

Recognition of Native Law.

Commission of 1883 acknowledged that a system of native law had from time immemorial been in use - not the capricious will of a chief.

This attitude confirmed by 1903-5 Commission

Select Committee 1911. (Union) Recommended that such legislation be introduced as would consolidate recognition of native custom as accepted in various parts of the Union.

1806. Rights of Colonists to Roman Dutch Law expressly declared. ∴ analogous rights of natives.

It is a general rule of British Law that in a conquered or ceded country, which has laws of its own these remain in force until changed by some competent authority & British common law does not hold. (This principle has been accepted in Indian rule)

Intergeneration rather than Territorial Law may have to be accepted.

Various acceptances have held in theory & practice in different parts of the country. The 1927 Administration act consolidated & amended.

1835 Urban made treaties with chiefs in which they agreed to live in agreement with the general laws of the colony, it being expressly pointed out that witchcraft was illegal.

It was later stated that internal customs would be permitted to them as long as they wished to retain them. But Christian converts were not to be compelled to cut

"witchcraft, mummification, polygamy, circumcision
forcible abduction & violation of females"

[These various treaties were annulled as policy
changed]

Transkei 1879. Colonial Law both civil & criminal
excepting when all parties set native in which case
the Magistrates might in their discretion apply Native
Law & Customs. Law of the Defendant's home to be applied
Special Proclamations may except any native customs.

Note. There have been many intestate cases both

- a) as to whether in a particular case a Magistrate
should or should not use such discretion
- b) as to when in a particular case some point
arose so repugnant to the principles of common law
that Magistrates would not take these into count
- c) when a lobola case seemed to be treating a woman
too much as a chattel.

1902 "When Native Custom is repugnant to justice & equity
it must give way" Polygamous marriages voided.

Ciskei Natives in the locations are nominally & legally
subject to the Common & Statutory Law of the C.P. but a
great deal of Native Custom has been followed & the
Magistrates & Superintendents have without judicial
authority administered Customary Law & Native Leadership
have dealt with many petty cases with no provision
for the enforcement of their decisions.

Also an extra-judicial court was established at
King Willaams Town to settle disputes under native law
on the distinct understanding that the parties will
submit to its decision.

1864 special legislation with regard to succession.

Native Appeal Court 17th of 1894. Chief Magistrate & 2 assistant
Magistrates

1886 Special Penal Code.

British Bechuanaland.

In annexation arrangements were left to leave the Chiefs exclusive civil jurisdiction in their own territories & Criminal except for major offences. Appeal has been one of the difficulties here.

"In so far as Native Law is consonant with Humanitarian principles"

Cape Provs. (include Ciskei)

No recognition of Native Law unless special legislation.

Trausoral

1858. Natives to live under their Chiefs - presumably according to their own customs.

1876. Demarcation of locations - recognition & selection of salared chief. Appointment of Native Commissioners & Sub-commissioners.

"In furtherance of morality, the purchase of women, or polygamy among natives is not ~~to be~~ recognised in this Republic by the Law of the Land"

(Note. at the Cape European Marriage was available - scarcely so in the Tol)

1881. During Brit. occupation. Introduced Natal system

1885 } Republican Govt. enacted that Native ^{only} Law remain in force "as long as they have not appeared

See Vol. p. 7. to be inconsistent with the general principles of civilisation recognised in the civilised world"

President -> Supreme Chief. System of Courts of Native Chiefs & sub-commissioners with appeal to Commissioners & Supt. of Natives.

1895. Circular issued by Supt. that purchase of women was contraband

Finally many decisions of courts established that most native marriages in Tol. are not recognisable in the courts.

Natal.

1848. Instruction & Administrative offices for Natal.
Native Law to be accepted "except so far as the same may be repugnant to the general principles of humanity recognised throughout the whole civilised world."

Powers of the Chief to remain
Natives are to continue to administer justice towards each other as in former times.

- 1849. Special Ordinance providing
 - a) For persons to be appointed to administer justice according to Native Law.
 - b) For appeals.
 - c) Lieut. Gov. as Supreme Chief
 - d) Crimes between natives & civil transactions to be cognisable under Native Law.

Crimes "repugnant to the general principles of humanity recognised throughout the whole civilised world" to come to the Colonial courts.

Interpretation "to abrogate unchristian & barbarous usages... as when an imaginary offence such as witchcraft was visited with punishment; when a serious offence of homicide was treated as excusable; when offences of slight moral character were visited with punishment owing to superstition (intend simply to control criminal enormities.)"

1869. Special law to control native marriage
Registration
lobolo
consent &c. modified from pure native towards civilised.

1875. Codification of Native Law.

"To make better provision for the administration of justice among natives & for the gradual assimilation of Native Law to the law of the Colony"

Deprived Chiefs of criminal jurisdiction. Limited scope of Native Law. Provided officers for administration. Native High Court & Court of Appeal.

Arranged for codification

1878 Code of Native Law amended in

1891.

Actually this was not all 'Native' Law but contained alien elements of colonial law, canon law & martial law.

47/1898. ^{Sect. 250} Civil cases between natives acc. to Native Law & Custom. Save as otherwise provided or "repugnant to" or unknown to Native Law.

Zululand Subject to Natal Code of 1875.

Actually Native Customary Law is considerably administered.

O. 4. 5.

Somewhat the same position as in the Cape proper.

No recognition of Native Law except

- a) Offspring of Native Nations may inherit.
- b) Rights of guardians protected.
- c) Special recognition of the Chief at Orbyeshoek in minor civil cases.

The Position has now been considerably altered by the passing of Act 38 of 1927.

See Sects. 11, 12, 20 & Ch. V.

Ordinarily the Courts apply the Common & Statutory laws but the Cts may in their discretion apply Native law & custom

n.b. Influence of Transvaal Proc. 145/1923. Sec 104

Defn of Native law

Trans. Proc 142/1910: Native law = Native usages & customs as practiced by Natives & recognized & admin^d by the Cts of the Transvaal Territory

But also it is qualified by the of general policy of recognizing ^{only} those laws & customs which are not opposed to the principle of public policy & natural justice

Important also

Sectn. 24, Subsecs 1 & 2

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