ARTICLES

THE RECEPTION AND CODIFICATION OF SYSTEMS OF LAW IN SOUTHERN AFRICA

By A. J. Kerr[1]

The problems of reception and codification discussed by Dr. A. N. Allott in his article on "The Authority of English Decisions in Colonial Courts" in [1957] 1 J.A.L. 23 *et seq.* have also been encountered in Southern Africa and something of interest and value may be found in an account of experience of the problems in this area.[2]

1. *Reception*

The Roman-Dutch law which is the common law in Southern Africa was received into Southern Rhodesia and into South West Africa from the Cape of Good Hope.[3] Section 13 of the High Court Act, Cap. 8 (Southern Rhodesia) reads:—

> "Subject to the provisions with regard to Native law and custom contained in the Native Law and Courts Act the law to be administered by the High Court and by the magistrates' courts shall be the same as the law in force in the Colony of the Cape of Good Hope on the tenth day of June, 1891, as modified by subsequent legislation having in this Colony the force of law."

From 1910 until 30th June, 1955, the Appellate Division of the Supreme Court of South Africa was the court of appeal from the High Court of Southern Rhodesia in civil matters. Since 1st July, 1955, the Federal Supreme Court has been the Court of Appeal. Section 1(1) of Proc. No. 21 of 1919 (South West Africa) reads:—

> "The Roman-Dutch law as existing and applied in the Province of the Cape of Good Hope [on the first day of January, 1920] shall from and after the said date be the Common law of the Protectorate . . . ."

The Appellate Division of the Supreme Court of South Africa hears appeals from the High Court of South West Africa.

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[2] As the authorities referred to may not be available to all readers of the Journal I quote more extensively than would otherwise be necessary.

[3] It is convenient to describe the date mentioned in the various statutes as the date of reception. It must be remembered, however, that this date is a statutory one and not necessarily the first day on which a particular system of law begins to have force in a particular territory, *e.g.* in Swaziland the statutory date is now in 1907, but Roman-Dutch law was in force in the territory before then, either in terms of the 1904 Proclamation or, earlier, because the South African Republic had jurisdiction: see *Nkambula* v. *The King* [1950] A.C. 379, P.C., at 392.

The statutes quoted have been interpreted by the Courts of their respective territories and the interpretations agree. In *Central African Airways Corporation* v. *Vickers-Armstrong Ltd.*, 1956 (2) S.A. 492 (F.C.), appellant, an *incola*, sought an order attaching a debt due from appellant to respondent, a *peregrinus*, to found jurisdiction. CLAYDEN, F. J., said, at p. 492:—

> " It is settled Roman-Dutch law that the Court, at the instance of an *incola*, will attach property of a *peregrinus* if the property is in its area of jurisdiction in order to found jurisdiction in the Court in a claim for money by the *incola* against the *peregrinus*, even if there is no other ground to exercise jurisdiction.
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> Although the law is now so settled there were conflicting decisions in the Cape Colony until 1931. . . . In 1907 in *Ex parte Kahn*, 24 S.C. 558, de Villiers, C.J., refused to grant an order to an *incola* to attach the goods of a *peregrinus* in order to found jurisdiction where no other ground for exercising jurisdiction existed. . . . Then in *Halse* v. *Warwick*, 1931 C.P.D. 233, it was held that *Ex parte Kahn* was wrongly decided, and the law in the Cape became settled in the form set out above.
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> There is no doubt that the law to be applied should be that laid down in *Halse* v. *Warwick* . . . unless it can be said that the principle of *stare decisis* requires that decisions in Southern Rhodesia based on *Ex parte Kahn* should not be departed from."

His Lordship then analysed the decisions in the High Court, which (as was noted at p. 494) do not bind the Federal Supreme Court, and continued at p. 493:—

> " Although in the Cape cases the actual decision relating to the *incola* and the *peregrinus* was not given until 1907, in *Ex parte Kahn*, it is clear, having regard to the remarks of de Villiers, C.J., that no decision other than that reached in *Ex parte Kahn* would have been given in 1891. But a practice, later shown to be erroneous, cannot be regarded as the law in force in 1891; the true law must be looked to."

The debt was therefore attached.

The South West African case is *R.* v. *Goseb*, 1956 (2) S.A. 696 (S.W.A.) and in it the Court was called upon to decide whether *furtum usus* was a crime. There were decisions in the Cape commencing with *R.* v. *Fortuin* (1883), 1 B.A.C. 290, stating that it was not a crime and there was a decision in the Orange Free State Provincial Division, *R.* v. *Mtaung*, 1948 (4) S.A. 120 (O), stating that it was a crime. CLAASEN, J. P., said, at pp. 698 *et seq.*:—

> " In coming to a conclusion as to the true meaning of Proc. 21 of 1919 [the proclamation on reception quoted above p. 82] the following factors must be taken into consideration:—
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> (*a*) The object of the Proclamation was to create a common law for South West Africa which was already a living, active system in the Cape of Good Hope.
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> (*b*) . . . . (*c*) . . . .
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> (*d*) On the 1st day of January, 1920, there were in existence in the Union the various Provincial and Local Divisions of the Supreme Court of South Africa with a common Appellate Division. That implied that there was a common law of South Africa which was

fundamentally or was intended in due course to be the same for all Provinces, except in so far as this common law had been modified by local statutes. This was illustrated by a case such as *Conradie* v. *Rossouw*, 1919, A.D. 279, and many other cases.

(*e*) The common law of the Cape of Good Hope was on the 1st of January, 1920, not something separate and distinct from the common law of the rest of the Union, but part and parcel of it. In my opinion, it was in effect the South African Law as existing and applied in the Cape of Good Hope that was introduced into this Territory on the 1st of January, 1920. This view finds support, in my opinion, in the Privy Council case of *Gideon Nkambula & Ors.* v. *The King*, 1950, A.C. 379.

(*f*) In my opinion sub-sec. (4) of sec. 3 [of Proc. 21 of 1919, giving the High Court the same jurisdiction as the Cape Court] meant no more than that this Court being equal in status with the Cape Provincial Division was free to follow one of its decisions and should in fact always endeavour to do so but was, just as that Division itself, free to depart therefrom, if convinced that it is clearly wrong.

(*g*) I am of opinion that this Court is not bound to follow a decision of the Cape Provincial Division if convinced that it is clearly wrong. For example, supposing that *Conradie* v. *Rossouw* had come on appeal from this Court to the Appellate Division and that case had been decided here in conformity with the eventual Appellate Division's decision in that case, would that Court have ruled that this Court should have followed the wrong decision of *Mtembu* v. *Webster* (1904), 21 S.C. 323 ? Certainly not ! Nor if the decision here had been in terms of *Mtembu's* case do I think the Appellate Division would have held that this Court by reason of the Proclamation was correct in applying the wrong law as laid down in *Mtembu's* case. It could in my opinion never have been the intention of the Legislature to saddle this Territory for ever with decisions that may have been wrongly decided in the Cape of Good Hope. . . ."

The reference in this paragraph and in (*d*) above to *Conradie* v. *Rossouw*, 1919. A.D. 279, is a reference to a famous controversy before Union in which the Cape and Transvaal Courts, with knowledge of each other's position, took opposite sides. In the Cape in *Mtembu* v. *Webster* (1904) 21 S.C. 323, DE VILLIERS, C. J., said, at p. 331:—

> "This court has repeatedly decided that, except in the case of donation . . . *'redelyke oorzaak'* really means valuable consideration . . ."

In the Transvaal, however, in *Rood* v. *Wallach*, 1904, T.S.187, INNES, C. J., said, at p. 201:—

> "So far as I have been able to consult the Roman-Dutch authorities, I have not discovered any great conflict in regard to the meaning of the word *causa* [*oorzaak* in the Dutch language (see p. 199)]; it is used again and again in the sense of reason or ground for a contract, and I am unable to find any indication that it was ever used in any sense equivalent to the English ' consideration '."

Conradie's case originated in the Cape and in the Appellate Division the view held by the Transvaal Court was preferred and is now adopted in all territories administering Roman-Dutch law.

The opinion in *Goseb's case* continues:—

> " (*h*) . . . .
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> " (*i*) It was clearly, in my opinion, also not the intention of the Legislature that the law should have remained static here in terms of the law as existing and applied in the Cape of Good Hope as at the 1st of January, 1920. It is clear on the authorities that a decision given by the Cape Provincial Division say in 1925 reversing another decision earlier than 1920 could validly be followed here. This follows clearly from such decisions as *Surmon* v. *Surmon*, 1926, A.D. 47; *Rex* v. *Burgess*, 1927, T.P.D. 14. . . .
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> It is further true that a decision interpreting the common law has retrospective effect, as if the common law had always been in conformity with the later decision. . . . In other words, whatever a Cape Court may have decided prior to 1920, a subsequent different decision by the Appellate Division must be read as if the effect of the later decision was already operative on the first day of January, 1920.
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> (*j*) The characteristics of the law that was introduced here were described by Lord Tomlin in the case of *Pearl Assurance Co.* v. *Union Government*, 1934, A.D. 560 at 563; 1934 A.C. 570 at 579 (P.C.), in the following words: ' That law is a living, virile system of law, ever seeking, as every such system must, to adapt itself consistently with its inherent basic principles to deal effectively with the increasing complexities of modern organised society. ' Such was the law that the Legislature intended to introduce into this Territory and it is the duty of this Court to interpret the law so as to deal effectively with complexities of the society that obtains here.
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> In my opinion it is to be inferred from sec. 1(1) of the Proclamation that it was the intention of the Legislature to introduce into this Territory the law of the Union of South Africa, as existing and applied in the Cape of Good Hope, which law has for its basic structure the principles of the Roman-Dutch law. Where those principles have been applied in the Cape of Good Hope differently from the rest of the Union, this Court must to the best of its ability endeavour to interpret and apply those principles as it considers the Appellate Division will interpret and apply them in a case coming before it on appeal from a decision of a Court in the Cape of Good Hope."[1]

When there is a decision, given before reception, in a court in the country from which the system of law has been received and when that court is superior in rank to the court called upon to decide a matter in the receiving country the difference in rank is a factor requiring consideration. Thus in *Acting Master, High Court* v. *Estate Mehta*, 1957 (3) S.A. 727 (S.R.), MORTON, J., after finding that the case before the Court was on all fours with *Seedat's Executor* v. *The Master*, 1917 A.D. 302,[2] said at, pp. 732-3:—

> " *Mr. O'Hagan* next submits that this Court is now free to differ from the decision in *Seedat's* case because the Appellate Division is

[1] The Appellate Division now stands at the head of the South African hierarchy of courts, appeals to the Privy Council having been abolished.

[2] This judgment was delivered after the date of reception but while the Appellate Division was the court of appeal from the Southern Rhodesian Court. The Court found, at p. 731, that the law in Southern Rhodesia was the same in 1917 as in the Union. There is also no doubt that the decision in *Seedat's case* would have been the same in the Cape in 1891: *cf. Ngqobela* v. *Sihele* (1893), 10 S.C. 346 and *Nanto* v. *Malgas* (1887), 5 S.C. 108.

> no longer our Court of Appeal. This is a startling proposition. If it is correct, not only this Court but also all lower courts of this Colony are now free to differ from decisions of the Cape Supreme Court from 1891 onwards and of the Appellate Division from its inception which were previously binding upon them. This might re-open many old controversies which we have long regarded as settled and would introduce grievous uncertainties into many business transactions and legal proceedings. In support of his proposition *Mr. O'Hagan* cites *John Bell & Co. Ltd.* v. *Esselen*, 1954(1), S.A. 147 (A.D.), in which Centlivres, C.J., said, at p. 154: 'As this Court is now the final Court in respect of appeals from Courts in the Union, it must naturally have the power, which the Privy Council had and which it does not now have in respect of those appeals, of departing from an erroneous decision of the Privy Council.' We are not in a position similar to that in which the Appellate Division then found itself. It is not this Court, but the Federal Supreme Court, which in our Judicature has taken the position formerly held by the Appellate Division. In my view, decisions of the Appellate Division in civil matters given before 1st July, 1955, . . . remain binding upon us until they have been dissented from or overruled by the Federal Supreme Court or by the Privy Council or have been avoided by legislation."

If it is remembered that in Roman-Dutch law the highest court, unlike the House of Lords, has power to depart from its own previous decisions in certain circumstances the statement in the above case will be found to accord with that in *Robins* v. *National Trust Co.*, [1927] A.C. 515, P.C., at 519, quoted by Allott, *op. cit.* p. 26.

There is a further point of interest in connection with *Estate Mehta's case*. *Seedat's case* was based upon a finding of public policy and it is arguable that for that reason the Court could have declined to follow it. Public policy is variable and decisions on it have less force in subsequent cases than those on matters of law. Thus in *Nordenfelt* v. *Maxim Nordenfelt Guns and Ammunition Co.*, [1894] A.C. 535, H.L., at 553, Lord WATSON said:—

> "A series of decisions based upon grounds of public policy, however eminent the judges by whom they were delivered, cannot possess the same binding authority as decisions which deal with and formulate principles which are purely legal."

In the matter of the recognition of polygamous unions contracted according to other systems of law (which was the question in both *Seedat's* and *Estate Mehta's* cases) changes are apparent in South Africa (see 73 (1956) S.A.L.J. 402-4) and the Court could with advantage have considered whether the public policy of the Federation of Rhodesia and Nyasaland in 1957 was the same as that of the Union of South Africa forty years earlier.

The principle to be extracted from the cases quoted above appears to be that the reception of a system of law in any country, while it marks the beginning of a new development, causes no break in the life of the common law[1]—what was sought before

[1] Using this term to mean the non-statutory law of whatever system is in question.

whenever and wherever the common law applied was a true interpretation of that law and this is also the aim of the courts of the country into which it has been received.

But what is the position in respect of statute law ? The orthodox view is that only the legislative authority or authorities of the receiving country has or have power to introduce new statutes.[1] This is the view found in the High Commissioner's proclamation of 29th May, 1884, providing for the reception of Roman-Dutch law in Basutoland,[2] in the High Commissioner's proclamation No. 36 of 1909 providing for the reception of Roman-Dutch law in the Bechuanaland Protectorate,[3] and in section 13 of the High Court Act, Cap. 8 (Southern Rhodesia).[4] No further comment would be necessary were it not for certain *obiter dicta* in *Nkambula* v. *The King*, [1950] A.C. 379, P.C. The Board in that case was called upon to interpret the provisions of the Swaziland Criminal Procedure and Evidence Proclamation of 1938 relating to the acceptance of accomplice evidence. In the proclamation as originally promulgated the test had differed from that in the Union of South Africa but an amendment had been introduced in 1944 and the Board found that this amendment resulted in a " return to the requisites which the law of the Union of South Africa demanded " (at p. 394). Leading up to this finding the Court reviewed the history of the law. In the Transvaal, before Union, the law on accomplice evidence was contained in Proclamation No. 16 of 1902 (see p. 392). In 1904, it was stated, at p. 392, " by Proclamation the Roman-Dutch and statute law of the Transvaal was applied to Swaziland ". This proclamation was not quoted by the Board because the relevant provisions were re-enacted by another in 1907, No. 4 of 1907, which read, in section 2:—

> " The Roman-Dutch common law save in so far as the same has been heretofore or may from time to time hereafter be modified by statute shall be law in Swaziland and all statute law which is in force in Swaziland immediately prior to the date of the taking effect of this Proclamation shall save in so far as the same is hereby amended or altered or is inconsistent herewith or may hereafter be amended or altered shall be the Statute Law of Swaziland."[5]

The Transvaal statute was therefore in force in Swaziland. It was repealed, however, in so far as it affected the Transvaal, in 1917 by the Union Criminal Procedure and Evidence Act of that year which was a measure " To consolidate and amend the laws

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[1] It is possible for reception to be decreed when there is no change in the legislative authority having power to make statutory law, *e.g.* Swaziland had no legislative assembly when Roman-Dutch law was received and still has none. It is also possible for reception to be decreed when the powers of the local legislative body are restricted. In such a case new statutes within the competence of the local body would be introduced by it while the remaining portions of the law would be subject to change by another authority.

[2] Quoted in *Bereng Griffith Lerotholi* v. *The King*, [1950] A.C. 11, P.C., at 20.

[3] See Lee, *An Introduction to Roman-Dutch Law*, 5th Ed., p. 12.

[4] Quoted above, p. 82.

[5] Quoted at p. 392.

in force in the several provinces of the Union."[1] The Board noted, at p. 392, that this was "a Union Act binding in the Transvaal" and, at p. 393, said that "From 1917 to 1938 the criminal law as administered in Swaziland was governed by the terms of this statute". Again, at p. 399, summing up the history of Swaziland law prior to 1938 the Board said:—

> "The position, therefore, is that the present form of words was made the law of the Transvaal by Proclamation No. 16 of 1902, and applied to Swaziland in 1904. . . . Subsequently the Act of 1917, which made the law of South Africa homogeneous, was passed and so became law in the Transvaal as part of the Union of South Africa and was in force in Swaziland inasmuch as the law of the Transvaal was there applicable."

In stating that the Criminal Procedure and Evidence Act, 1917, of the Union of South Africa "governed" or "was in force" in Swaziland the Board may have intended to convey either (1) that section 2 of Proc. No. 4 of 1907 required this; or (2) that a consolidating Act subsequently enacted in the territory from which a system of common and statute law has been received is binding in the territory which received it. Both propositions are, however, very far-reaching and neither was fully canvassed before the Board. It is submitted that the Board will in future be justified in reconsidering its remarks for the reasons which it gave in *Nkambula's case* for departing from its decision in *Tumahole Bereng* v. *The King*, [1949] A.C. 253, P.C. Repeated reference was made, at pp. 396-400, to the difficulties and dangers encountered when a matter is not properly argued. At p. 398, for example, the Board said:—

> "The present case . . . is one in which fresh facts[2] have been adduced which were not under consideration when *Tumahole's case*, [1949] A.C. 253, was decided, and accordingly it is one in which, in their Lordships' view, they are justified in reconsidering the foundations on which the case was determined."

The remarks under discussion can the more readily be reconsidered because they were not necessary for the decision of the case and were therefore *obiter*. The Board arrived at its decision by following the conclusion reached in *Bereng Griffith Lerotholi* v. *The King*, [1950] A.C. 11, P.C. It said, at p. 397:—

> "In *Lerotholi's case* [1950] A.C. 11 (P.C.), the cautionary rule which is followed in South Africa was brought to the notice of the Board, and is set out in the wording used by SCHREINER, J.A., in *Rex* v. *Ncanana*, 1948 (4) S.A. 399 (A.D.) at 405. . . . Their Lordships agree with the conclusion reached in *Lerotholi's case* that the cautionary rule so stated is that binding in Swaziland as it was in Basutoland. . . ."

The history of the matter in Basutoland corresponded very closely with that in Swaziland. In both territories a statutory rule was

[1] There is a new consolidating Act now, No. 56 of 1955.

[2] "fresh facts" in this context appears to mean the same as "fresh material" used on the same page to mean matters of law or facts of legal history "not communicated or . . . not fully presented to the tribunal which heard and decided the earlier case."

introduced on reception and those rules were substantially the same. In both territories a change was brought about in 1938 with the introduction of a Criminal Procedure and Evidence Proclamation and in both cases an amendment was introduced in 1944 after which the provisions of the territorial proclamations resembled those originally received and were (with two unimportant omissions which did not affect the sense) word for word the same as those of section 285 of the Criminal Procedure and Evidence Act of 1917, interpreted by SCHREINER, J. A., in *Rex* v. *Ncanana*, 1948(4) S.A. 399 (A.D.). The Board was therefore bound in the case of both territories by the statute law of the territory in question to apply the test stated therein which was the same as the South African test. The Board in *Lerotholi's case*, [1950] A.C. 11, P.C. at pp. 21, 22, referred to *Ncanana's case* as persuasive authority on "the corresponding section in the Criminal Procedure and Evidence Act, 1917, of the Union of South Africa" and it followed *Lerotholi's case* in *Nkambula's case*, [1950] A.C. 379, P.C.

It is submitted that the *obiter dicta* in *Nkambula's case* are not to be followed; that as the alterations or amendments envisaged by section 2 of Proc. No. 4 of 1907 (Swaziland) are those of the Swaziland legislative authority nothing in that section required the application of the South African Criminal Procedure and Evidence Act, 1917, in Swaziland between 1917 and 1938[1]; that there is insufficient authority for the proposition that a consolidating Act subsequently enacted in the territory from which a system of common and statute law has been received is binding in the territory which received it; and that the orthodox view is to be preferred. According to the orthodox view, it is to be noted, all relevant statutes and the cases interpreting them may be referred to as persuasive though not binding authority as was done in *Bereng Griffith Lerotholi* v. *The King*, [1950] A.C. 11, P.C.

2. *Codification*[2]

Codification, like reception, marks the beginning of a new development and in dealing with the question of its effect on the continuity of the system of law codified two different points of view require discussion. On the one hand it may be argued that a code is an entirely new beginning, the previous law having been super-

[1] Additional authority for this proposition is to be found in the fact that the Criminal Procedure and Evidence Proclamation dated 23rd December, 1938, in its 328th Section, read with the Fourth Schedule, repealed Transvaal Proclamation No. 16 of 1902 in so far as it referred to evidence or witnesses in criminal proceedings but made no reference to the Union Criminal Procedure and Evidence Act of 1917. The High Commissioner therefore cannot have considered that the Union Act of 1917 was in force in Swaziland and did consider that Transvaal Proclamation No. 16 of 1902 was in force up to 1938.

[2] Diamond, *Primitive Law*, 2nd Ed., p. 5, argues that a code need not necessarily be embodied in legislation but in modern times codes are invariably enacted. In this article Salmond's view (*Jurisprudence*, 10th Ed., p. 167) that ". . . the process which, since the days of Bentham, has been known as codification [is] the reduction of the whole *corpus juris*, so far as practicable, to the form of enacted law" is adopted with the modification that it is recognised that there are codes which embrace part only of the *corpus juris*, *e.g.* the criminal law only or the civil law only.

seded: *cf. Wallace-Johnson* v *.R.*, [1940] 1 All E.R. 241; [1940] A.C. 231, P.C., at 244, cited by Allott, *op cit.* p. 28. On the other hand, Maine has pointed out that a code is basically the proclamation of existing law in statutory form[1] and many questions concerning *mancipatio* in Roman Law would remain unsolved if one were confined to what is to be found in the XII Tables[2]. The different points of view may be reconciled if the circumstances in which the different types of codes are enacted are borne in mind.

When in the course of colonisation one sovereign is replaced by another, and the law of the colonists becomes the law of the land and provision is made for the recognition, in certain cases, of a previously existing system of law difficult questions are likely to arise. Apart from the question of the extent of recognition to be accorded to the second system of law two widely different needs have to be met. The first is the need to inform the subjects of the country whose administration has been undertaken of the criminal law which the new sovereign is to enforce, and the second is the need to inform judicial officers of the rules of a system of law which they are called upon to administer but which are difficult to ascertain. In the latter case there is no need to inform the people of the rules of law for it is their law. It " is not an occasional variant from the general law . . . ; it is their general law . . . ." [3]

In the administration of the criminal law the legal proceedings are " of a special kind ".[4] in which the state is " given by law a *locus standi* to seek the punishment of the offender. It does not follow that the State *only* may prosecute the offender . . . but . . . the State, in providing a special machinery for dealing with the perpetrators of [crimes], reserves to itself a right of putting that machinery in motion even where the individual most aggrieved by the unlawful act does not seek to procure the punishment of the offender." [5] It is in the circumstances only natural that when one sovereign is replaced by another the new sovereign should feel the need to inform the people brought within its rule of the principles upon which it will take action against them and the matters in which it expects obedience.

In more than one instance codification has commended itself as a good method by which the need in respect of criminal law may be met. Thus the terms of reference of the 1883 Commission[6] included a direction to suggest " a code of Civil and Criminal Law " and the

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[1] *Ancient Law*, Pollock's Edition, p. 16.

[2] *Cf.* Jolowicz, *Historical Introduction to the Study of Roman Law*, 2nd Ed., p. 107.

[3] Allott, " The Judicial Ascertainment of Customary Law in British Africa," (1957) 20 M. L.R. p. 246. Gluckman, *The Judicial Process among the Barotse of Northern Rhodesia*, pp. 238-241, mentions the same fact but in his discussion on the point appears to be considering particular custom whereas to the people affected their law is the general custom. *Cf.* footnote [3], p. 95.

[4] *Kenny's Outlines of Criminal Law*, 16th Ed. by J. W. Cecil Turner, M.C., M.A., LL.B., p. 4.

[5] Gardiner and Lansdown, *South African Criminal Law and Procedure*, 6th Ed., by the late Mr. Justice C. W. H. Lansdown, LL.D., Q.C.; the late W. G. Hoal, B.A., LL.B. ; and A. V. Lansdown, B.A., LL.B.; Vol. 1, p. 3.

[6] The Cape Government Commission on Native Laws and Customs 1883 (G. 4 of 1883).

Commission, while it felt unable to suggest a civil code,[1] reported in paragraphs 35 and 38 that:—

> " We find no uniformity in the criminal law or procedure, which until lately has been administered beyond the Kei. Some Magistrates inform us that they administer the Kafir law; others that they administer the Colonial law; some that they apply the Kafir mode of procedure by calling to their aid assessors, and allowing the examination of prisoners; others that they adopt our Colonial mode of procedure; some that they apply Kafir law and procedure in some cases, and the Colonial law and its procedure in others. *All are agreed that a Criminal Code is desirable in order to give certainty to the law that they are called upon to administer and to enable those subject to the laws to know them.* And this knowledge can best be secured by means of a code translated into the Kafir language, which, even if not read by the vast majority of Natives, will in substance be learnt by them from missionaries, educated Natives, and others, who, from the code itself, will be able to acquire a knowledge of law at present unattainable. . . . We have suggested a Penal Code, which while it adopts the general principles of the existing Colonial law endeavours to remedy its defects, and retains some law and principles of procedure dear to Natives, and which commend themselves to us as proper for those territories."[2,3]

When such a criminal code is enacted the guiding principle in interpreting it is, as in the case of all legislation, the intention of the Legislature, and when the circumstances surrounding its adoption are of the nature of those outlined above it is apparent that the Legislature's intention is to make a definitive proclamation and that the courts are not intended to be bound by any authority other than the code. Statements on the interpretation of codes in African territories within the British Commonwealth which emphasise this intention[4] refer to criminal codes and not to civil codes which do not exist outside Natal.[5]

When one turns to the Natal Code of Native Law which includes the civil law, a very different picture is presented. The circumstances calling for its enactment differed from those that brought the criminal code into being and the intention of the Legislature consequently differed. There have been three codes; the first was proclaimed in 1878 and applied originally only to Natal as it then

[1] Para. 61. The Commission appeared to consider that it was asked to codify as much of Roman-Dutch law and Native law as should be applied to the Transkei.

[2] Italics supplied. The Criminal Code, with some changes, was duly enacted for the Transkeian Territories in Act No. 24 of 1886 (Cape). With amendments, it is still in force and, with certain minor exceptions (*e.g.* Act 41 of 1898 replacing section 200) it applies to all races alike. The code was never, so far as is known, translated into the vernacular.

[3] The term " Kafir " has now fallen into disuse in legal terminology. Most legal sources use the term " Native ". " Bantu " is sometimes advocated and so is " African ", but as the *Journal of African Law* includes within its province all legal questions in Africa the term adopted to describe the legal system of the Bantu or Native peoples of Southern Africa is " Native law " *Cf.* 74 (1957), S.A.L.J. 314-317.

[4] See *e.g.* Allott, " The Authority of English Decisions in Colonial Courts ", [1957] 1 J.A.L. 27-30.

[5] Allott, " The Judicial Ascertainment of Customary Law in British Africa ", (1957) 20 M.L.R. 261.

was, *i.e.*, the land between the Umzimkulu and Tugela rivers.[1] In 1887 its operation was extended to Zululand, *i.e.*, the land between the Tugela river and the Portuguese border.[2] The second code, contained in the schedule to Law 19 of 1891, replaced the code of 1878 in Natal only and there were then two codes of Zulu law in operation, one in Natal and the other in Zululand.[3] The first code was repealed in 1929,[4] and in 1932 Proclamation No. 168 of that year substituted a new schedule to Law 19 of 1891 and extended the operation of the new code to Zululand with the result that there is now only one code, the third, in operation.

The first code was "merely a compilation and exposition of Native Law".[5] The Board which framed it said in a preface that it felt it wise "to avoid all doubtful detail and to content itself with stating what the Native Law [was] with reference to certain well defined leading principles". Mr. J. W. Shepstone, one of the members of the Board, stated that their aim was "simply to lay down what Native Law was, simply to codify Native Law as it existed".[6] The code was made for the benefit of judicial officers as the evidence before the commissions shows. "As I understand," said Mr. Justice BEAUMONT, "the Code was introduced because there was a considerable variety in the practice of Magistrates in different districts, and indeed, in the customs of the Natives themselves, occupying different districts in Natal, and one of the principal objects of the Code was to have some uniform system of civil jurisdiction right throughout the country".[7] "The object was," said Mr. J. W. Shepstone, "in the first instance, to . . . draw out, as we did, a skeleton form, as a guide to the magistrates or to the administrators of Native law . . . ."[8] Later codes are more detailed, incorporating the recommendations of later commissions,[9] having penal clauses not in the first code,[10] and regulating the position of chiefs[11] but the character of the civil provisions has not changed. The present code, though not the mere skeleton that the first was, is general and does not have the detail to be found in criminal codes. As it is cast in legislative form some of its provisions are imperative but other provisions show how descriptive it is intended to be. Thus section 100 (1) speaking of the sections of a kraal says:—

> ". . . there may be four, though in actual practice, except in the case of chiefs and others of rank, influence or wealth, there are seldom more than two."

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[1] Zululand now falls within the Province of Natal but in considering Native law it may still be spoken of as a separate entity, *e.g.* in sec. 2, Proc. No. 168 of 1932.
[2] *Ugijima* v. *Mapumana*, 1911, N.H.C. 3 at 6.
[3] *Ibid.* at pp. 7-8.
[4] *Jele* v. *Sibiya*, 1936, N.A.C. (T. & N.) 64.
[5] *Ugijima* v. *Mapumana*, 1911, N.H.C. 3 at 7.
[6] 1903 Comm., 18,727, Vol. 3, p. 59. The 1903 Commission is the South African Native Affairs Commission 1903-5, whose Report, Minutes of Evidence and Appendices was published in five volumes in 1905 in Cape Town.
[7] 1903 Comm. 18,082, Vol. 3, p. 16-17.
[8] 1903 Comm. 18,721, Vol. 3, p. 58; see also 1883 Comm. 8024, p. 456; 1903 Comm. 13,140, Vol. 2, p. 956; 18,955-56, Vol. 3, p. 75; 34,608, Vol. 4, p. 49.
[9] 1903 Comm. 17,811, Vol. 3, p. 2.
[10] *Ugijima* v. *Mapumana*, 1911, N.H.C. 3 at 7.
[11] 1903 Comm. 18, 669-74, Vol. 3, p. 55 and Chap. IV of Proc. No. 168 of 1932.

It seems clear that a legislature enacting the main general principles of a system of law does not intend a clean break with the past but rather a continuation of the system with greater clarity in part. It is not to be expected, at a time when judicial officers require legislative assistance in ascertaining a law with which they have but lately come into contact, that the persons entrusted with the duty of drawing up the code, able though they may be, should be capable of producing a completely comprehensive statement. Thus Mr. Justice BOSHOFF said: " I do not think that it would be possible for any Commission to reduce Native law to writing to a sufficient extent to embrace the whole law . . . ."[1] Other authorities are to the same effect[2] and in the present code provision is made for the application of the law relating to:—

> " . . . any relevant Native custom which is not opposed to the principles of public policy or natural justice, whether or not such custom is defined and dealt with under this Code; provided that where such custom is so defined and dealt with the provisions of this Code shall prevail."[3]

Authority to apply uncodified law therefore is clear and the question remains: How should the codified law be interpreted ? The answer is given in *Dhlamini & Ano.* v. *Kulusi*, 1937, N.A.C. (T. & N.) 147 at 152, where STAFFORD, M., says:—

> " In dealing with the matter at issue we are bound by the provisions of the Code. . . . At the same time the Court must not forget that it is dealing with Native law and custom and that the provisions of the Code must be interpreted in the light of such law and custom."[4]

Consideration of the institution of exemption from Native law gives further authority for the uninterrupted continuation of a system of law irrespective of codification. Under the provisions of Law No. 28 of 1865 (Natal) a Native might be exempted from " the operation of Native law ". Though there were no codes in operation when this provision was enacted any exemption granted[5] affects not only the unwritten law but also subsequent codifications[6] and subsequently enacted statutory Native law.[7]

Distinct from the questions of the nature of codes and their interpretation is the question of their advisability. There is a criminal code in the Transkei and there are penal sections in the present Natal Code, but in the remainder of South Africa the criminal law

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[1] 1903 Comm. 23,156, Vol. 3, p. 359.
[2] 1903 Comm. 14,622, Vol. 2, p. 1068; 17,275, Vol. 2, p. 1245.
[3] Section 144 (3).
[4] Used thus the term " Native law and custom " means the Native legal system as a whole: see 74 (1957), S.A.L.J. 314-17.
[5] Exemptions continued to be granted under this law until it was replaced by section 31 of Act No. 38 of 1927, under which exemptions may now be granted. Lest previous exemptions should fall away with the repeal of Law No. 28 of 1865 (Natal) such previous exemptions are deemed to be granted under the later Act. Exempted Natives may be deemed not to be exempted for certain purposes: see Stafford and Franklin, *Principles of Native Law and the Natal Code*, pp. 71-2.
[6] 1903 Comm. 29,627-28, Vol. 3, p. 720 per Mr. Justice Beaumont.
[7] *R.* v. *Mpanza*, 1946, A.D. 763; 74 (1957), S.A.L.J. at 318-9.

is uncodified. There is a civil code in Natal but in all other provinces the courts seek the law in the ordinary sources, in legislation, precedent, particular custom, textbooks, etc.[1] Little need be said about the advisability of criminal codes for it can be recognised that a criminal code is a good method of meeting the need outlined above, pp. 90-91. Codification is, however, not the only method as experience outside the Transkei shows and against it is the consideration that illiterate or near illiterate people are more likely to learn from precedents in actual cases than from a statutory code.

As regards civil codes it may be argued, and it has been argued for the Natal code, that a code " gives Government a greater power of introducing civilised ideas than if the Natives were left to themselves ".[2] Experience has shown, however, that Natives in parts of South Africa that are not subject to any code are no less civilised than those in Natal. In similar vein is the argument that " certain abuses [can] be removed and improvements [can] be made ".[3] Undoubtedly a code may incorporate reformative measures but it must be remembered that it is legislation as a source of law and not codification in the sense of " a compilation and exposition " of a system of law[4] that possesses reformative power. A custom which is opposed to the principles of public policy or natural justice will not be found in the Natal Code but neither will it be enforced where the Code does not apply because legislation distinct from the Code (Section 11(1) of Act No. 38 of 1927) in allowing the application of Native law prohibits the recognition of such customs. An improvement is made in the Code in section 65 which requires the registration of customary unions but a similar improvement requiring the registration of Native births and deaths throughout South Africa is made without reference to the Code by the application of Act No. 17 of 1923 to Natives in both urban areas[5] and non-urban areas.[6] Legislation has been resorted to in most areas of South Africa to regulate land tenure and although the law so made is statutory Native law[7] it is important to note that in Natal the regulations are to be found in Proclamation No. 123 of 1931 and that there is no mention of the subject in the Code. If it is felt that questions of land tenure in other areas require regulation[8] South African experience points to the advisability of a proclamation

[1] Kerr, *The Native Common Law of Immovable Property in South Africa*, pp. 8-10.

[2] 1883 Comm. 216, p. 12, a statement by Sir Theophilus Shepstone assenting to a proposition put to him. He himself was opposed to codification: see below p. 99. Sir Theophilus was one of the outstanding authorities on Native Administration, particularly in Natal, and the originator of the Shepstone system: Brookes, *The History of Native Policy in South Africa from* 1830 *to the Present Day*, Ch. III, p. 41ff.

[3] 1903 Comm. 41, 910, Vol. 4, p. 631.

[4] *Ugijima* v. *Mapumana*, 1911, N.H.C. 3 at 7, cited above p. 92.

[5] See G.N. No. 1819 of 1923.

[6] See Proc. No. 131 of 1952.

[7] Kerr, *op. cit.* pp. 37-38.

[8] See *e.g.* Pogucki, " A Note on the Codification of Customary Land Law on the Gold Coast ", (1956), 8 J.A.A. 192. Pogucki's arguments in favour of " codification " appear to be directed towards statutory regulation with improvements and not towards a code in the sense in which the term is used in the present article.

dealing with that subject alone in preference to a codification of the whole system of law.[1]

Legislation is not the only source which can be of service in the development of a system of law. Precedent may assist as in *Tshabalala* v. *Estate Tunzi & Ano.*, 1950, N.A.C. (C) 46, where MARSBERG, P., says, at p. 48:—

> "According to pure Native law no woman can own property but the Native Appeal Court has held that a widow is entitled to retain in her own right property earned by her after her husband's death; the Court was aware that this is in conflict with Native Custom but when Native Custom is repugnant to justice and equity it must give way."[2]

In Southern Rhodesia also the courts have been effective in developing the law to meet modern circumstances. Thus it has been held that a Native woman may in certain circumstances own cattle—*Katsandi* v. *Chuma* (1937) 2 N.A.C. (S.R.) 6 at 7, and *Nyongwana* v. *Mapiye* (1947) 3 N.A.C. (S.R.) 182 at 183-4—and that a court may, on grounds of equity, refuse to recognise the claims of the next in succession to guardianship over a minor heir—*Jamu* v. *Jim & Ano.* (1939) 2 N.A.C. (S.R.) 49. In *Jamu's case* appellant claimed the custody of three minor children of his deceased younger brother, one child being the son and heir, aged 12 years. Plaintiff proposed to remove the children to Nyasaland though neither the children nor their mother wished to go there. An award of custody would probably result in the separation of the mother from her children and the children would be removed from their birthplace and from the people amongst whom they had grown up. SIMMONDS, P., said at p. 52:—

> ". . . in view of the decisions in the case of *Dayimano* v. *Kgaribaitse*, 1931 S.R. 134-5, and in *Jeremiah* v. *Salome* (1932), 1 N.A.C. (S.R.) 43-45, the answer to the question [whether in the circumstances appellant should be granted custody of the minor children] must be found not in whether by Native or other law he was entitled to assume guardianship, but whether the appointment of appellant in that capacity would tend to be beneficial to the moral and material welfare of the minor children, and incidentally, of the family."

In certain cases particular customs may, if proved to the satisfaction of the court, be admitted to vary the general custom which is the common law.[3] Thus in *Sikwikwikwi* v. *Ntwakumba* (1948) L.N.A.C. (S) 23 at 24, SLEIGH, P., says:—

> "If a variation of the [general] custom is suggested this Court must be satisfied that this variation has been freely, frequently and

[1] Such a proclamation should deal with the legal aspects of tenure and should not include, as some South African proclamations do, administrative directions to officers in charge of districts.

[2] See also *Mlanjeni* v. *Macala*, 1947, N.A.C. (C. & O.) 1, and cf. Schapera, "The Sources of Law in Tswana Tribal Courts; Legislation and Precedent" [1957] 1 J.A.L. at 158.

[3] As to the distinction between general and particular customs see Allen, *Law in the Making*, 5th Ed., p. 66. As to the fact that the general custom is the common law, see Allen, *ibid.*; Salmond, *Jurisprudence*, 10th Ed., p. 216; Paton, *A Textbook of Jurisprudence*, 2nd Ed., p. 146.

consistently observed over a long period, and is just and reasonable."

Custom too may have the negative effect of abrogating old law with the result that certain rules which once formed part of the law are no longer enforceable. Thus the chief of the Amanikwe tribe can no longer nominate his great wife[1] and the chief of the Vandau tribe in Southern Rhodesia is no longer entitled to the skins of leopards killed.[2]

One of the main arguments against codification is that it places an undue emphasis on one type of law only, neglecting the others, and that the type or form chosen is not in the circumstances the most suitable. A code must necessarily be in the form of legislation.[3] The law becomes fixed either in general outline only or in outline and in detail as the legislature may determine. Although there are general principles common to all tribes in South Africa, such as the principle of primogeniture in succession, there is a danger that in framing a general code the particular rules of an outstanding tribe may be enforced on other tribes within the area governed by the code and that the variations adopted by lesser tribes may be swept away.[4] It may not be advisable to recognise every minor variation but " If you make any drastic change without consulting [the Councillors and wise man of the tribes] it would simply be inoperative " because " if the people do not choose to accept [the civil law] they keep out of Court " and the law cannot be enforced.[5]

On the other hand, if the code is too detailed it tends to introduce too great rigidity into what is otherwise a flexible system. The Code of 1891, for example, provided that the value of a *lobolo* beast should be £3 but in 1904 " it [was] impossible to get a beast anywhere for that price ".[6] There had been an epidemic of rinderpest since the code was enacted and not only had the value laid down lost all relation to fact but suitors found it impossible to find the number required by the bride's father which, according to the code as it then read, had to be paid before celebration of the union. The position was so bad that it became the practice for magistrates " to insist upon the marriage taking place and allowing ' lobolo ' to stand over " although they recognised that " It is very wrong for us to do so, because they are deprived of the right to sue for the balance of the ' lobolo '."[7] It might be argued that by amendment a code can be kept up to date, but experience shows that changes which have to be introduced by the legislative process are long delayed. The rinderpest epidemic took place about 1897-8 but no change had been introduced when the 1903 Commission took evidence; the present code, in section 86, sets the value at £5,

[1] *Poto* v. *Costa*, 1931, N.A.C. (C. & O.) 38.
[2] *Zaba* v. *Tolongo*, 1944, N.A.C. (S.R.) 52.
[3] See p. 89, n. [3] above.
[4] 1903 Comm. 18,082, Vol. 3, p. 16-17 *per* Mr. Justice Beaumont, quoted above, p. 92.
[5] 1903 Comm. 20,486-7, Vol. 3, p. 192, *per* Sir Henry Elliot, ex-Chief Magistrate, Transkei.
[6] 1903 Comm. 33,686, Vol. 3, p. 949.
[7] 1903 Comm. 32,453, Vol. 3, p. 877.

which is no longer a correct reflection of the actual value. The rule in Native common law is that the " average value of cattle of the type usually paid as dowry " at the time in question is to be taken,[1] and its operation in areas where there is no code demonstrates the greater flexibility and equity of the uncodified law. The common law rule might be thought to be cumbersome but in practice it is not so, because plaintiff pleads the average value and if defendant in his plea does not deny it the case proceeds without any evidence on the point.

The position with regard to errors and omissions further illustrates the disadvantages of codification in the circumstances outlined above. Errors appearing in legislation are more serious than those occurring in a source which is not binding but persuasive only such as a textbook. In a code framed to meet the need of " a country whose laws were either not yet fully ascertained, or still undecided upon, when the administration of the Government of it had to be undertaken "[2] errors are bound to occur and such proved to be the case with the Natal Code. Though the framers of the first code were " an able body of men "[3] the code erred in relieving the father of his duty in Native common law to return the *ikazi* in case of the wife's misconduct.[4] Asked about the second code, Mr. C. J. R. Saunders, Chief Magistrate and Civil Commissioner of Zululand, said that " There are many details in which it is incorrect."[5]

Equally serious are omissions. As pointed out above, at p. 93 codes such as those under consideration are not, and cannot be expected to be, complete expositions of the legal system. Faced with a matter falling outside the code the Court is immediately in a difficulty: was it the intention of the Legislature that the rule relating to the question in issue should not be recognised or is the case a proper one for the application of uncodified law ? Two cases may be given as illustrations. The first case is *Mgidhlana* v. *Munyu*, 1912 (1) N.H.C. 43. Munyu's wife, daughter of Mgidhlana, died a few months after he had entered into a customary union with her. Munyu sued Mgidhlana for the return of the twenty head of cattle he had paid. The first code, that of 1878, was applicable as the case originated in Zululand and section 15 thereof read:—

> " Payments in respect of a marriage are not after consummation thereof recoverable in whole or in part from the father or his estate."

This may be accepted as a correct reflection of the general rule but in Native common law special rules apply to the case where a wife dies without issue shortly after entering into a customary

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[1] *Majongile* v. *Mpikeleli* (1950) 1 N.A.C. (S.) 260, *per* Sleigh, P.

[2] 1883 Comm. 377, p. 20, *per* Sir Theophilus Shepstone. Much Native law in Africa is still not fully ascertained: Roberts-Wray, " The Need for Study of Native Law ", [1957] 1 J.A.L. 82, at 84, 86.

[3] 1883 Comm. 448, p. 25, *per* Sir Theophilus Shepstone.

[4] 1883 Comm., para. 69, p. 30.

[5] 1903 Comm. 30, 473, Vol. 3, p. 770.

union[1] and section 181 of the Code of 1891 which was not binding in Zululand allowed the recovery of a portion of the cattle not exceeding three-fourths in the event of a wife dying without issue within one year of her entry into a customary union. Relying upon this section the magistrate awarded Munyu fifteen head. On appeal to a single judge, JACKSON, J., upheld the magistrate's judgment and said, at p. 45-6:—

> " In view of this expressed anxiety [on the part of the Board which framed the code] ' to avoid all doubtful detail and to content itself with stating what the Native Law is with reference to certain well-defined leading principles' I think the Court is justified in placing a liberal construction on points not specifically laid down. Sec. 15 of the 1878 Code lays down a general principle which may well be held applicable in the case of deserting wives, or to other contingencies of domestic derangement, but is silent on any procedure or right which may accrue in the case of a wife dying shortly after marriage, and does not expressly prohibit an action at law in a definite case such as the one now under review. The Code of 1891, which was framed thirteen years later, and which equally aims at a clear exposition of Native Law, may although not in force in Zululand be referred to as illuminating obscure points. Section 181 lays down that in the event of a wife dying without issue within one year of her marriage, the husband is entitled to recover a portion of the lobolo not exceeding three-fourths of its original number or value. I have referred to this section not only for the purpose of illustration, but also to show the complete antagonism which would obtain in a matter of purely Native Law between Natives who reside in the same Province, who derive the law from the same source, and who are under the jurisdiction of the same Court of Justice, if it were held that Section 15 of the old Code precluded a right of action in Zululand, while Section 181 of the Natal Code expressly gave that right in Natal."

Notwithstanding this forceful reasoning, on a further appeal to the full bench, BOSHOFF, J.P., with whom CHADWICK and BENNETT, JJ., concurred, said, at p. 47:—

> " . . . having regard to the 15th section of the Code of 1878 . . . and to the imperative terms of that section, we are compelled to set aside the decision of the Circuit Court Judge and also that of the Magistrate."

The second case is *Mcunu* v. *Mcunu*, 1918, A.D. 323. Respondent alleged that he was heir to the *ikohlo* section of his father's kraal and the Court held that such a section must be recognised. INNES, C. J., said at p. 328:—

> " Strange to say, the Code of 1878 (differing in that respect from the Natal Code of 1891) makes no mention of an Ikohlo section or an Ikohlo heir. It does, however, recognise the left hand wife and the possibility of subordinate houses on that side. And I cannot think that the framers intended to impair in any way the right well recognised by Native custom of a kraal head to establish

[1] *Gwente* v. *Smayile* (1904), L.N.A.C. 71; *Qabuka* v. *Dlisondabambi*, 1937, N.A.C. (C. & O.) 187.

> an Ikohlo section possessing the special characteristics and enjoying the status accorded to it by Native usage."[1]

From the reasoning in this case and from the fact that the present code which applies in Zululand as well as in Natal embodies in section 94 the principle contained in section 181 of the Code of 1891,[2] it seems clear that the judgment of JACKSON, J., in *Mgidhlana's case*, 1912 (1) N.H.C. 43, was correct. It is equally clear from the judgment of the full bench in that case that it was the imperative terms of the Code which misled it. The case therefore shows clearly that codification which casts the law into legislative form is not a good method of meeting the need which the code was designed to meet.

If codification is not resorted to some other method must be adopted to guide judicial officers and to ensure some uniformity in the administration of justice. In the Transkei and Ciskei where the need was as great as in Natal a textbook entitled " A Compendium of Kafir Laws and Customs " was compiled by direction of Col. Maclean, C.B., Chief Commissioner in British Kaffraria, and was published in 1858. The outstanding advantage of a textbook is that it is persuasive authority only and not binding. It is therefore well suited to afford guidance when knowledge of the system of law with which it deals is necessarily incomplete. The textbook may serve as an introduction to an understanding of the law while a body of case-law is being built up. When there is litigation the Court, with the assistance of assessors, may test any proposition contained in the textbook. If it is correct, by adopting it the Court gives it added authority by the operation of the doctrine of precedent. If it is incorrect the Court is free to say so.

Many high authorities, including some with experience of codes, have preferred the Ciskeian and Transkeian method to that adopted in Natal. Capt. Blyth, Chief Magistrate, Transkei, and the Hon. Charles Brownlee, Chief Magistrate, Griqualand East, both considered that there was no necessity for a code.[3] Sir Theophilus Shepstone,[4] asked if he favoured " a more rigid codification of the law or . . . giving a wider discretion to the magistrates ", replied:—

> " I should like to see the law explained, so that it should be a textbook for the magistrates. If they were provided with such an explanatory book they would not need any wider discretion and greater uniformity would be the consequence."[5]

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[1] References to the *ikohlo* section in the different authorities are confused, some stating that it is on the right-hand and some that it is on the left. For the purposes of this article it is not necessary to resolve the difficulties because although the Code of 1878 mentioned both left hand and right hand wives (sections 25-26) it did not state the rules relating to the establishment of the *ikohlo* section or those relating to the position of the *ikohlo* heir with as great clarity as the Court required. The rule of interpretation stated by the Court must therefore be accepted for the purposes of the doctrine of precedent.

[2] The figure is now one-half instead of three-quarters.

[3] 1883 Comm. App. C., p. 45, A38; App. C, p. 61, A38.

[4] See p. 94 footnote [2].

[5] 1883 Comm. 410, p. 23, Cf. 1903, Comm. 18,721, Vol. 3, p. 58.

Sir Marshal Clarke, K.C.M.G., Resident Commissioner, Rhodesia, formerly a magistrate in Zululand, Special Commissioner and political officer in the Transvaal, magistrate in Basutoland, Commissioner of Police in the Cape Colony, Resident Commissioner of Basutoland and of Zululand, said:—

> " Codifying criminal law is one thing and codifying civil Native law is another thing, and I think that experience has shown us that . . . the codifying of civil law is stereotyping a state of law and custom which is naturally in a state of transition, and I think it would be very unwise to do so."[1]

The 1903 Commission itself after considering all the points of view put before it reported[2] that:—

> " The weight of evidence adduced before the Commission is against the enactment of a statutory code based on Native Law. It has been suggested, and with this the Commission agrees, that a textbook or handbook, for reference only, descriptive of Native law and custom would be useful as a help towards uniformity in administration."

Southern African experience then shows that with a textbook or textbooks of persuasive authority, with legislation where necessary for reform and regulation, with the beneficial work of the courts and with particular custom allowing changes to be made directly by the people themselves, a body of law rich in material and capable of development may be built up.

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[1] 1903 Comm. 34,980, Vol. 4, p. 75.
[2] In paragraph 232, Vol. 1, p. 44.