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A F R I C A N S T U D I E S I N S T I T U T E

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AFRICAN CUSTOMARY LAW - ITS SOCIAL AND IDEOLOGICAL FUNCTION IN SOUTH AFRICA

by Raymond Suttner

> 'Even though there has not been an attempt to abolish Bantu customs directly, the attempt was actually made to replace them surreptitiously with our own law. I have stated before that there was really a deliberate attempt - especially through liberalistic influences - to lead the Native away from what was fine in his Native rights and customs ... I want to allow him to develop his own law according to changed circumstances, but starting from a system of law which is his.' - Dr Verwoerd, 1955.[1]
>
> 'It is perhaps superfluous to say that retention of customary African legal sytems for Africans is fully consonant with South African government policy: paradoxically, perhaps, a desire to move away from these tribal systems is typical of South African liberal thought.' - PMA Hunt, 1963.[2]
>
> '... Customary law is now my devoted study, not because I willed it so, nor because I am one with those who bleat: "Let the natives develop along their own lines", but because up in the Maluti Mountains, and in several pocketes of lowland-dwellers, Custom is very much still *the* law and no amount of contempt - for it by others can alter this fact.' - AMR Ramolefe, 1969.[3]

The study of the terms and mode of application of African customary law in South Africa has generally been neglected both by lawyers and African Studies scholars. In the case of lawyers, there is little interest in a law potentially relevant to seventy per cent of the population - where that seventy per cent is for the most part unable to pay lawyers' fees.[4]

In the case of students of African studies, the segregated legal and judicial systems may seem of marginal consequence, in the light of the more serious disabilities that people experience through more patently repressive laws, such as those regulating influx control, resettlement, banishment etc., let alone laws concerning directly political activities. It would nevertheless be wrong, I shall try to show, to dismiss this area as unimportant or innoc-

uous.

This paper seeks to demonstrate how the special court and legal system set up to deal with civil cases between Africans, contributes ideologically, economically and socially,[5] to the national oppression of the African people.

IDEOLOGICAL/POLITICAL

While in any class or class-based social formation, coercion may be used or held in reserve, it is obviously preferable to the ruling class(es) to govern without the use of force. It is better to have the oppressed class(es) accept their subjection, to have them understand that 'it is so', that it can be no other way, that there is no alternative to the existing relations of production/domination. This, Althusser argues, is achieved (or attempted) through ideology.[6]

It may be objected that in a colonial-type society (where one encounters not only class exploitation but also national oppression, consequent on the denial of self-determination to the majority of the population) there is much more recourse to repression of the oppressed than ideological domination. This is true. In South Africa the government of whites is broadly by 'consent', whereas blacks experience the state in the form of control, regulation and a variety of other forms of coercion. Yet, even for blacks, ideology is not dispensed with.[7] There are constant attempts, through a variety of means, to 'win over' blacks to the institutions of *apartheid*. Every period of extreme repression coexists with or is succeeded by renewed attempts to 'win over' the population.

Althusser's work is useful, in explaining the specific way in which customary law contributes, at the ideological level, towards the national oppression of Africans. Althusser argues that the means whereby ideology operates, is through interpellating (constituting, hailing) concrete individuals as subjects. Through ideology, individuals *recognise* themselves as subjects. They recognize the 'obviousness' of their constitution as specific types of subjects. The 'category of the subject', Althusser argues, 'is the constitutive category of all ideology, whatever its historical date - since ideology has no history.

'I say: the category of the subject is constitutive of all ideology, but at the same time and immediately I add that *the category of the subject is only constitutive of all ideology in so far as all ideology has the function (which defines it) of "constituting" concrete individuals as subjects.* In the interaction of this double consititution exists the functioning of all ideology, ideology being nothing but its functioning in the material forms of existence of that functioning.'[8]

In any social formation one is interpellated in a number of different ways by a number of different Subjects - as citizens, mothers, daughters, Christians etc. The peculiarity of the South African social formation lies in the mode of interpellation of subjects by the state. Unlike convential bourgeois states where interpellation by the state as subject carries important ideological consequences, connoting equality and citizenship for all, the

South African state interpellates individuals not merely as South African subjects. They are also interpellated - by the state - as specific types of 'racial subjects' with varying rights - as 'whites', 'Indians', 'Coloureds' and 'Blacks'. In the case of Africans, furthermore they are not only interpellated as 'Blacks' but also as specific 'tribal' subjects - as Xhosa, Tswana etc. (In the case of the Xhosa, this process of sub-division goes even further with the separate constitution of Ciskeian and Transkeian Xhosa).

At one moment the African is treated as an ordinary bourgeois subject. When he or she enters into a contract, the labourer, Mr or Ms X, is legally equal to Anglo-American. Professors H.R. Hahlo and Ellison Kahn write that 'equality' is an 'offspring of reasonableness. Since law consists of reasonable rules and not arbitrary *ad hoc* judgements, persons in the same legal condition can expect to be dealt with alike.'[9]

In other words, Mr/Ms X, being a contracting party 'in the same legal condition' as Anglo, cannot expect any account to be taken of actual differences in negotiating power. 'The power given to one party by its different class position, the pressure it exercises on the other - the real economic position of both - all this is no concern of the law ... That the concrete economic situation compels the worker to forego even the slightest semblance of equal rights - this again is something the law cannot help.'[10] This attitude is well illustrated in the judgement of Kuper, J. in *De Beers v Minister of Mines*[11] (cited by Hahlo and Kahn);[12]

> 'Counsel said that justice to all parties required that Sir Ernest should be called. On two occasions he told the Court that the fact that Sir Ernest Oppenheimer is a very wealthy man should not influence the court against calling him as a witness. First of all, *there is no evidence that Sir Ernest is a wealthy man:* even if he is I think that the suggestion that this might influence the Court should not have been made ... *It hardly requires to be said that the financial standing or status of any particular person is completely and entirely irrelevant when it comes to the question of the rights of any citizen in this country.*'[13]

Obviously such statements contain a progressive element, for example, the right of an impoverished black person to damages is, in theory, as great and meant to be awarded on an equal scale to that of Sir Ernest. But this approach to class differences - 'There is no evidence that Sir Ernest is a wealthy man ...' - also means that the notion of surface equality must coexist with an *unacknowledged* substantial inequality and capacity to coerce.[14]

For purposes of much of criminal law, also, Africans are treated as South African subjects. A charge of theft, murder, treason, etc., does not require a specifically racial or tribal subjectivity. Yet here too the non-racial category conceals actual discrimination. In the first place, social conditions in the townships predispose impoverished blacks to commit offences, especially

against property.

But the mode of policing and punishing such offenders may also be discriminatory. Harry Morris KC has remarked: 'A White man is rarely hanged. The privilege is reserved for the Native. Lashes for the White man have almost been entirely forgotten, and caning is only half-remembered ...'[15]

In aspects of the Roman-Dutch civil law and general South African criminal law, therefore, a formally non-racial/non-class law actually discriminates or may discriminate against blacks and workers or it counceals unequal relations behind a judicial form of equality.

At another moment, however, the criminal law specifically constitutes Africans as 'Blacks' - *as a condition for criminality*. One cannot be an accused under certain laws, unless one is a 'Black.' In the case of pass offences, only a 'Black' has to carry a pass and is liable to penalisation for failure to have it in his/her possession.

Though such statutory criminal law interpellates Africans as 'Blacks' and therefore potentially liable for offences that do not apply to 'non-Blacks', it generally does not specifically differentiate between particular 'tribal' categories. Along with Radio Bantu, Bantu education, bantustan administrations etc., *it is one of the functions of the special system of civil law for Africans to interpellate Africans as specific tribal subjects.*

Only cases between Africans may be tried by the special courts, set up under the Black Administration Act.[16] (In the 'independent' bantustans, however, all people are potentially subject to customary law in all courts).[17] All parties must be 'Blacks'. Although the courts have a *discretion* to apply 'Black law', it will be argued, below, that they tend to favour it over the Roman-Dutch law.

This 'Black law' is not a general law (although there is a great deal of similarity between the various customary tribal laws).[18] The Black law applied is the law of particular 'tribes'. There are special rules for resolving disputes where parties belong to different 'tribes'.[19]

Not only is there a preference for 'Black law' but there is a tendency to apply a rigid, frozen form of original customary law.

The undue preference for 'Black law', in unchanged form, seeks to halt or set back the process whereby many/most Africans have reduced or ended their identification with tribal values and allegiance to 'tribal authorities'. It further seeks or serves to undermine the process whereby Africans have tended to reduce inter-tribal tensions and identify with one another as *Africans*. The policy of retribalisation through bantustans *et al* has sought to disorganize this growing national movement and to disrupt the development of national consciousness.

This attempt to halt the process of emancipation from 'traditional' life and to reestablish the coherence of the 'tribal order', with Africans having an allegiance to 'their' bantustans, does not go uncontested. This process is challenged in the first place by the reality of African life itself, by the fact that Africans do not generally live as tribespeople anymore. But it is also challenged at the political level by the growing strength of forces

working for democracy, which interpellate Africans as Africans and as South Africans.[20]

ECONOMIC

At the level of the economy, the encouragement of 'traditional' customary law has consequences for the capacity of families in the reserves to contribute towards the subsidization of the wage levels of migrant workers.[21] The encouragement of customary law means the refurbishing of the patriarchal, joint family system of the tribe. To the extent that 'Black law' impedes female emancipation (e.g. it prevents their emergence as 'free legal subjects', generally treating women as perpetual minors), it consolidates the family-centred, male-dominated 'tribal' redistributive system. This subjection and confinement of women as inferior members of a family group, helps to perpetuate the subsidization of the capitalist mode of production by production processes in the reserve.

SOCIAL

Characteristically, the African civil court and legal system is not merely segregated - but it is also inferior in status and in the quality of the justice dispensed (that is, the degree to which their judgments satisfy the needs/expectations of litigants in their specific social situation today). Far from alleviating disabilities, it will be argued that decisions of these special courts often add to the problems of men and women (but mainly women) who use them.

In personal relations one expects the law to regulate marriage, divorce, guardianship etc. in a manner that provides certainty as well as sufficient flexibility to encompass new living patterns.

The dualistic legal structure does not meet these needs. There is much uncertainty as to the law, as to who is married or unmarried. The terms of recognition of customary law, as a subsidiary legal system, has also produced negative side effects, such as the non-recognition of customary marriage as a lawful union for many purposes.[22]

THE SPECIAL SYSTEM ESTABLISHED BY THE BLACK ADMINISTRATION ACT

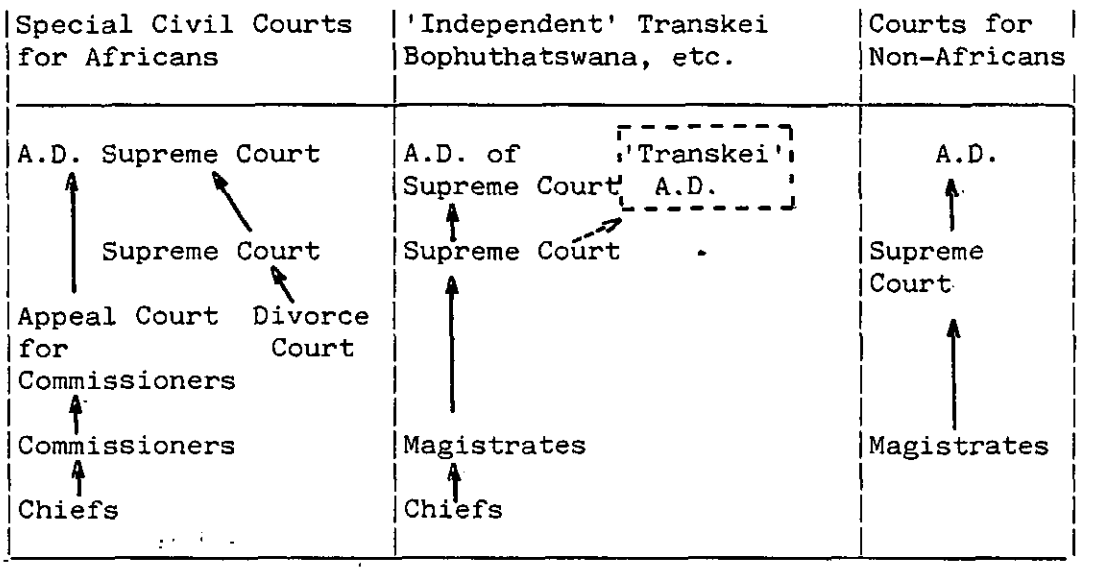
I have referred to the "special system of civil law" applied in cases between Africans. In such litigation courts may apply 'Black law' (previously called Native law/Bantu law). "Black law" is not synonomous with original customary law. It represents those aspects of African customary law that have been recognised and applied, subject to various modifications, by South African courts legislatures.

The existence of a separate court and legal system to regulate civil relations between Africans is a specifically colonial phenomenon.[23] Colonisers invariably declare their own law to be the 'law of the land'. The law of native peoples has to be specially 'recognised'. In the case of South Africa, the existence of legal and judicial dualism is merely an aspect of a wider bifurcation of state functions with separate state structures existing for white

and black in education, politics etc.[24]

THE SPECIAL COURT SYSTEM[25]

The diagram below contrasts the court system for non-Africans, that in the 'independent' Bantustans, and the special system established for Africans in the rest of South Africa.



There is not space here to give a full description of such questions as the jurisdiction of the various courts. I want to stress a few factors only:

While Commissioners are at the same 'level' in the judicial hierarchy as Magistrates, they have a much wider jurisdiction *as to amount* than do magistrates.[26] What this means is that whereas for cases between non-Africans, litigation involving large sums of money would have to be tried by Supreme Court Judges, for Africans such cases would be decided by the equivalent of magistrates, that is, officers with much lower status and qualifications.[27]

For non-Africans there is practically automatic appeal to the Supreme Court and then the Appellate Division in civil cases. For Africans there is an appeal to the special Appeal Court for Commissioners (appointed from the ranks of Commissioners) and only very limited possibilities of appeal to the A.D.[28] This means that for all practical purposes, the development of 'Black law' is left in the hands of officials of the Department of Cooperation and Development.

CRITIQUE OF THE SPECIAL COURTS

There is a widespread feeling amongst academics (echoed to some extent by practitioners and social workers)[29] that the Commissioners Courts are in crisis. Speaker after speaker in evidence before the Hoexter Commissioner into South Africa's court system mounted criticism against the operation of these courts. Many speakers

recognised that Africans regard 'their' judicial 'dispensation' as inferior and unsatisfactory. They feared that this would lead to (or increase?) disrespect for the law.[30]

Part of this expression of anguish is a result of the inability of these courts to meet the goals set for them. When the special coruts were established they were presented as providing unique advantages to Africans. Thus the president of a division of the Appeal Court remarked in 1929 that he saw in the new courts a 'system of judicature ... embodying a simple and convenient form of procedure, stripped as far as possible of legal niceties and technicalities, designed to meet the needs of the situation, one of the central ideas of which is to bring the machinery within easy reach of and accessible to, the highest as well as the lowest members of the Native community ... with comparatively little expense.[31] On a later occasion he elaborated on the legislature's aims: without losing flexibility, it was intended to bring into being forums designed to suit the 'psychology' of the African, recreating as nearly possible the atmosphere of the tribal court to which Africans were accustomed to submit their disputes.[32]

[33] The Commissioners courts are said to provide *simple proceedings*. If it is true that these courts are a great deal less formal than the ordinary courts, then it could be argued that African litigants do not need lawyers. They could conduct their own cases and thus save costs.

In fact it is quite clear that these courts do not perform in a manner that is remotely comparable to the Chief's courts in the old society. Their procedures are much more formalistic. Segregated from the community whose disputes they decide, Commissioners' courts cannot recapture the flexibility of the tribal court, a flexibility which arose from the court's position and function in the community.[34]

To conduct a case successfully one needs a lawyer. Procedure in these courts is only marginally less complicated than that in the Magistrate's court.[35] The consequences is that, where one party is represented and the other not, the represented party is almost invariably successful.[36]

Whether litigants need a lawyer or not may be an 'open question' for the academics but it is not for the ordinary people who realise that they need to be able to pay for their 'justice' One hundred years ago Ntabeni Magabela, Headman of Peelton Mission Station, King William's Town, told the Cape Native Laws and Customs Commission:

'Yes. There are many points in which they [i.e. principles of customary procedure] differ from those of the Colony:-

'First, In the colony a person goes with money to the laywers in order that his case may be entered upon. He who has no money is in perplexity about how his case will be heard.'[37]

Cases are regularly dismissed or repeatedly delayed because of formal deficiencies. Sometimes these defects are the result of the clerk of the court drawing up summonses incorrectly.[38] On other occasions, litigants stand bewildered while Commissioners, before

dismissing pleas, applications or arguments, ask what are confusing and formalistic questions.[39]

Related to the alleged simplicity of procedure in these courts is the claim[40] that *costs are substantially lower* than in the ordinary courts. Where a litigant appears *without a lawyer* (and with consequent disabilities) it may be true that his costs will be relatively low. Yet even this may have to be qualified, for repeated delays and problems with jurisdiction (especially in the special divorce court[41]) may mean many days away from work and possible loss of earnings.

Where a lawyer is employed it is doubtful whether such services would be any less expensive than for cases involving non-Africans. The tariff of costs (i.e. court fees etc.) is lower in the special courts than in the ordinary courts. This does not however stop attorneys from charging their usual fees[42] on a 'party to party' basis for their own services.

These courts may, then, be cheaper than those for non-Africans if the litigant appears without a lawyer (and, that is, with reduced chances of success). Where a lawyer is employed costs are not substantially lower than for other races.

It is also claimed that these courts are *staffed by experts.*[43] In the debate preceding the passing of the Black Administration Act in 1927, the Minister said that he envisaged[44] in these courts 'a man specially versed in native law.'

In fact the presiding officers hold[45] very low qualifications (lower civil service law examination) and display the conservative, sometimes racist attitudes which seem characteristic of the Cooperation and Development/Bantu Administration department.

Despite these low qualifications Commissioners adjudicate many matters that, in the case of non-Africans, can only be decided by Supreme Court judges, whose minimum academic qualification is a LLB.

Commissioners do not have to be proficient in a Bantu language - yet it is claimed by some officials that this total[46] reliance on interpreters has led to 'miscarriages of justice'.

Although not a 'claim' made for these courts, I want to consider a final characteristic of the special court system, that is, *the type of contribution made by practitioners and academics to the quality of their justice.*[47] Professor Ellison Kahn has remarked that:

> 'The process of producing a judgement in a law suit is a cooperative enterprise. Counsel is there to cite the relevant authorities and from the cut and thrust of argument points may emerge that were hitherto latent. In the word of Justice Louis D. Brandeis, one of the greatest judges of the United States Supreme Court, a "judge rarely performs his functions adequately[48] unless the case before him is adequately presented".'

Quite obviously this principle cannot be realised where the vast majority of litigants cannot afford to employ legal representatives. Even where litigants do have the funds, attorneys in South Africa prefer not to handle these cases. Not only do 'Black law'

cases pay far less well than company law, tax cases etc., but "Black law" cases are often very complex and make demands on the attorney's time that are considered out of proportion to the financial rewards.[49]

Even where they are willing, can one say that attorneys and advocates are *competent* to make a contribution to the law suit if it is seen (as Kahn says) as a 'co-operative enterprise'?

In the ordinary courts attorneys and advocates often argue 'hammer and tongs' not only over the facts but also over the meaning of the law, the way it is to develop, etc. In Commissioners' courts, however, the tendency is to only argue over the facts and to leave law to the Commissioner, to let him decide what the law is, whether or not to apply 'Black law' etc. In practice, therefore, the Commissioner is left free to apply his own static version of customary law.[50]

The shallowness of the intervention of legal representatives is largely a result of their training. On the assumption that lawyers are there to serve the more wealthy 20% of the population, very few law syllabuses demand a compulsory course in the law governing the civil relations of the most impoverished 70% of the population.[51]

Where lawyers have studied 'Black law', it has generally been through postivistic textbooks which ignore the changed social conditions in which customary law operates today. This means that even where lawyers know something about customary law, their orientation is so narrow that their contribution is likely to reinforce that of the Commissioners.[52]

IS JUDICIAL INTEGRATION THE SOLUTION?[53]

Some of the scholars giving evidence to the Hoexter Commission have called for the scrapping of the separate system of courts for Africans.[54] In the Transkei, Ciskei, Bophuthatswana and Venda a formally integrated structure has been established.[55]

It is not inconceivable that the Hoexter Commission will call for an end to judicial segregation, and it is also not impossible that the government will agree to the integration of the special courts as a special 'division' of the Magistrates' courts.[56] The Riekert Commission has already suggested that 'the administration of justice function at present exercised by the Department of Plural Relations and Development can be transferred to the Department of Justice. Such a step can only be conducive to uniformity in the country's administration of justice. Apart from the transfer of commissioners to the Department of Justice, some adjustments can be made to the curricula for law examinations in order to ensure that magistrates are properly prepared to deal with questions in which Native law arises ...'[57]

Under such a system, especially if the wide jursidiction granted to Commissioners at present,[58] is retained, the division handling African civil cases would remain effectively isolated. It would, of course, be able to continue the ideological function (as it does in the 'independent' bantustans) of interpellating subjects tribally.

It is true, nevertheless, that if the special Appeal Courts were abolished and appeals went to the Supreme Court, there would be greater opportunities for influences from outside the department of

Cooperation and Development on the development of African civil law - that is, in the very small number of cases where litigants know that they are able and can afford to appeal to the Supreme Court.

What effect will judicial integration have, assuming that it will entail, at least, greater access to the Supreme Court? Judges have higher academic qualifications than members of the (special 'Black') Appeal Court, but whether they know much about customary law (considering that few have ever studied it or handled cases concerning it) is questionable. Whether they would pursue a more progressive policy towards customary law is also doubtful. Such creativity runs counter to basic tenets of their training, which is very antagonistic to 'judicial law-making'.[59]

The fundamental problems that Africans face in civil cases will remain unresolved, irrespective of whether the hierarchy of appeal is segregated or integrated. Africans generally cannot afford the legal representation that they, like whites, need, in order to litigate effectively. Even those who can afford a lawyer, we have seen, cannot always obtain one who knows much about customary law. Certainly there are few practitioners who would be able and willing to contest the Commissioner's/judge's interpretation of the law and to urge modifications in accordance with changed social conditions.

An integrated court structure would solve little in itself. To respond adequately to the personal law needs of Africans one needs a primarily African bench[60] - trained to respond more dynamically, together with adequate provision of legal representation to all who require it. This cannot be realized in the present state structure.

THE LAW APPLIED -

Having provided a brief critique of the courts which decide African civil law cases it is necessary to give a fuller picture of the way in which they have operated in practice and the adequacy of their decisions, given the nature of social conditions today.

The Black Administration Act of 1927 gave Commissioners' Courts a discretion to apply customary law. Section 11(1) reads:

> 'Notwithstanding the provisions of any other law, it shall be in the discretion of the Commissioners' Courts in all suits or proceedings between Blacks involving questions of customs followed by Blacks, to decide such questions according to the Black law applying to such customs except in so far as it shall have been repealed or modified: Provided that such Black law shall not be opposed to the principles of public policy or natural justice. Provided further that it shall not be lawful for any court to declare that the custom of lobola or bogadi or other similar custom is repugnant to such principles.'

This section provides for a *discretion* which operates only in cases between African and African (In the 'independent' bantustans, however, the discretion operates in cases involving all races).[61] Where an African sues a white/'Coloured'/Indian or vice versa, the section has no application and Roman-Dutch law must apply.

Courts do not *have to* apply Black law in case between Africans. There is a choice ('discretion'). Nevertheless for a number of years in the 1930s and 1940s the Appeal Court interpreted this section to mean a mandate for a policy of 'legal segregation' - that is, that Black law had to be applied as far as possible.[62] In 1948 the Appellate Division of the Supreme Court, following a question put by the Minister, reversed these decisions.[63] (Where he doubts the correctness of any Appeal Court for Commissioners decision, the Minister may submit it to the AD to decide what the correct decision should be).[64] They held that section 11(1)[65] provided no basis for the view that 'native law should be treated as *prima facie* applicable in cases between natives ...'[66]

That is the law (laid down by the highest court) - but there are nevertheless indications in later decisions that the special courts are still giving an undue preference to Black law.[67] This preference is partly a result of their tendency to depict Africans as an undifferentiated mass, all of whom act and contract, etc. according to 'tribal' patterns. Thus in one case, when deciding to apply Black law rather than Roman-Dutch to a case of defamation arising from an imputation of witchcraft, the court held:

> 'But amongst Bantu an imputation of witchcraft is a most serious matter and may result in the most dire consequences to the person so accused so that any claim based on such an imputation is essentially a matter to be dealt with under Bantu law and custom and in my view the Commissioner was wrong in not having done so.'[68]

It may well be true that most Africans do believe in witchcraft and that allegations of witchcraft would cause serious social inconvenience in many African communities.[69] What the court was required to do in terms of its mandate, however, was to establish the circumstances of the specific litigants, whether an allegation of witchcraft would be significant in their particular case.[70] That it does not do so serves, obviously, to reinforce the constitution of Africans as tribal subjects - people living in a community to which the court attributes specifically tribal values.

This discretion arises in cases *'involving questions of customs followed by Blacks'*.[71] How one interprets the term 'customs' is crucial in determining whether customary law is to be frozen in supposedly 'pure', 'traditional' forms or whether it is allowed to retain its dynamic qualities. Thus Julius Lewin remarked in 1947:

> 'The customs recognised as Native law are ancient ones. But in actual fact many of these customs or certain features of them are changing as the social and economic conditions of Native life change. Nowhere in the world has social change been as swift and as far reaching as it has in Africa in the last two or three decades. Where customs of marriage or family life have undergone signficant change, which form of the custom shall the courts recognise as Native law? Shall they countenance only the practice of the oldest

> generation? Or shall they seek to find current or contemporary custom in the practice of younger people? ...'[73]

The courts and academics have generally tended to treat the term 'custom' as synonomous with *immemorial usage*.[74] Thus, in one case, the court speaks of the rule of succession (male primogeniture) as 'entrenched, sacrosanct'. The court regarded it as a dangerous doctrine to allow a modern local custom to oust 'a law which had its genesis in the ancient policy of the founders of the race and has been universally recognised and generally applied down through the ages to the present time'.[75]

This is not to say that there have not in fact been judicial innovations. The courts and legislature have superimposed on tribal society common law categories such as majority status, individual rights to property, etc. In *Sijila v Masumba*,[76] for example, McLoughlin, P. introduced the common law term 'majority' and declared a woman incapable of owning any category of property, all being vested in the only 'major', the 'kraalhead' or her husband, as the case may be. Though the decision diminished the rights of women, this was regarded as a natural result of European judicial administration of the indigenous law:

> 'It is when recourse is had to European courts with a procedure foreign to the Native system that complications and confusion results. The European individualistic system regards one man as outright owner, and it is in deference to the principles of that system that the present-day idea of personal ownership in a kraalhead has taken root.'[77]

The combined impact of the introduction of individualistic categories from the common law and the courts' conservative approach to the formation of custom, has been to strengthen the patriarchal domination over women. This has meant that the rights of women are often reduced below that which they enjoyed in the precolonial tribal society.[78]

The more general problem, however, is that courts are not dealing with people who are living in the same manner as 'the founders of the race'. Many men and women are finding that the male/female relationships of the old society are not always viable or suitable in the conditions which they experience today. When both men and women are independent wage-earners, women tend to demand a more egalitarian marriage relationship, or if unmarried, an independent female wage-earner, deriving little in the way of protection or few benefits from her male guardian - will resent his power over her personal life or her property.[79]

A woman's guardian may be her father, her husband, brother or even someone much more remote who never makes an appearance except when it is time to collect *lobolo* or an inheritance.[80] He has to consent to her customary marriage[81] (and in Natal and since 1972, also in the Transvaal, he must consent to her civil (Roman-Dutch law) marriage even if she is over twenty one).[82] He is no longer allowed to force her to marry[83] but he can make it impossible for

her to marry the man of her choice, through making unreasonable *lobolo* demands.[84]

This 'guardian', no matter how remote his actual connection with the woman may be, is entitled to damages for seduction from the father of her child[85] and he (the guardian) is entitled to *lobolo* when she marries. If she is an unmarried mother he is entitled to *lobolo* for her children, even if he contributes nothing to their support.[86]

The law regarding *divorce* from a customary union also reflects this patriarchal dominance over women. The guardian may come to an agreement with the husband to dissolve his daughter's/ward's marriage - even without her consent.[87] A man may simply repudiate his wife - provided he is prepared to forego the *lobolo* he has paid.[88] The woman has no such right. Normally she has to try and persuade her guardian to return the cattle/ money (or whatever the *lobolo* comprised).[89] She can, in theory, obtain a divorce if she has been driven out by her husband, with the intention of ending the relationship.[90]

The courts, however, are reluctant to conclude that a husband's behavious constitutes 'repudiation' and this leads them to condone violence against the wife. In one case, an application for dissolution of a customary union was rejected - despite the fact that the husband had assaulted his wife on a number of occasions, threatened to stab her, told her to go away and said that he would kill her if she returned. The court declared that the husband had not intended to drive her away 'in the legal sense'.[91] In another case, the court again reinforced the standards of the most reactionary section of the African community, by depicting it as 'customary':

> 'It is not uncommon for a Native husband to chastise his wife. Unless this is done brutally and with a reckless disregard of the consequences. Natives do not regard chastisement as a rejection of the wife.'[92]

To summarise: 'custom' has been interpreted by the courts to mean the custom of the most reactionary sections of the community and to reject the formation of new, more progressive (and less narrowly tribal) customs, born of changed living patterns. This reinforces the patriarchal structure of the traditional family and in a modest way, adds coherence to the attempts to re-establish 'tribal' order.

Section 11(1) also imposes *limitations on the application of 'Black law'*. Black law may only be applied where the customs out of which the law arises are not repugnant to natural justice or public policy.[93] Although natural justice normally has a fairly precise meaning, the courts have taken this provision to mean that they should intervene where particular customs outrage their sense of morality. In the early days of white administration of customary law, courts sometimes went so far as to outlaw customary marriage altogether because of its intrinsic connection to the *lobolo* and polygyny institutions.[93] These were said to reduce women to the level of slavery while their menfolk enjoyed lives of 'indolent sensuality'.[95] At one time it was impossible for Africans in the

Boer republics to contract lawful customary or 'common' law marriages.[96] It was to avoid such excesses in the new climate of tolerance of African customs (born of virtually completed land seizure etc.) that the legislature specifically prevented the courts from declaring *lobolo* repugnant.[97]

Since then, the repugnancy clause, where it has been invoked has often served a relatively progressive function. Through invoking this provision courts have outlawed a variety of coercive relationships, such as forced marriages.[98] One of the problems has been that they have been unwilling to use this 'repugnancy clause' to play a more ambitious reformative role.[99] In consequence, the Black law that is applied retains many practices that are very oppressive in relation to women.[100]

Lawyers concerned with the development of customary law in the Transkei have attacked the repugnancy clause, using anti-colonial rhetoric.[101] They argue, correctly, that the clause has often been used in the past to enforce Europeocentric values.[102] They say, (also correctly), that the fact that the customary law and not the common law is subject to the repugnancy clause, reflects the customary law's inferior status.[103] Digby Koyana, a former member of the Transkei 'cabinet' writes:

> 'As the sleeping giant of Africa awakens these restraints are gradually being removed. Thus, in Tanzania and Ghana the repugnancy clause has been dropped. It was considered unfitting to the dignity of the indigenous laws of the people of these countries to suggest that repugnancy existed ...'[104]

In principle, there is no reason to object to the view that Africans (like whites) do not need their customs to be measured against a repugnancy clause, that their values should be respected and that repugnancy clauses tend to negate such respect and to substitute European values for their own.

But this is not an abstract question about Africans or African values 'in general' but with what the proposal of Koyana and others, to remove the repugnancy clause, would signify *in South Africa today.*

Koyana, we have seen, points to post-independence developments in Ghana and Tanzania in support of his contention that this clause should be scrapped. If the position in the Transkei or in South Africa generally were analogous to that in Ghana or in Tanzania there would be no reason to object, for I think that these states were correct (as independent states) to get rid of the repugnancy clause.

But the position in South Africa is (obviously) different. Getting rid of this clause would (at most) serve to foster the illusion that such an act were emancipatory. In reality its effect, in present circumstances, might be undesirable and retrogressive.

Even if (as indicated) the courts have been reluctant to use this clause for reformist purposes, what effect will it have, to remove it now? In an area like the Transkei, where the power of chiefs is entrenched, one possibility is that without a repugnancy clause there is room for the introduction or reintroduction of a

variety of customs allowing for coerced relationships and a further degradation of the status of women.[105] Courts and the repugnancy clause have an erratic record but they have nevertheless provided a measure of protection.

CONCLUSIONS REGARDING LAW APPLIED UNDER SEC 11 (1)

We have seen that there appears to be a continued tendency on the part of the courts, to deny the diversity (and the direction) of contemporary African social patterns and especially to ignore the substantially changed lives of many people. This sometimes leads them to give an unwarranted preference to (their version of) customary law, instead of Roman-Dutch law. There is also an unwillingness to recognize that customary law has a diminished relevance (or no relevance at all) in many peoples' lives.

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. There is a tendency amongst liberal academics, under the guise of supporting 'equality before the law' to adopt a chauvinistic position towards customary law. Thus, Professor A.S. Mathews is reported to have told a law conference in 1962 that 'the Roman-Dutch law should be made of general application for all racial groups in South Africa'.[106]

Nor is it acceptable when Professor Carmen Nathan writes:

> 'The attitude of the South African government is a reflection of its policy which denies not only the permanence of the Black people in urban areas but also the fact that many Black people have lost all tribal identity. *This attitude shows a lack of understanding of the indigenous law and the fact that it can function only in a traditional setting. The time for allowing the indigenous system to develop and adapt through the medium of judicial decision has long since passed ...*'[107]

While not denying the relevance of customary law this view presents a rigid geographical division of the spheres of operation of Roman-Dutch and customary law. People in the urban areas are presumed to choose Roman-Dutch law (or if they don't choose it they *should* since, according to Nathan, the customary law cannot 'function' in urban areas). The operation of customary law, according to this view, should be restricted to rural areas.[108]

Such an approach underrates or ignores the complexity of living patterns in both rural and urban areas. Just as rural people are not unaffected by the changes that are most marked in the towns, equally there are many urban dwellers who retain a degree of adherence to 'traditional' ideas and behaviour patterns. Ellen Hellmann wrote:

> 'There is no one pattern of urban African family life. There are many changing patterns of behaviour within the family, many different adaptations between the traditional and modern. Income, occupation and educa-

> tion, length of urban residence - quite apart from personal attributes affect these patterns.'[109]

What this means is that it is not satisfactory to present people with the type of either/or choice that Professor Nathan provides: *either* one lives with the consequences of a customary union - unmodified (because 'the time for allowing the indigenous system to develop and adapt through the medium of judicial decision has long since passed ...') *or* one chooses the Roman-Dutch law marriage.

Now there are a great many Africans who prefer customary marriages to common law ones[110] and they are unlikely to be dissuaded by talk about the inability of customary marriages to 'function' in urban areas. And they are right because the basic problem does not lie in the incapacity of the customary union for reform. (As it happens, independent African states have successfully modified and developed that law).[111]

The problem lies rather in a different kind of incapacity - that the recipients of Commissioners' Court justice are unable to influence the course of 'their own' law. The *Roman-Dutch law marriage* operates in an environment quite different from that in which *it* originated. But it was developed by courts and recently by parliament in order to cope better with present conditions. Africans, a colonised people, who are unrepresented in parliament and hardly represented on the bench cannot rely on a similar sensitivity to their needs. This is not so much a result of the government's 'lack of understanding of the indigenous law' - but rather a result of the wider relations of colonial and class domination, as a result of which Africans cannot legally influence most of the fundamental circumstances of their lives.[112]

FUTURE OF THE CIVIL JUSTICE SYSTEM FOR AFRICANS

I have tried to show that the civil justice system established for Africans by whites in South Africa has generally failed to meet the actual needs of the overwhelming majority of the population. But it was not established to meet *their* needs. During the nineteenth century when tribal chiefdoms were still vital structures there was a much less tolerant attitude towards African customs than one finds in government circles today.[113] It was only after the seizure of African land and the subjugation of almost all the chiefdoms that a unified and generally 'benign' policy towards customary law started to evolve. Having created the condition for the gradual dissolution of tribal polities, the South African state sought to breathe new life into discredited chiefdoms through pseudo-tribal structures such as the Bantu Authorities system.

The Bantu law/court system articulates with this wider policy of retribalisation and helps to maintain the 'tribal' family. Its continued viability is important if the patriarchal family production is to continue its subsidization of the capitalist mode of production.

Ideologically, the special courts seek to constitute individuals as specific tribal subjects and this serves or seeks to splinter attempts at developing a national movement/consciousness. It is sought to blur the contradiction[114] between Africans and the white

colonial bloc, through promoting specific tribal identities.

Like much else in the colonial state structure the special court system is in crisis. It has for some time been patently ill-suited to the needs of the communities whose lives it is intended to regulate. Its direction of development is in contradiction to the emerging social patterns of the Africans community. The current state of the law of marriage, divorce and the status of women seeks to perpetuate social categories (e.g. perpetual minority of women) that are glaringly incompatible with the lives that many women actually lead. This legal inadequacy tends to result in many people taking the view that their *de facto* disabilities are less onerous than that likely to result from recourse to the law courts. Taken together with the other barriers in the way of successful litigation, it is not surprising that many people who are separated do not try to get divorced, many who cannot get their guardian's consent to marry (often through his making excessive *lobolo* demands) form loose unions. All of this contributes to the already very high levels of illegitimacy and attendant social problems.[115]

One of the most crucial barriers to adequate civil justice for Africans, that of adequate legal representation, cannot be solved while the legal profession operates on a basis that puts their services out of the reach of all save a minute number of Africans. This problem might be solved in the future by the socialisation of the legal profession, i.e. provision of legal representation as a necessary social service to all who need it. That any substantial moves in that direction cannot be envisaged under the existing state structure, is made abundantly clear by a statement of the Minister of Justice in 1978:

> 'Legal aid does not exist to be given to every person who wants it. The idea behind legal aid is that when a person cannot afford the costs of legal proceedings and he has a good case - and I want to stress that - a case which he ought to bring before the court, the richer sector of society helps the poorer sector of society to allow the administration of justice to take place. I do not want a legal aid which is available to all and sundry. We are surely not a socialist society.'[116]

The future of customary law and of the civil justice system within which it operates are tied to the future of the African people generally. Though it is possible that limited improvements may be made in present conditions, adequate resolution of the problems of African civil law await the satisfaction of the wider aspirations of the African people in realizing their self-determination in a democratic system of government.

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NOTES

1. Senate Debates, March 17, 1955, col. 751.

2. 'South Africa: The faculty of Law, University of the Witwatersrand, Johannesburg' (1963) 7 *Journal of African Law*, 120 at 125.

3. 'Sesotho Marriage, Guardianship and the Customary Heir' in Max Gluckman (ed.) *Ideas and Procedures in African Customary Law* (Oxford University Press 1969), at 197.

4. See R.S. Suttner 'African Civil Law - Special Legal Aid Problems' in *Legal Aid in South Africa* (1974) 189, where a survey of the opinions of practitioners is presented.

5. These categories are somewhat crude, but neverthelss useful.

6. cf. Louis Althusser 'Ideology and Ideological State Apparatuses. Notes towards an investigation' in B.R. Cosin (ed.) *Education: Structure and Societies* (Pelican, 1972), 242-280.

7. See Gerhard Mare, *Ideology and Ideological Struggle: hegemony, liberation and revolution* (unpub. 1980) note 3 at 5-6.

8. Op. cit. at 270. Emphasis in original.

9. *The South African Legal System and its Background* (1968) at 34. Juta & Co. Cape Town.

10. Engels, *Origins of the Family, Private Property and the State,* quoted Maureen Cain (1974) 1 *British Journal of Law and Society* at 142.

11. 1956 (3) SA 45 (W).

12. at 34.

13. at 50. Emphasis inserted.

14. See Maré at 2-3.

15. Quoted Barend van Niekerk (1979) 3 SACC/SASK 151 at 154.

16. Sec. 11 (1) Act 38 of 1927, as amended, henceforth referred to as "The Act").

17. See note 16 below.

18. e.g. GMB Whitfield, *South African Native Law*, 2 ed. (1948) at 4.

19. See Sec. 11 (2) of The Act and J.C. Bekker and J.J.J. Coertze, *Seymour's Customary Law in Southern Africa* 4 ed. (1982) at 65-67.

20. See e.g. the Declaration of the recently launched United Democratic Front.

21. cf. H. Wolpe 'Capitalism and cheap labour power in South Africa: from segregation to apartheid' (1972) 1 *Economy and Society* 425, where the process through which the mode of production in the reserves has subsidized the dominant capitalist mode, is described. While Wholpe virtually concludes that this subsidization has ended, my assumption is that it continues, though the contribution may have diminished in some respects. Without pretending to an exhaustive critique, I think that Wolpe focuses on the diminished relative contribution of the reserves, while ignoring its *increased* absolute contribution. According to official statistics, in the period 1959-1974, there was a relative decline in the importance of agriculture in the reserves, but its absolute value trebled. (From R45,5 m to R123,9 m. In 1973, 89,5% of agricultural production was reckoned to be subsistence production (i.e. of produce that was not marketed but consumed by the producers themselves.) According to Benbo at 81: 'During the period 1968/69 - 73/74 the gross value of agricultural and forestry production increased at an average rate of 11,7% p.a., whereas the producer prices of agricultural products during the same period increased at an annual rate of 8,6%. The increase in production thus averages 3,10%. Equally he pays insufficient attention to the contribution of factors other than agriculture to the reproduction of labour power. Finally, the fact that production in the reserves may not any longer constitute an independent mode of production, does not mean that production processes in the reserves do not continue the subsidization function.

22. See e.g. Sec. 195 (2) of the Criminal Procedure Act, No. 51 of 1977. Here the status of the 'customary union' is treated quite bluntly:

> '195(2) Anything to the contrary in this Act or any other law notwithstanding any person married in accordance with Bantu law or custom shall, notwithstanding the registration or other recognition under any law of such a union as a valid and binding marriage, for the purposes of the law of evidence in criminal proceedings, be deemed to be an unmarried person.

23. cf. e.g. Antony N. Allott, *Essays in African Law* (Butterworths 1960), T.O. Elias, *British Colonial Law* (Stevens 1962).

24. This 'bifurcation' is remarked on by the influential Riekert

Commission (Report of the Commission of Inquiry into Legislation Affecting the Utilisation of Manpower (excluding the legislation administered by the Departments of Labour and Mines) RP 32/1979, Republic of South Africa, Pretoria. Chairman: Dr P.J. Riekert) which (at 200) describes the Department of Plural Relations and Development (as it was then called) as a '"public service within a public service" in respect of the administration of matters affecting Black persons' exercising control over them and performing 'services for them that are undertaken by the functional departments for the other population groups ...'

One of the purposes of the present 'reform initiative', of the Botha regime appears to be to create the impression of 'deracialization', to imply that there is a common administration for all South Africans (i.e. excluding citizens of 'independent' bantustans). The concept race is apparently removed from labour legislation, labour movement is increasingly regulated as 'foreign relations' i.e. unwanted Africans are 'deported' to 'their' states. Departments that deal with 'racial affairs' e.g. group areas, black education etc., are now designated by neutral-sounding names e.g. Dept. of Community Development, Cooperation and Development, Education and Training etc. Such a tendency may lead to the integration of the "special courts" into the ordinary legal system.

25. The courts have previously been critically examined by Professor Ellison Kahn in *South Africa: the development of its laws and constitution* (1960), Julius Lewin, *Studies in African Native Law* (1947), R.S. Suttner, 'Problems of African Civil law Today' (1974) No's 78,79 *De Rebus Procuratoriis*, 266-268, 311-315 and *The System of Civil Justice for Africans in South Africa* (unpublished 1983), at 17-27.

26. There is no limitation as to the amount that can be involved in a case tried by Commissioners. In the case of magistrates once the issues involve more than a certain amount, it must be tried by the Supreme Court.

27. See below.

28. To appeal to the A.D. litigants need permission of both the A.D. and the Appeal Court for Commissioners itself. Very few appellants reach the A.D. (whether for lack of funds or lack of permission). See *The System of Civil Justice* op cit. at 14-15.

29. See evidence of academics and social workers reported in press during 1981, e.g. 'Hoexter - Kommissie van Ondersoek na Howe: Geintegreerde hofstelsel nodig', *Die Transvaler* 29-/8/81, 'Judicial officers' "ignorance" slated' RDM 29/8/81.

30. See evidence of Professors R. verLoren van Themaat, F.A. de Villiers and C.J. Maree to Hoexter Commission. Beeld

19.5.81.

31. 1929 NAC (N & T) 3-4, per Stubbs, P.

32. 1930 NAC (N & T) 9 at 12.

33. ibid.

34. See discussion of tribal courts in *System of Civil Justice* op cit at 3-7 and 'Discussion' in *Legal Aid in South Africa* op cit at 206.

35. See Lewin, *Studies* op cit at 16-20, R.S. Suttner, 'Towards Judicial and Legal Integration in South Africa' (1968) 85 *SALJ* at 445, note 61 where the rules are illustrated. According to the RDM 12/6/81 Mr. L.J. Make, public relations officer for the Zionist Christian Church in Pietersburg told the Hoexter Commission that the 'court procedure was totally alien to most rural blacks ...'

36. See R.S. Suttner, 'African Civil Law - Special Legal Aid Problems' in *Legal Aid in South Africa*, op cit 189-191, 201-202.

37. In reply to a circular from the *Cape 1883. G-4 Government Commission on native Laws and Customs*, Appendix C at 211.

38. The clerk sometimes/often helps unrepresented cleints.

39. See reference note 36 above.

40. See e.g. statements of Stubbs, P. above and Howard Rogers, *Native Administration in the Union of South Africa* 2 ed. by A. Linington (1949) 203.

41. See *System of Civil Justice* at 21-22.

42. Lewin *Studies*, 19-20, Hahlo and Kahn 332. See also Ms Zubi Seedate 'Lead-in Address' in *Legal Aid in South Africa* op cit at 204-205.

43. cf. *System of Civil Justice* 23-24.

44. House of Assembly Debates, vol. 9, col. 2907, 28 April 1927.

45. cf. *System of Civil Justice*, at 23-24.

46. See 'Many "found guilty" by interpreters' The Star 21/10/81, 'Courts misled by poor interpreters probe told' RDM 21/10/81.

47. cf. *System of Civil Justice*, 24-26, 'African Civil Law - special legal aid problems' op cit at 189ff.

48. 'The Judges and the Professors OR Bench and Chair' (1980) *S-ALJ* 560 at 571 quoting Brandeis 'Living Law' (1916) 10 *Illinois LR* 461 at 470.

49. See 'African Civil Law' op cit 191-196.

50. ibid. and see below.

51. cf. 'African Civil Law' 196ff.

52. See remarks of Mr Mu Ashekele, 'Discussion' *Legal Aid in South Africa* op cit at 206.

53. The view adopted here is much more sceptical of the advantages of judicial integration than expressed in 'Towards Judicial and Legal Integration' (op cit. note 35 above) at 445ff.

54 See e.g. "Hoexter-Kommissie van Ondersoek na Howe: Geintegreerde hofstelsel nodig', Die Transvaler 29/8/81.

55. See above.

56. See J.M.T. Labuschagne and D.J. Swanepoel 'Regspleging van die Stedelike Swartmens in Suid Afrika' (1979) 12 *De Jure* 16 at 27-28 where the establishment of such specialised divisions is in fact advocated.

57. at 208

58. See above.

59. For a wider examination of this aspect of 'judicial ideology' see the works of John Dugard, esp. *Human Rights and the South African Legal Order* (Princeton, New Jersey, 1978).

60. 'Appointment on merit' is not adequate unless merit includes knowledge of and sympathy for the problems of the community most affected by the law. There is, at present, a general lack of confidence amongst blacks in the law and the courts ... The establishment (in a democratic South Africa) of a bench composed primarily of people from the black community, will, it is suggested, be part of the process of establishing confidence.

61. See Sec. 53 (1) Republic of Transkei Constitution Act, No. 15 of 1976, Sec. 67 (1) of Republic of Bophuthatswana Act, No. 18 of 1977, Sec. 51 (1) Republic of Venda Constitution Act No. 18 of 1979 Sec. 61 (1) Republic of Ciskei Constitution Act, No. 20 of 1981.

62. See e.g. *Matsheng v Ohlamini*, 1937 NAC (N & T) 89 at 91, *Kaula v Mtimkulu* 1938 NAC (N & T) 68 at 70, and discussion in

Julius Lewin *Studies* op cit at 22 ff.

63. cf. *Ex parte Minister of Native Affairs: in re yako v Beyi* 1948 (1) SA 388 (A).

64. Sec. 14 Black Administration Act.

65. Quoted above.

66. per Schreiner, JA at 397.

67. See *Twala v Ngoqo and Ngoqo* - 1968 BAC 10 (N-E) and *Kumalo v Mbata* 1969 BAC (N-E) 69 and discussion in *System of Civil Justice For Africans* at 30-34.

68. *Twala v Ngoqo and Ngoqo supra* at 12-13.

69. See e.g. B.A. Pauw 'The Influence of Christianity' in W.D. Hammond-Tooke (ed.) *The Bantu-Speaking Peoples of Southern Africa* (1974) 415 at 437.

70. In *Yako v Beyi*, Schreiner, JA said (at 398) that it would not necessarily be an improper exercise of 'class distinctions' if the court were guided in its decision to apply the common law by the fact that 'the parties or either of them were educated, civilized, urbanised or detribalised ...'

71. See Sec. 11 (1) quoted above.

72. cf. Brun-Otto Bryde, *The Politics and Sociology of African Legal Development* (1976) at 108ff.

73. *Studies* at 107.

74. Regarding academics, see R.S. Suttner 'The Study of "Bantu law" in South Africa' 1968 *Acta Juridica*, 147 and 'African Civil Law' at 199-201.

75. *Mazibuko v Mazibuko* 1930 NAC (N & T) 143 at 146, 145.

76. 1940 NAC (C & O) 42.

77. at 47.

78. In contrast to the courts and the Natal Code (at least until its 1982 amendment) denying women any rights to hold property, various scholars have shown that their rights were not so restricted in the old society. cf. David Welsh, *The Roots of Segregation* (1971) 162ff Monica Hunter, Reaction to Conquest, 2 ed. (1961) at 119, N.J. van Warmelo and M.W.D. Phodphi, Venda Law (1948 parts 2 and 3), H.J. Simons, *African Women: Their Legal Status in South Africa* (C. Hurst, London, 1968) at 83, 92, 187ff, 194ff, 198ff, 202ff.

79. See Ellen Hellmann 'The African Family Today' in *African Family Life* (1968) 1, 'Social Change among urban Africans' in Heribert Adam (ed.) *South Africa: Sociological Perspectives* (1971) 158, 'African Townswomen in the Process of Change' (1974) 5 *South Africa International* 14 and *African Women* generally.

80. *African Women* generally, R.S. Suttner, *African Family Law and Research in South Africa Today: Prospects and problems* Paper presented to the Afrika-Studiesentrum Seminar, 'New Directions in African Family Law', Leyden, Netherlands, September 30 - October 4, 1974 (Henceforth referred to as *African Family Law*) at 13ff, Hellmann 'African Townswomen; 20-21.

81. Bekker and Coertze at 106 and ch. 5 generally.

82. See Sec. 22 *ter* of Black Administration Act, as amended by Sec. 2 of Act No. 23 of 1972.

83. cf. N.J.J. Olivier, *Die Privaatreg van die Suid-Afrikaanse Bantoetaalsprekende* (Butterworths, 2 ed., 1981) at 43ff, Bekker and Coertze at 107.

84. *African Women* generally, *African Family Law*, 18ff.

85. If there is also a claim for maintenance it must be brought under the common law by the woman herself. The customary law does not provide damages for maintenance. As a result of their lack of training, some lawyers bring actions under 'Black law', where it would be quite possible to bring a successful action under the common law. See case recorded in 'African Civil Law - Special Legal Aid Problems' op cit. at 194-195.

86. cf. *African Family Law*, 23-24, and Z.K. Seedat (unpub. BA (Hons) dissertation) *The Natal Code of Bantu law as it Affects African Women in the Chaning Situation Today* (1969) 84.

87. *Nkabinde v Mlangeni and Another* 1942 NAC (N & T).

88. Olivier 160ff, *African Women* 130, 131.

89. *African Women* ch. 12.

90. ibid. and Olivier 173ff.

91. *Mokoena v Mofokeng* 1945 NAC (C & O) 89.

92. *Stolleh v Mtwalo and Another* 147 NAC (C &) 33 at 34. The principle of 'moderate corrective chastisement' is approved by leading academic authors. See Bekker & Coertze at 190 and Bekker 'Grounds of divorce in African customary marriages in

Natal' (1976) 'Grounds of divorce in African customary marriages in Natal' (1976) 9 *CILSA* 346 at 350, where he states: 'It is a well-known fact that a Zulu husband will punish his wife for neglecting her marital duties.'

93. See above.

94. See E.R. Garthorne 'Applications of Native Law' (1929) 3 Bantu Studies, 249 at 256-7.

95. See Natal 1852/3 *Commission appointed to inquire into the past and present state of the kafirs in the District of Natal. Proceedings and Report.* Pietermaritzburg, J. Archbell.

96. cf. *African Women* ch. 3.

97. See Sec. 11 (1) at 12 above.

98. cf. Olivier 612ff.

99. The wife-beating cases (above) are a good example.

100. cf. generally *African Women, African Family Law Today.*

101. See Nicola S. Peart, 'Application of the Repugnancy Clause' 1980 *Institute for Public Service and Vocational Training Bulletin*, 51 at 52-53, D.S. Koyana, *Customary Law in a Changing Society* (1980) at 112-113.

In a recent personal communication Peart has indicated that she no longer adheres to the view expressed in the article that I criticise.

102. Peart at 54-55, 58. Koyana at 112-113. See similar remarks of Mr. Mu Ashekele in 'Discussion' *Legal Aid in South Africa* op cit., 205.

103. loc cit.

104. Koyana loc cit.

105. This wariness appears jutified, *inter alia,* by the recent report that the Transkei Marriage Act had removed the right of a wife to maintenance after a divorce. Mr George Matanzima is quoted as saying: 'We prefer the lobola sytem which gives a woman all the security she needs. If she leaves her husband she can go home - which is why the husband pays her father for her hand'. (Sunday Tribune 11/9/83)

While this does not constitute a reversal of some of the changes introduced by the repugnancy clause, it is an

indication of the Transkeian orientation.

106. *Verslag van 'n Noordelike Streekskonferensie van die Vereniging van Universiteitsdosente in die Regte in Suid-Afrika* (1962) 25 THR-HR 295 at 297. See also quotation from PMA Hunt at beginning of ths paper.

107. 'The Legal status of Black Women in South African Society' in A.J.G.M. Sanders (ed.) *Southern Africa in need of Legal Reform* (1981) 5 at 6. Emphasis inserted.

108 See also Julius Lewin, *Outline of Native Law* (1966) at 30.

109. 'The African Family Today' at 7, Koyana at xx

110. Most Africans who enter into legal marriages in South Africa still marry according to 'Black Law'. See e.g. Reep verloren van Themaat 'Die verfyning van die reg vir swartes in Suid Afrika' (1980) 43 THRH-R at 241ff. At 242 he remarks that the customary union 'is die huweliksvorm van ongeveer twee-derdes van die swart bevolking wat behoorlik getroud is'.

111. See Arthur Phillips and Henry F. Morris, *Marriage Laws in Africa* (1970) at 35ff.

112. For the lawyer what is perhaps the most striking illustration of the total indifference towards the state of 'Black law' is the lackadaisical attitude towards reported cases. In the case of the ordinary courts, reports appear a few months after decision. In the case of the Appeal Courts for Commissioners, they are now *four years* behind, so that is is impossible for lawyers to cite recent decisions nor to argue over their meaning (as is normal practice in ordinary courts) - unless they have direct access to unpublished judgement.

113. See *African Women* part one.

114. My view is that the primary contradiction in South Africa is that between the African masses composed of various classes and the white colonial bloc (composed of various classes). The *determining* contradiction is that between capitalist relations and forces of production.

115. See *African Family Law* at 15, Hellman in Adam, *South Africa Sociological Perspectives* at 163, 166-7, *African Women* ch. 7, Ntlantla S. Moena 'Illegitimacy in an African Urban Township in South Africa: an Ethnographic Note' (1977) 36 *African Studies*, 43-47.

116. Hansard, 14 col. 4843, quoted *Survey of Race Relations* in *South Africa* 1978 at 71.