
CONVERGING ATTITUDES OF CHURCH, STATE AND COURTS TO LOBOLO, POLYGYNY, SUCCESSION AND LABOUR IN 19TH CENTURY SOUTH AFRICA

David Taylor (University of South Africa)

1 Introduction

1.1 Background

In 1865 the Bishop of Grahamstown expressed his concerns about lobolo, polygyny and succession to the Cape Commission on Native Affairs.¹ He was of the opinion that lobolo was sale of women, polygyny was inconsistent with Christianity and recognition of indigenous laws of inheritance legalised the worst customs of Africans like polygyny. This is just one example of how colonists viewed these three African institutions when investigations into "native affairs" were conducted. Attitudes like that of the Bishop of Grahamstown give some understanding of the driving forces behind attitudes of the legislature and the courts towards indigenous legal institutions.

During the 19th century the legislature implemented a number of methods to make African labour available. The role of the courts in assisting this process of making the labour available has not been made explicit. This may have been due to the fact that judgments did not address the labour matter directly but were rather complicit in inducing labour by attacking indigenous institutions that provided economic security and stability for Africans. Justifications for judicial and legislative acts and the links between labour-inducing legislation and judicial decisions about indigenous law to some degree expose the economic expediency of many moral arguments used to justify some laws in South Africa at the turn of the 19th century.² The economic consequences of court decisions indicate the political alignment of judicial decisions with economic and political policies of the legislature and colonists. The effect was that the legislature and the courts pressed Africans into labour by threatening the economic security and stability of indigenous African institutions.

1 *Cape of Good Hope Commission on Native Affairs Proceedings and Evidence Taken by the Commission on Native Affairs, Appointed by his Excellency the Governor 1865* (1865) 10 (Quest 77); 11 (Quest 79); 12 (Quest 91).

2 See generally Taylor "Mixing morals and economics: Justifications for inducing labour by the courts and the legislature in 19th century South Africa" 2003 *THRHR* 200-212.

This article investigates the attitudes of colonists towards the indigenous African institutions of lobolo, polygyny and succession. Proof of these attitudes is drawn from evidence given by colonists before various South African Native Affairs Commissions in the 19th century. The article also examines the attitudes of courts towards these indigenous institutions during the same period.

1 2 The African homestead

The economic position of Africans needs to be understood in the context of the African modes of production of the time. There are clear benefits to the family physically living together as a community in a subsistence economy. In South Africa, generally, each African homestead was to some degree a self contained economic unit.³ Women were important producers and provided the family as a whole with greater resources and security. Rules and practices around the succession of property,⁴ lobolo, the movement and residence of women, children and men are integrated with polygyny to create a social structure that provided for some continuity and security.⁵ The economic aspect of lobolo on its own proves to be highly complex as a result of the various interrelations that arise out of it. Not only does it play a part in the economic relationship between the families of the bride and groom, but it also affects the economic relationship with other houses, associated with other wives of the same house, and if there are other houses also with those other houses.

The three institutions of lobolo, succession and polygyny are not easily separable.⁶ What they have in common, from an economic perspective, is the creation and stabilization of wealth in the homestead while at the same time forging economic interdependence between various members of the homestead as well as between different homesteads. The implication is that, should one of these institutions be attacked, the others would be dramatically affected, and from an economic point of view the stability and security of the household would be seriously threatened. The impact of the attitudes of colonists to each of these three institutions will now be examined individually.

3 Hammond-Tooke *The Roots of Black South Africa* (1993) 54.

4 Hammond-Tooke (n 3) 55.

5 The economic component of these institutions is by no means the only aspect; it may not even be the overriding aspect. To come to terms with the full complexity of lobolo one should at least also consider the religious aspect, the binding of the two families concerned, and the indication of respect and how the movement of the cattle gave notice to the community that a marriage had taken place.

6 Reductionist understandings of these institutions should be shied away from, but concerns about reductionism can not serve as an absolute deterrent to the investigation of aspects of the institutions.

2 Lobolo

We want to know what your custom of ukulobola is. We white people do not understand it.⁷

2.1 Attitudes about lobolo before the Commissions

The traditional missionary view was that Africans regarded their women as little better than slaves or chattels that were bought and sold for cattle. Claims were even made that fathers or brothers often sold women to the highest bidder.⁸ For the buyers, women were supposedly only a source of profit because a woman worked hard in the home and in the fields. This was the understanding the Native Affairs Commission assumed, as is evident by their questions: "Are you aware that according to Kafir law, women are property, the same as sheep or oxen?"⁹ Answers to this type of question elicited responses that likened the lot of African women to slavery. This may have been genuine concern on the part of those giving evidence or a manipulative attempt to play on the topical moral and political sentiments against slavery, or both.¹⁰ Not only was the immorality of slavery insinuated into the lot of the African woman but sexual impropriety was also emphasized.¹¹ The sudden concern for the standing of the African woman was not entirely unrelated to other concerns of colonists. Foremost in the minds of many white cattle farmers was the belief that the need for lobolo supposedly encouraged cattle theft.¹²

Yet there were counter views about lobolo to which little attention was paid. Some voiced their perception, to the various commissions, that lobolo and

7 Mr Roland asked Chief Gangalizwe: *Cape Commission* (n 1) 83 (Quest 7706).

8 Mr Warner *Cape Commission* (n 1) 77.

9 *Cape Commission* (n 1) 48 (Quest 455); 56 (Quest 540); (Quest 764).

10 Mr Potgieter commented that African women were not always compelled to marry; it was only when they were compelled that they could be regarded as slaves. In addition he pointed out that he had never heard of sale for any other purpose than marriage (Natal Commission to Enquire into the Past and Present State of the Kafirs, *Proceedings of the Commission appointed to Enquire into the Past and Present State of the Kafirs in the District of Natal 1852 Vol 1*, 24.) Van Staden understood women to be purchased as slaves (Natal Commission to Enquire into the Past and Present State of the Kafirs, *Proceedings of the Commission Appointed to Enquire into the Past and Present State of the Kafirs in the District of Natal 1852 Vol 2*, 7 (Quest 38).)

11 Mr Potgieter testified that the African woman becomes the "concubine" of the man who buys her (*Natal Commission Vol 1* (n 10) 21).

12 Evidence was repeatedly given about how cattle were supposedly stolen to purchase wives. Mr King: "Do you think the system of selling daughters is an inducement to steal?" – "Decidedly so": *Cape Commission* (n 1) 35 (Quest 335); Mr Potgieter: "I think that the wish to have wives is a great temptation to cattle stealing, and therefore I wish to have them removed" (*Natal Commission Vol 1* (n 10) 20 (Quest 337)).

African marriage could not be likened to slavery, but to no avail.¹³ The very attitudes evident from the commission reports are discernible in the arguments made to the courts at the time. Argument was made, for example, that lobolo was immoral. But argument was also made about the true moral nature of lobolo. Invariably it was between these two moral positions that the court felt it had to choose.

2.2 Judicial attitudes about lobolo

From the years 1880 to 1910 the courts heard a variety of cases relating to lobolo. In most of these cases arguments were put to the court that lobolo amounted to the sale of women and thus it was immoral and as a consequence the lobolo transferred in terms of the immoral contract were not recoverable.¹⁴ Wives and their families commonly made this argument where the husband on the desertion of his wife claimed the return of lobolo.¹⁵ In other cases where the husband was deceased and the widow returned to her father's homestead, claims were made on behalf of the heir of the deceased that the widow return, failing which the lobolo be returned.¹⁶ In these instances the wives and their families argued that lobolo was the purchase of women and thus immoral. In addition argument was also made that lobolo was a form of slavery¹⁷ requiring

13 In evidence before the Natal Commission Mr Howell made the following observation: "I do not consider that the natives giving 10 cows more or less for a wife to constitute slavery in the sense of that word. I have always understood and believed that the cattle given is a kind of deposit pledge for the mutual good behaviour of man and wife. As regards what has been stated as to compulsion being used by the natives to force their women to take husbands against their inclinations, similar practices I believe, exist in civilised communities. I have no doubt but that a proportion of Kafir marriages originate in mutual liking. I will allow our natives to be savages, but not a herd of beasts" (Natal Commission to Enquire into the Past and Present State of the Kafirs, *Proceedings of the Commission Appointed to Enquire into the Past and Present State of the Kafirs in the District of Natal* 1852 Vol 3 25). Mr Peppercorne, a magistrate, also testified that an African marriage is by mutual consent and that public opinion would prevent forced marriages. He pointed out that lobolo is not a purchase but rather a pledge or security similar to the custom described in the biblical book of Ruth (*Natal Commission* Vol 3, 63-64). The same magistrate pointed out that the movement of cattle was often nominal especially where families intermarry. He also observed that English law allowed for damages under the fiction of losing daughters service and so concluded that the lobolo "principle is obvious – never to leave a single, or unprotected, female" (*Natal Commission* Vol 3 63).

14 Eg where the defendant argued that the conditions upon which Nohajis was said to have married to Nthlanganiso are immoral. See *Nbono v Manoxowendi* (6 EDC 62) 1891, 72. Or where the defendant excepted to the summons on the "grounds that the contract of marriage according to Tembu laws and customs is an immoral one, and therefore void *ab initio*, and that as this action arises out of such a contract it cannot be maintained in our courts". This is the position the magistrate had taken in the court *a quo*. See *Ngqobela v Sihle* (10 SC 346) 1893, 354.

15 See *Kobendi v Matyoro* (6 EDC 39) 1891; *Malgas v Gakavu* (6 EDC 225) 1891.

16 *Segane v Gondole* (1 EDC Rep 195) 1880; *Nbono v Manoxowendi* (6 EDC 62) 1891.

17 Native marriages are valid trilateral contracts with the "implied condition" "that upon the return of the wife to her father's village the dowry should be returned to the husband's heirs, who are here represented by the plaintiff, his brother. I may say that under English law a bond given by the husband to the wife's father to induce the latter to give his

the widow to perpetually provide her labour to the heir of her late husband's estate.¹⁸

From the analysis of the realities of the African homestead it is clear that the "immorality" arguments presented to the court somewhat skewed the true position of lobolo and succession. The position of women in the context of indigenous institutions was not portrayed in its full complexity.¹⁹ But it was suitable to view the relationships created by indigenous institutions in this

consent to the marriage has been held to be in the nature of a marriage brokerage contract and contrary to public policy. Enough has been said to indicate that principles of that description are not applicable in the present case. But then there is the further contention that this contract of dowry savours of slavery, that it really constitutes the sale of a woman for a price. This is utterly repudiated by those best able to judge; and considering that it is the free election of the woman in this case to do as she pleases, as stated by Mr. Chalmers, that has given rise to this action, I cannot detect any element of slavery in the transaction" (minority position *Nbono v Manoxowendi* (6 EDC 62) 1891 69 per Maasdorp J). In the majority judgement Barry JP stated that "[u]kulobola was the universal form of native marriage. Did it contract for the enslavement of the women? Slavery is the state of entire subjugation of one person to the will of another. The power of life and death and the right of property in the master, and the absence of all rights in the servant, are the tests of slavery. Was this implied in the family or communal life, and did the contract of marriage perpetuate it?" (95). "No law gave him that right, and I cannot infer that the perpetuation of family life under a communal system of government necessarily leads to slavery A father may legally pass his daughter into another family, but only as the wife of the head of that family. He cannot give or sell her as a prostitute" (96). Barry JP agreed with Mr Justice Shippard who stated in *Singani v Singani* (EDC 195): "As far as I am able to learn from those best acquainted with kaffir customs and Kaffir ideas, a wife is not considered by herself or others like a mere chattel, because her dowry cattle are sent to her father, and certainly not in the way slaves are bought and sold." Barry JP asserts that this view accords with the evidence of a "distinguished expert" and that Ukulobola is a contract and ikazi is given partly for the fathers consent and partly as a "guarantee by the husband of his good conduct towards his wife", and not in consideration, for loss of slave but rather loss of services of a member of the house, namely a daughter and gaining the services of a wife by the husband's house (*Nbono v Manoxowendi* (6 EDC 62) 1891 97).

- 18 The plaintiff argued that the defendant had no entitlement to the cattle, but rather to "the right of property in the widow". However, since the *Native Succession Act* 18 of 1864 that permitted the administration of deceased estates according to native custom did not sanction "the right of property in the woman" such a claim could not succeed in this circumstance either. Barry JP found that it was of no consequence whether the contract was dowry or sale and purchase, whether it was legal or illegal, because the *Native Succession Act* contained nothing in it to indicate that it sanctioned the custom that forces a widow into life-long service of the heir of the deceased husband "against her will" (*Segane v Gondele* (1 EDC Rep. 195) 1880 201 204). See *Nbono v Manoxowendi* (6 EDC 62) 1891 80, where Jones JH dismisses evidence in favour of his own supposition that "ukulobola never was a trust form of marriage settlement I feel confident". At 81 the judge proposes that it is a species of trust, contract of guarantee, a loan or hire barter, but not a sale. It was rather recompense for services lost: "[L]obola is considered as an equivalent paid for their services" (84). Jones JH concludes that "[s]erve the woman must, or give up her children, and let her friends or her father's relatives pay the price of her release" (85). Jones concludes that this amounts to women being treated as chattel (90). Consequently since slavery is abolished lobolo cannot be sanctioned as it places the daughter of a man in a "distinctly servile" position (91). Shepstone's reply to a question as to whether lobolo should be administered as trust was that it would be too great an innovation but would be premised on the principles upon which ukulobola was based (*Cape Commission* (n 1) (Ans 495). Braatveldt P held that "[i]t is often dangerous to accept the evidence of even leading Natives in regard to what is their law and custom ... It is inconceivable that there is a custom by which a woman can be transferred to another family and clan by purchase – for that is what Appellant's contention amounts to" (*Petwula Ndhluvu v Matches Kanetse* 1940 NAC (N&T) 64 65).
- 19 *Natal Commission* Vol 1 (n 10) 20 23 32 37. *Natal Commission* Vol 3 (n 13) 32 37 50 63 64.

manner as it accorded with the views propagated by colonists in the pursuance of their main objective – that of acquiring cheap African labour. Admittedly this aim was often hidden or obscured, intentionally or not, by moral arguments made by colonists and missionaries that these practices were either blatantly immoral or that they lead to enormous hardship for African women.²⁰ It was in the climate of these views that courts heard argument and made decisions about indigenous institutions.

The result was that even though argument was made and evidence led about the true and moral nature of these institutions,²¹ courts still found them abhorrent or potentially abhorrent.²² Take for example the constant reservations made about the possibility that lobolo may amount to the sale of women even though the courts in the face of convincing testimony were compelled to find otherwise.²³

-
- 20 Bennett *Sourcebook of African Customary Law for Southern Africa* (1991) 301-310.
 21 In *Segane v Gondede* (1 EDC Rep 195) 1880 196. The defendant relied on the evidence of Rev Aitken Chalmers: "In every case it is the custom to give cattle for wives. In no case have I heard of any man taking to himself a wife by Kafir custom unless he gave cattle for her. That giving is called 'ikazi.' Europeans talk of it as sale, but the Kafirs do not recognise it as such, and it is only recently that the word 'sale' has been applied to it. Kafirs even now use the word 'ikazi', which means that which is given for a wife." In *Nbono v Manoxowendi* (6 EDC 62) 1891 Maasdorp J held: "This consideration is now generally known by the name of 'dowry', when an English term is applied to it, although it can hardly be said to possess any of the characteristics of dowry as known in our law." In the same case Jones JH states that a headman gave evidence that "payment of cattle was the seal of the marriage" (72). The magistrate wrote in the court *a quo* that the payment of cattle is considered in native law as the legal proof and the actual ceremony of marriage, and not a consideration given for an immoral purpose. On the contrary "the absence of this payment is asserted to be a stain on the morality of the connection formed between a man and a woman". The magistrate also held that "intelligent natives" contend that if the custom of "payment of cattle for a wife" were discontinued the result would be "a deplorable reduction of the standards of morals in native society" (73). Shepstone supported this view of lobolo: "[T]he Dower given represents the daughter of the house when that daughter is married and has left her home. It is a bond of alliance between the two families, the one gives the daughter and the other fills the void with cattle" (*Cape Commission* (n 1) 34).
- 22 *Segane v Gondede* (1 EDC Rep 195) 1880 201 204; *Nbono v Manoxowendi* (6 EDC 62) 1891 80-91; *Petwula Ndhluvuvu v Matches Kanetse* 1940 NAC (N&T) 64 65.
- 23 Barry JP was not inclined to see the transaction as the purchase of woman: "The evidence is at least as consistent with its being a gift to plaintiff in consideration of his contribution to Nonto's outfit, or with a dowry, which, instead of making the plaintiff a mere trustee, gave him the absolute property in the dowry but imposed certain obligations." Yet Barry JP did point out that if it were indeed a sale of woman there would be no question about the inability of the defendant to claim back what would in effect be the consideration given for the woman. In the same case Shippard J also did not regard the marriage as the sale of woman but saw it rather as a "species of trust". The cattle transferred to the plaintiff were thus in "possession [that] was at least lawful and just, and on good cause", thus the defendant had to return the cattle (*Segane v Gondede* (1 EDC Rep 195) 1880 203 209). The court has recognized the validity of lobolo and the practices pursuant thereto by ordering that the wife's family was not obliged to return the lobolo since it was the cruelty of the husband that had precipitated his wife's departure (*Kobendi v Matyoro* (6 EDC 39) 1891). Barry JP found that "where a native marriage takes place with the consent of the wife and her father who obtains a dowry, that dowry would be recoverable by her husband if after such a marriage the wife wilfully and without cause abandoned her husband, and was harboured by her father, while the father, as the recipient of the dowry, would in law be bound to maintain his daughter ill-treated or discarded by her husband" (*Nbono v Manoxowendi* (6 EDC 62) 1891 98). In

In the case of *Malgas v Gakavu*²⁴ the court was even at pains to find that lobolo could not be returned since it was transferred in pursuance of an illicit relationship. The relationship between the parties was regarded as illicit because the court did not regard the parties as married.²⁵

The Supreme Court supported this position in *Ngqobela v Sihele*.²⁶ The court reasoned that if a party wishes to recover lobolo, the court must first inquire whether the marriage is valid according to law of another country (in this case the dependency of Transvaal). Thereafter it must decide whether it is consistent with the essential nature of the contract of the colony (South Africa). If the answer is affirmative a husband can recover lobolo from his wife's father when the wife deserts him without cause.²⁷

After investigating the nature of indigenous marriages the court found that "[i]t is not inconsistent with such union (marriage union in the colony) that the wife's father should receive, as a necessary ingredient of its celebration, a certain

Matumba v Pambani, an unreported case discussed in *Segane v Gondole* (1 EDC Rep 195) 1880, a marriage was proposed but ultimately not entered into by the potential husband Matumba, even though cattle were transferred to Pambani (father of the bride-to-be). The cattle were not returned by Pambani but rather held as penalty for breach of promise even though Pambani's daughter was pregnant by another man, Magazola (205). The plaintiff claimed the return of the cattle. Counsel for the defendant alleged that the original contract was wholly immoral, as it was the sale of a woman. Shippard J disagreed: "To reason a priori that such a system is immoral merely because it does not accord with the advanced ideas of modern jurisprudence, appears to me unsound" (208). "I entirely fail to see what impropriety there could have been in these two young persons getting married if only the girl had remained faithful to the plaintiff. I will go further, and say that so far as I have been able to learn from those best acquainted with Kafir ideas, a wife is not considered by herself or others as bought and sold like a mere chattel because dowry cattle are sent to her father – certainly not in the sense in which slaves are bought and sold: nor, as I am given to understand, in any sense can alter the status of the woman for the worst" (207). Ultimately the case was resolved as a contractual matter and not as a case involving "native law" (208). The court held that the cattle were handed over in trust pending the completion of a contract. Since the defendant gave no consideration for the cattle and the contract was not completed through no fault on the part of the plaintiff, there can be no claim of breach of promise by the plaintiff.

24 *Malgas v Gakavu* (6 EDC 225) 1891.

25 The parties were not regarded as married in terms of colonial law. Indications are that had regard been given to indigenous law the transfer of lobolo may have pointed towards the validity of the marriage.

26 "In the absence of special legislation recognizing such a union as a valid marriage, courts of law are bound however much they may regret it to treat the intercourse, I will not say as immoral, but as illicit" (De Villiers CJ in *Ngqobela v Sihele* (10 SC 346) 1893 352). This view concurred with *Nanto v Malgas* (5 Juta, 108) and *Malgas v Gakavu* (5 EDC 225): "Any promise, therefore, made in consideration of such future cohabitation cannot be enforced, and any money paid to either party or to third persons cannot be recovered back by reason merely of the failure of such consideration. It follows that if, by native custom, 'dowry' cattle is paid to the woman's father on condition that upon her refusing to cohabit with the man any longer the latter shall be entitled to claim the cattle from the father, the claim cannot be enforced by our Courts. In law there is a *par delictum*, and the claimant cannot prevail over the possessor." This position was also taken in *Nbono v Manoxowendi* (6 EDC 62) 1891 69 in the minority decision of Maasdorp J: "Cohabitation without legal marriage is illicit, and any contract having for its object such cohabitation is therefore immoral."

27 *Ngqobela v Sihele* (10 SC 346) 1893 353.

number of cattle, to be restored by him to the husband in the case of the wife's deserting the latter without just cause".²⁸

The court decision was a consequence of Proclamation Number 140 of 1885 that dealt with African marriages in Tembuland. The proclamation was interpreted to give full recognition to marriages in Tembuland (even polygamous marriages), but such recognition was only to be afforded by Tembuland courts and not colony courts. If a matter went on appeal to a colony court, such a court would apply Tembuland law only as long as it is not "opposed to good morals, as understood in this colony".²⁹ The court then set out in detail under which conditions African marriages would be recognized, and thus lobolo could be reclaimed.³⁰ Buchanan J, in a separate judgement, stated that the court does not conflict with the cases of *Sengane* and *Nbono*³¹ which held "that there could be no heritable right of property in the woman or to her enforced service".³²

The choice of a woman to remain in her husband's homestead or return to her father's homestead was transformed by the court in this case, into a "heritable right in a woman" or "enforced service". An institution described in such terms was easily open to attack by the courts, particularly on a moral basis. This portrayal of lobolo was clearly not accurate, but under prevailing concerns about labour at the time it was easy to regard women as labour units and to see the "service" aspect of lobolo as overriding or all-encompassing. Colonists were familiar with labour arrangements that were akin to "enforced service"³³ and so could easily regard women as labour units transferred from one homestead to another with the "payment" of cattle. In particular African women were seen as a primary reason for the coveted African male labour not entering

28 *Ngqobela v Sihele* (10 SC 346) 1893 355.

29 *Ngqobela v Sihele* (10 SC 346) 1893 356.

30 In *Ngqobela v Sihele* (10 SC 346) 1893 357-358 the court concluded that the courts of Tembuland could recognize all (even polygamous) marriages entered before the *Proclamation No. 140* of 1885, but that colony courts could not recognize any polygamous marriages. Neither Colony or Tembuland courts could recognize polygamous marriages entered into after the proclamation. Neither court could recognize the right of a husband to take dowry by fraud or force. A husband can recover lobolo in a Tembuland court if a wife deserted him without just cause. If the marriage took place before proclamation it did not matter if it was polygamous, but if entered after the proclamation then courts could not recognize such a marriage. Colony courts could not recognise a marriage entered into in the colony by native custom without solemnities required by statute thus husband not claim dowry back if wife deserts him. Colony courts could recognize a marriage entered into in Tembuland according to native law if it was not polygamous and lobolo can be reclaimed from father if father is in the colony and the wife deserts the husband without just cause.

31 *Segane v Gondole* (1 EDC Rep 195) 1880; *Nbono v Manoxowendi* (6 EDC 62) 1891.

32 *Ngqobela v Sihele* (10 SC 346) 1893 356.

33 Van der Horst *Native Labour in South Africa* (1942) 57-58; Bundy *The Rise and Fall of a South African Peasantry* (1979) 232.

the labour market. Women contributed to the support of the household through their labour but they were also linked to the transfer of cattle, through lobolo, to a household when their labour was lost. The outlawing of lobolo could result in a household losing both the labour of a woman and the cattle that are received through lobolo. The result would be that the men of the household would enter the labour market in order to find alternative means of supporting the household. The courts would find it difficult to address the financial implications of lobolo without evidencing extreme bias towards the needs of colonists. But an argument about the immoral nature of lobolo would achieve the effect of forcing African males into the labour market whilst at the same time appearing to be impartial and concerned about morality.

There were judges who were, genuinely or otherwise, convinced of the inherent morality of lobolo but they were in the minority.³⁴ Yet the courts continued to state the problem of lobolo in terms of labour³⁵ regardless of whether they viewed the practice as moral or immoral. In the case of *Malgas v Gakavu* Barry JP held:

The evidence also shows that the eight head of cattle were given as "lobola" for the purpose of securing continuous cohabitation. This being so, the law assumes that they were given for an immoral consideration, which prevents their recovery. *Whether the "lobola" was also intended to place the wife in the position of a slave or a thing bought is not important. The evidence in this case goes far to support that view.* It may be that the evidence is incorrect, and "lobola" is given, as some contend, to guarantee the natives husband's proper treatment of his native wife, and that the legislature, therefore, might not unwisely recognise such native marriages under certain conditions as legal. This, however, is a matter of policy upon which we express no opinion, and with which we have nothing to do. Applying the ordinary principles of law, we must regard "lobola" as a consideration given for future immoral cohabitation, and, being, therefore, illegal, it cannot be

34 In the Transkei some courts did recognise lobolo: *Mpakanyiswa v Ntshangase* 1 NAC 17 (1897) and *Mlungisi v Dlayedwa* 1 NAC 44 (1901).

35 Buchanan J found that the widow's return to the plaintiff's kraal could not give rise to cause of action for return of cattle because there is no "heritable right to the wife", thus the defendant's case fails because "[t]he defendant virtually claims to have inherited the services of his brother's widow for the rest of her life", or to be compensated for the loss of her services by the restitution of her value ... this treats women as chattel and is "abhorrent to the spirit of our law and constitution" (*Segane v Gondole* (1 EDC Rep 195) 1880 210).

recovered in a court of law.³⁶ (My emphasis.)

In this instance we see the moral argument about the forced cohabitation running parallel with arguments about the wife being appropriated as a slave and thus forced labour. This dual argument led to the moral justification for the abolishment of lobolo triumphing. Ultimately the considerations as to the moral nature of lobolo were placed out of reach of the judiciary by the legislature.³⁷ Some members of the judiciary, such as Barry JP, were supportive of the notion that the legislature should handle the moral nature of lobolo because an assessment of lobolo in labour terms was a question of policy. At the same time he found a way not to sanction the practice of lobolo and label it as an "illegal" consideration for "immoral cohabitation".

The courts were inclined to accept that lobolo was primarily an institution that "enforced service" of women. Unwilling to outlaw lobolo as a labour practice the courts chose instead to outlaw the practice on the basis of moral considerations. The economic effect would be the same. Women could return to their father's homestead, under circumstances not traditionally sanctioned, without risking the return of lobolo. Such behaviour would disrupt the stability of the indigenous marriage concerned, possible future polygamous marriages the husband may consider, economic interdependence of both families, succession and the ability of the husband's homestead to maintain itself as an economic unit. What is more, such an act on the part of one person would unsettle these institutions in a general way. African households in precarious economic positions could be devastated by the loss of a wife and the cattle and the only option would be for the husband to seek work. The political nature of the courts' approach is evident. This is hardly surprising given the activity of judges in the legislative and administrative functions of the country. Legislative policy about labour was clear at the time and the attitudes of most colonists towards lobolo were also clear. On the other hand, although the courts had before them evidence as to the moral nature of lobolo, they studiously chose to ignore such evidence even in the face of the economic consequences to Africans.

36 *Malgas v Gakavu* (6 EDC 225) 1891 226.

37 See eg *Black Administration Act* 38 of 1927. The *Code of Native Law in Natal* GN 197 of 1878 also removed the elements of indigenous law that were regarded as immoral. Cf too Bennett *The Application of Customary Law in South Africa: The Conflict of Personal Laws* (1985) 80.

3 Polygyny

Africans were unmoved by the church's moral outrage at African marriages.³⁸

3.1 Attitudes about polygyny before the Commissions

Unlike the moral concerns of missionaries about polygyny the colonists giving evidence before the commissions showed an overriding concern for the effects of polygyny on the labour issue. This indicates that, for them, polygyny was less of a moral issue and more of an economic one.³⁹

Again concern was shown that polygyny led to increased stock theft for the purposes of lobolo.⁴⁰ There were also supposed concerns that polygyny (and lobolo) was hindering the civilization of Africans.⁴¹ But of greater concern was how polygyny was a hindrance to the availability of African labour. The Natal Native Commission Report concludes as follows:

The want of labour is mainly attributable to the following causes: - 1st. The permitted polygyny which prevails, and the forced labour of the female Kafirs; the latter institution enables the male Kafirs, young and old, to live in idleness. It does not appear probable to the Commissioners that the male Kafirs will ever of their own accord engage in regular industry to support themselves and families while the above practices exist.⁴²

The report clearly identifies polygyny as a hindrance to the availability of labour. Some of those giving evidence to the various commissions chose to attack polygyny owing to a supposed concern for the lot of the African wife. Some even went so far as to take it upon themselves to express the supposed views of these wives about polygyny. Potgieter, a member of the Natal Commission who also gave evidence before the Commission, was of the

38 Bennett (n 20) 170.

39 Mr Struben, a magistrate, was of the view that polygyny "may" be done away with but not "suddenly". He also did "not think that polygyny will diminish as the population increases so long as the advantages derived from a number of wives exist ... [I]n my opinion if polygyny was prohibited it would cause the emigration of a great number of the Kafirs" (*Natal Commission Vol 1* (n 10) 15).

40 *Cape Commission* (n 1) 75 (Quest 766) 77. Mostert *Frontiers: The Epic of South Africa's Creation and the Tragedy of the Xhosa People* (1992) 962.

41 "The great evils in these marriages, the great bars to the civilization of the Kafir population, are polygyny and female slavery": Natal Commission to Enquire into the Past and Present State of the Kafirs, *Report of the Commission Appointed to Enquire into the Past and Present State of the Kafirs in the District of Natal 1852* (1852) 37.

42 *Ibid* 44.

opinion that African women would prefer African men to have only one wife as "in that case the Kafir men would have to labour".⁴³ This argument is an attempt to infuse an economic argument with issues of morality. The perceived lack of labour activities by African men is portrayed as something morally disdainful in the eyes of African women, when in fact it was economically undesirable in the eyes of the colonists.

The issue was not primarily the lot of African women under polygyny but rather the effect of polygyny on access to cheap male African labour. Colonists characterized polygyny as affording African men the opportunity of idleness and laziness.⁴⁴ In doing so they may not have overlooked the fact that polygyny was one of the cementing factors in the African modes of substance production. Thus polygyny did not lead to laziness in African men, but rather provided economic security and stability for Africans in general, and men in particular, so that Africans were not inclined to enter into a labour market. Colonists blamed African farming successes on the proximity of Africans to the cities.⁴⁵ Polygyny was also cited as a cause of the success of Africans in the agricultural sector. Colonists sometimes linked these two reasons. They claimed Africans were able to out-perform whites because they were able to

43 "It is more probable that colonists would prefer Kafir men to have only one wife as in that case the Kafir men would have to labour." Mr Potgieter argued that the labour conditions are not easier for wives when there is more than one wife because "the result of the labour of each one goes to procure him more wives" (*Natal Commission* Vol 1 (n 10) 21). Paradoxically Potgieter also claims that additional wives do not reduce the labour of the wife because the only labour that is reduced is cooking (*Natal Commission* Vol 1 21-23). Potgieter's views give a clear indication that spurious and often contradictory arguments were being made under any head to support the ends that colonists pursued. How is it possible that having one wife can force the husband into labour but at the same time additional wives do not decrease the workload of wives, save for cooking? Either the lack of additional wives is so insignificant, from a labour point of view, that the husband can continue to stay outside of the labour market at the cost of perhaps taking on the extra duties of cooking. Or the lack of additional wives is so onerous that it does increase the workload of the single wife more than mere cooking so that the man is compelled to seek work. Clearly Potgieter hoped to argue that the removal of polygyny would at once compel the husband out to work while improving the lot of African women. This argument may have been more compelling had Potgieter not indicated that the number of wives does not affect the lot of women positively, and this being so the existence or otherwise of polygyny is neither here nor there.

44 See comments of Blaine in n 78 below and *Natal Commission* Vol 3 (n 13) 37.

45 Proximity to cities was particularly cited as a cause for the increase of polygyny. This argument may well have been an attempt to tap into sentiments that polygyny was unchristian and therefore must be prevented even if that meant removing Africans away from the cities. Benjamin Blaine objected to the establishment of locations close to town as it allows for the increase in polygyny: "The produce of the labour of the wife is carried to town by the wife, and the proceeds are invested in cattle for the purchase of other wives, as this is found to be the most productive investment of capital" (*Natal Commission* Vol 3 (n 13) 32). Ironically proximity to the cities is likely to have had the opposite effect as the nature of African modes of production which depended, *inter alia*, on polygyny would be disrupted by a labour economy based on currency. Mr Peppercorne, a magistrate saw the "great curse" of polygyny as stemming from protecting women in society where little guarantee of personal safety (*Natal Commission* Vol 3 (n 13) 63). Peppercorne saw polygyny as a "curse" because it forces a son to love his mother more than his father (*Natal Commission* Vol 3 (n 13) 64).

rely on the labour of many wives and they were able to make the fruit of this labour available to the public because they were close to the markets in the cities.⁴⁶ Again attempts were made to show that colonists only made these arguments out of concern for the lot of African wives. As a consequence of these arguments methods of ending polygyny were contemplated.⁴⁷

3 2 Judicial attitudes about polygyny

The courts recognized polygamous marriages for certain purposes but not as a general principle.⁴⁸ In the Transvaal some courts regarded polygyny as contrary to Christianity and general principles of civilization.⁴⁹ Others separated indigenous practices repugnant to humanity and justice such as infanticide from practices contrary to the Christians code of behaviour such as polygyny. The law could not proscribe the latter merely because it was unchristian.⁵⁰

In the case of *Kaba v Ntela*⁵¹ the appellant (the wife) argued that since her marriage is polygamous it is not legal and thus cannot sustain a claim for lobolo cattle or custody after she had left her husband. In his judgement De Villiers JP pointed out that polygamous marriage cases have held that in criminal matters wives in polygamous marriages could give evidence against their husbands. Thus, concluded the court, polygamous marriages cannot be recognized.⁵² The judge then confirmed the position of *Malgas v Gakavu*⁵³ and *Ngqobela v Sihele*.⁵⁴

Any promise, therefore, made in consideration of such future cohabitation cannot be enforced, and any money paid to either party or to third persons

46 Mr Pretorius regarded locations near town as an undue preference to Africans "possessing as they do an unlimited supply of labour by the plurality of wives" which would give them an advantage over whites (*Natal Commission* Vol 1 (n 10) 57).

47 Mr Potgieter stated that restricting inheritance to the children of one woman would not check polygyny (*Natal Commission* Vol 1 (n 10) 23): "Looking at the annual value of a Kafir woman's labour, do you think that an annual tax of 5s would be any effectual bar to a Kafir marrying a second wife?" (*Natal Commission* Vol 2 (n 10) 16) (Quest 58) put to Mr Van Staden. A similar question was put to Mr Macfarlane (*Natal Commission* Vol 3 (n 13) 52). The Transvaal never recognized customary marriages because it was "heathenistic and polygamous" but also did not let persons of colour to marry in terms of Roman-Dutch law, thus for some years there was no system for Africans to be legally married. See Sachs *Justice in South Africa* (1973) 82.

48 Bennett (n 20) 172. The system of recognising both indigenous and Western legal systems was not based on principle but expediency. See Sachs (n 47) 62.

49 S 2 of Law 4 of 1885; *Nanlana v Rex* 1907 TS 407; *R v Mboko* 1910 TPD 445, 447; *In re Kulsum Bibi* 1913 NPD 437, 440.

50 *Cape Commission* (n 1) 72.

51 *Kaba v Ntela* 1910 TPD 964.

52 *Kaba v Ntela* 1910 TPD 969.

53 *Malgas v Gakavu* (6 EDC 225) 1891.

54 *Ngqobela v Sihele* (10 SC 346) 1893.

cannot be recovered back by reason merely of the failure of such consideration. It follows that if, by native custom, "dowry" cattle is paid to the woman's father on condition that upon her refusing to cohabit with the man any longer the latter shall be entitled to claim the cattle from the father, the claim cannot be enforced by our Courts.⁵⁵

The claimant did not succeed in recovering the lobola. Bristowe J concurred, claiming that Law 4 of 1885 recognizes customs of Africans:

As long as they have not appeared to be inconsistent with the general principles of civilization recognised in the civilised world ... Now a native marriage is not consistent with the general principles of civilization, because of its polygamous nature ... Such a marriage is therefore void, and becomes from the narrow point of view of the law an illicit and, I am afraid I must add, an immoral cohabitation ... and at the same time ... the custom of Lobolo, the whole object of which is to secure the continuance of the immoral connection, is in accordance with those principles ... also immoral.⁵⁶

Again the judge concluded that lobolo cannot be recovered.⁵⁷ Since polygyny was, from a moral point of view, easier to attack than lobolo, the court launched its attack by first declaring polygyny as immoral. Then the court could reason that anything done in pursuance to a polygamous marriage (ie lobolo) was also immoral. In this way the courts were saved the task of having to say that lobolo was immoral per se and concluded that it was "indirectly" immoral. This need not have been the case. The courts were at liberty to find that polygamous marriages are invalid and therefore such cohabitations are immoral without also declaring lobolo immoral. There is no evidence that the object of lobolo was ever to secure immoral cohabitation. In fact, the exact opposite is true – lobolo is an incidence of indigenous marriage.⁵⁸ The absence of lobolo may, in some instances, be evidence of cohabitation outside of marriage. Not only would economic instability occur as a result of the refusal to recover lobolo, but the refusal to recognize polygamous marriages would also please colonists

55 *Kaba v Ntela* 1910 TPD 964 974.

56 *Kaba v Ntela* 1910 TPD 970-971.

57 See *Ngqobela v Sihle* (10 SC 346) 1893 971.

58 See *Church Marriage and the Women in Bophuthatswana: An Historical and Comparative Perspective* (unpublished LLD thesis Unisa) (1989) generally at chapter 3, 190-191. Church has shown that at least among the Tswana it does not affect the validity of the marriage. In some cases only the agreement to pay is required. See Schapera *A Handbook of Tswana law* (1970) and Prinsloo, Van Niekerk & Vorster "Perceptions of the law regarding, and attitudes towards *lobolo* in Mamelodi and Atteridgeville" 1998 *De Jure* 324 - 328.

who were well aware that polygamous marriages were an important factor in hindering the availability of African labour. Lastly it would also gratify the moral disdain many missionaries showed for polygyny.

4 Succession

So far as the natives are concerned their Law of Inheritance is very simple. They have no difficulties in connection with it.⁵⁹

4.1 Attitudes about succession before the Commissions

The Native Commissions showed much interest in African indigenous concepts of succession in spite of indications from the indigenous populations that the problems identified by colonists were not prevalent amongst Africans.⁶⁰ The Cape Native Affairs Commission of 1865 appeared unsettled by recent legislation supposedly sanctioning African law of succession. The legislation purportedly recognized the indigenous law of succession, but in fact allowed intestate property to be divided by African law and the governor was to state what African custom was.⁶¹ The Commission repeatedly requested of persons presenting evidence to present their views on the recent legislation. In his response one of the few Africans giving evidence indicates that succession is linked, in a material way, to certain homesteads, rather than individual persons. This is a feature of indigenous succession that added to the stability of economic resources.⁶² The courts found it difficult to come to terms with a conception of succession that did not devolve property on particular individuals.

4.2 Judicial attitudes about succession

The courts regularly avoided the complexities of the indigenous law of succession by giving remedies in individual cases or by simply applying the

59 Rev Soga *Cape Commission* (n 1) 150 (Quest 1586).

60 Rev Soga's initial response was that "[t]here are no disputes about inheritance ..." and when pressed he reasserted: "So far as the natives are concerned their Law of Inheritance is very simple. They have no difficulties in connection with it." And when the questioning continued unabated: "No, I don't think the Law of Inheritance should be interfered with, because there is no difficulty connected with it" (*Cape Commission* (n 1) 149-151 (Quest 1581 1586 1596)).

61 *Native Succession Act* 18 of 1864. See *Cape Commission* (n 1) 48.

62 *Cape Commission* (n 1) 58 (Quest 577). Bennett (n 20 393) argues that the notion of ownership as a nexus between person and thing is uniquely Western. See Taylor "Where there is a way there is a will: How traditional African homesteads reflect the legal consequences of succession" in Falola & Salm *Urbanization and African Cultures* (2005) 417-432.

common law⁶³ – as was the case with lobolo.⁶⁴ But, from an early stage, the indigenous law of succession was regulated by legislation. Courts were thus relatively constrained in what they could decide.⁶⁵

Originally, in indigenous law, estates generally vested in agnatic groups, and not just in specific individuals.⁶⁶ Upon the death of a member of the agnatic group, the survivors share (as a group) the rights in the property.⁶⁷ Western law, on the other hand, is premised on individual ownership.⁶⁸ The word "inherit" usually implies the personal ownership of property. In the indigenous context "inherit" can take on two meanings: firstly, the ability to be the person who administers the property on behalf of the agnatic group; and secondly, the ability of a person to be a member of an agnatic group and to be provided for out of the property to which the agnatic group has rights. The courts have failed to investigate the possibility of these two concepts in their decisions. This was in spite of the fact that some of the early legislation indicated devolution would take place according to "houses".⁶⁹ Instead the courts assumed that the term "inherit" was to be understood in a Western paradigm of individual property ownership. Therefore they are able to conclude that individual men could "inherit" or not "inherit", rather than focusing on where the property should be, so that homestead members can participate in the agnatic rights to property and determine who can "administer" the agnatic property.

The effect of attributing property to individuals would add to the breakdown of the homestead. It would also encourage Africans to view land, goods and (most importantly) labour as commodities. Africans granted individual ownership over property would be more likely to endorse the practice and to pursue further individual ownership.

There seems to have been little concern for African women when it came to succession, even though moral concerns about how women were treated were constantly raised in matters involving polygyny and lobolo. This may have been

63 *Ndamase v Sokwilibana* 1 NAC 230 (1909). Bennett (n 20) 395.

64 The common law was used to say that lobolo was immoral, or to say that polygyny was unlawful in terms of common law: thus anything pursuant to a polygamous relationship, like lobolo, can not be recognised.

65 Seymour *Native Law in South Africa* 2nd ed (1960) 202; s 8 of *Proclamation 142* of 1910 of Transkei; *Cape Native Succession Acts* 10 and 18 of 1864; s 11 of the *Native Marriages Act* 46 of 1887 of Natal; *Proclamation 140* of 1885 of Transvaal.

66 Seymour (n 65) 195.

67 Myburgh *Papers on Indigenous Law in Southern Africa* (1985) 94-95.

68 Hohfeld *Fundamental Legal Conceptions, as Applied in Judicial Reasoning* (1919) 76; Gluckman *Ideas and Procedures in African Customary Law* (1969) 94-149.

69 S 8 of *Proclamation 142* of 1910

a consequence of prevailing Western norms of the time. In *Ludidi v Msikelwa*⁷⁰ Whitfield Esq, in a dissenting opinion, stated that the position of Roman-Dutch law in South Africa was that illegitimate children were regarded as having no father. He also stated that the matriarchal system of succession generally practised by indigenous peoples in South Africa was an "abhorrent custom" and called for the common law of the then Union to prevail. This approach of Whitfield followed the principle that it is contrary to public policy (namely Western public policy at the time) that an "illegitimate" child should take the place of a legitimate one.

Ironically, since *Ludidi v Msikelwa* the values of Western society have changed and are more in line with the original premise of indigenous law. In the past, South African Roman-Dutch law accepted the exclusion of "illegitimate" children from inheriting⁷¹ from the estate of their father. "Illegitimate" children could inherit from their mother.⁷² Now legislation provides that "illegitimate" children are entitled to inherit from both parents.⁷³

The opinion of Whitfield indicates that Western perceptions of African social and legal practices were influenced by the values that Westerners prize. The result is that "[g]enerally, the courts overruled African cultural expectations about children and adopted Western social mores".⁷⁴ They did this using moral arguments particular to prevailing Western culture of the time.

70 *Ludidi v Msikelwa* 5 NAC (1926) 28 at 30.

71 Until the enactment of the *Intestate Succession Act* 81 of 1987, Roman-Dutch law in South Africa did not permit an illegitimate child to be an intestate heir of her/his father's estate. Nor could the child be an intestate heir of her/his mother's husband's estate. The child could inherit only from the mother's estate. See De Waal, Schoeman & Wiechers *Law of Succession: Students' Handbook* (1993) 23.

72 Whitfield's comment that the practice of the Fingo is "abhorrent" seems out of place now that Western law has changed its approach to illegitimate children. It may be that today public policy would regard the Roman-Dutch law principle that denied illegitimate and incestuous children the rights of inheritance as "abhorrent". Other examples of such a situation arise out of the shift of attitudes towards adultery. See Adams "Individualism, moral autonomy and the language of human rights" 1997 *SAJHR* 511 and *Green v Fitzgerald* 1914 AD 88 for a discussion of why adulterous children should be allowed to inherit from their mothers. In the Western context parents are understood as blood parents or adoptive parents.

73 S 2 of the *Intestate Succession Act* 81 of 1987. Illegitimate children suffer no legal disadvantage as a result of their status. Illegitimate children may still not inherit from the estate of their mother's husband, but may now inherit (as do legitimate children) from the estate of their fathers. They also continue to inherit from the estate of their mothers.

74 Bekker & Maithufi "The dichotomy between 'official and customary law' and 'non-official and customary law' " 1992 *Tydskrif vir Regswetenskap* 50. See also Bennett "The equality clause and customary law" 1994 *SAJHR* 122-130.

4 3 European situation

This African situation is easily contrasted with the position governing the white population in South Africa. Roman-Dutch law provides for property and land to be divided equally among heirs.⁷⁵ This type of succession increased the need for land by whites and added to pressures of white farmers who were compelled to produce agricultural goods off smaller properties than their forbearers. Heirs unable to survive off these small holdings were compelled to seek other ways to make a living. Western marriage focusing on monogamy and individual relationships did not always stress the creation of economic interdependence. These factors placed colonists in a position to want to induce African labour and encourage a currency-driven economy.

5 Labour

The white man...
 I loathe his work
 'Tis only fit for slaves
 Who fear the death
 Anon 1906⁷⁶

5 1 Attitudes about labour

The link between the concerns of colonists about indigenous institutions of lobolo, polygyny and succession all had in common the effect of these institutions on the availability of cheap African labour. Colonists coated their concern about labour availability in concern for the lot of African women,⁷⁷ even to the extent that their arguments were contradictory and bordered on the

75 This stems as far back to Holland and the *Nieuwe Schependomserrecht* (a political ordinance of 1580 April 1). The *Intestate Succession Act* 81 of 1987 s 1 (1)(b) still regulates the matter in South Africa. The point has been made that the Roman-Dutch common law principles of succession were "discarded when they appeared to obstruct economically rational use of land" and when it led to poor whites struggling to keep a hold on the land in the face of capitalisation of land. See Chanock *The Making of South African Legal Culture 1902-1936* (2001) 184.

76 Anon "Amagunyana's Soliloquy" in Couzens & Patel *The Return of the Amazi Bird: Black South African Poetry 1891-1981* (1982) 38.

77 "The wife of a Kafir becomes to a great extent his property, and is compelled by custom and force to labour for him ... The labour of the wife is severe and continuous, thus enabling the male Kafir to spend his life in indolent sensuality" (*Natal Commission Report* (n 41) 37). Mr Potgieter explained to the Commission how he felt that the African male lives off the labour of his wives who are purchased partly as wives and partly as labourers and so he regarded the African wife to be a slave (*Natal Commission Vol 1* (n 10) 20).

absurd.⁷⁸ Yet by their own admission colonists were not in a favourable position to assess the lot of African women.⁷⁹ Nevertheless they were confident enough to equate their position to that of slaves⁸⁰ even though there were indications, even at the time, that comparatively-speaking women were not worse off than their Western counterparts.⁸¹

In reality it was not the suffering of African women that drove most colonists to argue against African institutions such as polygyny and lobolo. Concerns were foremost economic as Blaine B neatly stated before the Natal Commission:

Because they are able, through the unpaid labour of their many wives, the paucity of their wants, their immunity from rent, and other expenses, and their proximity to towns, to drive out the market of the civilized European, so far as the common productions of the soil are concerned.⁸²

This statement makes clear that polygyny, lobolo and succession were economic rather than social concerns amongst colonists.⁸³ Judicial attitudes were informed by these concerns and in one instance Sir Sidney Shippard, former Cape judge, later leading administrator, expressed his feelings about

78 Mr Macfarlane stated that locations near towns cause hardship for African wives as they are pressured to produce articles for sale (*Natal Commission* Vol 3 (n 13) 32-37-50). Mr Toohey: "The difficulty of obtaining native labour arises from the faculty of obtaining a livelihood enjoyed by all classes of the natives independent of the whites, – the mothers of the young men naturally being willing to support them in accustomed idleness - the very debasing and immoral customs prevalent in the native villages having by far too great an attraction for the vicious and idle, the majority of the young people, to allow them to seek service." Benjamin Blaine believed that scarcity of native labour was due to "natural indolence and aversion" of Africans and the opportunity of "natives" to "satisfy all their wants by the labour of their wives" (*Natal Commission* Vol 3 (n 13) 31-37). Rhodes wanted to move Africans from "sloth and laziness" and stimulate them to seek out the "dignity of labour". Bundy "Mr. Rhodes and the poisoned goods: Popular opposition to the Glen Grey Council System, 1894-1906" in Bundy & Beinart *Hidden Struggles in Rural South Africa* (1987) 141. See too Bundy (n 33); Sachs (n 47) 108 and *Readers Digest "Illustrated History of South Africa: The Real Story"* (1988) 152. For psychological reasons for whites wanting to believe this about Africans, see De Kiewiet *A Short History of South Africa: Social and Economic* (1940).

79 Mr Potgieter: "I cannot say whether the Kafir women feel the hardship of their condition." But he was willing to venture an opinion that an African woman would prefer one wife as "in that case the Kafir men would have to labour" (*Natal Commission* Vol 1 (n 10) 21).

80 Mr Van Staden understood women to be purchased as slaves (*Natal Commission* Vol 2 (n 10) 7 (Quest 38)). "The great evils in these marriages, the great bars to the civilization of the Kafir population, are polygyny and female slavery" (*Natal Commission Report* (n 41) 37).

81 Bundy (n 33). Mr Peppercorne was of the view that African women did not suffer under labour that was more onerous than their counterparts did in England. In addition they divided their labour and shared the surplus. He felt that men did not derive benefit from the labour of their wives (*Natal Commission* Vol 3 (n 13) 64-65).

82 *Natal Commission* Vol 3 (n 13) 37.

83 Bundy "The response of African peasants in the Cape to economic changes, 1870-1910: A study in growth and decay" in *The Societies of Southern Africa in the 19th and 20th Centuries III 1971-1972*, 24-37. See too Bundy "Mr. Rhodes" (n 78) 33.

Africans: "They are people whom we have to teach ... the dignity of labour."⁸⁴

6 Conclusion

Dance to the skin drum
 Oh, Africa's son.
 The ancient heartbeat
 in nakedness greet.

During the 1850s the British governor, George Grey, was intent on destroying the political and moral authority of the traditional Xhosa leaders who had been the spearhead of anti-colonialist resistance for the previous seventy years. One means of achieving this was to sponsor the Christian converts as an alternative centre of moral authority.⁸⁵ The courts also drove much of their action with moral argument. As with the Xhosa uprising the setting-up of moral claims were often in pursuance, or hiding, of other objectives. Moral and economic arguments in the colonial era were loud and confused and office bearers were bombarded with views from many quarters. On the matter of "native affairs" missionaries, farmers, magistrates, miners and other officials were eager to pass comment in an attempt to influence policy makers. The small voice of "natives" that were permitted to speak were sidelined. It appears that the most powerful arguments were the economic ones. In particular, the argument was that the post-slavery economy could not be maintained – let alone make the leap from an agricultural economy to an industrial mine economy without cheap African labour.⁸⁶ As a consequence the legislature implemented a number of methods to make that labour available.

The role of the courts in assisting in the process of making this labour available has not been made explicit outside of the context of labour legislation. This may have been due to the fact that judgments did not address the labour matter directly, but were rather complicit in inducing labour by attacking indigenous institutions that provided economic security and stability. Courts forced Africans off the land and into the labour market – often using self-serving moral viewpoints based on certain perceptions of African institutions in

84 Sachs (n 47) 107.

85 Jordan *Zemk'inkomo magwalandini: The life and times of W.B. Rubusana (1858-1936)* found at [<http://www.anc.org.za/ancdocs/history/people/rubusana.html>] on (21 June 2005).

86 Sachs (n 47) 39.

spite of evidence to the contrary. It is not possible to always separate the moral and economic arguments, and in many cases they ran side by side. This confusion was exacerbated by the fact that judges did not always clearly see the separation between the objectives of the legislature, the executive and the judiciary. Judges often performed two or more of these functions at the turn of the 19th century.⁸⁷ It is also not always possible to identify which moral concerns were heartfelt, which were sincere and which were dishonest or merely self-serving. Courts argued that their decisions were not political, but ultimately moral arguments are political. The economic consequences of court decisions also indicated the political alignment of judicial decisions with economic and political policies of the legislature and colonists. The attempts by the colonial courts to avoid directly addressing the true nature of indigenous institutions, such as lobolo, polygyny and succession, cast doubt on their political impartiality. The effect was that the legislature and the courts pressed Africans into labour by threatening the economic security and stability of African homesteads. The legislature gave mainly economic reasons for its actions and the courts offered moral explanations. In both cases the politics is plain.

7 Postscript

Moral and economic interests of the time were clearly entwined. Attitudes towards dancing and nakedness of Africans can illustrate the convergence of these interests. Both practices were criticised as being unchristian and uncivilised. The question may be raised about the possible economic implications of outlawing nakedness and dancing. The voices of the 19th century may provide some answers.

The Reverend Davis argued that it was desirable that African dances be suppressed on the grounds of public morality: "They dance naked, and that is fineable by colonial law."⁸⁸ This moral argument was supplemented with economic arguments. Hudson H, a civil commissioner, recounts that when the "servants disappeared" at night and danced all night they were too sleepy to work the next day. So he warned the workers not to leave their own farms to join in the dances and he also ordered the end to the dances. One night he

87 See Werbner "Law and innovation in non-Western societies" in Nader *Law in Culture and Society* (1969) 258.

88 *Cape Commission* (n 1) 23.

found the workers dancing so he fined them for "breaching the peace".⁸⁹ Clothing was also not simply a moral issue. "All Kafirs should be ordered to go decently clothed. This measure would at once tend to increase the number of labourers, because many would be obliged to work to procure the means of buying clothing; it would also add to the general revenue of the colony through Customs duties."⁹⁰

It was a warm evening on the farm. The white farmer's fields had been tilled. In the heat of the day the workers perspired and cursed as they turned the rich red soil. The sun drank the moisture from their bodies and the newly exposed soil. The dry sand rose up choking them as they worked. Now as dusk approached the farm labourers could hear the cool gusts of wind approaching. It would bring relief to the lingering heat. Instigated by the wind, puffs of dust danced over the red furrows of the ploughed field. "Tonight there will be no rain", the old man informed the dancers who had gathered at the kraal. Normally such news would be greeted unhappily, but tonight was for dancing and not for raining. Some had come from neighbouring farms to join in. Bodies were smeared with the red soil and drums were tested. Soon the pitter-patter of drums had risen to thundering thumps rhythmically calling everyone to join in. Clapping hands, stomping feet, shouts and calls until there was a storm of joyous sound. This time the perspiration was not cursed. When the clouds of dust rose up beckoned by the stomping feet it did not choke but danced instead with the bodies covered in red. The drums called and responded. Soon the toil of the day had been blown away by the gusts of wind caused by bodies dancing past one another in ecstasy. Suddenly a loud crash sent dancers to the floor, drummers took cover and the drums were overturned, neglected.

The next day at church the farmer recounted the story to the minister:

"So I told them, minister, that it is not Christian to be dancing naked like that all covered in mud."

"Yes", replied the minister, "I do not know what is worse: the nakedness or the dancing. God would be displeased at either."

"I know, minister, that is what I told them."

89 *Cape Commission* (n 1) 51.

90 *Natal Commission Report* (n 41) 47.

"But both at the same time, it is a double sin and a shame before God."

"That is why I had them up before the magistrate. I told him straight, I have lost too many animals to this dancing. Just last week my wife woke me from my afternoon nap to show me how that lazy native had fallen asleep on the job again – it tires them out so that they can not keep proper watch you know."

"What did the magistrate do?"

"He fined them, minister, and also for the clothes too, minister. He told them God did not take kindly to people being so naked."

"I told them afterwards they were lucky my shot did not hit any of them, and if they wanted to avoid trouble again they should go down to the store immediately and buy clothes. I will take them tomorrow."

"It would please God for them to cover their nakedness and focus on the redeeming nature of work."

"Yes minister like your brother, he built that store up from nothing –."