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Costa, Anthony

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Customary law and the government of Africans in South Africa in the transition to a unitary state

Anthony Costa
Trinity College, Cambridge

'The way in which white has governed black in South Africa during approximately the past century', formed the focus of Edgar Brookes's *History of Native Policy* published in 1924.[1] Over the years, colonialism, segregation and apartheid have served as alternative labels for 'native policy', purported answers to the question 'What is the appropriate manner in which to govern Africans?' Responses to this question, and the particular role of customary law, form the subject of this paper, and its argument that by the end of the nineteenth century, the ground had been laid, in the Cape and Natal, for the recognition of African forms of government, including customary law, a development which may be located in the philosophies of indirect rule *and* liberalism. Africans were to be governed by 'traditional' structures, while the imperatives of progress were heeded by providing for the development of individuals.

The nineteenth century and Cape liberalism revisited

There is no need to recount the familiar narrative of South African historiography – and succumb to an unwitting teleology – in order to note that the race and capital war appears to be over.[2] Combatants have shed their uniforms along with monocausal explanations, forcing South African historians to range broadly in explaining the modern racial order, avoiding culture and eschewing economy. Factors to be considered, according to Beinart and Dubow, 'include the impact of modernity, the influence of social Darwinism and the metaphors, symbols and everyday assumptions that help to sustain notions of racial difference and political entitlement.'[3] Paul Rich does his bit by rejecting the 'blueprint' thesis, while Vivian Bickford-Smith insists upon the 'situational' study of the development of racial policies.[4]

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[1] Brookes, *The history of native policy in South Africa from 1830 to the present day* (Cape Town 1924), p. 2.

[2] For a recap of the historiography relating specifically to segregation, see William Beinart and Saul Dubow, 'Introduction: the historiography of segregation and apartheid' in Beinart and Dubow (eds), *Segregation and apartheid in twentieth-century South Africa* (London 1995), pp. 4–11.

[3] Beinart & Dubow, 'Introduction', pp. 1 and 21. Dubow did his best to realise this project by contributing a study of *Scientific racism in modern South Africa* (Cambridge 1995).

[4] Rich, *State power and black politics in South Africa, 1912–51* (London 1996), p. 11; Vivian Bickford-Smith, *Ethnic pride and racial prejudice in Victorian Cape Town. Group identity and social practice, 1875–1902* (Cambridge 1995), p. 7.

In this rapidly expanding universe of historical causes there remains a common understanding about the colonial state's approach to Africans in the nineteenth century, one rooted in the 'liberal decline'. 'The missionary cause,' writes Keegan, 'originally so convinced of the malleability of the human material at its disposal, and of Africans' receptivity to the cultural norms of the mission, became quite quickly suffused with notions of the innate inferiority of Africans once the initial flush of humanitarian enthusiasm had worn off.'[5] This progression is located within the Cape Colony, the Boer Republics having had no such pretensions to begin with, and Natal following Shepstone's lead away from such philosophies, under strict instructions from the Treasury.[6]

When exactly the shift began and how it progressed, are somewhat unclear, the milestones faded. What is certain is that by the third decade of the twentieth century, in Keegan's words, 'the wheel had turned.'[7] Literate Africans were abandoned by a perfidious state which 'understood better than any other colonial power the need for a policy that would harness culturally legitimate political allies – and not literate Africans ambivalent or even hostile to tradition.'[8] Thus the state had committed itself to its course, one which, with minor variations would lead to apartheid, bantu authorities and bantustans, untrammelled by internal white opposition, notably 'Cape liberalism'.

Late lamented liberalism has been exhumed from its neatly tended grave by Clifton Crais's *The Making of the Colonial Order*, which, despite its failings, has caused a re-evaluation of an important period of Cape history. While not deviating from the liberal decline argument, Crais draws attention to the existence of alternative forms of power in the nineteenth century. Applying Foucault, he contrasts 'two fundamentally antithetical forms of colonial power': that of the VOC, where 'power radiated from the body of the white master', or power as property; and that of the British, which 'rested on the accumulation of knowledge on and about the dominated and the production of truth in the exercise of more diffuse but

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[5] Tim Keegan, *Colonial South Africa and the origins of the racial order* (London 1996), p. 283. The same progression is present in Mahmood Mamdani, *Citizen and subject*, and Saul Dubow, *Racial segregation and the origins of apartheid in South Africa* (London 1989), p. 100, and David Welsh, *The roots of segregation* (London 1971), p. 321.

[6] On this decline, see, C. J. Uys, *In the era of Shepstone. Being a study of British expansion in South Africa (1842-1877)* (Lovedale, SA, 1933), pp. 7, 20–21 and 34.

[7] Keegan, *Colonial South Africa*, p. 292.

[8] Mamdani, *Citizen and subject*, p. 76.

potentially more invidious forms of control.'[9]

What is most novel about Crais's account is not so much its trendiness as the argument that the first half of the nineteenth-century was decisive in shaping the South African racial order.[10] This contribution to eastern Cape history proved so unsettling as to merit a special review section in the pages of the *South African Historical Journal*, wherein Jeff Peires, warnings about the postmodern *gevaar* aside, argued that Crais failed to give adequate attention to Cape liberalism. 'And yet,' Peires concluded, 'if the first half of the nineteenth century in the Eastern Cape did produce a common structure of thought, it was that elusive, ambiguous, rickety and hypocritical structure known as Cape liberalism.'[11]

And yet, Crais's treatment of liberalism is precisely what attracted Martin Legassick's attention in the course of a rambling review. 'For him,' Legassick writes of Crais, 'the transition to settler capitalism was not so much rooted in the "failure" of liberalism but in the "Janus face" of liberalism itself. The racial forms of domination of the nineteenth-century Cape were not the antithesis of liberalism, but grew out of one part of its contradictory discourse.'[12] It is fitting that Legassick should draw attention to this development as he was responsible for a series of papers – almost three decades ago, almost all unpublished – on the nature of South African liberalism.[13] His insights into the power of liberal thought remain unsurpassed, the directions he mapped out unexplored, swallowed in the vortex of the 'liberal-radical debate'.

Tim Keegan is another who has recently confessed his attraction to the liberal enigma,

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[9] Clifton Crais, *The making of the colonial order. White supremacy and black resistance in the Eastern Cape, 1770–1865* (Johannesburg 1992), p. 87.

[10] Martin Legassick, 'The state, racism and the rise of capitalism in the nineteenth-century Cape Colony' (28 *South African Historical Journal* 1993), p. 330.

[11] J. B. Peires, 'Pinning the tail on the donkey,' (28 *SAHJ* 1993), p. 321.

[12] Legassick, 'The state, racism and the rise of capitalism', p. 336. Legassick draws attention to a paper by Crais which considers liberalism, and the failings of South African history, in greater detail – Clifton C. Crais, 'Race, the state, and the silence of history in the making of modern South Africa. Preliminary departures' (Africa seminar, Centre for African Studies, University of Cape Town, 22 July 1992).

[13] Legassick, 'Liberalism, social control and liberation in South Africa' (paper presented to UK Political Science Association Conference, 1974); 'The making of South African "native policy", 1903–1923: the origins of 'segregation"' (University of London, ICS Postgraduate seminar, 15 Feb. 1973); 'The rise of modern South African liberalism: its assumptions and its social base' (University of London, ICS Postgraduate seminar, 1 March 1973); 'British hegemony and the origins of segregation in South Africa, 1901–14' in Beinart and Dubow (eds), *Segregation and apartheid in twentieth-century South Africa* [1972–73].

awarding Legassick the 'seminal' rosette for his review of Crais.[14] For Keegan liberal ambiguity is encapsulated in its simultaneous adoption of the principles of assimilation and territorial segregation, ambiguities 'accompanied by cultural absolutism.'[15]

While the nature of liberalism is re-examined, its strength is not, which is why Leon de Kock's *Civilising Barbarians*, straddling history and literary criticism, covers new ground in considering the importance of literacy and the civilising mission in the making of colonial South Africa. Missionary discourse, for De Kock, was a powerful element of Cape liberalism. At institutions such as Lovedale it 'not only established a widespread literate order incorporating institutional surveillance, but... in doing this it sought to "translate" African subjectivity into excessively narrow limits of expression determined by Western literary forms of understanding.'[16] Africans' success in appropriating the discourse of civilisation as a weapon against colonialism, should not detract from the ways in which their subjectivities were shaped, and to some extent controlled.

Cape historiography in the 1990s has opened the way for a re-examination of liberalism and government a century ago by raising the ambiguity that liberalism is both more and less than it appears – less accommodating, more powerful.

Foucault (Theory ahead)

The mere mention of theory causes most historians to scurry into the nearest archive, pausing only to fling disparaging remarks about French intellectuals, a suspicion translated into print when they have engaged with the opponents of their trade, doing so fiercely, leaving little room for compromise. It is hardly surprising that Foucault, and indeed French theorists in general, tend to receive scant attention, much of it negative. Given that Foucault has been criticised for his periodisation of European history, can there be any value in exporting his ideas to an African context? Before considering some of the work which has done just this, we must begin with some of Foucault's ideas.

If one word is required to describe Foucault's primary concern, it is 'power'. Dissatisfied

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[14] Keegan, *Colonial South Africa*, p. 13. See n. 36, where Keegan refers to 'the insightful comments' of Legassick's 'State, racism and rise of capitalism', 'a seminal article which prefigured the general approach of this book.'

[15] *Ibid.*, pp. 7 and 8.

[16] De Kock, *Civilising barbarians. Missionary narrative and African textual response in nineteenth-century South Africa* (Johannesburg 1996), p. 65.

with the study of power in modern societies, Foucault pronounced, 'We still have not cut off the head of the king.'[17] In pre-modern societies, he argued, power was exercised in a general form, namely 'the law of transgression and punishment, with its interplay of licit and illicit' which was 'power in a juridical form'. Thus, 'In Western societies since the Middle Ages, the exercise of power has always been formulated in terms of law.'[18] 'Power is not a substance. Neither it is a mysterious property whose origin must be delved into. Power is only a certain type of relation between individuals.'[19]

This form of exercising power, designated sovereignty, is followed by a new form, viz. surveillance and discipline, which produced 'subjected and practised bodies, "docile" bodies.'[20] Institutions such as prisons, schools, hospitals, factories, armies, all disciplined the body through a 'micro-physics of power'. 'Is it surprising that prisons resemble factories, schools, barracks, hospitals, which all resemble prisons?' asked Foucault. Discipline is a power that '"makes" individuals; it is the specific technique of a power that regards individuals both as objects and as instruments of its exercise.'[21]

In charting the emergence of disciplinary society, Foucault pointed out the complex and binding relationship between knowledge and power, expressed in his well-known coupling *pouvoir-savoir*, or power-knowledge, or even power/knowledge. The mechanisms of power, the relationship between power and knowledge and their mutual effect, are at the core of this concept. Not only does power need knowledge, but in addition 'the exercise of power itself creates and causes to emerge new objects of knowledge and accumulates new bodies of information.... The exercise of power perpetually creates knowledge and, conversely, knowledge constantly induces effects of power.... It is not possible for power to be exercised without knowledge, it is impossible for knowledge not to engender power.'[22]

Thus Foucault traced the emergence of a new form of power, a micro-physics of power, albeit

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[17] Michel Foucault, *The history of sexuality*, vol. I, trans. Robert Hurley (Harmondsworth, UK 1981), pp. 85 and 87.

[18] Foucault, *History of sexuality*, pp. 88–9.

[19] Foucault, 'Politics and reason' in Lawrence Kritzman (ed.), *Politics, philosophy, culture: interviews and other writings, 1977–1984* (New York 1988), p. 83.

[20] Foucault, *Discipline and punish*, trans. Alan Sheridan (London 1977), pp. 82 and 137–8.

[21] *Ibid.* pp. 228, 170.

[22] Foucault, 'Prison talk', pp. 51–52. See, also, *Discipline and punish*, p. 27.

one which bore different labels – including 'surveillance' and 'discipline' – in his work.[23] The 'model based on law' was replaced by the 'strategical model', that is 'a multiple and mobile field of force relations, wherein far-reaching, but never completely stable, effects of domination are produced.'[24]

This shift was retraced, and developed, by Foucault in his 1978 lectures at the College de France on the topic of 'governmentality', defined as follows:

> 1. The ensemble formed by the institutions, procedures, analyses and reflections, the calculations and tactics that allow the exercise of this very specific albeit complex form of power, which has as its target population, as its principal form of knowledge political economy, and as its essential technical means apparatuses of security.
> 2. The tendency which, over a long period and throughout the West, has steadily led towards the pre-eminence over all other forms (sovereignty, discipline, etc.) of this type of power which may be termed government, resulting, on the one hand, in the formation of a whole series of specific governmental apparatuses, and, on the other, in the development of a whole complex of *savoirs*.
> 3. The process, or rather the result of the process, through which the state of justice of the Middle Ages, transformed into the administrative state during the fifteenth and sixteenth centuries, gradually becomes 'governmentalized'.[25]

Central to governmentality was the development of liberalism – 'a style of thinking quintessentially concerned with the art of governing'.[26] Liberalism captured the value of limited government – made possible by the development of 'society', a complex independent reality with its own dynamics which could not be violated by the 'police state'[27] – and sought to establish relations between the government and the governed 'in which individuals are identified as, on the one hand, the *object* and target of governmental action and, on the other hand, as in some sense the necessary (involuntary) *partner* or accomplice of government.'[28] Or, as Nikolas Rose explains, 'Persons and activities were to be governed *through society*, that is to say, through acting upon them in relation to a *social* norm, and constituting their experiences and evaluations in a *social* form.'[29] The aim was 'a government which economizes on its own costs: a greater effort of technique aimed at accomplishing more

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[23] Keith Baker, 'A Foucauldian French Revolution?' in Jan Goldstein (ed.), *Foucault and the writing of history* (Cambridge, Mass. 1994), p. 194.

[24] Foucault, *History of sexuality*, p. 102.

[25] Foucault, 'Governmentality' in Graham Burchell, Colin Gordon and Peter Miller (eds), *The Foucault effect: studies in governmentality* (Hemel Hempstead, UK 1991), pp. 102–3.

[26] Colin Gordon, 'Governmental rationality: an introduction' in Burchell, Gordon and Miller (eds), *The Foucault effect*, p. 14.

[27] A. Barry, T. Osborne and N. Rose, 'Introduction' in Barry, Osborne and Rose (eds), *Foucault and political reason* (London 1996), p. 9.

[28] Burchell, 'Liberal government and techniques of the self' in Barry et al, *Foucault and political reason*, p. 23.

[29] Rose, 'Governing "advanced" liberal democracies' in Barry et al, *Foucault and political reason*, p. 40. See, also, J. Simons, *Foucault and the political* (London 1995), p. 58.

through a lesser exertion of force and authority.'[30]

But this development does not efface other modes of power. 'Accordingly,' Foucault writes, 'we need to see things not in terms of the replacement of a society of sovereignty by a disciplinary society and the subsequent replacement of a disciplinary society by a society of government; in reality, one has a triangle, sovereignty-discipline-government, which has as its primary target the population and as its essential mechanism the apparatuses of security.'[31]

Although Foucault leaves us with a triangle of sovereignty-discipline-government, he does not explain how they interact, a difficulty exemplified by his treatment of law. Hunt and Wickham accuse Foucault of expelling law form modernity through 'his metahistorical thesis that law constituted the primary form of power in the classical or pre-modern era and his point that law lingers on in the doctrine of sovereignty which continues to play a significant ideological role in political discourse. In the real world of power, law has been supplanted by the disciplines and by government as the key embodiments of power in modern society.'[32]

Foucault tried to explain how law survived as a mask for power, concealing the procedures of domination inherent in the techniques of discipline.[33] Such ideas on law were emphatically rejected by E. P. Thompson who asserted that law could function to protect as well as to oppress.[34] Foucault's 'unconvincing reworking of the Marxist conception of the juridical state as superstructural, with the infrastructure simply refined as mechanisms of disciplinary coercion' has led Keith Baker to ask, 'Why, after all, do disciplinary regimes need to be masked by the juridical theory of sovereignty when they possess their own legitimation as regimes of truth?'[35]

Reminiscent of quarrels within Marxism, Foucauldian arguments can become scriptural, as

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[30] Gordon, 'Governmental rationality', p. 24.

[31] Foucault, 'Governmentality', p. 102.

[32] Hunt & Wickham, *Foucault and law*, p. 56.

[33] Foucault, *History of sexuality*, p. 86; 'Two lectures', p. 105.

[34] Most notably in Thompson, *Whigs and hunters* (London 1975).

[35] Baker, 'Foucauldian French Revolution', p. 195. Similar criticisms are voiced by Dean, *Critical and effective histories*, pp. 163–5; and Hunt and Wickham, *Foucault and law*, pp. 41–45. A recent debate on this topic has drawn attention to the difficulties inherent in Foucault's treatment of law – Laura Engelstein, 'Combined underdevelopment: discipline and the law in Imperial and Soviet Russia' (98(2) *American Historical Review* 1993), pp. 338–353; 'Reply', pp. 376–81; Jan Goldstein, 'Framing discipline with law: problems and promises of the liberal state', pp. 364–75; Rudy Koshar, 'Foucault and social history: comments on "combined underdevelopment"', pp. 354–63.

quotes are used to support opposing propositions in an attempt to establish a true reading. It is frustrating, indeed futile, to search for a coherent paradigm, neatly explicated by Foucault himself. In an attempt to chart a way forward, Hunt and Wickham suggest that 'law has been a primary agent of the advance of new modalities of power' and by conceptualising an interplay between law, normalisation and discipline, it is possible to inject substance into Foucault's 'triangle'.[36] Unfortunately this interplay disappears in their rigid model, causing one writer to remark, 'The establishment of a new sub-discipline with methodological principles is surely a most un-Foucaultian way of using Foucault's work.'[37] More helpful is Hugh Baxter's suggestion that Foucault's

> account of the 'network' or 'dense web' of social relations emphasizes the importance of knowledge, particularly expert knowledge, in the process of constituting, reproducing, contesting, and transforming relations of power. Foucault's polemical dismissals notwithstanding, law is both product and producer of this ceaseless process. Law, no less than the discursive practices Foucault analyzed in detail, provides resources both for the exercise of power and for resistance to power.[38]

Law is not the same as juridical power. Rather, it exists within different modes of power, performing different functions. It may be noted that Foucault argued that law, under discipline, functioned as a 'norm',[39] which has led Sheila Duncan to conclude that 'the law through its disciplinary power is able to normalize as it traces the frontiers of the abnormal, as it defines, constructs and imposes what is normal.'[40]

Such statements, implying total subjugation, have led to the charge that Foucauldian theory makes no allowance for resistance. Such an application of Foucault's ideas do not flow of necessity from his theory. 'Power is everywhere;' he wrote, 'not because it embraces everything, but because it comes from everywhere.' Power will always meet resistance, not in a binary division, but a plurality of resistances. Just as the state 'relies on the institutional integration of power relations', so revolutions are successful when they achieve a 'strategic codification of these points of resistance'.[41] Elsewhere, Foucault noted, 'Individuals are the vehicles of power, not its points of application.'[42] This fits with Baxter's point, above, about

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[36] Hunt & Wickham, *Foucault and law* (London 1994), pp. 65 and 67.

[37] Mel Cousins, 'Foucault and law' (47 *Northern Ireland Legal Quarterly* 1996), p. 337.

[38] Baxter, 'Bringing Foucault into law and law into Foucault' (48(2) *Stanford Law Review* 1996), pp. 477–8.

[39] Foucault, *History of sexuality*, p. 144; *Discipline and punish*, p. 303.

[40] Sheila Duncan, 'Law's sexual discipline: visibility, violence and consent' (22(3) *Journal of Law and Society* 1995), pp. 327. On the normalising power of law as discipline, see, Peter Fitzpatrick, '"The desperate vacuum": imperialism and law in the experience of enlightenment' in Anthony Carty (ed.), *Post-modern law. Enlightenment, revolution and the death of man* (Edinburgh 1990), pp. 90–106.

[41] Foucault, *History of sexuality*, pp. 93 and 96.

[42] Foucault, 'Two lectures', p. 98.

the possibilities for resistance within law and discursive practices generally.[43]

Foucault and his commentators have postulated a style, or mode, of liberal government, one which functioned through society, relying increasingly on self-government as subjects asserted rights and interests 'that *should not* be interdicted by politics', as well as processes 'that they [government] *cannot* govern by the exercise of sovereign will because they lack the requisite knowledge and capacities.'[44] Of course, as Pat O'Malley reminds us, this approach 'privileges discourses, with the result that it becomes difficult for it to recognize the imbrication of resistance and rule, the contradictions and tensions that this melding generates, and the subterranean practices of government consequently required to stabilise rule.'[45] Sometimes governing is made difficult but that most obvious of causes – resistance.

Although the concept of governmentality has been developed to analyse western liberal states, it offers clues to the nature of their colonial relatives. Governmentality, after all, is concerned with 'how government is thought into being in programmatic form, how the practitioners of rule ask themselves the question of how best to govern, what concepts they invent or deploy to render their subjects governable in certain ways, and how government constantly reforms itself in light of failures and evaluations', as well as with the techniques by which these programmes are implemented.[46] By employing these ideas our attention is directed to a particular form of the exercise of power within the young South African state. The transition from sovereignty, to discipline and government did not occur solely in the metropole; nor did the periphery simply follow the centre, at a respectful distance. A unique style of government emerged, influenced by liberalism, homegrown and imported, yet rooted in traditions of the sovereign exercise of power.

Foucault in Africa: resistance and collaboration

Despite the attractions of Francophilia, few Africanists have attempted to employ Foucault's work. Those who have, do so to varying degrees. Some, such as Bayart, settle for an

[43] Other defences are provided by Dean, *Critical and effective histories*, p. 178; Barry Smart, 'Introductory essay: situating Foucault' in Barry Smart (ed.), *Michel Foucault. Critical assessments*, vol. I (London 1994).

[44] Rose, 'Governing "advanced" liberal democracies', p. 44.

[45] O'Malley, 'Indigenous governance' (25(3) *Economy and Society* 1996), p. 311.

[46] O'Malley, Lorna Weir and Clifford Shearing, 'Governmentality, criticism, politics' (26(4) *Economy and Society* 1997), p. 502.

expression or two sprinkled across the text.[47] More useful, perhaps, are those who employ Foucault, and then distinguish him in an African context. Diana Jeater's work on sexuality in Southern Rhodesia argues, following Foucault, that the regulation of sexual desire 'provides one of the most fundamental mechanisms by which power is exerted in a society', but parts company with the theorist to argue that this process served specific group interests. Thereafter, Foucault is relegated from the role of theoretical guide to narrator of developments in sexual discourses in Europe.[48]

A more comprehensive engagement is provided by Megan Vaughan's work on colonial medicine. She argues 'that in British colonial Africa, medicine and its associated disciplines played an important part in constructing "the African" as an object of knowledge, and elaborated classification systems and practices which have to be seen as intrinsic to the operation of colonial power.' From this promising start, Foucault's conception of power is challenged as ruling out effective resistance, and his conception of European medical discourses and practices is declared inapplicable to Africa.[49]

For Vaughan there are important differences between the power/knowledge regimes in the two settings. These relate, in the main, to the greater 'repressive' power employed by 'pre-modern' colonial states, and the extent to which colonialism, and medical discourse, created 'subjects' as well as 'objects', and operated through individual subjectivities. 'In colonial medical discourse and practice colonial Africans were conceptualized, first and foremost, as members of groups (usually but not always defined in ethnic terms) and it was these groups, rather than individuals, who were said to possess distinctive psychologies and bodies.' This raises 'the question of how far colonial power operated through the production of subjectivities at all, and how far it relied on the kind of "repressive" power which Foucault sees as characterizing pre-modern regimes. Did colonial biomedicine "subjectify" at all, or did it merely "objectify" through its elaboration of a discourse on "the African"?' It is a question Vaughan says she cannot fully answer.[50] Fred Cooper agrees, adding that 'power in colonial societies was arterial rather than capillary – concentrated spatially and socially, not very nourishing beyond such domains, and in need of a pump to push it from moment to

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[47] Jean-Francois Bayart uses the expression 'politics of the belly' to designate a mode of governmentality, although this seems to the limit of Foucault's influence on his work. Bayart, *The state in Africa: the politics of the belly* (London 1993), p. 268.

[48] Diana Jeater, *Marriage, perversion, and power: the construction of moral discourse in Southern Rhodesia 1894–1930* (Oxford 1993), pp. 17 and 18.

[49] Megan Vaughan, *Curing their ills: colonial power and African illness* (Cambridge 1991), pp. 8 and 9.

[50] *Ibid.*, pp. 10, 11, 202 and 203.

moment and place to place.'[51]

Unlike Marx it was never Foucault's intent to develop a universal 'paradigm'. In this sense, Vaughan is correct in highlighting differences between Europe and Africa, and in the operation of power. Whether this entails a rejection, holus-bolus, of Foucault's conception of power, is another matter. The nature of the exercise of power changes, in colonial as much as in metropolitan setting, and part of the answer to Vaughan's question lies in attempting to track these changes.

Such subtleties have, unfortunately, not detained Crais who applies Foucault with missionary zeal. Armed with *The History of Sexuality*, volume I, he castigates South African historians for 'their collective anaesthetic promenade', their pagan dances to the false god of liberalism.[52] There have been few reports of converts, the attractions of fundamentalism notwithstanding. As Shula Marks has pointed out, Crais's application of Foucault's ideas are 'perhaps a little too mechanical, a little too pat', lacking evidentiary support.[53] Instances of the shift to discipline are difficult to find to support Crais's claims, and his treatment of the role of 'law' (usually rendered in quotes) is nonexistent. More may be gained from De Kock's systematic development of the idea of 'discipline', which examines the way in which the circulation of knowledge was linked to 'the making of new conceptualisations of individuality'.[54]

'Discipline' is not the Foucauldian finale, but one mode of power, coexisting with others, and capable of appropriation and contestation. By tracing the emergence of different forms of power, different strategies, not according to a theoretical blueprint but by examination of the evidence, by proceeding warily, a Foucauldian approach may generate more light than heat.

Custom, law and the Cape

In the Victorian world, law was a benchmark of civilisation, an odometer measuring the distance covered on the road of progress. Customary law performs the same function for

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[51] Cooper, 'Conflict and connection: rethinking colonial African history' (99(5) *American Historical Review* 1994), p. 1533.

[52] Crais, 'Race, the state, and the silence of history', p. 8.

[53] Marks was also critical of Crais's vague use of discourse, noting, 'We still need to be shown the connections between the language and changing structures of power and exploitation.' Shula Marks, 'Racial capitalism: a cultural or economic system?' (28 *SAHJ* 1993), pp. 314 and 315.

[54] De Kock, *Civilising barbarians*, p. 35.

African societies, whilst reflecting on civilisation itself, raising the uncomfortable question, how could a primitive legal system be tolerated in a civilised society? Initially rejected as barbaric, custom came to be recognised as a legal form, and, once recognisable, capable of appropriation in the service of government.

The status of customary law in the nineteenth-century Cape Colony reflected the uneasy relationship between the settlers and their African neighbours, a relationship characterised by the relative weakness of the colonial state. Although the state remained concerned to 'establish Xhosa docility in order to secure the fringes of the colonial order', Alan Lester points out that for most of the first half of the century it lacked this capacity.[55] Successive schemes attempted to incorporate the Xhosa within the colony, the most notable being that of Sir George Grey, which according to Keegan, 'required that native peoples abandon not only their independence and their political systems, but all aspects of their social and cultural lives that did not accord with the liberals' definition of civilised standards and values, and that they submit to the tolerant paternalism of white patrons.'[56] It was only with the incorporation of British Kaffraria in 1865 that the African population under direct colonial rule reached proportions that required a re-examination of government policy.

A Commission of Inquiry under Rev. W. Impey was appointed in January 1865, to inquire into 'the relations of the Colony with the Native Tribes residing within and upon its borders.' By the end of April, the Commission had collected evidence but was unable to prepare a report in time for the then current session of parliament, and only the evidence was submitted to the governor.[57] Although a diversity of opinion was present, the Bishop of Grahamstown spoke for many when he declared, 'If the natives are to have the advantages of civilised life, they must be subject to the restraints of civilisation, and the very first of these restraints is as to the law of marriage.'[58] No report was submitted but the evidence of the Reverend Impey before his own commission was succinct:

> There are difficulties on both sides, but upon the whole I would greatly prefer that the natives should be brought under the ordinary law of the land, and that their own laws should be entirely ignored.... The natives will have all the benefit of our just and righteous laws, and if in any case those laws appear to press hardly upon them, I think they ought to be prepared to sacrifice something of what they conceive to be

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[55] Alan Lester, 'The margins of order: strategies of segregation on the Eastern Cape frontier, 1806 – c. 1850' (23(4) *JSAS* 1997), p. 639.

[56] Keegan, *Colonial South Africa*, pp. 284–85.

[57] *Proceedings of, and Evidence Taken by, The Commission on Native Affairs Appointed by His Excellency the Governor* (Cape of Good Hope, 1865).

[58] *Ibid.*, Evidence of Bishop of Grahamstown, p. 97.

good, for the greater good that they really obtain by conforming to colonial law.[59]

It was as clear a statement of cultural superiority as any uttered by a Victorian clergyman. Law was extolled as a civilising influence beneficial to Africans. Despite the failings of mission efforts, there was no pessimism as to the possibilities of reform, or optimism as the acceptance of customary law. Race, the basis of the otherness of Africans, formed no barrier to incorporation. The violence of assimilation is quite different from the violence of separation, even if both entail notions of cultural superiority.

The evidence before the Commission was clear, its impact less so. Despite most of the witnesses' opposition to the Native Succession Act passed the previous year, which had recognised certain customs and usages relating to inheritance, the law remained in force.[60] Religious conviction was one matter; the practicalities of government quite another.

Fifteen years later there followed a similar attempt to garner knowledge and formulate policy, this time on a far larger scale. In September 1880 Cape Governor Sir Henry Bartle Edward Frere established a commission to inquire into native laws and customs, suggest a civil and criminal Code, the possibility of legalising native marriages, the matter of land tenure, and the advisability of a system of local self-government for native territories. Governor Sir Hercules Robinson received the commission's report in January 1883.

Although the report contained a draft criminal code which was enacted three years later (Act 24 of 1886), the significance of the 1883 Native Laws and Customs Commission is far greater than the one law it spawned. Under the guidance of the influential judge-president of the eastern districts court, Sir Jacob Dirk Barry, the commission shaped thinking on the subject for the next century, and remains a source of customary law in South Africa.[61] Among the witnesses was Sir Theophilus Shepstone, his lengthy interview – he answered over one thousand questions – permeating the entire report.[62] For present purposes, the

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[59] *Ibid.*, Evidence of Rev. Impey, p. 1114. It was also the Reverend Impey's view that 'despotic authority' should be used to force Africans into societies which could be rendered governable – De Kock, *Civilising Barbarians*, p. 51.

[60] Act 18 of 1864. See *Sengane v Gondele* 1 EDC 195 [1880] at p. 204, where Barry JP held that the act recognised polygamous marriages as 'implied will or testament'.

[61] Ellison Kahn, 'Recognition of native law' in H. R. Hahlo and Kahn, *The Union of South Africa: the development of its laws and constitution* (London 1960), p. 320. Julius Lewin refers to the report as a 'classic document' - *Studies in African native law* (Cape Town 1947), p. 2.

[62] Brookes supports this contention – *History of native policy*, p. 110 n. 44. It is worth noting that Barry was a great admirer of Shepstone – Uys, *In the era of Shepstone*, pp. 392 and 394–95.

importance of the commission lies less in the legal 'rules' explicated thereby than with the ideas about African societies, their form of law, and how best to govern them.

The state's interest in customary law lay in fashioning it as an instrument of government. So the report began with a history of native law, followed by an exposition of its characteristics:

> Among them a system of law has for generations past been uniformly recognised and administered. Although an 'unwritten law,' its principles and practice were widely understood. ... This law took cognizance of certain crimes and offences; it enforced certain civil rights and obligations . ... The system was to a great extent created by and adapted to the conditions of a primitive, barbaric life, and in some respects it was not unlike that which prevailed among our Saxon ancestors in the early days of civilization. But intermixed with it were a number of pernicious and degrading usages and superstitious beliefs, as well as a course of judicial procedure in cases of the alleged offence of sorcery, or witchcraft, utterly subversive of justice, and repugnant to the general principles of humanity.[63]

Native law is framed as a recognisable legal system corresponding to primitive European modes of existence, particularly in its 'rules' which provide for ordered life. Placed on the evolutionary ladder, native law is granted a limited legitimacy, with the prospect, inevitability perhaps, of 'progress'. A system of law is taken as an embodiment of a people, their collective will, 'widely understood' and 'treasured', which includes 'pernicious and degrading usages and superstitious beliefs'.

This paradox had been raised twenty years earlier by Sir Henry Maine who wrote, 'There are two special dangers to which law, and society which is held together by law, appear to be liable in their infancy. One of them is that law may be too rapidly developed.' The other was that which had 'prevented or arrested the progress of far the greater part of mankind. The rigidity of primitive law, arising chiefly from its early association and identification with religion, has chained down the mass of the human race to those views of life and conduct which they entertained at the time when their usages were first consolidated into a systematic form.'[64] Although Sir Henry does not feature in the commission documents, his influence should not be underestimated.

In an acclaimed legal career Maine held the positions of Regius Professor of Civil Law at Cambridge, Legal Member to the Viceroy's Indian Council, Oxford Professor of Jurisprudence, Master of Trinity Hall, Cambridge, and, finally, Whewell Professor of

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[63] Cape of Good Hope, *Report and Proceedings, with Appendices, of the Government Commission on Native Laws and Customs* (Cape Town 1883 [G. 4.--'83]), s. 8.

[64] Henry Maine, *Ancient law: its connection with the early history of society and its relation to modern ideas* (London 1883, 9th ed. [1861]), pp. 75 and 77.

International Law at Cambridge.[65] A specialist in the field of 'primitive law', he published his most renowned work in 1861. Written in the heyday of Victorian legal science, and cloaked in the scientific ethos of the day, *Ancient Law* enjoyed a favourable reception by a wide audience.[66] 'With the publication of *Ancient Law*,' writes Peter Stein, 'legal evolution had reached its zenith. Mid-Victorians welcomed the doctrine that the law of civilised societies was the product of a development through a series of identifiable stages related to, but distinct from, the development of society itself.'[67]

By the time of the 1883 commission Maine's ideas formed the basis of thought, popular and learned, on primitive law. His persistent 'sweeping generalisations about races, laws, peoples, nations' and his assumption that it was possible to measure moral progress, spread across the English-speaking world.[68] In the colonial world, Martin Chanock has argued, 'local worlds have to be described and fashioned in external languages, with external concepts, derived for different places, societies, and times.'[69] And so Maine's language resonated throughout the world.

In his analysis of the early stages of legal evolution Maine wrote, 'Our authorities leave us no doubt that the trust lodged with the oligarchy was sometimes abused, but it certainly ought not to be regarded as a mere usurpation or engine of tyranny.'[70] The 1883 commission agreed:

> The inference we may draw from the whole evidence upon the subject is, that although natives have nothing corresponding to a representative form of government, their existing laws embody the national will, and that no Chief would attempt to alter a law without taking the opinion of his councillors, or referring the change to the people.[71]

African society is subtly de-exoticised, brought within a common evolutionary past, its form of government distinguished from mere tyranny. This recognition of the validity of modes of

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[65] George Feaver, *From status to contract. A biography of Sir Henry Maine 1822-1888* (London 1969).

[66] On the growth of Victorian legal science, see R. C. J. Cocks, *Sir Henry Maine. A study in Victorian jurisprudence* (Cambridge 1988), pp. 14–19.

[67] Peter Stein, *Legal evolution. The story of an idea* (Cambridge 1980), p. 99.

[68] Cocks, *Sir Henry Maine*, p. 56. On the influence of *Ancient Law* in the USA, see, Feaver, *From status to contract*, pp. 128–135.

[69] Martin Chanock, 'Race and nation in South African common law' in Peter Fitzpatrick (ed), *Nationalism, racism and the rule of law* (Aldershot, UK, 1995), p. 198.

Two Cape cases which applied Maine's evolutionary concepts are *Nbono v Manoxoweni* 6 EDC 62 [1891] at p. 76, and *Sengane v Gondele* 1 EDC 195 [1880] at pp. 207–208.

[70] Maine, *Ancient law*, p. 12.

[71] Cape of Good Hope, *Government Commission on Native Laws*, s. 31.

traditional government created space for the incorporation (or at least tolerance) of African society without the need for total subjugation.

Just as civilised law was unsuitable for natives, so too with civilised government. In a striking passage the Commission distinguished between 'Government' and the rule of African chiefdoms:

> Nothing can be more unsatisfactory to his mind than a brief, cold, inanimate telegram or despatch in reply to all the questions which he has felt it his business to put, and his opportunity of putting which is the one central point and pivot for his preference of the rule of a Chief. Anything in the nature of an abstract idea like 'Government' is to him next to if not altogether impossible; and he is apt to be altogether confounded by the frequent or sudden changes of Party Administration.[72]

Perhaps Shepstone was the authority for this contention. He had spoken against party government in native administration, telling the Commission, 'What is, I think, most required for their satisfactory government is an officer recognised as their head, whose position is permanent, their confidence in whom could grow, and to whom they could always look for guidance and advice as well as control.'[73] A form of control was thus necessary which operated not on western principles of Government, but on traditional African ones of patriarchal rule. So the problem of political incorporation was shelved, with the retention of tribal structures and, more importantly, government intervention in allegedly traditional ways. Thus the technique of governing Africans was shaped – not mere repression in the guise of tradition, but modern ideas which incorporated traditional structures.

It is instructive to compare this position with the classic 'Cape liberal' argument, as contained in the dissenting Minority Report by Jonathan Ayliff, MLA. Ayliff argued that it was clear that 'according to Kafir ideas and practice, effective Government does exist', which meant 'It would be far preferable to give the Natives to understand that our responsibilities and their welfare make it unavoidable that all the branches and machinery of Government should be in our own hands, and... must in all essential points be European.'[74]

Ayliff's vision of incorporation with no concessions to cultural diversity lacked the pragmatism of the main report. There was remarkably little support for the principles he enunciated. Even if, aside from the penal code, little action followed in the wake of the report, it opened space for the operation of the dual Cape system, which permitted native law

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[72] *Ibid.*, s. 117.

[73] *Ibid.*, Evidence of Shepstone, s. 265.

[74] *Ibid.*, Annexure V, ss. 21 and 91.

outside the colony proper. While deploring native customs, the state permitted their application beyond the realms of civilisation, an explicit recognition of the inability of the colonial state to govern directly all aspects of social life. Within the colony, in the heartland of civilisation, this admission was tacit, as African traditions were accorded unofficial recognition. Government had learnt, however slowly, from its failures and was attempting to adapt.

There is no better encapsulation of the Cape system as a strategy of governance, than that provided by Jacobus Wilhelmus Sauer, a former Cape secretary for native affairs, and acting premier, to the South African Native Affairs Commission. '[A]s we have had longer experience than any other South African Colony,' he explained, 'and as our Native is more civilised – I think he is a better man, too – than the Native in any of the other States, naturally we are not in such a hurry to alter our system.'
'Would you not think,' a less astute member of the commission asked, 'that the better man he is and the more political sagacity he has the greater danger he is politically?'
'Of course,' replied Sauer, 'if you follow that out you must get rid of him altogether. To be logical you must put him in a sack and send him out three miles into neutral waters! We cannot do that, so we had best made friends with him.'[75]

And in Natal

In nearby Natal, where the colonial presence was more muted, all native laws, customs and usages which were not 'repugnant to the general principles of humanity, recognised throughout the whole civilised world' were preserved by order of the Crown.[76] Turning this principle into a system of law and administration fell to the man who came to embody native administration, bequeathing his name: Sir Theophilus Shepstone. African chiefs were used as administrators, becoming the primary agents of government; where none existed, they were created.[77] Native law was preserved as part of the tribal system. 'The main object of keeping natives under their own law,' Shepstone explained in 1883, 'is to ensure control of them.

[75] *South African Native Affairs Commission, 1903-5* (Cape Town 1905), Volume IV, Evidence of Jacobus Sauer, ss. 45314-5.

[76] This order was embodied in Natal Ordinance No. 3 of 1849; David Welsh, *The roots of segregation. Native policy in colonial Natal, 1845-1910* (Cape Town 1971), p. 14.

[77] Welsh, *Roots of segregation*, p. 20.

You cannot control savages by civilized law.'[78]

The strength of Shepstone's system lay in its restricted conception of government, his unwillingness to legislate against many of the practices found by the missionaries to be objectionable. He told the 1883 commission he was not prepared to 'legislate for the mere purpose of making people moral.' However, he continued, 'I hold that, with regard to all social evils which in their nature involve political mischief, a Government is in duty bound to act more or less repressively'. And when political mischief arose, it was ruthlessly suppressed.[79]

This lack of concern with morality stems, perhaps, from a difficulty with enforcement, or, a recognition that certain moral principles might undermine the very system which preserved the order that was crucial to colonial survival. That, after all, was Shepstone's job. Even securing labour was less important than securing order, which was best done with minimal interference in African affairs.

Although not without its critics, Shepstone's system found favour in Whitehall for its economy. 'The dangers of all needless interference with rooted habits of barbarian races where not decidedly repugnant to humanity and morals,' declared the Colonial Secretary Bulwer-Lytton, 'are so great, and conciliation is so wise and easy a method of obtaining submission and docility from those whom we keep in check by our superior intelligence rather than our physical force.'[80]

Shepstone's inability to retain support among both settlers and missionaries made him a casualty of Natal politics, and rendered him powerless to stop the codification of native law

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[78] Cape of Good Hope, *Government Commission on Native Laws*, Evidence of Shepstone, s. 200.

It should be noted that Shepstone was initially as concerned with 'civilising' as with keeping order, when instructions from his political masters made it clear that expenses were to be kept to a minimum. See, Freda Wolfson, 'Some aspects of native administration in Natal under Theophilus Shepstone, Secretary for Native Affairs, 1857–1875' (MA dissertation, University of the Witwatersrand, 1946), pp. 4–10 and 99–111.

[79] *Ibid.*, Evidence of Shepstone, ss. 290 and 669. See Welsh, *Roots of segregation*, pp. 120–22, and ch. 8.

[80] Quoted in Welsh, *Roots of segregation*, p. 28.

in 1878,[81] his resistance apparently fuelled by fear of losing his almost unfettered powers.[82] Introduced to address the variety of practices by magistrates, codification produced a number of distortions, but the Code remained in force and was amended in 1891.

Shepstone's brother John, a former secretary for native affairs, provided a succinct statement of the Natal attitude to chiefs and native law:

> You must remember that every hereditary Chief has a very large and powerful influence over his tribe, and if you make use of his services as a subordinate to the Government – and in my opinion every Chief should have been used in that way up to this moment – then you would have had far more effective government, and far more power over the Natives than you have now, because if you depose these Chiefs, and simply leave them in the country, you have instruments for mischief.
>
> [Y]ou require a firm but just government, and a very firm government. They require it; they are savages; they are uneducated; and I would still make use of their own laws and customs to a great extent, because they are far more applicable than our own laws would be, than any statutory law that we might frame or pass. I would not be in any hurry to drag them out of their own system. There is no necessity to do it, and if you do these things hurriedly, you only do more harm than good.[83]

A lack of inclination to 'uplift natives' was unsurprising in a colony known for the racism of its settlers. Henri Guillaume Boshoff, a judge of the native high court, said of the notion of equality, 'The Native does not seem to recognise the fact that the Great Designer intended them to be an absolutely distinct section of the community for all their existence.'[84] Resident Magistrate Thomas Bennett told Sanac that bringing Africans under the common law would be 'suicidal' as 'They would get quite out of hand, and you would have them demanding the franchise, and demanding all kinds of things.'[85]

With no recognition of the possibility, or even desirability, of progress, Africans were relegated to an alien society, perpetual others. Although this resulted in a degree of autonomy for African communities, it was a sentence of exile for the *amakholwa*. Johannes Khumalo, a kholwa chief, had made his preference clear: 'The best thing is for us to be placed under the rule of His Majesty; let us follow the children of enlightenment, the children

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[81] In 1875 the Native Administration Law (Law 26 of 1875) deviated from Shepstonian principles, repealing Ordinance no. 3 of 1849, establishing a Native High Court, a Court of Appeals and courts of Administrators of Native Law. Criminal jurisdiction was removed from the chiefs. A process was initiated which three years later produced the Natal Code of Native Law. See Kahn, *Union of South Africa*, pp. 322–23.

[82] This view of codification was later expressed by John Chadwick, the secretary to the 1875 Native Law Board: 'reducing the Native customs to writing does away to a great extent with the authority of the Government. They are bound in a certain way by these Rules and Regulations, and it is not quite so elastic as when the Supreme Chief could do exactly as he liked.' *Sanac*, Volume III, Evidence of J. C. C. Chadwick, s. 28432.

[83] *Sanac*, Vol. III, Evidence of J. Shepstone, ss. 18767 and 18733.

[84] *Ibid.*, Vol. III, Evidence of H.G. Boshoff, s. 23063.

[85] *Ibid.*, Vol. III, Evidence of T. R. Bennett, ss. 27215–6.

of the sun, who came across from England and gave us peace.'[86] But the children of enlightenment refused to share their place in the sun.

A President approaching the fin-de-siecle

A decade before Sanac, the visions of Natal and the Cape were pitted against the Boer traditions when the president of the Orange Free State reflected on the issue which had eluded the best efforts at resolution – the native question.[87] President Reitz's solution, in sum, was to destroy the tribal system and traditions, and 'To adopt the principle and maintain it steadfastly, that there shall be no "equality" between the aborigines of South Africa and the people of European descent who have made this land their home.' To those who believed in equality, the president pointedly remarked, 'if there is to be equality, it should be complete, and you must not be so unreasonable as to refuse your daughters in marriage to a man who in every respect but that of colour is your "equal."'[88]

Reitz's *kragdaadigheid* was challenged in a number of responses which embodied a positive yet cautious approach. As one William Hay put it,'The problem for South African statesmen is how to deal with the natives so as to make them of real benefit to the country in which we all mean to live, if possible, and this requires a policy other than the affirmation of six negations.'[89] Shepstone himself was scathing of Reitz's naivete – the answer was not to abolish chiefs, an impossible task, but to 'use them as they have been used during the last 45 years in Natal; use their influence, their system of tribal management, their principle of mutual responsibility; make room for these in your own system.'[90]

A remarkable degree of consensus existed on the need to approach African traditions with caution, not to provoke resistance while not pandering to heathen customs. Even if equality was impossible, which seemed to be widely accepted, Africans could be transformed into assets of the country in a way which accorded with notions of population and government of the self. President Reitz and the traditions of the *republiek* belonged to a passing era. While

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[86] *Ibid.*, Vol. III, Evidence of Johannes Khumalo, s. 25409.

[87] Reitz, 'The native question', *The Cape Illustrated Magazine*, vol. II, 1891–1892. All contributions are taken from this edition of the journal, unless otherwise stated.

[88] *Ibid.*, p. 74–6.

[89] William Hay, 'The native question', p. 193.

[90] Shepstone, letter to *Natal Mercury*, 29 Jan. 1892, in 'Native policy: the Reitz--Shepstone correspondence of 1891–1892' (2 *Natalia* 1972), p. 17.

repression did not vanish as a strategy of government, it was losing its appeal as the primary mode of rule.

The South African Native Affairs Commission (Sanac) 1903–1905

'SANAC is clearly an important landmark in the evolution of the "native policy" of the South African state... prepared as a guidebook for future reference in the best imperial tradition through a synthesis of imperial guidelines with local expertise.'[91] Expertise on natives which was accumulated and deployed to facilitate effective government, although to what end is debatable. Adam Ashforth has argued that Sanac's main purpose was to allow for segregation, primarily territorial – in a manner acceptable in Britain – which would supply labour in South Africa, a project to organise native affairs so that natives could be 'induced without compulsion to become more industrious'.[92] There can be no argument with this, as long as 'industrious' does not relate solely to labour. Breathtaking in its scope, the report aimed to provide comprehensive knowledge with which to govern Africans, not just as mere units of labour, but as a population. It is less helpful to say that the state wanted the population to become more industrious, than to explain how this was to be achieved.

Following in the footsteps of the 1883 commission, Sanac postulated an African form of government which was based on tribe and chief, heavily patriarchal yet not despotic. 'As the father is to the family, so is the Chief to the tribe,' the commission reported.[93] It was a favourite analogy of Shepstone's, and confirmed Africans' place in the evolutionary hierarchy.[94] As a mode of government it belonged strictly to the European past and the African present, allowing that the two might coincide while not forcing the issue. After all, Sanac was aware of the inevitability of progress, of 'the process of evolution and the effect of changes upon people passing from semi-savage life to enlightenment.'[95]

This was a controversial assumption in a period when many doubted the capacity of Africans to reach the higher stages of civilisation, and the commission felt compelled to respond to the

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[91] Martin Legassick, 'British hegemony and the origins of segregation in South Africa, 1901–14' in Beinart and Dubow (eds), *Segregation and apartheid*, p. 49.

[92] Adam Ashforth, *The politics of official discourse in twentieth-century South Africa* (Oxford 1990), pp. 26–27, 30 and 53.

[93] *Sanac*, ss. 212–13.

[94] Welsh, *Roots of segregation*, pp. 117–18.

[95] *Sanac*, s. 57.

charge that civilisation had wrought more evil than good, reminding its audience, 'The final outcome of a righteous war is not to be judged by the devastations of opposing armies or by the scenes of slaughter and bloodshed on the field of battle.'[96] As evidence of the progress of the native, the commission presented scenes of hearth and home to melt the hearts of those who saw Africans as mere beasts:

> In their homes the Natives are a hospitable and social people, clever and bright in repartee, fond of music, open-hearted and generous hosts, imitative and tractable, and interesting in many ways. They are, speaking generally, not energetic of disposition, but the struggle for life has not been so hard with them as with the European nations, and there has in their past history been little to make them continuous workers.[97]

If the meaningless gyrations of barbarous tribes had failed to stimulate the development of the African, the influence of civilisation surely would. There could be no doubt of their common humanity, and human nature was, as everyone knew, susceptible to the flow of evolution and history which shaped all in their path.

Having brought light to the dark continent, there remained a duty upon the governments of the South African colonies 'as to the moral and intellectual elevation of the subject race'.[98] This was an underlying principle of Sanac's philosophy, a belief in the ability of a superior civilisation to benefit all humanity. Vices acquired under the influence of such a civilisation were regrettable but not ineradicable; yet the solution lay not in legal prescription, but in the inculcation of Christian virtues through moral and religious instruction in all Native schools. That the commission saw fit to deal with such seemingly mundane matters as the wearing of clothes indicates the total approach to government. Africans were not to be regulated by law alone, but disciplined through modern institutions, and, going further, developed into individuals subject to self-regulation. This was the project of government set forth in the report of Sanac.

An impression emerges of a subject race, slowly progressing, aspiring towards civilisation but requiring guidance. Race remained important – railway coaches, for example, were to be strictly segregated; Africans were not permitted to purchase alcohol save, of course, kaffir beer.[99] The belief in the ultimate entry of Africans into civilisation did not mean a common civilisation, but one socially segregated. Labour forms a large component of Sanac's report, for this is important not only to employers, but also to the discipline of Africans themselves.

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[96] *Ibid.*, ss. 276 and 272.

[97] *Ibid.*, s. 273.

[98] *Ibid.*, ss. 282 and 283–89.

[99] *Ibid.*, ss. 266–67 and 354.

If they are to approach European society, they must have similar experience, including that of wage labour. Yet it must also be clear that Sanac is not just, or even primarily, about securing this labour which formed just one part of a vast project which sought to compile the totality of colonial knowledge on the African. Far from a simple triumph of one system over another, the resulting strategy blended elements from the Cape and Natal to produce a form of sovereign government in an age of liberal modes of government.

Two cultures, one country

Sanac sat in a period when, Legassick observed, 'the protagonists in the debate consciously saw themselves as developing a policy which "transcended" not only what they called the "assimilative" policies of the nineteenth-century Cape, but what they called the "repressive" policy of the Republics and perhaps Natal.'[100] His observation has lain untouched by historians who have been content to argue that the policy of Natal triumphed over that of the Cape, indirect rule over assimilation.

'Transcendence', however, meant the adoption of elements of Cape, Natal, and even Boer, policies. Liberalism, in the Cape variety, recognised the ultimate humanity of Africans and their ability to evolve into a common society; it did not, in theory at least, permit cultural or political autonomy. Indirect rule in Natal denied the possibility of assimilation but granted an attenuated form of cultural and political responsibility to Africans, while Boer policy was premised on a denial of equality between the races. These modes of government combined in Sanac, a strategic initiative to modernise South Africa, which had access to new technologies of government highlighting the failings of repression as a form of rule. Such lessons could not be ignored, even in the field of native administration.

There was, of course, space for force, but not as a primary mode of government. Direct rule was rejected as the cost of the violence of assimilation was too high; indirect rule granted too much autonomy to Africans, posing a threat to their civilised neighbours. So blossomed a hybrid, which recognised the limits on government intervention, and the variety of strategies open to the state. By the close of the Victorian century official thinking had recognised the legitimacy of African forms of government and, unable to untie the Gordian knot binding law and society, that of customary law. The parameters within which it operated, and the role it played, were contested and fluid, yet its basic legitimacy was unquestioned in a mode of government which prized effectiveness at a minimum cost.

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[100] Legassick, 'The making of South African "native policy"', p. 1.