

"BANTU STUDIES DEPARTMENT"

BANTU LAW.

1. We have seen in the general lectures that human beings are never perfectly adapted to their own environment, and that therefore, there are sanctions controlling-conduct, that is, results which are to be expected from the performance or non-performance of actions. These actions may be positive or negative, and they are either individual or social. (See notes on early development of law).
2. When any sanction is organised, and is administered by a special body which we call a judicial authority, we get a legal sanction.
3. Bantu Law is very different from ours in many respects, and it is essential to keep clear the differences if we wish to get at the real spirit of this law.
4. The first most important thing to realise is, that Bantu judicial authorities are not concerned with crimes. The crimes recognised in Bantu Society are so universally abhorred, that the whole society rises up to stamp them out; they are not subject to the jurisdiction of the Court, but are treated as a serious ritual pollution, endangering the social welfare.

The chief crimes in Bantu Society are:-

(a) treason against the chief, (b) witchcraft, (c) incest, (d) the crime of being a "bad lot", that is, an incorrigible thief or a sexual pervert.

(a) A man is never tried for treason among the Bantu. The mere suggestion of such behaviour is sufficient, and the chief on the slightest rumour will send an Imvi to stamp out the whole village of such a person. Treason against the chief is the same thing as treason against the whole people, for the chief is the symbol of the unity of the people, and as such he is sacred.

(b) Witchcraft:- Witchcraft is a great crime among the Bantu. It is not tried by judicial process. No number of witnesses could establish the guilt or innocence of a wizard, for witchcraft is due to the working of unseen forces, and the real person in whom these forces are concentrated can be discovered only by an appeal to those unseen forces themselves. A man may be totally innocent of any intention to do harm, yet he may be the most pernicious wizard; hence, when a man is accused of witchcraft, ignorance of the crime, or innocence of intention, is no excuse whatever. Further, no human being may know from whom this evil power is radiating. It may be from a live person or from a dead one. Hence, the first thing to do is to discover unmistakably the centre of this evil-radiating power. Preliminary investigations are made by the diviner and the smeller-out, but the final test must always be made on the accused himself, with some infallible indicator, like the poison drink or some other form or ideal. The belief is that, in the

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ordeal a powerful concentration of spiritual power is obtained, and that this will immediately kill, or otherwise reveal, anyone who is so defiled that he is incapable of standing the contact with this powerful force. (See Junod for a good description of the preparation of the poison drink). Such is the treatment of crimes among the Bantu. The whole community reacts to an intolerable oppression of pollution. The chief is always concerned in a witchcraft trial because he represents the people as a whole, but the whole process is enti entirely different from a judicial trial.

(c) Incest: - There is no action taken against people who commit this crime, but they are looked on askance by the whole community. They are shunned as we might shun a leper, for they are thought to be filled with evil and, should any calamity come upon the community, such people would be considered the cause of it, and would be stamped out as wizards and witches. In some tribes the risk of such pollution is sufficient, and the culprits are stamped out at once most cruelly.

(d) A "bad lot": - A thoroughly bad person is often killed by his own kinsmen. Such killing is a ritual act undertaken after special purification ceremonies have been performed, and after the killing, further purification ceremonies are carried out. (Our best information on this head is from the Akamba and the Akikuyu; Hobley and Dundas).

The offences treated by the judicial authorities of the Bantu, are delicts and torts.

A delict is a wrong action offending the community (thus involving the ritual sanction), and it damages someone, (thus involving the sanction of revenge - e.g. homicide, or the restitutive sanction - e.g. theft).

A tort is any action which leads, or may lead, to the restitutive sanction. We should most certainly say that homicide is a crime when it is a case of either murder or culpable homicide; so also with us, theft is a crime and is punished by the public authorities. Not so among the Bantu. Both these offences are wrongs against individuals or against sibs; the public authorities take cognisance of them only at the request of these wronged persons. At the same time the spilling of blood is a ritual offence, and brings pollution on the person who spills it, whether he does it in war, in self defence, or in intentional revenge. In all cases of homicide, therefore, we have the working of two sanctions, the ritual sanction and the sanction of revenge. A man can never purge himself of ritual pollution. There are always specially qualified men, - medicine-men or elders - who have to purify such a man, and it is essential that he be purified, else his own life will be endangered and he will be a source of pollution to all around him. But further than this, he

is liable to be attacked by the friends of the men he has killed. The constant disturbance of the public peace caused by the working of the sanction of revenge, has led to the gradual control of this sanction by some central body authorised by the community as a whole, so that it is for the control of this sanction that judicial authorities come first to be established.

6. Among the different Bantu peoples we find a great many different methods of dealing with cases of homicide, the particular method depending, to a great extent, on the amount of central control that has been established among the people.

In some of the more backward Congo tribes and also in parts of East Africa, sib vengeance is supreme. Any injury to a sib member is revenged at whatever cost to the life of the whole. A life is demanded for a life, an injury for an injury, (lex talionis). No account is taken of intention. The sib has suffered a loss and must have its revenge, whether the deed was an accident or a deliberate murder. Further, the whole sib of the accused is held responsible, (collective responsibility).

In more developed tribes like the Herero, the Akamba, the Akikuya, and many other tribes of East Africa, we have some measure of tribal control. We find the chief and his council acting for the benefit of all the sibs alike. Either the accused appeals to them for protection, or the wronged, if they be weak, appeal to them for compensation. In either case, in the interests of the tribe as a whole, the judicial authority tries to get the wronged sib to accept compensation in the form of cattle, or in the person of another live human being. At this stage it still rests with the contending parties whether they agree to compensation or whether they insist on recourse to the vendetta. There is as yet no differentiation between accidental and intentional killing.

In South African Bantu tribes we have reached a further stage. Here, all injuries to persons are considered as injuries to the chief, for all tribesmen are regarded as belonging to the chief. Not much distinction is made between accidental and intentional killing, for in both cases the chief is injured. (See Maclean's Compendium) - Now, the chief is a public person; he is representative of the state, so we are beginning to get public recognition of offences, and the punishment of crime.

It is only among tribes like the Bushongo, however, that we get a clear recognition of the difference between a deliberate murder which is regarded as a crime and is punished by death, and accidental killing which is treated as a tort and is compensated by the transfer of cattle or other valuable goods.

7. Responsibility:- It is a very clear indication

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of the stage of advancement of a peoples to see how far they make a distinction with regard to responsibility. In less developed peoples we have objective responsibility. Injury has been done and someone must be made responsible. Someone must compensate the sib, no matter who. In Bantu societies this objective responsibility is somewhat limited, in that it will only be the sib of the man who committed the deed who will be expected to redress the injury, but collective responsibility applies throughout, for the whole sib is held responsible, or at least the whole household to which the offender belongs. Where it is the household which is held responsible, we find a principle prevailing which is found throughout Bantu Law, viz., that the principle is always responsible for the acts of an agent, or for the acts of a dependent. In Southern Bantu Law, only heads of households are responsible people. Women and children are never responsible in the eyes of the law; men only, when they marry and found a new homestead. Hence the kraal head is, in all cases, responsible for payment of compensation for acts done by his dependents.

Theft:- Theft is a delict, not a crime. It is reprehensible, but it is an offence against individuals or a sib, not against the state, unless it be theft from the chief, when it becomes treason. Incurable thieves are considered an intolerable pollution to a community, and are killed ritually. Collective responsibility applies in the case of theft as in the case of homicide. In all cases of theft the restitutive sanction comes into play, but, further, there is punishment in the form of a heavy fine for what is considered a reprehensible action. Theft from other tribes is not reprehensible unless it be detected, and the only redress for such thefts is war.

*also communal
responsibility*

We must notice that there is a distinct difference in the treatment of a delict committed against a private person, and a delict committed against the chief. Where there is a chief or a sacred king, we are beginning to get the idea of offence against society as a whole, and against its representatives. Such offences are treated more as crimes than as delicts.

Native Civil Law, that is, the law of torts, deals chiefly with marriage and inheritance. We have discussed Native marriage in other connections. Three types of cases come up chiefly before the courts: (a) disputes connected with lobola, and (b) disputes connected with the customs of the levirate, and (c) the sororate. (See notes on these points).

The Inheritance Customs of the Bantu differ from the tribe to tribe. The two most important distinctions are connected with the matrilineal and the patrilineal principle. Among our Southern Bantu, the customs are perfectly regular and simple. Each

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"house" inherits property allocated to it during the lifetime of the father, and the eldest son of the chief house is the principal heir and the residuary heir. If there is no son in this house, one of the "rafters" to this house supplies the heir, and only in case of default here, will the left-hand house succeed.

10. Bantu Judicial Authorities:- There are two chief types of judicial authority among the Bantu, (a) the democratic type, which we find in the north, e.g. among the Akikuyu and the Akamba; (b) the autocratic type, which we find in its fullest vigour among the people in the Highlands of East Africa and in parts of Rhodesia and the Southern Congo.

Angus Sanki

In the democratic type, we find a body of elders constituting the judicial body. These elders go through a series of initiations which gradually endow them with the necessary spiritual power, and with the necessary training for the judicial work. The properly initiated men are known throughout the country, and a group of them can be collected by the accused and the accuser, and asked to adjudicate on any case.

In the autocratic type the chief is the judge. His will is supreme and he forms the final court of appeal. In these cases we have to do with a sacred king or chief whose word is law. He represents the unity of the whole people, and any disobedience against him is sacrilege, and is one of the worst crimes. We find this type of king among the Baganda, the Bakitara, the Bushongo, the Awemba etc. The king has officials of state who try cases in their districts, but the king is the final court of appeal.

In South Africa we have rather a modification of this type. The chief is the judge, but he is always aided by the older men of the tribe, by his indunas, and it is always advisable for him to listen to their advice if he wishes to be popular with his people.

11. Evidence:- The facts of a case of recent date are not often in dispute before a native tribunal, and witnesses are made good use of. Where old disputes are brought up, or where the culprit is not definitely known, things become more complicated. Loyalty to a kinsman is much more vital to a native than the telling of the truth. Further, few natives can conceive of the rejection of a suit for lack of evidence. The theory of the Bantu is that it is for an accused man to clear himself. Since this is so, almost all the Bantu resort to an appeal to the unseen forces of nature in cases of doubt. The accused will swear some solemn oath that he is innocent, or he will submit to some form of ordeal to prove his innocence. These ordeals are very varied in type.

Another practice is for the judge to solemnly curse an unknown offender in the full expectation that this curse will act sooner or later. Many a culprit reveals himself rather than expose himself to the powerful influence called into play by the curse.

12. Enforcement of the decision of the Court:-

Bantu courts rather arbitrate than decide a case on evidence. But even when they have given a decision, it is an expression of tribal lore rather than a sentence which they enforce. In many tribes it lies with the claimant to obtain his redress. However, tribal custom is so sacred that it is not prudent to go against the decision of the court once it is given. In the democratic tribes, the elders are full of *mana*(?) and they can call down a fatal curse on the defaulter. Then, even if the culprit does not acquiesce in their decision at once, he is sure to do so as soon as he gets ill or feels that things are going against him.

In the tribes where the chief is the judge, decisions given in his court are, of course sacred; any refusal to comply with them would be tantamount to treason, and would be treated as such. The punishment is death, and confiscation of the whole property of a man.

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[Bantu Law is through and through a matter of ritual, and it is failure to realise this that has stultified all our attempts at codification, and has made the European treatment of Native cases so unsatisfactory.]

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Reading:-

Chapter in Lowie on Justice, Report of Commission of 1883 on Native Laws and Customs, The Evidence, Passim; Junod; Smith and Dale; Hobley: Journal of the Royal Anthropological Institute, Vol. 1921, Dundas.

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Collection Number: AD1715

SOUTH AFRICAN INSTITUTE OF RACE RELATIONS (SAIRR), 1892-1974

PUBLISHER:

Collection Funder:- Atlantic Philanthropies Foundation

Publisher:- Historical Papers Research Archive

Location:- Johannesburg

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