The Sources of Native Law

1. The ~~of the Native people constitute~~ customs observed by the different native tribes from time immemorial constitute the primary source of Native Law. As the native people prior to their contact with Europeans did not know the art of writing their customs and usages ~~were not recorded~~ which they observed in their daily relationships were not recorded. ~~and~~ Their law was unwritten law, treasured in the memories of the people and enforced by their chiefs in their courts.

2. ~~The student of native law~~ How then can the student of Native law learn its principles, and ~~where~~ in what direction must he look for ~~the~~ its rules? "The main source of our knowledge of Native Law is the writings of those who record their own knowledge of it based on direct contact or observation. In this respect our knowledge is both incomplete and defective and Native Law is accordingly weakened"

3. It is probably true to say, that scattered throughout the writings of early travellers and missionaries in British Africa may be found references to rules of conduct observed among the different indigenous tribes with whom they come into contact. This information is of little or no importance in the study of native law for present-day purposes, because practically all of it was based on incidental observations which were necessarily full of gaps and unsystematic

4. Next in order of importance ~~come~~ may be mentioned the works of anthropologists and others devoted to relatively full accounts of the life and custom of various native tribes. Some of these ~~sta~~ works were ~~[illegible]~~ very detailed and most intimate studies of the ~~cultural~~ social life of the tribal communities concerned and so might be said to give a picture of the social cultural background in which rules of law are developed.

Such books often include a chapter or two on the ~~form~~ machinery of government ~~of the tribes concerned~~ or the political systems of the tribes concerned but ~~little~~ not sufficient direct information on ~~the~~ rules of law in a form capable of use by students of law. As Lewin puts it, "Such books often include a chapter or two of legal interest on marriage customs or on tribal courts, or less frequently on inheritance; monographs are, of course, indirectly useful to lawyers in depicting the background against which cases must be considered, particularly in estimating the credibility of Native witnesses. But the material presented seldom makes the distinction necessary for most legal purposes between customs that might be regarded as mere social conventions and those which are "laws", i.e. features essential to the validity of a legal process. As Sir Donald Cameron has pointed out, we must avoid "the confusion of mere ceremonial practices with the essential requirements of law; for instance, dances and drumming at a Native wedding are the invariable custom, but they are not, like

the payment of dowry, essential in Native law to the validity of the marriage." The Native Appeal Court has also recognised and enforced this distinction (see Bila vs Masuka, 9 N.A.C. (Nat), 1937.

5. Another important primary source of information regarding Native law or custom consists of the reports of Government Commissions such as the Cape Commission of 1880, appointed soon after the annexation of the Transkeian Territories, to inquire into Native law as then recognised and administered in those territories. "Appended to the Commission's Report are summaries of Native laws & customs drawn from Maclean, from the Proceedings of the Commission on Native Laws & Customs of the Basutos, 1873, from the Natal Code of Native Law & from the replies to a circular on marriage, inheritance & crime". The Report of the Commission published in 1883 remains "unquestionably the major source of our knowledge of the substance of Native law". Other reports of Commissions which include references to special aspects of native law include the Natal Commission of 1852, the Natal Commission of 1881-2, the Natal Commission of 1906, the Cape Native Affairs Commission of 1920.

6. A few handbooks devoted to the subject of Native law may also be referred to ~~mentioned~~ in this connection. The earliest of these to be compiled was Maclean's "Compendium of Kafir Laws & Customs" (1858). It contains notes on Native law by Maclean himself assisted by experienced officials and missionaries like Dugmore, Warne, Brownlee, Kayliff & others. At the time it was published it was regarded "as a generally correct exposition of Kafir jurisprudence."
Another book of this type is a booklet by Harries on "Sepedi Laws & Customs", which is first published in 1909. The special significance of this book was that it dealt with the law of Sotho-speaking peoples of the Transvaal as against Maclean's Compendium which dealt with the law of the Khosa speaking tribes of the Cape.
The most recent work of this type is Schapera's "Tswana Laws & Custom". The work of a trained anthropologist, it was written for the "express purpose of making the information it contained available in the administration of justice according to Native Law." "Moreover, by taking some pains to present the material as far as possible in the categories normally adopted in legal literature, he rendered the book obviously useful to practising lawyers and practical administrators."

7. References may be found to Native Law in some of the statutes of the different Colonial governments which existed in South Africa prior to Union. In some cases as in the case of the Cape Native Succession Act of 1864 the statute merely directed gave statutory recognition to a certain aspect of Native law, without attempting to lay down the rules of Native law on the subject concerned. Sometimes the colonial legislature went to the length of embodying the rules of Native Law in a Code as in the case of the Natal Code of Native Law contained in the schedule to Natal Law 19 of 1891, or only certain parts of the Native Law as in the case

Transkeian Territories Penal Code (Cape Act 24 of 1886). "The original version of the Natal Code of Native Law, promulgated in 1878, was the work of a Board of Native Administration. The Code was revised and in 1891 it was passed in the form of Law 19 when it became legally binding on the Court." It remained substantially unaltered until 1932 when a thoroughgoing revision of it was undertaken and it was promulgated as Proclamation 170 of 1932. "The Code embodies the substance of Native law applied in Natal & there is a tendency to follow it in the Transvaal." The Transkeian Territories Penal Code was first recommended by the Cape Native Affairs Commission of 1883. It consists mainly of European criminal law to be applied to European & Native residents of the Transkei alike, but it includes a few features of native criminal law.

8. In certain parts of the Union Native law has been recognised and applied in civil proceedings between Natives for many years, and Native Appeal Courts have been engaged in working out and developing the principles of Native law. Thus in the Cape there has been in existence a Native Appeal Court since 1894. That Court was in existence until 1927 when it was abolished in terms of section 17 of the Native Administration Act 38 of 1927. Several volumes of the decisions of this Appeal Court ~~are~~ dealing with Native law are in existence. In Natal there has been a Native High Court since 1898. The judgments of this Court in all important cases have also been collected & published as precedents to be followed by the lower courts. This Court has been deprived of its civil jurisdiction in Native cases ~~and~~ in terms of section 17 of Act 38 of 1927.

Since 1929 two Native Appeal Courts have been established under the Native Administration Act of 1927, one with jurisdiction over Natal & the Transvaal, headquarters Pretoria & another with jurisdiction over the Cape and the Orange Free State. The important decisions of these Courts are also published in reports printed by the Government Printer. "As these Courts are applying Native law, the judges are entitled to rely on their own knowledge of Native law. To the extent that they do so, the Reports constitute a primary as well as a secondary source of knowledge. In addition, the Courts are empowered to summon Native assessors to advise them on points of law that arise in the course of a case on which precedents or indeed any kind of information is lacking. The replies of the assessors, who are usually men of distinction in the tribe are duly recorded whether or not the Court accepts their view of the matter in issue."

9. "Cases involving discussion of Native law also occasionally come before the various provincial divisions of the ordinary Supreme Court, & they are then reported in the ordinary law Reports. This happened more frequently before the establishment of the Native Appeal Court under Act 38 of 1927. "When such cases do arise however, they may be worth nothing because these Courts, unlike the Native Appeal Courts, normally apply the Common Law i.e. Roman-Dutch law, and are therefore not presumed to know Native law, of which they consequently hear expert evidence if necessary."

10. ~~Finally~~ Next mention must be made of a few text-books on Native Law. These include

① "Native Law & Custom" by Sargeaunt, published in 1911 which confines itself to Native Law in the Cape & is almost entirely based on decisions of the Transkeian Territories Native Appeal Court.

② "South African Native Law" by Whitfield, published in 1929. It attempts to deal with Native Law in South Africa as a whole. "Based on Law Reports" it also relied on blue books, on the writings of anthropologists & on other sources, in the attempt to cover as much of tribal law as was known, likely to be useful to lawyers or administrators. It became & still remains the best known and most frequently quoted book on the subject. This book like all standard legal textbooks attempts to give a systematic exposition of Native Law.

③ "Native Law as practised in Natal" by Stafford, published in 1935, which is limited to the interpretation that legal decisions have put on the Natal Code & to a criticism of conflicting & doubtful decisions.

④ "Native Courts Practice" by Blaine, published in 1931, which ~~deals~~ is limited to the interpretation that legal decisions have put on the Native Administration Act 38 of 1927.

⑤ "An Outline of Native Law" by Lewin, published in 1944, which sets out briefly ~~the differences between~~ Native Law, as applied in South Africa on certain topics.

11. Finally reference may be made to a few works which deal with the nature of primitive law in general such as

① "Primitive Law" by Sidney Hartland

② "Primitive Law" by A.S. Diamond

③ "Historical Jurisprudence" by Paul Vinogradoff, especially Vol 1. which contains a section dealing with "tribal law"

④ "Ancient Law" by Sir Henry Maine

* "Both divisions of the present Native Appeal Court have now been functioning for ten years so that there are already twenty volumes of Reports covering only this period.