

Ambiguities Of Mourning Law, Custom, Literature and Women before South Africa's Truth And Reconciliation Commission

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No justice – let us not say no law and once again we are not speaking here of laws – seems possible or thinkable without the principle of some *responsibility*, beyond all living present, within that which disjoins the living present, before the ghosts of those who are not yet born or who are already dead, be they victims of wars, political or other kinds of violence, nationalist, racist, colonialist, sexist, or other kinds of exterminations, victims of the oppressions of capitalist imperialism or any of the forms of totalitarianism

–Jacques Derrida

Currently winding down its work of hearing testimony to human rights abuses of the apartheid era, the Truth and Reconciliation Commission is an ambitious undertaking.¹ A counterpart to the Reconstruction and Development Programme, a long-term scheme for the creation of housing, infrastructure and jobs, the Truth Commission is part of a vast effort at nation-building in post-apartheid South Africa. By asking South Africans to remember, the Truth Commission seeks to come to terms, not only with the crimes of the apartheid era, but with a 350-year history of white domination. In the words of Justice Richard Goldstone, former UN Chief Prosecutor for War Crimes Tribunals in Yugoslavia and Rwanda, 'One of the most important advantages of the TRC [is] that it w[ill] write the past forever into South Africa's history' (*Pretoria News* August 18 1997). The

Truth Commission aims at what no program of reconstruction and development could achieve by material means alone. In the minds of its proponents, it aims at nothing less than the 'cleans[ing]' and 'moral and cultural reconstruction' of a society (Chikane 1995: 99, Sachs 1995: 106). It has as its goal the 'healing of a nation' socially and psychically sundered into fragments by apartheid (see Boraine and Levy 1995).

By what means does the Commission set out to realise its goals? Though its goals are ambitious, its means are seemingly modest. It will build no houses, electrify no townships, and create no jobs. Guided by the goal of national reconciliation, all it has done is solicit the truth from witnesses called upon to provide information which could aid it in its goal of 'establishing as complete a picture as possible of the causes, nature and extent of the gross violations of human rights' of the period 1960-1994 (*Promotion of National Unity and Reconciliation Act* 1995).² The Commission seeks to bring forward, as it distinguishes them, the 'victims' as well as the 'perpetrators'. In terms of a controversial provision designed to bring to light what court cases would be likely to obscure, 'perpetrators' applying to the Amnesty Committee can exchange a 'full disclosure' of rights violations for amnesty from criminal and civil prosecution.³ In order to qualify for amnesty, 'the act, omission or offence ... to which the application relates is an act associated with a political objective committed in the course of the conflicts of the past', and the Committee must assess 'the relationship between the act, omission or offence and the political objective pursued, and in particular the directness and proximity of the relationship and the proportionality of the act, omission or offence' (*Promotion of National Unity and Reconciliation Act* 1995 subsections 3 [1] [b], 20 [1] [b] and 20 [3] [f]). Although the amnesty hearings have

at times been marred by the delaying tactics of lawyers, a great deal of information about covert security operations has come before the public eye. What has captured the hearts of observers, though, is the testimony heard at the human rights violation hearings. As Antjie Krog writes, looking back: 'The last victim hearings finished five months ago, and the focus has been lost. No more the voices, like a leaking tap in the back of your mind, to remind you what this Commission is all about' (Krog 1998: 236-7).

A nationwide publicity drive, supported by church, community and support groups like the Johannesburg-based Khulumani – Speak Out! –, has encouraged ordinary people to come forward: to name their torturers, the murderers of their children, and to claim recompense.⁴ We are witnessing, as Kendall Thomas writes, 'the elaboration of a new social ethics of discourse' (Thomas 1997: 188). The process of testifying is an open one, with public hearings broadcast live on radio (the mass medium accessible to the largest number of South Africans), and covered regularly by South African Broadcasting Corporation television, both live and in a weekly wrap-up, *Truth Commission Special Report*. This openness distinguishes the Truth and Reconciliation Commission from most truth commissions to date.⁵ Many 'victims' have come forward. Some find the process helpful. Others do not: recalling and re-enacting old traumas is not of benefit for all. Leaving the representations of 'perpetrators' for another occasion, it is on the testimony of those people who come forward as 'victims' that I concentrate here.

After due corroboration, a report will be tabled from the representations of 'perpetrators' and 'victims'. The intention is to

present, with the aid of prefatory material, a historical context in which to interpret these testimonies. Through its final report, which is to be submitted to the President in October 1998, the Commission will give official imprimatur to what was in many cases surmised, and circulated as common knowledge. For instance, everyone knows that Black Consciousness leader Steve Biko was murdered while in detention, but not everyone, particularly among Whites, has wanted to believe it. The same is true for a number of the other high-profile cases. But, more than this, the stories of ordinary women and men are being acknowledged. Eventually, if it succeeds, the Commission will have transformed the country's fragmented 'collective memory' into a shared national history. This will not be a history of bare facts, but one judged, and thus shaped, according to the norms of universal human rights.

Speaking as a witness before the Commission thus implies being enjoined to frame one's testimony according to the demands of universal human rights. As a perpetrator or a victim, one testifies to a transgression of human rights: either one has violated those of another, or one's own have been violated. Soliciting testimony in this way makes apparent ambiguities in cases which do not fit, in an obvious way, into the paradigm of human rights guiding the Commission's work. The cases I have in mind involve the interface between universal human rights and assertions by human rights violation witnesses in the name of 'custom'. Appeals for funeral rites, invitations to join in the work of mourning, these cases reveal a disjuncture, endemic to postcolonial Africa, between law and custom. Concentrating on one testimony, I show how such instances reveal the limits of advocative representation – letting someone speak is too often ventriloquism

– similar to testimonial literature, a literature of protest and solidarity. They reveal to us, on the other hand, the agency of black women is exposing the disjuncture of custom and law, and the drawbacks of advocative representation. What an examination of this testimony shows, above and beyond this, is a responsibility to, and before, the dead or deceased, bound to the hearing of another injunction in the law. Addressed to a body of human rights, the demand for funeral rites – for and before the other – evokes, from the law, another ‘law’, perhaps that which Derrida gives the name ‘justice’. Summoned before the dead, the Commission at once takes up and forecloses this responsibility.

The Body

Observers of the human rights violation hearings have been struck by the frequency with which witnesses testifying as ‘victims’ claim the restitution of a body, or of body parts. The survivors seek to accord the dead proper funeral rites, and to enlist the aid of the Commission in doing so (Minkley et al 1996: 9ff, Ignatieff 1997). Although not anticipated by the Commission, and not budgeted for, more than 50 bodies, many those of African National Congress guerillas, have been dug up exhumed from pauper’s graves, or from unmarked graves on isolated farms (Krog 1998: 204-5, Daley 1998). In a separate initiative, it has recently been announced, the bodies of the first six political activists to be hanged in the 1960s are being exhumed for reburial at a specially-built ‘Heroes Memorial’ in Port Elizabeth (*Cape Times* June 22 1998).

There has been some debate about the cultural significance of the demand by witnesses for the bodies of family members.

Foreign journalists have insisted on its racial and ethnic specificity.⁶ The domestic media have, however, been more cautious. Early in the life of the Commission, *Truth Commission Special Report* ran a feature on what it termed the 'symbolic reburial' of bodies. Although a white psychologist was interviewed for commentary, all of those presented as approaching the Commission for 'reburial', or just to find information, were black (*Truth Commission Special Report* June 16 1996). In a subsequent program, presenter Max du Preez, a respected left Afrikaans journalist, sought to dispel the impression that this was 'a black *cultural* thing'. Featured was the widow of a white farmer who had disappeared without trace one day from his farm, later said to have been killed by guerillas (*Truth Commission Special Report* September 29 1996). A good case can be made for such journalistic balance when white South African mourning practices pass as culturally unmarked. Yet, in this instance, Du Preez's attempt at balance may obscure the significance of the fact that black witnesses, many of them women, have been the ones to bring the issue of funeral rites, to general notice.⁷ Their demands are, performatively speaking, quite different.

An intriguing instance of testimony, in this respect, is that of Lephina Zondo, mother of Andrew Zondo, an African National Congress guerilla executed, despite activism on his behalf, for his part in the bombing of a shopping mall in Amanzimtoti in 1985 (see Meer 1987, Lalu & Harris 1996). Here is an extract from Lephina Zondo response to questions from Alex Boraine, the Truth Commissioner designated to lead her testimony:

Lephina Zondo: There was a lawyer, Bheka, [who] represented him. He came back [and] told us that [Andrew had] been sentenced to death five times because of what he did at Amanzimtoti. They took him to Pretoria, they transferred him to Pretoria. We visited him quite often [there].... The police arrived at home to tell us that the day has arrived for him to be hanged, and they said we should go and see him. We left as a family ... we stayed there for a weekend.

They said that we can stay in Pretoria but we'll never see his body. We said: 'Yes, that is better. Can you make it possible so that we can see his body?'

They said: 'No. You will not see his body. You won't be allowed to see his body. You can go and attend the church service but you will never see the body'.

We felt that if we go and don't see the body because it's our custom, before a person can be buried we have got to look at him and be sure that it is the right person. And thereafter we came back and they buried him.

They said that they would bury him at Mamelodi and they said they would give us a death certificate after that, but we never received any death certificate.

There was this heavy burden in our hearts. Why didn't they give us a death certificate because they already hanged him. They said no, it's the law, they had to bury him. They said even if we can go we will not see him...

Alex Boraine: Don't... don't rush. When you are ready then you can continue.... Is that your full story?

Lephina Zondo: *Yebo* [yes].

Alex Boraine: Thank you. I won't keep you long because you have carried a very heavy load and you have been very brave. Just one or two short questions... .

Alex Boraine: Mrs Zondo, the commission is here to share in your pain and your distress. Is there anything that you would like the commission to do if the commission had the power to do that? Is there anything more you want to say?

Lephina Zondo:we do not have a death certificate and we cannot go to the place where my son is buried.

Alex Boraine: Mrs Zondo, we will certainly consider your request and we will very definitely be able to get hold of the death certificate so that you can have it. We will also make enquiries, I'm really not sure what the law is, but we will make enquiries about your son's body and we will come back to you and tell you what we have found out. I hand you now over to the chairperson.

Lephina Zondo: Thank you very much.⁸

Lephina Zondo's testimony is intriguing to read in the context of Max du Preez's hesitation over the cultural and racial specificity of codes of mourning. She testifies that the family was never allowed to see the body of their son: 'They said: "...You will not see his body. You won't be allowed to see his body"'. The *Prisons Act 1959* provides for the 'near relatives' of an executed prisoner to arrange his or her burial, under the supervision of the prison authorities. This is a provision implemented at the discretion of the Commissioner of Prisons. The restitution of the body is, as the Act is written, the exception; prisoners' bodies are legally available to medical schools as cadavers.⁹ Andrew Zondo's family did not arrange his burial, and the Reverend Aiken Zondo, Andrew's father, was not permitted to see his body, or to attend the burial arranged by the prison.¹⁰ Withholding the corpse, specifically sight of the corpse, represents a disruption of usual funeral rites, of the work of mourning which a family, and community, would customarily carry out. Blocked are the usual

affective transactions, what it is the family and community's custom or habit (*umkhuba wethu*) to do: 'We felt that if we go and don't see the body because it's our custom [*umkhuba wethu*], before a person can be buried we have got to look at him and be sure that it is the right person'.¹¹

The phrase 'because it's our custom' disrupts the syntax of her testimony. It also points beyond the Commission's mandated domain of gross human rights violations. At one level, the phrase is an explanation for Boraine, whom she appears to position as one ignorant of 'custom'. At another level, though, there is the sense that, when she replies, she responds before another authority. There is no doubt that the hearing is set up to learn of rights violations 'done to' her or to her son (though, in the case of executions, it is not clear how closely the Commission is sticking to its brief),¹² and that the Commissioner asking the questions plays his part as if this is so. There is, however, no reason to assume that the witness is being written by the same script. This is not necessarily a case of subversion. From somewhere in Boraine's questions and prompts comes the call for another response. If Boraine is the other, we could say that this is a call which comes from the other of the other. To that other, Lephina Zondo gives the name 'custom', and attributes to it an imperative: 'before a person can be buried we have got to look at him and be sure that it is the right person'. Audible somewhere in the soliciting of testimony to human rights violations is the call of 'custom'; here as the imperative to look at the body before preparing it for burial. For this call to be heard, and for the response of the witness to be heard as if it had not been heard – that is to say, in this instance, to be received as testimony to rights violation – emphasises how the Commission operates not only to reveal the

crimes of apartheid, but to expose the social rifts and fissures which are the legacy of almost 350 years of colonial and quasi-colonial rule.

Lephina Zondo's testimony leads us to the complicated interface of custom and human rights. As we approach this interface, we cannot assume custom to be an unambiguously good thing. In South Africa, culture is political, and 'custom' is contested. Aspects of 'customary law', especially as they affect women, are, for instance, seen by some human rights lawyers as being in conflict with basic human rights. And some would view the rivalry between the ANC and the Inkatha Freedom Party as the expression of the conflict between custom and rights on a national scale (see Comaroff & Comaroff 1997: 401-402). The tensions coming to the fore at the hearings between custom and human rights, a colonial history's newest turn, may also be a sign of an older hearkening to another authority in the law.

Custom And The Law

Strictly speaking, violations of 'custom' lie beyond the scope of the Commission, whose task it is to investigate 'gross violations of human rights' through the 'killing, abduction, torture or severe ill-treatment of any person' (*Promotion of National Unity and Reconciliation Act* 1995). The violation in this case – we are not talking about clandestine 'disappearance', the issue raised with exhumations – is the 'legal' denial of customary funeral rites, of the usual process of laying the dead to rest.

Though not, in the letter of the law, a 'gross violation' of rights, such a denial of funeral rites may be – at least in what is

called 'Western' thought¹³ – the violation of right par excellence. I am thinking not only of *Antigone*, but also of the part played in Hegel's *Phenomenology of Spirit* by Sophocles's drama in the section on 'The True Spirit. The Ethical Order' (*Der wahre Geist. Die Sittlichkeit*) – a text which can itself be read as an allegory of the complicated exchanges between custom and human rights. These exchanges involve at least four languages, and several discontinuous histories of translation.

Let us explore how this is so. In Sophocles, Antigone questions Creon's 'proclamation' (*krúxas*), the 'law' (*nómos*) which prohibits her from burying her brother, Polynices, who has been declared a traitor, and punished by being denied the honor of a proper burial (1984: l.500,502, 1994: l.450,452). For Antigone, Creon's 'law' (*nómos*) seeks to 'override the gods,/ the great unwritten, unshakeable traditions (*nómima*)' (Sophocles 1984: l.504-505, 1994: l.454-455). Although, as we know, *nómos*, which can be translated as *custom*, is usually consistent with law, Antigone's speech demands that we not simply conflate law and custom; that we not exclaim, all too quickly, that, here, at the navel of Western thought, law is actually at one with custom, united in the sphere of what Hegel refers to as 'the human law' (*das menschliche Gesetz*): 'the *known* law, and the prevailing custom' (*das bekannte Gesetz und die vorhandene Sitte*) (Hegel 1977: 267, 1970: 329).¹⁴ Set apart from law (*nómos*) in Antigone's speech, the word for 'traditions' is '*nómima*' – customs, usages – a word which, in other contexts, can refer to 'funeral rites'. In the *Phenomenology* Hegel, to whom modern communitarian political theory owes the determination of law, the family, and the state as moments of the customary – or, as it is usually translated, the 'ethical order' or 'ethical life' (*Sittlichkeit*) – does

not oppose law and custom (*Gesetz und ... Sitte*).¹⁵ Instead he sees a 'rift (*Zwiespalt*) between divine and human law' (Hegel 1977: 285, 1970: 350). A translation of *nómima* as 'traditions' or 'customs', however, allows what Hegel renders as 'divine law' (*göttliches Gesetz*) to shade into the customary. Rereading Hegel via Sophocles thus yields a tension not simply between human law as actualised in the state, and divine law, but a rift between what Hegel takes to be at one: civic law and custom.

There is a sense here that Antigone hearkens to the other of the law proclaimed by Creon: the *nómima* in the *nómos*. By responding before that authority, she can hold Creon responsible. The fact that, at one level, to respond before unwritten *nómima* is also to respond before the dead (*nómima* can be rites accorded the dead) suggests that, as the law speaks, from somewhere in it there is another call. We could follow Derrida, and call this responsibility before the nonliving and the living 'justice'.

Without forgetting the differences, striking parallels can be drawn between Antigone's challenge to Creon and the testimony of Lephina Zondo – as custom is affirmed, its recognition sought in a forum constituted on the basis of universal human rights. Both a 'perpetrator' and a 'victim' – to use the parlance of the Commission – Andrew Zondo is executed for crimes against the state; except that this is a state of which he was, in contrast to the high-born Polynices, in many ways, never really a citizen. Having been denied access to the body of their son, the family explains to the prison authorities that it is their custom (*umkhuba wethu*) to see the body of the deceased. *Nómima*, custom and funeral rites, custom as funeral rites, have been blocked by what is proclaimed by penal officialdom as *nómos*:

‘They said no, it’s the law’. The Commission implicitly makes itself available to the witness in a kind of ‘transference’. The contestatory dialogue with the prison officials between custom and law is repeated for it, and the demand made of the officials is reiterated in the standard ‘request’ a witness is called upon to make before the Commission. Testifying to a ‘legal’ denial of funeral rites as a violation of ‘our custom’, our habit of doing things, Lephina Zondo petitions the Commission for concrete means of redress: ‘I would request ... we do not have a death certificate and we cannot go to the place where my son is buried’.

Enormous differences exist, of course, between what we find in *Antigone*, and in Hegel’s reading, and the appeal the Truth Commission hears from Lephina Zondo. To the more obvious differences of geographical, historical and cultural location, and occasion (law and theatre, for instance), we can add at least two which are more telling. By attending to these differences, we can interrogate Hegel’s appropriation of Antigone and Greek antiquity. Africa, notoriously passed over by the world spirit in his *Philosophy of History* as ‘the land of childhood ... enveloped in the dark mantle of Night’ (Hegel 1956: 91), may yet teach Hegel something.

First, whereas Lephina Zondo appeals on behalf of her son, Antigone claims funeral rites for her brother, a contingent fact (the parents of Antigone and Polynices are dead) which Hegel transposes into the essential brother-sister relation, making it the basis for his determination of ‘the feminine’ (*das Weibliche*) as an actualisation of ‘divine law’ (Hegel 1977: 274, 280, 1970: 336, 343) – and thus, with our retranslation, an actualisation of ‘custom’. Although ethnography of ‘traditional’ Zulu social

formations has revealed women to have the social role of mourners (see Ngubane 1977: 77-99), we would not be justified in assuming that women who testify before the Truth Commission in order to claim a restitution of bodies do so for such reasons.¹⁶ If it is true that, in the aftermath of armed conflict, women are often the survivors (one thinks also, for instance, of the Argentinean mothers of the 'disappeared' (see Taylor 1997: 183-222)),¹⁷ as coverage of the Commission (see Ignatieff 1997), and the background to Lephina Zondo's testimony show (see Meer 1987), men, as fathers, also play a leading part in the process. We would thus be mistaken in identifying customs of mourning with the social role of women; we do not need to copy Hegel by essentialising from the outlines of a single case, or limited number of cases. Nevertheless, as I shall propose below, in the post-apartheid juncture, Lephina Zondo's testimony brings to light some major implications specific to women.

Second, as I have begun to suggest, Hegel implicitly assumes law and custom to coexist amicably within the realm of 'the ethical order' or 'ethical life' (*Sittlichkeit*). It is divine law and human law which are in conflict. Hegel's larger goal, however, is to outline a transition (*Übergang*) from the family to the state, a transition within an ordinarily cohesive 'community' (*Gemeinwesen*) comprised, in effect, of 'blood relation[s]' (*Blutsverwandten*) (Hegel 1977: 271, cf 278, 1970: 333, cf 341). Divine law, in the form of the family, is the motive 'element' (*Element*) of human law, and of the state (Hegel 1977: 288, 1970: 352); their coexistence is disrupted only by a deed such as that of Antigone, which sets family against state, divine law against human law – on our translation: custom against civic law.

What happens, however, when such cohesive relationships do not exist, or ones which do are unacknowledged or suppressed? When ties of blood invite a phobia ultimately legislated as apartheid?¹⁸ When, as in British colonial Africa, colonists enjoy civic law, but the colonised are subject to a codified 'customary law', in what Mamdani (1996: 16-23) calls a 'bifurcated state?' Hegel seems not to anticipate such a situation, one which prevailed in Equatorial and Southern Africa, attaining its most elaborated form in the 'ethnic' Bantustans of apartheid. His account of colonisation (*Kolonisation*) in the *Philosophy of Right* proceeds exclusively from the standpoint of the (English and Spanish) colonist, who, following an emancipation struggle akin to that of slave and master, merely restarts the family-bourgeois society-state teleology on new soil (Hegel 1991: 269). In his reading of *Antigone* in the *Phenomenology*, Hegel does not anticipate the possibility of 'custom' not being reconcilable with law as actualised in the state. He does not imagine a realm of the 'customary', of *Sittlichkeit*, being a zone of civic and geographic marginalisation.¹⁹ If Africa has anything to teach Hegel and Hegelians, the lesson will come from this peculiar structure of colonial and postcolonial African modernity. It is thus to that structure's specific implications for post-apartheid South Africa, and Southern Africa more generally, that we turn.

In his assessment of postcolonial Africa's legacy of late colonialism in *Citizen and Subject*, Mahmood Mamdani identifies as a problem the deracialisation of the upper levels of government without a corresponding democratisation at the local level. Mamdani traces this problem back to the structure of European colonial rule in Africa, which developed into an amalgam of 'direct rule' and 'indirect rule':

Debated as alternative modes of controlling natives in the early colonial period, direct and indirect rule actually evolved into complementary ways of native control. Direct rule was the form of urban civil power. It was about the exclusion of natives from civil freedoms guaranteed to citizens in civil society. Indirect rule, however, signified a rural tribal authority. It was about incorporating natives into a state-enforced customary order. Reformulated, direct and indirect rule are better understood as variants of despotism: the former centralised, the latter decentralised... Urban power spoke the language of civil society and civil rights, rural power of community and culture. Civil power claimed to protect rights, customary power pledged to enforce tradition (Mamdani 1996: 18).

It is clear from this account that, in late colonial Africa, the application of Hegel's theory of the state meets an obstacle. Whereas, as Hegel tells us, the society of the colonists developed along lines reproducing the dialectic of the modern European state, colonised social formations were incorporated into the colonial state in ways which precluded any dialectical relationship between *African* custom and the realm of civil society and rights (cf Mamdani 1996: 15). *Sittlichkeit* was torn asunder in colonial Africa, where a domain of 'custom' was mapped out to exclude Blacks from the civic freedoms and rights enjoyed as a matter of course by Whites. Apartheid was the apotheosis of this bifurcated system.

In this 'bifurcated' colonial state, two, unequal, juridical orders existed: 'customary justice was dispensed to natives by chiefs and commissioners, black and white; modern justice to non-natives by white magistrates' (Mamdani 1996: 109). The legacy of 'customary law' is, when examined historically, not

customary at all, but a subordinate part of the hierarchy of indirect rule. In the same way that African tribes and ethnicity were sometimes 'inventions' of missionaries and colonial states, customary law was a brainchild of colonial rule (Ranger 1983, Chanock 1985). Like post-independence Kenya, Tanzania, Malawi, Zambia, Zimbabwe, and other African countries, post-apartheid South Africa has a legacy of 'customary law'. First codified in 1878, the body of customary law known as the Natal Code became the law in Zululand in 1887 (Simons 1968: 26). In 1927, the Natal Code became a key part of the blueprint for customary law in the rest of the country, when the *Native Administration Act* made legal dualism part of a system of territorial segregation and indirect rule on a nationwide scale (Simons 1968: 53). Never having been applicable to Whites, customary law remains a juridical remnant of the almost total exclusion of Blacks from the realm of civic rights. Yet, traditional leaders and customary law continue to enjoy constitutional recognition and state remuneration.

If 'custom' marked a radicalised zone setting citizen and subject apart, 'customary law' as codified by colonial and apartheid rulers caricatured, as it did much else, relations between African men and women. According to Simons, 'the code stereotypes a concept of feminine inferiority unknown to the traditional society' (Simons 1968: 26). Under the still extant 'official code', women are denied proprietary and contractual capacity, and *locus standi in judicio* (Bennett 1995: 86-93). Customary law is thus in conflict with South Africa's obligations under the Convention on the Elimination of All Forms of Discrimination against Women, and with a Bill of Rights providing that: '[t]he state may not unfairly discriminate directly

or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth' (*Constitution of the Republic of South Africa* 1996 subsection 9 [3]).²⁰ Customary law is not always applicable, or applied in its 'official' form. Yet one can observe at an abstract level that, when and where it is, its burdens on black women are onerous. In a realm of the 'customary', black women are set apart, even more drastically than black men, denied access to the sphere of civic law and of human rights which, in post-apartheid South Africa, promises to include them.

How do we begin to measure the incidence of these factors on an interpretation of Lephina Zondo's appeal, in a forum of rights, for an official recognition of 'our custom?'

So far I have put into play several issues. Our reading of Lephina Zondo's testimony over against Antigone's challenge to Creon has taken us against the grain of Hegel's interpretation of Sophocles, and the part it plays in his account of *Sittlichkeit* in the *Phenomenology of Spirit*. In colonial and postcolonial Africa, as we have found, the Hegelian theory of the state encounters an obstacle: African custom and 'customary law' is cut off from civil society and the zone of rights in a way which disrupts the Hegelian articulation of custom and law. Like other postcolonial African countries, South Africa is thus compelled to come to terms with a colonial political and juridical legacy which compromises and confuses African cultural affirmation and retrieval. For many involved in the struggle against apartheid, culture and ethnicity are suspect; the Bantustan system was based on a rhetoric of cultural preservation, and, in its dying days, the apartheid state

legalised 'traditional weapons', such as spears, axes and clubs, carried by impis of the Inkatha Freedom Party, a notorious instance of the manipulation of 'custom' and 'tradition' by it and its allies (see Sarkin & Varney 1993). Human rights issues *vis-à-vis* customary law are, then, also more complicated than is usually understood to be the case elsewhere.²¹

Before returning in the final section to the specific implications for women of customary law, rights, and the democratisation of culture, in the next section I will return to the less easily grasped elements of the connection I have made between the testimony of Lephina Zondo and the challenge of Antigone: the work of mourning, hearing the other in the law, the work of mourning *as* hearing the other in the law. From these elements, less easily analysed in legal debates around customary law and human rights, we can, in a cross-disciplinary way, formulate another reading of the law and custom. Here literature, or the literary, or even, if one is not turned away by the difficulty of the term, a certain 'literariness', is of major importance. All will be lost in what I am trying to say if we *oppose* law and literature, the legal and the literary. In the process we are tracking, it is from within the constraints of the law (as *nómos* in Sophocles), or at the very least from within its dramatic *mise en scène* – its own literariness – that the witness bears witness to the call of another law, of the other of the law. I would like to suggest that this bearing witness involves, in an essential way, a process of mourning and of commemorating the dead and a relation of responsibility and justice beyond the law, or other than the law.

In works of testimonial literature (and perhaps all literature), there is a response to a law, that of the addressee or addressees.²² Yet there is also a response to the other, or what Lévinas (1967) calls the 'trace of the other', *in* the addressee. This trace is perhaps what one reads for when one reads 'responsibly'. As Lephina Zondo, like Antigone, hearkens to an other of the law, in the law, she exposes a set of historical paradoxes which the Truth Commission, while it can expose them, cannot begin to confront. Her testimony forces the Commission to bring to light the ambiguities, in post-apartheid South Africa, of custom and 'customary law': a system applying exclusively and unequally to Blacks, and, within that zone of inequality, usually a rural one, unequally to black women. Testimony such as Lephina Zondo's is able, as it were, to bring the customary to crisis in its inequalities because it is an affirmation of 'our custom' in a forum where a request made in its name it will be given equal consideration. To the extent that the Commission is a body affirming human rights, it is, given current debates about rights and customary law, an exemplary place to reflect on the democratisation of culture. If Lephina Zondo's affirmation of 'custom' has the pragmatics of what, in another context, Judith Butler (1997: 89-90) has described as a 'performative contradiction' – the claim to consideration in 'universal' terms to which one has historically been denied access – pointing toward a possible democratisation of culture, is there not something more going on in the exchange than simply an assertion of rights, a protest at 'severe ill-treatment?'

Reading her testimony over against a work of testimonial literature, where testimony is produced under comparable constraints, I will suggest an essential link between her affirmation

and justice as responsibility before the dead through a claiming of funeral rites, an affirmation which leaves the process open, for the making of new claims, for the invention of new rights. It is significant that, in contrast to the work we are about to read, a black 'subaltern' woman is the one doing so, as she exposes fissures between custom and the law.

Hearing/ Reading Testimony

Transgressions of custom, in a denial of funeral rites, are part and parcel of the history of colonial and apartheid South Africa. Executed prisoners were not the only ones affected. One thinks of restrictions on the funerals of political activists – a flashpoint of anti-apartheid struggle in the 1980s – and of the secret disposal of bodies in order to preempt political funerals (Krog 1998: 204). What interests me more than those restrictions is how *well-meaning* attempts to 'let the victims be heard' – such as the Truth and Reconciliation Commission – sometimes risk repeating the offence.

Paralleling the exchange before the Truth Commission between witness and questioner, the informant-transcriber relationship in testimonial literature registers problems of advocative representation vividly, though in sometimes unexpected ways. Recent work on Latin American *testimonios* has moved from an emphasis on constraint to an awareness of agency. Doris Sommer (1996), for example, has made readers aware of how, in her *testimonio*, *I, Rigoberta Menchú* (1983), Nobel Prize-winning Guatemalan activist Menchú alludes to, and withholds, certain 'secrets' from her transcriber-interlocutor and readers. The work I will discuss is autobiography; in South African

writing a more established genre than collaborative testimonial narrative.²³ In autobiography, the position corresponding to the transcriber, or questioner, is occupied by a presumed addressee. At this level parallels can be drawn. Revolving around mourning and commemorating the dead, and addressing a reader conversant in the language of human rights, Bloke Modisane's *Blame Me on History* (1963), is an excellent starting point for exploring parallels between testimony given before the Truth Commission and witnessing in literature.

Invoking the UN Universal Declaration of Human Rights, and the Declaration of the Rights of Man, *Blame* is, at one level, a classic work of protest (Modisane 1986: 122, 309-10). From the first page, however, another story begins to emerge, as the autobiographical narrator contemplates the destruction of Sophiatown, a vibrant but violent black residential enclave near the heart of Johannesburg – South Africa's Harlem perhaps, if one thinks of the Harlem of the Harlem Renaissance.²⁴ Sophiatown was bulldozed in 1958 in a campaign of forced removals, making way for a working-class white suburb obscenely called Triomf (Triumph).²⁵ The 'cover story' of anti-apartheid does not stop a subtext, associating Bloke and his father, to emerge from the destruction of Sophiatown.

Modisane writes: 'Sophiatown was like one of its own many victims; a man gored by the knives of Sophiatown, lying in the open gutters, a raisin in the smelling drains' (Modisane 1986: 5). His father, Joseph Modisane, was one of Sophiatown's victims, knifed to death following a barroom quarrel: 'the battered and grotesquely ballooned nightmare, hardly recognisable as a human being, was my father; the swollen mass of broken flesh and blood,

which was his face, had no definition; there were no eyes nor mouth, nose, only a motionless ball' (Modisane 1986: 26). Joseph Modisane and Sophiatown are thus textually associated in death, an association into which Bloke is also drawn.

The first sentence of the book reads: 'Something in me died, a piece of me died, with the dying of Sophiatown' (Modisane 1986: 5), a cryptic statement in the context of Bloke's relation to his father. By accident, Bloke's given name – William – is written on his father's coffin: 'The shock of seeing my name and not my father's on the coffin confused and frightened me, but it seemed symbolic somehow; I was officially dead, something I was later to exploit emotionally' (Modisane 1986: 31). 'William's death is confirmed as the bulldozers move in: 'Something in me died, a piece of me died, with the dying of Sophiatown'. Name and face coincide: 'I have no face, I have no name, my whole existence slithers behind a mask called Bloke' (Modisane 1986: 75). The Bloke name/face substitutes for the name/face which died with his father.²⁶ Modisane's autobiographical project, making himself, is to recreate the face of his father, 'to bring back that face' (Modisane 1986: 53).

The death of Joseph Modisane is a calamity for Bloke and his immediate family. "We are cast-offs in the wilderness", Ma-Willie [his mother] said, in Sesutho, "We are orphans, our *shield* is gone" (Modisane 1986: 27; my emphasis). Bloke leaves school, 'a fourteen-year-old man responsible for a family of four' (Modisane 1986: 28). Who does Modisane blame? Does he blame himself on history alone? Does he invite us as readers to do so? Modisane blames not only the state for destroying Sophiatown, and for killing his father, but reproaches his father for being killed

and for leaving him to take care of his mother and siblings. With Hendrik Frensch Verwoerd, Joseph Modisane stands in the way of his son 'ris[ing] above ... certain levels of labour' (Modisane 1986: 81), as Verwoerd's 1954 Address to the Senate on Bantu Education so crassly put it (Verwoerd 1964: 77-78). In a profound irony, in a layered work of protest, Joseph Modisane stands as co-accused, along with H F Verwoerd. Read with Modisane's short stories, *Blame* is not simply political protest, but enlists its readers in order to reach his father, to recreate his name and his face.²⁷

Over and above testimony to human rights violation, as autobiography *Blame* attempts to lay Joseph Modisane to rest.²⁸ This labor of mourning remains largely hidden to critics who read for protest or resistance (see Sanders 1994: 64 n1). By contrast, when witnesses come before the Truth Commission to conclude works of mourning, they do so, it would appear, openly. Custom, or customary rites of mourning, so it would seem, are not at odds with the law – as they are in *Antigone*, and as they appear to be in the reception of *Blame*, insofar as protest is a genre which favors representative testimony to the widespread violation of human rights over the more complicated psychodynamics, for example, of mourning – which sometimes involve anger at the one who died.

Let us return to the testimony of Lephina Zondo. As a petition for funeral rites, Lephina Zondo's appeal extends the scope of its founding assumptions about rights violation. Like Chile's National Commission on Truth and Reconciliation, which distributed its report with a letter from the President to the next of kin of each victim, the Truth Commission is in effect prepared

to join in the work of mourning.²⁹ As presiding Truth Commissioner Alex Boraine promises: 'Mrs Zondo, we will certainly consider your request and we will very definitely be able to get hold of the death certificate so that you can have it'.

Yet when Boraine says the Commission 'will ... make enquiries' into whether the family can have access to their son's body, he reinvokes, ironically, the very system of laws which disrupted customary practice in the first place: 'I'm really not sure what the law is'.

The Commission's handling of Lephina Zondo's evidence has been criticised by Premesh Lalu and Brent Harris – the historians who brought her intriguing testimony to wider scholarly attention – for its legalistic approach to evidence. In a provocative analysis, they draw parallels between the trial of Andrew Zondo, where Fatima Meer's sociological defence was rejected by the apartheid court, and the reception of his mother's testimony, which is dryly summarised by the Commission's Research Unit. The Truth Commission, they conclude, 'render[s] [her] voiceless', ignoring her 'allusion' to 'our custom'. Invoking the Subaltern Studies group, they propose that: 'Perhaps this is one instance where the testimony of subalterns seems incompatible with a process that is deeply rooted in modernity' (Lalu & Harris 1996: 35-36; trans. modified). To put things briefly, I am not sure that, in a country where culture is irrevocably hybrid, one can speak so assuredly about an incompatibility of 'custom' and modernity; or, in this case, about the silencing of a subaltern witness. I will attempt a different tack.

Women And The Crisis Of The Customary

As I have noted, women are often the witnesses who claim a restitution, before the Commission, of bodies or body parts. This parallels *Antigone*, where the figure of a woman confronts the law of the state for violating custom by denying funeral rites. Without forgetting the differences I outlined earlier, but indeed taking them into account, how are the valid parallels significant? In the light of Lephina Zondo's invocation of 'custom', we can make some observations, and track how testimony to the violation of custom relates to a process conceived and legislated on the basis of universal human rights.

As I have said already, in post-apartheid South Africa, custom is a mixed blessing. Under colonialism and apartheid, 'tradition' and 'custom' were, in part, entities 'invented' in order to serve a system of domination (see Ranger 1983, 1989, Marks 1989, Anonymous 1989). This is an order Hegel seems not to have anticipated. That troubling legacy is still with us; the authority of 'traditional leaders' and 'customary law' lives on in Southern Africa. As Mamdani reminds us, Southern Africa shared with Equatorial Africa a colonial system of 'indirect rule' mediated through a political manipulation of the 'customary' and the co-optation of local leaders.³⁰ Post-apartheid South Africa thus faces problems no different from those of post-independence societies in other parts of Africa; namely, a *deracialisation* of national government, without a corresponding *democratisation* at the local level, where a 'customary' administrative apparatus may still apply to Blacks.³¹ Such a racially 'bifurcated state' clearly contradicts the democratic, non-racial vision of a post-apartheid South Africa: to be post-apartheid is not necessarily to be postcolonial. Where

chiefly rule is autocratic and hereditary, and rural black women subject to legally codified patriarchal authority, 'custom' may present a clear barrier to democratisation.

What does the 1996 Constitution say about traditional leaders and customary law? 'The institution, status and role of traditional leadership, according to customary law, are recognised, subject to the Constitution' (*Constitution of the Republic of South Africa* 1996, subsection 211 [1]). Implicitly recognised is a history of legislative codification and amendment, and case law, in which African custom is effectively, as under colonialism and apartheid, subject to state lawmakers: 'A traditional authority that observes a system of customary law may function subject to any applicable legislation and customs, which includes amendments to, or repeal of, that legislation of those customs' (subsection 211 [2]). The fact that 'customary law' received the constitutional recognition it did is thanks to lobbying by traditional leaders at the Multi-Party Negotiating Process, the talks leading to the drafting of a preliminary Constitution (*Constitution of the Republic of South Africa* 1993). The chiefs attempted to have customary law exempted, as it is from anti-discrimination laws in Zimbabwe (Maboreke 1991: 219, Currie 1994: 149), from the equality provisions in the Bill of Rights:

During the debate on the Bill of Right in August 1993, a member of one of the traditional leaders' delegations, Chief Nonkonyana, objected to the equality provisions in the Bill of Rights, stating that, as a traditional leader, he did not support equality for women. The Chief's demand that customary law be excluded from the Bill of Rights was linked to a second claim for the recognition of the status and powers of traditional leaders. Both

of these claims brought the traditional leaders into conflict with women fighting for the principle of gender equality to be entrenched in the interim Constitution (Albertyn 1994: 57).

The Women's National Coalition (WNC) lobbied to ensure that the equality clause in the Bill of Rights included reference not only to race but also to sex. That put them into direct conflict with the 'chiefs' over customary law. The Bill of Rights also recognises a right to language and culture: 'Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights' (*Constitution of the Republic of South Africa* 1996 section 30). The clause could, the WNC realised, be interpreted in favor of customary law. Led by the Rural Women's Movement in this issue, the WNC made the demand that 'not only should equality apply to all groups but it should trump claims to culture and custom that justified discrimination against women' (Albertyn 1994: 59). Although customary law is subject to the Constitution, and the right to language and culture to the Bill of Rights, the effort by the WNC to include an 'equality trump' was unsuccessful. Women are left with a Constitution which, like the salaried traditional leaders, makes no distinction between codified and non-codified versions of customary law. As things stand now, constitutional review must decide on a case-by-case basis what aspects of customary law are legitimate.

How does this apply to the testimony under discussion? One could simply object that invoking 'custom' is retrograde; or, conversely, one could criticise, with Lalu and Harris, a legalism which seems to ignore it. But another way of reading Lephina

Zondo's invocation of 'custom' is to view it as performatively bringing the 'customary' to crisis – insofar as it is a system of domination – by claiming 'our custom' (*umkhuba wethu*) in a context where that claim will be – or ought to be – accorded equal consideration; where it will not be used to deprive the claimant of full citizenship, as it may have been under apartheid, with its system of ethnic Bantustans. For most black South Africans, culture and 'custom' are hybrid; Modisane, the city-dweller, has to learn what he has to do at his father's wake (Modisane 1986: 28). We would be wrong to assume that something 'authentic', untouched by modernity or Christianity, is being invoked. Ethnic purity is apartheid thinking. What is crucial here is that 'our custom' (*umkhuba wethu*) – our habit, our way of doing things – is being asserted. Equally crucial is that what is being asserted probably has nothing to do with 'customary law'.³² The word being used is not *isiko*, the synonym used when making reference to 'customary law' (*umthetho ophathelene namasiko*). *Umkhuba wethu* is affirmed in a context where that way of doing things is to be granted equal consideration. This can be read as an implicit critique of unequal aspects of custom, and as exposing the structural inequalities of 'customary law'.

Given that it is a black subaltern woman who brings the 'customary' to crisis, what are the specific implications for women? Each case is different, and generalisations therefore risky. We can nevertheless ask: If black women are, in certain cases, subordinated not only as Blacks under customary law, but also as women, does an appeal to 'custom' or 'tradition' before the Truth Commission not also bring the customary to crisis in terms of its 'official' patriarchal structure – since, before the Commission at least, a

woman's claims enjoy equal status; and since customary authority is not the authority before which appeal is made? Does this represent the makings of a democratisation of custom, and of culture? Are black women exemplary agents of this process, being even more ambiguously positioned in relation to the customary than black men?

It is in this affirmation and implicit critique that a black woman brings the customary to crisis, by exposing the rift between custom and law; by showing the customary to be a zone of exclusion from the sphere of civic law; and by showing black women to be marginalised in this zone even more than black men. By introducing *Antigone*, in cross-disciplinary fashion with Hegel, we can note that the appeal for proper funeral rites does two things: first, it hearkens to an appeal of the other in the other – the other of the law in the law; second, responding to the call of this other – from the place of the deceased – can be read as an instance of responsibility before the dead. This is what Derrida sets as a precondition for thinking 'justice'.³³

Provisionally, we can say that, at a political level, those witnesses who claim bodies, and body parts, extend, by their testimony, the human-rights brief of the Truth Commission. This is something like the 'test[ing] out [of] rights which have not been incorporated in it' which Claude Lefort (1986: 258) sees as characteristic of the democratic state. A consideration of claims for funeral rites shows that an affirmation of 'custom' does not have to be in conflict with the law, as it is in *Antigone*, and in a more mediated form in Hegel; or with full citizenship, as it often was under colonialism and apartheid. Modisane's *Blame Me on History*, as testament and autobiography, shows us how the more

complicated dynamics of mourning supplement currents of socio-political mobilisation. Literature exceeds and supplements history. Exceeding the task it was assigned, by helping with the work of mourning, the Commission brings to light wider tendencies of social change, and deeper-running fissures in the post-apartheid South African polity, not all of which are a legacy only of the apartheid era, let alone the Commission's period of reference. Deracialisation will only be followed by democratisation if custom, as recognised by the state, is separated fully from 'customary law' and from officially-recognised hereditary and patriarchal 'traditional leaders'. And only if women are able affirm 'custom' in ways which do not position them, as speaking subjects, as subordinate in systems which deny them full citizenship. The testimony of Lephina Zondo, an assertion of 'custom' at proceedings in which equality of consideration is, or ought to be, operative, can thus, in this larger context, perhaps also be heard as an implicit critique of customary law, and of its specific impact on women.

I have insisted on the qualification: equality of consideration *ought* to be operative. It is here that, as the law is provoked, the parallels with *Antigone* run deepest. According to Hegel in the *Phenomenology*, Antigone, as woman, is the 'eternal irony of the community' (*ewige Ironie des Gemeinwesens*) (1977: 288, 1970: 352, trans. modified). Recently, in *The Gift of Death*, Derrida relates Hegel's pronouncement to the original Greek sense of irony as *eir neta*, and to the *étr n*: the dissembler, the one who feigns ignorance in order to make the law speak (Derrida 1995: 76-77). If Antigone is an *étr n*, perhaps Lephina Zondo, and others asking for funeral rites withheld, affirming custom before the law, are too.

'I'm not ... sure what the law is', Truth Commissioner Alex Boraine says.

What will the law say when it speaks?

Notes

¹ Earlier versions of this essay were presented as a seminar at the Columbia University Institute of African Studies (September 30, 1997), and as papers at the Law, Culture and Humanities Conference at Georgetown Law Center, Washington D.C. (March 27-29, 1998) and the 7th Annual British Commonwealth & Postcolonial Studies Conference at Statesboro, Georgia (May 8-9, 1998). I would like to thank Nigel Gibson at African Studies for inviting me to present a seminar, and to the organizers of the two conferences for giving me the opportunity to share my work. My thanks go to Gayatri Chakravorty Spivak for her constant transformative questioning, and to Penelope Pether and Martha Minow for comments on the first draft of the essay. I would also like to thank Howard Varney for his conversation, and for reminding me about 'traditional weapons.' Special thanks go to Robert Burt and Renée De Mateo of Yale Law School for allowing me to borrow the School's videotapes of *Truth Commission Special Report*, and to Sias Scott at the South African Broadcasting Corporation for making available to me the master videotape of Lephina Zondo's testimony.

² A note on the significance of these dates: 1960: the declaration of a nationwide State of Emergency by H.F. Verwoerd's National Party government, which led to the massive and increased state repression of anti-apartheid organizations, including the detention and torture of activists; 1994: non-racial democratic

elections are held for the first time, in which an African National Congress majority effectively marks the end of National Party rule and the apartheid era.

- 3 The amnesty provisions were challenged in the Constitutional Court: *Azanian People's Organisation (Azapo) and Others v. President of the Republic of South Africa and Others*, 1996 (4) SA 677 (CC).
- 4 Khulumani is attached to the Centre for the Study of Violence and Reconciliation at the University of the Witwatersrand, Johannesburg (www.wits.ac.za/wits/csvr/khuluman.htm, visited June 14 1998).
- 5 Some witnesses testified publicly before the Argentine National Commission on the Disappeared (Taylor 1997: 141). The proceedings of Chilean Commission on Truth and Reconciliation, however, were not held publicly (Krog 1998: 238).
- 6 'Nason [Ndwandwe] sit in his garage, drinking beer and brooding over what happened. He says, in a hoarse voice, 'Phila [his daughter] has not been accepted into the fold of the ancestors.' He has talked to the ancestors to seek their advice. They say that the manner in which she died – so far from home, in such barbarous circumstances, among strangers – means that she cannot come home to her resting place among them. 'I must cleanse her,' he says. He must wash the blood from her bones to make her acceptable to the ancestors, and plead, 'Please accept her.' Until then, she is wandering alone, above us somewhere, in the humid Durban night' (Ignatieff 1997: 87); 'In the late afternoon, when the bones [of their son, Bafana Mahlombe] had been placed in a proper coffin, the Mahlombe family said they were finally satisfied. Like many Zulus, they believe that a spirit not put to rest will haunt the family' (Daley 1998).

7 This is implicitly acknowledged by Du Preez in his introductory remarks: '*Many black mothers and widows have told the Truth Commission that they would only be able to make peace with the loss of their husband or children if they could give them a proper burial. Many thought this was a black cultural thing. But this week those at the Truth Commission hearings at Klerksdorp were reminded of how similar we are in our basic emotions*' (*Truth Commission Special Report* September 29 1996, first emphasis mine).

8 Adapted from the transcript of the translated testimony of Lephina Zondo before the Truth and Reconciliation Commission, as recorded by the South African Broadcasting Corporation, Durban, May 10 1996 (reproduced in Lalu & Harris 1996: 30-32, trans modified). A note on the ellipses: three points indicate ellipses in Lalu and Harris; four indicate additional ellipses made by me. The official transcript, which differs from that in Lalu & Harris, and in which Lephina Zondo is referred to as Lupina Nozipho Zondo, is available on the Truth Commission's website (www.truth.org.za, visited July 22 1998).

9 According to the *Prisons Act* 1959, s35:

'(4) (a) The body of an executed person may, in the discretion of the Commissioner, be placed under the control of an inspector of anatomy to be dealt with in accordance with the provisions of the Anatomy Act, 1959 (Act No. 20 of 1959), or be handed over to a medical school which is legally entitled to be in possession of human corpses.

(b) If such a body is not disposed of under paragraph (a) it shall in the discretion of the Commissioner be buried in private, either by the authorities of the prison where the execution took place, or by the near relatives of the deceased under the supervision of the said authorities, and in either case the Commissioner may in his discretion permit near relatives of the deceased to be present at the burial' (Rabie & Strauss 1981: 125).

¹⁰ 'Aiken had thought he would remain until the day of the execution and he had thought that he would be allowed to say a prayer over his grave. But in the little office, in the prison, the warder told him; 'He will be executed on Tuesday. You can't see him after the execution. The prison will hold a service for ten to fifteen minutes. Then his body will be taken to the graveyard. You can buy a small bouquet and leave it here. We will put it on his coffin. If you want to see the coffin, you can see the coffin but you can not see your son in the coffin'.

Aiken listened and the pain was so intense in his heart that he thought it would squeeze dead. His eyes closed a moment and when he opened them, they were mercifully dry.

'If I want to see a coffin, I can go to Doves funeral undertakers.' He left the prison. He did not stay till Tuesday as he had planned to. Instead he left for Durban by bus' (Meer 1987: 170).

¹¹ I would like to thank Lynette Hlongwane for her assistance with the original Zulu of Lephina Zondo's testimony. I cite here the unedited South African Broadcasting Corporation videotape of the Durban hearing of May 10, 1996. The SABC translator renders '*umkhuba wethu*' as 'our tradition,' which loses the ordinary, everyday senses of *umkhuba* as 'conduct,' 'habit,' and so on. 'Custom' perhaps retains this sense, without doing away with ambiguous connotations – of colonial manipulation and even 'invention' – which it shares with 'tradition' in the Southern African context.

¹² Eugenia Thandiwe Piye, who is the next witness after Lephina Zondo, also testifies to the execution of her son, Lucky Piye. She corroborates Lephina Zondo's testimony: 'We didn't go to the graveyard where he was buried. As Mama has already said they wouldn't let us go. Those people who were with told us that we will not see him – that we will never see them. We asked them even if we couldn't see him in his coffin. We stayed at the

hospital at Mamelodi. We used to go to Mamelodi and stay there. We stayed there the whole day and we eventually realised that they had buried them and we had to go back. We never saw their graveyard where they had been buried. We were never even given their death certificate' (Transcript of testimony of Eugenia Thandiwe Piye, given before the Truth Commission at Durban May 10 1996, from the Commission website, www.truth.org.za, visited July 30 1998).

When capital punishment was declared to be in conflict with the Constitution in 1995, the Constitutional Court judges cited various clauses in the Bill of Rights, which are consistent with the UN Declaration: right to human dignity, right to life, right not to undergo cruel and inhuman punishment. They also cited the African notion of *ubuntu*, or human reciprocity. See: *State v. Makwanyane and Another* 1995 (3) SA 391 (CC).

- ¹³ A useful way to think the relation of Greece and the 'West' is as an appropriation of a hybrid Greek antiquity for the purposes of 'Western' cultural, national and racial self-assertion in Europe and the United States. As recent debates over Martin Bernal's *Black Athena*, and over African American appropriations of Egypt and Greece, have revealed, there are other historical possibilities (Bernal 1987 and 1991, Lefkowitz and MacLean 1996). There are ways in which Greek thought can be opened to dialogue, rather than proscribed, which is simply a legitimisation, by reversal, of its 'Western' appropriation. As A A Mazrui writes: 'Europe's title to the Greek heritage is fundamentally no different from Europe's title to Christianity. In these later phases of world history Europe has been the most effective bearer of both the Christian message and the Greek heritage. But just as it would be a mistake to let Europe nationalize Christianity, it would be a mistake to let her confiscate the hellenic inheritance. The Greeks must at last be allowed to emerge as what they really are

- the fathers not of a European civilization but of a universal modernity’ (Mazrui 1978: 97, quoted in Ngugi 1998: 5).
- ¹⁴ When Polynices is buried, it is according to *nómos*; there is no conflict to force a disjuncture between custom and law (Sophocles 1984: l.29, 1994: l.25).
- ¹⁵ According to the *Philosophy of Right*, laws are no more than customs written down (Hegel 1991: 241).
- ¹⁶ Ngubane argues that the Zulu women about whom she is writing occupy a position of ‘marginality,’ between ‘this world’ and ‘the other world,’ between the living and the dead (Ngubane 1977: 86). Drawing an analogy between mother, mourner and diviner, she observes: ‘The argument ... about the mother and chief mourner being channels through whose bodies spiritual beings cross from the other world and from this world to the other world, applies also to the diviner, who is a point of contact with the spirits who return to this world. Through a woman the transition of spiritual beings is made. This point is crucial in that it explains why diviners are women and why men must become transvestites to be diviners’ (Ngubane 1977: 88).
- ¹⁷ Of course, as Taylor notes, the Mothers of the Plaza de Mayo mobilized around the demand for the reappearance, alive, of the disappeared: *Aparición con vida* (Taylor 1997: 183).
- ¹⁸ The discourse of the National Party and its ideologues in the years leading up to 1948 register a phobia of ‘blood-mixing’ (*bloedvermenging*) taken up from the Afrikaans academics who drafted the landmark Carnegie Report on White Poverty (1932) (see Carnegie 1932, Cronjé 1945 and 1947, Coetzee 1991, Dubow 1995).
- ¹⁹ This is also why it is important to note the limitations of Hegelian theories of psychic or cultural colonization, which depend on access, actual or promised, of the colonized to the

civic life of the colonizer – an access available, if at all, to a small native elite. In this light, we would have to reread the writings of, among others, Frantz Fanon (1986) and Albert Memmi (1991). Exclusion means both an intensive political and economic marginalization and a relative avoidance of the psycho-cultural dialectic.

²⁰ Gerontocracy and agnatic succession, a key component of hereditary chieftaincy, are also in conflict with the anti-discrimination clause, while chiefly rule, in a more general sense, is in conflict with the democratic founding principles.

²¹ In countries subject to indirect rule, where custom and customary law were distorted and even invented, cultural affirmation and retrieval are faced not with a straightforward conflict between indigenous custom and human rights. In post-apartheid South Africa, as in many post-independence African countries, it is not only a matter of whether to bring local laws and norms into line with international charters (cf An-Na'im 1994), or whether to resist the tendencies of globalization (see Sassen 1996: 88-98) in the name of cultural difference in order, for instance, to minimize the inroads into national sovereignty of transnational capitalism, which is often heard speaking the language of rights (cf Cheah 1997). The undeniable fact that such interests try to hijack rights agendas should not lead us to deny the fact that some striking affirmations of the principle of rights – of what Hannah Arendt called 'the right to rights' – have come from the formerly colonized and the once enslaved. Such affirmations, inscribed today, for instance, in the African Charter on Human and Peoples' Rights (1981) (see Beyani 285-6), can be given a genealogy dating back at least as far as the San Domingo revolution, and Toussaint L'Ouverture's explosive challenge to the French Revolutionary 'Rights of Man and Citizen' (see James 1963, Blackburn 1991).

- ²² On Maurice Blanchot's *The Madness of the Day* in 'The Law of Genre,' Derrida writes: 'This text also speaks the law, its own and that of the other as reader' (Derrida 1992: 242).
- ²³ There are a few instances. Perhaps the most fascinating is Elsa Joubert's non-fiction novel, *Poppie Nongena* (1980), based on the tape-recorded testimony of a black South African woman. Drawing parallels between Joubert's book and the *testimonio* genre, Anne McClintock (1996) has explored related questions of narrative agency. I analyze in detail elsewhere how the original Afrikaans version of *Poppie* (Joubert 1978) foregrounds the politics of advocative representation.
- ²⁴ Sophiatown has been the subject of enormous recent critical interest and celebration. Books and films on Sophiatown of the last 15-20 years include: books: Motsisi 1978, Matshikiza 1981, Themba 1985, Modisane 1986, Schadeberg 1987a and 1987b, Chapman 1989, Nicol 1991, films: Rogosin dir 1994 (1959), *Have You Seen Drum Recently?* Nixon (1994: 11-41) draws parallels between the Harlem renaissance and cultural vibrance of Sophiatown.
- ²⁵ In Marlene van Niekerk's remarkable novel, *Triomf*(1994), the white residents of Triomf are haunted by the ghosts of the former inhabitants of Sophiatown.
- ²⁶ Paul de Man designates the address to the dead person, and the positing of his or her response, as the dominant figure of autobiography: 'it is the figure of prosopopeia, the fiction of an apostrophe to an absent, deceased or voiceless entity, which posits the possibility of the latter's reply and confers upon it the power of speech.... The dominant figure of the epitaphic or autobiographical discourse is ... the prosopopeia, the fiction of the voice-from-beyond the grave' (De Man 1979: 926-927).

- ²⁷ I cannot present this reading in full here. I refer readers to my essay, 'Responding to the "Situation" in Modisane's *Blame Me on History*' (Sanders 1994).
- ²⁸ One could read Modisane's autobiography as supplementing the 'traditional' work of mourning. At the tebello, the wake held for his father, he finds himself largely ignorant about the ideas about death familiar to the other mourners:
- "The poor man has gone to the ancestors".
- They spoke in Sotho, Zulu and Xhosa, and most of the imagery, and the relationships of the symbols intended, escaped me; I made polite gestures that the catering help was asking for me' (Modisane 1986: 29).
- ²⁹ 'The report was published in a book which was sent with a personal letter from the president to every affected family. The letter was another important gesture in that it was addressed to the individuals and pointed out where in the book the details of their loved ones could be found' (Zalaquett 1994: 52).
- ³⁰ As Simons relates, the system of indirect rule was, initially, not universally accepted by colonial policy makers, who feared strengthening tribal chiefs (1968: 15-26).
- ³¹ The democratization of 'traditional rule' is discussed by Mokgoro (1996), and by Motshabi & Volks (1991).
- ³² Writing at a time when the Bantustans were being established, Simons (1968: 51-2) insists on the political necessity, when Whites authorize themselves to speak for Blacks, of a distinction between 'own customs' and 'traditional law': 'Today many Whites – politicians, officials, anthropologists, even missionaries – would say that Africans wish to observe their 'own' customs. The answer begs the question, however. The customs of today are often not the same as those that are embodied in the traditional law.'

- ³³ The fact that, in South African *literary* history, this responsibility can, at an earlier time, be located in a work written by a man is something which remains to be explained historically.

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