'...trying to eat with both sides of his jaw at once'[1]: Examining the Legal Status of African Christian Marriage in Colonial Natal

History and African Studies Seminar

University of KwaZulu-Natal, Howard College

1st September 2010

Nafisa Essop Sheik

University of Michigan

nsheik@umich.edu

Abstract

This short paper is an attempt to think through some questions about the relationship between the nineteenth century colonial state in Natal and its African subjects. In particular, it looks at the longstanding African Christian marriage law promulgated in 1887[2] as an exemplification of the complexity of the state's attempt to fashion a legal place for Christian (monogamous) marriage amongst Africans who were not exempted from the operation of Native Law and who may or may not have been Christian. The debates preceding the passage of the law reveal a complicated picture of lawmaking in the Colony and present a range of views on gender, civilisation, Native exemption and the principles of Christian marriage. The result is a piece of legislation that is uncharacteristically complicated and subjective in its provisions. It struggles with the moral imperatives of fashioning a settler colonial state with a large majority of African subjects and is, at its heart, a concession to the difficulties of obtaining exemptions from Native Law in colonial Natal.

Most importantly this law, which was part of the vexed search for coherent Native policy in Natal, reflects the schizophrenic nature of the Natal state's settler colonial project as it straddles the divisions of Native Law and Colonial Law. It permits those Africans subject to its provisions to be governed by the civil laws regulating the lives of the colony's white

1 SNA 1/1/80 1885/55 Petition of certain Christian Natives relative to Christian Native Marraiges. Comments of H.C Shepstone, 3rd March 1885.

2 See Appendix A for the full text of Law 46, of 1887 to Regulate the Marriage of Natives by Christian Rites.

settlers for the purposes of marriage and possible subsequent entanglements such as divorce, but keeps them under Native law in all other civil matters. This 'special dispensation' for Africans choosing monogamous marriage reflects the uneasy capitulation of colonial lawmakers to the interests of missionaries and underlines both the abiding moral insecurity and the ongoing administrative equivocation of this marginal colonial state in the British Empire.

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

> ...the Zulu interpreter refused to grant them a licence. Benjamin Ndhlovu said the following: "the interpreter said, 'It is right that you should know that if you are married according to the Christian rites, the law does not allow you to lobolisa with your daughter. Do you agree to that?'... And Benjamin said, "I do not agree to that. I do not know it, but I know I cannot have polygamy. Then the interpreter said if you shall lobolisa, go away and wear your *Ibhetshu* and *isidwaba*, you cannot have a licence to marry according to the Christian rites."
>
> Sir this is a trouble many native Christians meet, and it has made many a native Christian go back to Heathenism, because in the magistrate offices they are told that they shall not lobolisa with their daughter, which saying is contrary to the law.'[3]

This case is a particularly good illustration of the nexus of competing expectations and realities surrounding the issue of Christian marriage amongst Africans in the late nineteenth and early twentieth century in Natal. The inadequacies of processes of Native administration and the competing understandings of 'Christian marriage' and 'Native custom', as well as the ambiguous legal and moral position of Christian marriage for Africans are epitomised by the interactions among Rev. Magwaza, the Assistant Secretary for Native Affairs Stuart, Benjamin Ndhlovu, the Zulu interpreter and the Resident Magistrate.

Stuart wrote seeking clarification from the magistrate, who confirmed that Ndholvu had refused to agree to a key condition governing the issuance of Christian marriage licenses for Africans. Through the interpreter, the magistrate had put a series of qualifying questions to both Ndhlovu and Tshangase under the terms of the Christian Native Marriages Act of 1887. These included whether or not they were exempted from Native law, if they were related to each other and if they had contracted previous marriages. They qualified for a Christian marriage license by answering in the negative to all of the questions and by indicating that they understood the legal penalties for bigamy. However, upon being asked by the magistrate if he understood that any children that he and Bertha might have as a result of

3 SNA 240/1910. Rev. F. Magwaza, Refusal of Clerk in OFfice of Mag New Hanover to issue a marriage licence (Xtian)

their marriage could themselves only be married by 'Christian rites' and not by 'Native customs and usages', Benjamin indicated his dissent. It was on this account that the license was refused. Benjamin's rendition of the interaction with the interpreter makes it clear that the interpreter had rendered the magistrate's question about 'Christian rites' and 'Native customs and usages' in terms of the practice of *ukulobola*, which to his own understanding was perfectly admissible under the Native Christian marriage law both for his own marriage and those of his children. The magistrate – who could not speak Zulu – could not say how his question had been framed from by the interpreter, and was able to say only that upon being asked by the magistrate, the interpreter claimed to have made no reference to *ibetshu* or *isidwaba*, implying that these inferences to a 'heathen' and unmarried state of being were made by Ndhlovu himself. With the assistance of the law department, Stuart confirmed that Benjamin was in fact correct in his assumption that his right to *ukulobola* was legally unaffected by the terms of 'Christian' marriage. The magistrate thereafter granted the licence, with all the parties having agreed that the requirement that children of Christian marriages should themselves marry by 'Christian rites' did not include a refutation of the practice of *ukulobola*.

The intricacies and fraught qualities of language and interpretation aside, this case raises a series of important questions for my analytical purposes. The law governing Christian marriage for Africans applied solely to those who were *not* exempt from the operation of Native law. The 'Christian' in 'Native marriage by Christian rites' appears to have been concerned mainly with the practice of bigamy or polygyny and did not affect the transfer of *ukulobola*. Allowing for the prosecution of bigamy under the ordinary law and courts of the colony meant permitting non-exempt Africans access to legal recourse under colonial civil law. The law governing Christian marriage for Africans thus occupied a legal middle-ground between exemption from Native Law and simple restriction to it. As abstract legal principles go, this was an unusual law. From its conception, it appears to have been less a legal act of disambiguation than an uneasy set of admissions about the muddled nature of colonial rule in Natal. What then possessed the Natal colonial state to make such law?

Backsliding, Bigamy and Enforcing 'Christian' Marriage

In January 1885, the Governor of Natal received a deputation of Christian Africans who presented a petition, written in both Zulu and English, bearing 1 486 *amakholwa* names.[4] It followed closely on the heels of two earlier petitions forwarded to the Governor the year before from members of the Natal Missionary Conference, which had reprised the issue of legislation for African Christian Marriages.

Legislating for African Christian marriage was first contemplated in the colony in1863 by then-Governor Scott but fell off a legislative agenda when Scott was replaced in

4 SNA 1/1/80 1885/55 Petition of certain Christian Natives relative to Christian Native Marriages. 30th January 1885.

1865.[5] The only attempt to explicitly reform African marriage practices was made by the 1869 African marriage law which required that brides provide witnessed consent to their own marriages. Despite the widespread dissatisfaction with that law on the part of both African patriarchs who were upset at having their authority over their female wards compromised by the government, as well as on the part of settler interests who believed that the law did not go far enough in reforming African marriage practices such as polygyny and *ukulobola*, there was no other direct attempt to intervene in African marriage until the Christian Native Marriage Act of 1887.

Numerous subsequent proposals were suggested in the legislature through the second half of the nineteenth century but none made it to the floor until the concluding report of the Native Affairs Commission of 1881/2 suggested intervention in Native marriage practices, including restricting lobola, freeing African women over the age of twenty-one from male guardianship, and outlawing polygyny altogether. In the wake of the report, individual members of the Legislative Council were prevailed upon by missionaries and clergymen to take up at least some of the proposals of the Commission.[6] Beginning in 1883, various bills were rejected by the House at different stages of the legislative process, the vast majority being dropped in committee. The Secretary for Native Affairs, Henrique Shepstone was instrumental in defeating these bills, by suggesting their deferment until such time that the entirety of the Commission's recommendations could be legislatively dealt with. But the agitation of the missionaries had been set in motion and with the submission of what Shepstone acknowledged was a 'large and influentially signed' petition by African Christians, and the issue could hardly be ignored. [7] Each of the petitions was specifically concerned with the problem of the enforcement of monogamy amongst Africans married by Christian rites. They complained that bigamy was widespread amongst Africans married by Christian rites and lamented the lack of recourse available under Native Law. Their claims were borne out by prominent cases on mission stations in the 1870s and 1880s in which men married by Christian rites and living with their families on mission reserves were discovered to have had subsequent wives and children in nearby villages for a number of years.[8] The concerns over bigamy were confirmed by H.C. Shepstone's observation that this was a common enough occurrence especially where many men began to accrue significant amounts of wealth such as in the case of the Umvoti mission

5 NCP 2/1/1/7 Christian Native Marriage Bill, August 6, 1885.

6 NCP 2/1/1/5 Native Marriages Bill, August 7, 1883.

7 SNA 1/1/80 1885/55 H.C Shepstone minute on 26/2/1885

station.[9] The junior Shepstone nonetheless differed from the missionaries on the utility of possible legislation. His opinion was that the law would be a failure as "the habits and nature of the natives [could] not be changed in a generation" and that the remedy lay in the hands of missionaries. His position was initially supported by the Governor who asserted that missionaries could simply 'marry no one by Christian rites who is not exempted from Native law'.[10] In support of his position, Shepstone wrote to the Governor claiming that he had spoken to 'old men from upcountry stations who had, at first, refused to sign the petition'. These men, Shepstone claimed, were concerned about the manner in which the missionaries had gone about the matter without proper consultation. They were supposedly disinclined to to 'appear of a man trying to eat with both sides of his jaw at once, that is to avail themselves of a portion only of white man's law and at the same time in other respects remain under Native Law.' [11] The implications of a request for civil penalties in bigamy cases necessarily meant removing Africans from the purview of Native Law for the purposes of marriage and placing them under colonial civil law where prosecution for bigamy was possible. The missionaries remained convinced that a limited concession admitting Africans married by Christian rites into the ordinary civil law of the colony was the most practicable means of achieving the ends they sought. Unhappy with Governor Bulwer's proposal that missionaries remedy the problem by refusing to marry non- exempted Africans by Christian rites, they pointed out the difficulties entailed in obtaining exemption from Native Law:

> we are deeply grieved...that the only method your Excellency can devise to avoid the scandal of Christian marriages being reduced legally to the level of polygamous unions is to insist that before the issue of a licence for marriage with Christian rites the parties shall have obtained

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

9 SNA 1/1/80 1885/55 H.C Shepstone minute on 26/2/1885

10 SNA 1/1/70 1884/89 Revd. Greenstock Fowards a memorial to the Governor with reference to Native Marriage.

11 SNA 1/1/80 1885/55 Petition of certain Christian Natives relative to Christian Native Marraiges. Comments of H.C Shepstone, 3rd March 1885.

> exemption from native law....we beg to point out....the injustice of a requirement which makes the consent of the Executive Council necessary to a marriage and renders it compulsory in case such consent is withheld that two years shall elapse before a second application can be made. Further the act enabling Natives of Natal to obtain exemption from the operation of native law shows ...[is] quite unsuitable for the comprehension of the majority of young people especially young woman desiring to contract holy matrimony as they cannot be supposed able to judge of the comparative merits of Native and English law. To force them to give up the whole of their own customs and to adopt a legal system of which they know little or nothing is a restraint on marriage... and frustrates [the] intention of making it easy for her majesty's South African subjects to contract matrimony in a civilised and Christian manner. We are fortified in making our request that Natives adopting the principle of monogamy in marrying according to Christian custom should thereby come under the ordinary law of the colony with regard to the validity and binding character of their union by the conclusions of the Native Law Board and the Report of the Native Commission 1881-82 and in the interests of the Natives and with a view to their advance in civilization we earnestly beg your Excellency to carry into effect the recommendations...from various quarters on the attention of the government.
>
> - Rev. Greenstock, Chairman Natal Missionary Conference 5th Feb, 1884.

There were other lawmakers in addition to the Secretary for Native Affairs who took a sceptical view of the missionaries' request. A member for Pietermaritzburg County, Mr. John Smith, observed that the call for law "looks very like an attempt on the part of the missionaries to drive the sheep into the fold when the sheep are not very willing". Taking a similarly position to Henrique Shepstone's on the question of legal jurisdiction he declared: "it looks a very strange thing...that if a native gets married and commits bigamy he gets into the civilised courts of the colony, but if he steals cattle he is under native law. He is under two laws -- civilised law and native law." [12]

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

> 1,500 of the most intelligent natives ...who are immediately affected by the existing law ask to be freed from that which is a hardship and a wrong...I say who are we, and are we fit to be called a Christian government if we refuse to accede to their wishes. I am suprised to hear...that we should place obstacles in the way of people raising themselves from the barbarous practices which are constantly inflicting hardship and wrong on the women.[13]

12 NCP 2/1/1/9 Legislative Council Debates, Native Marriages Bill, June 29th, 1887.

13 NCP 2/1/1/7 Legislative Council Debates, Native Marriages Bill August 10, 1885.

But the question of the object of the law remained a central tension, with Theophilus Shepstone offering the view that the proposed law was put before the legislative council solely for the benefit of the missionaries.[14]

Civil law or Christian Law?

Henrique Shepstone thought it ill-advised to legislate in an attempt to produce religious commitment in Africans. He was adamant that the bill being considered by the legislature was not intended to regulate the marriage of Africans by civil rites. Instead, he noted disapprovingly, it was to "try and make a Christian marriage recognised by the Natives as a binding marriage and a contract which they cannot break."[15] He was of the opinion that the colonial law ought not to be made solely to enforce religious principles. Being familiar, he said, with Natives who 'relapsed' by marrying other wives, he "[had] heard such relapsed natives when spoken to on the subject quote the old testament in support of what they had done." [16]

Shepstone's reference to the Old Testament defence offered by African polygamists indexed both an ongoing colonial debate and a nineteenth century empire-wide debate about what constituted 'Christian marriage' and what the relationship ought to be between civil law and religious (specifically Christian) principles. Throughout the 1880s, the Legislative Council was attending to another question of the relationship between 'Christian marriage' and civil law, with a debate percolating on the 'Marriage Law Amendment Bill'. The issue of Sororate marriage among white settlers in relation to Levirate practices amongst Africans raised heated debate on whether Natal's colonial law could absorb practices that were not strictly Christian.[17]

It is unsurprising that *amakholwa* concern centred on bigamy in particular. Christian (specifically mission) Africans making submissions to the Native Affairs Commission in 1881-2 expressed concerns over the prospect of reproducing the respectability they believed

14 NCP 2/1/1/7 Legislative Council Debates, Christian Natives Marriages Bill, August 13th, 1885.

15 NCP 2/1/1/9 Native Marriages Bill, June 29th, 1887

16 SNA 1/1/70 89/1884. HC. Shepstone Sec for Native Affairs 14/2/1884.

17 The matter was finally decided in favour of sensitively administering the exigencies of life in a still-forming settler colony, with marriage to a deceased wife's sister being permitted by law in 1887. See N. Essop Sheik, Customary Citizens and Customary Subjects, Paper presented in the History Dept, UKZN, Howard College at the History and African Studies Seminar, 24 May 2009.

they had achieved through conversion and this concern was most often expressed as a matter of generational influence and control. The specificity of the problem of bigamy requested as the object of sanction with a new law for Christian marriage was expressed as concern over the fate of Christian daughters. The reality they expressed was that Christian ceremonies of marriage did not carry the force of law in the way that the formation of homesteads carried the social and moral force of customary practice over generations. The missionaries and *amakholwa* petitioners were therefore hoping that colonial civil law could be used as an immediate, compelling moral force for African men who married by Christian rites.

The problem was that the law, while being used thus to produce 'faith', could in no meaningful way test for it. The law that the missionaries were inducing the colony's lawmakers to formulate would have to define 'Christian marriage' by a set of bureaucratic schedules attached to the law to which applicants for a Christian marriage license would have to agree before such a licence could be granted. Getting assent to questions such as the ones put to Benjamin Ndhlovu and Bertha Tshangase above required a kind of counselling for applicants on the legal requirements of Christian marriage rather than the principles of Christianity per se.

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

> This is not a bill to promote Christianity. It is a bill to determine the legal status of persons who choose to enter into a contract of marriage by Christian rites. As present...natives who are under native law in this colony can only be married according to native law, although on some occasions missionaries have gone through the religious ceremony which usually follows the contract of marriage. Still that religious ceremony does not necessarily, and by itself it could not, constitute a legal marriage. This bill has therefore been introduced, not for the purpose of promoting Christianity or rendering it necessary that persons who wish to contract marriage according to Christian rites should necessarily be professing Christians, but to give legal effect and validity to a ceremony of marriage which May be entered into by Christian rites.[18]

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

> It is not necessary for natives to be married by Christian rites that they should be professing Christians or having any certificate from a minister. They may be the rawest natives in the country, but if they express a wish to be married under this law they may obtain a licence; but then they may have a difficulty getting the minister to marry them. But I have stated the provisions of the law.[19]

18 NCP 2/1/1/7 Legislative Council Debates, Native Marriages Bill, August 10, 1885.

19 NCP 2/1/1/7 Legislative Council Debates, Christian Native Marriages Bill, August 7th, 1885.

To Lobola or Not to Lobola: ukuLobola, Guardianship and the Problem of 'free' African Women

Officially, the text of the 1887 law for Africans marrying by Christian rites made no mention whatsoever of *ukulobola*. As a result, most of the cases adjudicated with reference to the law appear to be in some way related to the transfer of bridewealth, with much confusion ensuing over the place of *ukulobola* in a Christian civil marriage.[20]

There was real administrative confusion amongst magistrates with the Secretary for Native Affairs fielding constant complaints from Africans seeking Christian marriage, and from their families. 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 that question. 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."[21] While he may have been overstating the missionaries approval of the practice, Shepstone was correct in noting that none of the petitions presented to the Governor sought any kind of reform of the practice of *ukulobola.* But upon further request for greater clarity from both clergy and magistrates, Shepstone replied:

> 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 matter to be mutually aggreed 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.[22]

In practice, however, the consent of the women's guardian was key to marrying by Christian rites. Often, when consent was refused, the issue of lobola figured as the site of disagreement. Shepstone's answer on the place of lobola, and the fact that lobola is not mentioned in the text of the law are both somewhat misleading. Both the legislative council discussions of the bill and the cases which arose in its aftermath reveal the imbrications of lobola, the age of majority and guardianship of women and the administrative desire to have women under some form of patriarchal control. One of the most keenly contested provisions in the law was the issue of the age of majority of African women. The Native Affairs Commission had urged that this be set at twenty-one

20 See for example, SNA 1/1/129 869/1890 Rev. F.A. David to Lieutenant Governor, 16th Sept, 1890.

21 NCP 2/1/1/5 Legislative Council Debate, Native Marriages Bill, June 29th, 1887.

22 SNA 1/1/129 869/1890 Sec for Native Affairs H. Shepstone to Rev F. A. David, Edendale 31st July, 1890.

which was the recognised age of majority for white women in the colony. During the legislative debates, the Speaker of the House, J.W Akerman asked why the Legislative Council proposed treating African women like children, more especially when these women were Christian and moved that the age of majority be set by the Christian marriage law being formulated. Members Boschoff and Garland concurred that it would be morally exemplary to grant the same right to African women as "all white girls over 21" enjoyed. As Garland pointed out: " ...if it is to be allowed that the woman is to be controlled all her life (for that is what it comes to) and prevented from marrying under this law, then the whole law becomes ineffective."

In answer to those members advocating a firm age of majority for African women Shepstone claimed, somewhat disingenuously, that it was as straightforward a matter for African women to seek exemption as it was for African men, and that the process of exemption was a more practicable means of granting majority to African women.[23] However, what the passage of a Christian marriage law for non-exempted Africans did by conceding limited rights under colonial law, was to tacitly acknowledge the difficulties of obtaining exemption from Native Law.

But H.C Shepstone and Attorney-General Gallway pressed the issue of administrative need for maintaining strong rights of guardianship over African women. In Shepstone's words: "Under native law a woman until she is married is under the control either of her parents or her guardian and we don't want to do away with that control."[24] He nonetheless met with strong opposition from the Speaker and others who argued that since a bigamy law was being contemplated to protect especially women married by Christian rites from being "pulled back into heathenism", upholding "heathen guardianship" was something of a contradiction.[25] The Attorney General backed Shepstone's administrative argument, and adding an explicit moral tone of his own:

> the effect of it would be to make all native women over 21 independent of their fathers and guardians altogether...and...we would have a lot of women knocking about Pietermaritzburg, as there are now, I am sorry to say. It would have the effect of increasing immorality among native women.

23 NCP 2/1/1/7 Legislative Council Debates, Native Marriages Bill August 10, 1885.

24 NCP 2/1/1/7 Legislative Council Debates, Christian Native Marriages Bill, August 7th, 1885.

25 NCP 2/1/1/7 Legislative Council Debates, Native Marriages Bill August 10, 1885.

The position of Secretary for Native affairs and the Attorney General differed from those of many of the elected members of the council. They viewed with thinly-veiled condescension their colleagues naive exhortations that Christian civilisation trumped administrative considerations. Both stressed the imperative of control and the important of retaining the ability to locate rights *in* women.

Their arguments were inadvertently reinforced by John Walton, the member for Newcastle who, in supporting the general need for a bill prosecuting bigamy amongst Africans illustrated the crucial link between male guardianship under Native law and the practice of *ukulobola*. He related a case that had occurred prior to the bill coming before the council in which the first wife of an African man, who had been married to him by Christian rites, was 'saved from heathenism' when the man took a second wife as the man had never paid lobola upon his Christian marriage and the women and her children could not, according to Native Law, be compelled to remain with him but were instead left to their own devices.[26] What Walton viewed as 'good fortune' for the purposes of Christian civilisation illustrated exactly why the practice of lobola needed to be a crucial administrative continuity through the nineteenth century. But any possibility of stipulating an *ukulobola* requirement for the validity of Christian marriages was out of the question. The broad general consensus being worked out on the moral object of the law would have been thoroughly undermined by such a provision. As Liege Hulett pointed out, it seemed hardly right that a Christian marriage be accompanied by 'legal heathenism'.

Nonetheless, the vagueness of the Christian marriage law on the question of lobola did not have the effect of causing any great diminution in *ukulobola* arrangements, more especially as the cases adjudicated according to its guardianship provisions reinforced the right of guardians to claim lobola. 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 refusing consent to their daughters' marriage by Christian rites by reiterating that lobola was, in fact, tied to questions of guardianship:

> Sec 5 of Law 46/1887 requires in the case of a native woman not exempted from native law, the consent of her father or guardian must be obtained before a licence can be granted for her marriage. There is nothing in this section or elsewhere in the law, which takes away the right under native law for a parent or guardian to claim lobolo...A parent or guardian who has such right cannot be regarded as unreasonably refusing his consent if the lobolo is not given. Secion 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.[27]

26 NCP 2/1/1/5 Legislative Council Debate, Native Marriages debate: August 7, 1883.

27 SNA 2278/1910 Question of Lobola under Section 15 Law No. 46 – 1887. Copy of Extract from papers SNA 2097/1900.

In the absence of father or known male relative who might have given consent, Bird pointed out that lobola would be preserved for 'a possible third party' for a set period of time before it accrued to the state. By sanctioning the exchange of bridewealth that was evidently changing in both form and function in the late nineteenth century and attempting to preserve and assert one aspect of a 'right' (that of male guardianship) identified by the state as inhering in its exchange, the state was qualifying its relationship to African female autonomy in the nineteenth century. By further inserting itself in the hierarchy of guardianship, the state was self-consciously creating its own administrative paternalism vis-à-vis African women.

While the legal designation of 'guardianship' hardly captures the complex of reciprocal commitment embodied in the customary practice of *ukulobola*, it is a useful way of understanding what lawmakers hoped to 'keep', in administrative terms at least, by maintaining the continuing and simultaneous operation of Native Law alongside Colonial Civil Law in this piece of legislation.

Conclusion

Law 46 of 1887, the 'Law to Regulate the Marriage of Natives by Christian Rites' was a complicated piece of legislation. In addition to allowing for the holding of the simultaneous legal statuses of Native and Colonial Civil Law, it set out a civil, legal definition of Christian marriage that prohibited polygamy but reasserted male guardianship rights in the form of *ukulobola.* Its complicated legal and moral character appears to have been administratively frustrating in practice. However, the influences that drove its passage and the provisions arrived at after almost six years of deliberation reveal a picture of lawmaking in the Colony that sits uneasily somewhere between historiographical designations of segregation and assimilation.[28] This particular narrative of lawmaking asserts a more complicated view of the moral and administrative imperatives driving legislators in the Colony of Natal in the nineteenth century. In this telling at least, Natal's supposed 'bifurcated state' appears to be something of an analytical red herring.

APPENDIX A: Law No 46, 1887

To Regulate the Marriage of Natives by Christian Rites

Preamble: Whereas it is desirable that the marriages of Natives by Christian Rites should be regulated; and whereas it is desirable that all such marriages so solemnized should, in all respects, be

---

28 David Welsh, Roots of Segregation: Native Policy in Colonial Natal, 1845-1910, London, Oxford University Press, 1972; Jeremy Martens, "'Civilised Domesticity': Race and European Attempts to Regulate African Marriage Practices in Natal, 1868-1875", *History of the Family* 14 (2009) 340-355.

treated as marriages under the ordinary law of this Colony, as administered in the Supreme Court thereof:

And whereas it is desirable to make provision accordingly:

Be it therefore enacted by the Governor of Natal, with the advice and consent of the Legislative Council thereof, as follows:-

1. On and after the coming into force of this Law, it shall and may be lawful for any of the Natives of this Colony who may be desirous of being joined together in matrimony by Christian Rites to be married under the provisions of Ordinance No 17, of 1846, entitled 'Ordinance to Amend the law regarding marriages within the District of Natal', subject, however, to the special provisions hereinafter set forth, in so far as the same may vary, alter, or amend, the said Ordinance and Order in Council of 7th September, 1838; and provided also that it shall not be lawful for any marriage officer appointed by the Governor under the provisions of Clause 12 of the said Ordinance No. 17, of 1846, to solemnise marriage between any parties, being Natives, and not exempted from the operation of Native Law under the provisions of Law No, 28, 1865.

2. Any Natives desirous of being married in accordance with Christian Rites shall apply to the Resident Magistrate of the Division of Country in which they or the intended bride reside, for a licence, and the said Natives shall, before obtaining such licence to be married in accordance with Christian Rites, subscribe and declare to the particulars required in the Schedule to this Law annexed, marked A; and the said Resident Magistrate shall, after the parties to the intended marriage have subscribed the declaration as set forth in the Schedule B, annexed to this Law, that the nature and obligation of the marriage contract they desire to enter into has been fully explained to and understood by them, and upon receipt of the fee hereinafter provided, issue a licence in the form of the Schedule to this Law annexed, marked C; provided always that such licence shall be in force for a period of three months from the date thereof, and no longer.

3. A marriage by Christian Rites shall be taken and deemed to be any marriage solemnized by any minister of religion duly authorised thereto under the provisions of the Ordinance No. 17, of 1846. Provided always, that whenever the form and ceremony used shall be other than that of the Church of England, each of the parties shall, in some part of the ceremony, make the following declaration: 'I do solemnly declare that I know not of any lawful impediment why I, A B, may not be joined in matrimony to C D, here present."

And each of the parties shall say to the other -

"I call upon these persons here present to witness that I, A B, do take C D, to be my lawful wedded wife (or husband)"

4. Any Native who shall wilfully declare to the truth of the particulars set forth in any declaration executed as aforeseaid before the Resident Magistrate, knowing the same to be untrue, shall be liable, on conviction, to a fine not exceeding 10 pounds, or to imprisonment with hard labour for any period not exceeding three months.

5. Should the Native woman to be married not be exempted from the operation of Native Law, then in such case, the consent of her father, or in the case of his death, the consent of the person who, by Native Law, stands in the position of her guardian, must in like manner be obtained to her marriage before the issue of the marriage licence: Provided always, that it shall and may be competent for the Governor to dispense with the consent of the parents, or guardians aforesaid, as in the next succeeding section set forth.

6. Should the parent or guardian whose consent to any marriage is required under this law be non compos mentis, or be dead, or be absent from the colony, or be otherwise incapable of consenting; or

should be, or they be induced unreasonably or improperly to withhold his, or their consent, it shall be lawful for the parties desirious of being married under this law to petition the governor; and the govornor may, should he be satisfied that there is sufficient objection to such marriage, issue his order in writing authorising the issu e of the licence as required in the last preceeding section, and every marriage duly solemnized in pursuance or under the authority of such order, and in accordance with this law, shall be as good, valid and effectual to all intents and purposes whatsoever, as if the consent of the parent or guardian had been duly given thereto.

7. It shall not be competent nor lawful for any Natives, one or both of whom may be subject to Native Law, to be married by Christian rites except the license herein provided for be first had an obtained.

8. It shall not be competent nor lawful for any Minister of the Christian religion to solemnize matrimony between Natives one or both of whom may be subject to Native Law, except upon the production to him, the said Minister, of the marriage license hereinbefore provided for, and for every Minister of the Christian religion solemnizing matrimony according to Christian rites between Natives, one or both of whom may be subject to Native Law, shall, in terms of Section 6 of Law No. 16 of 1867, transmit to the Registrar-General a certified copy of the duplicate original Register of every marriage so solemnized by him, together with a copy of the license required by this Law; and any such Minister, who may refuse or neglect to transmit the same shall, on conviction before the Court of any Resident Magistrate, be liable to a fine not exceeding 5 pounds sterling.

9. Nothing in the preceding Sections of this Law set forth shall be taken to apply to any marriage between Natives of which the parties thereto shall, both of them, prior to the date of such marriage, have been exempted from the operation of Native Law.

10. It shall and may be competent for the parties to nay marriage to be solemnized under this Law, when the male Native is exempted from the operation of Native Law, to make and enter into any ante-nuptial contract duly signed and jointly executed, or in the presence of two witnesses, in the same manner as the parties to any marriage who are not Natives, are, or may be, under the Laws of the Colony, permitted and authorised to make an ante-nuptial contract.

11. No marriage between Natives solemnized under this Law shall, when the male Native is subject to the Native Law in force in this Colony in anywise, except as is in this law provided, remove either of the parties to such marriage from the opretion of such Native Law, either in their persons or their property.

12. It shall not be lawful for any Court administering Native Law to entertain any suit or petition for any divorce or seperation, or the like, in reference to any marriage solemnized between Natives according to Christian Rites under the provisions of this Law: provided always, that it shall and may be lawful for the parties to any such marriage to sue for and obtain a divorce or other relief by process under the ordinary Laws of the Colony.

13. Any Native having contracted marriage under the provisions of this Law who shall during the lieftime of his or her spouse, unless legally divorced under the ordinary Laws of the Colony, contract any marriage in accordance with Christian Rites or under the Native laws, customs, or usages, shall be held to have committed bigamy, and shall be liable to be prosecuted and punished accordingly under the ordinary Laws of the Colony.

14. It shall not be lawful for any Native, having contracted marriage by Christian Rites under the provisions of this law, should either of the parties to such marriage become a widower or widow, as the case may be, or should they be divorced by process of law, to contract any marriage at any future time by native law, custom or usage, and any such future marriage, or pretended marriage, shall be null and void and of no effect; and any Native acting contrary to this provision shall be liable to be punished by fine, not exceeding 25 pounds, or imprisonment with hard labour, not exceeding one

year, at the discretion of the Supreme or Circuit Courts of the Colony on the prosection of the Attorney-General.

15. It shall not be lawful for the children of any Natives married by Christian rites under the provisions of this Law, such children being the issue of such marriage, to contract marriage by Native Law, custom, or usage, and any such marriage shall be null and void and of no effect, and the party or parties to the same shall be liable to be punished by fine not exceeding 25 pounds, or imprisonment with hard labour not exceeding one year, at the discretion of the Supreme Court or Circuit Courts of the Colony, on the prosecution of the Attorney-General.

16. There shall be payable to Her Majesty, Her Heirs and successors, to be applied to the uses of the Government of this Colony, on each marriage licence issued under this law, a fee of 10s, and the Resident Magistrate issuing any such licence shall collect the said sum from the person obtaining the same.

17. Any rules, regulations or other provisions of the Native Law or of the ordinary law in force in this colony, in so far as the same are at variance or in conflict with or repugnant to the several provisions of this law, shall be, and the same are hereby, varied or repealed as the case may be.

18. This law shall not come into operation unless and until the Officer administering the Government notifies by Proclamation, that it is Her Majesty's pleasure not to disallow the same, and thereafter it shall come into operation upon such day at the Officer administrating the Government shall notify by the same or any other Proclamation.

Schedule A

At_____Natal

Before me,_____Resident Magistrate

on_____day of_____18___

Appeared_____

who is desirous of entering into the Bonds of Matrimony in accordance with Christian Rites, and having been duly cautioned, states in answer to the following questions:

Name_____

Father's Name_____

Age_____

Where Born_____

Name of Chief and Tribe_____

Condition_____ [Single man or single woman]

Whether exempted from Native Law or not_____

If exempted, date of letter of exemption_____

Whether divorced or not_____

If divorced to produce proof of divorce

If previously married to state names, ages, and sex of children, if any by such marriage

TO be married to whom

I further declare that I am not related to_____and that I am under no previous engagement

Signed

I hereby certify that I have fully explained the nature and obligation of the marriage contract to the abovenamed, and that_____acknowledges to have fully understood the same.

Resident Magistrate

Schedule B

I also hereby declare that the nature and obligation of the marriage contract I desire to enter into has been fully explained to and understood by me; and I am aware that should I contract another marriage during the lifetime of my spouse without having previously obtained a divorce as required by Law No.....of 188, I shall be liable to prosecution for bigamy, and to punishment by either fine or imprisonment with hard labour, as may be decreed by the Court.

Signed

Schedule C

Resident Magistrate's Office, Natal 188_

_____ and

_____ having

appeared before me and stated their desire of being married under Christian Rites, and having complied with all the provisions of Law No.____ of 188_, this is to notify that licence is hereby granted to them to be married in accordance with Christian Rites.

Resident Magistrate