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For Mira and Zohran

CHAPTER ONE

Introduction: Thinking through Africa's Impasse

DISCUSSIONS on Africa's present predicament revolve around two clear tendencies: modernist and communitarian. Modernists take inspiration from the East European uprisings of the late eighties; communitarians decry liberal or left Eurocentrism and call for a return to the source. For modernists, the problem is that civil society is an embryonic and marginal construct in Africa; for communitarians, it is that real flesh-and-blood communitites that comprise Africa are marginalized from public life as so many "tribes." The liberal solution is to locate politics in civil society, and the Africanist solution is to put Africa's age-old communities at the center of African politics. One side calls for a regime that will champion rights, and the other stands in defense of culture. The impasse in Africa is not only at the level of practical politics. It is also a paralysis of perspective.

The solution to this theoretical impasse—between modernists and communitarians, Eurocentrists and Africanists—does not lie in choosing a side and defending an entrenched position. Because both sides to the debate highlight different aspects of the same African dilemma, I will suggest that the way forward lies in sublating both, through a double move that simultaneously critiques and affirms. To arrive at a creative synthesis transcending both positions, one needs to problematize each.

To do so, I will analyze in this book two related phenomena: how power is organized and how it tends to fragment resistance in contemporary Africa. By locating both the language of rights and that of culture in their historical and institutional context, I hope to underline that part of our institutional legacy that continues to be reproduced through the dialectic of state reform and popular resistance. The core legacy, I will suggest, was forged through the colonial experience.

In colonial discourse, the problem of stabilizing alien rule was politely referred to as "the native question." It was a dilemma that confronted every colonial power and a riddle that preoccupied the best of its minds. Therefore it should not be surprising that when a person of the stature of General Jan Smuts, with an international renown rare for a South African prime minister, was invited to deliver the prestigious Rhodes

Memorial Lectures at Oxford in 1929, the native question formed the core of his deliberation.

The African, Smuts reminded his British audience, is a special human "type" with "some wonderful characteristics," which he went on to celebrate: "It has largely remained a child type, with a child psychology and outlook. A child-like human can not be a bad human, for are we not in spiritual matters bidden to be like unto little children? Perhaps as a direct result of this temperament the African is the only happy human I have come across." Even if the racism in the language is blinding, we should be wary of dismissing Smuts as some South African oddity.

Smuts spoke from within an honorable Western tradition. Had not Hegel's *Philosophy of History* mythologized "Africa proper" as "the land of childhood"? Did not settlers in British colonies call every African male, regardless of age, a "boy"—houseboy, shamba-boy, office-boy, ton-boy, mine-boy—no different from their counterparts in Francophone Africa, who used the child-familiar *tu* when addressing Africans of any age? "The negro," opined the venerable Albert Schweitzer of Gabon fame, "is a child, and with children nothing can be done without authority." In the colonial mind, however, Africans were no ordinary children. They were destined to be so perpetually—in the words of Christopher Fyfe, "Peter Pan children who can never grow up, a child race."[1]

Yet this book is not about the racial legacy of colonialism. If I tend to deemphasize the legacy of colonial racism, it is not only because it has been the subject of perceptive analyses by militant intellectuals like Frantz Fanon, but because I seek to highlight that part of the colonial legacy—the institutional—which remains more or less intact. Precisely because deracialization has marked the limits of postcolonial reform, the nonracial legacy of colonialism needs to be brought out into the open so that it may be the focus of a public discussion.

The point about General Smuts is not the racism that he shared with many of his class and race, for Smuts was not simply the unconscious bearer of a tradition. More than just a sentry standing guard at the cutting edge of that tradition, he was, if anything, its standard-bearer. A member of the British war cabinet, a confidant of Churchill and Roosevelt, a one-time chancellor of Cambridge University, Smuts rose to be one of the framers of the League of Nations Charter in the post–World War I era.[2] The very image of an enlightened leader, Smuts opposed slavery and celebrated the "principles of the French Revolution which had emancipated Europe," but he opposed their application to Africa, for the African, he argued, was of "a race so unique" that "nothing could be worse for Africa than the application of a policy" that would

"de-Africanize the African and turn him either into a beast of the field or into a pseudo-European." "And yet in the past," he lamented, "we have tried both alternatives in our dealings with the Africans."

> First we looked upon the African as essentially inferior or sub-human, as having no soul, and as being only fit to be a slave. . . . Then we changed to the opposite extreme. The African now became a man and a brother. Religion and politics combined to shape this new African policy. The principles of the French Revolution which had emancipated Europe were applied to Africa; liberty, equality and fraternity could turn bad Africans into good Europeans.[3]

Smuts was at pains to underline the negative consequences of a policy formulated in ignorance, even if coated in good faith.

> The political system of the natives was ruthlessly destroyed in order to incorporate them as equals into the white system. The African was good as a potential European; his social and political culture was bad, barbarous, and only deserving to be stamped out root and branch. In some of the British possessions in Africa the native just emerged from barbarism was accepted as an equal citizen with full political rights along with the whites. But his native institutions were ruthlessly proscribed and destroyed. The principle of equal rights was applied in its crudest form, and while it gave the native a semblance of equality with whites, which was little good to him, it destroyed the basis of his African system which was his highest good. These are the two extreme native policies which have prevailed in the past, and the second has been only less harmful than the first.

If "Africa has to be redeemed" so as "to make her own contribution to the world," then "we shall have to proceed on different lines and evolve a policy which will not force her institutions into an alien European mould" but "will preserve her unity with her own past" and "build her future progress and civilization on specifically African foundations." Smuts went on to champion "the new policy" in bold: "The British Empire does not stand for the assimilation of its peoples into a common type, it does not stand for standardization, but for the fullest freest development of its peoples along their own specific lines."

The "fullest freest development of [its] peoples" as opposed to their assimilation "into a common type" required, Smuts argued, "institutional segregation." Smuts contrasted "institutional segregation" with "territorial segregation" then in practice in South Africa. The problem with "territorial segregation," in a nutshell, was that it was based on a policy of institutional homogenization. Natives may be territorially separated from whites, but native institutions were slowly but surely giving

way to an alien institutional mold. As the economy became industrialized, it gave rise to "the colour problem," at the root of which were "urbanized or detribalized natives." Smuts's point was *not* that racial segregation ("territorial segregation") should be done away with. Rather it was that it should be made part of a broader "institutional segregation" and thereby set on a secure footing: "Institutional segregation carries with it territorial segregation." The way to preserve native institutions while meeting the labor demands of a growing economy was through the institution of migrant labor, for "so long as the native family home is not with the white man but in his own area, so long the native organization will not be materially affected."

> It is only when segregation breaks down, when the whole family migrates from the tribal home and out of the tribal jurisdiction to the white man's farm or the white man's town, that the tribal bond is snapped, and the traditional system falls into decay. And it is this migration of the native family, of the females and children, to the farms and the towns which should be prevented. As soon as this migration is permitted the process commences which ends in the urbanized detribalized native and the disappearance of the native organization. It is not white employment of native males that works the mischief, but the abandonment of the native tribal home by the women and children.[4]

Put simply, the problem with territorial segregation was that it rendered racial domination unstable: the more the economy developed, the more it came to depend on the "urbanized or detribalized natives." As that happened, the beneficiaries of rule appeared an alien minority and its victims evidently an indigenous majority. The way to stabilize racial domination (territorial segregation) was to ground it in a politically enforced system of ethnic pluralism (institutional segregation), so that everyone, victims no less than beneficiaries, may appear as minorities. However, with migrant labor providing the day-to-day institutional link between native and white society, native institutions—fashioned as so many rural tribal composites—may be conserved as separate but would function as subordinate.

At this point, however, Smuts faltered, for, he believed, it was too late in the day to implement a policy of institutional segregation in South Africa; urbanization had already proceeded too far. But it was not too late for less developed colonies to the north to learn from the South African experience: "The situation in South Africa is therefore a lesson to all the younger British communities farther north to prevent as much as possible the detachment of the native from his tribal connexion, and to enforce from the very start the system of segregation with its conservation of separate native institutions."

The Broederbond, however, disagreed. To this brotherhood of Boer supremacists, to stabilize the system of racial domination was a question of life and death, a matter in which it could never be too late. What Smuts termed institutional segregation the Broederbond called apartheid. The context in which apartheid came to be implemented made for its particularly harsh features, for to rule natives through their own institutions, one first had to push natives back into the confines of native institutions. In the context of a semi-industrialized and highly urbanized South Africa, this meant, on the one hand, the forced removal of those marked unproductive so they may be pushed out of white areas back into native homelands and, on the other, the forced straddling of those deemed productive between workplace and homeland through an ongoing cycle of annual migrations. To effect these changes required a degree of force and brutality that seemed to place the South African colonial experience in a class of its own.

But neither institutional segregation nor apartheid was a South African invention. If anything, both idealized a form of rule that the British Colonial Office dubbed "indirect rule" and the French "association." Three decades before Smuts, Lord Lugard had pioneered indirect rule in Uganda and Nigeria. And three decades after Smuts, Lord Hailey would sum up the contrast between forms of colonial rule as turning on a distinction between "identity" and "differentiation" in organizing the relationship between Europeans and Africans: "The doctrine of identity conceives the future social and political institutions of Africans as destined to be basically similar to those of Europeans; the doctrine of differentiation aims at the evolution of separate institutions appropriate to African conditions and differing both in spirit and in form from those of Europeans."[5] The emphasis on differentiation meant the forging of specifically "native" institutions through which to rule subjects, but the institutions so defined and enforced were not racial as much as ethnic, not "native" as much as "tribal." Racial dualism was thereby anchored in a politically enforced ethnic pluralism.

To emphasize their offensive and pejorative nature, I put the words *native* and *tribal* in quotation marks. But after first use, I have dropped the quotation marks to avoid a cumbersome read, instead relying on the reader's continued vigilance and good sense.

This book, then, is about the regime of differentiation (institutional segregation) as fashioned in colonial Africa—and reformed after independence—and the nature of the resistance it bred. Anchored historically, it is about how Europeans ruled Africa and how Africans responded to it. Drawn to the present, it is about the structure of power and the shape of resistance in contemporary Africa. Three sets of questions have guided my labors. To what extent was the structure of power

in contemporary Africa shaped in the colonial period rather than born of the anticolonial revolt? Was the notion that they introduced the rule of law to African colonies no more than a cherished illusion of colonial powers? Second, rather than just uniting diverse ethnic groups in a common predicament, was not racial domination actually mediated through a variety of ethnically organized local powers? If so, is it not too simple even if tempting to think of the anticolonial (nationalist) struggle as just a one-sided repudiation of ethnicity rather than also a series of ethnic revolts against so many ethnically organized and centrally reinforced local powers—in other words, a string of ethnic civil wars? In brief, was not ethnicity a dimension of both power and resistance, of both the problem and the solution? Finally, if power reproduced itself by exaggerating difference and denying the existence of an oppressed majority, is not the burden of protest to transcend these differences without denying them?

I have written this book with four objectives in mind. My first objective is to question the writing of history by analogy, a method pervasive in contemporary Africanist studies. Thereby, I seek to establish the historical legitimacy of Africa as a unit of analysis. My second objective is to establish that apartheid, usually considered unique to South Africa, is actually the generic form of the colonial state in Africa. As a form of rule, apartheid is what Smuts called institutional segregation, the British termed indirect rule, and the French association. It is this common state form that I call decentralized despotism. A corollary is to bring some of the lessons from the study of Africa to South African studies and vice versa and thereby to question the notion of South African exceptionalism. A third objective is to underline the contradictory character of ethnicity. In disentangling its two possibilities, the emancipatory from the authoritarian, my purpose is not to identify emancipatory movements and avail them for an uncritical embrace. Rather it is to problematize them through a critical analysis. My fourth and final objective is to show that although the bifurcated state created with colonialism was deracialized after independence, it was not democratized. Postindependence reform led to diverse outcomes. No nationalist government was content to reproduce the colonial legacy uncritically. Each sought to reform the bifurcated state that institutionally crystallized a state-enforced separation, of the rural from the urban and of one ethnicity from another. But in doing so each reproduced a part of that legacy, thereby creating its own variety of despotism.

These questions and objectives are very much at the root of the discussion in the chapters that follow. Before sketching in full the outlines of my argument, however, I find it necessary to clarify my theoretical point of departure.

BEYOND A HISTORY BY ANALOGY

In the aftermath of the Cuban Revolution, dependency theory emerged as a powerful critique of various forms of unilinear evolutionism. It rejected both the claim that the less developed countries were traditional societies in need of modernization and the conviction that they were backward precapitalist societies on the threshhold of a much-needed bourgeois revolution. Underdevelopment, argued proponents of dependency, was historically produced; as a creation of modern imperialism, it was as modern as industrial capitalism. Both were outcomes of a process of "accumulation on a world scale."[6]

Its emphasis on historical specificity notwithstanding, dependency soon lapsed into yet another form of ahistorical structuralism. Alongside modernization theory and orthodox Marxism, it came to view social reality through a series of binary opposites. If modernization theorists thought of society as modern or premodern, industrial or preindustrial, and orthodox Marxists conceptualized modes of production as capitalist or precapitalist, dependency theorists juxtaposed development with underdevelopment. Of the bipolarity, the lead term—"modern," "industrial," "capitalist," or "development"—was accorded both analytical value and universal status. The other was residual. Making little sense without its lead twin, it had no independent conceptual existence. The tendency was to understand these experiences as a series of approximations, as replays not quite efficient, understudies that fell short of the real perfomance. Experiences summed up by analogy were not just considered historical latecomers on the scene, but were also ascribed a predestiny. Whereas the lead term had analytical content, the residual term lacked both an original history and an authentic future.

In the event that a real-life performance did not correspond to the prescribed trajectory, it was understood as a deviation. The bipolarity thus turned on a double distinction: between experiences considered universal and normal and those seen as residual or pathological. The residual or deviant case was understood not in terms of what it was, but with reference to what it was not. "Premodern" thus became "not yet modern," and "precapitalism" "not yet capitalism." But can a student, for example, be understood as not yet a teacher? Put differently, is being a professional teacher the true and necessary destiny of every student? The residual term in the evolutionary enterprise—"premodern," "preindustrial," "precapitalist," or "underdeveloped"—really summed up the "etc." of unilinear social science, that which it tended to explain away.

A unilinear social science, however, involves a double maneuver. If it tends to caricature the experience summed up as the residual term, it

also mythologizes the experience that is the lead term. If the former is rendered ahistorical, the latter is ascribed a suprahistorical trajectory of development, a necessary path whose main line of development is unaffected by struggles that happened along the way. There is a sense in which both are robbed of history.

The endeavor to restore historicity, agency, to the subject has been the cutting edge of a variety of critiques of structuralism. But if structuralism tended to straitjacket agency within iron laws of history, a strong tendency in poststructuralism is to diminish the significance of historical constraint in the name of salvaging agency. "The dependent entry of African societies into the world system is not especially unique," argues the French Africanist Jean-Francois Bayart, "and should be *scientifically* de-dramatised."[7] On one hand, "inequality has existed throughout time, and—it should be stressed *ad nauseum*—does not negate historicity"; on the other hand, "deliberate recourse to the strategies of extraversion" has been a "recurring phenomenon in the history of the continent." Dependency theory is thereby stood on its head as modern imperialism is—shall I say celebrated?—as the outcome of an African initiative! Similarly, in another recent historical rewrite, slavery too is explained away as the result of a local initiative. "The African role in the development of the Atlantic," promises John Thornton, "would not simply be a secondary one, on either side of the Atlantic," for "we must accept" both "that African participation in the slave trade was voluntary and under the control of African decision makers" on this side of the Atlantic and that "the condition of slavery, by itself, did not necessarily prevent the development of an African-oriented culture" on the far side of the Atlantic.[8] It is one thing to argue that nothing short of death can extinguish human initiative and creativity, but quite another to see in every such gesture evidence of a historical initiative. "Even the inmates of a concentration camp are able, in this sense, to live by their own cultural logic," remarks Talal Asad. "But one may be forgiven for doubting that they are therefore 'making their own history.'"[9]

To have critiqued structuralist-inspired binary oppositions for giving rise to walled-off sciences of the normal and the abnormal, the civilized and the savage, is the chief merit of poststructuralism. To appreciate this critique, however, is not quite the same as to accept the claim that in seeking to transcend these epistemological oppositions embedded in notions of the modern and the traditional, poststructuralism has indeed created the basis of a healthy humanism. That claim is put forth by its Africanist adherents; scholarship, they say, must "deexoticize" Africa and banalize it.

The swing from the exotic to the banal ("Yes, banal Africa—exoticism be damned!")[10] is from one extreme to another, from seeing the flow of events in Africa as exceptional to the general flow of world history to

seeing it as routine, as simply dissolving in that general flow, confirming its trend, and in the process presumably confirming the humanity of the African people. In the process, African history and reality lose any specificity, and with it, we also lose any but an invented notion of Africa. But it is only when abstracted from structural constraint that agency appears as lacking in historical specificity. At this point, abstract universalism and intimate particularism turn out to be two sides of the same coin: both see in the specificity of experience nothing but its idiosyncrasy.

The Patrimonial State

Whereas poststructuralists focus on the intimate and the day-to-day, shunning metatheory and metaexperience, the mainstream Africanists are shy of neither. The presumption that developments in Africa can best be understood as mirroring an earlier history is widely shared among North American Africanists. Before the current preoccupation with civil society as the guarantor of democracy—a notion I will comment on later—Africanist political science was concerned mainly with two issues: a tendency toward corruption among those within the system and toward exit among those marginal to it.

The literature on corruption makes sense of its spread as a reoccurrence of an early European practice: "patrimonialism" or "prebendalism."[11] Two broad tendencies can be discerned.[12] For the state-centrists, the state has failed to penetrate society sufficiently and is therefore hostage to it; for the society-centrists, society has failed to hold the state accountable and is therefore prey to it. I will argue that the former fail to see the form of power, of how the state does penetrate society, and the latter the form of revolt, of how society does hold the state accountable, because both work through analogies and are unable to come to grips with a historically specific reality.

Although I will return to the society-centrists, the present-day champions of civil society as the guarantor of democracy, it is worth tracing the contours of the state-centrist argument. Overwhelmed by societal pressures, its institutional integrity compromised by individual or sectional interest, the state has turned into a "weak Leviathan,"[13] "suspended above society."[14] Whether plain "soft"[15] or in "decline" and "decay,"[16] this creature may be "omnipresent" but is hardly "omnipotent."[17] Then follows the theoretical conclusion: variously termed as the "early modern authoritarian state," the "early modern absolutist state," or "the patrimonial autocratic state," this form of state power is likened to its ancestors in seventeenth-century Europe or early postcolonial Latin America, often underlined as a political feature of the transition to capitalism.

What happens if you take a historical process unfolding under concrete conditions—in this case, of sixteenth- to eighteenth-century Europe—as a vantage point from which to make sense of subsequent social development? The outcome is a history by analogy rather than history as process. Analogy seeking turns into a substitute for theory formation. The Africanist is akin to those learning a foreign language who must translate every new word back into their mother tongue, in the process missing precisely what is new in a new experience. From such a standpoint, the most intense controversies dwell on what is indeed the most appropriate translation, the most adequate fit, the most appropriate analogy that will capture the meaning of the phenomenon under observation. Africanist debates tend to focus on whether contemporary African reality most closely resembles the transition to capitalism under seventeenth-century European absolutism or that under other Third World experiences,[18] or whether the postcolonial state in Africa should be labeled Bonapartist or absolutist.[19] Whatever their differences, both sides agree that African reality has meaning only insofar as it can be seen to reflect a particular stage in the development of an earlier history. Inasmuch as it privileges the European historical experience as its touchstone, as the historical expression of the universal, contemporary unilinear evolutionism should more concretely and appropriately be characterized as a Eurocentrism. The central tendency of such a methodological orientation is to lift a phenomenon out of context and process. The result is a history by analogy.

The Uncaptured Peasantry

Whereas the literature on corruption is mainly about the state in Africa, that on exit is about the peasantry. Two diametrically opposed perspectives can be discerned here. One looks at the African countryside as nothing but an ensemble of transactions in a marketplace; the other sees it as a collection of households enmeshed in a nonmarket milieu of kin-based relations. For the former, the market is the defining feature of rural life; for the latter, the intrinsic realities of village Africa have little to do with the market. The same tendency can appear clothed in sharply contrasting ideological garb. Thus, for example, the argument that rural Africa is really precapitalist, with the market an external and artificial imposition, was first put forth by the proponents of African socialism, most notably Julius Nyerere. Largely discredited in the mid-seventies, when dependency theory reigned supreme, this thesis was resurrected in the eighties by Goran Hyden,[20] who echoed Nyerere—once again relying on empirical material from Tanzania—that the "intrinsic realities" of "Africa" have little to do with market relationships. Instead, he argued,

they are a unique expression of a premarket "economy of affection." Market theories were championed by IMF theorists who claimed that the rationality of ground-level markets was being simultaneously suppressed and distorted by clientele-ridden but all-powerful states. The argument was given academic respectability by Robert Bates's widely circulated study *Markets and States in Africa*. Whereas the latter tendency continues to enjoy the status of an official truth in policy-making circles, the former survives as a marginal but fashionable preoccupation in academia.

My interest is in the method that guides these contending perspectives. With market theorists, the method is transparent. They presume the market to exist, as an ahistorical and universal construct: markets are not created, but freed; African countries are market societies, like those in Europe, period. Goran Hyden, however, claims to be laying bare the intrinsic realities of Africa. Yet he proceeds not by a historical examination of these realities but by formal analogies. Searching for the right analogy to fit Africa, he proceeds by dismissing, one after another, those that do not fit. In the process, he establishes his main conclusion: Africa is *not* like Europe, where the peasantry was "captured" through wage labor; nor is it like Asia or Latin America, where it was "captured" through tenancy arrangements. But this search stops at showing what does *not* exist. "It is the argument of this book," writes Hyden, "that Africa is the only continent where the peasants have not been captured by other social classes."[21] In hot pursuit of the right historical analogy—the point will become clear later—Hyden misses precisely the relations through which the "free" peasantry is "captured" and reproduced.

In this book, I seek neither to set the African experience apart as exceptional and exotic nor to absorb it in a broad corpus of theory as routine and banal. For both, it seems to me, are different ways of dismissing it. In contrast, I try to underline the specificity of the African experience, or at least of a slice of it. This is an argument not against comparative study but against those who would dehistoricize phenomena by lifting them from context, whether in the name of an abstract universalism or of an intimate particularism, only to make sense of them by analogy. In contrast, my endeavor is to establish the historical legitimacy of Africa as a unit of analysis.

Civil Society

The current Africanist discourse on civil society resembles an earlier discourse on socialism. It is more programmatic than analytical, more ideological than historical. Central to it are two claims: civil society exists as a fully formed construct in Africa as in Europe, and the driving force of

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not double: between the state, the economy, and society. The realm of civil society is not the market but public opinion and culture. Its agents are intellectuals, who figure predominantly in the establishment of hegemony. Its hallmarks are voluntary association and free publicity, the basis of an autonomous organizational and expressive life. Although autonomous of the state, this life cannot be independent of it, for the guarantor of the autonomy of civil society can be none other than the state; or, to put matters differently, although its guarantor may be a specific constellation of social forces organized in and through civil society, they can do so only by ensuring a form of the state and a corresponding legal regime to undergird the autonomy of civil society.

The Gramscian notion of civil society as public opinion and culture has been formulated simultaneously as analytical construct and programmatic agenda in Jürgen Habermas's work on the public sphere.[25] Habermas accents both structural processes and strategic initiatives in explaining the historical formation of civil society. In the context of a structural change "embedded in the transformation of state and economy," the strategic initiatives of an embryonic bourgeois class shaped "an associational life" along voluntary and democratic principles.[26] At first, this "public sphere" was largely apolitical, revolving "around literary and art criticism." The French Revolution, however, "triggered a movement" leading to its "politicization," thereby underlining its democratic significance.

Critics of Habermas have tried to disentangle the analytical from the programmatic strands in his argument by relocating this movement in its historical context. Thus, argues Geoff Eley, the "public sphere" was from the very outset "an arena of contested meanings," both in that "different and opposing publics maneuvered for space" within it and in the sense that "certain 'publics' (women, subordinate nationalities, popular classes like the urban poor, the working class, and the peasantry) may have been excluded altogether" from it. This process of exclusion was simultaneously one of "harnessing . . . public life to the interests of one particular group."[27]

The exclusion that defined the specificity of civil society under colonial rule was that of race. Yet it is not possible to understand the nature of colonial power simply by focusing on the partial and exclusionary character of civil society. It requires, rather, coming to grips with the specific nature of power through which the population of subjects excluded from civil society was actually ruled. This is why the focus in this book is on how the subject population was incorporated into—and not excluded from—the arena of colonial power. The accent is on incorporation, not marginalization. By emphasizing this not as an exclusion but as another form of power, I intend to argue that no reform of

contemporary civil society institutions can by itself unravel this decentralized despotism. To do so will require nothing less than dismantling that form of power.

THE BIFURCATED STATE

The colonial state was in every instance a historical formation. Yet its structure everywhere came to share certain fundamental features. I will argue that this was so because everywhere the organization and reorganization of the colonial state was a response to a central and overriding dilemma: the native question. Briefly put, how can a tiny and foreign minority rule over an indigenous majority? To this question, there were two broad answers: direct and indirect rule.

Direct rule was Europe's initial response to the problem of administering colonies. There would be a single legal order, defined by the "civilized" laws of Europe. No "native" institutions would be recognized. Although "natives" would have to conform to European laws, only those "civilized" would have access to European rights. Civil society, in this sense, was presumed to be civilized society, from whose ranks the uncivilized were excluded. The ideologues of a civilized native policy rationalized segregation as less a racial than a cultural affair. Lord Milner, the colonial secretary, argued that segregation was "desirable no less in the interests of social comfort and convenience than in those of health and sanitation." Citing Milner, Lugard concurred:

> On the one hand the policy does not impose any restriction on one race which is not applicable to the other. A European is as strictly prohibited from living in the native reservation, as a native is from living in the European quarter. On the other hand, since this feeling exists, it should in my opinion be made abundantly clear that what is aimed at is a segregation of social standards, and not a segregation of races. The Indian or the African gentleman who adopts the higher standard of civilization and desires to partake in such immunity from infection as segregation may convey, should be as free and welcome to live in the civilized reservation as the European, provided, of course, that he does not bring with him a concourse of followers. The native peasant often shares his hut with his goat, or sheep, or fowls. He loves to drum and dance at night, which deprives the European of sleep. He is skeptical of mosquito theories. "God made the mosquito larvae," said a Moslem delegation to me, "for God's sake let the larvae live." For these people, sanitary rules are necessary but hateful. They have no desire to abolish segregation.[28]

Citizenship would be a privilege of the civilized; the uncivilized would be subject to an all-round tutelage. They may have a modicum of civil rights, but not political rights, for a propertied franchise separated the civilized from the uncivilized. The resulting vision was summed up in Cecil Rhodes's famous phrase, "Equal rights for all civilized men."

Colonies were territories of European settlement. In contrast, the territories of European domination—but not of settlement—were known as protectorates. In the context of a settler capitalism, the social prerequisite of direct rule was a rather drastic affair. It involved a comprehensive sway of market institutions: the appropriation of land, the destruction of communal autonomy, and the defeat and dispersal of tribal populations. In practice, direct rule meant the reintegration and domination of natives in the institutional context of semiservile and semicapitalist agrarian relations. For the vast majority of natives, that is, for those uncivilized who were excluded from the rights of citizenship, direct rule signified an unmediated—centralized—despotism.

In contrast, indirect rule came to be the mode of domination over a "free" peasantry. Here, land remained a communal—"customary"—possession. The market was restricted to the products of labor, only marginally incorporating land or labor itself. Peasant communities were reproduced within the context of a spatial and institutional autonomy. The tribal leadership was either selectively reconstituted as the hierarchy of the local state or freshly imposed where none had existed, as in "stateless societies." Here political inequality went alongside civil inequality. Both were grounded in a legal dualism. Alongside received law was implemented a customary law that regulated nonmarket relations, in land, in personal (family), and in community affairs. For the subject population of natives, indirect rule signified a mediated—decentralized—despotism.

Even historically, the division between direct and indirect rule never coincided neatly with the one between settler and nonsettler colonies. True, agrarian settler capital did prefer direct rule premised on "freeing" land while bonding labor, but indirect rule could not be linked to any specific fraction of capital. It came to mark the inclination of several fractions of the bourgeoisie: mining, finance, and commerce. The main features of direct and indirect rule, and the contrast between them, are best illustrated by the South African experience. Direct rule was the main mode of control attempted over natives in the eighteenth and early nineteenth centuries. It is a form of control best exemplified by the Cape experience. The basic features of indirect rule, however, emerged through the experience of Natal in the second half of the nineteenth century. The distinction is also captured in the contrast between the

experience of the nineteenth-century coastal enclaves (colonies) of Lagos, Freetown, and Dakar and the twentieth-century inland protectorates acquired in the course of *the Scramble*. The Cape-Natal divide over how to handle the native question was resolved in favor of the Natal model. Key to that resolution was the emergence of the Cape as the largest single reserve for migrant labor in South Africa, for the dominance of mining over agrarian capital in late-nineteenth-century South Africa—and elsewhere—posed afresh the question of the reproduction of autonomous peasant communities that would regularly supply male, adult, and single migrant labor to the mines.

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 centralized, the latter decentralized. As they learned from experience—of both the ongoing resistance of the colonized and of earlier and parallel colonial encounters—colonial powers generalized decentralized despotism as their principal answer to the native question.

The African colonial experience came to be crystallized in the nature of the state forged through that encounter. Organized differently in rural areas from urban ones, that state was Janus-faced, bifurcated. It contained a duality: two forms of power under a single hegemonic authority. 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. The former was organized on the principle of differentiation to check the concentration of power, the latter around the principle of fusion to ensure a unitary authority. To grasp the relationship between the two, civil power and customary power, and between the language each employed—rights and custom, freedom and tradition—we need to consider them separately while keeping in mind that each signified one face of the same bifurcated state.

Actually Existing Civil Society

The rationale of civil power was that it was the source of civil law that framed civil rights in civil society. I have already suggested that this idealization—also shared by contemporary Africanist discourse on civil

society—reminds one of an earlier discourse on socialism. More programmatic than analytical, more ideological than historical, its claims call for a historical analysis. Thus the need—as I have already suggested—for an analysis of actually existing civil society so as to understand it in its actual formation, rather than as a promised agenda for change.

To grasp major shifts in the history of the relationship between civil society and the state, one needs to move away from the assumption of a single generalizable moment and identify different and even contradictory moments in that historical flow. Only through a historically anchored query is it possible to problematize the notion of civil society, thereby to approach it analytically rather than programatically.

The history of civil society in colonial Africa is laced with racism. That is, as it were, its original sin, for civil society was first and foremost the society of the colons. Also, it was primarily a creation of the colonial state. The rights of free association and free publicity, and eventually of political representation, were the rights of citizens under direct rule, not of subjects indirectly ruled by a customarily organized tribal authority. Thus, whereas civil society was racialized, Native Authority was tribalized. Between the rights-bearing colons and the subject peasantry was a third group: urban-based natives, mainly middle- and working-class persons, who were exempt from the lash of customary law but not from modern, racially discriminatory civil legislation. Neither subject to custom nor exalted as rights-bearing citizens, they languished in a juridical limbo.

In the main, however, the colonial state was a double-sided affair. Its one side, the state that governed a racially defined citizenry, was bounded by the rule of law and an associated regime of rights. Its other side, the state that ruled over subjects, was a regime of extra-economic coercion and administratively driven justice. No wonder that the struggle of subjects was both against customary authorities in the local state and against racial barriers in civil society. The latter was particularly acute in the settler colonies, where it often took the form of an armed struggle, but it was not confined to settler colonies. Its best-known theoretician was Frantz Fanon. This then was the first historical moment in the development of civil society: the colonial state as the protector of the society of the colons.

The second moment in that development saw a marked shift in the relation between civil society and the state. This was the moment of the anticolonial struggle, for the anticolonial struggle was at the same time a struggle of embryonic middle and working classes, the native strata in limbo, for entry into civil society. That entry, that expansion of civil society, was the result of an antistate struggle. Its consequence was the

creation of an indigenous civil society. A process set into motion with the postwar colonial reform, this development was of limited significance. It could not be otherwise, for any significant progress in the creation of an indigenous civil society required a change in the form of the state. It required a deracialized state.

Independence, the birth of a deracialized state, was the context of the third moment in this history. Independence tended to deracialize the state but not civil society. Instead, historically accumulated privilege, usually racial, was embedded and defended in civil society. Wherever the struggle to deracialize civil society reached meaningful proportions, the independent state played a central role. In this context, the state–civil society antagonism diminished as the arena of tensions shifted to within civil society.

The key policy instrument in that struggle was what is today called affirmative action and what was then called Africanization. The politics of Africanization was simultaneously unifying and fragmenting. Its first moment involved the dismantling of racially inherited privilege. The effect was to unify the victims of colonial racism. Not so the second moment, which turned around the question of redistribution and divided that same majority along lines that reflected the actual process of redistribution: regional, religious, ethnic, and at times just familial. The tendency of the literature on corruption in postindependence Africa has been to detach the two moments and thereby to isolate and decontextualize the moment of redistribution (corruption) from that of expropriation (redress) through ahistorical analogies that describe it as the politics of patrimonialism, prebendalism, and so on. The effect has been to caricature the practices under investigation and to make them unintelligible. Put back in the context of an urban civil society encircled by a countryside under the sway of so many customary powers—thus subject to the twin pressures of deracialization and retribalization—patrimonialism, as we will see, was in fact a form of politics that restored an urban-rural link in the context of a bifurcated state, albeit in a top-down fashion that facilitated the quest of bourgeois fractions to strengthen and reproduce their leadership.

There is also a second contextualized lesson one needs to draw from that period. The other side of the politics of affirmative action was the struggle of the beneficiaries of the colonial order—mainly colons in the settler colonies and immigrant minorities (from India and Lebanon) in nonsettler colonies—to defend racial privilege. This defense, too, took a historically specific form, for with the deracialization of the state, the language of that defense could no longer be racial. Racial privilege not only receded into civil society, but defended itself in the language of civil rights, of individual rights and institutional autonomy. To victims

of racism the vocabulary of rights rang hollow, a lullaby for perpetuating racial privilege. Their demands were formulated in the language of nationalism and social justice. The result was a breach between the discourse on rights and the one on justice, with the language of rights appearing as a fig leaf over privilege and power appearing as the guarantor of social justice and redress.

This is the context of the fourth moment in the history of actually existing civil society. This is the moment of the collapse of an embryonic indigenous civil society, of trade unions and autonomous civil organizations, and its absorption into political society. It is the moment of the marriage between technicism and nationalism, of the proliferation of state nationalism in a context where the claims of the state—both developmentalist and equalizing—had a powerful resonance, particularly for the fast-expanding educated strata. It is the time when civil society–based social movements became demobilized and political movements statized.[29]

To understand the limits of deracialization of civil society, one needs to grasp the specificity of the local state, which was organized not as a racial power denying rights to urbanized subjects, but as an ethnic power enforcing custom on tribespeople. The point of reform of such a power could not be deracialization; it could be only detribalization. But so long as the reform perspective was limited to deracialization, it looked as though nothing much had changed in the rural sphere, whereas everything seemed to have changed in the urban areas. We will see that wherever there was a failure to democratize the local state, postindependence generations had to pay a heavy price: the unreformed Native Authority came to contaminate civil society, so that the more civil society was deracialized, the more it took on a tribalized form.

True, the deracialization of the central state was a necessary step toward its democratization, but the two could not be equated. To appreciate what democratization would have entailed in the African context, we need to grasp the specificity of tribal power in the countryside.

Customary Authority

Late colonialism brought a wealth of experience to its African pursuit. By the time the Scramble for Africa took place, the turn from a civilizing mission to a law-and-order administration, from progress to power, was complete. In the quest to hold the line, Britain was the first to marshal authoritarian possibilities in native culture. In the process, it defined a world of the customary from which there was no escape. Key to this was the definition of land as a customary possession, for in nonsettler Africa,

the Africa administered through Native Authorities, the general rule was that land could not be a private possession, of either landlords or peasants. It was defined as a customary communal holding, to which every peasant household had a customary access, defined by state-appointed customary authorities. As we will see, the creation of an all-embracing world of the customary had three notable consequences.

First, more than any other colonial subject, the African was containerized, not as a native, but as a tribesperson. Every colony had two legal systems: one modern, the other customary. Customary law was defined in the plural, as the law of the tribe, and not in the singular, as a law for all natives. Thus, there was not one customary law for all natives, but roughly as many sets of customary laws as there were said to be tribes. The genius of British rule in Africa—we will hear one of its semiofficial historians claim—was in seeking to civilize Africans as communities, not as individuals. More than anywhere else, there was in the African colonial experience a one-sided opposition between the individual and the group, civil society and community, rights and tradition.

Second, in the late-nineteenth-century African context, there were several traditions, not just one. The tradition that colonial powers privileged as the customary was the one with the least historical depth, that of nineteenth-century conquest states. But this monarchical, authoritarian, and patriarchal notion of the customary, we will see, most accurately mirrored colonial practices. In this sense, it was an ideological construct.

Unlike civil law, customary law was an administratively driven affair, for those who enforced custom were in a position to define it in the first place. Custom, in other words, was state ordained and state enforced. I wish to be understood clearly. I am not arguing for a conspiracy theory whereby custom was always defined "from above," always "invented" or "constructed" by those in power. The customary was more often than not the site of struggle. Custom was often the outcome of a contest between various forces, not just those in power or its on-the-scene agents. My point, though, is about the institutional context in which this contest took place: the terms of the contest, its institutional framework, were heavily skewed in favor of state-appointed customary authorities. It was, as we will see, a game in which the dice were loaded.

It should not be surprising that custom came to be the language of force, masking the uncustomary power of Native Authorities. The third notable consequence of an all-embracing customary power was that the African colonial experience was marked by force to an unusual degree. Where land was defined as a customary possession, the market could be only a partial construct. Beyond the market, there was only one way of driving land and labor out of the world of the customary: force. The day-to-day violence of the colonial system was embedded in customary

Native Authorities in the local state, not in civil power at the center. Yet we must not forget that customary local authority was reinforced and backed up by central civil power. Colonial despotism was highly decentralized.

The seat of customary power in the rural areas was the local state: the district in British colonies, the *cercle* in French colonies. The functionary of the local state apparatus was everywhere called the chief. One should not be misled by the nomenclature into thinking of this as a holdover from the precolonial era. Not only did the chief 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, necessary because the chief stood at the intersection of the market economy and the nonmarket one. The administrative justice and the administrative coercion that were the sum and substance of his authority lay behind a regime of extra-economic coercion, a regime that breathed life into a whole range of compulsions: forced labor, forced crops, forced sales, forced contributions, and forced removals.

ETHNICITY AND THE ANTICOLONIAL REVOLT

To understand the nature of struggle and of agency, one needs to understand the nature of power. The latter has something to do with the nature of exploitation but is not reducible to it. I started writing this book with a focus on differentiated agrarian systems on the continent. From the perspective that has come to be known as political economy, I learned that the nature of political power becomes intelligible when put in the context of concrete accumulation processes and the struggles shaped by these.[30] From this point of view, the starting point of analysis had to be the labor question.

I began to question the completeness of this proposition when I came to realize that the form of the state that had evolved over the colonial period was not specific to any particular agrarian system. Its specificity was, rather, political; more than anything else, the form of the state was shaped by the African colonial experience. More than the labor question, it was the native question that illuminated this experience. My point is not to set up a false opposition between the two, but I do maintain that political analysis cannot extrapolate the nature of power from an analysis of political economy. More than the labor question, the organization and reorganization of power turned on the imperitive of

maintaining political order. This is why to understand the form of the state forged under colonialism one had to place at the center of analysis the riddle that was the native question.

The form of rule shaped the form of revolt against it. Indirect rule at once reinforced ethnically bound institutions of control and led to their explosion from within. Ethnicity (tribalism) thus came to be simultaneously the form of colonial control over natives and the form of revolt against it. It defined the parameters of both the Native Authority in charge of the local state apparatus and of resistance to it.

Everywhere, the local apparatus of the colonial state was organized either on an ethnic or on a religious basis. At the same time, one finds it difficult to recall a single major peasant uprising over the colonial period that has not been either ethnic or religious in inspiration. Peasant insurrectionists organized around what they claimed was an untainted, uncompromised, and genuine custom, against a state-enforced and corrupted version of the customary. This is so for a simple but basic reason: the anticolonial struggle was first and foremost a struggle against the hierarchy of the local state, the tribally organized Native Authority, which enforced the colonial order as customary. This is why everywhere—although the cadres of the nationalist movement were recruited mainly from urban areas—the movement gained depth the more it was anchored in the peasant struggle against Native Authorities.

Yet tribalism as revolt became the source of a profound dilemma because local populations were usually multiethnic and at times multireligious. Ethnicity, and at times religion, was reproduced as a problem inside every peasant movement. This is why it is not enough simply to separate tribal power organized from above from tribal revolt waged from below so that we may denounce the former and embrace the latter. The revolt from below needs to be problemized, for it carries the seeds of its own fragmentation and possible self-destruction.

I have already suggested that the fragmentation is not just ethnic. Rather, the interethnic divide is an effect of a larger split, also politically enforced, between town and country. Neither was this double divide, urban-rural and interethnic, fortuitous. My claim is that every movement against decentralized despotism bore the institutional imprint of that mode of rule. Every movement of resistance was shaped by the very structure of power against which it rebelled. How it came to understand this historical fact, and the capacity it marshaled to transcend it, set the tone and course of the movement. I will make this point through an analysis of two types of resistance: the rural in Uganda and the urban in South Africa.

We are now in a position to answer the question, What would democratization have entailed in the African context? It would have entailed

the deracialization of civil power and the detribalization of customary power, as starting points of an overall democratization that would transcend the legacy of a bifurcated power. A consistent democratization would have required dismantling and reorganizing the local state, the array of Native Authorities organized around the principle of fusion of power, fortified by an administratively driven customary justice and nourished through extra-economic coercion.

In addition to setting the pace in tapping authoritarian possibilities in culture and in giving culture an authoritarian bent, Britain led the way in fashioning a theory that claimed its particular form of colonial domination to be marked by an enlightened and permissive recognition of native culture. Although its capacity to dominate grew through a dispersal of its own power, the colonial state claimed this process to be no more than a deference to local tradition and custom. To grasp the contradiction in this claim, I have suggested, needs the analysis of the institutions within which official custom was forged and reproduced. The most important institutional legacy of colonial rule, I argue, may lie in the inherited impediments to democratization.

VARIETIES OF DESPOTISM AS POSTINDEPENDENCE REFORM

Clearly, the form of the state that emerged through postindependence reform was not the same in every instance. There was a variation. If we start with the language that power employed to describe itself, we can identify two distinct constellations: the conservative and the radical. In the case of the conservative African states, the hierarchy of the local state apparatus, from chiefs to headmen, continued after independence. In the radical African states, though, there seemed to be a marked change. In some instances, a constellation of tribally defined customary laws was discarded as a single customary law transcending tribal boundaries was codified. The result, however, was to develop a uniform, countrywide customary law, applicable to all peasants regardless of ethnic affiliation, functioning alongside a modern law for urban dwellers. A version of the bifurcated state, forged through the colonial encounter, remained. Whereas the conservative regimes reproduced the decentralized despotism that was the form of the colonial state in Africa, the radical regimes sought to reform it. The outcome, however, was not to dismantle despotism through a democratic reform; rather it was to reorganize decentralized power so as to unify the "nation" through a reform that tended to centralization. The antidote to a decentralized despotism turned out to be a centralized despotism. In the back-and-forth movement between

a decentralized and centralized despotism, each regime claimed to be reforming the negative features of its predecessor. This, we will see, is best illustrated by the seesaw movement between civilian and military regimes in Nigeria.

The continuity between the form of the colonial state and the power fashioned through radical reform was underlined by the despotic nature of power. For inasmuch as radical regimes shared with colonial powers the conviction to effect a revolution from above, they ended up intensifying the administratively driven nature of justice, customary or modern. If anything, the radical experience built on the legacy of fused power enforcing administrative imperatives through extra-economic coercion—except that, this time, it was done in the name not of enforcing custom but of making development and waging revolution. Even if there was a change in the title of functionaries, from chiefs to cadres, there was little change in the nature of power. If anything, the fist of colonial power that was the local state was tightened and strengthened. Even if it did not employ the language of custom and enforce it through a tribal authority, the more it centralized coercive authority in the name of development or revolution, the more it enforced and deepened the gulf between town and country. If the decentralized conservative variant of despotism tended to bridge the urban-rural divide through a clientelism whose effect was to exacerbate ethnic divisions, its centralized radical variant tended to do the opposite: de-emphasizing the customary and ethnic difference between rural areas while deepening the chasm between town and country in the pursuit of an administratively driven development. The bifurcated state that was created with colonialism was deracialized, but it was not democratized. If the two-pronged division that the colonial state enforced on the colonized—between town and country, and between ethnicities—was its dual legacy at independence, each of the two versions of the postcolonial state tended to soften one part of the legacy while exacerbating the other. The limits of the conservative states were obvious: they removed the sting of racism from a colonially fashioned stronghold but kept in place the Native Authorities, which enforced the division between ethnicities. The radical states went a step further, joining deracialization to detribalization. But the deracialized and detribalized power they organized put a premium on administrative decision-making. In the name of detribalization, they tightened central control over local authorities. Claiming to herald development and wage revolution, they intensified extra-economic pressure on the peasantry. In the process, they inflamed the division between town and country. If the prototype subject in the conservative states bore an ethnic mark, the prototype subject in the radical states was simply the rural peasant. In the process, both experiences reproduced one part of the dual legacy of the bifurcated state and created their own distinctive version of despotism.

SOUTH AFRICAN EXCEPTIONALISM

The bittersweet fruit of African independence also defines one possible future for postapartheid South Africa. Part of my argument is that apartheid, usually considered the exceptional feature in the South African experience, is actually its one aspect that is uniquely African. As a form of the state, apartheid is neither self-evidently objectionable nor self-evidently identifiable. Usually understood as institutionalized racial domination, apartheid was actually an attempt to soften racial antagonism by mediating and thereby refracting the impact of racial domination through a range of Native Authorities. Not surprisingly, the discourse of apartheid—in both General Smuts, who anticipated it, and the Broederbond, which engineered it—idealized the practice of indirect rule in British colonies to the north. As a form of rule, apartheid—like the indirect rule colonial state—fractured the ranks of the ruled along a double divide: ethnic on the one hand, rural-urban on the other.

The notion of South African exceptionalism is a current so strong in South African studies that it can be said to have taken on the character of a prejudice. I am painfully aware of the arduous labor of generations of researchers that has gone into the making of South African studies: someone new to that field must tread gingerly and modestly. Yet we all know of the proverbial child who combines audacity with the privilege of seeing things anew; perhaps this child's only strength is to take notice when the emperor has no clothes on. My claim, simply put, is that South Africa has been an African country with specific differences.

The South African literature that has a bearing on the question of the state comprises three related currents. The first is a body of writings largely economistic. It focuses on the rural-urban interface and the diminishing significance of the countryside as a source of livelihood for its inhabitants. Its accent is on the mode of exploitation, not of rule. With its eye on an irreversible process of proletarianization, it sees rural areas as rapidly shrinking in the face of a unilinear trend. Because it treats rural areas as largely residual, it is unable fully to explain apartheid as a form of the state. It is only from an economistic perspective—one that highlights levels of industrialization and proletarianization one-sidedly—that South African exceptionalism makes sense. Conversely, the same exceptionalism masks the colonial nature of the South African experience.

The point is worth elaborating. It is only from a perspective that focuses single-mindedly on the labor question that the South African experience appears exceptional. For the labor question does illuminate that which sets South Africa apart more or less in a category of its own: semi-industrialization, semi-proleterianization, semi-urbanization, capped by a strong civil society. This is why it takes a shift of focus from the labor question to the native question to underline that which is African and unexceptional in the South African experience. That commonality, I argue, lies not in the political economy but in the form of the state: the bifurcated state. Forged in response to the ever present dilemma of how to secure political order, the bifurcated state was like a spidery beast that sought to pin its prey to the ground, using a minimum of force—judicious, some would say—to keep in check its most dynamic tendencies. The more dynamic and assertive these tendencies, as they inevitably were in a semi-industrial setting like South Africa, the greater the force it unleashed to keep them in check. Thus the bifurcated state tried to keep apart forcibly that which socioeconomic processes tended to bring together freely: the urban and the rural, one ethnicity and another.

There is a second body of scholarship, which is on the question of chiefship and rural administration. It is a specialized and ghettoized literature on a particular institutional form or on local government, whose findings and insight are seldom integrated into a comprehensive analysis of the state. And then, finally, there is a corpus of general political writings that is wholistic but lacks in depth and explanatory power. This is the literature on "internal colonialism," "colonialism of a special type" and "settler colonialism." No longer in vogue in academia, this kind of writing has tended to become increasingly moralistic: it is preoccupied with the search for a colonizer, not the mode of colonial control. With a growing emphasis on non-racialism in the mainstream of popular struggle in South Africa, it appears embarrassing at best and divisive at worst. As a failure to analyze apartheid as a form of the state, this triple legacy is simultaneously a failure to realize that the bifurcated state does not have to be tinged with a racial ideology. Should that analytical failure be translated into a political one, it will leave open the possibility for such a form of control and containment to survive the current transition.

The specificity of the South African experience lies in the strength of its civil society, both white and black. This is in spite of the artificial deurbanization attempted by the apartheid regime. The sheer numerical weight of white settler presence in South Africa sets it apart from settler minorities elsewhere in colonial Africa. Black urbanization, however, has

been a direct by-product of industrialization, first following the discovery of gold and diamonds at the end of the nineteenth century, then during the decades of rapid secondary industrialization under Boer "nationalist" rule. One testimony to the strength of black civil society was the urban uprising that built wave upon wave following Soweto 1976 and that was at the basis of the shift in the paradigm of resistance from armed to popular struggle. The strength of urban forces and civil society–based movements in South Africa meant that unlike in most African countries, the center of gravity of popular struggle was in the townships and not against Native Authorities in the countryside. The depth of resistance in South Africa was rooted in urban-based worker-and-student resistance, not in the peasant revolt in the countryside. Whereas in most African countries the formation of an indigenous civil society was mainly a postindependence affair, following the deracialization of the state, in South Africa it is both cause and consequence of that deracialization. Yet civil society–based movements in apartheid South Africa mirror the key weakness of similar prodemocracy movements to the north: shaped by the bifurcated nature of the state, they lack an agenda for democratizing customary power gelled in indirect rule authorities and thereby a perspective for consistent democratization.

The contemporary outcome in South Africa reflects both features, those generically African and those specifically South African. The situation leading to the nonracial elections of 1994 is a confluence of five historical developments. The first is the shift to apartheid rule in the late 1940s. Most analysts have seen this as an exception to the "wind of change" then blowing across the continent, a wind that in its wake brought state independence to nonsettler colonies. In retrospect, though, apartheid—the upgrading of indirect rule authority in rural areas to an autonomous status combined with police control over "native" movement between the rural and the urban, an attempt to convert a racial into an ethnic contradiction—was the National Party's attempt to borrow a leaf from the history of colonial rule to the north of the Limpopo. What gave apartheid its particularly cruel twist was its attempt artificially to deurbanize a growing urban African population. This required the introduction of administratively driven justice and fused power in African townships; the experience can be summarized in two words, *forced removals*, which must chill a black South African spine even today.

Second, forced removals notwithstanding, the processes of urbanization and proletarianization continued. The repression that administratively driven justice and fused power made possible—particularly in the "decade of peace" that followed the Sharpeville massacre of 1960—

created a climate of great investor confidence. As rates of capital accumulation leaped ahead of previous levels, so did rates of African proletarianization and urbanization.

Third, the decade of peace ended with the Durban strikes of 1973 and the Soweto uprising of 1976. For the next decade, South Africa was in the throes of a protracted and popular urban uprising. The paradigm of resistance shifted from an exile-based armed struggle to an internal popular struggle.

Fourth, the original and main social base of independent unionism that followed the Durban strikes of 1973 was migrant labor. The trajectory of migrant-labor politics illuminates the broad contours of the politics of resistance in apartheid South Africa. From being the spearhead of rural struggles against newly upgraded Native Authorities in the 1950s, migrant labor provided the main energy that propelled forward the independent trade union movement in the decade following the Durban strikes. But by the close of the next decade, hostel-based migrants had become marginal to the township-based revolt. As tensions between these two sectors of the urban African population exploded into antagonism in the Reef violence of 1990–91, hostels were exposed as the soft underbelly of both unions and township civics. Seen in the 1950s as urban-based militants spearheading a rural struggle—an explosion of the urban in the rural—by 1990 migrants appeared to many an urban militant as tradition-bound country bumpkins bent on damming the waters of urban township resistance: the rural in the urban.

If my objective in looking at the South African experience were simply to bring to it some of the lessons from African studies, the result would be a one-sided endeavor. If it is not to turn into a self-serving exercise, the objective must be—and indeed is—also to bring some of the strengths of South African studies to the study of Africa. For if the problem of South African studies is that it has been exceptionalized, that of African studies is that it was originally exoticized and is now banalized. But unlike African studies, which continues to be mainly a turnkey import, South African studies has been more of a homegrown import substitute. In sharp contrast to the rustic and close-to-the-ground character of South African studies, African studies have tended to take on the character of a speculative vocation indulged in by many a stargazing academic perched in distant ivory towers.

This lesson was driven home to me with the forceful impact of a dramatic and personal realization in the early 1990s, when it became possible for an African academic to visit South Africa. At close quarters, apartheid no longer seemed a self-evident exception to the African colonial experience. As the scales came off, I realized that the notion of South African exceptionalism could not be an exclusively South African

creation. The argument was also reinforced—regularly—from the northern side of the border, both by those who hold the gun and by those who wield the pen. This is why the creation of a truly African studies, a study of Africa whose starting point is the commonality of the African experience, seems imperative at this historical moment. To do so, however, requires that we proceed from a recognition of our shared legacy which is honest enough not to deny our differences.

If the reader should wonder why I have devoted so much space to South African material, I need to point out that the South African experience plays a key analytical and explanatory role in the argument I will put forth. It is precisely because the South African historical experience is so different that it dramatically underlines what is common in the African colonial experience. Its brutality in a semi-industrialized setting notwithstanding, apartheid needs to be understood as a form of the state, the result of a reform in the mode of rule which attempted to contain a growing urban-based revolt, first by repackaging the native population under the immediate grip of a constellation of autonomous Native Authorities so as to fragment it, and then by policing its movement between country and town so as to freeze the division between the two. Conversely, it is precisely because black civil society in South Africa is that much stronger and more tenacious than any to the north that it illustrates dramatically the limitations of an exclusively civil society-based perspective as an anchor for a democratic movement: the urban uprising that unfolded in the wake of Durban 1973 and Soweto 1976 lacked a perspective from which to understand and transcend the interethnic and the urban-rural tensions that would mark its way ahead.

Finally, the seesaw struggle between state repression and the urban uprising had reached a stalemate by the mid-1980s. It was as if the waters of the protracted uprising had been checked and frustrated by the walls of indirect rule Native Authorities. The uprising remained a predominantly urban affair. At the same time, the international situation was changing fast with glasnost coming to the Soviet Union and the cold war thawing. In this context the South African government tried to recoup a lost initiative through several dramatic reforms. The first was the 1986 removal of influx control and the abolition of pass laws, thereby reversing the legacy of forced removals. It was as if the government, by throwing open the floodgates of urban entry to rural migrants, hoped they would flock to townships and put out the fires of urban revolt. And so they flocked: by 1993, according to most estimates, the shanty population encircling many townships was at around seven million, nearly a fifth of the total population. Many were migrants from rural areas.

The second initiative came in 1990 with the release of political prisoners and the unbanning of exile-based organizations. The government had identified a force highly credible in the urban uprising but not born of it and sought to work out the terms of an alliance with it. That force was the African National Congress (ANC) in exile. Those terms were worked out in the course of a four-year negotiation process, called the Convention for a Democratic South Africa (CODESA). The resulting constitutional consensus ensured the National Party substantial powers in the state for at least five years after the non-racial elections of 1994. Many critiques of the transition have focused on this blemish, but the real import of this transition to nonracial rule may turn out to be the fact that it will leave intact the structures of indirect rule. Sooner rather than later, it will liquidate racism in the state. With free movement between town and country, but with Native Authorities in charge of an ethnically governed rural population, it will reproduce one legacy of apartheid—in a nonracial form. If that happens, this deracialization without democratization will have been a uniquely African outcome!

SCOPE AND ORGANIZATION

This book is divided into two parts. The first focuses on the structure of the state. Following this introduction is a chapter that reconstructs the moment of the late-nineteenth-century scramble as a confluence of two interrelated developments. The first was the end of slavery, both in the Western hemisphere and on the African continent. This shift of historical proportions both underlined the practical need for a new regime of compulsions and cleared the ground for it. The second contributory factor was the set of lessons that late colonialism drew from its Asian experience. The historical context illuminates what was distinctive about the nature of colonial power in Africa.

The political history of indirect rule, from its genesis in equatorial Africa to its completion in South Africa, is traced in chapter 3. I should perhaps clarify at this point that I do not claim to have written a book that is encyclopedic and panoramic in its empirical reach. The point of the examples I narrate is illustrative. As a mode of rule, decentralized despotism was perfected in equatorial Africa, the real focus of the late-nineteenth-century scramble. Only later did its scope extend north and south, parts of the continent colonized earlier. The examples I use from the colonial period are clustered around the period of incubation of indirect rule in equatorial Africa, with an extended discussion of South Africa, which is usually presumed to be an exception to the African experience and which I contend was the last to implement a version of decentralized despotism.

As its pioneers, the British theorized the colonial state as less a territorial construct than a cultural one. The duality between civil and customary power was best described in legal ideology, the subject of chapter 4. Legal dualism juxtaposed received (modern) law with customary law. But customary law was formulated not as a single set of native laws but as so many sets of tribal laws. Conversely, colonial authorities defined a tribe or an ethnic group as a group with its own distinctive law. Referred to as custom, this law was usually unwritten. Its source, however, was the Native Authority, those in charge of managing the local state apparatus. Often installed by the colonizing power and always sanctioned by it, this Native Authority was presented as the traditional tribal authority. Where the source of the law was the very authority that administered the law, there could be no rule-bound authority. In such an arrangement, there could be no rule of law.

This first part of the book closes with a chapter (5) on the relation basic to decentralized despotism, that between the free peasant and the Native Authority. Through an illustrative exploration of extra-economic coercion, chapter 5 sums up the distinctive feature of the economy of indirect rule. Together, chapters 3, 4, and 5 sum up the institutional triad through which this decentralized mode of rule operated: a fusion of power, an administratively driven notion of customary law, and a range of extra-economic compulsions. Each chapter also closes with a discussion of the variety and the overall limit of postindependence reform.

The second part of the book explores the changing shape of oppositional movements as they grow out of the womb of the bifurcated state. I focus on two paradigm cases to illuminate the rural and urban contexts of resistance: Uganda and South Africa. Within the context of exploring different ways of bridging the urban-rural divide, my objective is twofold: first, to counterpose the earlier discussion of authoritarian possibilities in culture (customary law) to a discussion of emancipatory possibilities in ethnicity; second, to problematize ethnicity as resistance, precisely because it occurs in multiethnic contexts.

The Ugandan material forms the bulk of case studies in chapter 6 on rural-based movements in equatorial Africa. My primary accent is on movements that seek to reform customary power in rural areas, so as to bring out both their creative moments and their limitations. The South African material in chapter 7 focuses on urban-based movements, organized the first time as trade unions and the second time as political parties. Through a combination of secondary source material and primary

interviews, mainly in some of the "violent" hostels in Johannesburg, Soweto, and Durban, I explore the dialectics of migrant politics (the rural in the urban) through the turning points of the 1970s and the early 1990s in the overall context of the politics of South Africa.

The conclusion (chapter 8) is a reflection on how oppositional movements and postindependence states have tried to come to terms with the tensions that the structure of power tends to reproduce in the social anatomy. My point is that key to a reform of the bifurcated state and to any theoretical analysis that would lead to such a reform must be an endeavor to link the urban and the rural—and thereby a series of related binary opposites such as rights and custom, representation and participation, centralization and decentralization, civil society and community—in ways that have yet to be done.

Part One

THE STRUCTURE OF POWER

found[102] that the powers actually wielded by TANU cell leaders "exceed[ed] greatly the instructions received from Dar-es-Salaam, local government officials and TANU leaders." The cell leaders not only "settle cases," but also "impose fines and charge fees for arbitration." People "dissatisfied with the judgement of their own cell leader" may turn to a "court of appeal," only to find that the court is the same cell leader "alone, or in combination." As brought out in hearings to the recent Commission of Inquiry on Land, these village-level officials even used to detain peasants for up to forty-eight hours. Like the agent of the Native Authority, the party cadre too came to exercise a fused power.

If the Achilles' heel of the Tanzanian reform was that it elevated the single party above society, as its unaccountable representative, the same cannot be said—at least not formally—of the Mozambican reform, which began in the second year after independence.[103] Here the abolition of chiefship was coupled with the direct election of representatives to People's Assemblies in localities or subdistricts. By 1980, more than thirteen hundred elected assemblies had been formed in administrative localities and communal villages over the whole country. The limits of the reform became clear as it moved beyond the village level. All elections beyond the village were turned into an indirect affair. If the Mozambican reform expanded popular participation, it simultaneously limited representation to a narrow village-defined limit. Indirect elections went hand in hand with a key feature of indirect rule: fused power. From the top down, the party head was also the head of government in the locality and the president of the corresponding people's assembly. The party had "a key role in the selection of candidates to any organ." Fusion of power was the principle around which the party-state was constructed.

As custodians of a militant nationalism that had successfully bridged the urban-rural divide and posed colonialism hitherto its most serious challenge, radical leaders tried to institutionalize the political gains of the nationalist struggle into a single party. However, this attempt to reform the bifurcated state from above did not succeed. Lacking in democratic content, it carried forward the colonial tradition of fused power and administrative justice. We will later see how, faced with a peasant resistance to a top-down development program, persuasion and politics degenerated into extra-economic coercion. As that happened, the center of gravity of the radical party-state shifted from the party to the state. The bitter fruit of a failed attempt to transform decentralized despotism turned out to be a centralized despotism.

CHAPTER FOUR

Customary Law: The Theory of Decentralized Despotism

COLONIALISM claimed to bring civilization to a continent where it saw life—to borrow a phrase from a context not entirely unrelated—as "nasty, brutish, and short." Civilization here meant the rule of law. The torchbearers of that civilization were supposed to be the colonial courts. The courts were intended neither just as sites where disputes would be settled nor simply as testimony to effective imperial control; rather, they were to shine as beacons of Western civilization. Yet no sooner was this claim made than it lay in shreds as power was forced to find ways of controlling multitudes on the ground. The history of that moral surrender was one of a shift in perspective and practice, from a civilizing mission to a law-and-order administration.

The judicial system that evolved in the colonies bore a remarkable similarity. Though names may differ, it was everywhere a bipolar affair. At one end were the courts of chiefs and headmen, courts of the first instance to which natives had ready and easy access, courts that dispensed justice according to customary law. At the other end was a hierarchy of courts cast in the metropolitan mold, courts designed to solve disputes involving nonnatives. The intermediate category consisted of tribunals staffed by white officials, called commissioners in British colonies and commanders in French ones, who listened to appeals from chiefs' courts and who were charged with the general administration of the native population. In this bipolar scheme, customary justice was dispensed to natives by chiefs and commissioners, black and white; modern justice to nonnatives by white magistrates.

The dualism in legal theory was actually a description of two distinct, though related, forms of power: the centrally located modern state and the locally organized Native Authority. The hallmark of the modern state was civil law through which it governed citizens in civil society. The justification of power was in the language of rights, for citizen rights guaranteed by civil law were at the same time said to constitute a limit on civil power. The key claim was that this form of power was self-limiting. Against this description was the reality: the regime of rights was limited and partial. Citizen status was not conferred on all within the ambit of civil society. The primary exclusion was based on race.

In contrast to this civil power was the Native Authority. It governed on the basis of ethnic identity. The Native Authority was a tribal authority that dispensed customary law to those living within the territory of the tribe. As such, there was not a single customary law for all natives, but roughly as many sets of customary laws as there were said to be distinct tribes. Customary law was not about guaranteeing rights; it was about enforcing custom. Its point was not to limit power, but to enable it. The justification of powèr was that it was a custodian of custom in the wider context of an alien domination.

Against this description was the reality: customary law consolidated the noncustomary power of chiefs in the colonial administration. It did so in two ways that marked a breach from the precolonial period. For the first time, the reach of the Native Authority and the customary law it dispensed came to be all-embracing. Previously autonomous social domains like the household, age sets, and gender associations—to cite three important instances—now fell within the scope of chiefly power. At the same time—and this is the second breach with the precolonial period—any challenge to chiefly power would now have to reckon with a wider systemic response. The Native Authority was backed up by the armed might of the modern state at the center. We will later see that just as civil society in the colonial context came to be racialized, so the Native Authority came to be tribalized. To the racially defined native as the other in civil society corresponded the ethnically defined stranger in the Native Authority.

In this chapter, I will be concerned with three issues. The first is the domain of the customary. Who were the natives who were supposed to live by custom? What were the courts through which custom came to be enforced? And what were the sources of this customary law? My second objective is to understand the process by which the customary came to be defined, particularly so in a context marked by a rapid shift in both the perspective of colonial powers and the situation of different groups among the colonized. Confronted first by the need to create order and then to enforce development among conquered populations, the ruling concern with law rapidly gave way to a preoccupation with locating and boosting those who would enforce the law. At the same time, this late-nineteenth-century transition from slavery to colonialism turned out to be a period of radical dislocation for different strata among the colonized. Instead of a traditional consensus about custom, it signified a time of rapid change and much contest over the customary. Yet colonial powers presumed an implicit and unchanging consensus over the customary. Who then really came to define *custom* and how? Third, given this divided legacy, of laws modern and customary, what was the promise and the limit of the legal reform effected in the postcolonial period?

THE DOMAIN OF THE CUSTOMARY

What did *customary* mean? And who were the natives to which this justice was to apply? The answers to both questions are indeed revealing, for legal pluralism in this instance was more an expression of power relations in a colonial society than a recognition and tolerance of any multicultural diversity. Colonial pluralism was basically dual: on one side was a patchwork of customs and practices considered customary, their single shared feature being some association with the colonized; on the other side was the modern, the imported law of the colonizer. In countries like Nigeria, where external influence was not limited to European powers but included Islamic sources, the law sought to remove all ambiguity: section 2 of the Native Courts Law of colonial Nigeria provided that "native law and custom includes Moslem law."[1]

Conversely, *native* was used not to mean a person whose life had historically been governed by the customary law in question, but as a blanket racial category. It is instructive to look at how the courts in Nigeria defined the term *native*. At first glance, there seems to be a range of definitions: according to the Western High Court Law, a native was simply a Nigerian; the Northern High Court Law distinguished between natives and nonnatives and remained silent thereafter; the Eastern High Court Law revealingly defined a native as a "person of African descent."[2] But all ambiguity was removed in section 3 of the Interpretations Act, which applied to the federation and northern Nigeria; according to this act, the statutory definition of the term *native* included "a native of Nigeria" and a "native foreigner." Further, a "native foreigner" was defined as "any person (not being a native of Nigeria) whose parents are members of a tribe or tribes indigenous to some part of Africa and the descendants of such persons, and shall include any person one of whose parents was a member of such tribe."[3] The point was no doubt to cast the net wide enough to catch within its fold every person with any trace of African ancestry. The objective was to arrive at a racial definition, not a cultural one. Similar racially governed formulations were found in other colonies. In Lesotho, section 2 of the General Law Proclamation spoke of customary law as "African law" to be "administered" to all "Africans."[4] Following a survey of the operations of Swazi customary courts according to the terms of section 3 of the Swazi Courts Act 80 of 1950, Khumalo concludes that these courts have civil jurisdiction over all "Swazis," meaning "a member of the indigenous population of Africa who is a Swazi citizen attached to a chief appointed under section 4 of the Administration Act 79 of 1950."[5] Pointedly excluded are all Swazi citizens of non-African descent. In Botswana the law simply defines the jurisdiction of customary courts as covering all "tribesmen"![6]

Yet customary law was not a racial catchall. The native and the tribesman were not the same. Natives were disaggregated into different tribes. Each tribe had its own customary law, which the leadership of the tribe had the power to enforce. The notion of the ethnically defined customary was both deeper and more differentiated than the racially defined native: it grounded racial exclusion in a cultural inclusion. The natives denied civil freedoms on racial grounds were thereby sorted into different identities and incorporated into the domain of so many ethnically defined Native Authorities.

The domain of customary law was confined to customary courts, being the lower courts. "Native customary law, in my view," opined a British judge in a West African case, "is more or less in the same position as foreign law and it must be established by an expert before courts other than the native courts."[7] Who, then, had the authority to establish this "matter of fact" rather than "matter of law"? What were deemed to be the authoritative sources of customary law?

On this question, there was no clear agreement and often an amusing confusion. In both British- and French-controlled territories, superior court judges, whether European or African, "often sat with African assessors who informed them what was the customary law in question."[8] That, however, still begs the question: who would qualify to be an assessor? Opinions varied. To Goldin and Gelfand, authors of *African Law and Custom in Rhodesia*, for example, the answer was obvious: "The African knows his laws, not as a result of study, but by virtue of being and living as an African."[9] Yet the matter was hardly as simple and straightforward. As Governor Cameron confided to a visitor to Tanganyika, "the difficulty after a period of disintegration is to find out what their system was. *They* know perfectly well but, for one reason or other, they may not tell you."[10] A Portuguese authority on the subject thought he had found a way out of the dilemma. Unlike "the common law [which] should be applied by a qualified jurist," he argued, "the questions relative to usages and customs should be judged by the administrator because it is he who is conversant with the local custom and the dominant mentality."[11] The same authority was compelled to add: "For this purpose he is assisted by two natives who inform him on the local law." The famed British administrator-anthropologist Rattray agreed. In calling for "the retention of all that is best in the African's own past culture," Rattray admitted: "The main difficulty lies in the fact that we and the educated African alike know so little of what that past really was."[12] But "those few who possess the requisite knowledge . . . are illiterate, and in consequence generally inarticulate for practical purposes, except when approached by the European who has spent a life time among them and has been able to gain their complete confidence." As

to why that should make the literate European indispensable but rule out the literate African, he never explained.

Presumably the illiterate native was the more pristine, just as the literate African was the more contaminated by alien worldly influences percolating through the written word. But even if the anthropologists considered the illiterate native a more reliable authority on customary law, that authority was surely seen in the nature of a primary source, to be sifted through, analyzed, its internal contradictions smoothed over, its gaps and lapses filled in, all to arrive at a coherent, consistent, and comprehensive secondary formulation. Still, it was not every native, not even every illiterate native, who was presumed to know customary law. For as many an experienced administrator and knowledgeable anthropologist suspected, it was more or less a truism that "real customary law was in the mind of the oldest men (or even of the dead) and that the new elders did not know it properly."[13]

With modern law there was no such problem; it was easily imported and read. For the British brought with them the common law, the doctrines of equity, and the statutes of general application that were in force in England at a particular cutoff date: in the case of Ghana, 1874; Kenya, 1897; Nigeria, 1900; and so on.[14] The French exported their civil code and other sets of legislation to their possessions. The Belgians went so far as to enact a simplified version of the mother code, calling it the Code Civil du Congo. On top of this imported law, there was the body of statutes promulgated by the colonial state.[15]

This dual system of justice was at the heart of indirect rule, and some variation of it came to be in every African colony. The pacesetter in these matters, as in others related to indirect rule, were reforms Lugard introduced in northern Nigeria. Three key statutes defined the nature of the judicial system in colonial Nigeria.[16] The first was the Native Court Proclamation. Under it, the resident in charge could set up four grades of native courts, with the highest sitting under the presidency of the paramount chief. The paramount chief's court had "full and unlimited jurisdiction to adjudicate in all civil matters or to try all criminal proceedings in which the chief's subjects were parties." For the subjects, there was to be neither a right of representation nor a right of appeal to a court presided over by a British judge or a political officer—no matter how serious the charge or the penalty involved. The paramount chief who presided over this court as the supreme native judicial authority was, in addition, the same paramount chief who sat as the supreme native administrative authority under the Native Revenue Proclamation!

The second statute defining the judicial system in the colony was the Provincial Courts Proclamation. A provincial court was set up by the high commissioner of the protectorate and was empowered to hear all

cases involving nonnatives. Required to administer English common law, the doctrines of equity and the statutes of general application in force in England on 1 January 1900, these too were no nonsense courts that neither admitted lawyers nor were required to follow strict English legal procedure. To the nonnatives basking under the tropical sun in a nonsettler colony, they offered an English version of African customary law. The pride of place, the jewel in this thorny crown, was the supreme court of northern Nigeria, set up under a third statute. As befits a crown jewel, it was required to follow strict legality and strict technicality, complete with the right of legal representation for all parties involved, but its writ was limited to only the two cantonment areas of Lokojo and Zungeru. The crux of the matter was that more than 99 percent of the judicial work in the protectorate was carried out beyond its purview, in courts run by nonlegal administrators, whether native or European.

In French colonies, too, there were two parallel court systems, one French, the other native.[17] French courts were presided over by French magistrates, who judged according to French law, and were used in all cases involving a French citizen. Cases involving only subjects were the preserve of native courts. Under the era of direct administration, however, chiefs gradually were deprived of judicial powers, which were transferred to European administrators: a 1903 decree limited police powers of chiefs to a fine of 15 francs and five days in prison; another decree from 1912 limited their competence only to matters of conciliation; and yet another decree from 1924 conferred the chair of the court of first instance to a European official, usually a clerk. The native court of the second instance was presided over by none other than the cercle commander, this all-powerful administrator-judge, or his deputy or any other European official designated by the governor. Although customary law continued to be dispensed in these courts, it was given legal recognition only by the court of appeal at Dakar, the supreme court of French West Africa, in a 1934 decree. The court recognized the African village as a legal entity with customary rights and the village chief as the defender of those rights.[18] In the Italian colony of Somalia, state recognition of the customary came much earlier: royal decree no. 695 of 1911 stipulated that Italians be governed by Italian law and Somalis by customary law.[19]

The dispensers of customary justice were the cadres known as chiefs. The term needs to be understood in a broad sense, stripped of all racial connotations: chiefs were really nonspecialized, nonlegal administrative personnel whose broad portfolio also included judicial functions. As such, they should be seen to include both native chiefs and white commissioners (British) or commanders (French). Unlike magistrates' courts, which were staffed by professional lawyers and cordoned off by high tariff walls (fees) and a remote location, the commissioners' tribunals were an informal affair, with easy access and nominal fees. Like the courts of chiefs and headmen, of which they formed the upper tier, the commissioners dispensed a form of justice that was informal, inexpensive, and efficient. Defined by the powers and role of the office they occupied, the commissioners were really the white chiefs of colonial Africa.

DEFINING THE CUSTOMARY IN A CHANGING CONTEXT

If the customary law dispensed in the courts of chiefs was presumed to be known by "the African . . . by virtue of being and living as an African" (Goldin and Gelfand), "by the administrator because it is he who is conversant with the local custom and the dominant mentality" (Moreira), by "illiterate natives" as transmitted to "the European who has spent a life time among them and has been able to gain their complete confidence" (Rattray), or by the "oldest" of the "elders," who then defined the substantive law? There were at least three sets of contenders with claims over defining the customary: the central state, the officials of the local state (the chiefs), and a range of nonstate interests. Everywhere, the claim of the central state set the limits to the customary in the form of a "repugnancy clause." Under French and Belgian systems, this limit was set unambiguously as the requirements of "public order and morality."[20] In some instances, the formulation came close to being crass: a law passed by French authorities in Senegal in 1912 stipulated that colonial law replace traditional law when the latter was "contrary to the principles of French civilization."[21] The Portuguese, too, had a formulation that clearly spelled out their claim to being both the custodians of "humanitarian" principles and the holders of power; the decree of 1954 that formally subordinated natives to custom and nonnatives to the common law required that custom not be "contrary to public order, that is, to the principles of humanity, the fundamental principles of morality or to free exercise of sovereignty."[22]

In British-controlled Africa, the colonial power simply claimed to be a custodian of general "humanitarian" notions of right and wrong. The standard formulation thus required that customary law be applicable if "not repugnant to justice and morality" (Kenya, Malawi), "not repugnant to natural justice and morality" (Southern Rhodesia), not repugnant to "natural justice, equity and good conscience" (Ghana, Nigeria, Sierra Leone), or not repugnant to "justice, morality or order" (Sudan).[23] Rarely did the British admit that the law must also safeguard the exigencies of power. Such a rare instance is found in the Evidence Act in Nigeria, which stated that no custom "contrary to public policy" would be enforced.[24] Similarly, the charter issued to authorize

the colonization of Rhodesia required the high commissioner to "respect any native [civil] laws and custom . . . except so far as they may be incompatible with the due exercise of Her Majesty's power and jurisdiction."[25] The same illuminating phrase can be found in the Native Courts Proclamation of 1942 in Bechuanaland.[26]

What kind of limit did the repugnancy clause set in practice? The overriding constraint stemmed from the reality of defending power. At the beginning of colonial rule, a clear distinction was made between the civil and criminal aspects of customary law: the former was to be tolerated, the latter to be suppressed. The official justification was that "humanitarian" consideration to eliminate "evil" required that chiefs be deprived of any criminal jurisdiction, for chiefs were no doubt the source of much "evil" in Africa. Not only did this appeal to Victorian sensibilities, it also made much practical sense, for any attempt to restore the old institutional order was bound to be chief centered. The colonial power understood very clearly that dealing with crime was first and foremost about social control and the exertion of power. "Criminal law," pointed out the minister of justice and defense in Rhodesia, is all about "wrongs against the government and against the community," whereas "civil law deals with relationships between individuals." Even if "the criminal law . . . does not conform to the ideas of the people who are ruled," the real point was that "the government could not tolerate any attempts against its own custom, its own law, against itself, that is to say." The chief justice of the supreme court of the Federation of Rhodesia and Nyasaland agreed: "This is a matter in which we feel our law should prevail, because we feel that when it is a question of something which wrongs the whole community—and that roughly is the definition of the word 'crime'—it should override all other considerations, and that is why we distinguish between criminal law and civil law."[27]

Rhodesia was a colony with a difference. Even when the existence of native law and courts was officially recognized in 1937, the courts were expressly denied criminal jurisdiction. This was different from other British colonies, where once the question of law and order was settled and colonial rule became relatively stabilized, chiefs did indeed receive limited criminal jurisdiction. For indirect rule, as Lugard recognized, would mean little if it did not give chiefs the "power to punish." Rhodesia, however, was much more like the Cape or those French colonies where native resistance to colonial rule had been intense and sustained. The specter of the Matebele Kingdom and the resistance it spearheaded continued to haunt settler memories. The problem was not just to crush such a resistance, but to prevent its resurgence. From the point of view of the settler-dominated state, the "exercise of criminal jurisdiction was thought to be (and in fact is) a significant instrument of social control, and its removal could go far towards making Ndebele resurgence impossible."[28]

It is not that Victorian notions of right and wrong played no part in setting practical limits to customary law. They did, in matters such as slavery, mutilation, polygamy, and bride-price; but they were subordinate to political considerations, and for that reason, they were always negotiable. French colonial authorities made a distinction between the end of the slave trade and that of slavery. The former was adhered to more or less strictly, but not the latter. After all, as we will see, the end of slavery was followed by the "rosy dawn" of compulsions. The abhorrence of mutilation—and this too we will see—did not stop any colonial power from resorting to corporal punishment as an integral part of customary law. The Boer and the British authorities in South Africa who righteously denounced polygamy as female slavery and bride-price as "purchase in women" had no qualms about legislating a customary code that treated women as perpetual minors subject to a patriarchal chief-dominated authority. We are, after all, talking of an era when English common law gave husbands controlling power over wives and the state and judicial authorities extraordinarily severe powers over those categorized as vagrant, idle, or disorderly.

Some colonial administrators, like Robert Delavignette in French West Africa, thought an arrangement that coupled customary law with a repugnancy test was riddled with contradictions. "What are these principles" of civilization to which "native law" must not run counter, he asked, "if not those of the Code?"[29] In other words, if the repugnancy test were consistently applied—so ran the logic of Delavignette's argument—the code would sooner or later have to govern all relations, whether native or nonnative. But one thing should be clear. The repugnancy test was never construed as requiring that the law in the colonies, common or customary, be consistent with the principles of English law or the Code Napoléon. Such a requirement would have sounded the death knell of administrative justice. The point of the repugnancy test was to reinforce colonial power, not to question it. One study of court cases in colonial Nigeria concludes: "It is clear that the courts decide whether a particular rule is to be rejected for repugnancy largely in an *ad hoc* manner."[30]

Conflict over the Customary

If in practice the repugnancy clause was a way of enforcing the exigencies of colonial power, does it mean that—within those limits—substantive customary law was really decided by the colonized, was really the

reflection of a traditional consensus that preceded the imposition of colonialism, and continued through it as the result of some kind of benign neglect? This could not have been, if only for one reason: the dawn of colonialism was a time of great social upheaval through most of the continent. Its most dramatic manifestation was the rise of conquest states in the nineteenth century. Their defeat liquidated the political power that had stabilized conquest-based claims. The end of slavery eroded or made uncertain an entire range of claims on the services of subordinates, from formal slavery to slave marriages. The onset of migrant labor provided young men with ways of earning cash and thus with an alternative to "service-marriage," an institution through which elders who controlled access to wives could claim a range of services from young men as prospective suitors. Instead of a consensual traditional notion of custom, the colonial era really began in the midst of conflicting and even contrary claims about the customary.

The content of customary law is difficult to understand outside this context of conflicting claims, many reflecting tensions hardly customary. These tensions were grounded in two intersecting realities: on the one hand, while an old regime of force (legal slavery) was eroding, a new one (colonial compulsions) was just as surely taking its place; on the other hand, while nineteenth-century commodity markets in slaves and artisanal products were fast shrinking, new colonial markets in wage labor and export crops were expanding just as quickly. Both those with and without claims in the old order sought to establish claims in the new one. The onset of colonial rule combined with new conditions—increased mobility and increased stratification—to generate new and contradictory claims. Not surprisingly, every claim presented itself as customary, and there could be no neutral arbiter. The substantive customary law was neither a kind of historical and cultural residue carried like excess baggage by groups resistant to "modernization" nor a pure colonial "invention" or "fabrication," arbitrarily manufactured without regard to any historical backdrop and contemporary realities. Instead it was reproduced through an ongoing series of confrontations between claimants with a shared history but not always the same notions of it. And yet—and this is the important point—the presumption that there was a single and undisputed notion of the customary, unchanging and implicit, one that people knew as they did their mother tongue, meant that those without access to the Native Authority had neither the same opportunity nor political resources to press home their point of view. In the absence of a recognition that conflicting views of the customary existed, even the question that they be represented could not arise.

To get a sense of how deep-seated was the conflict over the customary, we need to grasp how radical were the dislocations that marked the

onset of colonial rule. At least three sets of tension-producing developments interlocked and made for a single overarching process. The source of this triple dislocation lay in broad political, economic, and social changes: the process of state formation, the development of markets, and far-reaching changes in gender and generational relations. The impact of colonial rule in each instance was nothing less than dramatic.

We have seen that nowhere in nineteenth-century Africa had the territory-based claims of the state singularly triumphed over kin-based claims of lineages. Everywhere, and not just in the nonstate societies, kin groups contested with and balanced the claims of state authority. The onset of colonial rule tipped the balance decisively in favor of state authority. This was particularly evident in kin-based societies, where every person had depended on kith and kin to protect life and property—for there was no other authority to turn to before colonial rule created one. It was also true, however, where hierarchical authority (chiefship) had preceded colonialism, for the consolidation of colonial power went alongside setting up a parallel court structure that would not only recognize individual rights, but also do so with a sweep so exclusive as to include even the domestic realm. In her study of the Kilimanjaro region in Tanzania, Sally Falk Moore argues that customary disputes brought to the chief's court in the colonial period "were probably decided in pre-colonial times at home, that is, in the social fields in which they arose."[31] Whereas the practice in the precolonial period was for chiefs "simply [to] announce the decisions of the [age-grade] assembly," the colonial chief "presided over" the assembly and "made the decisions," in the process phasing out the role of age sets. With the onward flow of colonial rule, the tendency was for chiefly power to become consolidated, if only for one reason. The operation of the chief's court "was permeated by the knowledge that the colonial government could be relied on to supply excessive force behind chiefly authority": the chief "could turn any recalcitrant over to the colonial authorities by falsely accusing him of breaking the rules of the colonial government," or he could "manipulate those rules to deprive individuals of opportunities to work for cash by executive fiat."

If native courts provided an alternative authority to that of the kin group, the cash economy also made it possible for some to escape obligations to one's kin. The beneficiaries of the new legal order came from diverse social strata. At one end were new and relatively prosperous peasants whose springboards were offices in the local state and opportunities in expanding market agriculture and whose vision often coincided with a more individualized notion of rights. At the other end the expanding money economy and market-based relations often generated a rising spirit of independence among those women and (junior) men

who but yesterday were locked in servile relationships. Sometimes this led to a coalition of old victims and new beneficiaries around commonly advanced claims. Take the example of kin groups where households—persons and property—used to be inherited upon the death of the husband but where women and children often refused to be so inherited. Among the Langi people in northern Uganda, as among many others, such an inheritance used to be the right of the male sibling of the deceased. The former wife (*lako*), once inherited, was known as the *dako*. Although inheritance broadly continued to be practiced, women struggled for the right to choose a partner, even if within the confines of the kin group; in time widows won the right to refuse to be inherited by the husband's brother, in favor of a preferred—usually a better-off—member of the larger kin group.[32] Consider also "the typical circumstances of the migrant labourer who remitted his earnings home to his mother's brother who invested them in the purchase of cattle"; the resulting conflict as to whether the cattle "belonged to the individual whose earnings bought them or to their matrilineages" was often resolved by the new courts in favor of the younger man alone. As new property demanded new rights, old institutions (chiefs) newly recast recognized them, in the process emerging triumphant over other similarly traditional institutions (kin groups) more or less bypassed in the constellation of a new power. As Martin Chanock concludes in his brilliant study on law, custom, and social order in colonial Malawi and Zambia "economic individualizing and jural individuation went hand in hand."[33]

The spread of market relations, however, did not always lead to greater individual freedom for all concerned. When it came to conflict-producing and tension-ridden relationships, freedom for one could be only at the expense of another. This was often the case with the marriage bond between male migrants on the move and female agriculturists bound to village communities under the grip of a chief. As migrants appealed to tradition, chiefs often—as in Southern Rhodesia[34]—imposed punishments for adultery and enforced paternal control over marriage. In migrant labor zones, women could and did turn into cash crop–producing peasants, but their workload often increased alongside diminishing freedoms and increased compulsions.

In spite of the tendency of colonial texts to collapse the customary and the tribal into a single noncontradictory whole, there was seldom a clinical separation of tribes or even a homogenous internal culture in these times of great change and tension. The tendency was for a more or less mixing of tribes and an internal differentiation that went alongside varied and even conflicting practices within the same tribe. Not only

were the boundaries of ethnicity blurred and elastic, there was often little that was traditional about tribal boundaries drawn by colonial administrators, as we have already seen. As Chanock asks with reference to those conquest states where patrilineal authority had often incorporated many a matrilineal peoples into expanding state systems, whose custom was considered law—the patrilineal rulers or the matrilineal subjects—and therefore a reference point for the tribe?

How a customary relationship between the sexes came to be forged gives a better idea of the nature of forces whose interaction shaped that outcome. The beginning of colonial rule was marked by a combination of forces predisposed toward improving the position of women, even if each had its own reasons. Missionaries were appalled at the institution of polygamy and bride-price. Settlers, too, were convinced that polygamy allowed the native male to live in sloth and idleness and was at the root of their labor problems. An astute writer in the *Natal Witness* of 1863 poked fun at the "alliance between the missionary and the labor-needing colonist, to alleviate the sufferings of the native woman," and suggested that both were interested in the abolition of a custom "which materially interferes with the object for which they have respectively left their mother country."[35]

This alliance, however, did not last long. Once again, as law sought to establish order and the central state looked for allies to consolidate its hold over local spaces, perceptions changed. By giving rights to sons and women, wrote the British administrator Charles Dundas in 1915, European law "falls like a thunderbolt in the midst of native society"; "all precedent and custom are cast aside, and the controllers of society are disabled." The British had "loosened the ties of matrimony," "freely granted divorces in favour of frivolous girls, and permitted them to run from one man to another, heedless of the bad example thereby set."[36] As they sought out the "controllers of society," the search for good laws gave way to one for effective authorities. As they came to appreciate the possibilities of control in the customary, their interest focused more on customary authorities than on customary law. As the substance of the law was subordinated to the quest for order, the claim to be bringing the "rule of law" to Africa became handmaiden to the imperative to ground power effectively. With this slide into pragmatism, colonial powers were usually content to let customary authorities define the substantive customary law. These authorities were the officials of the local state, with some variation between settler and peasant colonies. Where customary law was not codified, local initiative was inevitably greater. In the settler colonies there was great interest in codification; in the free peasant economies, this interest did not surface until after the Second World War. It

is in the latter that, subject to the repugnancy clause, customary authorities came to have a disproportionate influence in shaping the substantive law.

Chiefs as Customary Authorities

The customary authorities were the chiefs. Stripped of military power and losing control over long-distance trade, chiefs faced the new era with great anxiety. Take the example of Chagga chiefs in the Kilimanjaro region of Tanganyika.[37] As most of their old sources of income dried up—from warfare to cattle raiding, from slave trade to ivory trade—chiefs desperately looked for and created new ways of earning extra income. Court fees were one means; extra-economic and extralegal exactions were another. Whatever the combination, a German observer of the pre–World War I period estimated that "the chief was paid seven times as much as the colonial government in this process."

Alarmed at how old service-yielding claims were disintegrating, chiefs were in a strategic position to seize the initiative under the new order. To do so, they claimed as customary every right that would enhance their control over others, particularly those socially weak. Central to this was the right of movement or settlement and sometimes even the right to claim children. In the increasingly stagnant pool of freed persons that this created over time, chiefs could glimpse multiple possibilities; the old slavery, with its innumerable gradations, from outright control to slave marriage, was giving way to the new clientelism, also with its multiple gradations. The chiefs were not alone in this quest. At different times, they were joined by different strata seeking to protect or gain privilege: free men in relation to women, the propertied in relation to the propertyless, seniors in relation to juniors, those indigenous against migrant strangers in their midst.

The fact that custom should be shaped by those in control of customary institutions was nothing new. The new thing about the colonial period was, to begin with, the privileging of a single institution—chiefship—as customary. Conferred the power to enforce their notion of custom as law, chiefs were assured of backup support from colonial institutions—and direct force, if need be—in the event they encountered opposition or defiance. Customary law thus consolidated the noncustomary power of colonial chiefs. Should it be surprising that this power came to enforce as custom rules and regulations that were hardly customary, such as those arising from a newly expanding market economy? The courts in Kilimanjaro thus penalized as a violation of the customary any failure to pay taxes or school fees, to observe price controls or obtain a marriage certificate, to terrace certain lands or to keep away from cultivating land alongside streams.[38] As they were turned into an enabling arm of the state power, the courts not only enforced authority as such, but were often key to setting up a colonial export-import economy. The orders of agricultural inspectors and veterinary officers on the Kilimanjaro were enforced by native courts through fines and jail sentences. Take, as one instance, the case of peasants who were fined in 1947 because they failed to plant cotton with seeds provided by the Native Authority.

The case of colonial Malawi and Zambia illustrates the incredible range of rules that gave Native Authorities criminal jurisdiction.[39] These rules did not only control "drinking and the carrying of weapons and freedom of movement"; they went so far as to regulate "villages' cleanliness and sanitation, control of infectious diseases, control of fire, road-making, tree-felling, limitations, tax registration, reporting of deaths, grass-burning, the killing of game and other administrative matters." The rules were often technical to the point of minutiae. Rules on tree cutting, for example, "encompassed and defined such matters as the width of tree which could be cut and permitted distances from roads and rivers," and similarly with "rules on the use of streams and control of diseases." The more technical the specification, the more objective would seem the justification and the more infallible would appear the authority in question.

The administration and the courts moved like a horse leading a cart. As administration became established, its demands were enforced under the threat of penal sanctions. More and more activity previously considered civil now became criminalized with a corresponding increase in the number of criminal prosecution in the courts. The number of convictions in colonial Malawi rose from 1,665 in 1906 to 2,821 in 1911 to 3,511 in 1918. Two-thirds of the latter were for new statutory offenses that had nothing to do with custom: of 8,500 convictions realized in 1922, 3,855 were "for offenses against the Native Hut and Poll Tax Ordinance of 1921," 1,609 for "leaving the Protectorate without a pass," and another 705 for "offenses against the Employment of Natives Ordinance." A decade later, a second category of convictions appeared alongside those for failure to pay tax, breach of a labor contract, or insisting on free movement. That year, 776 were convicted for offenses against the Forest Laws, 387 for violating Township Regulations, and 227 for breaches of the tobacco and cotton uprooting rules. Could there be a better illustration of the law functioning as an administrative imperative?

By the late 1930s, administrative control had taken on the proportions of a stranglehold. In one colony after another, peasants were being ordered to leave their homes in the interest of soil conservation, to destroy ("destock") herds so as to restore the balance between livestock and grazing land, and to uproot subquality coffee trees to improve crop husbandry. None of this was being done by the central state; all of it was being enforced on the command of Native Authorities, everywhere instructed by European advisers. Take, for example, colonial Tanganyika, where Native Authorities were given powers to make orders (section 9) and rules (section 16) for "the peace, good order and welfare of the natives" under the 1927 Native Authorities Ordinance. In agriculture the power to make orders covered not only the "protection of trees and grassland" and "the control and eradication of animal and human diseases," but also "the increase of food production." In 1930 these powers "were greatly added to" by specific orders of the governor. The regulation "related to every conceivable aspect of farming practice and land use." There were orders "on everything": from "anti-erosion measures (compulsory tie-ridging and terracing, de-stocking, control over grazing, etc.)" to "improved methods of cultivation (destruction of old cotton plants, mulching of coffee, etc.)," and from the practice of "animal husbandry (cattle-dipping, etc.)" to methods "designed to prevent famine (compulsory production of some famine crops such as cassava or groundnuts)." The fiction was that rules were locally formulated and imposed by the relevant Native Authority in response to local conditions and needs, but "the fact that so many of the individual Orders were couched in more or less identical terms" led at least one analyst to conclude that they were issued "invariably at the instigation of the Administration."[40] Not surprisingly, "complaints against regulations went hand-in-hand with criticisms of chiefs and the chiefly system," and revolt brewed as "enforced agricultural change" gathered pace.[41] Whereas the rationale was inevitably technical, the effect was life draining. Behind the mask of indirect rule lay the day-to-day routine—customary—violence of the colonial system.

Should it be surprising then that *enforcing custom* became a euphemism for extending colonial administration and developing a colonial economy? Run by native administrators, native authority courts were supervised by another set of administrators, only they were European. The Native Courts Proclamation in Nigeria, for example, set up native courts without spelling out their procedure or practice, except for empowering the district commissioner to make the relevant rules. When the rules were so made, they "were not exhaustive so the courts were left to the District Commissioner's administrative guidance."[42] It was the administrator in charge who defined the uncodified customary law. Lawyers, however, were kept at bay, out of courts. The whole point of indirect rule was "to find a chief and build a court around him."[43]

Customary law was never concerned with the problem of limiting state power, only with enforcing it. Liberal theory emphasized the double-sided character of law, that while it came from the state it also restrained power. Power was said to be grounded in consent. State command was presumed to be rule bound, not arbitrary. This was the meaning of the claim that civil society was framed by the rule of law. None of these claims, however, sounded sensible where power sought to secure order through conquest, not consent. In such a context, the triumph of techno-administration under the guise of indirect rule through customary law was nothing but a retreat into legal administration. That retreat was indirect rule. "The separation of judicial and administrative power," rationalized Lugard at one point, "would seem unnatural to the primitive African since they are combined in his own rulers." And at another point, just a few pages later, he conceded the necessity: "In a country recently brought under administration, and in times of political difficulty, occasions may arise when the strictly legal aspect may give way to expediency."[44]

Under colonial conditions, respect for the law was really respect for the lawmaker and the law enforcer, often the same person. Consider, for example, the daily routine of the British district commissioner of Tunduru in southern Tanganyika.

> D was in the habit of going for a walk every evening, wearing a hat. When, towards sunset, he came to the point of turning for home, he would hang his hat on a convenient tree and proceed on his way hatless. The first African who passed that way after him and saw the hat was expected to bring it to D's house and hand it over to his servants, even if he was going in the opposite direction with a long journey ahead of him. If he ignored the hat, he would be haunted by the fear that D's intelligence system would catch up with him.[45]

In the French colonies after the Second World War, for example, a native who passed an administrator and failed to salute him risked the confiscation of his head dress and its deposition in the office of the cercle commander's office.[46] The 1920 "reforms" in Ghana made it a crime to "insult a chief," to "drum," or to "refuse to pay homage to a chief."[47] In a similar vein, the KwaZulu Legislative Assembly proposed in 1976 to increase the fine for insolence from R 4 to a maximum of R 100. In the event, the central state actually outdid the chiefs; it permitted the ceiling to be raised even higher, to R 200. But a member of the assembly argued that increasing fines "would not change the insolent behavior which exists in the community because we normally find that people

who are disobedient to their chiefs are poor people." Not being in a position to pay fines, he argued that the poor should be meted out corporal punishment for insolence.[48]

The injustice that commissioners and chiefs administered was infinitely flexible: if a transgressor had property, he would be fined; if not, he would receive lashes in the nearest marketplace. Corporal punishment was not only an integral part of the colonial order but a vital one. In the Portuguese colonies, the *palmatoria*, a punishment delivered by means of a beating on the hands, became the symbol of the colonial legal system.[49] The French, the British, and the Boers preferred to administer the strokes of a hippopotamus hide—called the *manigolo* in Malinke, the *kiboko* in Kiswahili, and the *sjambok* in South Africa—on parts of the body less exposed but more sensitive.

Much has been written about the French colonial system of the *indigénat*, but inevitably it has been exceptionalized as a specifically French practice, and an early one at that. Its origin lay in an early colonial presumption that almost all the whites "had the authority to inflict punishment" on any native. Formalized as the indigénat in Algeria in the 1870s, the system was imported into French West Africa in the 1880s.[50] A decree of 1924 limited this generalized white privilege "to officials representing the public powers, administrators and their clerks." The privilege was then extended to nonadministrative chiefs for whom the "ceiling" was fixed at five days' imprisonment and a fine of 25 francs. The decree limited the offenses for which subjects could be penalized to twenty-four, "but their variety was such and their definition so loose that the effect was arbitrarily to cover anything." It gave the administrator a list of motives, "among which he could simply take his pick, and be sure of finding one that would suit a subject he wished to punish." In Guinea, for example, it included a penalty for anyone appealing the decision of an authority: "complaints or objects, knowingly incorrect, repeated in front of the same authority after a proper solution has been found." In Senegal it included penalties for "negligence to carry out work or render aid as demanded," for "any disrespectful act or offensive proposal vis-à-vis a representative or agent of authority" (including a failure to salute a passing administrator), or for "speech or remarks made in public intended to weaken respect for French authority or its officials" (including songs or "false rumors").[51] So marked was popular outrage against the indigénat by the time of the Brazzaville conference in 1944 that de Gaulle felt obliged to acknowledge publicly the need to abolish it.

Call it white privilege, rule by decree, or administrative justice, the point about the indigénat that set it apart from normal practice in the colonies was only that it crudely and brazenly put on the law books as

rules the gist of day-to-day practice in the colonies. For was not the whole point of administrative justice to let administration operate unfettered by judicial restraint? Take, for example, the following list of charges taken from the Fort James court book:

- four lashes for "wasting time instead of buying food";
- five to ten lashes for "sitting around fire instead of working";
- one man was fined for "absenting himself from hospital while under treatment";
- another man was fined for "singing near the native church at 11:30 P.M.";
- some were fined for "being late to work";
- others were fined for "gross disrespect";
- two men were fined five shillings each for "constantly running away at the approach of the Boma official."[52]

How different was the practice in a British colony from the French indigénat? Was not the point to teach the recalcitrant a lesson, to ensure they learned to respect authority the next time around?

Listen to the testimony of those with direct experience of this rough-and-ready justice. A Dahomey newspaper reported in 1935: "Every day men and women, even those who owe nothing to the fiscal authorities, are arrested, lashed together and beaten under the pretext of refusal to pay their taxes. . . . Many of them, to comply with the payment of their taxes . . . pawn their children."[53] Around the same time, a Senegalese journal illustrated the kind of customary authority which it was a crime to oppose.[54] Salif Fall was a canton chief whose way of recovering overdue taxes was to tie up all the natives who could not produce a tax receipt during his inspection tour; "these unfortunates were then whipped in sight of the whole village till they bled, and, as a more effective reminder of the canton chief's authority, their sores were smeared with wet salt through the good offices of the Diaraff."

In words not very different, another newspaper described what it meant to live in a British colony, with its "denial to natives of the principles and procedure of British courts" while "subjugat[ing] the judiciary to the executive," under an authority that "invest[ed] District Commissioners" otherwise "innocent of English law and practice" with "powers of life and death in the provinces over natives of whatever standing without any trial by jury or the right to retain counsel" while "detest[ing] . . . educated natives as the *bete noire* that haunts its political and autocratic dreams," under an order that prescribes "public floggings of general offenders stripped naked in the public markets" while "maintain[ing] . . . so-called 'white prestige' at all costs." This powerful indictment of administrative justice in colonial Nigeria was published by a

native paper, the *Lagos Weekly Record*, in its official tribute to Sir Frederick Lugard, the architect of indirect rule, on the eve of his retirement in 1919.[55] Two decades later, another Nigerian newspaper reported a meeting of the resident with representatives of various tribal unions and societies in the district, held in the Enugu High Court to discuss the question of the Enugu Native Court: "It is noteworthy that the general feeling of the meeting was against having anything to do with a native court for Enugu. . . . We ourselves have always been entirely lacking in enthusiasm for these so-called 'native courts.' In our opinion the scandal of bribery and corruption permeates the whole system and we see little likelihood of there being any improvement in this respect."[56] But having a native court was hardly a matter of choice, for written into the legal system of every colonial power was the distinction between subject and citizen. The prototype subject was the free peasant, ruled indirectly through an administrative cadre that was both native and European, purporting to work through traditional institutions that in reality were a mishmash—of practices severed from their original context, imposed by the colonial power, or initiated by officeholders—dispensing a customary justice that should more appropriately be understood as a form of administrative justice.

DERACIALIZATION AS POSTINDEPENDENCE REFORM

If customary law and the office of the chief, native or white, cannot be seen as a simple continuation of indigenous, precolonial forms of control, it is also true that this ensemble—the system of indirect rule—did not simply cease to be with independence. Nor was it just reproduced thoughtlessly or without restraint. The anticolonial platform of the 1950s often combined a demand for a unified legal system with a newfound respect for customary law as the embodiment of a much-maligned tradition. In this context, the call for a unified legal system meant a creative blending of customary and modern law and a single hierarchy of courts open to all as citizens. Such, indeed, was the agenda set by a conference of judicial advisers who met at Makerere University in 1953.[57]

But legal reform did not await political independence. It came as part of a larger reform of the colonial system undertaken in response to the great anticolonial movement of the postwar era. Anticolonial protest brought to center stage a debate that had been going on for decades within metropolitan circles, pitting administrators against lawyers, and conservatives against liberals. While administrators stood for efficiency, and in its name a "simple and speedy justice," lawyers called for "the transplanting of the technicalities of English criminal law and procedures." Professional legal criticism of administrative justice came to a head in the early 1930s with the appointment of the Royal Commission of Inquiry into the Administration of Justice in Kenya, Uganda and Tanganyika Territory in Criminal Matters. Chaired by H. G. Bushe, the legal adviser to the Colonial Office, the commissioners found it "fundamentally unsound" that "district officers should rest their prestige on their powers to judge and punish, and should base their judicial functions not on legal training and strict application of the laws of evidence but on their general knowledge of African life."[58]

The rising wave of anticolonial protest tipped the scales in favor of lawyers. The postwar reform of customary law proceeded along two lines: codification to blunt its arbitrary edge and professionalization of legal cadres while introducing a single unified appeal procedure to soften its administrative edge. Codification had been the preoccupation of settler regimes, concerned with limiting the autonomy of local state officials. It clearly had a double edge: while narrowing the scope for local initiative, codification also put the initiative in the hands of the central state. Codification as colonial reform began in 1938 when the government of the Bechuanaland Protectorate commissioned Schapero's *Handbook of Tswana Law and Custom*.[59] More books on African legal rules followed in the postwar era. Prominent among these was the work of Cory, who developed a method of recording customary law while working for the Tanganyika colonial administration.[60] This trickle of reform turned into a stream in the late 1950s as Britain moved into the decade of independence. Based at the University of London and inspired by earlier "restatements" prepared by the American Law Institute, an ambitious project, "The Restatement of African Law," was launched in 1959. It covered the countries of Commonwealth Africa and aimed at codifying the core of customary law: the law of persons, family, marriage and divorce, property (including land), and succession.[61] A parallel initiative attempted to build linkages between customary and modern courts, almost completely isolated from one another in the interwar period. Attempts were made in the 1950s to give high courts "a revisionary jurisdiction over native court proceedings" while attempting a shift of personnel "of the native courts from the traditional chiefs and elders to young lay magistrates with some basic training in law."[62]

To the radical leadership of the anticolonial movements, however, these appeared as no more than timid efforts at a late window dressing. Nothing less than a surgical operation that would unify the substantive law, customary and modern, into a single code would do. The militant edge of the anticolonial movement would be satisfied with nothing less than equal citizenship for all under the law. But soon it became clear

that this was a herculean task, daunting and even utopian under the circumstances. Ironically, the first step in postindependence legal reform was a continuation of the preindependence reform process. Its starting point was the narrower agenda for the unification of courts and not of the substantive law.

Broadly speaking, the reform of the court system proceeded along two lines. The minimalist tendency was content to stay with the colonial reform, retaining the dual structure of customary and modern courts while providing for a single integrated review process. The resulting linkages between the two court systems could be limited to the apex (as in Chad, the Central African Republic, and Zaire in the 1960s), or they could be effected at various levels (as in Togo).[63] The native courts were renamed, as either African courts (Kenya) or simply lower or primary courts. A variation of the reform was effected in Nigeria, where the supervisory and review powers of administrative officers were done away with and lawyers were admitted to top-grade customary courts and to customary appeals in higher courts. But lawyers continued to be barred from most customary courts, which were the vast majority of tribunals in the country.

The maximalist reform aimed at a unified court system. This was the major tendency in the former French colonies and in the more radical of the Anglophone countries. Niger, Mali, and Ivory Coast simply abolished all customary courts. So did Senegal. Ghana followed suit in 1960, and Tanzania in 1963. The Tanzanian reform is perhaps the most far-reaching: the language of the primary courts is Kiswahili; in theory, it has jurisdiction over all cases; also, in theory, lawyers are admitted to all courts. Yet in practice primary courts—the lowest level in the tripletiered hierarchy of the unified court structure—"have broader competence in cases of customary law than in those of modern law."[64] Similarly, in Senegal, a country considered a pacesetter in progressive legal reform in Francophone Africa, "no special court is set apart for the adjudication of customary cases," but "the jurisdiction of the courts of the justices of the peace is limited to minor cases in modern law, while it extends to all cases of customary law."

A unified court system without a simultaneous unification of substantive law was clearly still a long way from realizing the nationalist dream of "equality before the law." Neither did a unified court system mean that its several levels were now governed by a single and uniform set of procedures. To effect that would require a vastly expanded body of professional jurists. Not surprisingly, the managers of independent states soon discovered the advantages of customary courts in terms of their nonprofessionalism and accessibility. The problem was that the agenda

of creative synthesis that would transcend the limitations of both customary and modern courts, while incorporating advantages of both, had been replaced by a triumphant modernism: the modern court was considered the desirable goal, but so long as resources were beyond reach and peasants remained "backward," the customary was accepted as a compromise, inevitable but hopefully temporary.

Thus the restatement initiative, based at the School of Oriental and African Studies (SOAS) in London, began to gain adherents among African governments; by 1966 these included Kenya, Malawi, Gambia, and Botswana.[65] The SOAS initiative was very much a continuation of colonial notions of the customary. Restatement retained its tribal flavor. In Malawi, for example, even "where two or more ethnic groups inhabited the same district," an "attempt was made to present significant differences between their laws" and to "re-present the material by ethnic groups."[66] Also, although the law was restated in written form, it was not codified, leaving a degree of initiative in local hands. But the restatement was seldom so simple an exercise as to involve no more than a transcription of oral into written custom. Anthropologists who examined the restatement process, as in Kenya, argued that the outcome was more "a set of ideal statements as to how the law should be administered" than "a reflection of contemporary Kipsigis customary law."[67] This was even more so in Tanzania, where restatement was part of a wider reform process; a single unified body of customary law cutting across ethnic boundaries was written and codified. Restating thus involved ironing out differences between ethnic practices and arriving at a single norm restated in a single law.[68] Henceforth, "unification" referred not to a process whose object was to arrive at a single body of law applicable to all, whether customary or modern, but to a more restricted process that aimed only at a unified body of customary law applicable to all ethnic groups!

Yet a third variant obtained in countries such as Ghana and Senegal.[69] Both attempted to arrive at a single body of law enforced by a single system of courts. Yet in both cases the written law contained customary alongside modern rules. In Senegal, for example, "78 officially recognized bodies of customs, chosen from 33 different ethnic groups, were applicable in the courts."[70] In African legal discourse, this attempt to join the customary and the modern into a single body of law was termed integration. All three variants, however, shared a common dilemma, for all tried to overcome the colonial legacy formally rather than substantively. Whether customary rules were simply restated in writing or were also codified through unification or whether they were integrated into a single body of law, the distinction between the customary and the

modern remained. Both the courts and the parties to a dispute had to choose between two sets of rules in case of conflict. On this score, African countries divided into two: those which continued with the colonial tradition of a presumption in favor of the customary and those which reversed it.[71]

The latter group were the modernizers. Among their ranks were found a core, the radical anticolonialists, determined to bring to an end the colonial legacy with the proverbial surgical stroke. More than any other states, two officially Marxist-Leninist states exemplified this tendency: Ethiopia and Mozambique. Whereas the Mengistu regime in Ethiopia simply abolished the customary by implementing a radically modern civil code,[72] the example of Mozambique under Frelimo is of greater interest, for it claimed to have employed a strategy of reform more political than administrative, arriving at "a uniform judicial structure applying a uniform set of legal norms" but through a process that depended "to a large extent on a flexible and non-coercive relationship between the formal and the informal sectors of justice." This claim is made in an eloquent defense of the Mozambican road by two of its participants, Albie Sachs and Gita Welch.[73] The secret, argue the authors, lies in understanding change as the result of a "process," a "protracted struggle," in which "the objective is never seen to be that of destroying the old, but of transforming it, of developing the aspects that are positive and eliminating the aspects that are negative." The point, we are told, is to "ensure as far as possible that the people should be at the center of the process, so that the rate of advance in creating new structures is conditioned by the capacity of the people to assume new values."

But can a democratic political process result in a uniform outcome—not only "a uniform judicial structure applying a uniform set of legal norms," but more so "the remarkable achievement of the community courts" applying a uniform family law throughout the country[74]—under an incredible diversity of conditions, both historical and contemporary? Part of the answer lies in the modified version of "revolution from above" summed up in the earlier claims: the people are said to be at the "center of the process" only to the extent that they "condition" its "rate of advance," not its outcome! The outcome, the substantive law, is a given. What "facilitate[s] the attribution of a single set of rights and duties to all," Albie Sachs assures us, is that the substantive law sums up no more than the demands of "simple justice." After all, "the problems which tend to give rise to family conflict tend to be the same independently of how the family was constituted: men abandoning their wives, excessive drinking, physical abuse, sexual problems, financial stress, sterility, incompatibility of temperaments and so on." In such situations,

"simple justice" means recognizing that a "wife-beater is a wife-beater, and it does not matter whether he paid lobolo, or is a Christian or a Muslim or a non-believer."[75]

The demands of simple justice are then summed up as a series of "orientations" that the "judges receive on how to deal with family disputes," and these "constitute the principles equally applied to all unions." One such principle, for example, is to "facilitate the departure of a wife from a polygamous union." To be sure, since the relationship between the "formal and the informal sectors of justice" is said to be "flexible and non-coercive," there is "no attempt to penalize practices regarded as wholly incorrect"—"such as polygamy and child marriages"—but the "orientation" contains a strong presumption against these. "In all parts of the country," Sachs and Welch assure us, "independent of what was permitted by local tradition, the judges will regard it as wrong for a man to take a second wife." "He will not be punished for so doing, but his first wife will have a judicial remedy if she so chooses, and any determination in divorce proceedings made about the division of property or the custody of children would not be influenced by any claim he might make or imply to the effect that his religion or ethnic background permitted polygamy."[76]

The consequences of this simple justice are hardly this simple, for a presumption in favor of the first wife in a polygamous marriage is not simply a presumption against the polygamous husband; it is equally a presumption against the rest of the wives in the polygamous marriage. To entrench the rights of the first wife is simultaneously to erode the rights of the rest. This lesson can be drawn both from Victorian attempts of Boer republics to "abolish" polygamy in turn-of-the-century South Africa and from radical nationalist attempts to reform tradition in postindependence Ghana. The Volksraad of the Orange Free State recognized the "customary law of inheritance" but "only in administering estates of *de facto* monogamists." "Tribal marriages" were invalid in both the Transvaal and the Orange Free State. The supreme court in the Transvaal "ruled that polygyny was inconsistent with the general principles of civilization."[77] None of this was very different from the eventually abortive postindependence bill in Ghana, which "sought to withdraw legal recognition from all but the first wife,"[78] and so on with the so-called noncoercive way of abolishing *lobolo*, bride-price; for although "there is no legal prohibition of the payment of cattle by way of *lobolo*," at the same time "no one can go to court to argue that cattle so promised have not been paid, or cattle so paid should be restored." Sachs concludes with a straight face: "the state does not interfere." What is to be the likely consequence of such an orientation? Surely, the flourishing of the "informal sector of justice," with its provisions (at

least in the patriarchal societies) for ensuring that lobolo is both paid when customary and returned when customary.

If that is the case, one would have reason to doubt the claim that the Law on Judicial Organisation, passed in 1978, had within a decade been the instrument of realizing a "uniform family law" within all of Mozambique, "from the Ruvuma to the Maputo." To be sure, our authors also do concede a nonuniform outcome. "The new court system and the new forms of family law are most deeply rooted," we are informed, "in the areas where new relations of production and new forms of social organisation are most evident, namely in the communal villages in the countryside, and in the more strongly organised residential areas in the towns."[79] The communal villages "constitute more than 10% of all inhabitants of the countryside." In some of these villages, in Nampula, for example, where the family system was matrilineal, women "were reluctant to leave their traditional family villages where . . . they could count on a degree of protection from their kinfolk." "To move to a communal village," however, meant "entering a mononuclear relation with their husbands." One does not have to read much more to get to the root of the women's reluctance: in some villages, "some men left their original wives and children behind and entered into new 'monogamous' marriages in the communal village."[80] In this case monogamy becomes just another name for male license to shed a wife as a snake would shed its skin. And the "new forms of social organization" turn out to be a transition from a matrilineal to a patrilineal family organization, and the "orientation" a presumption against matriliny.[81]

The Mozambican reform was not without its positive side. But the gain was very much local: in the "people's tribunal at the lowest level," the system of chiefship was eliminated, and "the judges were elected from among the local population on the basis of their common sense, feeling for justice and their knowledge of the revolutionary principles contained in the Constitution."[82] As with colonial courts of chiefs, no lawyers were allowed; "all procedural formalism [was] reduced to the minimum." But not so in the higher courts, in the district, provincial, and national levels.[83] This means that poor people who won a case in a people's tribunal could easily find the tables turned in case of a review in a higher court if they could not afford a lawyer. But even if the lower court was no longer the customary court oriented by the chief, it was now a people's tribunal oriented by a judge whose "knowledge of the revolutionary principles contained in the Constitution" was an important qualification for election. That orientation and that knowledge, part of the revolution from above, was the key to the substantive justice administered in the new tribunals. As our authors disarmingly state, "The state sector at its best should represent all that is new, that transforms, that helps to establish a new consciousness"[84]—indeed a far cry from the principle that "the people should be at the centre of the process."

A less dramatic but no less drastic legal reform—from above—was introduced in postindependence Tanzania. Both family law and land law were "the subject of special legislation which either wholly or partly removes them from the jurisdiction of the normal court system." The reform channeled land disputes to land tribunals, four of whose five members were appointed by the ruling party (TANU) and the Ministry of Law and Settlement. Appeals were to go directly from the tribunal to the line ministry "without passing through any other courts." Family controversies, however, were to be handled by arbitration tribunals, all of whose five lay members were "appointed by the TANU Branch Committee having jurisdiction over the ward."[85]

I will put the legal reform in its wider political context in a later chapter. My interest now is in exploring the thread that links together the experience of the radical African states. This was the presumption that all one needed was a proclamation from the summit to change the flow of life on the ground. Were not the radical African states the true inheritors of the colonial tradition of rule by decree and rule by proclamation, of subordinating the rule of law to administrative justice so as to transform society from above? One radical regime after another carried out drastic changes, but mostly on paper. This is how Ghana tried to end polygamy and Ethiopia decreed an end to customary law. In a similar spirit, Tanzania proposed—as did a conservative state like Malawi—"the replacement of a matrilineal system of succession by a patrilineal one."[86] If the vision of change was audacious, the presumption that all that was needed to effect it was the stroke of a pen was breathtakingly naive. If the conservative regimes held up one part of the colonial tradition, recognizing African society as no more than an ensemble of tribes, each with its own customary law and thus with the right to be judged by its own law, the radical regimes took their stand on the ground that for all persons to be equal before the law, the law must be modern! It was a perspective best summed up in Samora Machel's well-known call: "For the nation to live, the tribe must die."[87] Just as they decreed a unified society—in the form of a single party, a single trade union, a single cooperative movement, and a single movement of women or youth—the radical regimes decreed a single body of substantive law. Whereas the conservative states were content with continuing the colonial legacy of a customary decentralized despotism, radical states tried to reform that legacy, but in the direction of a modern centralized despotism.

The result, predictably, has been an ever-widening gulf between what is legal and what is real. One cannot remove matriliny or polygamy or

bride-price by legal fiat. One cannot even do it with matters that lacked a deep historical standing, so that, whereas legislation required that "the law of contracts of England" be "generally applicable" throughout Kenya, "in practice the customary law of contracts is still recognized and enforced in African courts."[88] Not surprisingly, matters reached a point at which some jurists were alarmed that if judgments "are based upon principles dictated by the central government and at odds with well-established and recognized rules of the local customary law, there is good reason to expect less resorting to the state judiciary." "The nullification of the judicial process on the part of a substantial element of the rural population," concluded this particular jurist, "is a serious danger."[89]

This, however, is not to say that no meaningful legal reform took place with independence. It did, but the main tendency of the reform was not toward the democratization of the legal system inherited from colonialism, but toward its deracialization. Racial barriers were dismantled and a formal equality was observed. Often chiefs' and commissioners' courts were abolished, and their functions were transferred to magistrates' courts. All litigants were formally given a status of equality before the courts, and the debate on legal reform was restructured—in the erstwhile colony as in the metropolitan countries—around the question of access to justice. It was a reform that summed up progress in the first phase of African independence, as it did in the "independent" homelands of South Africa.

Deracialization meant that the social boundary between modern and customary justice was modified: the former was in theory open to all, not just to nonnatives; the latter governed the lives of all those natives for whom modern law was beyond reach. Although independence deracialized the state, it did not democratize it. Although it included indigenous middle and even working classes within the parameters of the modern state and therefore potentially in the ranks of rights-bearing citizens, thereby expanding the parameters of civil society, it did not dismantle the duality in how the state apparatus was organized: both as a modern power regulating the lives of citizens and as a despotic power that governed peasant subjects.

One needs to grasp fully both the general achievement of postindependence reform and its outer limit, and within those boundaries the different outcomes. Deracialization signified the general achievement; it was a tendency characteristic of all postindependence states, conservative and radical. The outer limit of postindependence reform was marked by detribalization, a tendency characteristic of only the radical states. Whereas customary law continued to be ethnically flavored in the conservative states, enforcing an ethnic identity on the subject population through ethnically organized Native Authorities, customary law in the radical states was reformed as a single law for the entire subject population, regardless of ethnic identity. The decentralized despotism characteristic of the conservative states was deracialized but ethnically organized, whereas the deracialized and detribalized power in the radical states tended toward a centralized despotism. We will see that the latter has turned out to be the more unstable of the two, generating a demand for decentralization which—if pursued in the absence of democratization—is likely to lead to a despotism as generalized and as decentralized as it was in the colonial period.

The situation of those subjected to customary law and indirect rule through the institution of chiefship cannot be grasped through a discourse structured around the question of legal access. Unlike the urban poor who live within the confines of the modern civic power—the law-defined boundary of civil society—whose predicament may be grasped as a de jure legal equality compromised by a de facto social inequality, a formal access to legal institutions rendered fictional in most cases by the absence of resources with which to reach these institutions, the situation of the rural poor is not that of lack of access or reach, but the actual law (customary law) and its implementing machinery (Native Authority) that confront them. Their problem can be grasped not through an absence or remoteness of institutions, but through institutions immediately and actually present. That ensemble of institutions, the deracialized regime of indirect rule, is best conceptualized as a subordinate but autonomous state apparatus.