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1996-05-06
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INSTITUTE FOR ADVANCED SOCIAL RESEARCH

SEMINAR PAPER
TO BE PRESENTED IN RICHARD WARD BUILDING
SEVENTH FLOOR, SEMINAR ROOM 7003
AT 4 PM ON THE **6 MAY 1996**

TITLE: Custom and Common Sense: The Zulu Royal Family Succession Dispute of the 1940s

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NO: 399

Custom and Common Sense: The Zulu Royal Succession Dispute of the 1940s[1]

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Introduction

In November 1981 the historian Nicholas Cope tracked down Tandayipi Absolom kaSolomon Zulu to a bottle store outside Nongoma, Zululand. Once a contender for the royal throne of the Zulus, Tandayipi was now an alcoholic who spent 'most of his days in the bottle store.' But the ravages of liquor had not completely stripped the memory of those times from Tandayipi's mind. 'I was displaced,' the old Zulu recalled of his abortive succession, 'If I was another chap... I had followers... I should have done a great mischief.' But the mischief never happened. As Tandayipi admitted, 'I simply put my head down like a worm, till now.' Almost forty years later he was still reluctant to talk, and steered the interview onto other topics.[2]

The disputed succession to Solomon kaDinuzulu Zulu forms the subject of this paper. It is a story with a fair share of drama, sex and violence. As the Chief Native Commissioner of Natal remarked of the affair, 'The history of the Zulu Royal House is one long story of intrigue.'[3] Yet the fascinating realm of Zulu politics ('byzantine' was Shula Marks's adjective) is only background to the story told here. The focus, rather, is on the dispute as a window into the creation of a form of customary law ('native law') in Natal, and its application by Native Commissioners and the 'native courts.'[4]

The study of customary law has its origins in anthropological writings, often conceived as guidebooks for colonial administrators. This straightforward approach was adopted by lawyers who attempted to extricate and summarise the 'rules' belonging to different 'tribes,' a process that was continued after independence.[5] The 1960s and 1970s saw a shift in focus to the study of litigants, rather than on law's role in maintaining social order.[6] Realisation of the bounding power of rules, led to new directions of study. In South Africa, Raymond Suttner built on the work of the French structuralists, in particular Louis Althusser, to argue that 'it is one of the functions of the special system of civil law for Africans to constitute Africans as specific tribal subjects.'[7] Suttner realised that his account of the creation of tribal consciousness was somewhat top-heavy, adding the caveat, 'In responding to such tendencies, it is important that one does not overreact and assume that customary law is a Nationalist Party creation, and that it has no relevance at all.'[8]

This tension was addressed by the writings of a new generation of legal anthropologists who recognised that 'the law of the western state comes first in time, and customary law afterwards,' but stressed that it was no mere colonial imposition.[9] Rather, it had emerged

as a result of interaction between colonial administrations and the elites of African communities. Not only was the creation of customary law a dialectic, but also its use, observations which were firmly rooted in the jurisprudential tradition of EP Thompson.[10]

Native Law in Natal

British colonial governments in Africa, hampered by lack of resources, found themselves facing a gargantuan administrative task. The solution lay in a policy of indirect rule—as formulated by Lord Lugard and, in Natal, Sir Theophilus Shepstone—which included the recognition of customary law. Settler societies were split by debates over the recognition and codification of customary law. The dilemma facing colonial governments was summed up by a contemporary lawyer who wrote, 'No Code can succeed in suddenly raising the whole tone of a semi-savage people; and, on the other hand, no code will be of practical utility unless it be acceptable in the main to the Natives themselves.'[11] The tension between civilising and administering is a recurrent theme in the colonial enterprise, no less in Natal than central Africa.

Following the annexation of Natal by the Cape in 1845, ordinance No. 12 of 1845 extended Roman-Dutch law to the District of Natal. Three years later Queen Victoria issued an order preserving native laws, customs and usages not 'repugnant to the general principles of humanity recognised throughout the civilised world,' which was embodied in Natal Ordinance No. 3 of 1849.[12] Shepstone's personal rule was interrupted after Langalibalele's Hlubi were brutally punished for refusing to surrender their ancient rifles to the government. The scandal prompted the colonial office to send Sir Garnet Wolseley to right matters, including systematising the administration of native law.[13] The Natal Code of Native Law attempted to codify the system of native law then operative in the colony. Initiated in 1875, it took three years for the board entrusted with the task of codification to produce the 1878 Natal Code of Native Law. Judge Chadwick, secretary to the board, later described how the process of collecting reports from magistrates, administrators, old colonists and missionaries produced 'voluminous answers,' especially on the question of inheritance:

> The Chairman [Sir Henry Connor CJ] boiled down all these voluminous answers into the few leading principles shown in the Code as it now stands. All that was said about ancestral kraals, Isizinda, Ikanda, Isokangqangi, and Mnawe were swept away by him as only calculated to trouble and confuse the Courts. He confined himself to declaring the supremacy of the kraal head, who had complete control so long as he lived over all the inmates of his kraal, and all the property of all the houses, but he gave a clear definition of house property and simply declared that all property which was not house property was kraal property.[14]

The distortions which resulted from this 'boiling down' led to general dissatisfaction with the Code. The Attorney-General explained in 1884 that the Board had relied on the expertise of its members and, 'Any absurdity that exists in the Code is therefore caused by the information so obtained. The great difficulty the Board had to contend with in reducing the Native Law to writing was to reconcile the conflicting opinions expressed by the skilled members as to the various Native Law doctrines or canons.'[15] The Code was slightly

revised and repromulgated in 1891.[16]

There were some slight changes after Union, but the big shake-up came with the Native Administration Act in 1927 (as amended by Act no. 9 of 1929), which removed the Natal Native High Court's civil jurisdiction and established two Native Appeal Courts, appeals from which were to the Appellate Division of the Supreme Court.[17] The Act made provision for Native Commissioner's Courts, which were defined as 'a court of law' and appeal from which lay to the Native Appeal court.[18] The Native Administration Act overhauled not only the courts, but also laid the basis for a revision of the Natal Code by means of section 24 which empowered the Governor-General to amend the Code by proclamation. A new Code was duly proclaimed by Supreme Chief EG Jansen in 1932.[19]

Since its inception, the Natal Code had been criticised for its rigidity. In 1897 Natal Prime Minister Binns, remarked, 'There was a certain amount of elasticity about Native Law before you codified it, which made it extremely useful. But now we are bound hard and fast, and tied to the four corners of the law.'[20] This problem was exacerbated by social change, as one Gumede had noted a few years before Binns when he wrote, 'Native laws were made by men, who died many years ago. These men lived a quite different life from ours; and never saw a streak of today life.'[21] A similar view, based on the nature of customary law, is expressed by legal academics Bennett and Vermeulen, that once customary law is codified, it is no longer customary law, thus 'a code is necessarily antithetical to customary law.'[22]

Administrators such as Theophilus Shepstone feared that their powers would be curtailed by a code; Shepstone himself was one of the Code's staunchest opponents. Natal Sheriff Thomas Phipson commented that he had been told by magistrates that 'Kaffir Law... was merely an euphemism for the arbitrary will of the chief, that is of the magistrate, checked only by an appeal to Mr Shepstone, and altered by him in every case that I ever heard of for the worse.'[23] And the officials of the Native Affairs Department in the Rustenburg district in the 1920s and 1930s recognised 'the "elasticity and flexibility" of customary law... as its most valuable asset in controlling the rural African population.'[24] Rigidity thus placed constraints on both governor and governed.

It was however a rigidity that was open to manipulation. Roberts and Comaroff argue that 'norm and reality exist in a *necessary* dialectical relationship' in Tswana law,[25] and a similar point can be made with regard to native law. It will be argued that while white officials were trying to ascertain customs in order to formulate 'rules,'[26] these very 'rules' were deployed in creative ways by both African litigants and white adjudicators.

The Story So Far

While the Supreme Chief legislated from on high, the king of the Zulus held court at Nongoma. Although not recognised by the government as anything more than the chief of the Usuthu, Solomon kaDinuzulu Zulu was popularly acknowledged as the heir to the great

Zulu kings. After failing to gain official recognition of his status, Solomon contented himself with the joys of the material world. But alcohol was a poor companion and the king died a bitter man in early 1933.[27]

Appointing an heir was no simple business, complicated by the fact that the late king's sons were still minors. Solomon's only full brother, Mshiyeni kaDinuzulu Zulu was nominated by the royal house and accepted by the government as regent. Compared to his dissolute sibling, Mshiyeni was a joy to the local NAD. Natal Chief Native Commissioner Harry Lugg was unstinting in his praise of the regent:

> Mshiyeni is an agreeable person to meet: he is abstemious, particular about his appearance and polished in manner. As a man and as a Chief, his conduct has hitherto been entirely satisfactory. As to his domestic affairs, perhaps I may mention that he has only two wives, as against his predecessor's forty-seven.[28]

Lugg successfully campaigned to have Mshiyeni's stipend increased, and eventually supported the regent's elevation to 'Acting Paramount Chief' in 1939, arguing 'It is necessary that we should have a powerful weapon to counter the insidious propaganda which is being disseminated amongst our urban Natives, and this can best be secured by strengthening our tribal system in Natal.'[29]

It was Mshiyeni who soon thereafter requested that the initial choice of heir, one Pikokwaziwayo, be replaced as he was an 'unsuitable' character. In his stead Tandayipi would be the candidate. Lugg cautiously supported the regent, but insisted that the new heir be chosen by a full meeting of the royal family and publicly announced.[30]

A meeting was held in April 1940 and it was reported to the CNC Natal that Tandayipi was elected as Solomon's heir. This decision, so Lugg reported, 'has met with the whole-hearted approval of all Chiefs and Natives of standing in this province.'[31] In an earlier private communication to Secretary for Native Affairs Douglas Smit, Lugg had been more effusive: 'The announcement was received with a thunderous roar of Bayedes and without a single dissenting voice. I know you will be greatly relieved to hear that this troublesome matter has been so satisfyingly disposed of.'[32]

Any relief Smit may have enjoyed was shortlived. In July 1944, the CNC somewhat resignedly informed his superior in Pretoria, 'You will be disappointed to learn that in spite of all our efforts to avoid it... there is going to be a dispute in connection with the succession to the late Chief Solomon.' The CNC promised to investigate, reassuring the SNA, 'Meanwhile do not worry unduly about this business. These people are merely acting in a manner traditional to the Zulu ruling house.'[33]

While these disingenuous comments may have pacified Douglas Smit, events back home were causing a great deal of worry to the Nongoma Native Commissioner, Hjalmar Peder Braatvedt. The son of Norwegian missionaries who bequeathed three sons to the civil service, Braatvedt prided himself on his knowledge of 'native customs,' his Zulu name

'Mqangabodwe' (the tall one), and his 1935 De Luxe Dodge Sedan, which after 17 500 miles on the treacherous Zululand roads was 'in perfect condition.'[34] He was approaching his fortieth year of service, having been recalled from retirement due to the war and was only transferred to the Nongoma magistracy, the senior post in Zululand, in April 1943.[35] Trouble was the last thing Mqangabodwe needed.

This desire to avoid conflict was not peculiar to Braatvedt. The maintenance of good order was a departmental priority, and any deviation was a blow to the image of both the department and the individual. Writing of Kenya, Bruce Berman has drawn attention to the importance of 'prestige' in colonial administration: '"Prestige" was more than mere authority; it was a question of mystique.... Where an officer failed to establish his personal authority, he not only damaged the "prestige" of the Provincial Administration, but also suffered a personal humiliation that could ruin his career.'[36] Further south than his Kenyan colleagues, Braatvedt was nonetheless a fine exemplar of this contention. If a challenger's claim were ignored and a 'flare up' resulted, he fretted, 'what would be the effect upon the Department, The Government, not to mention the officials who had ignored the claim? I am sorry this has happened while I am here and I am not looking forward to the work and worry which this business will involve.... There are scores of "Native Administration Experts" (selfstyled) who are waiting to heave stones at us.'[37]

Ultrasensitive to rumours of trouble, Braatvedt had informed the CNC as early as March 1944, that all was not well. 'It is freely discussed (in secret) that the rightful heir was manoeuvred out of the position as heir,' he observed, 'but that he will nevertheless, one day, claim his property.'[38] In May he told Harry Lugg that 'this is going to be a serious business.' For the man who had hoped to 'jog along with the team in a slack harness during the extra time [he was] "serving",' events were taking a decidedly unpleasant turn.[39]

Tandayipi's half-brother, Cyprian Bekezulu kaSolomon Zulu, was the claimant responsible for Mqangabodwe's distress. The young prince had been given a copy of a Zulu school textbook by his mother, Christina Zulu (also known by her family name, okaMatatela) who was Solomon's first wife. A seemingly innocuous primary school text by the Zulu writer RRR Dhlomo, *Izikhali zaNamuhla* contained one explosive passage:

> The king's heir, who is too young to rule, is named Cyprian. His regent is Prince Mshiyeni, son of Dinuzulu who succeeds Solomon in age. The choice of Mshiyeni was agreed on by all, even the government, so that he can rule until the heir grows up.[40]

It was these words, fixed on the page, which prompted Cyprian's challenge. Jeff Guy has written of the spread of literacy, 'The Book becomes the repository of Knowledge, the document establishes authority and precedent in a form independent of spatially restricted, temporally transient, human physicality.'[41] With his authority firmly in hand, Cyprian approached Zazeni Ngema, one of Solomon's trusted officials, telling him that he had been 'nominated by books.'[42] Cyprian arranged a meeting with the Regent to discuss his claim, but Mshiyeni was unimpressed. The old man, so Cyprian later reported, had shouted, 'I have a mind to shoot you immediately and then take to the forests having spilled blood.'

He also warned Cyprian that 'the Chieftainship of the Zulus was attained by bloodshed.'[43] Ever the traditionalist, Mshiyeni fought against the disembodied authority to which Cyprian appealed. 'Sir,' the regent wrote to his NC, 'it has angered us all that R.R.R. Dlomo should enter to such an extent into Cetshwayo family when we do not know him even with eyes.'[44]

While the Nongoma NC was convinced of impending disaster, Pretoria was intent on keeping the succession question closed, and insisted Mshiyeni call a meeting in an attempt to reconcile the two factions. The meeting, unsurprisingly, was unhelpful, and served only to deepen the antagonisms. Cyprian's supporters turned to government. On the morning of Saturday 23 September, much to Braatvedt's irritation, Cyprian and over one hundred others arrived at the NC's office. Amidst much talk of blood flowing, the government was warned to act quickly. The meeting had the desired effect and the following day Braatvedt wrote to the CNC, warning of an impending 'Civil War' if the matter were not resolved. He urged that an enquiry be held, adding, 'Whatever the decision will be, the position is fraught with grave dangers.'[45] The odour of fear emanating from Nongoma was however not enough to dispel the Departmental lethargy. It was another two months before Pretoria gave the go ahead for an enquiry. The Board of Advisers appointed to clear up the matter comprised Natal NAD stalwarts, men who 'knew the customs, language and minds of the natives'—the acting Natal CNC, Colonel Benjamin Martin; Nongoma NC, HP Braatvedt; and Pietermaritzburg NC Vivian Addison.[46] With the composition of the Board settled, all that remained was to select the heir.

Thus it was that the three officials appointed by the Governor-General found themselves in Nongoma in February 1945. In the muggy heat that comes with summer in Zululand, they set about their business of determining the heir to the Usuthu. For some eight days, spread over three months, the Board would hear evidence regarding the disputed succession. Witnesses would be called, recalled, cross-examined and generally interrogated by a variety of persons in an exhaustive process that was supposed to determine the chief of the Usuthu.

On Wednesday morning, 7 February 1945, Colonel Martin, the Chairman of the Board, opened the enquiry to cries of 'Nkosi!' Martin began by explaining the situation which had arisen and the role of the Board: 'Our function is only that of advisers to the government.... The ultimate decision rests with the government—with the Supreme Chief of the country.'[47] He implored those present to 'remain calm, cool and collected during this enquiry,' warning, 'Each member of this Board can claim to understand Zulu. We have made a study of Zulu customs. It will be no good trying to bluff us. We want just the truth—nothing more.'[48]

The Truth and the Law

As Solomon had, by all accounts, chosen no chief wife, the dispute was to be governed under section 104(4) of the Natal Code, which made provision for succession in the absence of a chief wife:

> it is the duty of the elders of the tribe to assemble and confer status upon the widows,

> appointing the chief wife [of the great house or *indlunkulu*] and determining the *ikohlo* [separate house in a homestead], the *iqadi* [house subordinate to the indlunkulu] and junior houses or in other customary and lawful manner fixing the rank of each house.

Family law, under the Code, was particularly rigid, and organised in terms of the 'kraal system.' Each wife of the 'kraal head' belonged to her own 'house'; when there was more than one house in the kraal it became necessary to define the relative importance of each house.[49]

Under native law, explained Judge Jackson of the Native High Court, in a passage that was cited with approval by the Appellate Division, there must always be an indlunkulu, or chief house, in every kraal in order for succession by primogeniture. To secure the succession, the kraal head may affiliate other houses to the indlunkulu or establish a supplementary great house known as the iqadi which is an integral part of the kraal. He could also create an ikohlo house, in order to circumvent the strict operation of the rule of primogeniture; this house was regarded as a distinct and separate section of the kraal. The ikohlo heir had no claim on the inheritance of the indlunkulu, except as a last resort, and vice-versa.[50]

A commoner's first wife was his chief wife (or indlunkulu wife), yet hereditary chiefs were permitted to appoint their chief wife at any time.[51] Section 104 of the Code related to chief wives of hereditary chiefs, who, in terms of subsection one were 'usually taken later in life than the first and second wives.' This was standard practice, Kerr avers, as a chief's first wife would be one of his own choice, whereas the indlunkulu wife, 'who is rarely his first wife, is chosen in consultation with the tribe.' The position of the first wife was safeguarded by making her house the senior ikohlo house.[52]

This indeed appeared to be the position, as applied by the native courts. A seminal case, with similar facts, was concerned with the succession to the late chief Teteleku of the Mpumuza.[53] The plaintiff claimed that his mother was virtually the chief wife and all that remained to confirm this was a formal declaration of her status. Witnesses testified to a number of factors which ostensibly indicated her superior position within the kraal. The plaintiff also argued that 'every canon of native law on the subject had been violated by the selection of the defendant, alleging that he was the son of the first wife—the Sokanqangi—whose status is well defined, and whose son is incapable of rightly succeeding his father.' Subsequent to the chief's death, 'the headmen of his family and of the tribe in the vicinity of his kraal' set about selecting an heir, eventually settling upon the defendant. The plaintiff averred that the meeting had excluded many of his supporters, yet the court found it was called in good faith. The taking or elevation of a chief wife, Campbell JP held, could not occur in secret but only with the support of the tribe. Reviewing the law on succession, the learned Judge President stated that amongst chiefs the heir is born of the chief wife, and his nomination is thus not personal to him but conferred by virtue of his mother's status. The eldest son of the first wife never succeeded to the position of his father.[54]

Thus the court found that Teteleku had not appointed a chief wife and the nomination by the family and leading tribal members was valid. In addition, and crucially, the defendant's mother was not the late chief's first wife and the defendant was thus eligible to be chief. This decision provides a clear statement of the law on succession which, in terms of the doctrine of *stare decisis*, was binding on later courts and does not seem to have been dissented from.[55]

The evidence relating to the practice of succession, outside the courts, is less clear and the position is difficult to reconstruct, although it seems to follow the 'legal' one. The *isokanqangi*, by all accounts, did not succeed his father.[56] Cetshwayo kaMpande Zulu confirmed that the eldest son of the chief wife was the heir, who could not be bypassed by the father. In response to the question, 'Can a man adopt as his heir anyone but the eldest son of his chief wife if such son is living?', the king gave a simple 'No.'[57]

The Custom of Kings

With the position so clearly settled, in both law and custom, the only remaining argument was that the royal house was *sui generis*, governed by special 'rules' which the Board attempted to elicit from the witnesses. The irony of making exceptions for kings who were not recognised by the Department, never struck the Advisers. 'The Chiefs of the Zulu Royal House,' the Board found, 'being of hereditary status, are entitled to the privilege of assuming a Chief or Tribal wife who is usually taken later in life than the first and second wives. It transpired during this enquiry, however, that the Kings of the Zulus had never, as far as is known, exercised that privilege but had reserved to themselves the autocratic right to select their heirs from amongst their many male offspring.'[58] This assertion was completely unsupported by the evidence; Mnyaiza kaNdabuko—the 'father of the Zulus' (ie. the senior member of the Zulu Royal House) and Tandayipi's supporter—denied that Zulu kings never had chief wives, adding for good measure that it was never the first wife.[59]

The anthropologist Max Gluckman seemed to agree when he wrote of Zulu royal succession, 'The rule of succession is that the heir is born of the woman whom the chief makes his chief wife.'[60] The history of the kings themselves, however, points more to individual ability than predestination. Senzangakhona's designated heir, Sigujana, failed to challenge Shaka when he took the chieftaincy, although it is unclear whether his father, or other influential men, suggested Shaka do so.[61] Shaka's brothers and successors, Dingane and Mpande, seized the throne by force, although later careful to employ legitimating devices.[62] Mpande's heir Cetshwayo was born of Mpande's chief wife and when the king began to favour Cetshwayo's brother Mbuyazi (son of his most beloved wife), Cesthwayo defeated Mbuyazi and effectively secured his own succession.[63] Dinuzulu was chosen by Cetshwayo as his heir after a dream in which he was told to select the fairest of his three sons; or, according to Gluckman, Cetshwayo's chief wife had no children so he appointed Dinuzulu, although after Cetshwayo's death a son was born to his chief wife whom the British made a chief.[64]

Even Solomon's succession had not been without controversy. Dinuzulu had died without nominating an heir and it was left to his principal headman Mankulumana kaSomaphunga Ndwandwe to consult with those who had been with Dinuzulu on his deathbed, his *izinceku* or personal attendants, and announce that Dinuzulu had nominated his son David Nyawana. This was confirmed with some 'leading men of the nation,' and announced to the gathering at Dinuzulu's funeral who acclaimed their new king. Before the cheering died down, dissenting voices could be heard from other 'prominent men' and a meeting of the royal family and Dinuzulu's izinceku and *izinduna* was called for the next day at which Mankulumana was roundly berated by Mnyaiza kaNdabuko for interfering in the affairs of the royal family. It soon emerged that David was unpopular within the inner circle, the majority of whom favoured his 'modest, sober and intelligent' brother Solomon. In the end it fell to Harriette Colenso to settle the matter by disclosing that Solomon had given her a letter from his father nominating Solomon as his heir. No letter, Cope notes, 'was ever produced—at least not in public.'[65] Chief wives, at any rate, were peripheral to the dispute.

This brief survey of royal succession, marked as it is by regicide, gives surprisingly little weight to the camouflage of rules; only with the last two monarchs did the will of their predecessor, however manufactured, emerge as the legitimating factor. Political support was the acid test. 'In fact,' John Laband notes, 'no settled principle of royal succession would ever become firmly established in the Zulu kingdom.'[66] Even the Code could not hope to capture family structure and succession practices. Not every kraal head, for example, created an ikohlo as this house carried the danger that its heir might attract followers and pose a threat to his half-brother. 'Probably for this reason,' Jackson J surmised, 'the reigning kings in Zululand appointed no Ikholo.'[67] So too for this reason was the succession left unclear, in order to minimise the threat from an heir apparent.

The ostensibly rigid succession rules in African society, John Comaroff has argued, were actually surprisingly malleable. He observed how in Tswana society genealogical 'rules' of succession were manipulated by contenders, producing a flexible system; one, he argued, that was distorted by state intervention and the mechanistic application of succession 'rules.'[68] The government ethnologist, Dr NJ van Warmelo, had perceived this at the time of the dispute, when he warned against a legalistic approach to succession:

> My contention is therefore that this picking of chiefs out of hat of chance will have to stop unless the whole institution of chieftainship is to come to grief. The natives always thought otherwise than to accept chiefs *only* on birth. In the olden days chiefs were men of birth *plus* a certain amount of ability. The latter factor was determined often by strife, and this we have to put an end to. But we cannot dispense with ability and I am certain that the Government must sooner or later return to the old principle of birth plus ability, and take responsibility for choosing the latter, and give the chiefs work to do in which the ability can be seen by all.... General usefulness should be the test.[69]

Perhaps unable to dismiss the injunctions of the Code as to chief wives, or moved by the weight of authority on this issue, the Board, having decided Zulu kings had no chief wives, still made an attempt to rank Solomon's wives.

The learned members made a great play of the fact that Cyprian's mother Christina was a 'Sibiya' and that the mothers of the kings were always Sibiyas and that this fact had not been contested.[70] But if the rank of the wife was unimportant, why determine it? The Board was clearly sensitive to allegations concerning the question of Christina's status as evinced by her nuptial ceremonies. Christina, it appeared, had been married without any ceremony, although there was no consensus as to whether *lobolo* had been paid.[71] Although Christina testified that Solomon had paid eleven head of cattle for her, she later claimed that only six head of cattle had been paid and she had never considered herself married.[72] A chief wife who was not properly married was no chief wife at all—the question of Christina's wedding was accordingly allowed to drop.

If the heir was appointed by virtue of his mother's status, as required by s 104(4) of the Code, this was apparently done when Tandayipi's nomination was made, as members of the family chose Tandayipi's mother, okaMbulawa, as Solomon's chief wife. This, at least, is what Tandayipi argued in his petition to the Governor-General to be reinstated as Solomon's heir, following the inquiry. Claiming that his mother had been ranked as chief wife in 1940 in terms of s 104(4) of the Code and that he had been recognised by the government as the rightful heir, the Board therefore could not affect the ranking already conferred upon his mother and his right, by virtue of that status, to succeed to the chieftainship. In addition, Cyprian was the isokanqangi, the oldest son of the first wife who could never succeed his father. Cyprian's appointment was thus 'wrong and contrary to the overwhelming weight of Zulu tradition and customary law.'[73]

Sadly for Tandayipi, customary law, even codified, did not bind the Board as tightly as he imagined. By some imaginative use of the concepts 'family' and 'tribe,' the Board argued that at the 1940 meeting which nominated Tandayipi, 'the family was not fully represented.'[74]

If the Board wished to establish a custom, they had to rely on the testimony of witnesses. In South African law, evidence is permitted on the question of custom and foreign law.[75] A similar rule was formulated in the Native High Court in the case of *Laduma v Bevu* where Campbell JP held, 'Expert evidence is allowable to describe a tribal custom or some local usage, but not with respect to general native law.... Such evidence has been allowed with regard to the general law in Zululand, and also upon some local custom, in the same way as professional men and artizans may give evidence respecting the custom of their profession or trade.'[76] The interface between 'general native law' and 'local custom' was such that neat distinctions were not always possible. Native law was an attempt to impose uniformity on a diverse system, while retaining the possibility of local flexibility. The result, as the judges were well aware, threatened to undermine the Code itself and, indeed, the whole operation of native law.

Believing all witnesses to be partisan, the native courts developed a distaste for hearing evidence on local customs. Natal sheriff Thomas Phipson wrote of African witnesses:

> [T]hey will say almost anything just to suit their present whim or purpose, thinking to conciliate the magistrate, or to please their own chief or friends, or perhaps merely for sport, just as it may happen. I do not mean to insinuate that they should be made incapable of giving evidence; but assuredly judges, and magistrates, and juries, should attach very little value to what they say, merely because they happen to say it.[77]

It was the contradictory testimony given by witnesses in *Ntukwini v Miso* which led the irascible Judge Jackson to remark, 'This... illustrates in a remarkable manner the little value which can be placed on so-called expert evidence when the witnesses are either partisans of one side or the other, or else have knowledge only of a local custom, which may exist only in their own tribe.'[78]
This scepticism was applied by the Board to Tandayipi's witnesses, who they found unreliable and biased. It is trite to say that the same points concerning bias and vested interest could have been made with regard to Cyprian's supporters.[79] In the 'SM case' Cohen and Odhiambo point to the issue of 'expertise and authority in the production of knowledge,' or, the weight which is accorded to a witness' testimony.[80] In the case at hand, the participants thought age and status to be significant. Mshiyeni, for example, would not answer questions on custom and succession, replying, 'Older men than I would be in a better position to answer... I cannot answer for the rule of the Royal House. I am still young.'[81] The Board however did not accept Mnyaiza's testimony, despite his age and status.[82]

The construction of authority is a complex process and it is dangerous to simply accept the images conveyed by the witnesses without factoring in other considerations. Gender, for example, allowed Cyprian's mother Christina to reconstitute herself as okaMatatela, a traditionalist guise in which she went by the name of her father, and arguably had more credibility than were she simply Christina Zulu. Even the question of 'chiefly authority' is not cut and dried. Explaining who is considered an 'expert' in state commissions of inquiry, Adam Ashforth writes, 'A "Chief", for example, speaking on matters of "tribal" administration or "Native law and custom" is an authority, and one which the state, in this scheme, must appear to listen to. The same person opining on the injustices of the Act of Union could be adjudged a nuisance and thus ignored.'[83] This account however ignores the wide discretion on the part of the officials, and the different ways in which (and different purposes for which) they heard African voices. Seemingly cloaked in authority, the chief would at times turn out to be wearing nothing at all.

Litigants and witnesses alike attempted to root Cyprian's claim in custom, employing different strategies in an attempt to maximise their chances of success.[84] Although 'nominated by books,' Cyprian's claim was most enthusiastically pursued on the grounds that he was 'marked' ie. circumcised. The 'mark' was thought to be significant in that it related to a statement allegedly made by Solomon that his heir would bear a 'mark' and Cyprian was the only circumcised son. This, certainly in the meetings of the royal family, was Cyprian's primary claim, and some of the strongest testimony in favour of Cyprian at the inquiry related to this aspect.[85]

When, however, the evidence of the attending physician showed that Cyprian was circumcised for medical reasons alone, the Board was forced to look to other issues. D.W. Cohen has noted cases where the court 'chose not to recognize the essential, and nonreciprocal, struggles constituted by each party to the litigation.'[86] Here, arguably, the members of the Board had an intimate knowledge of, and a deep interest in, the dispute. Yet they still chose what to hear, and what not; the voices which were heard most clearly, made no sound at all.

Since the question of the chief wife was so problematic for Cyprian's cause, it was necessary to locate his appointment in Solomon's intentions. With the significance of Cyprian's 'mark' diminished, and the other indicators of Solomon's intentions weak, the prince's claim was boosted by a spectacular development. Christina had produced a letter which she claimed Solomon had given her sometime in 1930:

> Although you disappointed me by deserting and wandering over the country, that did not remove from my heart the fact that you are - you ka Matatela - the one who was to bear the chief.... I give this letter to you to keep it safely so that in case I should die before putting my kraal in order, you should produce it so that it should be known that my 'inkosana' (heir) is Cyprian Bekuzulu.[87]

Questions were raised about the authenticity of the letter, and of the two handwriting experts consulted, only one would certify that it was genuine. Native Affairs head office was also suspicious; it was up to the Board to placate their superiors in Pretoria.[88] Assuming, however, that the letter was genuine, the evidentiary value ascribed thereto—'the fortuitous circumstance that an old native woman managed to keep a scrap of paper intact for so many years,' van Warmelo acerbically called it[89]—was out of all proportion to its 'actual' value which was merely to indicate Solomon's state of mind in 1930. If he had appointed Christina in 1930, as the letter indicated, such appointment would be invalid; as the Court held in *Bevu v Laduma*, 'There can be no clandestine appointment of chief wives among the natives.'[90]

If the letter really embodied Solomon's wishes, could that not be seen as a form of testamentary succession? Under 'original Native law,' according to Stafford and Franklin, testamentary succession was unknown.[91] This was modified by s 108 of the Code which permitted the disposal of personal and kraal property by will, but not house property. General succession, by implication, could not be effected by will. Chadwick AJP in *Ntukwini v Miso* held that 'the native in his raw state could not make a will in writing, though he might, and often does when nearing his end, desire to favour one son to the prejudice of another. Native Law as I understand it will not allow him to do so. Under Native Law inheritance depends on the position and rank of a man derived from the position occupied by his mother in his father's family or kraal.'[92] This deprivation of a fundamental right under our common law was necessary to preserve the structure of native family law. As Bennett points out, 'by making a will, the testator may upset the entire customary-law system of succession, especially the expectations of the intestate heirs.'[93] Aside from creating an ikholo, which was a form of testament, the kraal head had a clear heir whom he could not disinherit save by a formal procedure. Section 118 of the Code permitted disinherison for

'gross misconduct' but only after an enquiry by the father's chief or, if a chief himself, the Supreme Chief. The father was not permitted, after disposing of the heir, to substitute anyone other than the next in line of succession.[94] Such technicalities were never considered by the Board.

The Board Reports

In their report to the Governor-General, the Board attempted to make the matter as clear as possible. Tandayipi's claim was based on the status of his mother and alleged utterings of his father. Both were rejected, mainly because the Board was unimpressed by Tandayipi's claim and the manner in which the supporting evidence was tendered. Tandayipi thus dealt with, Cyprian's claim rested on the status of his mother, okaMatatela (Christina) and his father's alleged statements. The Board happily accepted the evidence tendered on these accounts; ultimately, however, everything turned on the letter: 'Whatever doubts your Board may have had in regard to the genuineness of Cyprian's claim, those doubts were dispelled entirely by the [handwriting] expert evidence which, in our view, places the issue beyond doubt. We are satisfied that the letter is... a genuine document and embodies therein his wishes as regards his heir.'

What was raised by books was disposed of by them as well, as they were written, recovered and tendered by Cyprian's faction in order to bolster his claim. But literacy, like codification, is often seen in a negative light. Jeff Guy, for example, argues that,

> The written word was part of conquest in South Africa... The document justified conquest, the published proclamation established the right to rule, and the codification of native law created the written precedent, removing customary law from its African custodians and handing over the practice and the execution of the law to an ever-growing body of literate professionals and state officials.[95]

But this obscures the flexibility of the apparently rigid. Firstly, Africans were able to function within this 'literate' legal environment; secondly, Africans continued to contribute to the development of native law through their oral testimony; and, thirdly, the 'body of literate professionals and state officials' were neither as homogenous as this statement presupposes, nor as bound by 'precedent.' James Clifford, in his study of the 'Mashpee case,' concluded that '[T]he law reflects a logic of literacy, of the historical archive rather than of changing collective memory.'[96] The relationship between the 'archive' and 'changing collective memory' is however rather more fluid. Cyprian's tactic of reverting to written evidence, was successfully employed by at least one educated 'outsider' in a Zulu succession dispute in the 1930s.[97] Words, whether oral or written, have no inherent value and are always available for appropriation by interested parties.

Ultimately, it was left to the Board members to adopt their own strategies to achieve the desired outcome. The Board, in a remarkable development, created the custom of the Zulu kings. Where no rule had been followed, perhaps for fear of an impatient heir, the Board drew forth a series of rules relating to the status of royal wives and the king's intentions.

The 'untraditional' manner in which the issue had finally been resolved, led the chairman of the Board, Colonel Martin, to refer to safer grounds in his unpublished memoirs, where he explained the finding: 'The Board was satisfied that, with the exception of [Dingane and Mpande], Zulu kings had, from time immemorial, regarded their first wives as the mothers of the Tribal heirs.'[98] First wives became chief wives, in an belated attempt to fall within the confines of the Code.

Behind all the twists and turns, the frantic search for custom, lay the fear of upheaval, rooted in political conditions. Needing to maintain order, the tension between administration and justice, as Chanock has made clear, was endemic to customary law in British colonial Africa.[99] The priorities of the administrators often meant that efficiency (and expediency) outweighed the niceties of the English legal system.

In the Natal of the 1940s, a revived Natal African National Congress (after George Champion defeated the moderate John Dube's chosen successor for President in 1945) threatened the tranquillity of the world of the native administrators. Well known to the Natal NAD from his involvement with the Industrial and Commercial Workers Union (ICU) in that province, Champion was also no stranger to Zulu politics, having tried to win the support of Solomon for his cause.[100]

This threat from the left meant a strong 'traditionalist' counterweight was needed, but the headstrong Mshiyeni was failing to perform. During his reign he had alienated many prominent Zulu leaders, as well as Nongoma Native Commissioner Braatvedt. Autocratic, with an explosive temper, the rancorous regent won few friends with his unwavering support of unpopular government policies like cattle culling and the recruitment of African servicemen. High-handed behaviour exacerbated the difficulties any regent was bound to face.[101] Politically isolated, Mshiyeni resigned soon after Cyprian's appointment as heir, lamenting, 'My heart is now dead. I have no inclination for anything. The people are making a football out of me.'[102]

Interesting in itself, Zulu politics (and the concomitant issues of who was supporting Tandayipi and who Cyprian and why) is peripheral to this paper. What is important here, as the Natal NAD recognised, is that Mshiyeni's unpopularity meant that his support for Tandayipi made the young man an unlikely heir. Great things would be required of the new incumbent, not least that he face Mqangabodwe's nightmares, George Champion and his Congress followers.[103] His colleagues on the Board shared a similar fear of the 'so called Bantu Intelligentsia.'[104] Given these imperatives, the men from Natal concluded their report in the vein of true native administrators:

> Your Board is fortified in its recommendation by the undoubted popularity of Cyprian with the members of the Usutu tribe. Such popularity was plainly indicated throughout our enquiry by the enthusiasm shown for his cause by the vast majority of the multitude which assembled daily to listen to the evidence. We feel safe in estimating that fully 90% of the people are his supporters. In such circumstances it would be futile, from an Administrative point of view, to accept Tandayipi as the heir even if his claim to that position were

substantiated, which is not the case.[105]

This outcome had been predicted by Braatvedt when the dispute had first surfaced. He had confided to Colonel Martin, 'From what I can gather, Cyprian has numerous supporters among the rank and file, and it is after all, the rank and file who will decide the issue for us one day.'[106] In *Bevu v Laduma*, the Court observed that the plaintiff had, over a few years, become the more popular candidate, yet concluded, 'It is useless to trace the origin of this revulsion of feeling; it lies outside the purview of a Court of Law, and does not affect the principles by which a decision of the case should be governed.'[107] Thus although of no 'legal' relevance, popular support proved decisive.

Such legal juggling was not uncommon to the practice of customary law which provided great scope for creative agency.[108] This has been noted by Terence Ranger who, in a recent re-assessment of his work on 'invented tradition,' has called for a modification of both his own and Chanock's views on customary law. Referring to the work of Sally Falk Moore Ranger contends that the recognition of customary law 'does not mean, as I argued, the ending of flexible custom and the introduction of a rigid code operating in the interests of patriarchy. Rather it means the setting-apart of a sphere—restricted, tolerated—in which an *assumed* static customary code in fact deals flexibly with matters below or beyond the concern of the state.'[109]

Even with codification (which constrained rulers and ruled), custom was not ossified. Thus when Mann and Roberts write, 'The invention and eventual codification of custom solidified fluid cultural and legal ideas and relationships into reproducible rules,' they fall into the trap of which Ranger warns us: 'I think now that my argument was too polarised between what I identified as 'admirable' flexible custom and what I defined as 'deplorable' invented tradition. I associated all the positive forces in African societies with custom and all the reactionary forces with tradition.'[110]

Conclusion

Customary law provided a space for the contestants to manipulate their claims to gain the maximum possible advantage. Deploying various strategies, literacy included, they attempted to mould their cases within a particular discourse. Just as customary law was created by interaction between Africans and Europeans, so Africans continued to represent themselves in particular ways and influence the development of customary law.[111]

Judges too entered this arena, employing precedent, codified rules, oral testimony, personal knowledge, prejudice and even whimsy to reach their decisions. Yet they always sat in the shadow of Native Administration. Van Warmelo had dismissed the Board's seemingly-legalistic finding arguing that he would 'on no account recognise Cyprian merely because Solomon (who was a sad specimen of a chief himself) wrote a little note on a typewriter and signed it.'[112] He later added, 'This is a political problem, not a judicial tilt. Personalities

and influence count for more than legal niceties. What would be the object of making impeccable legal decisions if these involved political blunders? The Government cannot afford them.'[113] What the ethnologist missed was that a judicial tilt was being used to resolve a political problem. When Lord Hailey reported on the African courts (in British Africa) that, '"native custom" administered in the courts has ceased to be a matter of precedent and has become just common sense,' it was with a great deal of concern for the future of native administration.[114] But common sense and precedent have always been members of the same legal family; if anything they were closer relations in native law. In the hiatus between written law and custom, native administrators wrought their own version of justice; poised between their conceptions of African autocracy and fair play, they adjudicated, legislated and generally intervened in local communities in ways that were designed more to keep the peace, than to accord with the strictures of custom. But the arguments of the litigants, and the verdicts of the judges, were always carefully draped with custom, cut from a cloth that was neither entirely natural, nor wholly artificial.

Notes

1. In the process of converting this paper from a dissertation into its present form, I benefitted greatly from the advice of Peter Delius and Paul la Hausse (who are however absolved from any liability for its final appearance).

2. Killie Campbell Africana Library, Durban (KC), KCAV 338, Oral History Project, N Cope, interview with Tandayipi kaSolomon Zulu, Nongoma, 10 Nov. 1981.
This paper has followed the orthographical system used by Nicholas Cope in *To Bind the Nation: Solomon kaDinuzulu and Zulu Nationalism, 1913-1933* (Pietermaritzburg 1993). Thus, modern Zulu orthography is used except for names of individuals (eg. Tandayipi, not Thandayiphi) as these were the names by which people were known at the time. Clan names too follow the modern orthography, save for certain family names which these families have apparently retained.

3. CAD, NTS 78/53/2 Vol. 1, part I, CNC to SNA, 24 July 1945.

4. The term 'native law' is used to refer to the system of customary law extant in South Africa in 1945 and its precursors.

5. K. Mann & R. Roberts, 'Law in Colonial Africa,' in Mann & Roberts (eds), *Law in Colonial Africa* (Portsmouth 1991), p. 6.

6. J. Starr & J.F. Collier, 'Introduction' in Starr and Collier (eds), *History and Power in the Study of Law* (Ithaca 1989), p. 4.

7. R. Suttner, 'African Customary Law - Its Social and Ideological Function in South Africa' in T. Lodge (ed.), *Resistance and Ideology in Settler Societies* (Johannesburg 1986), p. 121. For a similar position, which sees 'the notion of customary law [as] an ideology of colonial domination,' see F.G. Snyder, 'Colonialism and Legal Form' in C. Sumner (ed), *Crime, Justice and Underdevelopment* (London 1982).

8. Ibid, p. 131. See Graeme Simpson's critique of Suttner in, G. Simpson, 'Peasants and Politics in the Western Transvaal, 1920-1940' (MA diss., Wits University, 1986), pp. 39-41.

9. M. Chanock, *Law, Custom and Social Order: The Colonial Experience in Malawi and Zambia* (Cambridge 1985), p. 238; Mann & Roberts, 'Law in Colonial Africa,' pp. 3-4.

10. For this observation applied to the context of customary law, see S.E. Merry, 'Law and Colonialism' (25(4) *Law & Society Review* 1991), and Mann & Roberts, 'Law in Colonial Africa,' pp. 3-4.

11. A. Dulcken, 'Appeals in Native Cases' (VIII *Cape Law Journal* 1891), p. 208.

12. E. Henochsberg, 'The Passing of the Natal Native High Court' (LXXI (III) *South African Law Journal* 1954), p. 221; H.J. Simons, 'Marriage and Succession' (*Acta Juridica* 1960).

13. H.J. Simons, *African Women. Their Legal Status in South Africa* (London 1968), pp. 25-26.

14. *Ntukwini v Miso* 1917 NHC 216, at p. 223.

15. Quoted in D. Welsh, *The Roots of Segregation: Native Policy in Colonial Natal* (London 1971), p. 166.

16. Contained in the Schedule to Law 19 of 1891. It seems as if the Code did not apply to Zululand, which remained under the Code of 1878 until 1932—see J.C. Bekker, 'Two New Codes of Zulu Law' (53 *Tydskrif vir Hedendaagse Romeinse-Hollandse Reg* 1990), pp. 181-182.

17. Henochsberg, 'The Passing,' pp. 222-227.

18. Act 38 of 1927 as amended by Act 9 of 1929, s 10, ss 10(2) and s 15. Chanock, 'Writing South African Legal History' (30 *Journal of African History* 1989), p. 283, notes that the passing of the 1927 Native Administration Act changed the administration of native law, including that, 'The nature of judicial power was altered as the Native Commissioners' Courts themselves became largely administrative bodies, exercising powers which the Supreme Court defined as administrative and not judicial, and which were therefore beyond even the weak review tests of natural justice.' This statement seems to fly in the face of s 10(2). As his authority Chanock cites Marion Lacey's *Working for Boroko* at p. 101 who, in turn, cites *R v Mabi* 1935 TPD 408. This case however is concerned with the discretion of the Governor-General (the court holding that it had been fairly exercised and dismissing the appeal) and provides no support for the above-mentioned contention. Lacey herself uses the case to illustrate the Governor-General's sweeping powers, not those of the NCs' courts.

19. Proclamation No. 168 of 1932, dated 23 Sept. 1932.

20. Cited in Welsh, *Roots of Segregation*, p. 172. An assessment with which Welsh is in apparent agreement: "the Code [became] in effect, a straightjacket which stultified the development of customary law," p. 176.

21. *Inkanyiso*, 16 Feb 1892, cited in ibid., p. 173.

22. T.W. Bennett & T. Vermeulen, 'Codification of Customary Law' (24(2) *Journal of African Law* 1980), p. 219. For a similar view, see also, E.H. Brookes and C. de B. Webb, *A History of Natal* (Pietermaritzburg 1987), p. 249; and J. Lambert, *Betrayed Trust. Africans and the State in Colonial Natal* (Pietermaritzburg 1995), pp. 62-63.

23. R.N. Currey (ed), *Letters and Other Writings of a Natal Sheriff* (Cape Town 1968), letter to *Times of Natal*, 30 April 1873, p. 145.

24. Simpson, 'Peasants and Politics,' p. 47.

25. J.L. Comaroff & S. Roberts, *Rules and Processes. The Cultural Logic of Dispute in an African Context* (Chicago 1981), pp. 247-248.

26. Chanock, *Law, Custom and Social Order*, p. 76.

27. On Solomon and his reign, see Cope, *To Bind the Nation.*

28. CAD, NTS 250 78/53/3, CNC to SNA, 18 June 1934.

29. CAD, NTS 250 78/53/3, CNC to SNA, 5 Aug. 1939.

30. CAD, NTS 250 78/53/3, 'Notes of Interview,' Pretoria, 9 Dec. 1939.

31. CAD, NTS 250 78/53/3, CNC to SNA, 16 April 1940.

32. CAD, NTS 248 78/53/2 (Part I), CNC to SNA, 9 March 1940.

33. CAD, NTS 248 78/53/2 (Part I), CNC to SNA, 3 July 1944.

34. On Braatvedt's family background and views, see his memoirs, *Roaming Zululand with a Native Commissioner* (Pietermaritzburg 1949). Reference to his car, and the care he lavished thereon, can be found in CAD, BAO 3273 393/311, NC Mapumulo to CNC, 24 Feb. 1939.

35. Braatvedt, *Roaming Zululand*, p. 130.

36. B. Berman, *Control & Crisis in Colonial Kenya: The Dialectic of Domination* (London 1990), pp. 204 and 206.

37. CAD, NTS 248 78/53/2 (Part I), NC Nongoma to Lugg, 7 May 1944.

38. CAD, NTS 248 78/53/2 (Part I), NC Nongoma to CNC, 26 March 1944.

39. CAD, NTS 248 78/53/2 (Part I), NC Nongoma to Lugg, 7 May 1944.

40. *Izikhali zaNamuhla*, p. 65, quoted in S. Skikna, 'Son of the Sun and Son of the World: The Life and Works of R.R.R. Dhlomo' (MA diss., University of the Witwatersrand, 1984), p. 86. The reference to Solomon's heir was contained only in the first edition of the book, subsequent to which, the attention of the Chief Inspector of Native Education was drawn to the matter and in later editions, 'the reference to the heir of the Royal House was expunged.' CAD NTS 248 78/53/2 (Part I), Chief Inspector of Native Education to CNC, 18 March 1944.

41. J. Guy, 'Making Words Visible' (31 *SAHJ* November 1994), p. 7.

42. CAD, NTS 248 78/53/2 (Part I), Mshiyeni to NC Nongoma, 8 May 1944.

43. CAD, NTS 248 78/53/2 (Part I), Cyprian Zulu to NC Nongoma, 3 April 1944.

44. CAD, NTS 248 78/53/2 (Part I), Mshiyeni to NC Nongoma, 8 May 1944. An example of, in Hofmeyr's words, 'a struggle to keep documents accountable to the circumstances from which they come.' I. Hofmeyr, *'We Spend Our Years as a Tale That is Told.' Oral Historical Narrative in a South African Chiefdom* (Johannesburg 1993), p. 63.

45. CAD, NTS 248 78/53/2 (Part I), NC Nongoma to CNC, 24 Sept. 1944.

Before appointing the heir of an hereditary chief under section 2(7) of the Native Administration Act, the Governor-General could choose to appoint a Board of Advisers under section 23(2) of the Code:

> ...the Governor-General should he by reason of any dispute or other circumstance deem it desirable, may cause inquiry to be made by three advisers to be appointed by him. Such advisers shall be selected by reason of their special knowledge of the language, customs and laws of the Natives... They shall have all the powers conferred by law on magistrates' courts for the summoning of witnesses, their examination under oath and to compel the production of documents.

46. The appointment of the Board was hampered by the reluctance of retired Senior Grade Magistrate John Rawlinson to accept the appointment as his expenses would not be covered by the £2.2.0 per day he would be paid. In the end, and to Col. Martin's disappointment, Rawlinson withdrew due to the ill health of his wife and Addison (the son of a famous magistrate) was appointed in his stead. See CAD, NTS 248 78/53/2 (Part I), Rawlinson to CNC, 16 Dec. 1944, and related correspondence.

47. Department of Traditional Authorities, Pretoria (DTA), File 13-918, 'Notes of Evidence,' p. 1.

48. Ibid. p. 2.

49. W.G. Stafford & E. Franklin, *Principles of Native Law and the Natal Code* (Pietermaritzburg 1950), p. 167. The term 'kraal' is used, in the context of native law, to refer to a homestead.

50. *Ntukwini v Miso* 1917 NHC 216 at pp. 228-229. Although Jackson J dissented from the decision of the court, Innes CJ held in *Mcunu v Mcunu* 1918 AD 323 (which was the appeal of *Ntukwini*), at p. 329, that the learned judge's "remarks on the general subject are supported by a mass of evidence and are not, as I gather, dissented from his colleagues."

On the confusion between the different terminology in the 1875, 1891 and 1932 Codes, see A.J. Kerr, *Customary Law* (Grahamstown 1976), pp. 169-172.

The complex process of 'affiliation' is not relevant to us and will not be dealt with here—see Stafford & Franklin, *Native Law*, pp. 170-173.

51. Section 98 and section 104. Although prior to 1932 when the Code did not apply to Zululand, commoners were able to appoint their chief wife, in terms of what Stafford and Franklin refer to as 'original Native law.' See *Principles of Native Law*, pp. 172-173. See also J. Lewin, *Studies in African Native Law* (Cape Town 1947), p. 143.

52. Kerr, *Customary Law*, p. 177.

53. *Bevu v Laduma* 1900 NHC 22. The Board referred to this case in connection with the right of commoners to participate in the process.

54. This was in accordance with Shepstone's views as expressed before the 1881 Natal Commission on Native Laws—CAD, NTS 78/53/2 (Part II), 'Petition to Governor-General,' 30 April 1947. See, too, J. Chadwick, 'A Native Law Suit in Natal' (IX *The Cape Law Journal* 1892), pp. 31-32, who confirms this and relates it to the Roman law which also recognised the undesirability of permitting the next in line to act as guardian of the heir.

55. While precedent was binding in the native courts, it is less clear that this situation prevailed in the Appellate Division. See A.J. Kerr, 'The Application of Native Law in the Supreme Court' (74 *SALJ* 1957).

56. See, for example, C. de B. Webb and J.B. Wright (eds), *The James Stuart Archive*, Vol. I (Pietermaritzburg 1976), evidence of John Gama, p. 141 and the sources cited by the editor at p. 145 n. 28; and Vol. III, evidence of Mmemi kaNguluzane, p. 267. According to the 'native deacon Umpengula' the kraal head must use his own personal cow to establish a new house which does not belong to the hereditary estate and the wife so married is separate, a hill standing alone, and her son is not the chief—T.B. Jenkinson, *Amazulu. The Zulus, their Past History, Manners, Customs and Language* (London 1882 [reprint Pretoria 1968]), pp. 34ff.

57. C. de B. Webb & J.B. Wright (eds), *A Zulu King Speaks: Statements made by Cetshwayo kaMpande on the History and Customs of his People* (Pietermaritzburg 1978), pp. 86-89.

58. DTA, File 13-918, 'Report of the Board of Advisers,' p. 1, and the same point is made at p. 4.

59. 'Notes of Evidence,' p. 28, Evidence of Mnyaiza. Although Mshiyeni said that the royal house was not compelled to nominate chief wives, he later questioned his ability to speak on such matters—see pp. 13 and 19.

60. M. Gluckman, 'Kingdom of the Zulu' in M. Fortes and E. E. Evans-Pritchard (eds), *African Political Systems* (London 1940), p. 35.

61. Webb & Wright (eds), *James Stuart Archive*, Vol. I, p. 199, Evidence of Jantshi kaNongila (Shaka was 'offered the position of king'); Vol. III, p. 199, Evidence of Mkebeni kaDabulamanzi (Senzangakhona decreed that 'a madman' would be king).

62. Thus it was argued that Dingane had a superior genealogical claim to his brother regicide Mhlangana who was in addition debarred by having killed the king. J. Laband, *Rope of Sand* (Johannesburg 1995), p. 51.

63. Gluckman, 'Kingdom of the Zulu,' p. 35; Webb & Wright, *A Zulu King Speaks*, p. xi.

64. Webb & Wright (eds), *James Stuart Archive*, Vol. I, pp. 200-202, Evidence of Mkebeni kaDabulamanzi; Gluckman, 'Kingdom of the Zulu,' p. 36.

65. This paragraph is based on Cope, *To Bind the Nation*, pp. 38-41. The quote appears on p. 40.

66. Laband, *Rope of Sand*, p. xv.

67. *Ntukwini v Miso*, at p. 230.

68. J.L. Comaroff, 'Chiefship in a South African Homeland,' 1(1) *JSAS* 1974.

69. DTA, File 13-918, 'Succession to Solomon: Remarks by Ethnologist,' 28 May 1945. Hammond-Tooke, 'N.J. van Warmelo' (*African Studies*, forthcoming), pp. 7-8, recognises the links between van Warmelo and Comaroff's approaches, although his view of van Warmelo as a disinterested anthropologist with no ideology or theory is peculiar, considering the advisory role played by the ethnologist. In the present case, van Warmelo was unequivocal on the function of chiefs, and whom to appoint.

70. 'Report,' p. 9.

71. 'Notes of Evidence,' p. 3, Evidence of Gilbert (lobolo paid), p. 5, Evidence of Zazini Ngema (didn't know).

72. 'Notes of Evidence,' p. 51, Evidence of okaMatatela; R.H. Reyher, *Zulu Woman* (New York 1948), pp. 232-233. Rebecca Reyher was an American journalist who wrote Christina's 'biography.'

73. CAD, NTS 248 78/53/2 (Part II), 'Petition to Governor-General,' 30 April 1947.

74. 'Report,' p. 4. This confusion, wilful or otherwise, between 'family' and 'tribe' can also be found in the judgment of Campbell JP in *Bevu v Laduma*.

75. See L.H. Hoffmann & D.T. Zeffertt, *The South African Law of Evidence* (Durban 1988), pp. 427, 416 and 109-111.

76. 1905 NHC 93 at p. 95. See, also, the remarks by Lewin concerning the distinction between '"laws"' and 'mere social convention'—*Studies in African Native Law*, p. 4.

77. Currey (ed), *Letters and Other Writings of a Natal Sheriff*, Letter to *Natal Witness*, 18 April 1876, p. 218.

78. At p. 230; see also the remarks by Chadwick AJP in a similar vein in the same case at pp. 224-225.

79. 'Report,' pp. 7-8. The native courts were quick to give the greatest credence to white witnesses—see, for example, *Bevu v Laduma* at p. 25.

80. Cohen & Odhiambo, *Burying SM*, pp. 49-50.

81. 'Notes of Evidence,' p. 19, Evidence of Mshiyeni.

82. Mnyaiza was adept at manipulating 'age and status': at one stage the father of Zulus answered a question, 'I do not know whether King Shaka was a son of the first wife. I was not living at the time.' DTA, File 13-918, 'Notes of Evidence,' p. 31, Evidence of Mnyaiza.

83. A. Ashforth, *The Politics of Offical Discourse in Twentieth-Century South Africa* (Oxford 1990), p. 55.

84. D.W. Cohen, '"A Case For The Basoga": Lloyd Fallers and the Construction of an African Legal System' in Mann & Roberts (eds), *Law in Colonial Africa*. On the 'reification of custom' in the 'SM case' in Kenya, see D.W. Cohen & A. Odhiambo, *Burying SM* (Portsmouth 1992), p. 64.

85. As was observed by the liberal Senator Edgar Brookes, a staunch supporter of Mshiyeni. CAD, NTS 248 78/53/2 (Part I), Brookes to SNA, 8 June 1945.

86. Cohen & Odhiambo, *Burying SM*, p. 39.

87. 'Notes of Evidence,' Appendix H, Translation of letter from Solomon.

88. CAD, NTS 248 78/53/2, SNA to CNC, 28 June 1945, and Martin to CNC, 23 July 1945.

89. DTA, File 13-918, 'Succession to Solomon: Remarks by Ethnologist,' 28 May 1945.

90. At p. 21.

91. *Sitendeni v Saliwana* 1903 NHC 19, cited by Stafford & Franklin, *Principles of Native Law*, p. 184.

92. At p. 220.

93. T.W. Bennett, *The Application of Customary Law in Southern Africa: The Conflict of Personal Laws* (Cape Town 1985), p. 217. He is wrong however when he asserts, on p. 218, that Africans in Natal were permitted to make wills without restriction.

94. *Ndambeni Sithole v Nonsu Sithole* 1938 NAC 35, cited in Stafford & Franklin, p. 191; *Ntukwini v Miso* at pp. 220 and 226.

The same process had apparently been followed under the Zulu kings—see Webb & Wright (eds), *A Zulu King Speaks*, p. 89.

95. Guy, 'Making Words Visible,' p. 11.

96. J. Clifford, *The Predicament of Culture* (Cambridge Mass., 1988), p. 329.

97. P. la Hausse, 'Ethnicity and History in the Careers of Two Zulu Nationalists' (PhD diss., University of the Witwatersrand, 1992), pp. 335-337

For an interesting critique of Clifford's account of the Mashpee case, and the divisions therein between 'people with and without history,' see K.L. Klein, 'In Search of Narrative Mastery: Postmodernism and the People Without History' (34(4) *History and Theory* 1995), pp. 288-294.

98. KC, KCM 2668, B.W. Martin, 'Old Soldiers Never Die' (unpub. mss. 1969), p. 61.

99. Chanock, *Law, Custom and Social Order*, pp. 48-50, 103 and 107-111.

100. The rivalry between the followers of Dube and Champion is chronicled in detail in the pages of *Ilanga* in 1944. On the relationship between Champion and Solomon, see Cope, *To Bind the Nation*, pp. 154-158 and 181; la Hausse, 'Ethnicity and History,' p. 353.

101. For NAD opinions of Mshiyeni as autocratic and arrogant, including those of Braatvedt, see, CAD, NTS 250 78/53/3, NC Nongoma to CNC, 8 Nov. 1943, and, with hindsight, CAD, NTS 250 78/53/3, NC Nongoma to CNC, 20 December 1946. Jordan Ngubane also felt the regent's wrath (J. Ngubane, 'After the Collapse of Apartheid' (unpub. mss., n.d.), p. 168), as did the young Max Gluckman (H. Macmillan, 'Return to the Malungwana Drift—Max Gluckman, the Zulu Nation and the Common Society' (94 *African Affairs* 1995), pp. 41-42).

On the difficulties of being a regent, see M. Gluckman, *Politics, Law and Ritual* (Oxford 1967), p. 139.

102. CAD, NTS 248 78/53/2 (Part I), 'Minutes of Meeting,' Nongoma, 25 July 1946. Mshiyeni continued to take an active role in family affairs until his death in March 1953.

103. CAD, NTS 250 78/53/3, H.P. Braatvedt to D.L. Smit, 18 Nov. 1946.

104. CAD, NTS 248 78/53/2 (Part I), Board of Advisers to CNC, 26 April 1945.

105. 'Report,' p. 10.

106. CAD, NTS 248 78/53/2 (Part I), NC Nongoma to CNC, 26 March 1944.

107. At p. 23. Dr van Warmelo shared this opinion, although for different reasons, arguing, 'mass meetings of commoners should be avoided; the people need to realise they have no say in matters of this kind.' What he did not seem to realise, and what the Board did, is that unless the 'ruling caste' had the support of 'the people' they would not be able to rule effectively (or even remain the ruling caste)—CAD, NTS 248 78/53/2 (Part I), 'Succession to Solomon: Remarks by Ethnologist,' 30 May 1945.

108. On the 'social constructionist approach' to subjects of law as agents, see E. Mertz, 'A New Social Constructionism for Sociolegal Studies' (28(5) *Law & Society Review* 1994), p. 1246.

This 'creativity' is similar to the long-recognised role of judicial discretion, although this latter function is exercised within far tighter constraints. See, for example, C. Forsyth, 'The Judges and Judicial Choice: Some Thoughts on the Appellate Division of the Supreme Court of South Africa since 1950' (12(1) *JSAS* 1985), pp. 102-103.

And, of course, politically-inspired findings were not confined to native law. On the manipulation of the law by the colonial administration in order to punish Dinuzulu, see, B.M. Nicholls, 'Zululand 1887-1889: The Court of the Special Commissioners for Zululand and the Rule of Law' (XV *Journal of Natal and Zulu History* 1994/5).

109. T.O. Ranger, 'The Invention of Tradition Revisited: The Case of Colonial Africa' in Ranger and O. Vaughan (eds), *Legitimacy and the State in Twentieth Century Africa* (London 1993), p. 101. See, for example, S.F. Moore, *Social Facts and Fabrications. 'Customary' Law on Kilimanjaro* (Cambridge 1986), p 319:

> The construction of a restricted place for 'custom' by governments clearly has been a matter of calculated policy. But some of the operational effect may not have been fully foreseen. The policy has worked to increase the gap between official government conceptions and the realities of local affairs. The domain of local autonomy is not large, but it is carefully insulated from external references to whatever extent possible. The illusion from the outside that what has been labelled 'customary' remains static in practice is patently false.

110. Mann & Roberts, 'Law in Colonial Africa,' p. 4; Ranger, 'Invention of Tradition Revisited,' p. 83.

111. On Africans representing themselves in anthropological accounts, see H.L. Moore & M. Vaughan, *Cutting Down Trees. Gender, Nutrition and Agricultural Change in the Northern Province of Zambia* (Portsmouth & London 1994), pp. xviii and 3.

112. DTA, File 13-918, 'Succession to Solomon: Remarks by Ethnologist,' 28 May 1945.

113. CAD, NTS 248 78/53/2 (Part I), 'Succession to Solomon: Remarks by Ethnologist,' 30 May 1945.

114. Quoted in Chanock, *Law, Custom and Social Order*, p. 136.