development, and suppress glaring evils. By the use of this principle it would be possible while "checking the worst abuses to try to graft our higher civilisation on the soundly rooted stock, bringing out the best of what is in Native tradition and moulding it into a form consonant with modern ideas and higher standards, and yet all the time enlisting on our side the real forces of the spirit of the people". 

Furthermore the advocates of Native law point out that it is a well-worked out system which in many respects compares quite favourably with Roman Law on which most of the legal systems of modern states are based. It dealt mainly with the status of individuals as we shall see later. "The Native has lived from time immemorial under the immobility of status, and our problem", to use the formula of Sir Henry Maine's "Ancient Law", "is to lead him gradually from status to contract". 

"Native Law does not deserve the very grave condemnation with which it is so universally visited by those who are wholly unacquainted with it or who only possess a very limited knowledge of it. It is a law

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Sullivan, J.R. "Native Policy of Sir Theophilus Shepstone" page 97
suggested by circumstances, it is essentially just, and has been found effectual for the protection of individuals, and necessary for the good government of men living in a tribal condition....To those who are intimately acquainted with the Natives there is much indeed to admire both in them individually and in the laws which govern them. Many may think that, because they are barbarous and wholly uneducated in our sense of the word, any laws emanating from them must be worthless; but such is not the case."

No one would deny that as a result of the impact of Western civilisation upon it, native society is rapidly disintegrating. The kraalhead through no fault of his own, but rather through the sheer force of circumstances has lost or is losing his prestige and his pristine authority over his wives and children; the subsistence economy which met sufficiently previous conditions does not fit in with modern economic demands. No longer can the tribesman pay his tribute to his chief in labour or in kind; today he must leave the familiar haunts of his ancestral home and go to find the cash with which to pay his dues to a Supreme Chief who is

*See Memorandum, dated 1880, by Mr. T. Sheplestone, Jr., C.M.G. published in "papers relating to Native Custom in Natal, 1881" page 5*
rather distant from him; the introduction of the plough with which his wife cannot cope has changed his manly occupations; the maintenance of peace and order in the country has robbed him of the adventure derived from punitive expeditions to which he was accustomed in former days; no longer can he send his women into the woods to fetch firewood without limit; in his hunting operations he is much restricted by game laws which to his mind are intended, quite contrary to nature, to place the safety of animals above the food requirements of man— all these and many more instances which could be cited go to prove, it proof is needed, that native society is rapidly disintegrating. The result is confusion in the Native mind and disappointment with life. The social equilibrium is so disturbed that there is hardly anything worth living for for the tribesman who has thus been deprived of things which provided with a kind of ballast in the sea of life. The recognition of native law and custom is an attempt to restore this disturbed equilibrium, not with the idea of perpetuating the undesirable features of natives social organisation—for where these do not fit in with modern native life, no artificial attempt to bolster them up will be successful—but rather with the idea of making the transformation from one type of society to another as gradual as possible; it means
"the employment of the existing institutions of the country for all possible purposes to which they are adequate, their gradual moulding, by means of laws and made....by the Central Government and of the guidance given by administrative officers, into channels of progressive change, and the encouragement within the widest limits of local traditions, local pride, local initiative, and so of the greatest possible freedom and variety of local development" in the country. * This may be putting too charitable a construction upon the intentions of the Government with regard to the recognition of native law. But whether it is consciously intended or desired by the government or not, there is no doubt that recognition will allay the suspicions and relieve the confusion of a certain type of Native, i.e., the class which has not yet adjusted itself to modern conditions. For those who have already made this adjustment this confusion does not exist presumably, and for them the recognition of native law will make no difference; but obviously this must be a small proportion of the total population of Natives, although even in their case, it is probably true to say that they would be loth to see all native law go at once.

* See Huxley, Julian "Africa View" (Chatto & Windus) 1932 page 103
A further argument in favour of recognition is that it fits in with the segregation policy of the country. Ever since the passing of the Natives Land Act 27 of 1913, segregation has been the accepted policy of the country. Thus segregation in land policy under the Natives' Land Act was followed by segregation in Native Administration through the Native Affairs Act 23 of 1920; in urban affairs through the Native Urban Areas Act 21 of 1925; in economic affairs through the Mines and Works Amendment Act familiarly known as the Colour Bar Act of 1926. Further effect is given to this segregation policy by means of the four Bills of General Hertzog, namely the Natives Representation in Parliament Bill, the Coloured Persons Rights Bill, the Union Native Council Bill and the Natives' Land Act Amendment Bill. Although these Bills have so far not been put in the Statute Book, they are part of the Union's Policy of Differentiation in Native as well as other non-white affairs. The Asiatic Land Tenure is another example of this policy. It was therefore only logical to expect that this policy would be followed at some time by uniform segregation in legal affairs, which was ushered in by the Native Administration.
Act 38 of 1927. It is not part of our purpose at this juncture to criticise the policy of segregation. Suffice it to say that those who may be termed the enlightened segregationists, or adaptationists as they have latterly come to be called, are convinced that a separation of Native affairs from all European affairs, so far as this is possible in a land in which black and white live in such close juxtaposition, will ensure that they receive better attention than they are able to get when they have to wait upon the more pressing needs of the Europeans who constitute the bulk of the electorate. This is at least logical, although it must be said that political affairs in South Africa are seldom carried on logically, if they are anywhere else. It is not merely attention that Native matters require but an earnest desire on the part of the European to give the Native a square deal, and this requires not a change of administrative machinery, but of heart on the part of the white man. We have already pointed out that under this recognition of Native law the policy will be or ought to build on existing native institutions and improve them until they fit better into modern conditions. This will probably
necessitate an ever increasing use of Natives in this field of service. Already under the Native Administration Act greater responsibilities are to be placed upon the Chiefs. Undoubtedly the Chiefs will have to improve a great deal beyond their present development if they are to command the respect of either the Government or their people. There is always a danger "of allowing too much latitude to the representatives of the existing tribal system, the chiefs and headmen, without giving the common people sufficient opportunities of education and development, or sufficient chance of making their voice more effectively heard in local affairs through some democratic development of the system. This concentration on the administrative machinery instead of on the spirit of indirect rule may lead to corruption and oppression, and the last state may be worse than the first." But it is not inconceivable that as the Chiefs rise to the occasion, their responsibilities will be increased. We can look forward to the time for example when the Chief's Court will be a Court of Record as it now is not under the Administration Act. In this work the chief will require to be assisted by trained native workers of

* See Huxley, Julian "Africa View" page 132
different kinds. The same applies to the Native Commissioners' Courts and the Native Appeal Court. At
the present these are fields which have not been opened
to Natives; but undoubtedly as they develop it will be
impossible to resist, without manifest injustice, their
demands for larger vocational opportunities in the Native
Civil Service. The proposed opening of an Anthropology
and Law Department at Fort Hare Native College, the re-
peated requests of the Bungas for greater use of their
children in local councils and the avowed promises of
the Government to give effect to this as soon as circum-
stances permit are bound to bear fruit in the long run,
in spite of the overcaution created by the natural fear
of the African making mistakes, which makes experimen-
tation difficult.

Finally the recognition of native law will make it
possible for the government to introduce a much cheaper
and less expensive system for the Bantu. Our legal
system in South Africa derived as it is from the English
system, especially as far as procedure is concerned, is
much too full of technicalities and litigation is much
too costly for them with the result that "only a fraction
of the accumulated litigiousness of the people actually finds its way to the Magistrates Court. The old traditional methods of native justice are dealing with the bulk of the cases below the surface. Under a separate system of law for them it would be possible to bring reforms in this matter which would be impossible, or at least very difficult, to encompass in the general system of the country.

The History of the Recognition of Native Law in South Africa may be studied from two points of view, namely, in the first place, the position prior to the formation of the Union of South Africa, and secondly, the position since Union.

Prior to Union. To begin with the Cape Province first as the oldest colony in South Africa, we shall find that for this purpose it is advisable to divide the Cape into three sections which have formed for the most part three distinct administrative units, namely: (I) the Transkei and (II) British Bechuanaland, both of which represent what may be termed Native territories, and (III) the Cape Proper which consisted of the rest of the Province and which may be termed the European area,
although it included British Kaffraria which is densely populated with Natives, and therefore deserved special treatment.

In the Cape Province proper, the territorial view of law was taken, i.e., the same laws were held to be applicable to all people black or white living within the boundaries of the territory concerned. This system was quite defensible as far as those were concerned who lived within European areas such as the Western Province and who had become more or less detribalised. But in the case of an area such as British Kaffraria which was incorporated into the Colony by Act 3 of 1865 and which was mainly inhabited by Natives living under tribal conditions, it was impossible to adhere to the principle of applying Colonial Law consistently. As Brookes points out, "the Law Department at Cape Town would not consider the recognition of Native Law: the Magistrates on the spot would not apply any other system, unless indeed they were to refuse to hear ninety-nine per cent of the cases brought before them." The result was that without having any authority to do so, the magistrates in the Native areas dealt with the disputes between Natives

* Brookes, E.H. "History of Native Policy in South Africa" page 182
according to Native Law, on condition that the parties would abide by the decision of the Court. This worked quite well until certain lawyers came upon the scene and declared the whole procedure illegal. This point was well brought out in a report of the Magistrate of Herschel, a purely Native district, "Although Herschel is in the Colony and strictly speaking under the Colonial Law, it has been found absolutely necessary to settle most of what we called Native civil cases, such as dowry, etc., by Native Law and custom. So far there has been no hitch in particular, the Magistrate sitting as arbitrator generally and having the assistance, in many cases of the Headman. But, of late Law Agents have come into court, and caused some difficulty by asserting their dictum in opposition to the judgment of the Magistrate and Headman in Native cases, urging as a last resort that the whole thing is illegal, and every case must be settled by Colonial Law." The Magistrate concerned goes on to say that in the interests of justice and good government he intimated to the Law Agents that he would hear none of them in suits brought into court other than in the form of Colonial Law. In other words

Brookes, E.H. "History of Native Policy" page 184
he refused to allow Law Agents to appear in disputes involving Native Law and Custom. This by no means obviated the difficulty for in all cases settled by Magistrates an appeal lay to the Supreme Court of the Colony, which refused to recognise Native Law or any part of it, in the absence of statutory authority for such recognition. Thus by the Native Succession Act 18 of 1864 the Legislature of the Cape expressly provided that controversies or questions between the relatives or reputed relatives of deceased persons holding at the time of their death certificates of citizenship, and of all deceased Native residents at the time of their death in a Native location, shall be determined according to Native usage and customs by the Resident Magistrate or Superintendent of Locations, as the case might be. The question came up at once as to whether this Act recognised Native customary marriages by implication, and also the question whether there was an appeal from the courts of Magistrates or Superintendents of Native Locations who were specially empowered to deal with Native cases of inheritance, as explained above. With regard to the latter point of the jurisdiction of
the Supreme Court in Native succession cases the following quotation from the judgment of Shippard, J., in the case of Sengane vs Gondele (1 E.D.4. 195) is instructive.

"Nor with great deference to what was laid down by this court in case of Adam vs Dalza in 1875, can I see how the circumstance that the Legislature, for obvious convenience, has invested Resident Magistrates and even Superintendents of Locations, with certain functions, partly administrative and partly judicial, can possibly cost the Superior Courts of their jurisdiction as courts of first instance, or of their legitimate control by way of appeal or review, as the case may be, of the proceedings of any inferior tribunal. I cannot understand how this court can be held to have no judicial control over controversies between British subjects residing within the limits of its jurisdiction merely because certain disputes in the first instance are to be referred to special officers named in an Act of Parliament which does not in terms exclude appeal or review; all that the Native Succession Act of 1864 was held to have done was to give validity to a custom whereby property legally acquired by a Native during his life-

*Quoted by Whitfield, W.B. in "South African Native Law" page 16*
time was to be distributed after his death; it repealed the Colonial Law of intestacy as regards deceased Natives who have married according to Native custom, and substituted, therefore, in place of the Roman-Dutch Law of intestacy the distribution by Native custom.

With regard to the question as to whether this Act recognised Native customary marriage or whether it legalised polygamy, it was decided in the same case that polygamous marriages by natives were recognised only so far as to say that where a Native does enter into such marriage and does not marry according to Colonial law, and then dies, that his implied will or testament shall be taken to be a distribution of his property according to Native custom. Such recognition is not perhaps open to more comment than our own law, as well as the English Law, which allows a man to will his property to any number of concubines and their issue. Regarding the recognition of marriage by Native custom in the Cape Province proper, the leading case is that of Ngqobela vs Sihele (10 S.C. 346) in which the presiding judge was the celebrated and learned Chief Justice de Villiers who disposed of the question

Whitfield, W.B. "South African Native Law" page 15
in the following terms:

"The only mode in which a valid marriage can be contracted in this Colony is before a Minister of Religion, or a lay marriage officer, with previous publication of banns or notice, or failing these by special license. A union, therefore, founded only on Native usages and customs, within the Colony proper, is not a marriage, whatever rights may, by special legislation, have been given to the off-spring of such a union in respect of the distribution of the property left by their parents upon their death. In the absence of special legislation recognising such a union as a valid marriage, Courts of law are bound, however much they may regret it, to treat the intercourse, I will not say as immoral, but as illicit." Dealing with the international aspect of this case, the learned Chief Justice went on to say, "No state would refuse to recognise a marriage contracted in another place by persons there domiciled according to the solemnities of that place, merely because those solemnities are different from those prescribed by such state. Any marriage, therefore, which would be regarded as valid
in any dependencies of this Colony, must be regarded as valid in this Colony, although our own solemnities may not have been observed, provided it is not opposed to the essential nature of the contract as understood in this Colony. This last proviso is important. If Kafir customs in Tembuland recognise the marriage between brother and sister, or a polygamous marriage, this Court will not give effect to such marriage, although contracted by persons there domiciled; for whatever customs the Natives may have, no Court in the Colony proper, can without special legislation to that effect, recognise customs which are inconsistent with the very essence of the conjugal union."

It has been estimated that well over ninety per cent of the disputes between Natives arise out of their marriage customs, which emphasises the absurdity of refusing to accord recognition to the Native conception of marriage, as we seem to have done in the Cape proper. The state of affairs existing in the Cape proper prior to Union has been well summarised by Whitfield as follows:

"It will be seen that there was no straightforward recognition of Native law, and in consequence the Adminis-
tration was forced to the adoption of illogical and spasmodic makeshifts. For example, the establishment of an extra-judicial Court at King Williams Town to settle disputes under Native law upon the understanding that the parties will submit to its decision; the special retention by deed of grant of the Native law of succession in respect of arable and buildings such as are granted in the individual system of tenure of land; appeal to the Governor-General in cases of Native heirship in the districts originally constituting British Kaffraria; and powers to lay down by proclamation the usages to be observed in regard to the distribution and administration of property in such Native locations as may be proclaimed. No such proclamation was ever issued. These were, however, merely palliatives of conditions in which the Native social organisation operated on lines of its own out of harmony with the legal system."

British Bechuanaland was annexed in 1895. Therefore this district was administered purely as a Native area in which the Chiefs were allowed by a proclamation of 1885 to retain their previous jurisdiction in disputes

* Whitfield, W.B. op. cit. page 5
between Natives of their own tribes. The Chiefs in this territory had vast powers, including the power to grant divorce in marriages contracted according to Christian or civil rites, for by section 31 of Proclamation 2 B.B. of 1885 the chiefs concerned were given exclusive jurisdiction in civil cases between members of their tribes. By section 32 they were allowed to retain criminal jurisdiction except as regards certain grave felonies. When British Bechuanaland was annexed the operation of Native law as administered by the Chiefs was retained by proviso (e) to section 16 of Cape Act No. 41 of 1895 which reads thus: "The Native jurisdiction, provided by sections 31 and 32 of the Schedule to Proclamation 2 B.B. of 1885, shall not be deemed to be abolished by the passing of this Act."

This situation is in strange contrast with that of the Cape Proper where the most important aspects of Native Law failed to receive recognition, for example marriage by Native custom, the jurisdiction of the Native chiefs in disputes between members of their tribes, and lobola suits, for the contract of lobola was regarded as immoral transaction, entitling neither of the parties to
it to redress at the instance of a court of law, on the principle that no man will be assisted by a court in an attempt to reap the advantage of a turpis causa in which he himself took an equal part. (see Mqete vs Mqete; E.D.C. 229). The only portion of Native Law which was accorded substantial recognition in the Cape Proper was the Native Law of Succession and Inheritance, as we have shown above.

The Transkeian Territories have been regarded as essentially Native, and it is therefore not surprising to find that Native Law was here given a larger measure of recognition. This recognition was based on Proclama-
tions 110 and 112 of 1879, each one of which included a clause which provided that "where all the parties to the suit, or proceeding are what are commonly called Natives...it may be dealt with according to Native Law, and in case of there being a conflict of laws by reason of the parties being Natives subject to different laws, the suit or proceedings shall be dealt with according to the laws applicable to the defendant." This in brief was the position with regard to civil cases, i.e., in cases dealing with marriage, inheritance, lobola and
other matters incidental to or arising out of the relations of individuals to one another. But even here the recognition was subject to the usual proviso that Native Law is recognised only to the extent that it is not repugnant to the general principles of humanity observed throughout the civilised world. Under this proviso several Native usages and customs were suppressed, for example, the dances connected with the Initiation Ceremonies practised by the people, witchcraft as a legitimate accusation, the custom of umungena (the taking of a deceased brother's widow by a surviving brother), sentence of death for murder which in Native law was punishable by a fine, etc. Another important change made in Native Law in the Transkei was brought in by section 38 of Proclamation 140 of 1885 which provided that all persons, male or female, when they shall attain, or who have attained, the full age of twenty-one years, shall be deemed to have attained the legal age of majority. It will be observed that the essence of the policy followed in the Transkei was "to civilise and not merely to preserve peace and the status quo." * The courts of the Chiefs were replaced

* Brookes, E.H. "Native Policy" page 109
by the courts of the Magistrates, and from the Magistrates' Courts an appeal lay to the Native Appeal Court which had its headquarters at Umtata. At first there were three Chief Magistrates—one for the Transkei proper, another for Tembuland and a third for Griqualand East. These were later amalgamated into one Chief Magistracy. Native Civil Law was not codified, as we shall see was done in Natal, but had to be determined by investigation in each case, where any point of law was in dispute. Much use was made of Native Assessors to whom questions bearing on Native customs observed by the different tribes within the territories were referred, and so gradually Native Law was established. The records of the Native Appeal Courts bear eloquent testimony to the fact that codification is not indispensable to the recognition of Native Law. Much guidance was of course obtained by Magistrates from Maclean's "Compendium of Kafir Laws and Customs", compiled in 1856 and from the Records of the Native Appeal Court of the Territories. Another feature of the Transkei system was the introduction of rule by Proclamation. The Acts of the Cape Parliament were held to be in-
applicable to the Transkeian Territories, unless they were expressly extended by the Acts themselves or by special proclamations. In addition the Governor-in-Council, i.e., the Cabinet, in practice the Minister of Native Affairs was empowered to legislate by proclama-
tions for the Territories, with the proviso that such proclamations could be vetoed by Parliament. Many of the changes which have been made in Native Law in the Territories have been brought about by means of procla-
lations. Examples are Proclamation 140 of 1886, al-
referred to, proclamation 142 of 1910 which defines Native Law as meaning Native usages and customs as practised by Natives and recognised and administered by the courts of the Transkeian Territories, and procla-
mation 145 of 1923, one of whose sections provides that it shall be in the discretion of the Court, in civil suits or proceedings, between Natives, involving questions of customs followed by Natives, to decide such questions according to the Native law applying to such customs, except in so far as it shall have been repeal-
ed or modified by Act of Parliament or Governor's or Governor-General's proclamation. Where the parties to
suit reside in areas where different Native Laws are in operation, the Native law, if any, to be applied by the Court shall be that prevailing in the place of residence of the defendant. The advantage of the proclamation method as applied in the Territories is, according to Whitfield, "that Native law is here susceptible to definition, limitation and amendment by the executive, so that it can be moulded to suit the progress of the people, and thus neither shackles their development, nor forces, as an alternative, the premature adoption of principles of law alien to their conceptions and experience." *

With regard to **criminal law** the position in the Territories is somewhat different from what has been done as regards Native Civil Law. Native Criminal Law is not as well developed as Native Civil Law, and consequently it was felt that more changes could be introduced in this part of the law than in that which we have already touched upon. The Criminal Law to be applied in the Territories was embodied in a code known as the Transkeian Territories Penal Code passed in 1886. The provisions of the Code consist mainly of Colonial Law and apply to all people resident in the Territories,

both white and black. At the same time the Code gave recognition to certain rules of Native Law regarding procedure, such as the examination of an accused person and of his wife or husband, as the case may be, as ordinary witness. This is contrary to the rules of procedure and evidence applied in European courts, where an accused person or his or her spouse cannot be compelled to give evidence in a case in which a criminal charge is preferred against the other. In Native Courts prior to the arrival of the white man everybody who could throw light on a matter which was the subject of investigation was interrogated, and the accused and his relatives were no exceptions to the rule. Another important innovation derived from Native Law was the principle of communal responsibility which was applied in cases of stock theft. According to his principle "when the spoor of any stolen animals is traced to any kraal or locality responsibility in respect of the value of such stolen animals" was placed either on the head of the kraal to which the spoor was traced, or to the heads of the kraals in whose vicinity the spoor was lost or became obliterated. All assistance had to be given by persons living in that
vicinity in following up the spoor, and any person or persons refusing to permit any necessary search in their premises or to give all reasonable assistance in the search were held responsible for the value of the animal stolen. The reasonableness of this principle of communal responsibility is one which is readily understood by all Natives and its application has been found to be very effective in stock theft cases. Thus Native custom has been consistently recognised in the Transkeian Territories, has been modified by Proclamation as necessity or expediency has demanded and has been applied in judicial proceedings at the discretion of the courts.

Natal has always stood for the recognition of Native Law in civil cases. Under the influence of Sir Theophilus Shepstone Native Administration in Natal has consistently followed the policy of supporting Native institutions and traditions, believing that the past of the Native is the foundation on which the superstructure of his future development should be broad-

* Brooke R., B.S. "History of Native Policy" page 189 for examples of its working.

** Rogers, H. "Native Administration in South Africa" page 220
Accordingly we find that there is a frank recognition of Native Law in Natal. In order to give effect to this policy it was thought fit to prepare a Code of Native Law as known and administered in the Colony of Natal; a special Board was appointed for this purpose and in pursuance of its recommendations Law 19 of 1891 was passed in which it was declared and enacted that the Codes of Native Law which is contained in the Schedule to that Law constituted and comprised Native Law. Provision was made in Law 19 of 1891 for the amendment and alteration of any of the clauses of the code by the Legislative Council, but it is noteworthy that the first thoroughgoing revision of the Code was made in 1932, and the new Code of 1932 has replaced the old one. Thus Native Law in Natal means Native Law as set out in the Code and no court is empowered to depart in any way from the Code in matters for which it makes express provision. This Codification of Native Law was not part of Shepstone's policy; the great Native Administrator was more in favour of the system followed in Transkei where the law differed from tribe to tribe and was determined by

Sullivan, J.R. "The Native Policy of Sir Theophilus Shepstone" page 95
inquiry into the facts of each particular case.

Court System. One of the most important aspects of the administration of Native Law in Natal was setting up of a separate superior Court to deal with Native cases. In 1898 was established the Native High Court which was given both criminal and civil jurisdiction, and the Supreme Court of Natal was deprived of its jurisdiction, whether by way of repeal or otherwise in any cause, civil or criminal, in respect of which jurisdiction had been conferred by any Act of Parliament on the Native High Court. Among the crimes cognizable by the Native High Court when committed by Natives were the following:

Faction fighting, and any homicide or other crime (except murder) occurring in the course of a faction fight.

Crimes against public order of any of the following classes: Riot, Public Violence, Sedition, by whatever names the same may be known. Rape, Indecent Assault, Sodomy, and all crimes of indecency when any of the crimes mentioned in this subsection is committed upon a Native; Crimes included in any law for the prevention of Cattle Stealing and Killing, and kindred crimes;

But Burning: Perjury where committed in the course of
a case in the Native High Court, or in the course of a Native Case in a Magistrate's Court.

No special Magistrate's courts were established for the treatment of Native cases, but Native cases were to be recorded, noted and registered separately from other cases. A "Native Case" was defined as any action, suit, motion, application or other judicial proceeding in which all the parties were Natives or a criminal case in which the accused persons were Natives. An appeal lay from the Magistrate's court to the Court Native High Court in all cases, whereas other appeals from the Magistrate's Court went to the Supreme Court of the Colony.

Native Chiefs were given original jurisdiction in all civil cases between Natives of their own tribes, or in which the defendants were members of their own tribes, except in matrimonial cases and cases arising in connection with marriages by Christian rites. They were also granted jurisdiction according to Native Law in criminal cases committed by members of their own tribes, with the following exception: Murder, and all crimes punishable by death, and all crimes which are by this
Act made cognisable in the Native High Court, and all attempts or participation of any kind therein; Offences committed against the person or property of persons not being Natives; Culpable homicide; Assault with intent to kill or do grievous bodily harm; Pretended Witchcraft; Crimes created by the Ordinances, Laws, and Acts of Natal or Zululand, which were not offences under the common law or the Native laws and customs of Zululand. An appeal lay from the decision of the Native chief's court to that of the Magistrate in whose division the parties resided preferably, although the Magistrate of any adjacent division was also empowered to hear such an appeal.

The extent to which Native Law generally is recognised in Natal was put in a nutshell by section 30 of the Courts Act 49 of 1893 which provided "All civil Native 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; except that all civil cases arising out of trade transactions
of a nature unknown to Native law shall be adjudicated upon according to the principles laid down by the ordinary Colonial law in such cases: Provided that nothing in this section shall be deemed to extend the operation of any law of limitation or prescription of action to any case to which, but for this Act, such law would not have applied."

We are therefore not surprised to find on examining the Code of 1891 that "all the incidents of customary marriage, lobola and succession, and generally all the Native social organisation and discipline, are provided for. The Code, however, is rigid, and could only be amended by Statute, which militated against its ready adaptability to changing conditions." 9

Marriage between Natives according to Native custom was regarded as valid and binding, and all questions arising out of such marriages were to be dealt with under and by the provisions of the Code. It was not competent, for example, for any court to declare a marriage by native law and custom as an "immoral contract" as the Eastern Districts Court of the Cape Colony had done in the case of Nbono vs Mnoxoweni (6 E.D.C. 62). Native

9 Whitfield, W.B. op. cit. page 8
marriages according to Native law and custom were to be registered, and at each such marriage an Official Witness was present, and it was his duty to obtain the following information regarding the marriage:

A. Whether the woman about to be married was entering into the contract of her own free will and consent, and was not forced into it by her parents or guardians. The marriage proceedings were stopped in the event of the necessary consent being absent.

B. From what source or sources the lobola, if any, had been taken or obtained.

C. Whether in respect of the lobola a debt rested upon the house about to be established by the marriage.

D. In the event of there being a debt, the amount thereof, and to whom, or to what other house it was due.

E. At what time and in what manner, and from what source the debt, if any, had to be discharged.

With regard to lobola claims, it is interesting to note that in the Code as originally drawn up, lobola suits had been practically ruled out of court by Section 182 of the Code of Native Law which reads: "Subsequent to the 31st December, 1893, no action may be instituted
in any Court for the recovery of lobola, or inheritance arising out of lobola claims, in connection with any marriage entered into before the date of the promulgation of this Code; and no action may be instituted at any time or before any Court for the recovery of lobola in respect of marriages entered into after the promulgation thereof." This must be read together with section 177 of the Code which lays down that all the lobola must be delivered on or before the day of the marriage. If the lobola was not delivered on that date, a special arrangement to deliver it later had to made and registered in the Magistrate's Court, otherwise any lobola claim arising out of the marriage was barred. Later this section was amended by Section 20 of Act 15 of 1894 which provides: "The Supreme Chief-in-Council may, in any case where the circumstances appear to warrant that course, and notwithstanding the provisions of section 182 or Law 19 of 1891, authorise an action for the recovery of lobola or inheritance arising out of a lobola claim in connection with a marriage entered into before the date of the promulgation of Law 19 of 1891; Provided that no such authority shall be given after
the 31st day of December, 1894." A later Act, No. 7 of 1910, further empowered the Supreme Chief to make a proclamation affecting any one part of the whole area of Natal, suspending the operation of section 182 of Law 19 of 1891, and such a proclamation was made in 1910 and applies to the whole of Natal.

The Transvaal. The application of Native Law in the Transvaal has been dealt with excellently in a pamphlet published by Mr. E.R. Garthorne, of the Native Affairs Department, entitled "The Application of Native Law in the Transvaal." In order to outline the position as it existed prior to Union we cannot do better than quote the following historical account given by the author of the pamphlet referred to above: "Such Native Law, as is still operative in the Transvaal, derives its validity from the terms of Law No. 4 of 1885, supplemented by sections 70 and 71 of Proclamation 28 of 1902. Law No. 4 of 1885 has been subjected to change from time to time in directions which have traversed the conceptions upon which it was based, and it further seems to have been deflected from the intentions of its origin by a series of judicial decisions, inevitable no doubt.
as soon as its application had been forced under the alien authority of the Supreme Court, but apparently out of harmony with the purposes of its enactment and the sources of its inspiration. Sir Theophilus Shepstone, in his proclamation of the 12th April, 1877, annexing the Transvaal, emphasised at length the failure of the Native Policy of the Republic as one of its principal reasons for its annexation. During the British occupation, most of the legislation of the Republic, including Law No. 3 of 1876, was swept away en bloc by Law No. 11 of 1881, which clearly intended the substitution of the Natal system and policy, by a series of provisions drawn from, and based upon, the Natal Statutes No. 3 of 1849 and No. 26 of 1875. The principles, and, indeed, the actual text of Law No. 11 of 1881, were adopted by the re-established Republic, and embodied in Law No. 4 of 1885, with few alterations other than were necessitated by the change of government. Indeed, His Honour, the State President stated, in the Volksraad, that the law under discussion was an amendment only, and not a new measure." Quoted by Whitfield, W.B. op. cit. page 6
The relevant portions of Law 4 of 1885 are here quoted: "Whereas the ignorance and habits and customs of the Native population of this Republic, render them unfit for the duties and responsibilities of civilised life; and further, whereas it is necessary and desirable to provide for their treatment and management, by placing them under special supervision, and for the proper administration of justice among them, until they shall be able to understand such duties and responsibilities as they may reasonably be deemed capable of undertaking, in obedience to the general law of the Republic: Be it enacted therefore by the Volksraad of the South Africa Republic:

Section 2. The laws, habits and customs hitherto observed among Natives shall continue to remain in force in this Republic as long as they shall not have appeared to be inconsistent with the general principles of civilisation recognised in the civilised world.

Section 5. All matters and disputes of a civil nature between Natives shall be dealt with according to this law and not otherwise, and in accordance with Native laws at present in use, and, for the time being in force,
in so far as the same shall not occasion conflict with the accepted principles of natural justice."

On the face of it the above quoted provisions of Law 4 of 1885 seem to imply a very wide recognition of Native Law, but their effect has been seriously circumscribed by the manner in which the Supreme Court of the Transvaal has interpreted the proviso that Native laws and custom shall continue to remain in force "so long as they shall not have appeared to be inconsistent with the general principles of civilisation recognised in the civilised world." Thus in the case of Malana vs Nex (1907 T.S. 407) Chief Justice Innes dealing with the question of recognising Native polygamous marriages said, "To my mind a polygamous marriage is inconsistent with the general principles of civilisation recognised in the civilised world, and this is a polygamous marriage." This position of marriage by custom was made even more precarious by the fact that in 1897 a law was passed in the Transvaal which declared that the only marriages which were entitled to recognition were those which fall into the category of "lawful" marriages, and a "lawful" marriage was a Christian or civil marriage.
Lobola. The payment of lobola was not prohibited by law in the Transvaal, but lobola suits were not entertained by the Courts on the ground (I) that the custom was repugnant to the principles of civilisation recognised in the civilised world, and (II) the custom did not form part of the essentials of a lawful marriage as defined by Act 3 of 1897. Thus lobola was in this province regarded as fundamentally opposed to both the Common and the Statutory Law.

The Court System. The Native Court system of the Transvaal was based on the recommendations contained in a memorandum prepared by Mr. Henrique C. Shepstone, C.M.G. who was Secretary for Native Affairs in the Transvaal during the British Occupation of the Republic from 1877 to 1880. In discussing Native Law in this statement the administrator said, inter alia, "The government of the Natives cannot be carried on under the common law of the country. They are not yet sufficiently advanced in civilisation to understand or be ruled by it. It is essential that they should for some time be governed under and by their own laws and customs, and for this purpose it will be necessary to pass a law authorising such government,"
and that the Governor or Administrator should be appointed Supreme Chief with the power of appointing Administrators of Native Law to govern the Natives in accordance with their laws and customs, subject to appeal to him as Supreme Chief. As we have seen above, when the Republic had regained its independence, effect was given to these recommendations, albeit with various modifications, by Law 4 of 1885. The Court system set up under this law was as follows: At the Head of the system stood the President who was recognised as the Supreme Chief over all the Natives in the Republic, exercising as such all powers and authorities customarily vested in a Paramount Chief by Native Law. He was authorised to depose Chiefs for treasonable conduct, to remove them from the places in which they had resided, to place them under supervision, or in safe custody, and to replace them by suitable persons. These powers were to be exercised in conjunction with the Executive Council, but were not to be subject to revision in any Court in the Republic. The President had the right to review any decisions of Courts affecting Natives and might also fine a tribe. (See sections 7, 10, and 13 of Law 4 of 1885). Below the
President stood the Superintendent of Natives, the chief executive officer of the Administration, who was also the Court of Appeal from the decisions of the inferior Courts. With regard to the latter courts, it was decided that Natives must be dealt with only through specially qualified officers of the Native Affairs Department. Hence Commissioners were appointed in all areas where the density of the Native population made such a course desirable in the interests of better administration of justice among the Natives. In the Courts of Native Commissioners all disputes between Natives, of a civil nature, were to be settled according to Native Law as "at present in use, and for the time being in force, in so far as the same shall not occasion conflict with the accepted principles of natural justice" (Section 5). Native Chiefs who were recognised as such were allowed to exercise primary jurisdiction in civil cases, with the proviso that there was an appeal from the Chiefs' courts to the Government Courts, and with the further proviso that a case did not necessarily have to be brought in the Chief's Court before it was taken to the Commissioner's Court. Thus the
system of Native Administration set up by Law 4 of 1885 may be represented as follows:

The President of the Republic.

The Superintendent of Natives.

Native Commissioner's Court.

Native Chief's Court

Provision was also made for the appointment of Sub-Commissioners. It must be borne in mind also that it was Native Civil Law which received recognition here. As far as Criminal law was concerned the Natives had to conform to the ordinary law of the land, as well as to such special laws affecting them as a group as were considered necessary for their better control.

The Jurisdiction of the Ordinary Courts. The inferior courts, i.e., the courts of the Landdrosts of the Republic were deprived of their jurisdiction over their Natives in civil disputes between Natives by Law 4 of 1885 which made it obligatory for such cases to be dealt with in terms of that Act and not otherwise, and in accordance with Native custom with the limitation imposed by the Act (vide supra). But as far as the supreme Court
was concerned there was nothing in the Act which could be interpreted as ousting its jurisdiction, except in purely administrative functions exercised by the President as Supreme Chief of the Natives. Consequently appeals from the Commissioners' Courts were heard by the Supreme Court, and as we have already noted it gave interpretations of Native usages and customs as repugnant to the principles of civilisation which nullified to a large extent the usefulness of the application of Native Law in the Transvaal Republic.

In the treatment of Native civil cases the Courts were given no discretion by Law 4 of 1885 but had to treat them according to Native usages and customs in so far as they did not occasion conflict with the principles of natural justice. Thus in matters of inheritance and succession, Native law was applied by all the courts, both the special Commissioners' Courts and the ordinary inferior and superior courts of the country. (vide Section 5 of Law 4 of 1885) So the application of Native Law, with the necessary exceptions, was regarded here as a right of the Native and not as a favour granted at the discretion of the Court.
Territorial or Personal Application of Law. Prior to the British occupation of 1877-1880, the application of law in the South African Republic (Transvaal) was territorial, i.e., everyone who was either resident or sojourning in the country, whatever their race or historical background, was subject to the ordinary law of the land. This meant that the Common Law of the country was Roman-Dutch Law, which the Voortrekkers had brought with them from the Cape. But when Sir Theophilus Shepstone became connected with the Republic during the British Occupation, his son, H.C. Shepstone, the new Secretary of Native Affairs for the Republic, pointed out the absurdity and the manifest injustice of endeavoring to rule the Native population of the Republic by means of a system which was so utterly foreign to them and of which they were so ignorant. Consequently when the republic regained its independence, it took advantage of Shepstone's practical suggestions regarding Native Administration, and made the application of law personal as far as Natives were concerned, and so made it possible for them to be governed, at least as far a civil disputes between them went, according to their own usages.
and customs to the extent that they were still in force, and were not subversive of natural justice. This was put into operation by law 4 of 1885 (vide supra). No doubt the rulers of the Republic, had been unaware prior to shepstone's regime that there anything worthy of observance in Native customary law which appeared to them, as it did to many others elsewhere, to be so replete with evil and unjust practices as to be utterly incompatible with Western conceptions of justice.

Codification. Native Law was not codified in the Transvaal, but had to be established by enquiry into the facts of the case. The usual tests were applied to determine whether a Native custom had to receive the recognition of the Court, namely, (I) that it had to show a certain measure of conformity with justice and public utility as far as the tribe to which the individual belongs is concerned; (II) It must not be contrary to an Act of the Legislature, (III) that it must have been observed from time immemorial, i.e., it must have existed for such a long time that "the memory of man runneth not to the contrary". Recent or modern custom is of no account; (IV) The observance of the custom must be regarded
as obligatory by those who practice it before it can be accepted as a legal custom. Mere voluntary practice, not conceived as based on any rule of right or obligation does not amount to a legal custom. The above tests are, according to Salmon, the minimum requirements to be satisfied by a local custom if it is to be regarded as valid and operative. *

The Free State. The application of Native Law and Custom in the Orange Free State resembles in several respects the state of affairs to be found in the Cape Proper. This is a peculiar situation because as far as their general Native Policy is concerned, no two states could be more diametrically opposed. The Cape has always stood, in theory at least, for equal rights for every civilised man, whatever his race or colour, while the free State, like the Transvaal, has always postulated permanent inequality between black and white in Church or State affairs. Yet these two states have arrived at practically the same result as far as the recognition of Native law is concerned, although approaching it from different angles. "Under the impression that Natives were so barbarous that their laws must be worthless, the Orange Free State has failed, with one or two exceptions, to recognise native Law

* Salmond, J "Jurisprudence" page 208
at all. Under the equally mistaken impression that any differentiation between Europeans and Natives in the Law Courts meant oppression for the Natives and an infringement of the principle of equal justice for all the Cape Province has similarly withheld all recognition of Native Law. It is an illuminating comment of the proverb "Extremes meet".

It must be remembered also that the Native population of the Free State is very small. There are only two Native Reserves in the province, namely Thaba Nchu and Witzie's Hoek, and it is only in recent times, probably since Union, that the Native population of the Free State, especially in urban centres such as Bloemfontein and Kroonstad, has increased considerably. The recognition of Native Law would in such a province not appear to be of such urgent necessity as in Natal and Zululand and the Transkei which are mainly Native Territories and in which the bulk of the Native population of the Union is to be found.

The administration of Justice in the Native Reserve of Witzie's Hoek is laid down in Law No. 9 of 1898. According to this law the two chief judicial officers of

* Brookes, E.H. "History of Native Policy" page 181
the Reserve are the Native Chief and the Commandant. By Section 3 of this law the Chief shall have absolutely no jurisdiction in criminal cases, both he and his subjects being, like all the other inhabitants of the Orange Free State, subject to the criminal laws of the state. The Chief's jurisdiction in other cases is laid down in Section 4 as follows:

(a) All civil disputes regarding family matters, disputes with regard to land, cutting of reed grass, ploughing of land, grazing of cattle, and all such matters appertaining to the social life of the Natives which are not in conflict with the general principles of civilisation.

(b) All disputes of a civil nature where the amount in dispute does not exceed the sum of £10 sterling, or where the question in dispute can be estimated in money value at £10 sterling: Provided that the Chief shall in no case be allowed to inflict corporal punishment, and provided further that parties not satisfied with the decision of the Chief shall have the right to appeal to the Commandant who shall hear the case again and shall decide thereon as a court of equity.
It is worthy of note that the jurisdiction of the Chief is not confined to disputes involving questions of customs followed by Natives, but may include even cases foreign to Native Law as long as the amount in dispute does not exceed £10 or the question can be estimated in money value at £10. It is interesting to compare this with the position in Natal where trade transactions, for example, of a nature unknown to Native law did not form part of the Native law administered by the Native Chief. Presumably in dealing with such a case the Native Chief in Witzie's book would have to follow the ordinary law of the State, of which he might be ignorant.

Neither the jurisdiction of the Chief nor that of the Commandant ousted the jurisdiction of the ordinary courts of the Free State which in dealing with Native cases coming in appeal from the Commandant or from any other part of the Province followed the ordinary law of the Free State unless there was an express statutory provision to the contrary. Thus marriage by Native custom was not recognised in the Province, but Law 26 of 1899 which sets out the law governing all marriages in the Free State contains the following provision regarding
what it termed heathen marriages:

Nothing contained in this law shall prevent children born of heathen parents, though the latter may not have been legally married, from taking by way of inheritance the lawfully acquired properties of such parents, where it shall be proved that such parents regarded one another as husband and wife, and lived with one another as such. And nothing contained in this law shall prevent unmarried heathen parents as above from holding and exercising the same rights over their children that they would have had, if such children had been born in lawful wedlock, provided always that in the event of the mother being separated from or deserted by the father, the mother shall alone have the right to dispose with regard to her own children, but should the mother have deserted the father, the father shall retain the right of control over his children. Thus Native marriages are recognised for the purpose of (I) succession and inheritance, (II) parental control and guardianship over children. But the rights of the parents over the children shall be only what they would have been if the parents had been
married lawfully, i.e., by Christian or civil rites, which is very different from the control they had under Native Law. It is to be noted also that the wife may become a guardian of her children in the event of her being deserted by her husband. In true Native Law a woman was a perpetual minor, always under the tutelage of some male, or her husband or his heir after marriage. She therefore never became the guardian of her children.

It goes without saying that lobola suits were not entertained in any courts other than that of the Native Chief in the Witzie's Flock Reserve, and possibly the Commandant's Court of Equity.

Nothing could be more confused and confusing than the way in which a provision was made for the administration of Native Law in the Free State. It is clear that the matter never received any serious consideration, hence the inconsistencies and contradictions shown above.
CHAPTER IV

The Recognition and Application of Native Law since Union.

1. We have seen thus far that the Colonial Governments of the Cape, Natal Transvaal and the Orange Free State had not only followed different policies with regard to the recognition and application of Native Law, but that even within the same State, not infrequently, different courses were pursued in different areas, e.g. in the Cape. (vide supra). In 1910 these different States came together to form the Union of South Africa, and as a result of the deliberations of the National Convention held in Durban in 1906 the South Africa Act in which the Constitution of the Union of South Africa is embodied was passed by the British Parliament. In any study of the policy of the Union of South Africa with regard to its Native population, we have naturally to look for guidance to the South Africa Act. In fact the question of future Native policy was one on which the National Convention was sharply divided, and a serious deadlock was only averted by a compromise by which the status quo in the different States was maintained. But a careful examination of the South Africa Act soon reveals the fact that there are a few scattered and indirect references to the Natives in this important docu-
ment. For example among the indirect references we find that in Section 26* among the qualifications of a Senator is mentioned the following:—"He must be a British subject of European descent". Among the qualifications for members of the House of Assembly laid down in section 44* occurs the following:—"He must be a British subject of European descent." The conditions for membership of the Provincial Council laid down in section 70 contains the following clause:—"Any person qualified to vote for the election of members of the Provincial Council shall be qualified to be a member of such council." Under this section non-Europeans are entitled in the Cape to become members of the Provincial Council: Dr. W.B.Rabusa of East London, Dr. A.Abdurahman and Mr. S.Reagon, both of Cape Town, are examples of non-Europeans who have been members of the Provincial Council of the Cape under this section.

Direct reference is made to native administration in section 147* of the South Africa Act which reads:—"The control and administration of native affairs and of matters specially or differentially affecting Asiatics

* See "South Africa Act of 1909 U.G. 14-10"
throughout the Union shall vest in the Governor-General-in-Council, who shall exercise all special powers in regard to native administration hitherto vested in the Governors of the Colonies or exercised by them as supreme chiefs, and any lands vested in the Governor or Governor and Executive council of any Colony for the purpose of reserves for native locations shall vest in the Governor-General-in-Council, who shall exercise all special powers in relation to such reserves as may hitherto have been exercisable by such Governor or Governor and Executive Council, and no lands set aside for the occupation of natives which cannot at the establishment of the Union be alienated except by an Act of the Colonial Legislature shall be alienated or in any way diverted from the purposes for which they are set apart except under the authority of an Act of Parliament." This clause safeguards the land rights of the Natives and puts their administration in the hands of the Governor-General-in-Council.

As a result of the centralisation of Native Administration in the Governor-General-in-Council it was hoped
that it would be possible to develop gradually a uniform policy in regard to all Native Affairs, and so harmonise the inconsistent and somewhat contradictory policies that had been followed prior to Union. We are only concerned to trace the development of the recognition and application of Native Law, and will not touch upon other questions of Native Administration except so far as they impinge upon our main problem.

The first indication we get of an attack on the question of the question of the recognition of Native Law is in the recommendation of a Select Committee of the House of Assembly which reported as follows in 1911:—"Your Committee recommend that legislation be introduced admitting of the recognition by Courts of Law of such Native Law and customs as are already embodied in the law in force within certain parts of the Union." This recommendation was followed in 1912 by the introduction into Parliament of a Bill known as the Native Disputes Bill* the aim of which was declared to be to facilitate the settlement in accordance with Native law and custom of certain disputes between Natives. Section 3 of this Bill which is illuminating

* See appendix to Chapter IX of Brookes, E.H. "History of Native Policy" p. 205
as regards the intention of the Legislature reads:— "Upon the intimation to him by either of the parties to any dispute or by the duly authorised representative of such party that he is desirous of having the dispute settled in accordance with native custom, any magistrate may, if he think it expedient in the interests of justice, subject to any prescribed rules,

(a) Dispense with the procedure ordinarily required for action at law precedent to the trial of the dispute and substitute therefor such procedure as may be necessary to bring before him the parties to the dispute and their witnesses;

(b) Enquire into the dispute and, for the purpose of the enquiry, dispense with the procedure, including the manner and form of proceeding and rules of evidence, governing the trial of the dispute by ordinary action at law, and substitute therefor such procedure and rules as may, in his opinion, best assist the determination of the matter in dispute;

(c) Call to his aid such advisers as he may deem necessary to enable him to determine any question of native custom:
and

(d) Determine the dispute in accordance with native custom and make such order as may be necessary; Provided that effect be given to native custom only so far as its application to the dispute may, in the opinion of the magistrate, be in accordance with real and substantial justice." Thus the question in dispute was to be settled in accordance with native law and custom at the request of either of the parties or their representatives, although the final decision rested with the magistrate who had to satisfy himself that it was expedient to do so in the interests of real and substantial justice. In another section we read that appeal from the magistrates were to lie to any superior court of the Union or to a special court of appeal consisting of three magistrates to be constituted from time to time by the Governor-General as occasion may require. This Bill failed to reach the Statute Book.

Meantime the famous Natives' Land Act 27 of 1913 was passed. Among the objects of this Act was the establishment of the principle of territorial segregation in South Africa, i.e. the whole of the country was to be divided into two sets of areas, one in which Natives alone