RECOGNITION OF CUSTOMARY LAW

Edwin W. Smith and A. Murray Dale: The Ila-speaking Peoples of Northern Rhodesia.

"And it is important to observe that changes in traditional customs, and the establishment of new customs, are due largely and probably mostly, not to the ruling chiefs, but to those who are the mouthpieces of the gods - the prophets. They are actually the law givers, and of course do not base their demands upon anything they are in themselves, but upon the authority of the god . We do not lose sight of the fact that a prophet may be promoted by a chief, who uses his alleged supernatural gift when his own power fails. It must not be thought, however, that every word uttered by a prophet proves acceptable; his decrees may hold for a time and then be neglected, or they may never be accepted at all: it depends largely upon the status of the seer, and attendant circumstances. One prophet, for example, gave it as a message from Leza that the use of the Kamwaya bush in scattering inconvenient clouds was to cease. But immediately afterwards two men on their way home were overtaken by a storm, and one of them plucked some Kamwaya twigs and frantically waved them above his head, to turn the clouds and thus enable them to get home with dry skins. His companion remonstrated, reminding him of the prophet's message, but the impious fellow continued, until presently there was a flash of lightning and he fell dead. This was accepted by all as a confirmation of the prophet's orders and the news quickly travelled through the country. It will be interesting to know whether in a few years the use of the Kamwaya has ceased. We are persuaded that many a custom, and many a change of custom, might, if we had the means of doing so, be traced to the inspiration of prophets".

Legal Fiction

Maine: Ancient Law. Pages 30/1

"any assumption which conceals or affects to conceal the fact that a rule of law has undergone alterations, its letter remaining unchanged; its operation being modified".

Natural Justice and Principles of Civilization

Lugard: Dual Mandate. Page 536

"The fundamental law, applicable alike to Europeans and Natives in all our tropical dependencies, is the common law and doctrines of equity, administered concurrently, and the statutes of general application which were in force in England at the time the administration was created.

"In some colonies, where a European code existed prior to the assumption of British rule, the fundamental law existing at the time was not changed, e.g., ... the Cape retains the Roman Dutch law.

"This fundamental law, in so far as it is applicable to Natives, is modified by the proviso that British courts shall in civil cases affecting Natives (and even non-Natives in their contractual relations with Natives) recognise Native law, religion, and custom when not repugnant to natural justice and humanity or incompatible with any local ordinance, especially in matters relating to land, marriage and inheritance. The Native courts administer Native Law, e.g., Zanzibar, India, Nigeria".

In 1849 Royal Instructions were issued to the Officer Administering the Government of the district of Natal which said:-

"We have not interfered with or abrogated any law, custom or usage prevailing among the inhabitants previously to the assertion of sovereignty over the said District, except so far as the same may be repugnant to the general principles of humanity recognised throughout the whole civilised world, and we have not interfered with or abrogated the powers which the laws customs and usages or the inhabitants vested in the Chiefs, or in any other persons in authority among them, but in all transactions between themselves and in all crimes committed by any of them, against the persons or property of any of them, the said Natives are to administer justice towards each other as they have been used to do in former times."

Despatch by Lord Grey, as Secretary of State for the Colonies" who said,

"It is not desired to remove any particular class of offences from the cognisance of the Native authorities merely on the ground that the offence itself is of a serious nature. It is desired only to abrogate unchristian and barbarous usages in dealing with offences. For example, when an imaginary offence was visited with punishment - such as witchcraft; when a serious offence was treated as excusable, such as homocide in certain circumstances; or when offences of slight moral character were invested with importance owing to superstition."

Ius Gentium
Pollock in Maine: Ancient Law. Page 74.

The ius gentium was a body of "rules administered by the Roman magistrates in causes where Roman Law proper was inapplicable by reason of the parties not being both Roman citizens or allies or otherwise".

"Many Roman legal formulas involved a religious element and for that reason, we may be pretty sure, were available for Romans only .....Similarly two strangers living under different laws of their own could not be judged by either of those laws any more than by Roman law." Hence the Ius Gentium.

Maine: Ancient Law. Pages 53, 49.

The rules were really "a collection of rules and principles determined by observation to be common to the institutions which prevailed among the various Italian tribes". i.e. "all the nations whom the Romans had the means of observing". According to the Institutes of Justinian "All the nations who are ruled by laws and customs, are governed partly by their own particular laws, and partly by those laws which are common to all mankind".

The Cape Commission on Native Laws and Customs of 1882/3 reported that

"the results of its enquiries and the bulk of the testimony received by it, clearly demonstrated that many of the existing Native 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 to the highest degree".

The Commission proposed only a new Penal Code (based on the Indian Penal Code) and regulations dealing with marriage and inheritance leaving untouched much of their customary laws as are not opposed to the universal principles of humanity. The Commission went on to say that the aim should be to wean the Natives from their customs and enable them in course of time to "emerge from an uncivilised condition and join the ranks of their fellow subjects enjoying the benefits of a more enlightened system".

Republican Law 4 of 1885 (Transvaal)

"Whereas the ignorance and habits and customs of the Native population of this Republic, render them unfit for the duties and responsibilities of civilised life .....be it enacted .....(that) the laws, habits and customs hitherto observed among Natives, shall continue to remain in force in this Republic as long as they have not appeared to be inconsistent with the general principles of civilisation recognised in the civilised world"..... All matters and desputes of a civil nature shall be dealt with according to this law and not otherwise, and in accordance with Native laws at present in use, and for the time being in force, in so far as the same shall not occasion conflict with the accepted principles of natural justice."

Lugard: The Dual Mandate in British Tropical Africa. Page 563

"In reviewing the findings of a Native court a nice discrimination is often required between unnecessary interference with Native custom on the one hand, and the violation of natural justice on the other. Thus the payment of blood-money in expiation of certain cases of homocide may not be repugnant to natural justice, and when admissable under Moslem law it has been ruled that interference is not necessary, though the penalty does not accord with our views. But to demand it from relations or fellow-villagers, where no connivance has been shown, would not be in accord with justice. Lifelong imprisonment for debt would be equally inadmissable.

"Some even of the devout Moslems who interpret the Koranic law are not immune from a lingering belief in the power of the "Evil Eye", and in their endeavours to give due regard to pagan custom are found to differ considerably in their treatment of witchcraft cases, whether it be the complaint of the person bewitched or the murder of a person supposed to be a wizard. The same difficulty is presented in a British court, and confronts the Governor in his exercise of the prerogative.

"It may, for instance, be in evidence that the ordeal by poison was actuated by a profound belief that it would be harmless if the accused were innocent. The accuser may or may not have been actuated by malice, and those who administered the ordeal may have had no option but to do so when it was demanded, or the accuser may have killed the supposed with in defence, as he believed, of his own life. Or twins may have been murdered, or even human sacrifice perpetrated to avert, as they believed, disaster from the village.

"The degree of criminality is lessened by the superstitious terror which prompted the crime, but the necessity for stamping out such practices compels recourse to deterrent penalties, and since fear of death was the motive, no less penalty than death will be deterrent. It appears to me, therefore, that the only course that an administration can follow is to see that it is thoroughly understood in every village that participation in such

deeds will involve the death penalty, while exercising the prerogative in any case in which any extenuating circumstances can be shown, and discriminating between wizards who exercise their supposed powers beneficently, or for gain or revenge.

"As a general rule, offences against the person are appropriately dealt with by a Native court, while offences against public order would be tried in a British court. Competent authorities assert that it is more in accord with Native modes of thought that the latter class should be regarded as private wrongs, and that actions for damages should be encouraged rather than trials for criminal offences.

"A British court would, of course, deal with all offences which are not such under Native law, or are not made justiciable by a Native court, by virtue of a by-law. Even if thus brought within the purview of a Native court, offences which we regard as serious may to them appear venial, and in such a casé they would preferably be dealt with by a provincial court."

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"Native Customary Law (even Koranic Law), speaking generally, regards offences as having been committed against the individual rather than against the community, and punishment therefore takes the form of vengeance and reprisal. An African despot regarded rebellion as a crime against himself, and he resorted to burying or burning alive, to successive mutilation till the victim expired, or to impalement. Witnesses and prisoners were tortured to extort evidence, or a confession of guilt. Imprisonment was rare, and could only be inflicted in a capital city possessing a dungeon. I have described in Chapter X the dungeon at Kano.

"The conception that the suppression of crime for the public benefit is the function of the State, and that it can be effected by punishments which are deterrent though humane, and by the reform of the criminal, while the inidvidual aggrieved has his own remedy in a civil action for damages, is one which has to be instilled into the rulers and the courts. The punishments inflicted upon the African by his own rulers were sufficiently deterrent, but chiefs complain that wherever the white man comes crime increases, and they are not allowed to inflict punishments which will check it.

DIVISIONS OF CUSTOMARY LAW

Maine: Ancient Law. Page 377.

"..... all the known collections of ancient law are characterised by a feature which broadly distinguishes them from systems of mature jurisprudence. The proportion of criminal to civil law is exceedingly different..... the inspection of ancient codes shows that the law which they exhibit in/quantities is not true criminal law ..... it is the law of Wrongs, or to use the English technical word, of Torts."
/unusual

Salmond: Jurisprudence. Page 117

"Civil justice amounts to a claim of right, in criminal justice it amounts to an accusation of wrong."

N.B. But in both cases the sanctions are enforced in respect of wrong doers.

Maine: Ancient Law. Page 378.

"The Law of Persons, which is nothing else than the Law of Status, will be restricted to the scantiest limits as long as all forms of status are merged in common subject to Paternal Power', as long as the wife has no rights against her husband, the son none against his father the infant ward none against the agnates who are his guardians." Page 326. "The point which before all others has to be apprehended in the constitution of primitive societies is that the individual creates for himself few or no rights, and few or no duties. The rules which he obeys are derived from the station into which he is born, and next from the imperative commands addressed to him by the chief of the household of which he forms part. Such a system leaves the smallest room for Contract. The members of the same family are wholly incapable of contracting with each other and the family is entitled to disregard the engagements by which any one of its subordinate members has attempted to bind it."

Lowie: Primitive Society (quoted by Tozzer, Social Origins and Social Continuities, Page 216.)

"The regulation of personal relations by the status of the individuals, the administration and inheritance of property within the family according to customary law, and the absence of contracts between individuals adequately accounts for the diminutive part played by civil jurisprudence as compared with penal law."

Motive or Intent
Lowie: Primitive Society, Pages 367/8.

".....criminal intent plays not nearly the same part in primitive law as in our jurisprudence ..... and after all qualifications are made it remains true that the ethical motive of an act is more frequently regarded as irrelevant in the ruder cultures than in our courts of justice".

Collective Responsibility

The unit is the group - the family, the clan or (as between tribe and tribe) the tribe. Satisfaction is sought from the unit as a whole and not from an individual in the unit.

To sum up, customary law is not divisable into the highly analytical categories of modern law; it is indeed one whole with sections shading into each other, with no clear line of demarcation between them. There are Sins which become Crimes as the central authority is strengthened; Delicts which tend to become Crimes on the one side and Torts on the other. Thus we can say that we have Crimes, Delicts and Torts. That is to say, Criminal and Civil Law, but Civil Law is restricted by the narrow range of contractual relationships, and that both Criminal and Civil Law are profoundly affected by the principle of Collective Responsibility and by the extent to which Motive is disregarded

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