ENGLISH.

# APPLICATIONS OF NATIVE LAW.

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In September 1835 Sir Benjamin Durban entered into an agreement with the Chiefs of the Kafir tribe of Cungwa, i.e. the Amagqunukwebe, whereby they became subjects of the King of England and covenanted to live in submission to the general laws of the Colony, which, he pointed out, peremptorily forbade the pretended offence of witchcraft.

It was, however, a condition of the agreement that the Colonial law "did not, and would not, interfere with "the domestic and internal regulations of the Chiefs for "their tribe and families, nor with their customs" - no breach of Colonial law being involved - "the exercise of "which would be free to them so long as they might desire "to retain them." The agreement together with other similar instruments was annulled, and His Majesty's sovereignty renounced, in the following year. Treaties as with independent Nations were substituted in 1845, in which, however, the Chiefs engaged that Christian converts and mission Natives within their dominions should not be disturbed "for refusing to comply with the Kafir customs of "witchcraft, rainmaking, polygamy, circumcision or forcible "abduction or violation of females."

Apart from this abortive agreement of 1835, the earliest instance of the definite recognition of Native law by the Sovereign power in South Africa appears to be contained in Paragraph 28 of the Royal Instructions to the Officer Administering the Government of the District of Natal, dated 8th March, 1848, and proclaimed in Natal by the Lieutenant Governor on the 21st June, 1849. Her Majesty's will and pleasure is expressed as follows:- "we have not "interfered with or abrogated any law, custom or usage pre-"vailing 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 recognized throughout the whole civilized world, "and we have not interfered with or abrogated the powers "which the laws, customs and usages of the inhabitants vest-"ed in the said 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 adminis-"ter justice towards each other as they had been used to do "in former times."

Pursuant to this Proclamation Ordinance No. 3 of 1849, Natal, was enacted, repealing the exclusive operation of the Roman-Dutch law and providing (a) for the appointment of persons with powers to control, revise and direct the administration of justice according to Native law; (b) for appeals to the Lieutenant Governor and Executive Council; (c) for the appointment of the Lieutenant Governor as Supreme Chief, and (d) prescribing that all crimes committed by any Native against the person or property of another Native, as well as all transactions between Natives, should

be cognizable under Native law. These last provisions were modified by a section providing that all crimes by Natives which may be deemed repugnant to the general principles of humanity recognized throughout the whole civilized world should be subject to prosecution only in the Colonial Courts and by the Crown Prosecutor. These wide and unusual powers provoked the question whether they were not ultra vires the common law which they purported to exclude. To remove all doubt the Ordinance was re-enacted as an Order-in-Council by Her Majesty. In his despatch forwarding the Order, Lord Grey, the Secretary of State for the Colonies, intimated that the Lieutenant Governor should observe the principle of maintaining Native usages as far as this could reasonably be done. He further interpreted the modification as to "the general principles of humanity" which had been taken over textually from the Royal Instructions of 1848. It was not desired, he wrote, to remove any particular class of offences from the cognizance of the Native authorities merely on the ground that the offence itself was of a serious nature. It was 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 homicide in certain circumstances; or when offences of slight moral character were invested with importance owing to superstition. It should be noted that in this the first application of Native law in South Africa under civilized Government, the intention of those who framed the moderating proviso as to the principles of humanity and civilization, aimed solely at limiting the enormities of the criminal side of Native law.

By a law of 1869 power was taken in Natal to regulate marriages by Native custom, and regulations were issued in that year consisting of 39 sections, which prescribed the essentials and forms of such marriages, the necessity of registration, the amount of dowry or lobolo, the ensurance of the woman's consent, the duties of the Chiefs in this regard, and so on, and which were in fact a code of the law to be observed in connection with the important province of Native law dealing with marriage and divorce. The regulations are expressed to be a modification of Native marriage customs with a view to fitting the natives for a higher state of civilization, and of raising the social and moral condition of the people, especially of the female portion.

The avowed principle of codifying Native law was first introduced in Natal by Law No.26 of 1875, entitled a law to make better provision for the administration of justice among natives and for the gradual assimilation of Native law to the laws of the Colony. This law repealed the Ordinance of 1849: it definitely deprived the Chiefs of criminal jurisdiction: it limited the scope of Native law on its civil side to the extent that the same should not be recognized when of a nature to work some manifest injustice, or when repugnant to the settled principles and policy of natural equity: it provided for the appointment of European Administrators of Native law, and of Native Chiefs to administer justice in civil cases: it established a Native High Court and a Native Court of Appeal: and it abolished distinctions between Natives and Europeans as regards crime, excepting in respect to political offences, faction fights and special offences under Native law. This law further made provision for a Board which, within a period of two years was to reduce to writing the principles of Native law as administered in Natal. When the

Board was constituted, the members recorded their view that they could not express with detail and by way of hard and fast lines as law, usages which, though often or generally acted upon, were still not so much laws as in native public opinion, fashions or proprieties or partial customs. They stated that the main elements of Native law hinged upon a few leading principles, female subjection, paternal power, primogeniture, polygamy and adoption. But they thought it was not feasible to attempt to define the authority of Native Chiefs and Headmen in their tribes. They then formulated the code of Native law of 1878 consisting of 68 sections, which was published by Government Notice No.194 of 1878 and became the law of Natal until superseded by the code of 1891. This code is law in Zululand to-day, though it was stated by the Chief Native Commissioner of Natal in 1913 in evidence before a Select Committee of the Senate that it had never been enforced there and that "in Zululand they exercise unwritten Native law." # It is unnecessary to examine the code beyond pointing out that, since it omitted to elucidate the authority of the Chiefs, which had been retained under the Act of 1875, it was clearly imperfect as a code and left unregulated a very important province of control. It may here be observed that subsequently the Zululand Chiefs were given a limited criminal jurisdiction under Native law in cases of offences committed by Natives of their own tribes. By Law No. 44 of 1887 provision was made for a substituted code of Native law to be drawn up by a Board, which should have powers to propose alterations and amendments, and also to innovate; and it was further provided that administrative discretion should be exercisable in regard to any subsequent amendments of this new code, which should be susceptible of modification by proclamation. # The Code was duly drawn up but it was enacted by a statute, Law No.19 of 1891, which restricted the power of amendment to the legislature so that the elasticity originally intended was lost. This code of 1891 is divided into 26 chapters and consists of 298 sections. It has been amended and added to by eight supplementary statutes, and it consequently constitutes a most imposing body of law. It certainly contains numerous provisions which are alien to Native law and which have no doubt been inserted with a view to convenience of administration, such for instance as those relating to the registration of marriage, and of debts arising out of marriage customs with a prescription of claims in this connection; such also as the grounds allowed for divorce. It goes further than this and defines certain offences against decency and morals as criminal acts specially penalized. This does not seem customary Native law, nor is it to-day South African Law, though at one time the Roman Dutch Courts regarded matrimonial misconduct as an offence, confirmed with the idea in part no doubt by the Canon law. # Another provision of the code which it would be difficult to reconcile with Native law is that, commonly called "Isibalo", whereby the Supreme Chief is empowered to call upon all natives to supply labour for public works. This is a matter specifically apart from service for tribal defence, or the service due to the Chief, and rather calls to mind the definition given by the Transvaal Chief Justice in 1903 of Martial Law, which he said, was not so much law as the will of the Commander. # It is not necessary to criticize the code, but if it contains alien elements of Colonial law, canon law, martial law etc., and if there are many omissions and innovations, it cannot be invoked as a compendium of Native law outside the local limits where it runs as a statutory enactment.

In theory Natal Native law is not limited to the code. The Native High Court in 1902 laid it down that the code is mainly affirmative and declaratory, and does not embrace all the juristic practices of the Natives, and the Court referred to section 80 of Act 49 of 1898 :- "all civil cases "shall be tried according to Native laws, customs and usages, "save so far as may be otherwise specially provided by law, "or as may be of a nature to work some manifest injustice, or be repugnant to the settled principles and policy of "natural equity." The Judge President significantly pointed out how apt this is to be overlooked.

"That there is need for amendment of the code is "abundantly established by the evidence" was a dictum of the Natal Native Affairs Commission in 1907. It will not be contested that the Natal Native Code is rigid statute law; and therefore perhaps liable to the stricture of the Commission when they remark: "in alluding to the supplanting, "by statutory or restrictive law of the adaptable and "dynamic force of human personality in the control of a simple and semi-savage people, there is need to give a shock to the "political instincts of the dominant race."

The machinery of the operation of law consists of Courts; for ecclesiastical law, ecclesiastical Courts, for martial law, Courts martial; for Native law, Native Courts. Courts are correlative to law, and courts, though creatures of statute, necessarily import into their various ambits the momentum of their own exertions and the idiosyncracies of their proper superiors of revision and appeal. In brief, their birth is of the legislature, but their development of the judiciary.

The successive system of Courts for Native law in Natal have been as follows:-

1. Under Ordinance No. 3 of 1849: Native Chiefs retained their jurisdiction and Courts of Officers were established to administer Native law. These Courts took cognizance of all civil and criminal cases as between Native and Native, excepting only in the case of crimes repugnant to the general principles of humanity. The Lieutenant Governor was later by Law No. 21 of 1874 given power to extend the jurisdiction of Native Courts to crimes committed by Natives against Europeans. Appeals lay only to the Lieutenant Governor and Executive Council.
2. Under Law No. 26 of 1875: Native Chiefs were restricted to a civil jurisdiction and Courts of European Administrators of Native Law were established. The Administrators were subsequently given a summary criminal jurisdiction by Law No. 21 of 1878. The cases from the Chiefs' Courts could be re-tried before the Administrator. A Native High Court was established, of first instance and also of appeal from the lower Native Courts. This High Court consisted of a specially appointed Judge assisted by Assessors as occasion required. Appeals lay from this High Court to a Special Court of Appeal consisting of the High Court Judge, the Secretary for Native Affairs and a Judge of the Supreme Court.
3. Under Act No.13 of 1895: the Native High Court was abolished and Native cases were made appealable to the Supreme Court.

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4. Under Act No. 49 of 1898; the Chiefs retained their civil jurisdiction as re-affirmed and modified by the Code, with appeal to the Magistrate. The Administrators Courts were merged in the Magistrates' Courts, but Native cases were triable under separate Rules. Appeals lay to a New Native High Court consisting of three (subsequently four) Judges, which could function under one Judge as a Circuit Court either in appeal or first instance. The full High Court was the final Court of Appeal, and the jurisdiction of the Supreme Court was excluded.

5. To the last, which is the existing, system was added by Act No. 1 of 1911 appeal in certain cases to the Appellate Division of the Supreme Court of the Union.

Totally different was the germination of the system of Native law as operating to-day in the Great Transkeian Territories of the Province of the Cape of Good Hope.

Within that Colony, the Native was scarcely known to the Legislature, excepting incidentally as a troublesome neighbour, uhtil after the Kafir war of 1846 when the Colonial Border was finally extended from the Great Fish to the Keiskama River, and Sir Harry Smith vested the adjacent territory between that river and the Great Kei in Her Majesty the Queen, in what he described as military possession. The land was held of the Queen but was allocated among various Native tribes under the High Commissioner as "Great Chief" and he appointed four resident agents to advise the tribal Chiefs. in 1847 he instructed these residents or Commissioners as they were called, to receive reports of depredations from the Colonists, and to seek redress through the medium of the Chiefs and "Kafir Law", which, the innocently said, was ample and severe. The territory was a Native Protectorate, into which of course numerous Europeans penetrated, but it was only after the Native War of 1850-52 that the Government of British Kaffraria was established. This Crown Colony Government had its own legislative machinery steadily shaping Proclamations and Ordinances upon lines of European inspiration, and, with one exception (succession), almost exclusively regulating matters of European concern. The "ample and severe Kafir Law" referred to in 1847 fell into oblivion and was ignored, or operated unrecognized among the tribes.# By the Cape Act No. 3 of 1865, British Kaffraria was incorporated into the Colony and Cape legislation was generally substituted for the District laws. This first great accretion to the Cape was an absorption rather than an annexation. The Native Province was swallowed and assimilated by a Government "which knew not Joseph", and there was no question of conserving such traces of Native atmosphere as might previously have persisted.# The next adventure in the direction of Territorial expansion was Basutoland, which was annexed in 1871, but under very different conditions. By Proclamation of the 12th March, 1868, Sir Philip Wodehouse had admitted the Basutos into the allegiance of Her Majesty, and had declared them British subjects and their territory British Territory, intimating that it would probably be annexed to Natal. He informed the Basutos that, although it was not intended to interfere with Native customs more than was necessary, certain matters would have to be brought into some conformity with Christian and civilized usages. Sir Philip forwarded to the Secretary of State draft regulations which, he

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he said, had been discussed with the principal men of the Basutos and with the French Missionaries, and which he proposed to issue. Among these the following is of interest:- "The Administration shall for the present be conducted in "conformity with the Native usages of the tribe." These draft Regulations were elaborated and published under Government Notice of the 13th May, 1870, which contains very precise indications of the respect with which Native law was regarded, especially in connection with the important province of marriage, divorce, dowry and guardianship. Basutoland was annexed to the Cape Colony by Act No.12 of 1871, and it is in this instrument that first appear the principles of the retention of pre-existing local law, and the exclusion of Native Colonial legislation, together with the Conference upon the Executive of legislative powers, which were so widely and successfully adopted in most of the subsequent expansions of the Cape Colony. Proclamation No. 51 of 1871 was issued, containing some additional Regulations but substantially reflecting those of 1870. In 1872 a Commission of the Basutoland Magistrates was appointed to enquire into and report upon the Native laws and customs of the Basutos, and the amendments recommended by this Commission were embodied in the revised Regulations published by Proclamation No. 41 of the 29th March, 1877. Basutoland was of course disannexed from the Cape and replaced under the immediate authority of the Crown in 1884, but in the meantime the system evolved for that Territory had struck root and flourished in due course in the great Eastern Tracts taken over by a series of annexations, which now constitute the Transkeian Territories.

Briefly then this is the machinery which has produced the system of the Cape Native Territories; an Act of Parliament annexing the country, leaving existing laws in force, excluding the operation of Colonial law and conferring upon the Governor the power to legislate by Proclamation. Almost simultaneously appears a set of fundamental Regulations and subsequently, as experience may counsel, these regulations are amended, specific Colonial Statutes are adopted and applied after revision if necessary, Native law is moulded and a body of jurisprudence is built up, all this by Proclamation. In the fundamental Regulations that which most concerns the present subject lays down the civil jurisdiction of the Magistrates for whose appointments provision is made, and this is the marrow:- "all such suits and proceedings shall be dealt with "according to the law in force at the time in the Colony of the "Cape of Good Hope, except where all the parties to the suit "or proceedings are what are commonly called Natives, in which "case it <u>may</u> be dealt with according to Native law....." This principle has been retained in consolidating legislation.

It will be noted that there is here no attempt at any elucidation of Native law, which is regarded as a thing known or accessible. It is left to the Court to decide whether any particular suit shall be heard under Colonial law or Native law and the Magistrate's decision is of course guided by the nature of the claim. There has emerged, however, a basic element which must enormously modify Native law proper, which was stated in the judgment of the President of the Appeal Court in 1902 in the case of Nosaiti versus Xangati: "The "Court is aware that this is in conflict with Native custom, "but when Native custom is repugnant to justice and equity... "it must give way."

In the original Regulations it was made optional for

for persons married by Native custom to register the first such marriage together with the dowry consideration with the Magistrate, and the Cape Supreme Court held in 1892 that the object of this registration was to bring the first marriage by Native custom under Colonial law, thus invalidating subsequent marriages during the subsistence of the first. However, the Native Appeal Court in 1897 deviated from that ruling on the ground that the Native law governed the matter and could not be impeached, and it laid down that polygamous marriages were valid in law when contracted by Natives according to Native forms. It is certainly an arresting spectacle, that of the Chief Magistrate asserting the authority of Native law in contradiction to the finding of the Supreme Court. The bold and sympathetic energies of the Transkeian Native Appeal Court have heaped together a mass of judgments, many of them discriminated on Native advice according to diverse tribal customs. These judgments have been collected and published by Messrs. Warner, Henekel and Seymour, while others are in process of publication. Not only so, but the judgments of the Appeal Court are periodically circulated to Magistrates. A cursory survey of the reports might convey the impression that decided Native cases consist of little but a dismal catalogue of adulteries and seductions, but nevertheless there is a great deal of social discipline depending upon the treatment of these disputes, which are by no means the exclusive subjects of decision. It is largely from the records of the Appeal Courts that Mr. W.M.Seymour compiled his text book on Native law and custom published in 1911, in the preface to which he states that "knowledge of "pure Native law is not of such great importance to the "practical lawyer as hitherto" owing to the innovations which are taking place. The Native law operating in the Transkei may be regarded as case law, or law founded on a consistent series of judgments. This system seems to allow of a fecundity of growth, an efflorescence, which may well attract attention in connection with these alien conceptions, if the ultimate ideal of Government be to merge all law in the established jurisprudence of the Union. Refinements and complexities seem to supervene, as is suggested by the numerous references to the customs of the tribes of Griqualand East. Bearing in mind McCall Theal's description of the fragmentary and haphazard occupation of that territory, known before annexation as Nomansland, it is perhaps surprising to find it so distinctly recognized as a field of differentiated Native custom.

The Court system of the Territories has undergone but little serious change. The intervention in disputes of Chiefs or Headmen, originally acquiesced in, but contemplated as apart from and irrelevant to the Magistrate's judicial position of first instance, has largely fallen into abeyance, owing no doubt to the number of Magistrate's Courts which it has been found possible to maintain. Appeals which at first lay to the Chief Magistrate's Court, could also be taken to the Superior Courts of the Colony, but so far as regards cases under Native law a Native Appeal Court with exclusive jurisdiction was constituted by Act No. 26 of 1894, consisting of the Chief Magistrate with two Magistrates as Assessors. A study of recorded cases reveals the considerable extent to which the Court is influenced by the opinions of Native Assessors. Criminal law in the Territories is administered under a Penal Code passed by the Cape Parliament in 1886.

It is not alone in the Transkeian Territories that the Cape Colony has its experience of Native Law. By Act No. 41 of 1895 British Bechuanaland was taken over from the Imperial Authority and annexed to the Cape. Not primarily, however, as a Native area. The European interest was considerable and no doubt mineral possibilities were borne in mind, so that the Colonial law was made to apply. Large Reserves were laid off

off for the Native tribes and in these the operation of Native law was retained. By Section 31 of the original Bechuanaland Regulations the Chiefs had been given exclusive jurisdiction in all civil cases between Natives of their own tribes, and by Section 32 they had been allowed to retain jurisdiction in all criminal cases excepting certain grave felonies. Appeals lay from the Chief to a Court consisting of himself and the Resident Magistrate, with a further appeal to the Chief Magistrate. On the abolition of this latter office, the further appeal fell away, and as there could be little satisfaction to a litigant in appealing to a Court where the Judge of first instance sat with power effectively to oppose any modification of the original judgment, it may be held that there was virtually no appeal from the Chief until provision was made for appeals through the Courts of Magistrates to the Local Division of the Supreme Court by Act No. 7 of 1924.

The inception of Native law in the Transvaal is again different. The origins of the South African Republic were settlements of emigrants from the Cape Colony anxious to manage their own concerns in their own way. At first they probably had little opportunity to elaborate systems of law in the desolated regions which they occupied and such precepts as "thou shalt not kill" and the sanction "by man shall thy blood be shed" would suffice for their primitive needs. But the community grew and it was in June 1848 that Lord Grey ascribed "more regularity and greater "strength to that rude system of government which has grown "up of itself among these people from the necessity of their "position." Their earliest concern was to settle the Natives who in the Districts then occupied had been dispossessed and scattered by Mzilikazi, and in 1853 their Commandants were empowered "to grant lands to Kafirs, where "necessary, for occupation subject to good behaviour and "obedience." Instructions were issued in 1858 amongst which it was laid down that natives were to "live under "their Chiefs," presumably according to their own usages. Subsequently there were numerous sporadic regulations and the restrictions at the time considered necessary as regards Natives in contact with Europeans, but foreign to the present subject and of no particular interest; until finally Law No. 3-1876 was enacted. Provision was made for the demarcation of Native locations, for the recognition or selection of Chiefs, who should receive a salary, and for the appointment of Native Commissioners and Sub-Commissioners, but a significant section of this law contained the following:- "In furtherance of morality, the purchase of women or "polygamy among Natives is not recognized in this Republic "by the law of the land." It would seem that the Republican legislators had decided to reproduce the conditions of the Cape Colony Proper in this regard. There, Native marriage was ignored together with all native law. Here Native marriage was definitely excluded from judicial cognizance. In the Cape the forms of European marriage were available to the Native; in the Republic this was not the case. There was little time to judge the effect of this policy since early in the following year the Transvaal was annexed to the Crown. In the instrument of annexation, Sir Theophilus Shepstone referred to the failure of Native policy and the practical independence of the Native tribes as among the reasons for that step.

During the occupation a law (No. 11 of 1881) was passed expressed to be "for the better government of, and "administration of justice among, the Native population of "the Province." After sweeping away the Republican Native legislation en bloc it reproduced almost textually the Natal Law of 1875, excepting in regard to appeals, which lay through the Magistrates, in their capacity as Administrators of Native law, to the Secretary of Native Affairs; and excepting also in regard to the framing of Rules, which devolved upon the Governor in Executive Council. Also no question of codification was emphasized although it was made practicable. After the retrocession, this law was adopted by the South African Republic almost unaltered and appears in the Statute book to-day as Law No. 4 of 1885, so that the origin of the application of Native law in the Transvaal is identical with that in Natal. The preamble of Law No. 4 of 1885 and the retention in force of Native law, subject to the proviso as to the principles of civilization, are, saving the vagaries of translation, in the actual language of the Royal Instruction signed at Buckingham Palace in 1848. But the development of the system has been in steady divergence from the original intention.

Law No. 4 of 1885 (a poor translation of Law No.11 of 1881) lays down that the laws, habits and customs hitherto observed among the Natives shall continue to remain in force as long as they have not appeared to be inconsistent with the general principles of civilization recognised in the civilized world. It prescribes, further, that all matters and disputes of a civil nature between Natives shall be dealt with 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 evident injustice or be in conflict with the accepted principles of natural justice. It then provides that the State President as Paramount Chief shall exercise over all Chiefs and Natives in the Republic all power and authority which in accordance with Native laws, habits and customs are given to any Paramount Chief. And it carefully excludes Native disputes from settlement by other machinery than its own. This machinery consisted of Courts of Native Chiefs and of Native Sub-Commissioners, with an appeal to Courts of Native Commissioners, and a final appeal to the Superintendent of Natives, whose judgment would be executable only after confirmation by the Government. It seems that here was a system eminently suited to the needs of the Native population and conformable, though perhaps in an improved form, with principles operating elsewhere among the Native peoples of South Africa.# Perhaps an echo of the discarded pre-annexation policy reverberated in the Circular issued in 1895 by the Superintendent to the effect that the purchase of women for money or cattle was a contraband dealing upon which the Native Courts could not adjudicate. This instruction was rather infelicitously phrased. Money was foreign to the transaction: there could of course be no sale of women, and though the marriage custom might be open to abuse the Courts were there to prevent such abuse. The lobola or dowry is, generally, not recoverable under Native law proper by action against a defaulting husband, but by the custom of Ukuteleka or detention of the wife, to which the woman would necessarily be a party. As regards the reclamation of lobolo in

in certain cases of hardships, the Attorney-General of the Transvaal gave his opinion in 1905 that this was certainly not opposed to the accepted principles of natural justice. At the worst this was but a Circular which could have been withdrawn by a more happily expressed document, and in the case of Marroko vs. the State the High Court of the Republic in 1893 had held that native marriages were valid. An occasion to remove all difficulties arrived with the South African War, when in 1901 the legislative power lay in a single hand, but the opportunity was disregarded. Unconsciously as it were, the constitution of a New Supreme Court extruded the old detachment of the Native Courts. Instead of an immediate rectification the appellate jurisdiction of the Superintendent (Secretary for Native Affairs) was abandoned to the Supreme Court, together with his jurisdiction of divorce in regard to Native civil marriages, which had become possible in 1898. Some years later, to complete the disruption appeals from Native Chiefs were taken from the Native Commissioners and handed over to the Supreme Court too. There has been no appeal from a Chief to the Supreme Court. It would seem impracticable when the Chief probably cannot write his name and when the Court requires a record for consideration, but applications have been made to the Supreme Court by litigants from the Chiefs' Courts. An applicant in 1910, who had obtained judgment before a Chief, applied to the Supreme Court for process in aid of execution. The Judge held that the applicant had better proceed by way of action, but the case did not come to trial. No doubt the assets of the complainant were swallowed up in the initial costs of the application. The Republican system was effectively short-circuited, for though the Native Courts remained, disjointed and impotent, the Native law evaporated. As Mr. Justice Mason remarked in 1915, "it is true that one result of that neces-"sary conclusion from the invalidity of polygamous marriages "is to render ineffective to a great extent the provisions of "Law No. 4 of 1885 preserving as far as possible Native customs" and in the same case Mr. Justice Wessels said, "When we have "rejected these, we have so undermined the fundamental Native "customs that there is very little left of their customs as "to marriage and status." Now Native civil law is practically built up upon the family life which derives entirely from marriage and status. It was not in the falling of a leaf that the consequences of the momentous changes achieved were recognized. The balanced scheme of procedure was dislocated in 1901. In 1902 the infelicitous Circular of 1895 was reiterated, and in the same year the Tax Ordinance subjected the polygamous Native to an additional impost in respect of his additional wives. The cynicism that extorted revenue from a practice which the law rejected as immoral could hardly have been intentional. Indeed, in 1905 a Judge of the Supreme Court is reported to have expressed surprise in the Circuit Court at Middelburg, when told by the Native Commissioner that instructions had been received not to hear cases dealing with Native marriages. His Lordship remarked that the instructions were most extraordinary as the Commissioners had special jurisdiction to try these cases which could not be taken away. A timid suggestion was circulated in 1905 intimating that Native officials might adjudicate in regard to the return of dowry when the quasi-husband had been deserted without fault on his own part. However, the law as interpreted by the Supreme Court according to European canons prevailed and a series of decisions culminating in 1910 made it clear that 99 per cent of the Native marriages in the Transvaal were ineffective for any purpose of legal right. Certainly Native officials endeavoured to temper the wind to the shorn lamb as far as possible. No doubt if Native

Native Courts continued to hear the cases submitted, they did not adjudicate, but merely arbitrated! If they re-tried cases already heard by a Chief, no doubt they assumed that previous proceedings did not purport to be judicial! But palliatives of this nature could not continue indefinitely, and by Act No. 7 of 1924 the right of appeal from theChief to the Native Commissioner or Sub-Commissioner was re-established.

In the Orange Free State, generally, the position is similar to that in the Cape Colony Proper, and there is no recognition of Native Law, excepting that the offspring of Native Unions are regarded as entitled to inherit, and in the case of separation, rights of guardianship are ascribed to the parent other than the one who is responsible for the severance (Act No.26 of 1899 section 28). A further exception in the Free State was made when the tribe at Witzieshoek was received within the jurisdiction of the Republic. In this location the Chief is recognized as exercising a minor civil jurisdiction over his following and an appeal lies to the European Commandant of the Reserve.

Perhaps there is no need of a pedantic uniformity, but the question obtrudes itself whether it is desirable that in the system which must bridge the gap from barbarism to legality, as commonly understood, there should be so great varieties of practice and of right. As a concrete instance - should the great wife of a Native be the woman he elects as such, as in Zululand; or the first he marries, as in Natal; or the woman indicated by the Court on the merits, as in the Territories; or, as in the Transvaal, no wife at all, except for the purpose of fiscal exaction?

To summarize:

There is in Zululand a disregarded code and the Native unwritten law, applied by the Chiefs and the Magistrates, with appeal to the Native High Court.

There is in Natal a rigid hybrid thing called codified Native law, and also the disregarded unwritten law, applied by the Chiefs and the Magistrates, with appeal to the Native High Court.

There is in the Territories Native case law, ~~and~~ amended from time to time by the legislator, applied by Magistrates, with appeal to the Native Appeal Court.

There is in Bechuanaland unrestrained Native law applied by the Chiefs with recently established appeal to the Magistrates and the Supreme Court.

There is in the Transvaal, native common law, maimed and emasculated according to the European canon, applied by Chiefs and Sub-Commissioners, with appeal as the case may be, to the Sub-Commissioners or to the exponents of the White man's law.

There is in the Cape Colony proper no native law of any kind, excepting an indulgence as regards succession enjoyed in restricted areas under antiquated and defective

statutes, which lack machinery to function as regards fixed property - Cases under these statutes are decided by Magistrates, with appeal to the Governor-General.

There is in the Orange Free State the Native law of succession and certain rights of guardianship, and in the single area where tribal conditions really prevail, the limited operation of native law under the jurisdiction of the Chief with appeal to a Native Affairs official.

In one of these systems or in an adaptation of several of these systems there may be the fount of justice and of wisdom, but it is hard to suppose that each system is working for the best in its several sphere.

It is conceivable that applications of Native law might beneficially be resolved into an application of Native law, and that this application should be neither amorphous nor multiform, but should be consonant as to main principles, susceptible of flexibility as to details, progressive as to tendency on lines of civilized evolution, and operated through the instrumentality of such Courts as, by a process of elimination based upon experience, the study of half a dozen differing systems may recommend.

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