

## Writing Cultural Differences into the Law

Dilip Yogasundrum

The assertion of minority rights here in Canada tends nowadays to find its justification in a language of "cultural difference." That language involves more than merely calling for the recognition of values that lie outside of, and present a challenge to, a dominant norm; it also involves reevaluating and displacing the terms of prospective inclusion given under the principle of "diversity." When social justice is prosecuted through the law in affirmative action programmes ("employment and pay equity" in Ontario), and in the judicial review of discriminatory legislation (spousal benefits for same-sex couples, for example), the state is involved in a pragmatic administration of consensus, conducted in the name of diversity. The suspicion we might direct towards "diversity" concerns a double standard which works to contain the disruptive value of cultural differences – by their recognition as heterogeneous social facts which do not themselves set the universal terms of recognition, and by the effacement of the state's normative position from which such a universal recognition of nominally equal facts is constructed.

The question of cultural difference gets its broadest articulation in the debate within the humanities over the worth of vernacular traditions long considered to be minor or irrelevant within a certain canonical understanding of Western culture. Let me use the essay by Henry Louis Gates, Jr., that introduces the collection *"Race," Writing, and Difference* to draw out the implications of writing minority values into the law. The virtue of Gates's introduction is that he very quickly describes the dilemma of black writing, and in so doing sketches the form taken by the double standard implicit within the principle of diversity.

Gates records some consequences of the Enlightenment's privileging of a reflective reason, where writing became the material sign of reason's presence. Peoples ostensibly without writing were said to be without reason, and, without those repeatable and visible signs of reason, to have no collective memory or history of their own, no self-consciousness.

For black slaves in the United States to be ascribed no cultural history served to justify their continued exclusion from becoming juridical subjects. Slaves were prevented from writing – by law in some states – and those who wrote in spite of such adversity became the subject of arguments over the humanity of black people in general. Slave writing was a commodity exchanged from the margins of an economy of historical self-consciousness, a means of contradicting the purported absence of such a consciousness. “Writing, for these slaves, was not an activity of mind; rather, it was a commodity which they were forced to trade for their humanity.”<sup>1</sup> But if slave writing was not a detached “activity of mind,” this act of contradiction was also a writing into self-consciousness, a production of subjectivity which negotiated those commodified margins by undertaking the inscription of the material signs of reason.

Gates phrases the conditions of black writing in the form of an ironic dilemma: “How can the black subject posit a full and sufficient self in a language in which blackness is a sign of absence?”<sup>2</sup> Africans and Africa stood for what the project of human reason had left behind. For black writing, if the presence of subjectivity is not to be qualified by blackness, by race – if subjectivity is something that black people share in the same measure as whites, but whose expression has been denied, if it is something distinct or detachable from the signification of blackness as absence – then that subjectivity is presupposed as a universal possibility. But insofar as subjectivity is also something which institutes itself differentially in language, through invested signs of its presence and absence, such a universal subjectivity must efface in itself the traces of the differential signs which constituted its presence.

Writing, for African Americans, therefore “stood as a complex ‘certificate of humanity.’”<sup>3</sup> Their writing would always have to address and overcome the signs that differentiated them as an absence. To a degree, black writing beholden to a universal standard subjects itself further to the effects of that racism by having to demonstrate the “same” humanity, the “same” historical capacity, as whites. Aesthetic considerations would become secondary to a moral question. Such writing would always have to show that it could be as good as or the same as European writing, would always stand before an external judge whose normative view does not acknowledge any debt to black writing.

If, on the other hand, black writing displays another subjectivity, if there is something like a *black* subjectivity, then this exists, from the standpoint of the dominant culture, as fragmentary and heterogeneous in the diaspora of the New World. How would one bear witness, from an Afrocentric standpoint, to the subjugation of African cultures, to the adaptation and reincorporation of their legal codes, to the destruction of their conditions of existence, all carried out in the name of the the civilizing values of the West?

A reconstructive writing that would recapture a singularly Afrocentric subjectivity or seek to establish blackness as a positive aesthetic would have to distinguish itself decisively from those Western values. But what is specific to that black aesthetic does not present itself as empirically given in what persists of a culture experiencing the dislocation of slavery. Which idioms are to be recognized and valued as distinctively Afrocentric? What has been lost in translation? Who is invested with authority to speak? These are all questions for a judgement that is as much juridical as aesthetic. To base the specificity of a black subjectivity on the extant aesthetic signs of blackness – signs which are already invested by their relationship to an economy of self-consciousness constituting blackness as other – feeds into an exoticism which does not displace the limit that places blackness outside.

Black writing is caught between these two poles: of anticipating a subjectivity which it has been denied, but which, through its inscription, will demonstrate that that subjectivity was there all along; and recovering a subjectivity which will have funded a future horizon distinct from the particular subjectivity of the West.

Paradoxically, the aftermath of the Enlightenment also brought with it the thinking of just these questions within the West, in discourses which saw European freedom at home as compatible with colonialism and slavery. The emergence of the romantic discourse of nationalism in the nineteenth century marks an attempt to embody the space and time of signs taken to reflect reason, to plot the political and cultural unity of self-consciousness and self-determination while differentiating itself from others.

As Benedict Anderson and Homi Bhabha point out, the post-Enlightenment nation describes an ambivalent entity.<sup>4</sup> The dispersion of arbitrary and contingent signs – culture – is understood, within nationalist discourse, to reflect an internal necessity marking the integrity of a people with a historical self-consciousness. On the other hand, the principle of this self-recognition and necessity is itself constituted in the project of a nation to realize itself in a state, and this is performed in those cultural signs of its will. Anderson's oft-cited comment on the double-sidedness of the nation-state is apt: "If nation-states are widely conceded to be 'new' and 'historical,' the nations to which they give political expression always loom out of an immemorial past, and, still more important, glide into a limitless future."<sup>5</sup> The nation-state describes an entity pulled in two directions at the same time: the particular cultural gestures of the nation signify a communal past which, as a constitutive origin, enables the future universality of a self-determining will and self-conscious reason; while simultaneously the inscription of those gestures anticipates the universality which would retrospectively authorize their rootedness in a misty past. The discourse

of nationalism, then, produces itself through an ambivalence which it seeks to rule out: its constitutive origins are both presupposed and must be realized in a universal self-consciousness.

Gates locates the solution to this ambivalence of romantic nationalist discourse, at least in literary study, in the moment of formalism, and this moment is instructive precisely because it takes on a legal form, which will allow us to return to the issue of diversity.

Gates cites T.S. Eliot's ordering of the Western literary canon to include those texts said to embody the elevation of culture. In principle, that elevation is impartial, belonging to no one culture exclusively: transcending the intentional and parochial conditions that occasioned them, these texts speak out of, and to, the element of their universality (as expressed in such values as the "human condition," and so on). Considerations such as race, history, or other embodied differences now describe mere particularities and therefore fall away in significance faced with a reason common to all humanity. Nevertheless, the particular expression of such transcendent values of a universal human reason could be identified, their milieu interpreted and their history located, only through a philological and etymological analysis of their appearance.

In Gates's gloss on literary formalism, the language of the canon, then, is both the medium of universality, bringing its values into play, as well as the repository of an inheritance through which that universality can be recognized. The revelation that values can be free from particularity is enabled by a turn towards the formal patterns through which the expression of those values is achieved.

The implications of this gloss are that the canon reveals its literary objects as instances of constitutive values which are themselves given in signification; and it is because signification and constitution are presumed to share the same universal form and reflect each other in language that this is possible.

In one sense then, the form of reflection implicit in the canon is not beholden to a particular tradition; it claims to achieve a transparent identification of constitution with signification, presenting that achievement as a universal tradition, the common inheritance "of us all."

But in another sense, the act of reflection roots itself in a particular tradition insofar as the *form* of that reflection has been elaborated by those discourses – legal, literary, philosophical, theological, and others – which describe the complex project of the West emanating out of both the Judaeo-Christian and the Graeco-Roman traditions. The discourse of nationalism forms part of this history.

In yet another sense, reflection is not traditional at all, insofar as the relationship

between constitutive values and signification is not given, but rather is itself the subject of reflection and the object of a discovery. The (self-)understanding of the West and its limits opens itself up to critical inquiry: such an openness, at least, is a hope which legitimates its cultural practice and claim to universality. In interrogating its limits for the signs of its constitution, reflection orients itself to an outside and to a future, so that its form is always in the process of being completed.

If reflection is not beholden to given traditions, to its Western past, this past is nevertheless positioned at its centre as a virtuality – about to be actualized, and yet, having to be actualized, not yet centred. From this standpoint, the form of reflection which emerges through the discourses of the West can be said to consist in the (re)discovery of (its own) universality in a chain of signifying and constitutive values.

The ethnocentrism of the West would operate, then, by effacing the constitution of the universal subject of reflection, a constitution which nevertheless remains active, producing itself in relation to an outside which it institutes as the site for the discovery of new signifying values. Universality is indicated as the impossibility of presenting a comprehensive solution to the claims of particular signs, so that there is nothing preventing the establishment of regional or national canons insofar as they participate in, and become watchwords for, the rule of a universal law.

In terms of cultural difference, the principle of diversity emerges in the recognition of the gap between constitutive values and their signification as providing the basis for openness and tolerance. The consensus of the liberal state is based on a reason whose constitution cannot be fathomed as such. Communities and traditions give rise to the presumed consensus of the state, but this consensus has no particular cultural representation until retroactively identified in the form of individual rights.

The management of consensus then involves a veering between the assertion that individual rights exist politically and are sufficiently protected by the state, and the discovery of social differentials, whose correction will restore the rationality of consensus.

Issues of social justice dealt with by the liberal state have this appearance of being outside its proper concern and at the same time of being the means by which consensus is preserved. To have different cultural values outside the protection of the state is to subject them to an unfettered economic rationalization, but to protect cultural differences as minority rights, codified in a form available for their monitoring by the state, has the following consequence: the real social gains achieved by the critical pursuit of minority rights come at the price of the further commodification and individualization of particular cultural differences.

We can note this briefly with affirmative action and antidiscrimination laws. Often, the legitimacy of affirmative action is attacked on the grounds that it restricts the possibility of exercising judgement according to evaluative standards dearly held to be neutral, efficient, and fair. But even where such judgement can be exposed to have been ethnocentric and discriminatory in practice, the necessity of affirmative action is defended as a regrettable stopgap measure needed to redress past irrationalities and to restore a level playing field. This is because the level playing field can only ever be a regulative ideal for the state: the state is not in the business of giving a stereotyped substantive representation of that ideal society, which would abrogate the state's formal universality and reveal itself as once more ethnocentric.

Similarly, when antidiscrimination protections are instituted, they usually come under attack either for restricting free judgement and expression or for undermining traditional cultural norms and values. When such protections are defended, it is in the name of tolerating conduct which, beyond the particular form the conduct takes, evinces a rational character. This rational character is governed, in the dogma of the liberal state, by two sometimes contradictory impulses: individuals should be free to choose their mode of personal fulfilment; and the connections into which they enter to that end should be protected if those connections, associations, communities, and so on, are not inimical to social utility. But, again, social utility and individual fulfilment can be given no fixed cultural form.

Hence, it is only through a case-by-case demonstration of the rational basis of particular cultural differences that recognition of those differences is awarded and the principle of diversity maintained. Of course, the state figures crucially in this process, assuming the task of scrutinizing and upholding the fairness and representativeness of the political process itself. But since that rationality, whose guardian the state takes itself to be, only has a representation in the protection of minority values, the process of adjudicating differences works metonymically to provide a visible guarantee of the state's rational character.

In this scrutiny of the state, there are two operations to note. The legal recognition of differences leaves out something communal about their value in making them equally as valid as more dominant values: such a recognition moves towards an abstract generality. And, insofar as the state becomes involved in making cultural differences the object of knowledges identifying the irrational inequality of social position, those differences are progressively inscribed into the web of remedial state practices. But these two movements operate disjunctively – one towards a formal equivalence of values, the other towards a differentiation of social facts – and are attended by continual crises of governability.

The more the law applies itself to social life as a way of managing it, the more it produces a seriality of positive social facts dislodging the cultural difference from its communal conditions of existence. The legal codification of social life, undertaken in the attempt to recover an equilibrium, the level playing field, produces further discrepancies in the social body relative to an original consensus which can never be given a substantial representation. In this respect the law is complicit in the rationalizing of cultural differences and the production of surplus social repressions, even as it moves to protect them. But in this empowerment of minorities through rights secured, there are relationships of belonging, of community, produced in the interstices of the double operation of the law. Cultural difference affirms names which have not yet been heard, and this means not only what is left out in the identification of differences under the principle of diversity, but also an affirmation of what is produced as unidentifiable by the state's management of consensus.

#### NOTES

1. Henry Louis Gates, Jr., "Writing 'Race' and the Difference It Makes," *"Race," Writing, and Difference* (Chicago: University of Chicago Press, 1986), 9.
2. *Ibid.*, 12.
3. *Ibid.*
4. See Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (London: Verso, 1983), and Homi Bhabha, ed., *Nation and Narration* (London: Routledge, 1990).
5. Anderson, 19.