

# DEMOCRACY



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TRADITIONS OF POWER AND THE POWER OF TRADITION:  
THE STATE AND AFRICAN CUSTOMARY MARRIAGE  
IN SOUTH AFRICA

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AFRICANA

## Traditions of Power and the Power of Tradition: The State and African Customary Marriage in South Africa<sup>1</sup>.

By the early 1960s, the Nationalist government in South Africa had accumulated formidable powers. With a commanding battery of laws on the statute books, the principal opposition movements smashed, and solid electoral support, the National Party had initiated a newly aggressive onslaught on the lives of African people. Yet in 1962, the Department of Bantu Administration and Development balked at the prospect of imposing a national register of African 'customary unions'. The absence of such a register created gaping holes in the state's capacities for urban control, at a time when the state had expressly committed itself to more ruthless and systematically effective urban policies. Yet, Minister de Wet Nel, insisting on the need to 'act very carefully and with great circumspection'<sup>2</sup>, decided not to force the issue. Why was a government, confidently poised to embark on the most far-reaching programme of racial social engineering yet inflicted on the country, so wary and diffident over a mere register for African customary marriages?

Equally intriguing is the long history of the state's inaction over this issue. Since the late nineteenth century, repeated proposals were tabled to introduce legislation which would compel Africans marrying by custom to register their union officially. Yet, except in Natal, the proposed legislation never materialised. Why has there been such a long-standing history of non-intervention throughout a succession of regimes with prolific records of social, political and economic interventionism?


In addressing itself to these questions, this paper begins to disaggregate particular forms and styles of state power. One of the historiographical legacies of instrumentalist perspectives on the South African state is a tendency to treat the nature of power as a given, as if its mechanisms were either self-evident or uninteresting. Much more attention has been focused on explaining why power has been exercised, by identifying those interests which state power has served. A critique of instrumentalism therefore goes hand in hand with a closer examination of what forms power takes (at particular moments) and how it is exercised. Answers to these questions devolve partly on more detailed and systematic analyses of the internal institutional workings of the state; they also require closer discussion of the state's own discourses of power, and the extent to which these self-perceptions are realised in practice. A full examination of such issues is beyond the scope of a single paper. This paper tackles them through an exploration

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<sup>1</sup>. Thanks to Belinda Bozzoli, Deborah James, Karen Shapiro, Charles van Onselen, and especially Glenn Adler, for interesting comments and references.

<sup>2</sup>. *House of Assembly Debates (HAD)*, 5/2/63, col. 2040, vol. 2.

of some of the imprints of gender in state power.

As several feminist scholars have pointed out, most of the political sociology of the 

South African state is resoundingly silent on the political manifestations and effects of gender. 'Gender is clearly a relation of power, of domination, and of rule. Yet gender does not feature in the race-class debate, even in its more recent incarnations, and it is certainly far from conventional to refer to the masculinist state, the patriarchal state'<sup>3</sup>. But what exactly is a 'patriarchal state'? There is a danger that an insistence on the gendered nature of the state slips into yet another instrumentalism, treating the political process as a rather simple alliance between men dedicated to preserving their authority over women, and the state as their tool.

Instrumentalist understandings of the state tend to concentrate on what the state does, rather than what it *omits or fails to do*. Perhaps this partly explains the view that 'from the late nineteenth century the state moved in an increasingly decisive way to shore up the patriarchal authority of chiefs and homestead heads'<sup>4</sup>. Studies of the state's involvements in constructing 'customary law' have argued likewise, that 'African patriarchal gender values converged with colonial administrators' and judges' own patriarchal views and their administrative interests in controlling African women and strengthening the capacity of chiefs to govern locally'<sup>5</sup>.

This paper argues that the politics of gender has indeed had profound effects on the workings of the state, but in more complex and contradictory ways than usually suggested. A commitment to patriarchal values, 'traditions' and forms of control has certainly been an important facet of state practice in South Africa. Deeply bound up with crassly material efforts to control the process of African urbanisation, these patriarchal principles were also accepted by state actors as one of the fundamental moral imperatives of state power. But these patriarchal understandings of the state's role were mediated by other styles of governance, with uneven effects. The paper also shows that the relationships between state officials and various constituencies of men were far from uniform; nor did they necessarily share common constructions of patriarchy. Debates over the registration of customary marriage reveal that there were important points at which the state was paralysed by indecision, borne of different representations of male power competing for authority within the state.

The paper begins by recounting the history of the debates within South Africa over the registration of customary unions. This narrative underscores the paradox that for over 80 years, various state actors repeatedly acknowledged the problems caused by the absence of a register of customary unions and initiated efforts to create one; but except in Natal, all these endeavours were still-born. The second part of the paper reflects on

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<sup>3</sup> L. Manicom, 'Ruling Relations: Rethinking State and Gender in South African History', *JAH*, 1994, vol. , p. 444.

<sup>4</sup> C. Walker, *Women and Gender in Southern Africa* (Cape Town, 1990) p. 18.

<sup>5</sup> L. Manicom, *op cit*, p. 451.

the significance of this paradox, suggesting a partial explanation in the contradictory nexus between different forms of state power - one, informed by the state's construction of African patriarchy and operative principally in urban areas, and the other, rooted in another version of patriarchy and underpinning the processes of administration in the reserves.

## I

The call for the registration of African customary marriages was first heard prior to Union, as an issue concerning the governance of rural African societies. It seems that the colonial administration in Natal, unlike its counterparts elsewhere in the country, introduced a compulsory register for customary marriages with relatively little controversy or delay. The Instructions to Native Administrators in Natal, No. 1 of 1869, decreed that 'every marriage between native and native...shall be registered in the office of the Resident Magistrate'<sup>6</sup>. Customary marriages were registered under the following conditions: an official witness approved by the Magistrate should attend the celebration of the marriage, and ask publicly at the ceremony whether the bride had freely consented to the marriage; an official record would be made of the amount of lobola paid, the colonial state having stipulated a ceiling on the amount which could be paid under any circumstances. A registration fee was also payable to the magistrate. As Sir Theophilus Shepstone, author of the regulations, explained, the primary purpose of the registration provision was to 'regulate marriages'<sup>7</sup>, administratively and morally. Administratively, an official register of marriage was seen as a means of assisting the colonial state in adjudicating marital, inheritance and property disputes between African families arising from the payment of lobola. Morally, the registration regulations represented Shepstone's efforts to curb what he deemed the tendency within Zulu society to 'treat the women as chattel'<sup>8</sup>.

Shepstone's position was a familiar one amongst colonial officials (particularly magistrates) and missionaries, who maintained that the original purpose of the institution of lobola had become 'distorted' over time. Intended as a means of protecting women, they claimed, lobola had degenerated into a licence for various autocratic offences against women. The 'custom of twala' - typically, abduction as a means of forcing an unwilling woman into marriage - was considered particularly offensive. The system of registration, which required the public consent of the bride, was proffered as a moral antidote to such 'evils'<sup>9</sup>.

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6. *Report and Proceedings...of the Government Commission on Native Laws*, G.A. - '83, para. 570, p. 32.

<sup>7</sup>. *ibid*, para 571, p. 33.

<sup>8</sup>. *ibid*, para. 577, p. 34.

<sup>9</sup>. H. C. Lugg, 'The Practice of Lobola in Natal', *African Studies*, 4 (1), 1945; H. Britten, 'Twala: The Need for Registration of Customary Unions', *Bantu Studies*, 4(1), 1930.

For Shepstone, then, the creation of an official register of customary marriages was consistent with the principles of indirect rule. As he explained in the Royal Instructions of 8 March 1848, this system was predicated on Shepstone's preparedness to accept 'any law or custom or usage prevailing among the inhabitants...except so far as the same may be repugnant to the general principles of humanity recognized throughout the whole civilized world'<sup>10</sup>. Moreover, legislative intervention in the area of marriage was intended to tread a fine line between establishing control and preserving popular consent. Having calculated that the registration regulations would not alienate the Zulu chiefs in serious ways, he sought to use the registration system as a means of 'gradually' shaping Zulu opinion into a rejection of what 'civilized' Christian people regarded as the evil excesses of customary ways.

Much the same set of values and strategic considerations were invoked during each successive attempt to introduce a register for customary unions outside of Natal throughout the next 70-80 years - but with different outcomes.

The prospect of a comparable compulsory register in the Cape was investigated by the Native Laws and Customs Commission, in 1883. The Commissioners grappled at length with the tensions between upholding 'civilised' 'Christian' values, respecting local traditions, and avoiding intervening in African societies in ways which would incite resistance. The Commission finally concluded that it could not recommend the system of registration established in Natal, mainly because it 'would be looked upon as an attempt to interfere with their [natives'] social life and habits, and would be viewed with suspicion, as all innovations are by natives'<sup>11</sup>. Reiterating their own Christian convictions<sup>12</sup>, and the hope that such values would 'gradually' take root within 'native' society, the Commissioners nevertheless felt that 'it would be unwise to insist upon registration as an essential to marriage until the majority of the natives recognise the benefit which such registration will be to themselves'<sup>13</sup>. The furthest the Commissioners would go was to recommend the introduction of a voluntary system of registration<sup>14</sup>, in the hope that this would hasten the influence of Christian standards. But even this recommendation was not acted upon by the Cape's Governor.

In 1903 the Transkeian General Council unanimously adopted a motion calling for the registration of customary marriages throughout the Transkeian Territories. However, 'to the great surprise of those who for some years had endeavoured to obtain the passage of the motion through the Council, the subsequent magisterial conference declined to give its support, the reason advanced being that it would be difficult to get the Natives

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<sup>10</sup>. H. Simons, 'The Status of Customary Unions', *Acta Juridica*, 1961, p. 18.

<sup>11</sup>. *Report and Proceedings...of the Government Commission on Native Laws and Custom*, p. 35, para 86.

<sup>12</sup>. *ibid.* p. 34, para 84.

<sup>13</sup>. *ibid.* p. 36, para 91

<sup>14</sup>. *ibid.* p. 37 para 92

to agree and that registration without their whole-hearted support would be a failure'<sup>15</sup>.

The registration issue next surfaced in the context of urban politics, largely in response to the corrosive effects of urbanisation on 'healthy' family life amongst Africans. Since early in the century, various state committees and commissions had documented appalling living conditions with which most Africans in the urban areas had to contend. Dire poverty, overcrowding, crime, disease, and 'juvenile delinquency' were common cause. For state officials concerned with 'urban native administration', one of the most worrying features of this scenario was the destabilisation of marriage.

They identified the erosion of African 'traditions' of marriage principally in two ways. Of primary concern was the 'drift of undesired and undesirable females to the urban centres', fleeing the 'salutory control of tribal sanctions'<sup>16</sup>. Municipal censuses conducted during the 1920s in Johannesburg, for example, showed an overwhelming preponderance of single African men over single women<sup>17</sup>. But the state portrayed the urban malaise as principally a problem of 'uncontrolled girls and women'. According to the Department of Native Affairs, 'the unattached Native women...[were] at the root of the unsatisfactory conditions in regard to native settlement in large towns'<sup>18</sup>. Native Commissioners and municipal officials concurred: 'the crux of the situation was really the female, who was usually in industrial areas for unlawful purposes, and it was they and not the males who were crowding out accommodation'<sup>19</sup>.

For state functionaries, the loosening hold of fathers and husbands over women in the cities was tantamount to moral laxity. To be single was to be immoral. Single women were 'mere adventuresses', who had cut themselves adrift from the rigours of 'customary life' for the 'Fleishpots of Egypt'<sup>20</sup>. They had journeyed to the cities 'for the purpose of illicit liquor-dealing and prostitution'<sup>21</sup>. Their immorality, moreover, was contagious, both literally and figuratively. In terms of state discourses, 'unattached women...had

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<sup>15</sup> H. Britten, 'Tswala: The Need for the Registration of Customary Unions', *Bantu Studies*, 4 (1), 1930, p. 274.

<sup>16</sup> SAB NTS 74/366 9185, 'Memorandum on the Emancipation of Native Females', n.d.

<sup>17</sup> GNLB 402 56/11, Medical Officer, Johannesburg, to Director of Native Labour, Johannesburg, re 'Proclamation under the Natives (Urban Areas) Act', 19/6/29; SGJ 114 A1620, 'Census of Natives living on Portion 2, Ferreiras' and 'Census of Natives living on Portion 3, Ferreiras', 18/6/28.

<sup>18</sup> SAB NTS 57/333 7715, Under Secretary of Native Affairs to Secretary for Justice, re 'Control of Derelict Native women', 27/6/21.

<sup>19</sup> CPSA, AD 1433/AC 2.1, Minutes of conference of Native Affairs Officials, 5 and 11 September 1924

<sup>20</sup> NTS 74/366 9185, 'Memorandum on the Emancipation of Native Females', n.d., p. 3.

<sup>21</sup> NTS 57/333 7715, Native Affairs Commissioner, Benoni, to Director of Native Labour, 4/1/39 re 'Allegedly Undesirable Conditions ...in the Witwatersrand'

become reservoirs of infection<sup>22</sup>, who 'roamed from pillar to post...in loose manner'<sup>23</sup>, luring men overcome by their 'natural desire for sexual intercourse'<sup>24</sup>, into unhealthy liaisons.

The second, and related, issue of concern was the prevalence of 'loose' or 'informal' unions: African men and women living together without the formality or 'discipline' of marriage. By the 1930s, many African community leaders concurred with state officials that 'the decline in the institution of marriage was...a grave and growing problem among urban Natives'<sup>25</sup>. They agreed too, that the problem was often a response to township housing regulations. Many - if not most - municipalities insisted that family housing be restricted to married couples and their children only. Couples married in court or in church had to produce a marriage certificate as proof; but couples married 'by custom' simply had to swear an affidavit declaring their union, because there was no official register of customary unions. Administrators were well aware that thousands of 'undesirable' women simply 'joined forces with men so as to enable them to secure a house in one of the locations'<sup>26</sup>. In Kroonstad, for example, where the municipality strictly enforced a policy of barring women from the location unless they could produce proof of marriage to a man living there, the Magistrate 'ascertained that 75% of African 'marriages' [were] the direct result of this policy'<sup>27</sup>.

The loophole created by the absence of a register for customary unions was a significant one: it made a nonsense of the principle of excluding unmarried women from municipal housing, which lay at the heart of the state's strategy for controlling African urbanisation. Moreover, the Natives (Urban Areas) Act of 1923 imposed upon municipalities the economic and political responsibility of supplying housing to all married couples. So the opportunity for African women to fabricate a marriage also worsened the already onerous burden of dealing with severe accommodation shortages in the cities.

By the late 1930s, these issues featured very prominently on the Department of Native Affairs' agenda for discussion with urban administrators. The question of African

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<sup>22</sup> NTS, 103/315 6761, Memo on 'Female Natives in Urban Areas' by T. Chester, n.d.

<sup>23</sup> NTS 103/315 6761 part 1, Natal Municipal Association, Greytown, to Chief NAC, Pietermaritzburg, 10/1/34, re 'Native Beer canteens'.

<sup>24</sup> NTS 13/366 9167, Pietersburg Native Local Council, Memorandum on 'Native Marriage Laws', 1940; quoting the (white) Chairman of a meeting called to compile the memorandum.

<sup>25</sup> Star, 3/11/37, 'Moral Decline Deplored'. See also Wits Library, CPSA, A410 F1.3.5, Johannesburg Joint Council, Memorandum on 'Native Juvenile Delinquency', n.d. (but text suggests it was written in the mid 1930s)

<sup>26</sup> NTS 57/333 7715, Native Affairs Commissioner, Jhb to Director of Native Labour, Jhb, 30/11/38. See also NTS 166/333 7725, Manager of Non-European Affairs, Jhb, to SNA, 19/8/37; and Office of Station Commander, Vereeniging, to Additional Native Commissioner, Vereeniging, 22/9/37; Native Commissioner, Germiston, to Director of Native Labour, Johannesburg, 11/9/37.

<sup>27</sup> NTS 95/366 Magistrate, Kroonstad to Chief Native Commissioner, Northern Areas, 20/2/39, re 'Native Marriages by Civil Law'



marriage was embedded within a broader anxiety about the need to stem further urban deterioration through more decisive interventions from the central state. One of the Native Affairs Commissioners, for example, noting that 'conditions have worsened gravely in the urban areas since...1932', declared that 'what is lacking is sufficient administrative firmness and promptness of decision on part of the state'<sup>28</sup>. This included the issue of marriage. The principal problem was one of deficiencies in state control; but moral anxieties were also salient. In the aftermath of the Carnegie Commission's report on the 'poor white problem', similar concerns about the welfare of Africans were resonating more forcefully through the Department of Native Affairs and the polity at large.

In 1938, a range of white and African community leaders, welfare organisations, church groups and state officials, came together for an influential conference on Juvenile Delinquency, convened by the Johannesburg municipality. The overwhelming consensus at this conference was that juvenile delinquency was rooted in 'the problem of unstable homes', associated with the 'great number of men and women who live in the African urban locations as husband and wife without any formal marital union'<sup>29</sup>. The conference recommended that the Department of Native Affairs create a commission of enquiry into 'marital conditions among Africans in urban areas', and also take the necessary steps to ensure that 'informal unions be discountenanced by municipal authorities, and the parties urged to have their unions regularised'<sup>30</sup>. Central to this endeavour was a register for customary unions. 'The fact that outside of Natal or Zululand there is no system of registering marriage by African custom makes it possible for man and woman to claim marriage in this way without proof being possible under urban conditions'<sup>31</sup>.

The Department of Native Affairs then faced mounting pressure to act on the issue. The Native Affairs Commission strongly endorsed the findings of the delinquency conference:

*The Commission fully supports the recommendation of the Conference for the discouragement of informal marital unions and the appointment of a committee of enquiry to investigate marital conditions amongst Natives in Urban areas...the Commission feels that this is one of the saddest and gravest aspects of the Urban areas problem.*

*...having regard to the nature of the promiscuous society which is being created, there can be no doubt that the undisciplined life of these Natives is fraught with very great future danger to the areas in which they live'<sup>32</sup>.*

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<sup>28</sup>. NTS 8/331 7642, NAC to NAD, 22/11/40.

<sup>29</sup>. NTS 13/366, 9167, *Findings and Recommendations of the Conference on Urban Juvenile Delinquency*, October 1938.

<sup>30</sup>. *ibid.*

<sup>31</sup>. *ibid.*

<sup>32</sup>. NTS 8/331 7642, Native Affairs Commission to Minister of Native Affairs, 22/11/40, paras 34 and 38.

It was 'the duty of the state', urged the Commissioners, 'to take steps to ensure the sanctity of the marriage tie, whether contracted under Native custom or by Christian rites'<sup>33</sup>.

The concerns of the Juvenile Delinquency conference were also echoed by the Natives Representative Council (NRC). In 1939, the NRC passed a motion calling for 'the introduction of some form of registration of customary unions so that the position of those who are married may be regularised and recognised'<sup>34</sup>.

Taking heed of these lobbies, the Native Affairs Department sent out a call to various African leaders, in urban and rural areas, for 'suggestions to remedy the evil of informal marriages in urban locations'<sup>35</sup> - although without yet specifically raising the issue of a register for customary unions. The condemnation of 'undesirable' women living in urban areas without the discipline of marriage, was deafening. Almost all the chiefs and headman canvassed took a particularly hard line on the need to curtail 'this undesirable influx into towns'<sup>36</sup>. The overwhelming consensus amongst them was for a two-fold remedy: 'native custom must be rigidly recognised'<sup>37</sup>, and 'single women should...be excluded from urban areas'<sup>38</sup>.

By the early 1940s, then, the Department of Native Affairs was assured of a massive consensus, within and beyond the state, that urgent steps were necessary to ameliorate the destabilisation of African marriage.

The Department of Native Affairs took the initiative in 1943. In an Identical Minute on 'Native Marriages and Customary Unions', D. Smit (Secretary for Native Affairs) acknowledged that 'the time has come to improve the position by legislation consolidating the law in regard to Christian and civil marriages, and to customary unions'<sup>39</sup>. As far as customary unions were concerned, he proposed legislation to facilitate the creation of a compulsory national register, administered by the Native Commissioners' courts. Two parties to a customary union were to report to a Commissioner, with an official witness who could attest to the payment of lobola. The Commissioner would be empowered to register the union, provided both sets of parents, as well as both the man and woman entering the union, assured him of their consent to

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<sup>33</sup>. *Ibid.* para 34.

<sup>34</sup>. NTS 13/366 9167, 'Notice of Motion: NRC'

<sup>35</sup>. NTS 13/366 9167, Minutes of Special Meeting of Moiloa Reserve Local Council, 11/10/40

<sup>36</sup>. NTS 13/366 9167, Mphahlele's Location, Molgat, to Additional Native Affairs Commissioner, Pietersburg, 2/10/40

<sup>37</sup>. NTS 13/366, 9167, Minutes of Special Meeting of Moiloa Reserve Local Council, 11/10/40

<sup>38</sup>. NTS 13/366, 9167, Pietersburg Native Local Council, Memorandum on 'Native Marriage Laws', 1940.

<sup>39</sup>. NTS 13/366 9168, 'Department of Native Affairs Identical Minute: Laws Relating to Native Marriages and Customary Unions', 12/7/43

it. Once registered, customary unions could only be dissolved by a Native Commissioner's court. This court was thus also empowered to deal with all disputes involving lobola - such as those arising through death, desertion, infertility, or defaulting on lobola payments.

The motive for such a register was primarily strategic: it offered an opportunity to close a gaping loophole in the state's efforts to control the size and composition of the urban African population. It also laid the groundwork for more effective intervention by the courts in disputes surrounding marriage, divorce, inheritance etc. However, its purpose was also moral. Indeed, although not explicitly stated, the logic of this proposal closely resembled the arguments proposed by Shepstone and the 1880 Native Laws and Customs Commission (even if they each reached different conclusions regarding the customary register): African custom was to be accommodated, but within the framework of Christian patriarchal principles. For Smit, the creation of a register for customary unions was on the one hand, an attempt to restore the integrity of 'custom' by preventing its abuses perpetrated in the urban areas in efforts to secure housing. On the other hand, the proposed register was a means for *reconstituting* those very customs in more 'christian' ways. Control over customary unions was to be vested with Native Commissioners, not chiefs. And, as an antidote to what many considered the 'uncivilised' and 'unchristian' excesses of male traditional authority over women, a woman's consent to the union was set to become a necessary prerequisite.

Response to Smit's Identical Minute was prolific, and divided. His proposals for a register for customary unions was strongly supported in some powerful quarters. The Chamber of Mines had been calling for one for some time<sup>40</sup>, as had most municipalities, (particularly the larger ones), as an instrument of improved urban control. The Native Affairs Commissioners were strongly in favour of the stronger powers of control afforded them in the proposal<sup>41</sup>. The Johannesburg Council of Europeans and Africans 'welcomed' the registration of customary unions<sup>42</sup>. White liberal groupings, as represented by various affiliates of the South African Institute of Race Relations<sup>43</sup>, for example, as well as many church and missionary bodies<sup>44</sup>, were particularly in favour of allowing African women to consent to customary marriage - although some church

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<sup>40</sup>. NTS 57/333 7715, Transvaal Chamber of Mines, Gold Producers' Committee, to SNA, 8/11/38, re 'Exceedingly undesirable conditions that prevail in many of the locations of the Witwatersrand...'

<sup>41</sup>. See NTS 13/366 9169: for example, NAC, Germiston, to Chief NAC Germiston, 7/12/43; NAC, Bushbuckridge, to SNA re 'Laws relating to Native Marriages and Customary Unions'; Additional NAC, Sibasa to Chief NAC, Pretoria, 24/11/43; President, Native Appeal Court, to SNA, 13/7/43.

<sup>42</sup>. NTS 13/366 9168, Johannesburg Joint Council, Memorandum on the Proposed Native Marriage Laws, 21/6/44.

<sup>43</sup>. eg. Transvaal and East London regional committees of the SAIRR; Springs National Council of Women. See CPISA SAIRR AD 843 B100.13, 'Native Marriage Laws Amendments', 21/1/44.

<sup>44</sup>. NTS 13/366 9168, Archbishop of Kroonstad, Diocese of Bloemfontein, to SNA, 18/12/44; Magistrate, Ficksburg, to SNA, 14/8/43.

groupings preferred the abolition of customary marriage altogether<sup>45</sup>. A few chiefs and headmen too expressed their unqualified support<sup>46</sup>. But many were strongly critical of the proposal, being 'content to carry on in the way they're used to and as their forefathers did'<sup>47</sup>. A Select Committee appointed to consider Smit's proposal, comprising members of the Glen Grey District Council, Middeldrift and Peddie Local Councils, and four members of the Ciskeian General Council, refused to be goaded by an irritated chairman into rescinding its reluctance to 'combat...Native custom'<sup>48</sup>.

To the surprise and vexation of many, the matter was then dropped. Smit's explanation devolved partly on the stresses of the country's war effort, but his main reason was that opinions 'were so diverse that it was not practicable to proceed with legislation'<sup>49</sup>.

Consensus had never before been a prerequisite for government legislation. Indeed, Smit's proposal won strong support from constituencies whose views were typically uppermost in shaping the Department of Native Affairs' policies - most notably, the municipalities, Native Commissioners and employer bodies. Their failure to persuade the Department on this occasion is all the more significant because they were keenly attuned to the urban realities confronting the Department with increasing starkness at that time. (The manufacturing boost prompted by the country's war effort, coupled with agricultural decline in the reserves and deteriorating wages for farm workers during the early part of the decade, had triggered a massive influx of African people into the urban areas). The more telling and pertinent reason for the proposal's stillbirth was therefore who disagreed and why their disagreement was so powerful a deterrent, despite strong support in many influential quarters and pressing reasons for the Department to act accordingly.

The position taken by the various chiefs whose views were canvassed by the Department of Native Affairs, was a decisive factor. The archival documentation suggests that the Department made a particularly energetic effort to solicit responses from chiefs on the issue - more so, it seems, than on several other issues. The Department of Native Affairs was much less interested in, and respectful of, the views of chiefs when piloting various influx control laws and urban labour regulations, for example. Yet in the case of the proposed customary marriage register, Smit was clearly unwilling to risk incurring the wrath of chiefs.

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<sup>45</sup>. NTS 13/366 9168, Diocese of St Johns, Umtata, to SNA, 10/7/44

<sup>46</sup>. NTS 13/366 9169, NAC, Bushbuckridge to SNA, 25/8/43, re 'Laws relating to Native Marriages and Customary Unions', which claims that 'the natives are wholeheartedly in favour of the proposed legislation'; Additional NAC. Sibasa, to Chief NAC, Pretoria, 24/11/43; 'Detailed Summary of Replies', reporting that there was 'general agreement' amongst Africans canvassed in the Harrismith area.

<sup>47</sup>. NTS 13/366 9169, NAC, Stutterheim, to SNA, 15/10/43. See also 'Detailed Summary of Replies'; Tribal Meeting at Hockfontein', 16/11/43.

<sup>48</sup>. NTS 13/366 9167, Minute no. 62, 'Report of Select Committee on Proposed marriage Laws (Natives) for the Union of South Africa', p. 2.

<sup>49</sup>. NTS 13/366 9168, SNA to Secretary of Board of Missions, St Augustine's Priory, OFS, 30/8/48.

Equally significant, however, was Smit's refusal to consider an alternative proposal initiated, and preferred, by many of the chiefs - that a register for customary unions was indeed a good idea, provided the control of registration was in the hands of the chiefs themselves<sup>50</sup>. For, Smit's proposal represented in part an attempt to *curb* chiefly powers over marriage. One of the implications of the proposed register was an attempt to tailor the customs of lobola in line with christian principles, the courts having accepted that the 'customs' of 'native guardianship of women is not in accordance with the principles of civilisation'<sup>51</sup>. Also, Native Commissioners made it clear that they would not have tolerated such a dramatic shift in the balance of power in the reserves in favour of the chiefs.

Not surprisingly - given the pressures of accelerating urbanisation - the issue of registering customary unions remained a prominent one, despite Smit's prevarications. In 1946, a Native Affairs Commissioners' conference dwelled upon the issue of African marriage, and unanimously passed a motion strongly in favour of a register for customary unions<sup>52</sup>. The Association of Administrators of Non-European Affairs (a Reef-based organisation, and powerful lobby within the Native Affairs Department), urged that 'machinery should be immediately created for the registration of Native Customary Unions', as a means of deterring 'the growing custom of Natives to form loose marital unions with detrimental results on administrative and social conditions'<sup>53</sup>.

Smit was soon off the hook, however, as the fate of these proposals fell into the hands of the newly elected Nationalist government. The Nationalists reiterated much the same sort of vitriole against 'undesirable' women and 'loose unions' as had proliferated during previous regimes. Calls were made, once again, for the restoration of stable, 'healthy' family life, as part of the state's strategies for more effective urban control. The Native Affairs Commission - now comprising Nationalist politicians and ideologues, chaired by de Wet Nel - urged the new government 'to build up family life' by 'having the patriarchal system introduced again'<sup>54</sup>. A draft internal memorandum, circulated within the Native Affairs Department during the early 1950s, noted that the Department of the Interior had begun drafting legislation to consolidate African marriage laws, but - having failed to consult with Native Affairs - had omitted to include any reference to the prospect of a register of customary unions. Officials from the Department of Native Affairs therefore alighted upon the issue as one which merited their immediate attention.

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<sup>50</sup>. NTS 13/366 9169, 'Detailed Summary of Replies', and NTS 13/366 9168, NAC, Bushbuckridge to Chief NAC, Northern Areas, 20/2/46.

<sup>51</sup>. TAB TA 11393 1361, SNA re 'Control of Derelict Native Women', 20/7/21.

<sup>52</sup>. NTS 13/366 9168, Chief NAC, Pietersburg, to SNA, 1/12/47, re 'Native Customary Unions: Registration of Lobola'

<sup>53</sup>. CPSA, SAIRR, Evidence to Fagan Commission, Association of Administrators of Non-European Affairs, citing 'Minutes of Special Meeting, 31/1/47'.

<sup>54</sup>. *HAD* (1952), vol. 80, vol. 7882

'All the officials in the Department are in favour thereof', the memorandum confirmed<sup>55</sup>.

This position was reiterated within the Dutch Reformed Church in 1952, in a letter to the Departments of Interior<sup>56</sup>. Eiselen, the new Secretary of Native Affairs, sent a reply, to the effect that 'the matter awaits further thought, with an eye on the provisions of the Population Registration Act'<sup>57</sup>. He said nothing by way of clarification; indeed, it remains unclear how the Population Registration Act might have affected customary unions, other than through some sort of effort by the Department of Native Affairs to nudge - or force - Africans into ethnically homogenous customary unions. But this is speculation at this stage, as the archival files seem to contain no further reference to Eiselen's idea. Nor is there any evidence that it took hold in shaping state thinking on the registration issue in any way.

The Dutch Reformed Church then appointed its own commission to 'investigate Bantu marriage'. The commissioners' report, issued in 1955, acknowledged that 'Bantu marriages are one of the most important social problems in South Africa today', and reminded the state of its duty to intervene. 'To find a healthy foundation for Bantu marriage rites, the co-operation of the Government will be necessary'. It was up to the government, urged the report, to secure 'the proper registration of lobola marriages', in ways which allowed the bride's consent as a necessary condition<sup>58</sup>.

Throughout the 1950s, moreover, municipal officials repeatedly drew attention to the increasingly wide loophole created by the absence of a register for customary unions. By 1950, so-called 'house marriages' - fabricated by men and women who agreed to secure a house together by claiming to be married by custom - was thought to account for more than half the marriages recorded in the Johannesburg municipal area, for example. The proportion grew as the policy of restricting housing to married couples, was more strictly applied during the rest of the decade. Between 1958 and 1959, the number of African marriages recorded in Johannesburg shot up, from 2669 to 4569 - most of which were likely to have been 'house marriages' (or what the Department called 'unions of convenience'), as these were years in which thousands of new houses were being built in the neighbouring townships<sup>59</sup>.

Despite these pressures, the Department of Native Affairs held fire. Its inaction is particularly curious in the light of its priorities and strategies during the 1950s. Having identified a problem of inadequate state control in urban areas, the Department set out

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<sup>55</sup>. NTS 13/366 9169, NAD Draft Memorandum on 'Registration of Customary Unions' (n.d., but contents indicate that it was written in the early 1950s).

<sup>56</sup>. NTS 13/366 9168, NGK Transvaal, Lydenburg, to Secretary of Interior, 4/8/52, re 'Lobola-Huwelik'

<sup>57</sup>. NTS 13/366 9168, Eiselen to NGK, Lydenburg, 7/10/52

<sup>58</sup>. Cape Argus, 27/9/55, 'Bantu Marriages are most important social problem'.

<sup>59</sup>. The Star, 22/7/63, 'Bantu Divorce Court'

to 'stabilise' those Africans with 'residential rights' to live in urban areas. This stabilisation strategy included, at its very core, efforts to 'build' stable African family units. And this in turn entailed an increasingly strict policy of restricting housing to couples, both of whom were legally entitled to reside in the area, and who could produce proof of marriage.

Draft legislation on the registration issue finally saw the light of day in 1962. De Wet Nel, then Minister of Native Affairs, indicated that he had received 'strong representations...from welfare organisations, Bantu ministers of religions and non-White administrative officials' that the Natal system of registering customary unions should be extended nation-wide. He concurred, pointing to the number of 'false declarations' of marriage as the most important justification<sup>60</sup>. Support for his position was unanimous, other members of parliament pointing to the 'great evil'<sup>61</sup> of the 'unions of convenience'<sup>62</sup> facilitated by the absence of a register. Attention was also drawn, as before, to the state's duty in the grappling with the problem: 'we are the only people who can really deal with it effectively. The Bantu themselves cannot deal with it'<sup>63</sup>. Despite this support, however, de Wet Nel went on to qualify his position substantially:

we are not making it [a register for customary unions] compulsory. We are acting very carefully and with great circumspection. I hope it will be possible to make it compulsory eventually<sup>64</sup>.

He did not indicate explicitly the reasons for his caution. But there are some indications that as in the past, its roots lay in the processes of 'Bantu administration' in the reserves. By 1960, the Department's relationship with chiefs incorporated into the Bantu Authorities system had renewed salience, through the creation of a system of urban chiefs' representatives. In an effort to undermine increasingly obstreperous local politicians and community leaders in the townships, the Department tried to reconstitute political processes there by coupling ethnically defined urban constituencies with appropriate chiefs. In 1961, newly appointed chiefs' representatives were drawn into discussions with Native Commissioners on the issue of African marriage. The proceedings of the Johannesburg meeting indicate that apart from some Tswana representatives, the consensus was that 'the question of lobola should be settled in accordance with custom'<sup>65</sup>.

This was the view which prevailed. Section 22*bis* of the Bantu Administration Act of

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<sup>60</sup>. HAD (1962) col. 2040.

<sup>61</sup>. HAD (1962) vol. col. 2088

<sup>62</sup>. *ibid* col. 2087

<sup>63</sup>. *ibid*. col. 2090.

<sup>64</sup>. HAD (1962), col. 2039 - 40.

<sup>65</sup>. NTS 13/366 9168 B.J. Smithers, BAC, Johannesburg, to Chief BAC, 26/4/61, re 'Revision of the Marriage Laws'.

1962 empowered the State President to make regulations providing for the *voluntary* registration of customary unions. Such regulations, applicable to the homelands outside of Natal, were then issued in 1968.

De Wet Nel had capitulated. His offer of a voluntary system of registration completely failed to address either the problems of control or 'immorality' which he, along with all the proponents of a register, had underlined. Obviously, people using 'false declarations' of customary marriage as a means of retaining a foothold in the city or access to housing, were not going to avail themselves of the option of registering their union. Moreover, he had backed down in the midst of far more concerted efforts by the state to bring African urbanisation under control, than ever before<sup>66</sup>.

Why his surrender? Why the continuing efforts by a succession of governments throughout the century to address the problems surrounding the absence of a (compulsory) register for customary unions, coupled with the recurring failures to resolve these problems by producing a register?

Each manifestation of the registration issue was historically specific, embedded in particular phases in the development of state institutions, policies and discourses, as well as distinctive features of African society and leadership in rural and urban areas. Yet, despite these changing contexts, the state's position was remarkably similar: a recognition of the need for state intervention, backed by powerful and wide-ranging support within the polity - which intensified as the problems of urbanisation worsened; but an unwillingness to force the issue. The remainder of the paper explores this continuity, by returning to the more general questions about power and gender raised at the outset.

## II

This discussion concentrates on the contradictory interplay of the state's patriarchal powers and styles of governance operative in the reserves (later, bantustans). This is not intended as a full explanation for any one of the state's stop-start responses on the registration issue, but as one central aspect thereof. It is argued that the colonial administrations in the Cape and Transkei, and the Department of Native Affairs (later, Bantu Administration and Development) each initiated attempts to create a register for customary unions, in the name of their patriarchal values and control strategies. However, their capacity to act in pursuit of these ambitions was limited because they conflicted with the terms of the state's relationships with those chiefs and headmen incorporated into its administrative structures. These points are dealt with in turn.

Ann Stoller's observations about the application of 'patriarchal principles' in colonial South-East Asia, are equally pertinent to the South African case:

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<sup>66</sup>. See D. Posel, *The Making of Apartheid, 1948-1961*, ch. 9.



[State] authorities with competing agendas agreed on two premises: children had to be taught both their place and race, and the family was the crucial site in which future subjects and loyal citizens were to be made. These concerns framed the fact that the domestic life of individuals was increasingly subject to public scrutiny by a wide range of private and government organisations that charged themselves with the task of policing the moral borderlands of the European community and the psychological sensibilities of its marginal, as well as supposedly fully-fledged members.<sup>67</sup>

This included a sense that the state was the moral custodian, as well as the legal guardian, of the institution of marriage. The moral standard was an avowedly Christian, 'civilised' one: as the Commission on Native Laws and Custom declared in 1883, 'we recognise the essential element of marriage to be a contract between a man and women...and we hold that the Christian law of marriage sets forth the truest and purest idea of such a union'. But in the case of Africans, official notions of 'proper' patriarchal values and 'traditions', and the state's moral responsibilities in relation to them, afforded some measure of respect for 'tribal custom'. This recognition was partly strategic, borne of the insight that 'institutions which have become rooted in the social and political life of any people are not easily overthrown by direct enactment'<sup>68</sup>. But it was also grounded in racist discourses about the 'otherness' of Africans.

Racist discourses in South Africa have constructed the basis of racial difference in various ways - be it in terms of a Social Darwinist assumption about occupying lower rungs on a racial evolutionary ladder, or Christian understandings of the 'backwardness' borne of an ignorance or disregard of 'civilisation', or notions of a primordial 'tribalism' imprinted in the 'Native' psyche, or more recent 'ethnic' reformulations of the same primordialist idea. But all these representations shared the typically colonial fear and awe of 'Native' sexuality, as rapacious and menacing. In the familiar racist equation, 'primitive' peoples were more animal-like, and therefore subject to stronger, more consuming passions. For state officials, the 'savage discipline of tribal life'<sup>69</sup> promised a bulwark, a brake on 'raw' passions which were otherwise rampant and overwhelming.

'Natural' in men, the surges of lust in 'Native females' were particularly sinister. Left to their own devices, African women were sexual predators. The copious official correspondence over the years dealing with the 'problem of undesirable women' invariably describes such women as the initiators of sexual liaisons, as though 'immorality' was their primary purpose and consuming need. Lacking any capacity for self-control,

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<sup>67</sup> A. Stoller, 'The Politics of Exclusion in Colonial South East Asia', *Comparative Studies of Society and History*, 1992, p. 521

<sup>68</sup> *Report and Proceedings...of the Government Commission on Native Laws and Customs*, 1883, G.A., '83, para. 82, p. 33.

<sup>69</sup> Brakpan City Council, 'Non-European Affairs Files', 'Salient Points in the Report of the Native Affairs Commission appointed to Enquire into the Working of the Provisions of the Natives (Urban Areas) Act...' 31/10/44. [These papers have since been moved to the Intermediate Archives].

such women 'run wild'<sup>70</sup> - until subjected to the authority of a man. Discursively, marriage was an instant rehabilitator: once in the thrall of men, African women were transformed into respectful, caring, responsible, morally upright mothers and wives, suffering the sexual excesses of their husbands.

To some extent, then, the harsh rigours of tribal patriarchy were understood as the necessary antidote to raging 'primitive' passions. If African traditions of male authority were sometimes more forceful than 'Christian' ones, that was because African women needed a tighter, stronger leash than their white counterparts.

But the commitment to 'Christian' patriarchal standards did set limits - even if interpretations of such limits varied. Shepstone, for example, had roundly condemned the 'tendency towards treating women...as a chattel'<sup>71</sup>. The Native Laws Commission, while reluctant to impose radical reversals of 'custom', identified 'the duty of a civilized government' as 'paving the way' for 'more enlightened views on the sanctity of marriage and the rightful place of women'<sup>72</sup>. During subsequent decades, many Native Commissioners condemned 'customs' which excessively 'degraded' African women - such as 'indicating the toe'<sup>73</sup>. The President of the Native Appeal Court, in a letter to the Secretary of Native Affairs, urged the registration of customary unions as an antidote to the 'custom' of 'forced marriages': 'women must not be regarded as mere chattels in these days of enlightenment'<sup>74</sup>. A court case in 1946, involving 'an 18-year old Native girl' who had been 'married by Native custom against her will', sent ripples of moral outrage through the white polity. The woman had fled her abusive husband on various occasions, but each time, had received 'a very severe thrashing' from her father, aided and abetted by 'friends and relations'. Intending only to inflict an injury, she then murdered her husband, splitting his head open with an axe. The judge was clearly sympathetic to the woman: 'it was a pity that he [the judge] could not order the witness [the father] to be thrashed as he had thrashed his daughter...[He] had not cared what was done to his daughter as long as he kept those miserable sheep'. Although finding the daughter guilty of murder, the judge assured her of a lenient sentence, 'telling her that she should not worry any more'<sup>75</sup>.

Even during the 1960s, when the Nationalists were resolutely in favour of 'preserving' the integrity of 'ethnic' ways, the voice of the Dutch Reformed Church, for example, insured

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<sup>70</sup>. NTS 166/333 7725, Office of Minister without Portfolio, to Minister of Native Affairs, 9/6/39.

<sup>71</sup>. *Report and Proceedings...of Government Commission on Native Laws and Custom*, p. 34

<sup>72</sup>. *ibid.* p. 38, and para 80. p. 33

<sup>73</sup>. Commissioners claimed that this 'custom' was increasingly common during times of economic stress - when 'a father offers a daughter as security for advances of cash and food when in need, and these are financially transformed into lobola when the girl reaches marriageable age'. NTS 13/366 9169, Additional NAC, Sibasa, to Chief NAC, Pretoria, 24/11/43.

<sup>74</sup>. NTS 13/366 9168, President, Native Appeal Court, Pretoria to SNA, 13/7/43, re 'Appeal'.

<sup>75</sup>. Cape Mercury, 20/8/46, 'The Lobola Custom: Native Girl Who Repudiated Marriage'.

that similar concerns to delimit 'unchristian' excesses were acknowledged. Bantu Commissioners too, saw the role of 'Bantu' laws as aiming to preserve customs, 'but treading warily to stay on the right side of all religious morals'<sup>76</sup>. Thus, de Wet Nel too acknowledged that women in African society warranted greater respect - a problem which he diagnosed as having been caused by the corruption of the 'oldest' customs which accorded women their appropriate status. And he welcomed the growing tendency towards 'marriage by Christian rites'<sup>77</sup>.

The state's patriarchal principles in respect of African marriage have thus combined a respect for 'traditions' of male authority in 'tribal' society, with a commitment to tailoring these customs in more Christian ways. The state's 'duty', in the name of these principles, was to produce what state officials deemed the appropriate blend of custom and christianity, limiting the powers of husbands, male guardians, and chiefs where necessary.

As described in the first part of the paper, each attempt to initiate a register for customary unions invoked a blend of tradition and christian innovation.<sup>78</sup> But the preferred amalgam was fluid, depending on the officials and region/s in question, their history and particular circumstances of control. Thus, Shepstone's version differed from that of the Native Laws and Customs Commission. And once the issue of customary marriage arose in an urban context, the exigencies of state control changed, and sharpened the state's sense of the need for interventions to bring 'customs' in line with 'civilisation'. Here the christian nuclear model of marriage was more firmly the basis of the state's control strategies. Control over African urbanisation depended fundamentally on controlling the movements and living conditions of women (and thus their children). Indeed, 'urban native administration' was premised upon a highly 'non-traditional' model of the household: 'one man, one wife, one house'.

Moreover, as the pace of urbanisation and proletarianisation advanced, state officials felt an increasingly strong sense of their own strategic role, and moral responsibility, in rehabilitating male authority in the townships, as African men were seemingly unable to do so themselves. The route to town had opened up new spaces for women, offering them opportunities for living more independently of men. Ironically, these openings were widened by the state itself, particularly in its continuing reluctance to impose pass laws on African women. The absence of a register of customary unions contributed too, to the restructuring of gender relationships in urban areas, in which 'traditional' parameters of men's powers were contested and to some extent, redefined<sup>78</sup>. Officials' recognition of these struggles - articulated as the 'problem of undesired and undesirable women' and proliferation of 'loose unions' - heightened anxieties that unless the state itself undertook to buttress 'the patriarchal system', it would continue to crumble.

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<sup>76</sup>. NTS 13/366 9168, P. Gentle (BAC in charge of Civil Courts), 'Memorandum on Revision and Consolidation of Marriage Laws', 27/9/60.

<sup>77</sup>. HAD (1962) col. 2106.

<sup>78</sup>. See D. Posel, 'Men's Authority, Women's Powers: Rethinking "Patriarchy"'.  
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Read on their own, the state's patriarchal discourses and control strategies produce an expectation of far more systematic and aggressive interventions in rehabilitating marriage amongst Africans, than in fact occurred. This is not to say that 'undesirable' women were free from harassment by state officials, nor that the state was wholly unable to impose its constructions of patriarchy within African communities. Nevertheless, there remains a very stark contrast between the state's declared patriarchal objectives and values, and its capacity and willingness to intervene accordingly. It is essential then, to unpack the ways in which these patriarchal notions of state power intersected with others.

One of the consequences of the incomplete conquest of indigenous societies in South Africa was a highly decentralised, often paternalistic, style of 'native administration' in the reserves. Bruce Berman's observations about colonial rule elsewhere in Africa up to the 1940s, bear on the South African case too:

colonial domination was disciplined by an ultimate dependence on local consent and this required a degree of responsiveness to indigenous interests and grievances...It was...the decentralised discretion of the field administrators which permitted them the flexibility to work out local arrangements balancing the mobilization and exploitation of production and labour with effective political control in a stable 'concordat of existence'<sup>79</sup>.

At least until the 1940s, Native Commissioners, as agents of the Department of Native Affairs in the reserves, had a considerable degree of autonomy to forge personalised - if sometimes combative - relationships with particular chiefs and headmen. Uncertain of, yet profoundly dependent upon, their support, Native Commissioners 'actively sought a class of collaborators in indigenous society'<sup>80</sup> who could be counted upon to endorse state policies and defuse dissent.

This search was grounded in continuing processes of bargaining and accommodation, but articulated as a paternalistic relationship intended to promote the well-being of their 'Native' wards. Africans, as less 'civilised' and ill-educated, needed the guidance and upliftment offered them by 'Native administrators' who 'cared' for their well-being. Whether they had internalised these ideas or not, Africans party to these paternalistic relationships understood that this was the discourse in terms of which to negotiate or contest the powers of state functionaries. As the chiefs and headmen of the Engcobo district told the Native Laws and Customs Commission, 'we hope Government will, from time to time, send persons to explain matters to us. We are Government children, and a child should be advised every day'<sup>81</sup>. Chiefs and commissioners acknowledged their racial and cultural differences, and articulated this mutual acceptance as the basis of a sympathetic and respectful relationship. As members of the Ciskeian General Council

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<sup>79</sup>. B. Berman, 'Structure and Process in Bureaucratic States', *Development and Change*, vol. 15, 1984, p. 182.

<sup>80</sup>. B. Berman, *ibid.*, p. 183.

<sup>81</sup>. *Report and Proceedings...of the Government Commission on Native Laws and Customs*, p. 395.

put it, 'we do not despise the Native Commissioner's judgement, it is natural that white people and Natives should have different points of view because they are different people'<sup>62</sup>. And Native Commissioners generally made it their business to learn something of the 'customs' of the peoples in their charge, which also helped to personalise their relationships with particular chiefs and headmen.

It was a style of governance reflected in, and facilitated by, the ways in which the central Department of Native Affairs saw its role vis a vis the Native Commissioners - as more of a responsive, rather than an initiating, one, with little expectation of strict bureaucratic uniformity in the application of national policy in rural areas.

During the 1940s, leading members of the Department began increasingly to favour a more interventionist, centralising, role for the Department, as the basis for stricter, more uniform controls - although little action was taken during this decade to change the prevailing system.

By the 1948 election, the issue had been aired and politicised beyond the confines of Departmental debates. Both the Fagan Commission and Sauer Report - which informed the election campaigns of the United and National Parties during the 1948 election - reiterated the same conviction that more centralised, and therefore more bureaucratic, impersonal and rigid forms of administration had become more appropriate.

The new Nationalist government operated on two fronts simultaneously. More bureaucratic and authoritarian styles of administration developed within the central Department of Native Affairs<sup>63</sup>, alongside new strategies to build collaborative relationships with co-operative chiefs (which also involved marginalising unco-operative ones). The Bantu Authorities Act of 1951 was premised, in part, on the recognition that state control in rural areas still depended very heavily on co-opting chiefs and headmen as intermediaries. The Bantu Authorities system redefined previously paternalistic<sup>64</sup> styles of administration, drawing co-operative chiefs into new rural bureaucracies, increasing the material rewards of collaboration, along with the penalties for non-collaboration. This system was extended yet again in the 1960s, with the introduction of a system of chiefs' representatives in urban areas, in the (mistaken) belief that this would provide a conduit for chiefly authority into urbanised African communities.

Far more research should be done on the ways in which the authority of Native, and then Bantu, Commissioners was renegotiated, contested and redefined over the years. Still, the salient point for the purposes of this paper is that throughout these different phases of policy and changing features of administration, a central theme persists. It is well-

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<sup>62</sup>. NTS 13/366 9167, 'Minute no 62. Report of the Select Committee...' n.d.

<sup>63</sup>. This process partly involved an attack on the discretionary powers of urban administrators - see Posel, *The Making of Apartheid, 1948-1961*, chs. 1,9,10.

<sup>64</sup>. It is probably more appropriate to term these relations 'clientelist' rather than paternalist. See C. Charney, 'Vigilantism, Clientelism and the South African State', ASI paper no. 302, pp. 7 - 10.

captured by what John Lonsdale has called 'the paradox of rule': 'power could not be exercised without giving some of it away'<sup>85</sup>.

The interesting question, in relation to the registration issue recounted earlier, is which powers were given away? Absent from Lonsdale's rendition of this 'paradox of rule' - but crucial in relation to the concerns of this paper - is the ways in which this paradox was *gendered*. Throughout the more than 80 years covered in this paper, state officials recognised that renewed co-operation from chiefs and headmen depended heavily on respecting the powers of African men vis a vis their women<sup>86</sup>. As groups of men, they shared some sort of mutual recognition of the foibles of women, of the need to rein them in, and of the prerogatives of each man (be he father or husband) to do this for himself. In the words of state functionaries:

the [African] people would say, and with some justice, that their wives and marriages were private matters, with which we had nothing to do, or right to interfere<sup>87</sup>.

The government should have nothing to do with the regulation of women - the government shall certainly be blamed for everything that happened to them. We must let the native burn his own fingers...They should look after their women and I see no reason why we should accept the responsibility<sup>88</sup>.

If the Commissioners had any doubts, chiefs who met with them made the same point:

A Native Commissioner cannot be in the position of a parent. I would rather see the parent taking the decision for agreeing or objecting, rather than a Native Commissioner. Our people would like it left and not transfer the trouble to the Native Commissioner<sup>89</sup>.

We want to stick to our old custom to which we are used. Those living in the towns belong to the Government. They may see my daughter and say here is the law...The Law in Town belongs to the Native Commissioner; he can act on it. Our cases we deal with them here...we would like [our marriages] to remain as

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<sup>85</sup>. Berman, *op cit*, p. 182.

<sup>86</sup>. See also K. Eales, 'Gender Politics and the Administration of African Women in Johannesburg, 1903 - 1929', M.A. thesis, 1991, University of Witwatersrand.

<sup>87</sup>. *Report and Proceedings...of the Government Commission on Native Laws and Custom*, p. 275.

<sup>88</sup>. CAD K357 E.C.N,P,L., T. Norton, Umtata (Acting Resident Magistrate, and Acting Assistant Chief Magistrate, Transkei Territories), 1920, p. 3.

<sup>89</sup>. Councillor Jabavu, member of Select Committee on Proposed Marriage Laws, NTS 13/366 9167, 'Minute no 62: Report of the Select Committee on Proposed Marriage Laws for Union of South Africa', p. 2.

they are<sup>90</sup>.

Barrington Moore's theory of authority (drawing on Weber's) offers another, fruitful, way of making the point. Authority - as a form of power accepted by both parties as having some legitimacy - can be conceptualised as a 'implicit social contract, an un verbalized set of mutual understandings' about the proper boundaries of obedience and disobedience, which is 'always being renegotiated'<sup>91</sup>.

Rulers know that there are certain bounds to their power beyond which they cannot expect compliance...And to remain rulers, they require subjects. Meanwhile, standards of approval and condemnation exist among the subjects and form the source of these limits<sup>92</sup>.

These implicit understandings entail that relationships of authority can tolerate a certain degree of latitude and elasticity: minor infringements by either party will not undermine the relationship. But these limits are constantly being monitored and tested. Relationships of authority involve continuing processes of 'mutual surveillance and bargaining', during which the terms of the tacit contract are contested and renegotiated.

At least in the South African case, the paradox of rule was embedded in an authority relationship in which the tacitly accepted limits of compliance and non-compliance were infused with tacit mutual understandings between men, about the proper boundaries between public and private spheres of authority over women.

Moreover, these authority relationships were especially fragile - given the state's limited administrative capacities, the often fierce resistance amongst subject peoples to state policies, and hence the profound dependence on finding compliant chiefs and headmen. Native Commissioners were never guaranteed of support, which made it all the more important to respect the boundaries of the tacit authority contract. It was ominously clear, therefore, when proposals by state functionaries threatened to overturn existing understandings of the limits of their power.

Obversely too, the relationships of authority between Native Commissioners and chiefs set definite limits on the Commissioners' preparedness to accommodate the chiefs' preferences - even when these involved 'their women'. Thus, there was never any question of the Department of Native Affairs acceding to the request for chiefs themselves to control and administer the desired register for customary unions.

More formalised and systematic under the Bantu Authorities system, the authority relationships between state functionaries and their clients in the reserves were not therefore more stable. As the Nationalist government invested all the more heavily in networks of clientelist patronage in the bantustans, their dependence on the support of

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<sup>90</sup>. NTS 13/366 9169, Chief Motsepe, speaking at 'Tribal Meeting at Hoekfontein', 16/11/43.

<sup>91</sup>. B. Moore, *Injustice: The Social Bases of Obedience and Revolt* (London, 1978), p. 18.

<sup>92</sup>. *ibid.*

their clients deepened. Ironically, this heightened vulnerability in state power over the bantustans was matched by the increasingly confident, aggressive imposition of power in urban townships. Thus, the more urgent the need to create a compulsory register for customary unions, the more difficult it became to do so - until the Ministry of Bantu Administration and Development, at the very moment of gearing up for a frontal attack on African peoples' (limited) rights to remain in urban areas, buckled in the face of a confrontation with chiefs and headmen over the terms of African 'custom'.

In conclusion, the immediate purpose of this paper has been to decipher some of the inscriptions of gender relations in state power. The history of the state's indecision over the issue of creating a compulsory national register of African customary unions provides an antidote to simple instrumentalist understandings of the state as the vehicle of chiefly power, or any other single version of patriarchal principles. Indeed, in the case discussed in this paper, contests between competing constructions of male authority were so intense as to have subverted the state's intentions to act. There were compelling strategic and moral reasons for state officials to subscribe to each of two, mutually incompatible, positions: that 'we are the only people that can really deal with [problems of marriage] effectively; the Bantu themselves cannot deal with it', and that 'they should look after their women and [we] see no reason why we should accept the responsibility'.

The paper has other implications too. The concept of 'state power' should itself be disaggregated, into an (unstable) amalgam of different styles of governance, each with particular mechanisms and imperatives of control. The discussion in this paper has identified some of the contradictions between the imperatives of control in 'urban native administration' and 'rural native administration', exposed by the politics of gender - contradictions which were at their most intense by the 1960s. More dedicated, systematic efforts to curb African urbanisation placed an unprecedented premium on rehabilitating marriage and bringing African women fully within the ambit of state control - at the very moment that new strategies for restructuring and stabilising state control within the reserves made it all the more important to co-opt support among chiefs.