 
to deliver; academics singing its swan-song. More than 350 years after the Treaty 
of Westphalia and 200 years after the French Revolution, the nation-state and

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8 Nelson Mandela. 'Speech on his Release from Prison.' Cape Town: African National Congress. 
1990.

9 A vast literature has appeared on this subject since the late 1980s. Loci classicus on the central 
claims of the nation-state are Anderson (1983), Gellner (1983), Hobart and Ranger (1983). The 
failure to make good on these claims and the central characteristics of a 'post-nationalist' world order 
have been excellently described by Appadurai (1996), Moebele (2001), Migdal (1988), Scott (1998), 
Young (1993b).
the central assumptions on which it had come to rest—territorial integrity, monopoly of violence, political independence, domestic jurisdiction, non-intervention, unity—were under the most severe attack ever. Of course, the transformation took place in different ways. Some nations relinquished central powers freely, at conferences on an International Criminal Court or monetary unions, or in decentralisation and liberalisation programmes negotiated with alternative local actors. Others, like the Congo and Somalia, just imploded, their government buildings taken over by squatters, their postal services paralysed, their resources plundered by warlords and multinational companies, and their public services, if they existed, provided by churches and other non-governmental organisations.

Although it was a worldwide phenomenon, the fragmentation of the nation-state was particularly apparent in sub-Saharan Africa. After all, this continent abounded in artificial boundaries resulting from colonisers’ nineteenth-century attempts to cut up ‘this magnificent African cake’ as Leopold II put it. Even if most colonies did preserve the “steel grid of colonial partition” after decolonisation, this was more because of the ‘commanding force of circumstance’ than for any other reason (Young, 1993a). By the 1990s, many African states had become a liability, at best irrelevant to those who lived in them, at worst a threat to their existence. And everywhere this caused citizens to disengage and reorganise themselves in other ways, their nations at times no more than mere ‘geographic expressions’ as power was marshalled along other lines (Baker, 1997; Bierschenk and Olivier de Sardan, 1997).

The crisis of the African state was often conceptualised as a crisis of modernisation itself. As Crawford Young wrote on the ‘high tide’ of the nation-state in the 1950s and 1960s:

A confluence of circumstances, whose particularity emerges only in retrospect, yielded a historical moment when this form of political economy was unaccountably ascendant. With the idea of progress still robust, those policies which were perceived as least humane and least to a better future had singular power as authoritative models. Analytical vocabulary was saturated with such imagery: ‘modernity’ versus ‘traditionality’, ‘developed’ versus ‘underdeveloped’ (or developing), ‘advanced’ versus ‘backward’. (Young, 1993a:7)

This vocabulary itself came under the critical scrutiny of African people, academics and policymakers alike. As ‘Structural Adjustment Programmes’ and ambitious development projects designed on European and American drawing boards unceremoniously failed, there was increased pressure to disavow ‘neo-colonialist’ interventions. In turn, academics emphasised the essentially political agenda behind apparently neutral terms such as ‘development’ and ‘progress’ and openly questioned why Africa had to be measured along a schematic-evolutionary line with the Western individualist and capitalist state at its apex (Elliott, 1991; Ferguson, 1994; Leftwich, 1996; Leys, 1996; Sachs, 1992). Instead of clinging to these imported solutions, this colonial heritage which had brought so little of worth, some African intellectuals and policymakers started to argue in favour of indigenous solutions to the problems of the continent (Ayittey, 1991).

New politics

Intimately related to the transformation of the nation-state was the rise of a multifarious mix of alternative politics—some vintage, others virginal—eager to take over some of its practical and symbolic functions. As Appadurai wrote with foresight (1996:25):

It may well be that the emergent postnational order proves to be a system of homogeneous units (as with the current system of nation-states) but a system based on relations between heterogeneous units (some social movements, some interest groups, some professional bodies and some nongovernmental organisations, some armed constabularies, some judicial bodies).

Instead of the orderly system of territorial units, the new world was characterised by heterogeneous, network-like politics, operating locally, transnationally and internationally (Castells, 1996; Chatterjee, 1993; Friedman, 1999; Meyer and Gschwend, 1999; Sibey, 1997; Wilmer, 1993: Young, 1999). Globalisation—the increased flow of goods, information and people around the world and the ensuing interconnectedness between people and politics—gave these units new platforms on which to make their claims and new media through which to publicise them (Appadurai, 1996; Wilson, 1997:23).

For one, there was the rise of international organisations, all implicated in one way or another in ‘global governance’. The Bretton Woods institutions like the IMF and the World Bank, for instance, by the 1990s no longer contented themselves with economic assistance to developing countries, but firmly tied this assistance to demands for ‘good governance’: democratisation, decentralisation and the scaling down of the state (Abrahamsen, 2000; IMF, 1998; Otto, 1997). Even though international organisations like the United Nations, SADC, ECOWAS or the European Union remained stung by bureaucratic problems, their impact was large, and the 1990s’ acceptance of an International Criminal Court was indicative of the degree to which some states were prepared to surrender sovereignty to a higher body. Their interventions in many African countries were accompanied by those of powerful international NGOs, many of which were far more influential in health care, education and disaster relief than the governments of the countries concerned. And although their purpose was different, they wielded as much power as those many multinational corporations whose budgets far exceeded the GDP of some of the countries in which they operated.

The ‘information age’ also enabled a strengthening and politicisation of transnational politics. Of course, there had for long been religious communities with missions from Mauritania to Madagascar, Filipino households working in the West, Muslims connected through their pilgrimage to Mecca, Lebanese shopkeepers in every dusty African outpost. But Yahoo e-mail accounts, satellite television, charter flights, Internet sites and fast cash transfers made possible an unprecedented degree of contact within these imagined communities, allowing for a strengthening of their identity and their political mobilisation. Never was this clearer than on 11 September 2001, when a terrorist network trained in Germany and Saudi Arabia, America and Afghanistan, attacked the twin symbols of capitalism, causing commentators to conclude that the new warfare was not about states but about nebulous networks bound together by communal values, e-mail exchanges and bank transfers.

Some of the most vicious attacks on the nation-state, however, came from the inside. On the basis of research into nearly 300 ethnopolitical communities worldwide, Gurr concluded that nearly every kind of ethnic conflict was exacerbated from the 1950s to the 1990s (Gurr, 1994). Sertes, Basques, Irian Jayaans expressed, often by violent means, their feelings of no longer being represented by the nation-states under which they fell. Even the seemingly benign processes of democratisation and decentralisation in sub-Saharan Africa — often a result of strong outside pressure — unleashed forces of ethnicity, autonomy and exclusion along ethnic lines (Bierschenk and Oliveira de Sardan, 1997; Gould, 1997). The discrediting of the state also led to a call for informal justice, and to the rise of vigilante organisations which, from South Africa to Nigeria, permitted themselves to maintaining law and order because ‘the police can no longer protect us’ (Abrahams, 1996:23; Cotterell, 1992; Wilmer, 1993; Young, 1999:14).

One common thread linking these diverse polities in a fragmented world was the fact that many of them had forced ‘imagined communities’, and provided other scripts of belonging than that of citizenship in a nation-state. But another similarity was the essentially normative character of the claims many of them made on the nation-state (Appadurai, 1996; La Fraire, 1996; Oomen, 1999a:14). Might, it seemed, no longer made right. Now that the legitimacy of the state was no longer a given, the floor was open to all sorts of contestation to the justification of its rule, many of them couched in the language of human rights.

Others put the state to the test by playing the ‘culture card’, whether combined with human rights discourse or not.

The culture card
Marama, 25 August 1999: The customary court has been revamped, with fresh cut branches surrounding the withered thorn-tree. Today, the old men of the village have gathered to welcome a group of girls from the Guardian Angels School: they kids in Tommy Hilfiger clothes and expensive sneakers, undoubtedly sent to the ‘rural areas’ by their wealthy parents to shield them from drugs and drinking.

They’ve been reading O.K. Matepe’s ‘K’bromba ya Masata’ (The Customary Court) and the assembled old men act out a scene for them. Afterwards, they gaze at the chief, sitting on an ornate chair in front of his palace, surrounded by faded pictures, tortoise-shells, grain-baskets and divining bones. After their bus has driven off in a cloud of dust, the chief’s brother evaluates the benefits of, and plucks for, a permanent museum. ‘I saw a Ndebele woman decorating a BMW in tribal patterns on television the other day. Do you think she does that for nothing? I am telling you, old men, there is money in these traditional things these days...’

Arguably, one of the great surprises of the late twentieth century was the strengthening of the relationship between ‘culture’ and wider political and economic processes. Long considered ‘backward’, ‘tribalist’ and ‘an obstacle to modernisation’, culture became one of the prime ways in which to engage with a fast-changing world (Hunter, 1991; Meyer and Geschirre, 1995; Wilsmen and McAllister, 1996; Young, 1995a). ‘Around the world,’ as Sahlin (1999:11) was to write, ‘the peoples give the lie to received theoretical oppositions between tradition and change, indigenous culture and modernity, townsmen and tribesmen, and other clichés of the received anthropological wisdom’. Peruvian pan-pipe players in European shopping malls, French Camembert makers joining the anti-globalisation movement, Malag reviving traditional dances to please tourists, indigenous Internet sites all over the Web — all showed how culture had become a means by which to assert ‘authenticity’ in a fast-changing world, to localise modernity and appropriate some of its central forces. As Chanock himself seemed to have become commodified, subject to market forces as well.

Not only was the revival of culture related to wider economic processes, it was also often essentially political. From the Basques to the Brazilians Indians, from New Zealand aboriginals to Zambian secessionists, all stated their demands for greater autonomy in cultural terms, thus adding legitimacy to what were essentially political claims. To describe the political ends to which culture was put to use, Appadurai (1996:30) coined the term ‘culturalism’: the conscious effort to which culture was put to use. Appadurai (1996:30) coined the term ‘culturalism’: the conscious effort to which culture was put to use. Appadurai (1996:30) coined the term ‘culturalism’: the conscious effort to which culture was put to use.

The rise of ‘rights to roots’
It was not without reason that the 1990s became the UN ‘International Decade of the World’s Indigenous People’ (1995–2004). Not only did an increasing number of sub- and transnational polities make political demands couched in cultural terms, there was also a growing consensus that these demands were just, and that they should be honoured.11 In the course of the 1990s, many countries adopted legislation on cultural rights, ranging from the far-reaching laws which the Ethiopian Constitution granted to its ethnic groups, to rights to secede which the Ethiopian Constitution granted to its ethnic groups, to rights to representation of minority groups in governmental bodies, given in nearly every country in the world.12 Even in strong and homogenising states such as the United States, Canada, Australia and New Zealand, ethnic communities were demanding to be regarded as ‘first nations’, a powerful expression of the type of claim they suddenly rechristened ‘first nations’, a powerful expression of the type of claim they suddenly rechristened ‘first nations’, a powerful expression of the type of claim they suddenly rechristened ‘first nations’, a powerful expression of the type of claim they suddenly rechristened ‘first nations’, a powerful expression of the type of claim they suddenly rechristened ‘first nations’, a powerful expression of the type of claim they suddenly rechristened ‘first nations’, a powerful expression of the type of claim they suddenly rechristened ‘first nations’, a powerful expression of the type of claim they suddenly rechristened ‘first nations’, a powerful expression of the type of claim they suddenly rechristened ‘first nations’, a powerful expression of the type of claim they suddenly rechristened ‘first nations’, a powerful expression of the type of claim they suddenly rechristened ‘first nations’, a powerful expression of the type of claim they suddenly rechristened ‘first nations’, a powerful expression of the type of claim they suddenly rechristened ‘first nations’, a powerful expression of the type of claim they suddenly rechristened ‘first nations’, a powerful expression of the type of claim they suddenly rechristened ‘first nations’, a powerful expression of the type of claim they suddenly rechristened ‘first nations’. The latter document recognised ‘the urgent need to respect and promote

The resurgence of the traditional leaders.

The core features of the 1990s global order - the changing role of the nation-state, the related space for the rise of alternative politics, the rise of culture as a means through which to engage with modernity, the recognition of group rights - also facilitated a surprise re-entry, that of traditional leaders.11 While in the 1950s and 1960s many newly independent African states had attempted to crush chiefdoms on the path to a common nationhood, they were back with a vengeance. And even though they continued to derive a large part of their legitimacy from their relationship with the past, the conditions for their return and the way in which it took place were decidedly those of the post-modern world order.

Roughly, two scenarios seemed to govern the revival of traditional leadership in sub-Saharan Africa. The first was that of weak, or even collapsed, states like Angola, Somalia and the Congo, in which government institutions had ceased to function and (non)traditional authorities - as if by default - had taken their place. In the second scenario, relatively strong states, reacting to the global and local forces described above, sought to maintain legitimacy by recognising traditional structures of rule. Zimbabwe, for instance, re-welcomed traditional leaders to Parliament and reinstated the customary courts; Zambia established a House of Chiefs: Uganda officially revived the Buganda kingdom, and traditional leaders in Nigeria and Ghana.12 As we shall see, this state revival of traditional authority often turned out to be a Pandora's box; once unleashed, the forces of ethnicity proved difficult to contain and developed into a much larger threat to the nation-state than they had been before their recognition.

Thus, the resurgence of traditional leadership took different forms, depending on the character of the nation-state concerned. The states that switched to an (increased) official recognition of traditional leaders, their structures of governance and their representative bodies were often former British colonies with a tradition of indirect rule. But the resurgence also took place outside the Anglophone sphere, with an increase in the involvement of chiefs in governmental structures from Togo to Niger; from Mozambique to Namibia.20 However, just as the resurgence of traditional authority was unintended; in Angola, for instance, traditional leaders claimed they could run the country much better than the formal government. And for many countries a link between decentralisation, democratisation, donor policies and retraditionalisation was reported: the strengthening of the local sphere and the emphasis on grass-roots politics often led to a surprise revival of traditional authority.

11 Good general works that acknowledge and - in part - explain the resurgence of traditional authority in the 1990s are Englebert (2000); Harding (1998); Hofmeester and Scholz (1997); Konrad Adanae Salloum (1997); Van Rounsevelt van Nieuwaal and Van Dijk (1999); Van Rounsevelt and Ray (1996); Van Rounsevelt van Nieuwaal and Zips (1998).


10 Introduction
the inherent rights and characteristics of indigenous peoples, especially their rights to their lands, territories and resources, which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies.10

The fact that cultural communities were increasingly stating their essentially political claims in the language of the law had led to another key feature of politics in the 1990s: the rights revolution. In the course of the decade, many commentator remarked, often with regret, how political discourse had been reduced to 'rights talk', and how social movements chose to adopt strategies based on law rather than other forms of politics (Glendon, 1991; McCann, 1998; Sarat and Kearns, 1997). Political differences seemed to be fought out more efficiently in courts than in parliaments or through warfare. A striking illustration of this development was the appearance of a group of (white) Afrikaner farmers, complete with khaki outfits and feathered hats, at the 1994 session of the UN's Working Group on Indigenous Populations, to voice their demand for recognition as an 'indigenous people'. Clearly they reckoned that, with the violent repression typical of apartheid having failed, and having lost out at the negotiating table, their last chance lay in obtaining recognition of their group rights.

But the novelty of the 1990s did not lie only in the fact that rights in general became more important, but also in a change in the type of rights that were recognised and the moral justification for them. There was widespread debate on why and in what sense ‘rights to roots’14 should be recognised in addition to ‘rights to options’, with the general argument stemming to run as follows. (i) Cultural diversity is a central feature of present-day society; states incorporate many cultures. (ii) This is a good thing, worthy of legal recognition and protection for two reasons: a) there is an intrinsic value in cultural diversity, especially when it concerns cultures like those of indigenous peoples who have been marginalised and discriminated against in the past, and b) legal recognition of cultural diversity adds to the classical rights repertoire because it acknowledges the degree to which human identity is dialectically created and constituted, and thus adds to individual well-being as well as group protection. The increase in legal recognition of cultural diversity was thus based on both empirical and normative assumptions: the idea that cultural diversity was a feature of current society and that it should be so. These assumptions, as we shall see, also formed the foundation for a related phenomenon: the resurgence of traditional authority.

12 These terms were coined by B. de Sousa Santos, 'State, Law and Community in the World System: An Introduction', Social & Legal Studies 1 (1992), p.136. A more classic distinction is between first-, second- and third-generation rights: the first-generation rights are civil and political human rights such as the right to liberty, equality and bodily integrity; the second-generation includes socio-economic rights; and the third generation includes both 'cultural' and 'group' rights such as rights to a clean environment.
13 This is the general spirit of many national laws on cultural diversity as well as the international debate. Cf. Aneja (1996); Donders et al. (1999); Marquardt (1995). Nevertheless, there is a great variety of political positions on the subject, well set out in: Irion et al. (2000). The emphasis on the intrinsic value of culture can be found, for instance, in Johnston (1995); Muschel and Taylor (1995); while the argument of individual well-being was famously put forward by Kymlicka (1995) and Taylor (1992:7).
In sum, the reasons for which states chose to (re-)recognise traditional authority seemed to be threefold and, again, both normative and empirical: first, there was the belief that indigenous institutions were worthy of recognition; second, the fact that they could add extra legitimacy to the alling nation-states; and third, that they could not be wished away anyway. Many authors joined Van Rouwenvor and Ray (1995:1) in stating that an important explanation of state failure in Africa lies in the ‘overlooked relationship between the contemporary African state and traditional authority’. Indigenous African institutions and values deserved to be recognised within the official state and would contribute to it (Ayttey, 1991; Skalnik, 1996). For one thing, states could derive additional legitimacy from their association with ‘that other traditional, moral and political order’ which would enable them to get ‘around their own administrative weaknesses and the physical and emotional distance from their populations’. Other authors underlined the need for African states to be realistic: traditional authorities had shown a ‘remarkable resilience’ and were an undeniable part of the African socio-political landscape and, as such, hard to ignore (Herbst, 2000; Hofmeister and Scholz, 1997; Mawhood, 1982).

In the course of this book we shall see how post-apartheid developments in South Africa reflected this global mood, and how alternative policies were successful in relying on cultural difference to challenge the unity nation-state that had once been the dream in the struggle against oppression. This development, for instance, caused the mineral-rich ‘Royal Bafokeng Nation’ to claim for complete independence from South Africa before 2005, a claim which was published in national newspapers and glossy folders with investment opportunities, and promoted by ambassadors like ‘honorary tribalman’ American pop singer Michael Jackson. It also led to the new South African government enthusiastically embracing a ‘Khoisan consultative conference’, with the Deputy President stating:

This consultative conference stands as testament to the fact that we, as a nation, are successfully moving away from the darkness of the past into the brightness of the future. It is a future that seeks to achieve a living African Renaissance, where the dignity of all our citizens is respected, and where all communities are free to explore, explain, reflect and rejoice in that which makes them unique.

The official encouragement to South African communities to ‘explore, explain, reflect and rejoice’ in their cultural differences appeared to be based on the same empirical and normative assumptions as those fueling the recognition of group rights and the revival of traditional authorities in other countries. There seemed to be an idea not only that society consisted of a tapestry of distinct cultures, but also that the ascendant, normative and governmental systems of these cultures were worthy of official legal recognition. While these images and notions were presented as novel postulates of post-modern times, they nonetheless often bore a startling resemblance to the paradigms of a not-too-distant past, when they had formed the building blocks of indirect rule and apartheid policies. It is for this reason that we shall now turn to some of the long-forgotten lessons that those times, inside and outside South Africa, taught us about the malleability of culture, the creation of customary law and the character of bureaucratic chieftaincy.

3. Past nightmares

One of the founding legal texts of apartheid’s homeland policies started with the words: ‘Whereas the Bantu peoples of the Union of South Africa do not constitute a homogeneous people, but form separate national units on the basis of language and culture…” Apartheid was not unique in assuming the existence of separate administrative units with their own systems of law and governance, in need and capable of official recognition. On the contrary, it built on and refined the British policies of indirect rule, which took comparable notions of culture, community, customary law and chieftaincy as their point of departure (Beinart and Dubow, 1995: Costa, 1999a; Evans, 1997; Mamdani, 1996; Worden, 1994). By the end of the twentieth century, these notions and their usage as part of the colonial project were subject to severe debunking by both anthropologists and colonial historians, scholars interested in South Africa as well as other former British colonies. Instead, they offered some alternative interpretations of the relations between law, power and culture in colonialism and apartheid, which we shall briefly examine in the following sub-sections.

Culture and colonialism

In chapters on ‘cultural diversity’ and ‘black political organisation’, the 1990 Yearbook of the South African Bureau of Information offered an idyllic description of South Africa’s population: ‘a rich mosaic of distinctive minorities without any common cultural rallying point’ which reflect ‘the full global spectrum – from the Stone Age lifestyle of the Bushmen through the subsistence socio-economic organisation of traditional black communities to the modern urban industrial society’ (p.17). The ten ethnic black homelands, in which one could find Zulus with beehive-shaped huts and bone and ivory ornaments; Swazi who sculpted their hair with aloe leaves; Ndebele girls wearing up to 25 kilograms of copper, leather and beads; South Sotho with cone-shaped hats and brightly coloured blankets; all, according to this book, knew a political system in which ‘public opposition from outside the traditional system of government is foreign and frowned upon Therefore, political parties and factions in the Western sense are unknown.’ In any event, democracy would not have worked for South Africa because

there was no such thing as a homogeneous ‘Black majority’. In fact, there were no fewer than nine major distinctive ethnic groups, all minorities, each with its own cultural identity, including language, and a territorial base reasonably clearly defined by history and gradually being expanded and consolidated. (Ibid. p.174)

This neat classification, reproduced in tourist folders and state-sponsored anthropology text-books alike, not only legitimised minority rule and completely bypassed the degree of force that had gone into the creation of this ‘rich mosaic’.  

such as the forced removal of 3.5 million people. It was also based on the anthropological assumptions of a long-gone era, when Maine and Malinowski described 'tribes' as bounded, homogeneous entities, isolated both from change and from contact with other communities, with cultures that could be known, recorded and explained.24

By the time the 1990 Yearbook appeared, these insights had long been pulverised in academic discourse and replaced by new views. Culture had come to be considered a process instead of an entity, a verb instead of a noun (Bozonzaier and Sharp, 1985; Wilson, 1997:9). In a widely influential definition, Geertz linked the notion to the way in which people give meaning to their lives and stated that culture can be considered a "historically transmitted pattern of meaning, embodied in symbols, a system of inherited conceptions expressed in symbolic forms by means of which men communicate, perpetuate, and develop their knowledge about and attitudes toward life" (Ferguson and Gupta, 1997; Geertz, 1973). As these meanings could differ from individual to individual, from context to context, over time and space, some authors preferred to use the term 'cultural orientations' (Van Binsbergen, 1999). These were not given but created dialectically, and subject to permanent contestation and negotiation within the power relations in a community (cf. Ivison et al., 2000; Mbaku, 1997; Schipper, 1993; Sewell, 1999). Tradition could be invoked (often after first having been invented), not so much as an inheritance from the past but rather to legitimise certain values and actions in the present (Hatt, 1996; Hobebawm and Ranger, 1983; Van Binsbergen, 1999). This processual, negotiated and contextual view of culture also influenced thinking about the related concept of community: rather than a homogeneous entity bound by a pre-existing culture, this was now considered to be the loosely defined and fluctuating site within which some of these contestations take place (Gellner, 1995).

For others, some of these contestations take place not within but across the boundaries of communities. Here, the term ethnicity is often used, as in the famous 1960s work of Barth, who was the first to argue explicitly that cultural or ethnic identity could be considered not as a given, preceding cross-cultural contact, but rather as an outcome of such contact (Barth, 1969; Veumelen and Goorens, 1994). Even though this position soon became paradigmatic, his successors remained divided over the essence of ethnicity: purely instrumental, a resource in social and political competition, or also partly primordial, or a way in which individuals give meaning to their social existence (cf. Young, 1993a).

Recently, successful attempts have been made to synthesise both viewpoints and to underline that both the substance and the usage of ethnicity are important and feed on each other, and that there is a 'dual logic that encompasses identity (re)construction as well as instrumental and strategic activity'.25

The understanding of ethnicity, or culture, as a thoroughly relational concept created in a dialogue within or between 'communities' does not mean that such dialogue takes place on equal terms. Instead, it is often an encounter between the powerful and the powerless, the dominators and the dominated, in which the former are able to set the rules of the game and in which the dice are heavily loaded, to quote Mamdani (1996:22; cf. Comaroff and Comaroff, 1996; Wilmsen, 1986). One of the classic examples of that of the dialogue between colonisers and colonised, in which, according to some, the Europeans first built their own cognitive view of rural African society — strongly based on tribes, culture and chieftaincy — and then imposed it on daily life.26

Nevertheless, even colonialism was hardly a one-sided affair, a mere imposition of ethnic categories on a submissive African population. For one thing, recent authors have emphasised how in creating an 'Other' — primitive, native, tribal — the European colonisers also formed a new identity as an enlightened, individualistic 'Self' (Comaroff and Comaroff, 1997; Mudimbe, 1988; Said, 1978). Furthermore, Africans were mere not passive recipients of the ethnic categories imposed upon them, whether as subjects of indirect rule policies or of apartheid, instead they actively engaged with them, appropriating and transforming the package while rejecting others (Vall, 1989). Pedi migrant workers, for instance, would stress tribal or home allegiances but 'this emphasis was neither an anachronistic hangover from their rural origins, nor a quiescent acceptance of ethnic identities engineered by the apartheid state, but a newly constituted way of interacting with other people within the world of work and city'.27 And in Qwaqwa, ethnic entrepreneurs started painting idyllic rural scenes and clan portraits on the walls of the houses named 'Basotho, let's love each other', thus adopting parts of an identity which had not existed a few decades before the homeland system.28 The most powerful South African example, of course, remains the appropriation of the Zulu identity and its use as a weapon of resistance (Dehaas and Zulu, 1994; Golan, 1994).

Both colonialism and apartheid can thus be considered as dialogues on culture that took place in many ways, ranging from day-to-day encounters to grand narratives. Even though they occurred within clearly unequal relations of power, multiple voices could be heard in these dialogues and were involved in the production of certain understandings of culture. What has only recently come to be fully appreciated, however, is the importance of one of the languages in which the dialogues took place: the law.

The creation of customary law

Madibaneeng Tribal Office, 9 December 1998: A rambunctious school doubles as the community hall in which four male and two female officials officially recognised as Tribal Councillors, signed the council minutes with the words 'this is the first time we have been treated as equals in a council setting. We are getting our voices heard by and children peek in through the broken door as a lengthy case on land

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24 The most famous works of these two authors are: Maine (1861) and Bronislaw Malinowski, Argonauts of the West Pacific: Prospect Heights, IL: Caroll, 1984. There is no space here for an overview of the development in anthropological thought from Maine to present-day thinkers. Good introductions are Blake (2001), Falk Moore (1993); Geertz (1973), Strodten (1995).


ownership is discussed. One of the parties has not shown up, even though he received a hand-written letter from the ‘Tribal Clerk’. Around sunset, we evaluate the day and I get a chance to ask some questions. No, not much has changed since 1994, although the ‘Tribal Police’ and the ‘Tribal Drivers’ have difficulties in receiving their salaries. As I try to discuss the councillors’ ideas on customary law, one of them, an old man in a patched suit, says apologetically ‘Actually, we’re just settling cases here according to our own insights. If you want to find out about customary law, you’d better go to the Magistrate or the Traditional Affairs Official. They have all the books.’

Apartheid was largely legitimised and implemented through the language of the law, albeit with force lurking closely behind (Abel, 1995; Comaroff and Comaroff, 1997; Evans, 1997; Klug, 1996; Mandani, 1996). After the National Party had narrowly won the 1948 elections it slowly started working out a system of ‘administering the natives’ that was built not only on ‘multinationalism’ - the idea that each group must have its own sphere where it can enjoy and exercise in full the privileges of a free society - but also on all these groups having their own, distinct systems of law and governance which deserved recognition within the wider state context. In recognising ‘tribal governance’ and ‘native laws and customs’ the governments of Vervooro and his successors built on and refined the British policy of ‘native administration’, described by Lugard in 1918 as: ‘a single Government in which Native Chiefs have well-defined duties and an acknowledged status equally with British officials’. The system of ‘indirect rule’ he proposed put law ‘at the cutting edge of colonialism’ and made it an area in which Africans and Europeans engaged one another - a battleground as it were in which they contested access to resources and labour, relationships of power and authority, and interpretations of morality and culture. As a perceptive Tsawa remarked at the end of the nineteenth century: ‘Some say this is the English mode of warfare - by “papers” and agents and courts.’

In South Africa, the legal recognition of ‘culture, tribe and chiefdom’ was achieved through hundreds of laws, regulations and bye-laws dealing with all aspects of life, governance, property ownership and interpersonal relations. Even though the Zulu, Xhosa, Tsawa, Sotho Customary Law that was codified and perpetuated in laws, texts-books and judicial decisions claimed to reflect reality, it was as retrogressive as it was normative and instrumentalist. It was retrogressive because, by the time the government started to install state-appointed chiefs to demarcate tribes, to ‘move people back to their homelands’ and to codify and implement tribal laws and customs, capitalism and individualisation had long corroded communal life, which, in any case, had never corresponded to the picture painted by the architects of apartheid (Chanock, 1985; Costa, 1999; Hobbsawm and Ranger, 1983: 247; Klug, 1995; Mandani, 1996). It was also normative, because the government explicitly tried to shield Africans from the ‘onslaught of modernisation’ through the codification of custom. As the then Minister of Bantu Administration and Development said: ‘Whatever the world may say, the Bantu city dweller is someone who still yearns for his homeland, and that yearning must be stimulated.’ Also, those aspects of customary law deemed unwanted, such as polygamy, were barred from recognition through a ‘repugnancy proviso’. Apart from a paternalistic attempt to freeze parts of an idealised past, the administration of Africans through customary law was, of course, ‘hugely convenient’ for the governments of the day: The setting aside of a separate sphere in which Africans were ‘containerised’, barred from purchasing or individually owning property and relegated to separate homelands, where they were administered according to their own laws and customs and thus not in need of individual rights or democracy, was central to a political economy that not only enabled but also justified wealth accumulation in white South Africa.

The codification of customary law was thus all about the creation, for political purposes, of a uniforming and bureaucratic fallacy and its codification and implementation through courts and native administrators. The question was, of course, in what way this ‘official customary law’ related to what I, following Ehrlich, shall call ‘living law’ in this book: law as lived in day-to-day life and the norms and values it draws on. In the course of the twentieth century, academic thinking on this question went through a number of distinct phases, both ontologically and epistemologically.

Early legal anthropologists, who often doubled as colonial administrators, shared most of the central premises of the colonial and apartheid projects: the idea of bounded tribes, with fixed systems of law and governance which could be ascertained through conversations with village elders and should be catalogued before being washed away by modernisation. Schapera’s famous 1933 Handbook of Tswana Law and Custom was an example of this approach, as was Anthony Allott’s ambitious project of restating African Customary Law (Allott, 1970). In the 1960s, authors like Max Gluckman began to emphasise that customary law could only be ascertained by looking at actual processes of adjudication rather than abstract statements by village elders, and by keeping a watchful eye on the social context in which this adjudication took place (Gluckman, 1955, 1965; Gulliver, 1963; Nader, 1969; Nader et al., 1966). This planting of law within the societal context was worked out in the course of the 1980s, for instance by Hollemen who emphasised the need to look not only at troublesome but also at trouble-free cases, and in the celebrated Rules and Processes (Comaroff and Roberts, 1981; Hollemen, 1986; Falk Moore, 1986). In this latter work, Comaroff and Roberts synergised a rule-centred and processual approach, describing the Tswana concept of the world as ‘rule governed yet highly negotiable, normatively regulated yet pragmatically individualistic’ (Comaroff and Roberts, 1981: 215). In later years, attention increasingly turned to the dynamic role of law in society: as reflective and constitutive of power relations, as a discursive forum for the...
creation of meaning (Coller, 1976; De Gaay Fortman and Milroy, 1993; Merry, 1992; von Benda-Beckmann, 1989; Wilson, 2000). For, as academics came to realise, "presenting the "traditional" categories of legal discourse without the context of discourse offers statements without speakers, without their occasions, concepts outside history" (Falk Moore, quoted in Just, 1992:382).

The more it became clear that there was no such thing – and never had been – as a fixed body of customary law ready to be ascertained, but that living law was a fluid, relational and negotiable system intimately tied to fluctuating social and political relations, the more the claims of "official customary law" became untenable. Not surprisingly, many (legal) historians in the 1980s and 1990s turned their attention to descriptions of the "invention of tradition" and to debunking the "myth of customary law" (Chanock, 1985; Costa, 1998, 1999; Vail, 1989; Hobsbawm and Ranger, 1983). In a number of excellent works, customary law came to be understood as "a dynamic historical formation which at once shapes and is shaped by economic, political and social processes" (Mann and Roberts, 1991; cf. Comaroff and Comaroff, 1997). Law, it was now held, was an eminent and heretofore underestimated way of understanding wider social and political processes, a prism for looking into a society's power relations, but one which could never be distinguished from them.

As the "creation of customary law" within the wider socio-political setting itself became an object of study, academics were quick to realise that this – just like the implementation of cultural difference – had not been a top-down, one-way endeavour in which apartheid administrators merely planted their vision of customary society on a passive African population. Here, too, there had been a dialogue, even if it was within skewed power relations. For one, the African population concerned had also appropriated parts of the categories imposed on them and used them as a means of resistance, leveraging over chieftancy disputes, against expropriation, for additional recognition (Abel, 1995; Comaroff, 1997). Also, there was the realisation that, of the African voices which had had some input into the types of ideas that were frozen within the "austerity of tabulated legalism", one voice was privileged: namely, that of the traditional leaders. As one observer put it: "In a context in which there were multiple institutions with a customary claim – such as gender institutions, age groups, clan assemblies, hereditary ("customary") alongside bureaucratic (state-appointed) chiefs – colonial powers privileged a single institution, the bureaucratic chief, as the "customary" authority whose version of custom would henceforth be enforced as law" (Mamdani, 1999:98). Let us therefore now turn to this institution.

The character of bureaucratic chieftaincy
If the customary law officially recognised under apartheid could be considered as created in dialogue, an outcome of negotiation, two parties occupied the front seats at the negotiating table: the Department of Native Affairs (DNA) and the traditional leaders. While South Africa's ten homelands were considered to be separate political spheres, progressively working towards independence – as was attained by the Transkei, Bophutatswana, Venda and the Ciskei – the DNA was responsible for their running (Ashforth, 1997; Evans, 1997). The hundreds of laws, regulations and bye-laws that it produced to this end were – albeit loosely

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34 The locus classicus here is Chanock (1985).

35 Reawakenings


was "bifurcated", with an institutional structure that created ethnic subjects inside, and citizens outside, the homelands, and how this form of power also determined the type of resistance to it: "whereas civil society was racialised, Native Authority was tribalised" (Mamdani, 1996:19). In this structure, chiefs stood central, and functioned as 'decentralised despots'.

Not only did the chiefs have the right to pass rules (bylaws) governing persons under his domain, he also executed all laws and was the administrator in his area, in which he settled all disputes. The authority of the chief thus fused in a single person all moments of power: judicial, legislative, executive and administrative. This authority was like a clenched fist, because the chief stood at the intersection of the market economy and the nonmarket one.

Inside the homelands, under the authority of traditional leaders, Africans were turned into subjects, their rights and privileges tied to the acceptance of chiefly authority in formerly unprecedented ways. Whether it was about attaining a plot of land, getting a job permit or an old-age pension, or obtaining access to justice, the chief had by legislation been made into the sole portal to government.

The fact that traditional leadership was now bureaucratised and chiefs propped up by state power did not, of course, mean that they could completely disregard the opinions of 'their subjects' — an issue neglected by Mamdani. If traditional leaders did want to be murdered, stoned, burnt in their palaces or driven out, as happened in many instances, they had to maintain some form of local legitimacy. For instance, the father of Billy Sekwati Mampuru (whose coronation was described at the beginning of this chapter) stimulated publication of a book explaining the necessity and the mode of his cooperation with the administrators of the day.

Kgos Sekwati Mampuru never jumped to join the Native Authorities, but it was only after he realised that they were about development that he decided to take part. He negotiated with the administrators and was not scared to tell the Native Commissioner to move away if he was unhappy about something, and even refused some of the duties assigned to him. As such, he governed together with all those big elephants (dinaadiba) from different governments, doing his own thing while they came and went, fighting with each other because in white governments people do not rule for life. (Nkadineng, 1973)

In general, there was a wide variance in local arrangements, all of them dependent on the interplay between traditional authorities, alternative institutions, other government representatives and the population. Whatever the debates on chiefly authority within communities, it was nevertheless clear that both apartheid and colonialism had singled out one voice — that of the chiefs — for privileged attention within the state system, recognition in legislation and, ultimately, perpetuation and strengthening of the assumptions on which it rested.

4. Theoretical challenges

Let us now return from our brief excursion into the past and the scholarly lessons of relations between law and colonialism, back to the surprises of the late twentieth century. As we have observed, it was an era which saw the new global system described as 'a Culture of cultures', in which culture — cast in rights discourse — became the prime language in which a multiform mix of sub- and trans-national politics took on the nation-state and saw its demands for 'group rights' and 'cultural rights' met by it (Sahibs, 1999:x; cf. Oomen, 1998a).

Even though the situation had changed from one in which, as the joke went, every anthropologist had his own tribe to one in which every tribe had its own anthropologist, much of the rhetoric used was disturbingly familiar. The websites of first nations enthusiastically-quoted nineteenth-century ethnographic works; ardently appropriated what was once considered discriminatory discourse; presented images of bounties, atemporal cultures; put forward traditional leaders adornned in antiquated outfits; and above all underlined their difference. This reversal of roles, combined with the familiarity of the play enacted, generates questions concerning the relevance of the lessons of customary law studies to the present situation. As we have seen, these lessons came to understand culture not as a state but as a process, all about the discursive creation of meaning within and beyond the border of polities: customary law as essentially a creation central to the colonial project of institutionalising difference and its contents as determined in a dialogue between chiefs and administrators and both reflective and constitutive of the power relations of the times. With subnational politics — tribes, first nations, chiefdoms — starting to assert claims to sovereignty in the language of culture, custom and chieftainship and democratic nations everywhere responding to them, how could the relations between these polities, the way in which law, power and culture are woven into them, be reconceptualised?

It is a question which, I believe, socio-legal studies in general and legal anthropology in particular still has to tackle. For the past two decades, the paradigmatic position in legal anthropology has been that of legal pluralism (Fuller, 1994; Griffiths, 1986; Merry, 1992, 1998; Petersen and Zable, 1995; Tamaneha, 2000; Von Benda-Beckmann, 1996; Wilson, 2000). In what was as much a political as an analytical project, 'legal pluralists' set out to demonstrate convincingly the existence of a plurality of normative orders outside those of the centralist state, orders that issued norms as deserving of the predicate 'law' as the norms issued by the state. The state, in this reading, was considered 'monolithic', a statist Moloch for which, even if it did recognise cultural diversity as a hangover from colonisation, 'unification remained the goal' (Griffiths, 1986:18; Von Benda-Beckmann, 1996). For all its sensitising value, this approach seems to have been overtaken by events (or its own success, depending on your reading): many national states are no longer sites of uniformisation, but rather of 'organisation of diversity' in which the recognition of the plurality of normative systems within their borders plays a central role. As De Sousa Santos has pointed out this calls for bringing the state back into socio-legal analysis, but in an entirely different way:

Under current conditions the centrality of the state lies in the way the state organises its own decentering ... the distinction between state and non-state is called into question, and consequently the socio-legal topics that have been based upon it, such...
as community justice and legal pluralism, have become increasingly problematic. (De Sousa Santos, 1992:133)

The analytical challenges posed by the new order all revolve around the dialogues between the nation-state and other polities, which are cast in culture and rights discourse and related to wider socio-political forces, and their mutually constitutive character (cf. Darian-Smith and Fitzpatrick, 1999; Merry, 1992). Three groups of issues seem pressing. (i) If we indeed accept that culture, by its very nature, can never be adequately reflected in law, which versions of customary law and governance make it to ‘the austerity of tabulated legalism’ and why is this so? (ii) In a given polity, what are the constitutive effects of the legal recognition of cultural diversity? (iii) How, in this context, is the local resurgence of traditional authority to be understood? Although these questions form the backbone of this book and can only be answered in full in its concluding chapter, the following sections will uncover some of the groundwork that has shaped the enquiry.

Law, power, culture

The myth of the mirror’, one could say, still dominates as much of present political and academic thinking on the legal recognition of cultural diversity as it did in the past. This is the idea that state law can, and should, reflect cultural diversity – the existence of alternative systems of law and governance, defined in terms of cultural difference – within its borders. Any alternative reading, as in the case of many scholars, should start by drawing attention to the fact that law cannot be understood outside of social and political relations, which it both shapes and reflects.43 This is as true of the nation-state as it is of the subnational polities now demanding official recognition of their ‘customary’ systems of law and governance. The laws – or normative systems, as some would prefer to put it – of these tribes, chiefdoms or first nations are not a given, distinguishable from socio-political reality, but both reflect and reinforce it.44 Multiple voices, the old, the young, the conservative, the radical, the male, the female, within a given polity will have different ideas on what local living law is and should be, and their ideas depend on power relations, which versions and visions get perpetuated, accepted and institutionalised (Gulliver, 1969, 1979). Here, too, Foucauldian insights apply: power emanates in many places, and it is in discourse that power and knowledge are joined together to create – in this case legal – subjects, categories, divisions (Foucault, 1993, 1994). As such, law not only mirrors and creates power relations but also makes for meanings and understandings of identity (Cheater, 1992; Goheen, 1992). If law is created discursively within politics – those porous social fields with a specific political make-up recognised internally and externally – this is also the case between them. For all their self-regulatory capacity, the (fluid and shifting) ‘cultural communities’ are not bounded entities but are engaged in a permanent and mutually constitutive dialogue with other polities. This can be with other ‘cultural communities’ or with the international community or donor organisations but in one important case, also with the nation-state (Abel, 1995b; De Sousa Santos, 1992; Sugarman, 1983; Wilson, 2000). One increasingly successful way of getting claims to autonomy and access to resources recognised is through playing the ‘culture card’: underlining difference. There are ample indications that in these dialogues certain voices get recognition in preference to others, that certain versions of culture are accepted more readily, and that certain visions are more apt than others to be chiselled into the granules of the law.

Scholars working on the recognition of group rights, for instance, have noted with concern how atemporal and homogenising notions of cultural difference often inform the policy process and determine which rights do, or do not, get recognised. As Mamphela Barcham writes on New Zealand (2000:15):

claim a piece of land. 'In the conflict of interpretations,' Clifford writes, 'concepts such as "tribe", "culture", "identity", "assimilation", "ethnicity", "politics" and "community" were themselves on trial... Modern Indians, who spoke in New England-accented English about the Great Spirit, had to convince a white Boston jury of their authenticity' (1988:8). In the process, anthropologists called in as experts were forced to speak out in much more essentialist and deterministic terms than they would ever have used in academic discourse: the law posed certain demands of homogeneity and cultural continuity that simply did not correspond with reality.

The existence of the law thus leave little room for alternative voices and discord within communities. For instance, in one of the few critical analyses of the legal recognition of cultural diversity in South Africa to date, Robins demonstrates how in a *hikomani* San land claim 'strategic narratives of community solidarity, social cohesion and cultural continuity were produced by the claimants and their lawyers during this process' but how in the post-settlement period... social fragmentation and intra-community conflict became increasingly evident' (2001:833). Which voices do get heard depends not only on the power relations within the policy seeking state recognition, but also on who best fills the images of culture, custom and chieftaincy that those representing 'the law' wish to see (Templman, 1997). Just as in New Zealand, the traditional institutions of the Ivi (tribe) are, for their marginality, the only representative institutions recognised by the state, so, for instance, the state recognition of chieftaincy is bound to favour the voices of chiefs (Burcham, 2000).

The importance of these mediating institutions in defining culture and determining which aspects of identity should and should not be recognised has often been pointed out, as has their interest in stressing cultural differences: 'perfect communication will mean that the middleness of the Chagga in Tanzania as a semi-autonomous social field, which has the capacity to make rules and ensure compliance but is simultaneously firmly placed within the wider social matrix of the state (Falk Moore, 1973: 1978, 1986). This interpretation caused her to write, long before her colleagues would, that 'the place of state-enforceable law in ongoing social affairs, and its relation to other effective rules, needs much more scholarly attention' (1973:81). Similarly, there is work such as Mambani's, which stresses how the form of colonial power also shaped the resistance to it, with people partially appropriating the ethnic categories imposed upon them and using them (the Sukuma language, Pedi songs, chieftaincy structures) as instruments for emancipation (Kossier, 1998; Mambani, 1996; Ranger, 1993, 1982; Vail, 1989). His analysis has recently been complemented with a growing body of subtle analysis of how chieftainship was made acceptable, given meaning and imbued with respect and awe' (Spear. 2003:10). Vaughan's work on Nigerian chiefs and Berry's and Rathbone's analysis of the discursive relations between chiefs and the Ghanaian state, and the role of customary law in this discourse, offer some prime examples (Vaughan, 2000; Berry, 2000; Rathbone, 2000). But these works, with their focus on colonialism, fail to address the particularities of the present situation, with democracies legally recognising cultural pluralism within a globalising world order.

In the enquiry into the 'constitutive relation' between state law and other polities some of the more general conceptual tools of socio-legal studies can also be of use, for instance those devised to understand the relations between law and some voices and the exclusion of others. Immediately, a related but even more neglected question comes up: What does cultural rights legislation do? In other words, what are the local constitutive effects of the legal recognition of cultural diversity? For example, Clifford's description of the Mashpee case referred to above did not stop with a description of how suburban New Englanders were forced to produce a narrative of continuous and bounded tribalism to have their claims recognised. He also showed how, in the course of the trial, the Mashpee Indians increasingly started to live the story the law forced them to tell, complete with forming new tribal structures, holding pow-wows and wearing beads, in a way that went far beyond the merely performative (Clifford, 1988). These and other cases raise the question: does state recognition of certain aspects of custom, culture and chieftaincy, of certain narratives of communality and difference, lead to a strengthening of these forces and visions within the local political arena? And if so, in what way?

It has long been recognised that this issue, 'the dialectic, mutually constitutive relation between state law and other normative orders', should be the central concern of contemporary socio-legal studies (Falk Moore, 1973: Fuller, 1994: Merry 1988; F. Von Benda-Beckmann, 1984; Wilson, 2000). To quote Sally Engle Merry (1992: 358):

A focus on the dialectic, mutually constitutive relations between state law and other normative orders emphasises the interconnectedness of social orders and the vulnerability of local places to structures of domination far outside their immediate worlds. This theoretical position considers how state law penetrates and structures other normative orders and how non-state normative orders resist and circumscribe penetration or how they even capture and appropriate state law.

Again, customary law studies have laid some of the foundation. There is, for instance, Sally Falk Moore's famous analysis of the Chagga in Tanzania as a semi-autonomous social field, which has the capacity to make rules and ensure compliance but is simultaneously firmly placed within the 'wider social matrix' of the state (Falk Moore, 1973: 1978, 1986). This interpretation caused her to write, long before her colleagues would, that 'the place of state-enforceable law in ongoing social affairs, and its relation to other effective rules, needs much more scholarly attention' (1973:81). Similarly, there is work such as Mambani's, which stresses how the form of colonial power also shaped the resistance to it, with people partially appropriating the ethnic categories imposed upon them and using them (the Sukuma language, Pedi songs, chieftaincy structures) as instruments for emancipation (Kossier, 1998; Mambani, 1996; Ranger, 1993, 1982; Vail, 1989). His analysis has recently been complemented with a growing body of subtle analysis of how chieftainship was made acceptable, given meaning and imbued with respect and awe' (Spear, 2003:10). Vaughan's work on Nigerian chiefs and Berry's and Rathbone's analysis of the discursive relations between chiefs and the Ghanaian state, and the role of customary law in this discourse, offer some prime examples (Vaughan, 2000; Berry, 2000; Rathbone, 2000). But these works, with their focus on colonialism, fail to address the particularities of the present situation, with democracies legally recognising cultural pluralism within a globalising world order.
social change. Here, two approaches have emerged in the course of the twentieth century: the instrumentalist and the constitutive (Garth and Sarat, 1998:2). The instrumentalists, who set out to examine 'what social results can be attributed to law or legal reforms', ended up disappointed and concluded that 'the effects of law are highly unpredictable' (ibid.). Of late, however, the constitutive approach has reconceptualised law more as 'a pervasive influence in structuring society than as a variable whose occasional impact can be measured. Law is seen as a way of organising the world into categories and concepts which, while providing spaces and opportunities, also constrain behaviour and serve to legitimate authority' (ibid.). The emphasis is thus on the culturally productive capacity of law, the way in which people 'conceive, create and sustain definitions of situations'. The constitutive approach once again firmly places law in the social and political domain: 'While against instrumentalism, it reaffirms both the importance of social science to law and the importance of law to social science' (ibid.:4).

The challenge is thus to apply such a constitutive approach to the specific topic of cultural rights: what does state recognition of customary law and chiefly authority mean locally? Despite its theoretical importance being widely recognised, this topic has suffered a surprising neglect in legal anthropology, which has long tended to (and often still does) concentrate on an isolated description of the legal process in a given community. In one of the few exceptions, an excellent study on marriage law amongst the Bakwena in Botswana. Anne Griffiths notes with surprise how even the paradigmatic Rules and Processes pays no attention to the influence of Western or European law on local debates on Tsawana laws and customs, and relates this to apartheid conditions: legal pluralism was not viewed in positive terms and local people strenuously sought to insulate local dispute processes from the broader domain of the state' (Griffiths, 1987:28). This was no longer possible in the 1990s, when she found that 'an ethnographic approach to the study of law ... undermines any theoretical distinction that is drawn between Western and customary law' (ibid.:2).

Some of the literature on group rights outside Africa underscores the importance of looking at the constitutive effects of cultural rights legislation. Wendy Espeland, for instance, described how a bureaucratically implemented law created a forum and framework for reinterpreting the collective identity of a Native American community involved in a dispute over the location of a dam in central Arizona (1994:1150). She remarked how, in representing the interests of a group, the law may simultaneously construct the subject interests: 'law, whether enacted by bureaucrats, lawyers, or litigants, creates categories that become imposed on and practised in the world' (ibid.:1176).

Similarly, Willem Assies considered the 'ethenogenesis' that took place in many South American countries in the 1990s, a dialectic between voluntary identification and forced acculturation, and underlined how the chances offered by the law also affected relations of power and processes of stratification in indigenous society (2000:6).

Indigenous mobilisation can be viewed as involving processes of identity (re-)formation through the interaction between ascription and identification. It shows how, whatever their roots in tradition, qualities such as a special non-materialist and spiritual relation to the land, comensal decision-making and communisatismic are emphasised and given new meaning in an ongoing confrontation or dialogue with other social actors (ibid.).

This resounds with fears voiced by those legal scholars who are posed against the recognition of communal rights and who emphasise that 'groups are not homogeneous but dynamic, heterogeneous historical associations of individuals... To treat them otherwise is to risk empowering elites within groups and creating problems for "internal minorities"' (Iverson et al., 2000:6).

A focus on what cultural rights legislation does locally is also important because it allows us to move beyond a mere debunking of the myth of customary law to questions of substance (Assies, 1997:16). Now that it is clear that traditions might often be invented and communal identities, myths and customs created, it is time to move on and look at the substance and meaning of the surprising reappraisals of parts of these imposed identities by 'traditional communities'. Once such appropriation is the resurgence of chieftaincy. If we accept that official customary law not only comprises an imperfect mirroring of local reality but also possibly beams back at this reality, affecting social and political formations, constituting identities, strengthening certain positions and suppressing others, the question arises as to how this relates to the revival of traditional authority.

The resurgence of traditional leadership

The time has come to extend these hypotheses to the resurgence of traditional leadership all over Africa. Starting from the assumption that cultural rights legislation not only mirrors but also constitutes locally lived realities, creates categories and shapes identities, the following question arises: Could it be that the fact that nation-states all over Africa strengthened the formal position of traditional leaders at the end of the twentieth century, was not only reflective but also constitutive of chiefly powers? Is there a much more complex relation between the local resurrection of traditional authority and its reflection in national legislation than is commonly assumed? If cultural rights legislation could lead to the 're-invention of New Zealand's Maoris, the communalisation of South America's pueblos indigenas, and the reviving of pow-wows amongst the Mashpee, could it not form part of the causes of the resurgence of traditional authority instead of a mere consequence? It is this idea that will be explored further in the course of this study, guided by observations such as that of Englebert, who noted that the surprising resurgence of traditional authority seems to take place especially in strong states – Uganda, Ghana, South Africa – alongside their (default) revival in collapsed or failed states (Englebert, 2000).


46 A few South African examples are: Bekker (1959); Coetzee (1990); Olivier et al. (1993); Prinsloo (1983). Exceptions to this general observation are, notably, the work of Sally Falk Moore quoted earlier and the excellent Collier (1976).

Such an approach would amount to quite a radical departure from the views commonly held on the position of traditional leaders locally. Here, there are two positions, both striking in their simplicity. The first amounts to a variation on ‘debunking the myth of customary law’. It points out how state-recognised chieftaincies were colonial inventions, ‘tinpot autocrats’ rigged up with a host of non-traditional functions, bureaucratic failiaces put in place merely to bolster the state’s legitimacy (Costa, 1999a; Hammond-Tooke, 1975; Herbst, 2000; Jordan, 1997; Mamdani, 1996). By implication, the argument goes on, the traditional leaders have been distanced from their followers, who would prefer to have them replaced with democratic structures, even if false consciousness might stop them from realising this themselves (Mamdani, 1996: Ntsebeza, 1999; Ntsebeza and Hendriks, 2000; Zuma, 1990). A second approach swings in the other way but is equally straightforward. It underlines how traditional leadership yields a legitimacy that is rooted in culture and tradition, in a completely different rationale from that of the state. ‘They operate from cosmological views that are totally different from other groups within society’ and ‘are the representatives of that other traditional, moral and political order’ (Van Rovenoy van Nieuwaal, 1996:54). As South African Minister Valli Moosa said on the introduction of the Council of Traditional Leaders Bill to Parliament: ‘As long as the people who live in farway valleys, majestic green hills, on widely stretched out plains and mountainsides honour and support traditional leaders, the Government of the day will support and respect traditional leaders, as they are the custodians of people’s culture and are a people’s government’. How can these fairly unsophisticated positions continue to resound in spite of evidence of people embroiling and reviving the ‘bureaucratic failiaces’ imposed on them by national governments, on the one hand, and, on the other, chiefs seeking alliances with the state and becoming state agents rather than representatives of a completely different moral order? A main reason, as we shall see, is the lack of empirical research delving into people’s opinions on traditional leadership and their motivations for such views.

As stated above, the growing and often excellent scientific literature on chieftaincy is mostly concerned with interactions between traditional leaders and the national (often colonial) state. A review of this literature by Thomas Spear shows how its emphasis shifted from the notion of a top-down ‘invention of tradition’, as central in Ranger’s locus classicus, to a more nuanced analysis of the discursive relation between states and chiefs, and the reciprocal processes of legitimation (Ranger, 1993). Olufemi Vaughan, for instance, in a comprehensive discussion of a century of interactions between the state and chiefs in Nigeria, describes ‘the creative response of indigenous political structures to the problems of modernization and governance that have engulfed the African continent during the past century’ (2000:1). Two recent works on Ghana, Berry’s Chiefs Know Their Boundaries and Rainboth’s Nkrumah and the Chiefs also specifically focus on this level of interaction. Thus, the ideas of chiefly subjects on the legitimacy of those who rule them is a relatively neglected topic (cf. Mamdani, 1996; Van Rovenoy van Nieuwaal and Van Dijk, 1999; Vaughan, 2000). In addition, the ethnographic studies that do look at the position of traditional leaders locally tend to omit the state, either for political reasons or because it had not encroached too far on community life when they were written (Comaroff, 1974, 1978; Hammond-Tooke, 1974; Euper, 1970; Prinsloo, 1983). Thus, the ‘competing forms of authority within government systems at the “base” of society’ remain ‘grossly under-researched and undertheorised’ (20). It is in this field that this book also seeks to make a contribution.

5. An approach to the study

Even if this study is essentially about chiefs and custom in one area – Sekukhune in the Northern Province of South Africa – it arises out of an interest in the complex ties that link this locality and its chieftaincy politics to the national and even the global level, making these interactions its central focus. This theme, the complex links between official legal recognition and socio-political change, calls for a specific approach that provides a detailed ethnographic account of local dynamics concerning chieftaincy and customary law while also keeping a firm eye on the ‘wider social matrix’ in which they are positioned. In the following pages I shall give a brief outline of this approach – that of multi-sited ethnographic research – and some of the issues of definition and research methods that it raises.

The locality

The Leolo mountains, October 1995: Beehive-shaped straw hats, banana trees, boys drinking milk straight from the cows they are herding, children peering in amazement at the first white face they have seen – the villages that we come across while looking for a field site in the mountains, all unreachable by car, are storybook Africa, and live up to any field work fantasy I might have had. Even if I decide not to do the research in this part of the mountains, I shall always cherish memories of the uniqueness and remoteness of the world we briefly peek into. However, a few months later my memories have to be slightly adjusted: I sit in the provincial capital, eating pizza with university students. ‘Were you up in the Leolo mountains? they squeak. ‘Don’t you know that they have the best dagga in the world there, even better than the stuff you have in Holland? Why didn’t you bring us some...? Suddenly I realize that the remoteness of the villages we visited might well be by choice, and instead of being an indication of their detachment from the outside world may be precisely the opposite: a sign of their interlinkage with the global economy and dope smokers worldwide...

Since Malinowski’s work, anthropology has essentially been about doing ‘field research’ in remote places that ‘one could fly, paddle or trek to in order to record all of the material practices, ecological adaptation, marriage patterns, religious beliefs, and legal habits of a spatially-contained people (Drummond, 2000:49). However, now that ‘traditional societies’ are ‘negotiating their own multifaceted, globally connected modernities, having long left behind legal anthropology’s

conventional pieties about holistic legal systems', such a bounded approach becomes increasingly untenable. A researcher interested in Peruvian Indians cannot simply travel to a remote village with a field diary under his or her arm, but should also show up at the UN General Assembly, in BBC studios, at national protest marches and in the virtual community of first nations linked through the Internet. Of late, anthropologists have begun to recognize this need, to speak of a 'process geography' and 'travelling cultures' and to emphasize how localities are 'primarily relational and contextual rather than scalar or spatial' (Appadurai, 1996:13; Hughes, 1999; Plut 1999).

Of course there is a paradox here. On the one hand, the official strengthening of a multitude of subnational polities as a result of the dismantling of the nation-state (whether voluntary or not) forces all social scientists, not merely anthropologists, to focus increased attention on them. They have, after all, gained in importance in the (inter)national order. But, on the other hand, the Constitutions and internal political dynamics of these polities cannot be understood without taking into account their encounters with other polities, the state, donor organisations, the international community. The only way to grapple with these 'dialectics of flow and closure' seems to be through what Sally Engle Merry (2001) has called a 'multi-sited' ethnographic approach (see also Meyer and Geschiere, 1999). The interactions between polities, their 'mutually constitutive character', should be central in such an enquiry, in which the researcher moves between points of gravity in changing political formations. 'Too often,' Ferguson writes, 'anthropological approaches to the relation between the local and something that lies beyond it (regional, national, international, global) have taken the local as a given, without asking how perceptions of locality and community are discursively and historically constructed' (1994:6).

The dialogue that is central to this book is between two loosely defined sets of polities: the South African national state and the chieftainship of Sekhukhune, in the Northern Province. There are, of course, many other polities involved in the creation of meaning concerning chiefly powers and customary laws that will have a place in the narrative; from old-time classics such as the municipalities, the provinces and the international community to powerful donors, churches and vigilante organisations. One consequence of this approach is that it serves to relativise the role of the nation-state while simultaneously acknowledging the uniqueness of the tasks it has officially reserved for itself. Considering the nation-state as not simply yet another player in a wider and fluid playing field of sub-and supra-national polities demands that it, too, be approached ethnographically, so that its social and political forces can be unearthed, its discourses critically examined and its laws considered in context. As such, the state in itself comes to be considered as a locality, in a way not very different from the ethnographic approach taken in Sekhukhune.

In its approach to the locality and its interlinkages with the outside world this study can draw on the way in which many (legal) anthropologists have conceptualised local 'social fields' or 'political arenas'. For all their differences, they emphasise how these fields are characterised by some form of political authority, their ability to produce rules and to ensure their compliance. It is because of this political dimension that I prefer to use the term 'polity' or 'political arena'. The more sophisticated work on 'localities' has also pointed to their

Traditional leaders, living law

The multi-sited research approach that I have chosen and the focus on the skewed dialogue on chiefly authority and customary law within and between polities inevitably throw up some issues of definition. If we accept that meanings and power are created dialogically, and both reflect and constitute social power and relations, then it becomes practically impossible to divorce these meanings from the context in which they are created. For example: the South African state might well have on its payroll as a 'traditional leader' someone who lives in Johannesburg and has no contact with his supposed subjects. Conversely, people in Sekhukhune might follow a kgosi (traditional leader) who hands out land, settles disputes, is widely respected but has no contact whatsoever with the state. The same goes for 'customary law': there are rules codified as such that lead not to 'social life' whatsoever, since people have hardly heard of them. Simultaneously, local, living law, 'the outcome of the interplay between international law, state and local norms that take place through human interaction in different historical, social and legal contexts', might contain rules that are widely known and followed and easily enforced, but to which the national state turns a blind eye (Hillman, 1999:62).

How then can we define the notions that are central to this study: traditional leadership and customary law? The only way would seem to be through taking a non-essentialist approach and planting definitions and meanings firmly in the contexts in which they are generated, instead of seeking to sever them from their

approach could be taken to traditional leadership in considering as a traditional leader someone who, in a given set of circumstances, is recognised as such. Just as the 'spatial and temporal validity of law' needs mapping out, so does the spatial and temporal authority of traditional leadership (Hellum, 1999:62).

This contextual, non-essentialist approach does not mean that issues of substance are irrelevant. Law, whether considered as such by the people of Sekhukhune or by the South African state, will always be about rules, and the institutions involved in issuing them, perpetuating them and punishing their violation. Likewise, traditional authority will always refer to a structure of governance that derives part of its legitimation from an association with the past. It also does not mean that definitions are insignificant; more labels without consequences. Quite the contrary: a traditional leader officially recognised as such by the South African state is entitled to a state salary, a host of official functions, the support of a bureaucratic apparatus. Whether a South African court recognises a marriage as sealed according to 'customary law' can make the difference between obtaining or being refused a deceased husband's pension benefits. Similarly, being recognised as a kgoši in Sekhukhune opens the door to many privileges, just as the question of whether or not a norm is molo, can mean the difference between winning or losing a case or a plot of land, or being chased from the village. My point is merely that these definitions cannot, and should not be understood outside of the context in which they are generated. The vital point is not how 'law' and 'traditional leadership' are defined, but who has the power to issue definitions, or, as Tamanaha puts it, 'who identifies what as “customary law”', why, and under what circumstances and how definitions generated in different political intersects and help to constitute one another (2000:318).

The locality of study

The 'locality' in this study, the paramount chieftaincy of Sekhukhune, in South Africa's Northern Province, is characterised by red sands, agaves and cacti, and hills, with its crowded betterment settlements with shining corrugated iron shacks scattered around bottlestores and jam-packed taxi ranks, advertisements for Sunlight soap and Omo towering above them, as well as extensive settlements, with cows grazing peacefully next to the maize fields. To some, locals and migrants alike, Sekhukhune, or Bapedi, is home, the heartland of Pedi identity, cradle of its customs and bearer of a proud history. To the majority of South Africans, however, who will not find Sekhukhune on any map, it is a dystopia, an unattractive rural backdrop, one of the country's poorest areas in one of its poorest provinces. If the name sounds vaguely familiar, it is because of the Sekhukhune youth revolt against the bantustans in the 1980s, or the rampant witchcraft killings in the 1990s, that made sensational headlines. In Mandela's frequent references to the courageous Sekhukhune, it is not clear whether he meant Sekhukhune I, who stood up to the Boers at the end of the nineteenth century, or Sekhukhune II, who led the 1930s revolt against the bantustan policies. Their resistance was the main reason that the paramountcy was divided into 56 chieftaincies and the name Sekhukhune was wiped off the official map, only to reappear again in 2000 when a new municipality was dubbed 'Greater Sekhukhune'.

The estimated 200,000 people who live on its approximately 1100 square kilometres are mostly Bapedi, speakers of the Northern Sotho language Sepedi. Although the larger settlements house an increasing number of not only other South Africans but also 'illegal' immigrants, these are often frowned upon: 'Since Mandela married Graca Machel all those Mozambicans think that they are welcome here.' If any label sticks to the Bapedi, it is that of a proud and resilient people. 'Die Bapedi is korreklooppie en hul stamme almal deurmekaar' (The Bapedi are hotheads and their tribes completely mixed up), commented the government anthropologist who tried to talk me into selecting a 'nester tribe'. It is true that Sekhukhune history is largely one of revolt: against the Swazi and the Boers in the 1880s, against the imposition of the Lebowa bantustan in the 1950s, and against oppressive chieftaincy structures in the 1980s. Also, their 'splendid isolation', if it ever existed, has for more than a century been replaced by an intensive engagement with the outside world, with Bapedi working in mines on the Reef, in homes in Johannesburg and wherever else money can be made.

This combination of factors was one of the reasons to choose it as a research site. A second was the relative emphasis in South African studies on questions of Zulu and Xhosa identity formation and engagement with the wider state (cf. De Haas and Zulu, 1994; Switser, 1993). A third, equally important, reason was the availability of some excellent historical work on Sekhukhune: Delius The Land Belongs to Us and A Lion amongst the Cattle, both largely based on oral testimonies, allow for a retracing of chieftaincy politics into the beginning of the nineteenth century, while Van Kessel's 'Beyond our Wildest Dreams' gives an equally detailed account of the Sekhukhune youth uprising of the 1980s (see also Delius, 1990). And while the (legal) anthropological research done in Sekhukhune is no match for the size and sophistication of the work done for instance, on the Tswana-speaking people, the work of Deborah James on kinship and ethnicity in bordering areas provides a very useful point of reference.25

Even if Sekhukhune can, according to the people who live there, be considered a separate polity, bounded by history, linguistic ties and the paramountcy, it is also a large area which accommodates 56 officially recognised chieftainships. This study has concentrated on three of them, which have been selected as paradigm cases and provide diverging scenarios of the engagements between the locality and the state, and between chiefs, their subjects and the wider world. The chieftaindom of Ga-Masha was clearly a product of apartheid social engineering and kgoši Masha spent most of his time in the magistrate's office at the Provincial Department of Traditional Affairs or with the Land Claims Commission, seeking, like a true ethnic broker state support for his claims to authority. The way in which Mamone our second case-study, engaged with the state was quite the
opposite: even though the area developed rapidly, with electricity and telephone lines being installed every day, the Mamone traditional authority seemed to disengage from involvement with the state and to position itself against it. Hoepakranu, a tiny village in the mountains, provided a third scenario: that of a virtually absent state and quasself-reliant community. Although none of these cases can be considered as representative (nor could any other cases have been), I hope that delving into the debates on chieftaincy and customary law in these three different polities and placing these in the context of Sekhukhune chieftaincy politics does allow for a broader analysis of the dynamics at work in the "mutually constitutive" relations between chieftains and the state in present-day South Africa.

Methodology
Even though I had visited South Africa earlier, my first encounter with its traditional leaders came in 1995, when I was recruited as a student-assistant to the Traditional Authorities Research Group. Funded by the Dutch Ministry of Foreign Affairs, this South African-Dutch research collaboration had a year to look into the present position of traditional leadership and come up with policy recommendations. For all the excitement and merits of the project - working with a cross-cultural team in a fast-changing South Africa in which everything still seemed possible - the year went much too fast. At the end, after we had presented a ten-volume report to the Minister, containing the 1500-odd laws on traditional leadership still applicable, an overview of the literature, a few interviews and a discussion of the policy options, many of us felt that we had only scratched the surface (Traditional Authorities Research Group, 1996). There had been too little time to examine the changing local dynamics, and people's perceptions on traditional leadership. The group dispersed and went back to every-day academic work, but I had the freedom of doctoral funding and was able to devise a project that would concentrate on what was changing in the countryside and how the watershed national events affected South Africa's rural areas.

During visits to South Africa in 1995-6 (two months), 1997 (three months) I concentrated mostly on the national policy process.65 Even after I shifted focus to the 'locality' in October 1998, I kept in contact with national actors and followed the major discussions. As a result, the primary data woven into the following narrative roughly cover the 1995-2001 period and allow for a relatively longitudinal analysis.

After having struggled with Sepedi to the level where I could communicate independently and follow normal conversations, I set off in 1998 for twelve months in the fieldwork. The first priority was to find a research assistant. After a series of interviews with Sepedi law students, I was lucky enough to run into Patson Phala, a local newscaster widely known and liked but not attached to any political or chiefly faction, who proved to be an indispensable companion. While he communicated just as easily with kings and vagabonds, tribal elders and female activists, he schooled me in the mores of traditional society. After a tour of about fifteen traditional authority areas, we settled on the three divergent chieftaincies identified above, spending about four months in each of them.

The research in each chieftain followed a familiar pattern. In the first weeks, we would very much be the official guests, asked to explain our mission and given a front seat at meetings. Interviews would be 'en groupe', with people providing staccato answers which nearly always were much more an indication of what they thought we wanted to hear than a real reflection of local affairs. Gradually, however, the novelty of our presence wore off and we were able to take a more 'fly on the wall' approach, observing meetings and court cases, chatting with villagers, mapping out the institutional landscape and getting into the dynamics of local politics.

My initial fear, as a white woman, of not having access to chiefs and court cases proved unfounded. On the contrary, many men appeared flattered by the research project and keen to demonstrate and discuss the value of the traditional way of conducting politics and settling cases, even if it did take some time before they were comfortable enough to inflict corporal punishment in our presence (a phenomenon I personally never managed to come to terms with). What proved more difficult was the chance to speak to the subaltern voices, the marginalised, the strangers, the people outside the heat of village politics. The decision to do quantitative research with questionnaire interviews in addition to the qualitative ethnographic research proved useful here: 607 people responded, about 120 in each chieftain plus another 240 in wider Sekhukhune as a control group.67 The Probability Proportionate to Size method we used also allowed access to homesteads we would never have visited otherwise. Nevertheless, at the end of each case study we would be struck by the feeling that we were only just 'getting behind things', only in part remedied by later return visits and correspondence long after I had returned to the Netherlands at the end of 1999.68

It is on the basis of these conversations - under the peach trees with an old lady, in the Constitutional Court Judge Albie Sachs's Johannesburg coffee shop with a tape recorder on my lap, over a lunch with Kgosi Sekwati Mampuru - as well as a host of observations and archival, primary and secondary sources, that the following narrative has been written. Each of these conversations, in a way, is a snapshot of a country undergoing massive changes, both nationally and locally, at a time when there was unprecedented belief in the ability to forge change, to bring about 'a better life for all'. It is hoped that stringing these snapshots together and holding them against the light of other evidence will enable a more longitudinal and dynamic analysis of our work in a country with a people in the midst of the complex process simultaneously of formation and renewal, of identity search and reinvention.

65 N = 607, of which 52% female; 5% aged under 20, 28% 20-30, 22% 30-40, 19% 40-50, 14% 50-60 and 12% 60+; 20% no education, 21% up to standard 6, 42% standard 6-10, 7% matric, 7% technician, 3% university; only 27% formally employed. This is more or less representative of the Sekhukhune adult population as a whole (cf. CSS, Development Bank of South Africa, 'Statistical Macroeconomic Review Northern Province,' Natal: Development Bank of South Africa, 1995), and based on the的做法是就三个田野工作区域（N=240）和一个Sekhukhune传统权威区域（N=240）（见FSP- sampling Russell Bernard (1995)). The interviews were conducted by Tsiego Pasha, Patson Phala and myself or by two of us, usually in Sepedi, in personal, face-to-face interviews based on a Sepedi questionnaire with 45 closed and open questions, which would typically take 1-2 hours and have been translated into English by the interviewers.
66 In devising a field research strategy, I have been greatly assisted by the works of Glaser and Strauss (1967) and their emphasis on grounded theory, as well as the general work of Rustell Bernard (1995) and Strauss and Corbin (1990).
2. The Patchwork Democracy

Boundary Politics after 1994

What happens to a dream deferred?

...Maybe it just says
like a heavy load.
Or does it explode?

1. Introduction

Although the South African Department of Native Affairs was renamed Traditional Affairs after the transition to democracy, many things stayed the same. For instance, the maps depicting the borders of homeland and chieftaincy areas like a colourful patchwork continued to adorn the department's corridors long after the country had officially been reunified. Apartheid, as has often been remarked, was essentially a spatial endeavour, an exercise of mapping, creating separate territorial spaces each with its own political, administrative and legal rationalities. The political geography set out in atlases produced before the transition in 1994 is one which, apart from presenting 'white', 'coloured' and 'Indian' areas, is flecked with the four independent homelands - Transkei, Bophuthatswana, Venda and Ciskei - and the six self-governing territories, many of them scattered in ragged tatters in the vast surrounding area.

It is not surprising that it was remapping, just like rewriting history, that was one of the new regime's first priorities. The prospect of a unitary, democratic South Africa in which artificial boundaries like those of the homelands and created chieftaincies would be erased once and for all to make way for equality in spatial planning loomed large. At first glance, the new government was

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What happens to a dream deferred?

Does it dry up
Like a raisin in the sun?

Or fester like a sore -
And then run?

Does it stink like rotten meat?

Or crust and sugar over -
Like a syrupy sweet?

Maybe it just says
Like a heavy load.
Or does it explode?

2 Of Hughes. (1999:3) speaking of the 'territorialisation of power' and the transformation of 'rule by enslavement' to rule by land-holding.

3 The self-governing territories were KwaZulu, Kangwane, Qwaqwa, Gazankulu, KwaNdebele and Lebowa.