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CREATING CUSTOMARY LAW

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THE CONSTITUTION of the Republic of South Africa 1996….

One *law* for One *nation*

CHAPTER 12 - TRADITIONAL LEADERS

Recognition

211. (1) The institution, status and role of traditional leadership, according to customary law, are recognised, subject to the Constitution.

(2) A traditional authority that observes a system of customary law may function subject to any applicable legislation and customs, which includes amendments to, or repeal of, that legislation or those customs.

(3) The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.

Role of traditional leaders

212 (1) National legislation may provide for a role for traditional leadership as an institution at local level on matters affecting local communities.

(2) To deal with matters relating to traditional leadership, the role of traditional leaders, customary law and the customs of communities observing a system of customary law -

a. national or provincial legislation may provide for the establishment of houses of traditional leaders; and

b. national legislation may establish a council of traditional leaders.

No. 41 of 2003: Traditional Leadership and Governance Framework Amendment Act, 2003.

To provide for the recognition of traditional communities; to provide for the establishment and recognition of traditional councils; to provide a statutory framework for leadership positions within the institution for traditional leadership, the recognition of traditional leaders and the removal from office of traditional leaders; to provide for houses of traditional leaders; to provide for the functions and roles of traditional leaders; to provide for dispute resolution and the establishment of the Commission on Traditional Leadership Disputes and Claims; to provide for a code of conduct; to provide for amendments to the Remuneration of Public Office Bearers Act,**;** 1998; and to provide for matters connected therewith.

Traditional Courts Bill

To affirm the recognition of the traditional justice system and its values, based on restorative justice and reconciliation; to provide for the structure and functioning of traditional courts in line with constitutional imperatives and values; to enhance customary law and the customs of communities observing a system of customary law; and to provide for matters connected therewith.

I Legal Pluralism

As these three quotations indicate, customary law is an increasingly assertive feature of South African public life. It is also a particularly controversial one. Part of the difficulty is historical – authoritarian and racist regimes in the South African past implemented and justified their policies by evoking customary law and authority. Part is conceptual – 'custom' (like 'tradition') suggests stasis and therefore sits uneasily with ideas of change and reform and this is related to the methodological difficulty: how to understand past legal systems in their own terms.

I am at the moment researching and writing on the life of Theophilus Shepstone, the man widely considered to have been responsible for the successful incorporation of customary law into the system of colonial government in the Colony of Natal, which in turn profoundly influenced subsequent legal and administrative developments in South Africa a whole. Being interested in recent developments in the use (or misuse) of the term – as in 'to enhance customary law and the customs of communities observing a system of customary law' in the preamble to the Bill quoted above – one of my approaches has been an attempt to work backwards to the term's colonial origins. At first sight the law books, the published ordinances and the statutes for the use of legal practitioners seem just the source the historian might use. The initial instruction, its enactment, in chronological, thematic or alphabetical order; its repeal, amendment, and contemporary status: such ordered, tabulated, accumulative history must appeal to the historian who normally has to attempt to reconstruct documentation from incomplete and disparate primary sources. In practice however this has proved impossible and I have become persuaded that, methodologically, the historian and the lawyer live in different intellectual universes.

For example the opening paragraphs of the *Traditional Courts Bill* make it clear one that to understand the Bill one must first study the *Traditional Leadership and Governance Framework Amendment Act, 2003*, in the context of Chapter 12 of the *Constitution*. This isn't difficult, but it does mean that one must be familiar with a considerable body of related legislation. *The Law Commission Report on the Harmonisation of the Common Law and Indigenous Law: Traditional Courts and the Judicial function of Traditional Leaders* of 1999 should be a guide to this but I found it limited. And the foundation legislation, the *Native Administration Act of 1927,* has been so heavily amended that the emendations of the *Black Administration Act* as it is now called appear longer than the original text – and they themselves refer to other legislation, as amended of course.

It is not the work involved in creating a historical genealogy of this legislation. It would be tedious undoubtedly – but the more I look the more I realise that it would not be useful. This is because it refers not to the world, which after all is the subject of the historian's study, but to, obviously you might say, the law. It is self-referential. It seeks precedent, consistency, in the law. It is defined in terms of itself. Look at the legal quotations at the beginning of these notes and they terms they use. 'System', 'justice' 'community' 'custom' and

'tradition': what do they mean? what have they meant? wherein lies their power (as distinct from their authority)? why do the most senior organs of state advance them at this stage of our history? The literature, philosophical, sociological, and above all historical on all these terms is immense. Their complexities, contradictions, have been studied intensely in the great institutions of education and research, at times with insight, as part of projects seeking to understand the enormous difficulties facing citizens of the modern world. But the legal formulations such as those referred to above, already or soon to inform or become law, are presented as unproblematic – they can be understood – all one has to do is consult another legal formulation, which will draw its definitions from yet another. Meaning and significance, outside law, do not pose a challenge.

The *Traditional Courts Bill* has been criticised as an attempt to resurrect aspects of South Africa's divided, unrepresentative past. But this cannot be confirmed by examining its unreflective, circular assertions on tradition, community and custom. These key concepts remain emptied of meaning – leaving them open for those who have the will to fill and then defend them.

Historians are more used to a chronological framework and there are certainly some important contributions which use this approach. Some of the legal histories adopt this – but they tend to be lengthy on law but short on context.[1] To reach an understanding of customary law it is necessary but not enough to track the passage of the law from the granting of authority by the Order in Council, Letters Patent, to Instruction to Ordinance to Statute, and the long process by which they were rejected or incorporated into the administrative paraphernalia of the modern state. Welsh's *Roots of Segregation* has been very influential but misleading in its tendency to select quotations from very different periods in Natal's colonial history thereby creating an idea of administrative continuity.[2] This occurs even in Martin Channock's comprehensive and challenging book[3] One of the problems in South African historiography is the tendency to see the system of African administration which developed as unique. Mahmood Mamdani[4] protested productively at this in an attempt to envision it as part of an African system. And Lauren Benton's important book[5] is based on the even more significant point that legal pluralism is a universal feature of legal systems and a defining feature of colonial and imperial legal regimes. This paper examines the origins of one such system of legal pluralism.

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[1] T W Bennett, *Customary Law in South Africa* (Lansdowne [Cape Town]: Juta, 2004).
[2] David Welsh, *The Roots of Segregation: Native Policy in Colonial Natal, 1845- 1910* (Cape Town: Oxford University Press, 1971) Chapter 2 'The Creation of the Shepstone System' covers the same ground as parts I-VI of this paper using the same published official sources, but without the material derived from the Colonial Office records. This book been the standard work on the subject for a generation and I have chosen not to make my differences with it explicit.
[3]Martin Chanock, *The Making of South African Legal Culture 1902-1936: Fear, Favour and Prejudice* (Cambridge: Cambridge University Press, 2001).
[4] Mahmood Mamdani, *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (Kampala: Fountain, 1996).
[5] Lauren Benton, *Law and Colonial Cultures: Legal Regimes in World History, 1400- 1900* (Cambridge: Cambridge University Press, 2002).

II The Locations' Commission, 1846-1847

The territory that became known as the colony of Natal lay in an arc on the eastern and southern sides of the Zulu kingdom just outside the area where the kings could exercise directly physical control, but sufficiently close to be affected profoundly by the disruptive consequences of the military consolidation of the kingdom. As a result its people were driven away, went into hiding, or were incorporated into the kingdom, thereby giving the opportunity for the hunter/traders who arrived in the 1820s or the Boers in the 1830s to represent the territory as empty land to which they laid claim. The defeat of Dingane's army by the Boers in 1838 and the king himself by the Boers in alliance with Mpande in 1840, gave Africans the opportunity to re-establish themselves in Natal. For the few thousand settlers there the occupation and re-occupation of land by tens of thousands of Africans was a formidable threat. In 1843 the Boer Volksraad recommended the removal of Africans across the border. All this did was awaken the British fear of regional disruption and the consequent military occupation of Port Natal and the appointment of Henry Cloete as Special Commissioner to investigate and report on the situation that was developing in Natal.

It was Cloete who first recommended the setting up of 'locations' for Africans – a word with which he was probably familiar from the eastern frontier of the Cape.[6] To avoid a dangerous concentration of Africans there had to be at least six locations situated at a distance from immoral influences of the port. This principle of isolation and segregation was accepted by the British government and their establishment formed part of the instructions of the first Lieutenant-Governor of the District.[7]

Even before the new administration had been set up it was recognised that 'the immediate appointment of an agent to deal with the large native population of that settlement is absolutely necessary.'[8] Theophilus Shepstone was twenty-nine years old when he arrived in the Natal to fill that post. He had had already spent half his life in the Cape colonial service, first as an interpreter and then as Resident Agent just beyond the Cape frontier. With his experience as an administrator, his fluency in African languages and his knowledge of African law and custom his impact was immediate. Africans travelled from all parts of Natal and beyond to make their claims in the new territory, seek arbitration in their disputes, and to discover more about the implications of the new order being set up so slowly and hesitatingly from Pietermaritzburg.

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[6] BPP 1848: 35, Maitland to Gladstone, 16 May 1846, Annexure 1 Cloete to Montagu 10 November 1843 For 'one of the earliest appearances of the ill-omened term' of the word, by Benjamin D'Urban in 1835 see W.M.Macmillan, *Bantu, Boer and Briton* (Oxford, 1969), 151-2.
[7] BPP 1848: 35. Maitland to Gladstone, 16 May 1846, Annexure 2, Secretary of State to Governor Cape, 13 July 1844.
[8] BPP 1848: 23, Maitland to Stanley, 1 October 1845, 34.

The Locations' Commission received its instructions on 31 March 1846 and made its first report a year later.[9] It is generally believed that it was the work of Shepstone but this should not be assumed and at least some of the report's formulations reflect the views of other members of the commission. But the dominant ideas and phraseology are undoubtedly those of the Diplomatic Agent and reflects his version of settler ideology: not the 'drive them beyond our borders' nor the 'destroy them' variants, but – to use the opening phrase of the report – that of their 'management and efficient control'. Force was in fact out of the question in a district where settlers were outnumbered by perhaps 50:1 and as the report said in another characteristic Shepstonian formulation 'our destruction is inevitable the moment they become unanimous in determining it'.[10] Social and psychological barbarians perhaps, but the indigenous population was nonetheless amendable to what it recognised as a superior authority. The Report urged that immediate advantage be taken of this transitory amenability, and recommended ways in which it could be done.

What had to be addressed without delay was the fact that Africans were living without a formal legal and administrative system. They had accepted British rule, but were living beyond its reach. Roman-Dutch law had been promulgated but was not in operation as far as Africans were concerned. This had created an extremely dangerous situation: all the attractions of a life without recognizable law, obvious authority, and consequently 'the means of control'.

It was essential that the locations, when established, should be placed under Superintendents or Magistrates with their own staff and detachments of police. These would oversee a range of improving activities: road-making, education with missionary assistance, industrial training, the promotion of cash crop production amongst them. Individual title to land might come in the future but at present it should be held in trust by the government – 'the idea of property in land is not yet established in their minds'.[11]

Criminal law and cases between white and black would be dealt with by the colonial courts. The location superintendent would attend to civil law and minor criminal law cases with the assistance of a council of chiefs. As far as the law itself was concerned it would be 'productive of no good result suddenly to abrogate the laws and usages they have practised from time immemorial, except for witchcraft….' Instead the authorities should adapt 'as much to their own law as is compatible with the principles of ours, until by degrees the whole with advantage be brought under our code'.
A right of appeal would be allowed – to the Diplomatic Agent, who would apply 'British' law as far as possible while adapting his decisions to 'the usages and customs of native law' when this could be done 'without violating the stern requirements of justice'.[12] This balance, needing constant

[9] BPP.1848: 65, Pottinger to Grey, 26 May 1847, Report of Locations' Commission, 30 March 1847
[10] Report, 30 March 1847, 135.
[11] Report, 30 March 1847, 134.
[12] Report, 30 March 1847, 133.

adjustment as the situation changed with the impact of civilization, could only be kept by someone with an intimate knowledge of African custom.

A proper system had to be set up immediately. It is true that it would demand financial support, but positive action now would mean financial independence in the longer term. The baleful influences of the frontier had not yet affected African attitudes. Africans appreciated the advantages and security of colonial rule, and were still respectful of colonial authorities. Failure to act now would not only eventually cost more but bring disaster. If the recommendations of the Report however were 'zealously undertaken and persevered in'

> The native locations will become centres of industry and improvement; the whole of the native population in the district, and gradually that beyond it, will become consumers of imported articles, and producers of articles of export; and after a time, with a judicious system of taxation, will defray the expenses of their own establishments, and furnish an excess to the treasury of the district.[13]

III James Stephen's[14] intervention 1847

One wonders how the Commissioners could have been so naïve as to believe that such rhetorical optimism would be sufficient to persuade a British administration in 1847 of the need for financial commitment to native administration in the present, in order to create economic security in the future. Expenditure could never presuppose Income, government spending was based a positive balance in existing accounts, not a promise of prosperity to come. Extraordinarily the Commissioners had not even produced estimates of the cost of their administrative proposals.[15] James Stephen, influential under-Secretary of State for the Colonies was, or pretended to be, aghast.

> If anything was necessary to show that by forming a British Colony in Natal we have plunged into an almost interminable succession of expenses and difficulties, that conclusion wd, I think, be established by these Papers, and, especially the Report they contain. It is evident that the choice must be made between organizing immediately costly Establishments there, for which Great Britain must pay; or taking the almost certain risk of disturbances and wars, the repression of which will be still more costly, & more difficult. At the moment the Papers may be ans. by the remark, that there is no Estimate of the expense … But that Estimate will not be long in coming, and all experience is a deception if whether it be great or small at first it does not rapidly grow. At this moment there is no one element of wealth in the Country so far as we have yet heard by means of which the expenditure of the British Treasury could be repaid or materially reduced.[16]

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[13] BPP. 1848: 65, enc. 18 March 1847, 135.

[14] K Bell, and W.P.Morrell, *Select Documents on British Colonial Policy, 1830-1860* (Oxford: Clarendon Press,1928) has it that 'As the real founder of Colonial Office methods and traditions ... He was among the greatest of that great series of Civil Servants which forms one of the chief glories of nineteenth-century England.' xx. He was also the grandfather of Virginia Woolf.

[15] I have sometimes even wondered if Shepstone had proposed the system in a form which he knew the Colonial Office would reject – and in so doing enable him to lay the blame for any future failures on the British government's refusal to support these proposals – something that Shepstone in fact did till the end of his life – to be followed in this by liberal historians.

[16] CO179/2, 1657, Minute, James Stephen, 31 August 1847.

The Secretary of State for the Colonies, Earl Grey, in a draft reply also rejected the Commission's proposals, his free market principles overcoming his evangelical ones. While he was able to admire the progressive spirit of the report.

the local authorities must clearly understand that it is absolutely necessary that they should confine their views to the accomplishment of such gradual improvements in the social state of the district as may be introduced without looking to the mother country for pecuniary assistance ...[and this] necessarily leads to the conclusion that the attempt to subject a large native population ... to the regular administration of British law must be abandoned. [17]

There was an alternative however Grey felt – one that would not involve such expense: African leaders, not colonial administrators as the Commission recommended, could apply African law.

'Laws should be passed giving power to the Chiefs to exercise authority over their Tribes according to their existing customs, and to enforce obedience by the means usually employed among them to such of the Native Laws and Customs as shall not, from time to time, be specially abrogated by British Authority'

with the safeguard

'that the Chiefs should exercise their Authority by virtue of Commissions issued to them by the Lieut-Gov, & that a power should be retained of deposing Chiefs who might abuse their powers, and appointing others in their place.' [18]

Once again under-Secretary Stephen was critical, this time of his immediate superior. Indeed he believed that Grey's proposal was both legally unsound and politically problematic. A law, such as Grey envisaged would have to be established by a legislative body. Natal did not, Stephen believed, have sufficient authority to propose it. However if it came before British Parliament it might well be challenged and censured by its members. And understandably so.

… if a local Law shall give power to barbarous Chiefs to enforce their own Customs according to the means they usually employ, such a Law must sanction directly and explicitly much which the New Testament condemns, and much which all civilized societies abhor - such as the Homicides, the Rapine, the slavery, the debasement of Women, and countless oppressions which enter so largely into every system of Savage Life. And the means by which these wicked customs are habitually enforced are not less wicked than the customs themselves. There is no species of cruelty or of absurdity, or of injustice, which does not enter into this code according to which barbarous men enforce their barbarous usages. Suppose such a Law to be passed, and some Savage Chief in furtherance of it, to burn one of his Wives, and all her kindred, as a punishment for her Adultery; and suppose it to be said by his Advocate, these enormities were perpetuated in pursuance of a Law passed in the English language by English Legislators. Could the validity of such a plea by admitted, or denied without disgrace to the British name ...? Would any English Judge acknowledge that that such an Enactment wd. really render lawful Acts which the Laws of God, and of all Civilized men, denounce as, in the highest degree, Criminal?

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[17] Not having a copy of the draft I have taken this quotation from the version published in the BPP. There is internal evidence to suggest it was unchanged from the draft version. When I have quoted from the draft itself this is because Stephen used extracts in the minute cited in the following note.

[18] CO179/2, 1657, Minute, James Stephen, 17 September 1847, quoting Grey's draft.

Furthermore, commissions which vested authority in chiefs would imply that ultimate authority lay with the Queen who would therefore assume a degree of responsibility for a chief's actions. And even if she chose to depose a chief for some act of barbarism this would imply that she approved of acts to which she had *not* responded in this way. It was, Stephen warned, all far too dangerous.[19]

Grey agreed, thanked Stephen for saving him from 'falling into serious error', and asked for suitable amendments to his draft.

Stephen made them. His solution to the problem lay in not establishing chiefly authority at all – but in recognizing it. As he put it in his original minute:

I wd. cause it to be expressly declared that in assuming the Sovereignty of Natal The Queen had not interfered with or abrogated any Law, Custom, or Usage, prevailing among the Inhabitants antecedently to the British rule, save only such Laws, Customs and Usages as are abhorrent from and opposed to, the general principles of Humanity and decency recognized through the whole Civilized world, and that the Queen had not interfered with or abrogated the powers which the Law, Custom and Usages of the Inhabitants vested in the Chiefs, or in any other persons in authority over them: but that in all transactions between themselves, and in all Crimes committed by any of them against the persons or property of any of them, the Natives were (subject to this qualification already mentioned) to administer Justice towards each other as they had been used to do in former times. I would then reserve to The Queen the power of progressively amending the Laws of the Natives, and of providing for the better administration of Justice among them as might found practicable.

The completed despatch expressed Grey's admiration for the work the Locations' Commission had done and his sympathy for its proposals, which however, on the grounds of expense, could not be accepted. But it was obvious that some form of authority had to be exercised over the African population and

The only mode of meeting this difficulty which suggests itself to me is that of abstaining from any sudden or violent interference with the authority exercised over these people by their chiefs.[20]

The Natal authorities, he instructed, should announce that the Queen, while she reserved the right to amend it, had not interfered with native law or custom (except where it violated the accepted principles of humanity), or with the judicial powers of the chiefs to implement these laws. The differences between Grey's formulation, and Stephen's quoted above, are essentially stylistic. The paragraph was then incorporated as Clause 28 of the Royal Instructions setting up Natal's Legislative Council – again with stylistic changes only.[21]

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[19] CO179/2, 1657, Minute, James Stephen 17 September 1847. He also wrote that it would not in effect be that different from Grey's original suggestions, 'But the method I propose, would, as it seems to me, stand more aloof from Legal and Constitutional difficulties, and more out of the way of plausible misinterpretation and attack. It wd., in effect, be merely saying what has already been said in regard to New Zealand, and doing what is already done in regard to British India.'

[20] BPP1848: 66, Grey to Smith, 10 December 1847, 138.

[21] For the different versions see CO179/1, Minute by Stephen on 17 September 1847; BPP 1848: 66, Grey to Smith, 10 December 1847, 138; and BPP 1850: 29, Grey to Smith, 6 July

IV Clause 28: suspended, 1848

The Royal Instructions of 2 March 1848 containing clause 28 were considered by Natal's Executive Council on 15 August, together with written comments by the Recorder and the Diplomatic Agent. Shepstone's response was by the far the most significant. It consisted of two letters which together made up a review of the two and half years in which he had been in office. The first had been written for the Lieutenant-Governor's information three months after Shepstone had taken up office. During this time, he had written, most of Natal's chiefs had come to Pietermaritzburg to give their respects and pledges of loyalty to the new authorities. But it was not only chiefs: he had also been visited by the many ordinary people whose lives had been so disrupted in the immediate past that they no longer formed a cohesive social grouping, and now looked forward to consolidate themselves under British rule and were 'confidently speculating upon the amount of prosperity they look forward to under it.'[22] The contrast of their lives under the British, and the anarchy and bloodshed which had preceded it, was a constant and common theme and they rejoiced in their good fortune and the opportunities now being given them. They viewed the Diplomatic Agent as the government representative and continual appeals were made to him to adjudicate in disputes especially about 'cattle claims, questions of marriage payments, and assaults'. He had either done so or referred them to chiefs for their decisions. Whatever the outcome his decisions had been met with general approbation.

The fact that he was acting without formal authority was obviously something that had to be confronted urgently. This, together with the fact that the tyrannical nature of African rule on Natal's borders, made it very likely that the number of people seeking the benefits of colonial rule would add to the already vast African population persuaded Shepstone, in this early letter, to make some remarks on future policy for the Lieutenant-Governor's guidance. These are an early undeveloped version of the main thrust of the ideas which were to be put forward the following year by the Locations' Commission: locations of about 10 000 people under the authority of a Superintendent who with African assessors would hear civil cases, and criminal cases to be heard

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1850, enc., Proclamation, 21 June 1849, Clause 28. The final version reads: 'we have not interfered with or abrogated any law, customs, or usage prevailing among the inhabitants previously to the assertion of sovereignty over the said district, except so far as the same may be repugnant to the general principles of humanity and decency recognized throughout the whole civilized world; and that we have not interfered with or abrogated the powers which the laws, customs, and usages of the inhabitants vested in the said chiefs, or in any persons in authority amongst them, but that in all transaction between themselves and in all crimes committed by any of them against the persons or property of any of them, the said natives are subject to the conditions already stated to administer justice towards each other as they had been used to do in former times. Provided, nevertheless, and we do hereby reserve to ourselves full power and authority from time to time, as we shall see occasion, to amend the laws of the said natives, and to provide for the better administration of justice among them, as may be found practicable.

[22] BPP 1850: 9, Smith to Grey, 17 July 1849, sub-enc 5 in enc 7, Shepstone to West, 26 April 1846, 44. If the sequence had been followed correctly this would have been sub-enclosure 7. As happened on more than one occasion Shepstone's initial is mistranscribed as 'J'.

by the colonial courts: ‘With such an arrangement the maxims of European jurisprudence, might gradually be introduced amongst them.’[23]

This policy, although accepted by the Lieutenant-Governor had not been formally approved by London: the legal recommendations were nonetheless, Shepstone asserted, ‘in remarkable accordance’ with the Royal Instructions issued two years later. Thus they were in agreement with Shepstone’s opinion

that the Natal natives are not in such a state as would render it desirable or even prudent to substitute our civilized laws for their own, which in my opinion are in the main just and admirably calculated to rule men in [their] condition….

And it was on just these grounds that the Lieutenant-Governor had approved

of my administering on behalf of the Government their own laws to them through their chiefs, as far as the native agency existed, and directly where it did not …. [as] I think, the only safe and efficient principle that could be adopted

But there was one crucially significant exception to this remarkable accordance: this was that chiefly legal authority should not be abrogated or interfered with: instead, Shepstone insisted, it should be decided that

the former absolutism and supremacy of the chiefs are transferred as a matter of course to the Supreme Government of this district. ….

These were the policies already in existence already and the Lieutenant-Governor would confirm 'as to the wonderful measure of success they have been crowned with.’[24] There could be no question of supreme authority over their people reverting to the chiefs.

The chiefs now view themselves as the hereditary representatives of the Government to their several tribes, and as such apply for and receive directions for their guidance from me as the organ of the Government to them.

They already

view their former hereditary prerogatives as transferred to the hands of the British Government, and themselves as mere hereditary deputies exercising those prerogatives in a modified form: the people also take this view, but wish the power of the chiefs more curtailed that it is.

Furthermore at least half of the Africans in Natal were not under chiefly rule at all and looked to Shepstone as their legal authority. If the Royal Instruction was promulgated in its present form they would be under no authority at all. To restore powers that had been ‘voluntarily surrendered’ would be a most ‘retrograde step’, releasing chiefs from government control and thereby enabling them to apply laws by which their power was absolute. The result would be not only anarchy but also a betrayal of the common people for whom colonial government gave some protection from the ‘unbridled will’ of the chiefs. It was not that Shepstone was against the perpetuation of chiefly

[23] BPP 1850: T Shepstone to West, 26 April 1846, 45.
[24] BPP1850. 9, Smith to Grey, 17 July 1849, sub-enc 5 in enc 7, T Shepstone to West, 14 August 1848, 42.

power and the laws associated with it – but that they had to be under control in exercising it.

Shepstone then went further and summarised what he saw as the way forward, in a manner similar to, but more forceful than, the recommendations of the Locations' Commission. Hereditary or appointed chiefs should be given legal authority, but, unlike clause 28 of the Royal Instructions, it had to be a delegated authority. Locations should be defined as a matter of urgency and in them

> natives usages and customs shall be allowed under certain specified restrictions, and ... their own laws shall be administered to them by the Government through the agency of hereditary chiefs, and such other persons as it may be fit to appoint, ... reserving, of course, the right of amending those laws from time to time ... thus preserving the supreme prerogative which the chiefs have already voluntarily transferred to the hands of the Government ....[25]

The chiefs would be answerable to an official in each location, and he in turn would be under to the Diplomatic Agent. So far, Shepstone asserted, his authority had been based on the Lieutenant-Governor's tolerance and the consent of the people. Now he felt, 'my experience and my success'[26] warranted the formal recognition of his overall control of the system of African administration.

The matter came before Natal's Legislative Council again on 15 September 1848 when it was decided that the controversial clause should not be promulgated. This decision was justified not on Shepstone's objections, but on the less controversial grounds that earlier in the year significant developments had taken place in Natal of which the officials in London had been unaware when the Royal Instructions were issued in March.

In February 1848 the High Commissioner Sir Harry Smith, in a misguided attempt to stop Boers leaving Natal for the interior revoked the powers of the Locations' Commission and set up a Land Commission to re-examine land claims. The effect of this was to throw the district into confusion, and postpone the establishment of the Locations and associated legislation. Smith also failed to deal promptly with his Natal correspondence: the Lieutenant-Governor's despatch of September 1848, recommending the suspension of Clause 28, with its pile of supporting documentation, was only forwarded to London on 19 July 1849.[27]

V Clause 28: suspension revoked, 1849

They gave the Colonial Office a tremendous amount of work. The suspension of Clause 28 was agreed to and Shepstone's arguments for this were found able and interesting. Despite the difficulty of the problems raised, Earl Grey

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[25] BPP1850. 9, Smith to Grey, 17 July 1849, sub-enc 5 in enc 7, T Shepstone to West, 14 August 1848 43.
[26] BPP1850. 9, Smith to Grey, 17 July 1849, sub-enc 5 in enc 7, T Shepstone to West, 14 August 1848 44.
[27] BPP 1850: 9, Smith to Grey 19 July 1849. And they were not only late but unsorted and confused as can be seen in the citations immediately above.

remained enthusiastic and some of this enthusiasm can be credited to the way in which Shepstone had touched his evangelical zeal – kept within bounds of course by the demands of political economy:

I agree with Mr Shepstone that the present state of Natal & of the black population which has flocked there for our protection affords a noble opportunity for the diffusion of Christianity & civilization wh it wd be a disgrace to this country to neglect, & I am convinced that if proper means are taken to stimulate these people to exertion & to direct their efforts they may be made without charge to this country to supply all that is necessary for their improvement, & it is not merely to avoid expense but also to supply stimulus to the local authorities that I think it necessary to refuse to allow any part of the charge to be thrown on the British government.[28]

Instructions were given for the junior staff to examine all previous correspondence and prepare from it an abstract on the recent administrative history of Natal. The Law Officers were contacted for advice on how the decision not to issue the Proclamation 'may be most conveniently done in point of form, & consistently with the maintenance of due respect for Instructions under the Royal Sign Manual.[29] Herman Merivale had replaced James Stephen as under-Secretary and brought his considerable skills to the process and Sir George Barrow wrote the first draft of a long despatch for Grey's approval. Drafts, minutes, marginal comments and redrafts moved through the Office. The officials were united on one point: their praise for the manner in which Theophilus Shepstone had 'obtained an ascendancy' over Natal's Africans 'by the energy and ability which he has shown in managing them'.[30]

Grey sent the despatch approving of the suspension of clause 28 of the Royal Instructions on 30 November 1849. But despite the weeks of work which had gone in to its preparation it was largely a wasted effort. Shortly after its completion London received another despatch from Natal informing it that the Legislative Council in Natal had decided, after all, to revoke the suspension and promulgate clause 28.

The decision had come about in this way. On 19 June the Recorder Henry Cloete asked Shepstone to attend his court on the following day. Although the case had nothing to do with native administration Cloete took the opportunity to launch a lengthy attack on the Diplomatic Agent's assumption and application of the law. Cloete drew attention to the fact that serious criminal cases were not being brought before his court. For example the Diplomatic Agent had on his own authority recently charged, tried, and sentenced to a fine a man said have committed murder for witchcraft. He continued on the possible legal consequences of the Diplomatic Agent's actions: of how they might force the Recorder to bring him before his court; of how it covered up the fact that 'murder and rapine were rife' in the district; and that the commutation of the death sentence passed by his court 'had been the means of making that Court a laughing-stock, or justice a mockery.' Such proceedings could not be accepted by the Recorder who was responsible for

[28] PRO CO179/5, 2824, Minute on Smith to Grey, 19 July 1849. The first half of this quotation was incorporated into the final draft, the second was not.
[29] PRO CO179/5, 117/7965 - 137/7987, Eliott to Smith, 26 September 1849.
[30] BPP 1850: 12, Grey to Smith, 30 November 1849, 196.

the law, the powers of which could not be assumed by a mere individual and he warned the authorities to take notice of this.

His Lordship then turned to the Diplomatic Agent and solemnly warned him as to the awful personal responsibility he was incurring by being the instrument of such proceedings ... [and] felt it to be his duty to caution this officer, nay, to beg, to entreat of him to pause before he entered upon proceedings in the future.

Shepstone ended his letter by saying that he knew the Lieutenant-Governor was aware of the anomalous position he was placed in by having to carry out his administrative duties without legal authority. So was the public through newspaper debate,

but the public denouncement, by the judge of the land, of all the proceedings which I have, by the authority of the Government, carried out … has rendered it impossible for me any longer to maintain the position the Government has placed me in, unless some substantial remedy can forthwith be applied; and I apprehend that, so soon as the Honourable the Recorder's speech becomes known to the natives, which it inevitably will, sooner or later, a struggle must ensue to maintain the authority of the Government over them, at least, in so far as that authority is vested in me.[31]

The Lieutenant-Governor and the Legislative Council acted immediately. Cloete's public challenge to the legal foundations of the local government had to be met without delay. On 21 June 1849, the same day that Shepstone wrote this letter, they promulgated the hitherto suspended clause 24 of the Royal Instructions. This meant as we have seen that insofar as they were not repugnant to the 'general laws of humanity' African law, custom and usage would not be interfered with and the powers of the chief would continue as before. This was an obvious impossibility according to Shepstone as they had *de facto* been abrogated already. Consequently the Instruction's proviso that the laws could be amended for 'the better administration of justice' was acted upon in the new ordinance. By Clauses 1 and 2 the Lieutenant-Governor was given authority to appointment officers to administer justice through the application of native law, with the right of appeal to the Governor and the Executive Council. Clauses 5 and 6 confirmed and indemnified previous legal action taken by those in authority. Clause 3 was to become notorious: The Lieutenant-Governor was to have

all the power and authority, which, according to the laws, customs, and usages of the native, are held and enjoyed by any supreme or paramount native chief, with full power to appoint and remove the subordinate chiefs, or other authorities among them.[32]

This information arrived at the Colonial Office shortly after it had completed Earl Grey's long despatch on future policy in Natal. It could not now revisit the whole process. The amount of work being created by the legal confusion in Natal, together with the High Commissioner Smith's inefficiency, was time-consuming and not a little embarrassing. The Natal Ordinance that just arrived was clearly of great importance – but it was also not that well drafted, in places contradictory, and some authorities were not confident in its authors'

[31] BPP 1850: 36, Smith to Grey, 31 December 1850, sub-enc1 in enc 2, Shepstone to Colonial Secretary, 21 June 1849.
[32] BPP 1850: 36, Smith to Grey, 31 December 1849, enc 1, Ordinance, enactment 4, 103.

reading of the law.[33] But it was nonetheless, as Earl Grey said, in general accord with the policy he wished to pursue and in the end the Colonial Office decided to overlook the legal anomalies and ratify the ordinance while giving Natal extensive powers to amend its terms when necessary.[34]

To a certain extent it was Theophilus Shepstone's assertive perseverance and confidence which had the effect of so wearing down the imperial officials that Natal succeeded in obtaining formal recognition of African custom, usage and law – in the manner in which Shepstone defined and administered them. In this way the idea of vesting the head of the colonial administration with the absolute power of the Supreme Chief entered into South African legal and administrative history. As Jack Simons wrote in 1968:

> Legislation by proclamation is part of our colonial heritage. Its direct ancestry is the Shepstonian system, which concentrated power over tribes in the governor and officials acting in his name. [35]

VI falsified correspondence, 26 April 184?

But my analysis so far has been incomplete. Lauren Benton makes some interesting points on legal pluralism when she argues that it is usefully conceived as a number of overlapping, competing legal systems, within a local, national or indeed on a world scale. Legal pluralism is to be found in any legal system but it is especially prominent in colonial and imperial contexts. They can be 'weak', when indigenous legal systems retain considerable autonomy, or 'strong' when the state system successfully imposes itself over them.[36] On this spectrum Grey's original scheme tended towards the weak pole, Natal's towards the strong. Benton also warns against the tendency to depict plural systems as nested or necessarily hierarchical – the metaphor itself she argues is a function of a superimposed legality. Depictions of legal pluralism in South Africa generally fall into this category – and indeed it is reflected in the approach adopted so far in this paper. However I would argue that up to this point I have had to exclude the active African legal presence (itself, by the way, legally plural) for thematic clarity.

The legal situation as presented so far is, for me at least, complicated and difficult to track. Nonetheless there is a detailed written record from different official perspectives. Records presenting an African viewpoint point are however rare – and where they exist they are mediated by literate officials and observers. But there can be no understanding of policy and law without an analysis of the African legal system as it operated at the time, and how it came to articulate with that being introduced by the colonial state.

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[33] BPP 1850: 36, Smith to Grey, 31 December 1849, enc 3, Report, W. Porter, 1 December 1849. For the Minutes on the despatches see PRO: CO179/7, 10214 and CO179/8, 2670.
[34] BPP 1850: 29, Grey to Smith, 6 July 1850, and the final paragraphs of the approved version of the Royal Instructions which were enclosed with this despatch.
[35] H. J. Simons, *African Women: Their Legal Status in South Africa* (London: Hurst, 1968), 55.
[36] Benton, *Law and Colonial Cultures*.

The African population vastly outnumbered the settlers and as the Locations' Commission had it 'our destruction is inevitable the moment they become unanimous in determining it'. The question has to be asked, as half a century later it was asked by Africans, why they did not determine it: why did they accede to colonial rule when force lay so firmly on their side? Of course we can speculate – divisions amongst and between African societies and the consequent search for an ally: a sensible assessment of the balance of power on a world scale – but these don't seem to me to be sufficient answers.

Nor do Shepstone's. Take for example his letters to the Lieutenant-Governor forwarded to the Colonial Office to bolster the argument against the proposed prolongation of African law and authority. Africans had already accepted colonial authority, he asserted in August 1848, because

> As a class, the natives look upon themselves as far inferior to the white inhabitants, whom circumnstances have taught to view as their natural superiors and masters.[37]

Two years earlier in a letter dated 26 April 1846 he had concentrated on history rather than racial psychology: the African population accepted, or placed themselves under, British colonial rule because of the security and peace it gave to people who had so recently experienced appalling violence. As one of the few surviving old men had told him '"There is not a river in the country in which the bones of my kindred are not strewn; and many a blade of its grass has been stained with my own blood."' Even now they had the example of the Zulu kingdom where under Mpande 'it is notorious that the most revolting executions of entire communities are continually taking place at the capricious will of this tyrant'. [38]

This letter was sent to London and eventually published as an enclosure in the British Parliamentary Papers. There is a manuscript copy of this 1846 letter in the archives in Pietermaritzburg. Close examination however shows that it was altered before being sent to London. For me the most significant changes are those made in the second paragraph of the 1848 version. Both versions share the same first sentence, but the rest of the paragraph (the opening words of which are italicised below – the emphasis is mine) is cut from the version sent to London:

> Since my appointment here my office has been daily thronged with natives of all grades from the most considerable chief in the District to the lowest individual amongst the common people. *The chiefs generally followed by large retinues have come to pay their respects to His Honour the Lieutenant-Governor and* ***to ask for lands to be allotted to them by His Honor and that they may be protected in the occupation of them as British Subjects****….*[39]

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[37] BPP1850: 9, Smith to Grey, 17 July 1849, sub-enc 5 in enc 7, T Shepstone to West, 14 August 1848, 43.

[38] BPP1850: 9, Smith to Grey, 17 July 1849, sub-enc 5 in enc 7, T Shepstone to West, 26 April 1846, 45.

[39] PAR. SNA 1/1/8. Shepstone to Colonial Secretary, 26 April 1846. Note that while this isn't the original it is a manuscript copy and the context shows that it was written at the time stated, and therefore the amended version sent to London in 1848 must have been predated. The manuscript version is longer than the published one by just under a third. Its description of the horrors of rule in the Zulu kingdom are lengthier and there are other minor alterations.

There are number of conclusions to be drawn from this. Firstly, and most obviously, Shepstone was dishonest. For this is not just the perhaps excusable redrafting for publication of a hurriedly written letter. This letter was deliberately sent, and accepted as a true record, and was, as it was intended to be, influential. The Colonial Office worked on the assumption that it was a genuine copy of an original, acted on it in the development of policy, and published it for the information of members of parliament and the interested public. I have studied most of the British Parliamentary Papers dealing with the affairs of Natal and Zululand in the colonial period and have been struck by the fact that the officials in London were scrupulous in drawing attention to any changes of the original. Falsification undermined the very notion of open and honest government and would have been treated severely if discovered. And for the historian such an action reduces the special status implied in the term ‘official primary source’. In so far as a study of Theophilus Shepstone is concerned this one proven case undermines confidence in his writing generally and indeed the man himself.

But, and most significant of all in the understanding of Shepstone and the policy for which he was responsible, there is the specific item he chose to exclude and by implication the other items he chose to emphasize. The stress in these despatches is on African deference: the voluntary submission to an acknowledged superior power. The effect of the change in this official letter is to exclude what I believe to be the very key to his policy and to what success he had as an administrator, both now and in the years to come: that in return for expressions of deference and loyalty, he promised certain Africans secure tenure in land.

VII Postscript (13 August 2008) – Land and ‘civil law’

Access and attitudes to land are obviously so important to understanding these predominantly agricultural societies that it is too easy to simply state this fact and move on. But the reasons for their significance, and the social structures arising out of agricultural production on land cannot so easily just be assumed.

For the authorities the sale of Crown land was intended to be the foundation of the colonial economy. For some settlers working their land was a disappointing and insecure source of indigenous, agricultural and pastoral products, at least until the successful development of sugar plantations. But for important sectors of the settler population land was not necessarily a means of agricultural production at all, but a means of income through speculation and sale. In Natal land, or documents supposedly giving rights to land, were traded amongst speculating investors in the hope of profit in the future. Land could be left empty, or better still could be used as a source of rent, to await a rise in its value.

Nothing could be further than this from the attitudes of Africans for whom land had no value unless it was used. Furthermore access to land defined political authority because political allegiance required the allocation of land for the supplicant’s use. On this land men built the homesteads which housed their

dependants, children and wives who themselves had rights of access to land. Women's labour was expended in agricultural production and men husbanded the cattle which were exchanged for wives when the homestead was established and when it was expanded. The mental vice of capitalist ideology that so constrains our thinking that we can only see the goal of production as the creation of commodities in the form of objects has meant that this fundamental process of production and accumulation in the form of human beings (or more strictly labour power) was misunderstood at the time, and is not understood today. These were societies based on the production and the control of people, not of material commodities. It was the creation and the control of productive human beings which was the goal of production, and this was given value in terms of the cattle or their equivalents which initiated and sustained the processes of production.

Customary law was a function of a customary economy. At its most fundamental levels, in which all people participated, and which were exercised as part of everyday life, were the accords and the disagreements, the harmonies and the tensions, that arose out of the ordering of the homestead, organizing labour, succession to property and power, the ranking of wives, the obligations of the family, the rights to children, and the laws which established them and were compensated when broken in terms of cattle and their equivalents, in disputes that could reach back over generations.

It was in this complex of what were called civil disputes, between and within homesteads and the differential rights of their inhabitants to labour and property that customary law lay was situated and where it differed most profoundly from 'British' law. Criminal cases – assault, robbery, or Shepstone's favourite, contumacy – were more easily assimilated, and punished with the authoritarian powers vested in the Supreme Chief. The implementation of civil law lay with those men in authority over the African communities who participated in it. Shepstone wrote that in the early months of his holding office he dealt largely with 'cattle claims, questions of marriage payments, and assaults, the majority of long standing' – and this, with its emphasis on civil disputes within the homesteads, seems to me probably a valid although impressionistic and compressed description. An appeal to the new colonial authority would be an obvious course for those seeking a fresh intervention in old and unsuccessful litigation. 'Cattle claims' and 'marriage disputes' certainly summarise the majority of civil cases tried by customary law of which we have a record in the colonial period.

But it must be noted that the laws around the organisation of the homestead can never be treated as just domestic affairs, or mere marriage or family law. The homestead was the site of production: aggregations of homesteads were the economic base of the wider social organization. The application of customary law in civil cases went in fact to the very heart of the body politic. Shepstone's subsequent interventions show this – the all important 'hut tax' first collected in 1849, the revision of 'marriage law' in 1869, and land tenure reform securing the locations under the Natal Native Trust. And when fundamental economic change began to take effect – that is when the accumulation of commodities began to replace the accumulation of people –

the tensions were felt in the customs, laws and usages of the homestead by whose structures people's lives had been determined.

The effect of the interventions discussed in this paper was to establish, in the name of tradition, custom, continuity and security, an African political presence of significance in the colony of Natal, built around the demands of the customary economy and the application of customary law. To appreciate this we have to recreate the histories of *amakhosi* who accepted Shepstone's promise of security in their claims to land, lived and worked on it, and thereby built considerable chiefdoms whose influence, although radically changed, can still be discerned today. Amongst them we can name Musi kaGodolozi of the Qwabe, brought as a boy from a place of hiding in the Zulu kingdom by Qwabe survivors and set up by them to be their future *inkosi,* the first chief to be established by Shepstone, and who after forty years under colonialism had spread Qwabe power and influence from the northern edges of Durban to the borders of the Zulu kingdom: Fodo kaNombewu of the Hlangwini, attacked and deposed by Shepstone with African support in 1847 for contumacy, and once he had been made an example of, reinstated. Phakade kaMacingwane of the Chunu, contemporary and bitter enemy of the Zulu kings who lived on their border and died the year after his son and successor died amongst the British on the battlefield at Isandlwana: Thetheleku kaNobamba of the Mphumuza always a close confidant of Shepstone's: Langalibalele ka Mtimkulu of the Hlubi, forced out of the Zulu kingdom in 1849 and given land by Shepstone in the foothills of the Drakensberg until he was banished after the rebellion which exposed with such cruelty the nature of Natal colonial rule, and the political personality of Theophilus Shepstone. Zikhali kaMatiwane of the Ngwane who was established in his father's territory with his back deliberately against the Drakensberg the better to confront his opponents and whose descendants live there to the present day: Ngoza kaLudaba of the Qamu, the commoner who fought at Blood river in Dingane's army, and as Shepstone's *induna* became the most powerful man in the land if measured by followers. Shepstone ruled with and through such men. It is not as Welsh argued that 'The African population was a dominated group… [but] their reaction or anticipated reactions to policies were important…[40] Their courts, their application of the law, all played their part in the practice and the making of customary law, co-operating with the colonial authorities when advisable or necessary. As difficult as it might be to reconstruct this process there can be no understanding of the concept of customary law and its evolution without their inclusion as active participants in the process of its creation.

[40] Welsh, *Roots of Segregation*, 1