2.3.2.2

CONCLUSION.

We are now in a position to draw a few ~~ge~~ general conclusions from the foregoing description of Native marriage in the Union. Native marriage in its ~~true~~ relation to the social structure of ~~Native~~ tribal life has nowhere been fully recognised. It has been subjected to the judgement of the "civilised world" and modern Western civilisation has ~~alone been considered as civilised~~ been taken as the standard. If we look at the various civilisations we see that there are a number of universal institutions each of which is adequate for the society in which it originated. Each institution combines and interacts with others into an effective setting for human life ~~and culture~~, but if one institution is removed from the rest and transferred to a society in which the conditions differ to any great extent it loses its original ~~function~~ meaning, and after a time may even disappear entirely. ~~or survive merely as an interesting or picturesque custom "of olden times"~~. We must therefore briefly consider whether marriage according to Bantu law can function effectively in a milieu of Western civilisation.

Acts passed by the administration are naturally not the sole agencies affecting ~~causes of the degeneration of~~ change in Native marriage. Many laws have only come into existence after a change has already occurred and merely reflect ~~such change~~ that change has. Economic conditions have ~~affected~~ influenced marriage very considerably. For example, it was not legislation but contact with the European system of money economy which converted the lobola medium. The word "tenga", to buy, formerly never heard in connection with marriage is frequently used of the lobola transaction today because of £.S.D. (which have no religious significance as yet).

Polygamous marriages are the first to be affected by the economic conditions existing in urban centres. Polygamy is largely the result of a surplus of women, therefore it is rare where, on account of the labour demands, there are a greater number of men. In early Bantu society the polygamists were mainly the old and wealthy men, but in urban centres the old are not as a rule more wealthy than the young ~~because~~ where there is little discrepancy in the wage earned by the majority of town Natives. This amount is so meagre as a rule that it is difficult enough to support even one family. The economic advantages accruing to a polygamist are absent when once he moves to the town. His wives have no ground to cultivate and therefore rely on his labour for their support. If the women also work there is little family life and the chances of bearing and rearing children is made more difficult. The prestige of the man is not enhanced by having many wives in the town where the aim is to emulate the externals of the civilisation of the European. Polygamy is a dying institution in the towns and it seems unnecessary to agitate for legislative restrictions at this time.

Though the number of polygamous marriages is decreasing, the morality of the Native in the town is not improved. Under town conditions, girls are no longer subject to periodic examination

by the old women or by their parents, marriage takes place at a later age, and men and girls are subject to no tribal restraints. The following quotation is a description of conditions in one South African township. "Native illegitimacy, regarded seriously in the kraal is found to be accepted complacently by the European, and the Native, obsessed by his sex instinct, and severe tribal penalties, by a 2/6d weekly contribution for the keep of the child, indulges his instinct to the full. The conditions regarding immorality in urban locations are probably worse than in rural, where native customs survive to a higher degree. The urban locations have a greater proportion of unattached men; these form loose connections, and so have an illegitimate wife and family in urban areas, and a legitimate wife and family in rural location. At least 50% of the births are illegitimate - that is, receiving the sanction of neither native custom nor church.. No child in native society is ever without a home or relative, one might almost say that no native is ever an orphan. The orphan state is prevalent in towns and has a considerable bearing upon the number of non-chaste girls of low age". (Landler M.O.H. in Report on East London Health Conditions.)

Unions between people without the passing of lobola or any other legal or religious ritual are being looked upon by the natives as lawful marriages (1), and their number in Johannesburg exceed the marriages by lobola or European rites (2). A large number of native marriages are short-lived; with little or no excuse the man deserts the woman, sometimes he even seizes the children, and in many cases takes another wife regularly or by native customs. The woman in such a case has no redress, for, in the eyes of the law, she is not married, and besides, divorce and law-suits are expensive. Another result of such unions is that the children are brought up by the mother, whereas in Bantu society, though the closest of all bonds exist between a mother

(1) Native Economic Commission Evidence P. 9179.
(2) " " " " P. 9180.

and her child, (more especially if the father has more wives than one), the man or rather the males of the family, exert the strongest restraining influence on the growing generation.

Insert : 5a : The pattern &c.

Lobola is part of a strong tribal organisation, and it is there alone that it works at its best.

Some form of recognition of customary marriage between natives is essential, for the majority of natives are not as yet in a position or prepared to marry by European rites. If we take from them their original ceremonies, it is incumbent upon us to substitute an equally effective machinery to deal with the relation between the sexes and the individuals of the family. We have two modes of marriage to offer - Christian and Civil.

Insert in the (p5) -

Even where marriage is by Christian rites, heathen elements are frequently

customs introduced - for example, Rev. Andrew Kgosa, marriage officer in Bechuanaland Protectorate among the Bangwaketse, states that many of the young couples presenting themselves for marriage by Christian rites have cuts on their wrists. These marks are made by the maternal uncle at the time he sacrifices the ox, without which the bogadi ceremony is incomplete. Another example of modification is found among the Bakgatla, who are officially Christian, where the girl is secluded from the time of the reading of the banns until the marriage. ~~tabu~~. (Schapera).

In spite of ~~any~~ external ~~similarities~~ adaptations in ~~of~~ marriage by Christian and Bantu modes, ~~however~~, the spirit of the two religions is widely different. The aims of the former type of marriage are stated as being threefold. Firstly, "It was ordained for the procreation of children to be brought up in fear and humility of the Lord and to the praise of his holy name". The Bantu father openly desires children to praise and perpetuate HIS name. Among the Bantu the religion is primarily ancestor-~~worship~~ cult, and to all people practising that ~~cult~~ descendants are the first essential of life.

Secondly "it was ordained for a remedy against sin and to avoid fornication." All marriages attempt to combat immorality, but to the Bantu the ascetism of a Paul strikes at the very basis of their society, which requires as many children as a woman can bear. Such words as "it is better to marry than to burn" are entirely out of harmony with the Bantu outlook.

Thirdly, "it was ordained for the mutual social help and comfort that the one ought to have of the other both in prosperity and in adversity"! The same moral restraints are imposed on both parties to a Christian marriage, ~~and the woman is valued apart from her procreative powers~~. Throughout the New Testament, emphasis is laid upon the divinity of the individual soul and the individual nature of Christian marriage, it being clearly stated that "for this reason, i.e. matrimony, shall a man leave his father and mother and shall be joined unto his wife". The ~~custom~~ function of lobola in native life and the family nature of Bantu marriage has already been indicated.

The pattern of the Bantu family has been disturbed on account of the well intentioned desire of the ignorant to better the position of Native women. With the increasing independence of women lobola is seldom needed for maintenance and is losing an important practical function. Though it

~~Lobola~~, though it has nowhere been made a punishable offence, lobola is considered, even where recognised as a necessary evil or potential source of danger to individual liberty rather than as a well developed cultural organisation. It is

"It is necessary" said President Warner of the N.A.C. "to guard against the assumption that because the single term marriage is used to describe the conjugal relationships established both under the Common Law of the country and Native law that they are one and the same thing. They have indeed so much in common that each form regularises sexual union and the status of offspring, but in other respects the two institutions are fundamentally different in nature and the law governing them." (1) "The simple fact is that Native customary relationship can be identified as a marriage only by reference to its surroundings; its recognition is strictly limited and local; and to separate the custom from its associations, universalise its recognition and judge of its significance in every issue of South African law by the tests of a civil marriage must inevitably lead to confusion and chaos. Whatever it be, a marriage by Native law is not equivalent to a marriage by common law."

As the 1883 Commission points out, Native marriage is worthy of recognition in its own sphere. "Dealing with the question of marriage in its broadest aspect, we cannot accept the view

(1) Guma vs. Guma 4 N.A.C. 220.

extensively held that in dealing with a people among whom civilisation and Christian laws have but lately come, marriage can only be recognised as legal and valid when such marriage has been performed according to the rites of civilised or Christian countries and has been duly registered. We recognise the essential element of marriage to be a contract between a man and a woman into the celebration of which a certain defined social or civil or religious ceremony enters, whileat the same time we hold that the Christian law of marriage sets for the truest and purest idea of such a union, and fixes what should obtain amongst those who have accepted Christianity as a religion or in states ruled by Christian law. But we cannot on this ground hold that marriages celebrated in this or other countries where Christianity has not been established or where the civilisation is not Christian are not in reality marriages whether such marriages are monogamous or not, so long as certain conditions are fairly fulfilled viz. mutual life, fidelity, mutual support and recognition of certain duties to the offspring of such unions or marriages; for were this not recognised at least two thirds of the entire population of the globe would be in the position of being illegally married and therefore without any of the rights of marriage or responsibilities to children which belong to marriage, and the children without their just and natural rights." (1) '63 Comm. S84(b)

The Commission wished Natives either to be subject to their own Native law or to be wholly under the civil law of the land. For example, it never intended to permit a Native to validly contract a civil or Christian marriage during the subsistence of a marriage by Native rites.

Despite the above quotations, the ancient marriage ceremonies are fast disappearing, ~~because~~ the legal aspect is being emphasised above all others in an attempt to bring Native marriage into line with the conception of marriage as a contract.

It is possible for two entirely different systems of law to exist side by side. It is a principle of British law to allow a subject people who already have laws of their own to retain those laws until altered by competent courts. By the proclamation of Sir D. Baird in 1806, the rights and privileges of the inhabitants of the colonies as they existed under the Dutch East India Co. were expressly reserved to them. In this way Roman Dutch law was secured to the Europeans of South Africa. The natives of South Africa had an analogous claim to the recognition of their own social laws and customs.

The establishment side by side within the Colony and its Native dependencies of distinct systems of law may at first appear impracticable. This is however the position in India, where Mahomedan and Hindoo laws of inheritance are found in successful operation with British law which is applicable to a certain section of the population; in Bombay there are special courts to deal with polygamous marriages.

In South Africa the need for such a system has given rise to special provisions, such as Act 18 of 1864, and to the special legal machinery of Native Appeal Courts and, since 1927, Divorce Courts, etc., and to definite officials, such as Native Commissioners. The laws themselves, however, have not been kept apart but, as the Native Administration Act shows, it is the policy of the South African Government to combine European and Bantu marriage laws, without according full recognition to the latter.

In S.A. The majority of natives are still in tribal reserves where marriage by either Christian or Civil rites is unsuitable and not understood; it is essential, therefore, in order to preserve order and morality, that native marriages, polygamous or otherwise, be considered as valid and binding.

However, Though Bantu ethics may not be so high, the sacredness of the moral aspect of marriage suffers only from the Christian point of view, through polygamy.

Unfortunately, the conversion of the native to Christianity has consequences beyond the fact that he adopts a Christian faith and is received as a member of the Christian church. It automatically brings about a change in his relation to his family. The change is evidenced in such matters as Ukumgena and we find Christian girls frequently seeking help from the missionaries when, on the death of their husbands, they are claimed by his heathen brothers. If lobola has been given, it has been held by the courts of Natal that such protection cannot ~~legally be given~~ enforced by law, and if no lobola has been passed, the heathen relatives contend that no marriage has taken place and therefore claim the children. Christian marriage will inevitably result in the breakdown of the kinship system of the Bantu.

Marriage by civil rites or "according to the ordinary law of the land", as it is called, is, in South Africa, a reflection of Western civilisation interpreted by a Christian people. It is therefore hardly likely to be more suitable to the Bantu than marriage by Christian rites, and externally, at any rate, is less attractive, the formalities consisting of publication of banns and registration. Civil marriage is a legal recognition of the

(1) "Life of a South African Tribe" by Junod. Page 526.Vol.1.

marital bond, and may be entered into in addition to a religious ceremony, as is often the case in Christian, Jewish and Mahomedan marriages in South Africa. The effects of marriage by civil rites, however, conflict with the effects of marriage in accordance with native custom.

/Civil marriage is a legal skeleton alike for men of all colours, races and creeds residing in the particular country. It is therefore only subject to local variations. Christian marriage, on the other hand, is essentially religious, in other words it has a developed ritual but need have no legal consequences beyond the fact that the couple are bound by the sanctions and monogamous principles of the Christial religion. It is Christianity which includes such things as individual freedon of choice, the high status of women and a fine moral code. Christian marriage could merely be looked upon as the uniting of two Christians. Religion which is not territorially circumscribed need have no effects on such things as property and inheritance.//

[illegible] by European countries. Zululand

The Natal code of 1878 was in force in Zululand until specifically repealed by the Native. Ad. Act. when the law existing in Natal at the time was made applicable. Native marriage was, therefore, recognised, but in Zululand, for apparently no reason at all, no official witnesses were appointed, with the result that marriages were not registered. The traditional ceremonies, including the passing of lobolos and the marriage feast were the essentials demanded by the Courts in determing the validity or otherwise of a marriage. The case of Jim Nsele vs Ndlibani

In the towns where the number of natives capable of appreciating European culture is increasing, the full privileges of Christian or civil marriage could be granted to those who are capable of benefiting thereby. The uneducated native - the unskilled labourer, the mine-boy, & the domestic servant - could have separate courts which administer native law with the help of competent assessors, so that children born in urban areas would have a recognised status in the economic & social life of the community.

The open recognition of the nature of South native marriage would have far-reaching consequences. Then only could the administration justify its condemnation of a native marriage subsequent to & during the existence of a Christian or civil union as bigamous, & the converse would follow automatically.

In part I I outlined the ancient marriage rites, & showed how they reflected the economic, social & religious organisation. In Part II I described the attitude of the administration to native marriage. It was evident that, even where the administration was unwilling to grant any open recognition, it was forced to take cognisance of certain aspects of native life which arose from the type of family established by the marriage. Legislative measures however were, together with other causes economic & political, changing the original native customs. Next The remaining chapters I showed two following chapters indicated the nature of

alternative marriage laws & their effect on the South African Native. Though not averse to destroy the old customs, it was apparent that there was no great desire on the part of the administration to put Black & White on an equality even though both had undergone identical formalities.

The interpenetration of Native & European systems of law result in anomalies & conflicts. In dealing with these, there is no definite or logical approach, which might be possible along the lines briefly sketched in the final section.

The extent to which native usages can be modified to changing needs or the extent & which & by Chiefs & Courts can be adapted to native life are problems outside the scope of this paper, but they are the questions to be considered in introducing new laws & in examining the results of culture contact.

Land

Various Types of Ownership

1 Hunting

(h) Land. Bush land comes under a different category. "It is impossible to ~~regard it as~~ identify it with the personality of any individual" (Haviland). As I do not think we need for our purposes enter into a historical ~~discussion~~ ~~examination of the conditions under which land tenure~~ discussion of the various forms of land occupation & - I & J hunters, pastoralists & agriculturists. We may say that hunting tribes do recognise that the area they themselves cover belong to them as a tribe & intruders are resented; no division beyond this is recognised. Pastoralists, on the other hand, with stock to care for, do parcel out portions of the territory in which families or clans have exclusive rights of occupation. When we come to agricultural peoples we find that an individual family becomes tied down to definite plots of ground which must be tilled to secure sustenance.

It is however important here to make a definite distinction between rights of individual occupation and communal ownership. Individual ownership of land is a fairly late conception. Among the bantu, at any rate, it has only come into existence ~~since the "Glen Grey" legislation~~ during the last century.

Mr Southey, esc Col. Secretary at the Cape, in evidence before the 1881 Commission said "The land is the property of the tribe in common, & no one ~~has~~ (not even the chief & Council) has a right to alienate it or any of it."

Maclean's Compendium of Native Laws & Customs (quoted in the 1881 Com Report) says "According to Kafir laws

all lands are held by the chief, no man having a right to alienate or sell any piece of land, & no individual having an exclusive right to any spot as grazing ground".

"In the earliest stage," says Lugard in The Dual Mandate in ~~Tropical~~ British Tropical Africa, "the land & its produce is shared by the community as a whole; later the produce is the property of the family or individuals by whose toil it is won, & the control of the land becomes vested in the head of the family. When the tribal stage is reached, the control ~~is vested~~ passes to the chief, who allots ~~the~~ unoccupied lands at will, but is not justified in dispossessing any family or person who is using the land". (p. 280) Quote Hartland p. 143

These quotations adequately describe the Bantu land organisation. ~~Later we shall see how~~ But it w^d probably be wrong to assume that ownership ~~has~~ in land has always followed the same line of progress everywhere. It does not necessarily follow that communism was the earliest form in each case. Indeed in Africa itself there has been so much "~~tribal~~ hiving-off among the various tribes that individual ownership has often been the genesis of a new tribe. (Cf. Lugard footnote p 281)

It will perhaps help us to have a clear account of how land is allocated & held among the Bantu.

Lowie pp 210, 211, 212.

II Immovable.

(a) Land

Various types of ownership as above

(1) ~~Pastoral~~ Hunting – Communism

(2) Pastoral – (a) usually communism with private ownership of stock e.g. Masai

Hottentot

(b) Collective sib-ownership – Amer. Indians.

~~(c) Chiefs~~

(3) Agricultural

Here we pass from communal – collective – individual.

African political organisation ~~to~~ (i.e. Monarchy or Chieftainship) results in communal conception being modified by investment of the land in Chief

Growth of chief power see Melanesia Lowie p 215

Collective → (1) Ewe Zopolans Lowie 212

Chief Lugard.

Lowie p 213/4 – Dahomi Uganda

Lowie p.p. 211/2 — Thonga

Harries p 33

Maclean p 123

1883 Comm.

Women's right Lowie p 214.

Indiv. right Lowie p 216

Family – 217/8 219.

Jt Ownership 219/20

Water – see Seymour p. 145

cannot sell

Lugard. Chief allots. Chief not owner but only as sovereign tribe
see footnote p 281. as to ownership also 284
In Civ.d countries conquest does not justify confiscation
of private land
Registration of territory land p 283
Land tenure not communal p. 285
Growth of private ownership p 285 also 286
General principles 287

~~Relation to other~~ Claim to land does not lapse by adverse
– Effect on Cultivation of fear of expropriation

Lowie.

interpreting section 23(1) 1927 Act,

In Makalani vs Nsanti, (Whit. p284) it was ruled that in spite of a previous customary union, a subsequent "marriage" was valid. Community of property law extends to all the assets of the husband & wife, also law that which had been specifically allotted to a specific house.

Where property has been allotted to the house of a wife of a customary union, & the wife is subsequently married by Christian rites, the property so allotted does not vest in her house but falls into the Community. The marriage sets aside the allotment made under native law to the house of that woman.

Interpreting the section which aimed at perpetuating the allotment made under native law & so safeguarding them women from the consequences of a subsequent civil marriage, which has no place in native customs, the court ~~declared~~ stated that the declaration of an intending husband was not binding as a disposition of gift or a grant. (Whit. 295- Kopnas vs

We have already seen the extent to which native marriage & lobolo questions are recognised by the law.

Cardwin