to use it in that connection. The administration of the Pass Law is even worse. The indiscriminate and rough manner in which the Police demand passes and handle those who do not possess them is very irritating, to say the least. Therefore from all points of view to the native mind the passes represent the height of injustice, because on the face of it they have nothing to do with the public welfare which they look upon as the basis of all judicial administration.

7. Main Divisions of Law.

When we examine the legal system of any modern state we generally find it falls into certain more or less clearly defined divisions. The details of the systems under the various divisions will be found to differ considerably, but theoretical jurisprudence shows that the divisions are fairly uniform in all civilised states. Thus we find that all law may be divided into Public Law and Private Law. Public Law is concerned with those suits or cases in which at least one of the parties is not an individual but a state or a nation or a tribe. For example Criminal Law is a part of public law, because in a crime the parties

before the court usually include on the one hand the state or the crown or the representative of the crown in the person of the public prosecutor and on the other hand the accused or the person charged with the crime.* Private Law on the other hand deals with cases primarily concerned with disputes between private individuals. Even if the state has to make provision for the settlement of such cases, still the parties before the court are always private individuals in their private capacities. Thus a divorce case falls within private Law, for although the contract of marriage is such that it cannot be dissolved without the intervention of the Court, the parties concerned primarily are the individuals whose marriage is in question, and not the state which merely acts as an arbiter in the matter.

Public Law is generally further divided into (i) Constitutional Law which has reference to the determination of the sovereign power; (ii) International Law which deals with the relation of one state to other states like itself: (iii) Criminal Law which as we have already pointed out, concerns itself with offences against the state by private

* See Radcliffe-Brown "Primitive Law" Ency. Soc. Sciences

individuals.

Private Law on the other hand may be divided into (i) The Law of Persons or Family Law which deals with the rights and duties of private persons in so far as rights and privileges and duties depend upon the status of such individuals in the families or groups of which they form a part; (ii) The Law of Things or Property which is concerned with those rights of persons over things which do not depend upon or are not affected by the status of the individuals concerned; (iii) the Law of Obligations or Contracts which as its name indicates deals with those rights and duties which arise between persons as the result of agreements between them; (iv) the Law of Injuries or Delicts which deals with wrongs between persons in which the state does not feel called upon to intervene, and in which the only remedy is for the party affected to move against the wrongdoer with the state as arbiter. Private Law is sometimes known as Civil Law.

Divisions in Native Law. As is to be expected, when we come to examine primitive systems of law we find that the distinctions we have made above do not apply to them entirely.

For example, there is little in the line of International Law in primitive society. The "states" are in reality a number of small tribes, and such relations as they have between them are not based on any well established principles such as are observed in the relationships of the tribesmen to one another But even in modern states the development of international understandings has not proceeded so far that we can regard it as being in a healthy condition. The failure of the League of Nations to obtain the universal acceptance of the principle of the settlement of international disputes by arbitration rather than by war is a case in point. Among other matters of international significance which still constitute a bone of contention between different states may be included the extradition of prisoners, immigration laws, armaments, and trade tariffs. And yet it cannot be gainsaid that the fact that international conferences, however abortive they may be, are occasionally held over these questions represents a great advance over the position in primitive society. The position then is briefly summed up by Hartland as follows:-"The attitude of a

savage tribe towards aliens whether as a body or individually is very simple: it is one of suspicion and hostility." Strangers are suspected of treachery and hostile intentions, of the possible practice of evil magic on the slightest evidence. They are unable to partake in the tribal ceremonies, and it is doubted sometimes whether in the event of the death of a stranger within the territory of a particular tribal group, his corpse should be treated in the same way as that of a regular member of the tribe. Against this must be placed the traditional hospitality of the primitive. It is common knowledge that in Bantudom in travelling from one part of the country to another, the stranger need not provide himself with provisions or any baggage other than his ordinary weapons for self-protection against wild animals and other dangers common in a wild country. He is assured of a sleeping-place and of food wherever he comes across people. He may even be provided with a wife if he is the guest of a man wealthy in wives. He is welcome to stay at any kraal as long as he wishes without the embarrassment which anybody in a similar position in a modern community

would experience. Frequently the arrival of a stranger was the occasion for slaughtering the fatted calf or even the favourite goat of the head of the household. Members of the family rejoiced when a stranger arrived, because they knew that that foreshadowed good things for everybody around. But even in the midst of all this hospitality it is not difficult to find evidences of the fact that the stranger is regarded as a thing apart from the rest of the group. Often before he partakes of the food of the kraal he has to undergo certain cleansing processes, just as the daughter-in-law who in reality belongs to another group is only gradually admitted to the inner circles of the family and to full participation in all its practices. Sometimes the stranger is looked upon as a supernatural being in which case he is treated well for fear of the evil that would follow a different kind of treatment. If any evil befalls the group and all the methods of divination usually applied in such cases fail to bring to light the cause of the trouble, it is by no means unusual for the group to wreak their vengeance on the stranger who is blamed for the mysterious malady. Wherever

cf. The Hlonipha custom which is observed by daughters-in-law among the Nguni-speaking tribes of South Africa.

human sacrifice was practised or where someone needed to be buried with an important personage such as the chief, to attend to his wants in the next world, the stranger easily became first choice. What Junod says of the Thongas about this matter may be taken as of general application "if they dispense hospitality liberally, the Thongas can be very hard on people who do not belong to their special clan. Feelings of humanity are sometimes strangely deficient."* So far we have dealt with the treatment of individual members of other tribes. Regarding the relations between tribes or large groups the same facts hold. Frequently we find the most cordial relations existing between such groups, especially when they live close to one another. The greater the distance between tribes the greater the possibility of estrangement between them. When the tribes are on friendly terms, there is freedom of movement for members of the respective groups within the areas occupied by them, "but should relation between them be at all strained, or should war be imminent, all the roads would be closed and no one be allowed to enter the capital"** of either group. In the event of war friendly tribes often

* Junod, H.A.: "The Life of a South African Tribe" Vol 1 p 355
**Ibid. Vol.1. p. 433

make alliances in order to meet a common foe. Messengers go between tribes for the purpose of making proclamations and announcements on matters of common interest and as ambassadors to settle outstanding questions of dispute. Women often help to cement the good relations between tribes, as for example when a chief of one tribe marries a relative of the chief of another tribe. With regard to the question of the methods of conducting warfare, we find no "international" understandings. "No convention provides for what acts are permitted and what are not"* "All is fair in love and war" is a policy to which they subscribe. Frequently there is no formal declaration of war. The more completely you can catch your enemy unawares and raze his village to the ground before he realises what happened the better. Frequently primitive wars are characterised by the utmost cruelty. Prisoners taken were either tortured to death or made slaves; whole tribes were annihilated. The only remedy for the defeated party was often to abandon their villages and to fly for life into another district. During the raids of Chaka in South Africa in the early part of the 19th century defeat meant extinction and the effect

* Agar-Hamilton, J.A.I. "The Native Policy of the Voortrekkers" p.20

1 If we are to give credence to half of what we have told about atrocities committed during World War II, it would appear that modern civilisation can not boast of much advance in the matter of the treatment of enemy subjects in war time.

of the raids was that it destroyed many tribes and depopulated large stretches of country and often provided the opportunity to chieftains, hitherto insignificant, to build up a large following out of the wreckage of the various clans, as did Moshesh in building up the Basuto nation.* There were more formal methods of making peace, by means of mutual payment for lives lost in the war, or by the return of property taken, or by sacrificial ceremonies in which both groups participated and which formed part of a covenant between the groups concerned to "keep the peace" in the future. When the Bantu came into contact with the Europeans they were then first introduced into the notion of written treaties. The infringement of the terms of these treaties led to frequent disturbances between white and black, so much so that we find historians like Ager-Hamilton making the following remark "Let it be granted at the very beginning that Natives are utterly <u>incapable</u> of understanding the sanctity of a written contract and that treaties made with them have in practice proved useless."+ But apart from the fact that these treaties were often couched in phraseology which was incapable of being translated into

* Ager-Hamilton, W.J. "<u>The Native Policy of the Voortrekkers</u>" p.4

+ " " " " A. 21

1 Brookes "History of Native Policy in S.A." for treatment of Treaty Policy - Chapter 1.

the languages of the Natives, the notion of written treaties was so foreign to Bantu culture that the fact that they did not observe the treaties can easily be understood. The Europeans were strangers to them, and already pointed out, as strangers they were not entitled to the full loyalty regarded as due to fellow-tribesmen.

Constitutional Law among the Bantu. Constitutional Law as we have already pointed out deals with the form of government prevalent in any community or state. It determines for us where the sovereign power in the state lies, what the rights and privileges and duties of the different members of the state are to the community as a whole; it enables us to find out what are the various legislative bodies whose enactments can be regarded as binding by anyone who owes allegiance to a particular state. This type of law is not very highly developed among the Bantu. Its main principles are few and are soon learnt. In many civilised countries we find what are known as constitutions in which are set out in detail the powers of the various forms of the state legislative bodies. The American Constitution is such a document, and all the different American States,

48 in number possess constitutions in which the rights of ordinary members of the state are clearly defined. No such documents exist in Bantu Law. This is not alone due to the fact that the art of writing was not known among the Bantu prior to white contact, for a constitution does not have to be in writing in order that its principles should be well established. Great Britain, for example, does not possess a written constitution. It is one of the boasts of Englishmen that their constitution was not written down in any ambitious document known as a Declaration of Rights, but rather that it has grown with the English people, adjusting itself from period to period to the constitutional needs of the people. It is true that today there are in existence treatises dealing with English constitutional law: undoubtedly Acts of Parliament have been passed such as the Parliament Act of 1911 (the Statute of Westminster of 1931) which bear on the English Constitution, and numerous cases which now form part of the law of England form part of the law of the constitution. But it is still true that there is no special document known as the English Constitution. South Africa possesses a written constitution which is embodied in the South Africa Act of 1909. But in

Native Law there is no special law of the constitution, although it is possible to determine some of the elements of the Bantu form of government.

Form of Government. In every tribe there existed a central authority which issued commands to the members of the tribes and which had to be obeyed. As a rule supreme authority was vested in the Chief of the tribe, who, however did not act independently as is often supposed by those who have made only a superficial study of Bantu social organisation. In all his official acts the Chief acted in conjunction with and with the concurrence of his Counsellors. These were men who through their experience in dealing with state matters were regarded as representing the will of the people. They were not appointed in any formal way but secured their positions through merit as shown by their insight into the vexed questions and disputes of their community and their ability to state succinctly the wishes of the people they were supposed to represent. They constituted the Cabinet or the Executive of the Chief.

It must be remembered however that the Chief together with his Cabinet did not constitute a law-making body in

the ordinary sense of the term. In modern communities, for example, we have a legislative body like the English House of Commons and the House of Lords, or the South African House of Assembly and the Senate, which make all the laws within their respective jurisdictions, and which in some cases delegate their law-making powers to other bodies such as provincial councils or Divisional Councils. In Bantu Society we find no such law-making bodies*. The Chief-in-Council administers the law as he finds it, adhering as far as possible to the ancient customs of the tribe. Unless there are very clear circumstances calling for a different type of action, the tribesmen were held to the veneration of the methods of their forefathers in everything. Anyone who presumed to act differently suffered the fate of those who were disobedient to the wisdom of the ages. Where a change seemed to be called for in the customs of the tribe, the whole question was fully discussed in an ad hoc meeting of the community as a whole, and all its implications were gone into fully, and a proclamation made by the chief to the effect that a different custom had been established: but nothing corresponding

* The State as a law-making body had not yet emerged in Bantu Society. The laws of the tribe consisted of the rules relating to various social institutions. For a discussion of the difference between State-created law & laws arising out of the ordering of the relations within & between the various associations (i.e. social units) in the community see Ehrlich "Sociology of Law
also Malinowski "Crime & Custom in Savage Society
" " Introduction to Hoebel's "Law & Order in Polynesia"

to our modern system of legislature was known among the Bantu.

But apart from this difference between Bantu constitutional law and modern constitutional law, we must note the fact that in Bantu society, the Chief-in-Council exercised both the legislative functions in the state, to the extent that they did exist, as explained above, and the judicial, administrative and religious functions of the State. There was no separation of these functions such as we find in modern states. We regard it as anomalous that the same body should make the law, administer it, i.e. see that it is carried into effect, as well as deal with breaches of the law. Such a system is regarded as being calculated to lead to the abuse of the rights of the individual. The "reign of terror" of men like Chaka shows that this system was open to abuse but it may be said that in the majority of cases the chiefs discharged their duties in such a way that the tribesmen obtained substantial justice. The Chief himself was not above the law, and had to pay lobola in marriage, pay homage to his ancestors and otherwise submit to the rule of customary

law just as the meanest subject in his state. We do not find among the southern Bantu the same idea of the Sacred King that we find among the northern Bantu, for example the Baganda, but as Soga points out "the sacredness of their persons, the respect and honour in which they are held, and loyal obedience to their commands, in which "their's not to reason why," but submissively to fulfill: the mystical idea that in the chief resides the life and well-being of the tribe, that as the head of the tribe, and as such the repository of wisdom, endowed with the power to guide the collective members of the tribal body, and nourish the body politic: all this surrounds him with a halo more enduring than any outward symbol."* Every member of the tribe was regarded as valuable in the eyes of the community as a whole, and had a right to appeal to the chief for protection at any time when he felt that his rights were in jeopardy. The house-wife who ordinarily was under perpetual guardianship of either her husband or his heir in the house to which she belonged and as a minor had no locus standi in judicio was nevertheless entitled to appear before the chief to ask for the protection of

* Soga,J.H. "Amaxosa Life and Customs" p. 32

the proprietary rights of her children or against any ill-treatment which she might be suffering at the hands of her guardian. The same would apply to any other person regarded as a minor.

In order to carry out his work effectively the chief had under him in various partsof the territory occupied by his tribe a number of petty chiefs or headmen who did within the areas of their jurisdictions what the chief did for the tribe as a whole. They were answerable for their actions to the supreme or paramount chief. Under these Headmen were the heads of the families, familiarly known as Kraalheads, who were the people to whom the Headman looked for co-operation in the execution of his duties. The Kraalheads had the general oversight and supervision of all those who were inmates of their kraals, not only their blood relatives, but all those individuals who formed part of their households. Thus there was a complete hierarchy in which each stage was responsible to the next-- the members of the family being answerable to the kraalhead, the kraalhead to the headman and the headman to the Chief, providing us with "an unbroken chain of responsibility."* Finally it must be borne in mind

* Brookes, E.H.: "History of Native Policy" p. 175

that all the dignitaries mentioned above also had a certain responsibility towards those below them. Any Chief or Headman or Kraalhead who rode roughshod over the wishes of his people did so at his peril, for here as elsewhere the principle applies that no man can be a greater tyrant than his people will allow him to be.

Criminal and Civil Law among the Bantu. The distinction between criminal and civil law is drawn in primitive law as it is in modern law. Primitive criminal law is concerned with those gross antisocial acts, e.g. incest and witchcraft, which require to be stamped out with the utmost severity, because it is believed that they imperil the existence of the tribe as a whole, while civil law is concerned with private wrongs between individuals in the settlement of which the tribe does not interfere unless the dispute in question develops into something that threatens to disturb the equilibrium and the stability of the community. In modern law, on the other hand, a crime is an offence against the State or a dispute in which at least one of the parties is a State: the crime need not necessarily be of such a nature as to threaten group solidarity in the way witchcraft does in primitive society. As long as the State decides that

See Radcliff-Brown — "Primitive Law" Encyc. of Social Sciences

prosecution for a particular offence shall be at the instance of the State or a body to which the State has delegated authority for this purpose, the offence becomes a crime, e.g. riding a bicycle in a public street at night without a light; if the process of law is to be set in motion by a private individual, and the State feels that it is not called upon to defend the individual but merely to act as an arbiter in the dispute, then the offence is civil, e.g. the publication of defamatory matter about a person.

For this reason we find that many offences which are in modern systems of law regarded as crimes, in primitive law still fall within the catagory of civil wrongs which are expiated by means of restitution or compensation in the shape of cattle or other forms of property. For example, theft between members of the same tribe was a civil offence, which was settled privately without the intervention of the Chief except as an arbiter, whereas in a modern State theft is an offence against the State and is incapable of private settlement once it has come to the notice of the public authority. The fine imposed for theft in a modern state is paid into the State Treasury, and no compensation is given to the owner of the property

who may, however, institute a separate civil action against the thief for damages. But as the thief is generally a man of straw, proceeding against whom would be likely to yield nothing while involving needless expenditure, this virtually amounts to saying that the owner has no remedy, and this on the principle that strictly speaking the offence is not against him but against the public authority. In a primitive community the fine imposed on the thief is paid to the owner of the stolen property who is the chief sufferer by the action of the thief. While the chief often retained a portion of the fine for his services, the guiding principle was that the case was not his, but rather that of the owner of the property.

Another important consideration in connection with primitive law is the small place given to intent and motive in connection with offences. In a modern state, in a case of homicide, for example, one of the most important questions to be determined is always the motive or the intent of the person who did the killing, and the intention determines to a large extent whether the killing amounts to manslaughter or to murder. Thus if the homicide is performed by an executioner where the intention is to carry out an order of

court, or if it is in self-defence where another course would have jeopardised the life of the accused, the killing might be regarded as lawful; if the killing took place in a motor accident in which the action of the accused did not amount to reckless driving the consequences of which he knew or ought to have known would be the homicide in question, then it becomes simply a question of manslaughter; but where there was a definite intention to kill, then the homicide would amount to murder, in which case it would still be necessary to inquire whether that intention to kill was not the result of a form of insanity which impaired the sense of judgment of the accused sufficiently to render him unable to know the nature and the quality of the act he was committing or that he was doing wrong, which would be a complete defence to a charge of murder.*

These distinctions are unknown in primitive law. A homicide is a homicide; it means the loss of a member of the tribe and as such upsets the equilibrium of the tribe, whatever the intention of the killer may have been. The whole group which has been thus unsettled by the death of a member may rise up to wreak its vengeance on the killer or on

*See Goodhart, A. L. "Essays in Jurisprudence" Cambridge, 1931 p. 47.

the group to which he belongs until the equilibrium is restored. Among some primitive societies there is no central authority to deal with these offences and their settlement depended upon the affected party securing the force of public opinion on his side and so being permitted to get even with the offender. Here the taking the law into one's hand is permitted provided one has the force of public opinion behind one. But where there is a central public authority, as in modern society, taking the law into one's hand is not tolerated, the force of public opinion notwithstanding. The life of every member is equally important before the law, whether he is accused of a crime or not, and it is the State as a whole, not private individuals, which gets even with the offender.

The forms of punishment used in primitive society are also worthy of note. Among the South African Bantu as a rule we find no prison system. The death penalty is reserved for those gross antisocial acts which endanger the life of the community as a whole, e.g. treason, attempt on the life of the chief, witchcraft, and incest. Otherwise punishment is mainly be means of a fine in the form of goods such as cattle, sheep, etc. An important type of sanction in primitive society is the diffuse sanction of public ridicule.

The primitive man was very conscious of the fact that certain things were simply "not done" in society, and the man who overstepped the mark and flouted public opinion in these matters found himself an outcast, who had the protection of neither the living nor the departed members of his tribe. The curse of a parent or of a departed ancestor, the pointing of an ominous finger, the derisive songs of one's age-group—these were just as effective as being mulcted in damages, if not more so.

Again in a state of society where the unit is the group or the family rather than the individual, we would expect to find a high degree of development of collective responsibilty. Fundamentally it is always the group that has to bear the burden of responsibility for the actions of its individual members. Their good reputation redounds to the glory of the group as a whole, while their folly is always expiated by all their kinsmen or tribesmen.

All these characteristics are to be found in Bantu law in South Africa. It is well to point out that central government under the chief was fairly well developed in Bantu society; the distinction between crime and civil wrong was recognised, and collective responsibility is an

important factor in the maintenance of law and order, and has been used to good effect by the South African Government in its Stock Theft laws. (vide p.269). The whole kraal is responsible for the misdeeds and the debts of its inmates; a principal is accountable for the acts of his agents and dependants. Every member of the tribe was a kind of policeman whose duty it was to report (bika) to his superior any act or wrong which he witnessed or which came to his notice, if he did not want to be regarded as an accomplice or as an accessory after the fact. The death of a kraalhead did not extinguish his debts or his rights which were taken up by his successor just where he left them off. This group solidarity is one of the most fundamental aspects of Bantu social organisation and is at the bottom of most of their moral code.

Specific Crimes. As has already been pointed out, the crimes recognised in Bantu society are antisocial acts which are so abhorrent that the whole community rises to stamp them out with the utmost severity. As a rule the ordinary forms of tribal procedure in civil or criminal trials are suspended in dealing with these heinous offences, for when the whole safety of a society is believed to be threatened, the usual forms of justice are held to be in-

sufficient and rather unreliable as a method of dealing with questions involving the self-preservation of the group as a whole. Lynching in the Southern States of America is a modern case in point. There upon the commission of a certain type of offence by a black man on a white woman, the whole community rises to stamp out what they regard, rightly or wrongly, as a menace to the safety of the whole group. Again the spread of kidnapping has given rise to the same sense of social insecurity on the part of a section of the population, and rightly or wrongly the people brush aside the ordinary judicial process on the principle that the safety of the people as a whole which is thwarted is more important than the fair trial of a single individual. Now this suspension of judicial process is very unusual in modern society and is condemned by those who feel that the arm of the law is strong enough to protect the people as a whole against any antisocial acts; but in primitive society it is accepted quite readily and its justice is unquestioned. Yet even there we find that only a few offences have this quality of pollution of the community to such an extent that they are visited with this extreme form of punishment. Among such antisocial acts among the Bantu in South Africa may be mentioned:

(a) Treason. This is an offence which is calculated to overthrow the whole system of government, and being subversive of central public authority it strikes at the very heart of group life. It may be committed either generally by betraying the people as a whole or by an offence against the chief in his capacity as symbolising the unity of the people as a whole. Although the chief ordinarily was not different from the members of his tribe, e.g. his dress was quite simple, his person was sacred and treason against him was punished with great firmness. As Soga says, "the sacredness attributed to their persons, the respect and honour in which they are held, and loyal obedience to their command in which 'their's not to reason why', but submissively to fulfil; the mystical idea that in their chief reside the life and wellbeing of the tribe, that as head of the tribe, and as such the repository of wisdom, endowed with the power to guide the collective members of the tribal body, and nourish the body politic; all this surrounds him with a halo more enduring than any outward symbol."*

(b) Witchcraft was a serious offence among the Bantu, which was also tried in a manner different from that observed in ordinary cases. The accused was presumed to be guilty until

*Soga, J. H. "Amaxosa Life and Customs" (Lovedale) 1931 p. 30.

he had proved his innocence by undergoing some form of ordeal used to determine the guilty party. The general belief was that in the ordeal was concentrated a powerful spiritual influence or force which would without fail either kill or otherwise reveal anyone who was so defiled that he was incapable of surviving contact with this wonderful force. Not infrequently where the person was guilty, he confessed his guilt before he underwent the ordeal, but the protestation of one's innocence was met with this unfailing test in which the odds against the survival of the accused were wellnigh insurmountable. The ordeal is however always regarded as a final resort to be used where other methods such as divination or smelling out have not resulted in convicting the person suspected of the crime. The punishment meted out to the wizard was to raze to the ground all his huts and to destroy him and all the inhabitants of his kraals. Thus social justice would be satisfied and the danger averted.* Flogging and banishment were also resorted to in the punishment of less serious crimes.

(c) Incest and other unnatural sexual offences of this nature rendered the offender open to social ostracism or banishment or in cases accompanied by aggravating circum-

*For methods of divination and smelling out see Junod, H. A. "Life of a South African Tribe." (1927) Vol. II pp. 522-534.

stances to death. The man is driven away from his kraal and is no longer tolerated in the tribe, and as Whitfield observes, "misdemeanours of this nature were sometimes not punished directly but were prevented by the superstitious fears of the people which taught them to dread that some supernatural evil would befall the parties committing such acts; they lost caste and were considered in the nature of sorcerers, so that if any calamity came upon the community such people would be regarded as the cause of it and would be exterminated in the same way as wizards or witches (abatakati or baloyi)." All these cases concerned with witchcraft, incest and similar offences partake of the nature of general cleansing processes undertaken to rid the community of an infection endangering the life of the group as a whole. They provide the rudimentary foundations of the criminal law system which has been developed in modern states. The South African Government now of course prohibits by law the killing of wizards and those guilty of any other antisocial acts. They must now be dealt with by due process of law, and anyone putting to death a so-called wizard would be charged with murder, however genuine his belief that in doing so he was acting in the best interests

Whitfield : S. A. Native Laws

of the community. One need only say that it seems hardly equitable to expect people who have been accustomed to another system of jurisprudence to divest themselves of its influence in a short time, and when it is remembered that only 300 years ago civilised nations in Europe were burning hundreds of suspected witches after subjecting them to horrible tortures, it will be seen that misguided peoples who inflict these so-called atrocities are deserving of understanding and, it may be, of sympathetic treatment. To act otherwise would be no more unjust than it would be to condemn to death a person who had committed a murder under an insane delusion which made it impossible for him to realise the nature and quality of his act or that he was doing wrong or who was actuated by an uncontrolable impulse which Roman-Dutch Law regards as a proper defence to a charge of murder.* For he regards his act as an act of justice for the benefit of the community as a whole. Undoubtedly in course of time the Bantu will realise that the connotation of the term "antisocial" has changed and that the Supreme Chief, i.e. the Governor-General, can and will take care of all antisocial acts but the process of adjustment will for them be accompanied by much confusion and mis-

*See Gardiner and Lansdowne "South African Criminal Law" Vol. II dealing with "Specific Offenses" under "Murder."

understanding and a sense of injustice which education and sympathetic handling alone will allay.

(d) Homicide. Among some primitive tribes this offence is not regarded as a crime but is punished by exacting compensation from the guilty person or group. But among the Bantu the killing af a man was an offense against the tribe or chief to whom all people were supposed to belong. If compensation was exacted for the offence, it was paid to the Chief to whom it was due and not to the injured sib. As an act of grace the Chief might pass on some of the compensation to the relatives of the killed man in order to "wipe their tears", but he was the injured party. Here we find that private revenge or blood feuds such as existed in primitive times in certain parts of the world such as Australia or the Andaman Islands were not allowed, especially between members of the same tribe.* Revenge had been taken in hand by the tribe and controlled so that the community by means of its public body, the 'kgotla' or 'nkundla', dealt with it as a social rather than a private wrong. Compensation for all kinds of homicide is exacted regardless of circumstances, provided the act of homicide does not amount to treason or witchcraft. (vide supra).

*Lowie, R. H. "Primitive Society" (Routledge) 1921 pp. 400-409.

N.B. the principle "No man can eat his own blood" applies here.

less clearly defined areas and observing customs that vary in some respects from those of the other subdivisions or from those of the tribe as a whole. The triblets speak dialects of the same language, but members of these small groups sometimes refer with pride to the fact that they belong to one section rather than to another. Thus among the Bechuana we find Barolong, Bamangwato, Bathhaping, Bahurutshe, Bakwena, Bathatla, etc., all claiming to be Bechuana but recognising the fact that they differ in forms of speech and in customs even if only to a slight extent. Among the Xosa-speaking section we have the triblets of pure Xosa origin numbering not less than 25 according to Soga, to which must be added other tribes such as the Fingoes, the Pondos and the Pondomise. The Zulu triblets or clans, according to Bryant, the eminent Zulu authority, number not less than 800, while among the Basuto we find the Bapedi, the Bafokeng, the Bakwena, and numerous other clans. In administering Law among people with such a multiplicity of clans, one must at times be confronted with the problem as to whether the law applied is common to the different tribes. If these differences in the customs of these tribes are considerable and irreconcilable, it would obviously be inequitable to endeavour to apply one system to them all when as a

matter of fact they gave allegiance to different systems. In the Transkei where Native Law has been recognised by the courts for a very long time, the courts have often been faced with the question of deciding as to whether a certain custom was observed by the Fingo or the Pondo or the Tembu as the case might be, and the very useful plan of allowing the magistrate to call together a group of Native "assessors" to declare the tribal law on a particular point has been followed with satisfactory results. The Native Administration Act of 1927 also by implication recognises the fact of this question as to whether Native Law as a system is a practical one by making this provision with regard to the possible conflict of laws applicable to the parties in any dispute before the court in the following terms:

"Where the parties to a 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" (Section II (2) of the Native Administration Act 38 of 1927). But in spite of these variations in tribal customs it may be said that Native Law is a system for in essentials we find that the Bantu

tribes not only in South Africa but throughout the whole of Africa wherever they are to be found, show a remarkable similarity in their customary observances. For example, lobola or bogadi is an essential of marriage in practically the whole of Bantu Africa, although the lobola takes different form among different tribes. As Brookes points out in his "History of Native Policy", "the various Bantu tribal systems are very much closer than the systems of Common Law of those countries which build on the Code of Justinian. They are different dialects of the same language. For instance, ukulobola (the so-called bride price) among the Amakwamba often took the form of hoes manufactured from native iron, in the Lesuto of cattle sheep and goats together, among the Amatonga of Portuguese money. In times of scarcity baskets of corn and even of stones have been used as tokens. But the institutions of ukolobola itself and its effect in status and inheritance is exactly the same in every case.* The same conclusion was arrived at by the South African Native Affairs Commission of 1903-5 which reported that "it may be fairly said of the Natives of South Africa that, although there are variations of details in the laws of succession and inheritance, and in other customs and

*Brookes, E. H. "History of Native Policy" p. 173

usages, of the various tribes, there is great similarity in their tribal systems." * Naturally now that Native Law has been granted fuller recognition in South Africa, now that we have two Native Appeal Courts whose duty it will be to expound Native Law and establish it more firmly in the country we can expect to see it develop into a system even more than it has done in the past. It must be remembered that in the olden days the chiefs' courts were not courts of record, i.e. the decisions of the cases were not recorded so that they could be referred to later by way of precedent. The decisions were recorded in the memories of the people and were handed down by oral tradition from generation to generation. It need not be wondered at that we should find discrepancies and differences in the customs and usages of the various tribes, seeing they had to depend on such an unreliable type of record for their law. Under the new system, however, proper record will be kept of the cases heard in the courts of the chiefs, the native commissioners, the Native Appeal and Divorce Courts of the Transvaal and Natal on the other hand and those of the Free State and the Cape on the other. In the case of the Native Appeal Courts provision is made in

*Whitfield, W. B. "South African Native Law" p 3.

section 14 of the Native Administration Act 38 of 1927 for the bringing of cases before the Appelate Division of the Supreme Court of South Africa where a Native Appeal Court has given conflicting decisions within its own area of jurisdiction. With all these courts working at it, and with the Native population becoming more South African rather than purely local—Natives belonging to all tribes are to be found in almost every part of the country now—the task of harmonising even the conflicting usages and customs of the different tribes is well in hand. Education, travel, racial discrimination against all of them without any distinction are all tending to produce race consciousness among the Bantu, and this will help to remove the variations in their customs, so that it is not unreasonable to suppose that they will eventually all subscribe to their own legal system, especially now that it seems to a policy of the government to discourage exemption from Native Law which we shall discuss in a later chapter.

CHAPTER II

FAMILY LAW

1. The Family is the unit of Bantu society. There is no person in the group here who is not directly connected with or attached to some family or other. All the relationships into which one enters with one's fellowmen, all the contacts that one makes, are determined by, and in a large measure depend upon one's connection with some family group. Whether the individual is liable or not for his actions, whether he can sue or be sued in the legal disputes which are so apt to occur in life, whom he may marry and on what conditions, what he may do with his property during his lifetime or what his kinsmen may do with it after his death, under what conditions he may make a valid contract either binding himself or another--all these and many more questions can only be solved when a man's family position has been fully determined. By far the greater percentage of cases which fall to be dealt with in Bantu courts of law arise out of family relationships, and consequently we find that the law of persons which is family law par excellence is the most highly developed aspect of

Bantu law, and will well repay the closest scrutiny by students of Native law.

Not only is the family of great importance in Bantu society, but it can be shown to be so as an institution in human society generally. In her interesting study of the development and function of the family both past and present, Helen Bosanquet writes as follows about its purpose: "The purpose of the family, as conceived by those who have reflected upon it, has varied even more than its extent. Some find in it mainly an institution for the care of children, whose state of helplessness is prolonged so far beyond that of the offspring of animal; others, again, say that its original purpose was for the sake of the parents and the ancestors, that their cult might be preserved; and there have certainly been long periods of time among great peoples when this motive seems to have been the predominant one. Others, again, maintain that it had its origin in private property and was organised for purposes of inheritance; while others yet again find in it only a device whereby the man is enabled to turn the labour of wife and child to his own

account. To some it is the expression of a religion, indeed one of the most primitive and ultimate of religions; to others a merely material phenomenon, explicable entirely on economic grounds. The origin of justice, the source of law, the fountain of morality, the necessary prelude to the State, the most formidable rival to the State, a merely passing phase in the development of civilisation, an essential condition in all stages of human progress; all these the family has been held to be, and for nearly all views some justification may be found in past or present." *

2. The Nature of the Bantu Family. The Bantu Family is in several respects similar to the agnatic family of early Roman Law, i.e., the aggregate of all those who belong to the same household or come under the potestas of a single individual known as the Mnumzana or Mninimzi, i.e., the head or the owner of the settlement, commonly called in South Africa the Kraalhead. The Kraalhead is normally the oldest male in the family--females, being perpetual minors, were not eligible for the position save

* Bosanquet, H. "The Family" (Macmillan) 1906 p. 5

in exceptional circumstances. This form of the Family is that known as the Patriarchal Family one of whose chief characteristics is the supremacy of the father in the family. It is difficult to determine what is the source of this power or potestas of the kraalhead over his family or over the inmates of his kraal--it may be due to the fact of his superior physical strength as against his wife, or wives and children, or his wisdom and experience as the oldest member of the family or to the fact that being the progenitor he has the dominion over his wife and children in the nature of proprietary rights. All these reasons Bosanquet maintains must yield in importance to the fact that the kraal head is the repository of family tradition, "and just in proportion as family tradition is held to be of importance, the Head of the Family retains the peculiar dignity which attaches to him as the main storehouse of tradition and personal recollection. Amongst people whose main or sole religion is ancestor worship this dignity and authority are re-inforced by the whole weight of religious sanction, and it is the fact of

ancestor worship to which scholars now attribute the absolute power possessed by the Pater in the Patriarchal Family. He alone knew the traditional cult by which the departed ancestors were to be worshipped and appeased, and he alone could pass it on to his eldest son, and so ensure the continued prosperity of the Family. Thus any member of the Family who should cut himself loose from the authority of the Pater, not only debarred himself from the protection and favour of the ancestral gods during his life, but condemned himself to misery in the world of spirits, where he would be excluded from the family cult."* This is pre-eminently true of the Bantu family where the Kraalhead was regarded as the direct representative of the ancestors and the mediator or go-between between the living and the departed members of the family. Under his power the Mnumzana had (I) his wife or wives for the Bantu practised polygyny, (II) the children of his wives natural or adopted, (III) his younger brothers with their wives and children, (IV) his father's younger brothers

* Bosanquet, H. "The Family" (Macmillam Co.) 1906 p. 16.

with their wives and descendants, (V) any other persons not necessarily blood relatives who having lost or abandoned the potestas of their own natural kraalheads had voluntarily placed themselves under his. The kraalhead was the only person who was sui juris (i.e., a major) in this group of people. At law he owned all property in trust for the household (not in absolute dominium), and although as a rule he allocated it to the different houses forming part of his "muzi" (household) in the last analysis its administration and management remained in his hands. He alone could make contracts binding on the whole household, although he might use any of its members as an agent. He alone possessed the full locus standi in judicio, i.e., the right to sue and be sued unassisted in the Bantu court, and he was responsible for the peace, order and good government of his establishment, both as regards temporal and spiritual matters. Within the sphere of his household he combined in his own person administrative, judicial and religious functions.

"When we consider the nature of patriarchal power,"

says Willoughby, "our first impression is one of utter astonishment at the scope of its apparent despotism. As against the individual the patriarch has the sole right to gardens and grazing lands; claims to dispose of the persons of sons and daughters in marriage without regard to their wishes; controls the activities and earnings of the members of the family; can deprive them of their share of the family possessions and proclaim them outlaws; and in some districts is able to pawn members of the family or sell them into slavery. Ostensibly he holds the power of life and death over the members of the family at least till they have passed through puberty ceremonies into the larger community. He permits no members of the family to be silent concerning anything that has come to their knowledge and in matters of conscience and religion he is pontifical. In a word, patriarchal power wears the semblance of sheer tyranny over the individual. But in practice it is held in check by many influences." * The above is probably an exaggerated account of the power of the Kraalhead in

* Willoughby, W.C. "Race Relations in the New Africa" (Oxford) 1923 page 89

Bantu society, but at least in theory Bantu kraalheads claim to have most of the powers stated. Custom however sets many checks upon this apparent despotism. Among these may be mentioned the kraalhead's natural affection for the members of his family which was undoubtedly greater than is often realised, his sensitiveness to public opinion which did not allow undue excesses in the exercise of power, the prevalence of the method of consultation with the senoir male members of the family who formed a kind of family council, the power of his wives whose appeals for the mitigation of his severity were not always unheeded, and the sense of duty and responsibility which was developed to a considerable extent in Bantu society. Last but by no means least must be mentioned the family ancestors who though departed exercised a tremendous influence over the Pater in the exercise of his potestas. Many of the inmates of the kraal bore the names of these departed members, and any untoward acts of cruelty and mismanagement of affairs incurred the displeasure of the gods who made known their anger by means of disease and disaster, in dreams or omens and through divination. Thus "within the family

there is a large measure of communistic ownership and joint control, and a proportionately heavy collective responsibility, which amounts to a kind of perpetual and universal suretyship and guarantee against pauperism." *

3. The statement that the kraalhead was usually the oldest living male member of the family has to be qualified by pointing out that upon the death of the "Mnumzana", he was succeeded by his eldest son who assumed the status of his deceased father and held sway over all those who had come under the potestas of his father. This is an important difference from the Roman Patriarchal family where upon the death of the Pater all the agnates became sui juris. In the Bantu family at any one time there was always just one person who was completely sui juris in the household, namely the kraalhead. As we have just seen he was not necessarily the eldest male, but might have jurisdiction over his uncles who had been under his father's potestas during his lifetime. Not infrequently the heir to the kraal-

* Willoughby, W.C. "Race Problems" (Oxford) 1923 page 89

head was under age, and so during his minority one of his paternal uncles acted as kraalhead in his stead. This often led to friction because upon the heir reaching his years of discretion and attempting to assume his rightful position, the uncle now accustomed to the exercise of power over the inmates of the kraal sometimes refused to relinquish office and so usurped the position of his nephew. Moreover he might have a son of his own that he endeavoured to make the future kraalhead. If he succeeded in doing this, the heir deprived of his rights generally abandoned his home, and accompanied by the members of the family loyal to him, set up his own establishment elsewhere, thus founding a new kraal. On the other hand if the uncle failed to usurp his nephew's rights, he also, in order to avoid future friction might seek to establish himself and his supporters away from the seat of possible disturbances. These troubles occasioned by regencies occurred most frequently in the families of chiefs. A Chief generally married his Great Wife (i.e., the mother of the tribe) late in life according to the principle that a chief must not see

the son of his son, i.e., his grandson; this was due to the fear that when his son reached the age of discretion and became a married man, his own father, now an old man might suffer eclipse in comparison with his future heir as regards practical wisdom and insight into tribal disputes, military powers and general favour with his subjects which might lead to the old chief's deposition. Thus in effect the old chief safeguarded his own position by his late marriage, but left his son or heir to work out his own salvation with his paternal uncles. An interesting example of the trouble caused by regencies occurred when Chief Tshekedi Khama of Bamangwato tribe in the Bechuanaland Protectorate took up the chieftainship after the death of his brother Sekgome. Sekgome was the eldest son of Khama and so succeeded his father at his death. Sekgome himself died shortly after his father, leaving as his heir a boy four years old. Consequently Tshekedi, the brother of Sekgome, was appointed Regent. This was in keeping with the customs of the tribe. But Tshekedi had an elder sister who claimed that she or her husband (for she was married) should

have been appointed regent, expecially as Tshekedi was Khama's son by his second wife, whereas she was his daughter by his first wife. Khama was not a polygynist, but he had married twice during his lifetime. Hence the complication and confusion in the mind of his daughter. The result was a series of disturbances which nearly culminated in the death of Tshekedi. These were quelled by the British Administration, and the rightful regent maintained in his position. If Tshekedi should later refuse to give up the chieftainship, the tribe might divide into two sections, some following him and others the rightful chief.

4. Next to the kraalhead in power came the <u>married males</u> forming part of his establishment, especially in regard to matters affecting their particular "houses", wives and children. These married males consisted of his own married sons, his married uncles and married non-relatives attached to his kraal. Yet even with regard to these important steps were not taken without the knowledge of and consultation with the Mnumzana who had the general oversight of the kraal in his hands.

Married women and widows were minors under the double guardianship of their husbands in particular and the kraalhead generally. After the death of her husband the woman fell under the special guardianship of his heir. Each married woman lived in a separate house, and to each house was allotted a piece of land for cultivation, and a number of cattle, sheep and goats, if any, for the maintenance of the house. If the husband who had the general management of this property misused or alienated it to the detriment or disadvantage of the house concerned, it was the duty of the wife to appeal to the kraalhead, and if not satisfied, to the chief for the protection of her rights and those of her children. Similarly after the decease of her husband when she had to look to the heir for maintenance, it might also become necessary for the widow to appeal to the kraalhead or the chief for protection against the heir. But while married women and widows possessed this partial locus standi in judicio, divorced women and unmarried women did not --they were perpetual minors who were under the guardianship of some male member of the family who represented them in all actions at law by

or against them.

5. The Clan. Although the family was thus almost a self-sufficient unit or group, the Bantu lived together in communities consisting of a number of families such as the one described above. As a rule these communities were simply enlarged families in which the group as a whole claimed to be descended from a common ancestor. Thus in any particular area we might find a number of separate families living in separate establishments, but all answering to one family name, e.g., Makanya or Msomi or Gumede as the case might be. These enlarged families are sometimes called clans. Exogamy was strictly observed, especially by the common people, and breaches of this rule were punished by death in extreme cases or by banishment. Occasionally a chief ignored this rule and married a woman belonging to the same clan as himself. Where this was done, the particular family from which the girl was taken had to change its name immediately and so a new clan was formed, and the exogamy rule was observed ex post facto. As Bryant says, "the clans were formed mostly by a process of in-

ternal cleavage, a king marrying a clanswoman (technically a sister) against the common law of exogamy; whereon to put things right the family of the bride (or exceptionally even that of the bridegroom) by common usage, received another clan name, and 'the king had married outside his clan' or 'the prince had become a different clansman' ". * Bryant maintains that the fundamental unit in the Bantu political system was the clan, i.e., the magnified family in which all alike were descended from the same original ancestor, all were ruled by that ancestor's direct living representative, and all (at least in those times), dwelt and moved together in one great block, but did not intermarry, mates being sought outside. ** In the opinion of many this unit is too large for practical purposes, at any rate as far as the legal relationships between individuals were concerned, and while the clan may be the unit for military or intertribal purposes, it seems better to regard the smaller family group as the unit of Bantu society.

* Bryant, A.T. "Olden Times in Zululand and Natal" Longmans 1929 page 37

** Bryant, A.T. Ibid page 15

6. The Tribe. A larger unit than the clan was the tribe. This was made up of a number of clans owing allegiance to one Paramount Chief who exercised over the clans under his jurisdiction the same powers that the Kraalhead or the Headman exercised over their respective groups. The tribes lived independently under their separate chiefs as is still the case among the Bechuana today. Thus Chief Khama has authority only over the Bamangwato and has no power over the Bakhatla, although they also belong to the Bechuana section of the Bantu. Occasionally a chief arose who by superior military strategy conquered a number of tribes and made himself king over them. A good example of this was Chaka, the great Zulu Chief, who during the early part of the 19th century united all the Zulu tribes under himself, and spread his kingdom over the greater part of South Africa. His power or that of his successors was later broken by the white man, and today we find no such paramount chief among the Zulus, although they still live under tribal conditions. In Basutoland, on the other hand, we have an example of a Chief--Moshesh--who combined a number of tribes in a peaceful way, and thus formed the Basuto

"nation" of modern times which still has its paramount Chief.

7. Emancipation in the Bantu Family. We have already seen two ways in which members of a Bantu family might become emancipated and so acquire the rights of being sui juris, namely, (I) by voluntarily abandoning the potestas of their kraalhead owing to dissatisfaction or disagreement, with consequent disturbances, with the "overlord" of the family; (II) through the death of the kraalhead when his heir became a major and was therefore emancipated. This latter may be called natural emancipation. On the other hand an inmate of the kraal might be emancipated by the kraalhead with the consent of the chief or might be publicly disinherited for just cause by his kraalhead and so expelled from his home. Emancipation conveys the right to become a kraalhead, to erect a separate establishment in the same or any other district and to transact all the business of life independently of one's father or former kraalhead. Such an emancipated individual, however, had the right to attach himself to some other kraalhead and thus become alieni juris again as the inmate of some other kraal. *

* See section 92 of the Natal Code of Native Law 19 of 1891

But it must be remembered that there was no such thing as tacit emancipation in Bantu Law. The mere fact of a son leaving his father's kraal and building a separate one for himself did not automatically amount to emancipation from the kraalhead's control and anyone who alleged such emancipation had to prove it affirmatively. * Females were never emancipated and were always under the guardianship of their fathers (or their heirs) or their husbands (or their heirs). The position of woman is put very vividly, if harshly, by Willoughby, "She is a perpetual child, to be chastised when she is naughty, petted when she is compliant, and passed on like other breeding stock to another guardian when her present lord is dead." **

8. How the Family arises. The normal method of setting up a family in Bantu society is by marriage. This was a matter which formed the subject of arrangement between two family groups in which the wishes of the actual bride and bridegroom, especially those of the former, were of far less importance than those of the kraalheads and the family councils which generally

* See the case of "Karala vs Mbilana" (1917) N.H.C. 32
** Willoughby, W.C. Ibid. page 117 (In spite of his long stay among the Bantu, this paragraph shows that Willoughby failed to get a correct perception of the position of women in Bantu society.)

handled the delicate situations arising out of this contract. It might be mentioned in passing that marriage by capture and by elopement were practised to a certain extent. The former is clearly an extra-legal method of obtaining a wife which would only be countenanced when a state of war existed between one tribe or clan and another. The latter was a method of circumventing the objection of the parents to what was admittedly a love match but one which did not commend itself to the elders (abadala). When the elopement had already taken place the parents generally acquiesced in the situation, and contented themselves with exacting a fine for the elopement and demanding the usual lobola. This custom known as "Ukutwala" was fully discussed in the case of "Kolisana vs Leqela" (2N.A.C.) 189 heard in the Transkeian Territories Appeal Court (qui vide).

9. <u>The Essentials of a Marriage</u>. The essentials of a Bantu marriage are as follows: (I) the consent of the contracting parties; (II) the payment or the making of arrangements for the payment of Lobola or Bogadi; (III) the formal handing over of the bride by

her people to her husband's people.

There are certain other rites, ceremonies and feasts usually associated with a marriage in Bantu society, and differing from tribe to tribe or from locality to locality. But these are not essential and may be omitted, although they rarely are, without affecting the validity of the marriage, provided the above mentioned essentials are present. The contracting parties consist of the father or guardian of the bride, the bride, the prospective husband's father or guardian or his representative and the bridegroom.

Consent of the Parties. As already noted, in the olden days the consent of the bride was not of prime importance, and occasionally girls were forced to marry men for whom they had no desire. Girls were practically compelled by public opinion to accede to the wishes of their parents or guardians. But the mother often exercised her influence on behalf of her daughter and in the last analysis the girl could in an extreme case appeal to the chief of the tribe who often ordered or persuaded the father to abandon the project. Today with

the white man in control a forced marriage is invalid, and girls knowing this do not hesitate to complain to the government officials in regard to attempts by their guardians to force them into marriage. *

In Natal according to the Code of Native Law any kraalhead or other person who coerces any girl to marry against her will is guilty of an offence. It is also an essential of marriage there that the intended wife shall declare in public to an Official Marriage Witness, on the day of the marriage, that the proposed marriage is proceeding with her own free will and consent. In Zululand also by a proclamation of 1887 it is not lawful for any person to compel a woman to enter into a contract of marriage or to marry against her wish. It goes without saying that the ordinary Native father regards this so called protection of the girl as an encroachment upon his rights as a parent, leading to the disruption of family life and the weakening of parental control. But the State as the Upper Guardian of all persons reserves to itself quite justifiably in our opinion, the right to interfere on behalf of minors, of whom advan-

* See Mdleni vs Pezani (4N.A.C.) 212
See Kaba vs Ntela (1910 T.P.D.) 964