Toward a Comparative Understanding of African and Indian Marriage Exchange Regulation in colonial Natal

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Indian and African customary practices of marriage exchange both became the target of nineteenth century reformist discourse under colonial rule. The processes by which missionaries, settlers, state legislators and bureaucrats engaged these practices reflected the moral regulation inherent in state formation. Through the valorization of particularly gendered relationships and social roles amidst the contingencies of colonial administration in this nineteenth century moment, the Natal state began to establish differential patterns of gendered expectation for Africans and Indians. By setting the contemporaneous regulation of African and Indian custom alongside each other, I attempt to understand the differing historical and legal forms of gendered social order coming into being in this colony by the turn of the twentieth century. 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.

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 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 through 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.[1] 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 that marked marriage arrangements amongst Natal's Indian immigrants came to be separated from much of the ritual ceremony which accompanied customary gift exchanges or material transactions in the early decades of

[1] Y.S. Meer *Documents of Indentured labour, Natal, 1851-1917*, Institute of Black Research, Durban, 1980, Evidence of Ramadeen, p.370

indentured life.[2] The high proportion of single immigrant men and women making up immigration numbers for the better part of the first two 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 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.[3] Ethnographic work on 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.[4] 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.[5] In this form of exchange, gifts, historically featuring gold or jewelry are given by the 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. [6] This new, nineteenth century practice was being simultaneously made and characterized as a customary evil by a

[2] See chapter 2, Age of Consent.
[3] Bhana, *Indentured Indian Immigrants to Natal: A Study of Ships Lists*
[4] Ramaswamy ref.
[5] John Comaroff (Ed.) *The Meaning of Marriage Payments*, Academic Press, London, 1980
[6] 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 University Press, 2001)

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 on 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 the fathers of women transferring gifts to either their daughters or sons-in-law in Natal.

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 to the bride or her family.[7] The predominance of immigrants from South India among indentured workers no doubt 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.[8] The new demographic realities of indentured transport are a likely explanation for this customary transformation in other indenture contexts.[9] In Natal too, there were far fewer women than men who made up immigrant numbers. For the duration of the indentured labor system, women made up on average no more than a third of all migrants. This situation was exacerbated at the turn of the century by the increased recruitment of single men that began in the 1890s.[10] 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 legal freedom Indian women appeared ready to claim in Natal.[11]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

[7] Essop-Sheik, MA; Ashwin Desai and Goolam Vahed. *Inside Indian Indenture: A South African Story, 1860-1914*, HSRC Press, Cape Town, 2010
[8] 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.
[9] Fiji, Caribbean and Mauritius work. See also Desai and Vahed, Inside Indenture, pp 190-192.
[10] Bhana & Brain, *Setting Down Roots*
[11] II Files, Munusamy and Venkiah cases…others regarding labor too.

> 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.[12]

As Indians were not subject to indirect rule through customary authority, men had little means of customary recourse and, as the colonial state began to discover early on, the parents of young girls often turned betrothal practices into a profitable enterprise. An indentured migrant, Telucksing, informed the Wragg Commission in 1886 that '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.'[13] Telucksing's characterization of dowry practice amongst North Indian immigrants resonates with 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.[14]

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. These new contestations arising out of Indian marriage practices in 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. The reality that it was Indian men attempting to build families who were most often disadvantaged by the lack of state regulation of this 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.

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[12] Y.S Meer, *Documents of Indentured Labour.* Report, for 1877, of Major Graves, Acting Protector of Immigrants. p. 592. Emphasis added.
[13] Y.S. Meer, *Documents of Indentured Labour*. Telucksing, Wragg Commission Evidence, Durban p.389.
[14] Veena Talwar Oldenburg *Dowry Murder,*

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 Indian village contexts.[15]

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.[16] 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 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

[15] NAB II files, Vahed & Desai, *Inside Indian Indenture*, Y.S. Meer, *Documents of Indentured Labor*.
[16] The fungibility of these gifts had longstanding roots in the uncertainties of agrarian life in India with the upper caste Hindu custom of dower 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 dower 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 greater detail on the pre-colonial history and colonial transformations of dowry in nineteenth century North India see Veena Talwar Oldenburg, *Dowry Murder*,

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 indentured life, 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 on the current manifestation of this custom exists, 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.

The nature of marriage transfers in the mid-1800s, and men and women's claims to marriage gifts varied but appear to take more consistent forms in practice toward the close of the nineteenth century as employers of indentured workers and state officials at various levels of the colonial bureaucracy influenced the terms of these exchanges.

Women's Labor, Contract and Innovations of Marriage Exchange

The colonial government was at pains to convey to settler employers what were new expectations of the role that 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. [17] 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.

Unsurprisingly, single female migrants were derided as a 'source of trouble' on estates and throughout the indenture period both employers and officials were keen to

[17] NAB Indian Immigration Files (II) 1/58 I1256/90 Protector of Immigrants, Mason to Col Sec, 18/11/1890. See also II, CSO files

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.[18] The 1890s were characterized by increased concern over the mobility of these Indian women, with the passage of new venereal disease laws targeted specifically at them and the first attempt to codify Indian custom in the colony.[19]

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 familial and cultural reproduction.[20] Since the arrival of the first Indian indentees in the 1860s, single Indian men as well as those who had become 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'.[21] 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.[22] Other scholars of the region have pointed to high rates of crime and suicide among single Indian men in the nineteenth century as indicative of the emotional and psychological ruptures of migrancy, and the ensuing difficulties of securing forms of familial reproduction.[23]

Under indenture, 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

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[18] Chapter 2, Age of Consent, also MA Thesis, VD Paper…

[19] Nafisa Essop Sheik, *'A Beastly Nuisance': An Exploratory Paper on Attempts to Control Venereal Disease among Indian Immigrants in Natal 1874-1891*, Unpublished Honours Essay, University of Natal, 2003. See also Reports of the Coolie Commission (1872) and Indian Immigrant (Wragg) Commission (1887) in Y.S Meer, *Documents of Indentured Labor*, pp. 118-169.

[20] Y.S. Meer. *Documents of Indentured Labor*, Wragg Commission Evidence and Report, newspaper articles, MA 3rd Chapter.

[21] Luise White. *The Comforts of Home: Prostitution in Colonial Nairobi*, University of Chicago Press, Chicago, 1990; Y.S. Meer. *Documents of Indentured Labor*, Wragg Commission Evidence in Documents of Indentured Labor, II Files.

[22] NAB II 1/19/I1477/1903 R. Paxton, Falkirk, Mooi River; Sadar Singh wishes to get an Indian woman to look after his baby.

[23] F. Meer, Bhana and Brain, 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

sought out those men and women who would affirm their own claims to building homes and families.

In the absence of 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 'family' 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 compensatory.[24]

It is clear from the testimonies of all parties that Indian women were themselves implicated in mediating these transactions among 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 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.[25] 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. 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

[24] NAB II 1/120 I 1724/03 Dunning Deputy Protector to Protector, 25th August, 1903; II 1/126 I 623/1904 K.Punshtrous to Protector, March 3, 1904; II 1/141, I664/06, Re Civil Case tried by 2nd Civil Magste. Indian Sues for 17 pounds of a wife.
[25] Y.S. Meer. *Documents of Indentured Labor*, Wragg Commission, Evidence of Sonnar, p.412; .

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.[26] Indian men's assertion of the primacy of women's domestic reproductive labors 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.[27]

The legal consensus upon which claims to Indian women's contracted labor rested for the remainder of the century 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.[28] This legal understanding recognized 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 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 with whom they were acquainted, or for any woman who could carry out domestic and other reproductive labors.[29] On occasion it was women themselves who asked men with whom they had cultivated relationships to approach employers in order that the woman could be freed from estate labor and married to the man in question.[30] Also common were instances in which settler colonialist 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.[31]

While explicitly frowned upon by prominent Indian immigration officials, these transactions were generally tolerated by officials in charge of Indian administration, who

[26] NAB II I/16, 187/83, 17 December 1883; II I/18. 365/84, 9 April 1884.
[27] NAB II 1/161, I 1618/08 Working of Indian women.
[28] Y.S. Meer. *Documents of Indentured Labor*, Wragg Commission, Evidence, p.
[29] I 134/1863, 5 October 1863 Requests for transfers on the grounds of marriage.
[30] I 234/1863 Letter from the Coolie Agent to R.B Struthers, Nonoti 17 December 1863
[31] I198/1863, 11 March 1863, Tatham to Arthur Walker Esqr. PMB

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.[32] 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 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.[33] Men often cited these payments in substantiation of their claims over women in subsequent marital disputes in the Protector's court. 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 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.

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 with wage labor arrangements.[34] 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 had no civil legal

[32] II 1/120 I 1724/03 Protector Polkinghorne to Deputy Protector, 29/8/1903

[33] NAB II I/182 I133/1912

[34] II 1/126 I 623/1904 K.Punshtrous to Protector, March 3, 1904, Protector Polkinghorne to Deputy Protector, 29/8/1903.

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 spectre of slavery-type sales of bodies without rights.[35] Interestingly, the Natal state endorsed women's indenture contracts in 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.[36] 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 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 colonialists.

[35] Amy Dru Stanley *From Bondage to Contract*
[36] NAB CSO 509 681/1875. Telegraph from Protector (Mitchell) to Colonial Secretary & Telegraph to Resident Magistrate Pinetown 24/2/1875.

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. The generally straitened circumstances of 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 in a situation of demographic scarcity 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.[37] 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 legislative 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." [38]

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.

[37] Y.S Meer, *Documents*, Wragg Commission Evidence, Indian Betrothals: Remarks of the Protector and the Attorney General, pp.531-2.
[38] 1791 4871/1905 Original Correspondence.

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 that were purported to accompany it, the character of which no one amongst the colony's legislators appeared to be certain.[39] 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.[40] 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 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.[41] 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

[39] NAB NCP Legislative Council Debate, 1881 Bill
[40] NAB NCP Legislative Council Debate, 1883 Divorce bill (quote p.)
[41] NAB NCP 2/2/2/19. Legislative Council Debate, Indian Marriages Bill, May 8, 1906, Meer 531/2

came for the ceremony, left men with no legal recourse for the recovery of either their brides or their property.[42]

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 by her parents in marriage to Ramsamy upon payment to them of an undisclosed sum of money. The women 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.[43] 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.[44] 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

[42] NAB NCP 2/2/2/19. Legislative Council Debate, Indian Marriages Bill, May 8, 1906.
[43] NAB Colonial Secretary's Office [CSO] 1791 4871/1905 Original Correspondence. Natal Mercury, 9th February, 1905. Indians and Child Marriage. 'Rex vs. Ramsamy and six others for assault'.
[44] NAB II I/22, 345/84. Report of the Deputy Protector, September 1884; Y.S Meer, Wragg Commission Evidence, Indian Betrothals: Cases of Muthoora (May 1885) and Wavesaly (May 1887) , pp. 530 & 532 respectively..

important measures as regards the Indian population that have been brought in for many years."[45]

The 1907 Indian Marriages Act: Private Property and Punitive Civil Registration

The 1907 Indian Marriages Act, 'To make certain provisions relative to Marriages of Indian immigrants' was primarily an attempt to address the problem of marriage exchange conflict. It was the first law governing customary practice amongst Indian immigrants (who were not passengers) that was not consigned to the all-encompassing code of labor laws that had been used to regulated Indian indentured life in the colony until the end of the nineteenth century.[46] The act emphasized the mandatory registration of Indian marriages as civil contracts, something that had been introduced in 1872 and amended in 1891 under the Indian immigrant labor laws which I've discussed in the previous chapter. The 1907 law re-introduced 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 for a long time seemed to defy the attempts of the state to define and regulate them.

In a similar manner to the African Christian Marriage Law passed two decades earlier, legislative discussion had focused on a nexus of related customary issues including marriage payments, the extent of the need for guardianship of women and the question of an Indian ages of 'consent' and 'majority'.

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. 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

[45] NAB NCP 2/2/2/19. Legislative Council Debate, Indian Marriages Bill, May 8, 1906.
[46] Law 25, 1891, the only previous attempt to make 'Indian' customary law was passed as a bill to regulate labor immigrants.

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'.[47] Women who were mothers of brides and brides-to-be could thus be litigants in these suits separately to their husbands. In a manner entirely 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 was concerned with 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 defensible in the colony's civil 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.

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[47] II 1/150 I 468/07 Digest (Indian Marriages Act, 1907)

Africans and Bridewealth in Colonial Natal

In July 1889, Isaiah Msindi of Umsinga presented seven cattle to Sonyangwe Tusi as *ilobolo* 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 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".

This was an unusual, though not exceptional, case of customary marriage. A 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.

Missionaries and anthropologists such as H.A Junod viewed African marriage exchange as transferring the 'ownership' of women through the exchange of cattle in particular.[48] The view of African women as commodities has been challenged by Africanist scholarship which, while influenced by an anthropological tradition, has instead sought to place this form of marriage exchange in the context of a particularly gendered pre-colonial homestead economy.[49] 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.[50] Writing in the middle of the twentieth century H.J Simons argued for a revisiting of abstract anthropological notions of *ukulobola* as he observed how some wage-earning African women participated

[48] H. A. Junod, The Life of a South African Tribe, New York: University Books, 1962.
[49] Jeff Guy, 'Gender oppression in southern Africa's precapitalist societies.' In C. Walker (Ed.), *Women and gender in southern Africa to 1945.* Cape Town: David Philip, 1990.
[50] 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 though *ilobolo.* Mark Hunter, *Love in the Time of AIDS: Inequality, Gender, and Rights in South Africa. Indiana University Press: Bloomington,* 2010.

in accruing their own *ilobola* on behalf of their prospective husbands.[51] Historians 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.[52]

I am especially interested here in how legal state-making and the formation of a gendered moral order comes 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 colonial officials in Natal are important to contextualizing these exchanges as they occurred in this moment of mid-nineteenth century colonial intervention. The views of legislative and bureaucratic officials and those over whom they claimed authority reveal the stakes that both colonialists and their subjects came to have in a newly emerging social, political and economic context. 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.[53]

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.[54] In Natal, settler colonial civilizing discourse had identified polygny and *ukulobola* – or customary transfers of goods comprised primarily, though not exclusively,

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[51] H.J. Simons *African Women: Their legal status in South Africa*, Northwestern University Press: Evanston, 1968, pp.

[52] Joyini Inkomo: Cattle Advances and the Origins of Migrancy from Pondoland, William Beinart, *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

[53] 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.

[54]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.

of cattle from the bridegroom to the bride's family upon marriage – as a target of civilizing reform.[55] While most settlers including colonial legislators understood such exchanges as 'wife-purchase', others such as Theophilus Shepstone consistently 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.[56] 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.

Legal Regulation of African Bridewealth 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 discuss in detail in chapter two, the focus of this piece of legislation was ostensibly an attempt at a particular post-slavery form of gender liberalization that legally instituted African women's consent to their own marriages as a right that could be upheld and defended under African customary law.[57] More importantly than this, however, the law reflected an initial legislative foray into the gradual elimination of polygyny as a way of addressing the colony's labor needs and eroding the power of 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,

[55] 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; 1852-3 Commission
[56] H.J Simons, *African Women: Their Legal Status in South Africa*
[57] Chapter Two, Age of Consent

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 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 paraphrase Helen Bradford in a related context 'the power of patriarchs had to be broken for proletarians to emerge'.[58]

Legislators saw the manipulation of bridewealth as the key to eliminating polygyny, as each polygnous union was customarily legitimated by sizeable transfers of cattle between the prospective groom and father-of-the-bride which often occurred 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 rigified a new form of practice, 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 that inhered in bridewealth or *ukulobola* payments that ordinarily would have taken place as decades–long processes implicating the ongoing development of personhood and reciprocal obligation.[59]

Importantly, the law opened up recourse to magistrate's courts for African women

[58] 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, pp 59-88
[59] John Comaroff, and Jean Comaroff, 'On Personhood: An Anthropological Perspective from Africa', *Social Identities*, 7: 2, 2000, 267 — 283

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.

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 male fathers and 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.[60] 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

[60] James Stuart archive, Native Commission evidence.

especially chiefs and senior men, and making it possible for younger men to marry more readily.[61] Many 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.[62] 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.[63] Fathers expressed frustration that daughters could renege on marital agreements made amongst fathers and chiefs, choosing instead to marry 'men of no substance'.[64] 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."[65] These men 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 the men anymore. When the women complain they take their side and we have to pay a fine."[66] Chief Ngwaqa lamented the demise of the 'old laws' under which 'such things never took place.'[67] 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

[61] 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)
[62] Legislative Council debate over 1887 law, Shepstone at NNC
[63] NAB, 1882 Native Affairs Commission Evidence, p 176.
[64] NAB, 1882 Native Affairs Commission Evidence, p 176.
[65] NAB, 1882 Native Affairs Commission Evidence, p 176.
[66] NAB, 1882 Native Affairs Commission Evidence, p 176.
[67] NAB, Report of Native Affairs Commission, 1906-07, p 722.

no longer had the authority to marry them off.[68]

What soon became clear was that some colonial lawmakers had ill conceived of the far-reaching effects of the power of customary African patriarchs over their wives and daughters. Secretary of Native Affairs Theophilus Shepstone appeared to lament the hasty reforms that had produced this gendered state of affairs and implied that the state had failed to acknowledge the traditionalist power in which it was also invested. The consequences of women's seizing upon a limited concession to create possibilities for further complaints and rationalizations for leaving their childhood and marital homes, began to underline 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.

Before the Natal Native Commission in 1882, Shepstone observed in some detail the unintended effects of the consent and *ukulobola* clauses in the 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 *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.*[69]

[68] NAB, Report of Native Affairs Commission, 1906-07, p 722
[69] NAB, 1882 Native Affairs Commission Evidence, p 277. Emphasis added.

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.[70] Previously, infertility or adultery on the part of the woman, 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.[71] In his testimony to the Commission Shepstone lamented that his peculiar interpretations of *ukulobola* laws in the Natal Native Code was not only a temporal attenuation of these material transactions, but it effectively reconfigured the customary life of these exchanges and ongoing filial responsibilities previously encompassed by the practice.

Shepstone's emphasis on the manner in which the authority of fathers had, under his system, began to give way to the authority of husbands has been widely noted in the literature on colonial Natal.[72] 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 civilizing progress of African society.[73] These colonists argued that the legislative diminution of the power of polygynous African patriarchs was important both for securing labor and civilizing Africans.[74] 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

[70] NAB NCP Legislative Council Debates – and 1879 Native Code Amendment
[71] Harriet Ngubane, H.J Simons, African Women: Their Legal Status in South Africa.
[72] Benedict Carton, *Blood from your children,* Lambert etc
[73] David Welsh. *The roots of segregation: native policy in colonial Natal, 1845-1910*. Cape Town ; New York: Oxford University Press, 1971
[74] NCP 2/2/2/Legislative Council Debates, African Christian Marriage

> control has had a bad effect…I think that the parental authority is not sufficiently recognized in our Native administration.[75]

The regret that he expressed about the perceived immorality caused by the law (which was subsequently enshrined in the Native Code) is misleading. He was no doubt attempting to justify his reluctance to codify 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 thoughts were 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 colonialists that African women's mobility posed a moral problem, it certainly wasn't the case that Shepstone's views on the undermining of parental authority were 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 of 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."[76]

This shift in the locus of male power from fathers to husbands in colonial bridewealth law and practice that 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.

These policies of the 1860s and 70s appear to have had the *incidental* short-term

[75] NAB, 1882 Native Affairs Commission Evidence.
[76] Theophilus Shepstone letter to the editor, *The Natal Advertiser*, February 9, 1892

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 polygyny 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.[77] 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.[78]

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 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.[79] 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 gleaned from the responses of the Shepstones and their bureaucratic 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 Indians 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.[80] The junior Shepstone's observation was borne out by what remained a feature of working-class African life well into the twentieth century.

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

[77] NCP, Legislative Council Debates 1883 onwards
[78] See chapter three…Rev. Green, forward to the petition. Sheila Meintjies. Family and gender in the Christian community at Edendale, Natal, in colonial times. In C. Walker (Ed.), *Women and gender in southern Africa to 1945*. Cape Town: David Philip, 1990
[79] See intro and chapter two for a fuller explanation of the structural relationship between the practices of polygyny and *ukulobola.*
[80] Y.S. Meer, *Documents of Indentured Labor*, Wragg Commission Evidence

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 them 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."[81] 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.

> 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.[82]

Despite Shepstone's assurances that this '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

[81] Find NCP ref. as quoted In SNA 1/1/129 869/1890 H. Shepstone to Rev F. A. David, Edendale 31st July, 1890
[82] SNA 1/1/129 869/1890

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.[83]

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 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(sic)...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.[84]

[83] NCP 2/2/2/, Leg. Council Debate, Native Marriages.
[84] Copy of Extract from papers SNA 2097/1900

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 law 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 Rowe claimed that Rosalyn was an orphan, or possible runaway, who had been living on a mission station and her guardian could not be located.[85] 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. The junior 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.[86] 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 Native Commission 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 implication, his

[85] SNA I/I/75 1884/529 Correspondence among Rev. Rowe, H.C Shepstone and the Attorney General.

[86] SNA 1-1-116-1889-669 Guardian's consent.

status as her guardian upon marriage.[87]

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 but sought out *ukulobola* in an attempt to affirm their status as wives in what, despite the 1887 law, continued to be potentially polygamous unions.[88] Writing in the 1960s, Simons confirms that in general African women appear 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.[89]

The 1887 law was never really enforced against polygynous Chrisitian men, nor does it appear that the colonial bureaucracy was committed to its enforcement, except against polyandrous women.[90] Its half-heartedness and consequent failure to eliminate polygny 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 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.

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 of this:

Firstly, *ukulobola* transactions were upheld as the right of African men to lay

[87] Native Affairs Commission Evidence
[88] SNA I/I/189 957/1894 Petition of Unozinduku Mtetwa, Sept 24th 1894
[89] Simons, *African Women: Their Legal Status in South Africa*
[90] SNA Case of Emily Mkhize

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.

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