# POLITICAL AND SOCIAL THEORIES OF TRANSKEIAN ADMINISTRATORS IN THE LATE NINETEENTH CENTURY

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# P R E F A C E

This study sets out to examine the order of categories and values, structuring men's thought and perception at a fundamental level although not systematically formulated, in terms of which the Transkeian magistrates viewed the African communities under their governance. It is thus an essay in colonial administration, but the critical focus has been narrowed and is centred primarily upon the ideas and assumptions the magistrates used in the business of administration to explain society, government and law. At the same time, a major concern of this work has been to place the particular problem with which it deals - the elucidation of magisterial ideas and attitudes - within a wider framework of contemporary social and political thought, to fit them into the matrix of Victorian culture as it conditioned and shaped the administrators' perceptions and responses touching the indigenous black population. A methodological pitfall opens here, of assimilating individual or local currents of ideas to more general patterns - the 'climate of opinion' or what Matthew Arnold called the 'main movement of mind' of the age; of trying to press disparate, multifarious and often carelessly formulated ideas and assumptions into a conceptual framework or theoretical construct that was independently arrived at and presented as given. The mode of procedure followed was one that allowed the source material to suggest broader patterns and larger perspectives according to which it could be most intelligibly and satisfyingly ordered; one also that wove together various logically independent concepts and general propositions, derived from general studies of the topic and period, and brought them to bear on the Transkeian situation. In this way it is hoped that the main features and contours of the magisterial mind have been rendered with as much precision of detail and emphasis as the demands of analytical depth and conceptual rigour would permit.

The rather loose sense of period which the title conveys is meant to refer, more or less, to that period of time spanning the annexation of the Transkeian territories, whose extreme points are fixed by the years 1872 and 1894; but the writer has on many occasions strayed beyond these bounds, regarding them as useful markers rather than definitive frontiers. Indeed, these two dates are in only a limited sense major turning points in the history of the Transkei. It can be argued that the extension of white control beyond the Kei was a gradual process, that the course of incorporation by which the African communities were included in the Cape Colony took place across a broad range of aspects, economic, religious, social, as well as political. They are processes which long antedated 1872 and which have continued beyond 1894 up to the present time. The period described as the late nineteenth century spans, in addition, the active careers of four outstanding magistrates, namely Charles Brownlee, Matthew Blyth, Henry Elliot and Walter Stanford; and much of the argument of the work has been developed with special reference to the members of this distinguished quadrumvirate.

In constructing this thesis, it was found to fall almost naturally into a tripartite division. The first chapter offers a brief historical introduction to the annexation of the Transkeian territories, a process conceived as an extension of white control in the interests of the stability of the Cape's eastern frontier. The problem of control in the area is considered in its military, political and administrative dimensions, and the range of African responses to white encroachment - from passive obstruction to more organized, articulated forms of political resistance - examined briefly in turn.

Chapter two outlines the dominant theoretical framework within which Victorian social thinkers and, by extension, colonial administrators sought to order their experience and understanding of culture contact: for social evolutionism could accommodate diverse

modes of social organization while maintaining the essential unity of mankind, without impairing at the same time the absolute validity of western civilization. The conservative respect of the magistrates for traditional social arrangements found institutional expression in the unique 'native territorial system' that was fashioned for the administration of Transkeian Africans in the 1880s and 1890s. This was complemented by a characteristic concern for social reform and progress that would elevate the indigenous people in the cultural scale towards the superior life of western society. Both these conservative and reformist strains were caught up in and held together by the pervading administrative ethos of a benevolent paternalism, the illiberalism of which is considered specifically in relation to magisterial attitudes to the drink question.

Law and the administration of justice in the territories form the substance of chapter three. The issues involved in the recognition and codification of African customary law are discussed with particular reference to magisterial evidence given before and the final report drafted by the Cape Native Laws and Customs Commission of 1883. Thereafter, the judicial structure of resident and chief magistrates' courts established in the Transkei and the legal system enforced there are examined historically as to genesis and development; and from a study of the responses of the Cape officials to the organization of judicial administration are derived some of the central tenets of the magistrates' doctrines of jurisprudence. Once again, the significance of social evolutionary theory as a conceptual framework within which the administrators attempted to order the interaction of two diverse cultures reappears in the field of law and justice. For in moulding the legal and judicial systems to the social circumstances of the African people and in harmonizing them with the needs of the society they served, the magistrates in the territories drew upon the categories of

current social thought to understand and give effect to the legal requirements of a traditional or rather transitional society newly incorporated in the white polity. While accordingly the men on the ground conceded relative merit to tribal laws and customs within the circumstances of the tribesman's time and place, at the same time the absolute validity of western norms and values was reasserted in their characteristically moral appraisal of African customary practices: the relation between law, morality and liberty as established by the magistrates being examined in a subsection entitled, familiarly enough, 'Law and the Enforcement of Morals'. In conclusion, a review is undertaken of major areas of discussion and some significant patterns that emerge overall are highlighted.

At this point, I would like to thank Dr. Christopher Saunders and Professor Colin Webb of the History Department and the staff of Special Collections, Jagger Library, for the assistance and encouragement they have given me in the course of research.

# LIST OF ABBREVIATIONS

The following abbreviations have been used:

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| C.M. | Chief Magistrate |
| C.M.K. | Chief Magistrate of Griqualand East Papers |
| C.M.T. | Chief Magistrate of the Transkei Papers |
| C.O. | Colonial Office Papers |
| Col. Sec. | Colonial Secretary |
| C.P.P. | Cape Parliamentary Papers |
| memo. | memorandum |
| N.A. | Native Affairs Department Papers |
| para. | paragraph |
| P.M.O. | Prime Minister's Office Papers |
| R.M. | Resident Magistrate |
| Sec. | Secretary |
| S.N.A. | Secretary for Native Affairs |
| U.S.N.A. | Under Secretary for Native Affairs |

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# CHAPTER ONE

## THE ANNEXATION OF THE TRANSKEIAN TERRITORIES AND THE POLITICS OF CONTROL

### i The Extension of White Control Beyond the Kei, 1872-1894.

In 1872 the Cape Colony initiated a cautious forward movement across the Kei that was to draw the clusters of independent African chiefdoms beyond that river within the white polity.[1] By 1894, when Pondoland was at length annexed, the extension of colonial rule over the territories between the Kei and Natal and the progressive contraction of this enclave wedged between the two white states had been carried forward to an end, and the Cape and Natal colonial borders met.

Already at the beginning of the 1870s, the preconditions of this process of sub-imperialism clearly existed. White influence and white intervention beyond the Cape's eastern boundary was of long standing; and the pressure of the white presence, though of varying intensity, scope and length of time, had probably gone unfelt by none of the traditional societies. In the territories the Cape had conducted re-settlement schemes which had transformed areas neighbouring on the frontier into convenient dumping-grounds for colonial Mfengu and Thembu emigrants, as well as displacing the conquered Gcaleka under Sarili; while along the southern Drakensberg an autonomous Griqua state had been set up under white aegis. This gradual penetration of white control was marked by the devices of informal empire, of residents and diplomatic agents, who acted as the shock troops of the colonial advance, preparing the way for the political incorporation of the chiefdoms within the Cape Colony. That step

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1 This chapter owes much to C.C. Saunders, 'The Annexation of the Transkeian Territories, 1872-1895' (Oxford D.Phil., 1972).

few colonists doubted the Molteno Government would undertake. Besides the obvious fact of past involvement which, it was widely held, could neither be abandoned nor reduced without the loss of control, one concern loomed greater than others in the considerations of the Government in Cape Town. As Charles Brownlee, the first Secretary for Native Affairs, whose shaping hand is apparent in the formulation and conduct of his ministry's 'native policy', declared, 'The main object in view is to maintain peace on our borders and the longer peace is maintained the less probability is there of war'.[2]

Concern for the stability of its eastern frontier precluded the Cape from allowing the continuance of independent African rule and determined the Government in favour of intervention beyond the Kei. What undoubtedly gave particular shape and force to this policy decision was a complex of factors existing at the turn of the decade which helped to create a trans-Keian situation of increasing instability. There was the ever-present danger of border disputes between Mpondo and Mpondomise, Bhaca and Mpondo; an almost constant state of hostility between Gcaleka and Thembu, overlaid by rivalry between the chiefs Sarili and Ngangelizwe, and between Thembu and Mpondo; the intrusion of many African newcomers into Nomansland in the 1860s, coupled with the imperial designs of Adam Kok; and the death of the Mpondo chief, Faku. As it happened, the turbulence and dislocation in the territories were in good measure the very consequence of the white intervention which has already been described. Moreover, the presence of groups of Xhosa and Thembu on both sides of the frontier menaced the security of the Colony's eastern districts, and it was deemed better to control a whole chiefdom cluster rather than be at the mercy of political events beyond the Kei which might unsettle or provoke a section within the Colony.

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2 Cape Archives, N.A.840: Brownlee to Colonial Secretary, 2 May 1873 (part printed in CPP, A.10-'73, copy of which is enclosed).

Already in May 1873, writing some months after taking office, the Secretary for Native Affairs put forward the argument that the Cape Government should extend control beyond the Kei 'only under circumstances when the peace and tranquility of our borders are endangered by the acts of our neighbours', but he included by way of exception the incorporation of those 'weak tribes imploring our protection, and desirous of becoming British subjects', as well as the emigrant communities who might be regarded as British subjects already. In a confidential annexure to his report Brownlee proposed the Colony set about enlarging its influence by gaining a foothold beyond the Mbashe. The tribes of the Gatberg area were already, arguably, British subjects by virtue of earlier residence in British territory, they were afraid of external attack, and occupied a strategic position on the Colony's borders. To Brownlee's mind, this area should become '... a strong advanced outpost, from which we can gradually extend our influence and protection to such tribes as desire it ... overawe the Pondos, support the Tambookies and Umhlonhlo [a Mpondomise chief], and prevent any combination for evil between the Amapondas and Kreli'.[3]

That the Molteno Government was committed to a cautious and prudent advance east of the Kei, calculated to secure 'peace on our immediate frontier, and among the border tribes beyond',[4] was dictated by two factors; on the one hand, by the tactical argument that any rash assertion of control might create the very instability which white rule was intended to remove, and, on the other, by the constitutional necessity of working through the Imperial Government, relations between which and the Colony were as yet unclarified.

In the event, by mid-1876, the Cape found herself in

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3 Cape Archives, N.A.840: Brownlee to Colonial Secretary, 2 May 1873 (part printed in CPP, A.10-'73, copy of which is enclosed).
4 CPP, G.21-'75, p.132.

de facto possession of all Fingoland, Thembuland and Nomansland, colonial influence extending along the south of the Drakensberg, as far as Natal. The rapidity of this advance had outstripped cautious expectation and the success amply justified Brownlee's conviction, expressed a mere three years previously, that '... there is every reason to believe that our influence and government will be extended to Natal without violence or bloodshed'.[5] This rapid and successful accomplishment of the Government's aim to stabilise the frontier zone owed much to a particular set of circumstances in the territories, conditions presenting the Colony with an opportunity to intervene. In Nomansland, J.M. Orpen, magistrate sent to the Gatberg area in accordance with Brownlee's proposal of 1873, seized the initiative and pushed the territory towards political incorporation. In Thembuland, an advantage was offered when Ngangelizwe for the second time rashly provoked the danger of a Gcaleka attack and promptly appealed for 'British protection'. As regards Fingoland, where Matthew Blyth ruled the amenable Mfengu with the virtual authority of a colonial magistrate, and also the Idutywa Reserve, considered since the 1850s as a colonial settlement, both seemed ripe for annexation. Their location immediately across the Kei on the threshold of the territories ensured their early inclusion in any initial advance the Colony made beyond the frontier. But for Charles Brownlee, the addition of a large black population to the Cape by mid-1876, if not by conquest, then apparently by consent, meant that '... more than 450,000 ([Africans]) have of their own free will and choice placed themselves under our authority, being desirous of securing the peace and good order which British rule ensures to them'.[6] Although the Cape Government did not consider the use of

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5 Cape Archives, N.A.840: Brownlee to Col. Sec., 2 May 1873.
6 Cape Archives, P.M.O. 259: Memorandum by C. Brownlee, 7 July 1876, p.17.

armed force to hasten the incorporation of the remaining independent tribes along the coastal plain, thus wrapping up the work of annexation in the Transkeian Territories, the expectation was held that the Gcaleka, Bomvana and Mpondo would in time come peacefully under colonial sway. The self-evident blessings of the Pax Capensis enjoyed by the absorbed tribes, the security, prosperity, and freedom from despotic chiefly government, would, Brownlee was assured, persuade and impel the independent chiefdoms to seek subjection to white rule. Indeed, in his view, the whole thrust of colonial policy, tending towards the pacification of the frontier zone, would in the logic of things convince them of their interest to remain 'at peace and on friendly terms with us and those who are under us ...'.[7]

As it happened, the course of annexation, set in motion by the Molteno Government in the early 1870s and proceeding smoothly by 1876 towards the achievement of its objectives, was to be deflected and delayed. The extension of white control was forcibly challenged by African resistance movements in the war of 1877-78 and the rebellion of 1880-81. This resistance of the traditional societies effectively dispelled the belief that the annexation process would be a peaceful one, and, by rudely shattering the Cape's confidence in her ability to sustain an imperial rôle, gave rise to alternative solutions to colonial rule. In addition to the Cape's unwillingness to push ahead with the work of expansion, another major cause of delay was Imperial intervention in the course of incorporation. The Colonial Office enmeshed the question of the Transkeian Territories in Southern African confederation schemes by making Cape support for the projected confederation a prior condition of her annexation of Thembuland and Gcalekaland. Then, alarmed by the fear that the Cape left to her own devices would precipitate an African uprising,

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7 CPP, G.21-'75, p.131.

London required that British approval be given the form of government accorded the territories once they were brought within the Colony. While, then, resolutions had been introduced in the Cape Parliament in 1875 declaring the expediency of annexing Fingoland, the Idutywa and Nomansland, and those relating to Thembuland in 1876, this triad of factors interposed to set the process of incorporation off-course. In the event, Fingoland, the Idutywa Reserve and Griqualand East were annexed to the Cape Colony by an act of 1877, as enforced by proclamation in 1879; and Thembuland and Gcalekaland, the latter 'obtained by conquest' as a result of the 1877-78 war, by act and proclamation of 1885. The subjection of the Mpondo chiefdom in 1894 rounded off the incorporative process.

Intervention in the interests of the security of the Colony's eastern marches formed the dynamic principle of Cape policy, for the Government believed that the extension of white rule would impose stability on the frontier region and remove the threat of war, which might easily engulf the lands on both sides of the Kei. It was generally assumed that independent African rule which the Cape sought to bring to an end was endemically anarchic and, indeed, in contemporary accounts the superimposition of colonial control represents almost the enactment of a Hobbesian political philosophy. Surveying the Southern African arena in a broad historical sweep, with an obsessive focus on the Difaqane, Brownlee reflected, in an official memorandum, on the 'process of conquest and aggrandisement, destroying and building up' which he thought had regulated the political relations of the indigenous societies of South-Eastern Africa 'probably ... for centuries'.[8] The stark picture Brownlee presented of remorseless tribal warfare, a near pathological

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8 CPP, G.21-'75, p.122.

political instability, draws upon features of the conventional 'state of nature', that philosophical device employed by political thinkers to explain the logical presuppositions of civil society. But whereas philosophers did not regard such a state of nature seriously as a historical hypothesis, for Brownlee its historical reality was well grounded. The human nature he postulated of the 'barbarous tribes' was one actuated by a restless striving for power, precedence and domination: homo homini lupus. Proceeding to a dubious generic statement, he characterised the indigenous communities as motivated by '... aggression, love of conquest, extermination of conquered tribes, or ruling them with stern despotism'.[9] Just as Hobbes had attempted to deduce a prescriptive civil philosophy from psychological maxims, so for the policy-makers this state of anarchy beyond the Kei necessitated the imposition of control and the institution in the territories of civil society, as the only logically consistent step to ensure lasting peace and eliminate the arbitrary constraints which characterized the state of nature. In the words of the Bishop of St. John's, 'We have the right to assume that supervision which is implied in constituting ourselves the central power of government over the whole country. It is our duty to take upon ourselves that position, and not to perform it would be to leave the Kafir races ... to their savagedom and interminable intertribal warfare'.[10]

The imperatives of control and the interests of stability dictated a course of intervention by the Cape in both intra- and inter-chiefdom disputes. Civil warfare among the Mpondomise was exploited by the expansionist J.M. Orpen as a first step towards hustling the whole of Nomansland into the colonial embrace. Shortly after taking up his appointment in the area, he succeeded in con-

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9 CPP, G.21-'75, p.121.
10 Ibid., G.4-'83, Appendix C, p.85, q.8.

vincing the warring chiefs, Mditshwa and Mhlontlo, that 'British protection' would restore peace; and, dramatising their sporadic encounters, persuaded Brownlee that this extension of Cape rule would arrest a major shift in the local balance of power in favour of the Mpondo, who had been allied with the stronger chief, Mditshwa. As the Mpondo were known to be hostile to white encroachment, Brownlee considered that they should not be allowed to take advantage of Mpondomise rivalry to assert or reclaim influence in Nomansland, and so agreed to the reception of the chiefs as British subjects.

Two decades later, a struggle for power in Pondoland between the paramount Sigcawu and an influential councillor, Mhlangaso, indirectly prompted Cape ingression, for on this occasion the concern for stability was more immediately experienced by Natal than by her sister colony. The political crisis affecting the chiefdom only began to present the threat of 'anarchy and confusion'[11] to neighbouring areas in the early 1890s and even then the Cape-ruled territories were not much affected. But Natal could not ignore a civil war being fought on her border, and to anticipate the contingency of Natal intervention, the Cape took the decision to step in and establish its rule.

The penetration of colonial influence was directed towards the defined objective of regulating and harmonising political relations among the chiefdoms. Initially this was secured by the Cape's intervening as an arbiter in conflicts between tribes through the mediation of its agents, by exercising a protective function over groups traditionally friendly to the Cape and over those who had newly sought out the British connection against hostile neighbours, or by dispensing advice and exerting diplomatic pressure favourable to colonial interests. It is in such terms that the gradual involvement of the Cape in the long history of conflict between the

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11 Cape Archives, C.M.K. 2/7: Report of W.B. Stanford for 1890.

Thembu and Gcaleka can be understood. When Ngangelizwe, a young man with expansionist visions, became paramount chief, tensions between the two chiefdoms, expressed in cattle-thieving disputes and skirmishes, grew more pronounced and frequent. To defuse the inherited antagonism, Ngangelizwe's councillors arranged a diplomatic marriage between the two royal houses. Unfortunately, in 1870 Ngangelizwe, in one of his periodic outbursts of aggression, so brutally ill-treated his wife, the daughter of Sarili, that she fled to her father, permanently maimed. Fearful of Kreli's vengeance, the Thembu paramount petitioned the Cape High Commissioner to send an officer to reside with him, and in consequence, E.B. Chalmers took up his appointment as resident with Ngangelizwe in February 1871, initially to prevent hostilities between him and Sarili. In the following year, Ngangelizwe asserted a traditional claim to the country of the Bomvana, whose chief Moni regarded Sarili as his titular superior; and when Ngangelizwe raided him, appealed to Sarili for military assistance. Sarili promptly advanced through Thembuland and though Cape Town was alarmed that he might make extensive territorial gains, the chief withdrew his army. A duly chastened Ngangelizwe asked his resident in November for 'British protection', but when the loss of authority entailed in his submission to white rule was spelt out to him, the request was withdrawn. A commission appointed to investigate the conflict maintained it was of the greatest importance for the Colony that Ngangelizwe's position should not be further weakened. As an ally of the Colony, he should be built up as a counteractive force to the newly realised power of the Gcaleka. Then, in August 1875, relations between Thembu and Gcaleka reached crisis-point once more, but this time Ngangelizwe's irresponsible actions brought about the reception of the Thembu as British subjects. After a niece of Sarili had been beaten to death on his orders, Ngangelizwe was confronted with the unwelcome prospect of retaliatory action by the Gcaleka, followed by

defeat and loss of territory as a likely result. This prospect did not please the Cape Ministry either, for it had no wish to see the hostile Gcaleka gaining more land and dominating the frontier zone. So when at the prompting of his missionary, Ngangelizwe renewed his appeal for protection, the Cape acceded to the request and assumed control over Thembuland.

The Cape Government was clearsighted enough in estimating the sober realities of power to recognise that while the peoples of large areas had been persuaded to come under colonial rule voluntarily, the grounds of submission were not a mere value preference for civilized white government or the flattering transference of political allegiance away from chiefly despotism. The small-scale African chiefdoms had accepted British protection, either seeking assistance against external aggression or else reluctantly convinced by the pressure of circumstances that no other alternative lay open. As Brownlee remarked, 'With all the tribes who have placed themselves under our rule it has been simply a matter of expediency or necessity'.[12] In Nomansland, where as a result of the arrival of many African new-comers in the 1860s land was scarce and border disputes between the various groups in occupation were frequent by the end of the decade, it is obvious that the extension of white control bore the promise of advantage for some tribes. For the weaker chiefs British protection most likely offered the sole guarantee of the retention of their lands and the integrity of their chiefdoms against Griqua domination. But a closer understanding of what such protection would involve did not serve to lessen African disquietude over the bargain struck. The formerly autonomous tribes soon found the consequences to be ever-increasing pressures disruptive of the fabric of traditional society and, for the chiefs, the gradual erosion and curtailment of their independent powers, particularly in the

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12 Cape Archives, C.M.K. 2/3: Report of C. Brownlee for 1880.

judicial sphere. In the case of the Thembu, as the immediate danger of Gcaleka hostility receded, the price which the chiefdom had paid for protection was estimated higher than they had reckoned for. Disaffection with Cape rule mounted as the tribesmen came to realize that they had irretrievably lost their independence when they had only sought protection. Official annoyance provoked by the ingratitude of its charges who depreciated the magnanimously bestowed blessings of white rule was voiced, for example, by Brownlee of the Mpondomise:

> ... we have come in between tribes who were constantly fighting with each other, each seeking to obtain what the other had; we have interfered to save them, and instead of feeling grateful each tribe is dissatisfied because we do not give it that which it could not obtain by years of fighting and bloodshed although we have secured to all parties that which they possessed when we intervened and they have since enjoyed peace and prosperity.[13]

On the colonial side, the problem was how to avoid becoming embroiled in traditional local conflicts, serving the interests of one chiefdom in its rivalry with another, to the detriment of those larger concerns of stability and peace. For 'the tribes would be deriving the benefit of our interference and protection, in matters which suited them, and at the same time remaining independent and following their own inclinations in other matters'.[14] The restrictions on all-embracing control imposed by the limited liability of the Cape's rôle as policeman during the period when colonial control lay lightly over the area underlined the weaknesses of the system of informal rule through agents and residents. Likewise the increasing difficulty the Cape found in maintaining a neutral image, as an arbiter able to put to good effect its claim to impartiality in the settlement of conflict, and yet at the same time wield influence in the wider interests of peace or interfere if necessary 'in behalf of the

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13 Cape Archives, N.A.843: S.N.A. to Magistrate with Umhlonhlo, 7 December 1876.

14 Ibid., N.A.841: S.N.A. to Resident with Gangelizwe, 3 November 1874.

common good',[15] pointed to the desirability of extending colonial control over the territories as a whole. Only by incorporating the independent chiefdoms within the white polity could complete oversight of the conduct of foreign relations among the tribes be obtained, traditional hostilities regulated and reduced, and colonial faith in its 'aptitude for control of subordinate races' vindicated.[16]

At the same time, the Cape Government required assurance that each extension of white authority would not bring further border disputes in its wake. The Bhaca first asked for protection in 1873 but their subsequently renewed request was only granted in early 1876; Jojo and the Xesibe had to wait even longer. Both the Xesibe and Bhaca had quarrels with the Mpondo, and the Cape had no desire to inherit these. Even after a Cape magistrate had taken up residence in Xesibe country, the Government was wary of intervening in support of the Xesibe who were the target of Mpondo raids across an undefined border, as it wanted to avoid entanglement in a war with the Mpondo. But the refusal to intervene weakened the Cape's prestige in the eyes of both the Xesibe whom the administration was nervously restraining and who were thus hamstrung by the very 'protection' they had sought, and also of the Mpondo, who found they could raid with impunity. As Brownlee urged, 'If we do not grant the Xesibes [the protection] which we promised them in taking them over, we do an injustice to them and bring ourselves into contempt with those who plunder and dispossess the Xesibes, notwithstanding that they are nominally under our protection'.[17] Caution, too, would have to be exercised in case too premature an advance of white control, especially without clear evidence of local consent, might provoke resistance and prove counterproductive of the very ends for

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15 Cape Archives, N.A.841: S.N.A. to Gangelizwe, 11 August 1875.
16 Ibid., C.M.K. 2/11: Report of W.E. Stanford for 1896.
17 Ibid., C.M.K. 2/3: Report of C. Brownlee for 1880.

which such extension had been intended.

It was in the war of 1877-78 and the rebellion of 1880-81 that the problem of colonial control in the Transkeian territories came to be posed directly as one of military force. By mid-1876 the Cape had advanced her rule and realized her objectives east of the Kei with a rapidity and success that seemed to ensure the inevitable completion of the work of annexation through the gradual and peaceful extension of white control. The rounding off of the incorporative process it was thought would bring a more assured and permanent stability to the frontier zone, but the Colony did not contemplate armed intervention to hasten the course unless compelled to do so. The Government realised that the eventuality of war had not been precluded by the steps already taken, but it was believed that the Cape had achieved a position which enabled her to limit any conflict that might break out. Were war to come it would provide the opportunity for further advance, but the Government held to the expectation that the Gcaleka, Bomvana and Mpondo would in time come peacefully into the colonial fold.

Indeed, the initial skirmishing that blew into a full-scale war, in which the Colony and the Gcaleka were the major antagonists, evidently caught the whites unaware; however once war had been declared, the Cape determined to take full advantage of the occasion it presented to deal with the Gcaleka in such a manner that they would never again disturb the frontier. On the part of the Africans, the struggle represented an armed movement of resistance to the encroachment of white control which threatened the continued political independence of the chiefdoms; but in the event the military power of the Gcaleka was to be finally broken and all their country taken under <u>de facto</u> Cape rule. The successful prosecution of the war was, nevertheless, not to afford lasting stability in the territories,

for two years later the Colony found itself with a major rebellion on its hands. In 1880 the Transkeian territories erupted in a desperate attempt to throw off white supremacy and for a time it seemed that the Cape's whole position east of the Kei was in jeopardy. Soon after the commencement of the Basutoland war in September 1880, the Sotho in the Matatiele district of Griqualand East rebelled, followed shortly by the Mpondomise in the Qumbu and Tsolo districts, and some of the Thembu in Thembuland proper and Emigrant Thembuland. Even without Basutoland, the area in revolt was far larger in extent than that involved in the 1877-78 war. As it happened, the Colony proved militarily able to suppress the Transkeian rebellion unaided, and once hostilities had ended early in 1881 the Government proceeded to reassert its control, though the territories would long remain unsettled. After this critical phase in the history of Transkeian annexation passed, no very militant political resistance was ever to be mustered against the colonial régime, although fears in the Cape of another African rebellion remained very much alive. Recurrent rumours of an armed black solidarity against colonial rule fuelled the war-scare that periodically flared up and swept the frontier. J.A. de Wet, the Secretary for Native Affairs, had a hostile reception from the Thembu in September 1884 and later told the House they had been on the verge of revolt. Early in 1885 Blyth reported a widespread combination was forming on both sides of the Drakensberg and that the rejection of another Sotho demand for Matatiele would serve as a signal for an uprising from the Caledon to the Indian Ocean.[18] Though such alarms proved false if not groundless, they registered the traumatic impact with which war and rebellion had undermined the Cape's imperial confidence in her ability to rule a large black population beyond the Kei.

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18 C.C. Saunders, 'Annexation of the Transkeian Territories', p.328.

The extent of colonial involvement in the territories, it was soon realised, committed the Cape Colony to an all-incorporating extension of control, any reduction in which would endanger the whole position it had gained. This commitment had propelled a cautious but steady forward movement across the Kei until the critical events of 1877-78 and 1880-81 temporarily exhausted the Colony's imperial buoyancy and put paid to the belief that once the Cape had thrown its rule over the territories they would automatically become an area of stability. The feeling gained ground that the Cape should be relieved of the military and financial burdens of empire that had clearly proved too much for her, either by transference of the territories to Britain or else abandonment.

The idea of retrocession had first arisen out of the opposition to Premier Sprigg's Disarmament Act, called with unintentional irony the 'Act for the better preservation of peace within the Colony', as fear of the proverbial war of the races and the desire to safeguard African interests gave impulse to a movement for direct British rule of the territories. Then, in early 1883, the Scanlen Government declared itself in support of retrocession of the Transkei, in line with the abandonment of Basutoland, and in the meantime pursued a policy of laissez-faire and non-intervention with regard to the dependencies. Magistrates stationed beyond the Kei took a firm stand against what Walter Stanford, then in charge of Engcobo, called 'the present "letting matters drift" policy of the Government'.[19] To one current solution which proposed the complete abandonment of the territories and their reversion to independent African rule, the men on the ground were strenuously opposed, certain that such a course would precipitate anarchy and instability, quite counter-productive of the ends which the extension of white control had been intended to achieve, and likely to endanger white interests in the

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19 Stanford Papers: D1, Stanford to J. Frost, 11 May 1884.

area. Stanford wrote, 'it would be the worst possible policy to withdraw control and lose all that has now been gained. Central authority either Imperial or Colonial must be maintained'.[20] In view of the Scanlen ministry's measures of non-intervention and prospective retrocession, some magistrates declared themselves in favour of transference to the Imperial Government, a step thought doubly desirable, because the Cape faced the inevitable prospect of future rebellion, and for this her military resources were inadequate. Eventually, so Stanford believed, the government of the territories would revert to the Cape, a course for which the history of British Kaffraria formed a precedent; and with African resistance checked, 'probably with the hardest work over'.[21] However, after the Scanlen Government had been defeated at the polls on the very issue of retrocession, the process of annexation was resumed by its successor. Past involvement of the Colony excluded the alternative of disengagement from the territories, the strategic importance of which was a major reason for colonial control.

The reassuring completeness with which the Cape had won military control over the indigenous communities did not extend, however, to the wider and more intricate scope at which the Cape aimed in attaching the African people to the colonial connection through a loyalty strong enough to cause them to transfer allegiance wholly from the old to the new order. As the Cape's ambitions expanded to include the more complex aspects of the transformation of traditional society, its interlocking at numerous vital points with the white polity, so the problem of control, now no longer military, became complicated by all 'the grave difficulties that must attend the efforts to raise a people from barbarism'.[22] For the Africans

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20 Cape Archives, 1/ECO: 5/1/1/3: Report of W.E. Stanford for 1883.
21 Stanford Papers, D1: Stanford to E.J. Byrne, 15 April 1884.
22 Cape Archives, C.M.T. 2/62: Blyth to S.N.A., 4 November 1880.

the conflict of wills between white and black became a matter of retaining what was left of the fading power to fashion their own destinies and conduct their own lives in their own ways, of which political independence seemed an emblem and guarantee, instead of comprehensively adopting the vision of civilization and progress favoured by the administration, and for this the obstructive resources in their hands were many and varied. One such response was a dogged attachment to traditional social modes which magistrates categorized as an innate conservatism, a recalcitrance to the demands of change and modernization. Here the administration's authority though not overtly challenged met with passive obstruction. At the other end were more organized, articulated forms of political resistance, rejecting white control and asserting African independence of action, which because they did not assume the militancy of rebellion could not be answered or treated with the immediacy and simplicity of military force.

On the African side, war and rebellion had demonstrated the futility of the attempt to use military resistance to halt white encroachment. In Thembuland, black opposition to colonial rule was channelled into a protest movement among the Thembu, spearheaded by the Rev. Nehemiah Tile, that was both political as well as separatist-religious, and had the active support of the paramount chief, Ngangelizwe. This included in its programme the withdrawal of all but one of the magistrates, and the reception of the Thembu tribe by the British Government. Petitions organized by Tile sought in effect a return to the period of a British resident in Thembuland, before colonial protection was extended to the area and before the onerous magisterial jurisdiction existing in Thembuland in the 1880s had been introduced. For the traditional leadership had found that the establishment of Cape rule entailed the whittling away of their independent powers and the curtailment of their jurisdictional

authority. In March 1884, Stanford reported to the Secretary for Native Affairs '... a growing feeling in favour of a transference of the Native Territories to the Imperial Government'.[23] In the current debate on retrocession, he was himself in favour of such a step, and adopted a cautious attitude of attentisme, offering no discouragement to the chiefs and headmen who met with him to discuss the issue. But once the Scanlen ministry had fallen, the newly appointed Secretary for Native Affairs, de Wet, on a tour of the territories, quite firmly disabused the Thembu paramount of any idea of retrocession and reasserted the reality of colonial control. By the end of 1884, the Chief Magistrate of Thembuland, H.G. Elliot, was speaking of the 'total collapse of agitation';[24] but on Tile's return to his former position in the chiefdom by late 1890 there began a revival in the fortunes of his independent church that was however to prove short-lived. With his death in 1891, attempts to organize the Thembu to exert pressure on the Government for greater autonomy within a system of white suzerainty seem to have ended.

Towards the new class of Christian, educated evolués, of whom Tile was a member, the administration displayed a marked ambivalence, stemming from a basic inconsistency of attitude which desired African emancipation from the tribal system at the same time as fearing its consequences. Through contact with white society, the evolués had acquired new political skills of organization and propagandization, an articulation which could be put at the service of a wider vision and new social horizons, or which could provide a medium for the expression of tribal African grievances, as in Tile's case. As for the latter, the administration reassured itself of the political innocuousness of the Thembu protest movement by tendentiously representing the educated leadership as a radical minority group

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23 Stanford Papers, D1: Stanford to J.W. Sauer, p.166.
24 Cape Archives, C.M.T. 1/82: Report of H.G. Elliot for 1884.

who had tricked the Thembu into a mistaken belief of white oppression against their better judgement. By a process of isolation, this cadre could be safely separated out from the mass of traditional tribesmen: their loyalty to the white government was never really in question, though for a time misrepresented or perverted by the debased rhetorical arts of the radical clique. The Chief Magistrate, Elliot, reported that:

> considerable stir was caused throughout the Territory by the mischievous agitations of certain semi-educated natives (of no position or influence in the Tembu Tribe) who obtained a hearing by representing themselves as champions of the oppressed natives, and that from their education and intercourse with the white men, they were acquainted with their designs, and knew how to frustrate them. When these persons first appeared upon the scene they met with little countenance, or credence, from the bulk of the people, and to the end of their short reign ... were strenuously opposed by all the more sensible Chiefs and trusted Councillors of the Tembu Tribe. They nevertheless worked upon the shattered and debilitated mind of the Chief Ngangelizwe, and by making use of his name (no matter what the tribal opinion of Ngangelizwe personally may have been, his position was revered), succeeded in calling together at various times considerable numbers of natives ... when the agitators endeavoured to convince the people that they were being sorely oppressed by Government, and that if they were only firm and united, Government would abandon this Territory, as it had done Basutoland ....
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> [The Secretary de Wet's meeting with the Thembus in late 1884] caused a total collapse of agitation, and was assuring and encouraging to all loyal men (which I consider the mass of the Tembus to be). The tribe, fearing that what had been advanced in its name might mislead Government, brought pressure to bear upon Ngangelizwe, who ... publicly repudiated all that had been said in favour of separation from the Colonial Government, by expressing their loyalty to it, and asking for a continuation of its protection.[25]

Political protest of a different order, the first stirrings of an African nationalism, was observed among a small group of educated Mfengu in the Nqamakwe and Tsomo districts of the Transkei, who had absorbed the influence of and established contact with the new African élite in the Eastern Cape. 'Some of them had been holding meetings to discuss their alleged grievances, and had elected a

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25 Cape Archives, C.M.T. 1/82: Report of H.G. Elliot for 1884.

President and Secretary and were apparently in communication with the Native Political Association that has been I believe formed in the Colony'.[26] The Chief Magistrate of the territory expressed concern that the political movement was engendering a polarisation of white and black, by spreading propaganda among the 'semi-educated class' claiming that 'they are an oppressed people and that the actions and intentions of both the Government and its officers in these Territories is nothing but evil'.[27] A similar mechanism of re-assurance to Elliot's was employed by Blyth, which had the effect of guaranteeing the loyal attachment of the mass of the people and the traditional rulers (now co-opted into the white bureaucracy), at the expense of isolating the black protest group. 'All the most influential and best of the Fingoes are indignant at the course pursued by this small section ....'[28] The administration could rely on the passive deference of the tribesmen to the new order, for the overwhelming military force which the Cape had brought to bear in the war and rebellion must have convinced them of the futility of armed resistance on traditional lines. But the novel and more subtle forms of protest against white rule, shaped and organized by the educated evolués, presented the Cape Government with a renewed challenge though one expressed now in a westernized form. An ironic reversal had taken place. While the tribesmen became inured to Cape rule, displaying what Burke once called 'a sort of heavy, lumpish acquiescence in government', the focus of opposition shifted to an educated minority, one product of the civilizing impulses on which the Cape had pinned such high hopes in extending its rule.

The attitude to the evolués carried over into the

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26 Cape Archives, C.M.T. 2/67: Blyth to U.S.N.A., 14 June 1887. The South African Native Political Association, founded in early 1883, was an early African political organization.
27 Ibid., C.M.T. 2/68: Report of Matt. Blyth for 1887.
28 Ibid., C.M.T. 2/67: Blyth to U.S.N.A., 14 June 1887.

magisterial prescriptions regarding African education. The whole thrust of education, it was felt, should be designed to acculturate the traditional people along European lines, but nevertheless along lines appropriate to the African's position within the new dispensation. The primary concern, in the aims and conduct of African education, was to entrench and perpetuate the subordinate status of Africans in the white-controlled society fashioned with the incorporation of the territories within the Colony. Magistrates, for instance, severely criticized the 'bookish' academic fare provided by the mission schools and the kind of African who emerged from them, in terms of an implicit premise that blacks constituted a natural labouring class. 'Book-learning' unfitted the African for 'the social position his circumstances suited him for' and educated him beyond his station in 'the social economy'.[29] They held that advanced education only isolated the young man from his people and, because of the inequality of opportunities existing in the Cape, frustrated him in his search to find a job commensurate with his skills and proficiency. As one magistrate remarked, 'these are the men really who are found at the head of these agitations which are termed anti-European'.[30] Education was not conceived by the administration, as it was by progressive blacks, as the road to social mobility and personal advancement in the new society. Rather it was seen as a process whereby African entry into the white society could be controlled in accordance with the white conception of the Africans' subordinate status as a separate community in the new order.

The overriding concern of the Cape for stability did not brook the challenge of black resistance nor countenance any right of

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29 CPP, G.43-'79, Report of W. Ayliff, S.N.A.; G.17-'78, p.43.
30 South African Native Affairs Commission, Appendix C, vol. 2, Minutes of Evidence, no. 13313 [N.O. Thompson].

resistance that might invalidate the colonial claim to control or undermine the legitimacy of colonial rule. The administration would admit of no conditional limitation in fact to the extent of political obligation on the African side or of political authority on the Colony's side. For the fundamental grounds of obligation and authority were so heavily weighted in the Colony's favour as to impose an almost absolute duty of obedience on the ruled and an absolute right to govern on the rulers.

In order to define the terms of discussion, a distinction can be drawn between criteria that are formal and general and those that are substantive and specific. As regards the latter, the Government derived its title to rule from and rested the legal obligation of obedience on varying grounds. There was, first of all, the right of conquest to rule over the vanquished, as in the case of Gcalekaland which came under colonial rule as an inevitable consequence of the war of 1877-78. On the outbreak of hostilities in October 1877, the High Commissioner issued a proclamation deposing Sarili and forfeiting his country, in order to justify retrospectively the invasion of Gcalekaland; and once the territory had fallen by force of arms into the Cape's possession, formal steps were taken to annex Gcalekaland to the Colony. Military conquest gave an absolute right to persons and property, enabling the Government to relocate the Gcaleka in the greatly reduced northern portion of the tribal patrimony. With those chiefdoms on the other hand which had voluntarily consented to come under its rule the Cape acknowledged the political necessity of respecting their vested rights, though when it suited the interests of colonial control such claims were paid scant regard and even unilaterally abrogated as in the case of the Emigrant Thembu.

Political relations between Colony and chiefdoms were also regulated by formal conditions of cession, involving the transference

of sovereign authority and voluntary submission of the tribesmen to Cape rule. These bound the contracting parties to a strict observance of terms, although when the Cape felt sufficiently assured of its control the conditions could be adjusted or ignored as circumstances appeared favourable. The conditions drawn up on the reception of the Thembu provided, for instance, that Ngangelizwe and his sub-chiefs should be recognised and paid salaries; but for a time the Cape would not abide by the clause and had the paramount deposed, until political considerations, in fact heightening Thembu disaffection, prompted the Government to reinstate Ngangelizwe. Again, while the conditions had reserved to the chiefs judicial powers to settle law suits, excepting serious criminal cases, subject to the right of appeal to the magistrate, the Government's construction of the clause, namely that the magisterial courts exercised both original and appellate jurisdiction, effectively reduced the chiefs to civil arbitrators, for on appeal from the tribal courts all cases were heard de novo. The conditions of cession, then, provided a formal definition of relations, a common area of initial agreement within which the Cape could manoeuvre as occasion presented itself to thrust the Thembu along the road to a magisterial take-over of traditional authority.

Title to authority also rested upon the claim of long establishment, the fact of earlier residence in British territory, by virtue of which some African groups could arguably be regarded as British subjects anyway. Thus, the Idutywa had since 1858 been looked upon as in some sense a colonial off-shoot and its residents knew themselves as 'Government people'. As for Fingoland, although independent territory, it had been settled by colonial Mfengu who on their exodus had been promised that they would 'continue British subjects'.[31]

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31 C.C. Saunders, 'The Annexation of the Transkeian Territories', p.31.

A more general duty of obedience was located in the utility of colonial government. As Brownlee wrote of the Thembu, 'while on the one side they have received benefits, on the other they have incurred obligations to the power that has protected them'.[32] At other times, an indefeasible right to authority was asserted simply on the ground of the realities of power, proven by military superiority; and with shrewd discernment, unflattering to the civilizing pretensions of a white imperial power, it was realised that the Africans obeyed only while and since it was their interest to do so.

The Cape's refusal to admit any justification of black resistance that challenged the legitimacy of its authority or the supremacy of its power can be illustrated in the case of both the Emigrant Thembu and the Mpondomise who rebelled in 1880. The Emigrant Thembu had crossed the Indwe on the understanding and with the inducement that they would be independent of British rule, but found themselves brought gradually and insidiously under complete magisterial control despite the frequent protests of their chiefs. In 1878 control was tightened further when Emigrant Thembuland was divided into two districts, with a second magistrate. A year later not only were they disarmed and made to pay hut tax, but appeal cases were instituted from the chiefs' to the magistrates' courts. In 1880 their petition against prospective annexation was ignored and unaware that the parliamentary bill would not receive the Imperial assent, the Emigrant Thembu most probably assumed it would soon take effect and introduce into their country the full force of colonial law. Goaded to this point the majority of the chiefs led their people into rebellion. The Cape Colony had stubbornly ignored their guaranteed rights which it had proceeded unilaterally to revoke, as one former agent, E.J. Warner, contended, 'simply because Government

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32 Cape Archives, N.A.843: S.N.A. to C.M. Thembuland, 2 February 1877.

thought some alteration necessary' in the interests of white control.[33] To objections at the colonial take-over voiced by Warner and echoed by Stanford and Elliot, the Government argued in justification of its action that in a strictly legal sense the Emigrant Thembu had forfeited their title to independence as not all the colonial Tambookies had left the Queenstown district in 1864. But nothing could disguise the fact that the extension of Cape rule represented more a usurpation than a voluntary delegation of authority, a dictation of terms by a powerful neighbour who had arbitrarily transformed the political status of Emigrant Thembuland.

Likewise the Mpondomise who had accepted British protection discovered its consequences to be an ever-tightening web of control subversive of the traditional social and political order. The Mpondomise chiefs had keenly resented the magisterial usurpation of their powers and the assumption of authority over their people. The tactless and undiplomatic handling of Mhlontlo by the hapless administrator Hope, who gave his life and name to the rebellion, had served to estrange even the better disposed of the two leading chiefs. On their rebellion, Brownlee could present a weighted and selective interpretation of past relations between the Cape and Mpondomise, which allowed of no other conclusion but that the tribesmen had 'without any complaint, or assigned reason taken up arms against the Government'.[34] By a strict adherence to the terms of cession and a liberal fulfilment of its governmental responsibilities, the Cape had rescued the people from Mpondo aggression and factional conflict, taken them over at their own request, secured them in possession of their tribal patrimony, and bestowed the peace and prosperity of white rule on tribesmen who had, in turn, failed to observe 'the obligations undertaken by them, namely those of loyalty, and subordination to Government'.

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33 CPP, G.4-'83, Minutes of Evidence, no. 6250.
34 Cape Archives, C.M.K. 2/3: Brownlee to U.S.N.A., 10 October 1881.

> The Pondomise were taken over by us seven years since, when broken and scattered by other tribes [;] since then they have enjoyed peace and prosperity, and the broken members of the tribe have returned to the country from which they were expelled .... The people had no grievance, but having been strengthened under the protection obtained from us, they ... took advantage of the Basuto rebellion to endeavour to establish independence from our rule, and which we had never sought to impose on them, but which at their earnest and oft repeated application had been extended to them simply as an act of favour and mercy to themselves'.[35]

Once African resistance to the extension of white rule had been forcibly checked, the Cape proceeded with the reimposition of control so as to reaffirm and entrench its authority and preclude the recurrence of war or rebellion. After the 1877-78 war magisterial control of the Transkeian territories was strengthened by the creation of three chief magistracies. The Government reorganised and rationalised the administrative structure of the areas under its rule by a process of centralization and amalgamation of the hitherto unco-ordinated districts. Gcalekaland was united with Fingoland and the Idutywa to form the chief magistracy of the Transkei; Bomvanaland and Emigrant Thembuland were both included in the newly created chief magistracy of Thembuland; and when Brownlee was appointed Chief Magistrate of Griqualand East he was informed that the bounds of his jurisdiction would run to the Gatberg and include the Xesibe country as well. At the same time a rearrangement of personnel was effected which enabled the Cape to tighten its control of tribal law administration among the incorporated chiefdoms.

As a further instrument of control, the Cape insisted on disarming the tribes east of the Kei but succeeded only in exacerbating relations between its officials and the people among whom they were stationed. The Gcaleka and the Ngqika were disarmed before being allowed to settle in Gcalekaland, and the Mfengu and Emigrant

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35 Cape Archives, C.M.K. 2/3: Brownlee to U.S.N.A., 7 April 1881.

Thembu were persuaded, despite much resentment, to surrender their guns. Thembuland proper and Griqualand East were not systematically disarmed, as the Zulu war and the Moorosi rebellion broke out and the Government realised that, with Cape troops fully occupied, disarming tribes near the Mpondo would leave them defenceless against their hostile neighbours.

After the 1880-81 rebellion, which for a time had seemed to imperil the Cape's whole position in the area, the Government gave itself earnestly and defensively, in an atmosphere of continued unrest and threatened renewal of war, to the task of considering and implementing measures which would safeguard and stabilize white control. The major administrative undertaking tackled in the post-rebellion years concerned the relocation of rebel Africans. On the principle that rebellion should involve the forfeiture of land and territorial rights, tribesmen who had surrendered were not permitted to reoccupy their patrimony but were resettled in defined locations under government-appointed headmen. In this regard, Walter Stanford fashioned a new instrument of administrative control, the ward system, which after its successful adoption in the Engcobo district was widely canvassed and extended to other magisterial divisions. The subdivision of the district into small wards, each with a headman in charge who was directly responsible to the magistrate, was made possible by the confiscation of the tribal lands on the rebellion of the local chief, Dalasile. In line with the general instructions issued from Cape Town after the revolt, that 'Personal influence arising from national or tribal position should not be allowed to become permanent',[36] the ward system worked towards undermining the traditional authority structures inasmuch as it reduced the tribal headmen to the status of functionaries within the white-dominated

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36 Cape Archives, N.A. 915: U.S.N.A. to all Chief Magistrates, 15 September 1881.

bureaucratic hierarchy. Appointment to office was sanctioned by Stanford on the recommendation of two 'leading headmen' in the district, his n.c.o.'s, and in many cases commoners were given position. As for the rebel chiefs, the Government ordered that both those captured and those who surrendered were to be stripped of all title to recognised authority and once released were to be placed under the watchful surveillance of the local magistrate and forbidden to 'gather a following around them or to reacquire political influence among their former people'.[37]

The Cape also resorted to the classic technique of divide and rule, as the general instructions declared: 'If in the late disturbances there has been an attempt among the different tribes to combine against the Government, it becomes an important consideration to determine in what way such combinations in the future can be either averted or weakened ... and to ascertain whether the power of national sympathy strengthened as it will be by congregating in one locality all of a particular tribe, can be reduced or subjugated by the combination in one settlement of different native nationalities'.[38] Divide et impera was the administration's tactical response to the projected fear of 'combination' which haunted the magisterial mind particularly after the rebellion had debilitated official confidence. Many alleged to have discerned such a combination behind the revolt, widely interpreted as an organised conspiracy against the Colony, although the lack of cooperation between the rebel groups suggests there was in fact no plot. Some months prior to the eruption, Brownlee had drawn attention to the danger the enforcement of oppressive measures such as the Disarmament Act presented, as a unifying focus by which previously localized African opposition to the white order could be mobilized in a militant black front. 'Hitherto in

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37 Cape Archives, N.A. 916: U.S.N.A. to Acting C.M. Transkei, 27 June 1884.

38 Ibid., N.A. 915: U.S.N.A. to all Chief Magistrates, 15 September 1881.

all wars and rebellions we have been enabled to localize resistance to our authority, and our strength has consisted in the disunion of the various tribes, whom we have thus been enabled to use against each other, but should any trouble arise from the disarmament act, it needs no prophet's eye to see that a common ground of resistance to us will be established and that we must be prepared for a General Resistance'.[39] After the rebellion the relocation of Africans who had taken up arms was deliberately exploited by the Government to fragment compact chiefdoms and intersperse the tribesmen, so that a district like Engcobo came to represent a patchwork intermixture of various groupings.[40] By the mid-1890s considerable internal movement, resettlement and migration, had assisted the declared government policy of undermining the tribal system; and with the gradual erosion of the political integrity of the formerly independent African chiefdoms were removed the means to mobilise them 'in concert'.[41]

All the same, the spectre of combination, refusing to be laid, reappeared in such novel, non-traditional forms as African participation in the Transkeian conciliar system and representation in the colonial parliament. A common objection to the General Council, a body established for limited black self-government, was voiced for example by Elliot who argued that it bore seeds of 'political danger' in bringing 'the tribes together';[42] by another administrator, of conveying to Africans an exaggerated sense of their 'real importance and [their] strength numerically in South Africa'.[43] Likewise Elliot's cautious advocacy of limited black representation in parliament, which found support in the Malthusian

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39 Cape Archives, C.M.K. 2/3: Brownlee to S.N.A., 9 April 1880.
40 Ibid., 1/ECO: 5/1/1/1: Stanford to C.M. Thembuland, 18 September 1882.
41 Ibid., C.M.K. 2/10: Stanford to U.S.N.A., 21 May 1896.
42 South African Native Affairs Commission, Appendix C, vol. 3, Minutes of Evidence, no. 20495 [H.G. Elliot].
43 Ibid., vol. 2, Minutes of Evidence, no. 13149 [M.W. Liefeldt].

belief that 'there is no virtue in numbers', rested upon an argument that foresaw in a combination of black voting powers the likelihood of white-black polarity and a consequent political collision. Conflict between black and white societies had thus been transposed from the context of the frontier, where white had thrust back black by an overwhelming military superiority, to that of the political arena where blacks by strength of number and a rediscovered racial solidarity might rout the white overlord and recover in the colonial legislature what had been lost through conquest or cession. Both with regard to the conciliar system and parliamentary franchise, the alarm went out that whites who had resolutely removed the means and opportunity for combination among the African chiefdoms and had decisively swept away black resistance to the extension of white control were now with thoughtless liberality providing westernized institutional forms, through which blacks might renew their opposition and realize common aims, and so they were encompassing their own downfall. Techniques of white control would have to be correspondingly developed as Africans were emancipated from the tribal system and entered the new white-dominated society: such became the task of successive Union and Republican governments in twentieth century South Africa.

### ii The Administrative System of Control in the Transkeian Territories

As the territories were progressively incorporated in the Cape, colonial control came to be structured in a unified administrative system which was almost military in form and spirit. The edifice of bureaucratic rule was hierarchically organised, reaching its apex in the office of the Secretary for Native Affairs, with power devolved downwards through a disciplined chain of command that

ran from the Chief Magistrate to the district magistrate to the government-appointed headman at the base.

In the unitary form of government that was established, the executive was made the sole custodian of authority and vested with wide-ranging powers. The various Annexation Acts provided for the introduction of Cape laws to the newly-acquired territories, but the Cape Government was permitted to modify these laws by proclamation, a Shepstonian device first adopted for use in Basutoland. Laws made by the Cape Parliament after annexation applied only if specifically extended by proclamation of the Governor-in-Council. The only safeguard against arbitrary executive action was the provision that the proclamations had to be laid before Parliament in the next session after they were issued. The Transkeian territorial form of government, which ran quite counter to the liberal doctrine of the separation of powers, represented in fact an extreme type of the concentration of bureaucratic authority. At the level of the magisterial district, the officer of the Native Affairs Department united both executive and judicial functions, and wielded paramount influence in and full control over his jurisdictional area. This inclusion of all local governmental powers in a single hand the administration usually justified by analogy with the African political tradition, in which the chief invariably bore the sword of justice in his own person. Only at the level of the superior courts, after the Cape Supreme and Eastern Districts Courts in 1882 were given concurrent jurisdiction with the Chief Magistrates' Courts, was the judiciary kept distinct, for until then appeal had been taken to and the power of review held by the Secretary for Native Affairs.

Colonial control, it was believed, could only be effectively exercised by men on the ground vested with full undivided powers, acting from personal observation and experience, and linked into a military chain of command. Functioning in this way, the magisterial

system appeared to guarantee a strong, simple, paternal rule, devoted to the pacification and civilization of the indigenous African communities.

During the period of informal rule, prior to the co-ordination of the territories into a closely structured administrative unit, Cape officials, in the absence of any legal sanction, had exercised authority over the chiefdoms with which they were stationed by means of 'moral suasion'. As a rule, on taking up their appointments, the diplomatic agents and residents were instructed by Cape Town 'to obtain such an influence over Chiefs and people that you may in course of time be enabled to exercise a beneficial control in the internal affairs of the Tribe, and in what relates to the Tribe in connection with other independent Tribes, and with whom there may at present be no Residents'.[44] The force of circumstances put a premium on character and personality as factors determining administrative action and the quality of influence exerted. Thus an agent like Matthew Blyth was able, by the sheer force of his masterful personality, to exchange his vaguely-defined advisory capacity for the real coin of political power, ruling the Mfengu community with the virtual authority of a 'paramount chief'. The influence of the agents varied of course from tribe to tribe, according to their amenability to colonial rule; the degree of exposure to political pressures that forced the tribesmen to accept supervision from a Cape official and later to seek 'protection'; the relative advantage the chiefdom calculated could be derived from the British connection against external aggression. From a combination of these factors, neither the resident with Sarili, the superintendent of the Idutywa Reserve, nor the Tambookie agent, exerted an influence comparable with that of the Fingo agent. But the basic formula of informal white rule remained

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44 Cape Archives, N.A. 840: S.N.A. to W. Wright, 18 September 1873.

constant: the exercise of authority 'through personal influence, backed and supported by the well disposed among the people'.[45]

However, the absence of a formal administrative organization in the territories and the reliance on the personal capacity of Cape officials to work informally in co-operation or competition with traditional rulers formed, as it came to be realised, but a passing phase in a process of increasingly more direct and more embracing rule, which had been gathering apace since the end of the 1860s. Colonial control had at first lain lightly upon the area, but the territories were to be brought more firmly and closely under Cape rule through the superimposition of the bureaucratic structure of district magistrates working under a chief magistrate. The extension of control can be seen, then, as a movement from informal rule resting upon the personal influence of scattered agents to a bureaucratic-type authority with the executive welded into a strict chain of command. The wide range of discretionary powers previously lodged as of necessity with the men on the spot gradually gave way to a growing uniformity of administrative usages, a greater centralization of executive control, a clearer line of demarcation between judicial, executive and other (diplomatic, fiscal) functions, and an increased displacement of indigenous practices by colonial ones. As one officer astutely commented on one aspect of the trend: 'Up to the present many matters as to which there is no law have been regulated by the personal rule of the Magistrates .... The men are the same but times are changed, and more and more the Magistrate in a native district ceases to be a ruler and becomes an administrator of law'.[46] The heroic age of the Cape civil servant in the territories was passing.

As the government of men came to be modified in the

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45 Cape Archives, N.A. 844: S.N.A. to Magistrate at the Idutywa, 6 December 1877.

46 Ibid., C.M.T. 1/277: Report of the Acting Chief Magistrate for 1895.

direction of the administration of things, such change was obviously deplored by the magistrates. For it robbed the district officer of local initiative and of the plenitudo potestatis he had once enjoyed as a benevolent autocrat dwelling among his people; and it reduced him to a regulated functionary in a bureaucratic system. It was claimed, for example, that apart from his extensive judicial powers, the Chief Magistrate was 'a mere nonentity', acting simply as an official channel of communication between the district magistrates and Cape Town. He was bound to report and receive instructions on wide-ranging matters in dispute or in question referred to him for decision or direction by magistrates; he carried no voice in the appointment or transfer of any official serving under him; and he could not incur or authorize any expenditure, no matter how urgent or necessary, without first obtaining permission from the Secretariat. Centralization and concentration of the power of government in Cape Town, all the encumbering procedural formalities of bureaucratic rule, were impeding the vigour and efficiency of magisterial control. To remedy this, the simple logic of paternalism demanded that the men on the ground should be invested with such powers 'as will command the respect of the natives & enable them to look up to the magistrates & to feel that they really have Chiefs over them'.[47]

Indicative of the same trend towards bureaucratization and away from patriarchalism was the official rule sent out from head-quarters that magistrates were not to venture forth from their posts without superior permission. This invited criticism from district officers on similar grounds. It removed the magistrates from the closeness to their people in ways that had made government seem a tangible and beneficial thing, approachable, effective and sympathetic. Such an action, so one argued, had 'completely crippled them in their

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47 Cape Archives, C.M.K. 2/5: Report of the Acting Chief Magistrate [W.B. Chalmers] for 1884.

usefulness as officers on whose good management, strict supervision of the natives under their charge, the Govt. the country at large so very much depend'.[48] It was important 'if Govt. is to be considered otherwise than as a punishing and taxing master, that officers should be encouraged, nay required, to travel about and make themselves as thoroughly acquainted with their respective districts as possible and let the Natives see that they take an interest in their welfare'.[49] Colonial control, it was felt, could be most adequately maintained through this type of personal and paternal rule, which brought the district magistrate into intimate contact and understanding with his people.

Another feature of the administrative system which commended itself to the men on the ground was the way in which the local officers acting at a considerable distance in extra-colonial African country were knit together into a highly disciplined force. The military chain of command was valued as a means of ensuring the maximum energy and unity of purpose and action, which Blyth, that noted disciplinarian, considered 'so essential a factor in dealing with Natives'.[50]

But direct control of a vast black population could by no means be maintained by a handful of widely dispersed white magistrates. It was politically and administratively desirable therefore to make an accommodation with the traditional ruling élite and to harness them to the bureaucratic system, extending the line of command downwards to the front-line administrative ranks of co-opted chiefs and headmen.

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48 Cape Archives, C.M.K. 2/5: Report of the Acting Chief Magistrate [W.B. Chalmers] for 1884.
49 Ibid., C.M.T. 1/82: Report of H.G. Elliot for 1884.
50 Ibid., N.A. 283: Blyth to S.N.A., 18 June 1883.

As white rule was extended beyond the Kei, the congeries of independent African chiefdoms lost their autonomy and were incorporated within a common bureaucratic structure. Political relations in the area underwent a fundamental transformation. The decentralized pattern of pre-colonial political organization gave way to a tightly co-ordinated and clearly defined administrative unit ultimately ruled from Cape Town and immediately controlled by district and chief magistrates.

Animated by the principle that, as one magistrate expressed it, 'chieftainship and civilization are essentially antagonistic', Cape 'native policy' had long kept in view the steady aim of abolishing chieftainship and had long rung its death knell.[51] This objective was carried over into the Transkeian Territories, where government policy and administrative practice worked steadily but surely towards destroying the power of the chiefs and with it the autonomy of the chiefdoms. The rationale of the official attitude was contained in a multiple indictment of the institution. It was regarded as inimical to white supremacy and white civilization, which were readily equated; basically antithetical to them. Chiefs were seen as focusing the conservative and primitive energies of tribalism against beneficent white rule, acting as a brake on the desirable progressive development of the tribesmen from barbarism to civilization. As the lynch-pin of the tribal system, which it was the Cape's civilizing mission to transform, the administration looked to the ultimate destruction of chieftainship as necessary and inevitable. Any reduction in chiefly power, it was believed, entailed a corresponding increment in magisterial authority, and magistrates, jealous of their own powers, worked to ensure that the tide flowed in their direction. The criticism, for example, levelled against the introduction of colonial procedure in the territorial courts was

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51 CPP, G.33-'79, p.90.

partly governed by the fear of a consequent diversion of cases to the courts of the chiefs whose authority might thereby revive.[52] Again, even the limited jurisdiction granted chiefs in Thembuland under the terms of cession was regarded as an embarrassment to the administrators' prestige.[53] Matthew Blyth's authoritarian rule over the acephalous Mfengu came to be universally reckoned as a paradigmatic state of affairs, and this Chief Magistrate's successful administration was attributed to the very fact that he had no tribal chiefs to contend with.

The colonial magistrates also justified their opposition to the institution of chieftainship by arguments of chiefly despotism, contending that it was innately incapable of affording good government, or of maintaining a scrupulous respect for the rules governing the exercise of power, and so for this reason the African communities failed to satisfy the criteria of a capacity for independence. On the whole little understanding was shown of the checks and balances built into the traditional political system.

But the full weight of the magistrates' opposition lay behind the conviction that chiefs were dangerous potential foci of resistance. In the white mythology, chiefs assumed the guise of inveterate intriguers, fomenting rebellion, spearheading African protest to white rule and endlessly plotting in diplomatic concert to bring about the long-awaited 'war of the races'. The locus classicus of chiefly resistance was the Thembu-Mpondomise Rebellion of 1880-81. Brownlee, characteristically setting chiefs apart from commoners in terms of their response to the introduction of colonial rule, could describe it thus:

> The people as a rule were satisfied with the change, they enjoyed peace, prosperity and protection from arbitrary and unjust treatment.

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52 CPP, G.3-'84, Report of W.E. Stanford, p.125.
53 Ibid., G.3-'84, p.124.

> The Chiefs and those dependent on them were dissatisfied, they could no longer confiscate property and their adherents having no opportunity in sharing in the unjust actions of the Chiefs fell from them ... .
>
> The Chiefs desired a revolution and a return to the old state of affairs, with all its disadvantages the people did not concur, and the Chiefs would have remained powerless had we not in the disarmament act come to their aid, and they were not slow to take the advantage of this measure to suit their purposes.[54]

The official policy of eroding the institution of chieftainship was effected by imposing a bureaucratic structure on the territories that cut across tribal boundaries and all but ignored the old political units. The Transkeian administrative system was explicitly based on the arbitrarily defined magisterial districts and their subdivisions, the locations, and into this structure the area of chiefly jurisdiction was not formally integrated. Rather, the bureaucratic chain of command extended downwards from the chief magistrate to the district magistrate to the location headman, whose position fell directly under the authority of the magistrate, and so it effectively bypassed the chief. In the Transkeian territorial system the chiefs, then, came to occupy an ambiguous position.

The circumscription of chiefly authority was aimed at three main areas, limiting the judicial and executive competence of the chiefs, establishing economic controls, and stabilising the processes of accession and deposition. In the important sphere of judicial decision-making the chief's authority was drastically curtailed, and while often possessing the power to try petty civil cases, he had no power to enforce his decisions and, in addition, appeal lay to the magistrate's court where cases were heard de novo. On submission to colonial rule, the chiefs or those recognised by the Government were awarded annual stipends and lost their traditional right to tribute which had drawn chief and people together in the bonds of gift relationship. The withdrawal of tribute cut deeply

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54 Cape Archives, C.M.K. 2/3: Report of C. Brownlee for 1880.

into the whole nature of the relationship between them and had ramifying effects on the nature of the chief's prestige. Lastly, although recruitment to chieftainship was still to be governed by the hereditary principle, it was his formal recognition accorded by the Government that involved the chief in the chain of positional authority mediated through the magistrate and secured to him any residual power within the externally derived bureaucratic system. In such ways as these the Cape demonstrated its determination and ability to erode the legitimacy and reduce the authority of traditional chieftainship.

Nevertheless, chieftainship was to display a remarkable vitality and resilience, even in the face of colonial blows, and though convinced of the incompatibility of chiefship and modern civilized government, yet the Cape thought it neither expedient nor practical to extirpate it.' Instead it was considered politic to utilise the tribal rulers by harnessing them to the white administration, which would maintain overall control. In his capacity as Secretary for Native Affairs, Brownlee had urged the adoption of this policy with regard to the chiefs, for if their prestige were ignored 'an influence would always be at work, generally perhaps imperceptible, but liable at any fitting opportunity to break out into active opposition'.[55] As a principle this was to guide the Government, for example, in its decision to reinstate Ngangelizwe as paramount chief. Amid mounting Thembu disaffection, it was realised that the chiefs had been given an issue on which they had been able to unite the people behind them. In an attempt to restore popular confidence in white rule, Ngangelizwe was recognised in November 1876 as paramount, but subject to the conditions under which the tribe had come under 'British protection', for there was no intention of allowing him to rule with his former authority. Events like this brought home to

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55 CPP, G.16-'76, p.103.

the magistrates a sense of the essentially popular bases of the chief's authority, his traditional value as a communal symbol, the popular respect his person and office were accorded. Stanford, for one, deplored the rash cry of colonial politicians for the thoroughgoing suppression of chieftainship, which would meet with widespread African resistance; and while he did not support at the other extreme the retention of the institution, he argued that as civilizing impulses were brought to bear on the tribal system, the chiefs would gradually lose such legitimacy as the displaced values of traditional society had once served to bolster. In the meantime it should be government policy to 'control them, making their authority subservient to ours and cutting [it] down as opportunity offers'.[56] Brownlee was of a similar opinion: 'It is an anomaly that people in a British Colony should recognize a higher authority than that of Govt. [;] still with the natives the recognition of Chieftainship is a power so strong, and sacred that it cannot be removed or eradicated by enactments or restrictions, time can only remove this difficulty, and a judicious use of circumstances ....'[57]

In their account of the tribal system, magistrates revealed an almost Burkean sense of society as an organically integrated whole with long-standing institutions, chieftainship foremost among them, supported by traditions and prejudices which worked to cement African society together. They held to no hopes of a sudden transformation of the political and social life of the indigenous communities, carried through by the weapon of law, but looked instead to the civilizing impetus of white rule to effect the gradual displacement of 'the power and influence of Chieftainship among the Natives'.[58] Until such time as the Cape had succeeded in its policy of weaning

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56 Stanford Papers, D1: Stanford to J. Walker, 24 July 1879.
57 Cape Archives, C.M.K. 2/3: Brownlee to U.S.N.A., 10 October 1881.
58 Ibid., C.M.K. 2/3: Brownlee to S.N.A., 28 June 1880.

the people from the chiefs, the Government must needs manifest its determination to regulate the competence of chiefship, to cauterize its potential as the prime-mover and focus of resistance, and turn the prestige and traditional loyalties that surrounded the office to the advantage of white control, in other words, to tolerate it for the sake of its practical governmental value.

Whenever possible the magistrates attempted to work with the chiefs in their districts, particularly in matters affecting the tribe as a whole. The desire on the Government's part to attach the chiefs to the administration, to secure their fealty and assistance, was expressed in the award of stipends, the grant of farms, and the many ways of rewarding and disciplining some pour encourager les autres. Magistrates would encourage the practice of admissio or audience, by which chiefs visited the district office frequently 'for the purpose of giving and asking news, discussing matters of interest to the tribe, and expressing loyalty to Government'.[59] In fact, most of the traditional chiefs, excepting those who had rebelled against Cape rule, were recognised by the Government and involved in the administrative line of command as paid functionaries of the Native Affairs Department. In all, chiefs were not unimportant within the total administrative system; but although they continued to exercise civil and limited criminal jurisdiction and to command the loyalties of the tribesmen, political power had shifted irreversibly in favour of the white rulers.

If the chiefs occupied an ambiguous place within the bureaucratic system, then that of the location headmen was pivotal, for they formed the front-line ranks of the Transkeian administration, positioned immediately beneath the magistrate and directly responsible to him for the peace and well-being of their locations. Without them, the implementation of the policy of direct white rule would

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59 Cape Archives, C.M.T. 1/84: Report of H.G. Elliot for 1889.

have proved beyond the powers of the handful of districts magistrates. As Stanford remarked, headmen were 'as essential to successful management of natives as good non-commissioned officers in military forces'. Minor officials tied into the white administration, they represented 'the outcome of changing circumstances among the native tribes and [were] as a rule more amenable to Colonial ideas and methods than hereditary chiefs. The authority of the Headmen is derived from Government and they are dependent on Govt. support to maintain it'.[60]

In the ward system devised by Stanford in the Engcobo district, the rôle of the headman was clearly defined and apparent. After the rebellion of 1880-81, Stanford proceeded with the subdivision of Engcobo into 59 wards, with the assistance of two influential headmen and his administrative adjutant. On their recommendation, he appointed headmen in charge of the wards whose duties included both administrative and minor judicial functions. These comprised the collection of hut tax, the protection of location stock against theft and police work, the distribution of residence sites and arable lands, the settlement of minor land disputes, and arbitration in 'trifling' civil cases arising in their wards. They were also required to act as assessors, sitting with the magistrate's court.[61] As a technique of local administrative control, the use of headmen was invaluable in the day-to-day government of the tribesmen, for colonial authority could only be effectively exercised through their mediation and agency. They formed the baseline of the edifice of bureaucratic rule which the Cape had superimposed on the Transkeian territories and it was on their shoulders that the pyramidal structure, extending upwards in a chain of command towards the political and

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60 Cape Archives, C.M.K. 2/6: Stanford to U.S.N.A., 9 February 1888.
61 Ibid., 1/ECO: 5/1/1/3: Report of W.E. Stanford for 1883; 5/1/3/1: Stanford to C.M. Thembuland, 5 November 1883; 5/1/1/4: Stanford to C.M. Thembuland, 16 April 1884; 5/1/1/5: Report of W.E. Stanford for 1884.

administrative apex in Cape Town, finally rested.

The not uncommon misrepresentation of tribal government as an unlimited and arbitrary chiefly despotism provided a convenient justification for the authoritarian system of magisterial control in the territories. According to the Bishop of St. John's, 'the people, having been accustomed to the autocracy of the chiefs, would require to be treated autocratically by the Government'.[62] The Cape could at the same time boast that unlike in traditional society, African subjects in the Transkei, even if they took no part in government, enjoyed a precious liberty, for the law was certain and stable and administered by impartial courts. White rule was animated by a wise fatherliness which strove to ensure 'security of life and property and equality before the law for all people', the ends of government most usually defined with regard to the territories.[63]

Nonetheless, some magistrates clearly recognised the genius of tribal government in the way it allowed for the democratic involvement of all the adult members of the community. Elliot, for instance, remarked, 'Native self-government is far more constitutional and under the control of the populace than it is generally understood to be'.[64] This was adduced as reason for the political need to temper the Cape's benevolent despotism, to consult the people to explain government intentions to them, and to allow for strictly regulated participation in local processes of government. What was required were forms of political intercourse between rulers and ruled making for good government.

The ideal relationship between administration and people

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62 CPP, G.4-'83, Appendix C, p.79, q.13.
63 Ibid., G.4-'83, Appendix C, p.84, q.8 [Bp. of St. John's]. See also Cape Archives, N.A. 846: S.N.A. to C.M. Thembuland, 4 September 1879.
64 Ibid., G.4-'83, Appendix C, p.56, q.1.

was construed in highly personal and moral terms, as one of loyalty of the former to the latter, and of confidence and trust in the Government's benevolent intentions. It betokened the inauguration of a golden age when 'wars and troubles will end and peace and civilization progress on a sound basis'.[65] The amity of the link, however, was in no way a qualification of its resolutely hierarchical character. It was simply thought politically desirable to maintain an atmosphere of good feeling between governors and governed, and this the magistrates sought sedulously to cultivate. A feeling widespread among the community that their interests were being adequately cared for was regarded as an important psychological condition of stable government.

As it happened, after the passage of the Disarmament Act, African confidence in the white system was deeply undermined and a wide gulf blown open between the people and their rulers. At the time, Stanford wrote, '... our hold on the native mind is lowered many degrees. There is some fear of us left yet, but nearly all belief in the "nobility" of the "white people" is gone, and particularly in that institution of ours called "the Government" have they lost faith'.[66] On returning to Fingoland after his term as Chief Magistrate of Griqualand East, Blyth was much struck by the discontent among the Mfengu occasioned by disarmament. Prompted by an anxiety to overcome this very hiatus that existed between people and administration, Blyth proposed regular consultatory meetings between the magistrates and individual headmen 'whose presence would certainly have a gratifying & advantageous influence over the Native populace'.[67] After the outbreak of rebellion he reiterated an argument he had long advanced that the Africans in the territories should 'feel that they

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65 Cape Archives, C.M.T. 2/63: Report of Matt. Blyth for 1882.
66 Stanford Papers, D1: Stanford to J. Walker, 9 July 1879.
67 Cape Archives, C.M.T. 2/62: Blyth to S.N.A., 16 May 1879.

have some power and voice in their own government'.[68] Indeed, a constant burden in Blyth's reflections on African administration was the political wisdom of 'governing the people through themselves', and the folly of direct white rule, without the mediation of the traditional rulers or the participation of the tribesmen. As agent in pre-annexation Fingoland, Blyth, true to his self-assumed rôle of paramount chief, had followed the procedure of submitting proposed regulations to his people, so as to secure consensus and the popular involvement of the Africans in the decision-making process, before dispatching the measures to Cape Town for the approval of the Government. 'Even in old Kafir times, all laws were discussed by the people before being put in force'.[69] In these ways Blyth revealed his awareness of the importance of thorough discussion in the tribal decision-making processes of government.

As Fingo agent and later as Chief Magistrate, his fertile mind began toying with schemes of local self-government that would secure several ends. They would be a means of attaching the loyalty of the Africans to the white bureaucracy. They would provide a way of bringing local men of influence into the district administration and serve as a useful instrument of administrative devolution. Local self-government was also to be a means by which Africans would be allowed to take a great step forward in the management of their own affairs, an agency of popular political education 'to train them in habits of civilization, and good Government'.[70] It would provide strictly-controlled institutions for limited political self-expression and for the sponsorship of locally-financed welfare schemes. Ideas such as these had long been forming in Blyth's mind. As early as 1873 he had expressed the hope that the Mfengu 'may be gradually brought to take a more intelligent interest in their future, and so

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68 CPP, G.20-'81, p.39.
69 Ibid., G.20-'81, p.43.
70 Cape Archives, C.O. 3193: Report of Matt. Blyth for 1870, enclosed in Blyth to Col. Sec., 19 April 1871.

become educated to enable them in time to receive a form of Self Government, a step so necessary to the progress and well being of a people'.[71]

Seizing the opportunity that a proposal by headmen of the Butterworth district for a plan of local taxation presented, Blyth summoned the leading Mfengu headmen together in early 1882. In bringing to bear the wealth of creative ideas on the nascent scheme, Blyth elaborated a distinctive system of local self-government which came to carry the impression of this remarkable magistrate and his forceful administrative style. He proposed a scheme of local taxation to pay for roads, hospitals, schools and other district needs. Headmen from each Fingoland district were then formed into local committees, each of which was to meet monthly, under the chairmanship of the resident magistrate, and elect ten members to attend a quarterly meeting at the chief magistracy, where matters of more general concern might be discussed and any expenditure over £25 authorized.[72] As a scheme of local taxation the Fingoland District Fund was quite successful, but the minutes of the meetings reveal that the magistrates dominated the meetings and gave the headmen little opportunity to air their views and articulate their grievances.[73]

Blyth himself could claim that the district meetings 'result in a mutual feeling of confidence & good understanding' between the people and the magistrates.[74] Inspired by the relative success of the scheme, a vision grew in his mind of its gradual evolvement into a 'Representative Council where ... questions affecting the Government of the whole District could be discussed, and regulations framed

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71 Cape Archives, N.A. 151: Blyth to S.N.A., 3 September 1873.
72 Ibid., C.M.T. 2/63: Blyth to S.N.A., 13 February 1882.
73 C.C. Saunders, 'The Annexation of the Transkeian Territories', p.340.
74 Cape Archives, C.M.T. 2/66: Blyth to U.S.N.A., 27 August 1885.

from time to time, as required ....'[75] On such intimations, the Scanlen Ministry agreed to give pound for pound on the principle of parity to assist the Fund, but in fact the whole scheme rested on no legal foundation, and Blyth continually requested the Government to rectify this anomalous position by proclamation. However, it was considered politically undesirable to legalize the levy for to the mass of the people a compulsory tax would be looked upon as yet another burdensome colonial imposition.[76] In 1886 the Ministry of the day, pursuing an economic policy of retrenchment, withdrew the grant, and with a dwindling income from the voluntary subscriptions of 'the better class of people', Blyth expressed the fear that within a short time the Fund would entirely collapse.[77] The creative impulse seemed temporarily spent.

With regard to the territories as a whole, similar schemes were devised independently in districts outside the Transkeian Chief Magistracy by enterprising magistrates. In Engcobo, Stanford was in the habit of calling meetings of headmen and people, before which proposed local rules and regulations were presented for discussion and then put to the vote.[78] Magistrates were generally agreed on the necessity of conceding to the African population some form of local self-government, and their replies to a circular of the 1883 Cape Native Laws and Customs Commission, relating to this topic, bore a common theme: that headmen and chiefs be utilized and enmeshed in the white administrative and judicial structures, but that the magistrates retain firm overall control of the system. On this latter point they never wavered. Thus Elliot, 'No scheme would be desirable that lessened the authority or influence of Government, but I think a well and carefully considered system of partial self-

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75 Cape Archives, C.M.T. 2/63: Report of Matt. Blyth for 1882.
76 Ibid., C.M.T. 2/68: Blyth to U.S.N.A., 14 October 1887.
77 CPP, G.4-'91, p.31.
78 Cape Archives, 1/ECO: 5/1/1/3: Stanford to C.M. Thembuland, 16 November 1883.

government might be devised that would satisfy the people and materially strengthen the hands of Government'.[79] Some administrators regarded such techniques negatively as providing a 'safety-valve' for the regulated expression rather than profuse outpouring of otherwise suppressed political feelings, or merely as conferring 'the semblance of power without the reality', as one magistrate blandly admitted.[80] Others, however, far-sighted and more sympathetic to African interests, saw local self-government as an institutional stage in the development of African political maturity, a training for autonomy, a 'step in the right direction ... which might be afterwards extended as education and civilisation advances'.[81]

It is in Blyth's system of local self-government that we can trace the genesis of the Glen Grey Act, for Rhodes's measures followed the lines of the Chief Magistrate's Fingoland District Fund more closely than either the recommendations of the Barry Commission relating to a 'Native Council' or the conciliar proposals included in the parliamentary bills of 1883 and 1886. The relevant proclamation (352 of 1894) which established district councils in the territories did not follow the Glen Grey Act exactly, for the councils in the Transkei were to be smaller in composition, and provision was also made for a General Council. Meetings of the district councils were to be held quarterly under the chairmanship of the resident magistrate and to comprise six members, four chosen by the district headmen and two by the Cape Governor, in practice the local administrator. From each council two representatives would be nominated to attend the General Council, of which the Chief Magistrate was chairman and on which the other magistrates sat, although they held no voting rights. By the end of 1894 the first four councils had met in the four Transkeian districts to which the proclamation applied, and early in 1895 the first General Council assembled under Elliot's

79 CPP, G.4-'83, Appendix C, p.57, q.12.
80 Ibid., G.2-'85, pp.124-25 and 99.
81 Ibid., G.33-'82, Report of Matt. Blyth, p.6.

chairmanship at Butterworth.

From its inauguration in 1894-95 the conciliar system was to expand and develop until it covered all the territories. Like the early scheme pioneered by Blyth, the Glen Grey Councils suffered from the defects of a sharp limitation of focus on matters of purely local concern and a strict supervision exercised by the magistrates who dominated proceedings and ensured that criticism of government policy was kept within modest bounds. Nevertheless, in time, the Bunga at Umtata, the successor of the first General Council, would provide a central forum for the articulation of Transkeian African opinion and the councils a valuable training ground in the conduct and problems of local government.

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Colonial rule throughout the period of annexation remained primarily an exercise in the maintenance of control. The core of the magistrate's role, the range of responsibilities beyond which it could not be narrowed, was the retention of a minimal political control and administrative authority, the maintenance of peace and public order, of that 'discipline and obedience' which officers considered 'essential to good Government'.[82] The state of nature once existent beyond the Kei had been terminated through the extension of the Pax Capensis by the institution of the rudiments of civil society, such as the Colony understood it. The 'disturbed and unsettled state' of the area gave way before the introduction of a 'firm and settled Government', which secured what Hobbes had called civil liberties, affording adequate protection to persons and property, and

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82 Cape Archives, C.M.T. 1/82: Elliot to U.S.N.A., 17 January 1884.

administering an impartial and equitable justice to all.[83] But beyond that control, which had been imposed from without as a restraint on anarchic political relations among the independent African chiefdoms, lay wider ambitions on the part of the Cape that embraced the more complex aspects of the transformation of traditional society along western lines. The extension of the colonial bureaucracy was testimony enough to the expanded scope of the Cape's will to control and to transform the territories. Political order became a precondition of progress and social development, of that civilization which the Cape believed it was her mission to disseminate among the primitive and barbarous communities east of the Kei, living beyond the pale of civil society.

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83 Cape Archives, C.M.K. 2/2: Report of Matt. Blyth for 1876.

# CHAPTER TWO

## SOCIAL EVOLUTIONARY THEORY AND THE POLITICS OF PATERNALISM

### i Social Theory

The experience of culture contact which the Transkeian magistrates shared in common with Victorian Englishmen in Africa, in India and elsewhere, can be most intelligibly defined within the framework of social evolutionary theory. In the nineteenth century this theory performed the function of providing a common language and conceptual structure that could unify the study and experience of man and his societies, familiar and alien, civilized and savage.[1] As the cultural horizons of Europe expanded, the need arose for western man to make sense of disparate modes of organizing social life, which contact with alien societies had revealed, and to adjust his Europocentred vision that he might accommodate new social facts. At all times in the intellectual history of modern Europe, the figure of the savage has represented a disturbing problem for the cultural outlook, standards of value and philosophies of history of civilized men. Particularly as imperial commitments grew in the nineteenth century, it became increasingly necessary to discover social and ethical theories which took account of the fact that primitive forms of social existence did not merely belong to the past but constituted the everyday experience of colonial administrators.

At the heart of the matter, beyond any immediate concern to construct a reasoned and scientific history of mankind, lay deeply-felt needs of an age 'destitute of faith, but terrified at scepticism', in the words of Carlyle, for reassurance amid the questionings of honest doubt and for guarantees that all was ultimately well with the

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1 For this introduction and, indeed, for the whole conceptual framework of the chapter, I am deeply indebted to J.W. Burrow, Evolution and Society (Cambridge, 1966).

human situation. Evolutionary social theory arose in response to the breakdown of traditional systems of thought, in answer to the problem of how to reconcile a generally received body of descriptions and explanations with phenomena outside its range. What made social evolutionary theories attractive was that they presented a reformulation of the essential unity of mankind - a classical premise of European political and social thought - while at the same time meeting current objections to older theories of a general human essence, a central human character that was static and unalterable or even unaltered. 'Mankind was one, not because it was everywhere the same, but because the differences represented different stages in the same process'.[2] Accordingly, the various conditions in which human societies, both past and contemporary, are found, were treated as so many phases in a single scale of development. Societies were capable of being graded as so many links in a cosmic, objectively knowable progress, some stages of which were rendered automatically more valuable by their proximity to and mirroring of the final goal towards which humanity is marching. Nineteenth century social thought conceived history, then, as a drama: each act could be understood and evaluated independently but taken together these episodes constituted a single progressive ascent. Considered in these terms, humanity reveals itself as one everywhere, while at the same time assuming different and conflicting forms. As J.W. Burrow has perceptively written, theories of social evolution

> provided a way of being both relativist and not relativist; of admitting that many diverse modes of organizing and interpreting social life might have something to be said for them, and might play vital roles in the lives of human beings, while continuing to maintain the absolute validity of one such mode - the positivist. The Victorian social evolutionists achieved this tour de force by admitting that other modes of thought and social behaviour might have been valid once, but asserting or assuming that these

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2 J.W. Burrow, Evolution and Society, p.98.

> were only part of a larger process - social evolution - which had to be understood in a positivist manner, and which led ultimately in a direction satisfying to those who cherished an ideal of absolutely rational social behaviour.[3]

The dexterity with which Victorian social theory yoked together such heterogeneous ideas appears all the more remarkable when we consider the extent to which national chauvinism clouded any real understanding of alien cultures as authentic and valuable in themselves. Great Britain most often met with primitive societies on superordinate-subordinate terms, as conqueror, protector or powerful neighbour. The achievement of such political and military superiority lay in the same set of techniques which had raised the country to the status of a global industrial giant, inasmuch as they gave her mastery of the material world. Western civilization's high degree of control over the physical environment depended upon a complex filiation of factors, among which can be enumerated a relatively non-magical religion and a logic of natural causality; scientific technology designed to secure rational ends; an ethic of work which released human forces of production; the growth of bureaucracy, increasing specialization and structural differentiation. White superiority, then, was bottomed on brute mastery of the material world. But more significant for our study than this set of techniques are the socio-psychological foundations of the confidence and assurance of superiority with which Britons in the nineteenth century surveyed mankind from China to Peru, grounded as they were on the steadily increasing prosperity and steadily improving security of Victorian England. An understanding of ethnocentrism as a social phenomenon, deriving from the image men hold of their own society, can help to explain how in his interaction with alien cultures, the Briton entered with a mind brimful with concepts and values drawn

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3. J.W. Burrow, Evolution and Society, pp.263-264.

from his own milieu. These ideas and attitudes acquired for him a normative character and provided the inflexible standards of measurement by which other societies were ranked and evaluated. Elaborating upon social evolutionary theory, we can set up a conceptual model exhibiting the main features and contours of British ethnocentrism. The Briton, it may be argued, perceived his world in terms of a many phased progressional series, in which western civilization represented the penultimate, if not ultimate, stage of human endeavour. Whatever measure of recognition nineteenth century social theory might give the diversity of mankind and the variety of its social arrangements was severely qualified by the essentially positivist picture of society. Primacy and essential rightness were accorded to those major features of British society, economic, religious and political, or, in specific terms, industrial capitalism, Protestant Christianity and parliamentary constitutional government. These formed the essential marks of a 'civilized' society. Whereas traditional societies, with their subsistence economies, heathen customs and chiefly despotism, were relegated to the lowest rungs of cultural achievement, the earliest stages of human development. Primitive cultures were looked upon as so many steps towards the superior life enjoyed by western civilization, towards which they aspired and tended in a process that passed through inevitable stages according to inflexible social laws.

To turn to the Cape Colony, the evolutionary model has to be adjusted to suit local circumstances. As a consequence of almost a hundred years of interaction between black and white on the Cape Eastern Frontier, cultural stratification of African and white societies was, it must be recalled, not as rigidly defined as in, say, Natal, and some degree of cultural continuity was provided by intermediaries. There was no 'one dead level of barbarism' among

the trans-Keian Africans, as one magistrate rightly commented.[4] In the period spanning the extension of white control beyond the Kei, the intermediary position was occupied by the progressive Mfengu, settled on the threshold of the Transkei, who had for various reasons shown themselves amenable to white rule and receptive to the ideas of civilized advance, preached by magistrate and missionary. By contrast, at the furthest quarter of the territories were the Mpondo, who were widely considered to occupy the lowest rungs of the cultural hierarchy and the lag-end of the cultural scale, ranking far behind other tribes in 'civilization', so long had they escaped the extension of white control. Missionaries, led by the Bishop of St. John's, depicted them as children of darkness, while magistrates of the districts bordering on Pondoland regarded the prospective task of raising these racial pariahs in the scale of civilization as formidable. Close on their heels followed the Xesibes whom Brownlee pictured as 'about the wildest & most backward of all the tribes who have come under our influence'.[5]

As colonial rule over the indigenous people was more firmly consolidated, giving ampler play to the forces of social change, new social categories developed to mark the differentiation into defined socio-economic classes. By the end of the century a new term 'semi-civilized' gained currency to denote a well-defined grouping of African people (the small peasants) who held a transitional position between the old broadly devised polarities of the 'Red masses' and the School people. As for the latter, magistrates looked upon the Mfengu and the School Africans as protégés of the white administration, amenable to civilized development and exemplars to the black population at large, constituting what one officer called 'the party of progress'.[6] A Ciskeian administrator spoke of this progressive class

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4 CPP, G.33-'82, p.19.
5 Cape Archives, C.M.K. 2/2: Report of C. Brownlee, 20 May 1879.
6 CPP, G.3-'84, p.101.

as 'most advanced and civilized, having adopted more civilized habits, and ... generally speaking, in a more prosperous condition'.[7] However, in proportion to the total African population of the territories, the class of evolués formed but a civilized minority, a leaven among the Red masses, as Walter Stanford was constantly intent to emphasize. Particularly after the war of 1877-78 and the rebellion of 1880-81, when the strength of African resistance to the advancing white tide and the virility of traditionalism were forcefully demonstrated, the debate between magisterial radicals and conservatives about the nature and desirability of cultural conversion swung sharply in the latter's favour. As a result, given the observed extent of cultural cleavage between black and white, the recognition of the special interests of the indigenous people, flowing from their encapsulation within a particular phase of cultural development, was adopted into the official 'native policy' of the Cape Colony and embodied in institutional form in the distinctively shaped 'native territorial system'.

Notwithstanding the tactical concession, as it might seem, of the administration to the vitality of tribalism, rationalised as a belief in the efficacy of a gradualist 'native policy', the ethnocentrism of the white society was in no way impaired. Recognition and tolerance did not as a matter of course imply approval. The imperial posture of conscious superiority and confidence in the absolute validity of western civilization was not to be vitiated. Magistrates with unshakeable faith regarded white society as a cultural paradigm exhibiting most vividly and supremely the standards of value which they sought to apply to social reality. Alien societies were consequently described in terms of the deviation that they displayed from the ideal model. Western civilization indeed

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7 CPP, G.4-'83, Minutes of Evidence, no. 2925 [R.J. Dick].

was in many ways the measure of all things.

As the final term in an evolutionary process, western society stood as the omega-point of creation towards which all humanity was tending, the universal and dominant model in whose image all other societies were to be moulded. Transposed into the terms of administrative policy towards the African people, such cultural arrogance of the Victorians caused them to conceive their governmental responsibility as a civilizing mission. Writing in the mid-seventies, when the successful extension of the Pax Capensis over the Transkeian Territories seemed in time assured, Charles Brownlee spoke of the 'liberal' African policy which his government was applying with regard to the subjected African chiefdoms. The Colony, he argued, was conducting a 'civilizing' policy which flowed from and justified colonial intervention in the interests of its eastern marches, raising military-political ends to the status of a moral obligation. 'We have ... a higher mission to discharge towards the barbarous tribes on our borders than to govern them simply from interested motives. Our mission is to elevate and enlighten them, and to raise them in the scale of civilization and this we are endeavouring to do'.[8] This policy Brownlee regarded as being in direct continuity with the 'system' inaugurated by Sir George Grey, a comment expressive of the importance of the Grey view which was to continue as a strong current in the mainstream of official thought all through Colonial times, right up to 1910. To secure the advance of the Africans in civilization, Grey had adopted several devices, amongst which were the introduction of colonial magisterial rule over the indigenous people; the gradual destruction of the traditional authority structures, utilising them at the same time as instruments of white control; and attempts to create a progressive African peasantry. These techniques of Sir George Grey, Brownlee asserted, were being

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8 CPP, G.21-'75, p.133.

elaborated and extended by the Molteno Government in the incorporated territories. 'Thus, in 1856, was introduced our present native policy'.[9]

Implicit in Grey's understanding of the 'civilizing mission' was the principle of identity, the belief that the extension of white control over the indigenous communities entailed their full incorporation within the Cape's political, legal and administrative structures, in a word, their assimilation. The civilizing mission was grounded on the conception and vision of a legally non-racial society. Indeed, in the multi-racial society at the Cape, the British Government had maintained an identity of personal law and an equality of civic status for all subjects in the Colony, which were hallmarks of Cape liberalism. The system of identity was extended to British Kaffraria, which was annexed in 1865, where the African people had been conquered, broken, scattered and expelled from their patrimony over a period extending from the late eighteenth century and culminating in the desperate and disastrous cattle-killing delusion of 1857. Of the policy of integration, then, British Kaffraria in a legal sense stood as a model, but contrasted with it was the case of Basutoland, which the Cape treated after annexation as an autonomous territory. In fact, the two formed alternative paradigms of African administration, embodying the very different principles of incorporation and differentiation; and the history of the progressive elaboration of the Transkeian system of government is in formal terms the movement away from the one precedent in the direction of the other.

The benevolent paternalism of the Cape Government, implicit in the notion of the civilizing mission, remained the characteristic posture of the administration. Brownlee, for instance, considered the rôle of the magistrates paramount in advancing the civilization of the incorporated black population, for they were 'expected in

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9 Cape Archives, P.M.O. 259: Memo. by C. Brownlee, 7 July 1876, p.13.

every way to foster and encourage everything tending to the elevation of the coloured races'.[10] But the temper informing the administrative stance, the character of the administrative style, was dramatically altered, as a consequence of the traumatic experience of the war of 1877-78 and the rebellion of 1880-81. Prior to this critical period, in the early and middle years of the 1870s, the reports of the Cape officials in the territories registered a sense of robust forward movement among the indigenous people, which was regarded as the very substance of 'civilization'. The process of social change, it was commonly argued, was necessarily slow, but the advance was nonetheless steady and assured. This steady confidence would not go unchallenged. African resistance to the gradual encroachment of white rule, breaking out violently and actively in war and rebellion, revealed a surprising tenacity with which the traditional communities clung to their culture and it made explicit the vast extent of cultural cleavage between black and white. A new note of sober realism was struck in the counsels of the administrators and policy-makers, who were shocked into a realization of the magnitude and complexity of the task in which they were engaged. This sense of the intractability of human material that was not merely passive in response to external pressures like the proverbial lump of potter's clay, the reciprocal nature of the process of social interaction, altered the evaluation by magistrate and politician alike of the tempo of change to be expected from the African societies. Even though administrators from the time of the 1865 Native Affairs Commission had put their trust in a slow grinding of the mills and had baulked at the magnificent impatience of Grey who would capture the assimilationist ideal by a frontal assault at all hazards and in one sweep, the cautious gradualism which comes to the fore in the 1880s and 1890s is a new burden

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10 Cape Archives, P.M.O. 259: Memo. by C. Brownlee, 7 July 1876, p.34.

not heard before. There is a sense of the lowering of administrative sights, a concentration on the finite, the here and now, while the goal towards which magisterial labours were directed has receded into the almost indefinite future.

In view of the vitality of traditionalism, the Cape Government had good reason to be wary about imposing the Colony's administrative and legal systems on the subjected African societies. The war of 1877-78 and the rebellion of 1880-81 pointed the lesson of the dangers of excessive interference in the affairs of recently conquered communities, a lesson which the 1883 Native Laws and Customs Commission was to underline. Considered on the sheer grounds of political expediency, the principle of identity, espoused by Grey and applied officially in the case of British Kaffraria, came to be modified in that of the Transkeian territories. The shaping of the distinctive 'native territorial system', fashioned for the Transkei as a whole during the 1880s and 1890s, represented in fact an ever closer approximation to the Basutoland model. Indeed, from the very beginning, with the annexation of Fingoland and East Griqualand in 1879, the Transkeian territories were accorded a separate status from the 'colony proper' and governed in a distinctive manner. The Transkeian Annexation Act of 1877 rejected legal assimilation because the inhabitants 'are not sufficiently advanced in civilization and social progress to be admitted to the full responsibility imposed by the ordinary laws of the Colony'.[11] This Act gave the Governor-in-Council, in practice the Secretary for Native Affairs, the power to legislate by proclamation for the territories concerned; and, when in 1879 such proclamations appeared, provision was made for the discretionary application of customary law in civil suits between Africans. With the establishment of magisterial rule in the terri-

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11 A.N. Macfadyen (ed.), Statutes, Proclamations, and Government Notices: Act 38 of 1877, p.2.

tories, prior to formal annexation, the administration beyond the Kei was actually conducted on the same general principles as Basutoland, such being the pull of an apparently successful precedent exerted by this latter model; and so the various annexation acts can be said to have rationalised and sanctioned the existing administrative procedures. In part, the separate status given the territories followed from the piecemeal, additive nature of the annexation process. In addition, there was widespread agreement that these special measures provided only a temporary solution against the time when a permanent settlement for all the Transkeian Territories could be worked out, determining the precise way the territories were to be integrated with the rest of the Colony. However, as it happened, the Annexation Act of 1877 would remain, in some important respects, the charter of the 'native territorial system' elaborated in the eighties and nineties.

Informing the distinctive administrative system shaped for the government of the African people in the Transkei, we can discern a whole political theory of conservatism, which although not systematically formulated was crystallized and substantiated by the traumatic crises of the late 1870s and early 1880s. This conservative ethos pervades the magisterial mind as it bore upon the desiderata, possibilities, and ultimate aims of African administration. The initial premise of the magistrates' thinking, resting on the existence of cultural cleavage between black and white, recognised the special interests of a large black population encapsulated within their traditional culture. The cultural evolutionary distance set between African and British societies could not be ignored in practice and dashed any hopes of sudden and miraculous changes in the social life of the indigenous people. Administration, like politics, was the art of the possible, and radical legislation directed at undermining the traditional political and social systems, without regard

to the history and circumstances of African society, was impolitic and to be avoided. Magistrates expressed an almost Burkean sense that society is an intricate and delicate structure imperfectly understood by insiders or outsiders, and that men can go only a little way towards adapting it to their principles and purposes. Social forms are slow growths of time, intimately connected with the traditions and sentiments of particular peoples, and altering almost imperceptibly. Thus it was argued that the governance and the permanent settlement of the Transkeian Territories had to take into account and accommodate the social circumstances and conditions of African society. Magistrates called for the granting of a separate status for the territories, which would be administered in a distinctive way. Institutional form was to be given to the recognition of the Africans as 'a people apart'.[12] Consequently, the full incorporation of the dependencies in the Cape's political, legal and administrative structures receded from view and assumed the form of an ultimate goal towards which current African policy was cautiously directed.

In terms of social evolutionary theory, cultural differences between contemporary societies were to be ascribed to the achievement of different stages of essentially the same developmental process. From this some magistrates reached to an understanding that African modes of organizing social existence might have something to be said in their favour. African institutions could be seen as belonging uniquely to their own time and place, their own stage of social growth, and so of local and temporary, if not universal and permanent, validity, because the dynamism of the evolutionary process propelled them inexorably forward towards some other more perfect way of social life. Scattered hints abound of magisterial recognition that tribal cultures were possessed of an emotional value for their adherents and

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12 CPP, G.4-'83, Appendix C, p.114, q.27 [E.J. Barrett].

played significant rôles in their lives, that as a consequence the problem of social change was highly complex and deeply disruptive of an existing network of social relations. If this was the case, the administrative system must needs take cognizance of traditional institutions, give formal recognition to those social forms evolved by and suitably adapted to the genius of the African people, as being functionally appropriate within the total social system. The white administration, then, careful as it was not to impose alien structures proper to a civilized society, saw its task as one of preserving and adopting such traditional forms, not repugnant to the imperatives of Victorian morality, into a distinctive 'native territorial system', flexible enough to be both attentive to existing social conditions and responsive to the requirements of progress and change.

Special provision in institutional form for the circumstances of African society raised the question of the desirability and morality of differential treatment. The annexation of the chiefdoms and their incorporation within the Colony technically conferred upon the black population the status of British subjects, owing with the white colonists common allegiance to the Crown. But the rights and privileges which whites as a matter of course enjoyed were not to be similarly extended to the Africans. A moral dilemma faced the magistrates, which can be epitomised in the evidence of Charles Brownlee to the 1865 Native Affairs Commission. While he voiced his objection on principle to what was generically called 'class' (i.e. racially discriminatory) legislation, Brownlee argued that he could not see how 'any man .... while he maintains his distinct nationality and adheres to his barbarous customs can, as a matter of right, expect to be a partaker of the privileges enjoyed by his civilised countryman'.[13] Less than twenty years later, when the felt need to

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13 CPP, Annexures II, 1865, vol. 1: Proceedings and Evidence of the Native Affairs Commission 1865, Appendix I, p.14.

recognise the special interests of trans-Keian Africans had become widely accepted as an almost axiomatic premise of native policy, the acuteness of the dilemma appears blunted and magistrates, including Brownlee, were forcefully asserting without fear of contradiction that 'where classes are so dissimilar ... class legislation [is] not only desirable but absolutely essential'.[14] So enshrined had the principle of 'special legislation for the natives suited to their present condition'[15] become in administrative orthodoxy, as exemplified in the unique 'native territorial system', that Elliot could consider the whole debate closed. Writing in 1895, he claimed that 'the fad against "class legislation" is now pretty well exhausted and that it is time legislation was enacted for the true benefit of the native population'.[16] Thus over a period of thirty years in the history of the Cape's administration of its African subjects, the principle of identity had retreated as an immediate desideratum of policy and had been replaced by one of differentiation. The details of this movement of ideas, as they gave shape to the Transkeian administrative system, now require attention.

### ii The 'Native Territorial System'

As the territories were progressively annexed to the Colony, the necessity of formulating some general scheme for their governance came to press ever more urgently upon the Cape Government. Towards this end, the Native Laws and Customs Commission was appointed. But by the time the Commission presented its report to the Cape Parliament in 1883, the Thembu-Mpondomise Rebellion had intervened and side-

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14 CPP, G.4-'83, Appendix C, pp.57-58, q.23 [H.G. Elliot].
15 Ibid., G.4-'83, Appendix C, p.69, q.23 [C. Brownlee].
16 Cape Archives, C.M.T. 3/275: Elliot to U.S.N.A., 24 January 1895.

tracked the debate on the Transkeian Territories, throwing up the alternative solution of direct Imperial rule. After the Scanlen Ministry had been defeated at the polls on this very issue of abandonment, the process of extending white control was resumed by its successor. Now, with the greater part of the territories under colonial rule, the time seemed opportune to define the status of the Transkei on the basis of a permanent settlement.

At a Cabinet meeting held in April 1885, which Walter Stanford was summoned to attend, a series of proposals were drawn up for presentation to Parliament. Following the recommendations of the Barry Commission, which had declared itself in favour of what Stanford called a 'separated Government for the dependencies',[17] the measures of the Upington Ministry sought a middle path between incorporation and full differentiation. As the Cabinet meeting debated the proposals before it, the Commission's Report, which was thought to move too far in the direction of legal and administrative differentiation, came to be pared down. The Recorder's Court, which the Commission had favoured in preference to the extension of the colonial judicial system of circuit courts, was 'thrown out'. The 'Governor's Deputy', a permanent executive officer to be appointed to the territories in overall charge of the administration, was 'strongly objected to'.[18] Instead the Ministry decided to retain the system of chief magistrates; but this measure, which effectively recognised the special status of the Transkei, was to provoke opposition within Parliament and without long after the 1885 session. Stanford himself, a consistent advocate of the Barry Commission's recommendations, argued in favour of transferring judicial functions to a Recorder, in order to release the chief magistrates for administrative and diplomatic work.[19] But once the proposal of the Recorder had been scouted,

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17 Stanford Papers, D7, 23 October 1882.
18 Ibid., D10, 16 April 1885.
19 Ibid., D10, 1 August 1885.

he remained a firm proponent of what he called 'my old scheme of having all three territories under one Chief Magistrate'.[20] Such an arrangement would have the effect of co-ordinating the Transkeian Territories, hitherto divided in a tripartite structure, into a clearly defined administrative unit and of marking its separate status as a dependency of the Colony proper.

As late as 1889-1890, the Sprigg Government was intending to proceed with the abolition of the chief magisterial system, in the belief that the time had arrived when it was no longer 'necessary to have a separate and distinct establishment through which communications to and from the Government shall ... be carried on',[21] the magistrates to correspond thereafter directly with the Secretariat in Cape Town. The way to this change in administrative structure, Sprigg held, had been laid open as a result, firstly, of the introduction of the colonial circuits courts, which had relieved the chief magistrates of certain judicial duties imposed upon them by the Penal Code. It followed as a consequence, too, of African enfranchisement, their direct representation in Parliament securing them in the exercise of all the rights and privileges of British subjects; and, lastly, of the many 'advances in civilization'. To this course both Stanford and Elliot were firmly opposed. They met the Premier in Cape Town and pressed for the retention of 'a superior officer for [the] Native Districts',[22] countering at the same time Sprigg's proposal for the introduction of colonial civil commissioners as one 'unsuited to the conditions of the native people'.[23]

Walter Stanford, though recognising the desirability of the gradual assimilation of the administrative and legal system in the territories to that of the Colony, cautioned against any radical change

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20 Stanford Papers, D11, 16 December 1886.
21 Cape Archives, C.M.T. 1/147: U.S.N.A. to C.M. Thembuland, 23 December 1889.
22 Stanford Papers, D15, 8 April 1890.
23 J.W. Macquarrie (ed.), The Reminiscences of Sir Walter Stanford, vol. 2, p.123.

and suggested modifications, rather, of the existing arrangement which would be less likely to provoke African disaffection. He argued that the 'Red' people who bore the weight of numbers were suspicious of such change as disrupted their traditional authority structures or altered the white administration to which they had become accustomed. 'Personal government in so far as it approaches in form their own system is the most acceptable to them'.[24] It was essential, he continued, for the peace and well-being of the territories to station in some central position an administrative officer, in whom the Africans reposed confidence, and to whom 'Native Chiefs and people can personally apply for advice and relief in all their troubles and difficulties'.[25] Such an official would be empowered to 'inquire into and decide upon, or be the medium of communication generally with the Government in all questions affecting Native interests'.[26] In this recommendation we can catch an echo of the personalized view magistrates held of the white authority system, their understanding of its apparent relationship with the traditional rôle of the chief. In Stanford's own words, the African people regarded the magistrates '... not merely as the judicial authority before whom their cases must be heard or the collectors of revenue to whom taxes must be paid; they are the representatives of that far away undefined power known to them as the Governor, and the Magistrates are their channel of communication and should be their friends and protectors'.[27] Stanford's emphasis on the strongly personal nature of the relations between magistrate and people registers the demand made on the colonial administrator to interpret his rôle in a more

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24 Stanford Papers, F(o)10: Confidential Report by W.E. Stanford to U.S.N.A., 18 January 1890.
25 Ibid., F(j)15: draft copy of Stanford to Sir Thomas Upington (c.1885).
26 Cape Archives, C.M.K. 2/108: Stanford to U.S.N.A., 18 January 1890.
27 Stanford Papers, F(11)7: copy of Report by W.E. Stanford as Special Commissioner on Disturbances in Griqualand East.

human manner than was required by the impersonal norms of a bureaucracy. In traditional society, chiefs interacted with their subjects in a variety of rôles, official as well as non-official, private as well as public; and the white magistrates, who had assumed so many of the functions of the chiefs, were expected to adopt similar rôles by an African people still firmly attached to their tribal culture. The custodial aspect of the administration's function required that an attempt be made to establish substantial, if not formal, continuity of the white bureaucracy with indigenous authority structures; to accommodate traditional conceptions and expectations of governmental rôles within the new system; to render a government which was an innovation, a superstructure deriving from white overrule, as familiar and as accessible to the people as possible.

Walter Stanford's whole argument, then, rested on the felt need to make special provision for the administration of the territories in the interests of its African population. Such a need was underlined by Elliot's strenuous rebuttal of the reasons Sprigg had advanced in favour of abolishing the office of chief magistrate. As for the Premier's first point adduced in support of abolition, Elliot regarded it 'an error to suppose that the establishment of Circuit Courts will meet the requirements of the people in the matter of the Administration of Justice in these Territories'. In his view, the Chief Magisterial courts had provided a prompt and inexpensive form of justice in the settlement of civil disputes among Africans, the 'overwhelming majority' of whom were 'either raw barbarians or at best in the earliest stages of civilization'. The extension of circuit courts would not fulfil the functions performed by the Chief Magisterial courts, and would be distrusted in particular by the Thembu as the imposition of yet another colonial form, in contravention of the terms of cession they had agreed to, and as a further whittling away of the independence which they had never voluntarily

surrendered. Thembuland presented difficulties in another sense, as the integrity of the chiefdom cluster under one paramount, overlapping and stretching beyond the bounds of several magisterial districts, required the corresponding central authority of a chief magistrate. Regarding participation in the political life of the Colony, Elliot contended that Africans were largely ignorant of the value of parliamentary representation, as the number of registered voters in the territories was marginal in proportion to the whole population. Lastly, while the Territories had undoubtedly made great strides in civilization, the system of education operative in the Transkei, for one, was 'still in its infancy' and the number of school-going children confined to a tiny percentage of the total population. Elliot, too, like Stanford, sounded a note of caution, employing appropriately enough an organic metaphor, so dear to the heart of Burke and a standard weapon in the intellectual armoury of conservatives, as one appropriate to the conception of gradual evolutionary growth: 'Forced political changes are usually as unhealthy as Hot House plants and do not thrive under the blast of public opposition'.[28] Such conservatism, expressed as die-hard opposition to radical change, proved the mainstay of the administrators' case for the retention of the chief magisterial system.

In the event, Sprigg's thorough-going reforms were allowed to fall by the way. Stanford's scheme, on the other hand, of uniting the territories under one Chief Magistrate, by which the administration of the territories would be centralized under 'a superior officer', much like the Governor's Deputy recommended in the Barry Commission's Report, was finally realized in 1902 when Stanford himself took office as first Chief Magistrate of the United Transkeian Territories.

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28 Cape Archives, C.M.T. 1/147: Elliot to U.S.N.A., 31 December 1889.

Out of the measures submitted by the Upington Government to Parliament came the Native Territories Penal Code Act, no. 24 of 1886, which in effect expounded the colonial criminal law with a few essential modifications. Magisterial comments were almost universally favourable to the Code, regarding it as 'admirably adapted to the present condition of the people'.[29] Some were so enamoured as to attribute exaggeratedly beneficial consequences to the promulgation of the Code, including 'the total absence of political unrest and intriguing amongst the people during the past year'.[30] On the whole most readily concurred with Blyth's judgement that 'the effect upon the natives by the introduction of the Penal Code is most satisfactory, and they are fully satisfied with its administration by the Special Court'.[31]

However, even from the time of the publication of the Code, the Special Court was looked upon as an interim tribunal until provision was made by law and proclamation for the establishment of 'a superior court of record'.[32] In a memorandum to Upington, Walter Stanford, believing that events were tending towards the abolition of the Chief Magisterial courts, cautioned against any such change in the judicial system and drew attention to the advantages of the existing arrangement which provided prompt and inexpensive settlement of cases without recourse to the colonial courts. Stanford's concern that the abolition of the superior territorial courts was in the offing received confirmation when Upington promised in 1887 that circuit courts would be extended across the Kei at the 'earliest opportunity', thereby interlocking the Transkeian judicial system in an important respect with that of the colony proper. When a Thembu deputation led by the paramount chief, Dalindyebo, protested to

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29 CPP, G.6-'88: Report of H.G. Elliot, p.45.
30 Ibid., G.6-'88: Report of H.G. Elliot, pp.45-46.
31 Ibid., G.3-'89: Report of Matt. Blyth, p.29.
32 A.N. Macfadyen (ed.), Statutes, Proclamations: Act 24 of 1886, section 251, p.142.

Major Elliot against the advent of the circuit courts, in March 1889, Stanford remarked, 'It is most unfortunate that when radical changes are thought to be necessary in the administration of affairs such changes should be sprung suddenly upon officers and people in the Native territories'.[33] His fears of the disruptive effect of radical legislation were amply justified when in the course of time colonial judges reversed several magisterial decisions in lobolo cases and when finally in December 1893 the Cape Supreme Court declared that African customary marriages were illicit unions. Stanford, then Chief Magistrate of Griqualand East, informed the Government of what he called the 'revolution' implicit in the Supreme Court judgement, which threatened the stability of the territories. To remedy the dire state of affairs, the Native Territories Appeal Court was constituted in terms of legislation that provided for cases of appeal arising out of civil suits between Africans east of the Kei. For the very reason that the new Appeal Court followed the practice of the magistrates in recognising African customary law, Stanford looked upon the court as 'one of the most valuable institutions we have for the Natives'.[34] On the implicit assumption that law is an index of social relations, Walter Stanford felt assured that the social circumstances of the majority of the Transkeians, firmly encapsulated within their traditional culture, required a differential legal system. But nonetheless he foresaw the full incorporation of the Territories within the Cape's legal system as a goal attainable in the future, 'the goal of one law, one system of procedure for all'.[35] As he argued, 'that a time will come when the Colonial law and procedure will be fully extended to the Native territories is undoubted, but for any one to say that time has arrived would be

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33 Stanford Papers, D14, 14 March 1889.
34 Ibid., D33, p.43.
35 CPP, G.7-'92: Report of W.E. Stanford, p.43.

proof of his utter ignorance of the state of the various tribes to be dealt with'.[36]

Yet another item on the agenda for the Transkeian settlement was parliamentary representation. That, as it happened, the movement in the territories for representation was organised by a white minority, clamouring for participation in the political life of the Colony, made apparent once more the divergence of interests between black and white and confirmed the status of the African population as 'a people apart'. As early as 1883, the Chief Magistrate of Griqualand East was reporting organised white pressure for political representation and for local municipal self-government. The latter demand had caused unsettlement among the Griquas who, distrustful of white intentions, saw the move as a hostile attempt by land-grabbing whites to deprive them of their vestigial rights, to burden their property with taxes levied so as to compel them to dispose of it, in sum to extrude them from Kokstad.[37] A campaign for the detachment of Griqualand East from the Cape and its union with Natal was actively promoted by the Kokstad Political Association in 1885. A year later, when a Representation Bill failed to pass through Parliament, the Association moved for direct Imperial rule of Griqualand East. Needless to say, these political designs were heartily distrusted by the Griquas and Africans.

For Walter Stanford, then Chief Magistrate of the territory, the campaign advanced by the white pressure-group gave particular point to the disharmony of interests existing between white and black in the Transkei, and between the Territories and the Colony proper. The idea of detachment he took up and incorporated within his wider concern of giving shape to a permanent Transkeian settlement on the

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36 CPP, G.3-'89: Report of W.E. Stanford, p.45.
37 Cape Archives, C.M.K. 2/4: Report of C. Brownlee for 1883; General Report of 28 April 1884.

basis of a separate administration. He thought the '... best course ([would be]) to cut off ([the]) European communities from ([the]) Natives and while incorporating ([the]) former fully with ([the]) Colony, have {the} latter governed on ([the]) same lines as before .... Better for the present to regard unification {i.e. centralization under one Chief Magistrate} as the first step in consolidating the Native territories'.[38] The special status accorded the Transkei, in the interests of the black population, was however not to be construed as permanent racial segregation. 'I would not exclude Native areas from this privilege {incorporation within the Colony} where the people are sufficiently advanced and ask for it'.[39] Stanford saw the remarkable depth and permanence of the change that had come over the indigenous people as a result of the impact of white society, particularly in the case of the growing class of evolués, which he regarded as a portent of the future. In passing, it can be noted that in 1927 he dismissed the current slogan of encouraging the Africans in their 'reserves' to 'develop a civilization on their own lines' as a mere catch-phrase.[40] That Stanford's scheme of detachment was not solely determined by the articulation of white interests, but rather that the campaign had given particular form to his central concern of the 'native territorial system' was illustrated by the fact that he held to his scheme beyond the collapse of the white movement, once parliamentary representation was granted in 1887. Two years later he was to write about 'the formation of the three districts of Matatiele, Kokstad and Umzimkulu with a Civil commissionership to be cut off from the Native territorial system and fully incorporated with the Colony proper';[41] and the same argument was to

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38 Stanford Papers, D12, 21 January 1887.
39 Ibid., D12, 28 March 1887.
40 Ibid., F(ww)5: Address by W.E. Stanford to Conference called by Federal Council of Dutch Reformed Church, 2 February 1927.
41 Ibid., D14, 22 January 1889.

be repeated in the presence of Sprigg in 1890.

In extending representation to the territories, the white society ensured that its monopoly of the political system would in no wise be endangered. The Transkeian Territories Representation Act, no. 30 of 1887, while it did not recognise a differential franchise, nevertheless was so framed that the number of Africans enfranchised beyond the Kei was marginal in proportion to the total population. The Chief Magistrates reported little interest shown by the African people in the parliamentary elections. Many of the officers expressed themselves cautiously on the question of parliamentary representation for the territories. Uppermost in their minds was the fear that representation would create a black political consciousness, fraught with danger for white colonial interests, privilege and power. A countervailing pull was given by the recognised need to provide some measure of representation in the sovereign parliament as a 'protection' for black interests, an institutional medium for the voicing of black demands, that would enable Africans to exercise some say in matters of policy touching their governance and 'a voice in the management of their own affairs'.[42] In addition, magistrates acknowledged an obligation to enfranchise the African evolués, 'as they advance in intelligence, education and prosperity',[43] in order to avoid the evil of class legislation. But mindful of the preponderance of the Red 'masses' and the minority status of the School people, the administrators continued to urge the need to accommodate the special interests of the black population and cautioned against radical change involved in thrusting white political structures, alien and incomprehensible, onto the African people east of the Kei. Walter Stanford agreed with the policy of excluding 'those living on the communal system'

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42 CPP, G.4-'83, Minutes of Evidence, no. 7417 [H.G. Elliot].
43 South African Native Affairs Commission, Appendix C, vol. 3, Minutes of Evidence, no. 20503 [H.G. Elliot].

from the franchise, as no demand for representation had come from that quarter; but he added the circumspect provision, 'Were they to do so and in sections sufficiently advanced such a request might be considered'.[44] His solution to this complex and thorny problem, without recourse to a racially discriminatory common franchise, however covert, as in the case of Sprigg's, was more fully elaborated when as a member of the Inter-Colonial Commission on Native Affairs (1903-05) he proposed the New Zealand system of separate representation, 'as best for this country'.[45] In the face of 'an evident tendency to restrict Native rights and privileges' on the part of the Lagden Commissioners as a whole,[46] Stanford recommended and carried a resolution in favour of 'separate constituencies and voting by Natives for their representatives in Parliament',[47] and in this respect imprinted his standpoint, shared by many Transkeian magistrates, on the Commission's Report.

In the main, however, magisterial opinion settled on the view that parliamentary representation was simply irrelevant to the limited and divergent aspirations of the large majority of Africans, apart from a small class of evolués whose agitation for the franchise was considered misdirected and mischievous. Black interests, it was felt, were adequately safeguarded by the Native Affairs Department. If the benevolent paternalism of this separate administrative department were withdrawn, Africans would be abandoned to the hurly-burly of the free market of political and, more especially, economic life, where meeting with whites on unequal terms, and having no claim to protection from the Government, they would become vulnerable above all to the threat of land deprivation by whites wielding a superior economic power. The lack of interest shown by Africans in the

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44 Stanford Papers, D12, 1 April 1887.
45 Ibid., D34, 3 October 1904.
46 Ibid., D34, 21 November 1904.
47 Ibid., D34, 21 December 1904.

elections was attributed to their incomprehension of the white political system, and the complexity of white civilization, their residual attachment to traditional forms of government focused on the person of the chief. Because of the incongruency of colonial structures, black interests could best be served by some limited form of local self-government. As one magistrate wrote, 'a system of personal local government would be much better understood by them than any representation we can give them in Parliament'.[48]

It was for this very principle of local self-government that the Glen Grey Act, the last major component of the Transkeian settlement, was in large measure designed to provide. In a tour of the territories, Cecil Rhodes, architect of the bill, had impressed upon the African people that '... the Council system was the beginning of local self-government for them on new lines adapted to their changing conditions of life'.[49] Walter Stanford regarded the Glen Grey Act as the centre-piece of the whole 'native territorial system', and he who had played some part in its genesis, undertook as Chief Magistrate of the United Transkeian Territories the task of promoting and extending the system of councils throughout the territories.

Considered in one light, the District Council system was intended quite explicitly as a compensation for the curtailment of franchise rights imposed by the Glen Grey Act, which effectively disqualified Africans living under communal tenure from participation in the franchise. For many years, both Elliot and Blyth had been pleading for some 'well and carefully considered system of partial self-government'.[50] Both revealed an awareness of the importance

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48 CPP, G.6-'88, p.53.
49 J.W. Macquarrie (ed.), Reminiscences, vol. 2, p.230.
50 CPP, G.4-'83, Appendix C, p.57, q.12 [H.G. Elliot].

of thorough discussion in the traditional decision-making processes of government, and the genius of tribal government in the way it allowed for the involvement of all the adult members of the relevant community.

> Under their own laws (which are being steadily and surely abolished), every man had virtually a voice in the laws framed for the government of the tribe to which he belonged. All important matters were discussed by the Chiefs and principal men of the tribe (usually at the Chief's kraal). These meetings were public, every man belonging to the tribe could be present if he wished. Any one, no matter how poor his position, could express his views, and he would be attentively listened to. This privilege acted as a safety-valve, a very useful one. We have taken this form of franchise away, and given nothing in its stead. Natives are prone to say they are being treated like a flock of sheep. Any form of representation, no matter how limited, would be politic to sap this grievance, and supply a desirable safety valve.[51]

In this memorandum Elliot conveys a sense of the need to modify and adapt western forms to suit traditional styles of government and traditional processes of decision-making; to accommodate and utilize what Burke called the prejudices and sentiments of the political culture of a society whose governmental structures had been broken up with the extention of white rule - in fact, as it turned out, to graft district councils onto a tribal system which still retained considerable vigour. In the eyes of the colonial officials, parliamentary representative government was an inaccessible and unviable system for an alien people still encapsulated within their indigenous culture. The fact of cultural difference once again underlined the desideratum that 'a distinct system is required for the natives',[52] let alone the political inexpediency of endangering white power by a rash and wholesale extension of the franchise. Alternative arrangements were thus called for. 'A tendency to centralize all government at Cape Town, and leave these Territories without wholesome

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51 CPP, G.2-'85, pp.124-125.
52 Ibid., G.6-'88, p.51.

political life and some voice in their future should ... be carefully guarded against. Some measure of local self-government is not too wild an idea even for these Native Territories'.[53] The district councils, then, would provide strictly controlled institutions for limited political self-expression, and would function as a forum for African opinion, in which Africans could articulate demands and voice grievances arising from the peculiar social conditions that formed the context of their lives.

The conciliar system would fulfil other functions, too, one of which was an educative rôle. The white administration conceived its task as one of educating the African people in the art of self-government and of watching over the process of self-education. Africans would learn by being brought closer to government and by taking a subordinate part in it, learning not only as spectators but also as participants. The Council system would give valuable training in the problems and conduct of local government. As Blyth saw it, local self-government marked an institutional stage in the development of African political maturity, 'a step in the right direction ... which might be afterwards extended as education and civilisation advances'.[54]

The Glen Grey Act, as extended by various proclamations to the territories, rounded off the general shape of the Transkeian settlement. This articulated system of African administration was, as Walter Stanford remarked, 'specially adapted to the requirements of the natives under their present conditions of life, and proved by experience to be effective and satisfactory to the people'.[55] At the same time, while tolerant of traditionalism, it was responsive to changing social relations among the African people and held out

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53 Cape Archives, C.M.T. 2/65: Report of Matt. Blyth for 1884.
54 CPP, G.33-'82: Report of Matt. Blyth, p.6.
55 Ibid., G.12-'87, p.84.

inducements to 'civilized' advance.

Although not systematically expounded, a whole social and political philosophy of conservatism lurks behind and informs magisterial thought as it touched the 'native territorial system'. There is an almost Burkean conception of society as a well-integrated whole with long-established institutions supported by venerable prejudices which serve to hold the social body together. Society is many-sided and intricate, and its institutions are slow growths of time intimately connected with and sustained by the traditions and sentiments of particular peoples. Men can do only a little to change it in the way they would have it change. Society is not clay passive to the potter, but a delicate and living whole, more easily damaged than improved. Just as Burke was moved to scorn and anger by the 'arrogance' of the French revolutionaries, so the colonial administrators roundly condemned the rashness of radical social change engineered by the politicians and policy-makers in Cape Town. The motto that most aptly epitomised their work and thought was festina lente.[56] As one magistrate declared, 'The guiding principle of our policy with the natives should be to go slowly ... to interfere violently as little as possible'.[57] They brought to the task of administration the recognition of the gradual tempoof social change, an insistence that progress was an arduous and laboured process passing through inevitable stages, rather than a miraculous transformation of social life. Writing in his annual report for 1889, Walter Stanford reflected:

> Social progress is necessarily slow among a people such as we have in these territories with a system of their own which was eminently suited to their requirements so long as their surroundings were all of a more or less savage character. Individuals break away and adopt European habits. Education

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56 Cape Archives, C.M.K. 2/11: Report of W.E. Stanford for 1896.
57 South African Native Affairs Commission, vol. 2, Minutes of Evidence, no. 14478 [J.H. Scott].

> is more highly prized. Churches and chapels are built in parts where not many years back Kafir chieftainship and its ways ruled supreme. But the fact remains that the great majority are still wedded to their customs, are still attached with unimpeachable loyalty to their Chiefs and view with corresponding distrust the onward march of forces which they see only too well are destined to destroy their national existence.
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> . . . . .
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> Civilization is an uphill drag for them. They must have breathing time between the pulls.[58]

In line with this, frequent use is made, in magisterial writing on the subject of social change, of organic metaphors, which register their understanding of the process as one of evolutionary growth. Thus, Stanford: 'The forces, good and bad, of our civilization are doing their work slowly but surely among these people, and it is better by far that the fruit should be left to ripen fully on its native tree before it is picked'.[59] In view of the tenacity with which the African people clung to their traditional culture, the administrators strove earnestly against the extension of colonial institutions and forms, for which 'the conditions of Native life were not yet sufficiently advanced',[60] and warned against too rapid and premature an incorporation of the indigenous population within the white legal and administrative structures. With conservative attachment to the status quo, they expressed general satisfaction with the adequacy of the existing Transkeian territorial system as one 'well adapted to natives in various stages of transition from their own tribal forms to our more civilized way'.[61]

Subsidiary to these cautionary noises against precipitate change came the wish to remove policy-making as it affected the administration of the territories from the political arena, where the fall of governments could bring about a reversal of policy and a

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58 CPP, G.4-'90: Report of W.E. Stanford, pp.38ff.
59 Cape Archives, C.M.K. 2/7: Stanford to U.S.N.A., 26 July 1890.
60 Ibid.
61 Ibid., C.M.K. 2/6: Report of W.E. Stanford for 1888.

change in law. 'Frequent alteration in laws, and manner of administering them, greatly perplex and irritate the people, which is undesirable'.[62] Moreover, from time to time the magistrates issued loud complaint that policy was formulated and legislation enacted without consultation with either administrator or people to whom both policy and law applied. In part, their effort to lift administration out of politics reflected resentment at their exclusion from the highest decision-making process. It also registered the value they attached to an ideal of service both to their African charges and to the Colony alike, a professional ethic that rose above the rough and tumble of parliamentary life - a viewpoint characteristic of the conflict of outlook between functionary and politian. But, more than this, magistrates feared that policy decisions would be dictated by the chance play of party political forces in a parliament elected by and responsible to a white electorate, and would mark like a weathervane the prevailing currents of political life in the Colony, without regard to the real interests of the black people in the Transkei. What the men on the ground highly prized in administrative policy was uniformity, consistency and continuity in both planning and execution, which they believed that the vagaries of the parliamentary system rendered impossible of fulfilment. 'The changes of policy consequent upon the alteration of parties in the Government has the appearance to the natives of vacillation and inconsistency. A permanent and definite native policy in the territories beyond the Colony would be better understood by the natives, and would be more acceptable to them'.[63] Administrative activity must needs be ordered and regulated, carefully planned and judiciously carried out.

Given the extent of cultural cleavage between black and white, the need was universally acknowledged to provide for the

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62 Cape Archives, C.M.T. 1/83: Report of H.G. Elliot for 1886.
63 CPP, G.4-'83, Appendix C, p.204, q.23 [D. Strachan].

special interests of the indigenous people who were enfolded within their traditional social and political systems. This recognition of difference entailed an endorsement of separateness, of treating the Africans as 'a people apart'. The orthodoxy of Grey who had sought to promote 'civilization by mingling' became the heterodoxy of the Transkeian magistrates who set their face against what they called 'amalgamation'. It was thought that contact with whites would have a deleterious and corrupting effect upon the Africans, that they would succumb utterly to the demon drink and that miscegenation would become rife. It was also felt desirable to set aside for the black people exclusive territorial areas for their own occupation and cultivation, out of paternal concern to protect them against land deprivation and alienation by white farmers and land speculators. Magistrates believed it a 'good system [to] isolate large numbers of Natives living on large areas from which white settlement is excluded'.[64] Hence, the unwillingness on the part of the Cape Government to throw open the territories to white settlers, and the crisis that arose with the 'rushing' by white farmers of vacant lands in the Thembuland Chief Magistracy which had been cleared after the rebellion of 1880-1881. In part, the fear was one of potential conflict between land-hungry whites and dispossessed blacks, aggrieved and covetous; in part, fear that those Africans driven off the land and extruded from the territories would cross the Kei to squat on white farms or flock to the towns as a discontented landless proletariat. In all this we can find the root of the conception of the Transkei as a 'native reserve'.

According to the categories of social evolutionary theory which pervaded the general mental outlook of the administrators,

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64 South African Native Affairs Commission, vol. 3, Minutes of Evidence, no. 20614 [H.G. Elliot].

African societies were necessarily fixed and ranked in a particular stage of the cosmic developmental process. To this phase accorded their institutions and social forms, beliefs and mores, as uniquely adapted to their own time and place, to their social circumstances. From this followed the presumption of tampering unduly with the social order. There was need to take cognizance of traditional modes of organizing social life, inasmuch as they played vital and valuable rôles in the lives of the people, fulfilling various functions (whether economic, religious or political) adequately and appropriately within the total social system. Thus the desire of the administrators to adapt and accommodate, to step up a rhythm of continuity within change, to balance the old and the new, tradition and progress, which as R. Heussler has observed was 'the classic concern of Englishmen in Africa'.[65] From this flowed, inter alia, the recognition of African customary law by white magistrates as applicable in cases of civil disputes between black parties; the translation of traditional decision-making processes into the conciliar system of local self-government; and the interpretation of the magistrate's rôle in personalised terms appropriate to African chieftainship. Examples of this process of conciliation can be multiplied. Indeed, the elaboration of the whole 'native territorial system' exemplifies this cautious compromise between the modern and the traditional, traversing as it did a middle path between incorporation within the legal and administrative structures of the Colony and full differentiation.

The principle of identity, overt in Grey's African policy, with its implication of the thoroughgoing integration of the indigenous societies within the white polity, had long been set on one side. Particularly after the war of 1877-1878 and the rebellion of 1880-1881, there was a revaluation of the pace of cultural change, in the direction of assimilation, which could reasonably be expected of the

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65 R. Heussler, The British in Tanganyika, p.66.

African, change now to be reckoned on the African's terms. The early sense of robust forward movement which the men on the ground had reported in the 1870s gives place in the 1880s and 1890s to an emphasis on gradual evolutionary development, within the framework of the 'native territorial system', towards goals that have almost infinitely receded. The full incorporation of the black people within the Cape's political, legal and administrative structures has been displaced into the indefinite future. Elliot, for one, could speak comfortably of the possibility of legal identity as a matter of '200 or 300 years' time perhaps' when Africans had attained the 'stage of civilisation' of whites, thus removing assimilation out of the realm of immediate practical policy.[66] There was now widespread agreement that the 'civilizing policy' must be geared low, to keep in step with the administrative situation, side by side with the slowly advancing African. All the same, it must be remembered that the magistrates put a premium on civilized advance. There was no sense in which they desired to shore up the traditional system, as in Natal, where, as J.X. Merriman invidiously claimed, the Government had 'designedly kept [the Africans] in a state of barbarism'.[67] Rather they saw their task as one of promoting and encouraging activities that would help the people adapt to their changed conditions of life.

### iii Benevolent Paternalism and the Drink Question

It is almost a commonplace to state that the administrators conceived their rôle in the image of the benevolent paternalist. Answering to this, the frequent analogy they drew between Africans and children had a general basis in the hierarchical framework of concepts through which as white men they viewed racial divisions. The

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66 South African Native Affairs Commission, vol. 3, Minutes of Evidence, no. 20726 [H.G. Elliot].
67 Ibid., vol. 2, Minutes of Evidence, no. 5208 [J.X. Merriman].

comparison fitted aptly with the categories of current social evolutionary theories. These relegated traditional societies to a position of cultural immaturity and interpreted the process of acculturation as one of organic growth through various stages of maturation to the fully developed forms of western civilization. The child analogy, then, is more significant for what it tells of white attitudes and ideology, than of the innate qualities of blacks. Cultural misunderstanding informs Elliot's comment, for instance, that Africans were 'but children, by nature impulsive, changeable and easily led'.[68] This statement is fairly representative in its ascription of immature character traits, of emotionalism, instability and docility, to the stereotyped savage. For the magistrates, the analogy proved useful as it sanctioned and gave force to white paternal control, to the self-assumed responsibility of the civilized society to determine the future of the traditional people, to map out their lines of development.

At the same time, the child comparison bore definite advantages, containing as it did a certain trusteeship component which implied the training, maturing and eventual achievement of adulthood by the African. In this sense, the administrator looked upon his work as educative, both as custodial (in loco parentis) and formative, encouraging the backward, disciplining the wayward and advancing African interests as he best saw them. Considered as a custodial function, the task of the white administration, having taken to its paternal bosom the indigenous people 'under our care and control',[69] was to look after their interests, satisfy legitimate wants and secure their well-being, protecting them all the while against the blows and buffetings of the wider, outer world. For such reasons, the Government had needs preserve traditional or adapt western institutions in

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68 CPP, G.19-'97, p.80.
69 Ibid., G.4-'83, Appendix C, p.69, q.23 [C. Brownlee].

meeting the requirements of the state of tutelage. At the same time, it was the avowed objective of the Cape Government to incorporate the subjected chiefdoms more closely within the white polity, to promote the civilized advance of the Africans and to foster the process of assimilation, as long term goals. The 'civilising mission' laid stress on the formative aspect of the educator's rôle. 'The people must be gradually educated up to the level of civilized laws and customs, and their own laws and customs gradually modified and assimilated to colonial or British law, as time rolls on'.[70] Magistrates conceived of the 'Native territorial system' as an educational institution, an externally imposed structure in which Africans would become disciplined to accept and adopt new patterns of social and political behaviour, and acquainted with new styles and processes of social and political life. Cautioning against radical changes in the Transkeian system, Walter Stanford argued that 'the natives should be allowed to continue the training and education they are receiving under the existing system'.[71]

In like manner, the district councils were seen as a school in the arts of self-government. The assumption was that Africans would learn by being brought closer to government and taking a subordinate part in it. The process of self-education would be closely watched over by the ruling authorities: the magistrates were insistent that they retain firm overall control and strict supervision of the conciliar system. This was formally achieved by making the resident magistrate chairman of the district meeting and the chief magistrate the Chief Executive Officer of the General Council. While councillors might make recommendations, actual decisions and effective executive control were firmly in the hands of the white civil servants.

Yet another educative institution, in the administrator's

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70 CPP, G.4-'83, Appendix C, p.193, q.31 [A.R. Welsh].
71 Cape Archives, C.M.K. 2/6: Report of W.E. Stanford for 1890.

eyes, was provided by the system of migrant labour. In the context of the 'civilising mission', work was considered desirable as it represented an agency for the progressive development from barbarism to civilization of the indigenous people. Magistrates contended that Africans would derive great benefit from an intimate contact as a labouring class with whites. Employment in the industrial centres and on the colonial public works would be a 'school' for civilization where Africans acquired civilized habits and notions, and, through the mechanism of social drill or social mimesis, as Toynbee has called it, would come to 'adopt a life having a closer resemblance to that of the European'.[72] The labourer, it was hoped, would learn the virtue of self-reliance, an eminently individualist idea appropriate to the aggressive individualism of the Protestant religion, yet quite at variance with the solidarity of the traditional social organization, the collective sense of the kinship group and the tribal community. Discipline enforced on the mines and public works would teach the labourer to be 'punctual, obedient and civil' by sheer necessity, for the threat of dismissal hung over him if he did not respect these cardinal rules of the mechanically functioning economic system that was an intrinsic aspect of what Carlyle called the Age of Machinery.[73] Work would instruct him in the 'advantages of honest labour' and in industry, 'a proper recognition of the dignity which is invariably the result of honest toil'.[74] But most important of all, the entry and absorption of African wage-labourers into the white-controlled economy at the lower levels of unskilled, poorly-paid, low-status jobs would indoctrinate this proletariat as to 'their proper position in society'.[75] An economically intimate but socially segregated association with white civilization would instill a sense of the

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72 CPP, G.4-'93, p.95.
73 Ibid., G.21-'75, p.41.
74 Ibid., G.4-'93, p.95.
75 Ibid., G.27-'74: copy of Circular no. 5 of 1873, pp.153-154.

immeasurable distance separating black from white and the incredible superiority of white society, cultural, technological and moral. It would in sum vouchsafe 'a much clearer idea of the relative powers of the white man and the native'.[76]

Because of his faith in wage-labour as a school for civilization, the magistrate regarded it his duty to induce Africans to undertake employment in the white economy. Blyth, that rigorous educator, believed that 'the great lesson, labor vincet omnia, cannot be too strongly inculcated'.[77] As official recruiting agents in the territories, it fell upon the administrators to assist workseekers and stimulate the flow of labour to the work-centres of Southern Africa. The firm guiding hand of the bureaucracy was perhaps nowhere more apparent than in its efforts to encourage Africans to enter the labour market. Concern for measures and inducements, both fair and foul, to compel a readier stream of labourers received the constant attention of the magistrates. By such means, civilization would advance among the people.

The whole conception of paternal rule rested upon the argument that Africans were unable to help themselves and needed the firm guidance of the white administration. It was held that the people were involved in a process of disruptive change generated by the fact of cultural interaction, they were caught up in something they could not understand and therefore could not control. Moreover, as Africans were beginning to acquire western needs and standards, material, moral and political, they ought in their own interests to consent to learn from those who first set these standards how they were to be realised.

While as a general rule benevolent paternalism worked to the advantage of the African people, at times it sounds oppressively

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76 CPP, G.42-'98, p.80.
77 Ibid., G.33-'82, p.4.

through the exhortations of the white officers, jarring upon modern ears in its self-elevated moral tone. Thus Charles Brownlee, in a homiletic circular to 'the Native Chiefs, Headmen, and common people under British Rule':

> The Govt. has long striven to teach you to adopt better customs, it desires you to see for yourselves, & to accept its teaching because you yourselves see that it is good. Since, however, you close your eyes to the good & choose the evil, disregarding the teaching which has come to you, it becomes the duty of Govt. to stand up & say what shall & what shall not be done lest you should believe that the Govt. is satisfied with what you are doing, & lest its silence should confirm you in what is evil.[78]

The illiberal character of paternalism here verges on an overbearing authoritarianism, earnest in its moral self-assurance, didactic in its chaste admonitions. Freedom and reform, liberty and civilization, seem to be incompatible. In line with this, magisterial political thinking represented power not as a delegation of natural rights from the people, but rather a trust imposed on the Colony by an inscrutable Providence, to be exercised in a context of moral purpose on behalf of its subjects. This power would be used for the benefit of the people, without their prior concurrence in the wisdom of its direction or not. Government was seen as the repository of their best interests, and like the legislator in Rousseau's Social Contract could compel the people to "will" their common good, as the administration conceived it.

Obviously, the magistrates preferred to justify their activity by reference to the people's acquiescence in and even approval of their beneficent rule. 'As a mass, [the natives] certainly prefer that we should hold the reins, and are perfectly willing to be guided by us, so long as we treat them justly and straightforwardly. ... As a whole they would readily embrace any opportunity of guidance and assistance, were they fully convinced that it was plainly and

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78 Cape Archives, N.A. 841: Circular of C. Brownlee, 15 August 1875.

sincerely for their benefit'.[79] But in the face of African recalcitrance and opposition, the administrators would resort to the dogmatic assertion of the duty and right devolving upon whites to assume control over the African population, a duty thought to stem from and be validated by the establishment of white sovereignty over the territories, whether as a result of conquest or cession. Cape imperialism was not simply conducted, much less was it understood, in the terms of political power and military strength. As Charles Brownlee, the first Secretary for Native Affairs, argued, the Cape had been divinely entrusted with a civilizing mission, 'to elevate and enlighten ('the barbarous tribes on our frontier'), and to raise them in the scale of civilization'.[80] This it was her obligation to discharge. The infusion of white imperial control with the respectable content of moral responsibility served, then, to legitimise the extension of white rule over the independent African chiefdoms. Colonial control could also be justified by reference to the pre-annexation state of affairs in the territories, which, flying in the face of the natural order of things, merited the saving intervention of white authority. Political relations, for one, among the chiefdoms in the trans-Keian lands prior to annexation were viewed as anarchic, and white intervention substantiated as a necessary step to secure the pacification of the frontier zone. Then, secondly, the institution of chieftainship was looked upon as despotic and oppressive, and magistrates pictured themselves heroically as liberators of the common people. Elliot, for instance, quite assuredly believed that the restoration of the chiefs to their former positions of authority was 'not the wish of the mass of the people';[81] and he saw in the numerous appeals to the magistrates from the tribal courts and the frequent bypassing of

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79 CPP, G.4-'83, Appendix C, p.132, q.8 [T. Liefeldt].
80 Ibid., G.21-'75, p.133.
81 Ibid., G.3-'84, p.118.

the latter as evidence of gross injustice in the administration of law by the chiefs. Lastly, African customary practices were roundly condemned, for every Englishman knew, as Lord Acton was to pontificate, 'Opinions alter, manners change, creeds rise and fall, but the moral law is written on the tablets of eternity'.[82] The image of Africans sunk in heathenish customs cried out for the redemptive ministry of western cultural missionaries and their conversion to what were known as the 'usages of civilised society'. In sum, endemic inter-tribal warfare, chiefly despotism and primitive customs morally justified white intervention, providing the raison d'être of the civilizing mission. The task was immense, although self-imposed, but the call of duty and the satisfaction of cultural arrogance could not go unanswered. The prospective transformation of the untutored savage merely ennobled the civilizing mission. The Bishop of St. John's gave his blessing to the Government's apostolate:

> We have the right to assume that supervision which is implied in constituting ourselves the central power of government over the whole country. It is our duty to take upon ourselves that position, and not to perform it would be to leave the Kafir races ... to their savagedom and interminable intertribal warfare. Hitherto they have manifested no power of self-originated civilisation; all change for the better ... has been due to the presence of Europeans, and as the distinct result of that presence.[83]

Paternal concern for the moral welfare and civilization of its African charges shaped the administration's thinking on the drink question. Once again, in yet another area of social behaviour, magistrates distinguished the African people as a separate social category for whom special legislative provision was to be afforded in recognition of their status of pupilage. As the liquor problem demonstrated, unregulated contact with white society was liable to produce a corrupting effect upon the Africans. Caliban, that

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82 Lord Acton, 'The Study of History' in Lectures on Modern History, p.40.

83 CPP, G.4-'83, Appendix C, p.85, q.8 [Bp. of St. John's].

literary archetype of primitive man, had succumbed to the worship of the demon drink when exposed to his cult by the dissolute servants of European civilization. Magistrates in the Transkei were alarmed by evidence of similar failing among their subjects, who were contracting 'civilized vices' acquired by promiscuous intercourse with the colonial society. As it unhappily turned out, the blessings of civilization seemed neither wholly self-evident nor unmixed. Some tried to exonerate civilization and argued that heathenism made the Africans more susceptible to evil, less resistant to temptation, exercising, so it was claimed, less self-control than whites; yet the evidence for corruption was alarmingly apparent. The administrative response was to enfold the people in a protective legislative mantle, to remove the object of temptation and prevent contamination from evil by shunning all contact with it. The task of the guardian was to render the charges immune from the corruptions of white society through a process of education, by deliberately creating an artificial environment conducive to the moral growth and eventual achievement of responsible adulthood by the Africans. Liquor regulations affecting the territories reflect, then, the custodial component of the administration's rôle and at the same time give substance to the ruling ideology of the civilizing mission. As one magistrate expansively wrote:

> Unless that care which a parent exercises over his ignorant children is realised and assumed by a paternal government over the natives, and they are thus by law prevented from drinking, they will lapse from a state of semi-barbarism into a condition infinitely worse, and be for ever a menace to, and a millstone round the neck of the country. In such a case Great Britain will not, so far as this country is concerned, have fulfilled what has been since the Crusades, and I believe still is, her great trust and her destiny - to civilise and Christianise the dark places of the earth.[84]

The drink question was complicated in the minds of the

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84 CPP, G.42-'98, p.100.

administrators by the fact that whereas white society had introduced the local people to liquor - indulgence in Cape brandy being what was called 'an acquired taste' - beer-drinking among the Africans depended much, on the other hand, on cultural tradition, and so called for a different approach in its regulation. Among the Cape Nguni, beer-drinking usages were woven into the very fabric of their life, having both social and ritual functions. Beer was the most important beverage, and particularly between the harvest and ploughing seasons beer-drinking feasts were frequent. The generalized objection of magistrates to beer-drinking, as with all drinking (which they invariably equated with drunkenness), was its antipathy to civilization. Their specific objections are adequately represented in this account:

> At present beer is working sad havoc among the Fingos. Men and women, and sometimes even boys and girls, flock to the nearest beer drinks at early dawn, and remain there, or at the nearest beer-drinking kraal, for several days and nights, the men and women to the neglect of their homes and duties, and the boys and girls to the complete prostitution of principle, to say nothing of the frequent breaches of the peace which occur at these gatherings, and which often result in loss of life.[85]

These 'beer orgies'[86] were denounced as a great moral and social evil. Magistrates supposed that beer-drinking lay at the root of all other sins: stock thefts 'seditious talk, breaches of the peace, and many immoral and disgusting practices'.[87] As the feasts, like the drinking bouts of Irish navvies in England, were common occasions for fights, 'broken heads' frequently bestrew the annual reports and the number of deaths as a result of beer fights was only equalled in the magistrates' estimation by that of murders owing to witchcraft.

The drink problem was regarded as pressing and measures were advocated and adopted to remedy it. Blyth, as usual, took the lead in Fingoland when in January 1872 he convened a meeting of headmen and people, which duly passed a series of regulations to limit

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85 CPP, G.3-'89, p.33.
86 Ibid., G.5-'96, p.87.
87 Ibid., G.4-'93, p.58.

the beer-gatherings. These defined the accountability of location headmen or homestead heads in the event of disturbance, prohibited the attendance of women or children, and disallowed beer-gatherings to accompany the initiation rites of boys or girls.[88] But, as the Chief Magistrate was to discover to his chagrin, such regulations lacked legal standing. Before the Liquor Laws Commission of 1889-1890, magistrates variously suggested that legislative checks be imposed to prevent the wholesale brewing of beer, particularly in large quantities, to stop its free sale and control the beer-gatherings. While caution was expressed in the matter of restricting manufacture, because beer formed a valuable food staple and because Africans would resent white interference with their customary practices, as for its sale, however, magistrates agreed that it should be totally prohibited except under licence. This was strictly speaking given effect by Proclamation 343 of 1894, section xii, which declared the beverage an intoxicating liquor. Beer-gatherings received greater attention from the Commission, as the administrators regularly attributed a large percentage of the district crime to brawls arising out of them. From a legal point of view, beer fights were dealt with in the territorial courts under sections 94-97 of the Penal Code as 'offences against the public tranquility' rather than as cases of common assault. All who attended a gathering where an affray had occurred made themselves liable to conviction and the gathering was then reckoned for legal purposes an 'unlawful assembly'. Nevertheless, beer-gatherings themselves were not affected and continued to plague the administration. Walter Stanford's suggestion, which he argued was 'founded upon Native law', that the kraalhead 'should be held responsible for the good behaviour of his guests', was taken up, recommended by the Transkeian General Council in 1895,[89] and enacted as Proclamation 185 of 1895

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88 Cape Archives, N.A. 151: Blyth to S.N.A., 5 February 1873.
89 CPP, G.4-'91, p.44; G.5-'96, p.87.

(for the Transkei) and Proclamation 291 of 1902 (for Thembuland and Griqualand East).

With greater urgency, the men on the ground expressed alarm and moral concern at African addiction to Cape brandy, the notorious 'Cape smoke'. As one wrote, 'The evils arising from the worst customs of the natives are not to be compared to those arising from the sale of brandy'.[90] Magistrates were prohibitionists to a man and anxious to keep the Transkei 'dry'. Their case rested on the earnest belief that the sale and consumption of brandy presented a formidable obstacle to the advancement of 'civilization'. They erected brandy-drinking into an all-embracing evil, radix malorum, and argued that prohibition formed the essential pre-condition of progress in any other sphere of social reform. The Barry Commission gave an almost definitive resumé of magisterial opinion. The Commissioners regarded:

> the use of spirituous liquors (chiefly ardent spirits, the product of distilleries), as an unmitigated evil to the Native Races, and that no other cause or influence so directly increases Idleness and Crime, and is so completely destructive, not only of all progress and improvement, but even of the reasonable hope of any progress or improvement. Those members of the commission who ... had occasion to visit the Border districts, were eye-witnesses of the mischief, wretchedness, and misery which the multiplied facilities for the sale of spirits, by licensed 'canteens' in the neighbourhood of native locations, are producing; if unchecked, it can have only one result, and that is the entire destruction of that portion of the natives who acquire the taste for brandy. All the better class of natives, and even the heathen and uneducated portion ... have implored the Commission to suppress the evil which is bringing ruin on themselves and their country.[91]

Extreme remedies were a natural response to excessive drinking. Both teetotalism and prohibitionism were advanced. Pinning their faith on the moral education of the individual, missionaries organized temperance societies in the towns and on the mission stations, on the model of similar movements in England. The magistrates

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90 CPP, G.13-'80, p.131.
91 Ibid., G.4-'83, Report, para. 129, p.48.

supported the cause and often patronised the local organizations. Kokstad boasted no less than four of these societies, directed chiefly at the Griquas. Here, one missionary body had introduced the Good Templar movement, a pseudo-masonic temperance body of zealous tee-totallers pledged to total abstinence; the Band of Hope, a juvenile society devoted to rearing children in sobriety; and a branch of the Blue Ribbon Army, which had originally sprung up in Oxford. This close alignment of evangelical religion with the temperance movement is significant, for magistrate and missionary alike brought over into their reforming activity many of the attitudes and assumptions they acquired in their religious life. As devout or even nominal Christians they saw the world as deeply tainted and corrupted by sin: it could be purified only through the reclamation of the individual soul. They believed that social ills could be explained in terms of individual moral failure, and hence ascribed the African's drinking habits primarily to a failure of moral responsibility rather than to social and environmental factors causing drunkenness. Likewise social reform was conceived entirely in terms of sudden 'conversion', whether of the individual or of society as a whole, as a miraculous character transformation produced merely by the sinner's act of faith, his exertion of will-power. The temperance movement was conducted as a ministry of salvation to the lost children of the House of Israel, a moral crusade against the snares of sin and the forces of darkness. A missionary among the Mfengu declared, 'If all missionaries and magistrates in the Transkei and beyond would unite in promoting "total abstinence", by example and precept, a mighty power would be wielded against barbarism, and in favour of Christian civilization'.[92] The campaign for abstinence thus fitted into the larger evangelical cosmology of a Manichean conflict between good and evil, in which mankind was engaged.

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92 CPP, G.33-'82, p.25.

The same inattention to social factors affecting the incidence of drunkenness, the same explanation of social experience in moral categories, marked the magistrates' inflexible demand for total prohibition throughout the territories. Their observations reveal a failure to grasp the precise nature of social problems attending a process of rapid change, problems which the Good Samaritan model, of individual compassion and reclamation, could never hope to resolve. It was common knowledge, for example, that a number of chiefs were notorious drunkards. 'Most Kaffir chiefs were and are under the curse of brandy, thus breaking down themselves, their strength, and their power'.[93] However, it would seem that this assertion has mistaken cause for consequence and ignores the socio-psychological foundations of drunkenness among chiefs. Indeed, one can say that the encroachment of white society brought to bear intolerable pressures on African chiefs and that the erosion of their powers as a result of the extension of white rule and the deliberate policy of destroying their legitimacy led to severe personal tensions which they relieved by drinking. Not only individuals but almost entire communities, like the Ngqika, suffered the disrupting effects of subjection to white sovereignty and the pressure of social change. In 1873 the Civil Commissioner of King Williamstown estimated that the Ngqika in his charge consumed 25 to 30 thousand gallons of brandy annually.[94] The resettlement of the Ngqika community in liquor-free Gcalekaland in the late 1870s was thus regarded as an exodus from the bondage of drink to a promised land. 'I attribute much of their happiness and prosperity to their inability to procure brandy, the use of which at one time before their "exodus" from the Colony threatened their entire destruction as a people'.[95]

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93 CPP, G.3-'84, p.138.
94 Ibid., G.27-'74, p.15.
95 Ibid., G.8-'83, p.150.

State intervention in the form of liquor prohibition entailed a drastic infringement of personal liberty, but for magistrates the question 'whether we have a right to interfere with a man's individual freedom' was seldom presented.[96] In the traditional and transitional states the Africans occupied, it was argued, the mass of the people were incapable of enjoying real and responsible freedom, and if most were not yet ready for autonomy, they must be made ready for it through a process of education. The promotion of moral progress and civilization would demand, then, not less interference with individual liberty, negatively conceived as an absence of restraint, but more.

The issues involved in the argument become more apparent when we examine the conflict within mid-Victorian Liberalism between the claims of individual freedom and of moral progress, as exposed by the drink question. The radical liberal, John Stuart Mill, averred that the individual would progress morally only if the state left him entirely unshackled in his moral choices. Other liberal thinkers, by contrast, were far less patient with prevailing evils and advocated consequently a far more positive rôle for the state than Mill, for whom liberty increased with every curtailment of state control. His prohibitionist critics within the liberal camp argued just the reverse: that civilization depends upon restraining and regulating individual liberty. Mill's foremost contemporary antagonist, James Fitzjames Stephen, the author of Liberty, Equality, Fraternity (1873), held that compulsion was 'a condition of human life', that coercion of the individual by society constituted the main safeguard of social cohesion and discipline. The anarchic nature of man made necessary his submission to the restraint of authority. Coercion, Stephen believed, was essential to maintain and reinforce the generally accepted order of beliefs and values which held society together; and to carry

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96 CPP, G.4-'83, Minutes of Evidence, no. 3412 [E.A. Judge].

through from above those vital changes in social and political life which made for progress and advancement in civilization. It was justified by the nature of the end and by the effectiveness and economy of the means employed to gain it. Such was the message of the conservative brand of liberalism espoused by men like Stephen.

The magisterial apologia for legislative intervention in the matter of liquor rested primarily on an appeal to the self-assumed civilizing duty that sanctioned interference in the real or best interests of the subject people. Support for the cause was also drawn from the appreciative assent of the Africans themselves to the measures adopted on their behalf, though this line remained purely incidental and subsidiary to the claim that the white administration understood the true interests of blacks better than they did. Prohibition was vindicated too by the advantages derived from so drastic a step. Indeed, self-interest happily united with duty for the benefits conferred upon the Africans - of moral well-being and sobriety - would redound equally to the self-regarding advantage of the whites, now presented with a redeemed people who were more amenable to control and more desirous of work. As one magistrate wrote, legislative compulsion was justified by

> that higher law which requires us as civilized people and professing Christians to take such steps in our dealings with the natives, and in our governing them, as will raise them in the scale of civilization and Christianity, and not drive them to self-destruction by forcing a curse upon them .... The natives themselves do not in the least object to the restrictions put upon the liquor traffic; on the contrary, they appreciate these restrictions very much indeed, as they see that they are for their own good, happiness, and prosperity; and the Chiefs, Headmen, and people have expressed to me a hope that these restrictions will not in the slightest degree be relaxed .... And as we have to do with such a vast native population in the whole country, and as such restrictions have in every way proved such a success here, it is to be hoped that the Legislature will see the advantages to be derived, in every respect, by protecting our natives throughout the country from the baneful influences of intoxicating liquors; and the necessity

> of adopting such steps as will put a stop to the wholesale traffic which is carried on in other parts, and which is proving such a curse to the whole country and people. Such measures would tend not only to the benefit of the natives themselves, but also to our own advantage, and to the peace and prosperity of the whole country.[97]

The history of liquor regulations as they were extended to the territories can be briefly reviewed. The annexation proclamations nos. 110 and 112 of 1879, section 59, prohibited the sale of spirituous liquors, without a licence, in the Transkei and Griqualand East. As for Thembuland, because the conditions of cession did not make actual legal provision for the territory, Major Elliot was forced to resort to issuing a circular prohibiting the sale of liquor to Africans, until the general regulations of 1885 finally brought the area into line with the two other Chief Magistracies.

Yet such legal barriers, however firmly erected and vigilantly guarded, were not impregnable, and magistrates fulminated at betrayal both from within the Transkeian territories and from without. Exception to the blanket prohibition was made in the case of whites, and licences were issued under strict control of the Chief Magistrate, usually to white traders, who received permission to keep accommodation houses and to sell liquor to white residents and travellers. For magistrates, licensed houses represented a necessary evil, being a potential source of brandy within the territories, since apart from illegal retailing, Africans could use whites as go-betweens. Moreover, the traders who were for the most part the owners of accommodation houses attracted and bribed customers by obviously underhand means. Deficiencies and loopholes in the law pointed to the need for more stringent regulations, duly provided for by Proclamation 154 of 1885. Blyth had previously alerted the attention of the Government to the fact that because of the loose wording of section 59 of the Transkeian regulations, restrictions on the sale of liquor to Africans need not

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97 CPP, G.2-'85, p.165.

legally be written into the licences, so that dealers were not conditionally bound to sell only to whites.[98] Section 5 of Proclamation 154 was meant to cover the opening but in fact merely complicated the problem, insofar as it laid down that no liquor was to be sold under licence 'to any native not being a Chief, Petty Chief, or Councillor' without his first obtaining a permit from the magistrate. Blyth vehemently objected to this exception as he feared that it would provide an opportunity for dealers to evade the law and sell almost indiscriminately. He argued that chiefs and headmen were more addicted to drink than other classes of natives; and that the 'common people' would resent the class legislation implicit in the clause.[99] The Chief Magistrate called in, as well, the support of his charges and could report several meetings of the headmen and people of various districts, which had resolved to memorialize the Government on the subject of repealing the offending clause.[100] When the Secretary for Native Affairs expressed his opinion that it would be inexpedient to alter the Proclamation, Blyth took the dramatic step of travelling to Cape Town where he made personal representations to the Government. Proclamation 210 of the same year duly amended no. 154 by excising the notorious phrase.

If accommodation houses and trading stores represented the Trojan horse secreting the enemy within, then the canteens strategically established on the borders of the territories stood for the enemy without. It was from the Colony that a brisk trade in liquor was conducted. Magisterial opinion was decidedly unfavourable. One Ciskeian administrator wrote graphically of 'vile dens called canteens ... placed wherever a sufficient number of natives in the vicinity can be entrapped to swallow the abominable and maddening

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98 Cape Archives, C.M.T. 2/66: Blyth to U.S.N.A., 8 September 1885.
99 Ibid., C.M.T. 2/66: Blyth to U.S.N.A., 13 October 1885.
100 Ibid., C.M.T. 2/66: Blyth to U.S.N.A., 13, 16 and 23 November 1885.

poison, a cheap and most vile compound, rendering such remarkable profits to the vendors!.[101] Enterprising African carriers in Fingoland added the profitable trade of brandy to their business and made their purchases in Queenstown and King Williamstown. The administration retaliated in the form of section 8 of Proclamation 154 of 1885, which required the Chief Magistrate or Resident Magistrate of the district to issue written permits for importing liquor into the territories. This clause was also designed to meet the difficulty experienced by the courts in securing conviction for liquor offences under the annexation proclamations, which provided a penalty only for the actual sale of liquor and did nothing to halt the flow of liquor across the Kei. Africans responded by smuggling brandy, packed in dry goods cases, red ochre barrels and paraffin tins, into the territories and frequently escaped under cover of darkness the police patrols set up along the border. Penalties for illegal importation were stiffened by Proclamation 343 of 1894, so as to offer a deterrent for infringement of the law; and Proclamation 454 of the same year authorized the administration to search transport wagons 'on proof of reasonable suspicion' that liquor was being smuggled into the Transkei.

So intricate and knotty did the liquor question prove that by 1893 Walter Stanford was already complaining of the utter inadequacy of Proclamation 154 of 1885 and pressed the need for framing new regulations to control the liquor traffic in the territories.[102] He claimed that according to existing rules dealers could sell wine and beer freely and in unlimited quantities to Africans, rendering the detection of brandy selling difficult. Again, the authority to issue permits for the purchase of liquor was not confined to the magistrates but was indiscriminately extended to field-cornets and ordinary justices of the peace. Moreover, rules to guide the Chief

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101 CPP, G.27-'74, p.63.
102 Cape Archives, C.M.K. 2/8: Stanford to U.S.N.A., 14 April 1893.

Magistrates in drawing up the conditions on which licences were issued had not been laid down and their competence to impose such conditions, if challenged, would most likely not be upheld in a court of law. Stanford also recommended that provision be made for the punishment of the African who bought liquor illicitly as well as the seller. 'With a Proclamation upon these lines I feel sure that illicit dealing would to a great extent be prevented'. To remedy this state of affairs, Proclamations 343 and 454 of 1894 were extended to the territories; and Stanford noted with paternal concern that the African people were well protected by the terms of these regulations.[103]

### iv Progress and Social Change

Imbued with a faith in the absolute validity of western civilization, the magistrates posed as cultural missionaries who sought to foster the civilized advance of the African people by a process of education that would discipline and direct them in new ways of social life and so fit them for entry into the new society. The administrators were conscious agents of social change, the revolutionary nature of which went far beyond their powers to understand or control.

At a theoretical level this characteristically Victorian concern with progress, advancement, change, was registered in the predominant position which the idea of social development held as the central concept of nineteenth-century social theory. Victorian social thinkers assumed the creation of a social science to be virtually identical with the creation of a science of history, a presupposition founded partially on an increased respect for history and

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103 Cape Archives, C.M.K. 2/10: Stanford to U.S.N.A., 23 October 1895.

a perception of the fundamental character of historical change. The result was an emphasis, as social science developed, on the discovery of laws of social change at the expense of the study of social systems. This theoretical leaning can best be exemplified in Herbert Spencer's sociology. His work paradoxically combines a rigidly deterministic brand of evolutionism with a surprisingly modern use of the structural-functional approach to social theory. Intellectual reconciliation was achieved by means of social evolutionary theory: for Spencer uses the ideas of structure and function, which he derived from evolutionary biology, always subordinately to the governing conception of evolution. Like other nineteenth century social thinkers, his positivist faith in the universal operation of natural laws, his almost religious determination to prove human life part of an ordered totality, led to an impatience with merely partial explanations of social relations.[104]

This relative neglect of Social Statics in favour of Social Dynamics is mirrored in the thinking of the Transkeian magistrates. Despite the frequent use of that nineteenth century sociological vogue-word 'system', popularized by Spencer, their reports reveal little sense of the wholeness and otherness of the tribal social system. African culture was viewed through a framework of accepted concepts and valuations which made for a selective interpretation of tribalism. They appraised it in terms of a single overarching standard of values, derived from and appropriate to western society, which represented for them the measure of all things. In this manner were parried the blows that historicism threatened to deliver against the classical tradition of western thought, to which the notion of perfection is essential. For if there is no common standard in terms of which to grade societies, there can be no final solution to the central problem of what mankind should aim at. Instead, holding fast to the myth of the 'Dominant Model', the

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104 J.W. Burrow, Evolution and Society, chapters 3.3, 4.1, 6 passim.

administrators viewed primitive societies as so many steps towards the more perfect way of life embodied in western civilization.

The inability to understand African society from within, in terms of its own purposes and outlook, manifests itself in the magistrates' partial insight as to the ways traditional institutions fulfilled the social needs and suited the social circumstances of the people. Walter Stanford, for one, could observe that the Africans possessed 'in their own polity many laws and customs well suited to their needs and conditions'.[105] Such cross-cultural sympathy gave impetus to the formal recognition of African customary law as applicable to civil disputes between African parties. But at the same time, in magisterial reports and discussions, while component parts of African culture stand out in isolation, the sense of how the parts interrelate functionally with each other and how the whole system is organically integrated is dimly and intermittently grasped. The administrators showed little understanding of the coherence of the African way of life, and displayed an inability to understand and value traditional society in terms of its own scale of values, its own rules of thought and action, and not those of some other culture. Given what Lord Annan has called 'the curious strength of positivism in English thought' in the last century, they could never attain to a consistent standpoint of cultural pluralism, the belief not merely in the multiplicity, but in the incommensurability, of the values of different cultures and societies. To avoid the unpleasantly relativist implications of a world in which many of the old certainties were disappearing and startlingly new and alien social phenomena were demanding accommodation within Europocentred systems of thought and value, nineteenth century social thinkers and colonial administrators as well turned to and leant heavily upon social evolutionary theories. These fulfilled the need for a satisfactory conceptual structure in

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105 J.W. Macquarrie (ed.), Reminiscences, vol. 1, p.99.

which to order their world and stabilize their experience. Within such a framework they could concede that primitive modes of social behaviour might be appropriate and valid for a particular cultural stage, the tribal system being 'eminently suited to [the natives'] requirements so long as their surroundings were all of a more or less savage character'.[106] At the same time they asserted that contemporary primitive peoples represented the earlier stages of human development, that such phases formed but part of a larger process of social evolution which happily led in a direction marked out by western society. Of this hypothetical sequence, white civilization represented the culminating point, the Benjamin, the peak of the creative process.

Magisterial concern, then, was not to preserve African cultures intact, but to change them, however modestly, in a desirable way. The fact of social change was something of which no thoughtful administrator could remain unaware, forming as it did a basic datum in the experience of the indigenous communities and of the magistrates in their administrative rôles - which they sought to stimulate, to control and direct, and applaud. Looking back over a period of a hundred years, we can observe that the impact of white advance had generated a process of change that was progressively to transform the traditional systems. As the interaction between black and white on the Cape Eastern Frontier grew ever more intense, from their first meetings to the political incorporation of the chiefdoms within the white polity and beyond that time, the impulse of change, quickly gathering pace, propelled the African societies out of their existing course and forced them upwards on to a new plane. This rapid acceleration in the tempo of change was revolutionary in nature and marked a decisive climacteric in the history of the Cape Nguni. It was one of the great watersheds in their socio-historical experience.

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106 CPP, G.4-'90, p.38.

Borrowing a term from W.W. Rostow's analysis of the industrial revolution, we can say that the period spanning the political incorporation of the Transkeian Territories, with which we are largely concerned, was one of 'take-off'. The change-over from 'primitive' to 'civilized' society gradually got underway, as traditional society was more closely interlocked with the large-scale white society. The African chiefdoms entered a wider world, which was to remodel them profoundly in its own image.

Modern social anthropologists, in their desire to construct a value-free study of comparative societies, have conceived the process of social change in terms of an increase of scale, over a broad range of features, economic, political, religious, et alia.[107] In its economic aspect, change overtook the locally self-sufficient traditional economies and brought about the growth of peasant communities. The course of political incorporation in turn drew the hitherto independent chiefdoms into a wider political structure. As the magisterial system was extended to the annexed territories, so the African chiefdoms lost their sovereignty and became local units of government within a white-controlled administrative system. Paralleling the process of political incorporation, on the one hand, and the growing economic interdependence of white and black, on the other, was the process of religious inclusion, as missionary evangelism spread the Christian religion among African converts and drew them within a new and wider form of organization, the Church. Whereas present-day anthropological study would understand the fundamental difference between traditional and modern societies as a difference of scale, the nineteenth century administrator conceived the difference as one of kind and value. The ethnocentric assumption, that western culture represented the pinnacle of human endeavour and embodied

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107 Cf. G. Wilson and M. Wilson, The Analysis of Social Change (C.U.P., 1945).

standards of universal validity in terms of which other cultures were to be evaluated, caused African societies to be relegated to an inferior status. 'Civilization', as it found supreme expression in white society, was opposed to the 'primitive' or 'barbarous' African race. This separation of the cultural sheep from the goats provided the point of entry and moral justification for white intervention and control, exercised as a 'civilizing mission'. For the magistrate the process of social change was construed as a healthy forward movement, the progressive development from barbarism to civilization, an ever closer approximation to a single universal pattern exemplified by British society - in a word, 'progress'.

The idea of progress is one of the characteristic and ruling notions of the administrative mind and indeed of the whole age. The classic historian of this idea, J.B. Bury, has remarked that in the latter half of the nineteenth century the doctrine of progress became a generally received article of faith, an idolum saeculi, and was absorbed into 'the general mental outlook of educated people'.[108] The socio-psychological foundations of this notion can be discovered in the mid-Victorian confidence born of the steadily increasing prosperity and steadily improving security of a rapidly industrializing world power. In extending what the prophet of Victorian progress, Lord Macaulay, called 'the empire of man over the material world',[109] England had outstripped other nations and seemed poised for a boundless destiny. Faith in material progress found its evidences in the expanding productivity and increasing wealth of industrial capitalism, in which Britain glorified. Contrasted with this, the unspecialized, poor and non-accumulating economies of Africa were scorned as unprogressive. Moreover, the confident expectation that the expansion of trade would displace the parochialism of nations by international

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108 J.B. Bury, The Idea of Progress, p.346.
109 Lord Macaulay, Critical and Historical Essays, p.395.

co-operation and advance world peace influenced white attitudes in Africa to the supposed endemic anarchy in the tribal interior. Progress implied, too, a release from the fetters of tradition and the old order in the case of political institutions and religious doctrine. In the African context, the destruction of chieftainship and the adoption of Christianity in the place of heathen superstitions were seen as so many signs that the burdens and errors of the African past were yielding before the advance of civilization. To foster this continuous forward movement lay, in the view of the colonial magistrates, at the very heart of their civilizing mission.

If we are to unpack the meaning ascribed by the administrators to the notion of progress, it must be understood that the identification of social evolution with progress, categories which they considered interchangeable, served to convert the social theory into a moral one. Looked at in a wider cultural perspective, it is apparent that as traditional certainties and beliefs began to crumble, the human need for assurance that man was moving in a definite and desirable direction found secular expression in the doctrine of progress. Colonial magistrates were as certain that social change was propelling the African societies along a new course, as the Victorians in general were that their society was travelling. What they wanted to know was the route and the destination. They required guarantees that mankind was advancing in a desirable and satisfying direction, which the dogma of progress provided. For the magistrates, who represented European civilization as the universal model, the highway of progress entailed an ever closer approximation by the traditional people to the modes of social life supremely embodied in their own society. Fortified and sanctioned by the doctrine of progress, they looked upon the movement of change working among the Africans and saw that it was good.

But in attempting to comprehend a process of radical social

change such as the African chiefdoms underwent, the very concentration on development and continuity proved itself inadequate in describing the complex historical process. It is in the discussion of the Transkeian administrators on the impact of change disrupting traditional patterns of social life that we can confirm what Karl Popper has called the 'poverty of historicism'. In their inability to understand revolutionary change from the viewpoint of the African experience of it, the magistrates tended to focus their attention on the pleasing and satisfying surface, which reflected a story of 'progress', passing over at the same time those deeper undercurrents which were stirring African society. That social change was seen as a progressive development towards a higher form of civilization, rather than radical discontinuity with traditionalism, can be illustrated by a report of Walter Stanford.

> My faith in the colonising genius (of the British) ... is too robust for me to join in the general pessimistic wail that no progress towards better things is seen amongst our natives .... Twenty years are but as a moment in the life of a people, and yet what changes have occurred in these territories since 1876. The power of the chiefs, supported by that of the witch doctors, was unbroken throughout numerous tribes this side of the Kei. Raids, reprisals, and stock lifting were rampant. It took over two years of fighting, from the end of 1878 to the beginning of 1881, to firmly establish the authority of Government. Since then trade has developed enormously, and the quality of merchandise sold the natives rises steadily higher. The area under cultivation has been widely extended, and the use of ploughs and wagons has become general. Substantial schools and cottages built by natives are to be seen in every district. In 1876, I do not suppose a hundred men went out annually to labour from such tribes as the Gcaleka, Tembu, Pondomisi and others. Now they go out by thousands to Johannesburg, Kimberley, and other parts. In the more advanced districts we see natives carrying out a large measure of local self-government with conspicuous success.110

If this report resembles a parochial imitation of Macaulay's paean to mid-Victorian England, the similarity lies precisely in their subordination of the socio-historical process to the ruling notion

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110 CPP, G.19-'97, p.129.

of progress. Insofar as progress culminated in their own civilization, British society of the nineteenth century provided the measure and standard with which, in Macaulay's case, the past and, in Stanford's, African culture, were judged. For the magistrate, the highroad of progress as traversed by the traditional people tended towards the superior life of civilization: peaceful and beneficent government stripped of despotic chieftainship; security of life and property; the interchange of commerce and trade; increasing agricultural production; education; and the dignity of labour. The great argument of the colonial administrators seeks, in sum, to justify the ways of white society to black.

This supreme confidence of the 'dominant race' in its cultural superiority led to an oversimplification of the complex problems involved in social change. Magistrates saw themselves as emissaries of a higher, more advanced culture, bearing the fruits of civilization to a 'backward' and 'inferior' race. It was assumed with extraordinary complacency that the blessings of civilization were self-evident, and that the African people, acknowledging their inferior cultural status, would voluntarily release themselves from the trammels of tradition, throw off their 'Hebrew old clothes', in Carlyle's words, and submit to white rule. Moreover, by defining the process of white-directed change as one of moral progress, administrative activity embodied its own justification. Magistrates convinced themselves that they knew by some intuitive means, available to their superior position, the 'real' or 'best' or 'substantial' interests of Africans better than they did and could proceed to impose policies against their will, in the belief that African ignorance would eventually be enlightened on discovering the tangible benefits conferred. A fine example of begging the question can be quoted here: 'all thoughtful Natives must be aware that the provisions of the [Glen Grey Act] are calculated to confer large and lasting benefits

upon the people if they can be induced to see what is really best for their own advancement and elevation. Many, it is to be feared, do not wish to be advanced. ... they may submit to being improved although against their inclination'.[111]

The magistrates' analysis of the mechanisms of social change was confined to an enumeration of the various 'civilizing agencies' and, subsidiary to this, an identification of the 'hindrances to Christianity and civilization'.[112] As for the former, these agencies were most commonly denoted as the colonial administration, the Christian religion, and commerce. Magistrates universally assumed that change, although desirable, was not self-generating and would therefore have to be externally induced. Frequent reference was made to the essential conservatism of the African people and their innate aversion to change. This conservative belief in the intractability of human material seems to form a common strand in nineteenth century colonial administrative thinking. It was incorporated as a general statement by the Indian administrator, Sir Henry Maine, in his indictment of democracy, Popular Government (1885), where he argued that the natural condition of mankind was to be unprogressive and to scorn all change. But, he continued, human progress though limited had been real, and its instrument had always been a minority which had brought about innovations that the multitude would have rejected. Such an élitist conception of political leadership in Maine's writing harmonised well with the magistrate's image of himself as the apostle of a higher civilization to the benighted Africans. His appointed duty was to command and to lead; the reciprocal obligation of the Africans was to obey and to follow. As a representative of the colonial government, his task was to entrench and extend white rule over the black population, to combine

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111 Cape Archives, C.M.T. 3/275: Report of H.G. Elliot for 1894.
112 CPP, G.17-'78, p.105.

the rôles of law-giver, judge, father and chief of his people; as a cultural missionary, he was charged with disseminating western civilization and evangelising the primitive societies.

In this civilizing mission, the magistrate was assisted by the fellow agency of the missionary and the trader. Administrative reports reveal a frequent collocation of Christianity and civilization. So inseparably were western culture and Christianity fused in the magistrate's mind that the magistrate and missionary appear as complementary figures. They looked upon each other's work as mutually supportive and let no opportunity slip by to exchange warm tribute. For the administrator, evangelism and conversion prepared the way for his coming, rendered the Africans more receptive to civilization and more amenable to white control. The progressive Africans, the School people, were invariably Christians and patronisingly looked upon as models of law-abiding and obedient subjects. The Church, then, was a useful pillar of the Government.

That the administrators frequently collocated Christianity and civilization and used them as interchangeable concepts points once again to the characteristic transference, already observed in the drink question, into their reforming activity of attitudes derived from their religious life. Social reform was conceived wholly in terms of 'conversion' at the level of the individual, who by an exertion of will-power, the conscious exercise of free choice, released himself from the snares of sin and made himself anew. Because of the voluntary nature of the redeeming act, determined by a free moral agent, magistrates set themselves against the use of force and legislative interference to 'make men moral', and not only on the grounds of political expediency. The function of legislation, rather, was to create an environment conducive to social change and moral reform. The conversionist analogy, reflected in the very terminology used to express a missionary view of change, as one of 'advancing'

and 'enlightening' the Africans, occurs as well in the magistrates' fear of 'relapse' on the part of their subjects into barbarism, a retrograde movement like that of the Christian sinner who has fallen from the light. Thus, the administrator regarded it as his duty to keep his charges up to the mark,[113] to a civilized pitch, as the missionary would his flock, exhorting, encouraging, disciplining. On the removal of one respected magistrate from Tsomo, the Chief Magistrate expressed his concern that the people of the district 'would go back and get lost'.[114] It was the cultural regression of the Mfengu under the laissez faire administration of Captain Cobbe who was content to leave them much to themselves, acting merely as a diplomatic adviser, that prompted the Government to appoint Matthew Blyth in his place. Blyth believed that to arrest the evident cultural decline, he would have to institute a thoroughgoing civilizing programme, that involved the erection of churches and schools, and by a process of reinforcement confirm the Mfengu in the civilized ways previously adopted and since almost lost. However successful this administrator's work was in the long run, there was a constant need like that of the God of Israel to recall an erring people who were ever 'going back to barbarism and destruction',[115] becoming 'careless and indifferent ... discouraged and [losing] heart'.[116] Blyth's task was to keep them on the right path and to prevent their returning to the fleshpots of traditional life.

This emphasis on the personal factor, implicit in the analogy of conversion, comes through likewise in the individualism colouring the administration's ideal of the advanced civilization towards which the African people were progressing. In fostering the

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113 CPP, G.4-'91, p.32.
114 Cape Archives, C.M.T. 2/63: Blyth to U.S.N.A., 14 July 1882.
115 CPP, G.4-'91, p.31.
116 Cape Archives, C.M.T. 2/68: Blyth to U.S.N.A., 25 January 1888.

progress of their subjects, the magistrates sought to liberate the individual from the slavery of custom and from the tyranny of priest and king - the witchdoctor and the chief. The individualism which they espoused was opposed to and subversive of the firm inclusion of the African within communal forms of organization, his close identification with the kinship group and the tribal community. They regarded with hostility the traditional social organizations as inimical to the advance of civilization and believed it both desirable and necessary to destroy these social forms. Only by breaking up the traditional structures could those progressive energies be unleashed and the individual allowed to emerge, to attain an independence that was the necessary condition of any healthy forward movement.

In the magistrates' eyes, traditionalism became a 'hindrance' barring the way to the establishment of the individualist, competitive society which they looked upon as the acme of an advanced civilization. It presented obstacles retarding that forward advance which they thought it their duty to promote. As a minor theme in their analysis of the mechanisms of social change, they identified 'the main obstacles to the further advance of civilization' as 'the customs, and superstitions, and traditions' of the indigenous people.[117] The whole traditional system was embodied in and symbolized by the chief. The institution of chieftainship was looked upon as inimical to white supremacy and white civilization (which were facilely equated), essentially antithetical to them. The administration saw the chiefs as focusing the conservative and primitive energies of tribalism against beneficent white rule, acting as a brake on the desirable progressive development from barbarism to civilization; and it looked to the ultimate destruction of chieftainship as necessary and inevitable. Particularly after the war of 1877-78 and the rebellion of 1880-81, when the African societies displayed great tenacity in

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117 CPP, G.33-'79, p.90.

clinging to their traditional social system, the white tendency to reduce the complexities of interaction to the crude polarity of a naked 'conflict between civilization and barbarism' was reinforced.[118] This vulgar simplification of the issues at hand in terms of polar abstractions rendered it less possible to treat the problems attending social change and social upheaval in a pragmatic manner. The traditional system was an ill to be eradicated, an obstacle to be overthrown, an immature and inferior social form whose future it was to be replaced by the superior life of western society.

The antithesis of traditional and modern, of 'primitive communism' on the one hand and liberal individualism on the other, was best exemplified for the magistrates in the economic area. They derogated the system of communal tenure as unprogressive, precisely because it stifled individual effort and enterprise. Its apparent egalitarian socialism seemed at odds with the spirit of competitiveness, the institution of private property and the individual accumulation of capital, which formed the components of the capitalist system, whose productive efficiency when contrasted with the relative inefficiency and poverty of the tribal economy provided its own justification. The magistrates argued that only individual ownership of land, free of the threat of confiscation by conservative chiefs, would act as an inducement to progress and improvement. As one officer wrote, 'The communistic practices of Kafir society are fatal to individual enterprise. Should a man by superior industry and skill obtain a large crop, he must share it with his less fortunate (because more lazy) friends, of whom there are sure to be numbers ....'[119] These considerations gave impetus to the magisterial promotion of individual titles to land. Individual ownership was at variance with indigenous systems of land tenure whereby the tribal land was held in

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118 CPP, G.20-'81, p.43.
119 Ibid., G.17-'78, p.115.

trust by the chief, and so the white innovations in granting individual titles and 'certificates of occupation' risked and incurred the opposition of the traditional authorities. The chiefs resented the loss of power entailed in the prerogative of distributing land, and were alarmed at the dispossession of the tribal patrimony by a progressive black minority allied to the white administration. In their turn, magistrates saw the granting of individual ownership as a lever for subverting the power of the chiefs, whose resistance to the advance of civilization was strengthened by the claim that the tribal reserve was vested in their own person. Walter Stanford believed that land would be the final solvent of the old order; and with its demise the power of the chiefs would go. 'With individual title the individual owner steps to the front rank at once and away go chieftainship and all that combined to sink the man's individuality in the tribal bond'.[120]

Set at liberty in this way from the despotism of chiefs and communal ownership, African society would be stirred out of its inveterate backwardness and stagnation, and set moving along the path of improvement. In true liberal tradition magistrates regarded the institution of private property as the tap-root of individual liberty and progress.

Turning to the third civilizing agency, that of commerce, we can say that the close alliance of civilization and trade, found in the administrators' reports, is descriptive of the strong commercial component forming their notion of civilization. There was widespread agreement that the expansion of trade tended to promote friendship and co-operation among nations and advance universal peace; that the acquisition and accumulation of material goods, distributed by commerce and trade, was a sure index of prosperity and progress. In this sense, the civilization disseminated by the magistrates was often

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120 Cape Archives, C.M.K. 2/7: Report of W.E. Stanford for 1890.

frankly and grossly materialist. They viewed the increasing turnover of the trading stores and the sale of such products as European clothing and agricultural implements to a growing African clientèle as visible signs of progress. Like the Utilitarians, the administrators welcomed the multiplication of African wants and took it for a mark of progress. The more men's wants multiply, they argued, the greater the need for peaceful and industrious collaboration between white and black and the greater the cohesion of the new society which had been forged by the incorporation of the chiefdoms within the Cape Colony. The function of commerce was to penetrate the isolation of the parochial African societies and 'bring them into contact with civilization'.[121] The interchange of commerce would create civilized wants and satisfy awakened needs, advance the material prosperity of the Transkei, and, not least, expand the Colony's markets. The whole strength of the civilizing mission rested, then, on the happy union of duty and self-interest.

Considered in more general terms, magisterial discussion reveals a tendency to concentrate on agency in the social process, to the exclusion of those profounder structural forces, involved in the very circumstances of interaction between black and white, working inexorably to transform African society. However much, for example, the administration might ascribe migrant labour to the rational acceptance by Africans of a new ethic of work, it is incontrovertible that pressures on land and population increase set up a chain reaction, impelling Africans willy nilly to seek work in the industrial centres of Southern Africa. In their desire to make sense of and thus control the forces of transformation, the magistrates were concerned to discover agency in the process of change, the agencies of the magistrate, the missionary, and the trader. White agents and institutions,

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121 CPP, G.5-'96, p.126.

by being brought directly to bear on the daily life of the people, would promote their continuous upward advance.

In conclusion, we must recognise the tension existing between the conservative and the modestly reformist tempers of administrative style, which the Transkeian magistrates apparently contained, however uneasily, at an intellectual level in social evolutionary theory. On the one hand there exists a significant conservative component of thought which accepted the importance of socio-historical understanding, the intractability of human material and the folly of wantonly uprooting a traditional system of society on radical a priori principles. On the other hand, magisterial appetite for progress and improvement left them unsatisfied with the conservative criterion of judgement, the prescriptive force of tradition, as being too inert and unprogressive. For the Victorians were certain that mankind was advancing, that western civilization formed the vanguard, being necessarily closer to or a prefiguring of some ultimate human goal, and therefore superior to the more traditional societies which took up the rear. The history of man and society was represented as the progressive assimilation to a single universal pattern which formed the ultimate standard of value and to which western civilization most nearly approximated. For the colonial administration the task became one of fostering the acculturation of the African people to the dominant European model, of watching over a process of education through various fixed stages of social growth until they attained the fully developed forms of western society. To this end, administrative policy was geared to the slow tempo of evolutionary change, and was valued for its responsiveness to transformations in the social relations among the trans-Keian Africans. Following the contours of social development, it represented, in the words of one magistrate in the territories, 'a unique progressive policy, adapting itself to the varied stages of advancing civilisation'.[122]

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122 CPP, G.33-'82, p.19.

# CHAPTER THREE

## LAW AND THE ADMINISTRATION OF JUSTICE

### i The Recognition and Codification of African Customary Law

The sphere in which the colonial magistrate operated was wide, but it was in the rôle of judicial officer that he achieved his most sustained and immediate form of contact with the African people, with the court as the locale or context of interaction, and law the style of discourse between them. This essay is concerned largely with one party to the dialogue, the white administration, and to decode, as it were, the particular medium of communication, it would be useful at the outset to examine the magistrates' notions of law, their understanding of the nature and function of the language - legal in kind - that flowed between the colonial and African societies.

Two concepts of law, embedded in magisterial thinking, can perhaps be defined. There is, first of all, an Austinian-like notion of law as the command of the sovereign or 'determinate human superior' in receipt of habitual obedience from the bulk of his subjects. This implies a prior characterization of the body politic as one susceptible of a simple top and bottom analysis, divided into rulers and ruled. The governmental system operative in the Transkeian territories, being essentially one of direct rule, approximated most nearly to such an ideal political type. It comprised a bureaucratic hierarchy, reaching its apex in the office of the Secretary for Native Affairs, with power devolved downwards to assignable persons through a disciplined chain of command. The authority of the local magistrate, the right to command obedience and exact respect, was 'positional', deriving from his ranking in the administrative hierarchy, and in this sense differed from that of the traditional chief

whose authority was consensually legitimated. Backed by the Administration, the magistrate enjoyed full control of his district, and in theory his sovereign fiat was law, although in practice he did not usually enforce his authority against popular opposition or without popular support. In line with this, the conception of administrative action which was generally held by the white officers revolved around the confident issuing and ready receipt of lawful orders. The decisions, whether judicial or administrative, which he reached and enforced, the magistrate regarded in the nature of laws, entitled to the prompt and unquestioning obedience of the subjects he ruled. The concept of law as command, then, is appropriate to a government imposed upon an alien people from without, a superstructure deliberately fashioned as an instrument to serve conscious ends, those of civilization and control.

The other notion of law implanted in magisterial thought represented law as a socio-historical institution, a conception which suggests supremely the work of F.C. von Savigny and of Sir H.S. Maine, the foremost legal proponent of the historical method in the English-speaking world. The principal doctrines of the historical school, as expounded by Savigny, are two in number. Law springs from, is organically connected with and justified by, the ideals and character of a given people in its historical surroundings (what Montesquieu had called 'l'esprit de la nation'). Each culture develops its own legal habits and institutions, as it has its peculiar language, mores, and government. If this is so, it follows that laws are not of universal validity or application. Secondly, law, being determined by the whole past of the people, cannot be changed arbitrarily by legislative decree: for law is found, not made. As Savigny himself expressed the idea: 'Law is the organ of folk-right: it moves and grows like every other expression of the life of the people: it is formed by custom and popular feeling, through the operation of silent

forces, and not by the arbitrary will of a legislator'.[1] An implicit criticism is contained in the last phrase of the Austinian view, shared by writers like Hobbes and Bentham, which treats civil law, if not always as commands, then at least as effects of power, and which by extension seeks to explain social institutions as instruments to serve human purposes. The historical school, by contrast, displayed a superior understanding of the social determinants and functions of law. As conceived by its outstanding theorists, law is only one among many aspects of social development, conditioned by the same sort of factors as social life in general. They were impressed by the social fact that laws are the slow products of time and experience, by the manner in which they form the context of men's lives and purposes, the social environment we are born into. Men are creatures of law more even than creators of law.

Just as the notion of law as command issued from the bureaucratic system of magisterial control, described in chapter one above, so the concept of law as a socio-historical institution ties in with the social evolutionary theory, outlined in chapter two. Indeed, as Sir Frederick Pollock has said, the historical method of which Henry Maine was the leading Victorian proponent in the field of legal studies, was nothing else than the doctrine of evolution applied to human institutions.[2] In his magnum opus, Ancient Law (1861), Maine sought to demonstrate that a greater appreciation of the social basis of all legal forms would be achieved when jurists used the techniques of the historian to trace the implications for all present systems of law, of the full course of legal development in the ancient world. In common with other contemporary social thinkers, his work advances arguments and carries assumptions which need only be stated to be recognised as familiar. For Maine admits the relative validity of

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1 E. Barker, Political Thought in England 1848 to 1914, p.164.
2 Ibid., p.165.

primitive legal modes as the expression of a particular stage in the continuous development of a particular society, while maintaining the absolute validity of modern western institutions, and he assumes that ancient legal forms were only part of a larger process of legal evolution, which he formulated in his famous 'status to contract' theory. As he argued, 'Starting, as if from one terminus of history, from a condition of society in which all the relations of Persons are summed up in the relations of Family, we seem to have steadily moved towards a phase of social order in which all these relations arise from the free agreement of individuals'. And again, 'the movement of the progressive societies has hitherto been a movement from Status to Contract'.[3] Legal, as well as other social, institutions were thus capable of being arranged on a single scale of progress. Viewed independently, they were seen to belong uniquely to a particular stage of social growth, but taken together they constituted a single progressive ascent. In effect, Maine's research was shaped by an ideological intent. To his contemporaries, the work represented a scientifically tested exposition and vindication of liberal individualism, manifesting itself in history, in which progressive western man was tending towards the apex of legal refinement: the freedom of individuals to enter into contracts on their own behalf and so determine their own status.

Corresponding to the two notions of law, best known in the formulations of the analytical and the historical schools of jurisprudence (which are incidentally the leading and conventionally contrasted legal doctrines of the nineteenth century), are two differing conceptions of the sovereign, which stand side by side in magisterial thinking. On the one hand, there is the Austinian idea of the sovereign as the source of law, issuing commands and demanding

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3 G. Feaver, From Status to Contract, p.53.

obedience. On the other, the sovereign is regarded as the custodian and repository of customary law. The understanding of the white administration that African tribal law, like everything else in traditional society, was the expression of the changing habits, beliefs, general attitudes of African society, at a particular stage of its cultural development, shaped its recognition as a legal system to be administered in a modified form by Cape magistrates beyond the Kei. Such was the conservative form of evolutionary jurisprudence which saw tribal law as the expression of the deepest traditions and instincts that had formed the character of the indigenous society, not to be superseded by advanced colonial structures out of harmony with its cultural ethos. At the same time it was complemented by a reformist strain which demanded that the law should respond attentively to changing social needs, generated as a consequence of the interaction between black and white societies. In the Transkeian territories, the flexibility of the legal system, its relevance and responsiveness to changing social relationships among the African people, were guaranteed by the discretionary capacity conferred upon magistrates to apply customary law in civil suits where both parties were black. As one administrator observed, 'Thus [in regard to] native people attaining a civilized status [and] entering into contracts based upon civilized or Christian procedure or rites, colonial law applies, but contracts based upon native custom obviously call for application in cases of dispute of such custom, restricted however by [the] dictates of humanity ....'[4] Moreover, as primitive modes of social life represented, according to the categories of social evolutionary theory, inferior stages of human development, the colonial administration conceived its task not merely to wait upon change, but, in the exercise of its civilizing mission, deliberately to foster such

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4 J.W. Macquarrie (ed.), The Reminiscences of Sir Walter Stanford, vol. 1, p.100.

change and promote the civilized advance of the tribal communities. The sovereign therefore assumed, in addition, the guise of the educator, whose function it was to create a legal environment conducive to social progress, holding out inducements to the adoption of a western life-style. This was achieved, for example, by a system of exemption from the operation of customary law. By Act 39 of 1887, in the territories, any duly registered parliamentary voter was completely exempted from African customary law and from all laws differentially affecting Africans. Cape tribal law policy held out the promise and set up the objective of full incorporation within the colonial legal system of the African people east of the Kei, towards which goal they would be levelled up progressively as time and circumstances changed. In the transitional stage, however, recognition would be extended to traditional law as a necessary accommodation to social reality. As Walter Stanford argued, 'that a time will come when the colonial law and procedure will be fully extended to the Native territories is undoubted, but for any one to say that time has arrived would be proof of his utter ignorance of the state of the various tribes to be dealt with'.[5]

The issues involved in the recognition of African tribal law can best be illuminated by reference to the 1883 Cape Native Laws and Customs Commission, which was appointed to investigate the complex question of what system of law and government should be applied in the territories.

That social evolutionary theory formed the general conceptual framework within which the Commission regarded customary law is evident from the significant description which the Report provided of the nature of law in traditional society. The law, according to the

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5 CPP, G.3-'89, Report of W.E. Stanford, p.45.

commissioners, was unwritten, it embodied and was transmitted by oral tradition, being rooted in established custom and tracing back to the habits and usages of the people. Tribal law reflected the social circumstances of African society, it was 'created by and adapted to the conditions of a primitive, barbaric life'. At the same time, leaning upon the work of Maine, the Report located the traditional system of law fairly low in the scale of legal evolution, and acknowledged that 'in some respects it was not unlike that which prevailed among our Saxon ancestors in the early days of civilization'.[6] Thus, once again, the familiar dialectic, characteristic of nineteenth century social theory, between absolute values which reside in modern western civilization, and those which depend upon time and place in a concrete situation, reappears in colonial thinking on African administrative policy.

The argument in favour of recognising the customary legal system received greatest force from the traumatic impact of the African resistance movements. Sitting in the aftermath of the war and rebellion of the late 1870s and early 1880s, which had incontestably demonstrated the vitality of traditionalism, the Barry Commission concluded that the supersession of African customary law by the colonial legal system was inexpedient, for 'many of the existing Kafir laws and customs are so interwoven with the social conditions and ordinary institutions of the native population ... that any premature or violent attempt to break them down or sweep them away would be mischievous and dangerous in the highest degree ....'[7] A spirit of conservatism informs the Commission's judgements, not least in its refusal to contemplate the wanton uprooting of the traditional social system, the transformation of tribal institutions by means of positive acts of legislation, and in its reluctance to

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6 CPP, G.4-'83, Report, para. 8.
7 Ibid., G.4-'83, Report, para. 28.

ignore, to quote words redolent of Burke, 'the important sanction which long prescription and national feeling give to all laws'.[8] Law in this sense was regarded as the expression of the deepest traditions which have shaped the character of a people - bound up with the 'organic' development of a community, not to be deflected by the arbitrary fiats of reforms that disregard its historical 'spirit' and social circumstances. Like Burke, the commissioners were impressed by the intricacy and variety of tribal laws and customs, by their being the slow products of time and experience, by their power to affect the mind and take hold of the feelings. The capacity of radical reformers to change and alter laws, it was held, is limited by their nature and function, as the social context of men's lives and purposes, informing and shaping as laws do their habits and prejudices, the assumptions men make without even being aware that they make them. On these grounds the Commission declined to propose radical reforms in the direction of legal assimilation, and its conclusions carried behind them a large weight of magisterial opinion. Elliot, for one, stressed the danger and futility involved in challenging the traditional legal system to which the Africans were tenaciously attached and underlined the threat of African resistance which such reckless interference might provoke. As he wrote:

> The natives in this territory are totally unprepared to accept colonial law, and would resist any attempt to force it on them .... any attempt to rudely break down existing laws and customs (to which the people are much attached) would meet with determined and obstinate opposition.[9]

It seems clear that given the temper of the time, with the prevailing loss of self-confidence in the Cape's ability to rule the subject African people, pragmatic considerations of administrative expediency allied to a cautious and sceptical conservatism largely

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8 CPP, G.4-'83, Report, para. 32.
9 Ibid., G.4-'83, Appendix D, p.280, q.29 [H.G. Elliot].

determined the formal recognition of customary law in the Transkeian Territories. However, for some magistrates, the desire to give greater effect to tribal law in the territorial courts was shaped by a superior understanding of the close and necessary relation of the African legal system to the traditional social structure. Blyth, in evidence before the Barry Commission, drew from his administrative experience in commending the social utility of customary law and the adequacy of the Transkeian regulations, which had given the magistrates discretionary powers to apply such law suitably modified, in encompassing the needs of the Mfengu community.[10] Walter Stanford, to provide another outstanding example, implicitly recognised that the criterion for assessing the viability of a legal system is its relevance and responsiveness to social realities. As he was continually to maintain, the African people possessed 'in their own polity many laws and customs well suited to their needs and condition'.[11] African laws bore the merits of clarity and simplicity of definition; they embodied concepts of right and justice discoverable in more developed legal systems; their procedures were neither cumbrous nor prohibitively expensive on account of costs. He was convinced therefore of the desirability of extending recognition to African customary law as a system of law. More specifically, he held that traditional laws of inheritance, founded on male primogeniture, were consistent with the structure and social functions of the extended family system. To abolish the institution of polygyny, as missionaries demanded, although a pattern of marriage 'in conflict with the principles of Christianity and of western civilization', would result in the disruption of family life and of the whole joint family organization. As for the tribal custom of lobolo, it legalised the marriage and made the children legitimate. The practice of the

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10 CPP, G.4-'83, Appendix D, p.266, q.29 [Matt. Blyth].
11 J.W. Macquarrie (ed.), Reminiscences, vol. 1, p.99.

courts in the Colony proper of regarding traditional marriages established by lobolo invalid before the law was intolerant and harsh in its social consequences.[12] Stanford's insight into the social structure underlying the legal arrangements of the African community informed his advocacy of formal recognition of customary law in the territories.

At the same time, he understood the need for the adjustment of law to meet changing situations, and held that the function of law must be to encompass new social relations among Africans, brought about by their absorption and participation within a wider white-dominated society. African customary law, or that version of it administered by the colonial magistrates, was geared to the needs of a small-scale society of herders and cultivators. But as many Africans emerged from the bounds of tribalism and, entering upon a process of cultural transition, came to form new relationships, customary law would have to be modified to accommodate their changing needs, or exemption granted from its operation to those evolués who had broken entirely from their culture. Stanford himself was aware of 'many cases of ... hardship resulting from a code no longer applicable to the conditions of the native people, even the heathen'.[13] As instances of Africans entering into newly contracted relations, he cited the examples of a female African teacher and the many women in domestic service in the white towns and on the white farms. He realized the need for suppleness in the legal system and regarded the provisions in the various Transkeian proclamations for the discretionary application of customary law in civil cases an admirable expression of such need. As an advocate of flexibility, Stanford opposed the codification of customary family law, holding that 'as conditions changed in the life of the native people, a written code which would be sure to crystallize and be difficult to amend would constantly

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12 J.W. Macquarrie (ed.), Reminiscences, vol. 1, p.187.
13 Ibid., p.101.

check the people's advance'.[14] There was a danger of imparting rigidity to the law. In fine, as Stanford wrote in the early twentieth century, the legal system prevailing in the Transkei while 'allowing for the circumstances then prevailing ... [has] undoubtedly largely led to the good government of the Territories and the steady advance of its people in civilization'.[15]

Yet another cluster of arguments advanced before the Barry Commission in favour of recognition centred upon the custodial function of the white administration. It was argued that on the assumption of political sovereignty, the magistrates had stepped into traditional authority rôles and adopted chiefly personae. For this reason they were bound to sanction customary law so as to maintain a necessary continuity between the old and the new régimes, without which the traditional social system would be seriously dislocated. Consequent upon the displacement of the tribal ruling élite from their positions of authority, the need arose for the white magistrates to step into the breach, to uphold and continue the administration of justice after the traditional manner of the chiefs. Fearful of the disintegration of the indigenous social structures, the rending of the social fabric, the administration sought to reinforce some of the traditional rules making for the stability of the social system under the impact of new forces of change. The Cape was thus impelled to acknowledge the effectiveness of customary law as an instrument of social control, well tempered to suit the social circumstances of the African people, if the 'cake of custom' were not to crumble. Moreover, the transitional cultural state the Africans occupied between barbarism and civilization, to which colonial laws were clearly inapplicable, demanded the recognition of a modified corpus of tribal law, so that

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14 J.W. Macquarrie (ed.), Reminiscences, vol. 1, p.99.
15 Ibid.

the social life of the African communities could be brought under some form of legal control. In this condition of tutelage, it was argued, the administration must needs take account of the special needs of the black population beyond the Kei as 'a people apart', until by a process of education they were weaned from traditional modes of social behaviour and introduced to a western life-style, at which point of time the extension of the colonial legal system would become a matter of practical policy. The whole tenor of Sir T. Shepstone's case in favour of recognition, which carried great weight with the Barry commissioners, was that African customs ought to be recognised for the sake of placing them under some control.[16] 'The main object of keeping natives under their own law is to ensure control of them. You cannot control savages by civilized law'.[17]

Again, magistrates contended soundly enough that non-recognition of African tribal law would entail a denial or deprivation of justice to those seeking to enforce rights previously obtained according to local custom. In addition, refusal to hear claims arising out of customary arrangements and to entertain previously contracted family ties and obligations would effectively lessen magisterial control, as Africans were sure to take their cases to the traditional courts where such claims were regarded as cognisable. Unless the realities of the situation were to be completely ignored, then, strong practical considerations compelled the administration to accord some measure of recognition. Magistrates were plainly aware of the sheer impracticability of applying socially incongruous laws. 'If we make laws unfit for a people, they will become a dead letter, ... and the people will follow custom rather than obey law'.[18]

The opposing standpoint, spearheaded by the missionaries, expressed a downright aversion to any formal recognition of African

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16 CPP, G.4-'83, Minutes of Evidence, no. 667.
17 Ibid., G.4-'83, Minutes of Evidence, no. 200.
18 Ibid., G.4-'83, Appendix C, p.70, q.18 [Bp. of St. John's].

law. Disapproval was grounded in the main on moral grounds. Indeed, magisterial attitudes towards tribal customs and law were characteristically suffused with a high seriousness, ever mindful of the moral law 'written on the tablets of eternity'.[19] To several features of traditional African culture, particularly to the complex of witch beliefs and the initiation rites, magistrates reacted with a deeply felt sense of moral repugnancy. To many administrators, aspects of the kinship system, more particularly polygynous marriage and lobolo, seemed genuinely shocking, as they violated a conception of Christian marriage on which it was believed that the whole fabric of civilized life rested. Missionary opinion, and the weight of religious orthodoxy, fortified this view. At numerous vital points, touching established social mores and norms, then, the practices and values of tribal life conflicted with western society. It was argued consequently that traditionalism presented a formidable obstacle to the advance of civilization, and that it should be destroyed, for, as one magistrate wrote, 'heathenism means antagonism to everything of a progressive and developing nature'.[20] Just as the Africans were entitled to the benefits of civilization, conferred on them under white rule, they should in turn, so the argument continued, be subject to its restraints. More impelling than this, the magisterial radicals opposed the establishment of a system of legal dualism, as a consequence of 'class legislation', in the belief that 'the European and the native should be equal in the presence of the law',[21] but ignored at the same time the cultural cleavage between black and white, which for the magisterial conservatives was a primary consideration. Whereas the latter considered that cultural difference made special legislative provision necessary for the African people as a separate

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19 Lord Acton, 'The Study of History' in Lectures on Modern History, p.40.
20 CPP, G.16-'76, p.27.
21 CPP, G.4-'83, Appendix C, p.71, q.30 [Bp. of St. John's].

social category, the former argued that any formal recognition of cultural pluralism in legal matters would merely highlight that divergence of interests between white and black societies which it should be the Colony's vital concern to bridge and reconcile. 'So long as the natives adhere to these customs ... so long will they remain a separate and distinct people, and will never become one with us in habits and feeling; ... so long may we expect Kafir wars'.[22] From the critical experience of African resistance to white encroachment could be drawn two contrasting lessons about the desirability and nature of acculturation.

Among the administrators as a whole the conviction held sway that the social circumstances of the Transkeian people, firmly encapsulated within their traditional structures, required a differential legal system. 'It would be well to consider that native law, so-called, is an outcome of their social life, and that European law is the outcome of a vastly different social life; and the same legal system is not likely to suit such different social conditions'.[23] In a spirit of legal realism magistrates perceived the incongruity of colonial laws and, by contrast, the utility of African customs and law which

> having grown out of the requirements of the people, are more suited to the genius of the race. Experience proves too that laws which work well, as regards a civilised community, have an opposite effect when brought to bear upon an alien people, whose institutions, associations, habits, modes of thought have been cast in a different mould. While these remain unchanged, all legislation on other lines is likely to fail to produce satisfactory results. The introduction of English law would throw out of gear the whole machinery by which the national life of the people is carried on.[24]

However much they considered tribal law of questionable morality, even 'vicious when measured by our standard of morality',[25] the men

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22 CPP., G.4-'83, Appendix C, p.176, q.6 [E.J. Warner].
23 Ibid., G.4-'83, Appendix C, p.70, q.18 [Bp. of St. John's].
24 Ibid., G.4-'83, Appendix D, p.297, q.29 [W.G. Cumming].
25 Ibid.

on the ground advocated the principle of recognition as a matter of practical administrative necessity. All the same, for some who looked beyond immediate requirements of policy, the full incorporation of the territories within the Cape's legal system beckoned as a goal attainable in the future, 'the goal of one law, one system of procedure for all'.[26]

With regard to the Transkeian Territories, the desire to give greater effect to African customary law received permanent and formal recognition. Indeed, from the first, with the annexation of the Transkei and Griqualand East in 1879, the general regulations proclaimed had given the magistrates discretionary power to apply tribal law in civil cases where Africans were parties to the suit. Even before the promulgation of the annexation acts, in the period of informal rule, the Cape agents who exercised a type of pseudo-magisterial authority in the area had orders from Cape Town to observe the rudiments of tribal personal law. In Fingoland, for example, the Agent was guided in the administration of justice by a code of rules drawn up by Sir W. Currie on the exodus of the Mfengu and endorsed by the Government although bearing no statutory authority: these regulations declared that 'Kaffir law' was to prevail. The case in favour of sanctioning the tribal legal system found its fullest and most definitive expression in the Report of the Barry Commission which, while recognising African civil law, refused to codify it. At the same time, appended to the Report were a series of regulations relating to customary marriages and traditional laws of inheritance, but these were never enforced or enacted, thus leaving civil cases to be dealt with under the discretionary provisions of the governing proclamations.

The marriage regulations framed by the Barry Commission represented a cautious attempt to reform the traditional system of

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26 CPP, G.7-'92, Report of W.E. Stanford, p.43.

family law, but as the Colony proved reluctant to antagonize traditionalism, customary marriage would continue to secure official toleration in the territories. Two features of the indigenous marriage system, polygyny and lobolo, were the principal objects of the Commission's reforming zeal, as they had long been regarded as directly antithetical to the western ideal of Christian marriage. The Commissioners declared that 'the Christian law of marriage sets forth the truest and purest idea of such a union'.[27] As Victorian gentlemen they set store by a monogamous union, chaste and sexually restrained, entered into by freely consenting partners, bound together in life-long constancy and fidelity, and animated by an exalted love which was both platonic and romantic. This culturally determined pattern of marriage conflicted with the practices and values of the customary marriage system, rooted as it was in the social structure of African communities, and provided an important source of cultural misunderstanding.

Magistrates in their evidence and the Commission in its Report advanced strong objections to polygyny on moral and other grounds. There was a widespread conviction of its incompatibility with 'civilization'. Charles Brownlee thought 'polygamy is antagonistic to civilization and therefore an obstacle to its advance among the natives'.[28] Magistrates objected in particular that it degraded women and reduced them to a servile status, enabling men to live in idleness by battening on the labour of their exploited wives. Women were said to take revenge on elderly polygamists by having extramarital liaisons with young lovers. The polygynous family was supposed to be rent by the jealousy and ill-feeling of the co-wives. Not least, polygyny was harmful to the material interests of the Colony as it locked up the potential labour resources in the terri-

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27 CPP, G.4-'83, Report, para. 84.
28 Ibid., G.4-'83, Appendix C, p.64, q.41.

tories. But despite strong criticism of the institution on moral grounds, as an institution for the enslavement of women and the unbridled sexual licence of men, the colonial administrators by and large were willing to tolerate the practice as one to which the indigenous people were firmly attached, to make allowances for the weaknesses of the flesh and the social circumstances of the black population. Major Elliot made the distinction in these terms, 'I do not disapprove of the native custom of polygamy upon social grounds (although I do upon moral), because I consider in the present condition of the people it is impossible to abolish it without introducing a more questionable evil'.[29] This evil was the disruption of family life, which magistrates feared would follow in the wake of abolition, as wives would be relegated to the status of concubines and children rendered illegitimate. Indeed, one administrator went so far as to urge missionaries to admit polygynists as converts to Christianity, appealing to the practice of the biblical patriarchs who seemed to have secured divine toleration in marrying a plurality of wives.[30] The enlightened insight of Sir T. Shepstone was, however, exceptional when he held, 'The kind of existence [the African people] lead and their peculiar beliefs and views render polygamy almost a necessity as far as their social condition is concerned'.[31]

In a more restrained manner, the Commission argued, true to the tenets of social evolutionary theory, that while a monogamous Christian union represented the ideal type of marriage, primitive marriage forms insofar as they incorporated the essential of a contract between a man and a woman could not be regarded as invalid merely because the Christian rite of celebration was absent. 'Marriage is as fully recognised an institution among them as among us, and to ignore their marriages would destroy the very foundation

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29 CPP, G.4-'83, Appendix C, p.54, q.48.
30 Ibid., G.12-'87, p.75.
31 Ibid., G.4-'83, Minutes of Evidence, no. 742.

of their social life'.[32] Furthermore, refusal to recognise the practice would place the people outside the operation of the law, without the opportunity of civil remedy. Just as in order to gain control of judicial functions in the African communities, magistrates found themselves obliged to uphold customary law, so if they were to regulate polygyny in the direction of its ultimate demise it would be necessary to recognise the custom. In sum, the Barry Commission adopted a cautious viewpoint, generally representative of magisterial opinion, tolerant of polygyny, but looking nevertheless to the gradual spread of the civilising agencies of Christianity and education to bring about the suppression of the practice, without resorting to direct legislative bans. The Report concluded:

> We must express our conviction that it would be for the welfare of the native people of this country if this practice could be speedily abolished, and that its disappearance would materially aid the labours of Missionaries, and conduce to the prosperity of the country. On the other hand we recognise that institutions which have become rooted in the social and national life of any people are not easily overthrown by direct enactment. They are never so overthrown unless there is a preparation of opinion and a certain willingness on the part of the people to accept such changes, or unless the Government promulgating such enactments is in possession of sufficient force to give effect to these laws, and is also satisfied both as to the justice and necessity of using such force. None of these conditions exist at the present moment.[33]

At the same time, the Commission did attempt in the appended marriage regulations to offer certain recommendations, radical in the case of the Colony though more conservative in that of the Transkei, for the gradual reform of customary marriage by indirect legislative devices. The commissioners surveyed the various statutory techniques for the suppression of polygyny and gave particular emphasis to the provisions of the Natal Marriage Code for registration, which was one of that Colony's major contributions to marriage reform. Registration

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32 South African Native Affairs Commission, Appendix C, vol. 5, p.87, q.4 [H. Sprigg].
33 CPP, G.4-'83, Report, para. 82.

was valued as a device for achieving certainty in marriage as to the respective rights of husbands, wives and children, and so dissipating the confusion that surrounded the claims and rights of each particular house in a polygamist's homestead. It was also regarded as an instrument of control by which, as the author of the Natal Marriage Code explained, the administration could induce Africans 'to look to the law for direction. You would thus create a habit of obedience, which you could use as a step to introduce changes at favourable opportunities'.[34] But the Commission feared that obligatory registration would be met by mass evasion of a law which could not be strictly enforced, and the creation of illegal marriages and illegitimate offspring. Consequently, the provision of permissive rather than compulsory registration of marriages was recommended. In fact this was an endorsement of the existing system of optional registration of a man's first marriage only, which the various annexation proclamations had introduced with a view to the gradual discouragement of polygyny, by reducing all wives subsequent to the first to the position of concubines. In terms of the regulations customary law marriages could be brought under the Colonial law as regards property rights, divorce, guardianship and inheritance by registering them with the magistrate. Although registration did not prevent a man from marrying other wives by tribal law, the status of the second and subsequent marriages was rendered obscure. While the Supreme Court declared that they were illicit unions, the Native Territories Appeal Court at Umtata ruled that these subsequent marriages were valid when contracted according to customary law.[35] As it happened, however, registration was almost wholly ignored by the Transkeians and also by the magistrates, the system fell into desuetude and was repealed in 1910.

The other feature of traditional marriage to which the

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34 CPP, G.4-'83, Minutes of Evidence, no. 764.
35 H.J. Simons, African Women, p. 85.

Barry Commission devoted its attention, the custom of lobolo, likewise stimulated a principled debate between magisterial radicals and conservatives about its nature and social function. Modern-day anthropologists regard lobolo as an essential component of customary marriage which is established by the transfer of cattle or ikhazi. The marriage consideration, then, is a significant element that distinguishes marriage from illicit cohabitation.

Magistrates' objections to lobolo rested on the sale and purchase interpretation which reflected the values of the commercially-minded society to which they belonged. Their criticisms were levelled against what one described as 'the system of buying and selling girls'[36] and another a 'traffic in human flesh and blood'.[37] As cases arising out of inherited debts and recurring obligations attached to the lobolo institution occurred frequently in the territorial courts, some urged that the custom should not be recognised by the Government in order to reduce litigation and asked to be relieved 'from the most unpleasant duty of superintending almost daily the sale into slavery of the women of the tribe'.[38] Others recognised that a husband's rights and powers in relation to his wife were not those acquired by a commercial contract. Brownlee wrote, 'The woman does not regard herself as sold, the husband does not consider he has bought her ... and the transaction is called "ukulobola" and not "ukutenga" (to purchase)'.[39] The husband was customarily obliged to maintain her, and was liable to lose her and forfeit his claim to the lobolo if he ill-treated or neglected her. But while most magistrates expressed a degree of tolerance for the practice, claiming that it had important advantages and functions in the traditional social system, nonetheless their insight was limited and their tolerance never

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36 CPP, G.33-'79, p.104.
37 Ibid., G.4-'83, Appendix C, p.114, q.18 [E.J. Barrett].
38 Ibid., G.33-'79, p.104.
39 Ibid., G.4-'83, Appendix C, p.62, q.20.

whole-hearted. Thus, for Brownlee, while he looked upon lobolo as a transaction serving to bind the customary union, the ikhazi were a basely material consideration when compared with those binding qualities of 'affection, faithfulness, high principle', which suffused the ideal conception of western marriage.[40] At the same time, he advised against the disallowance of customary arrangements, fearful that such tampering would loosen the bonds of social control and cause deep reverberations in the whole social structure. Lobolo was held the author of other evils, encouraging young men to steal cattle for payment, whence the incidence of stock-lifting. Champions of the institution countered with the claims that lobolo was regarded as security given by the husband for his own good conduct towards his wife, for if she left him because of ill-treatment, he lost his claim for the return of the cattle. Not only did it ensure good treatment and care of women, but also gave the wife legal claim on her father to protection and maintenance should her husband maltreat her. Finally, it guaranteed the good behaviour of the wife to some extent, for if she left her husband without just cause he could claim back the marriage payment. Mindful of the social utility of the institution, one magistrate regarded lobolo as 'a very right and proper thing for Kafir society in its natural state'.[41] However, as Simons has tellingly remarked, such claims ignore the 'difficulty of isolating the effects of lobolo from other factors that influence marriage and family relations'.[42]

On the whole, there was general agreement among the colonial administrators that the custom should be legally sanctioned and the Transkeian courts be allowed to settle cases arising from the practice in accordance with traditional law. Magistrates cautioned against radical interference by the Cape Government in reforming this feature

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40 CPP, G.4-'83, Appendix B, p.33,q.43.
41 Ibid., G.4-'83, Appendix C, p.158, q.6 [W. Girdwood].
42 H.J. Simons, African Women, p.88.

of customary marriage. Because of the vast network of kinship claims and the recurring obligations attached to lobolo, manifest in frequent litigation in the courts, and because of the tenacious hold of traditionalism upon the African mind in general - lobolo being 'thoroughly understood and believed in by natives',[43] they regarded suppression as out of the question. Magistrates, then, presented the viewpoint of 'moral suasionists' who saw in the spread of civilization the occasion of the gradual disappearance of the institution. The Barry Commission considered:

> the custom of ukulobola could not from its peculiar nature and history be repressed and rendered illegal by direct enactment, without overt or concealed opposition, or constant evasion of the law, as such legislation would necessarily affect masses of people unwilling at present to accept such change, and, because unenlightened by previous teaching, preferring to be let alone. But the Commission in all its enquiries and in the Regulations it has framed, has steadily kept in view the emancipation of the Kafir woman from the degraded position in which, according to English views, she is placed by the practice of ukulobola and certain forms of native marriage, especially when those marriages are polygamous.[44]

As in the case of polygyny, the marriage regulations framed by the Commission with regard to lobolo sought to curb the practice, 'to turn the custom to some use, while the way is being paved for its abolition by more enlightened views on the sanctity of marriage and the rightful place of woman'.[45] They provided for the free consent of the woman about to be married, thus meeting the objection that the contractual element occurring in the agreement between the girl's guardian and the prospective husband necessarily implied the compulsory marriage of the woman, who was bartered away on an open market to the highest bidder. The regulations stipulated that the gift of ikhazi would constitute an obligation on the part of the father or kinsman to maintain a woman in case of need, so as to exaggerate the

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43 CPP, G.4-'83, Appendix C, p.54, q.52 [H.G. Elliot].
44 Ibid., G.4-'83, Report, para. 73.
45 Ibid., G.4-'83, Report, para. 79.

least objectionable, morally respectable function of the custom. The dowry could also be reclaimed by the husband in the case of unjust desertion by his wife, so as to prevent the institution being abused by the father as a system of barter for gain. The giving of lobolo was no longer to be an essential for the validity of the marriage, and would only be claimable by the woman's family if the husband had originally agreed to give it. The Commission also recommended that only in some cases would claims for the return of dowry be heritable or transferable from the husband, thereby preventing a widow from being forced by her family to return to that of her husband against her will, so that they could retain the ikhazi. All these attempts to regulate lobolo in the hope of inducing Africans to abandon the practice were never enacted, and the marriage regulations, considered too radical by Government and magistrates alike, fell by the way. The institution, as it became apparent, has suffered most from the decline of the extended family system and the emergence of the nuclear family unit, rather than through legislative reform.

The whole thrust of the Commission's recommendations regarding African customary marriage were impelled by its 'desire to secure the sanctity of marriage and the rightful place of woman'.[46] Indeed, with the institutions of polygyny and lobolo, the whole status of the African woman in traditional society was inseparably bound. Magistrates universally believed that women held an inferior position in African society, from which it was the duty of the white government to emancipate them. For Blyth, 'Amongst the heathen natives the woman is regarded as the chattel of her husband, and therefore her condition is servile'.[47] To the magistrates, in whose own society women were exalted as 'the teacher, the natural and

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46 CPP, G.4-'83, Report, para. 72.
47 Ibid., G.4-'83, Appendix C, p.45, q.10.

therefore divine guide, purifier, inspirer of the man',[48] and worshipped as 'the angel in the house', African women held a degraded status. Women, it was argued, had no legal capacity in traditional culture, they were perpetual minors, neither able to inherit nor to own property in their own right. Traditional marriage had the result of transferring the guardianship of the woman from her father to her husband, which seemed to place her in the position of a slave; but in practice the property on which she depended for food and clothing was well protected, as was her person. Furthermore, as Simons has justly remarked, such concepts of ownership and status appropriate to western common law are informed by an individualism alien to tribal culture and they misrepresent the social relations underlying the African system of law. It was the extended family, which was the cornerstone of the social system, rather than the individual, that had full legal capacity. People regarded themselves as members of domestic and kinship groups, each occupying a clearly defined position with recognised claims and obligations inseparable from their group affiliations. The man was the senior partner of the patrilineally joint family; and the woman held a subordinate position in domestic affairs, sharing at the same time her husband's or her father's rank. Acting on a misconception of the woman's place in traditional society, the Cape Government conferred majority status on women as well as men at the age of twenty one years under the provisions of the various territorial regulations.[49] Walter Stanford believed that this clause 'emancipated [the African woman] from the thraldom of native law and custom. Under that she remains a minor all the days of her life and may not so much as own property in her own right even if earned by her own efforts'.

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48 Charles Kingsley, Letters and Memories of His Life, quoted in W.E. Houghton, The Victorian Frame of Mind, p.351

49 A.N. Macfadyen (ed.), Statutes, Proclamations: Proclamations 110 and 112 of 1879 (sections 39, pp.14 and 32) and 140 of 1885 (section 38, p.73).

He held that this measure emancipating women from the tribal rule of perpetual tutelage 'has led to the advance in Christianity, knowledge, and civilization of the native people in the Transkeian Territories'.[50] Despite Stanford's assertion, the rights conferred by the Cape were seldom enforced by Transkeian women, the innovative regulations proved inoperative and were repealed in 1910. Sociologists of law maintain that legal reforms made in advance of related social changes are likely to be ineffective.

With considerations in mind, similar to those informing the recognition of African customary marriage, the Barry Commission also drafted a succession act for all the African territories, defining existing tribal customs and usages relating to inheritance. There was universal commendation among the administrators of the social relevance of traditional laws governing succession, as being 'perfect of their kind and ... admirably adapted to the condition of the people',[51] which in essence provided that only men could inherit and that the eldest son of a house inherited all the property as well as debts of that house. The Commission pointed to the satisfactory legal situation within the Colony proper where Act 18 of 1864 had legalised the tribal law system of succession (though it had left undefined what this was) and where as a consequence little difficulty had been experienced in the administration of deceased estates of Africans. The draft act appended to the Report laid down rules for the testamentary disposition of property by Africans, for guardianship of incapable persons, and for the care and custody of their property. As with the marriage regulations, the Commission again introduced certain modifications of the tribal law, such as giving women the right to acquire property and dispose of it by will, and a procedure was laid down whereby Africans could choose to have their

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50 J.W. Macquarrie (ed.), Reminiscences, vol. 1, p.99.
51 Cape Archives, C.M.K. 2/6: Stanford to U.S.N.A., 11 April 1889.

property distributed after their death, according to the colonial law of succession. Governing its work, the explicit intention of the Commission was 'while adopting the Native law in the main ... to introduce such changes as shall tend to the elevation of women, and promote the advancement of all Natives desirous of rising above the level of their own laws and customs'.[52] As in the case of the marriage regulations, the draft succession act was never promulgated, and the administration of estates continued to be dealt with in the Transkei under African tribal law. The general regulations proclaimed after the annexation of the territories had provided that actions arising out of estates of Africans married before a Christian minister or marriage officer were to be decided according to Colonial law, and the practice developed of referring to the Chief Magistrate, in his capacity as deputy of the Master of the Supreme Court, the administration of estates of testate Africans and intestate Africans married by Colonial law.

There is an obvious disparity of attitude between the kind of evolutionary jurisprudence which regards laws as a function of social development and which shaped the formal recognition of customary law in the territories, and the Roman tradition of codified law, dedicated to the rigorous application of fixed standards of justice, independent of time and place and circumstance, which lay behind the criminal code drafted by the Barry Commission. That a penal code was necessary was agreed upon by all the important witnesses who appeared before the Commission, in addition to the three Chief Magistrates although they differed as to whether colonial law suitably modified or customary law subject to a repugnancy clause should form the basis of it. Indeed, there was a long-standing plea on the part of the Transkeian magistrates for a definitive manual or code of law

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52 CPP, G.4-'83, Report, para. 102.

to guide them in administering customary law, both in its civil and criminal branches, among Africans and to ensure a uniformity of judicial practice. Uncertainty as to the true provisions of this law, complicated by the fact of differences in the detail of tribal legal systems, was leading to irregularities and inconsistencies. The Barry Commission in its investigations discovered a wide diversity of laws and procedure administered in the territories, as well as varying divisions of jurisdiction between the magistrates' and the chiefs' courts. Legal confusion, almost baroque in kind, resulted when, for example, in cases which the colonial law defined as criminal, the magistrate was quite likely to deal with acts which in tribal law were not offences as crimes to be penalised according to their gravity in the sight of the colonial, not the African, law. In punishments, too, colonial law was imposed. 'Magistrates, completely untrained even to recognize the legal problems involved, yet caught in the middle of this culture collision, would have needed the wisdom of Solomon to have done justice in many cases'.[53] A heavy responsibility was placed by such legal uncertainty upon the magistrates to administer an equitable and impartial justice, and given the unique conditions of the territories it was inevitable that some discretion had to be left in their hands. From this it was but a short step to the frequent criticisms of the territorial judicial system that the administrator was virtually a law unto himself and that the judicial process was 'not the carrying out of the definite law, but the caprice of a magistrate'.[54] The ancient issue between the rule of men and the rule of law assumed particular relevance in the Transkeian context.

As for African civil law, the Barry Commission drew up marriage regulations and a draft succession act recognising tribal

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53 S.B. Burman, 'Cape Policies Towards African Law in Cape Tribal Territories 1872-1883' (Oxon. D.Phil., 1973), p.135.
54 CPP, G.4-'83, Minutes of Evidence, no. 5887 [C.H. Driver].

law with certain modifications, but as both Stanford and Upington agreed with Shepstone that a substantive civil code might rigidify customary law, no full civil code was drafted. 'All tribes are not equally advanced, and hence the impossibility of laying down one special code for all. One tribe should not be kept back for the sake of others'.[55] This objection they agreed was of little weight with regard to a criminal code. The Transkeian Penal Code in its draft form was almost entirely the work of Sir J.D. Barry, chairman of the Commission. It was essentially a statement of the criminal law of the Colony, though with certain modifications. The Commission gave as its reasons for taking Colonial law as a basis, the vagueness of the distinction between civil and criminal law in the African legal system, such criminal law as there was being based upon the assumption that all members of the tribe belong to the chief and that injury to them is injury to him. On the other hand Colonial law alone was insufficient because it did not concern itself with the imputation of witchcraft with which so much African crime was bound up and it did not recognise the principle of communal responsibility; moreover, its law of procedure offended the African sense of justice by failing to exhaust every source of information, including the accused and other persons able to throw light on the matter under investigation.

On these grounds, the Commission resolved to draw up a Penal Code, which 'while it adopts the general principles of existing Colonial law endeavours to remedy its defects, and retains some laws and principles of procedure dear to natives, and which commend themselves to us as proper for those Territories'.[56] This statement of intention, it can be seen, is framed in the familiar terms of social evolutionary theory, with its assertion of the normative character of western forms coupled with the admission that primitive social institutions might be functionally useful and, on that account, valuable

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55 CPP, G.4-'83, Appendix D, p.272, q.29 [W. Girdwood].
56 Ibid., G4-'83, Report, para. 38.

for the particular stage of cultural development which the community had achieved. Or, to use the categories of jurisprudence, there was combined the notion of justice both as a transcendental eternal standard and as a natural function or relationship between changing social factors. The main additions incorporated in the code (which can thus be regarded as conceding those values dependent upon time and place in a concrete situation) were the adoption of the provisions that prohibited the enforcement of circumcision or intonjane by force or threats, or without the consent of parents or guardians; made punishable both imputation of witchraft and habitual practice as a witch-doctor; and recognised communal responsibility in respect of stock theft. In punishments, emphasis was placed upon the imposition of fines, as being familiar to Africans, and the use of flogging was correspondingly curtailed. The main procedural difference from colonial law was that the accused and his wives would be allowed to testify in court. In this way the Commission sought to give effect to the African view that only by thorough examination of every possible source of information could substantial justice be achieved. Another important alteration made provision for African assessors to sit with the court, and so sanctioned a practice which had been followed by some magistrates for many years.

The administration of the Code was, in the case of more serious criminal offences, to be entrusted to a special court, presided over by a recorder, the court to have jurisdiction concurrent with that of the Supreme Court within the territories. This recommendation the Commission felt justified in making on the grounds of 'the special character of the laws to be applied', the need for immediate revision of magisterial decisions in criminal cases and other advantages derived from the close supervision exercised by a 'high judicial officer' over the inferior courts.[57]

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57 CPP, G.4-'83, Report, para. 120.

The Penal Code was a territorial not a personal one, every resident in the territories, African and European alike, being subject to it. The existence of a white minority within the Transkei as well as a category of cultural evolués, who claimed the protection of colonial law, had raised the question of the scope of operation of a special code. In the magisterial courts the practice gradually developed of administrators applying at their discretion colonial law 'in the case of Europeans and other civilized people';[58] but a difficulty arose in suits and proceedings involving a conflict of laws, where both white and black were concerned: this the annexation regulations sought to resolve by providing that such cases were to be dealt with according to the laws applicable to the defendant. Moreover, to complicate the matter, as Africans were plunged into the process of cultural transition, they came to form new relationships of which customary law did not take cognizance and experienced changing needs which it did not encompass. Thus, in the period of informal rule, since the general order to officials was to enforce tribal and not colonial law when they tried cases, Christian converts who had broken entirely with their culture apparently suffered on occasion.[59] With regard to a criminal code, magistrates in their evidence before the Commission considered it undesirable to exclude whites resident within the Transkei from its operation, as a system of legal dualism would lead to confusion, the administrators having to face an increasing number of intricate legal problems arising from a conflict of laws, and also to dissatisfaction among the African people who would regard special legislation as discriminatory in intent. At the same time, the Government was concerned to secure to the whites all the rights and privileges enjoyed under colonial law.[60] Inasmuch as the Penal

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58 S.B. Burman, 'Cape Policies Towards African Law', p.340.
59 Ibid.
60 CPP, G.4-'83, Appendix D, p.267, q.35 [Matt. Blyth] and p.280, q.35 [H.G. Elliot].

Code, as drafted, was basically a statement of advanced colonial criminal law, shortened, simplified, made intelligible and precise, with certain essential modifications, as in the provisions for the punishment of witchcraft and the principle of communal responsibility from which whites were explicitly exempted, the European community suffered no major legal disability. The Commission sought, in effect, to reach a plausible compromise between white and black usages. It recognised that the colonial criminal law in many respects overlapped with the indigenous system of criminal justice, apart from the difference that some common offences defined as crimes in the colonial legal system were regarded in tribal law as offences against the individual only, that is, as civil wrongs; and so it effectively assimilated African criminal law to the colonial system.

The Native Territories Penal Code, in an amended form, was enacted as Act 24 of 1886 and came into force on 1 January 1887.

### ii The Transkeian Judicial System and Magisterial Doctrines of Jurisprudence

The distinctive feature of the judicial system operative in the Transkei was the structure of magisterial courts, administering a modified form of customary law in all civil disputes between African parties, with an appeal lying to the Government's senior officer, the Chief Magistrate, in the territory. In effect, the whole system was a replica of the Basutoland model, the convenience and success of which had prompted the Cape to extend and apply it to the Transkeian Territories, despite the illegality this involved. For several years constitutional problems surrounding formal annexation delayed the legal administration of a Basutoland-type system of law and government in the territories, and the Transkei was consequently ruled by a 'system of bluff'.[61]

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61 S.B. Burman, 'Cape Policies Towards African Law', p.314. The first part of section ii (i.e. pp.150-159) draws largely upon Burman's thesis.

Prior to the promulgation of the annexing acts, the only legal powers possessed by Cape officials beyond the Kei were those conferred by the Imperial Act 26 and 27 Vict. Cap. 35. This extended the operation of Colonial laws to all British subjects in the extra-colonial territories and empowered the Governor to appoint special magistrates in these areas, with authority to arrest offenders and transmit them to the Colony for trial. As a general rule the Cape's agents held commissions under this act, but such a definition of their legal powers provides no indication of the actual powers they exercised, which far exceeded them.

Britain had not formally annexed the territory, but the disposition and resettlement of the tribes in the Kei-Mbashe area, each with an agent, as effected in the 1860s, presented an opportunity of introducing a form of pseudo-magisterial authority into the territory. J.C. Warner was appointed British Resident in the Transkeian Territories, with general supervisory authority over the other Transkeian agents, and was stationed at the Idutywa. When he wrote to the Colonial Secretary for a clarification of his and the agents' powers, he received in reply a remarkably candid statement of how the authorities proposed that the British officials should exercise the judicial powers of magistrates, although not legally competent to do so.

> His Excellency believes it to be essential to the successful working of the Trans-Keian Settlement, that the British officers employed there should be perfectly aware, that they possess no authority in the legal sense of the word, derived from the British Government, inasmuch as Her Majesty's Government have deliberately determined to relinquish the possession they obtained of that Country.
>
> The authority of the British officers must therefore strictly speaking be derived altogether from the Chiefs, and people with whom they dwell, and by whom any directions, or advice they may give must be carried into effect.
>
> But although it is right that these officers should themselves correctly appreciate their position: it by no means follows that they should bring this circumstance prominently into notice, and thus lower their own influence in dealing with the Natives.

> Each of the Tribes settled in the Transkei looks with more or less jealousy on the others. Each desires to retain the good-will of the Government. The leading men set a value on the allowance they receive. The individuals composing each tribe have become alive to the benefit of an impartial administration and have probably little desire to come under the uncontrolled power of their chiefs.
>
> All these influences will operate to sustain the authority of the British Resident and to enable him to procure the execution of orders given with discretion, and with a due regard for the habits and prejudices of the Native Races.[62]

Acting on these instructions, the Fingo Agent rapidly assumed the virtual authority of a magistrate, since the acephalous Mfengu had been accustomed in the colony, prior to their exodus, to supervision from a white official and with the hostile Gcaleka for neighbours had an added reason to co-operate with their agent. This enlargement of his status followed directly from the strong position in which Sir W. Currie's code of rules had placed him. According to these regulations, endorsed by the Government but lacking statutory force, the agent was declared the 'paramount chief' of the country; all serious cases and inter-location disputes were to be brought before him, while 'trifling cases' were left to be adjudicated by the chiefs and headmen; and the traditional authorities were no longer entitled to receive criminal fines, which were henceforth to belong to the 'Fingo Government'.[63] In like manner, the influence of the Tambookie Agent residing with the Emigrant Thembu gained from the fear of the four chiefs of outside interference, in this instance from the Thembu paramount, under whom they had no desire to fall. On their departure from the Queenstown district the Thembu had been guaranteed independence from colonial rule and told that 'they would be permitted to manage their own internal affairs, in accordance with

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62 Stanford Papers, F(a)9: copy of R. Southey, Col. Sec., to British Resident, Transkei, 8 November 1866.

63 Cape Archives, C.O. 3193: Blyth to Col. Sec., 9 September 1871.

their own customs and usages, when not opposed to the laws of humanity'.[64] But as it happened this assurance was soon broken and to their dismay the Emigrant Thembu witnessed the steady aggrandizement of white authority. After the area they occupied was divided into two districts in 1878, both magistrates exercised similar powers to the other officers in Thembuland. As for the Resident with Kreli, Sarili resented using him as a channel of communication with Cape Town, and neither this official, nor the superintendent in the Idutywa Reserve, nor the Tambookie Agent, had an influence comparable with that of the Fingo Agent.

On the assumption of responsible government, the Cape Colony from the first deliberately adopted as a model the Basutoland policy of gradually weaning the African people from the traditional courts and slowly modifying African customary law. Accordingly the Cape extended the system of law and government as developed in Basutoland to those chiefdoms newly brought under colonial rule, even though it could not legally be imposed prior to annexation. When J.M. Orpen received the appointment of resident at the Gatberg, with the additional duties of government representative for the whole area beyond the Mthatha, he was directed to act on the Fingoland precedent, which recognised customary law so long as it was not cruel or unjust. Arch-expansionist that he was, Orpen sought to thrust the whole of Nomansland into the colonial embrace, and he succeeded in persuading the Cape ministry to accept the warring Mpondomise chiefs, Mhlontlo and Mditshwa, as British subjects. On their reception, the agent informed the tribe that witchcraft trials were forbidden and killing for any reason prohibited, and in future a right of appeal was to be allowed to him in all cases. These rules were subsequently elaborated when Charles Brownlee met the Mpondomise the following year, adding

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64 Cape Archives, N.A. 401: E.J. Warner to W. Ayliff, 17 April 1879, quoted in S.B. Burman, 'Cape Policies', p.316.

as he did that confiscation of property was also forbidden except by the judgement of a properly constituted court, and that while chiefs were to try lesser cases they were to have no authority to enforce any judicial decisions. They were not to be permitted to pocket fines as in the past, but were to be paid salaries by the Government instead.[65]

The tribal law policy the Cape applied in the territories at this time was the same as in Basutoland except in the important respect that central control was lacking in the country. There was no equivalent figure to the Governor's Agent, and no code of regulations similar to those extended to Basutoland when magisterial rule was established. In the absence of statutory rules, the extent to which colonial law was introduced when cases were decided was in practice left to the discretion of each officer for settlement on the basis of the situation, political and social, in the community with which he was stationed. Each official had instructions from the Secretariat to observe the rudiments of tribal civil law, he was to punish witchcraft accusations but could not enforce the death penalty. Some officials, such as those with the Thembu and Emigrant Thembu, had in effect very little power to decide cases or intervene in legal disputes. At the other extreme, Blyth assumed exclusive jurisdiction in cases of murder, rape, assault, and probably cases where whites were the plaintiffs. When cases were brought before the agents, they had very little official guidance as to how far they could introduce western norms and values. A number of officers, for example Orpen, did at their discretion apply colonial law 'in the case of Europeans and other civilized people'. As for Africans living on mission stations their cases were usually dealt with by the white missionary according to the station regulations; and on occasions these regulations were regarded by the magistrate as municipal laws and as such enforced in court.[66]

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65 S.B. Burman, 'Cape Policies', p.329.
66 Ibid., p.340.

Considered in legal terms, general regulations could not be proclaimed for a territory until it was formally annexed. In 1875 steps were finally taken to place some of the Transkeian territories, namely Fingoland, the Idutywa and Nomansland, more firmly under Cape control and on the same legal footing as Basutoland. The intervention of African resistance movements and the demands of the Imperial Government, however, deflected and delayed the course of annexation, and the Transkeian Annexation Act of 1877 was only extended to the territories by proclamation in 1879, whereby magisterial rule for the first time became legal beyond the Kei.

After the war of 1877, colonial control over the whole area was strengthened by the establishment of three chief magistracies. In Griqualand East, to which Brownlee was posted, the Chief Magistrate followed closely the Basutoland code of rules 'with some slight modifications'.[67] Blyth was transferred back to Fingoland on promotion as the new Chief Magistrate of the Transkei. About this time he introduced a number of changes in the regulations for the government of the territory which included the provision that 'no headman or chief will be permitted to hear or decide any case, but all cases shall be brought before the Magistrate of the District, whose decision shall be final in all cases under the value of £2', allowing for an appeal to the Chief Magistrate in all other cases. The judicial authority of the headmen was thus abolished, a system which the new Secretary for Native Affairs, W. Ayliff, apparently did not favour.[68] All serious criminal cases were to be heard by the Chief Magistrate and the Resident Magistrate in whose district the offence had occurred, after the latter had conducted a preliminary examination. The African court system of messengers who received a portion of the fine was to be replaced by the colonial system of police messengers

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67 Cape Archives, C.M.K. 2/2: Brownlee to S.N.A., 30 December 1878.
68 CPP, G.43-'79, pp.11-12.

receiving no reward beyond their salaries for court duties, for the old practice it was alleged had led the messengers to encourage litigation. Fines were to be the property of the government in assault cases; even in adultery cases part of the fine was to go to the government, and all fines were to be paid in coin where possible.[69] These changes in the system of law and government brought the Transkei almost exactly into line with the Basutoland code. However, as the territory was not yet annexed, the regulations could not be legally enforced, but the African people could not know this.

The anomalous legal standing of the white administration in the area became uncomfortably apparent in the case of Thembuland, to which Elliot was appointed as Chief Magistrate in August 1877. The Thembu had been received as British subjects in 1875 under conditions of cession which included a clause to the effect that the chiefs were 'to exercise authority and settle law suits (except cases of murder, crimes arising out of the charge of witchcraft, serious assault, and theft from other tribes and from the Colony), within their own section, subject to right of appeal to the Magistrate'.[70] The conditions also provided that the paramount Ngangelizwe and his sub-chiefs would be recognised and paid salaries, although for a time Ngangelizwe was deposed by the Cape Government. On the recommendation of a special commissioner charged with settling the new form of government, a chief magistrate and three assistant magistrates were appointed to act as government representatives in their area and to recognise customary law. Although legally they held office under the High Commissioner, in fact the Native Affairs Department exercised full control on his behalf. The Cape regarded annexation as an impending formality, but it was not until 1885 that Thembuland was

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69 CPP, G.33-'79, pp.94-95, 104-105.
70 Cape Archives, N.A. 307: Conditions accepted by the Thembu and Dalasile, encl. in Elliot to U.S.N.A., 2 August 1883, quoted in S.B. Burman, 'Cape Policies', p.344.

annexed to the Colony.

In the meanwhile the question whether the Cape magistrates had any authority to exercise judicial powers in the territory claimed the anxious attention of the Government. A test case raised the moot point of Elliot's competence to impose the death penalty on African prisoners. On referring the matter to Cape Town for confirmation, the Chief Magistrate was instructed that in terms of his commission he had no authority to try or sentence any criminal offender who was not a British subject and could exercise judicial authority in civil disputes among Africans only with the consent of both parties.[71] Elliot, in reply, adopted the standpoint that all authority in Thembuland had been voluntarily ceded to the Colonial Government in 1875, a transference which marked the establishment of de facto if not de jure white rule. Were he to comply with the ministerial directives, the territorial judicial system would be rendered inoperative, and there would ensue 'the non-recognition of all constituted authority' and, what was more, 'the complete restoration and assumption of all power by the chiefs'.[72] When the question was referred to the Attorney-General, he found that the extension of British protection in 1875 was an informal act and that Thembuland was not part of the Colony, nor even British territory, 'although it practically belongs to the Crown'. Until such time as the country was formally annexed to the Cape, the magistrates held no authority to decide civil disputes between non-British subjects except with the consent of the parties at issue, nor to try or sentence any criminal offender. Nor had the Cape Government any right to confer jurisdiction upon him over persons resident beyond the limits of the

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71 CPP, G.4-'83, Minutes of Evidence, p.428, copy of U.S.N.A. to Elliot, 21 March 1881.

72 Ibid., G.4-'83, Minutes, p.429, copy of Elliot to U.S.N.A., 4 April 1881.

Colony.[73] The whole matter received the careful consideration of the Ministry which endorsed the opinion of the Attorney-General. This left the Under Secretary for Native Affairs no alternative but to inform Elliot to assume that his actions were tacitly approved by the tribal chiefs and to forbid him to submit cases to Cape Town for review as in the past.[74] It also meant that the Government lacked the legal means of enforcing the authority of its magistrates and of the laws they administered, which if challenged would not be upheld in court.

The device the Cape resorted to in order to put its administration on a legal footing was to commission Sir H. Robinson as governor of Thembuland, Bomvanaland and Gcalekaland in November 1881, empowered to issue proclamations for their 'peace, order, and good government'. In January 1882 a proclamation extended Cape laws to these territories except as modified by the regulations it contained, which were the same as the existing Transkeian and Griqualand East regulations. As a consequence uniform administration was established throughout the Cape-ruled territories east of the Kei, with the exception of Xesibe country.

The general regulations by which the territories were to be ruled were partly based on ones drafted by Blyth, which were in turn modelled on the earlier regulations he had introduced in Fingoland, and in the final form in which they were eventually passed resembled closely those of Basutoland.[75] Section 23, dealing with jurisdiction and procedure in civil suits, provided for the discretionary application of African law 'where all the parties to the suit or proceedings are what are commonly called Natives'. An appeal lay from the decision of the magistrate to the Chief Magistrate's court in civil cases (section 25). In criminal cases no sentence exceeding one

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73 Cape Archives, C.O. 1156: Memoranda by A.G. Leonard, 23 and 25 April 1881, filed with U.S.N.A. to Under Col. Sec., 16 April 1881.
74 CPP, G.4-'83, Minutes of Evidence, pp.429-430, copy of U.S.N.A. to Elliot, 25 June 1881.
75 A.N. Macfadyen (ed.), Statutes, Proclamations: Proc. 110 of 1879, pp.4ff.

month's imprisonment or fine of £5 or 12 lashes might be carried out until it had been transmitted for the consideration of the Chief Magistrate, who might confirm, alter or reverse the judgement but might not increase the sentence (section 26). Fines in criminal cases were to belong to the Government, but part could be given to informants or the injured party, thus enabling magistrates to follow the African law of restitution in cases of theft (section 22). There were a number of minor differences from the Basutoland regulations, but the only important change in the personal law was in relation to marriage: in the new regulations customary marriages could be brought under the colonial law by registering them with the magistrate. The far-reaching implications of this system of registration have already been discussed.

On the whole the general regulations evoked a favourable response from the magistrates. Blyth's criticism centred on the enlarged judicial powers of the magistrates, for the punishments now open to them included long terms of imprisonment, deportation and even the death penalty. Neither colonial nor Transkeian magistrates had any experience of exercising such wide powers of punishment as they now possessed. He recommended that in serious cases proceedings be forwarded to the Government, so as to gain the satisfaction that his decisions were supported by professional legal opinion.[76] In the main, Blyth considered that the regulations were 'a great step in the right direction and ... quite sufficient for the present wants of the people .... As civilization and education advance it may be necessary to make changes from time to time, but they should be gradual'.[77] It was these regulations of 1879 that would form the ground-plan of the system of law and government operative in the territories throughout the eighties and nineties, and beyond that time.

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76 Cape Archives, C.M.T. 2/62: Blyth to U.S.N.A., 2 October 1879.
77 Ibid., C.M.T. 2/62: Blyth to U.S.N.A., 19 April 1880.

The central tenets of the magistrates' doctrines of jurisprudence can best be determined by taking the measure of their critical response to the remodelling and reorganization of the judicial structures in the territories. All through the 1880s and beyond, as the distinctive 'native territorial system' was progressively elaborated, a debate raged among policy-makers and administrators as to the desirability of interlocking the Transkeian judicial structure, particularly at the level of the higher courts, more closely with that of the Colony proper. For the men on the ground, this touched most directly the chief magisterial system, whose fate consequently hanged in the balance throughout this period.

There was widespread agreement that the special circumstances of the territories required some higher tribunal, be it the appointment of a recorder or the extension of the colonial circuit courts. While Act 40 of 1882 had provided for appeals to go to the colonial high courts, the prohibitive costs attending the legal process, particularly when the case at issue revolved about a point of law, had the effect of deterring parties from availing themselves of the right of appeal. Furthermore, under the terms of Proc. 81 of 1881 cases of murder were transmitted to the Colony for trial, but the expenses incurred and delays involved in removing prisoners and securing witnesses hardly justified the arrangement.[78] The Barry Commission recommended the establishment of a 'superior court of record', presided over by 'a high judicial officer', to whom was to be entrusted the administration of the Penal Code, in the case of more serious offences.[79] The magistrates had favoured a recorder in preference to the introduction of circuit courts as he 'would always be accessible for advice in chambers, and thus prevent cases hanging over many months'; furthermore, 'where the duty of a judge or person is confined to administer-

78 Cape Archives, C.M.K. 2/4: Report of Acting C.M. for 1882; Report of C. Brownlee for 1883.
79 CPP, G.4-'83, Report, para. 120.

ing native laws, there would be less chance of confusion and conflict with Colonial law'.[80] The transference of judicial functions to the Recorder was also welcomed as it would release the Chief Magistrates for administrative and diplomatic work.

However, objections to the Recorder's Court were voiced by the Upington Ministry, largely on the grounds of expense. In its place, as an interim measure pending the restructuring of the judicial system, the Penal Code made provision for a Special Court, consisting of the Chief Magistrate and two Resident Magistrates, to try more serious offences, thereby revamping the combined court of the 1879 General Regulations. While the administrators came to value the system of Special Courts highly, championing them resolutely when replaced by the colonial circuit courts, nonetheless, at the outset, in their conservative suspicion of innovative change, they fretted about the African reaction and bemoaned the disruption of administrative routine caused by the practical demands of the system, which in Griqualand East at least required the Chief Magistrate to travel from one magistracy to another to attend sittings and entailed the constant absence of at least one official from his post.[81] Such peregrination soon had the Under Secretary barking about travelling expenses. A more serious criticism advanced was that the Chief Magistrate to whom all preliminary examinations were forwarded in the first instance had no authority to remit cases to the local magistrate for trial, as when the accused admitted his guilt. This procedure incurred unnecessary delay and expense, and it was suggested that the criminal jurisdiction of the magistrates be enlarged.[82] The Penal Code also allowed for African assessors to sit with the court, which was the feature that presented itself most favourably to the magisterial mind.

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80 CPP, G.4-'83, Minutes of Evidence, no. 7385 [H.G. Elliot].
81 Cape Archives, C.M.T. 1/83: Elliot to U.S.N.A., 13 January 1887; C.M.K. 2/6: Stanford to U.S.N.A., 21 November 1888.
82 Ibid., C.M.T. 1/83: Elliot to U.S.N.A., 17 June and 22 August 1887.

Walter Stanford commented, 'The attendance of Chiefs and Headmen at each sitting has been full and regular and as assessors they have proved of great value'. And again, 'Their cross examination of witnesses was acute and enlightening and their opinions on the issues involved were given clearly and impartially'.[83] A political advantage was gained, in addition, in securing the co-operation of the traditional ruling élite who were in this way enmeshed and utilized in the judicial process.

The system of Special Courts was explicitly constituted as a provisional arrangement. Magisterial concern that the abolition of the chief magisterial courts was therefore imminent received confirmation as proposals came repeatedly before Parliament relating to the structural alteration of the higher courts in the territories. In a memorandum written to Upington in 1885, Stanford, believing that events were tending towards the supersession of the chief magisterial courts, cautioned against any such radical change in the judicial organization and underlined the utility of the existing system which provided prompt and inexpensive settlement of cases without recourse to the colonial courts and also sufficient check on magisterial decisions.[84] Similar arguments were rehearsed as late as 1890, when the Sprigg Government was bent upon proceeding with the abolition of the office of chief magistrate. The way to this change in judicial structure, Sprigg considered, had been laid open as a result of the extension of circuit courts whereby the senior officers had been relieved of certain judicial duties imposed upon them by the Penal Code in their capacity as presidents of the Special Courts. In turn, Stanford, while acknowledging the desirability of the progressive

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83 Cape Archives, C.M.K. 2/6: Stanford to U.S.N.A., 17 June 1887; Report of W.E. Stanford for 1887.

84 Stanford Papers, F(j) 15b: draft copy of Stanford to Sir Thomas Upington (1885).

assimilation of the legal system in the territories to that of the Colony proper, voiced his distrust of innovation and recommended instead modification of the existing framework, which while curtailing the wide powers of the magistrates and extending the jurisdiction of the superior colonial courts at certain points, would not provoke African disaffection. He argued that even were the Chief Magistrates to be removed, it was essential for 'the peace and contentment of the Native tribes in these Territories' to station an officer, who would combine both judicial and administrative functions, as senior representative of the Government in the area. With his appointment, the judicial authority then exercised by the Chief Magistrates could be transferred to the colonial courts in respect of criminal review, the administration of estates, appeals in civil cases where either the defendant or both parties involved were white, and jurisdiction in European divorce cases. The officer would deal with cases of appeal arising out of civil suits between Africans east of the Kei and would follow the existing practice of the magistrates in recognising customary law, but his judgements could be appealed against to the superior courts of the Colony, so as to prevent maladministration and abuse. In some important respects this rough scheme foreshadowed later developments that saw the establishment of the Native Territories Appeal Court.[85]

Inasmuch as the prospective senior officer, himself an inflated version of the Chief Magistrate, incorporated two conventionally distinct features of government within himself, Stanford projected a characteristically paternalist conception of the rôle of the executive. The executive was here made the sole custodian of authority, with the administration of justice confided largely to its hands. Such a unitary form of administration, running quite counter to the cardinal liberal doctrine of the separation of powers, the magistrates

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85 Cape Archives, C.M.K. 2/108: Stanford to U.S.N.A., 18 January 1890.

justified by reference to traditional African forms of government where no formal distinction was made between the tribal council sitting as a moot and as a court. In African society, the decision-making process involved two kinds of activity and the chief-in-council constituted itself into two different institutions to effect this, but there was no formal division of powers as in classical liberal theory. The custodial conception of the white government's function demanded that an attempt be made to accommodate traditional expectations of authority rôles within the white judicial and administrative systems, so as to render the colonial administration as familiar and accessible to the African people as possible. As Blyth remarked on the Draft Transkeian Penal Code which had provided for a recorder:

> The natives have always been accustomed to see their Chief invested with full legal powers, and to have any real influence over them, this must continue to be the case, and were the proposals of the [Barry] Commission carried out, both the Magistrates and Chief Magistrates, more particularly, would be deprived of all influence and be perfect nonentities in the land, and I think this is hardly advisable, at present certainly. Officers placed in grave responsible positions over natives must be able to exercise power[;] if they abuse it, then replace them by others.[86]

Walter Stanford's memorandum rested its recommendations on the perceived need to make special provision for judicial administration in the territories in the interests of the large black population, the indispensability of which was corroborated by Elliot's refutation of the reasons Sprigg advanced for abolishing the chief magisterial courts.[87] He regarded it 'an error to suppose that the establishment of Circuit Courts will meet the requirements of the people in the matter of the Administration of Justice in these Territories'. In his eyes, the chief magistrates' courts had afforded an inexpensive and expeditious form of justice in the settlement of

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86 Cape Archives, C.M.T. 2/63: Blyth to Secretary of the Native Laws and Customs Commission, 22 May 1882: 'Confidential Report on the Draft Transkeian Penal Code'.

87 Ibid., C.M.T. 1/147: Elliot to U.S.N.A., 31 December 1889.

civil disputes among Africans, the large majority of whom were firmly encapsulated within their traditional culture. The introduction of circuit courts would not fulfil the functions performed adequately by the higher magisterial courts, and at the same time they would combine the disadvantages of inaccessibility, unfamiliarity and infrequency of sitting. Presided over by officers trained in western juridical techniques and remote in their everyday lives from the people whose laws they administered, such courts Elliot rightly feared would insist on a precision and formalism alien to the tribal legal tradition. As Elliot wrote:

> An overwhelming majority of the inhabitants are either raw barbarians or at best in the earliest stages of civilization. They are by nature litigious to a degree hardly credible to more advanced stages of society. The petty actions in respect of matters of small consideration are innumerable and these petty actions touch their daily life. Hitherto cheap, speedy and substantial justice has been done, both in weighty and minor matters, and the facility of appeal to a Court within easy access of their means and convenience is a safety valve the value of which cannot be overlooked. The abolition of this tribunal would involve serious consequences, as its place could not be taken by a Circuit Court, sitting but twice a year and presided over by an officer who, although possessing unquestionably higher legal capabilities than the Chief Magistrates, would be unknown to the litigants, pressed for time, and unapproachable save by Counsel instructed by attorneys.

The introduction of the circuit courts was considered a premature and incongruous imposition of colonial forms 'unsuited to the conditions of the native people'.[88] Their lukewarm reception was registered, for example, in the restrained tones of Stanford's report:

> The Circuit Courts are working as could be expected considering the qualification and training of those who preside over them and the conspicuous ability of the members of the bar. As to the view taken by the natives I can only say that the abolition of the Special Court with its native assessors was passively received.[89]

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88 J.W. Macquarrie (ed.), Reminiscences, vol. 2, p.123.
89 Cape Archives, C.M.K. 2/6: Report of W.E. Stanford for 1889.

The new system found favour only with whites 'because it attaches more importance to the Territory and circulates a little money'.[90]

It was commonly conceded that the Transkeian magistrates exercised extensive judicial powers that far exceeded those of the colonial magistrates and heard cases that were usually reserved for the superior courts in the Colony. Because of their lack of legal training, they were unqualified to settle issues requiring a sure grasp of legal problems and a close knowledge of complicated laws, particularly in the case of the white community of Griqualand East where land transactions were common subjects of dispute.[91] At the same time, however much magistrates acknowledged the importance of having serious criminal cases and major civil cases involving whites tried before a judge at a circuit court, this concern was outweighed by other considerations which bore far greater weight in magisterial jurisprudence. As Blyth put it, 'No doubt a Judge would from his technical ... training be better fitted to understand any legal points that might be raised ... but I think more than that is wanted'.[92] Magistrates set great store by familiarity with local circumstances, an ability to follow the contours of the African mind and to intuit a sense of the inwardness of the ethos of African society, a capacity to reveal sympathetic understanding of traditional patterns of social life - for all which the rigorous and precise application of a corpus of law, without regard to men or time or place - mere legalism - could never suffice. More than this, there was a desire to simplify the administration of law, to pare judicial procedures to their essentials, to remove excrescences and eliminate technicalities which encumbered, confused and complicated the law and its administration. By these means, the judicial process would be restored to its pristine

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90 Cape Archives, C.M.T. 1/84: Report of H.G. Elliot for 1889.
91 Ibid., C.M.K. 2/4: Reports of Chief Magistrate for 1882 and 1883..
92 Ibid., C.M.T. 2/63: Blyth to Sec. of Native Laws and Customs Commission, 22 May 1882.

vigour and efficacy, and the original function of the law, to render substantial justice, until then obscured by western forms, would regain its primary and necessary place in the judicial system. Mindful of the custodial function of the white administration, magistrates saw the need to shape the administration of justice in the territories to traditional conceptions and expectations of dispute-settling in African society. They understood the function of juridical mechanisms in indigenous culture as one of reconciling disputants in order to restore the social balance. English law on the other hand they saw as tending to limit itself to a strict enforcement, according to rigorously applied rules, of the legal rights of one party to the exclusion of the other and in these terms accounted for its devotion to the polemics of legal casuistries. They sought to be arbitrators, in Aristotle's sense of the word, rather than judges: 'It is equity ... to prefer arbitration to judgment, for the arbitrator sees what is equitable, but the judge only the law'.[93]

By their emphasis on the strongly personal nature of the relations between magistrate and people, the administrators also strove to approximate to that close, immediate and direct level of engagement with which the traditional chief had interacted. For in tribal society the chief's judicial role merged symbiotically with other more personalized roles (kinship for example), and his relations with those under him tended to be particularistic and diffuse. Thus Blyth, 'it seems to me a very important matter ... to bring [the natives] and their lawgiver into close contact, without the intervention of Agents, Attorneys and Barristers etc. who so confuse the case to the unsophisticated native mind, that all sense of justice is completely lost'.[94]

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93 Aristotle, Rhetoric, 1.13.1374b, quoted in T.O. Elias, The Nature of African Customary Law, p.272.

94 Cape Archives, C.M.T. 2/63: Blyth to Sec. of Native Laws and Customs Commission, 22 May 1882.

Another disadvantage of the colonial circuit courts was the delay resulting from the fact that sessions were held twice yearly as in the Colony. This offended against the principle of prompt justice administered with a minimum of inconvenience. 'In dealing with natives, certainly in their present condition, it is a matter of great importance that all offenders be promptly dealt with, and that punishment should follow the offence, as speedily as possible'.[95]

The extension of the circuit courts meant the interlocking of the Transkeian judicial system in an important respect with that of the Colony proper. However, it was commonly acknowledged by the magistrates that the legal situation in the Colony made no allowance for the realities of African society as it then existed in the border districts. The Cape's policy of civilizing the Africans by non-recognition of their law was in practice unworkable, and was being only partially applied, and it had been found incompatible with genuine magisterial control. Blyth could claim, 'it is generally admitted that the natives are in far better order and in a more satisfactory and progressive state than in the Colony'. Moreover, as a consequence of the refusal to recognise customary law, Africans preferred to take their cases to the tribal courts 'rather than face the expensive uncertainties of Colonial law surrounded as it is by difficult and perplexing technicalities'.[96] If, then, the magistrates sought to replace the chiefs as the judges in disputes between Africans, they had to offer a legal and judicial system which the African people would regard as preferable to that of the traditional courts.

This lesson was amply confirmed when in the course of time colonial judges reversed several chief magisterial decisions in lobolo cases heard on appeal. In 1891 the Eastern Districts Court

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95 Cape Archives, C.M.T. 2/63: Blyth to Sec. of Native Laws and Customs Commission, 22 May 1882.
96 Ibid.

in the case Nbono vs. Manoxoweni set aside customary law, according to which a widow's lobolo-holder was liable to repay cattle when she refused to remain with her relatives-in-law, since a husband's death did not cancel his widow's marriage; and refused to order the return of the lobolo cattle. Importing western legal notions of majority status, the court held that a deceased husband's heir could not assert powers of guardianship over the widow or claim her services. This interpretation, founded on the relevant provision of the general regulations which conferred the status of a major on both women and men who attained the age of 21 years, the President of the court added, purged tribal marriage of a feature 'which although it did not imply slavery, placed a woman in a state of dependence liable to gross abuse'.[97] Then, in 1893 the Cape Supreme Court in the case Ngqobela vs. Sihele declared that African customary marriages were illicit unions, and being de jure polygynous, were 'inconsistent with the very essence of the conjugal union', and entirely opposed to the country's policy and institutions.[98]

Both Walter Stanford and Henry Elliot sprang to the defence of judicial practice in the territories where the courts sanctioned and gave effect to customary marriages. They argued that the African people were tenaciously attached to their traditional marriage system, the two principal components of which, polygyny and lobolo, fulfilled valuable and recognised functions in the tribal social structure. The Chief Magistrates advised strongly against radical interference in long-cherished customary arrangements as liable to produce 'disturbing political effects', and looked to the civilizing agencies of education and Christianity for the gradual passing of these social institutions rather than to legal coercion. As a matter of judicial administrative policy, they urged that African civil law cases be

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97 Nbono vs. Manoxoweni, 6 EDC 62 (1891).
98 Ngqobela vs. Sihele, 10 SC 346 (1893).

removed from the jurisdiction of the higher colonial courts which had overturned several chief magisterial decisions taken from the territorial courts on appeal. Elliot considered it 'a great misfortune that purely Native cases should be adjudicated upon in the Courts of the Colony ... where it cannot be disputed that [the judges] are in total ignorance of Native laws and customs, and know absolutely nothing of the manner in which the people are affected by them'.[99] As the rulings of the superior colonial courts were held binding upon the Transkeian courts, the magistrates who were empowered to administer customary law faced a legal dilemma resulting from the conflict inherent in a dual system of law and procedure. 'If they give judgment according to Native custom their judgment may be upset by the Eastern Districts Court. If they put Native custom aside the Chief Magistrate will as certainly reverse their action'.[100] A similar predicament confronted the senior magistrates, as the general regulations left 'the mode of conducting appeals to the Chief Magistrate's Court absolutely to the discretion of that officer so long as the course adopted by him may lead to the just, speedy, and ... inexpensive settlement of the case; yet when the action of the Chief Magistrate is appealed against on the grounds that the procedure laid down for the Courts in the Colony has not been adhered to, that officer's decision has been quashed on the grounds of gross irregularity'.[101] Both Stanford and Elliot recommended that a special proclamation be issued, confirming the magistrates in their discretionary power to apply tribal law in all civil cases where Africans were parties to the suit, and Elliot proposed that the circuit courts be replaced by a tribunal presided over by a recorder.[102] In explicit terms, this amounted to a recognition of the need for a separate judicial and legal system for the territories, which would accommodate the social

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99 Cape Archives, C.M.T. 3/273: Elliot to U.S.N.A., 27 May 1892.
100 Ibid., C.M.K. 2/7: Stanford to U.S.N.A., 31 March 1892.
101 Ibid., C.M.T. 3/274: Report of H.G. Elliot for 1893.
102 Ibid., C.M.K. 2/9: Stanford to U.S.N.A., 8 February 1894; C.M.T. 3/273: Elliot to U.S.N.A., 3 June 1892.

circumstances of the African people. To meet such need, the Native Territories Appeal Court, composed of the Chief Magistrate and two assessors, was constituted in terms of legislation which expressly provided for cases of appeal arising out of civil suits between Africans east of the Kei.[103] The decisions of the Appeal Court would be final unless an application was made for a case to be forwarded to the Supreme or Eastern Districts Court on review. For the very reason that the new tribunal formed the coping-stone of a separate judicial structure specially designed to serve the legal needs of the African population, Stanford looked upon the court as 'one of the most valuable institutions we have for the Natives'.[104]

The central notions of magisterial doctrines of jurisprudence, which have emerged as normative concepts in terms of which the organization of judicial administration in the Transkei was evaluated, can be more fully uncovered in isolated abstraction. As to legislation, magistrates insisted on the need for the widest 'publicity' in order to make the law certain and known. Blyth's intentions extended further than this, for he sought to reproduce the democratic involvement of Africans in the decision-making process, that had characterized the traditional political society. Prior to the official promulgation of new regulations, a public meeting would be held to discuss the rules in question and so enable the local people to have 'some voice in public affairs'.[105] An advantage accrued to the administration of gauging the popular response to new measures, and of preparing conservative tribesmen for innovative legislation which if thrust upon them without due warning would provoke disaffection and be quite counterproductive of the ends for which the regulations had

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103 A.N. Macfadyen (ed.), Statutes, Proclamations: Act 26 of 1894, pp.243-44.
104 Stanford Papers, D33, p.43.
105 CPP, G.33-'82: Report of Matt. Blyth, p.6.

been framed. Referring to the radical action of the Eastern Districts Court in refusing to entertain lobolo claims, Stanford remarked, 'For such changes to come without disturbance the people should be met beforehand and be allowed an opportunity to express their views'.[106]

A similar desire to include Africans within the judicial process, modelled after traditional modes of dispute-settlement, where there was communal participation and in which consensus was all-important, lay behind the use of African assessors in the magisterial courts. The Penal Code vested the magistrate with the discretion 'to call to his assistance any such number of assessors not exceeding five, who shall be chosen by him from the principal Chiefs, councillors, headmen, and others, ... to aid him in the hearing of any trial with a view to the advantages deriving from their observations, and particularly in the examination of witnesses', though only the magistrate had the power to find.[107] This practice had been followed and advocated by Blyth for many years in Fingoland. The provision was also applicable to the Special Courts. Stanford believed that the use of African assessors sitting with the Special Courts had resulted 'in much good to the people by securing the hearty co-operation of their leading men in the trials and by diffusing a general knowledge and appreciation of our laws and procedure in every part of the Territory'.[108] Popular participation in judicial proceedings in this way helped secure the principle of popularity of justice, whereby the people could understand the machinery and purposes of judicial arrangements, and the law applied by the courts.

The magistrates laid great emphasis upon an efficient judicial procedure, to ensure prompt, accessible and cheap justice with

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106 Cape Archives, C.M.K. 2/7: Stanford to U.S.N.A., 31 March 1892.
107 A.N. Macfadyen (ed.), Statutes, Proclamations: Act 24 of 1886, section 262, p.144.
108 Cape Archives, C.M.K. 2/6: Stanford to U.S.N.A., 21 November 1888.

the minimum of inconvenience to witnesses and parties. The demand for the prompt settlement of cases and prompt punishment of offenders and the impatience with delay lent force to the general criticism of the Circuit Courts, which visited the territories but twice annually. As the criminal procedure involved committal for trial, the deterrent effect which 'prompt punishment and speedy examples' would provide, as in the case of stock-stealing ('the principal crime of the Territory'), was weakened by the lapse of time before the case was heard.[109] Justice, to fulfil its public exemplary function, must be swift and immediate.

Frequent arguments for the abolition or reduction of institution fees and all other forms of law taxes filled magisterial correspondence and reports. Blyth regarded it of great importance 'that justice should be administered with as little expense as possible to the parties concerned, and that they should thus be encouraged to bring all their cases to the magistrate's office for settlement'.[110] In Fingoland, where the steady aim of the Chief Magistrate was to 'lessen the expenses of cases',[111] a fixed office fee of 10s. was charged on lodgement of complaint in civil cases; on their conclusion the magistrate decided whether the plaintiff or the defendant would pay the fee. However, in 1885, a government notice substituted the colonial tariff of court fees, much to Blyth's dissatisfaction, and thereby brought the system in the Transkei into line with that operative in Griqualand East and Thembuland.[112] Elliot, then Chief Magistrate of Thembuland, wrote of

> the importance of fixing all charges in the Courts of this Territory upon the lowest possible scale. It would, in my opinion, be greatly to the advantage of Govt., if all native cases could be adjudicated upon at no expense to litigants beyond what is necessary

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109 Cape Archives, C.M.T. 1/83: Elliot to U.S.N.A., 13 January 1887.
110 Ibid., C.M.T. 2/63: Blyth to U.S.N.A., 3 May 1881.
111 CPP, G.4-'83, Minutes of Evidence, no. 8492 [Matt. Blyth].
112 Cape Archives, C.M.T. 2/66: Blyth to U.S.N.A., 26 March 1885.

> to cover the cost of serving summonses; so long as any further charge is made it will be looked upon by the natives as a tax for giving them justice. The great majority of natives in this Territory are wholly unable to pay any fees .... I am confident that in very many instances natives who feel themselves aggrieved are deterred from seeking redress in the Courts of the Territory from a fear of the costs. While this feeling exists it is impossible that the Courts of the Territory can be considered other than institutions for the wealthy, whereas to be respected & of general benefit to the natives they should be accessible to the poorest.[113]

The concept of costs was not unfamiliar to the tribesmen. The chief was entitled to keep part of the fine in civil and the whole in criminal cases in payment for his services, and such payments formed part of his regular income. In addition, as the defendant or accused had to be given notice of the case against him and the date of the hearing, a court messenger would have to be employed, and would also have to be paid from the judgement debt. The same would apply if his services were required to enforce the judgement. Under white rule, the chiefs were no longer permitted to keep fines but were paid salaries instead. Moreover, the African system of messengers was replaced by the colonial system of police messengers receiving no reward beyond their salaries for their court duties. Since in traditional society the gainer in civil law cases paid the costs, often a high percentage of what he recovered, the mode of law subsequently introduced by the colonial magistrates was to prove preferable in this respect.

In the legal contact between black and white other forms of costs were introduced as the colonial system of procedure came to be extended. The inability to understand this alien system was to make for much disillusionment with the white man's justice. Fees charged by law agents, those <u>bêtes noires</u> of the Transkeian courts, were the subject of hostile and unremitting complaint. Magistrates charged the agents with fostering litigation, in which they had a vested

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113 Cape Archives, C.M.T. 1/83: Elliot to U.S.N.A., 7 June 1887.

interest, and with destroying, by the interposition of technical procedural forms, 'the proper feeling that should exist between the people and the magistrate'.[114] Agents bore responsibility, it was claimed, for converting the informal character of traditional legal settlements and trials into a formal process conducted according to complicated rules of evidence and procedure, which rendered the magisterial courts remote from and inaccessible to the people they were meant to serve. Blyth reported a headman saying, '"We are confused; it is all Agents, and our office is now of no use to us"'.[115] The administrators maintained that legal expenses incurred as a result of written demands, stamped summonses, agents fees for appearance, witness and other expenses 'unheard of in Native procedure'[116] were heaped up in minor cases, 'in which the aim should be to facilitate an easy and unexpensive settlement'.[117] Trivial amounts usually in dispute were being swallowed up by exorbitant costs.

In the territories as a whole, the administration allowed suitably qualified and duly enrolled agents, on the payment of £10, to practise in the magisterial courts. Instances undoubtedly occurred where agents or attorneys who had been struck off the rolls in the Colony and where whites or blacks without legal qualification conducted civil cases in the local courts. These settled costs by private arrangement with their clients rather than charge for their appearance in the taxed bill of costs.[118] For the magistrates the problem yet again presented itself of reconciling, balancing, adjusting colonial and African forms and usages: for in tribal society there were no professional lawyers and each party in the case (as well as his relatives and friends) would put his case. Stanford was of the

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114 Cape Archives, C.M.T. 2/63: Blyth to U.S.N.A., 3 May 1881.
115 Ibid., C.M.T. 2/65: Blyth to U.S.N.A., 29 October 1884.
116 Ibid., C.M.K. 2/5: Stanford to U.S.N.A., 30 July 1886.
117 Ibid., C.M.K. 2/6: Stanford to U.S.N.A., 29 April 1887.
118 Ibid., C.M.K. 2/9: Stanford to U.S.N.A., 11 January 1895.

opinion that the right of a litigant to employ a friend to assist him in court should not be withdrawn, but would give the officers discretionary power to grant or refuse permission to any unqualified person to conduct a case.[119]

In essence, the indictment of the law agents formed a particular criticism of the importation of an alien legal procedure, incongruent with traditional modes of dispute-settlement. Magistrates reported that Africans regarded the whole system of fees as an imposition by the white government and were consequently avoiding the territorial courts and being driven back upon their own tribal courts. The common remedy suggested in this area was an amended tariff of costs in 'purely native cases'.[120]

In all, the administrators revealed a common concern to maintain an informal style of legal settlement, a process of judicial interaction between the lawgiver and people that would be unmediated, personal, immediate - to administer substantive rather than formal justice, simply yet equitably. This ideal reinforced the paternal image of the kindly autocrat, dwelling among his people, to whom he dispensed the justice of a Solomon. It also reflected resentment of the interloper - the law agent - with his learned lore, preoccupied with the niceties of legal procedure, who interposed himself between magistrate and people, and so encroached upon and diffracted the authority relationship conceived in personalized terms as holding the two together. As Walter Stanford observed, the magistrate who realized his 'true position and regard[ed] with sympathy & consideration the natural feeling, and tendencies, even perhaps the prejudices of the native people', 'soon becomes what the natives would wish him to be, the chief to whom at all times they can go with confidence in

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119 Cape Archives, C.M.K. 2/9: Stanford to U.S.N.A., 11 January 1895.
120 Ibid., C.M.K. 2/3: Stanford to U.S.N.A., 30 July 1886.

their tribal difficulties or individual disputes[;] instead of a strict insistence upon form or procedure he becomes more of an arbitrator disposing of many a knotty point to the satisfaction of all concerned without the observance of any technicalities in the way of demands, processes, and the like'.[121] At another level, this juridical ideal was sustained by the magisterial desire to keep the supervision and control of the African people entirely and solely within his own hands. On it rested the claim to executive discretion, inasmuch as the administrator 'being on the spot and knowing the state of affairs is best capable of judging what is applicable to the people'.[122] The magistrate was girded with executive power. At the same time, judicial discretion enabled him to temper the law and its administration to suit the circumstances of the particular case and the conditions of the local community.

The idea of appeal carried great importance in magisterial notions of jurisprudence. It was the principle that answered the need, on the one hand, to secure prompt, accessible and inexpensive justice administered by local tribunals and, on the other, the need to establish an efficient control for preventing maladministration and abuse. The officers insisted that the freest right of appeal, with a minimum of costs, should be allowed in every case, and justified this by reference to tribal judicial practice. In the Transkeian territories, the chief magisterial courts were constituted to exercise appellate jurisdiction, with controlling and supervisory power over the district courts. Originally appeals could be taken from the chief magistrates and, during the period of informal rule, from the agents, to the Secretary for Native Affairs. Act 40 of 1882 for the first time provided for appeals to go to the colonial high courts. Criticism of the provision, however, was expressed on the grounds of

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121 Cape Archives, C.M.K. 2/6: Report of W.E. Stanford for 1887.
122 CPP, G.4-'83, Minutes of Evidence, no. 7990 [A.R. Welsh].

the costs attending the process of appeal and the unfamiliarity to the Africans of colonial forms. Elliot refused to believe 'natives will appreciate the right or advantage of appealing to a tribunal or person unknown to them and before whom (from poverty or ignorance) they cannot appear to plead their own version of the case'.[123] Frequent reversal of magisterial verdicts on appeal to the colonial courts, which were not empowered to take cognizance of customary law in civil suits between African parties, led to the establishment of the Native Territories Appeal Court. By Act 26 of 1894, appellate jurisdiction to hear civil appeals from the magisterial courts was transferred exclusively to the Appeal Court, but the jurisdiction of the Supreme Court remained unaltered in respect of suits in which one or more of the parties was white.

In fine, the cardinal doctrine of magisterial jurisprudence, which informed and shaped the whole organization of the Transkeian judicial administration, was the principle of the social utility of the legal system. There was widespread agreement that to operate effectively law should respond to social realities, that the judicial structure should be in harmony with the needs of the society it serves. For the very reason that it largely met this primary desideratum, the legal and judicial system operative in the Transkeian Territories throughout the period under discussion was highly and widely valued as being 'specially adapted to the requirements of the natives under their present conditions of life'.[124]

### iii Law and the Enforcement of Morals

One of the nicest issues in the philosophy of law, which engaged the high seriousness of the Transkeian magistrates, is the

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123 CPP, G.4-'83, Appendix I: Report of H.G. Elliot on First Draft of Penal Code, p.396.
124 Ibid., G.12-'87: Report of W.E. Stanford, p.84.

permissible limits of legal coercion. Edmund Burke, himself a lawyer by training and profession, once observed 'It is one of the finest problems in legislation .... What the State ought to take upon itself to direct by the public wisdom, and what it ought to leave, with as little interference as possible to individual discretion'. To this question, concerning in particular the legal enforcement of morality, J.S. Mill addressed himself in his essay On Liberty a hundred years ago, and the famous 'one very simple principle' in which he couched his answer expresses the central doctrine of his essay. He asserted, 'the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others'. And to identify the many different things which he wished to exclude, he added, 'His own good either physical or moral is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because in the opinions of others, to do so would be wise or even right'.[125] In his own time the radical liberalism of Mill's doctrines did not go unchallenged. J.F. Stephen's Liberty, Equality, Fraternity was written explicitly as a critique of On Liberty, and in our own day the debate has been resumed with H.L.A. Hart and Lord Devlin as the two leading antagonists.

In his sombre work Stephen insisted that society was perfectly justified in using the criminal law beyond the limits demarcated by Mill, and, in particular, was entitled to compel conformity to the social code of morals and to punish deviations from it even when these do not harm others. For Stephen, the fact that certain conduct was by 'the public and accepted standard of morals' severely condemned as immoral was sufficient cause for making that conduct

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125 J.S. Mill, On Liberty, p.68

punishable by the 'rough engine' of the law.[126] He argued that the criminal law was not merely an instrument for the prevention of suffering or harm, but a 'persecution of the grosser forms of vice'.[127] If the function of the criminal law lay in 'promoting virtue and preventing vice', it followed, he believed, that 'it ought to put a restraint upon vice not to such an extent merely as is necessary for definite self-protection but generally on the ground that vice is a bad thing'.[128]

Two theses have been identified as comprising the positive grounds advanced to justify the legal enforcement of morality.[129] According to the moderate thesis, society is held together by a shared morality, infringements of which can be justifiably punished, like the crime of treason, so as to preserve the social body from dissolution or collapse. The defence of this argument rests upon the unexamined assumption that there is a necessary harmony of values, that all morality forms in H.L.A. Hart's words 'a single seamless web',[130] so that those who transgress any one part are likely to transgress the whole. The conviction is held that all the positive values in which men have believed must, in the end, be compatible, and perhaps even entail one another. Such a form of monism excludes the possibility of the pursuit within the same society of incompatible and incommensurable yet equally valid ends and ideals.

By contrast, the more extreme thesis regards the legal enforcement of morality as an end in itself, apart from its beneficial consequences in preserving society and independent of its instrumental value analogous to ordered government. Yet the general principles underlying the several varieties of this second thesis hold up as values things which seem contrary to every notion of morality, for the

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126 J.F. Stephen, Liberty, Equality, Fraternity, pp.162 and 140.
127 Ibid., p.152.
128 Ibid., pp.150 and 143.
129 H.L.A. Hart, Law, Liberty and Morality, pp.48ff.
130 Ibid., p.51.

sake of which society should impose restraints upon individual liberty and inflict punishments for the promotion of virtue and the prevention of vice. They include the gratification of the feeling of hatred and the desire of vengeance which, according to Stephen, 'crime excites in a healthy mind',[131] even where there has been no victim to be avenged but only transgression of a moral rule. They include, too, the infliction of punishment as an expression of the 'moral indignation of mankind',[132] whereby society vindicates and ratifies the common standards of morality; and, lastly, conformity to coercively-induced moral rules, which unlike voluntary restraint seems quite empty of moral value.

The relation between law and morals received an added dimension in the Transkeian context of cultural collision, for the practices and values of tribal culture at numerous vital points, touching the established social norms and mores, were at variance with the positive morality of colonial society. Both as a question of practical administrative policy and as one of a moral order (though the two were inextricably linked), it exercised the thoughts and engaged the feelings of the colonial administrators.

Borrowing from Matthew Arnold's searching analysis of Victorian society in his essay Culture and Anarchy, we can characterise the magisterial mind as infused with the spirit of Hebraism, with its typical emphasis on moral character and conduct. The Cape administrators brought in their baggage a heavy burden of domestic concepts and values, of stock notions and habits, in terms of which they appraised the African societies. They tended to think and act in moral terms. This strong desire to structure the world in moral categories cannot be more strikingly exemplified than in their attitudes, however widely diverging, to traditional customs and law, in

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131 J.F. Stephen, Liberty, Equality, Fraternity, p.154.
132 J.F. Stephen, quoted in R.J. White's introduction to Liberty, Equality, Fraternity, p.4.

the moral weight attached to their cross-cultural judgements. From their own society the magistrates derived a single overarching standard of values in terms of which all cultures were evaluated. Notwithstanding, a number of outstanding administrators displayed an exceptional tolerance, understanding and insight with regard to traditional African society, what Arnold would express as 'sweetness and light'. Yet such was the force of Hebraism in Victorian culture that their liberal tolerance and even enlightened approval of the alien communities, while conceding merit to customs within the circumstances of the tribesman's time and place, were invariably qualified by moral objections.

This tendency for moral earnestness and indignation to interpose in the magisterial appraisal of African society can be seen at work in the Report of the Cape Native Laws and Customs Commission. In their description of the nature of law in tribal society, the commissioners recognised the social efficacy of customary law, as coping successfully with the lives of the African people. The law, according to the Report,

> took cognizance of certain crimes and offences; it enforced certain civil rights and obligations; it provided for the validity of polygamic marriages; and it secured succession to property and inheritance, according to simple and well-defined rules.

'But intermixed with it', the Commission went on to declare,

> 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.[133]

Traditionalism was seen as tainted with imperfections, even pervaded with evil, and presented in part an affront to Victorian morality, which demanded the intervention of the law. But intervention would not be wholesale, and in demarcating the bounds of legal coercion,

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133 CPP, G.4-'83, Report, para. 8.

the Commission drew a relevant distinction, supported by many of the magistrates, between actions and practices which are harmful to others and those which deviate from Christian morality but harm no one. Only with regard to the former, the considered opinion of the commissioners went, was the state obliged to interfere in order to protect the sanctity of human life and the integrity of the human person.[134] This rule governing the bounds of legal enforcement brought the practice of witchcraft in the territories within the jurisdiction of the criminal law administered by the magistrates. Both the General Regulations of 1879 and 1885 and the Territorial Penal Code of 1886 made provision for witchcraft as a punishable offence.[135]

Foremost among customary practices, that of witchcraft was universally condemned by colonist and magistrate alike, as being contrary to all principles of justice, morality and reason. It was denounced and reviled, in an exhaustive vocabulary, as barbarous, vicious, devilish, abominable, detestable, the 'source of almost every evil'.[136] The discovery and punishment of witches were looked upon as a Machiavellian device fraudulently employed by both chiefs and witchfinders for the end of personal gain, material or political. Magistrates represented the witchdoctor in the rôle of the chief's henchman, his strong arm, a political instrument in fact for terrorizing his tribe into docile submission, ridding the chiefdom of opponents and curbing the power of wealthy tribesmen. By imposing on a credulous and superstitious people, the witchdoctor could effectively maintain the authority of the chief and ensure the internal security of the tribal polity. As one magistrate put it, the institution of witchcraft was 'a powerful engine of Kafir statecraft'.[137] The

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134 CPP, G.4-'83, Report, para 84.
135 A.N. Macfadyen (ed.), Statutes, Proclamations: Proclamations 110 and 112 of 1879, sections 14 and 15, pp.8 and 26-27; Native Territories Penal Code Act (24 of 1886), sections 171-175, pp.123-124.
136 CPP, G.17-'78, Report of Matt. Blyth, p.61. Epithets drawn from various reports.
137 Ibid., G.13-'80, p.165.

practice was regarded as morally vicious and the Cape Government was determined to root out the institution by the weapon of the law. The Chief Magistrate of Griqualand East, for one, commended the adequacy of the provisions of the criminal code for the protection of life and property which were liable to forfeiture under tribal custom in witch trials. 'Considering that we have in this territory a population of 148,000 natives nearly all believers in sorcery and comparing [the handful of convictions on witchcraft charges in the local courts] with the frequent deaths and confiscations in Pondoland it is clearly proved that witchcraft in its worst aspects has practically been put down under the existing system of administration'.[138]

Notwithstanding legislative enactment, however, and the active influence of missionary and magistrate, witchcraft continued to exercise a tenacious hold upon the African mind, as the annual magisterial reports testify. Some magistrates looked beyond legal sanctions to the ameliorating spread of education, Christianity and western medical practices, and enlisted the support of chiefs and headmen to curb the practice and destroy its social rationale. So abhorrent to the administrators was the custom, with its consequences of mindless cruelty and murderous death to innocent people, that a magistrate like Blyth was convinced that it should be 'stamped out rigorously'.[139] But with the intensifying and determined measures, statutory and administrative, of the white government, the practice went 'underground', and while fewer cases were brought before the courts, frequent cases of arson, the mysterious firing of huts by night, slaughtering of cattle, and the quiet departure of people from the district were taken as reliable indications that the Africans held as staunchly as ever to their traditional customs and beliefs. 'Belief in the power of witchcraft, and the ability of witch-doctors

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138 Cape Archives, C.M.K. 2/7: Stanford to U.S.N.A., 24 April 1891.
139 CPP, G.17-'78, p.61.

to divine who has practised it, is as strongly rooted in the minds of the masses of the people as it ever was ....'[140] Even among the School people, belief in supernatural agency, it was reported, had not been abandoned entirely. Yet this was interpreted as evidence of moral shortcoming rather than the persistence of a traditional system of beliefs.

That the complex of witch beliefs, with its related institution of divination, formed an integral part of a total religious system, as modern anthropological research has asserted, was scarcely understood by the colonial administrators. Anthropologists recognise that the witch beliefs attempted to grapple with the problem of evil in the world. Because the western concepts of chance and contingency are absent from traditional magical religions, the African people believed that all occasions of misfortune are caused by some agent, whether the supernatural agency of tribal ancestors or a human being using supernatural means. As the causes of illness were not understood, witchcraft was genuinely believed to be responsible for such adversity. The sickness or death of a chief, for example, almost always resulted in a 'smelling out' of witches and a witchcraft trial. In traditional religion, witchcraft and sorcery (a distinction which magistrates rarely made) were wholly evil, regarded as so anti-social as to endanger the whole community, a belief issuing in the violent reaction of death whenever a witch or sorcerer was discovered. As for the administrators, the Victorian culture which they represented and disseminated, was characterized at that point of time by the growing displacement of the orthodox Christian religion, itself relatively non-magical, by a secularized world-view, which had developed a stringent logic of natural causality and laid heavy emphasis on the notion of rationality. From this culture-bound standpoint, the magical religious system of the Africans was denigrated as 'super-

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140 CPP, G.4-'93, Report of H.G. Elliot, p.46.

stitious'. A rationalist scepticism dismissed witchdoctors as mere 'impostors' and their victims as simple 'dupes'. This amounted in one case to a recommendation for mercy on the grounds that the accused was a deluded 'victim of an evil national system'.[141] Yet another officer expressed his sense of incredulity that 'a native may against all our ideas of reason accept the dictum of a witchfinder and deliberately accept the social ban involved therein'.[142]

That witchcraft was vigorously denounced as an evil by the administrators is in one respect a measure of their involvement, personal and official, in their work of governing the subjected African societies. This involvement, strongly registered in the feelings of outrage and compassion which witchcraft evoked, precluded any disengagement of what Arnold called the 'disinterested intelligence' that could investigate critically this customary practice.

By contrast with capital crimes such as witchcraft, there is the special topic of sexual morality where it seems plausible that there are actions immoral by accepted standards and yet not harmful to others. With regard to the legal enforcement of a sexual code, magisterial attitudes towards African initiation rites can be taken as a representative case-study. The initiation rites, both for boys and girls, were singled out for special attack as they were held to violate the acceptable norms of sexual behaviour. Magistrates associated the initiation schools with sex-instruction and the ceremonial surrounding the rites as occasions of sexual promiscuity. In their aversion to the coarsely natural world of the senses, the zealots among them took earnest steps to do away with the ceremonial and even prohibit the schools entirely. Matthew Blyth, as Fingo Agent and later as Chief Magistrate of the Transkei, was in the vanguard of the moral crusade. He believed that for the white administration to sanction

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141 Cape Archives, C.M.T. 1/83: Elliot to U.S.N.A., 25 April 1887.
142 Ibid., C.M.K. 2/7: Stanford to U.S.N.A., 24 April 1891.

or connive at these practices was to compromise its self-proclaimed civilizing mission, to call into question the validity of those moral principles which were the foundation and justification of white rule. Only by taking a firm and principled stand on the basis of its moral convictions would the colonial administration win the respect of the African people. 'It seems but just and right that any civilized and Christian government should discountenance and discourage all filthy and disgusting and immoral native laws and customs ... and all the people admit that a Christian government are acting consistently by doing so'.[143]

In 1875, Charles Brownlee, then Secretary for Native Affairs, dispatched a general circular to chiefs and people, a tract for the times intended for their edification, calling upon them to abandon those 'evil customs which keep you in darkness and ignorance'. Particular mention was made of the "abakhwetha" and "intonjane" rites, by which the male and female initiation ceremonies were commonly known.[144] Acting in the spirit of the minister's directives, Blyth had had a self-imposed regulation passed by a meeting of the Mfengu community, prior to the formal annexation of Fingoland to the Colony. This sought by a process of sublimation to clear away the dross from the custom, prohibiting the 'abakhwetha' dances of the male initiates, while tolerating at the same time the circumcision rite. When colonial Ngqika were located in Gcalekaland after the war of 1877-78, Blyth enforced similar regulations, duly approved by the Government. However, this series of local rules lacked any legal standing in the territories, and such legal anomaly was to lead to a minor _cause celèbre_, when in 1882 one Fynn, a Ngqika headman, was fined by the Resident Magistrate of Kentani, Gcalekaland, for holding an "intonjane" dance at his homestead. On review the magisterial decision was con-

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143 _CPP_, G.4-'83, Appendix C, pp.44, q.28.
144 Cape Archives, N.A. 841: Circular of C. Brownlee, 15 August 1875.

firmed by Blyth in his capacity as Chief Magistrate, but after Fynn had made private representations to the Cape Government through a third party - 'some European friend' - the Attorney-General directed Blyth to reimburse the headman to the amount paid 'in satisfaction of a judgment which cannot be sustained'.[145]

Blyth, in a stream of letters to the Under Secretary for Native Affairs, respectfully urged reconsideration of the Government's ruling. He argued that the regulations, although they carried no statutory force, had been duly endorsed by the Government of the day, and, appealing to the popular verdict, had been passed 'by the large majority of the natives', 'the people themselves seeing the evils that resulted from this custom of white boys and the unbridled licence that ensued'.[146] He urged that the matter be considered not only from the narrow vantage of strict legality but as 'one of policy and Good Government',[147] for, he declared, in a rather exaggerated fashion as events were to prove, the reversal constituted a moral victory for the Red people, it would open the floodgates to 'the grossest immorality and vice', and would seriously retard the advance of 'civilization and Christianity'. Furthermore, Fynn's action in bypassing the usual judicial processes of the established territorial courts, through appealing in private to Cape Town, undermined the authority and standing of the white administration in the territories and flouted the judicial system, setting 'law and order ... at defiance'. In the exchange of letters to and from the Transkei, Blyth's animus against the initiation rites in particular and the allegedly immoral customary practices in general became more intensely directed, as the Government stood consistently to its position and as his appeal became correspondingly more urgent. At an early stage he denounced the

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145 Cape Archives, C.M.T. 2/63: Blyth to U.S.N.A., 8 September 1882.
146 Ibid., C.M.T. 2/63: Blyth to U.S.N.A., 8 September 1882 and 15 December 1882.
147 Ibid., C.M.T. 2/63: Blyth to U.S.N.A., 10 October 1882.

"intonjane" dances as 'openly immoral'; then entered a description of the custom at which the female initiates were given out 'to young men upon paying a small fee where scenes of the utmost debauchery, and the grossest indecency takes place'.[148] By his third letter, Blyth spoke brazenly of 'open prostitution'. While the Chief Magistrate advanced his cause in the pages of the Blue Books[149] and secured the support of several Transkeian missionaries,[150] the Cape Government refused to invoke legislative bans against the initiation rites, other than by permitting magistrates to dismiss headmen who organized or connived at such rites in their wards. But Blyth's conviction in the righteousness of his cause never faltered, and even in the late 1880s Fynn's case was still held responsible for retrogression towards heathenism among the Ngqika of the Kentani District.

Considered in a broader perspective, the position Blyth adopted can be characterized, to use a term employed by H.L.A. Hart, as one of legal moralism. The white administration was cast into the rôle of moral educator and the courts were represented as custos morum or general censor and guardian of public morality, whose function it was to punish moral wickedness, whatever was contra bonos mores et decorum. According to this view, the enforcement of sexual morality is a proper part of the law's business.

Within the Transkeian Territories, initiation rites were officially discountenanced by the administration, but in the eyes of the law a distinction was made between the immorality of the practice and its aspect as a public offensive act or nuisance. A line divided the punishment of immorality from the punishment of indecency which was provided for under sections 124-25 of the Penal Code. The Code also declared that persons compelling novices to participate in the schools without their free consent would be liable for prosecution,

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148 Cape Archives, C.M.T. 2/63: Blyth to U.S.N.A., 8 September 1882
149 CPP, G.8-'83, pp.130-131.
150 Ibid., G.3-'84, pp.101 and 108.

but no action was contemplated against the ceremonies per se.[151] Official action was, however, taken when the initiation rites became the subject of local political dispute, as in the case where Mfengu clients of the loyalist Bhaca chief, Makhaula, had persisted in practising circumcision in defiance of Bhaca law which prohibited the rite. The Chief Magistrate submitted that the provisions of the Penal Code in respect of initiation ceremonies were inoperative as both parents and novices gave their consent to the rite, and he recommended that a proclamation be issued to give local effect to Bhaca custom in the Mt. Frere District.[152] A similar case occurred in the location of the chief, Zibi, a Christian convert, where certain headmen were fined on instructions from the Under Secretary for permitting the practice of the rite in their sub-locations against the chief's express wish. The Chief Magistrate noted that he was not aware of any law under which such fines could be imposed or enforced, but observed that had the headmen refused to pay they would have rendered themselves liable to suspension from office.[153] In both cases cited, then, the implicit justification of punishment was not the enforcement of morality, but the prevention of local civil dispute.

The views Blyth expressed in favour of legislation for the suppression of immoral traditional practices were not endorsed by the Government nor were they representative of chief magisterial opinion. Reporting on the initiation rites, Elliot wrote, 'If it has been found impossible to suppress by legislation practices of even equal or more demoralising effect in the most civilised cities in the world, it is I submit idle to expect success amongst a horde of barbarians'. The Chief Magistrate upheld the legal distinction drawn between the punishment of immorality and the punishment of indecency, and if the

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151 A.N. Macfadyen (ed.), Statutes, Proclamations: Native Territories Penal Code Act (24 of 1886), sections 124-125, pp.111-112 and sections 153-154, p.119.
152 Cape Archives, C.M.K. 2/11: Stanford to U.S.N.A., 15 June 1896.
153 Ibid., C.M.K. 2/7: Stanford to U.S.N.A., 31 March 1890.

distinction were to be a significant one, refused to acknowledge the white claim for protection from the distress inseparable from the bare knowledge that Africans were acting in ways considered wrong.[154] The conception of the positive functions of the criminal law, which was adopted as the official ruling, regarded it as designed to protect one man from another and not to punish moral wickedness. Stanford, for one, refused to consider that 'punishments should be provided against superstitious practices which do not endanger life or property'. He questioned the attribution of value to mere outwardly conforming behaviour, in abstraction from both motive and consequence, and stressed the importance of individual self-determination and voluntary self-discipline, not submission to legal restraint, in dealing with those traditional practices condemned by western society's code of morals. As he wrote, 'it seems to me very doubtful if the moral standard of the native people will be raised by legislation'.[155] Rather than direct frontal assault on tribal culture, the Cape looked to the 'civilizing agencies' of education and Christianity for the gradual abolition of the customary rites de passage. The civilisation which accompanied the extension of white rule east of the Kei would of necessity be a slow but steady penetration and transformation of the indigenous societies, regulated rather than carried through by the weapon of the law.

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154 Cape Archives, C.M.T. 1/84: Elliot to U.S.N.A., 24 April 1891.
155 Ibid., C.M.K. 2/7: Stanford to U.S.N.A., 24 April 1891.

# CHAPTER FOUR

## CONCLUSION: PROSPECT AND RETROSPECT

To attempt to subsume the Transkeian territorial system under the generic categories of segregation or integration - those two irreconcilable alternatives which political scientists have conventionally applied to describe the varieties of South African 'native policy' - is to fit the social evolutionism animating administration in the territories to the Procrustean bed of a static ideology, to confuse a dynamic process with an achieved or projected ordering of race relations. For Cape policy in the territories took cognizance of the vast extent of cultural cleavage dividing black and white, which it sought to accommodate within a separate administrative system specially fashioned for the social conditions of the large African population beyond the Kei. At the same time, it remained attentive to the profound changes generated by more than a century of interaction between the two societies on the eastern frontier, transformations in social life that created an ever thickening nexus of interconnecting links enmeshing colonist and tribesmen. Indeed, what the Cape magistrates, who had improvised, constructed and extended the unique 'native territorial system', above all valued was its flexibility and responsiveness to changing circumstances; they set great store by the dynamic principle of governmental policy, impelling the indigenous people along the royal highroad of civilization. Cape administration in the territories, then, was tolerant of traditionalism, but sought at the same time to infuse into the tribal communities the necessary catalysts of social progress, to close the cultural gap through the long-term operation of western institutions upon primitive society.

At a theoretical level, magisterial thought was pervaded

and shaped by a social evolutionism which in the nineteenth century performed the function of providing a conceptual framework that could accommodate the diversity of human cultures without denying the unity of mankind. Traditional societies were treated as lower phases or stages in a single line of development that culminated in the achieved forms of European civilization. While tribal modes of social life were accorded a relative degree of recognition as uniquely valuable for the particular stage of cultural growth of a particular society, western civilization retained its primacy as a universal model, superior to earlier movements in the cosmic drama. Considered in these terms, the Cape magistrates regarded the social development of the African people under their charge as a process of assimilation to the single universal pattern conveniently represented by their own society.

Cape 'native policy', at its most liberally optimistic, set up the objective and held out the promise of the full incorporation of the African people within the Colony's administrative and legal structures, but the final term of this assimilative process came to be set in the remote and unprobable future. When, moreover, colonists and officers were compelled at critical moments to face squarely the issue of the ultimate political consequences of westernization, with all that this meant for the maintenance of white power and privilege, they drew back from the logical outcome of their liberal reformism, equivocating, to cite a telling instance, on the crucial principle of a non-racial franchise.

A major shift in official thought and feeling, marking a broad tendency away from assimilation towards differentiation, can be traced to the traumatic impact of war and rebellion in the late 1870s and early 1880s. From this time, a new note of sober realism came to characterize the administration in the territories. The men on the ground were more sober-minded, still eager and hopeful, but with

longer views and more modest pretensions. Striking the new keynote of cautious gradualism, the Barry Commission lent the weight of its authority to existing arrangements which conferred a separate status upon the territories and gave definitive expression to the widely acknowledged need to recognise the special interests and circumstances of the African people encapsulated within their traditional culture. In line with this transmutation in the official administrative ethos, which was espressed in a long-raging debate about the nature and desirability of cultural change, was the altered conception magistrates held of tribalism. Particularly after the challenge of black resistance to the white advance had been successfully met by colonial arms, the tribal system, for long thought antagonistic towards 'civilization', now no longer was reckoned a serious threat to the Cape's position in the territories. As the tribesmen became inured to Cape rule, the traditional ruling élite and authority structures were effectively utilized by and enmeshed in the white administrative system, and so retained for their practical governmental value instead of suffering the fate of annihilation which policy-makers and officials from the time of Grey had invoked in their aggressive preference for colonial institutions. This rehabilitation, as it might be called, of traditionalism overlapped in time with the emergence, chiefly from among the progressive Mfengu, of a nascent, educated African élite, the long expected offspring on which the Cape had pinned such hopes in its civilizing crusade against barbarism. Yet, ironically, this small class of evolués evoked a highly ambivalent response from the Cape magistrates, which revealed their fundamental misgivings about the consequences of the programme of social progress and civilized advance they had initiated in the territories. African resistance to white overrule, it was argued, was being channelled from traditional forms of warfare and rebellion into novel westernized political organizations by a radical minority who placed the skills

and techniques learned from their contact with white society at the service of new social and political visions. Civilization, it was feared, would breed its own discontents.

The changing conceptions of Cape 'native policy' marked as well official attitudes towards the small peasantry and commercial farmers, whose fostering had, from the time of Grey, in the history of Cape liberal ideology, remained a cardinal tenet as representing a positive social and economic good. From the late 1880s, in certain areas of the Transkei, and during the 1890s the peasant communities began to experience the hardships of declining agricultural productivity; and though the magistrates expressed real concern to ameliorate the condition of this struggling peasantry, more and more, attention and energy were diverted to creating a mass migrant labour force, as the only viable alternative to rural stagnation. As the decline of the peasant sector coincided roughly with an intensifying demand from the mining industries for a plentiful supply of cheap African labour, so the administrators considered it of paramount importance to feed the stream of migrant labourers flowing to the industrial growth-points of South Africa. Thus stimulated, a growing proportion of the African population became dependent upon employment in the white-controlled economy for their existence. In this way Africans entered white society through an economic gateway, but at the lower levels of the white-dominated hierarchy mostly as a landless proletariat, at the bottom of the economic scale. The white economy had incorporated the black population, but the colour bar that developed, registering differences between skill and lack of skill, between economic power and economic powerlessness, reflected and entrenched the racial stratification and cultural pluralism of Cape society and the subordination of the indigenous people.

In the history of Cape 'native policy' there is, then, a

discernible movement of ideas away from assimilation towards differentiation, notwithstanding the formal homage paid to the principle of identity, pledge and token of which remained in such forms as the ostensibly colour-blind franchise. The full incorporation of the African people within colonial society might still be posited as a final goal towards which the Transkeian territorial system was tending, but more as a remote possibility, a far-off divine event, than as a discrete end attainable by definite stages. As the process of annexation was concluded, the government of the Transkeian Africans settled into the sluggish channels of routine administration, slogging along constructively and steadily though unspectacularly in its well-worn grooves as it kept busy with immediate tasks and concerned itself with finite tangible ends. The vulnerability of the liberal vision that had once animated Cape 'native policy' became apparent as the state of pupilage to which the territorial system had subjected Africans beyond the Kei was transformed into a permanent status of subordination. The changing conceptions of Cape liberalism, deriving from white concern to entrench and extend its privilege by effectively barring black access to the political and economic means of power, were working to alter the nature and purpose of colonial government of the African people in the Transkei. Since African policy fell under the purview of a white electorate not accountable to the black population, it not only suffered from the equivocations of Cape liberalism but, more fatefully, faced the ominous prospect of the implementation of an ideology embodying essentially opposed views as to the proper ordering of race relations. In the 1920s, an advancing host of political forces and doctrines, signalled by the advent to the premiership of General J.B.M. Hertzog, represented such a radical challenge to the principles that had once informed the Transkeian territorial system. This policy of segregation, its opponents argued, was static, whereas the facts of social and economic

life were dynamic; and it was precisely these organic processes of political adaptation and social change which the territorial system had been designed to accommodate. Again, while official Cape attitudes to the mode of administration were experimental and pragmatic, the policy of segregation, on the other hand, was doctrinaire; and its advocates proclaimed it a solution with all the reductive simplifications of a neat formula to the complex racial, economic and social problems of South Africa. Moreover, the narrow exclusiveness of segregation, which its champions insisted would 'preserve' white civilization, was wholly at variance with the potential inclusiveness of the civilizing mission as the Cape magistrates conceived it. Accordingly, with the fragmentation of South Africa in the 1950s in terms of the grand design of separate development, the Cape liberal vision once upheld, latterly receding, was finally dispelled.

# A P P E N D I X

## THE TRANSKEIAN QUADRUMVIRATE: BIOGRAPHICAL SKETCHES

BLYTH, Matthew Smith. Born September 1836 in Norfolk, England, 1853, commissioned as ensign in an Imperial Regiment at the Cape of Good Hope. 1861, served in British Honduras, where he was once secretary to the Governor of that Colony. 1867-69, in Natal. 1869, appointed British Resident in Fingoland. March 1876, Chief Magistrate of Griqualand East. September 1878, Chief Magistrate of the Transkei. February 1883, acting Governor's Agent in Basutoland. March 1884, resumed duties as Chief Magistrate of the Transkei. Died in Cape Town, July 1889.

BROWNLEE, Charles Pacalt. Born March 1821 at Tyume Mission, near Alice, the eldest son of Rev. John Brownlee. At an early age accompanied American missionaries to Natal as interpreter. On return to Eastern Cape took up farming. 1846, appointed clerk to the Native Commissioner, Rev. Henry Calderwood, who settled at Block Drift. October 1848, appointed Commissioner of the Gaika (Ngqika) tribes. May 1868, civil commissioner and resident magistrate, Somerset East. June 1871, promoted to King Williamstown. December 1872, first Secretary for Native Affairs, held office until retirement of the Molteno ministry in 1878. February 1878, civil commissioner for native affairs, resident at King Williamstown. December 1878, Chief Magistrate of Griqualand East. Retired owing to ill-health as from November 1884. Died at King Williamstown, August 1890.

ELLIOT, Henry George. Born near Niagara Falls, Canada, in December 1826. Joined the Royal Marines, August 1847, and served in the Crimean War. Retired from service in December 1869, with the rank of major, because of ill-health. Came to South Africa. July 1877, took up appointment as Chief Magistrate of Thembuland, on the persuasion of Sir Bartle Frere, at a time when the High Commissioner had anxiously reported to London that a general rising among the African tribes seemed likely. September 1891, appointed Chief Magistrate of Thembuland and the Transkei, on the amalgamation of the two magistracies. Retired in 1902. Died in Pietermaritzburg, 1912.

STANFORD, Walter Ernest Mortimer. Born August 1850 at Alice. July 1863, appointed clerk to Tambookie Agent, Glen Grey; office of agent moved to Southeyville in 1865. January 1871, clerk to resident magistrate, Queenstown. February 1874, clerk to civil commissioner and resident magistrate, East London. July 1874, officer in charge of Tambookie Location, Glen Grey. April 1876, magistrate with Dalasile, chief of the Ama-Qwati tribe; title of

magistrate with Dalasile changed to resident magistrate, Engcobo, in 1882. July 1885, Chief Magistrate of Griqualand East. July 1897, Superintendent of Native Affairs; title changed to Secretary to Native Affairs Department, 1899. During Anglo-Boer War commanded British forces in Griqualand East. July 1902, appointed first Chief Magistrate of the united Transkeian Territories. July 1904, recalled to the headship of the Native Affairs Department in Cape Town. 1908, elected Member of Cape Parliament for Thembuland. 1909, a Cape representative to the National Convention, where he fought for franchise rights irrespective of race or colour. 1910-1929, served as Union Senator representing African interests. Died in Cape Town, September 1933.

## CRITICAL NOTE ON SOURCES

The greater part of the research for this thesis was conducted in the Cape Archives, where the papers of the Native Affairs Department and those of the Chief Magistrates of the Transkei, Thembuland and Griqualand East, relating to the period 1872-1894, were consulted at some length. For a study of this kind, unconcerned as it is with establishing particular historical facts or with tracing a series of chronological events, the departmental archives inevitably contained much that was superfluous and irrelevant, not to say repetitive. At times the accumulation of historical detail, besides the miasma of day-to-day administrative routine, threatened to obscure the broader contours of ideas and assumptions in which the researcher was interested. Yet it was only by immersion in the veritable flood of source material until one was able, in G.M. Young's words, to hear the voices of the age speak, did the writer come away with a valuable sense of such imponderables as the magisterial ethos, the characteristic style of administration, a subtle transmutation of attitude or even 'the temper of the times' - all of which would give concreteness and plausibility, perhaps the breath of life, to the historical account. Of particular and, in this case, direct importance were found to be the official reports and memoranda penned by the Chief Magistrates of the various territories. These opened a current and authoritative view on to contemporary events, significant decisions and changes of policy, the actual operation of the administrative and legal systems, as well as providing insight into the magisterial mind as it concerned itself with the immediate desiderata, possibilities, obstacles and ultimate aims of African administration.

Official publications relating to the Transkeian territories were used as an additional quarry and source for research.

Besides the Cape Blue Books on Native Affairs of which extensive use was made, the Report and Appendices of the 1883 Native Laws and Customs Commission proved extremely helpful. This important document is a mine whose every rift is loaded with historical ore. The private papers of Sir Walter Stanford were employed to gain entry into the official mind and a representative case-study was obtained of magisterial responses to and evaluations of the Transkeian territorial system, as viewed through the intelligent eyes of this outstanding administrator.

The author's indebtedness to a whole body of secondary works must be apparent at almost every turn of the thesis, for these were used as standard texts for understanding the general issues involved in particular aspects of the work. The following may be singled out as studies on which special reliance was placed: C.C. Saunders's 'The Annexation of the Transkeian Territories'; the stimulating book of J.W. Burrow, Evolution and Society, which provided the dominant theoretical orientation of this thesis; S.B. Burman's 'Cape Policies Towards African Law in Cape Tribal Territories'; and the work of H.J. Simons, African Women, which offered an authoritative guide through the mazes of African law and customs.

# B I B L I O G R A P H Y

## I MANUSCRIPT SOURCES

### (a) PRIVATE PAPERS

Walter Stanford Papers:

deposited in Jagger Library, University of Cape Town.

(i) D1 - D39: diaries, 1876-1909.

(ii) F(a) - F(zz): miscellaneous correspondence and papers.

### (b) ARCHIVAL RECORDS

In the Cape Archives, Cape Town.

(i) Native Affairs Department Papers

N.A. 1-3: letters received from C.M. Transkei, 1878-1879.

N.A. 150-154: letters received from Agents and Magistrates with Native Tribes, 1872-1876.

N.A. 283-284: letters received from Governor's Agent, Basutoland, 1883-1884.

N.A. 840-846: letter books, 1873-1880.

N.A. 913-917: letter books, 1879-1885.

(ii) Chief Magistrates of the Transkei Papers

C.M.T. 1/79 - 1/84: letter books (of C.M. Thembuland), 1877-1892.

C.M.T. 1/147: miscellaneous correspondence and papers (of C.M. Thembuland).

C.M.T. 2/62 - 2/69: letter books (of C.M. Transkei), 1879-1890.

C.M.T. 3/273 - 3/278: letter books (of C.M. Thembuland and the Transkei), 1891-1897.

(iii) Chief Magistrate of Griqualand East Papers

C.M.K. 2/2 - 2/11: letter books, 1876-1899.

C.M.K. 2/108: confidential letter book, 1886 and 1890.

(iv) Magistrate of Engcobo Papers

1/ECO: 5/1/1/1 - 5/1/1/5: letter books, 1881-1885.
1/ECO: 5/1/3/1: confidential letter book, 1881-1888.

(v) Colonial Office Papers

C.O. 1156: letters received from Native Affairs Department, 1881.
C.O. 3163, 3179, 3193: letters received from Border Magistrates and Transkeian Territories, 1869-1871.

(vi) Prime Minister's Office Papers

P.M.O. 259: correspondence and memoranda, 1875-1881.

## II GOVERNMENT PUBLICATIONS

### CAPE OF GOOD HOPE COLONY

(a) Annexures and Appendices to the Votes and Proceedings of the Cape Parliament.

(i) Blue Books on Native Affairs:

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| G.27 - 1874 | G.3 - 1889 |
| G.21 - 1875 | G.4 - 1890 |
| G.16 - 1876 | G.4 - 1891 |
| G.12 - 1877 | G.7 - 1892 |
| G.17 - 1878 | G.4 - 1893 |
| G.33,43 - 1879 | G.9 - 1894 |
| G.13 - 1880 | G.8 - 1895 |
| G.20 - 1881 | G.5 - 1896 |
| G.33 - 1882 | G.19 - 1897 |
| G.8 - 1883 | G.42 - 1898 |
| G.3 - 1884 | G.31 - 1899 |
| G.2 - 1885 | G.50 - 1900 |
| G.5 - 1886 | G.52 - 1901 |
| G.12 - 1887 | G.25 - 1902 |
| G.6 - 1888 | G.29 - 1903 |

(ii) Government Commissions:

Proceedings of, and Evidence taken by, the Commission on Native Affairs 1865 (Grahamstown, 1865).
G.4-1883 Report and Proceedings, with Appendices, of the Government Commission on Native Laws and Customs.
G.1-1890 Report of the Liquor Laws Commission, with Minutes of Proceedings, Minutes of Evidence, and Appendices.

(b) The Cape of Good Hope Government Gazette. 1879-1896: odd reference.

OTHER

South African Native Affairs Commission, 1903-1905. Report and Evidence (5 vols.; Cape Town, 1905).

III PUBLISHED COLLECTIONS OF DOCUMENTS, including LAW REPORTS

A.C. Dulcken (ed.), Reports of Cases decided in the Eastern Districts' Court of the Cape of Good Hope, vol. VI, part II (Cape Town, 1892).

H.H. Juta and C.H. Tredgold (eds.), Reports of Cases decided in the Supreme Court of the Cape of Good Hope, vol. X, part III (Cape Town, 1894).

A.N. Macfadyen (ed.), Statutes, Proclamations, and Government Notices in force in the Native Territories of the Colony of the Cape of Good Hope (Cape Town, 1907).

H. Tennant and E. Jackson (eds.), Statutes of the Cape of Good Hope, 1652-1895, 3 vols. (Cape Town, 1895); vol. 4 (1896-1900) (Cape Town, 1900).

IV PUBLISHED WORKS

Lord Acton, Lectures on Modern History, ed. H. Trevor-Roper (London, 1960).

Matthew Arnold, Culture and Anarchy, ed. J. Dover Wilson (Cambridge, 1932).

E. Barker, Political Thought in England 1848 to 1914 (London,1915)

C. Bolt, Victorian Attitudes to Race (London, 1971).

E.H. Brookes, White Rule in South Africa, 1830-1910: Varieties in Governmental Policies Affecting Africans (Pietermaritzburg, 1974).

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H.A.C. Cairns, Prelude to Imperialism: British Reactions to Central African Society, 1840-1890 (London, 1965).

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T.O. Elias, The Nature of African Customary Law (Manchester, 1956)

G. Feaver, From Status to Contract: A Biography of Sir Henry Maine 1822-1888 (London, 1969).

M.P. Golding, Philosophy of Law (Englewood Cliffs, New Jersey, 1975).

B.H. Harrison, Drink and the Victorians: The Temperance Question in England, 1815-1872 (London, 1971).

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T.B. Macaulay, Critical and Historical Essays (London, 1872).

J.W. Macquarrie (ed.), The Reminiscences of Sir Walter Stanford, 2 vols. (Cape Town, 1958 and 1962).

J.S. Mill, On Liberty, ed. G. Himmelfarb (Harmondsworth, 1974).

D.D. Raphael, Problems of Political Philosophy (London, 1970).

J. Rutherford, Sir George Grey: A Study in Colonial Government (London, 1961).

H.J. Simons, African Women: Their Legal Status in South Africa (London, 1968).

J.F. Stephen, Liberty, Equality, Fraternity, ed. R.J. White (Cambridge, 1967).

E. Stokes, The English Utilitarians and India (Oxford, 1959).

L. Thompson and M. Wilson, Oxford History of South Africa, 2 vols. (Oxford, 1969 and 1971).

D. Welsh, The Roots of Segregation: Native Policy in Natal, 1845-1910 (Oxford, 1971).

G. Wilson and M. Wilson, The Analysis of Social Change (Cambridge, 1945).

G.M. Young, Portrait of An Age: Victorian England (Oxford, 1936).

(The above is a select list and includes only those works considered directly relevant to the study.)

## V UNPUBLISHED THESES

C. Bundy, 'African Peasants and Economic Change in South Africa, 1870-1913, with Particular Reference to the Cape' (Oxon. D.Phil., 1976).

S.B. Burman, 'Cape Policies Towards African Law in Cape Tribal Territories, 1872-1883' (Oxon. D.Phil., 1973).

R.H. Davis, 'Nineteenth Century African Education in the Cape Colony' (Wisconsin Ph.D., 1969).

C.S. Manona, 'Captain Matthew Smith Blyth's Work in South Africa, 1869-1889' (Unisa M.A., 1973).

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C.C. Saunders, 'The Annexation of the Transkeian Territories, 1872-1895' (Oxon. D.Phil., 1972).