'A DANGEROUS DOCTRINE'
TWINS, ETHNOGRAPHY, AND THE NATAL CODE[1]

Thomas V. McClendon

Records of litigation over inheritance in the province of Natal, South Africa, in the 1920s and 1930s reveal conflicts among rural Africans, chiefs, and white administrators about the nature of custom, the privileges of seniority, and, not least, the control of cattle. One case in the Native Commissioner Court of a central Natal district is particularly emblematic of these conflicts over conception and management of the material.

The eldest brother of a labor tenant family claimed that he was the proper person to inherit the considerable stock of his deceased younger brother. The Chief's Court, however, had affirmed the right of the deceased's surviving twin brother to succeed to the property on the theory that twins were, according to custom, 'one person'.[2] The eldest brother appealed to the Native Commissioner Court, where a white judge applied customary law as described by the Natal Code of Native Law.

---

[1] This article was first presented as a paper at the Stanford-Berkeley and UCLA Symposium on Law, Colonialism, and Inheritance in Africa, 10 May 1996. I have benefitted from the comments of Rick Abel, William Worger, and other participants in the symposium. Another version was presented to the UCLA Law Faculty symposium on 29 April 1996, and I have also benefitted from comments made at that forum. I conducted field research with the aid of the Social Science Research Council and a Fulbright-Hays fellowship in 1991-92.

[2] Africans had the right to bring cases initially either to the Chief's Court or to the Native Commissioner Court. If a litigant lost in the Chief's Court, he could appeal to the Native Commissioner Court. In such appeals, the chief was often called to explain his decision. Chief's Courts did not maintain records before the 1950s.

That court and, on further appeal, the Native Appeals Court ruled for the eldest brother, holding that primogeniture was the only applicable rule of succession under customary law. Although the chief and all witnesses in the trial had supported the surviving twin's right to inherit, the colonial courts held that the only legally recognizable 'custom' was that which had prevailed from 'time immemorial'. Since witnesses seemed to suggest a change in practice relating to twins, the 'custom' they articulated was not legally valid, being a mere contemporary deviation.

The case offers the opportunity to examine how Africans and colonial officials viewed the nature of custom.[3] It also raises the question of why primogeniture was so important to the official understanding of customary law. This article will tie these issues to the official drive to retribalize Africans in the face of economic pressures that were creating opportunities for some labor tenants and peril for others.

Customary Law and Colonial Courts

The segregated legal system in place in Natal in 1929 was heir to more than 80 years of colonial intervention. Natal became a British colony in the 1840s. Officials in the early colony found it necessary to establish authority over Africans at a time when the colonial government had very few resources. Theophilus Shepstone, the colony's first Secretary for Native Affairs, solved the problem of the need to establish "hegemony on a shoestring" (Berry 1993) by instituting an early version of what would later be called indirect rule in other parts of colonial Africa. (In Natal, it therefore was called the Shepstone system.) The colony established reserves for Africans (on the land least suited to farming) and appointed chiefs where none previously existed (Lambert 1995: 7-38). Africans, whether living in the reserves, on white-owned farms or on Crown land, were subject to 'native customary law' administered by the chiefs and by white

[3] Britain annexed Natal in 1843, first as a district of the Cape Colony, then as a separate British colony. Natal, including the defeated and annexed Zulu kingdom, became a province of the Union of South Africa when the latter was established as an independent country (albeit still connected to the British crown) in 1910. Since this independence did not confer any rights on South Africa's black inhabitants, I continue to use the term 'colonial' until the inauguration of the new constitution in 1994. This decision is reinforced by the strong similarities between 'native' policies in South Africa and other parts of colonial Africa, especially the settler colonies of Southern Rhodesia (Zimbabwe) and Kenya (Mamdani 1996).

magistrates assisted by 'native assessors'.[4] In an attempt to rein in Shepstone's rather autocratic administration of this system, customary law was codified as the Natal Code of Native Law in 1878 (Welsh 1971). The Natal Code was mainly concerned with issues of family law, such as marriage, bridewealth and inheritance, while Africans were subject to 'white' criminal law and, in their dealings with whites, to common law and statutory law.

Customary law in Natal, as in the Central African examples discussed by Chanock (1985), was created through the interaction of white colonial officials and African chiefs, elders and colonial employees. Chiefs were in an ambiguous position, trying to retain some legitimacy with local communities while acting as tax and labor collectors for the government (Lambert 1995: 23-37). Despite their divergent interests in other arenas, these actors had a common interest in reinforcing, or even creating, elaborate and rigid hierarchies and imbuing them with legitimacy. These hierarchies would shore up the legal authority of officials, chiefs, and homestead heads, which were eroding as a result of social changes accelerated by the colonial presence. As Chanock and others have emphasized, the early encounter was marked by Europeans' optimism and arrogance about their ability to reshape the culture and institutions of the colonized. Legal intervention at this stage often took the form of attempts to 'liberate' African women and other subalterns from what the colonizers imagined to be tyrannical authority. Later, as social and economic processes set in motion by colonial rule became more apparent to officials, they turned their attention to restabilizing 'disrupted' social systems in the rural areas, relying on a renewed alliance with chiefs and male elders (Jeater 1993; Marcia Wright 1993; Schmidt 1992; Chanock 1985). In this second phase, authorities saw rural stability as a key to the political and economic success of the colonial enterprise. The resulting system emphasized the rights and authority of males and elders and the powerlessness and deference of women and juniors (McClendon 1995b).

Customary law, as 'invented' or at least transformed from the fluid field of custom to the rigidities of codified law, conceptualized Africans as unchanging and, indeed, as incapable of change. While colonizers were aware of the warfare and state-formation that accompanied their expansion into the interior of southern Africa, they ignored the wider social implications of these changes and assumed that change itself was aberrant in Africa. At the same time, the colonizers sought to introduce change to make Africans 'productive', and remold them to fit western ideals. Fear of the

[4] As far as I can determine, 'native assessors' ceased to have any formal role after the codification of customary law, though chiefs and other elders testified as experts on custom in particular cases. There were no native assessors in the customary law system at the time of the case discussed in this article.

instability and unforeseen consequences fostered by the colonial intrusion led colonizers to seek to impose order through what they assumed was the self-regulating, unchanging nature of precolonial African tradition. As Berry (1993) argues for tropical Africa, the colonizers thus imposed a system based on a conception of static tradition and custom in an Africa that had been already been subject to major social change in the nineteenth century. This was certainly the case in KwaZulu-Natal. From the late eighteenth century, the social geography of southeast Africa had been profoundly unsettled by complex processes, including acceleration of trade at Delagoa Bay and colonial intrusion in the interior of southern Africa. These factors stimulated intensified warfare and the rise of a number of defensive and militarized states, including, in the early nineteenth century, the Zulu kingdom (Wright and Hamilton 1989).[5] There was a centralization of power in the heartland of the Zulu state and considerable upheaval in the kingdom's periphery, including Natal. Our understanding of these changes remains limited, but it is apparent that the rise of larger and more intrusive state structures, the removal of young men and women from the homestead to serve the state, and the insecurity resulting from warfare must have had deep effects on the organization of social life (see e.g. Guy 1990).

In the midst of these changes, the intrusion of white colonists who made demands for labor and taxes and missionaries pressing western values in the guise of Christianity ensured the further acceleration of conflict and change. The attempt by the framers of customary law, therefore, to 'freeze' the 'traditional' hierarchies of politics, gender and generation were absurd in light of the accelerated change predating colonial rule, and in direct conflict with the interaction of Africans and colonists in realms of production and ideology. Colonists failed to recognize, or at least turned a blind eye to, the fact that claims made in the name of tradition and custom did not point to actual stasis, but were the idiom in which Africans debated the shape of social institutions in the face of change (Glassman 1995; Berry 1993).

Customary Law under Segregation

I want to jump forward now to the period on which my research has concentrated, the 1920s to 1940s. Although much had changed by this time, the Shepstone system

[5] Since the late 1980s, there has been a wide-ranging rethinking of eighteenth and nineteenth century southern African history. Much of this effort has emerged in the context of the 'Mfecane debate', sparked by Julian Cobbing's (1988) provocative article. See Hamilton (1995) for a collection of many of the important contributions to this debate.

remained the foundation of the legal order applied to Africans. The creation of the Union of South Africa in 1910 from four previously separate entities was motivated in part by a drive to unify 'native policy' under the rigidifying ideology of segregation. Segregation would create or maintain separate legal, political, and territorial spheres for Africans in order to achieve social control at minimal cost. Proponents of the ideology emphasized the need to 'protect' Africans while also preventing their full proletarianization. Segregation, which was also becoming the dominant ideology in the United States at the time, represented a change from Victorian ideals of incorporation and assimilation reflected in the limited franchise in the Cape and attempts by nineteenth-century missionaries to eliminate African social practices such as bridewealth and polygyny. The newly pessimistic intellectual atmosphere after the turn of the century, combined with white fears of African urbanization and African economic and political competition, encouraged segregationist thought. At the same time, the ambiguous position of African Christian elites led many of them (such as John Dube) to support key elements of segregation, which at least promised to preserve the territorial integrity of African land, albeit in the very circumscribed form of the reserves (Marks 1986).

The legal and administrative arm of segregation was established by the 1927 Native Administration Act, which built on the Shepstone system as well as on traditions of professional administration in the Transkei.[6] Like the Natal Code in the late nineteenth century, the Native Administration Act brought a more bureaucratic ideal to the administration of native affairs. It gave the Native Affairs Department the legal power to supervise Africans through a bureaucratized version of Shepstone's autocratic rule. The Act envisaged a hierarchy running from the Governor-General as 'Supreme Chief' through district-level white native commissioners and appointed African chiefs (many of whom also had historical claims to chiefship). It reaffirmed the use of customary law in courts (now called Native Commissioner Courts) created for litigation among Africans. In practice, an African who wished to bring a case under this system could begin in the court of an *induna* (chief's deputy), appeal to the chief, and then appeal to the white Native Commissioner. Alternatively, he could bring the case directly to the

[6] Dubow (1989) argues that the Native Administration Act and the post-Union Native Affairs Department drew on Transkeian traditions of administration, and he dismisses Welsh's (1971) argument that the 'roots of segregation' lay in Natal. My own research, however, shows that there were significant continuities of practice in Natal, even though the unified native policy was informed by an industrialized economy and a bureaucratized civil service.

Commissioner.[7]

In Natal, these structures rather seamlessly replaced those created to administer the Natal Code of Native Law, under which magistrates had acted in cases among Africans as 'Administrators of Native Law'. A single official often still was the Native Commissioner responsible to the Native Affairs Department and the Magistrate responsible to the Department of Justice. While the 1927 Act authorized rather than required the application of customary law, the existence of the Natal Code of Native Law ensured that it was applied and cited as authority. The 1891 version of the Code remained in force until replaced in 1932. The latter was essentially a reorganization to bring the Code into line with the 1927 Act and made no significant change in the conceptualization or practice of customary law (McClendon 1995a).

Segregation took on added urgency in the 1920s as the state reacted to the burgeoning and unpredictable social, religious, and political movements created by Africans. Segregationist discourse in the 1920s and 1930s pressured the Native Commissioner Courts to apply a version of 'customary law' that reinforced hierarchies of gender and generation in order to bring stability to the rural social order. Officials hoped to control the process of urbanization and proletarianization by ensuring that Africans remained securely tied to the territory and presumed 'traditional culture' of the countryside, under the firm control of chiefs. The policy aimed to 'retribalize' Africans and 'refurbish traditionalism'. Proponents worried about the dangers posed by radical movements such as the Industrial and Commercial Workers Union (ICU), which had gained tens of thousands of adherents in the countryside in the late 1920s. The segregationists argued that "If we do not get back to communalism we will most certainly arrive at communism" (McClendon 1995b).

The struggles over the nature and meaning of tradition, which Chanock sees in the process of 'inventing' customary law, were therefore very much on the minds of South African officials between the world wars. Even though Natal's customary law had been 'invented', shaped and even codified in the nineteenth century, therefore, African litigants continued in the early twentieth century to argue over the meanings of custom and tradition, showing in the process that those concepts embodied change, not stasis.

[7] Under the Natal Code, women were perpetual legal minors, obliged to enlist a male guardian as co-plaintiff when suing (usually for divorce).

Labor Tenancy in Natal

I collected case records in 1991 and 1992 in Natal in connection with my larger research project concerning gender and generation conflict among labor tenants in the Natal Midlands and adjoining thornveld region. I was interested in labor tenancy because of the work of Helen Bradford (1987) on the meteoric rise and fall of the radical-millenarian ICU in the South African countryside, including Natal. Labor tenancy, like customary law, had a long lineage in Natal. It was established through the struggles of African tenants to retain autonomy in the face of labor demands by relatively weak settler farming in the nineteenth century. The system that developed, in ideal terms, provided that African tenant families gained access to land for gardens and grazing in return for supplying some of the family members to work for the white farm owner for six months of each year. This was known as the 'six month system' (*ukusebenza isithupa*) (Lambert 1995; McClendon 1995a).

Labor tenancy only gradually replaced rent tenancy, which had been dominant in the nineteenth century. The turn to labor tenancy was spurred by greater demands for labor on white farms as settler production gained momentum beginning in the 1880s. The better-capitalized farmers also relied on their much greater access to political power to impose legal restrictions on so-called 'kaffir farming' (rent tenancy) in order to push their less production-minded neighbors into 'freeing' African labor. These legal actions (including the 1913 Natives Land Act and the 1932 Native Service Contract Act) were pitifully ineffective in the short run, but eventually gave added leverage to white farmers seeking to maximize land and labor.

As Bradford's work shows, tensions rose in the Natal countryside in the late 1920s as white farmers sought to take advantage of boom conditions for the production of wool and wattle trees (grown for the bark, which was used in tanning leather). African tenants came under increasing pressure to provide labor (or more family members for longer periods of time); those who refused (or whose land was needed for new production) faced eviction. Under these conditions, many tenants responded enthusiastically to the multivalent and eventually millennial messages of the ICU promising the restoration of land, or at least a fair wage. The ICU bubble soon collapsed in the wake of official repression, internal corruption, and failure to deliver on these large promises. The wool and wattle boom also collapsed in the face of the worldwide depression beginning in the late 1920s. But tenants continued to experience the pressure of state-backed landlords, as many of the latter slowly continued their drive to rationalize farm production. Despite low prices throughout the 1930s, farmers were encouraged by massive state subsidies to maintain or even expand production. The more 'progressive' farmers agitated for the eventual elimination

of labor tenancy in favor of more 'efficient' full-time farm labor. Meanwhile, they disciplined tenants through eviction and the threat of eviction and encroached on the 'traditional' privileges of labor tenants, especially by restricting grazing (McClendon 1997).

Labor migrancy, of course, was an important social factor in the South African countryside in the early twentieth century, affecting not only of the reserves, but also the lives of tenants on white farms. Because labor tenant households were paid little or nothing for farm work, the same members of the household most often called on to perform farm 'service' - young men - also tended to migrate to urban jobs during their months 'off'. This led to tension over who was entitled to control the far higher wages earned by migrants in the city (cf. Beinart 1982; Harries 1994). Often wages were remitted for the purpose of investment in cattle. A struggle was played out between household heads and migrant sons over wages, work and bridewealth. Those who failed to work 'six months', or who failed to remit urban wages were deemed less deserving of family wealth. 'Fathers', including uncles and elder brothers who headed homesteads, insisted on the filial duty of sons and their own 'traditional' rights as seniors to control and distribute cattle or other wealth. These issues often lay below the surface in litigation about bridewealth and inheritance (McClendon 1995a).

The Twin Case

A 1929 case from the Native Commissioner Court in Estcourt, *Mazibuko v Mazibuko*,[8] illustrates several elements of my discussion about customary law, while containing some suggestions of changes in farm tenancy in the late 1920s. The case shows how the customary law system embodied a hardened concept of custom, in which the colonial process privileged some features of traditional social practice over others and 'heard' some testimony on the content of tradition, while turning a deaf ear to deviant and 'untraditional' accounts. It also shows that despite that rigidification, reinforced by the state in the late 1920s as a result of the rise of segregation doctrine, Africans continued to debate the meaning and content of custom and tradition, and some used the state's western-style customary law courts to do so.

The case pitted brother against brother over inheritance of the considerable cattle holdings of the younger brother's deceased twin. The parties were, at the time of he deceased twin's death, residents of a white-owned farm in the Estcourt District. The deceased twin, who had been working in Johannesburg for several

[8] Natal Archives, 1 EST 2/1/2/1, Case 60/1929.

years, had accumulated funds and sent them to his twin brother, Kula, to purchase cattle. Between the hearing of the case by the chief and its arrival in the Native Commissioner Court, the elder brother had been evicted and had moved away, leaving behind the deceased twin's cattle. The surviving twin, Kula, testified that whites had only recently been present on the farm and he had sold some cattle to pay newly-imposed fees for dipping tenants' cattle.[9] It appears that the Mazibukos, who were probably former rent-paying tenants on land owned by absentee whites, were in the late 1920s being drawn into relations of labor tenancy (cf. Bradford 1987). The elder brother, Dhlozi, may have been ejected for refusing to enter into a labor tenancy contract or to pay dipping fees to the newly resident landlord. Or the herd he believed he had inherited from the deceased twin may have exceeded the number allowed by the landlord. If the surviving twin, Kula, inherited the cattle, on the other hand, he would immediately turn over eleven head (the standard amount of bridewealth cattle transferred from a groom's family to his bride's family) to his prospective in-laws and begin again to build up a family (since his previous wife had died leaving him with one child). Thus Kula was in a position to remain on the farm despite the worsening conditions of tenancy. Expanded production on white farms and the generation of wealth from migrant wages created opportunities for some Africans while narrowing the options of others. The changing economic landscape and the increasing influence of new moral and legal codes sharpened this type of dispute among family members and encouraged resort to the colonial courts in order to achieve a sure and final resolution (Kidder 1978). The colonial presence ironically accelerated change while denying that change and 'custom' could co-exist.

The dispute in this case revolved around 'customary' practices concerning twins and whether those conflicted with the supposed 'ancient custom' of primogeniture, which was conceived by the framers of the Natal Code to be one of the main pillars of 'native' law. The case of the Mazibuko twins arrived in the Estcourt Native Commissioner Court on appeal from the court of Chief Peni Mabaso. In the Chief's Court, the elder brother, Dhlozi, had claimed 38 cattle and 18 goats, which had belonged to his deceased younger brother, Nyovana, but had been appropriated by the deceased brother's surviving twin, Kula. The chief denied the plaintiff elder brother's claim. The elder brother, bringing his appeal, complained that "[t]he Chief in giving his judgment stated that he was trying the case under

[9] The government required dipping of cattle to control tick-borne cattle diseases, especially East Coast Fever, which had killed large numbers of cattle in southern Africa in the first decade of the 1900s, hard on the heels of the devastating Rinderpest cattle epizootic in the 1890s. For a discussion of African resistance to dipping in the native reserves, see Bundy (1987).

the old Zulu custom which I am ignorant of myself".[10]

The case turned on differing interpretations of the legal and spiritual personality of twins, as two entities or one. A corollary question was whether the customary law courts could recognize changes in customary practice. The elder brother staked his claim on the basis of his right as homestead head (*umnumzane*) to inherit the wealth of heirless members of his homestead. Absent the complicating factor of twinship, all (including the Code) were agreed that the estate of the deceased brother (who had no heir) would go to the eldest brother (plaintiff), the general heir of their father. But Kula, the surviving twin, argued that "our customs" considered twins to be one person, so that on the death of an heirless twin the surviving twin inherited all his property.[11] In effect, the argument was that there had been no real death, and the property continued to belong to the survivor, who embodied the twinship unit.

Kula argued not only that custom supported him, but also that the eldest brother had affirmed Kula's status through action. On Dhlozi's orders, Kula's personal effects, including sticks, penis sheath, and other clothing, were buried with the deceased twin, while the latter's effects were turned over to Kula (cf. Krige 1950: 162). Kula now planned to marry the fiancée of the deceased twin and claimed that the elder brother had arranged this. Kula sought to use the cattle from his

[10] Both brothers were assisted by counsel. It was common, but not universal, for one or both parties to have lawyers in the Native Commissioner Court. All the lawyers in the records I have looked at were white, and the fees imposed on losing parties demonstrate that their charges were substantial by the standards of labor tenant incomes and wealth. While the Native Commissioner Courts were established with the intention of providing African litigants with a relatively informal and inexpensive appeal from or alternative to Chiefs' Courts, the hiring of white lawyers in these cases must have largely defeated these aims. The fact that only a small percentage of court records survives from this period, however, leave me uncertain as to whether counsel were employed as frequently as they suggest. See McClendon (1995a) for further discussion.

[11] A father of twins in Msinga, near Estcourt, confirms that this is the custom today among 'traditionalists' (meaning, in this instance, rural non-Christians). Twins count as one 'person' and cannot be considered dead until both have died. The death of one twin is referred to by a different verb from the usual one for death. Interview with Mashiya Dladla (1994). Another informant, a *kholwa* (Christian) mother of twins, stated, somewhat ambiguously: "I was told they were one person, but only knew they were two." Interview with Domby Phungula (1992).

deceased twin's estate already designated as bridewealth in order to conclude this marriage.

What turned out to be the crucial strategic error in Kula's case was an admission that this practice regarding twins had not been in place from 'time immemorial'. Questioned by the Native Commissioner, Kula stated: "*Originally* the native custom was to kill one of the twins as it was thought that if one was not put out of the way both would die and it was also said that if one was not put out of the way the parents would not have more children" (emphasis added). Chief Peni, who testified to explain his judgment below, but also appeared as a sort of expert witness, agreed that "*In the old days* it used to be the custom to put one of the twins out of existence" (emphasis added). He claimed that the (then) current custom was for the twins to be separated and brought up in different kraals, although this apparently had not been done in the case of Kula and his twin. Chief Peni and another witness also cited some relatively recent instances of a survivor succeeding to a deceased twin's estate.

Dhlozi argued simply that twin succession was not the ‘native custom’. He did not deny having handed over the deceased twin’s personal effects but denied arranging for the fiancée to marry Kula and argued that this might have happened even had they not been twins (since brothers often married their widowed sisters-in-law under the *ukungena* practice, McClendon 1995b). No other witnesses supported Dholzi’s version of ‘native custom’.

Kula’s witnesses interpreted the behavior of the Mazibukos to show that the twins were treated as one 'person'. They said that a 'native' would not normally wear the clothes of a dead man as Kula had done. And they claimed that Dholzi had stated that no mourning period of 'cleansing' for the fiancée were necessary. As Chief Peni concluded, "I therefore gave judgment for the defendant (Kula) [as he] and the deceased were looked upon as only one person and not two different persons."

Despite the chief's finding in favor of the surviving twin and the overwhelming testimony supporting it, the case took on a different legal cast in the white court system. The Native Commissioner Court, and then the Native Appeals Court (NAC)[12] rejected these arguments and reversed the judgment of Chief Peni, finding in Dhlozi's favor.[13] The native commissioner's judgment held that the

[12] NAC Case no. 8/3/30; contained in the native commissioner court record cited above, note 8.

[13] The NC structured his judgment, however, so that the 11 cattle designated for

'custom' of twin succession did not have sufficient longevity to overcome the Code's fundamental principle of primogeniture (enshrined in the preamble to the first codification of customary law in Natal in 1878) since "it only originated within the last 50 or so years while the law of primogeniture has been observed by the natives from time immemorial". Instead, the white trial and appellate judges latched on to the discrepancy between what Kula and Chief Peni said had been done "in the old days" and what they claimed was now normal practice. The Native Commissioner viewed the evidence as establishing merely that:

> *within the last 50 or 60 years a custom has sprung up, amongst the natives of this district*, of treating twins as a single entity… thereby ousting the eldest son of the 'house' from his right to succeed… by the law of primogeniture. (Emphasis added)

This 'springing up' of a new custom among a 'section of the Zulu' (as the NAC put it) was insufficient to overcome the principle of primogeniture under the standard applied by the trial court and upheld on appeal. The NAC spelled out the legal hoops a custom must jump through before it would be accepted as legally binding:

> Is the alleged custom [one] that can be regarded as a well-established custom having the authority of Law? Van der Linden on custom says (1) it must be based upon sound reason; (2) it must be satisfactorily proved (a) by a great number of witnesses; (b) by an unbroken chain of decisions; (c) by living usage. Holland in his *Elements of Jurisprudence* says [of custom as law]: "It is characteristic that it is a long and generally observed course of conduct… [*N]o one was ever present at the commencement of such a course of conduct*." (Emphasis added)

Because the twin succession 'custom' was of recent origin (so far as the evidence showed), it did not meet this standard. Furthermore, as a result of an offhand

---

the fiancée of the deceased could still come from the deceased twin's estate, being "regarded as *lobola* given by the elder brother for the younger brother's wife", that is, a gift that the court required the elder brother to make. While the Native Commissioner and Appeal Courts therefore took a hard line on the primacy of primogeniture and the longevity of recognized custom, they showed a willingness to effect compromise in the interest of inducing the parties to accept their judgment. Kula had no right to the lobola cattle unless the court believed that Dhlozi had indeed donated the cattle for the purpose of Kula's marriage to his twin's fiancée.

remark by the chief, the courts found the claimed custom in conflict not only with older practice but also with the "present acknowledged custom of rearing twins in separate kraals [which] seems to me to negative [sic] the fiction of one entity for the two persons." This displays a lack of philosophical understanding of the concept of personhood, to say nothing of displaying a rather unsubtle legal mind. Again, the problem of reasoning results from the insistence that there must be only one custom, on which all members of the community agree, and which is followed in every instance, without variation in time or place.[14] The NAC enthusiastically endorsed the Native Commissioner's reasoning, and carefully went on to smother this 'twin custom' to ensure that it did not survive to cause the death of the elder brother Primogeniture. It is interesting to note the stridency of the NAC's language:

> [I]t would indeed be *a dangerous doctrine* to hold that because such is the modern development within a tribal entity in a given area, a law which has its genesis in the ancient polity of the founders of the race and has been universally recognised and generally applied down through the ages to the present time, a law which is embodied and receives its further sanction and reaffirmation in the Code of Native Law, Sections 101, 106 and 115, is ousted thereby. (Emphasis added)[15]

---

[14] Inconsistency between the 'old practice', the current norm, and observed behavior was not unusual. Three years later in the neighboring district of Weenen the NC gave the following assessment of the customs concerning twins:

> I have not heard of a case of the killing of one or more of plural born children.... I have spoken to a number of natives who inform me that it was an old Zulu custom but was discontinued many years ago.... The present custom amongst some... is to separate the children but the majority do not do so. (Natal Archives, 1 WEN 3/3/1/2, 2/5/5, NC Weenen to CNC, 31 Oct. 1932)

Unfortunately, this letter sheds no further light on the specific issue of twin succession.

[15] Both the standards for the recognition of custom in law and the rhetoric of dangerous consequences that were sure to flow from deviation from ancient practice were imported into South African customary law by judges and native commissioners familiar with the practice and rhetoric of English common law. In both instances, the rhetoric and requirements enable the courts to allow change

The courts therefore approached the issue as one of whether the alleged 'custom' of twin succession was of sufficient antiquity and universality to overcome the 'sacrosanct' principle of primogeniture, claimed by the authors of the Code to be one of the main principles of native law. Once the issue was framed this way, it was clear that Kula would lose. The twin succession rule was not explicitly admitted to be recent, but the cases cited by the witnesses were within living memory.[16] More crucially, Chief Peni admitted that "in the old days it used to be the custom to put one of the twins out of existence", implicitly admitting that the twin succession was an innovation at some stage. Innovation, especially an innovation deemed to be in conflict with one of the fundamental principles of 'native customary law', was not to be permitted. As Peni was forced to admit on cross-examination, "*Shepstone* laid down that all the property in a kraal belonged to the head of the kraal" (emphasis added). The irony of his words, suggesting that the foundation of 'ancient customs' lay precisely in colonial interventions, went unnoted in the record. Indeed the concept of innovation was in conflict with the colonial conception of customary law as emanating from 'time immemorial' and therefore 'sacrosanct'.

The case record shows that most of the African participants in 1929 had a very different conception of custom and customary law from that of colonial officials. Rather than something fixed and immutable, they were satisfied that, although one practice had been followed 'in the old days', another might be followed now. Thus, if one or both twins were no longer killed, 'twin succession' might emerge as a limited exception to the general rule of primogeniture.

Ethnography and Customary Law

The Native Commissioner and the appellate court looked beyond general principles of customary law in support of their view that primogeniture could not be displaced. They also cited ethnographic evidence that twins were 'bad characters' in African eyes and that "[e]ven now very little care is bestowed on the weaker of the two which rarely survives the meagre treatment meted out to it" (NAC, citing Alfred Bryant, a missionary who worked in Natal and Zululand

only in a selective and ritually validated manner.

[16] In the then predominantly oral culture of the Zulu-speaking witnesses, it was the very fact that the cases were remembered by the witnesses that made them persuasive evidence.

from the late 1880s[17]). As further proof of the invalidity of the 'new' twin succession custom, the NAC cited evidence from various 'leading tribes' of southern Africa. These included: the 'Bavenda' (where the NAC judge said his 17 years experience showed that cases of twin murder "were and are continually before the courts"); the 'Thonga' (where, the NAC said, the missionary ethnographer Junod reported a mother of twins had to undergo purificatory rites, and people avoided baby twins); as well as the 'Zulu'. The court drew on this mixed evidence from different times and places to 'prove' that there was an 'African' attitude toward twinship. This general rule prevailed over any local variant, since custom was presumed valid only if it was ancient and universal. Thus, even though the specific treatment of and feelings about twins might vary ethnographically, the general disfavoring of twins meant that the apparent exception in Estcourt could not be allowed to upset the first principle of primogeniture. The NAC concluded that "the disabilities of twins in the general make up of Native family life" were decisive and conclusive compared with a "comparatively modern innovation" in the District of Estcourt. "[I]t does not lie with this Court to allow these attempts at impingement upon institutions of Law entrenched, sacrosanct" - that is, the institution of primogeniture.[18]

The appeal to ethnographic authority suggests certain commonalities between the ethnographic practice of the time and the renewed emphasis on customary law in the late 1920s and 1930s. Although I do not wish to blame ethnographers for the lack of subtlety and sophistication shown by these judges, certain common assumptions were operating in both fields.

Krige's compendium of collected ethnographic wisdom on the Zulu, published in 1936, would have provided the judges with additional fuel had it been available when the rulings were rendered in the twin case in 1930. Her contribution on twinship is under the subheading "Abnormal Births and Beliefs about Twins" (Krige 1950: 75-76). She did not do her own fieldwork in Natal and Zululand but

[17] Bryant's ethnographic and historical work on the Zulu-speaking peoples became the most influential foundation for subsequent academic work. Much recent work related to the Mfecane debate has suggested a more critical appraisal of Bryant's published work. See Wright and Hamilton (1989).

[18] It is, of course, ironic that a colonial court should refer to indigenous custom as sacrosanct. Not only had the customary law regime been predicated from the outset on the idea that some customs would not be recognized because they were 'repugnant' to natural law, but colonial rule itself ignored the most fundamental local customs concerning membership in a community, use of land, and political and religious authority.

put together a structural-functional account of the supposed Zulu social system based on the published accounts of others. Her sources, including Bryant, had published their accounts in the late nineteenth and early twentieth centuries, based on observations across many years. Nevertheless, in the main they purported to present 'Zulu' custom as it was before the arrival of whites. This assumed that there was one 'it' to be described, that 'it' was 'Zulu', and that 'it' was subject neither to change nor contestation (though on occasion Krige makes reference to contemporary informants who discuss the effects of Christianity).

Her account of twinship is based on Kidd's *Savage Childhood* (Kidd 1906), which Krige cites to show the exotic nature of Zulu beliefs concerning twinship, while also trying to present these beliefs as a unified and functional whole:

> Kidd mentions a number of beliefs held by the Zulus about twins which show that, even though one of the twins has been killed, the other is never regarded as quite ordinary…. Twins are not counted in the number of children in a family… and when a twin marries there is no wedding dance….
>
> There is never any mourning at the death of a twin for that would anger the [ancestral] spirits…. If both twins survive, as sometimes may happen through stealth, there is no mourning on the death of one lest the other suffer through sympathy. (Krige 1950: 75-76)

My point is not whether this account supports the claim of the elder brother or that of the surviving twin. I wish to emphasize the way the ethnographic claims of the time, like those of customary law, argue for a unified and unchanging functionalist approach. Failure to perform these practices would be "unlucky" or would "anger the spirits", bringing about disharmony and disorder. In much the same way, customary law seeks order through the imposition of hierarchy, also seen as unchanging and unchallengeable. It is unclear whether twins (or one of them) were in fact killed 'in the old days' in the Estcourt region. Chief Peni's description of the newer practice of bringing up twins in separate homesteads suggests that practical considerations were involved as well as 'magical' ones. The statement that twins were killed formerly may reflect historical memory or be an ideological statement justifying the different treatment of twins. In conditions of undependable rainfall and limited techniques of food storage, twin babies would have presented obvious difficulties. People phrased their arguments over how to deal with the practical and spiritual problem as appeals to 'tradition'. In a changing social, economic, and ideological climate, however, 'tradition' was subject to more rapid fragmentation and change.

Krige's account also evokes some of the more lurid visions of twinship that have continued to entertain Orientalist observers (including, I suppose, myself). A story of the secretly surviving twin lies at the heart of the plot of Rider Haggard's *King Solomon's Mines*, for instance (Haggard 1985). Krige continues:

> The natives declare that twins have a soft occipital protuberance to the skull, that there is a special whorl of hair over the right side of the forehead and that the hair recedes unduly over the left temple. Thus twins can always be recognized. Twins are said to have no brains and yet are thought to be unusually sharp and clever. (Krige 1950: 75-76)

Indeed, perhaps the danger in twins was as much in the eye of the observer as in the accounts of Africans. Observers, including Chinua Achebe in *Things Fall Apart* (Achebe 1986), have emphasized understandings of twinship as a point of difference between African and Western views.[19]

Conclusion

Like the framers and enforcers of customary law, then, ethnographers of the late nineteenth and early twentieth centuries sought to impose order and rationality on African social 'systems' while silencing deviant narratives of informants and litigants. These concerns were all the more prevalent in the 1920s and 1930s. Segregation emphasized the difference of Africans, while its structures sought to ensure stability, order, and hierarchy in the countryside. In this context, customary law was called on to reinforce claims of the superior rights of elder males against disobedient daughters and sulky sons. Circumstances could bring about multiple and shifting alliances among African claimants, who were not wedded to a single, unchanging version of custom. Thus, while Chanock and others have rightly portrayed chiefs as beneficiaries of the new interpretation of tradition engraved by customary law regimes, in this case the chief was a proponent of a 'non-customary' view. This should alert us that chiefs, like both colonial governments and ordinary rural Africans, were not monolithic forces with predictable views but individuals and office holders involved in a variety of alliances that could not always be captured in generalizations about attitudes

[19] The plot of Achebe's book uses the treatment of twins as a point of cultural and cosmological contrast between the precolonial order and the disruptive teachings of colonial Christianity. In the novel the Christian mission gains symbolic capital when it successfully ignores taboos concerning twinship and the 'evil' forest.

toward 'tradition' and change. Ironically, the chief, the surviving twin, and his supporters probably saw themselves as defending 'custom' in the face of the attempts of the elder brother and the colonial courts to impose a deviant pattern of inheritance. As Berry (1993) argues, custom continued to be the battleground of competing views rather than the repository of a received consensus. Colonial courts, meanwhile, saw themselves as defenders of purified African custom, described by ethnographers and enshrined in the Natal Code, against dangerous doctrines that might undermine first principles such as primogeniture. But despite the outcome, litigation such as this is evidence of the inability of the customary law regime to impose its uniform and static vision on Africans.

References

Archives

Natal Archives Depot, Pietermaritzburg

Estcourt Magistrate and Native Commissioner files.
Weenen Magistrate and Native Commissioner files.

Secondary Sources

ACHEBE, Chinua
1986 *Things Fall Apart*. Portsmouth, N.H.: Heinemann.
BEINART, William
1982 *The Political Economy of Pondoland 1860-1930*. Johannesburg: Ravan Press.
BERRY, Sara
1993 *No Condition is Permanent: The Social Dynamics of Agrarian Change in Sub-Saharan Africa*. Madison: University of Wisconsin Press.
BRADFORD, Helen
1987 *A Taste of Freedom: the ICU in Rural South Africa 1924-30*. New Haven: Yale University Press.
BUNDY, Colin
1987 '"We don't want your rain, we won't dip": popular opposition, collaboration and social control in the anti-dipping movement, 1908-16.' Pp. 191-221 in William Beinart and Colin Bundy (eds.), *Hidden Struggles in Rural South Africa: Politics and Popular Movements in the Transkei and Eastern Cape 1890-1930*. Johannesburg: Ravan.

CHANOCK, Martin
1985 *Law, Custom and Social Order: the Colonial Experience in Malawi and Zambia*. Cambridge: Cambridge University Press.
COBBING, Julian
1988 'The Mfecane as alibi: thoughts on Dithakong and Mbolompo.' *Journal of African History* 29: 487-519.
DUBOW, Saul
1989 *Racial Segregation and the Origins of Apartheid in South Africa, 1919-36*. Houndmills, U.K.: Macmillan.
GLASSMAN, Jonathon
1995 *Feasts and Riot: Revelry, Rebellion, and Popular Consciousness on the Swahili Coast, 1856-88*. Portsmouth, N.H.: Heinemann.
GUY, Jeff
1990 'Gender oppression in southern Africa's precapitalist societies." Pp. 33-47 in Cherryl Walker (ed.), *Women and Gender in Southern Africa to 1945*. Cape Town: David Philip.
HAGGARD, H. Rider
1985 *King Solomon's Mines*. Oxford: Oxford University Press (1887).
HARRIES, Patrick
1994 *Work, Culture, and Identity: Migrant Laborers in Mozambique and South Africa, c. 1860-1910*. Portsmouth, N.H.: Heinemann.
HAMILTON, Carolyn (ed.)
1995 *The Mfecane Aftermath: Reconstructive Debates in Southern African History*. Johannesburg: Witwatersrand University Press.
JEATER, Diana
1993 *Marriage, Perversion and Power: The Construction of Moral Discourse in Southern Rhodesia 1894-1930*. Oxford: Clarendon Press.
KIDD, Dudley
1906 *Savage Childhood: A Study of Kafir Children*. London: A. and C. Black. (Reprinted 1969, New York: Negro Universities Press.)
KIDDER, Robert
1978 'Western law in India: external law and local response.' Pp. 155-79 in Harry M. Johnson (ed.), *Social system and legal process*. San Francisco: Jossey-Bass.
KRIGE, Eileen J.
1950 *The Social System of the Zulus*. Pietermaritzburg: Shuter & Shooter (1936).
LAMBERT, John
1995 *Betrayed Trust: Africans and the State in Colonial Natal*. Pietermaritzburg: University of Natal Press.
MAMDANI, Mahmood
1996 *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism*. Princeton: Princeton University Press.

MARKS, Shula
1986 *The Ambiguities of Dependence in South Africa: Class, Nationalism, and the State in Twentieth Century Natal*. Baltimore: Johns Hopkins University Press.
McCLENDON, Thomas
1995a. *Genders and Generations Apart: Labor Tenants, Law, and Domestic Struggle in Natal, South Africa, 1918-1944*. Ph.D. dissertation, history, Stanford University.
1995b. 'Tradition and domestic struggle in the courtroom: customary law and the control of women in segregation-era Natal.' *International Journal of African Historical Studies* 28: 527-61.
1997 '"Hiding cattle on the white man's farm": cattle loans and commercial farms in Natal, 1930-1950.' *African Economic History* 17 (forthcoming).
SCHMIDT, Elizabeth
1992 *Peasants, Traders and Wives: Shona Women in the History of Zimbabwe, 1870-1939*. Portsmouth, N.H., Harare and London: Heinemann, Baobab and James Currey.
WELSH, David.
1971 *The Roots of Segregation: Native Policy in Colonial Natal, 1845-1910*. Cape Town: Oxford University Press.
WRIGHT, John and Carolyn Hamilton
1989 'Traditions and transformations: The Phongolo-Mzimkhulu region in the late eighteenth and early nineteenth centuries.' Pp. 49-82 in Andrew Duminy and Bill Guest (eds.), *Natal and Zululand from Earliest Times to 1910: A New History*. Pietermaritzburg: University of Natal Press.
WRIGHT, Marcia
1993 *Strategies of Slaves and Women: Life Stories form East/Central Africa*. New York and London: Lilian Barber Press and James Currey.

Interviews

Dladla, Mashiya. Keate's Drift, 10 August 1994.
Phungula, Domby. Nottingham Road, 20 May 1992.