



Colonial Rites: Custom, Marriage Law and the Making of Difference in Natal,

1830s - c. 1910

by

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## ABSTRACT

### Colonial Rites: Custom, Marriage Law and the Making of Difference in Natal,

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Chair: David William Cohen

This study is centrally concerned with examining the historical construction of difference through the contestations surrounding the state regulation of marriage custom in colonial Natal. It attends to the historical making of gender ideology and practice, in particular how the legal machinations of colonial state-making in 19<sup>th</sup> and early 20<sup>th</sup> century Natal relate to the imagining of a colonial order differentiated by race and gender. As an account of the role of multiple, different and changing forms of patriarchal state-making, espoused in the actions of various prominent officials and legislative bodies tasked with governing colonial subjects in this region, this work seeks to demonstrate the possibilities offered by gendered histories of law and ‘the state’, in all of its

contestation and complexity, to address the racialized compartmentalization which characterizes the historiography of colonial Natal.

The relations among colonial officials inside of the colonial state bureaucracy, employers of labor, white settlers and Indian and African subjects in this period implied particular forms of gendered negotiation and contestation which worked to shape social hierarchies at contingent moments of colonial rule. Women were both discursively and materially drawn into these struggles over the relative masculinity and femininity of colonialism's citizens and its subjects. Thus, both women and men who were the citizens and subjects of British colonialism might be viewed as actors in a wide field of gendered contestation. In the context of the colonial history of late nineteenth and early twentieth century Natal, such a gendered analysis of the relations of colonial rule has further implications: it permits viewing 'African', 'Indian' and 'White' subjects within the same analytical frame, by considering colonial processes of regulation which were common to all of these legally-identified groups. The intentions of a gendered analysis are twofold: by placing gender at the center of this account I illuminate the gendered constructions and effects of colonial rule, as well as drawing out the similarities, complexities and contingencies of ostensibly 'separate' policies for supposedly distinct racial groups in the same colonial space.

## **Introduction**

### **Gender, Law and the Making of Colonial Difference**

This study is centrally concerned with examining the historical construction of racial difference through the contestations surrounding the state regulation of marriage custom in colonial Natal. It attends to the historical making of gender ideology and practice, in particular how the legal machinations of colonial state-making in 19<sup>th</sup> and early 20<sup>th</sup> century Natal relate to the imagining of a colonial order differentiated by race and gender. As an account of the role of multiple, different and changing forms of patriarchal state-making, espoused in the actions of various prominent officials and legislative bodies tasked with governing colonial subjects in this region, this work seeks to demonstrate the possibilities offered by gendered histories of law and ‘the state’, in all of its contestation and complexity, to address the racialized compartmentalization which characterizes the historiography of colonial Natal.

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materially drawn into these struggles over the relative masculinity and femininity of colonialism's citizens and its subjects. Thus, both women and men who were the citizens and subjects of British colonialism might be viewed as actors in a wide field of gendered contestation. In the context of the colonial history of late nineteenth and early twentieth century Natal, such a gendered analysis of the relations of colonial rule has further implications: it permits viewing 'African', 'Indian' and 'White' subjects within the same analytical frame, by considering colonial processes of regulation which were common to all of these legally-identified groups.

The intentions of a gendered analysis are thus twofold: by placing gender at the center of this account I illuminate the gendered constructions and effects of colonial rule, and I draw out some of the similarities, complexities and contingencies of ostensibly 'separate' policies for supposedly distinct racial groups in the same colonial space. In the South African context, writing histories of any one of the aforementioned communities, marked as racially and socially distinct, requires an understanding that colonial realities were instances of interconnected processes and histories and not moments of rupture in discrete historical trajectories for single groups of people.

I investigate the manner in which colonial negotiations and legislative contestations over custom speak to the gendered processes of state-making and the gendering of colonial rule by analyzing the administration of similar forms of customary practice amongst these colonially-identified groupings. It was through the state regulation of customs of marriage, which were key to the social makings of culture at the most basic

level for all of these people, that gender in the form of historically specific notions of masculinity and femininity was negotiated, assigned, contested, refused, assumed and socially embedded through state practices and institutions in conversation with the men and women who were subject to state power. This dissertation explores the moral regulation inherent in state formation, and the valorization of particular gendered relationships and practices in the historical forms of social order which came into being in this colony in the mid-nineteenth century.<sup>1</sup>

Social histories produced about colonial Natal and the primary inhabitants of the region – ‘white’, ‘African’ and ‘Indian’ – have typically tended to focus on the experiences of one of these groups either to the exclusion of others, or (in the case of Indians and Africans) by locking them into a Manichean relationship to whites, who are with all too rare exceptions treated as synonymous with oppressive power, in the process reducing black experience to suffering and resistance.<sup>2</sup> The latter trend (itself reflective of a larger long-standing tendency in the South African historiography), has been personified until very recently by two dominant and mutually exclusive sub-traditions within the historiography of Natal: work on Zulu-speaking Africans and work on Indians who came to the region as part of an indentured labor scheme in the second half of the nineteenth century.

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<sup>1</sup> Linzi Manicom ‘Ruling Relations: Rethinking State and Gender in South African History’ *The Journal of African History*, Vol. 33, No. 3 (1992), 441-465. It was in this important piece that Manicom offered the critical insight that a new, gendered understanding of state formation and modes of governing was necessary.

<sup>2</sup> Some of the best of this work has explicated a more complicated ‘whiteness’ than the earlier Marxist history writing by employing greater sensitivity to class differences within white communities in Natal as well as gender. See Robert Morrell, *From Boys to Gentlemen: Settler Masculinity in Colonial Natal, 1880-1920*. Unisa Press, Pretoria, 2001 and Anne Shadbolt, *Daughters of the British Empire: A Study of Five British Women in Colonial Natal*. Unpublished Masters Thesis, University of Natal, Durban, 1998.

There were some important early exceptions to this trend,<sup>3</sup> and new historical work – on healing traditions and Indian/African racial dynamics in this region – has self-consciously set about doing the hard and important work of bringing together aspects of the nineteenth and twentieth century social and political lives of Indians and Africans (and in some cases<sup>4</sup> a more complicated sense of ‘whiteness’ too) in Natal.<sup>5</sup> However, we still have very little sense of how the legal and social categories of ‘Indian’ and ‘African’ came into being, and even less sense of how their creation as colonial ‘Others’ may have been achieved in relation to a colonizing white ‘Self’ in a context where Indians and African together outnumbered European settlers by more than five to one by the turn of the twentieth century. In its attempt to make righteous the wretched subjects of colonial history, the historiography of the region of South East Africa that this dissertation has taken as its subject, has refined the colonial binaries of ‘white’ and ‘black’ into their individual racial essences, and produced the history of each of these groups – their political identities always and forever separately embodied in the notions of ‘citizen’ and ‘subject’ – as discrete entities.<sup>6</sup>

The opening chapter of the dissertation situates the early colonial dominion over

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<sup>3</sup> Especially Shula Marks, *Not Either an Experimental Doll: The Separate Worlds of Three South African Women*, Bloomington: Indiana University Press, 1987.

<sup>4</sup> Julie Parle, *States of Mind: Searching for Mental Health in Natal and Zululand, 1868-1918*, Pietermaritzburg: University of KwaZulu-Natal Press, 2007

<sup>5</sup> Jon Soske, ‘Wash Me Black Again’: African Nationalism, the Indian Diaspora, and Kwa-Zulu Natal, 1944-1960’, PhD Thesis, University of Toronto, 2009; Karen E. Flint, *Healing Traditions: African Medicine, Cultural Exchange, and Competition in South Africa, 1820-1948*. Ohio University Press: Athens, 2008. Heather Hughes, ‘The Coolies will elbow us out of the country’: African reactions to Indian Immigration in the Colony of Natal, South Africa’ *Labour History Review*, Vol. 72, No. 2, August 2007

<sup>6</sup> Mahmood Mamdani, *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism*, Princeton: Princeton University Press, 1996.

local African and immigrant Indian subjects in Natal in terms of the emerging nineteenth century post-emancipation context of labor and ‘consent’. An imperial and colonial need for labor brought these groups of people together in this part of South East Africa, and it is their relationship to colonially-sanctioned forms of labor which has, historically, set them apart as objects of study.

The historiographical distinction which marks the assumed difference between Indians and Africans – in a liberal vision<sup>7</sup> as the racialized capacity for work, and in a Marxist<sup>8</sup> one as related to each group inhabiting discrete modes of production – was enabled by the historical circumstance of the colonial importation of subjects of the British Raj to the East Coast of South Africa as a replacement for the African labor which proved too difficult and politically volatile for colonists to extract in the mid-nineteenth century. The historical circumstances of the administration of Africans in Natal therefore invoked the historical presence of Indians in this part of Africa. But this point of mutuality becomes instead a story of divergence. While the separate identities of ‘African’ and ‘Indian’ were created through ethnographic productions of empire both inside and outside the colony, the labor question becomes the point of both the legal and historiographical divergence of these categories.

The labor question is key to the reification of racial difference as class difference. In a Marxist historiography it has featured as an historical ‘fact’ that Africans and Indians

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<sup>7</sup> Edgar Brookes and Colin de B Webb, *A History of Natal*, University of Natal Press, 1965, 91.

<sup>8</sup> Bill Freund, *Insiders and Outsiders. The Indian Working Class of Durban, 1910-1990*. Portsmouth and London, Heinemann, 1995.



in the nineteenth century inhabited different modes of production. This scholarly treatment has worked to make racial categories coterminous with those of class. In contradistinction to this approach, I historicize and gender the notion of ‘class’ by attempting to understand the very basic social changes implied by new and changing understandings of labor, family and custom. In contrast to a parallel historiography detailing the difficulties of the expropriation of African labor and the creation of an African working class in the twentieth century,<sup>9</sup> there is a significant body of scholarship which characterizes Indians, from the moment of their disembarkation from Indian ports, as an already-constituted ‘working class’. These works fail to address the profoundly gendered social and familial transformations lying at the heart of the transition to this form of unfree wage labor, which offered different imperatives to the formation of family and community life than did the subsistence arrangements which predominated in the lives of migrants before their arrival in the colony.<sup>10</sup> It has been suggested that the most impressive history of the ‘Indian working-class’ in the existing historiography – Bill Freund’s *Insiders and Outsiders* – is not in fact one which places class at the forefront of

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<sup>9</sup> Keletso Atkins, *The Moon Is Dead! Give Us Our Money! : The Cultural Origins of an African work Ethic, Natal, South Africa, 1843-1900*. Portsmouth, NH London: Heinemann; Currey, 1993; Patrick Harries, *Work, Culture, and Identity: Migrant Laborers in Mozambique and South Africa, C. 1860-1910*, Portsmouth, NH: Heinemann, 1994; Charles Van Onselen, *Studies in the Social and Economic History of the Witwatersrand, 1886-1914*. New York: Longman, 1982

<sup>10</sup> A particularly striking example of this is Bill Freund, *Insiders & Outsiders: The Indian Working Class of Durban, 1910-1990*. Pietermaritzburg: University of Natal Press, 1995. Others include: C.G. Henning, *The Indentured Indian in Natal (1860-1917)*. New Delhi: Promilla, 1993; Fatima Meer. *Portrait of Indian South Africans*. Durban: Avon House, 1969; Uma Dhupelia-Mesthrie. *From Cane Fields to Freedom: a Chronicle of Indian South African Life*. Cape Town: Kwela Books, 2000; Surendra Bhana (ed.), *Essays on Indentured Indians in Natal*. Leeds: Peepal Tree Press, 1991; Surendra Bhana and Joy P. Brain. *Setting Down Roots: Indian migrants in South Africa, 1860-1911*. Johannesburg: University of the Witwatersrand Press, 1990; Bhana, Surendra and Pachai, Bridglal. (eds) *A Documentary History of Indian South Africans*. Cape Town: David Philip, 1984; Joy P. Brain. *Christians Indians in Natal 1860-1911: An Historical and Statistical Study*. Cape Town: Oxford University Press, 1983; Surendra Bhana and Goolam Vahed. *The Making of a Political Reformer; Gandhi in South Africa, 1893-1914*. New Delhi: Manohar Press, 2005; Ashwin Desai and Goolam Vahed. *Inside Indian Indenture: A South African story, 1860-1914*. University of KwaZulu-Natal Press, Durban, 2007.

its analysis, but one that begins with a premise of ethnic specificity and ultimately suggests a particularity of cultural and community experience.<sup>11</sup>

My research suggests that the distinctiveness of experience to which existing scholarship is wedded is the product of an *a priori* assumption of working-class identity for Indians in Natal which does not recognize the importance of the gendered processes of social reconstitution involved in transformations of class, thereby undermining the possibility of a history which conveys the simultaneity of African and Indian colonial experiences, and the contemporaneity of the discourses employed in their colonial regulation.

Like the Africans they encountered in Natal, immigrants from rural India were about to enter into similar struggles with colonial officials, with their employers, with Africans, and crucially with each other, over the profound social and familial transformations accompanying the colonial extraction of their labor. Indians and Africans were brought into the same physical space, and the same discursive terrain, by a form of colonialism which attempted to simultaneously impose on both a similar social order, in the form of 'custom' and 'tradition'.

The gendered implications of colonial laboring dispensations came to take on new political relevance in the post-emancipation period, beginning with the end of slavery in

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<sup>11</sup> Keith Breckenridge, 'Promiscuous Method: The Historiographical Effects of the Search for the Rural Origins of the Urban Working Class in South Africa', *International Labor and Working-Class History*, 65, (Spring 2004) 32.

the nearby Cape Colony in the 1830s. The kinds of homestead-based labor which existed in colonial spaces like Natal laid claim to the simultaneous productive and reproductive labor of African women, articulating what Jacqueline Jones has described as one of the central gendered problematics of slavery.<sup>12</sup>

These kinds of laboring arrangements had begun to receive closer moral scrutiny in the abolitionist moment of the early nineteenth century, and moral reformers including missionaries came to identify homestead-based production as analogous to ‘immoral’, slavery-like conditions. Of course, the movement toward ‘free labor’ for the racialized populations of Empire was by no means uncomplicated by the competing rhetoric and intentions of various levels of imperial bureaucracy, local administration, settler capitalists and interest groups such as abolitionists. It was nonetheless the case that the British Empire had endured a tumultuous turn away from slavery, and the social underpinnings of that system needed to be undermined, at least rhetorically. This was certainly pursued more vigorously where the destruction of alternative laboring arrangements coincided with colonial and capitalist interests such as gains of labor in settler spaces. But the Natal colonial administration’s inability and disinclination to forcibly proletarianize Natal’s African population meant that the encompassing discourses of moral reform amongst missionaries and a settler colonial public which targeted the Nguni population remained in tension with the continuing administrative prevarication over the ‘civilizing mission’ of Native policy.

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<sup>12</sup> Jacqueline Jones. *Labor of Love, Labor of Sorrow: Black Women, Work and the Family from Slavery to the Present*. New York: Vintage, 1985.

‘Indians’ appear on the scene in mid-nineteenth century Natal in this context of relative (though ultimately short-lived) African economic independence, and in the broader context of the recent demise of Atlantic slavery and the branding of indenture as a form of ‘unfree’ wage labor.<sup>13</sup> I situate indentured labor transport in terms of the gendered reproductive debates of this imperial moment and consider the implications of the new gendering of this form of labor for imperial and colonial policy.

New forms of labor such as indenture, emerging in the wake of slavery, were closely bound to ideas of ‘proper’ sex and gender relations. **By the middle of the nineteenth century in England, the family and the home had come to epitomize the central area of women’s responsibilities with accounts of women’s lives in the nineteenth century conveying a powerful ideology of domesticity.**<sup>14</sup> As Anna Davin illustrates in the context of nineteenth century British imperial domination, **‘women’s place’ was inextricably bound with motherhood, domesticity and the reproduction of families.**<sup>15</sup>

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<sup>13</sup> Madhavi Kale, *Fragments of Empire: Capital, Slavery, & Indian Indentured Labor in the British Caribbean*, Philadelphia: University of Pennsylvania Press, 1998, 26.

<sup>14</sup> Leonore Davidoff and Catherine Hall, *Family Fortunes: Men and Women of the English Middle Class 1780–1850*, Chicago: University of Chicago Press, 1987. See also Sara Delamont & Lorna Duffin. *Nineteenth Century Women: her cultural and physical world*, London: Croom Helm, 1978; Joan Burstyn. *Victorian Education and the Ideal of Womanhood*, London: Croom Helm, 1980; Joseph Banks. *Prosperity & Parenthood: A Study of Family Planning among the Victorian Middle Classes*, Routledge & Kegan Paul, 1954; Deborah Gorham. *The Victorian Girl & the Feminine Ideal*, London: Croom Helm, 1982.

<sup>15</sup> Anna Davin. ‘Imperialism and Motherhood’, *History Workshop Journal*, 5, 1978, 9-65.

*The Making of Difference: Customary and Common Law Divisions of 'Citizen' and 'Subject'*

The contestation over the categories of 'ruler' and 'ruled' which lay at the heart of colonial politics in Natal were confounded by the racial ambiguities of gendered customary practice which existed in the pre-colony. The acculturation of early 'white' traders in the area to African customary ways of life not only confounded the binaries of a colonial encounter, but placed colonists like Theophilus Shepstone at the forefront of the struggle to delineate the boundaries of 'whiteness.' The legal lines which men like Shepstone were attempting to use to divide desire from racial discipline were an attempt to 'other' the ambiguous sexual and social existences of these early 'settlers' who had arrived in Natal in the late pre-colonial period.

If the 'otherness' of colonized persons was neither inherent nor stable, and difference had to be defined and constantly maintained, this struggle necessarily occurred in relation to the making of 'whiteness.' In early colonial Natal, as missionaries took pains to point out, social boundaries marking racial purity were not clear but had to be made so through discourses and institutions of 'civilization' and by the constant legal attention to differentiation between 'Native' custom and an unmarked (and by implication 'white') common law which was provided by state legislation.

Colonial racial difference in Natal was institutionalized through the establishment of colonial legal categories. Rather than the claim that *a priori* 'difference' is the basis for

the making of a 'colonial legal culture', it is my contention that new colonial understandings of difference, of social boundaries, of 'civilized' behaviors and of the possibilities and limits of race and respectability, are co-constructed in conversation with emerging legal institutions which assist with the reproduction of these new understandings of colonial difference. In analyzing attempts to assert difference, this study admits the dialectical complexity of the making of historical understandings of forms of difference, in particular as a wide range of individuals come to be enrolled in the working out of an always unstable 'colonial project'.

It is through the analysis of gendered state regulation that the legal making of racial difference is revealed. The development and institutionalization of racially distinct bodies of law coded gendered relationships in ways that are 'racialized' or culturally specified, for Indians and Africans. They marked customary practices which constitute and reproduce the gendered roles of men and women as husbands and wives in relation to each other as 'deviations' from an always 'moral' common law norm. The common law exclusion of 'uncivilized' (and therefore unassimilable) custom both identifies practices and their practitioners as different, and marks it as deviant to 'moral convention.' The common law default against which custom is imagined, and which came to embody the 'normative' gendered prescriptions of the mid-nineteenth century is simultaneously marked as 'white', and an embodiment of an aspirantly 'universal' morality in that it is supposedly constituted of material which has no cultural particularity.

The bifurcation of common law vs. customary law has become one of the defining characteristics of postcolonial African historiography and the ‘colonial moment’ is often posited as one of binary oppositions. To quote Ann Stoler and Fred Cooper, while we might in our ‘postcolonial’ existence be assured that the world which we inhabit is “infinitely more complicated, more fragmented and more blurred...we need to think through not only a colonial history that appears as Manichaeic but [an] historiography that has invested in that myth as well.” When Mahmood Mamdani’s *Citizen and Subject* was published more than a decade and a half ago, it offered a critique of liberal visions of colonial lawmaking and helped to further an understanding of the authoritative substance encapsulated in reifications of colonial difference.<sup>16</sup> But it did not offer a critique of the binary notions of difference which it identified, as being colonially-reified. As such it simply established a basis for furthering Manichean visions of colonial rule by inverting them to suit a particular, bifurcated, postcolonial understanding of historical virtue. In contrast, this is a study of law which lays bare some of the simultaneities, contemporaneities and interstices of legal discourse and practice that characterized the making of a ‘colonial order’ in the very space in which he situated his study.

With respect to this, chapter two of this thesis draws out the making of the referent for colonial legal exclusion: that is the abstracted, deracinated ‘colonizer’. What this chapter reveals is that the modernization of ‘whites’ and the installation of white minority rule in twentieth century South Africa was neither a teleological movement, nor a politically and socially manifest destiny in the mid-nineteenth century. For what would

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<sup>16</sup> Mamdani, *Citizen and Subject*.

become a politically and socially dominant racial grouping, fractures of language, ethnicity, class and respectability dogged the social mobility of many. As Cooper and Stoler have argued, “the resonance and reverberation between European class politics and colonial racial policies was far more complicated than we have imagined... The language of class itself in Europe drew on a range of images and metaphors that were racialized to the core.”<sup>17</sup> The basis of a racialized social hierarchy which allowed for the discursive assimilation of settlers of all classes into the privileged position of ‘whites’ came to depend on the new differentiations of race and class which political elites were only beginning to shape in relation to their colonial ‘Others’ in nineteenth century Natal.

It is curious that the racial terms of ‘white’, ‘Indian’ and ‘African’ as they are used in much of the historiography of Southern Africa, reserves capital letters for the ‘Others’ that colonialism made, and a small ‘w’ for this region’s colonial rulers. Perhaps this represents an act of self-consciously virtuous postcolonial re-enactment, diminishing the textual prominence of the once-powerful. Likely, it hints at a more depressing historical and historiographical reality. The un-capitalized “w” represents the taken-for-granted realm of colonial citizenship, the uncritical unmarked domain of whiteness, representing a stability of subjectivity, and a security of colonial existence which we have come to accept as being out of reach for the Capitalized Ones. ‘Blacks’ (or ‘Africans’) and ‘Indians’ are specific, they are marked as the essential bearers of race, ethnicity and

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<sup>17</sup> John L. Comaroff in ‘Images of Empire, Contests of Conscience: Modes of Colonial Domination in South Africa’ in Frederick Cooper and Ann Laura Stoler. *Tensions of empire: colonial cultures in a bourgeois world*. Berkeley: University of California Press, 1997; John Comaroff and Jean Comaroff, *Of Revelation and Revolution Vol. II: The Dialectics of Modernity on a South African Frontier*, University of Chicago Press, 1997; Gareth Stedman-Jones, *Outcast London: A Study of the relationship between the classes in Victorian Society*, Oxford: Clarendon Press, 1971.



culture against the ‘whites’ who claimed dominion over them through abstractions of law which have, for the most part, remained unexamined. But ‘whiteness’ in the colonies, as much as in Europe, had to be made through discursive and material struggles in relation to its ‘Others’. This dissertation is offered as a modest beginning to ‘unwriting’ these racially ghettoized histories.

It is in the service of understanding these struggles that chapter two deconstructs and demystifies the making of colonial civil law. Much of the writing about the administration of Native law in Natal has attempted to illuminate the character of the legal ‘outside’ created by Theophilus Shepstone and his colonial contemporaries to rule Africans in Natal.<sup>18</sup> It is ironic, with respect to understanding the making of ‘difference’ in this region that there is little historiographical sense – beyond stereotyped assumptions about the common law – of the content, or the making of the entity, from which ‘African custom’ is understood to be differently, and supposedly antagonistically, made.<sup>19</sup>

This chapter provides an account of the making of an aspect of colonial marriage law for Natal’s white settlers and argues for the simultaneous making of ‘Self’ and ‘Other’ in Natal. It is an empirical account of the immense struggle that goes into making

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<sup>18</sup> Jeff Guy, ‘An Accommodation of Patriarchs: Theophilus Shepstone and the Foundations of the System of Native Administration in Natal’, Unpublished paper. *Colloquium on Masculinities in Southern Africa*, University of Natal, Durban, 1997; Thomas McClendon, *White Chief, Black Lords: Shepstone and the Colonial State in Natal, 1845-1878*, Rochester: University of Rochester Press, 2010; Norman Etherington ‘The Shepstone system in the colony of Natal and beyond the borders’ in Andrew Duminy and Bill Guest (eds), *Natal and Zululand from earliest times to 1910*. Pietermaritzburg: University of Natal Press, 1989, 170-192; David Welsh, *The Roots of Segregation: Native Policy in Colonial Natal, 1845-1910*. Cape Town: Oxford University Press, 1971; Martin Chanock, *Fear, Favor and Prejudice: The Making of South African Legal Culture, 1902-1936*, Cambridge: Cambridge University Press, 2004

<sup>19</sup> Mamdani, *Citizen and Subject*.

both citizens and subjects out of people subject to laws of custom. It is also a consideration of how colonial citizenship is made in reference to both an imperial metropole and the creation of colonial ‘Others’. In particular, it is an account of how law that had been offered by colonial rulers and legislators in this region as the moral default is constituted out of practices based on the selfsame principles that it regards as ‘immoral’ and ‘uncivilized’ in those who were made to be colonial subjects.

The very large and excellent Africanist scholarship on the history of customary law and colonialism in Africa – in particular the work of gender historians – provides important inspiration for this dissertation.<sup>20</sup> But what this otherwise very sophisticated historiography has paradoxically left intact is an *a priori* understanding of the colonial state and the civil codes through which it governed, as being without a cultural specificity of its own beyond an over-determining racist white supremacy. The contestations in

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<sup>20</sup> Terence Ranger, ‘The invention of tradition in colonial Africa’, in Eric Hobsbawm and Terence Ranger (eds.), *The Invention of Tradition* (Cambridge, 1983), 211-62; Martin Chanock, ‘Making customary law: men, women, and courts in colonial Northern Rhodesia’, in Margaret Jean Hay and Marcia Wright (eds.), *African Women and the Law: Historical Perspectives* (Boston, 1982), 66-7; Martin Chanock, *Law, Custom and Social Order: The Colonial Experience in Malawi and Zambia* (Cambridge, 1985); Elizabeth Schmidt, *Peasants, Traders, and Wives: Shona Women in the History of Zimbabwe, 1870–1939* (Portsmouth NH, 1992); Diana Jeater, *Marriage, Perversion, and Power: The Construction of Moral Discourse in Southern Rhodesia 1894–1930* (Oxford, 1993); Sara Berry, ‘Hegemony on a shoestring: indirect rule and access to resources in Africa’, *Africa*, 62 (1992), 327–55; Kristin Mann and Richard Roberts, (eds.), *Law in Colonial Africa* (Portsmouth NH, 1991); Marcia Wright, ‘Justice, women, and the social order in Abercorn, Northeastern Rhodesia, 1897–1903’, in Hay and Wright (eds.), *African Women and the Law*; Judith Byfield, ‘Women, marriage, divorce, and the emerging colonial state in Abeokuta (Nigeria) 1892–1904’, in Dorothy Hodgson and Sheryl McCurdy (eds.), *‘Wicked’ Women and the Reconfiguration of Gender in Africa* (Portsmouth NH, 2000), 27–46; Sean Hawkins, ‘“The woman in question”: marriage and identity in the colonial courts of modern Ghana, 1907–1954’, in Jean Allman, Susan Geiger and Nakanyike Muisi (eds.), *Women in African Colonial Histories* (Bloomington, 2002), 116–43; Brett Shadle, ‘“Changing traditions to meet current altering conditions”: customary law, African courts and the rejection of codification in Kenya, 1930–60’, *Journal of African History*, 40 (1999), 411–31; Jean Allman and Victoria Tashjian, ‘I Will Not Eat Stone’: A Women’s History of Colonial Asante (Portsmouth NH, 2000); Richard Roberts, *Litigants and Households: African Disputes and Colonial Courts in the French Soudan, 1895–1912* (Portsmouth NH, 2005); Rachel Jean-Baptiste, ‘These laws should be made by us’: Customary marriage law, codification and political authority in Twentieth-Century Colonial Gabon’ *Journal of African History*, 49 (2008), 217-40.

Natal over the ‘Deceased Wife’s Sister Bill’, and the subsequent ‘Colonial Marriages (Deceased Wife’s Sister) Act’ of which the former was a part, reveal much more crossover and complexity in the making of custom and common law in this region than is acknowledged by the existing historiography. In particular, it reveals a commonality of customary practice to the lives of all those who found themselves in mid-19<sup>th</sup> century Natal, and the contingent circumstances of colonial and imperial respectability out of which aspects of this colony’s civil law was wrought.

### *Customary Regulation and Colonial Morality*

This theme of the colonial state’s appropriation and transformation of historically existing forms of customary practice is taken up in relation to ‘African’ and ‘Indian’ customary regulation in the remaining chapters. In chapters three to five I argue that the institutions of colonial rule made and remade custom in conversation with those in whose lives state intervention was intended, as well as with regard to the moral imperatives presented by reformers and a wider settler colonial population.

The position of Indians as labouring subjects of Empire placed new obligations on colonial officials for the facilitation of a reproductive realm which was coming increasingly to be understood in this moment as ‘private’, and was one in which customary practices were predominantly implicated. In addition to being tied to a more global imperial labor context, until the turn of the twentieth century the administration of Indian customary practice in Natal was carried out with overlapping administrative

imperatives in mind: the status of indentured migrants as temporary residents in Natal meant that their administration initially proceeded with reference to an alternative imperial space, one which was understood at this point in the Empire as being of singular ethnographic and customary integrity. But their continued presence in the colony, and the inability of the administration to force their return to the Indian subcontinent enabled the rapid growth of the number of Indians resident in the colony in the second half of the nineteenth century. The struggles of these migrants to build new lives as individuals and families in the context of the social ruptures of indentured transport, and the fact that they came to outnumber the white settler population by the early twentieth century, induced different kinds of interventionist colonial administration in their customary lives.

The Imperial regulation which was meant to facilitate indentured familial and social life to ensure the stability of imperial and colonial rule began with the setting of a mandatory sex quota for indentured transport to Natal which was higher than that for any other indenture colony. The British Indian government and the Colonial Office had insisted that four women were required to be recruited for every ten men shipped to Natal in the first year of immigration and that this quota be raised by just over three percent a year to fifty percent of women by 1863. As early as 1863 then, fully half of all indentured Indians arriving in the colony were expected to be women.<sup>21</sup> The quota was informed by emerging nineteenth century metropolitan understandings of gender roles, together with ongoing contestation over the status of women in British India.<sup>22</sup>

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<sup>21</sup> Y.S Meer, *Documents of Indentured Labor in Natal, 1851-1917*, Durban: Institute for Black Research, 1980, Document 21: 'Proceedings of the Madras Government', 51.

<sup>22</sup> See for example, Lata Mani. *Contentious Traditions: The Debate on Sati in Colonial India*. Berkeley and Los Angeles: University of California Press, 1988; Mrinalini Sinha. *Colonial Masculinity: The 'Manly*

Many contradictions attended the issue of sex quotas: on the one hand, unattached males in colonial territories outside of India posed a number of difficulties, but the Indian Government could also not be seen as sanctioning the transfer of especially single Indian women to ‘alien lands.’<sup>23</sup> When ‘free’ from parental or spousal authority, Indian women immigrants were demonized in British India and in the colonies as the agents of corruption. However, in domestic relationships with male indentees, Indian women were pursued as ‘the most effective barriers to moral corruption, and carriers of the seeds of morality, stability and culture.’<sup>24</sup>

This view was not only applicable to Indian women in the nineteenth century. Historians writing about eighteenth and nineteenth century Britain and the imperial world have discussed, at length, similar discourses implicating single white women in Britain and settler women in the colonies. In their discussions of gender and sexuality in empire scholars such as Ann Stoler, Margaret Strobel and others have illustrated that the designated role of white women in imperialism was in large part directed towards re-creating British and Dutch domestic life in the colonies; and that settler and ‘indigenous’ sexualities played a significant part in delineating the position of women as subordinate to men in colonial endeavors.<sup>25</sup>

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*Englishman’ and the ‘Effeminate Bengali’ in the Late Nineteenth Century.* Manchester and New York: Manchester University Press, 1995.

<sup>23</sup> Rhoda Reddock. *Women, Labor and Politics in Trinidad and Tobago: A History*, London: Zed Books, 1994, 28.

<sup>24</sup> Reddock. *Women, Labor and Politics*, 28.

<sup>25</sup> Ann Stoler. *Carnal Knowledge and Imperial Power: Race and the Intimate in Colonial Rule*. Berkeley: University of California Press, 2002; Margaret Strobel. ‘Gender, Race, and Empire in Nineteenth- and Twentieth-Century Africa and Asia,’ in Renate Bridenthal, Susan Mosher Stuard, and Merry E. Wiesner (eds.) *Becoming Visible: Women in European History*. New York: Houghton Mifflin Company, 1998;

Once in Natal, women arriving under the auspices of indentured transport needed additionally to be policed in particular ways in a colonial space where customary practices were regarded to have wider moral implications in relation to the colony's settler and African inhabitants. Natal was the only nineteenth century British colony to which indentured workers were transported which had a majority 'Native' population, but which devolved into 'white' settler minority rule until the closing decade of the twentieth century. As such, the state routines of legal and bureaucratic administration through which attempts to establish patterns of gendered authority were made in the nineteenth century colony were in constant dialogue with settler rhetoric and fears of racial transgression and moral deviance.

It was Indian women, in particular single Indian women, who became the key site for the colonial moral regulation of 'Indian custom' in Natal. The ambiguous status of these women's indenture contracts and their ensuing mobility caused administrative consternation over the 'failure' of custom to constrain their movement, and ultimately forced colonial reform of 'Indian' customary practice, albeit in qualified ways, by the 1890s. The public visibility of their agency resulted in repeated attempts by colonial legislators to tie them to male domestic authority, first by deferring to an undefined but racially-imagined 'custom.' But the failure of this administrative course, and the settling of the residency status of ex-indentured workers in favor of their permanent domicile by

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Phillipa Levine. 'Introduction: Why Gender and Empire?' in Phillipa Levine (ed.) *Gender and Empire*, Oxford: Oxford University Press, 2004. See also Ann Shadbolt. *Daughters of the British Empire: A Study of Five British Women in Colonial Natal*. Unpublished Masters Thesis, University of Natal, Durban, 1998 and Ann Shadbolt. *Victorians in Natal: A Study of Colonial life in Natal constructed through the letters and diary of three generations of a British Settler Family*, Unpublished Honours dissertation, University of Natal, Durban, 1996.

the turn of the twentieth century resulted in more decisive administrative intervention asserting colonial morality and legally rejecting customary practices such as polygny. The assimilation of Indian indentured and ex-indentured workers into colonial common law with the rejection of some forms of custom met with the approval of Gandhi and other ‘colonial-born’ nationalists who sought the civil legal incorporation of a group of people whose ‘Indianness’ was realized by racialized, customary identification in this part of South East Africa.

For Indian women in particular, assimilation proved to be a double-edged sword. Women remained key to the new political discourse into which indentured Indians were drawn in twentieth century South Africa.<sup>26</sup> But the newly respectable manner in which they began to be constructed in Gandhian discourse, as the noble bearers of timeless ‘Indian tradition’, belied the nineteenth century struggles in which their sheer ‘unrespectability’ had made visible their life projects. The contestations which these women had offered to colonial attempts to define their place in Natal either in relation to ‘Indian custom’, or emerging nineteenth century colonial gendered divisions of labor and authority, had rendered them discursively analogous to the fears posed by African men who came under the jurisdiction of ‘uncivilized’ Native law which continued to uphold ‘immoral’ gendered practices. It was from this racial ambiguity that Indian women had to be redeemed in the twentieth century.

Even more so than was the case with the government of indentured migrants,

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<sup>26</sup> See the conclusion of this dissertation and Radhika Mongia, ‘Gender and the Historiography of Gandhian Satyagraha in South Africa’ *Gender & History*, Vol.18 No.1 April 2006, 130–149.

African customary regulation reveals the tensions and fractures within the colonial administration; and between moral reformers and missionaries, and those involved in Native policy. There was little consensus over the desirable pace or terms of ‘civilizing’ reform amongst the prominent individuals and interest groups which made up ‘settler society.’ **The struggles amongst missionaries themselves over morally permissible forms of custom; and between dominant missionary ideas and Native administrative actions over the desirability of the direction and pace of ‘Native policy’ toward moral imperatives of ‘civilization.’**

African men, and their relationships to African women as their prospective brides, wives and daughters, proved to be a useful Shepstonian foil to broadly-stated colonial aims of ‘civilization.’ Like many similar native administrators elsewhere in Africa, the Secretary for Native Affairs manipulated existing forms of gendered authority to shore up a particular vision of colonial life which was racially-segregated and culturally discrete. While his detractors inside and outside of the colonial administration decried what they believed was the affirmation of ‘immoral’ custom through Shepstonian Native policy, Native administration in nineteenth century Natal ultimately came to reflect his ideas rather than those of colonists and moral reformers who understood the eventual assimilation of Africans and the eradication of customary practice to be the aim of colonial rule.

Even when Shepstone’s policies appeared to intersect with reformist visions, such as with the 1869 African Marriage Law which instituted the right of African women to



consent to their marriages, this was (as elsewhere in colonial Africa) in pursuit of the aim of undermining the power of older patriarchs in relation to younger men rather than a wholehearted liberal concession of individual majority to women. When African women in Natal responded with alacrity to the limited rights conceded to them by the law, Shepstone was quick to recant this single moment of ‘reformist’ policy. Native policy therefore remained at odds with reformist gender discourse, and Shepstone’s maintenance of African ‘custom’ through manipulation, negotiation, coercion, obfuscation and re-invention continued to valorize particular kinds of masculine power at different moments of rule. Shepstone was a supporter of ‘African patriarchy’ in its most caricatured colonial incarnation.

He produced a written body of law which favored African men in the roles of husbands over those of men as fathers, and in the words of legal scholar H.J Simons ‘stereotype[d] a concept of feminine inferiority unknown to the traditional society’.<sup>27</sup> This written, colonial iteration of custom was nonetheless embraced by many prominent African interlocutors. Its general acceptance by a number of chiefs as well as a largely Christian, Zulu-speaking literate elite reflected some of the shared assumptions of masculine power between colonial administrators and African male subjects. The Zulu/English newspaper *Inkanyiso* reported in September 1891 more than a decade and a half after the Code was promulgated, that it was in many respects a ‘very good digest of our Native Laws’.<sup>28</sup> Shepstone’s reluctance toward outright reform meant the inclusion of the ‘accommodations of patriarchy’ as they were produced in the code may not have had

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<sup>27</sup> H.J. Simons, *African Women: Their Legal Status in South Africa*. London, 1968. 26.

<sup>28</sup> Campbell Collections (KC), *Inkanyiso*, September 1891.

a great deal of long-term stability, but it exemplified the co-production of a legal regime which augmented particular forms of customary authority, and assisted with the production of a racially-differentiated, gendered social order in the years of rapid colonial expansion in Natal.<sup>29</sup>

But Shepstonian refusal to admit Africans to colonial common law did not go unchallenged. The *amakholwa*, as the African Christian population of Natal were known, provided their own challenges to colonial exclusion. Early on, this small but publicly-prominent African Christian population engaged the terms of their exclusion from ‘civilized law’ critically by seeking conversion on their own terms. The first generation of *amakholwa* drew missionaries such as the Anglican Archbishop of Natal, John William Colenso into theological conversations and deep reflection on the imperatives of first generation conversion in missionary contexts.<sup>30</sup> Their interactions resulted in Colenso’s argument for the permissibility of admitting first generation African converts who were polygynists, and their families, to baptism. But conversion did not admit even these few thousand Africans, who were convinced of their ability to meet the civilizational goals set by missionaries and some settler-colonists, to the domain of ‘white law’ or colonial common law.

As a collective, they strove to transcend the racial division of Native law and tried

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<sup>29</sup> Guy, ‘Accommodations of Patriarchs’

<sup>30</sup> Jeff Guy, ‘Class, Imperialism and Literary Criticism: William Ngidi, John Colenso and Matthew Arnold’, in *Journal of Southern African Studies*, vol.23 no.2 and Vukile Khumalo, ‘Epistolary Networks and the Politics of Cultural Production in KwaZulu-Natal, 1860-1910’, Ann Arbor: University of Michigan, Ph.D. Dissertation, 2004.

to claim access to the common law by advocating the criminalization of bigamy for those Africans married by Christian rites. In doing this they were attempting, in concert with missionaries, to induce the colonial state to follow through on the claims of ‘gradual civilization’ made by its Secretary for Native Affairs and its Lieutenant –Governor. But in nineteenth century colonial Natal, even the dubious liberalism of Empire was dead in the water. Instead, the simultaneity of their legal existence between Native law and colonial common law which the African Christian Marriage law ushered in did little to further the process of legal assimilation into a realm of colonial citizenship.

By the turn of the century, as this dissertation concludes, the state had turned completely against the African Christian enterprise. Fears of ‘Ethiopianism’, or political revolt by independent African churches resulted in the further denial of common law provisions to permit Africans to even solemnize marriages, causing African Christians who became prominent early twentieth century nationalists to declare the hypocrisy of a ‘Christian’ colonial enterprise.

## Chapter One

### **From African Colonial Production to Indian Indentured Labor: Gendered Moral Economies in an Age of Consent**

The Colony of Natal was annexed as an outpost of British settlement in 1843, with the British having forced the retreat of the Boer *volksraad* [people's parliament] of the short-lived Boer Republic of Natalia, and the concession of land between the Tugela and Buffalo Rivers from the Zulu King Mpande. Although the colony was initially intended as a 'European' (white) settlement, Natal's government soon came to realize that the existing presence of local African chieftaincies and the continuing migration of thousands of Africans fleeing post-Shakan civil war in the mountainous areas immediately north of the colony (a region known to colonists and into the present-day as Zululand) to areas in and around Natal, necessitated more carefully considered administrative attention.<sup>1</sup>

The social upheaval which had been tearing apart the Zulu kingdom since the 1830s appeared to the new colonial administration to present possibilities for the fulfillment of the colony's growing labor needs. It also presented considerable legal and political challenges with respect to the administration of the customary practices of this

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<sup>1</sup> *Proceedings of the Commission Appointed to Inquire into the Past and Present State of the Kafir in the District of Natal and to report upon their future government, and to suggest such arrangements as will tend to secure the peace and welfare of the district*, J. Archbell and Son, Pietermaritzburg, 1853.

new Imperial subject population. The immediate difficulty was that the Zulu Kingdom was not subject to British authority but an independent polity, and would remain nominally so until its military defeat by the British in 1879.<sup>2</sup> In 1853, in order to determine the nature, extent and implications of customary forms of political authority amongst Zulu-speaking Africans to better serve the interests of this fledgling settler colonial enterprise, the Natal government established a Commission of Inquiry into ‘the past and present state of the Kafirs in the District of Natal’.<sup>3</sup>

The Commission listed amongst its foremost aims an inquiry into the nature of Zulu customary authority; personal forms of customary practice amongst Africans with specific regard to marriage, ages of male and female majority and property succession; and the ‘causes and possible remedies for the want of labor’ in Natal.<sup>4</sup> What the 1853 Commissioners came to realize in the course of their investigations were the clear imbrications of customary chiefly authority, property succession, and marriage amongst Zulu-speaking Africans in the region; something which anthropological and historical studies of Zulu culture would describe in greater detail in the twentieth century.<sup>5</sup>

Marriage – in particular polygynous marriage – was the basis for the formation of homesteads consisting of houses belonging to the individual wives of African patriarchs.

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<sup>2</sup> Jeff Guy, *The Destruction of the Zulu Kingdom: The Civil War in Zululand, 1879-1884*, London, Longman 1979.

<sup>3</sup> *Commission into the Past and Present State of the Kafir*.

<sup>4</sup> *Commission into the Past and Present State of the Kafir*, 5

<sup>5</sup> Eileen Krige, *The Social System of the Zulus*. Pietermaritzburg: Shuter & Shooter, 1936. Harriet Ngubane, ‘Marriage, affinity, and the ancestral realm: Zulu marriage in female perspective’ in Krige, E. J. and Comaroff, J. L. (eds), *Essays on African Marriage in Southern Africa*. Cape Town, Juta, 1981.

These homesteads formed functional units of both subsistence and market-oriented production, and set the customary terms for the reproduction of lineage-based succession. As such, they were the basic unit of political authority under local chiefs. The report of the commission elaborated these complex imbrications, detailing possible reforms of customary practice without which the commissioners believed the colonial expropriation of African labor would not be possible. By drawing out the moral premises and colonial implications of African customary arrangements as they understood them, they began to constitute philosophical bases for administrative interactions between an emerging colonial moral and political economy, and Natal's growing African population.

#### *Racial Segregation, Gendered Labor and Colonial Morality*

The 'introductory historical narrative' which opened the Commission's report and framed the inquiry asserted an overwhelming political desire for the racial supremacy of a white settler minority over a large African population, who were discursively constructed as an 'undesirable' presence within the boundaries of the colony. The colony's African population was growing steadily through migration from the Zulu kingdom, to reach close to a hundred thousand by the 1860s. It therefore decisively outnumbered the six thousand or so mainly English settlers living in the colony after the majority of Boer families departed from the region within a few years of the declaration of British rule in 1843. The Commission was at pains to declare the majority of the Africans in the colony to be 'foreigners' fleeing violence in the north, granting the

legitimate presence of only a few thousand ‘aboriginal’ inhabitants.<sup>6</sup>

Earlier ‘Location Commissions’ set up in the late 1840s to investigate a landed, political solution to an African presence had proposed setting aside large tracts of land, or ‘Native locations’ to which Africans could be consigned to live in relative autonomy in an effort to protect settlers from the constantly invoked threat of violent revolt believed to be posed by African ‘barbarism’ or ‘savagery’.<sup>7</sup> While colonists believed that a great deal of this threat was one of almost-inevitable violence to white settler life and property, they viewed the moral threat of ‘uncivilized’ customary practices with equal foreboding. The 1853 Commission upheld the resolutions of the earlier Commissions that efforts towards the moral ‘improvement’ of Africans depended critically upon raising the social status of women through the reform of customary practices. It recognized, however, that the total abrogation of existing Nguni customary practices was likely to remain impracticable for some time.

Practices like polygyny, *ukungena* (levirate marriage), *ukulobola* (‘bridewealth’) and premarital sexual practices such as *ukusoma* (thigh sex) which had been observed and documented by missionaries and magistrates since early white settlement, were constructed as manifestations of the kinds of moral perversions from which new settler families needed to be protected. As I argue in the following chapter, it was the temporal and psychic proximity of settlers themselves to ‘non-Christian’ forms of customary

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<sup>6</sup> *Commission into the Past and Present State of the Kafir*, 6.

<sup>7</sup> Pietermaritzburg Archives Repository, (PAR hereafter), *Blue Book* for 1848, The Report of the Location Commission, of date 30th March, 1847.

practice which made moral transgression seem imminently dangerous. African men, the 1853 Commission argued, should not be situated

in the neighbourhood of towns as [this] aggravates the sufferings of the Kafir wives or female slaves, who have increased field labour laid upon them, to produce articles for sale...Kafirs so situated...are also dangerous to the safety of the towns. In proportion to the profits derived from this forced female labour, is the disinclination of the adult male Kafir to work. He consequently remains an unimproved savage.<sup>8</sup>

The ‘forced female labor’ to which the Commissioners’ comments referred loomed large in colonial reformist discourse as a key part of the immorality of an African homestead-based economy in which African men supposedly lived idly off of the agricultural labor of African women, and which evoked the moral specter of recently-abolished slavery.

The 1853 Commission supported the proposal for the setting up of Native locations as segregated spaces, but argued strenuously against the manner in which the earlier commissions had viewed such spaces in relation to white settlement. The 1853 Commissioners presented the twin moral and political imperatives of ‘civilization’ through gradual customary reform and inducements for African men to labor for settlers as primary considerations in the making of ‘Native policy’. They proposed instead that the locations envisioned should not be large or self-sustaining, and rather than permitting the kinds of subsistence production (both agricultural and artisanal) through which African women’s labor reproduced homestead life, these spaces needed to be oriented toward producing ‘civilization’ through male labor and its ‘natural’ inducement to a

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<sup>8</sup> *Proceedings of the Commission Appointed to Inquire into the Past and Present State of the Kafir*, 50



different sort of family life, based in monogamous, nuclear, male-headed households. African men, especially, were to be drawn into relationships with settlers through the diminution of the size of locations as, in the words of the commission, African access to considerable tracts of arable land would ‘do away with the mutual advantages to the settlers, and the Kafirs, anticipated from the Location system, rather diminish[ing] than increas[ing] the supply of labour, prevent[ing] the union of the two races, as employer and employed, and consequently destroy[ing] in that respect the opportunity of the latter acquiring the habits of civilization’.<sup>9</sup>

The elaboration of ‘industrial work’ or wage labor as a path to moral improvement was more than just instrumental to securing a colonial labor supply. It was, first and foremost, crucial to the imagining of a racially-based social order in which white settlers maintained ultimate control over the lives and labor of their racial ‘others’ in the colony. This was so important that the report of the 1853 Commission worked towards revising the dominant, pejorative view in ‘English opinion’ of early Trekboers or Dutch farmers as intransigent and brutal slaveholders who had left the Cape colony for areas like Natal early in the nineteenth century to escape ‘progressive’ British social reforms such as the abolition of slavery. They recast the Dutch emigrant farmers from the Cape who first settled in Natal as people

who had suffered much from the Kafir wars there, for which they were not to blame, notwithstanding the many statements to the contrary, industriously circulated in England, which represent the settlers as cruel

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<sup>9</sup> *Proceedings of the Commission Appointed to Inquire into the Past and Present State of the Kafir*, 19

oppressors of the Kafirs, and the latter as wronged and innocent people.<sup>10</sup>

The report claimed that cruelty or oppression of ‘the kafir’ was not sanctioned by the *Volksraad*, but at the same time under that Government the same authority which the law allowed a parent over his child, or a master over his apprentice, was allowed to a master over his coloured servants. This, of course, involved the right of inflicting corporal punishment, which, in the opinion of the Commissioners, was a power liable to much abuse, and ought only to be entrusted to the Resident Magistrates. Under the administration of the *Volksraad* however, Africans were

peaceable, submissive and willing to be instructed...[and] became to a considerable extent safe and useful members of society. The Kafirs have never so felt or acted under the British Government, either here or in the Cape Colony; and until such habits can be re-established, civilization will make no progress, and the generally unfortunate effect of British rule on the coloured races in South Africa will continue unaltered.<sup>11</sup>

British rule in Natal had been proclaimed in a post-emancipation spirit of abolitionism. The Proclamation had declared that ‘there should not be in the eye of the law any distinction or disqualification whatever founded on the mere distinction of colour, origin, language, or creed, but that the protection of the law, in letter and in substance, should be extended to all, impartially, alike.’ However, the Commissioners not only found it impracticable that ‘this [African] population should be put on the same footing, and ruled by the same law as the civilized inhabitants, and treated in all respects as British subjects’, but offered the post-slavery Proclamation as a key reason for the departure to the interior of South Africa of Afrikaner settlers, who in the middle part of

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<sup>10</sup> *Proceedings of the Commission Appointed to Inquire into the Past and Present State of the Kafir*, 9

<sup>11</sup> *Proceedings of the Commission Appointed to Inquire into the Past and Present State of the Kafir*, 8

the 1800s would have easily trebled the white settler population.<sup>12</sup>

This reimagining of the virtuousness of Boer rule for civilizing Africans was based in the necessity to create a racialized labor dispensation which was not primarily concerned with furthering the progressive liberal impulses of the abolitionism of the 1820s and 30s in the Cape Colony, from where both Dutch farmers and early English settlers to Natal had come. Among the Boers who had settled in Natal in the previous decades were those who had brought with them *inboekselings*, or unfree servants. These children, and occasionally young women, formally apprenticed – *ingeboek* – to Boer households were acquired through capture by Boer commandos, or pledged by African societies as political assurance, or sold by settlers and some African societies.<sup>13</sup> These trekkers were no longer able to rely upon the kinds of labor available to households in the pre-Trek Cape, and their constant encounters with British influence meant that there could be no formal slavery or sale of human beings on an open market. As a result, these *inboekselings* were incorporated into Boer society as a dependent servile class. The British Proclamation in Natal had caused these primarily rural households to flee into the interior of the country, and the 1853 Native Commission attempted in its proposals to re-imagine the violently illiberal impulses of Boer labor practices as no more than a Master-Servant regime of moral tutelage which was important to the creation of a desirable racial hierarchy. This view differed significantly with early missionary efforts and with Colonial Office instructions of the 1840s which were far more liberal and utilitarian in

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<sup>12</sup> *Proceedings of the Commission Appointed to Inquire into the Past and Present State of the Kafir*, 45

<sup>13</sup> Peter Delius and Stanley Trapido, 'Inboekselings and Oorlams: The Creation and Transformation of a Servile Class', *Journal of Southern African Studies*, Vol. 8, No. 2 (Apr., 1982), 214-242

character and the Commission's views remained in tension with policies ultimately implemented by the Natal colonial administration in its interactions with Africans in the region until the 1880s.

### *Liberal Aspiration and Colonial Reform in the Early Colony*

The link between wage work and moral uplift was not immediately clear in the context of early missionary activity in Natal. As early as 1835, The American Board of Commissioners for Foreign Missions (ABCFM) was the first to establish a mission to the Nguni, and they had hoped to convert the entire Zulu population in one generation.<sup>14</sup> The first missionaries assigned to this part of Southeast Africa were given a mandate by one of the Board's officers: 'we aim', he said '...to exert general and enduring influence; to reach and mould the elementary and fundamental principles of Society and rear up Christian Communities which...shall be able to stand and flourish without foreign aid.'<sup>15</sup> As Norman Etherington points out, the success of this aim depended on Africans retaining political independence and responding readily to Christianity. In order for missionaries to achieve these ambitious goals of conversion, they also had to remain convinced of Zulu potential for self-government.

With slavery winding down in nearby colonies, to be abolished in the Cape in 1837, early missionaries in Natal did not tie their success at converting Africans to the

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<sup>14</sup> Norman Etherington, 'An American Errand into the South African Wilderness', *Church History*, XXXIX (1970), 62-71.

<sup>15</sup> KC, Miscellaneous Missionary Papers, Anderson, Charge to Missionaries to South East Africa, 1835.

establishment of colonial rule or the establishment of a colonial wage labor economy into which African men could be drawn. Not long after the arrival of the missionaries, the ensuing violence and disorder of Trekker incursions into Natal in 1838 almost caused these missionaries to abandon the field. The displacement of Trekboers by British rule in the years following resulted in further instability, and missionaries like Henry Venable were convinced that white settler intervention made it impossible to create self-sustaining Black Christian communities.<sup>16</sup> The failure of early mission enterprise to convert significant numbers of Africans in Natal was initially blamed upon white settler interference.

But as it became clear that resistance to missionary Christianity came from Africans themselves, and centered on issues which were central to their social and economic lives, the failure of missionary work came to be attributed to the endurance of Nguni economic arrangements. Missionaries trying to understand the challenges of Christianizing attempts to African society began to point to African economic and social arrangements as reminiscent of the moral depredations of slavery. In a similar fashion to anti-slavery missionaries of the earlier part of the century, these clerics began to believe that the new economic universe represented by British colonialism also made possible the proper conditions for moral regeneration.<sup>17</sup> African homestead-based subsistence and market arrangements, based as they were primarily on the agricultural labor of women,

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<sup>16</sup> Henry Venables, quoted in Norman Etherington, *Preachers, peasants, and politics in southeast Africa, 1835-1880: African Christian communities in Natal, Pondoland, and Zululand*, London: Royal Historical Society, 1978, 25.

<sup>17</sup> For the earlier anti-slavery arguments of missionaries in the Cape see Pamela Scully, *Liberating the Family? Gender and British Slave Emancipation in the Rural Western Cape, South Africa, 1823-1853*, Heinemann, 1997.

harkened back to a supposedly atavistic morality supported by a previous economic order, one in which women were not ‘protected’ by newly emergent ideals of hetero-normative, male-headed, single-spouse domestic arrangements in which there existed a gendered separation of spheres of ‘home’ and ‘work’. In these clear moral visions (which were unencumbered by the complexities and contradictions of the emergent gendered division of labor in England or its colonies in the eighteenth and nineteenth centuries) as soon as African men and women could be made to emerge from conscious degradation, they could be expected to undergo an attendant change of moral character which was tied to the acceptance of new gender roles.<sup>18</sup>

By the time British rule was established in the 1840s it had become apparent to missionaries of the American Board that Zulu-speaking Africans in Natal were wedded to allegedly morally reprehensible social practices, such as polygyny and ‘bridewealth’, which were inextricably bound up with their economic and political life. These gendered forms of customary practice were, in the minds of missionaries (and settlers with whom they were coming increasingly to agree on the subject of ‘civilization’), the roots of supposed African moral recalcitrance.

In 1863, a writer in the *Natal Witness* newspaper characterized reformist opinion

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<sup>18</sup> The literature on the contradictions and complexities of the historical moment of industrial development and gendered separation is immense. We know from this work that the economies of metropolitan England and its colonial peripheries were dependent on working-class women’s waged labor. We also know that the process of industrialization in England entailed an enlargement of some categories of commodity production within the home itself. See, for example, Louise Tilly and Joan Scott, *Women, Work and Family*, (New York: Routledge, 1989); Leonore Davidoff, ‘Gender and the ‘Great Divide’: Public and Private in British Gender History’, *Journal of Women’s History*, Vol 15, No. 1, (Spring), 2003.

as ‘the alliance between the missionary and labor-needing colonist, to alleviate the sufferings of the Native woman...’ The writer went on to suggest that this confluence of interests with respect to Native custom was an attempt to abolish that ‘which materially interferes with the object for which they have respectively left their mother country.’<sup>19</sup> In the manner of programs to ameliorate British slavery in the 1820s and 1830s, overwhelming missionary effort and the majority of settler colonial public opinion began to focus on the African (‘slave’) family, women’s sexuality and on the promotion of familial structures and gender relations which officials believed conducive to the creation and reproduction of a stable and industrious male African working-class.

Most government officials, many of whom were commercial farmers and capitalists themselves in need of male labor supported these ideals; but the practice of Native policy by the colonial legislature, local authorities and the one man tasked with Native administration for most of the nineteenth century - Theophilus Shepstone - made the social and economic reform of Zulu life a far more ambiguous and ambivalent enterprise than moral reformers imagined.

*The Shepstone System: Gendered Labor and the Subsidization of Colonial Political Economy*

As growing numbers of Africans began to find themselves within what settlers had proclaimed as their legal jurisdiction, the colony’s new young Diplomatic Agent,

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<sup>19</sup> *Natal Witness*, 16 October 1863.

Theophilus Shepstone, stamped his authority on the administration of their lives in the colony. Shepstone had convinced the Natal Executive not to implement the 1848 Royal Instructions for the colony in its entirety. These instructions had been issued as a mandate for colonial government in Natal not long after its proclamation as a British colonial territory.<sup>20</sup> He favored the instructions which suggested non-interference in African customary law where it met the somewhat ambiguous legal test of colonial ‘repugnance’, but found the instructions to uphold African chiefly authority to be less to his liking.<sup>21</sup>

He acknowledged that since not all Africans in the colony lived under the jurisdiction of chiefs, he had been administering custom through chiefs where they existed and directly where they did not. Shepstone argued further that maintaining the customary power of chiefs would be a retrograde step, and claimed that such power should be curtailed in order to protect ordinary Africans from despotism or ‘the unbridled wills of their chiefs.’<sup>22</sup> He would later come to embrace ‘chieftainship’ himself, declaring his own chiefly powers and gathering *izinduna* (headmen) around him in the manner of African chiefs. While Shepstone appeared to desire the destruction of chiefly power, the manner in which he constructed, performed and consolidated his own authority in relation to Natal’s Zulu-speaking population demonstrated that his investment was in

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<sup>20</sup> David Welsh, *The Roots of Segregation: Native Policy in Colonial Natal, 1845-1910*. Cape Town: Oxford University Press, 1971, 15.

<sup>21</sup> In legal terms, ‘repugnance’ was historically referred to practices which were deemed to be ‘contrary to the nature of colonial rule.’ The ambiguity of this test for the purposes of legal administration provided both challenges and possibilities for the establishment of the limits of legally acceptable practice in the colonies. Hsueh, Vicki, ‘Law Out of Repugnance: Governance, Sensibility, and the Limits of Deliberation.’ Western Political Science Association 2010 Annual Meeting Paper. Available at SSRN: <http://ssrn.com/abstract=1580770>.

<sup>22</sup> Quoted in Welsh, *The Roots of Segregation*, 15.



appointing chiefs personally, and having established chiefs in the district under his ultimate political control.

Born in the Eastern Cape to Wesleyan missionaries, Shepstone's juridical reign lasted more than a half century as Diplomatic Agent, Secretary of Native Affairs and ongoing 'expert' advisor to both the colonial and imperial government on the colony's 'Native tribes' until his death in 1893. His approval of customary legal jurisdiction for Africans was based on an understanding that customary law was 'in the main just and admirably calculated to rule men in the condition of the natives', it was simply the case, in his view, that customary laws would be better administered through colonial – Shepstonian – control of chiefly power. Under Shepstone's singular authority, there emerged a modern, nineteenth century contrivance of a peculiarly exclusive legal dispensation, a code of 'Native Law' for the government of Africans in Natal. The formative legislative terrain of nineteenth century customary law in this region began to be carved from his autocratic peregrinations, and its conservative, neo-traditionalist features characterized an enduring Shepstonian romance with African homestead-based patriarchy.

To the great and growing dissatisfaction of other officials in Whitehall and inside the colony, Shepstone began to fashion himself as Native Administrator or 'Paramount Chief' of Natal's Africans.<sup>23</sup> The 'Shepstone System', as the administration of Zulu-

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<sup>23</sup> The appropriation of indigenous cultural logics and idioms was an important part of Shepstone's positioning of himself as a legitimate charismatic authority in relation to the Zulu-speaking population in the region. See Carolyn Hamilton, *Terrific Majesty: The Powers of Shaka Zulu and the Limits of Historical Invention*, Cambridge, Massachusetts, Harvard University Press, 1998.

speaking Africans in Natal later came to be known, was a system ostensibly predicated on the labor needs of the colony in accordance with instructions from the Colonial Office in Whitehall. But as the nineteenth century progressed, it became more a vehicle of Theophilus Shepstone's autocratic vision of what some scholars have described as the 'traditionalist' rule of Africans in the region.<sup>24</sup> He told an applicant for labor in 1853 that:

It is not reasonable to expect that a nation of hunters and warriors should at once become steady labourers. There are grounds, however, for thinking that by prompt and regular payment and strictly just treatment, a considerable supply of Native labor may be obtained, but I am to add that in the opinion of [the Lieutenant-Governor] it would not be prudent to engage in any work requiring a constant or uninterrupted supply of labor, relying solely upon that which can be obtained from the Natives.<sup>25</sup>

By virtue of the knowledge which he claimed to possess of Zulu language and customary practice, Shepstone was essentially conducting the work of colonial ethnography in the practice of administering Natal's African population. Funded by a 'hut tax', or a tax imposed on each African marital household and directed at manipulating institutions of Zulu society such as marriage, Shepstone's activities were backed by the guarantee of state violence. He created customary chiefs and magistrates and frequently adjudicated customary disputes in person. Marriage practices were at the

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<sup>24</sup> Aspects of this 'neo-traditionalism' have been illuminated in a small number of focused studies on Shepstone. See Jeff Guy, 'An Accommodation of Patriarchs: Theophilus Shepstone and the Foundations of the System of Native Administration in Natal', Unpublished paper. Colloquium on Masculinities in Southern Africa, University of Natal, Durban, 1997; Thomas McClendon, *White Chief, Black Lords: Shepstone and the Colonial State in Natal, 1845-1878*, Rochester: University of Rochester Press, 2010; Norman Etherington 'The Shepstone system in the colony of Natal and beyond the borders' in Andrew Duminy and Bill Guest (eds), *Natal and Zululand from earliest times to 1910*. Pietermaritzburg: University of Natal Press, 1989, 170-192; David Welsh, *The Roots of Segregation*

<sup>25</sup> PAR, Secretary for Native Affairs (SNA hereafter) 1/8/83, Shepstone to an applicant for labor, 14 December 1853.

center of colonial struggles over the conflicting and contradictory aims which Shepstone stated as being the basis for 'Native policy', such as generating revenue for local administration by the maintenance of forms of traditional economy, and later, for extracting African labor. These 'colonial aims' were by no means shared evenly among colonial officials in a vast imperial bureaucracy, with Shepstone's jurisdiction over African custom continuously bringing him into conflict with the Colonial Office and with local Natal settlers in need of labor. But despite these 'tensions of empire',<sup>26</sup> Shepstone's nineteenth century administration of Africans placed women in Zulu society at the heart of administrative attempts at raising revenue, expropriating African land for settler use and controlling the labor and lives of men and women.<sup>27</sup>

The leverage exercised by settlers over African administration, and hence over a potential local labor supply, was substantially restricted by the strict political and financial separation of European and African Affairs. The former was the purview of the Colonial Secretary, and the latter the concern of the Secretary for Native Affairs. The rationality of this system was drawn from the need to restrict African representation to four nominated members of the sixteen-member Legislative Council and the Lieutenant Governor. Thus, the small Department of Native Affairs – embodied, in reality, by the charismatic authority of Shepstone – had no responsibility to the colony's legislature and was able to thwart settler attempts to fashion a 'regular' labor force from Natal's African

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<sup>26</sup> Frederick Cooper and Ann Laura Stoler. *Tensions of empire: colonial cultures in a bourgeois world*. Berkeley: University of California Press, 1997.

<sup>27</sup> Jeff Guy 'Gender Oppression in Southern Africa's precapitalist societies' in Cheryl Walker (ed) *Women and Gender in Southern Africa to 1945*. Cape Town: David Philip, 1990; Jeff Guy, 'Women in Labor: The Birth of Colonial Natal', unpublished History and African Studies Seminar Paper, University of KwaZulu-Natal, 29 April 2009.

population.<sup>28</sup>

As a result of this legal arrangement, the colony's new Master and Servants' Laws governing the employment of labor in the colony from 1850 (which were derived from post-emancipation reform laws of 'apprenticeship') were ultimately subordinated to the Native Code in the case of Africans. Native administration had to be entrusted with keeping at bay the threat of Native revolt by pursuing a policy of gradual 'civilization' rather than decisive civilizational transformation, as well as by ostensibly providing labor to settlers on Shepstone's personal recognizance.

Much of the historiography of this colonial moment in Natal understands the protective aspect of Shepstone's administrative role as that of a liberal defender of Nguni society against the destructive interventions of settler rule and labor expropriation.<sup>29</sup> On the other hand, Patrick Harries argues for the recognition of the fact that Shepstone's protection of African ways of life was very much in the economic interests of the colonial state.<sup>30</sup> While fewer than a third of the 30 000 workers that settlers demanded in 1856-7 were drawn from the local African population, the 'hut tax' which Shepstone had instituted in 1848, contributed more than a third of all colonial revenues by the early 1850s. In the early years of Shepstone's tenure as Secretary for Native Affairs, he worked with chiefs to collect the new hut tax levied on Africans. The tax not only

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<sup>28</sup> Patrick Harries, 'Plantations, Passes and Proletarians: Labour and the Colonial State in Nineteenth Century Natal' *Journal of Southern African Studies*, Vol. 13, No. 3 (Apr., 1987), 372-399.

<sup>29</sup> See Welsh, *The Roots of Segregation*, especially chapter 1; Edgar Brookes and Colin de B. Webb, *A History of Natal*, 56-60; Ruth Gordon, *Shepstone, the Role of the family in the history of South Africa 1820-1900*, Cape Town, 1968; Etherington, *Preachers, Peasants and Politics*, 11.

<sup>30</sup> Harries, 'Plantations, Passes and Proletarians', 374.

facilitated the cost of the administration of Africans but of the entire colonial civil service whose personnel were overwhelmingly engaged in settler administration, and whose numbers quadrupled in the decade after its collection began.<sup>31</sup>

The gendered basis of this form of colonial revenue has been insufficiently recognized. It was calculated on the number of houses in the African homestead and was, as Jeff Guy points out, ‘premised on the continuation of traditional modes of rural agricultural production...implied the gendered division of labor within a polygamous household in which wives were divided amongst a number of houses – that is the “huts” referred to by the tax...[and] was a direct tax on married African men, and an indirect tax on the labor of married African women and their children [who performed most of the agricultural work] within the homestead’.<sup>32</sup> While the role of women in African production ran afoul of imperial and abolitionist concerns over the gendering of productive labor, Shepstone’s plans for Natal’s Africans helped to sustain this form of homestead production through the middle of the century in the face of increasingly strident missionary and settler objections.

With its African inhabitants engaged in independent forms of production which subsidized settler colonial life, it was not long before the pressure of settler calls for labor caused the Natal government to begin looking outside the colony. Amongst the first ‘foreigners’ pressed into wage labor in commercial agriculture were *amaTonga* migrants

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<sup>31</sup> Harries, ‘Plantations, Passes and Proletarians’, 374

<sup>32</sup> Jeff Guy, ‘An Accommodation of Patriarchs: Theophilus Shepstone and the Foundations of the System of Native Administration in Natal’, Unpublished paper. Colloquium, Masculinities in Southern Africa, University of Natal, Durban, 1997, 13.

from Mozambique, although their numbers were small compared to the labor scheme to which Natal began to subscribe in 1860 which imported indentured Indian laborers to the colony.

*British Imperial Labor Transport and Post-emancipation Gender Reform*

The post-slavery scheme of indenture which began in the Caribbean colonies in the 1820s was one in which impoverished, often indebted Indian peasants from across rural British India were transported to far-flung parts of the British Empire including the British Guiana, Mauritius and Fiji to work primarily on sugar plantations, and in other commercial agricultural and industrial enterprises as a solution to the imperial labor shortages which prefigured the imminent demise of the Atlantic slave trade. The scheme was an obvious choice for a British colony in need of labor. When the Natal government began discussions about indentured transport with the British Indian government and the Colonial Office in the mid-1850s, indentured labor had only shakily withstood the immediate post-emancipation apprenticeship decades of the 1830s and 40s as a dubious form of contractual labor. In the early decades of its implementation indenture was vilified by reformers as a distinctly coercive kind of labor in the places it had been instituted, most notably British Guiana, and Mauritius where labor-abuses were egregious and particularly violent.<sup>33</sup>

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<sup>33</sup> For British Guiana see Madhavi Kale, *Fragments of Empire: Capital, Slavery, & Indian Indentured Labor in the British Caribbean*, Philadelphia: University of Pennsylvania Press, 1998, 26. For Mauritius see MD North-Coombes, 'From Slavery to Indenture: Forced Labour in the Political Economy of Mauritius 1834-1867,' in Kay Saunders (ed), *Indentured Labour in the British Empire, 1834-1920*; Canberra: Croon Helm, 1984.

From the beginnings of post-slavery indenture in the 1830s the system had to be clearly distinguishable from slavery in order for the scheme to continue receiving the support of a British Parliament which was under consistent pressure from abolitionist groups and social reformers to reject all forms of slavery.<sup>34</sup> The fact that indenture was a form of fixed-term, bonded wage labor was not sufficient in abolitionist eyes given that, in principle at least, this new system had to uphold the fundamental humanity of the laborers who were contracted under it. The multiple, layered legal and social transitions from understanding slaves as forms of property to seeing wage laborers after slavery as rights-endowed human beings was a long, difficult and not-at-all teleological process in the nineteenth century, involving struggles between and amongst former slaves and masters, new wage workers, capitalists, abolitionists and colonial agents in various parts of the Empire.<sup>35</sup> The emerging world of wage labor itself embodied relative degrees of freedom and unfreedom. These included the new ‘rights’ and corollary ‘obligations’ entailed in the notion of freed-slaves as men, women, and increasingly, children in the historical context of mid-nineteenth century ideologies of social reform. Reformers placed these gendered categories in relation to each other by elaborating desirable notions of family and social reproduction in the age of emancipation.<sup>36</sup>

Many of the arguments against the institution of slavery in the early 1800s had

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<sup>34</sup> Kale, *Fragments of Empire*, 23

<sup>35</sup> Frederick Cooper, Thomas C. Holt, and Rebecca J. Scott, *Beyond Slavery: Explorations of Race, Labor, and Citizenship in Postemancipation Societies*, Chapel Hill and London: University of North Carolina Press, 2000.

<sup>36</sup> Amy Dru Stanley ‘Conjugal Bonds and Wage Labor: Rights of Contract in the Age of Emancipation’, *The Journal of American History*, Vol. 75, No. 2 (Sep., 1988), pp. 471-500; Kale, *Fragments of Empire*; David Northrup, *Indentured Labor in the Age of Imperialism, 1834-1922*. New York: Cambridge University Press, 1995.

condemned the material and moral effects that the system of unfree labour had had upon family life. Anti-slavery campaigns were often family-centric, highlighting the sanctity of the family and the moral and physical violence that slavery had done to family units and to colonial culture more generally.<sup>37</sup> Criticisms included the breakup of marriages and households in many African societies from which slaves were taken and on the plantations on which they were enslaved, the high male to female ratio which resulted in short-term unions, ‘independent’ women and children out of wedlock without the support and authority of fathers.<sup>38</sup> Abolitionists also pointed to the absence of protection against the breaking up of slave families by slave-sales and as Donald Matthews points out, slavery was constructed in the arguments of many abolitionists as a ‘legalized system of licentiousness’.<sup>39</sup>

These criticisms emanated from conceptions of family and roles within households which had begun to take shape in the latter part of the eighteenth century in the context of industrialization in Europe. The ‘amelioration laws’ which had emerged from the efforts of male and female anti-slavery activists and government which were aimed at strengthening family ties – in particular the hierarchically imagined, gendered bond of husband and wife – for former slaves and free persons. These legislative efforts were based in the belief that the morality of women was especially important to the

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<sup>37</sup> William Green, ‘Emancipation to Indenture: A Question of Imperial Morality’, *The Journal of British Studies*, Vol. 22, No. 2, Spring 1983. 98-121.

<sup>38</sup> John Stuart MacDonald and Leatrice D. MacDonald, ‘Transformation of African and Indian Family Traditions in the Southern Caribbean’ *Comparative Studies in Society and History*, vol. 15 no.2 (March, 1973), 171-198.

<sup>39</sup> Donald Matthews, ‘Abolitionists on Slavery: The Critique behind the Social Movement’, *The Journal of Southern History*, Vol. 33, No. 2, May, 1967, 163-182.



discipline of a recently freed slave population. These moral reformers argued that the capacity to bear freedom's responsibilities required the inculcation of acceptable gendered norms of family life. In these arguments it was often former male slaves, men who had had their efforts at establishing households frustrated and often destroyed by slaveholders, who had to be made to regain the appropriate masculinity of household head which they had been denied under slavery. As Pamella Scully argues convincingly, in the visions of these reformers emancipation delivered men *into* a particular, emergent historical form of masculine personhood by giving men the right to protect, and indeed to own, their wives.<sup>40</sup>

For 'free' women then, the notions of appropriate womanhood, or femininity, which the post-emancipation period delivered, were inextricably tied to conjugality and the broader reproductive obligations of domestic households. Needless to say, these ideas formed an ideal philosophical background against which reformers made their claims, rather than the practical circumstances out of which gendered family life in the colonies, or for that matter in Britain, was wrought. Nonetheless, this was the discursive context of complementary and inextricably-bound ideals of masculinity and femininity in which colonial struggles over women's labor and consent were fought in the post-emancipation moment.

From its inception, the imperial founders of post-slavery indentured transport proposed the indentureship of equal numbers of both male and female 'laborers' from

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<sup>40</sup> Scully, *Liberating the Family?*, 36

India in an attempt at overturning the unequal sex-ratio which had been a feature of Atlantic slavery.<sup>41</sup> They argued that indenture could be distinguished from slavery, and attain some measure of moral legitimacy, if workers migrated with their wives and families or if there were sufficient numbers of women that social stability could be promoted through the formation of families. This pre-condition was unable to prevent the ensuing disparity in the sex-ratio in all of the colonies where indentured labor was contracted, and placed increasing pressure on labor recruiters, employers of labor and colonial administrators in these colonies to promote Indian women's immigration. Early on in the indenture system, the issue of the sex-ratio – and the shortage of women more generally – was a crucial argument in the politics of anti-slavery groups and Indian nationalists.<sup>42</sup> Both groups argued that the continuation of a slavery-style demographic arrangement meant that the supposed recognition of the humanity of former slaves, and now indentured workers, by a system of paid labor which no longer regarded them as property was a compromised principle. As long as laborers were constrained in their social reproduction (especially given that any offspring produced by women under indenture would not necessarily contribute positively to the labor supply as had been the case in most slave contexts) they could not be deemed to be any freer than they might have been under slavery. The continuing legitimacy of this new 'free' labor system therefore depended largely on the indenture of increasing numbers of women, in particular in the roles of wives, mothers and daughters, rather than primarily as 'workers'.

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<sup>41</sup> Kale, *Fragments of Empire*, 14-37.

<sup>42</sup> Matthews, 'Abolitionists on Slavery'. In Natal, on average, no more than 30% of indenture recruits were women over the fifty year period of the scheme.

*Indian Indenture, Legal Reform the terms of Social Reproduction in Natal*

By the time indenture began in Natal in 1860, the British Indian Government had set more vigilant conditions for the assumption of the scheme, particularly in the settler colony of Natal. Included in the agreement between the British Indian and Natal Governments was the precondition of freehold land allocations to time-expired workers who had completed two terms of indenture and who did not seek to return to India at the end of their re-indenture. The concession of either free return passage or freehold plots of land to time-expired Indians implied the possibility of permanent domicile in Natal despite the fact that from the inception of the indenture scheme government officials in colonial Natal believed that Indians indenturing under the system would only be temporary migrants. While the land grants proved deeply unpopular with the majority of Natal's white settler colonists in the longer term and were repealed in the 1870s, at the outset at least the concessions made by the Natal administration reflected the determination to secure the wage labor that it needed to thrive, and which it was unable to expropriate from the colony's African inhabitants for the better part of the nineteenth century.

The nineteenth century administration of Indian indentured and ex-indentured immigrants, male and female, began under the Indian immigration laws which came to be known in colonial legal parlance as the 'Coolie Consolidation Laws' for their attempts to encompass all aspects of the lives of Indian immigrants. The primary legal reason for this was that all civil law aspects of 'Indian' life which might ordinarily have fallen under the

jurisdiction of colonial common law could in this way be excluded from the colony's emerging body of civil regulation by their enshrinement in a 'code' of what were ostensibly labor laws, but which functioned as an ethnic and culturally discrete domain of common law.

This indentured law code to which Indians were subject was adjudicated by an official known as the 'Coolie Agent' from 1860, but this was turned into the bureaucratically discrete office of the 'Protector of Indian Immigrants' by the Coolie Commission of 1872. The Protector of Indian Immigrants was an office which evolved out of that of the Coolie Agent, the first bureaucratic representative of both the interests of the local colonial state as well as commercial interests, primarily in agriculture, but also the Natal Government Railways and other smaller enterprises in which the state had invested by sanctioning the indenture scheme at public expense. But as the indentured population grew and large numbers of 'time-expired' ex-indentees (those men and women who had completed indenture contracts) remained in Natal, it became clear that a new kind of office was necessary to deal with contingencies of their presence in the colony. While the responsibilities of the Coolie Agent had been to represent the colony's commercial interests, the various different holders of the post had found themselves alternatively allocating labor quotas, locating spouses and absent family members, managing contractual issues between employers and employees; registering marriages, births and deaths, and adjudicating the gamut of civil and domestic disputes amongst Indian men and women. The establishment of an office to serve these needs had first been suggested in the 1860s by former Coolie Agent and future Secretary of Native Affairs

Henrique Shepstone, son of the man who as we have seen was responsible for the administration of Africans in the colony, Theophilus Shepstone.

During a break in the indenture scheme in Natal due to an economic recession between 1866 and 1874, ex-indentees who had returned to India complained of poor working conditions and ill-treatment at the hands of colonial employers and the Indian sirdars hired by employers to supervise indentured workers.<sup>43</sup> The Coolie Commission of Inquiry which was set up in 1872 by the Natal government when it was charged by the British Indian government with addressing the situation, belatedly resurrected the junior Shepstone's proposal that a protective office be constituted for Indians, and, in a manner similar to the establishment of this kind of office in other parts of the empire where indentured labor transport occurred, named it in accordance with a mandate of protection for imperial subjects of the British Raj.

The allegations of abuse made by ex-indentees returning to India on board the *Red Hiding Hood* in the 1860s imperiled the continuation of indentured transport, causing diplomatic tension between the Natal and British Indian Governments which could only be resolved by Natal's Lieutenant Governor personally travelling to Delhi to meet with representatives of the British Raj.<sup>44</sup> The Coolie Commission was the result of his diplomatic efforts and the Protector's office, which arose from its recommendations, came to be the primary supporting legal and bureaucratic institution of Indian

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<sup>43</sup> Meer, *Documents of Indentured Labor*, 126-7.

<sup>44</sup> Hugh Tinker, *A New System of Slavery: The Export of Indian Labour Overseas, 1830-1920*, London and New York: Oxford University Press, 1974, 244.

immigration, enduring past the eventual end of the indenture scheme in this region into the mid-twentieth century.

Much has been written in a critical, Marxist indenture literature about the failure of indenture to distinguish itself from slavery-like conditions.<sup>45</sup> The Protector's office, where it did exist in places like Trinidad and Fiji has come to be maligned in the historiography as a largely ineffective, and even disingenuous colonial creation. The argument that capitalist agriculture and imperial authorities merely paid lip service to reform has become a widely accepted feature of this literature. Where observations have been made of exceptions to this norm, it has provided little inspiration for the historical contextualization of the institution either within particular colonial locales or with regard to the 'tensions of empire' that its ideological and pragmatic foundation espoused in the post-slavery moment.<sup>46</sup>

Shortly after the creation of this office in Natal, the Protector of Indian Immigrants became embroiled in disputes with employers of Indian labor, primarily sugar plantation owners who employed most of the colonial indentured workers and were

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<sup>45</sup> The work of Hugh Tinker is especially emblematic of scholarship arguing for the continuities between slavery and indenture. Tinker, *A New System of Slavery and also Marina Carter, Servants, Sirdars and Settlers: Indians in Mauritius, 1834–1874* (New Delhi: Oxford University Press, 1995); Marina Carter, *Voices from Indenture: experiences of Indian migrants in the British Empire*. London: Leicester University Press, 1996.

<sup>46</sup> Hugh Tinker makes the observation that not all 'Protectors' accepted participating as cogs in an empire-wide machine of labor coercion, but goes on to ignore this possibility in a sweeping work that seeks to draw out similarities between the regimes of slavery and Indian indenture. A local study analyzing the Natal Protector's investigation of labor abuses on the Reynold's Brothers Estate on the Natal North Coast by Philip Warhurst, hints at the importance of personality, ideology and local politics to the work done by different holders of the office. Philip Warhurst, 'Obstructing the Protector', *Journal of Natal and Zulu History*, vol.7, 1984, 31-40.

the worst offenders against their employees. One of the most prominent struggles which the Protector waged against colonial capitalists resulted in the enforcement of penalties for violations of the rules restricting corporal punishment which had been laid down by the 1872 Commission.<sup>47</sup> In a similar manner to the apprenticeship laws on which much indenture legislation was modeled, corporal punishment began to meet its legal end in the mid-to-late nineteenth century. The pressures of colonial labor needs and imperial politics caused much diplomatic tension between the India and Colonial Offices, and the British Indian and Natal governments, leading to the further amelioration of working conditions and the repeal of previously legally sanctioned punishments such as whipping. But in addition to the reform of the more punitive disciplinary aspects of a post-slavery labor regime, other crucial features of new wage labor arrangements which were coming to predominate in the nineteenth century imperial metropole began to take decisive shape in this colony.<sup>48</sup>

The 1872 Coolie Commission included as one of its primary recommendations the need for recruiting agents and other immigration officials to work harder toward fulfilling the sex quota set out in the immigration laws. The Natal laws had envisioned that three years into the scheme, by 1863, fully half of all indenture migrants would be women. This recruiting target was not realized at any point over the following half century for a number of reasons, including nineteenth century Indian customary preferences relating to gender and caste, the preference for women as recruits to the Assam tea plantations in British India where the work was supposedly 'better suited' to

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<sup>47</sup> Warhurst, 'Obstructing the Protector.'

<sup>48</sup> Leonore Davidoff, 'Gender and the Great Divide'.

their sex, and the eventual turn toward the increased recruitment of single Indian men by the turn of the twentieth century when an end to the indenture scheme began to be envisioned by the Natal government. In 1872, however, the Coolie Commissioners observed that ‘the evils arising from the paucity of women are so serious and have come so prominently to our notice that we cannot refrain from urging them upon the attention of the government’.<sup>49</sup> Along with the recommendations that higher percentages of women be recruited, the Commissioners also proposed the registration of all existing Indian marriages, as well as all future marriages as they took place, and that the crime of seduction of young girls should be met with heavy penalties.

*The Protector’s Dilemma: Gender and Labor Amelioration*

The Protector’s office, in addition to being responsible for the adjudication of labor-related disputes, was also constituted as an ‘Indian’ civil or ‘personal’ law court.<sup>50</sup> It is in the workings of this court and through the efforts of the officials who acted as arbiters of indentured and ex-indentured Indian life that the new racially and culturally coterminous category of ‘Indian’ began to take shape in a context where the integrity of practices of social distinction such as caste, language and religion were up for grabs. In the mid-nineteenth century the imperial, cultural identification implied by the term ‘Indian’ came into a particular efficacy in Natal. It assisted in making and describing new customary practices which may have had little customary definition before indentured transport in the lives of the people who claimed them.

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<sup>49</sup> Meer, *Documents of Indentured Labor*, 129.

<sup>50</sup> Coolie Consolidation Law 2, 1870 in Meer, *Documents of Indentured Labor*, 214.



It is worth noting, that any attempt to define ‘Indian custom’ had to contend with the reality that the one hundred and fifty thousand Indians transported to Natal under the auspices of indentured labor came from the length and breadth of British India. The sheer cultural, linguistic, caste and religious diversity of what was a relatively small concentration of people meant that the category of ‘Indian custom’ could not mark the kind of singular cultural persona to which either imperial or settler colonist rhetoric aspired. Furthermore, the various holders of the Protector’s office in the nineteenth century did not lay claim to a cultural knowledge of ‘Indians’ in the same way that Theophilus Shepstone did for Africans. Unlike Africans, Indian migrants to Natal had no chiefs or other ready forms of customary authority to adjudicate ‘custom’ until the 1890s at least. The first Protector, a retired Indian Army Colonel named Bannister Pryce Lloyd who was on leave in Natal from the Indian civil service when he was appointed, appears to have been chosen by the Indian Immigration Trust Board for his ‘Indian experience’. But while he supposedly spoke ‘Indian languages’, state officials such as the Protector made little claim to knowledge about Indian customary practice beyond broad generalizations about aspects of custom which were circulated in memos and other bureaucratic documents in the colonies of the British Empire.<sup>51</sup>

While former Coolie Agents such as Henrique Shepstone had understood the need for an administrative mandate over Indian customary practices in the 1860s, the aforementioned circumstances of the establishment of the 1872 Commission meant that the Protector’s tasks in Natal emerged at the intersection of labor administration (in

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<sup>51</sup> Report of the Indian Immigrants (Wragg) Commission in Meer, *Documents of Indentured Labour*, 261-2.

particular the amelioration of working conditions) with the reformist concerns of the social reproduction of indentured life. To be sure, the post of Protector was held by a number of different colonial officials until the end of indentured transport, and in addition to the vagaries of personality and ideology amongst these individuals, their differing relationships to capital and government authorities clearly influenced their efforts. That is to say that there was no clearly uniform manner in which the Protector's tasks were carried out over the course of the second half of the nineteenth century, although the particular prominence of certain officials like Louis Mason, who held the office for more than two decades and came to be both well-known and well-liked by Indian immigrants (indentees often threatened to report their employers to what they called 'Mason's Court'<sup>52</sup>), helps to provide some complexity to claims that the Protectors were indifferent or merely colluded with employers.

While some Protectors and other colonial officials in this imperial system believed that their role was to support employers in addressing Indian contraventions of work contracts (as with W.H Coombs in Trinidad), others believed their mandate to be one of genuine protection and even 'friendship' as in the case of Arthur Gordon (later Lord Stanmore), a Trinidad-born barrister educated in London who acknowledged that it took 'a very great deal of courage...to stand up against [the] influence' of employers who 'form...the whole of the upper class of society'.<sup>53</sup> In contexts such as Mauritius, where the punitive violence meted out to indentees was extreme, a magistrate evidently

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<sup>52</sup> Meer, *Documents of Indentured Labour*. Coolie Commission Report 1872, Appendix of Evidence Taken, 130-146.

<sup>53</sup> Tinker, *A New System of Slavery*, 309

developed a degree of self-reflexivity, admitting that he served as ‘a machine for sending people to prison’.<sup>54</sup>

In a similar manner to the apprenticeship laws in other parts of the British Empire, Natal’s Indian immigrant labor laws bore the imprint of the distinctive characteristics of post-emancipation labor legislation. In particular, the conditions of labor transport which governed sexuality and the gendering of family life strongly resembled the ‘amelioration laws’ of the post-slavery decades of the 1830s and 40s in other colonies. After the establishment of the Protector’s office in Natal by the Coolie Commission, there was greater pressure from the Colonial Office as well as the India Office and the British Indian government to adhere to the letter, if not the spirit, of the law. As explained above, women’s special position in this newly emerging labor dispensation was taking shape and this set the stage for conflicts of interest between employers and the Colonial Government.

### *Indian Women, Work and the Conceptualization of a Private Sphere*

Within a decade, complaints from employers of indentured workers proliferated over the status of women’s field labor, and this led the Colonial Secretary of Natal to inquire about the work that women were assigned to perform in other colonies. The administrators of indentured labor in Jamaica, Demerara in British Guiana, Mauritius, Trinidad and Fiji all concurred with the opinion of the Medical Officers in Natal whom

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<sup>54</sup> Tinker, *A New System of Slavery*, 310.

the Colonial Secretary had first consulted. They argued that despite the fact that many women helped their husbands in the fields, most forms of field labor were particularly ‘unsuited’ to women’s physique and that in all the colonies women were not compelled to work. The Attorney General of British Guiana went so far as to say that:

With respect to the general treatment of women, I may point out that the tendency in this Colony is to keep in view the fact that the woman is the complement of the man, and is against being too exacting in respect of their work. Major Comins, in dealing with this question remarked that ‘even when under indenture, the labour laws should not be strictly enforced against them’, and this opinion has not been lost sight of.<sup>55</sup>

The Colonial Secretary circulated a memorandum acknowledging the questions arising around women’s work and confirming the flexibility of women’s indenture contracts:

It seems quite clear...that female Indian immigrants cannot be compelled to work *against their will*, but that when they do work they are entitled to half wages. Of course it is optional with the employer to employ these or not.<sup>56</sup>

Employers did not pay to employ individual women since the cost of the importation of women was included in the cost which was paid for men, the assumption being that each woman in the colony would at some point be attached to a man. It was less often true that employers could choose whether or not to employ women than it was that they had women assigned to them as the domestic partners of men. Often where arriving men and women declared that they were married or had children, the Protector was compelled by law to ensure that families did not become separated. There were a number of occasions

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<sup>55</sup> PAR, Indian Immigration Department (hereafter II) 1/161 I 1618/08 Working of Indian women.

<sup>56</sup> PAR, Colonial Secretary’s Office (hereafter CSO) 510 735/1875 Memorandum 736/1875. Emphasis added.

where families were split up, although this appears to have been exceptional in a context of high concern over the comparisons of indenture with slavery.<sup>57</sup>

Officials contending with the constant stream of complaints about the labor of women had their problems compounded by a memorandum circulated to all indenture colonies in February 1870. The Downing Street circular advised the Lieutenant Governor of Natal of a law which had been passed in Trinidad and which the Colonial Office suggested was an important legal precedent for other ‘Cooly-importing Colonies’. The object of the law was

...on the one hand, to relieve Women from the obligation, which has been found to bear hard upon husbands and wives, to make up after their period of indenture for time lost through pregnancy and other unavoidable causes, and, on the other hand, to compensate the Employer for the labour so lost by the reduction of the indenture fee for Women by 50 per cent... fine has been provided as the prior alternative of imprisonment for unlawful absence of Women from work. This has been done because it has been felt to be *contrary to humanity* to compel Women to go to Gaol for absenting themselves from work, for the purpose of attending their infant children.<sup>58</sup>

The memorandum was explicit in its request that the Natal government consider similar legislation subordinating wage labor contracts to women’s primary domestic role within a conjugal household. Until this time, indentured women were compelled to make up time lost due to illness (a category which included pregnancy). It is no doubt the case that changing ideas of womanhood in England were influential in the development of empire-

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<sup>57</sup> Goolam Vahed and Ashwin Desai, *Inside Indian Indenture: A South African Story, 1860-1914*, Cape Town: Human Sciences Research Council, 2010, 199.

<sup>58</sup> PAR, Attorney General’s Office (hereafter AGO) I/9/1 1A/1870 Granville, Downing Street to the Lieutenant Governor of Natal 15th February, 1870. Emphasis added.

wide attempts at legal change. Changing ideological discourses around women, motherhood and the family, and late nineteenth century amendments to English family law in the metropole, began to filter into colonial legislation through British common law understandings of gender.<sup>59</sup> While the Natal administration appears to have had little inclination toward further antagonizing employers who were demanding women's labor, their actions tended toward understandings of a gendered division of labor and the differentiation of gendered spheres of activity.

In February 1875, the resident magistrate in Pinetown, west of Durban, sentenced thirteen Indian women to two weeks prison with hard labor for refusing to work. Upon being informed of this development, the Protector Charles Mitchell immediately telegraphed the Colonial Secretary:

Magistrate had no power as they are not bound to work *against their will*. These women...have children. Get governor to cancel sentence by telegram that they may be released.<sup>60</sup>

The Colonial Secretary cancelled the sentence without delay, declaring its illegality and ordered the magistrate to release the women at once.<sup>61</sup> The decision to repudiate the most punitive aspects of the new labor regime in respect of women's emerging idealized domestic roles raised the issue of consent to labor in mitigation of employers' legal claims. The actions of the Protector and Colonial Secretary appear to provide for the

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<sup>59</sup> See for example Jane Lewis (ed.) *Labour and Love: Women's Experience of Home and Family 1850-1940*. New York: Basil Blackwell, 1986 and Phillipa Levine (ed.) *Gender and Empire*, Oxford: Oxford University Press, 2004; Scully, *Liberating the Family?*

<sup>60</sup> PAR, CSO 509 681/1875. Telegraph from Protector (Mitchell) to Colonial Secretary 24/2/1875. Emphasis added.

<sup>61</sup> PAR CSO 509 681/1875, Telegraph to Resident Magistrate Pinetown 24/2/1875.

place of women's consent to the extraction of the labor which they provided to employers in return for a wage. By defending the notion of women's consent for wage labor, the government was juxtaposing contractual labor relations to the labors women provided within conjugal households, for which no consent appeared to be necessary. While the contract itself could have been deemed to be consensual what the concerns over the domestic and social reproduction of Indian men's labor did, was to subordinate expectations of contract to those of domestic conjugality. The absence of a legal obligation to obtain consent for domestic reproductive labours is no doubt part of the historical process by which the realm of an ostensibly 'private' household space comes to be reified in this moment as the 'natural', legitimate domain of women's work.<sup>62</sup>

Married Indian indentured women were often the most reticent to work outside of their marital homes. Some women made claims to the privacy of their own labors by absenting themselves from work and either remaining in their own homes or being shielded by their husbands or friends on estates.<sup>63</sup> In other cases it was men, often husbands of women, who complained to the Protector or employers that their wives' labors were necessary within the home.<sup>64</sup> More often than not though, despite reluctance, refusal, and negotiation, married Indian women or those attached to men in some way and responsible for providing them with what Luise White has called 'the comforts of home', continued to provide both wage labor and unpaid domestic labor for the duration

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<sup>62</sup> This echoes Carol Pateman's critique of the Lockean naturalization of the conjugal bond. See Carol Pateman, *The Sexual Contract*, Stanford: Stanford University Press, 1988.

<sup>63</sup> PAR II 1/16, 187/83, 17 December 1883; II 1/18, 365/84, 9 April 1884.

<sup>64</sup> PAR II 1/172, 374/1910.

of their contracts and beyond.<sup>65</sup> The simultaneity of women's productive and reproductive labors is a continuous feature of the post-emancipation moment despite the legal and discursive shifts in gender ideology toward the privatization of women's labor. Nonetheless, these very real struggles over the status of women's labor and the emergence of ideas of 'consent' reveal the basis of competing claims amongst Indian men and women.

The new mid-nineteenth century legal implications of 'women's consent' exemplified the new alignments of masculinity which began to be imagined in the post-emancipation moment. Colonial officials' recognition of the primacy of domestic labor was an acknowledgment of the new reproductive rights of Indian men as household heads in an emerging 'private' domain, rather than an assertion of the individual rights of Indian indentured women to refuse to work altogether. Women's participation in these struggles often found them enrolling themselves under the ambit of domesticity, where their own refusal to work under indenture contracts did not 'free' them unconditionally as autonomous subjects but tied them to husbands and male partners in a domestic space and provides clear indications of their own agentic imbrications in a domestic reproductive project. The space of the Indian indentured household in nineteenth century Natal remains largely unexplored in the existing literature, but studies of this 'unit' as it developed subsequently indicates the increasing constraints which it placed on women's

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<sup>65</sup> Luise White, *The Comforts of Home: Prostitution in Colonial Nairobi*; Chicago: University of Chicago Press, 1990; Bill Freund's work on the reproduction of the Indian household demonstrates the ongoing simultaneity of women's productive and reproductive labors in the making of Indian households after indenture and well into the twentieth century. See Bill Freund, *Insiders and Outsiders: The Indian Working Class of Durban, 1910-1990*. James Curry, London, 1995 and Bill Freund, 'Indian Women and the Changing Character of the Working Class Indian Household in Natal, 1860-1990' in *Journal of Southern African Studies*, Vol. 17, No. 3 (Sep., 1991), 414-429.



mobility between the early indenture period and the rise of working class Indian households in the twentieth century, after indenture.<sup>66</sup>

It is worth noting, as I do in later chapters, that colonial discourses in which single women were implicated reveal the new patriarchal imbrications of liberal gender discourses in the mid-nineteenth century. While, in theory, Indian indentured women had to consent to labor, those women who could not be identified as ‘belonging’ to one man, or those who were observed moving between and amongst men on different estates and came to be derided as ‘prostitutes’, did not appear to have the luxury of ‘consent’.

By the 1890s, the bonds of state power had provided for the forcible detainment and medical inspection of these single, mobile Indian indentured women amidst long-simmering discourses in Natal about venereal disease.<sup>67</sup> Where single women, in particular those who refused to work or whose employers could not be identified, were found to have such infections provisions were often made by the state for their hasty repatriation to India.<sup>68</sup> The refusal of single women to provide work for wages often

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<sup>66</sup> Freund, ‘Indian Women and the Changing Character of the Working Class Indian Household in Natal’ and Fatima Meer ‘Women and the family in the Indian enclave in South Africa’ *Feminist Studies*, Vol. 1, No. 2, Autumn, 1972, 33-47.

<sup>67</sup> For a sense of the alarm in public colonial discourse about venereal disease in this period See Jeremy Martens, ‘Almost a Public Calamity’: Prostitutes, ‘Nurseboys’, and Attempts to Control Venereal Diseases in Colonial Natal, 1886–1890,’ *South African Historical Journal*, 45:1, 27-52. As I discuss below, Martens’ study is circumscribed by its narrow racial focus, ignoring the ways in which such concerns about venereal disease extended to the bodies of indentured Indian women and men.

<sup>68</sup> PAR, Natal Colonial Publications (hereafter NCP) 5/2/18, Law 25, 1891. Also PAR II 1/127, I 974/1904, Papers concerning the Indian Woman named Karum Dani no. 102072, suffering from venereal disease, indentured to Arthur Holme of Polela – recommended for return to India; Meer, Y. *Documents of Indentured Labour*. Appendix Q. Venereal Diseases. Letter from H.W. Jones, Medical Officer, Stanger Medical Circle to the protector, 25 May 1885. Letter from J. Liege Hulett to H.W Jones. 25 April, 1885. Letter from Edwin Essery to H.W. Jones, 27 April, 1885.

coincided with their increased mobility as they could not be, in strict legal terms, constrained in their movements by the terms of indentured labor contracts. Thus, their refusal to labor in the *absence* of discernible stable domestic relationships or marital ties – which would have placed them in relation to men besides employers who could make legitimate claims upon their reproductive labours while simultaneously curbing their mobility – meant that these single, mobile women were often cast as ‘known prostitutes’, imagined to be deserving of moral censure.

As I demonstrate in chapter four, the unanticipated mobility of these single Indian women who indentured in Natal but could not be constrained by the terms of their labor contracts came to represent similar kinds of moral threats, in a settler colonial imaginary, to the supposedly ‘unrestrained’ sexuality of a small number of potentially polygynous, migrant African men whose always-implicitly polyamorous way of life continued to be upheld by Native policy, against reformist protest by settlers and missionaries.

While imperial legal assessments of Indian women’s role in the indenture scheme in the mid-1800s began to reflect a broader global movement toward the consolidation of particular forms of domestic gender ideology which was in turn tied to developments in European industrialization; colonial reforms around African women’s place within Zulu society were not tied in the same way to an imperial system of ‘industrial labor’ in which contract and the oversight role of the British Indian government played key parts. Instead, African administration in Natal was subject primarily to the colonial contingencies of Shepstonian policy. As such, as will become clearer in the coming chapters, reforms of

African customary practice came to reflect both the intersection of, and disjuncture between, liberal imperial gender ideologies of this moment and the conservative inclinations of colonial Native administration in Natal.

## Chapter Two

### **Customary Citizens and Customary Subjects: Colonial Respectability and the Making of Settler Marriage Law in 19<sup>th</sup> Century Natal**

#### *Race, Sex and the Interstices of Civilization in the Pre-Colony*

Before the establishment of British settlement in 1843, and in the midst of a growing missionary presence, there was a small but prominent band of English men who hunted, traded with and supported early Nguni forms of agricultural production near the Port of Natal. These men gathered a few thousand displaced Nguni refugees as clients and incorporated their own economic and social activities in this pre-colonial period of the 1820s and 30s along Nguni political lines. As other scholars have demonstrated for this period, white traders such as Henry Francis Fynn, Henry Ogle and John Cane who were granted trading and settlement concessions by the Zulu monarch Shaka, engaged in a process of ‘mutual acculturation’ with their Zulu interlocutors.<sup>1</sup>

What has been characterized in the historiography as ‘necessary social and physical acculturation’ entailed profound changes in all aspects of the lifestyles of these

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<sup>1</sup> See especially Charles Ballard, *John Dunn: The White Chief of Zululand*, A.D. Donker: Craighall, 1985.

men from manners of dress and comportment, to marriage and the establishment of families along Nguni cultural lines.<sup>2</sup> Henry Fynn became notorious for ‘discarding European clothing’ for ‘less conventional garb’ which was described by an associate Nathaniel Isaacs as consisting of ‘a crownless straw hat, and a tattered blanket fastened around his neck by means of strips of hide served to cover his body, while his hands performed the office of keeping it around his nether man’.<sup>3</sup> Their dwellings were modeled roughly along African lines and the materials were locally sourced to construct houses described as no more than a ‘barn of wattle and daub with a thatched roof and a reed door but without windows’. Missionary Allen Gardiner commented as late as 1837 that these early traders ‘live in the most disgraceful way and they make do as the natives do... There is not one that has a table or chair among them’.<sup>4</sup> The emphasis placed here on the absence of furnishing and domestic architecture should not surprise: domestic detailing was after all regarded as a key marker of civilization in nineteenth century colonial settings, particularly in missionary eyes.<sup>5</sup>

Perhaps the most notable aspect of white hunter-trader existence before colonial settlement was the almost complete absence of a white female population. Men such as Fynn and Ogle were polygynous and frequently took wives from the local Nguni population. The extent of this racial integration of frontier society may have caused the

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<sup>2</sup> Ballard, *John Dunn*, 18-19

<sup>3</sup> Ballard, *John Dunn*, 20

<sup>4</sup> Ballard, *John Dunn*, 20-1

<sup>5</sup> See for instance Jean and John Comaroff, *Of Revelation and Revolution Vol. II: The Dialectics of Modernity on a South African Frontier*, University of Chicago Press, 1997, 274-322 and Nancy Rose Hunt, ‘Colonial Fairy Tales and the Knife and Fork Doctrine in the Heart of Africa’ in *African Encounters with Domesticity*, edited by Karen Tranberg Hansen. Rutgers: Rutgers University Press, 1992, 143-171.

early missionaries to Natal much chagrin, but it aptly represents the forms of masculinity subscribed to by white men in pre-colonial Natal. The oral testimony provided by African informants to magistrate and oral historian James Stuart more than a half century later claimed that Ogle and Fynn, known to Africans by the names *Wohlo* and *Mbulazi* respectively, had the largest number of wives with interactions between them and their wives taking place according to prevailing Nguni marriage customs. These men summoned preferred wives who would attend at their houses on specified nights, supposedly performing the role of Zulu patriarchs as ‘important men’ did, rather than visiting individual wives in their own huts which was a mark of ‘commonness’.<sup>6</sup> They also made efforts to legitimize their marriages by the payment of *ilobolo* (a form of marriage exchange likened to ‘bridewealth’ by twentieth century anthropologists).

This existence of social integration and the performance of a complicated, racially-imbricated masculinity were not easily erased by the proclamation of Natal as a British imperial possession in the 1840s. Hundreds of women and children referred to in colonial parlance as ‘half castes’ remained as a reminder of the prevailing way of life which preceded the establishment of British colonial dominion. As colonial settlement grew through the introduction of significant numbers of male and female European settlers who were largely British, attempts were made to establish radically different forms of racial interaction and gendered reproductive practice. The new colony was to be based along newly-established lines of racial hierarchy and the promulgation of respectable, gendered forms of settler sociability based in ideas of ‘civilization’, the

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<sup>6</sup> Cited in Ballard, *John Dunn*, 20-21.

making of class distinction, and increasingly, notions of racial purity and social and sexual distance.<sup>7</sup>

The aforementioned forms of ‘frontier masculinity’ continued to exist as remnants of pre-colonial life inside of the newly declared colonial district, and in marginal ‘frontier’ spaces which remained just outside the ambit of colonial control. After the proclamation of British rule, Henry Ogle went as far as publicly announcing in a local Natal newspaper that his eldest son by his first wife, for whom he had paid *ilobola*, was to be his legal heir. Such isolated but enduring displays of racial and cultural complexity formed the basis for the conceptualization of a new form of racial and sexual deviance, one existing in opposition to new norms which would help to mark discursive distinctions of race and class in colonial Natal.

The colonial prominence of one man in particular proved a useful discursive foil for the making of a new form of ‘civilized’, racially pure colonial masculinity. After the formal establishment of Natal as a British colony, Zululand, the seat of Zulu political authority just across the Thukela River from Natal, remained a ‘frontier zone’ of sorts as British political and legal authority did not extend into the area until the defeat of the Zulu kingdom in 1879. Not long after the colony of Natal was proclaimed as British territory, and the government promulgated its first ordinances setting out an imperially-approved moral basis for the reproduction of settler society, John Robert Dunn continued

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<sup>7</sup> The social distance which came to define racial interaction in British settler life in Southern Africa during the second half of the nineteenth century is ably captured in Simon Dagut, ‘Paternalism and Social Distance: British Settlers’ Racial Attitudes, 1850s-1890s’ in *South African Historical Journal*, 37, Nov. 1997, 3-20.

to earn the scorn of colonists whose self-consciously morally superior civilizational claims rested on assumed racial purity and social segregation.

Dunn was born in 1834, the son of an English 1820 settler, and grew up in the Port Natal frontier country of the Fynns and Ogles. He hunted and traded with his father as a young adolescent, and upon the death of his parents became a colonial ‘adventurer’, advisor to the Zulu king Cetswayo, and important mediator between Africans in a still-independent Zululand, and British imperial forces and settler authorities in Natal. He lived in Zululand as its most prominent white settler, and as a polygamist with 48 Zulu wives (in addition to his first Cape-Malay wife, Catherine Pierce) and 117 children. While John Dunn was never regarded as a ‘Natal settler’ as he remained in Zululand for most of his life, his relationship to British imperial power – especially the imperial concession of ‘chieftainship’ to him in an area of Zululand which came to be called ‘Dunnsland’ in recognition of his assistance to British forces during the Anglo-Zulu war – confirmed his political allegiances. However, Dunn’s frontier life, in particular the manner in which he consolidated his immense wealth and status by his participation in the particularly gendered rituals and reproductive practices of Zulu cultural life, was a key point of reference for the making of new forms of colonial racial distinction and respectability, and its attendant forms of masculinity and femininity, for white settlers in Natal in the second half of the nineteenth century.

Dunn had ‘accepted’ many of his wives as gifts in his diplomatic interactions with Zulu authorities from the 1850s until the Anglo-Zulu War of 1879, and incorporated them



into the kinds of homesteads which had been much more characteristic of pre-colonial frontier life. While Dunn's personal and political life were being established with full acceptance of and participation in Zulu customary life in this period, another political envoy was couring a career path of rather more circumspect and manipulative use of Zulu idiom and custom.

Theophilus Shepstone was the 'Diplomatic Agent to the Native Tribes' in Natal in 1879, when Dunn was given chiefship over newly-annexed Zululand and was amongst his most prominent detractors:

a great deal has been said, and is still said, about efforts being made by the government to advance the civilization of the Zulus in Natal, but what will happen if the government appoints to be chief over Zulus in Zululand, a man who, despite being an Englishman has renounced it because he has renounced civilization? Polygamy amongst the Natal Zulus is looked upon as being, and no doubt is, the root of much mischief. The suppression of this practice in Natal is an object which the government has always professed to desire, but it appoints an English polygamist, i.e. an Englishman who has taken several Zulu women to wife.<sup>8</sup>

And yet, some decades earlier, in 1852, in a manner redolent of the interactions of the likes of Dunn with powerful African interlocutors, Shepstone was 'given' King Mswati's sister, Tifokati, as his 'wife' as part of diplomatic alliance-making between colonial Natal and Swazi rulers.<sup>9</sup> Shepstone graciously accepted the gift, indicating his recognition of, and participation in, a particular gendered, cultural instantiation of African patriarchal expression. Soon afterward he 're-gifted' the young woman to his senior

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<sup>8</sup> C.O. 879/17/224, Appendix M. Settlement of Zululand. Wolseley to Hicks Beach, 9th October 1879.

<sup>9</sup> Phillip Bonner, *Kings, Commoners, and Concessionaires: The Evolution and Dissolution of the Nineteenth-Century Swazi State*. New York: Cambridge University Press, 1983, 63.

assistant, a Zulu headman named Ngoza, thereby engaging in a patrimonial cultural politics of alliance-making, while simultaneously underlining the emergent colonial limits he desired for the practice of certain kinds of racially differentiated gendered customs. Shepstone's actions marked him as distinct from men like Dunn.

While he accepted African practice as a desirable political tool, and permissible and even desirable for Africans themselves, he understood his civilizational position as an 'Englishman' to prevent his full participation in what he saw as a racially-distinct form of customary practice. This single incident provides a remarkable retrospective measure of Shepstone's longer term relationship to the discourse and practice of racialized civilization and African customary patriarchy. In light of Shepstone's words and actions throughout the nineteenth century, which I describe in later chapters, we might discern that his rebuke of Dunn's position of pre-eminence in a colonial ruling elite appears to have been tied less to Dunn's mere approval of the practice of polygamy (as Shepstone himself expressed similar – even romantic – approval for the structural relationships implicating polygynous practice in African society), than the fact that the kind of culturally-complicated masculinity to which Dunn subscribed indicated a full embrace of a racially 'othered' form of cultural expression which denied him the right, in Shepstone's view, to claim the respectable, civilized position of a colonial Englishman.

As Kenneth Ballhatchet and Ann Laura Stoler have shown, the colonies were a domain for the indulgence of the sexual fantasies of colonizing men, but elites were additionally intent to mark the boundaries of a colonizing population, to prevent men of

their own race from ‘going native’, and ‘to curb a proliferating mixed-race population that compromised their claims to superiority and thus the legitimacy of white rule’.<sup>10</sup> In colonial spaces, as in European societies, the survival of a ruling race was often seen to be precariously predicated on a strict adherence to cultural- and specifically gendered-prescriptions.<sup>11</sup> This drawing of boundaries in pursuit of ‘racial survival’ was especially the case in Natal in the 1850s where the settler population of a mere two thousand or so lived in fear of being racially overrun by the almost one hundred thousand Africans in and around the district.

### *Settler Customary Marriage in Colonial Natal*

With the first marriage ordinance passed in 1846, the Natal Government effectively established a civil law of marriage distinct from customary practice for all the colony’s citizens or those governed by the common law of Natal.<sup>12</sup> This imperial law dealt with marriage in the newly annexed territory of Natal. It was an extraordinary piece of legislation which, by its provisions, repealed previous ‘laws, customs or usages’ which may have been considered (in classic imperial formulation) ‘repugnant to or inconsistent with’ the idea of Christian marriage which the Ordinance envisioned as the legal norm not just in the colony but for a number of ‘colonies, plantations and possessions’ of the British Empire. But both ‘Christian marriage’ and its position in relation to the creation

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<sup>10</sup> Kenneth Ballhatchet, *Race, Class and Sex under the Raj: Imperial Attitudes and Policies and their Critics, 1793-1905*. New York; St. Martin’s Press, 1980; Ann Laura Stoler, *Race and the Education of Desire: Foucault's History of Sexuality and the Colonial Order of Things*, Durham, North Carolina: Duke University Press, 1995.

<sup>11</sup> Frederick Cooper and Ann Laura Stoler, ‘Between Metropole and Colony’ in *Tensions of Empire*.

<sup>12</sup> PAR, NCP 5/5/4, Ordinance 17, 1846.

of Natal's common law were vastly less settled issues than early colonial lawmakers had imagined.

The colony's first civil marriage officer was appointed by the state a year later in 1847. In England the appointment of secular marriage officials, or those who were not ordained ministers of religion, would not begin for another decade as the English law of marriage was still administered by Ecclesiastical courts according to the canon law. Civil courts were able to modify and control this canon law by means of the writ of prohibition, but State authority had not yet come to supersede the sanctifying authority of the Church of England. It was only in 1857 that canon law became subordinate to the common law in metropolitan England, and where the two conflicted the civil courts would overrule ecclesiastical courts. In Natal, as in other colonies, the appointment of a marriage officer with state-imbued rather than what was regarded as divinely-inspired authority appears to have been a practical measure in support of early settler efforts at social reconstitution and reinvention.

However, the appointment of an essentially non-religious authority to perform marriages was not met with unqualified approbation on the part of those whom it was meant to assist. Some members of a small, colonial public elite found:

the appointment in question...ever objectionable...[it] appears rather an indecent violation, producing laceration in the marriage bond, and frailty in the refined union of wedlock. Denuded of its proper religious character, it becomes a mere business transaction and civil contract, which our rulers heretofore have ever exerted their authority and influence to prevent.<sup>13</sup>

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<sup>13</sup> 'Appointment of a Marriage Officer', *Natal Witness*, 16 April 1847.

The appointment of state marriage officers assisted with the practicalities of administration, as English settlers were not the only immigrants from Europe who would come to constitute Natal's 'white' settler community. The Anglican Church, while still the institution to which the overwhelming number of colonists belonged, was not the only denomination represented amongst these settlers. Methodists, Lutherans, Presbyterians and others featured amongst early groups of settlers. Most smaller groups of settlers representing different nationalities co-terminously represented different traditions of religious law and marriage practice, with German Lutherans in particular differing over customary issues such as the traditional 'degrees of affinity' permitted and proscribed to constitute a religiously-acceptable marriage in the Anglican Church. Despite many broad similarities, the question of what *exactly* constituted 'Christian marriage' for settlers in Natal therefore differed by denomination and European traditions of origin.

The appointment of secular marriage officers representing state authority in the sanctification of marriages circumvented the question of religious veracity, with these officers being bound primarily by the broad terms of the 1846 Imperial Marriage Ordinance. To be sure, the Ordinance embodied a number of elements which represented a European Christian tradition, broadly speaking, in particular the prerequisite of monogamy for the marrying parties. However, as the basis for secular marriage law, it provided only the broad outer limits of morally-acceptable marriage in the colonies of Empire and was not intended to address the practicalities of everyday administration. The Church and the State may not yet have separated in jurisdiction over marriage in England, but they were coming to be increasingly differentiated by the pragmatics of

local colonial administration.

The legal precepts of marriage law being considered for settlers in Natal in the mid-nineteenth century bore the telltale influences of generations of struggle between civil authorities entrusted with adjudicating a British common law of marriage which was derived from specific English regional, church and village- and parish-based forms of customary practice over many generations, and the Anglican religious authorities who formed the backbone of institutionalized Church power in the early colony. One particularly prominent issue of English custom raised in the ever-contingent colonial context highlighted the manner in which the civil law of Natal was taking on its own specific moral character.

Beginning in the 1870s and ending with the passage of law in 1897, the struggle to pass the law known as the ‘Deceased Wife’s Sister Act’ (also known as Sororate Marriage for its moral affirmation of the particular relationship between a widower and his late wife’s sister as an approved ‘degree of affinity’ for marriage) confirms Robert Morrell’s contention that the family “constituted the building block of settler identity and community.”<sup>14</sup> The issue of marriage with a deceased wife’s sister was replete with contestations over class and race respectability and it provides a window to understanding how the colonial relationships among English custom, imperial law and African custom was constituted through colonial law during the second half of the nineteenth century in Natal.

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<sup>14</sup> Robert Morrell, *From Boys to Gentlemen: Settler Masculinity in Colonial Natal, 1880-1920*. Unisa Press, Pretoria, 2001, 249.

The problem of sororate marriage was more than simply a colonial legal question. It was a small but significant part of an ongoing metropolitan and empire-wide debate which had begun in the early nineteenth century and which would take more than seven decades to be resolved. It is in the context of this larger debate that contestations over sororate marriage in the colony of Natal might be more fully elaborated.

*The Case for Respectability: Making Home and Family in early Settler Natal*

Edward Ryley and his wife Mary Ellen arrived in Natal from England with their ten children in late August 1879.<sup>15</sup> Filled with both hope and anxiety over the future of their family, they alighted the steamer they had boarded in Southampton carrying little more than a few suitcases and some savings they had accrued during their marriage. Mary Ellen was expecting another child and the Ryleys were hoping to make a prosperous new beginning in one of her Majesty's newest colonial possessions. The immigration recruiter for Natal had assured them that land was plentiful in the colony, and that a large swathe had been set aside for people just like themselves. But their hopes were shattered barely two months later when, soon after giving birth to their eleventh child, Mary Ellen died.

New to the colony, sick with grief and burdened by the needs of his large family, Edward was desperate for help. With no family nearby to call upon, Edward wrote to his wife's sister in England. His children, especially the youngest, were inconsolable and the

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<sup>15</sup> PAR, Magistrate and Commissioner, Ladysmith (hereafter 1/LDS) 3/3/5 Resident Magistrate Ladysmith forwards petition and affidavit of Edward Ryley. August 10<sup>th</sup> 1885.

Ryleys had not had the opportunity to find 'house help' since their recent arrival. In his letter to his sister-in-law Margaret Jemima Atcherley, Edward expressed his sorrow over the loss of his dear wife and his inability since her death to properly care for his young children. His work kept him from attending to household matters, he explained, and all this responsibility now devolved upon his twelve year old daughter. He acknowledged the deep affection that Margaret had had for her sister and for her nieces and nephews. Would she come to Natal and marry him, and in doing so provide much needed care and comfort for this large family whom she held in great affection?

Margaret, greatly grieved over her sister's death, was not immediately convinced, but Edward persisted over the next few years. In 1885, six years after her sister's untimely death, Edward wrote that his oldest daughter who bore almost all of the responsibilities of the household, had died aged only seventeen. His oldest remaining daughter, aged thirteen, would now have to bear this burden. Margaret finally agreed that a suitable period of mourning her sister had passed, and given the new difficulties that had arisen, she would be happy to take her sister's place and care for those whom Mary Ellen had loved most. Edward began making arrangements for her arrival. The marriage would have to be contracted with haste once Margaret arrived if she was to live with her brother-in-law in propriety. Colonial outposts were notorious in England for the impropriety they supposedly spawned, and neither Edward nor his sister-in-law wanted their respectability to be doubted by their new friends, neighbors and social acquaintances.



With Margaret en route to Natal, Edward visited his local parish priest and discovered, to his immense disappointment, that a marriage to his sister-in-law was not going to take place without considerable difficulty. The local parish would not allow the publication of banns of marriage<sup>16</sup> as the official position of the Anglican Church in Natal was that marriage by a man to his deceased wife's sister was immoral, falling within the prohibited degrees of affinity as proscribed by the Church. To the surprise and disappointment of Edward Ryley, in order to proceed with such a marriage they would have to get a special dispensation from the colonial administration in far away Pietermaritzburg. The situation in which Edward Ryley found himself was not a unique one. In a situation of widespread poverty, poor health and high maternal mortality in the colony, a small number of settler men were making applications to the state to contract marriage to their sisters-in-law, and these petitions had caught the attention of Natal's colonial legislators.

*Customary Degrees of Prohibition: Levirate Marriage, Sororate Marriage & Polygamy*

Marriage with a deceased wife's sister (Sororate Marriage) was prohibited by Anglican canon law since the reign of Elizabeth I, but was nonetheless an occasional and generally acceptable occurrence over the centuries in England, a sister-in-law making a convenient replacement for her dead sister as both wife and step-mother to her children. Despite the Anglican Church's official disapproval, such marriages were rarely

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<sup>16</sup> Banns of marriage refer to the public announcement in Christian parishes, especially associated with Church of England and other denominations, of an impending marriage between two named persons. Its purpose was to permit the raising of any public objection - on canonical or civil grounds - to the prospective union.

challenged in the ecclesiastical courts which had jurisdiction over the regulation of marriage. Such marriages were therefore effectively legitimated until the passage of the 1835 Marriage Act in England which prohibited a widower's marrying his sister-in-law after his wife's death.<sup>17</sup> This act brought English common law in line with Anglican canon law, and annulled all marriages outside the 'prohibited degrees' after August 31, 1835, while at the same time legitimizing those made before that date. The Act became the focus of imperial and colonial debate for the remainder of the century, until its repeal in England in 1907, not least because the biblical 'prohibited degrees' of affinity rendered into civil marriage law raised more than a few practical difficulties. The seven decade long movement which the 1835 Act provoked in Britain for a bill allowing sororate marriage (which Gilbert and Sullivan nicknamed 'the annual blister')<sup>18</sup> coincided at a number of points in the nineteenth century with attempts by various British colonies to pass acts legalizing this form of marriage and having such marriages recognized in the United Kingdom. The issues raised by the coincidence of these imperial and colonial debates are revealing of a number of issues at stake in the making of citizens and subjects in the British Empire more broadly, but more specifically for the purposes of this chapter, during the second half of the nineteenth century in colonial Natal.

The debate on the legality of marrying one's wife's sister forced Victorians to

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<sup>17</sup> Until 1857 the law of marriage was administered by the ecclesiastical courts, according to the canon law. However the civil courts modified and controlled this canon law by means of the writ of prohibition: canon law became subordinate to common law in 1857, and where the two conflicted the civil courts would over-rule the ecclesiastical courts. Bruce S. Bennet, "Banister vs. Thompson and Afterwards: The Church of England and the Deceased Wife's Sister's Marriage Act", *Journal of Ecclesiastical History*, vol. 49, no. 4, October 1998.

<sup>18</sup> Cynthia Fansler Behrman, 'The Annual Blister: A Sidelight on Victorian Social and Parliamentary History', *Victorian Studies*, 11 (1968): 483.

closely examine the Bible whose authority they had long taken for granted. Levirate marriage (or marriage to a deceased husband's brother) is expressly forbidden in Leviticus 18:16, but the prohibition on sororate marriage and polygamy are interpretive inferences drawn in analogy from the original prohibition. The supporters of the Marriage with a Deceased Wife's Sister Bill offered for public scrutiny the way in which the monogamous law of God, taken by many for granted as a Christian institution is 'written only in the margin', or exists as the interpretations added to the biblical text, but not within the text itself. The English law of marriage, which some imperialists hoped would 'put an end to polygamy' in spaces of colonial conquest in the name of God, was rather a marginal and supplementary interpretation added to the main body of the Bible.<sup>19</sup>

The Marriage Law Reform Association which was formed in 1851 for the sole purpose of legalizing marriage with a deceased wife's sister repeatedly emphasized the scriptural lawfulness of this kind of marriage. An 1883 pamphlet by the Association entitled 'A Summary of the Chief Arguments for and against Marriage with a Deceased Wife's Sister', for example, stressed that the so-called scriptural prohibition against the marriage was an invention as it was not stated within the original text.<sup>20</sup> The pamphlet likewise attacks the translation of the Bible, namely the marginal rendering of Leviticus 18:18 – 'one wife to another' for 'a wife to her sister' - as serving the same purpose of adding a human interpretation to the sacred text. It went on to claim that the translation

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<sup>19</sup> Nancy Anderson, 'The "Marriage with a Deceased Wife's Sister Bill" Controversy: Incest Anxiety and the Defense of Family Purity in Victorian England', *The Journal of British Studies*, vol. 21, No. 2 (Spring, 1982), 67-86.

<sup>20</sup> Marriage Law Reform Association. *A Summary of the Chief Arguments for and against Marriage with a Deceased Wife's Sister*. London, 1883.

was a variation made by a small sect of Jews called the Karaites, who rejected polygamy, and falsified the passage to support their opinion:

If their variation was adopted, it would amount to a prohibition of polygamy. But polygamy was then, and for ages after, allowed. The verse is not “wrongly translated.” It is the translation given us by our Church; its accuracy is admitted by the best scholars; and it accords with the Septuagint, Chaldee, Syriac, Arabic, Vulgate, and every other version.<sup>21</sup>

In this rendering, monogamy is exceptional and permitted to exist in the biblical text only as one of many possible variations. The other versions accurately translate the original, preferring what the Bible literally commands, that is, polygyny. The Marriage Law Reform Association therefore argued that the Christian law of monogamy was nothing but an interpretation and mistranslation of the sacred text which occupied, among other more authentic readings of the Bible, only a marginal position to the original word of God. This scrutiny of the Bible not only marginalized the contemporary Christian interpretation, but it also disclosed the ‘tribal’ origin of the Holy Book. The opponents of the Bill thus had to answer the charge that the Book of Leviticus did not dictate the Christian law of marriage, but the Hebrew law which permits polygamy.

However, the supporters of the Bill, while stressing the Scriptural lawfulness of those marriages at the same time argued that the biblical restriction should not be applied to ‘Christian times’ for it deals with the polygamous custom of ancient tribes.<sup>22</sup> They quoted as their authority the opinion of the prominent Orientalist, Sir William Jones, who

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<sup>21</sup> Marriage Law Reform Association. *A Summary of the Chief Arguments for and against Marriage with a Deceased Wife’s Sister*. London, 1883, 5

<sup>22</sup> Hansard, vol. 149: 614.

argued that the Book of Leviticus did not refer to marriage at all:

it is surprising, that the chapter before us should ever have been taken for the *law* of marriage, since it is apparent that all the laws contained in that chapter relate only to the impure lusts and obscene rites of the Egyptians and Canaanites, to the abominable customs and ordinances, as they are called, of the idolatrous nations, who were extirpated by the chosen people.<sup>23</sup>

Jones therefore concludes that the English, by faithfully observing the Levitical degrees as Marriage Law, were in fact venerating the old custom of the idolatrous tribes. His close reading of the Hebrew bible undermined the authority of Christianity as a directly revealed religion by turning the Book into an object of philological study.

The supporters of marriage with a deceased wife's sister, in their close examination of the Bible to find God's approval of such marriages, undermined the authority of God as the law-giver. The Bible suggested that the incestuous and polygamous practices encountered in colonial spaces were nothing but the manifestation of an older, dormant sexuality which, still existent, might at any time subvert 'the Christian society'. But the specter of this already loomed large in the minds of those determined to prevent the passage of the Deceased Wife's Sister Bill. It was for this reason that English cultural critic Matthew Arnold objected to legalizing marriage with a deceased wife's sister, which he condemned as a 'great sexual insurrection of our Anglo-

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<sup>23</sup> *A Summary of the Chief Arguments for and against Marriage with a Deceased Wife's Sister*. Marriage Law Reform Association, London, 1883,147.

Teutonic race'.<sup>24</sup>

Arnold claimed that Indo-Europeans had distinguished themselves from Semitic races over time, and his condemnation of Semitic practices of marriage banished them to a time and place only marginal to Indo-Europeans. In these racial imaginings, legalizing marriage with a sister-in-law was to incite a sexual revolution, for it would permit the 're-emergence of a marginal, polygamous nation inside of the English home'.<sup>25</sup> The English Marriage Law, true to the word of God, was standing as a safeguard against the dissolution of monogamous domestic space. It marked a boundary between Home and Harem, which did not necessarily correspond to the geographical contours of the Empire. For example, the Empire allowed conquered people such as Indians and later, Africans, to have polygamous and incestuous marriages according to their marriage laws, as the English were not supposed to interfere with their customs, except in cases of such exceptional inhumanity as widow-burning.<sup>26</sup>

Additionally, and more importantly for an analysis of the debate over contested practices of settler custom in colonies such as Natal, the issue was frequently presented as 'a poor man's question', in reference to the English working class for whom marriage with a deceased wife's sister was argued to be most common. They were derided by

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<sup>24</sup> Matthew Arnold, *Culture and Anarchy, with Friendship's Garland and Some Literary Essays*. Ed. R.H. Super. Ann Arbor: University of Michigan Press, 1965, 207.

<sup>25</sup> Kaori Nagai, "A Harem in the Home: The Deceased Wife's Sister Bill and the Colonisation of the English Hearth", *Australasian Victorian Studies Journal* 8, 2002, 45-59.

<sup>26</sup> Anderson, 'The Marriage with a Deceased Wife's Sister Bill Controversy', Kaori Nagai, "A Harem in the Home", Elisabeth Rose Gruner, 'Born and Made: Sisters, Brothers, and the Deceased Wife's Sister Bill', *Signs*, vol. 24, no. 2 (Winter, 1999), 423-447.

social reformers and as such came to constitute the same 'racial' category within the professedly purely monogamous nation.<sup>27</sup> The working class as well as the polygamous Indian and African subjects of Empire were, though the decisive majority, marginal 'Others' to be civilized, and against whose immoral influence the domestic happiness of the middle and upper classes had to be carefully guarded.

### *Circumstances of Class and Respectability in the Early Colony*

The imbrications of morality and marriage practice with these concerns over class respectability and racial 'otherness' took on new significance in the particular class circumstances of colonial Natal. The overwhelming proportion of Natal's English settlers were made up of immigrants who were rural or working class, most with little or no education and few prospects for social mobility. Few had access to family wealth, and where settler individuals and families put up capital to buy into privately run settlement schemes, many claimed this to be their life savings.<sup>28</sup> Most settlers who sought it were allotted land by the state's European Immigration Department. Only 14% of the settlers who arrived in the early 1850s were self-supporting.<sup>29</sup> The privately-run settlement schemes, such as the Byrne settlement, into which some of the aforementioned settlers bought their way, tended to be unsuccessful and reduced hundreds of settler families to

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<sup>27</sup> McClintock, A. *Imperial Leather: Race, Gender and Sexuality in the Colonial Contest*. New York: Routledge, 1995 and Margaret Strobel, 'Gender and Race in the Nineteenth- and Twentieth-Century British Empire,' in Bridenthal, R. and Koonz, C. (eds.) *Becoming Visible: Women in European History*. Boston: Houghton Mifflin, 1977.

<sup>28</sup> Hattersley, *The Natalians*, Brookes and Webb, *A History of Natal*.

<sup>29</sup> Jo Beall 'Class, race and gender: The political economy of women in colonial Natal', M.A. Dissertation, University of Natal, Durban, 107.

penury.<sup>30</sup>

These people met with downward class mobility, as did those few who traveled to Natal by declaring lower-class occupations than might have actually been the case, in order to claim free passage. These people, ‘reared up in a confined counting house or behind a shop’s counter, arrived...under the name and title of a skilled laborer...and when [asked] how it happened that he was devoid of the usual characteristics belonging to that class, such as hard horny hands, strong muscular frame and weather-beaten countenance...[the reply is that] it was necessary to assume another character, as without this there would be neither grant to emigrant nor bonus to emigration agent’.<sup>31</sup>

As the Natal colonial government sought an increase in settlement it provided ‘assisted passage’ to thousands of English immigrants, and some colonial officials and prominent settlers were at pains to stress to their legislative colleagues the social stigma attached to the publicizing of the names of immigrants receiving such public immigration assistance in the colony’s newspapers and government gazettes. As Sir John Robinson told the Natal legislature in 1890:

...already these names are blazoned forth to the world in the columns of the public press. The immigrants who come to our shores now come here by special direct steamers and we all of us know that the passengers by those steams, whose names are published in the public papers, come out as assisted immigrants. But what man in his senses presumes to cast the smallest reflection upon any individual who thus comes out...as if they are

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<sup>30</sup> Hattersley, *The Natalians*, 72.

<sup>31</sup> Hattersley, *The Natalians*, 69.



convicts?<sup>32</sup>

The search for renewed class mobility amongst those of recently straitened class circumstances nonetheless coincided with those of the majority of assisted settlers who arrived in the colony under more clearly working class circumstances as laborers, artisans and servants to settlers. As Natal landowner, prominent settler businessman and legislator John Moreland told the *Natal Independent* newspaper in March 1852:

by far the greater number of those who have emigrated to this colony have done so to improve their condition – men (and, it may be added, women) of industrious habits whose increasing families demanded forethought and consideration, and who were prepared to undergo difficulties and hardships in order to establish their children in more easy circumstances than they could possibly hope for in England...<sup>33</sup>

One of many such persons was the Yorkshireman William Wilkinson who landed in Natal on the ship *Haidee* as an indentured servant to settler farmer Benjamin Lund. A few years later, he bought his release from bonded servitude for fifteen pounds and went on to cut and sell thatch, livestock, and took paid work helping settlers erect houses, stables and other buildings. Wilkinson's experiences of work in the colony highlight the racial marginality of working-class settlers such as himself as he worked alongside Africans and Indians in these early occupations in order to make a living.<sup>34</sup>

The colony's 'Master and Servants' laws, the first of which was passed in 1850,

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<sup>32</sup> PAR NCP 2/1/12 June 10, 1890 Debate on Immigration.

<sup>33</sup> 'Letter to the editor' by John Moreland, *Natal Independent*, 7 March 1852.

<sup>34</sup> Hattersley, *The Natalians*, 73-74.

are particularly significant for the unique manner in which they worked to produce ‘internal’ class difference in this early colonial setting. Douglas Hey and Paul Craven have noted that Master and Servants laws in this period in Britain’s colonies were primarily responsible for making racial distinctions amongst different colonial groups, especially between Natives and settlers or ‘Black’ and ‘White’.<sup>35</sup> Natal’s Master and Servants labor regime developed within the colony’s emerging common law *parallel* to exclusionary codes of law for the colony’s Africans (and to a lesser extent, Indians, who were governed by immigrant labor laws). As I pointed out in the previous chapter, these Master and Servants laws were subordinated to Native law in the administration of Africans and were therefore inapplicable to them. Master and Servants’ laws were similarly subordinated to the Coolie Consolidation Laws in the case of indentured Indian administration and only became applicable to Indians in the event that their indenture contracts had been completed, and then only if they chose to enter into voluntary service in Natal afterward. Natal’s Master and Servants’ laws thus worked primarily as a mechanism for making and managing class differentiation/distinctions *within* settler society itself.

Until African administration was embraced as a necessity by the 1853 Native Commission which deemed a racialized, labor hierarchy to be essential to the ‘civilizing’ relationship of European settlers to Africans in this period, there were no clear legal visions for the establishment of a middle-class white settler society whose servants would inevitably be black Africans. The Location Commissions of the 1840s had determined

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<sup>35</sup> Douglas Hay and Paul Craven (Ed), *Masters, Servants and Magistrates in Britain and the Empire, 1562-1955*, Chapel Hill: University of North Carolina Press, 2004.

that the creation of sizeable Native locations could ensure ongoing complete legal and social segregation between Africans and settlers, but this was rejected in 1853. While the 1853 Native Commission's visions for a massive laboring African underclass were not realized for almost half a century, mid-nineteenth century settler public opinion began to favor a class hierarchy, based in the relationship of Master and Servant, which was more racially distinct than it had been in the early years of the colony's settlement.

In the early decades of colonial settlement, some settlers were able to secure the itinerant labor of African refugees and migrants, especially single men who worked on farms and in households as domestic servants, in the interior of the district.<sup>36</sup> But by and large, those who labored as nursemaids, nannies, cooks, cleaners, artisan apprentices, and day labor in households and smallholdings for settlers until the 1860s were working class European men and women.<sup>37</sup> This is hardly surprising in the context of a poor, marginal space in the British Empire, many of whose settlers began to struggle in Natal for class respectability which their backgrounds would never have permitted in England. It was the presence of a large, racially and supposedly morally 'degenerate' African population which provided the path to settler class respectability, attained through the construction of racial and civilizational distinction.

People such as William Wilkinson, poor or working class, were unable to immediately claim the kind of hierarchical social distance from racial contact with the

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<sup>36</sup> Jeff Guy, 'The Remarkable Mr. Peppercorne: (or Adam Smith in Msinga)'. Unpublished Paper presented at the History and African Studies Seminar, UKZN, Howard College, 2011.

<sup>37</sup> Hattersley, *The Natalians*.

colonies ‘lower classes (races)’ which was necessary for the attainment of the visions of white settler respectability which this chapter has outlined. In fact, the early presence of a mass of poor English immigrants in Natal was crucial to white settler elites securing their own class-based respectability. But as men like Wilkinson prospered, and as more moneyed settlers, and men from more aristocratic backgrounds with English public-school education began immigrating to the colony after the middle part of the century, the effort to make distinctions of social status came to be ever more pronounced, and ushered in a period of rapid social reinvention for many settlers through the acquisition of land which remained relatively cheap for all European settlers, carefully-chosen marriage alliances, attendance at elite public schools modeled on their English antecedents, and the molding of names to ‘convey gentility and to suppress ordinariness’.<sup>38</sup>

Often establishing oneself as respectable in relation to a settler elite entailed a combination of these factors. The relativity of class-making meant that class-based settler ‘respectability’ was made against the referent of working-class immigrant settlers who formed the majority of Natal’s settlers, and as the settler population became more class mobile and the colonial government claimed greater legal jurisdiction over Africans, class-based respectability came to imply additional aspects of racial distinction and subordination.

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<sup>38</sup> Morrell, *From Boys to Gentlemen*, 36-7.

*(Re)producing Family and Inventing Settler Respectability*

The fear of falling – of class ‘backsliding’ – was especially intense in a colonial context where the backgrounds of the vast majority of settlers meant that they would have found themselves on the margins of a metropolitan English social respectability firmly based in class distinction; and where the intimacy of white, settler-colonial social life implied a close policing of social mores in terms of emerging colonial ideas of class and respectability. These notions were strongly gendered and represented attempts by the small number of wealthy, prominent English émigrés to Natal to establish themselves along the lines of ‘rigid castes...[where]...everyone knew his or her place.’<sup>39</sup> But these ‘caste lines’ were not as easily drawn in the colonies where people struggled to reinvent this supposedly inherited social status.

In a colonial context, it was the newly created family which reassured working-class men that they would not slip back into the proletariat. In nineteenth century Britain the proletariat was constructed in class discourse as analogous to African barbarians living in squalor and unreason and unsettled family conditions.<sup>40</sup> This was why settlers from working-class backgrounds who had newly arrived in colonies like Natal worked arduously to create families which distanced themselves from Africans and the image of African barbarity so vivid in colonial visions. As the Comaroffs have put it, ‘the construction of the ‘private’ domain (in the family and the home) was fundamental to the

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<sup>39</sup> Morrell, *From Boys to Gentlemen*, 37.

<sup>40</sup> See Gareth Stedman-Jones, *Outcast London: A Study of the relationship between the classes in Victorian Society*, Oxford: Clarendon Press, 1971; and Jean Comaroff and John Comaroff, *Ethnography and the Historical Imagination*, 265-294.

propagation of the social order; within it were contained the elemental relations of gender and generation upon which social reproduction came to depend'.<sup>41</sup>

Crucial to the construction of this new settler family was the need for domestic labor. This need came to be especially acute as settlers who arrived as married couples often went on to have huge families, and those who arrived as young families with a few children often grew sizeable in the colony. Settler diaries and accounts of early life in Natal put the number of children of first generation settlers, on average, in excess of a dozen per couple, with significant rates of infant mortality.<sup>42</sup> These were not 'modern', middle-class, nuclear families. It is evident that for generations of settler family life, whites in nineteenth century Natal had yet to experience the social markers of such a transition. The demographic turn to smaller families which was facilitated by improved health care, lower infant mortality and the mass education of white men *and* women was something which occurred decisively only in the middle part of the twentieth century.<sup>43</sup> Most of these early settler families became involved in small scale agricultural enterprises which often engaged the labor of the entire household, including women and children. As the nineteenth century progressed, the struggle for class respectability for many of these people depended upon the enrollment of African and Indian labor in appropriate positions of domestic and agricultural servitude.

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<sup>41</sup> Comaroff and Comaroff, *Of Revelation and Revolution*, Vol. II, 321.

<sup>42</sup> Anne Shadbolt, *Daughters of the British Empire*.

<sup>43</sup> Charles Simkins, 'The Evolution of the South African Population in the Twentieth Century', in Robert Ross, Anne Kelk Mager and Bill Nasson (Eds.) *Cambridge History of South Africa*, Volume II. Cambridge: Cambridge University Press, 2011.

As some of these families attained class mobility, and began to constitute new forms of social respectability over succeeding generations (with the aid of inter-generational wealth transmission via inheritance) they were able to mirror some of the social transitions accompanying that kind of mobility in metropolitan England, through participation in different forms of associational life in the colony.<sup>44</sup> In the mid-nineteenth century the active making of respectability emerged together with what Robert Morrell argues were new ideas of appropriate, class based forms of masculinity and femininity which developed amongst white settlers in Natal. For white settler women in Natal it was the employment of servants, and increasingly African servants, to undertake the kinds of household work done by working class women and men which came to represent appropriate notions of respectable colonial womanhood.

The 'Old Natal Family' as Morrell characterizes it, was the basic unit out of which respectable colonial community was constructed. Over the course of the century, the position of women in it changed as they moved out of production and into what he refers to as 'the vitally important realm of social display and interaction and in the process became ladies'.<sup>45</sup> Respectability was attained, over time, by and through the simultaneously constituting and affirming force of public social interaction in which men and women behaved individually and in relation to each other in a manner conforming to the contemporary social mores of manhood and womanhood. The public, social basis for the making of respectability often made the enterprise of its construction a mutually affirming process for those it involved. For women, it was both in relation to their own

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<sup>44</sup> Morrell, *From Boys to Gentlemen*.

<sup>45</sup> Morrell, *From Boys to Gentlemen*, 249.

and other families that they had the task of protecting the family name by displaying laudatory gendered behavior. 'Respectable' women were ultimately those who committed themselves and their resources to the family. However, the successful attainment of respectable settler family life was ultimately tied to the fact 'that it was in the family that racially exclusive, classed conceptions of society were embodied'.<sup>46</sup>

*The Case for Customary Exception: Social Reproduction and the Labors of Women*

In colonies such as Natal then, there was much discursive and material work to be done by white settlers in order to attain class-based respectability, and by implication a racial superiority, parallel to the imagined respectability of elites in Britain. Attempts by settler colonies in the British Empire to pass similar acts legalizing marriage with a deceased wife's sister throughout the nineteenth century took place in a particularly vexed context of debate with vast implications for race and class respectability. In Natal especially, the presence of a large, Zulu-speaking African population whose customs were similarly subject to derision by the settler colonial state, offered unique opportunities for settlers to imagine and elaborate understandings of race and class difference which could help them to establish, in a poor and marginal colonial space, their respectability vis-à-vis the imperial metropole.

The petitions received by the colonial secretary provide important clues to the motivations of Natal's early settlers. A prominent theme was the need for a stable family

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<sup>46</sup> Morrell, *From Boys to Gentlemen*, 249.



life and a keen sense of the ‘great scandal’ which would ensue should the sister-in-law in question remain unmarried but living with her late sister’s husband in the colony. These claims speak to the desire for respectability, and the implications of the legal rejection of these marriage and family arrangements for settler domesticity and masculinity. As Catherine Hall and Leonore Davidoff have demonstrated at great length, women’s labor within the extended family was tremendously important for the reproduction of households in the metropolitan society from which the majority of Natal’s settlers originated in this nineteenth century moment.<sup>47</sup> Sisters and sisters-in-law, especially those who remained single or were ‘spinsters’ could expect to have their labor called upon for childrearing and other domestic purposes in England. It appears from the extent of contestations over the legal terms of sororate marriage in the colonies, that an embedded nineteenth century social practice implicating these women in the care of their relatives, particularly as ‘replacements’ for the material, moral and affective labors of deceased sisters as mothers and wives, was supported rather than curtailed by emigration and the division of extended families over great distances in the British Empire.

As settler immigration increased and men and women attempted to establish families, thereby engaging in processes of making class and respectability in the fledgling colony, there was a marked increase in what was nonetheless a relatively small percentage of applications to contract sororate marriages. Settler poverty, high fertility rates and high maternal mortality in the mid- to late 1800s were important contributing factors to this notable increase. All the petitioners made reference to their unattended

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<sup>47</sup> Leonore Davidoff and Catherine Hall, *Family Fortunes: Men and Women of the English Middle Class 1780–1850*, Chicago: University of Chicago Press, 1987.

childcare needs due to the recent deaths of their wives. The urgent need for the domestic reproductive and affective labors of women, in light of the invariably large numbers of children left motherless was a constant theme.<sup>48</sup> The aforementioned case of Edward Ryley and Margaret Jemima Atcherly was one typical example. In his petition Edward went beyond invoking absent gendered domestic labors, indicating that the moral education of his children, the youngest of whom was six years of age, was at stake in his plea that the prohibition of marriage to his late wife's sister be rescinded. In addition to the children's moral welfare, the respectability of a wider, extended family and community could be compromised as Miss Atcherly 'having come to the Colony for the sole purpose (of marrying Mr. Ryley) and having made no other provision will be left homeless in [what was to her a] strange land, unless joined to (Ryley) in holy matrimony'.<sup>49</sup>

Many of the men who petitioned the colonial state had sought legal advice upon being turned away by the religious and bureaucratic authorities involved in securing marriage licenses and performing ceremonies of marriage. Most discovered that such a marriage could be contracted only in the event that special dispensation was obtained from the relevant government authorities. Some dispensations had been granted in earlier decades although the increase in petitions for dispensations in the 1870s began to make the Natal authorities nervous, especially in light of the ongoing contestations in England

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<sup>48</sup> See, for example NAB CSO 582/1877/655 Settler Remarriage, PAR CSO 505/1875/240 Memorial of John Julius Pistorius of Pietermaritzburg, Trader, PAR CSO 1205/1888/5575 Petition to marry deceased wife's sister.

<sup>49</sup> PAR 1/LDS 3/3/5 Resident Magistrate Ladysmith forwards petition and affidavit of Edward Ryley. August 10<sup>th</sup> 1885.

over this very subject in the mid-nineteenth century.

Natal's Lieutenant Governor, Robert William Keate, was by this time accustomed to making colonial exceptions for customary law among his African subjects, though these were easily rationalized under the rubric of 'Native Custom', or the exclusionary realm of 'Native law' through which colonial authorities governed the lives of Africans in Natal. Those practices that legislators believed could not be morally sanctioned such as polygamy and *ukungena* (an instance of Levirate marriage in which a woman is married to her deceased husband's brother) were permitted to continue with some restrictions under a separate Native code to which all of Natal's Africans were subject. In light of this, Keate's increasing reluctance to grant dispensations for those whose practices were required to conform to the respectability of Natal's civil code of law is revealing.<sup>50</sup>

In 1870, not long before the legislative agitation in favor of the Deceased Wife's Sister Bill (or the Colonial Marriages Act, as it would revealingly come to be known) took hold of the colony's legislature, the Secretary for Native Affairs Theophilus Shepstone created regulations for the customary practice of *ukungena* marriage for Africans in Natal along the lines of the 1869 African Marriage law which was the only law previously in place to deal specifically with African customary marriage practice. Sensitive to missionary and colonist allegations of coercion involved in *ukungena* (echoing gendered discourses comparing polygamy to slavery), he corresponded with

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<sup>50</sup> PAR CSO 505/1875/240 Report by Attorney General, M.H. Gallway to Colonial Secretary on R 112/1873.

both local newspapers<sup>51</sup> and resident magistrates in an attempt to reinforce his general belief that:

The Native Custom in accordance with which a junior brother takes the wives of his deceased elder brother to raise up seed to the house of the latter is so universal and held in such respect by the Natives generally that it was deemed undesirable to attempt to put a sudden stop to it by any regulation under Law 1, 1869. It is however a practice which the Government has always discouraged and is still desirous of discouraging as far as it may be wise to do so. This custom is called 'Ukungena' and the object of it is to prevent a large establishment from being necessarily broken up, the women dispersed and the children left without any persons to care for their wants on the death of the head of the family. In the view of the Natives themselves therefore the custom was established to benefit the bereaved family.<sup>52</sup>

African men such as Chief Mvakwendhlu pleaded with the state that *ukungena* meant that women could remain with their children to look after and to provide for them, and they could keep families from being broken up and a number of young children from being deprived of their mothers. As he told the Under Secretary for Native Affairs:

Men do not make the gardens they do not attend to domestic requirements and they cannot look after a number of children deserted or left by their mothers, by *ukungena* these difficulties can be met because the mothers will then remain with their children.<sup>53</sup>

Similarly, other magistrates noted that African women whose husbands had died continued to be a necessary part of the reproduction of the homestead-based lineages into

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<sup>51</sup> Welsh, *The Roots of Segregation*, 108-109.

<sup>52</sup> PAR 1/LDS 3/3/3 H54/1870 Ukungena Rules.

<sup>53</sup> PAR SNA 3143/1895 Chief Mvakwenahlu complains of the provisions in the Code with regard to 'ukungena', USNA (S. Samuelson) to AG, June 10, 1895.

which they had married. Their ongoing labors were necessary ‘to attend to the culinary duties of the kraal’, and as one magistrate put it, older members of the family were ‘naturally loath to lose [women’s] services’. These identifications of the centrality of gendered labor to familial reproduction were remarkably similar to the reasons which settler petitioners gave in support of their pleas for legal relief. For Africans, Shepstone laid out rules, drawn from the provisions of the 1869 act, regulating the practice of *ukungena* and circulated these among the colony’s resident magistrates. As Guy demonstrates, he was determined that reform would happen on the terms of his own interactions with Africans,<sup>54</sup> although as Jeremy Martens shows, on occasion he certainly employed the language of civilization and savagery to characterize these policies.<sup>55</sup> But while Martens attempts to demonstrate the force of Enlightenment discourses of civilization, he mistakenly seeks to undermine the important work of subject-making done by constructions of race that remained at the heart of Native policy.

The increasing legal jurisdiction that Natal’s settler colonial government was beginning to claim over Zulu-speaking Africans in the late nineteenth century provided a buffer to comparisons between these newly powerful white settlers and a derided English working class. The creation of the segregated legal domain of Native law was crucial to this. Difference in customary practice did not have to be demonstrated if racial difference could simply be asserted in the law and if the civil laws of the colony, in the process of being established as the legal status quo, and which governed only its white citizens,

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<sup>54</sup> Guy, ‘Accommodation of Patriarchs.’

<sup>55</sup> Jeremy Martens, ‘The Impact of Theories of Civilization and Savagery on Native Policy in Colonial Natal’, unpublished paper, African Studies Association of Australasia and the Pacific 2003 Conference Proceedings.

could be made to conceal their customary roots. In making the contested customary practices of English settlers invisible by enshrining it in the colony's civil laws, Natal's colonial government took what was a highly-contested form of English custom and turned it into a legal abstraction which it asserted as morally universal. Not unlike scholars writing about the legacy of colonialism in Africa, these colonial legislators were asserting that the civil, legal institutions of colonial rule, viewed against the constructions of Native Law and systems of indirect rule in most of Africa, were without cultural specificity – that they genuinely were unmarked. As a moral default it was offered as an intuitive system of social order that was clearly differentiated from the systems of law devised to govern those subjects whose allegiance to custom and 'tradition' was assumed to be paramount. The system of law to which different colonial inhabitants could be subject was determined by race alone. Racial difference then implied cultural particularity and secured the paternalistic rationalization of ongoing legal segregation.

*Making Settler Custom 'Civil': The 'Marriage with a Deceased Wife's Sister Act' in Natal*

Despite the fact that attempts to contract sororate marriage did not represent the marital circumstances of the majority of Natal's settlers, prominent public voices proclaimed that the matter nonetheless held wider implications in the colonies than in Britain. As an editorial in the *Natal Witness* elaborated in 1877:

in the colonies...something more practical has been done, a measure for legalizing marriage with a deceased wife's sister having been passed by

the legislatures of Victoria and New South Wales in 1872 and 1875 respectively. It was perhaps only to be expected that there should be a strong affirmative feeling on this subject in the colonies than at home. It is a natural step for an emigrant when he first begins to realize success in his new abode, to bring out his own or his wife's relations, and, especially, to give his wife that female countenance and domestic assistance which could only be gained by the presence of a sister. And in case of his being left a widower, it could easily become almost a binding necessity, for his own sake and his children's sake, that he should, by marriage with that sister, preserve in his household the influence which alone could adequately make good his loss. A widower in a colony is far more helpless than a widower at home; and while the scarcity of a female society would tend to narrow his choice in selecting a second partner, his wish for as little change as possible in the constitution of his household would limit it still further. It may be said, then, that this question of marriage with a deceased wife's sister is a question which is more likely to involve cases of actual hardship in the colonies than at home...<sup>56</sup>

Lieutenant Governor Keate may have been reluctant to permit sororate marriage for settlers in the 1870s, but legal momentum gathered behind the petitioners for these marriages. By the 1890s, a number of bills had been put before Natal's Legislative Assembly to allow for marriage with a deceased wife's sister and a range of views were heard on the subject by colonial notables. Issues of class respectability and its relationship to sexual propriety were implicit in these discussions, with the bill's detractors in the legislature especially keen to avoid comparisons between settlers (in what was, in fact, a very poor colony) and Britain's lower social classes, not to mention the colony's African population.

Most of Natal's legislators claimed to be in favor of the Deceased Wife's Sister Bill arguing that the contingencies of establishing home and family and therefore, respectability, in a fledgling settler colony trumped concerns over social disapproval in a

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<sup>56</sup> 'Editorial', *Natal Witness*, July 17, 1877.

far-away metropole. However, legislators were nonetheless generally cautious in their assessment of this legal measure. Many of them were following the as yet unresolved attempt to pass similar legislation in England and were hesitant, as a marginal colonial space desirous of properly earning their independence from Metropolitan England, to take the lead in legislating on the question of sororate marriage.

Public opinion on the matter of the bill could hardly be described as stridently in favor of, or in opposition to, the reform measure. In general, apart from letters to the editor in various newspapers from those in some way directly or indirectly affected by the bill, or those involved in its legal conceptualization in the colony, the tone of colonial public sentiment, in its widest sense, was relatively muted on the issue. Those who knew of sororate marriage through the experiences of especially close family understood that the quiet moral stigma attached to these unions continued to have social effects over generations. The *Witness* editorial made the case for legal acceptance of what it acknowledged was a marginal customary practice, in particular with regard to the children of such marriages:

...the only stone that can be cast at them is cast by that law which, with a singular ingenuity of injustice, makes the children suffer for what is regarded as no fault on the part of the parents...Society is not eager after such marriages; society does not say, and never will say, that marriage with a deceased wife's sister is a thing to be desired above everything else. It does not say this, any more than it says that marriages between first cousins are to be so desired. But it does say that those who may be led by circumstances to contract such marriages are perfectly at liberty to do so, and shall suffer no disparagement on that account.<sup>57</sup>

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<sup>57</sup> 'Editorial', *Natal Witness*, July 17, 1877.



The matter took on renewed contestation when a German Lutheran man near Durban protested against having to adhere to Anglican canon law proscriptions on marriage. His argument that the canonical prohibitions of the Church of England could hardly be foisted upon all of the colony's settlers regardless of the fact that they were small in number, intersected with the views of colonial legislator and former Coolie Agent for Natal, Edmund Tatham who was the most vigorous proponent of the bill in all its forms. From the 1870s until its eventual passage in 1897, Tatham offered the bills to the Legislative Council and provoked a debate about the desirability of a law permitting customary marriage among Natal's citizens by providing the legislature with examples of the daily struggles of Natal's settlers to build families under difficult circumstances and attain respectability in a marginal colonial setting. An ardent believer in the separation of ecclesiastical and civil powers, he defended the proposed inclusion of what might have been regarded as an *ukungena*-type union for settlers by offering clergy a reprieve:

The Bill provides, in the first place, that these marriages shall be valid, and it carries the validating process a little further than has been carried in some cases, inasmuch as it validates those marriages between a widower and his deceased wife's sister, and between a widow and her deceased husband's brother...I introduce it again today, giving the House an opportunity of discussing whether or not that portion of the Bill should stand in it. For my own part I hope it will stand...no minister of religion shall be liable to pains or penalties for refusing the solemnisation of marriage made valid by this Act. We ask those of the extreme Church party who have strong feelings on this question to give those who think differently absolute freedom of thought, and we say we are prepared to concede to you the freedom of thought which we demand for ourselves and if you have conscientious scruples about solemnising, as ministers of religion, a marriage made valid by this Act, then we will not force you. We offer you the same freedom of thought that we claim for ourselves, and this Act makes it optional for you to perform the ceremony.<sup>58</sup>

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<sup>58</sup> PAR NCP Legislative Assembly Debates 2/2/5 Marriage Law Amendment Bill. March 29, 1897.

The arguments of postcolonial scholars aside, legislators in the nineteenth century were under no illusions about the avowedly cultural content of that with which they were dealing. There were abiding attempts to differentiate between ‘Christian civility’ and ‘barbaric Native custom’ in the creation of separate administrations of law, and the idea of Natal’s civil marriage laws as needing to conform to broad ‘Christian’ ideals received considerable support although what the limits of this ‘Christian’ morality could be, under clearly contingent colonial circumstances, was open to question in the minds of many of the colony’s legislators.

Among the dissenting voices was William Kenneth Macrorie, John Colenso’s replacement as de facto Bishop of Natal, who held a special synod and requested that the clergy’s petition of protest against the bill be forwarded to Queen Victoria.<sup>59</sup> Macrorie’s missive acknowledged that the Church appeared to be in the minority on the issue and re-emphasized the canonical prohibition against sororate marriage. He concurred with the opinions of the bill’s dissenters in the United Kingdom who were concerned that the permission to marry a wife’s sister would relax the prohibition against marrying other members of the family, such as the wife’s nieces, step-daughters and step-granddaughters.

As the Bishop of Exeter commented in 1882:

I do not mean that the passing of this law would immediately be followed by great impurity, but I do mean to say this, that the passing of this law would tend to introduce the possibility and the probability of many impurities, seductions, and adulteries of a new and peculiar kind, such as

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<sup>59</sup> PAR CSO 739/1880/440, 28<sup>th</sup> January 1880. Protest against Bill legalizing marriage with deceased wife’s sister. Interestingly, both Queen Victoria and the Prince of Wales had offered their submissions in both Houses of the British Parliament as supporters of the British version of the bill.

adulteries with the wife's nearest relations. Is it not awful to think of the added guilt of such adultery?<sup>60</sup>

These fears were well-founded. In addition to sororate marriage, the 1897 version of the Natal bill attempted to permit marriage with a deceased wife's niece as well and called for the repeal of the original Levirate prohibition against marriage with a deceased husband's brother, as was the case with Africans in Natal with respect to *ukungena*.<sup>61</sup> While the Levirate provision was ultimately dropped amid much Christian protestation, the final iteration of the bill went on to include a deceased wife's sister's daughter in the permitted degrees of affinity for marriage. Tatham's attempts were eventually aided somewhat by the passage of similar laws in other colonies including the Australian territories, Canada and the Cape Colony, although the specter of compounding colonial marginality and the fragile and constantly imperiled search for respectability in Empire meant it would take two decades of vacillation before the bill became law.

The passage of the new marriage law in Natal (and the fact that an analysis of this contestation of *settler* custom hasn't found its way into the historiography of colonial Natal) amounts to a re-mystification of the colony's civil law as always implicitly Christian, moral and respectable. The respectability achieved by the legal act of assimilating a highly-contested form of English custom as a 'civil' part of colonial citizenship stands in stark contrast to the colonial tyranny of the customary 'outside' created for Natal's Africans. The desperate struggle for class and racial respectability among settlers in Natal proved to be a double-edged sword. While the passage of a

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<sup>60</sup> Bishop of Exeter, *Marriage with a Deceased Wife's Sister*. Exeter: James Townsend, 1882.

<sup>61</sup> PAR NCP Legislative Assembly Debates 2/2/5 Marriage Law Amendment Bill. March 29, 1897.

sororate marriage act might well have compromised colonial respectability in relation to the metropole until Britain passed a similar law in 1907, the creation of a fledgling settler colonial space with a large majority of indigenous subjects provided new opportunities for the achievement of respectability under difficult circumstances of familial and class re-making. This deceit of civil law was made a conceit of colonial respectability.

## Chapter Three

### **African Customary Marriage Regulation: Gender, Consent and Moral Reform**

#### *'Forced Marriage' and Discourses of Slavery*

In the opening years of the nineteenth century the first Zulu King Shaka kaSenzangakhona refined the *ibutho* (age based labor 'gang') form of Zulu social organization by introducing the strict regulation of Zulu marriage, with the result that the age-regiments of young men who were drawn into military service, and young women who were eligible to be married, needed the permission of the king to marry. This permission was granted (or withheld) at the *Mkosi* – feast of the first fruits – when the Zulu king announced which age-sets would be permitted to marry. As numerous scholars have noted, the practice had been initiated in order to render the army of a burgeoning regional military power both more mobile and more subservient to royal authority.<sup>1</sup> As subsidiaries of the King, chiefs and older patriarchs continued to exert great authority over the marriage of younger generations of Zulu men and women in the post-Shakan period, although European missionaries noted by the mid-nineteenth century that the

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<sup>1</sup> Welsh, *The Roots of Segregation*; John Lambert, *Betrayed Trust: Africans and the State in Colonial Natal*, Pietermaritzburg, University of Natal Press, 1995; Norman Etherington, *Preachers, Peasants, Politics*; Benedict Carton, Benedict Carton. *Blood from Your Children: The Colonial Origins of Generational Conflict in South Africa*. Charlottesville: University Press of Virginia, 2000; Jeff Guy, *Destruction of the Zulu Kingdom*.

practice of *Mkosi* had evolved into customary practice less as a marker of fealty to the King than out of the respect for past usage. By the time of the reign of the Zulu king Mpande (the half-brother of Shaka) in the 1840s, marriage by age-set was not even strictly enforced within the close ambit of Zulu power, in Zululand itself.<sup>2</sup>

By the 1830s it had appeared to missionaries such as the Reverend Lewis Grout of the ABCFM (American Board of Commissioners for Foreign Missionaries) that the primary factor influencing the decision of African men in Natal and Zululand to marry was their access to cattle for the purpose of *ukulobola* ('bridewealth').<sup>3</sup> The control which chiefs and older African males could exert over the ability of younger men to secure cattle implied a social hierarchy based in gendered and generational authority.<sup>4</sup>

Young African women were, on occasion, married to much older polygynists who could provide the 'bridewealth' demanded by the head of the girl's family. As scholars have noted for Natal and other parts of Southern Africa, especially Southern Rhodesia, many young women fled to mission stations to escape these kinds of 'forced' marriages.<sup>5</sup> These 'runaways', as they came to be known in colonial parlance in Natal, particularly featured young women who desired companions other than those to whom they may have been promised in marriage. Many young women did indeed seek such 'rights' to consent

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<sup>2</sup> Welsh, *Roots of Segregation*.

<sup>3</sup> Welsh, *Roots of Segregation*, 67.

<sup>4</sup> Benedict Carton, *Blood from your children: The Colonial Origins of Generational Conflict in South Africa*. Charlottesville: University Press of Virginia, 2000; Jeff Guy, 'Gender oppression in southern Africa's precapitalist societies' in Cheryl Walker (ed.) *Women and Gender in Southern Africa to 1945*; Cape Town, David Philip, 1990.

<sup>5</sup> Diana Jeater, *Marriage, Perversion and Power: The Construction of Moral Discourse in Southern Rhodesia 1894-1930*. Oxford: Clarendon Press, 1993; Ben Carton, *Blood from your Children*.

to prospective marriage partners who were viewed by their guardians to be ‘unsuitable’, primarily by virtue of their age and lack of access to cattle for *ilobola*. Settler public opinion made much of the disparity in age between prospective African brides and the polygynists to whom they were often ‘pledged’.

The matter of age, and by implication an African women’s ‘right’ to consent to her own marriage became an important part of the rhetoric around the customary reform of African marriages. The issue of consent was viewed as inextricably tied to issues of generation and *ukulobola* practice, where older men with greater access to the resources for ‘bridewealth’, in particular cattle, could more easily consolidate their local status as homestead heads and communal patriarchs through marriage than younger men.

In addition to the widespread belief that African women were routinely forced unwillingly into marriage, in both missionary and settler rhetoric, polygyny and its ties with *ukulobola* figured in the colonial imagination as a form of female slavery. Many settler colonists argued that the ostensible ‘sale’ of women in the ‘bridewealth’ exchanges which validated African customary marriages, and the polygynous nature of many of these marriages which resulted in the extension of African homestead-based production engaging women’s agricultural labor, was little different from the moral and economic relationships characterizing slavery. For missionaries in particular, these were primarily moral concerns. But as I began to argue earlier in the dissertation, these moral imperatives came to coincide neatly with the labor-seeking concerns of settlers.

In October 1860, the *Natal Witness* published a letter it claimed was written by an African woman under the pseudonym ‘Mrs. Cant-hater’. She wrote:

Did you ever hear that something should be done by the government and the legislators to provide ‘native labor’ – and if so, do you see how ‘native labor’ is to be provided, unless our husbands and children are to abandon us, and go and work for others away from their homes?...when half-a-dozen of us have only one husband amongst us, we should prefer not to be interfered with by the kind planters, politicians and legislators, who find so much relief to their overburdened sympathetic hearts, and if they will just find some other sponge to absorb their tears, than the never-failing yell about the evils of polygamy, we shall be much obliged.<sup>6</sup>

For his part, the Secretary for Native Affairs, Theophilus Shepstone seemed to agree with this position as he held a much more complicated view of African customary practices than most missionaries, and his legislative counterparts. He argued, for example, that the structural relationships between polygyny, *ukulobola* and the formation of families in Zulu society were hardly comparable to crude sociological understandings of slavery. At a number of points in the political struggles over Native policy in the nineteenth century his observations and arguments – however self-serving or manipulative of Africans, missionaries or the legislators with whom he disagreed – acknowledged (in a manner resonant with twentieth century anthropological understandings) that African customary marriage practices involved configurations of reciprocity, obligation and affective import.<sup>7</sup> For Shepstone, it was in harnessing and manipulating exactly these complex gendered configurations of authority that his autocratic vision of colonial Native policy could be realized.

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<sup>6</sup> ‘Letter to the Editor’, *Natal Witness*, October 26, 1860

<sup>7</sup> PAR Theophilus Shepstone Collection, 2 May 1872.



European missionaries in the early decades of colonial settlement up until 1865 urged that any colonial reform which was contemplated include the effective abrogation of polygyny and *ukulobola* practice, and the institution of the right of African women to consent to marriage.<sup>8</sup> But it became clear by the mid-1860s that reform was unlikely to take any kind of wholesale form. Early legislative attempts which undermined the totality of practices constituting African customary marriage were scuppered by Shepstone, in consultation with the Governor and the Colonial Office.<sup>9</sup> Given the socio-structural linkages of African marriage practices, the kind of reform that missionaries in particular sought involved the wholesale undermining of African political and economic life in Natal. Not surprisingly, those charged with Native policy considered it unwise to antagonize a very large African population whose social and economic labors subsidized colonial life and whose political existence, Shepstone persistently argued, could be more easily controlled through gradual colonial intervention. The anti-colonial uprisings in the 1850s and 60s in India and Jamaica no doubt supported Shepstone's case, his arguments for gradualism and the shoring up of customary practice finding favor with a Colonial Office newly attuned to the threat of revolts and freshly reacquainted with the virtues of the long-stated imperial mandate of 'non-intervention'.<sup>10</sup>

Not all missionaries were convinced by the equation of African customary

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<sup>8</sup> Welsh, *The Roots of Segregation*.

<sup>9</sup> Welsh, *The Roots of Segregation*.

<sup>10</sup> The 1857 rebellion in India and the rising of former slaves at Morant Bay in Jamaica in 1865 marked spectacular symbolic ruptures undermining the liberal reformist imperialism, heralding the ascendancy of a sharper-toothed imperialism and the 'Invention of Tradition' turn within the British Empire. See Thomas Metcalf, *Ideologies of the Raj*, Cambridge: Cambridge University Press, 1994, especially chapter 2; and Bernard Cohn, 'Representing Authority in Victorian India' in Terence Ranger and Eric Hobsbawm, (Eds.) *The Invention of Tradition*, Cambridge University Press, 1983.

practices such as *polygyny* and *ukulobola* with slavery, but those who believed otherwise were exceptions to the rule. Katherine Lloyd, who arrived in Natal during the American Civil War as the wife of ABCFM missionary Charles Lloyd was a fervent abolitionist who had worked amongst ‘free-black’ populations in the American North. She expressed her own reservations about missionary characterization of Zulu custom. Lloyd challenged mission orthodoxy on customary marriage practices as ‘female slavery’ from the position of her abolitionist background, and raised the issue in a letter to her mother:

It is true that those of our mission who are so strong in saying “women are slaves” and “the mission shall be broken up and go home before this horrible custom is allowed,” these can bring up a few solitary cases that seem very horrible – just as I can tell of cases in America where daughters were forced to marry against their will an old and rich man instead of someone they loved who was poor...I fear our missions have not been willing to hear the natives on the subject and so some of them really “speak evil of a thing they know not,” as Paul said...the women are no more slaves than you are to father or I was when [my husband] was living.<sup>11</sup>

Lloyd’s observations, which placed the morally ‘othered’ African objects of missionary derision on equal footing with the kinds of moral excesses more familiar to missionaries in their own societies, blurred the ostensibly clear divisions between ‘civilized’ and ‘uncivilized’. Her opinions implied that the strident nature of discourse which characterized the absence of women’s expressed ‘consent’ upon marriage as being akin to enslavement rhetorically overdetermined instances of ‘forced’ marriage (of which there were undeniably many) to seem to be the structural norm in Zulu society. Along

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<sup>11</sup> Cited in Richard Elphick and Rodney Davenport (ed) *Christianity in South Africa: a political, social and cultural history*, Berkeley: University of California Press, 1997, 101.

with missionaries like Natal's Anglican Bishop John William Colenso, who was a close friend and supporter of Shepstone's until the 1870s (and who was excommunicated for attempting to empathize with polygynous African men, their wives and children) Katherine Lloyd's arguments featured only on the margins of missionary thought.<sup>12</sup>

The views of missionaries like Lloyd and Colenso were not assisted by the publicity roused by cases such as the one that was sensationalized in the Natal press in 1863. A young African woman in Natal was tortured for running away from her husband to her lover, and the incident was reported extensively in the press, alongside the kinds of criticism of Shepstone's policies which were becoming commonplace by the 1860s. As it was a criminal case the husband, a man by the name of Nhlabati, was charged with rape and the case was sent to the Attorney-General's office. Shepstone informed the Attorney-General that a legal marriage had taken place, so the case was remitted to be heard under customary law instead. The magistrate who adjudicated the case convicted the defendants on the girl's evidence and imposed a heavy fine upon Nhlabati, and those who had helped him. Shepstone claimed that the girl sought the conviction of the accused as she had a lover and wanted to dissolve the marriage. Doubting her veracity and convinced that the case would therefore be overturned on appeal, Shepstone refused to honor the magistrate's sentence.<sup>13</sup>

Cases of forced marriage such as this one were unusual though not rare, and

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<sup>12</sup> For more on Bishop John Colenso's thinking and biography see Jeff Guy, *The Heretic: A study of the Life of John William Colenso 1814-1883*, Johannesburg: Raven Press, 1983.

<sup>13</sup> Welsh, *The Roots of Segregation*, 89.

tended to receive a great deal of publicity in the settler press especially as colonial opinion began to turn on Shepstone's policies. The editor of the *Natal Witness* R.E. Ridley, who was also an elected member of the colony's Legislative Council, captured settler mood in 1868 with his editorial proclaiming that Natal Native policy under Shepstone was not productive of 'more, revenue, more labor [or] more civilization' – but worked instead to 'allow [Natives] to settle down in confirmed barbarism'.<sup>14</sup>

*The 1869 African Marriage Law: Revenue, Reform and the Regulation of Polygyny*

Under fire from settler legislators and vilified by public opinion, Shepstone introduced an African marriage register in 1869 to provide for the administrative and moral regulation of marriages amongst Natal's African population. Administratively speaking, an official register of marriage was a means of assisting the state in adjudicating marital, inheritance and property disputes amongst Africans arising primarily out of the payment of *ilobola* ('bridewealth'). In terms of moral reform, the registration regulations represented Shepstone's efforts to curb what he claimed at one point was the tendency within Zulu society to "treat the women as chattel", in denying them the right to 'consent' to their marriages. It also represented the spluttering administrative attempts of the colonial government to secure African male labor through the manipulation of custom.

Firstly, and most controversially, the law made African women's 'consent'

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<sup>14</sup> 'Editorial', *Natal Witness*, 11 June, 1869.

indispensable to African marriages conducted under the auspices of Native law. This was one of the few occasions on which Shepstone's moral claims appeared to coincide with missionary conceptions of African customary practice, and liberal attempts at reform more generally. But this instance of moral reform appears to have been a peculiarly Shepstonian innovation in that it instituted African women's 'consent' under penalty of law while simultaneously denying them civil legal autonomy, or the attainment of legal majority, at any point in their life cycle. An African women's consent, while necessary to the legality of African marriages under Native law after 1869, was still subordinated to the consent of her parent or guardian whom the law envisioned as always male.

While European women in the colony were granted an age of majority of twenty-one years in accordance with British common law, African women could *never* attain legal majority under Native law, as Shepstone claimed deference to a vision of African custom in which he believed women remained always under the authority of fathers and husbands. Marriages could not occur without the consent of a father or male guardian, in addition to the new provision of the consent of the bride, raising the question of what exactly such an intervention as the institution of African women's consent meant in the context of a system of Native administration heavily skewed towards the defense of patriarchal power.

I deal in more detail with the gendered *effects* of the 1869 consent law in chapter five, but it is sufficient to say at this point that setting the consent of African women as young as thirteen years old as a necessary pre-requisite alongside the consent of their

fathers or uncles quickly convinced older African men that their authority over their daughters and wards was being usurped by the colonial state. Young African women took advantage of the opportunity offered by the law when their new right to consent was denied by African patriarchs, and complained to local magistrates who were responsible, under the law, for providing them with haven until the complaint could be adjudicated. The implementation of the law, and the imposition of fines for disregarding the requirement for women's consent, resulted in the kinds of gendered disruptions of customary practice which would cause older African men to lament the loss of particular kinds of male authority in giving evidence before the Natal Native Commission in 1882.<sup>15</sup>

The idea of African women's explicit, oral consent which needed to be attested to by a witness was in many respects certainly a radical form of legal intervention, as similar moves proved to be in other colonial African contexts, but it becomes clearer that in conjunction with Shepstone's accompanying policies concerning polygyny and 'bridewealth' in particular, that the law was tailored less to inspire gender reform in favor of African women than it was an attempt to undermine the particular gendered generational powers of older African patriarchs. As I will show below, the consent clause of the 1869 law was just one part of a Shepstonian strategy to weaken the power of older African men over younger ones. The other parts of the law, regarding polygyny and *ukulobola*, were all ultimately geared toward an attempt to shift generational, rather than

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<sup>15</sup> Report of the Natal Native Commission, 1881-2, Pietermaritzburg, Government Printers, Church Street.

gendered power.<sup>16</sup>

In addition to institutionalizing African women's formal consent to marriage, the 1869 law was a measure that contained the implicit recognition of the structural relationship between customary marriage practices such as polygyny and the reproduction of an African homestead-based subsistence economy, which needed to be undermined if a reliable supply of African male labor was to be secured for emerging forms of settler capitalism. As I have shown, since early on in the life of this settler colony, the imperatives of modernizing, ostensibly Christian moral reform was intended to work effectively toward the end of procuring African labor. The 1869 law attempted to grapple with polygyny amongst Africans as the regulations taxed every marriage contracted by Africans, restricted the practice of *ukulobola* and required that brides publicly express their assent to the marriage.<sup>17</sup>

Shepstone argued that the 1869 law could 'only favour the operation of natural causes to achieve the extinction of polygamy.'<sup>18</sup> Lieutenant Governor Keate articulated this nexus of moral reform in the Natal administration's approach to dealing with polygyny amongst Africans. He argued that instead of tackling polygyny directly the legislative course adopted was prudent, as 'all that could be done by Legislative

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<sup>16</sup> These generational shifts associated with Shepstone's legal intervention around consent are similarly identified in Carton, *Blood from your children*.

<sup>17</sup> Welsh, *The Roots of Segregation*, 67-96.

<sup>18</sup> PAR, SNA 1/7/8 pp.18-23. T. Shepstone, 'Memorandum: Registration of Native Marriages', 22 March 1869, cited in Jeremy Martens, 'The Impact of Theories of Civilization and Savagery on Native Policy in Colonial Natal', unpublished paper, African Studies Association of Australasia and the Pacific 2003 Conference Proceedings, 6.

interference [is] to help on and remove obstructions to the natural causes which are leading, however slowly, to that result.’<sup>19</sup>

The law introduced limits on the amount of ‘bridewealth’ cattle which could be exchanged between African homesteads, as well as on the duration of the exchange in an attempt to cloak traditional marriages ‘with as much finality as possible’.<sup>20</sup> The movement of *ilobola* from the groom’s family to that of the bride was made into a completed, once-off transaction, and the longer-standing practice of ongoing exchange between lineages over a period of many years was abolished by Shepstonian fiat.<sup>21</sup> Shepstone made some concession to the protests of older African men by fixing different amounts for men of different ‘customary’ status, allowing ten head of cattle for commoners, fifteen for brothers and sons of hereditary chiefs, twenty for government-appointed chiefs and placed no limit on the cattle that could be exchanged by hereditary chiefs. Any cattle given in excess to the regulations were subject to seizure and fines by the state. Shepstone also claimed that the new marriage tax imposed by the law would encourage ‘labour habits among the male portion of the native community upon which more than anything else the practice of polygamy depends’.<sup>22</sup> Africans were thus

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<sup>19</sup> Keate cited in Martens, ‘Theories of Civilization’, 6.

<sup>20</sup> Welsh, *The Roots of Segregation*, 83

<sup>21</sup> Anthropological scholarship has underlined the processual nature of wedlock in African societies prior to such interventions. See A.R. Radcliffe-Brown and D. Forde (eds) *African Systems of Kinship and Marriage*, London: Oxford University Press for the International African Institute, 1951; Colin Murray, ‘Marital Strategy in Lesotho: The Redistribution of Migrant Earnings’, *African Studies*, 35 (2): 99–121, 1976 and Colin Murray, ‘The Symbolism and Politics of Bohali: Household Recruitment and Marriage by Installment in Lesotho’, in E.J. Krige and J.L. Comaroff (eds) *Essays on African Marriage in Southern Africa*, Cape Town: Juta, 1981. See also, John Comaroff and Jean Comaroff, ‘On Personhood: An Anthropological Perspective from Africa’, *Social Identities*, 7: 2, 267-283, 2001.

<sup>22</sup> Keate cited in Martens, ‘Theories of Civilization’, 6.



expected to be ‘weaned’ off polygynous practices, and this process was intended to be tied to changes in the sexual division of labor brought about by colonial interventions.

While polygyny declined significantly over the next century, this was not necessarily due exclusively to the additional institution of a new marriage tax by the 1869 law, which was added to the existing hut tax on each marital homestead (or each wife). Together, these taxes exemplified the logic of making polygyny more expensive and forcing men into wage labor in order to raise the cash to pay the colonial administration.<sup>23</sup> If anything, Shepstone’s innovation of the hut tax and the unexpected revenue boom it had produced for the colonial government had tied the economic fortunes of the colonial administration of all of the colony’s inhabitants to the continuation of polygynous household arrangements amongst Africans.<sup>24</sup> Shepstone was not unaware of the tensions and contradictions amongst the competing legislative aims of revenue generation, ‘civilization’ of the colony’s African population and the attempt to expropriate male African labor.

He had also proposed the new marriage tax as a further revenue stimulus for the colony, but this second revenue boom never actually materialized. Despite Shepstone’s deceitful assurances to African patriarchs that they did not pay anywhere close to as much tax to the colonial state as European settlers did, African opposition to the

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<sup>23</sup> H.J Simons, *African Women: Their Legal Status in South Africa*.

<sup>24</sup> This dependence of colonial Natal’s political economy upon African household labor and production resonates with Harold Wolpe’s famous argument about the role of rural household’s in the subsidization of South Africa’s racial capitalist political economy. Harold Wolpe, ‘Capitalism and Cheap-Labour Power in South Africa: From Segregation to Apartheid’, *Economy and Society*, 1, 1972.

additional taxation led to its repeal a few years later, in 1874.<sup>25</sup> It did not help that some legislators such as Attorney General M.H Gallwey viewed the twinning of revenue with reform as a manifestation of insincerity. As Gallwey put it, ‘any attempt to check polygamy should be made pure and untrammelled by any system of taxation so that the Natives can appreciate our intentions and feel convinced that our desire to abolish polygamy is an honest and sincere one, and that the native parent whose property (marriage portion) [is] depreciated cannot reproach the Government that they obtained a pecuniary benefit from their interference’.<sup>26</sup>

Other settler colonists also viewed this ostensibly ‘gradualist’ approach to civilizing Africans as threatening to a colonial moral order, and based their objections in racialized fears of sexual transgression. They argued that the 1869 polygyny proscriptions did not go far enough, and instead institutionalized African customary marriage practices such as polygyny. An editorial in the *Natal Witness* published shortly after the passage of the 1869 African Marriage Law criticized its sanction of African marriage practices as ‘but another phase of slavery’ which brought ‘similar curses in its train’.<sup>27</sup>

### *Polygyny, Racialized Sexual Panic and Discourses of Self-Restraint*

Besides figuring in analogy as slavery, polygyny also featured prominently in colonial public discourse as a causal explanation for what the *Witness* editorial

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<sup>25</sup> Welsh, *The Roots of Segregation*.

<sup>26</sup> Cited in Welsh, *The Roots of Segregation*, 80.

<sup>27</sup> ‘Editorial’, *Natal Witness*, 21 May, 1869.

characterized as ‘increasing attacks and assaults upon white girls and women made by the colored males’.<sup>28</sup> While, as Norman Etherington points out, these fears appear to have had little basis in reality, they are nonetheless instructive of the manner in which polygyny, sexual danger and the capacity of wage work to produce male ‘self-restraint’ came to be discursively tied together in Natal in this moment in the mid-1800s.<sup>29</sup> As the editor of the *Witness* understood it, polygyny encouraged supposedly ‘unmanly’ and ‘uncivilized’ habits in men that led to “depravity and lasciviousness”. As he put it:

Kafir indolence and vice are fostered and strengthened by polygamy...one man is allowed to have five wives, it is clear that four must go unmarried and wifeless, as nature is pretty uniform in the supply of the two sexes. If in England they point with sorrow to the fact that there are no less than 500,000 unmarried women, in Natal we reverse the picture, and present to the world of philanthropists a formidable phalanx of savage unmarried men, greater by far in proportion to the respective populations.<sup>30</sup>

In a speech to the Natal Farmer's Club, R. Baynes heaped scorn on Shepstone's system of rule for perpetuating the institution of polygyny and exacerbating the ostensible moral problems that resulted. These critics generally agreed with one another that Shepstone was responsible for entrenching polygyny, when “polygamy entails upon the white race this bitter curse”.<sup>31</sup> Even before the passage of the law in 1868, the Durban Vigilance Committee which was established during this rape scare in the 1860s to supplement the official police of the colony presented a petition to the Natal legislature on the subject of

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<sup>28</sup> ‘Editorial’, *Natal Witness*, 21 May 1869.

<sup>29</sup> Norman Etherington, ‘Natal's Black Rape Scare of the 1870s’ in *Journal of Southern African Studies*, Vol. 15, No. 1 (Oct., 1988), 36-53.

<sup>30</sup> ‘Editorial’, *Natal Witness*, 21 May, 1869.

<sup>31</sup> ‘Editorial’, *Natal Witness*, 21 May, 1869.

what became widely referred to among colonists as ‘Native Outrages’, or the allegedly ever-present danger of Black men raping white women. The almost four hundred signatories to the petition argued that ‘the Native Customs of the Kaffirs...greatly tend to aggravate these offences, debarring the young men from getting married, and that if any measure could be devised for a modification of such customs it would greatly tend to allay the frightful evil to which Your Memorialists advert’. In addition, Durban Town Councilors also attributed the (fear of the) rape of white women to the ‘unnatural state of things among the Native population induced by polygamy’ and tied the safety of white women in the colony to the legislative ‘discouragement’ of polygyny.<sup>32</sup>

The discursive characterization of Africans as having yet to attain a level of self-control comparative to that allegedly possessed by white settlers was a constant reminder of the ongoing situation of African domestic organization which supposedly ‘produced wandering unmanly idlers who lived off the labor of women, had no respect for women, lacked discipline and who therefore presented a sexual danger to female settlers’.<sup>33</sup> Unlike Shepstone’s elaborate articulation of the relationships amongst aspects of African domestic organization which structured authority and control and lent themselves to colonial administrative manipulation, these colonial rape discourses cast African customary domestic relationships as merely representing illicit forms of sex which could be undermined by forcing African men into waged work and effecting a differentiation of a gendered division of household labor. It was ostensibly through wage work, therefore,

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<sup>32</sup> PAR, CSO 298 (696/1868) 5 March 1868.

<sup>33</sup> Etherington, ‘Natal’s Black Rape Scare of the 1870s’, Martens, Jeremy Martens, ‘Almost a Public Calamity’: Prostitutes, ‘Nurseboys’, and Attempts to Control Venereal Diseases in Colonial Natal, 1886–1890,’ *South African Historical Journal*, 45:1, 27-52.

that African men could be redeemed and civilized, thereby obtaining a colonially-desirable level of self-control. Expropriating African male labor therefore remained instrumental for much of the moralizing, racialized public discourse in Natal during the nineteenth century.

It was in the pivotal decades of the 1860s and 70s that Shepstone attempted to distance his methods of Native administration from these causal accusations of immorality. He blamed the moral ‘outrages’, as the rape of white women was discursively coded, on the migration of ‘Kafir vagabonds’ [such as the *amaTonga* migrants from Mozambique] into Natal:

having no domicile, no tribe or family in the Colony, [African migrants from elsewhere] are subject to none of the restraints or means of control which are applicable to the permanent Native population. The presence of a large body of men in the Colony under such conditions, cannot fail soon to become a source of anxiety to the Government. Changed by regular food, from the state [of] attenuated starvelings to that of well-conditioned full-blooded men; - transferred suddenly from a despotic personal rule under which their every word must be well weighted before uttered, to a country whose only sign of Government to them is the timid control of their employers, is it to be wondered at, that they become licentious, that complaints are heard of assault upon women, and that experiencing no restraining power they act as though none existed?<sup>34</sup>

With this, Shepstone sought to justify his investment in the continuation of what reformers saw as ‘despotic personal rule’ by claiming it as a guarantee of customary restraint. His juxtaposition of this supposedly more effective form of customary restraint, culturally-embedded in ‘tribe or family’ to the ‘timid control of their employers’ was an

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<sup>34</sup> Cited in Etherington, ‘Natal's Black Rape Scare’, 46.

attempt to shore up an alternative, conservative moral vision, one which did not necessarily view the institution of male waged labor and the freedom it provided to especially younger men as being more effectively productive of self-restraint.

Jeremy Martens ties these interventions to contemporary suspicions of a non-white male presence in urban spaces but does not reflect on how these historically competing visions of male African work relate to the political administration of Africans in Natal.<sup>35</sup> Shepstone's support of stricter controls on these men through vagrancy laws and other legislation appears to have been about a more general administrative desire for control of the colony's non-citizen inhabitants rather than any complete acceptance of the terms of discourse set by his settler-colonial detractors who did not share his views on the self-control which resulted from being subjected to customary/despotic forms of authority.

As Norman Etherington observes, this discursive furore during the late 1860s and early 1870s implicating polygyny and African homestead organization in fears of rape and moral deviance ended as mysteriously as it began.<sup>36</sup> While he offers no explanation for why this might have been the case, it is remarkable that the end of this moment of moral panic and the general diminution of the settler-driven reformist labor-expropriation it proposed coincided with the resumption of Indian indentured labor transport to the colony in 1874 after an eight-year break due to economic recession in Natal.

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<sup>35</sup> Jeremy Martens, 'Polygamy, Sexual Danger and Vagrancy Legislation in Colonial Natal' in *Journal of Imperial and Commonwealth History*, Vol. 31, No. 3, September 2003, 24-45.

<sup>36</sup> Etherington, 'Natal's Black Rape Scare of the 1870s', 51.

The acceleration of Indian indentured labor migration from the mid-1870s dampened some of the stridence of these reformist propositions on the part of labor-seeking settlers, at least, as the colonial administrative imperatives of African labor expropriation were temporarily ameliorated. Until the end of Shepstone's tenure as Secretary for Native Affairs in 1883 the moral reform of African custom, while still rhetorically invoked as ostensibly part of the civilizing mission of British colonial rule, was subject more to the whims of his own personal autocratic vision than it was to the imperatives of either a labor-seeking or an unequivocally modernizing colonial administration.

As I elaborate in greater detail in chapter five, in the 1880s Shepstone came to express apparent regret over the earlier customary interventions that were part of the 1869 law, especially the new colonial restrictions on 'bridewealth'. Shepstone and the African patriarchs who testified before the 1881-2 Native Affairs Commission understood the ensuing parental and administrative difficulties entailed in policing the relative increase in the public movements of African women throughout the 1870s to have been a direct consequence of these restrictions, and this only further entrenched his recalcitrance to proposals for further customary reform of marriage practices like polygyny during the period of his tenure and in the years immediately following in his capacity as a consultant to the Natal government on native administration.<sup>37</sup>

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<sup>37</sup> A similar backlash against the liberalizing gendered effects of customary reform occurred in colonial Zimbabwe. See Elizabeth Schmidt, 'Negotiated Spaces and Contested Terrain: Men, Women, and the Law in Colonial Zimbabwe, 1890-1939' *Journal of Southern African Studies*, Vol. 16, No. 4 (Dec., 1990), pp. 622-648.

*“The Shibboleth of their Fitness for Civilized Life”*

Through the 1870s, the discursive weight of issues of customary marriage reform for Africans in Natal was carried mainly by the colony’s Protestant clerical elite and their debates were strongly influenced by widespread settler public discourse. Much of this clerical discussion was cross-denominational and included the views of prominent American Congregationalist and Presbyterian missionaries who formed part of the American Zulu Mission, working under the auspices of the American Board of Commissioners for Foreign Missions, in discussion with other Wesleyan, Methodist and Anglican clergy.

The debates during the 1870s over polygyny and other customary marriage practices such as *ukulobola* (‘bridewealth’) were a continuation of a two-decades-old conflict within the colony over admitting African polygynists to baptism. This earlier conflict, between the Anglican Bishop of Natal at the time, John William Colenso, and members of the American Zulu Mission resulted in Colenso’s eventual excommunication from the Anglican Church in the 1860s.<sup>38</sup> The missionary conflict over the practice of polygamy revealed not only these missionaries’ own perceptions of proper marital relations, but also their broader moral vision of a division of family labor based in the emerging nineteenth century conceptions of modern bourgeois life in which African women who were supposedly compelled to provide agricultural subsistence labor in polygynous homestead arrangements could instead be domesticated into a private

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<sup>38</sup> See Jeff Guy, *The Heretic*; Jonathan Draper, *Eye of the Storm: Bishop John William Colenso and the Crisis of Biblical Interpretation*. Cluster Publications, Pietermaritzburg, 2003.



household with African men working outside the home.<sup>39</sup>

American missionaries, who were the first foreign missionaries to the region in 1835, regarded both polygyny and *ukulobola* as the ‘twin pillars of heathenism’ which needed to be rejected by Africans seeking conversion to Christianity.<sup>40</sup> Bishop Colenso, on the other hand, differed significantly from them in his view that a renunciation of polygyny was not necessary for the conversion of first-generation African Christians. In his *Commentary on the Epistle to the Romans*, Colenso drew on what biblical scholars have characterized as Calvin’s pragmatic missionary ideas regarding the permissibility of polygyny amongst first generation converts.<sup>41</sup> In general, Colenso’s views on the question of a Christian mission to Natal’s Africans differed dramatically from those of his European contemporaries.<sup>42</sup> The Bishop’s views had much in common with the gradualist policy of African modernization advocated by his then-close friend Secretary for Native Affairs Theophilus Shepstone.

While some scholars have characterized both Colenso and Shepstone’s beliefs that the utilization of earlier social forms could assist with the challenges posed in a rapidly changing colonial context as ‘progressive’, it seems more the case that their

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<sup>39</sup> For missionary insistence elsewhere in nineteenth century southern Africa on a sexual division of labor locating men’s labor outside the home and women’s work inside the home see John Comaroff and Jean Comaroff, *Of Revelation and Revolution Vol. II: The Dialectics of Modernity on a South African Frontier*, University of Chicago Press, 1997, 274-322.

<sup>40</sup> Iain S. Maclean, ‘The Twin Pillars of Heathenism: American Missionaries, Bishop Colenso and Converts in Conflict-Polygamy and Ukulobola in 19th Century Natal and Zululand,’ in Jonathan Draper (ed.) *The Eye of the Storm*.

<sup>41</sup> Maclean, ‘The Twin Pillars of heathenism’, 270.

<sup>42</sup> See Guy, *The Heretic*.

inclination toward conserving aspects of customary patriarchy differed little from the avowedly traditionalist views of their male African interlocutors.<sup>43</sup> The five pound marriage tax in the 1869 marriage law became the point of dispute for missionaries who attacked the law claiming that it put marriage out of the reach of all except rich older African men.<sup>44</sup> The anti-Colenso faction of the Church of England used their Diocesan Synod in 1872 to charge that Colenso's 'heretical' tolerance of first generation converts' polygyny and Shepstone's customary conservatism encouraged immorality.

As the Dean of Pietermaritzburg, James Green claimed:

people of whatever race, colour or religion, living in ease, comparative wealth, idleness and safety, would naturally become self-indulgent...[Africans] were living in a singular degree of comfort, ease and idleness, and the natural and necessary result was that there was an increase of licentiousness and immorality.

These views were presented in a petition to the Lieutenant Governor encouraging further customary reforms directed at the colony's African populace. The Reverend J.L. Crompton criticized Colenso by observing that "a work on the Romans had been published, containing the astounding proposition that Natives might be received in the Church whilst still living in Polygamy."<sup>45</sup> To missionaries like Green and Crompton, if the *amakholwa* (Christian Africans) were to be held up as an example of civilizing success, men and women would have to be both monogamous and fulfill the gender roles

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<sup>43</sup> Jeff Guy, *The Heretic*.

<sup>44</sup> PAR SNA 1/1/24, 9 November 1874, Memorial of the American Zulu Mission enclosed in Rood and Wilder to Pine.

<sup>45</sup> Etherington, 'Natal's Black Rape Scare of the 1870s', 47.

appropriate to ‘civilized’ society.

On the question of polygyny, in the 1850s and 1860s, Colenso appeared primarily concerned with the social and economic fate of the multitude of wives and children that polygynists were compelled to abandon in order to themselves convert to Christianity. His awareness of these difficulties appears to have emerged from the pointed questioning of one of his first converts and Zulu assistant, William Ngidi – a probing which reflected the lively culture of intellectual engagement at Colenso’s Ekukhanyeni mission station in the nineteenth century, and the network of debate amongst Christian Africans occurring parallel to (and sometimes intersecting with) European missionary discussions.<sup>46</sup> Bishop Colenso specifically cited his intense conversations with William Ngidi in support of the need for a more liberal, missionary understanding of biblical scripture.<sup>47</sup> For his part, Ngidi related the manner in which he had come to his own understandings of the place of polygyny in the lives of African Christian converts:

I first learned from the Americans and they taught me it is a sin for any man to have more than one wife and if he wish to save his soul he must put away all the other wives and children, keeping one and her children. When they told me it was sin, I believed them. But now [Bishop Colenso has taught me] and I think what [he says] is true - and my own thought is, if God our Father is so good, more good and merciful than all people, He would not call a man and say “Come thou and be saved though thyself alone and cast the others away to be lost”.<sup>48</sup>

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<sup>46</sup> These networks of debate are explored in Vukile Khumalo, ‘Epistolary Networks and the Politics of Cultural Production in KwaZulu-Natal, 1860-1910’, Ann Arbor: University of Michigan, Ph.D. Dissertation, 2004.

<sup>47</sup> J.W. Colenso, ‘William, the Kafir Teacher’, *The Mission Field*, II (1857), cited in Jeff Guy, ‘Class, Imperialism and Literary Criticism: William Ngidi, John Colenso and Matthew Arnold’, in *Journal of Southern African Studies*, vol.23 no.2, 224.

<sup>48</sup> Quoted in Guy, ‘Class, Imperialism and Literary Criticism’, 225.

Indeed much of the debate around polygyny which continued into the 1870s and 80s among missionaries, their Zulu converts and government legislators was centrally concerned with the moral status of Christian African men relative to African women. While Colenso's missionary and legislative detractors may not have been enamoured of the gradual civilization argument, they shared with him a concern over the fate of African women. However, Colenso's concern with the societal fate of African women already married to polygynous African men who were seeking conversion to Christianity was positively worldly in comparison to his critics' preoccupations with a more existential notion of these men's salvation and civilizational 'fitness'. Colenso understood that the over-determined emphatic focus of Christian conversion on the atomized individual would likely entail severe social trauma as it disrupted African notions of belonging to homestead, clan and lineage which is why, despite allowing that no person already converted could enter into a polygynous relationship, he could not accept that the price to be paid for salvation could be the social institution through which he believed God's love was manifested: marriage.<sup>49</sup>

African women appeared to be the most formidable opponents of monogamous, Christian conversion. Shortly after a chief sent two of his sons to a German mission school, a crowd of 140 women led by one of the chief's wives besieged the mission station. A similar incident occurred on the grounds of Colenso's mission station at Bishopstowe in 1856 where women had to be driven away by their male relatives.<sup>50</sup>

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<sup>49</sup> Guy, 'Class, Imperialism and Literary Criticism', 224.

<sup>50</sup> Etherington, *Preachers, Peasants and Politics*, 61-2

Many missionaries reported their incomprehension when children withdrew from mission schools against the will of their fathers but at the instigation of their mothers.<sup>51</sup>

This opposition included woman who were themselves first wives whose husbands had become polygynous after marrying them. Given the principle of ‘putting away’ subsequent wives and children, missionaries might have had less trouble understanding the resistance to monogamy on the part of those who were second, third or subsequent wives who would be abandoned by their husband’s conversion, but it wasn’t at all clear that first wives were convincingly invested in the monogamous renunciation of ‘sister-wives’. Norman Etherington reports the case of a would-be convert who approached Methodist missionary Joseph Gaskin out of concern for the fate of his second wife. The problem, to which the missionary could offer no immediate solution, was solved by the departure of the man’s first wife who denounced her husband’s conversion.<sup>52</sup>

In the dominant missionary moralizing narrative, polygyny reduced African women in homestead subsistence arrangements to the status of slaves, and men who converted to Christianity needed to be able to cast off the heathenism of multiple wives (and the children born of these unions) in order to redeem their souls. It was thought more beneficial, in terms of both individual salvation and civilizational pedagogy, that those Africans at least who availed themselves of Christian teaching needed to be decisively extricated from what was regarded as an atavistic morality despite the social

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<sup>51</sup> Callaway in Etherington, *Preachers, Peasants and Politics*, 62.

<sup>52</sup> Etherington, *Preachers, Peasants and Politics*, 62

and familial ruptures this may have entailed.<sup>53</sup> This latter view continued to be the dominant means of African Christianization in Natal until the end of the century, and it is what ultimately forced the colonial administration to make a legislative gesture toward customary reform despite Shepstonian recalcitrance in the 1870s and 1880s.<sup>54</sup>

These simmering disputes about the nature of African civilization and the interests served by colonial administration taking the shape of personalized ‘customary’ rule reached a point of crisis in Natal with the Langalibalele affair of 1873. The Hlubi chief Langalibalele was falsely accused of rebellion by the colonial government and was arrested, tried, convicted largely on Shepstone’s misleading evidence and sentenced to imprisonment on Robben Island, near Cape Town, in what scholars have described as a sham of a trial.<sup>55</sup> This was the turning point in Shepstone’s relationship with Bishop Colenso. Colenso protested the treatment of Langalibalele, characterizing Shepstone’s Native administration in Natal as ‘rotten to the core’. It was, in part, Colenso’s passionate condemnation of his autocracy which resulted in Shepstone being ultimately forced to codify his peculiar interpretation of African custom and oral tradition in the Natal Native Code in 1875.<sup>56</sup>

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<sup>53</sup> PAR SNA 1/1/70, 1884/89, Revd Greenstock forwards a memorial to the governor with reference to native marriage.

<sup>54</sup> By the end of the nineteenth century, as I discuss in the conclusion of this dissertation the Natal administration developed an open hostility toward African Christianization as the aspirations of the adherents to African Christianity eluded denominational and missionary control, resulting in heightened concern among officials in the Natal government about the rise of ‘Ethiopianism’ amongst African converts.

<sup>55</sup> Jeff Guy, *View Across the River: Harriet Colenso and the Zulu Struggle against Imperialism*. Cape Town: David Philip, 2001, 40.

<sup>56</sup> Welsh, *The Roots of Segregation*.

Shepstone's claims to being the ultimate repository of colonial knowledge of Zulu oral tradition – and his insistence on the centrality of orality to his rule – was no longer administratively tenable in the eyes of colonial lawmakers and he was obliged, in the aftermath of the Langalibalele debacle, to produce the knowledge he claimed in a written document. This document formed the basis for a legislative understanding of the content of African customary life in Natal and secured the legal exclusion of Africans from the ordinary colonial civil realm. It made tenable the perpetuation of indirect rule of Africans in Natal through forms of customary authority supervised by Shepstone and his successors, and incorporated recent colonial administrative interventions (innovations) such as the 1869 law as reified 'African custom'. Attempts to reform aspects of African customary practice in the years immediately following its passage were offered as amendments to the Native Code but received little support from Shepstone or his immediate successors to the position of Secretary of Native Affairs, his brother John Shepstone and his son Henrique.

*Monogamy, Civilization and the Problem of Legal Simultaneity*

In January 1885, the Governor of Natal received a deputation of Christian Africans who presented a petition, written in both Zulu and English, bearing 1 486 *amakholwa* names, almost the entire *amakholwa* population in Natal.<sup>57</sup> It followed closely on the heels of two earlier petitions forwarded to the Governor the year before from members of

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<sup>57</sup> PAR, SNA 1/1/80 1885/55 Petition of certain Christian Natives relative to Christian Native Marriages. 30<sup>th</sup> January 1885.

the Natal Missionary Conference, which had reprised the issue of legislative recognition for African Christian Marriages under the ordinary civil laws of Natal.

Making legal provision for African Christian marriage had first been contemplated in the colony in 1863 by then-Governor Scott but fell off a legislative agenda when Scott was replaced in 1865.<sup>58</sup> Numerous subsequent proposals were suggested in the legislature through the second half of the nineteenth century but none made it to the floor until the concluding report of the Native Affairs Commission of 1882 suggested intervention in Native marriage practices, including restricting lobola, freeing African women over the age of twenty-one from male guardianship, and outlawing polygyny altogether.

In the wake of the report, individual members of the Legislative Council were petitioned by missionaries and clergymen to take up at least some of the proposals of the Commission.<sup>59</sup> It is unsurprising that *amakholwa* concern centered on bigamy in particular. Christian Africans, especially those who lived on mission stations making submissions to the Native Affairs Commission in 1881-2, expressed concerns over the prospect of reproducing the religious respectability they believed they had achieved through conversion. This concern was most often expressed as a matter of generational influence and control. The signatories to the petition requested that the “problem of bigamy” be addressed with a new law for Christian marriage. They articulated their concern over the fate of Christian daughters:

We who are parents understand that when our daughters are married

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<sup>58</sup> PAR, NCP 2/1/1/7 Christian Native Marriage Bill, August 6, 1885.

<sup>59</sup> PAR, NCP 2/1/1/5 Native Marriages Bill, August 7, 1883.



before the missionary that their husbands shall not take more wives while the first lives. But some do not keep their promises. They marry wives before the missionary then afterwards take other wives by the law of the heathen people. It appears that the first wife is deceived; the husband has not kept his word. This is very bad to us; it causes quarrels amongst the children of Christians and teaches the people falsehood.<sup>60</sup>

The reality that the *amakholwa* petitioners expressed was that Christian ceremonies of marriage, despite often being conducted by missionaries on mission stations, did not carry the moral force of law in the way that the formation of homesteads carried the social and moral force of customary practice over generations. The narrative of these converts underlined the continuing hegemony of African customary marriage practices through the accommodations of Shepstonian Native policy. Their call for law was also a call for the unambiguous application of a new form of legal hegemony for Africans, that of a modernizing, Christianizing reform which viewed the domestic relationships formed between men and women in new ways, representing new emerging nineteenth century forms of gendered roles. In a context where assimilation into the common law was an exclusive privilege denied to Africans by the discursive intertwining of race and a supposed preference for the perpetuity of custom, the search for social change through a colonial common law intervention that upheld the rights of African Christians, however limited, was nothing less than a radical strategy.

Beginning in 1883, various bills were rejected by the House at different stages of the legislative process, the vast majority being dropped in committee. The Secretary for Native Affairs, Henrique Shepstone was instrumental in defeating these bills, by

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<sup>60</sup> PAR SNA 1/1/80, 1885/55, Petition of certain Christian natives relative to Christian native marriages.

suggesting their deferment until the entirety of the Commission's recommendations could be legislatively dealt with. But the agitation of the missionaries had been set in motion and with the submission of what Henrique Shepstone acknowledged was a 'large and influentially signed' petition by African Christians, the issue could hardly be ignored. Each of the petitions was specifically concerned with the problem of the enforcement of monogamy amongst Africans married by Christian rites. The *amakholwa* complained that bigamy was widespread amongst Africans married by Christian rites and lamented the lack of recourse available under Native Law. Their claims were borne out by prominent cases on mission stations in the 1870s and 1880s in which men married by Christian rites and living with their families on mission reserves were discovered to have had subsequent wives and children in nearby villages for a number of years.<sup>61</sup> The concerns over bigamy were confirmed by Henrique Shepstone's observation that this was a common enough occurrence especially where many men began to accrue significant amounts of wealth such as in the case of the Umvoti mission station.<sup>62</sup> The junior Shepstone nonetheless differed from the missionaries on the utility of possible legislation. His opinion was that the law would be a failure as 'the habits and nature of the natives [could] not be changed in a generation' and that the remedy lay in the hands of missionaries. His position was initially supported by the Governor who asserted that missionaries could simply 'marry no one by Christian rites who is not exempted from Native law'.<sup>63</sup>

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<sup>61</sup> PAR, SNA 1/3/23 R1063/41. Bird to Secretary for Native Affairs 31<sup>st</sup> March 1871. See also Sheila Meintjies, "Family and Gender in the Christian Community at Edendale, Natal, in Colonial Times", in Walker ed., *Women and Gender in Southern Africa to 1945*. Cape Town, David Philip, 1990.

<sup>62</sup> PAR, SNA 1/1/80 1885/55 H.C Shepstone minute on 26/2/1885.

<sup>63</sup> PAR, SNA 1/1/70 1884/89 Revd. Greenstock forwards a memorial to the Governor with reference to

In support of his position, Shepstone wrote to the Governor claiming that he had spoken to ‘old men from upcountry stations who had, at first, refused to sign the petition’. These men, Shepstone claimed, were concerned about the manner in which the missionaries had gone about the matter without proper consultation. Shepstone’s elderly interlocutors were supposedly disinclined to ‘appear of a man trying to eat with both sides of his jaw at once, that is to avail themselves of a portion only of white man’s law and at the same time in other respects remain under Native Law’.<sup>64</sup> The junior Shepstone’s position was in step with his father’s earlier recalcitrance to permit African legal assimilation on any terms. When Theophilus Shesptone was asked by the 1852-3 Commission whether he thought ‘any savage as long as he is not brought under a civilized law can be made Christian of?’, the older Shepstone had replied that a man could be Christian under any law.<sup>65</sup>

The implications of a request for civil penalties in bigamy cases necessarily meant removing Africans from the purview of Native Law for the purposes of marriage and placing them under colonial civil law where prosecution for bigamy was possible. The missionaries and *amakholwa* petitioners were therefore hoping that colonial civil law could be used as an immediate, compelling moral force for African men who married by Christian rites. A law had been passed in 1865 permitting that Africans ‘who have attained a desirable level of civilization’ be exempted from Native Law and indirect rule.

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Native Marriage.

<sup>64</sup> PAR, SNA 1/1/80 1885/55 Petition of certain Christian Natives relative to Christian Native Marriages. Comments of H.C Shepstone, 3<sup>rd</sup> March 1885.

<sup>65</sup> *Commission Appointed to Inquire into the Past and Present State of the Kafir*, 83.

The vague and subjective conditions of exemption under this law meant that, in practice, exemption was difficult to achieve for those Africans who sought it. The vast majority who petitioned the state for assimilation into colonial civil law were African Christians, although there remains no record of full legal exemption ever being granted to any single African in Natal.<sup>66</sup> The missionaries remained convinced that a limited concession admitting Africans married by Christian rites into the ordinary civil law of the colony was the most practicable means of achieving the ends they sought. Unhappy with Governor Bulwer's proposal that missionaries remedy the problem of bigamy by refusing to marry non-exempted Africans by Christian rites, they pointed out the difficulties entailed in obtaining exemption from Native Law:

we are deeply grieved...that the only method your Excellency can devise to avoid the scandal of Christian marriages being reduced legally to the level of polygamous unions is to insist that before the issue of a licence for marriage with Christian rites the parties shall have obtained exemption from native law...we beg to point out...the injustice of a requirement which makes the consent of the Executive Council necessary to a marriage and renders it compulsory in case such consent is withheld that two years shall elapse before a second application can be made. Further the act enabling Natives of Natal to obtain exemption from the operation of native law shows ...[is] quite unsuitable for the comprehension of the majority of young people especially young woman desiring to contract holy matrimony as they cannot be supposed able to judge of the comparative merits of Native and English law. To force them to give up the whole of their own customs and to adopt a legal system of which they know little or nothing is a restraint on marriage... and frustrates [the] intention of making it easy for her majesty's South African subjects to contract matrimony in a civilised and Christian manner. We are fortified in making our request that Natives adopting the principle of monogamy in marrying according to Christian custom should thereby come under the ordinary law of the colony with regard to the validity and binding character of their union by

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<sup>66</sup> Norman Etherington 'African Economic Experiments in colonial Natal, 1845-1880' in Bill Guest and John M. Sellers (Ed) *Enterprise and Exploitation in a Victorian Colony: Aspects of the Economic and Social History of Colonial Natal*, Pietermaritzburg: University of Natal Press, 1985.

the conclusions of the Native Law Board and the Report of the Native Commission 1881-82 and in the interests of the Natives and with a view to their advance in civilization we earnestly beg your Excellency to carry into effect the recommendations...from various quarters on the attention of the government.

- Rev. Greenstock, Chairman Natal Missionary Conference 5th Feb, 1884.<sup>67</sup>

There were other lawmakers in addition to the Secretary for Native Affairs who took a skeptical view of the missionaries' request. A member for Pietermaritzburg County, Mr. John Smith, observed that the call for law 'looks very like an attempt on the part of the missionaries to drive the sheep into the fold when the sheep are not very willing'. Taking a similar position to Henrique Shepstone's on the question of legal jurisdiction he declared: 'it looks a very strange thing...that if a native gets married and commits bigamy he gets into the civilized courts of the colony, but if he steals cattle he is under native law. He is under two laws – civilized law and native law'.<sup>68</sup>

But still others thought that the petitions had considerable merit and were consistent with the moral objectives of the state. In the words of Representative Thomas Garland of Victoria County:

1,500 of the most intelligent natives ...who are immediately affected by the existing law ask to be freed from that which is a hardship and a wrong...I say who are we, and are we fit to be called a Christian government if we refuse to accede to their wishes. I am surprised to hear...that we should place obstacles in the way of people raising themselves from the barbarous practices which are constantly inflicting

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<sup>67</sup> PAR SNA 1/1/70, 1884/89, Revd Greenstock forwards a memorial to the governor with reference to native marriage.

<sup>68</sup> PAR NCP 2/1/1/9 Legislative Council Debates, Native Marriages Bill, June 29th, 1887.

hardship and wrong on the women.<sup>69</sup>

But the question of the object of the law remained a central tension, with Theophilus Shepstone offering the view that the proposed law was put before the legislative council solely for the benefit of the missionaries.<sup>70</sup>

*From Heathendom to Christianity: Civilizational Progress and Enforcing Christian Marriage*<sup>71</sup>

Henrique Shepstone thought it ill-advised to legislate in an attempt to produce religious commitment in Africans. He was adamant that the bill being considered by the legislature was not intended to regulate the marriage of Africans by civil rites. Instead, he noted disapprovingly, it was to ‘try and make a Christian marriage recognized by the Natives into a binding marriage and a contract which they cannot break’.<sup>72</sup> He was of the opinion that the colonial law should not to be made solely to enforce religious principles. Being familiar, he said, with Natives who ‘relapsed’ by marrying other wives, he ‘[had] heard such relapsed natives when spoken to on the subject quote the old testament in support of what they had done’.<sup>73</sup>

The junior Shepstone’s reference to the Old Testament defense offered by African polygamists indexed both an ongoing colonial debate in which African Christians were

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<sup>69</sup> PAR NCP 2/1/1/7 Legislative Council Debates, Native Marriages Bill August 10, 1885.

<sup>70</sup> PAR NCP 2/1/1/7 Legislative Council Debates, Christian Natives Marriages Bill, August 13th, 1885.

<sup>71</sup> PAR NCP 2/1/1/7 Legislative Council Debates, Christian Natives Marriages Bill, August 7<sup>th</sup>, 1885. Comments of Speaker of the House.

<sup>72</sup> PAR NCP 2/1/1/9 Native Marriages Bill, June 29th, 1887.

<sup>73</sup> PAR SNA 1/1/70 89/1884. HC. Shepstone Sec for Native Affairs 14/2/1884.

active, searching participants and a nineteenth century empire-wide debate about what constituted 'Christian marriage' and what the relationship ought to be between colonial civil law and religious (specifically Christian) principles. Throughout the 1880s, the Legislative Council was attending to another question of the relationship between 'Christian marriage' and civil law, with a debate percolating on the 'Marriage Law Amendment Bill'. As I discussed in chapter two, the issue of Sororate marriage among white settlers in relation to Levirate practices amongst Africans had raised heated debate on whether Natal's colonial law could absorb practices that did not fit contemporary Christian interpretations. The problem was that the law, while being used in this way to produce 'faith', could in no meaningful way test for it. The law that the missionaries were inducing the colony's lawmakers to formulate would have to define 'Christian marriage' by a set of bureaucratic schedules attached to the text of the law to which applicants for a Christian marriage license would have to agree before a marriage license could be granted. Getting assent to the questions in the schedule required a kind of counseling for applicants on the legal requirements of Christian marriage, rather than the principles of contemporary Christianity per se.

By the time the bill was in the final stages of discussion, the Acting Attorney-General commented:

This is not a bill to promote Christianity. It is a bill to determine the legal status of persons who choose to enter into a contract of marriage by Christian rites. As present...natives who are under native law in this colony can only be married according to native law, although on some occasions missionaries have gone through the religious ceremony which usually follows the contract of marriage. Still that religious ceremony does

not necessarily, and by itself it could not, constitute a legal marriage. This bill has therefore been introduced, not for the purpose of promoting Christianity or rendering it necessary that persons who wish to contract marriage according to Christian rites should necessarily be professing Christians, but to give legal effect and validity to a ceremony of marriage which May be entered into by Christian rites.<sup>74</sup>

He did, however, admit the difficulty of making such a law for marriages which could only be conducted by a Christian marriage officer:

It is not necessary for natives to be married by Christian rites that they should be professing Christians or having any certificate from a minister. They may be the rawest natives in the country, but if they express a wish to be married under this law they may obtain a licence; but then they may have a difficulty getting the minister to marry them. But I have stated the provisions of the law.<sup>75</sup>

His initial claim that the 1887 law was not an attempt to produce religious ‘civilization’ was belied by the stipulation in the law which attempted to prevent the children of people married by Christian rites from marrying by anything other than these rites, just as the Native Affairs Commission had proposed. This strong rejection of Native custom and the generationally binding nature of its religious, modernizing prescription were unprecedented. Except for slavery and manumission in the modern world, there appear to be few historical circumstances under which children are bound by law to inherit the social status of their parents.<sup>76</sup>

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<sup>74</sup> PAR NCP 2/1/1/7 Legislative Council Debates, Native Marriages Bill, August 10, 1885.

<sup>75</sup> PAR NCP 2/1/1/7 Legislative Council Debates, Christian Native Marriages Bill, August 7th, 1885.

<sup>76</sup> Judith Schafer, *Becoming Free, Remaining Free: Manumission and Enslavement in New Orleans, 1846-1862*. Baton Rouge: Louisiana State University, 2003.



Moreover, this was a significant break from the foregoing dominance of gradualism in Native policy. **By forcing the children of African Christian marriage to marry in this way, the colonial administration appeared to be taking an unusually hard line in opposition to ‘back-sliding’ by black Christians.** This seemingly unequivocal administrative stance looked very different in practice, where the effect of this legislative intent was considerably attenuated. Crucially, the proscription embodied in the law rested on the definition of ‘Christian Marriage’ which remained an exceedingly complex contrivance for the practical purposes of Native administration into the twentieth century.

On January 21, 1910, the Reverend Francis Magwaza, Assistant Priest in a Pietermaritzburg parish wrote to the Assistant Secretary for Native Affairs, James Stuart, complaining that an African parishioner Benjamin Ndhlovu and his fiancée Bertha Tshangase had been refused a marriage license by the Resident Magistrate at New Hanover. He detailed the events that had taken place at the Magistrate’s office as they had been recounted to him by Ndhlovu:

...the Zulu interpreter refused to grant them a licence. Benjamin Ndhlovu said the following: “the interpreter said, ‘It is right that you should know that if you are married according to the Christian rites, the law does not allow you to lobolisa with your daughter. Do you agree to that?’ ... And Benjamin said, “I do not agree to that. I do not know it, but I know I cannot have polygamy. Then the interpreter said if you shall lobolisa, go away and wear your *ibhetshu* and *isidwaba*, you cannot have a license to marry according to the Christian rites.”<sup>77</sup>

While local magistrates attempted, at times, to enforce the letter of the law as in the case

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<sup>77</sup> PAR SNA 240/1910. Rev. F. Magwaza, Refusal of Clerk in Office of Magistrate New Hanover to issue a marriage licence (Xtian).

of Benjamin Ndhlovu and Bertha Tshangase, even where promises could be extracted from fathers in terms of the future of their own children, there was little chance of these promises being upheld as legal obligation on the part of the children. What could be inferred from the generational clause, however, was that fathers remained guardians of daughters until they married. It was therefore, as potential recipients of *ukulobola* or 'bridewealth' for their daughters upon their marriages, that colonial legislators understood that extracting a promise of a man's wish for his daughter to remain 'on the path to civilization' was, in fact, a renunciation of this other much-maligned attendant African marriage practice. It was this customary practice of *ukulobola*, or the exchanges of cattle and/or goods upon marriage, and the rights of authority it signified that are key to understanding how 'Christian Marriage' for Natal's Africans was made to differ from 'Christian Marriage' for Natal's settlers.

With respect to criminalizing polygyny, the 1887 African Christian marriage law was modernizing in appearance only. Despite the repeated calls for the prosecution of bigamous African men into the 1900s, there was little administrative enthusiasm for the enforcement of the law's provisions except in the case of bigamous women. Emily Mkhize was first married under Native law to an unnamed man, and then subsequently married a Christian man named Enoch Msomi by Christian rites. She had assumed that an ethic of Christian renunciation automatically annulled the first marriage as missionaries had assured her this was the case.<sup>78</sup> The Deputy Secretary for the Interior adjudicated this civil matter in terms of the African Christian Marriage Law and found that marriage by

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<sup>78</sup> PAR SNA 2202/16 Re: the marriage by Christian Rites of Persons formerly married in Accordance with Native Custom, also SNA 2720/03 and SNA 1102/1891.

Christian rites could not supersede a previous marriage entered into according to Native law unless a divorce had been granted under Native law. The colonial construction of the separate legal jurisdictions of civil and Native Law did not provide for the simultaneous legal ascription of Africans in this case. The Deputy Secretary for the Interior fined Mkhize £7 for the crime of bigamy, and informed the Wesleyan Reverend Jacob Somuza from the Edendale Mission on which Mkhize and Msomi lived that if they continued to live together Emily Mkhize could be prosecuted for adultery under the provisions of the Native Code. Where women in particular sought freedom from the customary strictures of Native law through the 1887 law which brought Africans under the ordinary civil laws of the colony for the purposes of Christian marriage, they found it difficult to obtain.

While the Natal colonial legislature had acted to promote the dominant missionary efforts at Christianization of Africans in Natal through the 1887 African Christian Marriage Law, these local lawmakers' attempts at a more decisive form of legal assimilation for Christian Africans than the policy of Shepstonian accommodation and 'gradualism' contemplated was ultimately restricted by the subordination of their jurisdiction over the civil domain from which Africans were ultimately excluded, to the domain of Native Law which was the racialized legal default into which all Africans were primarily enrolled.

Importantly also, section 12 of the 1887 Christian Marriage Law made it impossible for a spouse, and by inference a wife, to claim a divorce on the basis of the contravention of this law, i.e. bigamy or polygyny committed by a husband. The primacy

given to customary practice as a means of curtailing African women's mobility and to the rights of their guardians in the practice of Native administration confirmed this law's ultimate equivocation in terms of a civilizing, Christianizing colonial mission. It further underlines the terms on which African exclusion from the colony's ordinary civil realm was to be effected. For the overwhelming majority of the colony's African subjects who remained under the exclusionary legal jurisdiction of Native Law, the prohibition of polygynous practice was an even more remote prospect than it seemed to be for the fifteen hundred African Christians whose assimilationist aspirations were stymied by administrative disinclination to enforce the proscriptions of the new law.

## Chapter Four

### **Indian Customary Marriage Regulation: Mobile Women and the Status of 'Tradition' under Colonial Indenture**

#### *Recalcitrant Women and the Unmaking of Custom*

Eighteen year-old Votti Veeramah Somayya arrived in Natal in May 1890 from Madras. She apparently 'fought' to be allocated to a sugar estate in Ifafa, with two men she had met aboard ship, Govindsamy Veerasami Naik and Bappu Ponnusami. She lived together with Naik as his 'wife' until he committed suicide in November the same year. Shortly after his death she began 'living with' Bappu on the same estate but would frequently disappear 'for six to eight days at a time', causing Bappu and their employer Gavin Caldwell to report her disappearances to the Protector. Votti claimed in 1893 that she had never been married to Naik. 'He was not my husband. I was only living with him', she told the Protector of Indian Immigrants. She said that after Naik's death, Caldwell had refused to keep her in his employ 'unless I got a husband and I said I did not want a husband and my Master became disagreeable...I have no husband in the colony although I have been living with Bappu...I do not wish to live any longer with him'.

At Caldwell's request, the Protector transferred Votti into the employ of a 'free

Indian, Charlie Nulliah who had completed his own indenture and bought freehold land which he turned into a profitable sugar-farming enterprise. But Votti refused to work for him. She deserted his estate repeatedly on the grounds that he made sexual overtures toward her. She was imprisoned numerous times for between a week and a month at a time for desertion and ‘being without a pass’ which employers were responsible for providing to authorize the public movement of their indentured workers. In spite of repeated imprisonment, Votti remained defiant, ‘I am not ready to go back and I will not go back. You can cut my throat but I will not go back...I came to work, not to be a wife...’<sup>1</sup>

Striking as Votti’s story is, there are some features of it which represent common aspects of nineteenth century indentured life in Natal. Like hundreds of men and women who appear in the colonial record, (and doubtless many who do not), Votti and Naik had left India as single migrants and formed a relationship on board the ship transporting indentured migrants to Natal. A number of these liaisons were formalized upon disembarkation at Immigration Depot in Durban where presiding officials registered as ‘married’ arriving men and women who appeared to be acquainted or claimed to be ‘together’ in relationships of some kind.<sup>2</sup> The precise nature of these relationships came under greater scrutiny in ensuing years as indentured men and women worked to realize

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<sup>1</sup> PAR, II, 1/68, 1521/1893.

<sup>2</sup> For eg. PAR II 1/162 I2154/1908 Sonarie Deposition 17<sup>th</sup> September, 1908. The Protector’s annual marriage returns often reflected a comparatively high number of marriages registered upon disembarkation. Along with unions that new arrivals stated they had entered into during the voyage, this process of registration also included marriages that had been entered into as a civil contracts in India as well as those solemnized by Hindu and Muslim religious authorities on the subcontinent. The looseness of the ‘marriage’ ties often formed aboard ships is alluded to in other work including Desai and Vahed, *Inside Indenture*.

their own life's aspirations in a new colonial world.

'Marriage' in the context of indentured transport was an institution which was difficult to define in official terms. The men, and women such as Votti, who appeared before the Protector in civil disputes knew well what they did (and did not) believe to constitute the binding union of marriage and its reciprocal obligations and entailments – in particular when they did not desire its personal or social strictures. For the Natal colonial administration, however, the legal definition of what constituted 'marriage' amongst indentured migrants presented a significant challenge.

The implications of women such as Votti's rejection of broadly-defined 'marital' arrangements presented particular administrative problems for Natal's regulatory authorities. Immigration officials expected the administrative act of recording 'Indian' marriages by registration upon the arrival of migrants in Natal to function as colonially-produced evidence of already-existing unions which, whether contracted upon ships or before embarkation, could be relied upon to conform to existing ritual and customary expectations in the 'Indian' cultural lives of these imperial subjects. Women in Britain's imperial indenture scheme were viewed in official discourse as 'the accompaniment of the men', rather than as single women, migrating in any independent capacity.

In reality, however, the later was rarely the case as single women predominated amongst female migrants from India. As the Deputy Protector, Charles Manning testified before the Wragg Commission in 1886, it was rare for women and men in established

family relationships to make the journey across the Indian Ocean or what indentured immigrants called the *kala pani* (dark water) to Natal. As other scholars have outlined, nineteenth century proscriptions of caste, and growing struggles in India around women as the repository of socio-religious respectability meant that few women who were recruited as single in India would likely have been regarded as ‘respectable’ in their local contexts. Some scholars, such as Desai and Vahed, have rejected the claims of colonists with regard to the marginal moral status of single women recruited for indenture. It is more likely the case, as Jo Beall has argued, that it was precisely the structural position of single female migrants, most of whom found themselves on the margins of nineteenth century Indian social life as young widows or orphans of low caste backgrounds, which allowed their recruitment in significant numbers for indentured transport.<sup>3</sup>

As Protector Manning observed – with apparently rather more moral condemnation than sympathy for the socio-structural relationships in which these women were implicated – few of the women recruited for transport to Natal were ‘respectable females who [came] with their families... and the proportion [of women required by indenture quotas had] to be made up by touting the cities just before the ship [left] India’.<sup>4</sup> Colonial discourse almost uniformly interpellated single Indian women in Natal as ‘prostitutes’, both with respect to their occupational provenance before indenturing in India as well as with respect to the facility that many displayed in moving amongst men

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<sup>3</sup> Jo Beall, ‘Women under Indenture in Colonial Natal’ in Cheryl Walker (ed.) *Women and Gender in Southern Africa to 1945*, Cape Town: David Phillip, 1990, 150; Vahed and Desai, *Inside Indian Indenture*, 190-213.

<sup>4</sup> Meer. *Documents of Indentured Labor*, Indian Immigrants Commission Evidence - Examination of Mr. C. Manning, 340.



on different rural estates in Natal in search of affective and economic security, and in realization of their own desires as workers, women, lovers, wives and mothers.

The dilemma of competing claims to Indian women's waged and domestic labor which I outlined in the opening chapter of the dissertation alluded to the ambivalences and contradictions which characterized colonial officials and employers treatment of indentured women's work contracts.

As a result, the new, uncertain status of contract and the resulting uncertainty of the position of indentured Indian women in relation to indentured Indian men and a colonial administration in search of political stability and moral 'order', permitted Indian women a window of opportunity, albeit a brief one and one fraught with danger, for the assertion of their own visions of individual, domestic and familial reproductive projects in this moment of colonial rupture and social reconstitution.

The experiences of indentured Indian women provide ample clues to what Ann Laura Stoler has called the 'regularities of power' or practices of rule through which the colonial government tried to establish new gendered ideas in relation to the colonial presence of these women and in response to their actions.<sup>5</sup> The overwhelming tendency, through colonial legislation, oversight and the local administration of disputes for the duration of the existence of the indenture scheme, was to curtail the nominal legal autonomy of indentured Indian women to better suit the dominant liberal imperial and

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<sup>5</sup> Ann Laura Stoler, *Along the Archival Grain: Epistemic Anxieties and Colonial Common Sense*. Princeton: Princeton University Press, 2009.

colonial reformist imperatives in this mid-to-late nineteenth century moment which prized the domestication of women into monogamous, male-headed household relationships.

Crucially, the difference in social context between the Indian subcontinent and Natal meant that indentured Indian women found many of the strictures placed upon them by extended family, religious institutions and nationalist discourse in India eased by indentured transport across the *kala pani*. Outside of the Indian colonial and nationalist context of struggle over 'tradition' at least until Gandhi's *satyagraha* campaign at the beginning of the second decade of the twentieth century, and in a new and ambiguous position in terms of legal individuality and civil labor regulation in the colony of Natal, indentured Indian women were claiming space to negotiate 'customary' practice on their own terms with Indian men, in what some scholars have referred to as 'the inversion of tradition'.<sup>6</sup>

*Governing 'Temporary' Migrants: 'Indian Custom' and the Natal Colonial State*

Not long after the beginning of the transportation of indentured Indians to Natal, colonial officials observed the aforementioned differences in women's participation in ritual and custom between India and Natal. The ostensibly 'traditional' role which British colonists assumed Indian women occupied in India was being reconfigured in mid-

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<sup>6</sup> On the gender politics of Indian nationalism in the context of Gandhian *Satyagraha* campaigning in the Natal and the Transvaal, see the conclusion of this dissertation and Radhika Mongia, 'Gender and the Historiography of Gandhian Satyagraha in South Africa' *Gender & History*, Vol.18 No.1 April 2006, 130–149. On the 'inversion of tradition' see Vahed and Desai, *Inside Indenture*, 197

nineteenth century Natal. In this colonial context ‘customary’ practices were being made under new and contingent demographic circumstances. The shortage of Indian female indentees who made up, on average, less than a third of migrants and the corollary surplus of men saw a marked incidence of ‘bigamy’ amongst Indian women who appear to have moved with great facility between rural estates.<sup>7</sup> Together with the uncertainty of the status of ‘custom’ under indenture, the competition amongst male indentees for access to this small number of women gave women relatively greater leverage and opportunities for mobility than (with the exception of a minority of ‘runaways’ to missions and towns) their African counterparts. These indentured Indian women’s movements came to the attention of the Protector and local magistrates through a variety of means. Some employers complained of their desertion from estates on which they were assigned to labor, and other men who claimed to be husbands arrived at the Protector’s office either in search of their ‘wives’ or in pursuit of the property (primarily gold jewelry and other goods, about which I write in greater detail in chapter five) with which these women often absconded.

At other times, indentured Indian women presented themselves at the Protector’s office to complain about their husbands’ abuse or philandering, or to register new unions with other men. Upon being questioned by the Protector, they most often claimed to have been fleeing abusive and neglectful partners for men with whom they felt safer and more secure, or whom they believed to be better suited to the fulfillment of their own life

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<sup>7</sup> See Meer, *Documents of Indentured Labour*. Report of the Coolie Commission, 130-146.

projects.<sup>8</sup> Their mobility, and the manner in which their search for suitable partners appeared to undermine the reconstitution of Indian family life, either along the lines of an emerging nineteenth century bourgeois family model or in terms of more ‘traditional’ forms of customary patriarchy, held the attention of employers and jilted ‘husbands’ who observed and protested their movements to the Protector and Resident Magistrates.

As Theophilus Shepstone spent his time trying to get settlers and legislators – who were eager to transform a nominally independent African society, with marriage at its heart, into a reserve army of labor – to understand the relationships of authority vested in customary marriage practices and the administrative utility to which these might be turned, officials tasked with the administration of indentured Indian migrants were only beginning to discover the regulatory disadvantages of the ruptures in customary practice entailed in labor transport across the *kala pani*.

But it was not possible, within the resources and regulatory framework of indenture, to remake older forms of customary authority for Indians in Natal. To begin with, there were no readily-exploitable forms of customary authority amongst Indian indentees onto which colonial administration could be grafted, as was the case with African chiefs under Shepstonian policy. The Protector was the sole authority responsible for both labor and all other forms of civil administration, and the bearers of this office carried out these tasks without being able to confidently lay claim to the kinds of ethnographic knowledge and authority which Shepstone claimed to possess with regard

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<sup>8</sup> PAR II 10/1/83; II 729/7/1930; See also Desai and Vahed, *Inside Indenture*, 206-213.

to Natal's African population. The absence of customary authority to enforce purportedly 'traditional' practices was conspicuous as officials despaired in their search for Brahmin authorities who might be entrusted with the responsibility of enforcing customary moral order amongst Indians of disparate caste, language and religious backgrounds, under the supervision of the colonial government.

The efforts to Christianize Indian indentured workers in colonial Natal, where attempts were made, were few and far between.<sup>9</sup> Indenture in Natal began at a key moment in the self-conscious re-orienting of official British imperial policy toward stricter conformity to the policy of 'non-intervention' in the customary lives of especially British Indian subjects.<sup>10</sup> For all its contradictions and its continued breach in practice, the colonial manifestation of this moment of imperial policy was borne out, at least discursively, by men like Charles Mitchell a prominent colonial official in Natal. When a small section of legislators proposed a parallel 'hut tax' for Indians to the one already imposed upon Africans, Mitchell who was the Colonial Secretary at the time remarked that:

[Indians] are not uncivilized people; they are not living in an uncivilized fashion, and for that reason I decline to accede to the principle laid down, that these men are to be civilized by taxation - for practically it amounts to that. The incidence of the Kafir tax is solely meant to civilise our Natives. I say you have no right to call a civilized people - people who had the germs of civilization long before our ancestors had them - uncivilized, and try to civilize them by taxation...we cannot call them a civilized people in the sense that we understand civilization, but they are a people who have

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<sup>9</sup> Joy Brain, *Christian Indians in Natal*, Cape Town, Oxford University Press, 1983.

<sup>10</sup> Metcalf, *Ideologies of the Raj*, 52-59.

been under a certain civilized system for thousands of years...<sup>11</sup>

Mitchell's statement draws out the relationality between colonial administrative views of Indian and Africans with particular clarity. His remarks allude to a number of issues key to the colonial making of difference between these two groups of racially-defined subjects. To begin with, while it was common that the rural dwellings of Africans, indentured Indians and indeed, even early white settlers, approximated the description of 'huts' with their mud walls and thatched roofs, the 'hut tax' was more than an attempt to generate revenue by taxing particular kinds of simple, rural dwellings. It represented a very particular form of legislative intervention in African customary life and one of its multiple and contradictory aims was the attempt to 'civilize' Africans by taxing the dwelling inhabited by each wife in a polygynous homestead. Not only was no similar form of social organization discernible in early indentured Indian domestic life in Natal, but there existed no structural relationship between the elimination of Indian customary practices such as polygyny (which was an existing practice amongst only a small number of upwardly mobile and Trader/Passenger Indians, albeit in a vastly different manner to Africans) and the extraction of Indian labor.

But Mitchell's comment went further than this, drawing on classically Orientalist notions of the timeless integrity of Indian civilization to defend Indians in Natal from claims of a lack of civilization which lumped them with Africans.<sup>12</sup> This racialized view of cultural difference cast Africans as being in need of Christianizing reform in contrast

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<sup>11</sup> PAR, NCP 2/1/1/5 Legislative Council Debates 'Taxing Indian occupants of Huts', Oct 8, 1883. 594.

<sup>12</sup> Ronald Inden 'Orientalist Constructions of India', *Modern Asian Studies*, Vol. 20, No. 3, 1986, 401-446.

to newly-arrived Indians who, despite their evident dislocation from their originary cultural context, supposedly continued to embody and inhabit a defensible cultural realm with its own 'natural' moral precepts. And yet in many ways Mitchell's view of Indians was in fact remarkably similar to the vision of Zulu culture held by Shepstone, which was characterized by his own romance with African 'tradition' and cultural integrity. While Shepstone's romance with African traditionalism – in the originary context of this tradition as he saw it – prevailed in the policy of Native administration, the need for the Christianizing reform of Africans remained the discursive norm amongst settler colonists, further entrenching the discursive differentiation of 'African' and 'Indian' in the colony.

The vision of a fundamental 'Indian' racial and cultural integrity came together with the temporary residency status of indentured migrants for most of the nineteenth century to produce an administrative regime of sporadic colonial intervention in 'Indian custom'. The ongoing attempts to repatriate Indians in Natal to the subcontinent meant that legislative debates over custom were informed by a certain deference to the Imperial 'non-interventionist' mandate, and the willingness of the British Raj to arbitrate in contentious issues of colonial indenture as it demonstrated in the early 1870s.<sup>13</sup> Natal's colonial administrators and legislatures were accustomed to the British Indian government looking over their shoulders. As Natal's Attorney General pointed out in 1882, 'the Indian government are very jealous of these persons' rights, and requires that they should be protected, that they should have facility to make their complaints, whether

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<sup>13</sup> Warhurst, 'Obstructing the Protector'.

frivolous or otherwise...'<sup>14</sup> It was only by the final decade of the century, as the residency status of indentured and ex-indentured migrant came to be understood as more permanent and the granting of Responsible Government to Natal in 1893 and the greater political independence from Imperial mandates which that secured for Natal, that this minimalist form of legislative intervention would give way to more decisive, precedent-setting legislative action.

*'The Marriage Tie is a Loose One': The 1872 Coolie Commission and the Registration 'Solution'*

The relationship of single, mobile Indian women to the growing white, settler population of the colony strongly influenced the only aspect of colonial administrative consistency in the regulation of Indian customary life in Natal: that of civil registration. The overriding determination with which this particular tool of nineteenth century bureaucratic modernization was pursued in Natal was closely tied to the legal existence of Indian indentees in Natal within the jurisdiction of settler colonial common law. There was no racially and culturally discrete code for the administration of indentured Indian life in Natal, as there was for Africans, and the civil labor code which governed all aspects of Indian indentured migrants' colonial presence was a temporary legislative tool which colonial legislators anticipated would eventually be dissolved upon the assumed eventual repatriation of migrants to the Indian subcontinent. While it became clearer by the close of the nineteenth century, with the refusal of the Colonial Office and the British

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<sup>14</sup> PAR NCP 2/1/1/4 Legislative Council Debate, Tuesday June 15, 1882.



Indian government to accept a repatriation scheme that Indians were likely to be permanent residents in Natal the regulation of 'Indian custom' in the colony until the early twentieth century was driven chiefly by concerns over mobile women and characterized by intermittent but determined attempts to create, and effect, a civil registration process for people whom the administration understood to be temporary migrants.

The 1872 Coolie Commission, constituted in the wake of allegations of labor abuse by indentured Indian workers returning to India, heard evidence from early Coolie Agents regarding the difficulties of adjudicating Indian civil complaints and of facilitating the kinds of social reproduction envisioned as appropriate to the post-emancipation context I explicated in chapter one of this dissertation. Former Coolie Agents Henrique Shepstone and Edmund Tatham testified before the Commission to the difficulties of administering customary life in the absence of clear understandings of what precisely constituted 'custom' amongst indentured Indian migrants. The inability of officials to define 'marriage' and to keep track of the movements of women were amongst the most prominent complaints which the Commission heard. This prevailing concern was informed by the widespread prevalence of cases of assault, murder and suicide amongst indentees. The high incidence of these forms of social pathology appeared to officials to imply instability in what they understood as the domestic, reproductive realm of sex, marriage and attendant efforts towards the reconstitution of family life. One such case was that of the women Wootme who was murdered by her husband. The husband, Mulwa confessed to crushing his wife's head with an axe and

testified to his anger and frustration at having to 'share' Wootme with two other Indian men, Sahebdeen and Moorgasen, with whom the couple shared a dwelling:

We lived with [the two men] who said if [she] would cook for them they would give her clothing and give us food. [She] cooked food and took it to the field for the men. She did not bring me food. I then [sought a separate house for us, but could not get one]. I killed [her] because she went with other men and I said 'I was not sufficient for you'.<sup>15</sup>

Numerous cases of which this was but one provided a dire picture of what scholars have referred to as the 'sexual jealousy' which pervaded indentured Indian life. These cases formed the subject of the testimony of 'free' Indian men such as Rangasammy, who worked as an innkeeper in Verulam on the North Coast after completing his indenture, and typified complaints over problems of social reproduction for early Indian immigrants in Natal. He told the Commission:

As to marriages, among the Coolies we first imported, too many males were single, and the scarcity of females caused many debauches, and in many cases they committed suicide; therefore I consider to stop this, when they agree to marry, the agreement should be drawn by the Coolie agent, in the Coolie office. After they agree to marry, if either party refuses to marry, the Coolie agent should punish the guilty person. If a woman commits adultery, she should be punished by cutting off her hair, and ten days' imprisonment, and cautioned that if she goes to another man, she must pay the first husband ten pounds. The adulterer should be fined five pounds, and be imprisoned for twenty days and get twelve lashes. The wife should be imprisoned until she repaid the money, or went back to her husband.<sup>16</sup>

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<sup>15</sup> Vahed and Desai, *Inside Indian Indenture*, 17.

<sup>16</sup> Meer. *Documents of Indentured Labour*. Appendix to Report of Coolie Commission, 138-9. Evidence of Rangasammy, Free Indian, to the Coolie Commission, Verulam, June 23<sup>rd</sup>, 1872. The punishment of cutting off women's hair was suggested by a few Indian men who claimed that this was, in fact, a 'customary' form of punishment.

Rangasammy's evidence found sympathy with the Commissioners who agreed that recruiting more women for the purpose of realizing the social reproductive imperatives of this post-slavery moment could assist with stabilizing some of the more egregious instances of violence and social pathology which characterized early indentured life.

Testimony such as Rangasammy's epitomized the overlapping existence of notions of 'tradition', particularly in the distinctive form of corporal punishment for recalcitrant women in contrast to men, along with aspirations to complete colonial legal assimilation embodied in the proposal that the 'Coolie Agent' or Protector be empowered to 'perform' Indian marriages by the act of civil registration. In the face of these simultaneous, competing visions of law, the Commission would commit to neither. Struggles over how to define Indian custom in Natal, in particular the struggle over the registration of customary marriages drew officials and Indian men into dialogue over customary meanings of patriarchy and the manner of the state's powers as its custodian. But while commissioners held out against providing greater customary definition for 'Indian custom', they did suggest that more females be targeted for recruitment in order to address the problems raised by Indian men like Rangasammy regarding the difficulties of establishing families in a context of severe demographic imbalance between the sexes. Together with this, the Commission proposed measures to better regulate the presence of Indian women who were brought to Natal. What the testimony of Rangasammy and the proposals of the Commission had in common was the contradictory tension regarding the place of women in the social reproductive lives of Indians. Indian women were cast as

both the problem and solution to the difficulties of social reconstitution experienced by Indian men.

Government officials and Indian men understood that increasing the recruitment of women would provide some relief for the latter, and address the worst criticisms surrounding the status of indenture. But administration officials also had to consider the problem of regulating the presence of women once they were in the colony. One of the principle recommendations of the Commission, enshrined in the first Coolie Consolidation Law promulgated in 1872 was the mandatory compilation of two civil registers: one to record the existence of marriages, and another to register the status of all Indian women present in Natal. The law was explicit that marriage registration was simply an act of recording the existence of marriages conducted in the colony by some prior ceremony, the precise nature of which it did not stipulate. Registration in the absence of a ritual ceremony of some kind was not contemplated, as it was the official position of the colonial state that administrative actions such as registration were not intended to supplant the rituals necessary for the marriages of temporary migrants to continue to have customary veracity in India. Registration by itself could therefore not constitute marriage for Indians in Natal.

Together with the mandatory registration of marriages within one month of a marriage ceremony, legislators attempted to solve the problem of Indian women's mobility which was enabled by the permissiveness of their labor contracts. The law also mandated registering Indian women separately to marriages, along with their marital

status as ‘married’, ‘single’ or ‘concubines’. The third category was an attempt at a kind of catch-all for what officials believed were the characteristically loose associations formed by indenturing men and women such as Votti, which had complicated earlier attempts at registering marriage and restricting the movements of women. As the Protector explained to the Colonial Secretary, many migrants ‘who eagerly desired on their first arrival to live together no less eagerly demanded to be separated from one another in the course of a month or two’.<sup>17</sup> The limited definition of marriage in colonial common law meant that keeping record of what could officially be termed ‘marriages’ did not necessarily enable officials to keep track of highly-mobile women. The civil register of women was an attempt to compensate for the indeterminate status of many early marital unions. As a result, the category of ‘concubine’ also came to describe the status of those women who might well have considered themselves to be married but had never had their marriages officially registered for a number of reasons, including the disincentive of late registration penalty fees, a disinclination to register marriage with the state, as well as a more a general lack of knowledge of existing registration laws.

Unsurprisingly, the register of women failed despite the Protector of Indian Immigrants’ best attempts, and was eventually abandoned in 1890. While registering the status of women arriving after the passage of the 1872 law was simple enough, women who had been in the colony since the 1860s did not voluntarily present themselves for registration, nor was there any kind of comprehensive effort to register ‘colonial born’ female children. The absence of these girls and women from the register despite their

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<sup>17</sup> PAR II, Protector to Col Sec, 11 June 1877.

existence in Natal often came to light at the moment of civil complaints or marriage registration, but enforcing the registration of marriages also proved to be somewhat difficult in the customary terms set out by the new law.

*The Difficulties of Registration: Rupture, Ceremony and Repugnant Custom*

One of the enduring problems was that many couples presenting themselves for registration by the Protector had been living together for a long time and considered themselves 'married' even though there had been no Brahmanical ceremony or nuptial feast which the law had set as prerequisites for registration. As Protector Charles Manning said, more than a decade after the passage of the registration law, 'it is natural that when single men and women are working together they should form attachments, and when I find that to be the case I urge they should be married. Almost without exception they eagerly consent but say that neither they nor their masters know what the law is'. Many couples, with each party of different castes and religions, had had children in the meantime and they 'wish[ed] to acknowledge their union and legitimize their children, but marriage of such different castes being contrary to their traditions it would be very difficult except as a civil contract'.<sup>18</sup>

The 1872 law prevented the Protector from registering such marriages. The provision for an antecedent ceremony meant that despite migrants' claims to being married, registration was the exception rather than the norm. But the need for ceremony

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<sup>18</sup> Meer. *Documents of Indentured Labor*, Indian Immigrants Commission Evidence, Examination of Mr. C. Manning, 340

was just one obstacle to registration. The interpersonal and social difficulties entailed in the reconstitution of customary life were not erased by the determination of Natal's colonial government to leave well enough alone with regard to defining 'Indian custom'. Those Indians who tried to register their unions – and they were notably many in number with marriage registration in Natal reaching an imperial high for indenture colonies of around 30%; with other indenture colonies like Fiji averaging a proportion of merely 6.7% – began to seek out the Protector's official sanction of the kinds of 'marriages' and attendant practices which officials believed required greater legal scrutiny and bureaucratic consideration before being admitted to the realm of colonial common law.

The challenges which stymied the registration efforts of officials, and migrants who responded with comparative alacrity to having their marriages recognized by the state, were overwhelmingly posed by the nature and status of both 'old' and 'new' customary practices. They involved attempts to register marriage with multiple spouses or partners, the widespread practice of the betrothal of young girls to older men and issues of contract emerging from these 'marriage promises', as well as what officials like the Protector believed to be the necessity to make legal provisions for divorce, something which was severely restricted for Hindus and Muslims in India.

Cases such as that of the young woman Tejia, demonstrate the manner in which customary ritual, expectation and reinvention by Indian women, their families and Indian men, came together with the recognition of Indian marriages by official registration.<sup>19</sup> In

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<sup>19</sup> PAR II 10/1/83 AND II 729/7/1930

April 1887 an Indian man named Muthoora traveled from the estate of Laurence Platt in Isipingo, on the South Coast to the Protector's office in Durban, twenty kilometres away to request the registration of his marriage to a fifteen year old girl, Tejia. When the marriage had not been registered a month later, Platt inquired as to the nature of the delay. The Protector Louis Mason discovered that Tejia had already been 'married' by customary rites involving a form of marriage exchange and a ritual ceremony to Shewdal Persad in 1882 when she was eleven years old. Upon reaching the 'age of consent' of thirteen in 1884, Tejia went to live with Shewdal, at which point the marriage was consummated. However, in 1885, Tejia left Shewdal and went to live with Muthoora 'as his wife'. Muthoora paid a 'dowry' to Tejia's father and thereafter attempted to register the marriage. Protector Mason was at a loss, as 'the law does not appear to be framed to deal with instances of this kind' despite the fact that as he noted 'quarrels of this kind have frequently come before me'.<sup>20</sup> While Tejia's first marriage had not been registered, it was clear to Mason that she was already married in a manner potentially recognizable under the registration laws of the colony. He did not feel as if he could, in good conscience, accede to the request to register her marriage with Muthoora. Mason regarded Muthoora as yet another 'unfortunate (male) sufferer' conned by a wily young woman and her family out of a 'dowry', but felt compelled to force Tejia to return to Shewdal, with whom she remained until Shewdal's death almost fifty years later. The Protector did not seek Tejia's own testimony at any point, nor did he consider any affective considerations which may have been entailed in her participation in ritual marriage, desertion, remarriage and an attempt at registration.

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<sup>20</sup> Meer, *Documents of Indentured Labour*, 530-532.



What the position of women like Tejia did present the bureaucracy with, however, was sufficient legal complication for the colonial government to act with ever more determination to enforce registration *as soon as possible* after marriage ceremonies. The government published notices urging registration and threatening the imposition of fines provided for by the law where registration was not done within 30 days of the marriage being contracted. These notices were translated into a number of different Indian languages and circulated by government messengers to the various estates on which Indians were employed. Officials enlisted the help of *Sirdars*, or Indian supervisors on estates employing indentured workers, as well as the assistance of literate Indians and those fluent in multiple ‘Indian’ languages including Tamil, Teloogoo (Telegu), Hindi and other local Indian village dialects to help propagate the registration law throughout the colony. These notices were read out by employers, sirdars and interpreters in the hope that it would convince Indians to register their unions.<sup>21</sup>

Between 1873 and 1886, 4 981 ‘Indian’ marriages were recorded by registration despite the aforementioned difficulties with the law, which meant that fully a third of all adult indentured migrants were registered as ‘married’.<sup>22</sup> Notably, twenty-seven of these recorded unions were bigamous marriages conducted in India and (in what was to be a fiercely-contested legal move) registered by the Protector’s office. Bigamous men, in particular those who married women in Natal after leaving behind wives or young girls to whom they were betrothed in India, were a prominent feature of registration struggles in the closing decade of the century. As ‘tradition’ was supposed to be preserved for

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<sup>21</sup> Meer, *Documents*, Wragg Commission Report, 243-633.

<sup>22</sup> PAR II 1/35, Protector of Indian Immigrants to Justice Wragg, 30 June 1886.

repatriation purposes, some officials believed it their duty to record marriage practices which they understood as continuing to have customary import despite the ruptures of indenture. The registration of these bigamous marriages fell under such administrative considerations. The real problem was that bureaucratic action with regard to polygynous practices was inconsistent as there were other officials, from magistrates to those in the Protector's office, who refused registration to men whom they understood as bigamous under the laws of Natal. They saw Indian men who married multiple wives while in the colony or those who sought registration after marrying a wife in Natal in addition to claiming to have one in India, as being in contravention of the colony's civil marriage laws.<sup>23</sup>

The Wragg Commission of Inquiry was instituted in 1885 to examine the social conditions of Indian life and social reproduction in Natal more than two and a half decades after the scheme began, and in anticipation of a planned increase in immigrant numbers in the following decades. Amongst other things, the Commission was tasked with determining a future legal course of action for the colonial treatment of Indian custom. Colonial officials were still hoping for the successful negotiation of repatriation, despite growing evidence to the contrary by the 1880s. As one official put it optimistically in 1883:

We know by the records of this council that they [Indians] are regarded as aliens. When therefore they are considered as aliens they ought to bring with them when it is not interfering with the rights of the people of Natal, their personal rights, their personal status, and their personal abilities and

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<sup>23</sup> Meer, *Documents of Indentured Labor*, Wragg Commission Evidence, Mr. C. Manning, 340.

disabilities. During their sojourn in this colony they should therefore have an opportunity of [customary rights] according to the laws of their own country, so that when they go back to their home judgment may have exactly the same effect and force there as if [the custom had been dealt with] when they were in India by the courts there.<sup>24</sup>

His claims were more hopeful than they were based in any kind of thoroughgoing understanding of similarities and differences in customary marriage practices between India and Natal in the lives of the tens of thousands of Indians who had indentured in the preceding decades. Not only was there little sense of the legal transformations which ‘Indian custom’ was beginning to undergo in colonial India itself in the nineteenth century (and notwithstanding the development of different regimes of religious personal law for Hindus and Muslims under the British Raj),<sup>25</sup> but the idea of customary integrity this official imagined was even less tenable in the context in which his argument was made, that of a debate over a prospective ‘Divorce Bill’ for indentured Indians in Natal.

The divorce bill had been proposed by the Protector and other Indian administration officials in the 1870s, not long after the conclusion of the Coolie Commission’s inquiry. The Protector complained in 1876 that he lacked the power to dissolve marriages upon the request of Indian women who sought separations from husbands who either deserted them or were abusive. ‘I am frequently besought by the women to grant them divorces, but never by men’, he noted in his annual report.<sup>26</sup> The

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<sup>24</sup> PAR NCP 2/1/1/5 Legislative Council Debate, Indian Divorce Bill, September 17, 1883.

<sup>25</sup> David Washbrook, ‘Law, State and Agrarian Society in Colonial India’, *Journal of Modern Asian Studies*, vol.15, no.3, 1981. 649-721; Bernard Cohen, ‘Law and the Colonial State in India’ in *Colonialism and its Forms of Knowledge: The British in India*. Princeton; Princeton University Press, 1996.

<sup>26</sup> Meer, *Documents of Indentured Labour*, Wragg Commission Evidence, Chapter III: Indian Marriages and Divorces, 258-266.

problem was not so much that he wanted to be able to provide ‘relief’ for Indian women. Rather, it was the fact that women who were unable to procure divorce from husbands who abused or deserted them often ended up destitute and mobile once again, defeating administrative attempts at control as they were legally unable to seek out alternative partners in relation to whose household authority their status in the colony could be recorded and adjudicated. Many of these women who embarked on new relationships could not claim a status any more formal than that of ‘concubine’.

Women like Soyrub Nudairchand who met her husband Mahadeo on board the ship *Blenheim* when Soyrub was twenty years old and Mahadeo twenty-two typified the problem. They registered their marriage in 1874, but ten days later Mahadeo left Soyrub to fend for herself. According to Soyrub’s testimony, Mahadeo continued to live on the estate but refused to support her, forcing her to seek agricultural work and to ‘stay with other men’ when she was unable to find sufficient work to support herself. A year later, Soyrub moved in with another man called Buldeo and they had a child together. They wanted to be married, but could not do so until Soyrub obtained a divorce from Mahadeo. The Protector at the time, McCleod found Mahadeo guilty of cruelty and desertion but had ‘no power by the law to offer any redress’.<sup>27</sup>

Not long afterward, the case of Thoyee came to the Protector’s attention. She had arrived in Natal in September 1865, with her parents. When she was thirteen, she married a man named Rungiah and they registered the marriage with the Protector in July 1877.

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<sup>27</sup> Desai and Vahed, *Inside Indian Indenture*, 206-7.

In 1882, Thoyee returned to live with her parents, who ‘could scarcely afford to keep her.’ She claimed that Rungiah had seduced his eldest daughter and fled the colony soon afterward. Thoyee requested a divorce, but the Protector could not grant one in terms of the law as he understood it. Only registration was mandated by law and if the spirit of colonial ‘non-intervention’ was to be adhered to, then officials had to acknowledge that divorce was severely restricted, and often impossible to claim, for both Muslim and Hindu women in nineteenth century India.<sup>28</sup> The Colonial Secretary eventually ruled that Thoyee could not be granted a divorce, but a bill was tabled before the legislative council later that year. It was, however, withdrawn at the second reading in 1883 as legislators bound themselves in knots trying to devise a course for granting ‘customary’ divorce, in the absence of any definition of what constituted customary marriage.

#### *The Wragg Commission of 1885-7: The Case for Customary In(ter)vention*

By the time the Wragg Commission was convened in 1885, the mass of evidence pointing to the inconsistency and incoherence of Indian customary administration was impossible for colonial authorities to ignore. The complications of customary regulation and the terms on which the reproduction of Indian families could proceed in Natal were prominent concerns and represented a large part of the testimony the Commission heard and the recommendations which it made upon conclusion of the inquiry two years later.

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<sup>28</sup>Anshu Malhotra, *The Moral Woman and the Urban Punjabi Society of the Late Nineteenth Century*, *Social Scientist*, Vol. 20, No. 5/6 (May - Jun., 1992), pp. 34-63; Lata Mani, *Production of an Official Discourse on “Sati” in Early Nineteenth Century Bengal*, *Economic and Political Weekly*, Vol. 21, No. 17 (Apr. 26, 1986), WS32-WS4.

The Commission provided a retrospective reassessment of the imperatives of colonial Indian administration and took issue with the position taken by early Coolie Agents and Protectors who had acted decisively to intervene in matters of customary significance. They were very critical of the pragmatic administrative stance adopted by Henrique Shepstone who had dissolved a handful of marriages in the 1870s, inferring customary authority in much the same way that his father had acted with regard to African custom, despite having no comparable ‘expert knowledge’ of Indian custom in the Commissioners’ view.<sup>29</sup> The concession of divorces disrupted supposed ‘Indian’ customary integrity, and revealed that while government officials desired the preservation of ‘Indian custom’ by registration, custom was in fact being simultaneously invented by administrative action as much as it was being remade by migrants’ own experiences. As a result, the Commission clarified the impotence of the Protector with respect to adjudicating customary disputes and conferred these powers, instead, on the magistrates’ courts of Natal.

The uncertain status of polygyny and divorce were two areas identified as specially necessitating more consistent administrative attention. Mitchell’s Orientalist vision of the cultural integrity of essential ‘Indian’ custom continued to inform administrator’s actions, but Commissioners had to contend simultaneously with the administrative problems posed by the proximity of Indians to settlers, in both legal and spatial terms, in Natal.

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<sup>29</sup> Meer, *Documents of Indentured Labour*, Wragg Commission Report, 259.

The Wragg Commissioners tied racial and sexual fears of disease to the enduring difficulties of Indian customary regulation. But unlike the Coolie Commission, the Wragg Commission envisioned a more comprehensive legislative course which they believed would enable the better regulation of Indian familial and social reproduction in Natal for the duration of their residence in Natal. There was continuity in the Commission's concern with Indian women's mobility, and Indian men concurred with the Commission's assessment that the customary authority of husbands needed to be entrenched by law.<sup>30</sup>

As would be the case with African marriages in the early part of the twentieth century as African urbanization quickened, the Commission identified the erosion of 'tradition' in unattached and mobile women, and linked the destabilization of marriage amongst Indian migrants to other social pathologies, implicating fears over racial proximity and deviant sex such as the colonial prevalence of venereal disease. The continuing instability of Indian family life and the proximity of indentured workers to urban and peri-urban areas of white settlement meant that both indentured Indian women *and* men were implicated in colonial moral fears over venereal disease.

Indian men and women both came to be viewed with much the same moral discursive trepidation as that which attached to African men (and women, though to a much lesser extent in this period because of their limited urban presence) in the colony who as I discussed in the previous chapter were imagined as always potentially

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<sup>30</sup> Meer, *Documents of Indentured Labour*, Wragg Commission Report and Evidence, Testimony of Indian Witnesses Aboobaker Amod, Jhankie, 389 and 424.

polygamous and sexually transgressive. But while the fears of an unrestrained, migrant male African sexuality remained a feature of the sexualized, racially discriminatory legal regimes of Southern Africa until very recently, the ‘domestication’ of ‘Indian’ colonial subjects into more ‘restrained’ forms of sexuality by the encouragement of heteronormative, monogamous relationships are more discernible in new colonial legislative efforts in the aftermath of the Wragg Commission.

The Commission began to lean toward a more decisive course of legislative action in a period of what might be characterized as hopeful administrative uncertainty over Indian repatriation. They were careful to keep their intervention within the continuing jurisdiction of the Coolie Consolidation laws ‘regulating the government of Indian immigrants’, rather than assimilating new legal interventions directly into the statutory realm of colonial common law. They proposed that a single law be passed with sections including laws governing labor issues, Indian marriages and divorces and other regulatory concerns including the management of venereal diseases. These recommendations were accepted by the legislature and passed in a single law in 1891. ‘Coolie Consolidation Law’ 25 of 1891 encompassed the entire range of issues concerned with the government of Indians and by legislative sleight of hand including what had been contentious points of legal intervention into a seemingly innocuous law ‘governing and regulating Indian immigrants’.

Perhaps the most contentious of the provisions had been venereal disease laws. A law modeled on imperial and colonial ‘Contagious Disease Acts’ and aimed chiefly at



‘prostitutes’ of all races in the colony – or rather women suspected of being prostitutes – was being debated in a colonial Select Committee while the Wragg Commission was in process in 1886. The laws proposed by the Committee were rejected twice, first in 1886 and later in 1890 due to the contentious nature of Contagious Disease Acts in contemporary imperial politics.<sup>31</sup> But what the colonial administration could not do for everyone, especially white women in Natal, it could do for Indians under the auspices of labor regulation, in particular the medical examination of immigrant workers. The inclusion of venereal disease management provisions in the law permitted the invasive examination of all women thought to be prostitutes, and the forcible detention of these women and the men with whom they were believed to have had sexual relations.

‘Single’ Indian women and the indeterminate nature of domestic relationships amongst Indians were, once again, flagged by the Commission as a cause of concern and explicitly implicated in imagined venereal disease etiologies.<sup>32</sup> Upon visiting the Reynolds estate in Umzinto on the Natal South Coast, the Commissioners claimed to have found an Indian man debilitated by syphilis, as well as the women whom they

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<sup>31</sup> For venereal disease measures elsewhere in southern Africa during the second half of the nineteenth century, see Elizabeth van Heyningen, ‘The Social Evil in the Cape Colony, 1868-1902: Prostitution and the Contagious Diseases Acts’, *Journal of Southern African Studies*, 10 2 (1984), 170-97; For the wider British empire view of the politics of VD control with a particular focus on British India see Phillipa Levine, ‘Venereal disease, prostitution, and the politics of empire: the case of British India’, *Journal of the History of Sexuality*, 4:4 (1994), 579-602.

<sup>32</sup> Jeremy Martens’ account of the politics of venereal disease control in Natal in the late nineteenth century focuses on the stigmatization of the sexuality of African female prostitutes and of African male domestic servants working in white homes and looking after white children as the key cause of official, medical and settler concern about the transmission of VD. This focus on the association of African sexuality with VD causes Martens to ignore similar stigmatization of Indian sexuality in the material which he cites, a racial narrowing typical of the historiography which this dissertation sets out to critique. See Jeremy Martens, ‘Almost a Public Calamity’: Prostitutes, ‘Nurseboys’, and Attempts to Control Venereal Diseases in Colonial Natal, 1886–1890,’ *South African Historical Journal*, 45:1, 27-52.

claimed had ‘infected him’. ‘She was in her room in the barracks, ill in bed with syphilis; nevertheless, she was living with another man, who confessed to cohabitation with her in her diseased state!’<sup>33</sup> In the 1880s, local Medical Officers were unable to confirm an increase in the statistical prevalence of venereal disease in Natal but were nonetheless eager to participate in the discursive reification of single Indian women as diseased. As James Allen, surgeon for Grey’s Hospital in Pietermaritzburg testified before the commission, ‘My returns do not show [syphilis to be on the increase], but I do not take that as anything; I think it must be, it cannot be otherwise’.<sup>34</sup> In concert with such views, the Commissioners declared themselves satisfied ‘that there are just grounds for such complaints. The spread of diseases is fostered by well-known Indian prostitutes, who wander from one estate to another, and by the arrival on estates of newly assigned Indians, male and female, in whom the diseases are existing’.<sup>35</sup>

The implication of the proximate moral threat of a disorderly ‘Indian’ sexuality was justification enough for such a law. The specter of transgressive sexuality was no doubt made ever more real by attempts to maintain an imagined ‘Indian custom’ since the beginning of indenture, in the face of the administrative chaos provoked by Indian women’s unexpected mobility. The state’s explicit refusal to self-consciously remake custom through colonial precedent from the 1870s had exacerbated the regulatory difficulties.

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<sup>33</sup> Meer, *Documents of Indentured Labor*, Wragg Commission, Chapter 20, Venereal Diseases, section 6.

<sup>34</sup> PAR, CSO 1264, Report of the Select Committee, 7.

<sup>35</sup> PAR, CSO 1264, Report of the Select Committee, 7.

After hearing from a wide-range of ‘experts’, the Commissioners reinforced the pre-eminence of registration for more effective administration and ultimately resolved that registration had to be made to constitute the only legally recognizable contract of marriage for Indians in Natal under the 1891 law. This intervention afforded common law standing to Indian marriages which were registered, and ended the legal recognition of undefined religious and customary ceremony as the basis for constituting valid marriages. It also recommended the repeal of the £5 late registration fee which was no longer necessary if registration was to constitute the act of marriage.

The terms of registration were decisively set to limit ‘morally unacceptable’ forms of practice, such as polygyny. The law prohibited common law recognition of polygynous marriage amongst Indians, although this was a decision which legislators soon came to regret and the qualification of this proscription in 1896, and later in 1907, revealed the instrumentality of the legal interventions precipitated by the Commission to be inextricably tied to the moral imperative of ‘domesticating’ Indian women into matrimonial quietude.

This law was amended in 1896 to afford legal recognition to all polygynous marriages in existence before the passage of the 1891 law. Viewed together with the legal provisions for divorce and other customary practices, these laws exemplified the use of custom to curtail the problematic moral presence of mobile, single Indian women in Natal.

In the two decades following the conclusion of the Wragg Commission in 1887, its recommendations regarding all forms of customary practice were revealed to be instrumental to the attempt to subject Indian women arriving in Natal, and those already in the colony, to colonially-acceptable forms of male authority. The antipathy towards single female Indian migrants became more pronounced from the 1890s, in a period of growing concern throughout southern Africa with prostitution and the immigration of 'undesirables' into the region more generally. Against the background of the South African mineral revolution and the influx of immigrants – and accompanying vice, in the form of single women – from all over the world, indentured recruitment began to turn decisively to the importation of single Indian men, and greater administrative neglect of the legal quota of female recruits ensued in immigration practice.<sup>36</sup> By the early years of the twentieth century, local administration officials began openly decrying the necessity for the quota and many suggested that the Colonial Office be petitioned to altogether rescind the requirement for women to accompany male indentured migrants.<sup>37</sup>

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<sup>36</sup> Marilyn Lake and Henry Reynolds present the period at the end of the nineteenth and beginning of the twentieth century as one marked by the drawing of a global 'color line', with hardening racial hierarchies and immigration restriction in defense of white supremacist interests in Britain, the United States and Britain's colonial dominions. See Marilyn Lake and Henry Reynolds, *Drawing the Global Colour Line: White Men's Countries and the International Challenge of Racial Equality*, Cambridge: Cambridge University Press, 2008. Concerns about prostitution and sexual trafficking ('white slaving') as part of global vice networks were key touchstones of moral panics throughout the world in this era, including in newly industrializing southern Africa after the discovery of gold. See Charles Van Onselen, *The Fox and the Flies: the World of Joseph Silver, Racketeer and Psychopath*, London: Jonathan Cape, 2007; For Natal specific manifestations of concern about vice see Ros Posel, "'Continental Women' and Durban's 'Social Evil', 1899-1905", *Journal of Natal and Zulu History*, XII, 1989 and for 'undesirable' immigration concerns less rigidly framed by Lake and Reynolds' racial analytic see Andrew MacDonald, 'Strangers in a strange land: Undesirables and Border-controls in colonial Durban, 1897-c1910', M.A., University of KwaZulu-Natal, 2007.

<sup>37</sup> PAR CSO 1760 1904/3996. Secretary I.I.T Board, Durban 6/5/04.

Law 25 of 1891 also laid out a series of ostensibly ‘non-interventionist’ principles for the reproduction of Indian customary life. While the law made provisions for divorce, in particular for women, it did so on what legislators believed were ‘restricted grounds’. It made desertion or the prolonged unexplained absence of spouses the primary basis for divorce suits. Adultery was not sufficient basis to seek divorce, unless it was accompanied by willful desertion in excess of six months, or cruelty, as determined by the relevant authorities. By itself, desertion for a period longer than a year justified the concession of divorce. While it appeared that the wording of the law gave equal rights to men and women in respect of divorce, the Protector had testified that it was Indian women who most frequently sought divorces.<sup>38</sup> In light of official acknowledgment that it was the visits of women to the Protector’s office which had precipitated the law, the emphasis on desertion underlines the new emphasis in colonial law on the character of the relationship between married parties and the attention given to the role of husbands in relation to the women whom they married.

The attempt to ‘domesticate’ Indian women depended on the construction of a relationship of reciprocal, gendered obligations. The disciplining of Indian women into ‘wifeliness’ had as a corollary the legal molding of Indian men into the role of husbands in a manner in which newly hegemonic gendered ideas relating to matrimonial behavior deemed appropriate. Desertion became the legal basis for divorce amongst white settlers too in the late nineteenth century, indicating the predominance of the physical, household presence of husbands as a determining feature of the validity of marriage, in particular of

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<sup>38</sup> Meer, *Documents of Indentured Labour*, Wragg Commission Evidence. Chapter III: Indian Marriages and Divorces, 258-266.

emerging colonial common law understandings of companionate marriage.

The rejection of polygyny was implicit in the 1891 law as it permitted the annulment of marriages where one party was discovered to have already been legally married. But this apparent attempt to enforce colonial morality proved to be ill-advised considering that the imperative of legal intervention had been to retrieve an administrative situation in which officials desired that Indian women's mobility be decisively curbed by the state's support of domestic relationships conducted with appropriate deference to male husbandly authority.

Two prominent cases brought by Indian women in the 1890s clarified the difficulties of attempting to deal categorically with polygynous marriage on the emerging moral terms of colonial common law. These cases also illustrate the advantage that some Indian women took of the early uncertain status of Indian personal and customary law in Natal, and is analogous to the argument that African women were, in the later period of the mid-twentieth century, similarly quick to turn to the law courts.<sup>39</sup> In 1899, an Indian woman named Tulukanum petitioned the Natal colonial state for the annulment of her marriage to a fellow indentee, a man by the name of Munusami. Tulukanum claimed that her marriage to Munusami was polygynous and therefore invalid under the laws of the colony. Tulukanum had arrived in Natal with Munusami and their young child, as well as with a child bride to whom her husband was betrothed, a ten-year-old girl named Thoyee. She applied for the annulment of her marriage, as well as custody of their three children,

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<sup>39</sup> A.R. Booth, "'European Courts Protect Women and Witches': Colonial Law Courts as Redistributors of Power in Swaziland, 1920-1950', *Journal of Southern African Studies*, 18, 2 (June 1992), 253-275.

two of whom had been born since their arrival in Natal.

Tulukanum and Munusami's marriage had been recorded at the emigration depot in Madras together with Munusami's marriage to Thoyee, as both marriages were deemed to be valid in India. The Protector then registered Tulukanum's marriage to Munusami upon their disembarkation in Natal. There appears to be no record of his registration of Munusami's marriage to Thoyee, who was under the 'age of consent' which had been set by the 1891 Coolie Consolidation Law at thirteen years for Indian females. The Protector's registration was no longer simply a reflection of an existing marriage but a legal reconstitution of the marriages of arriving migrants. That he registered Tulukanum and Munusami's marriage while another 'legal' marriage (albeit one valid only under Indian legal jurisdiction) was already on record implied that he had performed a bigamous marriage in Natal. The presiding magistrate granted Tulukanum an annulment in respect of this fact.

The state was flummoxed by the magistrate's decision in this civil case and the Protector petitioned the opinions of former legislators and current practitioners of law in the colony on the matter.<sup>40</sup> None of the attorneys canvassed by the state had any doubt as to the legal correctness of the magistrate's decision, leaving the Natal government with a legal mountain to climb and very little time in which to do it. The Wragg Commission's recall of the Protector's judicial powers of arbitration in civil cases between Indians and the conveying of these powers to the Colony's magistrates instead, meant that appeal

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<sup>40</sup> PAR II 1/141 I447/1899. Tulukanum No. 58021 vs. Munsami No 58019, Nullity of marriage.

against the decisions of magistrates could only be made to the Supreme Court of Natal and had to be lodged within twenty days of the magistrate's decision.<sup>41</sup> The problem, of course, was that Munusami did not possess the financial means to institute such an appeal although officials believed that it was imperative for the colonial state – and for the protection of the patriarchal power in which the state was deeply invested – that he did in fact appeal. The Attorney-General's office granted state-sponsored assistance to Munusami to institute a civil appeals process but lack of bureaucratic efficacy (between the magistrate's decision, canvassing the opinions of various legal minds and eventual official authorization for state concession of financial assistance to Munusami) resulted in more than twenty days elapsing, making further legal recourse for Munusami impossible.<sup>42</sup>

While the Wragg Commission had resolved that the new civil unions amongst Indians which were constituted by the Protector's registration in Natal could not exceed specifically monogamous moral boundaries, their primary concern had been with subjecting Indian women to male household authority through the recognition of marital unions. New divorce laws were promulgated to enable the dissolution of those particular unions which did not meet colonial requirements for restraining women's mobility in favor of new unions which could. The eschewing of polygynous practice proved ill-conceived for this broader colonial purpose. The problem of the contemporaneous legal existence of settlers and indentured migrants acted as a form of moral restraint on continuing legislative permissiveness toward the customary practices of indentured

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<sup>41</sup> PAR NCP 5/2/18, Law 25, 1891.

<sup>42</sup> PAR II 1/141 I285/06. Protector Indian Immigrants, Durban, 2 February, 1906.



migrants in the closing decade of the nineteenth century, although not all those in the state bureaucracy involved in Indian administration agreed with the judicial proscriptions on Indian polygyny.

The colonial legal loophole which Tulukanum had exploited was the lack of provision for polygynous marriages which had been contracted in India, where these marriages were similarly validated by British colonial authority. The Protector had raised this problem in his 1889 annual report, but the 1891 law did nothing to address it.<sup>43</sup> The problems are apparent in one particularly heated exchange when the Attorney General remonstrated with the Protector for registering both wives of a newly arrived male immigrant. The Protector argued that:

It would be a distinct breach of faith to bring these people here and then on arrival cast adrift one of the wives because of the interpretation of a section of the law which has never been tested by the Supreme Court of the law. Polygamous marriages are valid in India and when we recruit Indians for labour in Natal we are bound by simple justice to admit them with the same privileges as are accorded them in India in this connection. In view however of your opinion in this matter it appears to me that it would be more advisable and to the point to cause the Agents of India to be instructed not to recruit men with more than one wife. This would obviate any necessity for further action.<sup>44</sup>

The Wragg Commission had proposed that recruiters of labor in India be instructed to refuse to accept as emigrants to Natal Indian men with more than one wife. However, in practice, this provision was much more difficult to fulfill. The ongoing imperial concern with the reproductive rights of imperial workers meant that emigrating ‘families’,

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<sup>43</sup> PAR NCP 7/2/2/6 Report of the Protector of Immigrants, 1889.

<sup>44</sup> PAR II 1/141 I285/06. Correspondence between the Attorney General and the Protector.

however they may have been defined, were promoted at least in official discourse. But more importantly, while it was true that some indenturing migrants did not always declare betrothals or marriages in India, it was mostly the case that those indenturing in Calcutta or Madras were in fact monogamous upon emigration.

Problems of ‘polygyny’ often arose once migrants arrived in Natal and began to constitute kin anew. Civil disputes which arose in Natal around what colonial officials referred to as ‘bigamy’ or ‘polygamy’ were less an indicator of widespread polygynous practice amongst Indian men than it was an indication of the contingencies of constituting new domestic relationships in an imperial context.

In January 1906 twenty-five year old Adary Venkiah arrived in Natal supposedly as an indentured migrant, together with her four-year-old daughter and one-year-son.<sup>45</sup> She refused assignment to an employer once in the colony, instead declaring her intention to locate her husband Ramsamy who had indentured the previous year but hadn’t followed through on his promise to send money back home. The Protector traced Ramsamy to the Natal Navigation Collieries in Dundee and discovered that he had ‘remarried’. His subsequent wife Mahalatchmy had been a shipmate from the same village of Anakapally, near Madras. It was not clear whether they had eloped together or met on board, but neither had anticipated Adary Venkiah’s resolve. Her presence in Natal presented them – and the Protector – with a complicated situation. The prohibition on polygyny meant that Ramsamy’s marriage to Mahalatchmy would have had to be

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<sup>45</sup> PAR II 1/141 I285/06 Correspondence between Protector Indian Immigrants & Attorney General, Durban. February and March, 1906.

annulled before Adary Venkiah could be officially confirmed as his wife. But Ramsamy refused to acknowledge his marriage to Venkiah, and she returned to India with her children soon afterward, likely recognizing that she would be unable to recreate the kind of relationship with Ramsamy for which she had hoped. The Natal Government's new polygyny proscription assisted this particular rupture in indentured family life, which Ramsamy appears to have desired. However, it was fortuitous for the Natal authorities that Venkiah resolved to return to India. Had she chosen to remain in Natal after indenturing, she would have been another 'single' woman, held in moral contempt by settlers and the colonial state.

Principal Under Secretary for Natal, John Bird, recommended approving an amendment to Law 25 of 1891 which would ameliorate the bind in which colonial officials found themselves regarding the kinds of 'polygynous' unions identified in Natal which arose from marriages contracted in India. The prohibition on all polygynous marriages had clearly proven to be an ill-conceived legal strategy on the part of state legislators and the cases of both Tulukanum and Venkiah demonstrated this most strikingly. The result was that in 1907, the year following Venkiah's case, a provision was included in the new Indian Marriages Act retrospectively permitting the registration and declaring the validity of all unions contracted in India under British Indian legal jurisdiction. This included polygynous unions, betrothals of young women whose circumstances did not meet colonial standards of consent and other customary marriages valid in contemporary British India.<sup>46</sup>

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<sup>46</sup> PAR NCP 5/3/15. Act No.2, 1907, 'To Make Provisions Relative to Marriages of Indian Immigrants'.

As a direct result of Venkiah's case, the new law permitted that polygynous unions could be upheld by registration officials in the colony even where the marriage in India had been a monogamous one and the man in question had contracted a subsequent union (i.e. the polygynous union) in Natal without the knowledge of his first wife. This attempt to close a gaping hole in the administration of Indian women in Natal via concessions to 'Indian personal law' meant a compromise in the principle of monogamy in Natal which colonists had been strongly defending, in favor of a limited concession to the customary practices of indentees.

*The 1907 Indian Marriage Law: Polygyny, Betrothal and Civil Assimilation*

The 1907 Indian Marriages Act, 'To make certain provisions relative to Marriages of Indian immigrants' was the first law governing customary practice amongst indentured and ex-indentured Indian immigrants which was not consigned to the all-encompassing code of labor laws that had been used to regulate their lives in the colony until the end of the nineteenth century. Instead, it was the first explicitly race-based statute aimed at all those who had arrived in Natal from the subcontinent. It designated 'Indians' as a legally-identified racial group in the title of the law, and brought those of indentured origin together for the first time under colonial common law with 'passenger Indian' traders (known as 'Arabs' for the predominance of Muslims amongst them).<sup>47</sup> This legislative move was prefigured by the impending end to indentured labor transport and brought laws governing the overwhelming majority of Indians – those who had arrived in the

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<sup>47</sup> PAR NCP 5/2/18, Law 25, 1891, the only previous attempt to make 'Indian' customary law was passed as a bill to regulate labor immigrants.

colony under indenture – together with the racially-exclusive common laws governing the small, but economically-significant population of ‘passenger Indians’ in Natal.

The limited concession to ‘polygyny’ in the 1907 law was in the service of what continued to be the single overriding concern of Indian customary administration of indentured Indians in Natal – the need to place Indian women under male control – and came the year after the decisive rejection by the Colonial Office and the British India government of the proposed repatriation scheme for ex-indentees. As a result of the ongoing, determined attempts of the Natal government to effectively deny rights of permanent residence to those indenturing under the scheme the Colonial Office, at the behest of the British Indian administration, sanctioned the end of indentured transport to Natal. Legally permitting polygynous marriages which arose out of existing unions contracted in India was therefore not a provision which indefinitely validated such marriages, but one whose administrative usefulness extended only as far as necessary, until the end of indentured migration to Natal in 1911.

Another concession which passed with much less public recognition, and one which I place in its own unique legislative context and elaborate on in the next chapter, was the recognition of the betrothal practices of Indians in which older men often provided material goods to the parents of often very young girls in exchange for a promise of marriage. The proliferation of civil suits over this form of customary practice once again implicated young women’s agency, and what officials characterized as a tendency toward recalcitrance, in this colonial context. While the act did not formally

recognize these early betrothals as marriages, it did attempt to turn these marriage promises into legally-recognizable contracts which had to be followed through by all parties concerned.

The Act acknowledged that ‘Indians’ continued to access registration on their own terms, and ever more so with the increased consecration of places of worship by immigrants in the closing decade of the century which created greater opportunities for religious marriage ceremonies. The existence of new religious spaces began to be accompanied, by the turn of the century, by the rise of individuals and groups claiming customary authority, including the capacity to solemnize marriages.<sup>48</sup> While no more than two of these individuals were officially recognized as marriage officers by the state, most individuals claiming customary or religious authority appear to have sanctified marriages by the consensus of recently-constituted communities of adherents coming into being in particular colonial locales in this turn-of-the-century moment.<sup>49</sup> With the incorporation of the Natal colonial government into the Union of South Africa along with the British colonies of the Transvaal, Cape and Orange Free State looming, the Natal administration made one last-ditch attempt to control these unions and their civil entailments by striving once again to induce the registration of these ‘Indian’ marriages and bring them into the realm of the common law. As a result, the 1907 law re-introduced

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<sup>48</sup> See especially Goolam Vahed, ‘Uprooting, Re-rooting: Culture, Religion and Community among Indentured Muslim Migrants in Colonial Natal, 1860-1911’, *South African Historical Journal*, 45, Nov, 2001, 191-222; Goolam Vahed, ‘A Sufi Saint’s Day in South Africa: The Legend of Badsha Peer’ in *South African Historical Journal*, 49, Nov 2003, 91-122. Also Vahed, ‘Mosques, Mawlanas and Muharram: Indian Islam in Colonial Natal, 1880-1910’, *Journal of Religion in Africa*, vol. 31, fasc.3 (Aug. 2001) 305-335.

<sup>49</sup> Vahed, ‘Mosques, Mawlanas and Muharram’; Vahed, ‘Muslim Marriages in South Africa: The Limitations and Legacy of the Indian Relief Act of 1914’, *Journal of Natal and Zulu History*, vol.23, 2001.

the penalty for late registration which had been repealed by the 1891 law and quadrupled the amount to a remarkably punitive £20, stressing civil registration as the site of control over these ‘traditional unions’, which nonetheless continued to defy the attempts of the state to define and regulate them.

But the 1907 Act was not the final word on ‘Indian’ marriages in the twentieth century. The provision of the law which had permitted the recognition of polygynous marriages contracted in India with respect to the complications of indentured administration was one that was seized upon by more prosperous, predominantly-Muslim, and more polygynous passenger Indians. These men – and they were primarily men at the turn of the twentieth century – took the opportunity to bring over wives whom they had left behind on the subcontinent despite having taken other wives in Natal. Cases which came before the state in 1911 and 1913 resulted in the eventual prohibition of state recognition of any and all polygynous marriages after this period, something that remains in place in South African law until the present day.<sup>50</sup> These judgments fomented Gandhian political agitation in the second decade of the twentieth century and were roundly condemned by Gandhi for the manner in which their non-recognition of ‘Indian custom’ paralleled the exclusionary administration of Africans by the South African state.

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<sup>50</sup> Vahed, ‘Muslim Marriages in South Africa’.

## Chapter Five

### **Laws of Property and Guardianship: African and Indian Marriage Exchange Regulation in Colonial Natal**

The construction of the legal edifice/s of the Natal colonial state, and the formation of the legal bases for gendered moral order, came to be imbricated with colonial accommodations of marriage exchange custom in nineteenth century colonial Natal. For the purposes of understanding the gendered basis of colonial accommodations of custom, the observations of Indians and Africans themselves, as well as colonial officials, are important to contextualizing these exchanges as they occurred in this moment of mid-nineteenth century colonial intervention for both Indians and Africans. These views of legislative and bureaucratic officials and those over whom they claimed authority reveal the gendered stakes that both colonists and their subjects came to have in a newly emerging social, political and economic context.

#### *Marriage Exchange, Kinship and Indian Labor Migration in Natal*

Before the Wragg Commission of Inquiry into Indians in Natal in 1886, an Indian man named Ramadeen, who was about to return to his ancestral village near Calcutta to visit his surviving relatives, narrated the manner in which he had worked to build a



family and a life in Natal over the previous decade. Ramadeen told the commissioners that he had arrived in Natal with his brother and his brother's wife in 1876. His brother died after a few short years in the colony and Ramadeen subsequently married his late brother's wife whom he emphasized 'has not been living with another husband [but] with me as my wife'. Ramadeen told Justice Walter Wragg that after serving two consecutive five-year terms of indenture he intended leaving his wife and young child behind in Natal with the intention of eventually returning to them. In addition to leaving £8 in 'money for expenses' which he anticipated would last about a year, he claimed to have left his wife in possession of her marital jewelry which he said would continue to affirm his commitment to her as his wife and secure her fidelity during his intended absence. The jewelry he described included three gold bracelets, armlets, bangles, a necklace, anklets, nose-rings and a pair of earrings, the collective worth of which he estimated to be 9 pounds 6 shillings and 9 pence.<sup>1</sup> In addition to the £17 he claimed to be taking to India, this was a significant sum of money for a recent ex-indentee who, during his term of service, earned between 10 and 14 shillings per month plus rations. Ramadeen and his wife were far from exceptional in this regard. Throughout the indenture period, colonial officials came to cite instances of such significant gift exchanges in their attempts to characterize what they understood in the Natal context to be 'Indian' custom.

The material transactions which marked marriage arrangements amongst Natal's Indian immigrants came to be separated from much of the ritual ceremony which

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<sup>1</sup> Meer, *Documents of Indentured Labour*, Wragg Commission Evidence of Indian Ramadeen, 370.

accompanied customary gift exchanges or material transactions in the early decades of indentured life. The high proportion of single immigrant men and women making up immigration numbers for the better part of the first three decades of indenture frequently meant the absence of the family of the prospective bride and groom to initiate transactions of marriage. A practice that implicated complex kinship arrangements in India was thus being redefined in a nineteenth century context where indentured labor migrants were renegotiating a tradition constrained by demography and the absence of either religiously or administratively-constituted customary authorities.

Around two-thirds of indentured Indian immigrants to Natal came from villages scattered around the South Indian Madras Presidency.<sup>2</sup> Ethnographic work on nineteenth century South India indicates the longstanding historical predominance of what are generally deemed to be ‘bridewealth’ practices in this region, with matrilineage being the primary marker of descent in the nineteenth century.<sup>3</sup> Of the remaining third of Natal’s indentured migrants, many were from agricultural castes (that could be Hindu or Muslim in the mid-nineteenth century) originating in the Central and Northern provinces of British India, where other practices of marriage exchange that often occur in agnatic lineages have been observed by ethnographers. These most notably include the practice colloquially referred to as ‘dowry’, or by its anthropological identification, *dower*.<sup>4</sup> In this form of exchange, gifts – historically featuring gold or jewelry – are given by the

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<sup>2</sup> Surendra Bhana, *Indentured Indian Immigrants to Natal: A Study of Ships Lists*. New Delhi: Promilla & Co., 1991.

<sup>3</sup> P.N Mari Bhat & Shiva S. Halli, ‘Demography of Brideprice and Dowry: Causes and Consequences of the Indian Marriage Squeeze’, *Population Studies*, vol.53, no. 2, July 1999, 129-148.

<sup>4</sup> John Comaroff (Ed.) *The Meaning of Marriage Payments*, Academic Press, London, 1980.

bride's family to the bride-to-be upon marriage.

In the mid-nineteenth century, precisely at the moment that Indians began immigrating to Natal from British India, dower was undergoing radical, violent change in North India as colonial land tenure systems made women more vulnerable in their marital homes. It was in this period that the practice of dowry as a transaction between bride's natal families and their in-laws began to take precedence over longer-standing transfers of wealth from fathers to their daughters upon marriage.<sup>5</sup> This new, nineteenth century practice was being simultaneously made and characterized as a customary evil by a British Indian administration that emphasized North Indian land tenure as a focus of colonial government in this period. It may be argued that British imperial discourse about Indian marriage exchange practices, and their struggles with Indian nationalists over the status of custom, produced a view of this peculiar form of North Indian dowry practice as metonymic for marriage exchange amongst Indians in all parts of the empire. This was particularly true in Natal where there appear to be no recorded observations by the Protector of Immigrants, local magistrates and other colonial officials, or in the testimony of Indians themselves during commissions of inquiry, or in civil and criminal depositions, of fathers of women transferring gifts to either their daughters or sons-in-law.

Recent work on Indian life in Natal has identified the existence of 'bridewealth' exchanges in Natal, no doubt due to the directionality of these exchanges from the groom

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<sup>5</sup> Veena Talwar Oldenburg has observed how this changed with colonial rule in India to diminish the agency of women in the exchange, with the gifts coming to be seen in the nineteenth century as a form of pecuniary accumulation by the family of the prospective groom. Veena Talwar Oldenburg, *Dowry Murder: The Imperial Origins of a Cultural Crime*. Oxford: Oxford University Press, 2001.

to the bride or her family.<sup>6</sup> The predominance of immigrants from South India among indentured workers surely influenced the preponderance of marriage payments that replicated aspects of 'bridewealth' exchanges, as opposed to those of dowry, which dominated property transactions on the occasion of customary marriages.<sup>7</sup> The new demographic realities of indentured transport are a likely explanation for this customary transformation in other indenture contexts.

In Natal too, there were far fewer women than men who made up immigrant numbers. For the duration of the indentured labor system, as I have indicated, women made up on average no more than a third of all migrants. Despite the steady establishment and growth of families in the nineteenth century, and the eventual demographic correction that might have been anticipated as a result, this disparate gender demographic was not helped when, near the turn of the twentieth century, recruiting for indenture turned increasingly to single men.<sup>8</sup> It was particularly the case that in the first three decades of indenture the competition for wives was intense, and finding a wife in a context of demographic scarcity was made more difficult for Indian men by the greater degree of freedom Indian women appeared ready to claim under the law in Natal.<sup>9</sup>

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<sup>6</sup> Vahed and Desai, *Inside Indian Indenture*; Goolam Vahed, 'Indentured Masculinity in Colonial Natal, 1860-1910' in Lahoucine Luzgane and Robert Morrell (eds.) *African Masculinities: Men in Africa from the late Nineteenth Century to the Present*. Pietermaritzburg: University of KwaZulu-Natal Press, 2005.

<sup>7</sup> Bhat & Halli, 'Demography of Brideprice and Dowry'.

<sup>8</sup> Bhana & Brain, *Setting Down Roots: Indian Migrants to South Africa, 1860-1911*, Johannesburg, 1990.

<sup>9</sup> Meer *Documents of Indentured Labor*, Coolie Commission Report, 'Necessity for Introducing More Women', 129; Wragg Commission Evidence, 338-477.

As the Acting Protector, Major S. Graves, complained in his annual report for 1877:

...the Protector is compelled to register all marriages which may be reported, Indian Immigrants being also required, under a penalty of 5 Pds., to report their marriages to him within one month of their occurrence...with the custom common amongst these people of contracting their daughters in marriage at a very early age, when the time comes for the ratification of the contract the girl as often as not refuses to live with her husband, and in the absence of the strong public opinion, so to speak, which would act upon her were she in India, obtains her own way. The Protector is appealed to...but he has no power, even were it desirable, to compel the girl against her inclinations.<sup>10</sup>

As Indians were not subject to indirect rule through customary authority like Africans, men had little means of customary recourse and, as the colonial state discovered early on, the parents of young girls often turned betrothal practices into a profitable enterprise.

Especially outside of the context of India (and however much colonial officials desired its prohibitive effects) the opportunistic use of 'tradition' was becoming, in the eyes of state officials, the reason for moral laxity instead of a means of preventing it. New contestations began arising out of Indian marriage practices by the 1870s and 80s, and the absence of customary authorities to adjudicate them became the biggest obstacle to the acceptance of Indian 'customary law' as a practicable system of legal administration for Indians in Natal. Their perception that it was Indian men attempting to build families who were most often disadvantaged by the lack of state regulation of this

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<sup>10</sup> Meer, *Documents of Indentured Labour*. Report, for 1877, of Major Graves, Acting Protector of Immigrants, 592. Emphasis added.

particular customary form caused the Protector and Attorney General to seek the kinds of accommodations that would secure both the property rights and reproductive rights of husbands by re-envisioning betrothals as property contracts.

The testimonies of Indian men and women given to the Protector of Indian Immigrants and local magistrates in the nineteenth century indicate that the transfer of goods that initiated marriage exchanges was neither absolute nor did it convey the same kinds of meaning that Indians in Natal may once have expected from such transactions in previous generations, or in their previous Indian contexts.

The place where the goods that changed hands ended up on the occasion of marriage was an uncertain affair. There does not appear to have been any consistent expectation that transfers of wealth upon marriage ought to involve the bride's family or male representative, but it is likely that this was the response to securing reproduction in a context where the fathers of women were not always present to receive such transfers, and it was often women themselves who became the recipients of these gifts, most especially where the transfers involved gold jewelry.<sup>11</sup> It was not (and still isn't) uncommon for Indian women to hold marital jewelry worth significant sums of money as personal property and to wear at least some of the jewelry, such as gold bangles, on a day

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<sup>11</sup> The fungibility of these gifts had longstanding roots in the uncertainties of agrarian life in India with the upper caste Hindu custom of dowry in which fathers gave their daughters such gifts including gold jewelry upon their marriage. Until the changes in land tenure policies instituted from the end of the eighteenth century and the social and economic crises these transformations precipitated, the cultural practice of dowry as the personal property of brides in North India especially assisted woman with securing their own positions in their marital homes and provided them with fungible resources in the event of emergencies. For pre-colonial context and colonial transformations of dowry in nineteenth century North India see Veena Talwar Oldenburg, *Dowry Murder*.

to day basis. The pervasiveness of this practice from the nineteenth century moment into the present is arguably less an expression of some kind of inalienable property right than it is an expression of the marital status of both women *and* men. The individual manner of married women's possession of 'bridewealth' remains commonly practiced and, in nineteenth century Natal, became as much an affirmation of the rights of women to their own domestic reproductive and familial projects as it was an assertion of the economic and sexual rights of their husbands.

There has been little scholarly recognition of the critical characteristics of Indian marriage exchanges in Natal which was characterized by the absence of the participation of kin in the early years of indenture, as well as the ability of women to hold exclusive possession of gifts, most notably that of gold jewelry. It is only possible to speculate that this peculiar feature of marriage exchange in the early decades of indenture might have been influenced by both the absence of fathers of women which was another contingency of the early decades of indentured life especially, as well as the aforementioned North Indian notions of dower which involved women's ownership and control over their marriage gifts. It is nonetheless true that among North Indian Hindu and Muslim families in South Africa in the present day, women continue to retain control of their marital jewelry and other monetary gifts. While no scholarship exists on the current manifestation of this local custom, the ability of women to take individual possession of marriage gifts resonates with the peculiarly North Indian, high-caste reinvention of South African Indian life.

Women's near-exclusive claims to marriage gifts as a characteristic feature of marriage exchange in Natal appear to have been consistent from the 1860s, but as families began to form and marriages began to be negotiated in the context of an increased parental presence over the later decades of the century, the nature of the transfer and the 'ownership' of marriage gifts took on more contested features. As one indentured migrant, Telucksing, informed the Wragg Commission in 1886, 'according to the Indian habit, the father gives a dowry to his daughter. Here, a practice which morally amounts to selling a daughter has arisen, and this ought to be stopped'.<sup>12</sup> Telucksing's characterization of the history of dowry practice amongst North Indian immigrants is supported by historical and ethnographic understandings of the character of such practices in British India before its decisive transformation through monetization in the latter part of nineteenth century. His further contention that the integrity of the longstanding 'Indian' practice of dower was being manipulated in Natal corresponds closely with the increasing administrative concern of the 1880s and 1890s over the manner in which such 'manipulations' of these women-centered exchanges were beginning to impact disproportionately on the capacity of Indian men to secure their reproductive futures.<sup>13</sup>

*Women's Indentured Labor, Contract and Innovations of Marriage Exchange*

From the very beginning of indenture in 1860, the colonial government in Natal was at pains to convey to settler employers what were new expectations of the role that

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<sup>12</sup> Meer, *Documents*, Examination of Telucksing, Wragg Commission Evidence, 389.

<sup>13</sup> Veena Talwar Oldenburg *Dowry Murder*.



indentured Indian women were to fulfill in a post-slavery labor regime. They informed employers that upon contracting indentured male workers, they received the women 'for free'. Employers did not pay for female indentees in the way that they did for men, as women were primarily expected to perform a domestic role in relation to Indian men instead of performing agricultural work. Employers were only expected to pay women wages in the event that the women performed other kinds of estate work outside of their homes.<sup>14</sup> While officials repeatedly castigated employers for forcing women to provide estate labor, the state could not ensure compliance from employers who remained legally responsible for providing women (especially those who were single or without male guardians) with food and shelter regardless of whether or not they performed wage labor.

As I have demonstrated elsewhere in this dissertation, single Indian female migrants were derided as a 'source of trouble' on estates and throughout the indenture period both employers and officials were keen to have single women attached to Indian men in the colony through hastily-arranged 'marriages' or, where justification could be found, returned to India at public expense. From the 1860s there had been increased colonial concern in Natal over venereal disease and the mobility of these Indian women in a wider imperial context of proliferating moral discourse connecting single women in various parts of the British empire to deviant sex, racial transgression and visions of moral disorder.<sup>15</sup> It was also true, as I have indicated, that the discursive construction of

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<sup>14</sup> PAR II 1/58 I1256/90 Protector of Immigrants, Mason to Col Sec, 18/11/1890.

<sup>15</sup> See Reports of the Coolie Commission (1872) and Indian Immigrant (Wragg) Commission (1887) in Meer, *Documents of Indentured Labor*, 118-169. See also Phillipa Levine, 'Venereal disease, prostitution, and the politics of empire: the case of British India', *Journal of the History of Sexuality*, 4:4 (1994), 579-602.

single, 'independent' Indian womanhood in Natal as an immoral state of being coincided with the construction of African polygyny as a deviant form of sexuality. In this period, both single Indian women and polygynous African men thwarted the colonial state's attempts to imagine a moral status quo based on monogamous, hetero-normative and male-headed forms of domestic life in Natal, just as urbanizing 'independent' migrant African women would later do on the Witwatersrand from the 1920s.<sup>16</sup>

Together with the ostensibly moral and administrative problems of the mobility of Indian women, and the difficulties of acceding to employers' demands for women's wage labor in a post-slavery context, the state had to further contend with a high incidence of what it termed 'social ills' amongst Indian men unable to properly secure their expectations of familial and cultural reproduction. Since the arrival of the first Indian indentees, single Indian men, and subsequently those who became widowed in Natal due to high maternal mortality had been petitioning the state to 'provide' them with women who could offer what Luise White has theorized in another African context as 'the comforts of home'.<sup>17</sup> Some men, like indentee Sadar Singh, caused alarm amongst employers and local magistrates by threatening to commit suicide or kill their young children if the state did not comply.<sup>18</sup> Other scholars of the region have pointed to high rates of crime and suicide among single Indian men in the nineteenth century as

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<sup>16</sup> Phil Bonner, "Desirable or Undesirable Women? Liquor, Prostitution, and the Migration of Basotho Women to the Rand, 1920-1945," in Cheryl Walker, ed., *Women and Gender in Southern Africa to 1945*, Cape Town: David Philip, 1990.

<sup>17</sup> Luise White. *The Comforts of Home: Prostitution in Colonial Nairobi*, University of Chicago Press, Chicago, 1990.

<sup>18</sup> PAR II 1/19/11477/1903 R. Paxton, Falkirk, Mooi River; Sadar Singh wishes to get an Indian woman to look after his baby.

indicative of the emotional and psychological ruptures of migrancy, and the ensuing difficulties of securing forms of familial reproduction.<sup>19</sup> Under indenture in Natal, Indian women came to be enrolled in new forms of interaction between Indian men and the settler employers to whom the state had entrusted their interim welfare. In this context of cultural and familial reconstitution, Indian male indentees sought out those men (administrators and employers) and women who would affirm and facilitate their own claims to building homes and families.

In a context marked, until around the turn of the twentieth century by the absence of 'Indian' customary authorities, Indian men and the women with whom they intended to make kin anew in Natal looked to the Protector's office for official sanction of these new familial relationships. Indian women in Natal entered into relationships with men both on the estates to which they were assigned as well as with those whom they came to know through co-workers and friends on nearby estates. In an attempt to authorize their relationships, men and women first approached employers, whom they understood correctly to be provisionally responsible for the 'guardianship' of the single indentured women living and working in their homes or on their estates. Indian men who were trying to set up homes and establish families of their own were willing to pay a negotiated fee to the employers of single women to whom they desired to be wed. This practice appears to have been widespread and anticipated by employers of single Indian women as

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<sup>19</sup> Goolam Vahed, 'Indentured Masculinity in Colonial Natal, 1860–1910' in *African Masculinities: Men in Africa from the Late Nineteenth Century to the Present*, Edited by Lahoucine Ouzgane and Robert Morrell, University of KwaZulu-Natal, Press, 2005 and Julie Parle, *States of Mind: Searching for Mental Health in Natal and Zululand, 1868-1918*, (Pietermaritzburg: University of KwaZulu-Natal Press, 2007, especially chapter 5.

compensatory.<sup>20</sup>

It is clear from the testimonies of all parties that Indian women were themselves implicated in mediating these transactions between their employers and prospective partners. In many cases these women had been embroiled in disputes with employers, often refusing to do fieldwork and complaining to the Protector or Resident Magistrate over the reticence of employers to provide them with food rations. The illegal withholding of food rations for indentured women who refused to or were unable to work was the primary manner, particularly in the case of single women, of compelling them to provide estate labor.<sup>21</sup> These women appear to have either sought out, or were amenable to being released into the ‘care’ of men with whom they may have been previously acquainted. Women about whose fieldwork employers had no complaint similarly requested transfers between estates and employers in order that they could live with men with whom they entered into relationships. In a great many cases where employers refused permission to transfer women who wished to marry or ‘take up’ with men on other estates, women would ‘become difficult’, refusing to work as they might previously have done and demonstrating ‘insolence’ in order that employers would concede to their wish for a transfer. In one case, a women described by her employer as ‘decent’ and ‘a good worker’ resorted to exposing herself to other workers and to her master’s children, with the result that the employer hastily agreed to her transfer.<sup>22</sup>

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<sup>20</sup> PAR II 1/120 I 1724/03 Dunning Deputy Protector to Protector, 25<sup>th</sup> August, 1903; PAR II 1/126 I 623/1904 K.Punshtrous to Protector, March 3, 1904; PAR II 1/141, I664/06, Re Civil Case tried by 2<sup>nd</sup> Civil Magste. Indian Sues for 17 pounds of a wife.

<sup>21</sup> Meer. *Documents of Indentured Labor*, Wragg Commission, Evidence of Sonnar, 412.

<sup>22</sup> PAR II 1/69 I881/93. A.T Button to Protector, November, 1893.

Upon marriage, almost all of these women raised the question of the status of their work contracts with the Protector. It was often husbands who refused to permit their wives to work outside of the home. In these cases, it was routine for the colonial state not only to repudiate husbands' claims but on occasion to fine the men in question who deserted estates in order to complain to the Protector.<sup>23</sup> The assertion of the primacy of women's domestic reproductive labors by Indian men was supported by instructions from the Colonial Office and the British Indian Government, but employers and colonial officials continued to extract married women's field labor even though these claims remained contentious for the duration of indenture.<sup>24</sup>

The legal consensus upon which claims to Indian women's contracted labor rested was one in which the Natal colonial government defended employer's rights to women's waged work *except* under egregious personal circumstances such as pregnancy or the illness of children or husbands.<sup>25</sup> This legal understanding imagined the consummate role of Indian women as a private, domestic one in step with instructions from Whitehall and Delhi, but simultaneously subordinated customary obligations of fealty to husbands in marriage to the civil obligations of work contracts.

The negotiations that resulted in exchanges that transferred Indian women out of the employ of settlers and into relationships of marriage with Indian men were complicated. At times single men made direct offers to employers for a specific woman

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<sup>23</sup> PAR II I/16, 187/83, 17 December 1883; II I/18. 365/84, 9 April 1884.

<sup>24</sup> PAR II I/161, I 1618/08 Working of Indian women.

<sup>25</sup> PAR AGO I/9/1 1A/1870 Granville, Downing Street to the Lieutenant Governor of Natal 15th February, 1870.

with whom they were acquainted, or for any woman who could carry out domestic and other reproductive labors.<sup>26</sup> On occasion it was women themselves who asked men with whom they had cultivated relationships to approach employers in order that they could be freed from estate labor and married to the man in question.<sup>27</sup> Also common were instances in which settler colonist employers, through negotiation, suggestion, encouragement, manipulation and coercion of their male and female employees, attempted to resolve the problem of single Indian women by contriving relationships among the people who worked for them and on nearby agricultural estates.<sup>28</sup>

While explicitly frowned upon by prominent Indian immigration officials, these transactions were generally tolerated by officials in charge of Indian administration, who made no apparent attempts to intervene in the cases where they were informed of these transfers of women out of the 'employ' of settlers and into the 'guardianship' of Indian men who paid employers variable sums of money.<sup>29</sup> In numerous cases throughout the nineteenth century, the Protector acceded to the written requests of employers to register the marriages of Indian men and women sent to the Protector's office. The participation of settler employers was no doubt a contributing factor to the government's administrative permissiveness on the issue. Colonial capitalists were constantly embroiled in conflict with the colonial state over the employment of female indentured workers, and appear to have used these interactions with Indian men to help resolve many

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<sup>26</sup> PAR II 134/1863, 5 October 1863 Requests for transfers on the grounds of marriage.

<sup>27</sup> PAR II 234/1863 Letter from the Coolie Agent to R.B Struthers, Nonoti 17 December 1863.

<sup>28</sup> PAR II 198/1863, 11 March 1863, Tatham to Arthur Walker Esqr. PMB; NAB II 1/127 I 974/1904. Correspondence among Cuthbert Phipson, A.R Holme and the Protector, April 1904.

<sup>29</sup> PAR II 1/120 I 1724/03 Protector Polkinghorne to Deputy Protector, 29/8/1903.

of these issues around female workers where the state bureaucracy appeared intractable to their demands.

While employers claimed these transactions as compensation for the ‘loss of services’ they supposedly suffered, Indian men like Chinyapan and his co-workers appear to have understood such payments as the mandatory payment to secure a wife.<sup>30</sup> Men often cited these payments in substantiation of their claims over women in subsequent marital disputes in the Protector’s court.<sup>31</sup> Indian men and women saw these exchanges as a means of legitimating the establishment of families in a context of significant insecurity over the nature and status of customary practice. Indian men and the women whom they attempted to ‘free’ from employers by claiming them as wives undoubtedly drew on their own ideas of the customary roles of men and women in these interactions over marriage as they enlisted the help of settler men in fulfillment of the role of absent patriarchs.

When these transactions appeared in public view, as with an article which appeared in *The Prince* in March 1904, employers and colonial officials were quick to deny that such practices were either widespread or condoned by administrators. As the correspondent claimed, in reference to the Natal Government Railways where large numbers of indentured Indian men and women were employed:

It is strongly rumored that Indian women indentured to the Railway

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<sup>30</sup> PAR II 1/182 I133/1912.

<sup>31</sup> PAR II 1/191 I 820/1916B C.Platt (Prospection Sugar Estate) to Protector, 27<sup>th</sup> March, 1916, Indian Woman Bakiyam 1147717; II 1/162 I2154/1908, Magistrate, Impendhle 1<sup>st</sup>, October, 1908 Deposition of Indian woman Sonarie.

department are not restricted to the men for whom they were imported, but are freely disposed of to free Indians outside. If this is so, it is done for the purpose of making money of somebody, and if the authorities know nothing about it, it would be as well for them to make careful inquiries. We are very foolish in Natal if we give the Exeter Hall brigade the slightest chance. Once they get hold of something to go upon, however slight, there will be general ructions all round, as colonists have learnt to their cost to-day. It is for this reason that I would ask those in authority to treat the Indians with the justice that is due to them, neither more nor less.

The Protector's inquiries on the matter which the article provoked did not proceed beyond the receipt of assurances from railway officials that 'there [was] no truth whatever in the assertions'.<sup>32</sup> The writer's allusion to the 'Exeter Hall brigade' referenced constant struggles between imperial and colonial labor officials and British anti-slavery activists (the Anti-slavery movement in the United Kingdom held their meetings at Exeter Hall in London) who remained critical of indentured labor throughout its existence.

As with the case of the woman Basmolia, who worked on a farm in Nels Rust Indian immigration officials' appeared wary of the implications of linking 'customary' practices such as these with wage labor arrangements.<sup>33</sup> The transactions transferring women out of the 'employ' of settlers inferred that women were subject to the terms of labor contracts in the first instance. The enforceability of these contracts had already been undermined by the Colonial Office soon after the indenture scheme began, and employer's claims that used women's labor contracts in legitimation of these payments

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<sup>32</sup> PAR II 1/126 I768/1904 Indentured Woman disposed to free Indians, extract from the prince 25 March 1904 and reply by the chief labor clerk natal, government railways Durban.

<sup>33</sup> PAR II 1/126 I 623/1904 K.Punshtrous to Protector, March 3, 1904, Protector Polkinghorne to Deputy Protector, 29/8/1903.



had, strictly speaking, no civil legal standing, although women's work contracts continued to exist in practice and women continued to serve them out, in all their ambiguity, until the last indentees emerged from indenture in 1921.

The implications of such exchanges in which settler capitalists claimed to participate under the auspices of what in reality were permissive labor contracts that could not be enforced against women who refused to honor its terms, raised the specter of the slavery-type sales of bodies without rights.<sup>34</sup> Interestingly, that the Natal state endorsed women's indenture contracts at this mid-nineteenth century moment when employers complained of women's refusal to work (although it no longer claimed the legal power to imprison women after the 1870s) inferred the legal majority of women to act in a manner independent of the direct male authority of fathers, husbands and brothers.<sup>35</sup> However, the Colonial Office's instruction that a woman's labor contract remained subordinate to expectations of her domestic labor in the role of wife and mother meant that these women *could* be subject to the continuing authority of forms of domestic patriarchy.

'Domesticating' women became the defining gendering feature of this form of colonial custom. The general unenforceability of these work contracts in the face of Indian men and women's protests had incurred the ire of settler capitalists who sought to extract these women's productive labor alongside that of Indian men, but employer's

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<sup>34</sup> Kale, *Fragments of Empire*, 26.

<sup>35</sup> PAR CSO 509 681/1875. Telegraph from Protector (Mitchell) to Colonial Secretary & Telegraph to Resident Magistrate Pinetown 24/2/1875.

legal impotence in terms of these contracts often resulted in both settler employers and Indian men innovating arrangements around the customary practice of marriage.

Transactions such as the ones described above began to shape the terms of Indian men's and women's participation in customary life in the colony, negotiating gendered roles anew under new imperial labor arrangements and ideas of domesticity. In the first three decades of indenture, these transactions assisted male and female indentees in envisioning a gendered, ostensibly 'private', domestic sphere amongst Indian indentured migrants in Natal in which the customary social roles of Indian men and women were being increasingly differentiated with the assistance of settler colonists.

#### *A Colonial Recasting: Marriage Exchange Conflict as Property Disputes*

Marriage exchanges also occurred among Indian men and the families of Indian women where kin were present in Natal. These kinds of exchanges implicating the family of young girls occurred alongside the ones described above, but took on greater prominence by the closing decade of the nineteenth century, indicating the steady growth of the indentured population, which reached almost a hundred thousand by the turn of the century; as well as the establishment of families amongst those Indians who had been in Natal for more than a generation and whose children were regarded as 'colonial born'.

The generally straitened circumstances of these indentured and ex-indentured families fuelled an already-existing economy of early marriage amongst Indians. This

meant that marriage exchanges were often bound up with practices of the betrothal of young girls to older men and, increasingly, with new understandings of property and right in the colony and their creative use and manipulation by the parents of young girls. The competition for young women did not abate with the natural growth of the Indian population in Natal after almost four decades in the colony. The gender disparity which was the defining feature of indenture demography was worsened by an emphasis on the recruitment of single men in the 1890s, and this proved lucrative for poor families with daughters. From the cases implicating marriage exchanges which came before local magistrates, some of which ended up in the Supreme Court of the Colony, colonial officials painted a cynical picture of self-interest and wealth accumulation on the part of Indian families.<sup>36</sup> Legislators claimed that the parents of Indian brides insist ‘not only on the youth’s parents bearing all the expenses of the wedding and of the jewels, but they also exact payment of a sum of money in return for their daughter’, the amount of which some officials claimed was supposedly “laid down by caste custom’. In the words of one colonial official:

This method is the commonest of all; for to marry and to buy a wife are synonymous expressions in India. Most parents make a regular traffic of their daughters. The wife is never given up to her husband until he has paid the whole of the sum agreed upon. This custom is an endless source of quarrels and disputes. If a poor man, after the marriage has taken place, cannot pay the stipulated amount, his father-in-law sues him for it, and takes his daughter away hoping that the desire to have her back again will induce the man to find the money.<sup>37</sup>

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<sup>36</sup> Meer, *Documents*, Wragg Commission Evidence, Indian Betrothals: Remarks of the Protector and the Attorney General, 531-2.

<sup>37</sup> PAR CSO 1791 4871/1905 Original Correspondence.

The circulation of the above memo amongst members of the colonial bureaucracy in 1905 highlighted legislators' interpretations of marriage exchange practices amongst Indians as 'payment' for a wife in a manner similar to settler characterization of African marriage exchange practices in this period as institutionalizing female slavery.

It is a notable feature of the colonial documentary record that the material part of Indian marriages could be better described by officials than the religious or ritual ceremonies which were purported to accompany it, the character of which no one amongst the colony's legislators appeared to be certain.<sup>38</sup> Colonial officials were unable to describe Indian marriage ceremonies – or even to tell the difference between Hindu and Muslim marriages (in a context of much inter-religious and inter-caste marriage) – beyond the idea that in some cases the marriages were often long affairs which might last a few days and involve various 'stages' and in others there appeared to be no ceremony at all.<sup>39</sup> In a context of widespread poverty and deprivation amongst immigrants it is hardly surprising that it was the material transfers of marriage exchange which raised the most prominent contestations amongst Indians and held the attention of government bureaucrats and legislators.

However, it is not simply the case that the state misrecognized the underlying customary principles of these exchanges as purely material transfers. By the close of the nineteenth century, it was the overlaying claims of Indian men *to* property, rather than merely claims to the fulfillment of customary obligations arising from these material

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<sup>38</sup> PAR NCP 2/1/1/5 Legislative Council Debates, 1883. Indian Divorce Bill.

<sup>39</sup> PAR NCP 2/1/1/5 Legislative Council Debates, 1883. Indian Divorce Bill.

transfers, that had begun to feature prominently in disputes over marriage exchanges. These disputes did more than just illuminate a nexus of competing customary expectations amongst Indians, they represent the employment of the language of personal property by Indian men making claims upon the state for customary enforcement. As the materiality of marriages came to take precedence in the claims of Indian men and the subsequent attentions of government functionaries, personal property came increasingly to figure as a crucial part of Indian customary relations in the social and economic context of indenture and post-indenture life in Natal.

The complaints of men who claimed to have had promises of marriage (betrothal) reneged on by potential wives or in-laws struck a chord with colonial legislators who claimed to understand these men's loss of property and inability to marry as an assault on their masculine dignity.<sup>40</sup> As one 'colonial-born Indian' man put it after a reported case of assault resulting from a woman reneging on a betrothal promise, '...blame can hardly be attached to the husband for displaying his pugilistic powers'.<sup>41</sup> It was especially the case that those men whose marriages were unregistered and whose wives deserted them, or refused to marry them when the time came for the ceremony, left men with no legal recourse for the recovery of either their brides or their property.<sup>42</sup>

In February 1905, a man named Ramsammy and six of his friends were convicted of assault. The assault occurred in a dispute over a young woman who had been promised

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<sup>40</sup> PAR NCP 2/2/19. Legislative Council Debate, Indian Marriages Bill, May 8, 1906; Meer *Documents of Indentured Labor*, 531/2

<sup>41</sup> 'Letter to Editor', *Natal Mercury*, 9 Feb, 1905

<sup>42</sup> PAR NCP 2/2/19. Legislative Council Debate, Indian Marriages Bill, May 8, 1906.

by her parents in marriage to Ramsamy upon payment to them of an undisclosed sum of money. The woman had instead eloped with another lover. The parents claimed that they bore no responsibility, so the lover was found and beaten by Ramsamy and his friends.<sup>43</sup> The widely publicized criminal case that followed precipitated key legislation to regulate marriage exchange amongst Indians. Several similar cases were adjudicated in districts around Natal, and the issue appeared prominently in a new bill introduced into the legislature in 1906 to regulate Indian marriage.<sup>44</sup> As the Minister of Agriculture remarked in the debate over the proposed legislative measure:

[I]t is a matter of most serious concern that such a measure should be passed. Not only is it a matter in which fraud is perpetrated between the bridegroom and the parents-in-law, but it is a matter which leads to frequent murders and most murderous assaults. It is only a few months ago that a case occurred in this very City in which a man had married a girl by the ordinary Indian rites, the marriage had not been registered, the husband found that his wife had been given to another man, and he immediately murdered the wife...it is most imperative that this measure should become law, because of the prevalence of crime owing to the present position of affairs. A man who has paid for his wife (as Indians do pay, in presents and so forth) has no remedy under the present law. He cannot sue because it his position that he should have registered the marriage. If he has not done that, and the parents object to it, and won't allow the girl to register the marriage, he has no remedy in law at all...I am convinced it is one of the most important measures as regards the Indian population that have been brought in for many years.<sup>45</sup>

The legislative debates around the issue of Indian men's rights in cases of betrothal were characterized by expressions of sympathy on the part of colonial legislators for Indian

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<sup>43</sup> PAR Colonial Secretary's Office [CSO] 1791 4871/1905 Original Correspondence. Natal Mercury, 9<sup>th</sup> February, 1905. Indians and Child Marriage. 'Rex vs. Ramsamy and six others for assault'.

<sup>44</sup> PAR II 1/22, 345/84. Report of the Deputy Protector, September 1884; Y.S Meer, Wragg Commission Evidence, Indian Betrothals: Cases of Muthoorra (May 1885) and Wavesaly (May 1887), 530 & 532 respectively. Also II 1/183 I 535/1912: Percy Stott to Protector, 19/2/1912.

<sup>45</sup> PAR NCP 2/2/19. Legislative Council Debate, Indian Marriages Bill, May 8, 1906.

men whose 'masculine dignity' appeared to them to be under threat. It did not take too much 'debate' before legal measures were taken to protect the culturally-bound masculine prerogatives entailed in betrothal promises which supposedly implicated Indian men's property rights.

*The 1907 Indian Marriages Act: Private Property and Punitive Civil Registration*

The 1907 Indian Marriages Act emphasized the mandatory registration of Indian marriages as civil contracts, something which had been introduced in 1872 and amended in 1891 under the Indian immigrant labor laws discussed in the previous chapter . As an attempt to address the problem of marriage exchange conflict, the law set out unexpected limits for 'marriage promises'. While marriages could not be registered until the bride was over 13 years of age (which was the age at which marriages could be consummated for Indian women in Natal) the law permitted promises of marriage to be secured much earlier. As discussed in the previous chapter, this unprecedented customary provision was part of the multiplicity of efforts to constrain the mobility of Indian women in Natal. Indian practices of betrothal, where the parents of young girls no more than a few years old promised them to often much-older men upon the transfer of early marriage gifts, were thus endorsed as a colonially-assimilable form of custom by being enshrined in this piece of civil legislation. But the law went further than this. It enforced all marriage gifts, including early promissory ones, as civil contracts in which the reneging parties, whom it envisioned as the parents or guardians of the prospective bride, could be sued for the recovery of property in the colony's civil courts, rather than the Protector's court.

Marriage transfers, or customary gifts given in the practice of betrothal or promised marriage, were thus enforced by the state as private property transactions.

In consideration of the difficulties of finding women's kin in Natal, the Act also expanded the guardianship of Indian women to include a father *or* mother, or 'any person having the custody of a girl'.<sup>46</sup> Women who were mothers of brides and brides-to-be could thus be litigants in these suits separately to their husbands. In a manner vastly different to African women's administration, the guardianship provision of the 1907 law did not bear any expectation of Indian women's perpetual minority. It set the legal age of majority for Indian women at eighteen years, which was three years younger than that for white women in Natal.

More than anything, the punitive character of the act, which enforced a £20 penalty for late registration, was concerned with the assertion of administrative control over civil aspects entailed in marriage contracts, one of the most prominent of which was the creation and protection of private property amongst Indians. The goods transferred in marriage exchanges were no doubt the most consistent types of customary property exchanged amongst Indians in Natal. The institution of the right of either party to the agreement to sue for breach of contract crucially cemented the position of adult Indian women as potential litigants, rather than merely as witnesses which was the position to which African women were consigned. The transformation of the rights in the goods transferred in marriage exchanges from customary rights to rights in private property

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<sup>46</sup> PAR II 1/150 I 468/07 Digest (Indian Marriages Act, 1907).



defensible in the colony's civil law courts exemplified a crucial difference in the approach of the Natal administration to the government of Indians, as compared to that of Africans. This law effectively began the assimilation of the customary rights of both Indian men and women into colonial civil law in a manner that was unthinkable for Africans whose customary administration continued under the parallel system of Native Law.

*Africans and 'Bridewealth' in Colonial Natal*

In July 1889, Isaiah Msindi of Umsinga presented seven cattle to Sonyangwe Tusi as *ilobolo* ('bridewealth') for Baleka Inbedwini whom he intended to make his wife. Tusi accepted the *ilobolo* as he was adjudged to 'stand in the position of her guardian' by the Umsinga Magistrate in terms of Section 5 of the African Christian Marriage Act of 1887. Sonyangwe Tusi was, in fact, Baleka Inbedwini's former husband whom she had recently divorced. The magistrate maintained that 'Sonyangwe is her natural guardian (and practically her owner) until [she is] actually married again'. In referring the matter to the Native High Court, Secretary of Native Affairs Henrique Shepstone (Theophilus Shepstone's son) appeared to agree with the magistrate's assessment: 'as the law now is... a divorced woman is apparently without a guardian. The divorced husband is the only person to have any interest in her'.<sup>47</sup>

This was an unusual, though not exceptional, case of customary marriage. A

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<sup>47</sup> PAR SNA 742/89 260/89 Marriage by Xtian Rites Guardian of Divorced Woman. Native Law.

number of similar cases arose from the 1870s, after the passage of the 1869 African Marriages Law. A study of how the legal regulation of the African custom of *ukulobola* took place in Natal helps to shed some light on the quandary in which the Resident Magistrate and Secretary for Native Affairs found themselves in 1889.

Many late nineteenth century and early twentieth century missionaries and anthropologists writing about African societies in southern Africa viewed African marriage exchange as transferring the ‘ownership’ of women between men through the exchange of cattle in particular.<sup>48</sup> This view of African women as commodities was subsequently challenged by Africanist scholarship which instead sought to place this form of marriage exchange in the context of a particularly gendered pre-colonial homestead economy.<sup>49</sup> Neither of these competing views contest that this type of pre-colonial marriage exchange practice exemplifies a form of male domination that ultimately constitutes the exchange of women.<sup>50</sup> Writing in the middle of the twentieth century legal scholar H.J Simons argued for a revisiting of abstract anthropological notions of *ukulobola* as he observed how some wage-earning African women in South Africa participated in accruing their own *ilobola* on behalf of their prospective

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<sup>48</sup> A particularly exemplary case is Swiss born missionary-anthropologist H. A. Junod, *The Life of a South African Tribe*, New York: University Books, 1962.

<sup>49</sup> For southern Africa, a particularly important intervention was Jeff Guy, ‘Gender oppression in southern Africa’s precapitalist societies.’ In Cheryl Walker (ed.), *Women and gender in southern Africa to 1945*. Cape Town: David Philip, 1990.

<sup>50</sup> This view has been complicated by recent work on African intimacy which confirms the historical simultaneity of structures of male domination and expectations of women’s fertility with mutual affection and intimacy in relationships secured through *ilobolo*. Mark Hunter, *Love in the Time of AIDS: Inequality, Gender, and Rights in South Africa*. Indiana University Press: Bloomington, 2010.

husbands.<sup>51</sup> ‘Revisionist’ social and cultural historians writing towards the close of the twentieth century similarly complicated earlier accounts of the incorporation of African rural societies into the southern African region’s capitalist economy, illuminating the central role of *ukulobola* and homestead-building projects to the manner in which African men undertook wage labor on their own terms.<sup>52</sup> Africans in Natal were, through their interactions with new forms of legal hegemony, themselves developing a stake in colonial forms of government and mid-nineteenth century notions of gendered power.<sup>53</sup>

Decades before marriage exchange practices amongst Indians began to encounter the scrutiny of colonial authorities colonial discourse surrounding African marriage practices proliferated in Natal as it did in other contexts of European colonialism in Africa.<sup>54</sup> In Natal, as I have shown, settler colonial civilizing discourse had identified polygyny and *ukulobola* – or customary transfers of goods comprised primarily, though not exclusively, of cattle from the bridegroom to the bride’s family upon marriage – as a

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<sup>51</sup> H.J. Simons *African Women: Their legal status in South Africa*, Northwestern University Press: Evanston, 1968.

<sup>52</sup> William Beinart, ‘Joyini Inkomo: Cattle Advances and the Origins of Migrancy from Pondoland,’ *Journal of Southern African Studies*, Vol. 5, No. 2 (Apr., 1979), pp. 199-219; Dunbar Moodie, T., and Vivienne Ndatshe. 1994. *Going for Gold: Men, Mines and Migration*. Berkeley, CA: University of California Press; Patrick Harries. *Work, Culture, and Identity: Migrant laborers in Mozambique and South Africa c 1860-1910*, Portsmouth, New Hampshire: Heineman, 1994.

<sup>53</sup> Jeff Guy ‘An Accommodation of Patriarchs: Theophilus Shepstone and the Foundations of the System of Native Administration in Natal’ Unpublished paper presented at Colloquium on Masculinities in Southern Africa, University of Natal, Durban, 2-4 July, 1997. See also Jeff Guy. ‘The Destruction and reconstruction of Zulu society.’ in *Industrialisation and social change in Africa*. Edited by S. Marks and R. Rathborne, Harlow: Longman. Norman Etherington, ‘The Shepstone system’ in the Colony of Natal and Beyond the Borders,’ in Duminy and Guest, *Natal and Zululand*, 170-92.

<sup>54</sup> Nancy Rose Hunt ‘Noise over camouflaged polygamy, colonial Morality Taxation, and a Woman-naming Crisis in Belgian Africa’ in *The Journal of African History*, Vol. 32, No. 3 (1991), pp 471-494 and Diane Jeater, *Marriage, Perversion, and Power: The Construction of moral discourse in Southern Rhodesia, 1894-1930*, Clarendon Press, Oxford, 1993.

target of civilizing reform.<sup>55</sup> While most settlers including colonial legislators understood such exchanges as ‘wife-purchase’, others such as the Secretary for Native Affairs, Theophilus Shepstone, argued otherwise throughout the nineteenth century by elaborating the manner in which he saw *ukulobola* as structuring authority in Zulu society.

In the context of Shepstone’s growing legislative authority in the middle part of the century, the moralizing imperatives of colonial civilizing discourses were rarely manifested in colonial law. This remained particularly true of *ukulobola*, the spasmodic regulation of which came to epitomize the equivocating modernization of the Shepstonian legislative era. Unlike the customary institution of polygyny which declined steadily into the mid-twentieth century, *ukulobola* regulation was rather more ambivalent and the practice has persisted into the present, in a manner distinct from polygny.<sup>56</sup> Below, I attempt to situate the customary continuity of *ukulobola* historically by contextualizing its nineteenth century regulation by the Natal Native administration as a form of practice both structurally tied to, and discrete from, polygny.

### *The Legal Regulation of African Marriage Exchange Practice*

The first instance of explicit colonial intervention in this form of African customary practice occurred with the passage of the 1869 African Marriage Law. As I have illustrated, the focus of this law was ostensibly an attempt at a particular post-

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<sup>55</sup> See also Jeremy Martens ‘Civilised domesticity’, race and European attempts to regulate African marriage practices in colonial Natal, 1868–1875, *History of the Family* 14 (2009) 340–355; also 1853 *Commission of Inquiry into the Past and Present State of the Kafir*.

<sup>56</sup> H.J Simons, *African Women: Their Legal Status in South Africa*.

slavery form of gender liberalization which legally instituted African women's consent to their own marriages as a right that could be upheld and defended under African customary law. More importantly, however, the law reflected an initial (and I've suggested, fundamentally contradictory) legislative foray into the gradual elimination of polygyny as a way of addressing the colony's labor needs and eroding the power of senior African patriarchs.

Viewed from the perspective of gendered customary reform, this initiative spluttered to life at intervals during the nineteenth century, but the form in which it was targeted in the 1869 Marriage Law is especially important as it reveals an understanding, on the part of some legislators at least, of the structural relationship between 'bridewealth' and polygyny which undergirded African subsistence economy. The elimination, or at the very least a reduction of polygynous practice, was key to another mid-nineteenth century colonial administrative imperative: the need to secure a reliable supply of male African labor. As long as African men continued to have multiple wives to perform subsistence agricultural work in their homesteads, there was little need for them to labor for colonial interests. To quote Helen Bradford in a related context 'the power of patriarchs had to be broken for proletarians to emerge'.<sup>57</sup>

Legislators saw the manipulation of 'bridewealth' as the key to eliminating polygyny, as each polygynous union was conventionally legitimated by sizeable transfers of cattle between the prospective groom and father-of-the-bride which often occurred

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<sup>57</sup> Helen Bradford, 'Highways, Byways and Culs-de-Sacs: The Transition to Agrarian Capitalism in Revisionist South African History' in *Radical History Review*, 46/7 1990, 72.

over a decades-long period of time. By setting a maximum limit on the number of cattle that could be transferred as part of *ukulobola* the 1869 law sought to circumscribe the accumulation of women, and their labor, for African homesteads. Shepstone had offered the law that reduced the amount of *lobola* to the colony's lawmaking body in 1869 as a gradualist attempt to phase out the custom. His claim of gradual civilization through laws that reduced the amount of 'bridewealth', turned it into a one-time payment, and codified and rigidified a new form of practice which became the standard for the regulation and reform of *ukulobola* practice in the nineteenth century.

While these new colonial rules reconfigured the limits within which 'bridewealth' practices could continue, by themselves official proscriptions on the amount and period of 'bridewealth' payments did not necessarily have profound transformative effects on the imputation and inferral of customary meaning attached to these payments. The effect of the law was to change customary practices of 'bridewealth' by reconfiguring the relationships of authority inhering in 'bridewealth' or *ilobola* payments which ordinarily would have taken place as decades-long processes implicating the ongoing development of personhood and reciprocal obligation.<sup>58</sup>

Most importantly, the law opened up recourse to magistrate's courts for African women to report contraventions of the 1869 law, where previously women were unable to seek such colonial assistance. African women then could potentially lay criminal complaints against fathers and prospective husbands for contravening the law.

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<sup>58</sup> John Comaroff, and Jean Comaroff, 'On Personhood: An Anthropological Perspective from Africa', *Social Identities*, 7: 2, 2000, 267-283.

In the half century following the 1869 Marriage Law, African men expressed their displeasure at the gendered and generational transformations initiated by the law's provisions of consent and restrictions on *lobola*. In discussions with colonial magistrates and Native administration officials in the 1870s, and before commissions in the 1880s and early 1900s, these African patriarchs complained of the manner in which their continued capacity to attain the respect of their contemporaries by fulfilling the rights and obligations of fatherhood came to be undermined by the enforcement of the 1869 law. As they expressed it, what appeared to be a crucial modernizing intervention imperiled the reproduction of a particular form of masculinity, whose foundations lay in the ability to initiate and execute transfers of marriage thereby building both material signs of wealth and status (in both cattle as well as other goods) as well as respect within localities and wider clan groups. Where some of their complaints referred directly to the law's *ukulobola* restrictions, others drew out the manner in which the consent clause eventually impacted on their ability to claim *ukulobola* for their daughters whose 'value' diminished in the wake of marriage disputes.

They spoke of the manner in which the foregrounding of African women's consent rather than the consent of their fathers and male guardians (whose objections could be overridden by the Secretary of Native Affairs, though this rarely occurred) had resulted in an increase in premarital sex with lovers who no longer respected the authority of the fathers of the women whom they wished to marry. Many young women engaging in premarital sex were 'corrected' through beatings in an attempt by fathers to reassert

their customary authority.<sup>59</sup> Some of these older men offered the opinion that the rise in such instances of corporeal gendered violence was as a result of colonial interventions in African customary practices, where such violence had not previously been necessary to ensure young women's fealty to patriarchal authority.

Still other men, particularly younger men and those professing Christianity, welcomed the 1869 restrictions as a way of checking the authoritarian power of especially chiefs and senior men, and making it possible for younger men to marry more readily.<sup>60</sup> Some young women fled their homes for fear of coercion, and the problem of African women 'coming to town' rather than remaining in the rural homesteads of fathers or moving to those of prospective husbands began to become increasingly widespread.<sup>61</sup> Much of this related to disputes in households over new marriage regulations and the inability of fathers, under threat of colonial sanction, to compel their daughters to marry 'men of substance'.

African men weighed in with their condemnations of this liberalization primarily in their capacities as fathers and chiefs.<sup>62</sup> Fathers expressed frustration that daughters could renege on marital agreements made amongst fathers and chiefs, choosing instead to

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<sup>59</sup> Colony of Natal, *Blue Book on Native Affairs*, 1904 (Pietermaritzburg, 1904) 72-78.

<sup>60</sup> For more on the generational tensions exacerbated by colonial rule in this region see Benedict Carton, *Blood from Your Children: The Colonial Origins of Generational Conflict in South Africa*. Charlottesville: University of Virginia Press, 2000.

<sup>61</sup> PAR NCP 2/2/2 Legislative Council Debates, African Christian Marriage; 1882 Native Affairs Commission Evidence, 277; Evidence of Theophilus Shepstone.

<sup>62</sup> PAR, 1882 Native Affairs Commission Evidence, 176.



marry ‘men of no substance’.<sup>63</sup> In general, those African men who offered their thoughts on the law claimed that such a concession of rights to women had wider implications for what they imagined to be the necessary submission of women within the homestead: ‘It is our custom. Under our laws a wife was afraid of her husband. This may be against your custom, but it is ours. We husbands are mere nothings now. If you say a word they threaten to go to the courts and get a divorce, and marry someone else’.<sup>64</sup> The implications of this kind of testimony was that gendered rupture was a feature of the replacement of ‘traditionalist’ modes of living with newly gendered colonial customs which favored women’s autonomy.

Even the prominent *Kholwa* political leader and founding father of the African National Congress, John Dube, asserted these men’s rights to ‘old obligations of custom’ in his belief that:

...daughters...are under certain obligations to their fathers...to quote the right of selecting a husband as a warrant for a girl ignoring her moral obligations to her family in choosing to discard their mode of living for the purpose of taking up, to them, a somewhat strange and uncertain mode of life, is not logical...surely...in the position of one of those Fathers [one would have to be sure of] what it really meant for his daughter to leave the old mode of life for a new one.<sup>65</sup>

The fathers whom Dube referred to pointed to the magistrates’ courts as encouraging women’s recalcitrance: ‘they come here to lodge their complaints and pick up with someone under the trees, and the wives are then gone. Magistrates do not support

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<sup>63</sup> PAR, 1882 Native Affairs Commission Evidence, 176.

<sup>64</sup> PAR, 1882 Native Affairs Commission Evidence, 176.

<sup>65</sup> John L. Dube, *Ilanga lase Natal*, 19 November 1909, ‘Native Girls and Christianity’.

the men anymore. When the women complain they take their side and we have to pay a fine'.<sup>66</sup> Chief Ngwaqa lamented the demise of the 'old laws' under which 'such things never took place'.<sup>67</sup> More than simply anger, frustration and patriarchal nostalgia, these commentaries reveal the sense of dislocation, the sharp recasting of gender roles that this particular legal intervention had provided. Chief Mnyamana spoke on behalf of the men in his district, many of whom claimed that their daughters had run off to the towns and were leading 'immoral' lives because fathers no longer had the authority to marry them off.<sup>68</sup>

It is unclear from the evidence that young African women had begun to take the kind of liberties in relation to the new legal liberalization which their fathers and guardians claimed. While the available testimony of African men and colonial officials provides a palpable sense of the unanticipated way in which women actually used the law to leave their parental homes and 'come to town' I would argue, also, that the protests of older African men was a reflection of the unprecedented nature of the rupture in gendered authority and the real *and* imagined consequences for the customary positions of masculine power in which they had come to be invested over the course of generations.

What soon became apparent was that some colonial lawmakers had not conceived of the administratively-desirable effects of the power of customary African patriarchs to curb the mobility of their wives and daughters. By the turn of the century, James Stuart,

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<sup>66</sup> PAR, 1882 Native Affairs Commission Evidence, 176.

<sup>67</sup> PAR, Report of Native Affairs Commission, 1906-07, 722.

<sup>68</sup> PAR, Report of Native Affairs Commission, 1906-07, 722.

the Assistant Magistrate in Durban who would later become one of the foremost recorders of African oral tradition in this region, outlined what he saw as a ‘crisis’ arising from the transformation of African ‘ancient habits and customs, their beliefs and modes of being’. A key part of Stuart's assessment of increasing lawlessness and individualism among Zulu-speaking Africans was the erosion of traditional forms of social life. He advocated a return to traditional mores in relation to women, whose ‘universal immorality’ he regarded as largely responsible for social disruption.<sup>69</sup>

Soon after the passage of the 1869 law Secretary of Native Affairs Theophilus Shepstone appeared to regret the hasty reforms which had produced the disorderly state of affairs which African patriarchs complained of, and implied that the state had failed to acknowledge the traditionalist power in which it was also clearly invested. The consequences of African women seizing upon a limited concession to create possibilities for further complaints and rationalizations for leaving their childhood and marital homes underlined the effectiveness of paternal strictures in keeping a check on the movements of African women in the colony and provided evidence in support of Shepstone’s longstanding arguments against African customary reform.

Testifying before the Natal Native Commission in 1882, Shepstone observed in some detail the unintended effects of the consent and *ukulobola* clauses in the 1869 marriage law, and the subsequent reforms embodied in the Native Code that he had drafted in the mid-1870s. His comments addressed the manner in which customary rights

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<sup>69</sup> Colony of Natal, *Blue Book on Native Affairs*, 1904 (Pietermaritzburg, 1904) 72-78.

*in* women were being remade by colonial proscriptions on ‘bridewealth’ in the 1869 law:

I suppose the real purpose of [*ukulobola*] is that it keeps the parental authority more intact. To thoroughly understand it you must look at other tribes not affected by our regulations. You will find that amongst all the tribes between Natal and the Cape Colony, when a woman is badly used, she goes to her father, who keeps and protects her if he sees fit until the husband has paid the fine that he may exact. Sometimes this right by the father is used to an extravagant extent; but an appeal to the chief will usually secure the rights of the husband. This system has worked better than ours, for which I am mainly responsible; and which has much loosened the ties between father and child in such cases. *According to our system, when a husband dies the father of the wife has no right to receive her back to this protection, but she becomes the daughter of the husband's family.*<sup>70</sup>

Shepstone’s statement referred to the manner in which the reconfigurations of *ukulobola* practice exemplified in the Natal Native Code and its subsequent amendments through the 1870s and 80s turned the exchange of ‘bridewealth’ into a once-off transaction.<sup>71</sup>

Previously, infertility or adultery on the part of the woman, or mistreatment on the part of the husband implicated the return of and fines in amounts of cattle or goods that tied families and their patriarchs into long-term reciprocal relationships and, in theory at least, acted as a customary form of moral restraint on men and women.<sup>72</sup> In his testimony to the Commission Shepstone lamented that his peculiar interpretations of *ukulobola* laws in the Natal Native Code were not only a temporal attenuation of these material transactions, but effectively reconfigured the customary life of these exchanges and ongoing filial responsibilities previously encompassed by the practice.

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<sup>70</sup> PAR, 1882 Native Affairs Commission Evidence, 277. Emphasis added.

<sup>71</sup> Welsh, *The Roots of Segregation*.

<sup>72</sup> Harriet Ngubane, ‘Marriage, Affinity and the Ancestral Realm: Zulu Marriage in Female Perspective’; H.J Simons, *African Women: Their Legal Status in South Africa*.

Shepstone's emphasis on the manner in which the authority of fathers had, under his system, begun to give way to the authority of husbands has been widely noted in the literature on colonial Natal.<sup>73</sup> While the Natal Native Code was largely a vehicle of Shepstone's own autocratic vision, he only produced this codification of African custom under great pressure from colonial legislators with whom he was embroiled in ongoing disputes over settler demands for the labor of African men and the civilizational 'progress' of African society.<sup>74</sup> These colonists argued that the legislative diminution of the power of polygynous African patriarchs was important both for securing labor and civilizing Africans.<sup>75</sup> While Shepstone did little to appease these calls for customary reform except on his own terms, his own efforts to check the power of African patriarchs such as the 1869 African Marriage Law both intersected with these demands and produced a situation of which neither the colony's settler employers, nor its legislators approved. Shepstone's testimony about the increased mobility of young African women observed by the Commissioners and other witnesses was characteristically manipulative:

I'm afraid we cannot do much [to prevent women coming to town]; we can only lessen the facility for their doing so. I feel that the removal of the girl from parental control has had a bad effect...I think that the parental authority is not sufficiently recognized in our Native administration.<sup>76</sup>

The regret which he expressed about the perceived immorality caused by the 1869 law (which was subsequently enshrined in the Native Code in 1875) seems misleading. From what we can tell, he appears to have attempted to justify his reluctance to codify

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<sup>73</sup> Benedict Carton, *Blood from your children*; Lambert, *Betrayed Trust*.

<sup>74</sup> Welsh. *The Roots of Segregation*.

<sup>75</sup> PAR NCP 2/2/2 Legislative Council Debates, African Christian Marriage.

<sup>76</sup> PAR SNA 1882 Native Affairs Commission Evidence, 277.

Native law in the first place while making an argument against further attempts at colonial reform of African customary life unless such reforms supported the aims of his administration. Rather than a statement of the intended role of African parental authority, Shepstone's views appear to be oriented toward determining the ends to which customary practice could be harnessed for his purposes of Native administration. While he may well have shared the views of other legislators and colonists that African women's mobility posed a moral problem, it appears from the legislation passed through his singular influence in the 1860s and 70s that Shepstone's views on the undermining of parental authority might not have been quite as regretful as he made them appear to be. A few years after his testimony before the 1882 Native Affairs Commission, he responded to criticisms of his truncation of *ukulobola*:

The unfortunate son-in-law is never released from legal liability to the avaricious demands of his wife's father or brothers...I have had to adjudicate on scores of cases arising out of this custom, some of them more than fifty years old. I have found that instead of producing domestic or social harmony...it is most prolific of family feuds and bitter discord. One generation hands on its quarrels to another exaggerated by the accretions of time. It was surely necessary to restrict this source of constant irritation [as in the 1869 African Marriage Law]...and ultimately to put a stop to it altogether by taking a step in the direction of civilized useage.<sup>77</sup>

This shift in the locus of male power from fathers to husbands in colonial 'bridewealth' law and practice which Shepstone acknowledged as the effect of his efforts was a key part of Native administration attempts to secure early marriage amongst Zulu men in the mid-nineteenth century.

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<sup>77</sup> Theophilus Shepstone letter to the editor, *The Natal Advertiser*, February 9, 1892.

These policies of the 1860s and 70s appear to have had the *incidental* short-term effect of producing modernizing gendered change. While this legal shoring up of the ability of younger men to enter into marriages may have been a crucial step toward reforming a gendered division of homestead and household labor and possibly for imagining some kind of modern remaking of African family life in Natal (in a manner similar to the colonial regulation of Indians in this same period), this came to be quickly undermined by Shepstone's subsequent legislative deeds. His rendition of customary practice in the above quotes casts the work of one particular aspect of African patriarchy, in the roles of both fathers and husbands, as fulfilling a specifically desirable administrative function: that of the guardianship of women.

Shepstone's interpretation of the role that customary practices such as 'bridewealth' had played in structuring gendered authority and control was a view that the colony's Legislative Council began to draw upon to prevent the further erosion of control over African women's mobility by the early part of the twentieth century. One of the key indicators of the particular administrative instrumentality to which *ukulobola* practices were put is the state's legislative decoupling of polygyny and *ukulobola*.

#### *Uncoupling Polygyny and 'bridewealth': Christian Morality and Heathen Customs*

Strident colonial discourse about the evils of African polygyny persisted through the middle part of the century both in public forums and amongst legislators, but legislative consensus could not be reached to further undermine polygamous practices

amongst Africans until significant missionary agitation forced the issue in the late 1880s. Legislative reticence to intervene decisively in polygynous practice was influenced primarily by prominent Native Affairs officials, including Theophilus Shepstone, his brother John and son Henrique, all of whom at some time held the post of Secretary for Native Affairs. Together with the Colonial Secretary and a few other prominent legislators these men believed further direct legislative intervention to be unadvisable, implying in their floor comments on the bill that members of the Legislative Council representing local districts who sought African customary reform on the basis of public opinion had little expertise in Native government and that these local legislators displayed considerable administrative naiveté in imagining the possibility of straightforward civilizing/Christianizing reform.<sup>78</sup> Despite this legislative split in opinion, the Natal Missionary Conference effectively forced the hand of the legislature by framing the issue as a concern over the moral responsibility of the colonial state toward a growing number of Christian Africans, many of whom remained polygynous despite being married at some point by Christian rites.<sup>79</sup>

The ultimate passage of the 1887 Native Christian Marriage Law was a rare triumph of missionary agitation over the longer-standing administrative sensibilities of the 'House of Shepstone'. It was notable in its break from the 1869 law which remained as the only other legislative attempt to deal with polygyny amongst Africans in Natal. It

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<sup>78</sup> PAR NCP, Legislative Council Debates, African Christian Marriage Bill, 1883-1887.

<sup>79</sup> PAR SNA 1/1/70, 1884/89, Revd Greenstock forwards a memorial to the governor with reference to native marriage, Foreword to petition. See also Sheila Meintjies, 'Family and gender in the Christian community at Edendale, Natal in colonial times'. In Cheryl Walker. (Ed.), *Women and gender in southern Africa to 1945*. Cape Town: David Philip, 1990.



made no reference whatsoever to *ukulobola* and thus represented the first administrative uncoupling of these forms of African custom which the colonial state had previously regarded as inextricably intertwined in the administrative pursuit of African male labor.<sup>80</sup> With the passage of the 1887 law, polygyny had become a self-standing administrative target, an end in itself, and its prohibition reflected an explicit form of Christian moral regulation.

*Ukulobola* did not feature in the law and the reasons for this may be gleaned from the responses of the Shepstones and their supporters to the ensuing confusion amongst local magistrates over the status of these seemingly inevitable marriage transactions. In 1886 Henrique Shepstone told the Wragg Commission of Inquiry into Indian migrants that the continuation of *ukulobola* in Zulu society was actually an inducement for men to seek employment as they attempted to accrue the necessary 'bridewealth' to enable them to marry.<sup>81</sup> The junior Shepstone's observation would be borne out by the continuing importance of such homestead-building strategies to African male workers engagement in migrant labor to the gold mines of the Witwatersrand, well into the twentieth century.<sup>82</sup>

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<sup>80</sup> See earlier chapters for a fuller explanation of the structural relationship between the practices of polygyny and *ukulobola*.

<sup>81</sup> Meer, *Documents*, Wragg Commission Evidence, H.C Shepstone, 495-6.

<sup>82</sup> For studies of the importance of homestead-building to defining the terms of African men's engagement with wage labor see William Beinart, 'Joyini Inkomo: Cattle Advances and the Origins of Migrancy from Pondoland,' *Journal of Southern African Studies*, Vol. 5, No. 2 (Apr., 1979), pp. 199-219; Dunbar Moodie, T., and Vivienne Ndatshe. 1994. *Going for Gold: Men, Mines and Migration*. Berkeley, CA: University of California Press; Patrick Harries. *Work, Culture, and Identity: Migrant laborers in Mozambique and South Africa c 1860-1910*, Heinemann, Portsmouth, 1994.

Officially, the text of the 1887 law for Africans marrying by Christian rites made no mention of *ukulobola*. Unsurprisingly, this key omission resulted in most of the cases adjudicated with reference to the law being in some way related to the transfer of ‘bridewealth’, with much confusion ensuing over the place of *ukulobola* in an African Christian marriage. There was real administrative confusion amongst local magistrates tasked with enforcing the new law. The Office of the Secretary for Native Affairs had to field constant complaints from Africans seeking out Christian marriage rites, and from their families. Theophilus Shepstone referred the legislators who sought his counsel in these cases to his floor comments upon the bill’s passage into law where he pointed out, after much legislative wrangling on the issue that: ‘this bill does not touch [the question of *lobola*]. If the people choose to claim the cattle which it is the custom amongst the natives to give there is no objection to it as far as I can see, and the missionaries themselves do not make any objections to it’.<sup>83</sup>

Shepstone was more than overstating missionaries’ approval of the practice, but he was correct in noting that none of the petitions presented to the Governor explicitly sought any kind of reform of the practice of *ukulobola*. After the law’s passage, however, missionaries such as the Reverend F.A Davids expressed concern over the difficulty in practice to deny the inextricability of *ukulobola* and African marriages of *any* kind. Shepstone was himself only too aware of this, and in his responses to missionary inquiries rhetorically manipulated an impracticable and literal legal rationalization of his own legislative preferences to appear to suit the interests of his missionary questioners.

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<sup>83</sup> PAR SNA 1/1/129 869/1890 H. Shepstone to Rev F. A. David, Edendale 31st July, 1890.

The answer to your question is therefore that natives wishing to be married under the law 46 of 1887 are neither freed from giving nor compelled to give lobola cattle. It is a matter to be mutually agreed upon between the intending husband and the father or guardian of the woman. But in no case of a marriage celebrated under the provisions of law 46 1887 is the giving or receiving of lobola cattle essential to the validity of the marriages.<sup>84</sup>

Despite Shepstone's assurances that this nominally 'Christian' law did not in any way *require ukulobola*, the consent of the women's guardian, in addition to her own assent, was key to marrying by Christian rites. Often, when consent was refused, it was the *ilobola* that figured as the site of disagreement. Shepstone's answer on the place of *ukulobola*, and the fact that *ukulobola* is not mentioned in the text of the law are deliberately misleading in light of his earlier expressed views on colonial legislative intervention in African custom and his subsequent intransigent refusal to give in to missionary pressure over the regulation of polygny. During debates over the proposed law in the Council, he refused to entertain any suggestions that *ukulobola* regulation be included in the bill despite the revelation in legislative council discussions and the cases which arose in its aftermath of the imbrications of *ukulobola* and the administrative desire to have women under some form of male control.<sup>85</sup>

#### *ukuLobola and the Guardianship of African Women after 1887*

Cases arising out of uncertainty on the part of clergy and local officials over the status of *ukulobola* were adjudicated according to the guardianship provisions of the 1887

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<sup>84</sup> PAR SNA 1/1/129 869/1890, H. Shepstone to Rev F. A. David, Edendale 31st July, 1890.

<sup>85</sup> PAR NCP 2/2/2, Legislative Council Debate, Native Marriages.

law and reinforced the right of the male guardians of African women to claim *ukulobola*. This was confirmed in no uncertain terms in a case in 1900 when Secretary for the Law Department John Bird defended the right of fathers who refused consent to their daughters' marriage by Christian rites. Bird reiterated that *ukulobola* was, in fact, tied to questions of guardianship:

Sec 5 of Law 46/1887 requires in the case of a native woman not exempted from native law, the consent of her father or guardian must be obtained before a licence can be granted for her marriage. There is nothing in this section or elsewhere in the law, which takes away the right under native law for a parent or guardian to claim lobolo...A parent or guardian who has such right cannot be regarded as unreasonably refusing his consent if the lobolo is not given. Section 11 makes it clear that the fact of having been married by Christian rites does not remove either of the parties from the operation of the native law, either in their persons or their property, save as may be provided in the law. In the absence of any contrary provision, the native law of guardianship is unaltered by marriage.<sup>86</sup>

In the absence of a father or known male relative who might have given consent, Bird pointed out that the *ilobola* in question would be preserved for 'a possible third party' for a set period of time before it accrued to the state. It is through this 'third party' provision that African women's own participation in *ukulobola* practices might be better understood.

The legal provision which Bird had elucidated was included in the 1887 Act after cases such as that of Rosalyn Mngomani who wished to marry Johann Mayisa in 1884. The Wesleyan Reverend Evans Rowe claimed that Rosalyn was an orphan, or possible

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<sup>86</sup> Copy of Extract from papers SNA 2097/1900, Secretary Law Department responds to Magistrate on Lobola.

‘runaway’, who had been living on a mission station and her guardian could not be located.<sup>87</sup> Henrique Shepstone petitioned the Attorney General for provision that the state could accept the guardianship of women in such cases where kin were deceased or could not be found. Shepstone’s proposal was that the state, in the person of the Lieutenant-Governor who was also the ‘Supreme Chief’ of Africans, could provide consent to a marriage along the lines of the 1869 law which deemed it a requirement alongside the consent of the woman in question.<sup>88</sup> Section 3 of the Natal Native Code opposed the possibility that *ukulobola* not feature in the marriage.

According to the terms of the 1887 law, Rosalyn Mngomani and other women who sought out Christian marriage and were in a similar position vis-à-vis guardianship would have to have *ukulobola* transferred unless the state, as newly appointed guardian, consented to its revocation under terms of the 1887 guardianship clause which made any claim to *ilobola* the prerogative of an African woman’s guardian. The concession of this prerogative appears liberalizing in some respects as it contemplates the possibility that a guardian might choose not to lay claim to *ilobola*. However, in practice this was hardly ever the case. Even prominent Christian Chiefs such as Stephen Mini, who testified on the issue of *ukulobola* before the 1882 and 1906 Native Commissions conceded that despite his personal disapproval of *ukulobola*, he would nonetheless be forced to claim it for his own daughter in consideration of her status vis-à-vis other wives, and by

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<sup>87</sup> PAR SNA I/I/75, 1884/529 Correspondence among Rev. Rowe, H.C Shepstone and the Attorney General.

<sup>88</sup> PAR SNA 1/1/116, 1889/669 Consent of Women’s Guardian.

implication, his status as her guardian upon marriage.<sup>89</sup>

While the assertion of the state's guardianship over African women reinforced the rights of African patriarchs over their daughters and wives, and ultimately worked to enforce the material basis of African patriarchal power, it is not necessarily the case that the absence of the state's guardianship would have resulted in these women giving up the practice of *ukulobola* altogether. Women like Rosalyn Mngomani may have sought the negation of the practice, which was denied by the state at the time; but African women such as Unozinduku Mtetwa who claimed to have repeatedly fled oppression and colonial servitude sought out *ukulobola* in an attempt to affirm their status as wives in what, despite the 1887 law, continued to be potentially polygamous unions.<sup>90</sup> Writing in the 1960s, H.J. Simons confirmed that in general African women appeared to be 'staunch supporters' of *ukulobola* and that into the twentieth century working women contributed out of their own earnings to the costs of their *ilobolo* on behalf of their husbands.<sup>91</sup>

The 1887 law was never really enforced against polygynous Christian men, nor does it appear that the colonial bureaucracy was committed to its enforcement, except against polyandrous women.<sup>92</sup> Its half-heartedness and consequent failure to eliminate polygyny was foreseen by those legislators who had been opposed to the law's passage from the outset. The resulting provision of the state's guardianship for women without

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<sup>89</sup> Native Affairs Commission Evidence, Testimony of Stephen Mini.

<sup>90</sup> PAR SNA I/I/189 957/1894 Petition of Unozinduku Mtetwa, Sept 24th 1894.

<sup>91</sup> Simons, *African Women: Their Legal Status in South Africa*.

<sup>92</sup> PAR SNA 2202/16 Re: the marriage by Christian Rites of Persons formerly married in Accordance with Native Custom, also SNA 2720/03 and SNA 1102/1891.

fathers or male kin may well have worked as an administrative failsafe for those African women who sought out *ukulobola* in protection of their wifely status in relation to other wives in potentially-polygynous arrangements. Where African women in Natal sought the continuation of forms of customary male power to which their own life-projects were tied, they found themselves amply assisted by colonial law.

### *Conclusions*

Indian and African customary practices of marriage exchange became the target of nineteenth century reformist discourse under colonial rule. As was the case with polygny, the processes by which missionaries, settlers, state legislators and bureaucrats engaged these practices reflected the moral regulation inherent in state formation. Generally speaking, it was through the valorization of particular gendered relationships and social roles amidst the contingencies of colonial administration in this nineteenth century moment that the Natal state established differential patterns of gendered expectation for Africans, Indians and white settlers. By setting the contemporaneous regulation of African and Indian marriage exchange alongside each other, it is possible to view the differing historical and legal forms of gendered social order coming into being in this colony by the turn of the twentieth century for each of these colonial groups. In each case, state administration was inflected by pre-existing forms of power and gender regulation which were appropriated and transformed by the colonial state's legal institutions in conversation with those subjected to colonial rule.

In the case of Indians this meant negotiating the terms of marriage exchange in a context of the existence of the labor contracts of both men and women. The civil implications of these work contracts, and the manner in which state regulation of the transfer of goods upon marriage eventually came to institute the right of Indian men and women to hold private forms of property, produced a qualified modern legal status vastly different to that permitted to Africans.

For Africans, *ukulobola* regulation worked not only to undermine the power of senior African men in relation to younger men and the colonial state, but it was also a means of attenuating some of the unintended moral consequences of early forms of gender liberalization around African marriage. The legal accommodation of *ukulobola* by the state as a means both of securing male labor and the perpetual minority of African women not only exemplifies a narrative of frustrated modernity, but forms the foundation for the exclusion of African patriarchies from the colony's ordinary civil realm.

Practically, the act of not restricting or in any way regulating *ukulobola* in the 1887 law which brought only certain marriage practices into the realm of colonial civil law meant continuing to consign the administration of *ukulobola* to the realm of Native Law. There were some important legal implications to this:

Firstly, *ukulobola* transactions were upheld as the right of African men to lay claim to customary forms of property and the gendered authority inhering in them. The ongoing rights of guardianship which it reinforced undermined African women's



independence or attainment of a legal age of majority.

Secondly, *ukulobola* transactions continued to hold the status of exclusion from colonial civil law which meant that these African men whose customary rights were being upheld could not infer claims under civil law in the manner in which Indian men were permitted to do so in the opening years of the twentieth century. Denying *ukulobola* the status of civil property rights while upholding the right of African men to lay claim to it granted rights over African women to African men, but qualified the status of African patriarchy as a culturally particular exclusion, an inferior culture of law, which although recognized by customary codification, was made racially subordinate to the emerging modern forms of settler and Indian patriarchies.

## Conclusion

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The government of both 'Indian' and 'African' marriage in colonial Natal began with the premise of legal subjecthood, enshrined respectively in migrant laws regulating 'labor' and Native law governing 'custom'. The regulation of these 'customs' was set against a common law realm of unmarked, 'white' moral convention. This dissertation has been an attempt to pry open the discursive and material bases of these discrete legal codes and to illuminate the historical circumstances of their construction. By employing a gendered reading of legal regulation, and state interaction with those it constructed as 'citizens' and subjects', I have attempted to demonstrate the gendered basis for the construction of legal understandings of difference by the colonial state.

The legal contrivances of this state marked colonial common law as 'moral' despite the sharply contested moral nature of some of the practices which it was made to embody, and it set this common law moral standard as the basis for the 'Othering' of forms of customary practice such as polygyny. In the arguments of some imperialists, these 'immoral' practices supposedly reflected an older, barbaric moral universe, and could only be tolerated in those whose 'civilization' was in question. But the resonances such practices evoked remained key to the dialectical establishment of this particular culture of colonial rule.

‘Indians’ and ‘Africans’ came to be understood as customary rather than common law subjects through the legal contrivances of the colonial state, but did not always meet with the same legal sanctions. I show how the problem of this historico-legal and historiographical divergence might be illuminated by a gendered history of colonial processes of customary regulation.

By elaborating the gendered basis of colonial economic and laboring relationships, I have demonstrated the manner in which a gendered historical reading of the nineteenth century intersections of ‘African’ and indentured ‘Indian’ economic lives can undermine the racial bifurcations of the existing historiography. While African women were without access to a contractual regime of any sort (however ambivalent) which may have conceived of their legal autonomy and were subject to the vagaries of continuing forms of exclusively-male authority reified as absolute and entrenched by Shepstone’s Native Code, indentured Indian women were interpellated as nominally individual legal subjects in the imperial and colonial legal regimes of this moment. It is in the struggles and imbrications of the gendered relationships between African and Indian women and the men in relation to whom their gendered roles of wives, lovers, mothers and daughters was authorized that the legal relationships of custom and common law came to be differently worked out.

The historical features of the legal contestations presented demonstrate the distinct manner in which ‘Indians’ came to be differently envisioned in colonial law than the mainly Zulu-speaking Africans who were subject to indirect rule. It also provides a

view into the ways in which a form of colonial legal segregation underpinned by the imperial principle of colonial difference and ‘non-interference’ in ‘Indian custom’ until the 1890s, gave way to a more assimilationist legal approach by the first decade of the 1900s. The legal segregation of Indian administration did not take place through indirect rule or customary authority as with Africans, but through the legal view of indentured Indians as temporary labor migrants which persisted for the first three decades of the indentured labor scheme, a view which worked to mark Indians discursively as consummate workers.

Administrative discussion regarding the place of customary marriage practices amongst Natal’s ‘Indians’ was marked by the absence of debates on Christianization and the nature of civilizational reform. There are some critical reasons for the contrasting features of the customary administration of ‘Indian’ indentured migrants despite there being similar aspects of their practice to those of Zulu-speaking Africans. From the outset, the presence in Natal of migrants from the Indian subcontinent was premised on the availability of their labor. While some Indians arriving in Natal had come from rural Indian contexts in which having multiple wives was tied to the economic reproduction of households in a manner not entirely dissimilar to Natal’s Africans, this was no longer the case upon their arrival in the colony. This meant that there was no structural relationship, in the colony, between the elimination of polygyny amongst Indians and the extraction of their labor as in the case of Zulu-speaking Africans. Polygyny was therefore never part of conversations about the extraction of Indian labor. In fact, it was the increasing availability of Indian labor in Natal in the middle part of the century which helped to

ameliorate some of the more strident settler calls for the coercive expropriation of African male labor and the destruction of polygynous African homesteads.

The resulting colonial discourse about Indians as ‘hardworking’ reflected an existing colonial economy of labor extraction rather than the supposedly objective assessment of the ‘industrious nature’ of ‘the Indian’ in contrast to ‘African indolence’. The terms of the individual work contracts of Indian indentees inferred a readiness to perform agricultural and industrial work that was not always quite so unambiguous in practice, and violent coercion of both male and female indentured workers was a hallmark of the early decades of indenture. There were consequently a number of commissions of inquiry into labor abuses, and the issue of dealing punitively with indentees refusing to work featured in official inquiries into the mid-1880s.<sup>1</sup> Thousands of indentees were beaten, fined and imprisoned for ‘refusing to work’ over the course of the nineteenth century and the frequency with which the issue of ‘malingering’ recurs in the colonial record belies the discursive essentialism which has since come to distinguish the divergent historiographies of Indian and African modernization in the twentieth century. Indian and African men and women all engaged in struggles with the colonial state over the terms on which they would render their labor. The fact is that the terms of possibility for entering into colonial service for each of these colonial groupings differed significantly in this nineteenth century moment.

The discursive work done by ideas of ‘Indian industry’ came together with the

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<sup>1</sup> Meer, *Documents of Indebted Labor*, Reports and Evidence of the Shire Commission, Coolie Commission and Wragg Commission.

definite material realities of Indian men *and* women's waged work under contract (however reluctant women's acquiescence to this might have been) and the temporary migrant status of Indians until the 1890s, to produce a legal interaction with the state bureaucracy over issues of custom such as polygyny that was very different to the kind of legal status Africans would be permitted in nineteenth century Natal and later, in twentieth century South Africa. The eventual assimilation of indentured 'Indians' together with the small but economically powerful group of 'free' or passenger 'Indians' (or 'Arabs' as they were known) into colonial common law as a distinct *racial* group, helped to shape a particular kind of racialized, nationalist political discourse in the twentieth century which drew on colonial ideas of 'civilizational' difference embodied by different regimes of law. The decisive inclusion of all Indians into colonial common law with the racially-distinct 1907 Indian Marriages Act which placed a qualified prohibition polygyny in Natal but permitted early marriage promises, embodied both a partial admission of Indian 'industriousness' and 'civilization', and a simultaneous recognition of enduring racial and cultural difference. In the first two decades of the 1900s Gandhian political agitation drew on both these aspects of the legal constitution of colonial 'Indianness'.

Firstly, while attempting to argue for the exemption of Indians from laws restricting the mobility of all 'non-white' persons in South Africa, he invoked in a series of writings, an idea that has become central to the conceptualization of Indians and Africans in South Africa as distinct racial communities. He wrote:

One can understand the necessity of registration of Kaffirs who will not work, but why should registration be required for indentured Indians...about whom the general complaint is that they work too much?<sup>2</sup>

Gandhi's comment was rooted in the recent colonial history of Natal, where 'Indian' industrial 'civilization' had come to be distinguished from 'African indolence' through the construction and elaboration of racially-discrete legal regimes. He began to argue against the similar, racialized legal terms which were beginning to be invoked to discriminate against both Indians and Africans as 'non-whites.' In his view, Indians' exemplification of industry was one index of the civilizational difference between the two races.<sup>3</sup>

In 1913, when the infamous 'Searle judgment' refused to recognize the validity of unregistered but monogamous Indian marriages conducted according to religious rites, Gandhi wrote:

Any nation that fails to protect the honour of its women, any individual that fails to protect the honour of his wife is considered lower in level than a brute. We know that many battles have been fought to protect the honour of women...If we lose our honour, what remains of happiness?<sup>4</sup>

Gandhi's argument was that unregistered, customary unions which were not Christian ought to be defended by the state as valid unions. This attempt to have Muslim

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<sup>2</sup> *Indian Opinion*, 'Editorial', March 18, 1905.

<sup>3</sup> Isabel Hofmeyr, 'The Idea of 'Africa' in Indian nationalism: Reporting the Diaspora in the Modern Review 1907-1929', *South African Historical Journal*, vol.57, ed.1, 60-81. In pages 75-77, she describes in detail the umbrage that Gandhi took to Indians being discriminated against in the same manner as 'Natives'.

<sup>4</sup> 'Attack on Indian Religions', *Indian Opinion*, 22 March 1913.

and Hindu marriages recognized as having the same civil standing as Christian marriages was an appeal to the guarantee of the British Empire to respect difference, which he offered alongside claims to equality on the basis of ‘civilization’. As he had written in an *Indian Opinion* editorial in 1911, ‘In British Dominions, wherein all religions are respected, it is not possible to have laws insulting to any recognized religion flourishing under it’.<sup>5</sup>

But while Gandhi’s attempt to claim a legal status for Indians as ‘equal but different’ was still premised on the superiority of ‘Indian culture’ to ‘African barbarism’, the inclinations of the new Union government of South Africa recognized no difference at all.<sup>6</sup> The laws against which Gandhian activism was based in early twentieth century South Africa were less opposed to the recognition of Muslim and Hindu marriages in particular than they were opposed to all ‘non-whites’, even those who were Christian, from having any standing whatsoever in the legal realm of citizenship.

Norman Etherington argues that a full-frontal attack against black Christianity was mounted in Natal at the turn of the twentieth century. The context of this attack was increasing concern among officials about African evangelism and the ways in which African Christians were effectively making Christianity their own. The religious questioning which had emerged out of cross-fertilisation between elite mission educated Africans and African-American congregationalism, and the gap between missionary

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<sup>5</sup> ‘Indian Wives’, *Indian Opinion*, 8 July 1911.

<sup>6</sup> Hofmeyr, The Idea of ‘Africa’ in Indian nationalism: Reporting the Diaspora in the *Modern Review* 1907-1929, *South African Historical Journal*, vol.57, ed.1, 60-81.



rhetorical claims and African converts experiences of the obstacles preventing their social progress, espoused the threat of political radicalism. ‘Ethiopianism’ became the cover term which came to stand for these fears, with its ‘Africa for the Africans’ rallying cry. Etherington argues, perhaps somewhat pre-emptively, that the war on black Christianity convinced black Christian intellectuals to embrace black nationalism as their faith in the promise of equality before the law entailed in imperial citizenship was misplaced.<sup>7</sup>

In the opening years of the twentieth century there was an increasing denial of the right of African Christians to solemnize marriages. The reluctance of Shepstone’s administration to admit Christian Africans to even limited common law rights came to be realized more fully in these years as the colonial government crushed the aspirations of African Christianity. In 1904 the colonial government amended the 1887 African Christian Marriage law to regulate the granting of marriage licences and adopted a hard-line approach, granting very few licences to any African priests who applied, discriminating particularly against ministers associated with black American Churches and the American Zulu Mission.<sup>8</sup> What was at issue was precisely the colonial dialectic of control and independence: the government insisted that the only acceptable African Christians were those under the thumb of white missionaries, and performance of marriages by ordained African priests was a precursor to ‘Ethiopianism.’ S.O Samuelson the new Secretary for Native Affairs, defended his prerogative to ‘stop any preacher or

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<sup>7</sup> Norman Etherington ‘Religion and Resistance in Natal, 1900-1910’ in *One hundred years of the ANC: Debating liberation histories and democracy today*. Eds. Arianna Lissoni, Jon Soske, Natasha Erlank, Noor Nieftagodien, and Omar Badsha, Wits University Press: Johannesburg, Forthcoming.

<sup>8</sup> African Christian Marriage Law Amendment Act, 1904; PAR SNA1/1/301, 1322/03, Proposed Amendment of Law 46/1887.

person meddling with the natives under the cloak of religion'.<sup>9</sup>

John Langalibalele Dube, founding editor of the isiZulu language newspaper *Ilange Lase Natal*, a Congregationalist priest and founder in 1912 of the South African Native National Congress (which later became the African National Congress) wrote an angry editorial on the 25<sup>th</sup> of November, 1904:

Our teachers are debarred from solemnizing marriages, but no reasons for doing so are given. I prophesied when this law was being framed that it was their intention to 'check' us...The government stated that if the missionaries' application were supported by the signature of the Chairman of the denomination to which they belonged, they would receive the authority to celebrate marriages, but all these are but empty promises. From the point of view of Zulus, what do you consider to be the object of those who rule us? Is it a fact that they intend to civilise and promote us from our present position? ...The government cannot throw dust into our eyes by stating that the restrictions placed on our protectors prevent the spread of Ethiopianism. This is the very reason that would cause it. If we perceive that in matters of civilisation and improvement we are being hampered, they may find those amongst us with burning aspirations, acting improperly....What has happened that government should humiliate us with such a law as this? Was the word of the Saviour which says 'Go forth and preach my word', implied in respect to white people I ask?...No, I maintain that the object is to deter the civilisation of our race...We see that we [Christians] are being treated unfairly, and yet diviners are permitted to practice their callings on locations, where we are not allowed to impart the word of Jesus, or the very rudiments of education to our people...We will not give those in authority (the government) any rest until we have secured our rights.<sup>10</sup>

The repeated denial of licences to African priests represented a major symbolic affront to *kholwa* aspiration. Dube equated the possession of the legal right of African Christians to solemnize marriages amongst themselves to their claims of 'progress' and 'civilization'.

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<sup>9</sup> PAR SNA1/1/301, 1322/03, Proposed Amendment of Law 46/1887.

<sup>10</sup> PAR SNA1/1/315, 2468/1904, Excerpt from *Ilange lase Natal*, 25th Nov, 1904

His appeal for common law recognition of *amakholwa* rights to solemnization were little different from the claims of the *amakholwa* petitioners of the 1880s whose moral visions were tied to the legal recognition by the state that Christian Africans had imbibed new, Christian marriage practices. While the 1887 law was passed as an acknowledgment of missionary pressure, it remained a statutory aberration which was never implemented in practice.

In a similar manner to the legal conflation of indentured and passenger Indians by the 1907 Indian Marriages Act; the regulation of African marriage determined that all Africans were the same under colonial laws, Christian and non-Christian alike, bound together in their identical racial construction by a colonial state which began to give legal definition to the major categories of racial difference which have come to shape the social realities of all South Africans into the present.

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