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BANTU LAW AND WESTERN CIVILISATION IN SOUTH AFRICA

A Study in the Clash of Cultures

AN ESSAY

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BY

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PREFACE.

1. In our ever narrowing world the matter of culture contacts, the impingement of one civilization upon another, becomes increasingly important. In no sphere is this impingement more important than in legal matters where the new civilization has behind it power and sanctions and prestige, and in no place is the resulting disintegration and disturbance of the social equilibrium more clearly seen than in the Union of South Africa. When Jan van Riebeek and his brave band of followers landed at the Cape of Good Hope in 1652 for the purpose of establishing there a settlement which would make Table Bay a more useful port of call for Dutch ships on their way to and from India and the East, the southernmost point of Africa became one of the most interesting centres of culture contacts and race relations in the whole world. The objects of their settlement which included providing fresh food for the passing ships brought them into contact with the Bushmen and later the Hottentots who inhabited that part of the country: but in any conflict that arose the issue was soon settled in favour of powder and shot. It was not until the latter part of the 18th century that the white settlers who were

beginning to look upon the land as their own by indisputable right encountered more formidable opponents in the Bantu who coming from their home somewhere in the eastern part of Central Africa were migrating southwards driving before them the Bushmen and the Hottentots. Then followed a succession of more serious so-called "Kafir Wars", first with the Xosas in the Eastern part of the Cape of Good Hope, then with the Zulus in Natal, the Basuto under Moshesh in the Free State, and the Bapedi under Sekukuni in the Transvaal, until the end of the end of the 19th century when it may be said that the Bantu tribes were finally overthrown and made subjects of the different Colonial governments. But although peace was now established all over the country, the conflict was by no means at an end. It had simply taken a different form, no less grave and requiring no less courage and wisdom, albeit it was fought with no death-dealing weapons. It was a conflict of cultures rather than one of physical prowess which had set in, the problem being how to build up a South African Nation from the divergent elements of the population with their differences in cultural heritage

and racial background.

One of the commonest results of the contact of cultures is social disintegration, especially where a primitive culture such as that of the Bantu is juxtaposed with one which abounds in the subversive influences of present-day European civilization. The Bantu in an attempt to adjust themselves to modern society with its aggressive individualism have had to or are called upon to give up conceptions of the fitness of things which they held dear in the old days, with the result that the equilibrium of Bantu society has been seriously disturbed, and the individual Native finds himself out of step with the ordinary march of events in his environment. In no aspect of life is this disturbance of the social equilibrium more disconcerting than in the field of legal relationships. When the Bantu find that their form of marriage is not recognised and that the result of the coming of the white man has been to bastardise their whole race, when the hereditary chiefs for whom they have fought and died in the past have been deprived of their administration and judicial functions and are now merely "amapoyisa" (constables), when they find their parental authority

1. For an interesting study on this question see . . . . "I am Black"
2. See . . . . "Legal Plight of Bantu Women" — "Race Relations"
3. Shropshire "Bantu Women under the Natal Code of Native Law"
4. Paton, A "Cry, the Beloved Country".

reduced by the white man's law to mere paternity, can they be blamed for becoming disconsolate and dejected? Wistfully they yearn for the old days when their social solidarity could withstand outside attack, when they were "men" and not "boys"; otherwise for them life is not worth living. One cannot help feeling that unless this question of the conflict of Native Law with European law is properly settled, native society will be in constant danger of collapse, and all the best elements of Bantu culture--of ubuntu (humanity as conceived by the Bantu)--will be irretrievably lost.

Law is concerned with the regulation of the rights and duties of the members of a particular society. Every society develops a legal system in which is enshrined what it regards as the best arrangement for the maintenance of its solidarity, for the prevention of its disintegration and for its proper adjustment to the environment in which it has to work out its existence. Owing to environmental, racial and other differences as well as to historical accidents, we find that different societies evolve different legal systems. Thus when two legal systems are inextricably juxtaposed, there is a

lack of congruency between them which leads to social confusion and maladjustment and inwhich the student of culture contacts takes the deepest interest. In South Africa we have at least three dominant groups which are endeavouring to harmonise the legal difficulties caused by their juxtaposition. First we have the Dutch who since the settlement of the Cape by Van Riebeek in 1652 have lived under Roman-Dutch Law as their common law: secondly the English who since their occupation of the Cape in 1806 have brought with them English Law, especially its highly developed criminal law and procedure, and finally the Bantu tribes with a more archaic system of law, but one which was eminently suited to the conditions under which they lived and which they had followed from time immemorial. The legal aspect of the South African Problem then is to harmonise these three systems without doing violence to the genius of any one and without depriving any section of the population of the sheet-anchor of their social life, the cohesive factor of their moral code. The writer is interested in the unravelling of this skein of events from the Bantu point of view.

The question is a very practical one at the present

subject that calls for monographic treatment, the writer proposes to limit it by confining his attention to Native Law proper. There are two ways in which the legal aspect of the Native Problem in South Africa could be approached. One is by a consideration of all the legislation affecting the Native which has been passed by the white man in his endeavour to control native affairs in different parts of the country. This is in the main a study in administration, which would concern itself with Pass Laws, Labour Laws, Land Tenure, Electoral Laws, etc. The other is by showing how law as conceived and developed by the Bantu prior to white contact has changed, is changing and seems likely to be changed in future by the impinging of western ideas of law and order upon Bantu conceptions. This is in the main a study in judicial administration and social adaptation, which would deal with customs which have the effect of law in native society, the methods and results of changing these by superimposing western ones upon them. It is the latter task that is essayed in the following pages. The writer of this essay being a South African and a member of the Bantu race, has come into direct contact with the native customs described and

commented upon. His acquaintance with the European side of the problem has been derived, inter alia, from his study of Law for the LL.B. of the University of South Africa which deals very largely with Roman-Dutch Law, the common Law of the country. He has also drawn upon his experience in teaching the subject of Native Law to native students preparing for the Higher Primary Teachers' Certificate of the Natal Education Department, many of whom are drawn from sections of the country in which Native Law and Custom is still of vital importance.

3. In addition to his experience the writer has drawn upon the following sources in the preparation of this essay:-

(a) Treatises on General Jurisprudence dealing with both modern and primitive systems of law.

(b) Monographs on the Bantu tribes such as Junod's "Life of a South African Tribe". Although these are generally concerned with practices which do not all have the force of law, yet they throw light on the underlying conceptions of the people regarding legal rights and duties.

(c) Law Reports of special Courts set up to deal with Native Cases, e.g. the Native High Court in Natal, the Native

Appeal Court in the Transkeian Territories and the recently established Union Native Appeal Courts.

(d) Reports of Government Commissions on Native Laws and Customs and Native Affairs generally. Of these the most important are the Natal Native Commission 1881, the Cape Native Laws and Customs Commission 1883, the South African Native Affairs Commission 1903-5 and the Native Economic Commission 1930-1932.

(e) Treatises on native judicial administration. A few of these exist and although they deal with the law of different tribes, they have been extremely useful in helping one to discover some of the underlying conceptions of Native Law.

(f) Statutes, statutory codes of Native Law, Proclamations, Rules and Regulations bearing on the native judicial administration.

(g) Journals and magazines devoted to the study of African Culture. Of these the Journal of Bantu Studies, the African Society Journal, Africa, and the publications of the South African Association for the Advancement of Science have been most helpful.

The Essay is divided into five parts. First comes

a section in which an attempt is made to define and discuss the nature of Native Law and to summarise its characteristic features from the anthropological point of view. Then a description of the content of Native Law in the main departments into which all law is generally divided is attempted. Then follows a brief history of the recognition of Native Law prior to Union showing how the different Colonial Governments and their Courts tried to grapple with the problem. How the Union has since 1910 gradually taken hold of the matter, culminating in the passing of the Native Administration Act 38 of 1927, its amendment in 1929 and the revision of the Natal Code of Native Law in 1932 is the first part of the story of the next chapter which ends up with a discussion of the effects of the Native Administration Act on different aspects of Native social life. The last chapter attempts to evaluate what is being done on this problem in South Africa, and essays the attractive, if hazardous, task of looking into the future of Native Law and Custom.

4. Acknowledgements.

Grateful acknowledgement is made to Yale University and

the Phelps Stokes Fund for providing the scholarship which made it possible for me to spend the academic year 1933-1934 in the Department of Culture Contacts and Race Relations in the Graduate School of Yale University where Professor Charles T. Loram and his students, many of whom had had experience in legal and administrative work in other countries where similar problems obtain, have helped to develop and clarify my thinking. I am also indebted to the Faculty in the other departments of the Graduate School, especially those of Anthropology and Ethnology. Without the resources of the Sterling Memorial Library and the really excellent library of the Law School I should have been under great disadvantages in being so far away from official documents and records.

I have also derived profit from a tour in the Southern States of the United States with Professor Loram and my fellow-students where one observed, perhaps from a slightly different angle, the difficulties which arise when two different racial groups are under the same political and legal system, but where there

is considerable discrepancy between the systems as they exist on paper and as they are carried out in practice. This tour was made possible by the cooperation of Yale University, the Phelps Stokes Fund and the Carnegie Corporation.

While I have tried to make use of all the resources of Yale University the statements and views expressed in this essay are my own, and throughout this effort I have been actuated by a desire to make a contribution, as a Native South African, to the cause of race harmony in South Africa where black and white are seeking to find a way of living together in amity.

CHAPTER 1

THE NATURE OF NATIVE LAW

1. Law and its Evolution

"Man is a political animal", says Aristotle. By this is not meant that man is naturally interested in politics, as we use the term today: but rather that no man is, nor indeed can be, a thoroughgoing individualist. Wherever man is found, he is always found living in more or less

close association with other individuals like himself, forming part of a group or a society. The community to which he belongs may be a small or a large one, a family, a clan, a tribe, a nation or an empire. In any event the individual is bound to the rest of the members of his group by ties which are not found to the same extent among other than political animals. "We have needs both bodily and spiritual which are rooted in our human nature, and which only society can supply." * How far and in what sense man is or ought to be self-sufficing is a radical problem of ethics and religion into which we do not propose to enter here; all we are concerned to point out is the fact that for his proper development man seems to regard membership in a society of some kind as inevitable."

One of the most important results of membership in a society is the evolution of rules of conduct which are intended to regulate human action. In the course of his association with his fellows, the individual acquires rights and privileges which determine his relationships with other members of his group. As Hartland points out, "such aggregates whether of few or many, whether temporary or perman-

* Bosanquet; "Education in Plato's Republic" - p. 33

ent, necessitate rules governing the relations of the individuals composing them to one another and to the aggregate, and the relations of the aggregate to the individuals composing it to similar aggregates and to alien individuals in general. Without these rules the assembly or the band would be a mere agglomeration of individuals guided only by their individual wills: it could not continue to exist. Such governing rules are the laws which the individuals and aggregates alike obey". *

2. Law and Bantu Society

Law as the Gateway to a People's Mind. One of the best ways of getting to know something of the mind of a people is through a study of their legal system: for in it we are apt to find enshrined what the society concerned considers or has considered most worthy of preservation among its customs and practices. As Salmon so well points out, in these customary laws we find embodied principles of truth, justice and public utility. Consequently it is well that courts of justice in seeking for those rules of right and wrong which it is their duty to administer should be content to accept those which have already in

* E.S.Hartland: "Primitive Law" p.1

their favour the prestige of long existence, rather than attempt the more dangerous task of fashioning a set of rules for themselves by the light of nature. The national conscience may well be accepted by the courts as an authoritative guide; and of this conscience national custom is the external and visible sign.* But this notion of law as a gateway to the mind of people is not only true of customary or unwritten law. It is also true of statutory law. We can,by a study of the statute law of any country get a fair idea of the national conscience of the country concerned, but undoubtedly this statement can be made with greater truth regarding that section of the law of a people which is the result of unconscious evolution over a long period of time, namely their customary law.

The Existence of Law in Bantu Society. This evolution of Law of which we have spoken above took place among the Native tribes of South Africa prior to the arrival of the white man. For many generations before white occupation there had been in vogue among these people a system of jurisprudence which was simple but well defined and eminently suited to the conditions and the needs of a

* Salmond J. "Jurisprudence" p.208

primitive community. It was the mistake of those who first came into contact with them and were responsible for the administration of justice among them to fail to recognise the existence of this system of law which had regulated the lives of the Bantu from time immemorial. The fact that this law was unwritten and therefore comparatively inaccessible made it difficult for early administrators to lay their hands upon its basic principles; consequently it need occasion no surprise that they yielded to the temptation of applying to the Bantu as well as to the rest of the inhabitants of the country Colonial Law which was in reality Roman-Dutch Law, to which they could have ready access in the pages of Voet, Grotius, Van Leeuwen and other authorities of the common law of Holland.* But although Native Law was unwritten "its principles and practice were widely understood, being mainly based upon customary precedents embodying the decisions of chiefs and their councils in bye-gone days, handed down by oral tradition, and treasured in the memories of the people. This law took cognizance of certain crimes and offences: it enforced certain civil

* Roman-Dutch Law is no longer the common law of Holland, having been replaced by the Napoleonic Code at the beginning of the 19th Century.

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 principles or rules".* A knowledge of the customary law of the Natives of South Africa ought to be particularly valuable to the missionary and the administrator both of whom are generally concerned with the introduction of new forms of conduct among the Bantu. Any new rules of behaviour imposed upon a people by an external authority of this kind are always likely to come into conflict with the rules already in vogue among them and which have the advantage over the new of being clothed with the halo of tradition. Native Chiefs prior to the arrival of the white man were charged with the duty of administering the customary law of their respective tribes. Occasionally a chief tried to bring about a reform by means of legislation: but very seldom did the change brought about in this direct fashion have the desired effect. Contrary to the general belief engendered by the despotism of Native chiefs like Chaka, "Natives have not been subject to capricious laws made by a chief,

* Whitfield, W.B. "South African Native Law" p2

but to laws emenating from the national will, which laws have been administered by a chief."* Therefore when Europeans impose upon the Bantu laws which are not regarded by them as being the result of the working of their national will, they are apt to cause confusion and disappointment and lead to evasions of the law which they do not respect as they do their own. As Salmond points out, "The existence of an established usage is the basis of a rational expectation of its continuance in the future. Even if customs are not ideally just and reasonable, even if it can be shown that the national conscience has gone astray in establishing them, even if better rules might be formulated and enforced by the wisdom of the judicature, it may yet be wise to accept them as they are, rather than to disappoint the expectations which are based upon established practice."**Such arguments as the foregoing have been used by students of Native affairs in South Africa in advocating the recognition of Native law throughout the country, as we shall see in a later chapter. Their arguments have not fallen on deaf ears entirely; for by the Native Administration Act 38 of 1927, with its

*Whitefield, W.B. "South African Native Law" p.2
**Salmond, J. "Jurisprudence" p.209

amendments, Native Law has now been granted fuller recognition in South African Courts than it enjoyed in the Colonial governments prior to Union. It is the purpose of this study to trace, after a brief outline of Native Law as it existed prior to white contact, the development of Native Law after white contact, showing the changes which have been introduced both by judicial interpretation and by act of parliament in an attempt to harmonise Native Law with the Law applied to the rest of the inhabitants of South Africa.

3. Native Law and Laws affecting Natives

I. Definition of Native Law. The expression Native Law is generally used in two senses in South Africa. On the one hand by Native Law is meant the indigenous system of customary jurisprudence existing among the various Bantu tribes of South Africa. This law was in existence prior to the arrival of the white man and in spite of the impact of western civilisation on the Bantu the observence of this system of jurisprudence by the majority of them has not yet been impaired to any considerable extent. This may be called Native Law proper or Original Native Law. On the

other hand the expression Native Law may be used to designate those Laws which have been passed by the various South African legislatures and intended primarily to affect the Natives as a special group among the inhabitants of the country. A good example of a law affecting Natives as a class is the Pass Law which makes it obligatory for a Native to carry on his person under circumstances specially laid down in the law concerned a document permitting him to do certain things such as being abroad at night in a town after certain hours, looking for work, travelling from one area to another, etc. A law such as this which is the result of the European belief that it is necessary to control the movements of Natives and which does not form part of the customary law which was in force prior to white control of the country may be called a <u>law affecting Natives</u> to distinguish it from proper Native Law. But there is a third sense in which the expression Native Law may be used, and this is the meaning which we shall find attached to the term Native Law more and more in the future, especially now that Native Law has received the recognition of the courts of

* Brookes, E.H.: "History of Native Policy" p.172

South Africa. This meaning or definition is to be found in Proclamation No. 142 of 1910 which is in force in the Transkeian Territories. In Section 1 of the Proclamation, subsection 2(d) Native Law is defined as the usages and customs as practiced by Natives and recognised and administered by the courts of the Transkeian Territories. A very important distinction is made here in that in order to bring any Native practice within the meaning of this proclamation it must be shown not only that it is a custom of the Natives but it must also be one that is recognised and administered by the courts mentioned in the section. In other words no custom that the courts refuse to recognise can be regarded as part of Native Law, notwithstanding the fact that it may be practiced by the Natives. As already pointed out this is probably the meaning which will ultimately be given to the term Native Law, for whenever Native Law has been accorded recognition either prior to or since Union it has always been found necessary to reserve to the court the right of saying what portions of Native Law shall be recognised. Such customs as seemed to the court to be repugnant to the principles of natural

justice or public policy or humanity or civilisation in general were denied recognition. The Select Committee on Native Affairs appointed by Parliament in 1911 to go into this matter reported as follows to the House of Assembly:- "Your Committee recommend that legislation be introduced admitting of the recognition by Courts of Law of such Native Laws and customs as are already embodied in the law in force within certain* parts of the Union." This recognition has been granted by the Native Administration Act 38 of 1927 in the following terms:-

"Notwithstanding the provisions of any other law, it shall be in the discretion of the courts of Native Commissioners in all suits or proceedings between Natives involving questions of customs followed by Natives, to decide such questions according to Native Law applying to such customs except in so far as it shall have been repealed or modified: Provided that such Native Law shall not be opposed to the principles of public policy or natural justice: Provided further that it shall not be lawful for any court to declare that the custom of lobola or bohadi or other similar custom is repugnant to such principles". (Section 11 (1) of

* The italics in this section are the writer's

the Native Administration Act of 1927) It is quite clear that the Native Law contemplated by this section is not on all fours with Native Law as it existed among the Bantu prior to the arrival of the white man. It excludes from recognition any customs which have been repealed or modified, presumably either by statute or by judicial interpretation; or which have been or may in future be regarded as repugnant to the principles of natural justice or public policy. But it is noteworthy that this section has restored recognition to a custom (i.e. the Lobola custom) widely observed among the Bantu and which had been denied recognition by some of the Supreme Courts of the Provinces notably in the Transvaal in Rex vs Nalana (1907, T.S 407), in Rex vs Mboko (1910, T.S.445) and in the Cape Province proper in Ngqobela vs Sihele (10 S.C.346) all of which cases tended to invalidate marriage according to Native custom as being inconsistent with the principles of civilisation. Thus we have the three meanings of Native Law

(1) Native Law as the Law affecting Natives as a class, e.g. the Native Administration Act of 1927 which does not (in general) affect Europeans* (or other non-Natives such as Coloureds or Asiatics)

* Some of the sections of the 1927 Act enacted are of general application and do not affect Natives only.

(ii) Native Law as meaning the customary law in vogue among the Bantu and the result of unconscious evolution independent of foreign contact.

(iii) Native Law as recognised and enforced by the courts of the Union of South Africa. This will differ markedly from (ii) especially in the future.

It seems idle to imagine that Native Law will not change with the passing of time. As Brookes points out, "Native Law cannot remain stereotyped in its present state, if we do our judicial work properly, unless Native progress is absolutely checked. Law is the index of civilisation. The day will undoubtedly come when the majority of Natives will look on polygamy as anomalous and abnormal, if not criminal. The day may come---though this is far more doubtful---when they will take up a similar attitude as regards lobola. It would be idle to pretend that Native Law is a perfect system, or that Native society will never change from its present state. And even if Government does nothing to encourage change, yet the influenne of the missionaries, the example of European institutions and customs, and

the slow process of natural growth will undoubtedly effect important changes. But at the same time there is no great reason why Native Law should be assimilated in all points to or amalgamated with, European (i.e. Roman-Dutch) Law.* The third meaning of the term Native Law which we have shown to be the one contemplated by the Native Administration Act of 1927 seems to imply the gradual assimilation of Native Law within the South African system of jurisprudence as a whole, but students of Native Law seem to be agreed that such a state of affairs need not certainly eventuate. While they are prepared to admit that with a change of the social order of the Bantu from a communal to a more individualistic one European legal and other forms will come to be adopted by them more and more, it appears as if there need never be a complete assimilation of their laws with those of the Union of South Africa. This is particularly true of the Native Laws of inheritance and succession which with minor exceptions are every bit as reasonable as those of other legal systems.

* Brookes, E.H.: "History of Native Policy" p.202

4. Elements of Compulsion in Law.

There are two important elements in law which must be noted. In the first place the prominent idea of all law is compulsion.* Some form of compulsion and control is essential for the realisation in human conductof the idea of justice; but this compulsion or enforcement need not be carried out by any determinate body. The essential element is not so much the nature of the enforcement as the personal and public recognition of the particular type of enforcement as being effectual. Thus for example a law may have a non-material means of enforcement such as the possible displeasure of the departed ancestors, but this is no less important than the imposition of a fine in cattle, for in both cases the result is the same, namely that the person sought to be affected is compelled by the sanction to obey the law. Any definition of law which is to be regarded as complete must therefore include obligatory rules in primitive societies which would not be covered by a definition which presupposed a material sanction only. Legal arrangements are but a variety of social organisation in which it has been evolved.

* See Wille: "Principles of Chinese Law" 2nd ed. p. 2 and the authorities quoted on p. 7.

The other important element involved in law is the ethical element involved in the administration of justice, for the primary purpose of law is to uphold justice and to maintain rights--to regulate the rights and duties of the members of a society. The rules of law are the principles of right and wrong as recognised and enforced by a particular society. That is why the problem of the clash of cultures as far as law is concerned is so important. Each person born into a society becomes the centre of a whole complex of rights and duties based upon the sense of right and wrong of the people to whom he belongs. But when two cultures come into contact with one another, we get two circles of rights and duties that are not congruent surrounding the same individual and it is in this lack of coincidence between rights and duties in the two systems that is responsible for the maladjustment and the disturbance of the social equilibrium.

Relation of Law to forms of Social Organisation.

We have noted above that when we examine the legal system in force in any country or among any people, we always find that there is a close relation between the

type of law evolved and the type of society which has given rise to it. Law finding its ultimate origin in the customs of a people is an expression of their deepest feeling about the rightness and wrongness of things, and therefore it is not surprising that law varies with the type of social structure with which we are dealing. Hobhouse in his "Morals in Evolution"* says there are three fundamental principles according to one or other of which societies are generally organised with the consequent development of a different type of law in each. These fundamental principles he calls (i) The Principle of Kinship, (ii) the principle of Authority, and (iii) the Principle of Citizenship. They are of course not mutually exclusive, and it is probably not inconceivable that traces of each principle may be found in operation in every form of society, only in differing degrees and with different emphases. We need not stop to inquire as to the relative merits of the principles as far as proper government is concerned, nor as to the probable order of their evolutionary development. Suffice it to say that these principles give rise to different types of political organi-

* Hobhouse, L.T. "Morals in Evolution" Vol 1. Chapter 2 pp. 48-78

sation and different systems or complexes of rights and duties..

Under the principle of Kinship we find that the society is based upon the blood tie, real or fictitious. This tie takes the forms of common descent and intermarriage. Descent may be reckoned through the mother only, or through the father only or through both parents. Those closely related form groups which keep together for mutual defence and protection and other common purposes, when organised like an extended family under the eldest male or someone in his place for a clan. The clan is connected with other clans in part by multiplication which causes subdivision, in part by intermarriage, so as to form a tribal or quasi-national union. Under mother right the ties formed by intermarriage cross and conflict with those of the family. Under father right they rather supplement one another Both forms of society are consecrated by religious or magical beliefs, totemism being specially associated with the maternal clan, and father right having formed a basis for the strong development of ancestor worship.

The Principle of Authority* gives us the following

* Modern examples of authoritarian form of government include Nazi Germany, Fascist Italy and Communist Russia

forms of society resting ultimately on force or force transmitted into authority. (a) The Absolute Monarchy where the king is divine and lord without restraint of the persons and properties of his subjects. This form has most vitality in relatively small and barbaric communities.

(b) The Feudal Monarchy, suited to wider areas where power is delegated, and the governing class form a hierarchy.

(c) The Empire*, formed by the aggregation of kingdoms, overstepping national bounderies and exhibiting very varying degrees of units and local freedom.

As to the nature of the Government, the conception of a moral duty to the governed develops in proportion to the degree of unity achieved, but throughout law is conceived as based upon authority, and the social system on the subordination of class to class. In this order a religious sanction is found, generally in the special association of the rules with the deity, often also in the semi-divine character of the ruling race or caste, or finally in their conquering and civilising mission.

* For a discussion on the question of the compatibility of the idea of Empire with the idea of Democracy see Barnes, L. "Empire or Democracy (Holberg)

This principle belongs to epochs of expansion in culture and improvements in the arts of life. Large communities are formed with greater facilities for self-preservation and maintenance of internal order than in the primitive clan or community, a higher order ethically is imposed, but it tends to perpetuate and deepen the distinctions between man and man.

Under the principle of Citizenship* is evolved the State, whose structure and character depend upon the goodwill of the bulk of its members and whose welfare rests on their loyalty and public feeling, while the State is the source and the guarantee of the free exercise of their rights as citizens. The citizen is a fully responsible agent with rights and duties as a member of a community. Privileges depend on the exercise of functions, and such functions are open to all those who are capable of them. Thus we have two sides to it, namely (a) The responsible individual fully possessed of civic rights and duties (b) The responsible government expressing the will of the whole society. Under the first we have guaranteed to every individual security under the

* (This principle claims or is supposed to obtain in so-called Democratic countries such as the United States or Great Britain

law, i.e. the recognition of the rule of law, and under the second we have recognised the power of the community to make and modify the law. Such principles are found in the City State such as existed in Rome or in The National States of modern times.

In the main the system of government in Native society under which Native customary law was evolved was based upon the principle of kinship. The father in the family, the headman in the clan, and the chief in the tribe exercised authority which was in the last analysis based upon the tie of relationship which bound to them those over whom they ruled. Thus we find the largest development of law in those aspects that have to do with family relationships, and the least in those aspects of law which have to do with rights in rem. i.e. rights which are available against the whole world, and which do not depend upon the position or status of the individual in a particular family. Attempts were made here and there, for example, by the Zulu Chiefs from Chaka to Mpande in the 19th century to develop something of the nature of a nation based upon the principle

of authority in which society the rule of the king was absolute,* but this coincided with the advent of the Europeans who broke down the absolute rule of these Great Chiefs and thus that system of government was prevented from taking root in Bantu society. Thus wherever the chiefs are still in authority today in South Africa, we find their rule patriarchal or paternalistic rather than that of authority. On the other hand there is a distinct tendency on the part of the Government of South Africa to apply the principle of authority in dealing with the Natives, through the Governor-General (who) has been made Supreme Chief of the Natives and holds powers somewhat analogous to those which were held by Chiefs such as Chaka, Dingaan or Mpande among their people. Government by Proclamation which is the form of legislation used by the Governor-General is based upon the principle of authority rather than that of citizenship or kinship. It implies the wide use of discretionary powers by administrative officers who are in no way answereable to the people over whom they rule for their actions. It is consistent with the droit administratif

* See Gibson, T.Y.: "Story of the Zulus"

of French law rather than with the rule of law which is so well established in England.* One of the strongest reasons given for the development and the use of government by proclamation in native affairs is the desire to prevent native affairs from becoming a matter of politics and the fact that native matters were generally relegated to the last days of Parliamentary session with the result that they did not receive the attention which they deserve. This difficulty is therefore obviated by having Parliament delegate its legislative powers as far as Natives are concerned to the Governor-General-in-Council who acts through the Ministers of the different departments, chiefly the Department of Native Affairs. But one of the results of government by proclamation is invariably the limitation of the right of appeal to the courts for redress. This has already come about in South Africa where it is now possible for the Supreme Chief where he is satisfied that any Native is dangerous to the public peace to authorise his arrest by proclamation and detention in jail for a period not exceeding three months.** Such an individual has no right of appeal to the Courts of the

* See Dicey, A.V. "The Law of the Constitution" Chap's. 1-3
**See Section 8 of the Natal Code of Native Law of 1932 as amended.
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land until three months have elapsed. Now there is no doubt that anybody who is a danger to the public peace ought to be detained in gaol for perhaps even longer than three months, but when one's state of being a danger to the public peace depends solely upon the Supreme Chief, who is by no means above the abuse of his power where this is not checked by the supreme custodian of the rights of members of the State--the Court--considerable cause for alarm is bound to exist. Another example of the extraordinary power of the Supreme Chief is his ability under Section31 of the Native Administration Act 38 of 1927 to withdraw by proclamation the Letters of Exemption from Native Law of any Native without assigning any reason and without giving such Native, of course, any right to appeal to the court.*

It is true that all these proclamations have to be laid on the table of Parliament for ratification or amendment or repeal, but they remain in force unless and until so repealed or amended; moreover if it is true that Parliament has no time for Native Affairs or does not give them the attention they deserve, it is difficult

* See also Section 5 of the Native Administration Act 38 of 1927 under which the G. G. is empowered, if he considers it expedient in the public interest, to order the removal of any Native from any place to any other place"

to see how Parliament will have any more time to attend to these matters just because they come in the form of proclamations which have already been promulgated. The very fact that Natives have not got citizen rights except in one Province of South Africa i.e. the Cape Province,* increases the odds against the probability of these wide discretionary being used in a judicious manner.

5. The Nature of Native Law

Native Law is frequently referred to as Native Law and Custom. This is due to the fact that it is often hard to draw a distinction between what may merely be regarded as custom in Native usages and what has the force of law. Undoubtedly there is not infrequently a doubt in the minds of most people as to the exact difference between law and custom. Some like to refer to Native Law as customary law, suggesting thereby that it has the elements of both custom and law.

What is a law, and what is a custom? The answer is not easy. Both of them have reference to conduct and may be regarded as rules of conduct intended to direct human action.

* The franchise rights of Cape Natives were radically altered under the Natives Representative Act 12 of 1936. Although Cape Natives possessing the necessary educational and property qualifications are still allowed to become registered voters, they are now placed on a separate Native Voters Roll differing from the common roll on which the voters are placed and they vote for separate Native Representatives in the House of Assembly.

But when does a custom become a law? Holland in his "Jurisprudence" controverts the idea of those who, like Austin, maintain that a custom becomes law only when it receives the imprimatur of the state or the tribe, by saying that when a custom is well established, reasonable and no longer questioned it has become law and that the court of the state or tribe merely affirms it when any doubt is raised as to its existence or validity, and does not then set going what has already been observed for generations.* Customs have to come up to a certain standard of general acceptance and usefulness before they can be regarded as forming part of the law of the tribe or state. But in a discussion of this kind with reference to Native Law we must keep clearly in mind the conditions obtaining in a primitive society such as Bantu society. Holland, Austin, Salmon and Sohm in dealing with this question apparently had in mind states which had the two types of Law, namely Statute Law and Common Law. Statute Law is the result of legislation by the legislative bodies recognised by the state concerned, while common law has its origin in the usages which have been observed by the people

* Holland, T.E.: "Jurisprudence" p.56 See also Wille: Principles of S.A. Law (2nd ed) pp 17-18 ; Ehrlich: "Fundamental Principles of the Sociology of Law"

prior to the establishment of legislative bodies. No doubt the common law is always a point of departure for any law-making body. "Usage or the spontaneous evolution by the popular mind of rules the existence and general acceptance of which is proved by their customary observance is no doubt the oldest form of law-making. Custom originated no doubt in the choice of the more convenient of two acts, though sometimes doubtless in the accidental adoption of one of two indifferent alternatives; the choice in either case having been either deliberately or accidently repeated till it ripened into habit. A habitual course of action once formed gathers strength and sanctity every year: it is generally believed to be salutary and any deviation from it is felt to be abnormal, immoral. It is therefore unquestionably obeyed by individual members of the society. The question to be settled is whether a custom which is invariably obeyed is a law. Holland defines a law as a general rule of human action, taking cognizance only of external acts, enforced by a determinate authority, which authority is human, and among human authorities, is that which is paramount in a political society. Salmon on the other

hand says, "Law in its most general and comprehensive sense signifies a rule of action, and is applied indiscriminately to all kinds of action, whether animate or inanimate, rational or irrational. Thus we say the laws of motion, of gravitation, of optics or mechanics as well as the laws of nature and of nations."* Salmond goes on to divide law into the following kinds:- (i) Imperative Law, (ii) Physical or Scientific, (iii) Natural or Moral, (iv) Conventional (v) Customary, (vi) Practical or Technical, (vii) International, (viii) Civil all of which he defines. He further points out that these divisions are not based on any logical order but constitute merely an enumeration of the different senses in which the word law is used; they are cross divisions, some being merely subspecies of others, and in his opinion it is futile to try and determine which of these is law properly so-called. We should like to submit, however, that there is a distinction between law and custom even in Native law which is largely customary. A custom, like a law, is a rule of conduct but it differs in that it generally lacks the type of sanction usually associated

* Salmond, J.: "Jurisprudence" p.19

with a law. Breaches of custom may render an offender liable to abuse or ridicule only, without imposing any material sanction or a specific penalty at the discretion of a judicial functionary. To illustrate, if A invited B to dinner and B failed to keep the engagement after having accepted the invitation, A would not be entitled to sue B in a court of law for damages for the expenses he had incurred in preparing the dinner. For although it is a rule of social intercourse and domestic life that engagements of the nature described above should be kept, and although anyone who repeatedly flouted social customs of this kind would eventually find himself ostracised and a social outcast, it is understood that breaches of such social customs do not render the offender liable to punishment at the instance of a court of law. In other words unless a custom can form the basis of an action in a court of law it cannot be regarded as a law. In connection with a Native marriage, for instance, there are many customs relating to the marriage feast or to gifts of various kinds to be made by members of the one group to members of the other group and vice versa

which are generally observed: but their non-observance in any particular instance does not render the defaulters liable to an action for breach of custom. When a beast has been slaughtered in a kraal custom decrees that certain portions of the beast shall be handed over by an inferior "house" to the head of a superior "house" in the kraal, when the beast is slaughtered by such inferior houses. But this custom is not enforceable at law. Not so with the lobola or bogadi, which is an essential of marriage. The lobola or bogadi has to be agreed upon, and even if it is not paid prior to or even during the subsistence of the marriage or even within the life-time of the parties concerned, the payment of it will nevertheless have to be made. Without the observance of this custom no marriage is regarded as valid, and in default of the payment of lobola a cause of action arises which is maintainable in a court of law. Native Law is very largely a matter of custom and not infrequently it becomes difficult to make a clear-cut distinction between custom and law; but broadly speaking, although there is no law in Native society which is not enshrined in custom, the

difference we have tried to make above will be found to hold. In all the main Bantu languages used in South Africa we find a distinction made between law and custom. In the Suto-Gwana group we find the word "mokgwa" used to designate custom, while "molao" is the term reserved for law proper. In the Zulu-Xosa group the word "Umteto" is more usual for law, while Soga in his "Xosa Life and Customs" suggests the word "usiko" as indicating the tribal or communal custom on which law is founded.* Customs which have not got the force of law are described by the words "umkwa", "isiqelo", or "umkuba" in the Zulu-Xosa group. Thus we may conclude the matter by saying all Native customs may be divided into two kinds, namely (i) those which can form the basis of an action at law, and (ii) those which are merely conventional. It is with customs that fall within the first category that we shall be mainly concerned in this essay.

With regard to the question of a sanction in the case of those customs which are enforceable at law, it is to be doubted whether in the mind of the individual Native in primitive society a material sanction such as

* Soga, J.H.: "Amaxosa Life and Customs" p. 130

a fine of so many head of cattle or a flogging was more effective than the more indeterminate type of sanction such as the possible displeasure of ancestral spirits, the curse of a parent. In primitive society law is enforced not only by a sanction prescribed ad hoc by the chief or tribe in the form of valuable consideration or goods, but also by means of sanctions involved in the beliefs and practices of the community as a whole.** This is true of Native Law and will be discussed later.

6. Sanctions in Native Law.

"Law comprises all those rules of conduct which regulate the behaviour of individuals and communities, and which by maintaining the equilibrium of society are necessary for its continuance as a corporate whole." This shows that law is not a negative thing, but rather a positive one. Its whole object is to maintain an equilibrium and the penalties of primitive law are directed to the restoration of this order. Law makes for order, uniformity and social cohesion. No society could exist without it. Every member of a society has positive or legal rights representing advantages which accrue to him as a social being, and

** Hartland, E.S.: "Primitive Law" p. 137

which are recognised and protected by the group to which he belongs.*

But no society is perfect, and however carefully rights and duties are balanced there will always be a clash between the interests and impulses of the individual on the one hand and the group on the other or between individual and individual, group and group. In order to maintain the obligations, the behaviour and the social cohesion on which society depends for its existence, there must be sanctions attached to these obligations to make them binding. A sanction may be defined as a social reaction which the individual is taught to expect from the performance or nonperformance of certain actions.*

Sanctions differ in their nature. If a sanction acts as an incentive to a person to act in a certain way, it may be called a positive sanction; on the other hand if it has a preventive or deterrent effect it may be called a negative sanction. Among positive sanctions may be mentioned forms of commendation, social rewards and decorations for deeds performed. Their intended effect is "Go thou and do likewise". Perhaps on the ground that virtue

* Goodhart and Others: "Cambridge Legal Essays" (Heffer) 1926 p.223

See Wills: Principles of I.H. Law 2nd ed. p.7.

is its own reward, we find that this type of sanction---the positive---is not as well regulated and organised as are negative sanctions. Perhaps The "Honours List" in England may be mentioned as an example of an organised form of positive sanction, but in primitive Bantu society, positive sanctions are comparatively speaking uncommon. A Chief might reward his loyal soldiers by dividing among them the cattle or the women or both captured in war, but this course was not followed invariably, and could not therefore be said to havebeen organised. More notice was taken of negative sanctions, those which have a deterrent effect on the individual. Among these a few may be mentioned. Opprobrium which varies from mere ridicule to strong moral reprobations still plays a large part in civilised society. We see this clearly in the law relating to defamation of character which is based upon the fact that no man has the right to expose another to the ridicule and contempt of his neighbours by injuring him in his reputation; and if the court finds that the defendant has so injured the plaintiff without any justification for doing so, he will be mulcted in heavy damages. In primitive

society such as that of the Bantu this type of sanction is still very strong. The whole community is behind it and seldom will anyone dare to flout public opinion without bringing upon themselves this much dreaded opprobrium. In a very illuminating article on "Premarital Pregnancy among the Bakgatla,"* Dr. I.Schapera of Cape Town University, South Africa, has an interesting discussion of how this sanction was used to prevent premarital pregnancy among the Bantu in the olden days. So sensitive were people to this kind of public jesting that they would rather die by torture than renew their shame by repeating their actions. Revenge is another negative sanction which is found in primitive communities. It is par excellence an individual sanction, but because of the strong bond of kinship found in primitive societies, it often developed into a social sanction, one group joining an individual member in his attempt to wreak his vengeance on a member of another group which replied with the same tactics.* In inter-tribal or even in international affairs this is still the dominant type of sanction. When the League Of Nations succeeds in regulating this sanction,

* See "Africa" Journal of the International Institute of African Languages and Culture, Volume VI No. I January 1933 pp.64-68

* Most of the faction fighting which still remains in Native areas fall out this category

a World State will have come into being. For one of the chief features of a State or organised social body is that it does not permit private revenge within its boundaries, but itself undertakes the duty, as an impartial body, of administering and regulating this type of sanction in the interests of the group as a whole.

Tabuq. This is a social sanction which plays an extremely important part in all primitive communities, although it is practically unknown in modern communities, except among religious groups, or in a modified social form. The fear of hell or the hope of heaven is an example of this type of sanction in some Christian circles. This ritual sanction acts automatically as it were, for the unseen powers bring disaster upon anyone who offends against its rules. It is probably from this type of sanction that the conception of crime as an antisocial act arises, for anyone violating a tabuq, who does not "zila" or "ila" the things proscribed by custom becomes defiled, and unless he undergoes such purification ceremonies as we have described before, he becomes a danger to himself and the community. The result is that the group takes steps to

rid itself of the pollution, and as a protective measure may punish the offender. This breach of tabu may concern matters which in modern times would not be regarded as moral offences, e.g.sexual intercourse by married people during a time when an "impi" (regiment) has gone off on a military or hunting expedition. But these ritual and religious tabus are at the very basis of social life in primitive communities and from them have sprung the punishment of crime, the regulation of moral conduct and religion.* When any sanction is organised and is administered by a special body which we call a judicial authority, we get what is known as a legal sanction. As a rule we find that it is the negative sanctions that are first organised, hence the impression is often created that law is concerned mainly with restrictions, whereas the purpose of law is to create and protect rights and duties rather than to impose restrictions.

Sanctions in modern law. Most of the sanctions of modern law partake of the nature of organised sanctions. Hence we have established very fully the principle of the rule of law, namely that no man shall be punished for doing or

* See Junod, H.A. "Life of a South African Tribe" Vol II Chapter IV

omitting to do anything that is not expressly forbidden or required by law, and every such act of omission or commission is punished without respect of persons, ie. everybody is subject to the law.+ Here we do not find such indeterminate sanctions as opprobrium and ritual observances to the same extent as inprimitive law. Where they do exist they are invariably reduced to terms capable of express and definite statement. Two important elements are found pervading all modern sanctions:-(i)The repressive sanction, which is the punishment of what we consider to be a crime. The public authorities take action against the offender, i.e. action is taken in the name of and at the instance of the State or public authority. Thus our criminal cases are between Rex(the Crown as representing the State) and the accused. As a rule even in modern society crimes are primarily offences against deep-seated sentiments of the community. Homicide, theft, treason, etc. are all recognised as crimes in modern Western law. But in addition we find a large number of technical offences which have only an indirect or remote reference to public safety. For example riding a bicycle at night without a proper

+ See Dicey "The Law & the Constitution" for a classic discussion of the Rule of Law.

light, is prohibited on grounds of public safety, but to the Native mind it does not appear prima facie to have anything to do with the public weal. The same applies to the Pass System in South Africa. The Native Economic Commission gives as the reasons for its enforcement the following: (i)It affords a protection to the rural Native who comes into surroundings which are entirely new and strange to him; (ii) inso far as the pass represents a service contract it affords a further means of protection to the Native: (iii) the pass is necessary as a means of indentification; (iv) it assists the employer in preventing strange Natives from living or sleeping on his property: (v) it prevents absconding from farms or other forms of employment: (vi) in general it prevents crime: (vii) it affords some means of stopping wholesale entry of Natives into towns where, if not required to carry passes, a large number will deliberately refrain from being employed and will loaf and ultimately live on their wits. It is very poor commentary on the protective power of the Pass System when one realises that it sends to jail every year more Natives than any other form of

legislation, with the exception of the Native Taxation Act which makes it obligatory for a Native to carry his tax receipt on his person--another pass. On p.113 of the Report of the Native Economic Commission 1930-1932, a list is given of the crimes for which Natives were convicted in 1930. Thus

Drunkenness	15,995
Illegal possession of Native Liquor	35,777
Municipal Offences	25,912
Common Theft	13,435
Common Assault	18,166
Master and Servants Acts	15,861
Pass Laws	42,262
Urban Areas Act	20,877
Native Taxation Act	49,772
Native Labour Regulation Act	23,293

Pass laws are second as far as this list is concerned; but as has already been mentioned, the offences under the Taxation Act are also of the nature of pass offences: so are a number of the offences under Municipal Offences, Urban Areas Act, Master and Servants Acts and Native

Labour Regulation Act which impose upon the Native the necessity for obtaining permits of different kinds. The effect of these laws is to bring many Natives into prisons under circumstances in which their sense of the white man's injustice is heightened, while prison loses for them its deterrent effect, for they are sent there for the commission of offences to which no moral turpitude can be attached. If the Pass System ever served a useful purpose in the past, it does not do so now, and the only logical thing to do with it would be to abolish it. In the Cape Province where the Pass Law is practically a dead letter, there is far less serious crime than in the Transvaal which prides itself on its rigorous administration of Native Affairs. In a recent interview with a Native Deputation from the Transvaal African National Congress, the Minister of Native Affairs, Mr. P.G.Grobler, is reported to have said that the time had not yet come for the abolition of the Pass in the Transvaal, especially considering the feeling of a large section of the white population of the matter. Perhaps the Pass System protects the white population, but as far as the Native goes, it is a travesty of the term protection