B5

POLITICAL MISCELLANY

B5.1 – B5.6

B5.1 Articles by others

Livingston, P.A. A summary of the reports of certain pre-Union Commissions on Native affairs. 1924

Ntloko, C.S. The report of the Native Laws Commission, 1946-48 : a review

Warne, H.S. South Africa. Who provoked the riots ? The Nation, [1953]

Booth, A.R. Memorandum to W.C.C. colleagues re Policy on South Africa. July 1964

African General Workers' Union. Constitution

Remarks on NUSAS Survey of Transkei 1967?

(20)

A

SUMMARY

of the

REPORTS

of certain

PRE - UNION

COMMISSIONS ON NATIVE AFFAIRS

March, 1924

Prepared by:
P.A. Linington

C O N T E N T S

COMMISSION ON NATIVE LAWS AND CUSTOMS,
CAPE OF GOOD HOPE, 1881 - 1883

Sir J.D. Barry (Chairman)
x Hon. Charles Brownlee
ø W.B. Chalmers
Rev. James Stewart
W.E. Stanford
Hon. Thomas Upington, M.L.A.
J. Ayliff, M.L.A.
W. Bisset Berry, M.D.
E.S. Rolland, M.A.
R. Solomon, Barrister-at-Law

x Unable to attend meetings. ø Resigned October, 1881

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Terms of Reference.

(a) To enquire into the Native Laws and Customs which obtain in the Territories annexed to the Cape Colony and to suggest such a code of civil and criminal law as may appear suited to the future condition of those Countries;

(b) To enquire into the expediency or otherwise of providing for the legalization of native marriages which have already taken place, regulating the validity of native marriages in the future and declaring or amending the Law relating to the succession of property in such cases;

(c) To enquire into the Native Customs in the matter of land tenure and to make such suggestions regarding to tenure of land as may seem best suited to carry out when practicable the policy of the Cape Colony in the matter of individual tenure;

(d) To report on the advisability of introducing some system of local self-government in Native Territories.

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Kafir law and some of its characteristics.

A system of law has for generations past been uniformly recognised and administered among the native peoples of the Colony. Although an "unwritten" law its principles and practice were widely understood, being mainly founded upon customary precedents, embodying the decision of chiefs and councils of bye-gone days, handed down by oral tradition and treasured in the memories of the people. This law took cognisance of certain crimes and offences; it enforced certain civil rights and obligations; it provided for the validity of polygamic marriages; and it secured succession to property and inherited according to simple and well defined rules. The system was to a great extent created by and adapted to the condition of a primitive barbaric life and in some respects it was not unlike that which prevailed among our Saxon ancestors in the early days of civilisation. But intermixed with it were a number of pernicious and degrading usages and superstitious beliefs, as well as a course of judicial procedure in cases of the alleged offence of sorcery or witchcraft, utterly subversive of justice and repugnant to the general principles of humanity.

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Early attempts to modify Native Laws.

In 1835, natives living between Keiskama and Kei Rivers were declared British subjects, retaining possession of their lands and locations but governed by Colonial law and authority. The resident Government agents had jurisdiction over major crimes, viz., treason, murder, rape, arson, theft. The crime of pretended witchcraft was forbidden under penalty of severe punishment. All minor offences and all civil matters were adjudicated upon by chiefs in accordance with Native Law and Custom. At that time it was in contemplation to frame a code, but this could not be carried out as the British Government reversed the policy of Sir Benjamin Durban and receded to the Great Fish River. In 1836 new treaties were entered into with the Natives living east of the Great Fish River, acknowledging their independence and recognising their full right to adhere to Native Laws and Customs. In 1840 and 1845 some amendments of the treaties were secured, entitling native converts to Christianity to certain privileges such as freedom from disturbance for refusing to comply with customs of witchcraft, polygamy, etc. In 1846 the "War of the Axe" broke out and lasted until near the close of 1847; on the 23rd December of that year Sir Harry Smith issued a proclamation abrogating all treaties and extending British sovereignty to the Great Kei River. The territory between the Keiskama and the Great Kei Rivers was created a separate Province with the title of "British Kaffraria" and its peoples were declared subject to "such rules and regulations as Her Majesty's High Commission should deem best calculated to promote their civilisation, conversion to christianity, and general enlightenment". The Civil Administration of British Kaffraria was placed in the hands of a military officer entitled "Chief Commissioner of Kaffraria" and subordinate to him were assistant commissioners acting as magistrates and advisers amongst the native tribes. The Chiefs ruled their people in accordance with custom but their decisions were subject to review by the Commissioner. War occurred again in 1850 and lasted to 1853 and after its conclusion Sir George Cathcart treated British Kaffraria as a "conquered territory in military occupation" and laid down the following principles for its government, viz., that the Colonists be restricted to their limits and that the Kafirs be not prematurely annexed to the Colony and subjected to Colonial laws but be allowed, as British subjects, to be governed as to their interior discipline by their Chiefs in accordance with Native Laws and Customs until European influence shall have removed objectionable and bad practices, The Government Commissioners took the position of political agents without any of the magisterial authority previously held by them.

Sir George Grey introduces a further change

In 1855 an important change in the administration of justice was effected by Sir George Grey. It was represented that the chiefs appropriated for the use of themselves and their councillors a large part of the fines imposed in civil and criminal cases, a practice that in Sir George Grey's opinion constituted a barrier to the advancement of the people in civilisation. He referred also the anomaly of chiefs in a British possession exercising independent powers and jurisdiction and deriving a considerable revenue from the fines and fees of courts of justice, thus exercising sovereignty by appropriating to their own wants what should have been part of the public revenue, and interfering with the prerogative of mercy by preventing the Crown from remitting fines and penalties and, finally, preventing the Crown from protecting well disposed Kafir subjects by the application of British laws. To remedy this position, the Governor offered to pay the chiefs and their principal councillors fixed monthly stipends in lieu of the fines and fees they formally received, and in consideration of their voluntarily relinquishing the authority conceded by Sir George Cathcart; the offer was eventually accepted by all the chiefs. Under the arrangement come to, the chiefs were to continue to hear cases but be assisted in their deliberations and decisions by European Magistrates, and all fines and fees were to go to the public revenues. The system was soon afterwards extended by the sub-division of the locations into areas over which paid headmen and sub-headmen were appointed who were made responsible for the maintenance of good order, etc. The headmen were responsible immediately to their own chiefs but ultimately to the Magistrates. The latter were expected to exercise a civilising influence; in the administration of justice they gave decisions jointly with the chiefs "according

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to equity and good conscience" - at the commencement deviating from Kafir principle as little as possible but keeping in mind that the law should by degrees ultimately merge into that of the Colony, so modified as to suit the state of the native population.

Kaffraria constituted a separate Dependency.

In 1860, when British Kaffraria was constituted a separate dependency of the Crown, all proclamations and regulations previously issued were continued in force and declared to be subject to abrogation and amendment by legislative enactment only. The existing system of dealing with cases arising out of the dowry (ikazi) custom was still to be followed.

Kaffraria Transkei & Griqualand East annexed to Colony.

British Kaffraria was incorporated with the Colony under Act 3 of 1865 and its inhabitants were brought within the pale of Cape Colonial Law although no adequate machinery for giving effect to this was provided in so far as the natives were concerned. In regard to the Transkei and Griqualand East, however, provision was made by a proclamation in 1879 for the administration of Colonial law with the exception that where all the parties to civil suits were natives the case should be dealt with according to native law. The mass of the natives in the frontier districts are still under their own laws and customs and in King William's Town and Queenstown the special magistrates and superintendents of natives without any statutory authority have continued to administer native law and in some locations headmen deal with petty cases. In the Transkei many cases are adjudicated according to Native Law; in Tembuland the Chief Magistrate is entirely guided by Native Law and Custom; in that area the Chiefs, in terms of a Convention of 1875, exercise authority according to native usage within their own sections, subject to appeal to the Magistrate, in all cases except those of a grave criminal nature.

Conclusions as to Native Laws and Customs which obtain in territories annexed to Colony.

Many of the existing Kafir Laws and Customs are so interwoven with the social conditions and ordinary institutions of the native population that any premature attempt to break them down or sweep them away would be dangerous, besides defeating the object in view. We consider it would be most inexpedient wholly to supersede the native system by the application of Colonial Law in its entirety; and we have directed our attention to the drafting of a special code which would leave such of their customary laws as are not opposed to the universal principles of morality and humanity, substantially unaltered and at the same time secure a uniform and equitable administration of justice in accordance with civilized usage and practice.

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NATIVE TERRITORIES PENAL CODE

There is a general concurrence of authoritative opinion in favour of a criminal code for the Native Territories.

Source of existing Native Law.

In considering the system of existing Native Law, we have had to enquire into its derivation and source. It appears that although the Chiefs have at times exercised despotic power, the power of making law does not in reality vest absolutely in them. The Chief himself is subject to the laws in force when he assumed his chieftainship. The laws are not usually made by the Chief and his Councillors without reference to the people. The laws have all grown up among the people and are only administered by the Chief. From instances brought to the notice of the Commission it is clear that the natives have not been subject to the capricious laws made by a Chief, but the laws emanating from the national will, which laws have been administered by the Chief. In future legislation it would be well therefore, as far as possible to give effect to those native laws which, while they do not conflict with natural justice are capable of being administered with benefit to the natives. If the Chief who attempted to change a law did so without consulting his Councillors, and without allowing the proposed change to be publicly canvassed before it was adopted, the probability would be that, if the law were at all objectionable, the disaffected would withdraw their allegiance from the chief and transfer it to another; and this although such transference is a serious offence from a native view. The inference we may draw from the whole evidence upon the subject is, that although natives

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For the reasons given it would be unwise to sanction or codify native criminal law which is neither certain nor uniform. The criminal law of the Cape Colony is not in a form which can commend itself either as certain or satisfactory, and is not codified. Again there are many punishments known to Roman Dutch Law which are too cruel to be enforced, and the discretion given to the judge tends to lack of uniformity in sentences. Some offences known to our law are inapplicable to the native territories, on the other hand no provision is made in it for dealing with witchcraft. Our law of procedure in the trial of criminals offends the native conception of justice by failing to exhaust every source of information including the examination of the accused and other persons who are able to throw light upon the subject under investigation. The adoption of the Colonial Criminal Law in its entirety would perpetuate these evils and it is chiefly to avoid them that we have suggested a penal code which while it adopts the general principles of Colonial Law endeavours to remedy its defects and retain some laws and principles of procedure dear to natives.

In the work of codification we have been especially aided by the Indian Penal Code due to the Commission over which Lord Macaulay presided nearly 50 years ago and by the draft criminal code framed by Sir J. Fitzjames Stephen. We have followed the Indian Code by introducing the use of illustrations to facilitate the understanding of the law. The intention is thereby to illustrate what the legislature meant and the illustrations make nothing law which would not be law without them. Thus the code will be a statute book and a collection of cases; defects could be reported by the judicial officers administering the code.

The penal code is intended to apply to all persons in the territories irrespective of class or colour. The Native Law which creates communal responsibility in cases where spoors of lost cattle are traced to native kraals has been embodied in the code. The punishment of death has been retained in the case of murder and treason but a discretion is vested in the Governor to commute the punishment into imprisonment for life. Transportation for life might also be an alternative in cases of murder. It may be mentioned that amongst kaffirs murder is a fineable offence. Wherever possible effect has been given in the code to the kaffir mode of punishment by fine. Provision has been made for payment of compensation to a person injured by an offence; this principle of reparation is recognised in India and in the Cape Stock Thefts Act of 1864. Native polygamist unions have been excluded from the term "bigamy".

Courts. It is recommended that a high court to be presided over by a high judicial officer to be styled the Recorder of the Native Territories should be established and have a jurisdiction concurrent with that of the Supreme Court in those Territories. Provision has been made in the Code permitting Magistrates to call to their aid native assessors. Effect has also been given to the native system whereby the accused must be liable to examination. Trial by jury is provided for, also the attendance upon the courts of qualified persons able to serve as jurors without regard to race or colour.

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NATIVE TERRITORIES CIVIL CODE

Fears were entertained by some of the witnesses that the codification of native civil law would carry with it the perpetuation of such law. They considered that the laws of growth should be allowed to operate so as gradually to extinguish native law. The Commission feel that the framing of a civil code would be a very arduous undertaking and greatly prolong its labours. It is recommended that the ordinary colonial civil law be suitably adapted for use in the territories until such time as a civil code is passed for the Colony. Draft measures have however been framed in respect of native marriages, native customs relating to inheritance, seduction and adultery, testamentary disposition and administration of estates.

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NATIVE MARRIAGES AND LOBOLA

An interesting paper has been contributed by the Rev. Kropf on the lobola custom and is appended hereto.

In order to secure the father's consent to the marriage of his daughter, translating her from his guardianship to that of her husband, and by which the father would lose the benefit of his daughter's services, the intending husband was obliged by payment to the guardian to prove his fitness to undertake the duties of husband and future guardian. The reasonable services of the daughter to the father are by marriage transferred to the husband; as long as the condition to which a woman is reduced by marriage is not that of a slave, her voluntary consent to be married to the man who paid her father for the loss of her future services would not import into the contract anything which the law should prohibit as illegal.

The dowry is not paid merely for the loss of services but as a guarantee of good conduct. If the wife wrongly leaves the husband the dowry must be returned while upon proof of the husband's misconduct which leads to desertion the dowry may be retained by the father. The Natal Code in departing from this provision and imposing no obligation on the father to return the ikazi in the case of the wife's misconduct has created an evil which the native law avoided.

Ukulobola may be taken to be a contract between the father and the intending husband of his daughter, by which the father promises his consent to her marriage and to protect her in case of necessity either during or after such marriage and by which in return he obtains from the husband valuable consideration, partly for such consent and partly as a guarantee by the husband of his good conduct towards his daughter as wife. Such a contract does not imply the compulsory marriage of the woman. The ikazi may therefore upon every principle of sound law be recoverable under such a contract unless a native marriage involves a condition of slavery and thus becomes illegal.

The woman is not the slave of her husband. He has no property in her. He cannot kill, injure or cruelly treat her with impunity. He cannot legally sell her and with the exception of paying cattle to her father as dowry upon marriage there is nothing to indicate that native law and custom treats the wife as a chattel.

The Commission considers the custom of lobola could not from its peculiar nature and history be repressed and rendered illegal by direct enactment without opposition and constant evasion of the law. But with a view to the emancipation of the kafir woman from the degraded position which according to English views she is placed in by the practice of lobola and certain forms of native marriage the Commission has framed draft regulations as to native marriages, etc., of which the most important points are: -

1. The perfectly free consent of the woman;

2. The non recognition in any Courts in the Colony Proper of suits for conjugal rights in the case of polygamist marriages;

3. The dowry shall constitute an obligation on the recipient to maintain the woman in the event of her being deserted or reduced to poverty;

4. To prevent abuse of this custom the dowry may be recovered by the husband in case of his wife's desertion without just cause;

5. Such claim for restoration of cattle not to be heritable or transferrable from the husband;

6. Dowry is omitted from the essentials of marriage as recognised by law and it can only be claimed by the father or guardian in cases where the husband shall have agreed to pay it.

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It may be noted that native women are in favour of the continuance of the lobola system which imports to her marriage something which is best expressed as "respectable".

In its original idea the custom amounted to a provision for a wife or widow in certain circumstances but like many other customs it has been perverted. It is also a means for binding families and sub-tribes together and securing the oversight of children. It is advisable not to sweep away the custom but to utilize it for a time while the way is being paved for more enlightened views. The Commission has therefore framed regulations restricting without ignoring the practice so as gradually to lead to its abolition.

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NATIVE MARRIAGES AND POLYGAMY

It would be for the welfare of the native people if polygamy could be speedily abolished but the Commission recognises that institutions which have become rooted in the social life of any people are not easily overthrown by direct enactment, and in view of the present stage of progress amongst the natives does not at present recommend the suppression of polygamy in that manner. Rather should indirect measures be adopted the effect of which would be to draw restrictions round the practice in the form of certain disabilities. The reasons for these views are:-

(a) Polygamy, whilst discounted by enlightened christian opinion, is yet not repugnant to the general principles of humanity and justice as are the customs of immolation of widows in India and of witchcraft in South Africa. Absolute prohibition of these last mentioned practices by direct enactment is justifiable and necessary on the ground of the sacredness of human life.

(b) We cannot adopt the view that in dealing with a people among whom civilization has but recently come marriage can only be recognised as lawful when it has been performed according to the rites of civilized countries and has been duly registered. We cannot hold that marriages are not in reality marriages so long as certain essential conditions are fulfilled, namely, mutual life, fidelity, mutual support, and recognition of duties to children; for were such marriages not recognised at least two thirds of the population of the globe would be in the position of being illegally married.

(c) The suppression of polygamy by direct enactment has not been attempted in other countries and the Commission does not consider that the practice should be at once suppressed in this country amongst the native population.

The following methods of gradually suppressing polygamy have been suggested: -

(1) Natal System, which provides for official witness who attends the marriage ceremony and enquires of the woman whether she is marrying of her own free will and consent. On this consent being given and the terms of lobola ascertained, the information is conveyed to the Magistrate who registers the marriage. This system may hereafter enable the law, by refusing its sanction to more than one marriage, entirely to suppress polygamy. The Commission is however for various reasons unable to recommend the adoption of that system in the Cape Colony or the Transkei.

(2) Compulsory registration of all past and future native marriages and after a time to limit registration and recognition to only one of such future marriages. The Commission considers that the difficulty of giving effect to this proposal would be too great.

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(3) Legalise all past and future native marriages whether registered or not, but impose a fine on husbands who hereafter marry according to native rites without having such marriage registered. After a certain time only the first wife married after such date to be regarded as legally married. The Commission does not favour this proposal.

The Commission makes the following recommendation:

(1) All existing marriages, however contracted, to be recognised as valid.

(2) All future civil marriages to be registered.

(3) All native marriages by native custom to be recognised up to a date to be fixed.

(4) After a date to be fixed, recognition of one marriage only, being that of first wife married according to Native Custom; provided (a) such date be not less than five years from promulgation of regulations, (b) rights of children of other unions in the family not to be affected in regard to inheritance of property apportioned to them during life time of parents, (c) from the fixed date no court shall entertain claim in respect of dowry other than for first wife.

Registration is to be aimed at so as to obtain certainty as to rights of husbands, wives and children, but it should not be given effect to until native opinion appreciates its benefits. At present, permissive registration is recommended. Marriage according to native custom, as creating legal rights, must be recognised, by the adoption of the above proposals the legal status of the first wife and devolution of unapportioned property to her eldest son as heir are secured. The informal dissolutions of marriages commonly transacted by natives should be recognised in so far as that children will not be prejudiced.

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NATIVE LAW OF INHERITANCE AND SUCCESSION TO PROPERTY

The native system of inheritance is that of primogeniture and is legalised in the Cape Colony by Act 18 of 1864 which is however incomplete owing to non definition of native laws and customs. In practice the distribution of property in deceased estates is generally made by the natives themselves in accordance with native law. The Commission has drafted a Bill providing for the completion of Act 18 of 1864 and for the requirements of the Native Territories; while adopting native law in the main, care has been taken to introduce changes tending to the elevation of women and the advancement of natives desirous of rising above the level of their own customs. Other features of the Bill are the securing of the rights of women to acquired property and the privilege of testamentary disposition by every native above the age of 21 years. A clause has been introduced providing for the disinheritance of an heir in accordance with native practice. The suggestion that an orphan chamber be established is one that merits consideration.

Although it may appear objectionable to have the Colonial and native systems of law in operation side by side it must be remembered that the native law of Inheritance and Succession has been and will be followed by the native population. Our aim should be therefore to draw them away gradually from these customs until they are ready for a more enlightened system.

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NATIVE TENURE OF LAND AND THE INDIVIDUAL TENURE SYSTEM.

According to Native Custom the land occupied by a tribe is regarded theoretically as the property of the Paramount Chief; in relation to the tribe he is a trustee holding it for the people who occupy and use it, on communistic principles, in subordination to him. The Commission, in view of native sentiment, is unable to recommend a general division of native lands and the issue of title at present for the territories; it nevertheless considers that this should be the end to be aimed at. Meanwhile it is recommended that the following regulations apply to all land in the native territories:-

(a) all tribal lands to be vested by formal title deeds in Boards of Trustees.

(b) the Board shall have no power in regard to mortgage, alienation or sale except for specific purposes and with the approval of the Government;

(c) the Trustees shall frame annual reports to be laid before Parliament;

(d) each Magistrate shall keep a register of occupiers of land;

(e) the occupier of any kraal or plot of land may sell his right of occupation to another native;

(f) rights of occupation shall cease if the occupier is absent for more than twelve months;

(g) rights of occupation may be granted by the Magistrate;

(h) rights of occupation shall be heritable;

(i) individual title may be issued upon receipt of a request to that effect from the majority of occupiers;

(j) title shall be issued in respect of plots occupied by the individual;

(k) claims to the individual title will be decided by the government after receipt of recommendation from a commission consisting of the Magistrate and two Headmen;

(l) individual title shall be heritable but not transferable by purchase of sale except between natives.

A similar scheme should be applied to locations in the Colony Proper. The system of transfer of land held under individual tenure should be made simpler and less expensive.

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LOCAL SELF GOVERNMENT.

The Commission feels that the time is opportune for a departure from the existing system of administration and therefore submits the following proposals.

The Colony Proper is occupied chiefly by Europeans acknowledging institutions belonging to European civilisation whereas the Territories are occupied by persons of a widely different origin who still adhere to primitive tribal institutions. Despite this difference, the Government of the Colony and of the Territories is attempted with one and the same undivided administrative machinery. Then also, regard must be taken of the isolation of the Territories and of the mass of detail laid on heads of departments to the serious detriment of the requirements of the territories. The Commission considers the necessity for a division of labour if not of responsibility is clearly established.

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The Kafir is best governed by personal touch, a method that accords with his own tribal system, and the Commission considers a mistake has been made in supposing that he could immediately and spontaneously accept the existing system of government. The Commission also considers the provision of magistrates and chief magistrates to be insufficient, as it is vain to expect judicial officers to bridge the gulf that separates the people from the government. The Chief magistrates, owing to lack of powers and the multiplicity of their duties, have not been able to undertake those functions of supervision and leadership which are indispensible to the advancement of the natives. It is therefore recommended:

(1) That a permanent executive officer be appointed whose continuation in office is to be independent of party government changes. He should be stationed in the Territories and be charged with the administrative details thereof now falling to the Secretary for Native Affairs; all official co munications should pass through his office; he should be consulted by the Government on staff matters and general administration; the Government should delegate to him powers necessary to the good government and welfare of Transkeian natives.

(2) It is desirable that a Recorder or other judicial officer be appointed for the Territories for the following reasons. (a) The special character of the law prevailing in the Territories, (b) the necessity for immediate review of magistrate's decision, (c) the advantage to be secured by the supervision exercised by such judicial officer over subordinate courts, (d) the advantage of easy reference to an Appelate court without the expense to suitors entailed by appeals to colonial courts. The judicial functions of the Chief Magistrates should cease whereupon these officers would be able to concentrate attention on the civil administration of their districts.

The chairman dissented from the above resolutions, being of opinion that circuit courts presided over by a judge of the Supreme Court would be preferable to the creation of a special judicial officer.

(3) Sir Theophilus Shepstone considers it would be an advantage if meetings of chiefs and headmen were held to discuss with the Secretary for Native Affairs any contemplated change in the law or administration. The Commission recommends that a native council be established having power only to suggest or initiate alterations of the law for the consideration of Government. The Commission considers there should be one council for the whole Territories consisting of a President who would be the Governor's deputy, three chief magistrates and fifteen natives elected by the people.

(4) Chief Magistrates should be relieved of judicial functions which will put them in a better position to act as advisers to the natives.

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LIQUOR TRAFFIC

The Commission has been deeply impressed with the evidence forthcoming regarding the sale and consumption of strong drink and is of opinion that the use of spirituous liquors is an unmitigated evil to the native races. It favours the continuance of prohibition in so far as Transkeian natives are concerned.. In regard to the Colony Proper it has considered the preventatives adopted by other Governments and is favourably impressed with the laws of New Zealand on this subject. In that country there has been special legislation for regulating the sale of spirits within what are termed "Native Licensing Districts" and preventing the sale or supply of spirits to natives therein or the importation of spirits within such districts against the wishes of the natives; but no native licensing districts are constituted unless in the opinion of the Governor-in-Council at least one half of the inhabitants thereof are persons of the aboriginal native race. It is considered that this principle should be adopted in this colony and that in predominently native areas special restrictive legislation should be introduced.

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PASS LAWS

The Commission considers that the Pass Law should be repealed and natives encouraged to seek employment in the Colony without being obliged to obtain passes. Where the natives desire it, protection passes might still be issued on application by Magistrates, Location Inspectors and Pass Officers.

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SUPERINTENDENCE AND INSPECTION OF NATIVE LOCATIONS.

The Commission considers that the control of locations by means of superintendence is advantageous.

With a view to bringing pressure to bear on urban local authorities to provide suitably for water supply, sanitation, etc. in municipal locations, it is suggested that the threat of cancellation of the regulation providing for the payment of rent by the location residents be made use of.

An elected committee of municipal location residents could conveniently undertake the management of some location affairs thereby developing a capacity for municipal self-government.

It is thought that the time has arrived when in some of the older towns the existing informal tenures of municipal location plots should be replaced by the substitution of permanent titles.

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GENERAL REMARKS

The Commission has had ample evidence placed before it to show the very great influence for good exercised by Christian missions in regard to the moral educational and industrial welfare of the natives.

To the prudence and skill of magistrates and other officers charged with the administration of affairs in native districts and territories may be ascribed to a great extent the present prosperity and advancement of a considerable portion of the natives. Such examples show that the success of our government of the native tribes depends as much upon the tone of the public servants we employ as upon the intrinsic merits of the measures we introduce among them.

The Commission recommends that practical recognition be accorded native affairs officials who qualify in law, pass an examination in the Kafir language and prove themselves acquainted with native law and custom. A precis of laws affecting natives in the territories should be drawn up in simple language and translated into the Kafir dialect for the information of the people.

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"UKULOBOLA"

By the Rev. A. Kropf.

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From the earliest age of history Ukulobola was practised among all oriental nations and in their migrations towards the west they brought it even to Europe, where it died away eventually under the influence of Christianity. From its earliest practice as recorded in Holy Writ, it was not a religious but a civil or social custom, and if you like to call it an evil, it is one of the social evils which we find among all nations coming in contact with Christianity.

Ukulobola in its original significance has degenerated and it cannot be denied that at present many evils are connected with it. Those who contend that the custom of a mere buying and selling I wish to refer to the Bible where

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the Besrow verb Mohar never means buying or selling in the ordinary sense. Its primary sense is that of exchanging which is also proved by the softened form Mur and the hardened Makar. The nearest signification of this word is given by Gesenius; uxo rem pretio parentibus soluto - It is the equivalent which the bridegroom gives to the bride's father for the services which can no more render to him but must render to her husband.

That Ukulobola is not buying and selling can also be proved by the husband having no liberty to sell his wife again which he can do with bought chattels. The use of this word in the Old Testament is restricted to this transaction only, and cannot be used in any other connection, just as it is in kafir where it is alone used for marriageable women.

We find the word for the first time in Genesis XXXIV.12. "Ask me never so much dowry and gift". It is here connected with the word Mathan. The first Mathan is given to the father and the second Mathan to the bride. Also Genesis XXIV.53. where the servant of Abraham gives to Rebecca jewels of silver, of gold and raiment but to the brother and mother precious things. That the custom of Ukulobola became at that time consolidated, we infer also from Genesis XXIV.7.

The daughter was of valuable service to the father in the house or in the field by minding sheep, etc. By giving her to be married he lost these services and therefore a part of his property and wealth which had to be redeemed by the bridegroom either by money, precious things, cattle, or by serving the father-in-law in the fields like Jacob or as a warrior like David. One Samuel XVIII.25. In this sense the customs prevailed among the Arabs, Mohammedans in India, the Kurds, Turcomans, Circassians, and Kabyls, the latter giving eight pots of fat and thirty camels for a girl. The Woguls in the District of Perm in the Ural Mountains give five roubles for a lean, and twenty-five for a fat girl. The Tahiers in West Africa ask Ukulobola but the parents often refuse it for the purpose of claiming the children. But if the girl has the courage to ask for and accept the Ukulobola then the issue does not belong to the parents.

If any doubt should still exist about the meaning of the word Mohar a reference to Exodus XXI.18. - XXII.17. will remove it. Those sections speak of the indemnification to be given for loss of or damage to property, the word property including the daughter. In this passage occur the noun and the verb. The man had to pay the Ukulobola even if the father refused to give the daughter to him. Here we see that the Ukulobola was already fixed, and Dout. XXII.29. mentions only the highest Lobola in such a case.

From the foregoing we infer -

1. That in ancient times the brother, just as it is among kafirs, had a nearer right of control and protection over his sister than the father.

2. The Mohar is never mentioned as given to the bride, which the English word dowry will infer, but to the father. In Dout. it is said "He shall give to the damsels father 50 shekels of silver".

Homer in his Iliad Hymn XI.241 says "The unfortunate, far away from his consorts, far away from his wife, for whom he had given first a hundred bullocks and further promised for her a thousand goats and the same number of sheep". Or in the Odyssey, "Till the father shall give me back all bridal presents which I have given him for the girl".

Among the Germans the unmarried women were in the power of their male relatives, who had to defend them and who enjoy and receive as an equivalent for this defence the indemnification which those have to pay who offended the woman. This right, analogous to the Roman Manus, was exercised by the father,

brother or guardian. As the girl, by being married, was transferred from such guardianship to that of the husband, the marriage could only be concluded by the formal public transfer of the bride from the guardian to her future husband; and as at the same time this guardianship was looked upon as a complex of property rights, on account of those moneys that fell to the guardian for defending and protecting the woman, the transfer therefore was done as a purchase - not of the woman, but of the guardianship, which was considered to be a property right. This transfer of the wife was executed in the open market place and marriage was legalised by paying down a fixed sum. In later times this money did not come into the possession of the guardian, but was settled on the wife as provision for her future widowhood. In the course of the middle ages this purchase of guardian rights disappears and there remain to this day only certain symbolical actions such as the giving of a ring by the bridegroom to the bride. When this custom died, the right of the guardian to marry his ward against her will died at the same time.

Ukulobola obtained also amongst the Pruczi and the Sclavi who inhabited the Eastern part of Europe. After the Lobola was fixed by the father the girl would cry "Who will in future make the bed for my father; who will wash his feet, my dear little dog, my dear little pig, who will feed you in future, my dear fire who will in future supply you with wood that father and mother may refresh their dying limbs with your heat". These details aptly illustrate similar customs among the kafirs. The women attach great honour to the lobola custom and think themselves degraded by being given away without lobola.

A remnant of Ukulobola is still to be found in Christian Norway. Before the bride and bridegroom go to Church, the attorney of the bride tries to get as much as possible from the bridegroom, say 100 dollars with horse and sledge, by praising highly the beauty of the bride; whereas the attorney of the bridegroom tries his utmost to lower the sum by praising the bridegroom. During the whole transactions the bride has to be present. As soon as it is finished the marriage ceremony commences.

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SOUTH AFRICAN NATIVE AFFAIRS COMMISSION
1903 - 5

MEMBERS: -

Transvaal

Sir Godfrey Lagden (Chairman)
J.C. Krogh
J.A. Hamilton

Cape Colony

W.E. Stanford
F.R. Thompson

Natal

S.O. Samuelson
Marshall Campbell

Orange Free State

J. Quayle Dickson
J.B. de la Harpe

Rhodesia

T.C. Scanlen

Basutoland

H.C. Sloley

Terms of Reference.

1. The status and condition of the Natives; the lines on which their natural advancement should proceed; their education; industrial training and labour.

2. The tenure of land by Natives and the obligations to the State which it entails.

3. Native Law and Administration.

4. The prohibition of the sale of liquor to Natives.

5. Native marriages.

6. The extent and effect of polygamy.

Natal Code of Native Law.

Law No. 19, 1891, of the Colony of Natal, enacts what is known as the Code of Native Law; it does not abrogate Native unwritten law and it comprises generally the main principles of Native law which were first codified in a more limited way in 1878. Law No. 19, 1891, has been repeatedly amended since 1893, when responsible Government was given to Natal. It has not been extended to the Province of Zululand, where uncodified Native Law is administered. It has been extended to the Northern Districts recently transferred to Natal.

The Native High Court, Magistrates and Chiefs administer Native Law as already described under limitations as to jurisdiction defined by law. The Governor is Supreme Chief of the Native population in the Province of Zululand, with powers and authority defined by Section 7 of Law No. 44, 1887, and in the rest of the Colony, as defined by this Law, amended by Law No. 19, 1891, enacting the Code. Chiefs have power to try all civil cases, divorce / . .

divorces excepted, between Natives.

In the Province of Zululand they have considerable criminal jurisdiction, but in the rest of the Colony this jurisdiction is much narrower. Appeals from Chiefs may go to the Magistrates or direct to the Native High Court. In addition to Law No. 19, 1891, and its amendments, and uncodified Native Law, the Natives of Natal are also subject to special laws applicable to them only. Where the Code, or Native Law, or special laws do not apply, then the Natives come under the ordinary Colonial Law as applicable to Europeans.

Transvaal Native Administration.

Up to 1885 there was no special law in the Transvaal for regulating Native administration. In that year the late Republic made legal provision for:-

(1) The recognition of existing Native Laws and Customs not repugnant to the general principles of civilisation;
(2) The appointment of officers to exercise the authority formerly exercised by Chiefs;
(3) The constitution of the President as Paramount Chief of all Natives in the Republic.

LAND TENURE

Existing Land System

In the Cape Colony, the Natives occupy land as follows:

(1) In locations or reserves set apart for Native occupation;
(2) In locations on private property;
(c) As servants in continuous employment of land-owners;
(d) As holders of individual titles in freehold or leasehold or under quitrent tenure;
(e) In urban locations.

The policy followed by the Cape Government has been to adopt the Native communal system of tenure, and by adopting it to meet changing conditions of life and by establishing sound administration, to pave the way to individual tenure system. First, Native residents are registered for hut tax purposes, then the tribal area is sub-divided into locations. The influence of the Chief has been utilised, but at the same time controlled. For the first system of individual title, see Cape Act No. 40 of 1879; in actual working that Act proved defective in various respects and to provide a remedy, the Glen Grey Act No. 25 of 1894 was passed.

The broad principles recognised in the Glen Grey Act, form of tenure may be summarised as follows:

(1) The grant is subject to the payment of perpetual quitrent at the rate of 15/- per five morgen allottment, which is the average, and 3/- for every additional morgen, and survey expenses including cost of title.
(2) It is inalienable without the Governor's consent.

(3) It is hereditable according to the law of primogeniture as observed by the Natives themselves, powers of disherison for good cause and after due enquiry being conceded.

(4) Transfer upon approval of the Governor or according to the table of succession is effected by simple endorsement of the Residential Magistrate upon payment of a registration fee of 2/6d.

(5) It cannot be sub-divided or sub-let.

(6) Rights of way and rights of expropriation for public purposes are reserved, mineral rights being subject to the provisions of the Mineral Law of the Colony.

(7) It is liable to forfeiture for non-fulfilment of conditions, particularly for:-

(a) / . .

(a) Rebellion;
(b) Conviction of Theft;
(c) Non-beneficial occupation;
(d) Non-payment of outstanding instalments of survey expenses or quitrent, after summary process of distraint.

(8) The value of the land cannot be counted for the purpose of qualifying for the franchise.

Outside tribal areas there has not been, nor is there, at present, any bar to the acquisition of landed property by Natives.

In Natal, Natives occupy land as follows:-

(a) Locations vested in the Natal Native Trust constituted under Letters Patent dated the 27th day of April, 1864.

(b) Mission reserves vested in the Natal Native Trust for religious and educational purposes.

(c) Crown lands.

(d) Private Lands.

(e) Special Trusts created for European immigration not yet so utilised, and for educational purposes.

Act No. 7 of 1895 enables Natives to dispose of immovable property by will, and regulates the devolution of such property in cases of intestacy in accordance with Native Law. Under sub-section B of section 6 of the Courts Act of 1898, cases involving questions of ownership of immovable property, or questions of title thereto or rights therein, are excluded from the jurisdiction of the Native High Court.

Law No. 2 of 1855 was enacted by the Native Legislature to prevent the unlicensed squatting of Natives on Crown lands or private farms, and to ensure the annual rendering to Government of accurate returns of such squatters and their families. This Law, however, has become a dead letter; in fact, it is not clear that it was ever enforced. Several sections of Law No. 15 of 1871 deal with labour tenants on private land. These may also be said not to have been fully complied with.

Crown lands in Natal are occupied by Natives who are subject to certain conditions of occupation and have to pay £2 per hut per annum in addition to hut tax.

In the Orange River Colony, Natives occupy land as follows:

(a) In locations or reserves set apart for Native occupation. (Witzieshoek and Thaba'Nchu);
(b) As servants in continuous employment of land owners;
(c) As squatters and as labour tenants periodically employed;
(d) As owners of farms;
(d) In urban locations.

Under Law 4 of 1893 the number of Native squatters permitted on any farm or registered portion of a farm is limited to five families, but may, by special permission be increased to not more than fifteen families.

Under / . .

Under the articles of Chapter XXXIV. O.R.C. Law Book (see Part I, Sections 1, 2, 3 and 6) Natives may not purchase or lease land, but the articles of Part II of this chapter make special provision in respect of Natives who own ground in the T[illegible]ba'Nchu District. In this District there are 87,761 morgen owned by Natives, whose rights thereto were guaranteed under the Proclamation annexing the late Baralong Territory.

In the Transvaal, Natives occupy land as follows:-

(a) In locations or reserves set apart for Native occupation;
(b) On land owned by Natives;
(c) On other private lands;
(d) On Crown lands;
(e) In urban locations.

Section 22 of the Pretoria Convention of 1881 provided for the reservation of locations and the definition of their boundaries.

Section 13 of the P[illegible]toria Convention of 1881 provided that:

Natives will be allowed to acquire land, but the grant or transfer of such land will in every case be made to and registered in the name of the Native Location Commission, hereinafter mentioned, in trust for such Natives".

In Southern Rhodesia, Natives occupy land as follows:-

(a) In reserves set apart for the N[illegible]tive population;
(b) On unalienated lands belonging to the C[illegible]rtered Company;
(c) In locations on private lands by tenancy agreement under the provision of Proclamation of 14th October, 1896;
(d) On private farms without agreement.

In Basutoland, all land is occupied by the Natives under tribal tenure, the allottment of arable plots resting with the Native Chiefs, grazing being in common. No purchase of land within this territory is permitted.

In Bechuanaland Protectorate, Natives occupy land communally.

Communal Occupation

Recognising the attachment of the Natives to and the present advantages of their own communal or tribal system of land tenure, the Commission does not advise any general compulsory measure of sub-division and individual holding of the lands now set apart for their occupation; but recommends that movement in that direction be encouraged, and that, where the Natives exhibit, in sufficient numbers, a desire to secure and a capacity to hold and enjoy individual rights to arable plots and residential sites on such lands, provision should be made accordingly under well defined conditions.

Individual Tenure.

The right of permanent occupation should be assured, subject to the following principal reservations:-

(1) Liability to forfeiture on account of:

(a) Conviction for rebellion, treason or sedition.
(b) Failure to beneficially occupy
(c) Failure to punctually pay such rent or tax as may attach to the land.
(d) Second conviction for stock theft.

(2) The right of resumption of the whole or any portion of the lands for public purposes, subject to due compensation in land or otherwise.

(3) All rights to minerals and precious stones.

(4) The payment of an annual rent.

The / . .

The reservation to be made in the granting of individual tenure having been stated, it remains to indicate what general conditions should, in the opinion of the Commission, be included:

(1) The limitation of the area of each holding to be determined by:

(a) Present occupation;
(b) Quality of land;
(c) In the absence of special circumstances, the limit to be approximately four morgen (=8.4 acres).

(2) Mortgaging or pledging to be prohibited and invalid.

(3) Alienation or transfer not to be allowed without the sanction of Government.

(4) Succession to be the lawful heir, subject to:

(a) The right of widows to use and occupy until remarriage or death;
(b) The heir who already occupies a holding electing to abandon that holding.

(5) The setting apart of a commonage.

(6) The holdings and commonage to be subject to all such duties and regulations as may be established with regard thereto.

(7) The occupier's interest not to be liable to attachment in execution.

Squatting.

The term "squatting" includes natives residing on Crown lands not formally set apart for native occupation and whose settlement thereon is regarded as not entitled to the recognition accorded those who have permanently allotted locations, and natives on private property who are not labour tenants nor in the continuous service of the owner or occupier of such property.

The general tendency of South African legislation is to limit arbitrarily the number of native families on any one farm, regardless of its size or requirements. The Cape Colony bases its limits on the working requirements only. The Commission favours the Cape Colony principle.

The Commission considers:-

(1) That the unrestrained squatting of Natives on private farms, whether as tenants or otherwise, is an evil and against the best interests of the country.

(2) That no Native other than bona fide servants of the owner or occupier, with their families, should be permitted to live on private lands, except under Government sanction and control, and, further that such sanction should only be given on proof that it is necessary or desirable, and save in the case of labour tenants, should be subject to an adequate annual licence to be paid by the owner or occupier of the land. The word "families" does not include adult sons unless they themselves are bona fide servants.

(3) That the main principles relating to locations on private property should be applied to Natives on Crown lands other than those duly set apart as Native reserves or locations, and that sanction for Native occupation on such Crown lands should not be given unless an adequate rent is charged to the Native occupier, based upon the producing value of the land.

(4) That contracts of tenancy exceeding one year should be in writing and duly attested.

(5) / . .

(5) That, so far as may be practicable, lands held by Municipalities or other public bodies or societies which are occupied by Natives should be subject to regulations similar to those applicable to private or Crown lands, as already recommended by this Commission.

Purchase and Leasing.

In the Cape, and Rhodesia, and in Natal - with the exception of certain lands in Natal and Zululand - land except that reserved for Natives only, may be held in freehold or upon lease, without the distinction of race.

In the Orange River Colony, land may not be purchased or leased by Natives.

In the Transvaal, as provided in the Convention between the British Government and the late Republic, they may acquire land subject to its transfer on trust to an officer of the Government.

In Basutoland, the land is unalienable.

In Bechuanaland Protectorate, the land reserved to Natives is unalienable.

The Commission considers it is necessary to safeguard the interests of Europeans, but that the door should not be entirely closed to deserving individual Natives acquiring land.

Certain restrictions upon the purchase of land by Natives are necessary and it is recommended:

(1) That purchase by Natives should in future be limited to certain areas to be defined by legislative enactment.

(2) That purchase of land which may lead to tribal, communal or collective possession occupation by Natives should not be permitted.

It should be explained here that the words "collective possession" are not to be considered to bar the joint ownership of a piece of land in the defined areas by a limited number of Natives, the object of the Commission being to prevent large numbers of Natives evading the spirit of the resolution by acquiring and holding land in undivided interests, and thereby, in effect, extending tribal or communal occupation.

It is recognised that in those colonies where the acquisition of land by Natives has been hitherto un-restricted, vested rights have been set up. The above recommendations are, of course, made without prejudice to such rights.

The Commission further resolved:

That whatever principles govern the settlement of the question of the purchase of land by Natives should apply equally to the leasing of land by Natives.

The Commission is of opinion and recommends:

(1) That locations and reserves should be defined, delimited and reserved for the Natives by legislative enactment.

(2) That this should be done with a view to finality in the provision of land for the Native population and that thereafter no more land should be reserved for Native occupation.

(3) The creation, of Native locations for residential purposes near labour centres.

(4) That the right of occupation be subject to forfeiture in case of rebellion.

Trust / . .

Trust System.

In some Colonies land has been purchased by Natives and is held for them by Trustees. This system the Commission does not recommend should be continued, but is of opinion:

That it is undesirable to extend the system of officially or otherwise taking into trust lands purchased by Natives, and that any land so held and acquired should be converted into individual holdings so soon as a desire for a change in that direction is manifested by those who can establish that they have proprietory rights in such lands.

In specially setting apart any land for Native occupation, certain obligations may be held rightly to attach thereto, that is to say, the Crown should reserve:

(1) All minerals and precious stores.
(2) The right of removal and re-entry in the case of rebellion.
(3) The power to apply regulations.

TRIBAL SYSTEM - NATIVE LAW AND CUSTOM

ADMINISTRATION

Native Law

The laws, customs and usages prevailing amongst the Natives previous to the establishment of European Government over them have not been abrogated or forbidden, except so far as the same may be repugnant to the general principles of humanity and civilisation.

Tribe

The tribe is a community of Natives forming a political and social organisation under the Government of a Chief who is the centre of tribal life.

Supreme Chief

In Natal, the Transvaal and Southern Rhodesia, certain powers are vested by law in the Governor or the Officer for the time being administering the Government. This was done with the object of retaining certain administrative powers formerly possessed by Chiefs which could not be exercised ordinarily by a Governor or Administrator, and also to supersede in a manner comprehensible by Natives the Paramount Chief or Chiefs by the substitution of the Head Officer of the Government.

In the Transvaal, by Law No. 4, 1885, which has not been repealed, the State President was constituted Paramount was empowered further with the advice and consent of the Executive Council, to make and frame regulations for the administration of the law. These powers are now exercised by the Lieutenant Governor in Council.

In the Cape Colony and the Orange River Colony, neither the Governor nor the State President appears to have been placed in any special relationship towards the Native population which he did not occupy towards the rest of the inhabitants. In the Cape Colony, however, it has been found necessary to provide for certain special cases in the Transkeian Territories, by legislation. This, in Colonies where the Governor or the Administrator possesses extraordinary powers would not have been necessary, thus showing that some special executive authority conferred by Parliament is required in respect of the large masses of Natives inhabiting British South Africa.

Code of Native Law

The weight of the evidence addjuced 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 text book or handbook, for reference only, descriptive of Native Law and Custom, would be useful as a help towards uniformity in administration.

Communal Responsibility

The principal of communal responsibility was recognised by the Natives wherever the tribal system prevailed and has been adopted in the spoor laws of the Transkeian Territories and Natal. Further, it is applied in Natal and in the Transvaal in cases of homicide, assault and other injury to person or property.

Disposition / . .

Disposition of Property by will.

In the Cape Colony, a Native may, with the exception of land held under the Glen Grey Act, leave his property by will. In Natal he has this right only in respect of immovable property held under title. In Southern Rhodesia the Cape Law applies. There is nothing in the laws of the Transvaal or Orange River Colony to prevent a Native from disposing of his property by will. There appears to be no good reason for withholding from the Natives the power to make a will, and this power should be given to them in respect of devisable property.

Ukungena

The custom of "Ukungena" should not be countenanced in any way.

Age of Majority of Women.

In the Cape Colony and the Orange River Colony, a Native woman attains her majority at the age of 21 years. Under Native law she is under guardianship all her life. As soon as practicable, the age of majority should be fixed at 21 years in the other Colonies.

Succession and inheritance

The Commission is of opinion that in the case of a Native dying intestate, the succession and inheritance to all land in his estate held under title in the form customary in South Africa should, unless otherwise provided in such title, be determined in accordance with ordinary Colonial law.

Urban Native Locations

Municipal locations should be in the control of the local authority. Those who desire it should have the opportunity of acquiring in their own right, holdings for residential purposes within these locations.

It is recommended that the principle of the following resolution be adopted by defining an area within each Municipality in which Natives may reside and hold property without being subject to location regulations:

"That purchase by Natives should in future be limited to certain areas to be defined by legislative enactment".

Appeal Courts.

The Native Appeal Court in the Transkeian Territories, the proceedings of which are subject to review in the Supreme Court of the Cape Colony, is of great value to the Native population, affording as it does an early and inexpensive settlement of appeals in civil matters from the decisions of Resident Magistrates. Similarly in other colonies, where adequate arrangements have been made to secure the same object, much satisfaction has been given to the Native people.

The Native High Court in Natal is a striking illustration of an independent Court, free from jurisdiction of the Supreme Court. The risk, indeed the certainty, under such conditions of different Courts giving decisions inconsistent with each other, is shown by the fact that in these two Courts conflicting judgements involving serious issues have been given. An instance of this quoted to the Commission is where the Native High Court refused to hear a case brought before it by a coloured man, on the ground that the party or parties were Europeans, and that the case should go to the Supreme Court while in the same or an identical case the Supreme Court held that the party or parties were Natives, and that the case should go to the Native High Court. The decision of neither Court is binding on the other. The result is that a whole class of persons in Natal are deprived of all legal remedy - a disability as grave as it is singular.

The Commission disapproves of separate Courts to deal with Native cases outside the jurisdiction of the Supreme Court. It recommends that in all Native cases there should be a right of appeal to the Supreme Court. The existing Native Courts of Appeal should continue to exercise powers of final decision in civil cases between Natives, arising out of Native Law and Customs, provided that the Supreme Court shall retain powers of review.

Native / . .

Native Jurymen and Assessors

In the opinion of this Commission, Natives should not be empanelled as jurymen. The use of Native Assessors in Courts should, however, be extended.

Pass Laws.

(1) Travelling passes issued under the recognised regulations of any Colony or Possession should be in force till the journey has been completed, requiring only to be revised if thought necessary, and without charge, on arrival at first Pass Office in any other Colony or Possession.

(2) Uniformity should be secured in the form of Pass issued; a distinctive colour to be adopted by each Colony.

(3) On trains by which Natives mostly travel there should be a Native conductor, or other similar official, to give them necessary information and generally to assist them.

(4) That railway officials should be instructed to remember that the travelling Natives are paying passengers and are entitled to reasonable attention.

CHRISTIANITY AND MORALS

The Commission is satisfied that one great element for the civilisation of the Natives is to be found in Christianity.

It is of the opinion that regular moral and religious instruction should be given in all Native schools.

MARRIAGE BY NATIVE CUSTOM

The Commission considers:-

(1) That polygamy generally is on the decrease throughout South Africa.

(2) That it is not a custom which should be strongly suppressed; Christianity, civilisation and other causes will tend to its disappearance in time.

(3) That in respect of marriages under Native Custom:

(a) Such marriages should not be accorded the status of a Christian marriage solemnised by a Minister of Religion or a Civil marriage officer;
(b) All marriages under Native custom should be duly registered;
(c) Recognition of the succession rights of children should be accorded.

Lobola

The contract is not one of purchase and sale. The woman does not become her husband's slave. He may not sell her. He may not kill, injure, prostitute and maltreat her - all of which would be within his power and right were the statement correct that by the passing of "ikazi" or "lobola" a woman becomes the chattel of her husband. The customs regulating the restoration or retention of "ikazi" or "lobola" cattle constituted in the heathenish state a salutary check on both husband and wife. Should the marriage be proved a happy one, the father was contented with his cattle and the husband with his wife. If the husband illtreated his wife beyond all reconciliation, she returned to her father's protection and the husband recovered either residuum or, in some cases, none of his cattle, thus losing both the wife and dowry. On the other hand, should separation have resulted from the wife's misbehaviour, most of the cattle were returned. The woman lost caste, and her father suffered. Moreover, by Native custom no widow or woman separated from her husband, might marry a second time, except from her father's village, and with his consent, or, in his absence, that of her guardian.

Such / . .

Such, in briefest outline, is the favourable aspect of the custom as it operates among the Natives today. It is much to be regretted, however, that cases do occur of avaricious or pecuniarily involved parents bringing pressure upon their daughters to accept wealthy suitors, nor are such instances impossible under the highest forms of civilisation. But, as the law now stands, among the Natives as among ourselves, anything beyond persuasion is not permitted, and the use of force would be severely punished if brought to light.

The consent of a Native girl is necessary in every Colony or Possession in South Africa before marriage, and in some of these, where she is permitted to attain majority at the age of 21 years, her position is still stronger and she may marry without the consent of her father or guardian. Thus such hardships as are suffered are due partly to the clinging of the women themselves, even while they suffer for it, to their ancient customs, partly to their shrinking from the indecorous act of exposing their parents, and partly due to ignorance of their rights, but not to any inherent defect in the law itself.

Even if it were possible it would not be advisable to do away altogether with the payment of dowry until Christianity and Civilisation have advanced sufficiently among the natives to have substituted something which will take its place in maintaining proper relations between husband and wife, and by that time the custom, in all probability, will have died a natural death.

Holding these views, the Commission sees no good reason why a Native married under Native Customs should be debarred in any Colony from seeking for redress when deserted by his wife without just cause. This redress under the custom which governs the marriage is by way of restoration of the whole or a portion of the cattle according to the merits of the case. The rights of children born of such marriages are secured by special legislation in most of the States of South Africa, and it is certainly inconsistent that the check imposed by Native Custom both on the treatment of the woman by her husband, and on her conduct towards her husband, should be disregarded, thus leaving it open to avaricious fathers to trade upon the cattle system which, properly applied, tends rather towards upholding than to breaking down the sanctity as far as it does exist of native family life.

The Commission is of opinion that the Native custom of passing cattle known variously as "lobolo", "Ikazi" and "bohadi" in connection with marriage by Native Custom and Usage, should not be interfered with by prohibitory legislation, but be left to die out gradually as the outcome of an advance in civilisation. Evidence taken points to a tendency in that direction.

Provision should be made for the hearing and determination of claims arising under Native Custom for restitution of "lobolo" or such portion thereof as may be deemed equitable where a husband is deserted without sufficient cause by his wife.

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MARRIAGE BY CHRISTIAN RISTE AND BY CIVIL MARRIAGE OFFICERS.

Except in Natal, the principle underlying legislation on the subject appears to have been, throughout, a disinclination to accord to marriages under Native Law and Custom the full status which a Christian or Civil marriage carries with it, but so far as possible to mark the status of a couple married by Christian rites or civil ceremony, by bringing them and their property at once under the operation of the common law in such matters as applied to Europeans. The result is to remove the intestate estate of a Native who has contracted a Christian or Civil marriage from the operation of the Native Law of Succession, and to bring it under the ordinary or Roman Dutch Law, prevailing in the Colony. This disinclination is based upon the lack in marriages under Native custom of the essential condition in Christian marriage, that it is the union of one man and one woman for life. In the Native marriage, polygamy may be, and often is,

in / . .

in contemplation by the husband. Moreover, under their own customs, separation was, and is, effected by the parties concerned without judicial proceedings being necessarily resorted to, simply by restoration to the husband of the cattle, or in some cases a portion thereof, paid by him to his father-in-law.

In Natal, on the contrary, the Native marriage is fully recognised and the devolution of estates under the code of Native Law is prescribed by enactment, and such devolution is not affected by any Christian marriage by Christian rites, nor by anything but formal exemption from Native Law. The tendency there has been to level up in certain respects the Native marriage to the Christian marriage and the status and permanence of Native marriages have been recognised as strengthened by legislation. Divorce by a competent Court has been made necessary to annul a marriage by Native custom. A Native may not marry by Christian rites who already has a wife by Native law; this law is held to prevent even a Native monogamist converting his marriage under Native law into a valid Christian marriage with his own Native wife, and a Native married by Christian rites who subsequently contracts a Native marriage, commits the crime of bigamy. A Native may, however, marry an indefinite number of wives under Native custom and commit no crime.

Further, in Natal, differing again from other Colonies, Christian marriage, unless the husband be exempted from Native Law, does not improve the status of himself or his wife and does not remove his property from the Native Law or Succession and Inheritance, so that, failing sons, his property in the event of his death, goes to the male next-of-kin on whom devolves the guardianship of the widow and daughters.

Except in Natal, the intestate estate of a Native who has contracted a Christian or Civil marriage is administered according to the Roman Dutch Law, the principle of which in this respect is the division of the property in prescribed shares to the widow and children of the deceased. This is distinctly opposed to Native Law, which recognises the principles of primogeniture under which the eldest son succeeds to all unallotted property. The effect of Christian marriage under such circumstances is, therefore, to alter the distribution of the intestate estate very much in favour of the widow and minor children, but to the disadvantage of the eldest son or other male heir. This does not affect the devolution of land held under the Glen Grey System of title, in regard to which special provisions have been made to a great extent in accordance with Native Law.

In the Cape Colony a Native can escape from the position by disposing of his property by will, but in Natal, while subject to Native Law, he has no such freedom of testamentary disposition except in respect of any landed property owned by him.

The following resolutions were adopted:-

That it should be the endeavour of Ministers of Religion and Civil Officers who solemnise the rite of marriage between Natives, to satisfy themselves that such Natives in Colonies in which the effect of Christian or Civil marriage is to bring administration of their estates within the Roman Dutch Law, fully realise the legal obligations which they are undertaking.

That no Minister of Religion should solemnise a marriage without being licensed as a Marriage Officer.

CHURCH SEPARATIST MOVEMENT

The Commission would not advise any measure of legislative repression, unless unforeseen developments render it necessary, considering effort should rather be directed towards securing efficient constitutional control and organization, in order that the influences at work may be wisely directed and any individual cases in which pastors abuse the trust reposed in them, may be amendable to authoritative discipline. To this end the Commission would deprecate the recognition of detached secessionary fragments acknowledging no efficient central authority.

NATIVE PRESS

The Commission recognises the value to the Natives of their own press, and sees no cause for anxiety on the part of Europeans in the existence of a Native Press.

NATIVE POLITICAL ASSOCIATION.

The Commission sees no occasion for the adoption of repressive measures towards the formation by Natives of Associations for the protection and promotion of their political interests, so long as the movement is conducted publicly and constitutionally.

EDUCATION

The Commission recommends:-

(a) The continuance of Government Grants in aid of Native Elementary Education.
(b) That special encouragement and support by way of Grants in Aid be given to such Schools and Institutions, as give efficient industrial training.
(c) That a Central Native College, or similar Institution be established, and aided by the various States, for training Native Teachers and in order to afford opportunities for higher Education to Native students.

The Commission further recommends that it should be recognised as a principle that Natives receiving Educational advantages for themselves or their children, should contribute towards the cost - in the matter of elementary education and industrial training, by payment of School fees or a local rate, and as to higher Education, by payment of adequate Students fees.

The Commission is of opinion that, where possible, in Schools or Natives, there should be instruction in the Elementary Rules of Hygiene.

The Commission is of opinion that regular moral and Religious instruction should be given in all Native Schools.

LIQUOR

The Commission recommends:

(a) That the sale or supply of spirituous liquors to Natives should be prohibited.
(b) That the penalties for the contravention of the laws or regulations prohibiting the sale or supply of liquor to Natives should be uniformly severe throughout South Africa.

(c) That no licence should be granted to sell or supply spirituous liquors within any Native location or reserve, or in proximity thereof, where the reasonable conclusion is that no remunerative business can be conducted without sale or supply of liquor to Natives.

With regard to Kafir Beer it was unanimously resolved:

That the manufacture of Kafir Beer containing not more than 4% of spirit be permitted for home consumption; that the holding of Kafir Beer parties on private property be under restriction and in Native locations or areas in which Natives are congregated be regulated by Government; and that the sale of Kafir Beer be prohibited.

LABOUR

The following are the recommendations made, with a view to stimulate industry among the Natives:

(a) Check the practice of squatting, by refusal to licence all but necessary or desirable locations, and the imposition of a tax on such locations as may be authorised, based on the number of able-bodied Natives domiciled thereon.

(b) Impose a rent on Natives living on Crown lands, as distinct from recognised reserves or locations, such rent to be based upon the value of such land and to be regularly and punctually collected.

(c) Enforce laws against vagrancy in Municipal areas, and Native labour locations, whereby idle persons should be expelled.

(d) Encourage a higher standard among Natives by support given to Education with a view to increase their efficiency and wants.

(e) Encourage industrial and manual training in Schools.

(f) Protect the Native worker in his health, his comfort, his safety and his interests by suitable provision for his accommodation and transport when travelling by rail or road, to and from his work.

(g) See that labourer's living conditions at larger centres of labour are satisfactory.

(h) Abolish all taxes or charges upon passes when travelling.

TAXATION

The Commission is of opinion:

(1) That it is necessary to impose direct taxation upon the natives.

(2) That direct taxation can best be imposed by means of a Poll Tax or Hut Tax.

(3) That such tax should not be less than £1 per year, payable by every adult Native, with an additional £1 for every wife, after the first.

(4) That the following be exempt:

(a) Farm servants in bona fide and continuous employment.
(b) Natives domiciled within any urban area who pay local taxes.

REPRESENTATION

In the Cape Colony, Natives are admitted to the franchise or equal terms with the whites. In Rhodesia the law is the same as in the Cape. In Natal only two voters figure on the roll. In the Transvaal and Orange River Colony Natives have no votes.

The Commission considers the Cape Franchise is sure to create an intolerable situation and is an unwise and dangerous thing.

It is impracticable to take away the franchise where it has already been conceded. Some privilege should be granted Natives in other colonies, and the idea is, therefore, to change the manner in which the franchise is exercised.

The Commission accordingly recommends:

(a) That no Native shall vote in the election of any Member or Candidate for whom a European has the right to vote.

(b) / . .

(b) That the extent of such representation; that is, the number of members to be granted to Native Constituencies, shall be settled by each Legislature, and that at least one such seat should be created in each of the Self-governing Colonies in South Africa now, and in each Colony or Possession as it becomes self-governing.

(c) That in each Colony now self governing, or when it becomes self-governing, there should be created an Electoral district or districts, in which Native Electors only shall vote for the election of a member or members to represent them in the Legislature, and that there should be separate voters' lists and separate candidates for Natives only, but that this should in no way affect the franchise, the voters' lists, or the representation of the European community within such districts.

(d) That the qualification for the Native voter be the same as for the Europeans.

(e) That the qualification of the member or members to represent the Natives should be determined by each Legislature.

NATAL

NATIVE AFFAIRS COMMISSION, 1906-7

MEMBERS: H.C. Campbell, (Chairman)
T.K. Murray
J.L. Hulett
C.H. Birkenstock
H.E. Rawson
Maurice Evans
J. Scott

Terms of Reference

1. Definition of "Native"
2. Amendment of Code of Native Law and its extension to Zululand.
3. Exemption from Native Law
4. Marriage between Natives and with others than Natives.
5. Pass Laws.
6. Tenants and Landlords - Contracts between
7. Courts Act, 1898
8. Usury
9. Education: Industrial training and Ecclesiastical Control of Religious activities.
10. Labour and other connected questions.
11. Natal Native Trust
12. Control of Police by Magistrates.
13. Native Administration
14. Cost of Native Administration
15. Liquor

Native Code. Law 44 of 1887 delegated to the Administration the codification of Native Law and preparation of Rules relating to Natives. Law 19 of 1891 withdrew its power. Code cannot be changed except by Parliamentary Enactment. Parliament is a body not specially equipped for dealing with changes in Native Law. Moreover, the Natives are not consulted in the matter.

SUGGESTED POLICY FOR GOVERNMENT OF NATIVES

Charter Parliament should grant a charter to administration within defined limits for the more effective control and improvement of the Natives.

Supreme Chief. This office to be retained by Governor, with definite enlarged powers, including those of inflicting penalties for enforcing his administrative duties, and of appointing and dismissing Chiefs and holding Courts.

Council of Native Affairs. To be composed of four official and three non-official members appointed by Governor-General-in-Council, one each to retire annually. It should be enacted by Act of Parliament. Functions would be advisory and relate to:

1. Revision of Code
2. Framing regulations for guidance of administrative officers.
3. Report on appointment of Magistrates and other officers
4. Occupation of locations, etc.
5. Report on contemplated legislation affecting Natives.
6. Consider matters referred to it by Government.

Minister Secretary for Native Affaits should no longer be ministerial office but an administrative one. Minister should instead have title of "Minister of Native Affairs" and portfolio should be held by Prime Minister.

Native Commissioners At least four Native Commissioners should be appointed as the principal Executive Officers of the Native Administration. They would have no judicial powers but would be the advisers of the Government and the protectors and helpers of the Natives. They would advise the Supreme Chief in the selection of Chiefs, and would supervise the action of Chiefs. They would exercise general supervision over Magistrates who would be subordinate. The Native Commissioners should be answerable direct to the Prime Minister. These appointments are considered to be the leading feature in the Commission's scheme of policy.

Magistrates / . .