

## **Customary Citizens and Customary Subjects: Colonial Respectability and Marriage Law in 19<sup>th</sup> Century Natal<sup>1</sup>**

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This paper is an attempt at deconstructing and demystifying the category of colonial civil law in 19<sup>th</sup> century Natal. While much has been written about the exceptional legal systems created in this region to administer colonial subjects, especially Zulu-speaking Africans, very little is understood about the establishment of the common law, or the ‘ordinary civil laws’ of the colony as the moral order against which indirect rule was created and enforced. As such, this paper identifies and begins to address this enduring difficulty in the colonial historiography of this region. Much of the writing about the administration of Native law attempts to theorize the legal ‘outside’ created by Theophilus Shepstone and his colonial contemporaries to rule Africans in Natal. It is ironic that in understanding the making of ‘difference’ in this region, there is little historiographical sense of the content or the making of the entity from which ‘Native custom’ in Natal is understood to be differently, and supposedly antagonistically, made. African colonial ‘Otherness’ in nineteenth century Natal, made through the elaboration of particular colonial understandings and elaborations of what constituted the realm of the ‘customary’ for Africans, is implicitly always referential of a colonial ‘self’ (constituted by common law default) often disapproving of the content of African custom. This paper provides a brief account of the making of an aspect of colonial marriage law for Natal’s white settlers, and has important implications for bringing the study of citizen- and subject-making in Natal into the same analytical frame. It is an empirical account of the immense struggle that goes into making 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 motherland 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 are made to be colonial subjects.

Those writing about custom and the making of indirect rule in this region have often had their work characterized by a moral bind – the sympathies to a ‘civil law’, characterized by many features common to present day democratic practice including such desirable trappings as women’s rights and monogamous marriage, and that of the laws of particularity, the customs of a people, understood as invented and historically contingent, but nonetheless an important part of the lives and practices of the people who have historically been subjects of this region. The contestations 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

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<sup>1</sup> Many thanks to Stephen Sparks: stair climber, box carrier and general archival assistant extraordinaire, without whom the archive work for this paper would not have been possible.

complexity in the making of custom and common law in this region than is acknowledged by the existing historiography. In particular, it reveals the commonality of customary practice to the understandings of all those who found themselves in mid-19<sup>th</sup> century Natal, and the contingent circumstances of the search for colonial and imperial respectability out of which aspects of this colony's civil law was wrought.

*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 challenged in the ecclesiastical courts<sup>2</sup> that regulated marriage and 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. This act, bringing English common law in line with Anglican canon law, rendered null all unions 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 1907, not least of all because the biblical "prohibited degrees" of affinity rendered into civil marriage law raised more than a few practical difficulties. The seven decade long movement that the 1835 Act provoked inside Britain for a bill allowing sororate marriage (which Gilbert and Sullivan nicknamed "the annual blister")<sup>3</sup> coincided at a number of points in the 19<sup>th</sup> 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 paper, in 19<sup>th</sup> century colonial Natal.

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

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<sup>2</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>3</sup> Cynthia Fansler Behrman, "The Annual Blister: A Sidelight on Victorian Social and Parliamentary History", *Victorian Studies* 11 (1968): 483.

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>4</sup>

The Marriage Law Reform Association, formed in 1851 with the exclusive object of legalising 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, lays stress on the fact that the so-called scriptural prohibition against the marriage is an invention: it is not stated within the original text.<sup>5</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 goes on to claim that the translation 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>6</sup>

In this rendering, monogamy is allowed to exist in the biblical text only as one possible variation, and as an exception. The other versions accurately translate the original, preferring what the Bible literally commands, that is, polygamy. The Christian law of monogamy was nothing but an interpretation and mistranslation of the sacred text, occupying, 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 marginalised the 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 does not dictate the Christian law of marriage, but the Hebrew law which permits polygamy.

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>7</sup> They quoted as their authority the opinion of the prominent Orientalist, Sir William Jones, who 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

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<sup>4</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), pp. 67-86.

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

<sup>6</sup> Marriage Law Reform Association. *A Summary of the Chief Arguments for and against Marriage with a Deceased Wife’s Sister*. London, 1883. p.5

<sup>7</sup> Hansard, vol. 149: 614

abominable customs and ordinances, as they are called, of the idolatrous nations, who were extirpated by the chosen people.”<sup>8</sup>

Jones therefore concludes that the English, by faithfully observing the Levitical degrees as the 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 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 legalising marriage with a deceased wife’s sister, which he condemned as a “great sexual insurrection of our Anglo-Teutonic race”.<sup>9</sup>

Arnold distinguished between the Semitic and Indo-European races, banishing Semites to a time and place only marginal to Indo-Europeans. In these racial imaginings, legalising 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>10</sup> The English Marriage Law, true to the word of God, was standing as a safeguard against the dissolution of the 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 colonies such as India to have polygamous and incestuous marriages according to their marriage laws, for the English were not supposed to interfere with their customs, except in cases of such exceptional inhumanity as widow-burning.<sup>11</sup>

Additionally, the issue was frequently presented as “a poor man’s question”, in reference to the working class, for whom marriage with a deceased wife’s sister was argued to be most common. They also constituted the same “racial” category within the professedly purely monogamous nation. The working class as well as the polygamous Indian subjects of Empire were, though the decisive majority, marginal Others to be civilised, and against whose immoral influence the domestic happiness of the middle and upper classes had to be carefully guarded. For the colonies then, these implications for class respectability and a racial superiority contiguous with Britain were clear. Attempts by the colonies to pass similar acts legalising marriage with a deceased wife’s sister throughout the 19<sup>th</sup> century took place in this particular context of debate.

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<sup>8</sup> Marriage Law Reform Association. *A Summary of the Chief Arguments for and against Marriage with a Deceased Wife’s Sister*. London, 1883 p.147

<sup>9</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. p.207.

<sup>10</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>11</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), pp. 423-447.

*Settler Customary Marriage and African 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.<sup>12</sup> This piece of legislation dealt specifically and exclusively with marriage in the newly annexed territory of Natal. It was an extraordinary piece of legislation that, by its provisions, repealed previous 'laws, customs or usages' which may have been considered 'repugnant to or inconsistent with' the idea of Christian marriage that 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 of Natal's common law were vastly less settled issues than early colonial lawmakers had imagined.

The question of what constituted 'Christian marriage' and what could be allowed under the colony's civil marriage laws raised its head in poignant fashion with the relative surge in applications to contract sororate marriage in Natal in the mid-1800s.<sup>13</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 authorities. Some dispensations had been granted in earlier decades<sup>14</sup>, although the increase in petitions for dispensations began to make the Natal authorities nervous, especially in light of the ongoing contestations in England over this very subject in the mid-19<sup>th</sup> century.

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 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 increase. All the petitioners made reference to the childcare needs gone unattended due to the recent deaths of their wives. The urgent need for the domestic reproductive and affective labours of women, in light of the invariably large numbers of children left motherless was a constant theme.

The case of Edward Ryley and Margaret Jemima Atcherly was one of many such instances. Mary Ellen Ryley, the late sister of Margaret Jemima and wife of Edward Ryley died soon after the birth of their eleventh child in October 1879, barely two months after their arrival in the colony from England. Upon his wife's death, Ryley attempted to contract what he believed to be a lawful marriage with his deceased wife's sister, paying for her passage to the Colony for the sole purpose of the marriage. He was subsequently advised that the marriage could not legally take place in Natal and petitioned the colonial state for a dispensation to go ahead with the marriage due to the difficult situation in which he and his family found themselves. His solicitor was at pains to emphasize the hardship that prohibiting the marriage would force upon the family:

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

<sup>13</sup> See, for example PAR 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>14</sup> PAR CSO 505/1875/240 Report by Attorney General, M.H. Galloway to Colonial Secretary on R 112/1873

(Mr. Ryley's) occupation necessarily keeps him from attending to household matters and prevent him bestowing proper care and supervision over his young children, who are consequently neglected to a great extent... (His) oldest daughter recently died and the whole of his household matters now devolve upon his oldest living daughter who is at present thirteen years old. (He) is firmly convinced that the comfort, welfare and happiness and moral education of his young children - the youngest of whom is now six years of age - could not be better advanced... than by his marriage with the said Miss Atcherley. That Miss Atcherley having come to the Colony for the sole purpose above stated and having made no other provision will be left homeless in a, to her, strange land, unless joined to (Ryley) in holy matrimony. (Mr. Ryley) therefore humbly prays that Your Excellency will be graciously pleased to take this, his petition, into favourable consideration and cause the restrictions placed by the ordinary laws upon marriages with a deceased wife's sister, to be, as far as he and she said Miss Atcherley (sic) are concerned, set aside and dispensed.<sup>15</sup>

The many similar petitions received by the colonial secretary provide important clues to the motivations of Natal's early settlers. The need for a stable family life and a keen sense of the 'great scandal' that would ensue should the woman in question remain unmarried but living with her late sister's husband in the Colony speaks to the desire for respectability and the implications of the legal rejection of these marriage and family arrangements for settler domesticity and masculinity. As Robert Morrell has argued, the family "constituted the building block of settler identity and community and the success of settler families in Natal needs to be understood in wide terms, for it was in the family that racially exclusive, classed conceptions of society were embodied."<sup>16</sup> The issue of marriage with a deceased wife's sister was replete with contestations over class and race respectability and provides a window to understanding how the relationship between metropole and colony, between English custom, imperial law, colonial law and African custom might be constituted.

Natal's Lieutenant Governor, Robert William Keate, was by this time accustomed to colonial exceptions for customary law among his African subjects, though this was easily rationalized under the rubric of 'Native Custom'. Those practices that legislators believed could not be morally sanctioned such as polygamy and *ukungena* (an instance of Levirate marriage) would be allowed to continue with some restrictions under a separate Native code. 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 potentially revealing.<sup>17</sup>

Colonialists were attempting to build an understanding of African custom from the 1840s as they ruled over Zulu speaking Africans in the region. Under Theophilus Shepstone, the Natal Native administration made a series of observations and assumptions about African people in Natal. To the great and growing dissatisfaction of other colonial officials in Whitehall and inside the colony, Shepstone had fashioned himself as Native Administrator or 'Paramount Chief' of

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

<sup>16</sup> Robert Morrell, *From Boys to Gentlemen: Settler Masculinity in Colonial Natal, 1880-1920*. Unisa Press, Pretoria, 2001. p.249

<sup>17</sup> PAR CSO 505/1875/240 Report by Attorney General, M.H. Gallway to Colonial Secretary on R 112/1873

Natal's Africans. The Shepstone System, as the administration of indigenous Africans in Natal later came to be known, was a system ostensibly predicated on the labour 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>18</sup>

Shepstone, by virtue of his enviable knowledge of Zulu language and customary practice was, in the practice of administering Natal's reserve army of labour, essentially conducting the work of colonial ethnography. Funded by a 'hut tax', or a tax imposed on each African marital household and directed at manipulating institutions of indigenous society such as marriage, Shepstone's activities were backed by the guarantee of state violence. He created customary chiefs and magistrates and himself adjudicated customary disputes. Marriage was at the centre of these customary struggles between larger colonial aims for Africans, such as generating revenue for local administration by the maintenance of forms of traditional economy, and later, for extracting African labour. 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 settlers in need of labour. But despite these 'tensions of empire',<sup>19</sup> Shepstone's dealing with Africans placed women in Zulu society at the heart of administrative attempts at raising revenue, expropriating African land for settler use and controlling the labour and lives of men and women.<sup>20</sup>

In the early years of Shepstone's tenure, he worked with chiefs to collect the new 'hut tax' levied on Africans. The tax facilitated the cost of the administration of Africans, 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 labour 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 labour of married African women and their children within the homestead."<sup>21</sup>

While the role of women in this form of production ran afoul of imperial and abolitionist concerns over the gendering of productive labour, Shepstone's plans for Natal's Africans meant the continued domination of the reproductive and productive power of women through his supreme 'traditional' authority over Africans. Shepstone's activities implied the recognition of a patriarchal order, - in its most fundamental aspects, male control over female lives and labour. At the very centre of Shepstone's compromise with African men was the resuscitation of the

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<sup>18</sup> David Welsh, *The Roots of Segregation: Native Policy in Colonial Natal, 1845-1910*. Cape Town: Oxford University Press, 1971. Thomas McClendon, 'The Man Who Would Be Nkosi: Civilizing Missions in Shepstone's Early Career', *Journal of Southern African Studies*, vol.30, no.2, June 2004.

<sup>19</sup> Frederick Cooper and Ann Stoler. 'Tensions of Empire: Colonial Control and Visions of Rule', *American Ethnologist*, 16, 4, (1989).

<sup>20</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, Guy, "Women in Labour: The Birth of Colonial Natal", History and African Studies Seminar Paper, University of KwaZulu-Natal, 29 April 2009.

<sup>21</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. p. 13

homestead – with its polygynous households – and the domestic dominance of married men, their control over women, their labour and reproductive power, and their movement from the control of fathers as daughters, to the control of husbands as wives.<sup>22</sup> It was later, with increased settler immigration, and the pressure on Shepstone to generate labour for the colony increasing, that this arrangement stood in the way of the expropriation of land and the procurement of especially male African labor for commercial agriculture and the newly established gold and diamond mining industries.

Shepstone introduced an African marriage register in 1869 to provide for both the administrative and moral ‘regulation’ of marriages amongst Natal’s African population. Administratively, 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 *ukulobola* (bridewealth). Morally, the registration regulations represented Shepstone’s efforts to curb what he deemed was the tendency within Zulu society to “treat the women as chattel”, in denying them the right to consent to their marriages. For Shepstone, the creation of a compulsory register of African marriages had originated in the principles of indirect rule. As he explained in the Royal Instructions of 8 March 1848, this system was predicated morally on the colonial state’s willingness to accept “any law or custom or usage prevailing among the inhabitants...except so far as the same might be repugnant to the general principles of humanity recognized throughout the whole civilized world”.<sup>23</sup> While Shepstone’s own early ‘traditionalist’ activities contradicts this explicit philosophy, it is perhaps more the case, as Guy discusses at length, that a combination of local administrative exigencies and Shepstone’s own selective acceptance of the powers of patriarchy influenced the ruling relations between Africans their colonial interlocutors in the nineteenth century.

Most of Natal’s legislators were determined that practices such as polygamy and *ukungena* had no place in the Colony, while other, mostly local administrative officials, argued that as non-citizens governed by laws of ‘custom’ instead of the ‘ordinary civil laws’ of the colony polygynous subjects did not strictly disrupt the moral order of Natal, especially where local administrative needs had some use for the practice.<sup>24</sup>

Shepstone’s 1869 marriage law was a measure that attempted to deal with polygyny amongst Africans as the regulations taxed every marriage contracted by Africans, restricted the practice of *lobola* and required that brides publicly express their assent to the marriage.<sup>25</sup> Shepstone expressed that the 1869 law could ‘only favour the operation of natural causes to achieve the extinction of polygamy.’<sup>26</sup> Lieutenant Governor Keate argued that instead of tackling polygyny directly the legislative course adopted was prudent, as ‘all that could be done by Legislative interference [is] to help on and remove obstructions to the natural causes which are leading,

<sup>22</sup> Guy, *Accommodation of Patriarchs*, p. 9-10

<sup>23</sup> Quoted in Deborah Posel, ‘State, power, gender: conflict over the registration of African customary marriage in South Africa, c. 1910-1970’, *Journal of Historical Sociology* 8 (1995) 3, 223-256.

<sup>24</sup> PAR NCP 2/1/1/5 Legislative Council Debates, 1883. Indian Divorce Bill. In a manner strikingly similar to the colonial interventions in African customary practice, Indian subjects in Natal too had their practices of polygyny and bridewealth regulated through an accommodation of the interests of the various intersecting patriarchies of the colonial state, employers of labor, the Protector of Indian Immigrants and the domestic needs of Indian men.

<sup>25</sup> David Welsh, *The Roots of Segregation*. 67-96.

<sup>26</sup> PAR SNA 1/7/8 pp.18-23. T. Shepstone, ‘Memorandum: Registration of Native Marriages’, 22 March 1869, p.23.

however slowly, to that result.’<sup>27</sup> He also claimed that the marriage tax it set out would encourage ‘labour habits among the male portion of the native community upon which more than anything else the practice of polygamy depends.’<sup>28</sup> This was a reference to African homestead production in which African women performed almost all agricultural subsistence labour and the ability to have more than one wife meant that there remained little incentive for African men to consent to labour for the colonial government. Africans were thus expected to be ‘weaned off’ polygamous practices, and this process was intended to be tied to changes in the sexual division of labour brought about by colonial interventions.

Similarly, Shepstone created regulations for the customary practice of *ukungena* marriage along the lines of the 1869 law. Sensitive to missionary and colonist allegations of coercion involved in *ukungena*, he corresponded with both local newspapers<sup>29</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>30</sup>

He laid out rules, drawn from the provisions of the 1869 act, regulating the practice of *ukungena* and circulated these among the colonies resident magistrates. As Guy demonstrates, he was determined that reform would happen on the terms of his own interactions with Africans,<sup>31</sup> although as Jeremy Martens shows, on occasion he employed the language of civilization and savagery to characterize these policies. But while Martens attempts to demonstrate the force of what he refers to as 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.<sup>32</sup>

*Making the Law Civil: Colonial Respectability and the Marriage with a Deceased Wife’s Sister Act in Natal*

Despite the abiding attempts to differentiate between ‘Christian civility’ and ‘barbaric Native custom’ in the creation of separate administrations of law, the idea of Natal’s civil marriage laws

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<sup>27</sup> Jeremy Martens, *The Impact of Theories of Civilization and Savagery on Native Policy in Colonial Natal*, African Studies Association of Australasia and the Pacific 2003 Conference Proceedings, p 6. Available at: [www.ssn.flinders.edu.au/global/afsaap/conferences/2003proceedings/martens.PDF](http://www.ssn.flinders.edu.au/global/afsaap/conferences/2003proceedings/martens.PDF)

<sup>28</sup> Keate in Martens, *Theories of Civilization* p.6

<sup>29</sup> David Welsh, *Roots of Segregation*, 108-109.

<sup>30</sup> PAR 1/LDS 3/3/3 H54/1870 Ukungena Rules

<sup>31</sup> Guy, Accomodation of Patriarchs.

<sup>32</sup> Martens, *Theories of Civilization and Savagery*.

as conforming to Christian ideals appears to have been naturalized in the minds of only some of the colony's legislators.

Keate may have been reluctant to permit sororate marriage in the 1870s, but legal momentum began to gather behind the petitioners for these marriages. By the 1890s, a number of bills had been put before the Legislative Assembly to allow marriage with a deceased wife's sister and a range of views were heard on the subject by colonial notables. While most claimed to be in favour of the bill, legislators were generally cautious in their assessment of the measure as many were following the as yet unresolved attempt to pass similar legislation in England.

Among the colony's 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 the Queen.<sup>33</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 UK 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 adulteries with the wife's nearest relations. Is it not awful to think of the added guilt of such adultery?<sup>34</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 as dropping the original Levirate prohibition against marriage with a deceased husband's brother!<sup>35</sup> The most vigorous proponent of the bill in all its forms from the 1870s until its eventual passage was colonial legislator and former Coolie Agent for Natal, Edmund Tatham. It was Tatham who offered the bills to the Assembly 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

<sup>33</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.

<sup>34</sup> Bishop of Exeter, Marriage with a Deceased Wife's Sister. Exeter: James Townsend, 1882.

<sup>35</sup> PAR NCP Legislative Assembly Debates 2/2/2/5 Marriage Law Amendment Bill. March 29, 1897

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>36</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 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 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 colony's historiography) 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 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.

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<sup>36</sup> PAR NCP Legislative Assembly Debates 2/2/2/5 Marriage Law Amendment Bill. March 29, 1897