THE LEGAL POSITION OF THE AFRICAN WOMAN

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INTRODUCTORY

Legal systems all over the world have assigned an inferior status to women. To this statement the law of South Africa, based on Roman-Dutch supplemented by English Law, does not form an exception. Nevertheless, women in most parts of the world have managed, gradually and largely though still not completely, to throw off legal disabilities and to compel recognition of their status as individuals. (~~While practical acknowledgement of this has usually preceded any change in the legal position, which still lags behind the progress of civilisation, there can be no denying that the general trend has been upward.~~ Unfortunately the African woman is still heavily penalised, both as a member of a race against which much South African ~~legislation~~ discriminates, and through falling under a special, non-progressive system of law.

Except in Natal, where a Code of Native Law has operated since 1891, and the Transkei, where magistrates were authorised by proclamation to apply Native Law to cases between Africans if they thought fit, no special legal system applied to tribal groups until 1927. Nevertheless, it became more and more obvious that the adaptation of European legal concepts to tribal institutions would be a slow and difficult process; meanwhile it was held that perfect systems of Native Law existed among the various tribes for application to those very institutions. The idea of utilising these systems also fitted in with the policy of segregation which was gaining in favour, and in 1927 Parliament passed the Native Administration Act, No. 38 of that year. The Act established a series of special courts for the hearing of civil and criminal cases concerning Africans, and by Section 11 (1) gave them discretionary power to apply Native Law in cases between Africans involving questions of African customs, provided these did not run counter to "public policy or natural justice", and provided also that the practice known to the Zulu as lobolo and to the Sotho and Tswana as bogadi was recognised. Parliament appreciated that if this point were not assured the whole system would be likely to become unreal, since its way of regarding women is one of the most characteristic traits of Bantu Law, and one of those which distinguish it most markedly from "European" or Common Law.

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LOBOLO.

According to tribal ideas, the community is regarded as an organic whole, of which the women, though not viewed as independent individuals, are a by no means inferior ~~position~~ portion. An African shows the utmost deference to his mother and sisters. On the marriage of the latter, her future husband pays cattle to her guardian (usually her father or her elder brother). The amount of this payment (the lobolo or bogadi mentioned in the Act) varies among different tribes; in Natal, according to the Code, ~~it~~ the maximum is 10 cattle for the daughter of a commoner, on marrying a commoner, though payment varies according to rank; among other tribes there is no legal maximum, and the amounts vary from tribe to tribe, but it is usual for the Basuto to pay about 20, the Shangaans about 11 cattle, etc. Whatever was paid, however, would in pre-European times have been regarded with pride by a young African girl, as an acknowledgement of her value as well as a public sign of her marriage and the legitimacy of her children. The fact that calculations might be made by other members of the family which depended upon the amount of lobolo to be received when she married did not affect her status, since a commercial bargain was not the main or even a very important object of the transaction. Even the custom of polygamy did not result in lowering the status of women as such, since the position held by each wife was fixed, and a husband who ill-treated his wife would lose both ~~of~~ her lobolo, which was not returned, and the woman, who would go back to her father .

Since the passing of the 1927 Act the situation has, however, changed. This may be largely attributed to the impact of European individualistic ideas, the action of new economic forces causing both spiritual and geographical separation between members of the same family, and to the dead level of poverty which has made African fathers and guardians adopt an increasingly commercial outlook. A very large proportion of the litigation between Africans arises from questions about lobolo - and litigation is expensive. Female children are nowadays frequently only regarded as security for lobolo, and the small amount of land allocated to each tribe or individual in the Reserves is being ruined by large numbers of low-quality cattle accumulated for or from lobolo. The old idea that the sons and daughters of a house were interdependent in the matter of lobolo

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In the towns lobolo is now paid in cash, which is usually spent on the wedding festivities. It is as high as £60 - even £80.

is falling away. Sometimes the rural family of a young man working in town simply feels no obligation to provide lobolo, perhaps for his marriage to a woman whom none of them have ever seen; sometimes, on the other hand, it is genuinely unable to do so. On his side, the youth does not feel the force of family ties, and his bride-to-be may even be a woman from another tribe of whom the family would not approve of they were asked. It is still true that most African women prefer lobolo to be paid for them, but the parallel existence of "European" marriage, in which no lobolo need be paid for the woman, has tended to upset the working of the other system. No father can now count with certainty upon receiving lobolo for his daughter. Except in Natal, the courts will not recognise a customary union unless lobolo has passed. Unfortunately, at the age when most young men want to marry they have not earned enough for lobolo, even if money is substituted for cattle. The formation of illegal unions is often the result.

It has also been found that the working of the lobolo system depended upon the woman remaining a minor in law. Detribalisation tended to weaken the control of the family and the husband, and in 1943 it was considered necessary to amend the Native Administration Act to say

"A Native woman who is a partner in a customary union and who is living with her husband, shall be deemed to be a minor and her husband shall be deemed to be her guardian." (Section 11 (3) (b)).

This means that she cannot sue or be sued in her own name, open a bank account, rent a house in a municipal location, inherit or have money delivered directly to her ~~(even, in Natal, if it is compensation for her husband's death)~~, and is placed under various similar disabilities.

A woman who lives in Natal is at once in a worse and a more fortunate position. Section 27 (1) of the Code says

"ANative female is deemed a perpetual minor in law and has no independent powers save as to her own person and as specially provided in this Code".

Thus even unmarried women and widows must be under guardianship. The widow of a customary union is placed in a particularly difficult position today. She may be a woman from a different tribe, whose union took place in town and who has little or nothing in common with her husband's relatives.

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Yet according to Sections 44 (4) and 45 of the Natal Code of Native Law she and her minor children pass under the guardianship of the kraal head after her husband's death. Her property must be managed by her guarduan, and if he is an unscrupulous man he may fritter it away. Workmen's compensation for her husband's death, for example, cannot be delivered to her.

However the Natal Code, unlike the Native Administration Act, does contain provision for release from minor status in certain circumstances. An "unmarried female, widow, or divorced woman, who is the owner of immovable property, or who by virtue of good character, education, thrifty habits or any other good sufficient reason, is deemed fit to be emancipated" may be set free by order of the native commissioner's court and vested with the full powers of a kraal head. But this section makes no provision for the married woman living with her husband.

It is possible that by decreasing poverty and encouraging the growth of social services among Africans, something of its original significance may be restored to the lobolo custom. But it would probably be wiser to recognise the fact that it is a custom suited only to tribal conditions, and ~~rapidly becoming out-of-date~~ has changed its character today. The infiltration of European ideas into tribal society, the rapidity of change of old institutions, and the inevitable gap between the old and the new, together with increasing contact between different tribes, must cause much suffering and maladjustment. It would be better to attempt to decrease this, rather than to preserve customs which can only serve, under present conditions, to increase it. In short, while there is no need to adopt the attitude of the early Cape missionaries, and regard lobolo as a wicked and barbarous custom, the amount required should be limited by Union legislation ~~and it should nowhere be regarded as essential to a valid customary union~~.

CUSTOMARY UNIONS

There is no doubt that the Native Administration Act recognised customary unions. In view of this fact, it is surprising that many Europeans, particularly in the towns, do not regard such unions as legal, or differing in the least from plain unvarnished cohabitation. There is no such thing, they consider, as polygamous marriage, and women who are willing to live with a man upon those terms cannot claim to be called his wives. Such an attitude is partly the effect and perhaps partly also a contributory cause of the large amount of immorality im the towns.

It would assist toward the clearing up of this confusion if for the phrases "marriage" or "legal marriage" and "customary union" in state and legal documents were substituted "common law marriage" and "Native law marriage".

Another unfortunate fact is that except in Natal customary Uions are not registered. An early attempt to introduce registration in the Transkei was abandoned, and so was the U.B.A. attempt in 1943. It is frequently desirable in a case to prove the existence of a regular union between two people, and a system of registration of such unions, and of divorces from them, would both simplify the task of the administration of justice and give a more definite status to the African "customary wife", together with a protection which would be particularly valuable in cases of disputes about inheritance.

A curious point is that while a woman who is "legally" married (i.e. under the common law of South Africa), and who is frequently in a position of legal independence, having made an ante-nuptial contract excluding the marital power, cannot be compelled to give evidence against her husband, the customary wife not only can be so compelled but frequently is! Whatever the reasons for according this "protection" to the one woman, they may be expected to apply with equal force to the other - indeed, "protection" is surely more needed by the woman who is regarded as being incapable of managing her own affairs!

MARRIAGE

The contemptuous attitude of town-dwellers mentioned before often extends to ordinary common law marriages between Africans, which are regarded as not being "real" marriages. It is, however, probable that both the "marriage" and the "customary union" suffer from confusion with the all-too-common illegal unions, and that measures taken to discourage these and to fix the status of the customary wife must react well upon marriage.

Certain elements of Native Law apply to the married African woman as well as to the partner in a customary union. For instance, such a marriage is not, except where a special declaration has been made, in community of property. ~~It is possible to make an ante-nuptial contract, but that is expensive and rare;~~ In most African marriages the property of the spouses is kept separate, but without any definite contract. ~~(Inheritance is usually by Native Law.~~

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For Africans the Native Administration Act as amended in 1952 has altered the position under the Marriage laws, by providing that for them marriage is out of community of property unless a declaration to the contrary is made by the parties at least one month before the marriage.

The necessity for making a declaration in favour of community of property, if it is desired, at the correct time (one month before the celebration of the marriage) may easily fail to be realised. Marriage in community of property is often considered undesirable by Europeans, as it involves the minor status of the woman and may leave her at the mercy of an unscrupulous husband who wastes her earnings, but it does give her a certain protection, as it ensures that at least half the estate will not be willed away from her on her husband's death, and will be handed to her in case of divorce. Under the Natal Code, unless she makes special application to the courts, an African woman must remain a minor all her life in any case. While there is much to be said on both sides, it seems that the protection offered by marriage in community of property is particularly valuable to those who, like most African women, are not well off and who live in a turbulent and rapidly-changing society.

But, whatever choice is made, (and it will probably depend upon individual circumstances in each case), the legal implications should be fully explained to Africans intending to marry, so that there can be no question, as at present, of confusion or ignorance on this most important point.

ILLEGAL UNIONS

Many urban Africans who are unable to pay lobolo and have not realised or do not understand the possibility of a common law marriage, or who do not wish, by entering into a monogamous marriage, to dissolve a previous customary union, from illegal unions. It is difficult to adopt a moral attitude about this, as these men are attracted to the towns by economic forces set in motion by Europeans, and the entrance of African women into the towns is made difficult by deliberate policy. An African woman requires a special pass to enter an urban area, which she cannot obtain unless her husband or, if she is unmarried, her father has lived and been continuously employed there for two years. Once she has entered, she is not allowed to rent a house in a municipal location in her own name. She often does so, therefore, in the name of a man with whom she lives, although she is not his wife.

While some of the illegal unions formed in town are brief and casual, and the women who take part in them bear no resemblance to

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wives, others continue for a long period between the same man and woman, who regard each other in the light of husband and wife although they are not formally married. Similar legal disabilities attach to both these kinds of cohabitation; both types or woman are, for instance, regarded as competent to give evidence against their "husbands". It seems that it should be possible to distinguish in law between the two - perhaps by offering a higher legal status to couples who have been together for a given number of years, and who are generally regarded by their friends as a "pair". It should be remembered that it is not easy to apply rigid formulae to a society in transition. At the same time , it would be going too far to attach to such a union, however permanent, all the privileges of regular marriage, such as the legitimacy of the children.

GENERAL

The question of the enfranchisement of African women sounds of minor importance in view of the small amount of representation granted to African men, Yet, since the whole question of the franchise for Africans may not be raised here, it is desirable to point out that the more limited the representation, the more necessary it is that it should be real. European women have had a long struggle for enfranchisement, ending, in South Africa, in the passing of the Women's Enfranchisement Act No. 18 of 1930. But, in the words of the Act,

"Woman' means a woman who is wholly of European parentage, extraction, or descent."

In tribal society women often had an important influence upon political affairs, and were much looked up to. Yet today they are not only excluded from taking part in the individual voting for the three members elected by the Cape to the House of Assembly, but are not counted in the blocks of votes cast for the four elected Senators, which are given a value equivalent to the number of taxpayers (i.e. African males over 18) domiciled in the area. A similar system applies to voting for the Natives Representative Council, and where members of local councils are elected, the tax payers are usually the electors. An educational test would perhaps be necessary to exclude the ignorant African woman of the Reserves, but it is foolish not to make use of the reservoir of intelligence and ability which is to be found among the more experienced women in the towns.

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NOTES ON THE LEGAL RIGHT OF AFRICAN WIVES TO RESIDE WITH THEIR HUSBANDS IN URBAN OR PROCLAIMED AREAS

1. The full text of Section 10 of the Urban Areas Act (before the amendments proposed by the Bantu Laws Amendment Act of 1963) is set out in an annexure hereto.

2. Shortly, it provides that an African born in the Republic or South-West Africa may remain in an urban or proclaimed area for more than 72 hours if :

   (a) he or she has resided there continuously since birth; or

   (b) he or she has worked there continuously for one employer for 10 years; or has been there continuously and lawfully for 15 years and has thereafter continued to reside there and is not employed outside the area; and if during these periods the African has not been sentenced to a fine exceeding R100 or to imprisonment for a period exceeding six months; or

   (c) he or she is the wife, unmarried daughter or son under 18 years of age of an African falling into the classes mentioned above and ordinarily resides with him; or

   (d) he or she has been granted a permit to remain, by a labour bureau in the case of work-seekers or by "an officer designated for the purpose by the local authority" in the case of persons who are not work-seekers.

3. It should be stated that revised labour regulations were promulgated under Government Notice No. 63 of 9th January, 1959. These regulations, inter alia, made it necessary (1) for the following classes of women to obtain documents proving their right to be in proclaimed areas in order to safeguard themselves against arrest :

   (i) women already in employment before the regulation were issued.

   (ii) women who qualified to be in the area, whether or not they were in employment (section 10 (a) (b) or (c)).

   (iii) women who were not work-seekers but had been permitted by the local authority to enter the area (section 10 (d)).

4. Many African men marry women qualified in their own right to be in an area under sections (a) and (b), and here no great problems seem to arise. The position of African women actually registered as workers in an area will also not be discussed.

5. This memorandum will discuss only the position of wives applying to enter or remain in an area as non-workseekers under sections (c) and (d) as these sub-sections seem to be interpreted and administered differently by different local authorities.

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(1) Survey. 1958/9. P. 106.

6. Section (c) and (d)

Certain qualifications are laid down in Section (c) and provided that these can be proved, it seems that the women is entitled to a permit as of right, i.e. she must be married to an African qualified under (a) and (b) and ordinarily resident with him.

It seems, however, that different interpretations are put on the phrase "ordinarily resident with him" which will be pointed out below.

In terms of section (d), complete discretionary powers seem to be vested in "an officer designated for the purpose by the local authority" in the case of women who are not workseekers. This sub-section is not contingent upon any of the previous sub-sections. I have not been able to discover the existence of any clear-cut Government directive stating how it is to be applied, and it seems doubtful whether as the law stands, the Government has the power to insist that it should be uniformly applied by municipalities. In actual fact, it seems that there are wide divergencies in the way that different municipalities exercise their discretionary powers in granting or refusing permits to women wishing to enter the area for purposes other than employment.

JOHANNESBURG.

(Summary of position as I understand it from a telephone conversation with Mr. Steenhuysen, Senior Registering Officer, Non-European Affairs Department. Phone 23-7381).

1. Few permits are now, in fact, granted under Section 10 (c) to wives to enter the area because of the condition that a women must be "ordinarily resident" with the husband. This they interpret as meaning "ordinarily resident within the area of Johannesburg", (an interpretation which they point out has been placed beyond doubt by the Bantu Laws Amendment Bill (see later)

(Presumably women already married to (a) and (b) men and resident in the urban area at the beginning of 1959 when G.N. 63 was promulgated would have registered in terms of this sub-section, but the bulk of these wives would already have registered).

2. I put the hypothetical case of a woman who came into Johannesburg in 1960, got a job, married an (a) or (b) man while she was still working and entitled to be in the area lawfully, resided with him and then gave up work in order to have a family. Would she, for instance, qualify under section 10 (c).

The reply was that it was the sort of case that would have to be considered. However, her permit to seek work would probably have stated that if her employment terminated, she had to leave the area and this would probably override the other factors so far as any right to qualify under Section 10 (c) was concerned.

3. Those permits that are issued are under the discretionary powers vested in the local authority under Section 10 (d).

There appears to be no clearly defined policy and each case is treated on its merits.

I did, however, gather that :

(a) only women from other proclaimed areas are granted such permits

e.g. a woman from Alexandra, Pretoria or even Durban could be considered but not a woman from a Zululand or Transkei reserve.

(b) there also has to be some special circumstance, e.g. if a woman living with her children in a Pretoria township was under pressure from the authorities there to leave and her husband had been working from some period (not defined) in Johannesburg, this would be a case in which she may be granted a permit to join him.

(c) the husband need not necessarily qualify under sub-sections (a) and (b) - all the surrounding circumstances would be taken into account.

It would seem that the general policy is to keep married women out rather than to find reasons for admitting them (unlike the policy in Benoni which appears to be exactly opposite).

It was very difficult to get any clarity, and the official I spoke to kept repeating that there were no hard-and-fast rules and that every case was considered on its merits.

BENONI.

Summary of position as I understand it from a telephone conversation with Mr. Cowley, an official on the staff of the Benoni Non-European Affairs Department.

1. So far as Benoni is concerned, any man working in the area may bring a wife in from anywhere in the country, irrespective of whether he is qualified under Section (a) and (b) and for however short a time he has been married. It makes no difference whether the wife is from a rural or an urban area. The only exception is in cases where the Benoni authorities have reason to believe that the woman concerned is an undesirable character.

2. I gathered that this was done under the discretionary powers granted to local authorities under Section 10 (d). (The official concerned seemed to think that Section 10 (c) only applied to women in the area before 1959 and that its applicability had fallen away, for all practical purposes).

3. Benoni's "open door" policy is carried out with the full knowledge and approval of the central Government.

4. Their policy is to encourage and provide family housing wherever ~~policy~~ possible, and in fact :

(i) Benoni had done away with employers providing private compounds for workers in the area, except in the case of mining concerns where they had no control.

(ii) If a married woman applied for single accommodation in Benoni, it was not granted unless there was a good reason for her being accommodated separately from her husband, e.g. a letter from him explaining the circumstances and confirming her request.

(iii) If a woman had to live elsewhere, e.g. as a domestic servant and the husband was accommodated in the township as a lodger, the authorities arranged week-end permits in order that she could stay with her husband whenever possible.

ALEXANDRA.

Summary of position as I understand it from a telephone conversation with Mr. Swart of the Peri-Urban Areas Health Board, Alexandra).

1. It is much more difficult for an African to qualify under Section 10 (b) so far as Alexandra is concerned, because the proclaimed area is mainly residential and does not also include industrial and working areas, as e.g. Johannesburg. (Lady Selbourne near Pretoria was mentioned as another area of this sort).

It will be seen under Section 10 (b) that a person must have worked continuously in an area for at least 10 years, or resided in an area for at least 15 years and is not employed elsewhere.

As Section 10 (c) is dependent on a woman being married to a 10 (a) or (b) man, its applicability would be limited because of the special circumstances applying to Alexandra, and the difficulty of qualifying under (b).

2. A wife could however come into the area if it could be established that her husband was a Section 10 (a) man, i.e. had been born and lived continuously in Alexandra.

He was of the opinion that in the case of a woman from elsewhere, the term "ordinarily resident with him" in sub-section 10 (c) was no obstacle and was not intended to preclude such wives, He stated that it "stood to reason" that this was not the intention of the sub-section, because on the grounds of common-sense, if a man has just married a woman, he could not have been ordinarily resident with her previous to the marriage.

I then asked what the sub-section did mean, and he was of the opinion that it was intended to cover the type of position where a man might have two wives, e.g. one in the Transkei and one in the town, and he was thereby precluded from bringing into town the one in the Transkei because he was not "ordinarily resident with her". If the Transkei wife was his only wife, there would then be no objection, provided he qualified under section (a) or (b).

(It should be noted that this official's interpretation of the clause is completely different to the interpretation of the Johannesburg official).

3. The position with women granted permits in the discretion of the local authority under Section 10 (d) was not very clear - the official merely stated that no permits could be granted to any woman under any section unless she was in the area before 1958. The telephone call was interrupted by a trunk call.

However, I note from the 1958/59 Survey that Alexandra was during 1958 placed under the control of the Peri-Urban Areas Health Board and that thereafter influx control was very strictly controlled.

"Residential permits were granted to those qualifying to remain permanently under Section (a) (b) or (c) or who were legally in employment in the Health Board's area of jurisdiction. Wives of men in the latter category could remain if they were there by February, 1958. Others legally in employment in Johannesburg or other neighbouring towns could obtain temporary permits but it was planned to move them gradually to townships in the urban areas where they work".

It seems likely that no permits are granted under Section 10 (d) in terms of the Board's policy, although they do possess discretionary powers under this sub-section.

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PROVISIONS OF ~~GENERAL~~ BANTU LAWS AMENDMENT BILL OF 1963.

Amongst other things, the Bill :

1. Applies Section 10 to all "prescribed" areas which may be far more extensive in area than the "urban or proclaimed" area to which this and other sections presently apply.

2. Lays down that the onus is on Africans to prove in the prescribed manner that they fall into one of the classes of persons defined under sub-sections (a) (b) (c) and (d) of section 10. (Sect. 62 (a).)

3. Adds to sub-section (c) so that it will read "and ordinarily resides with that native within the prescribed area". (Sect. 62 (b))

   Note : In view of the differing interpretations of the sub-section as it stands at present, it is not clear what the effects of this addition will be.

4. Deletes the existing sub-section (d) of Section 10 and substitutes : (Section 62 (d)).

   (d) in the case of any other Bantu permission so to remain has been granted to him by an officer in charge of a labour bureau in accordance with the provisions of paragraph (a) of sub-section (6) Section 21 ter of the Bantu Labour Regulation Act. 1911 (Act No. 15 of 1911).

   Note : (i) The provision referred to in the Bantu Labour Regulation Act is a new clause providing that a municipal or district labour officer shall have powers to grant or refuse permission under Section 10 (d) both to persons seeking employment and to other Bantu. So far as the latter are concerned, they are to have due regard to any conditions which may be prescribed or which may be determined by the Secretary for Bantu Administration.

   (ii) thus while previously labour bureaux dealt with work-seekers and some other official could be appointed by the municipality to deal with applications by non-workseekers (see sect. 10 (d)), labour bureaux will in future deal with both categories, including married women applying to come into the area.

   (iii) Municipal labour officials are under .....
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   much more directly responsible to the Government than other categories of municipal employees who can at present be appointed. They can be removed from office by the Government, even though they are on the payroll of a local authority.

5. Provides that no woman shall be granted permission to enter an area under section 10 (d) unless she produced certain documents prescribed under the Bantu Labour Regulation Act. (Section 62 (e)).

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Notes : (i) These documents are the same as those required if a woman is coming into an area to take up employment, i.e.

(a) a certificate of approval from the Bantu Affairs Commissioner in the area where she normally resides, given by him after reference to the chief, headman, or Bantu authority.

(b) if she is under the age of 21 or is married or widowed, her guardians or husband's consent.

(c) if she wishes to live in a prescribed area, a certificate of approval from the local authority concerned to the effect that accommodation for her is available in an African location, village or hostel, and that the local authority has no objection to her employment or residence in the area;

(d) if she wishes to live in a prescribed area, a certificate of approval from the Bantu Affairs Commissioner having jurisdiction in the area.

ANNEXURE

EXTRACT FROM NATIVE (URBAN AREAS) ~~ACT~~ CONSOLIDATION. ACT.

. (As substituted by section 27, Act No. 54 of 1952 and amended by section 5, Act. No. 16 of 1955 and section 30, Act No. 36 of 1957.)

10. Restriction of Right of Natives to Remain in Certain Areas.

(1) No native shall remain for more than 72 hours in an urban area or in a proclaimed area in respect of which an urban local authority exercises any of the powers referred to in sub-section (1) of section 23 or in any area forming part of a proclaimed area and in respect of which an urban local authority exercises any of those powers, unless -

(a) he has, since birth, resided continuously in such area; or

(b) he has worked continuously in such area for one employer for a period of not less than 10 years or has lawfully resided continuously in such area for a period of not less than fifteen years, and has thereafter continued to reside in such area and is not employed outside such area and has not during either period or thereafter been sentenced to a fine exceeding £50 or imprisonment for a period exceeding 6 months, or

(c) such native is the wife, unmarried daughter or son under the age at which he would become liable for payment of general tax under the Native Taxation and Development Act, 1925 (Act. No. 41 of 1925), of any native mentioned in paragraph (a) or (b) of this sub-section and ordinarily resides with that native; or

(d) in the case of a native who is not a workseeker as defined in section 1 of the Native Labour Regulations Act, 1911 (Act No. 15 of 1911) and is not required to be dealt with by a labour bureau as provided for in any regulations framed under paragraph (c) of sub-section (1) of section 23 of that Act, permission so to remain has been granted to him by an officer designated for the purpose by the urban local authority concerned or in the case of a native who is such a workseeker, permission has been granted to him by such labour bureau to take up employment in such area.

C/A/24

SOUTH AFRICAN INSTITUTE OF RACE RELATIONS

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MEMORANDUM ON THE LEGAL STATUS OF AFRICAN WOMEN

by Dr. the Hon. E.H. Brookes

1. The general position of women under tribal law is that of perpetual minors. A woman is always under the guardianship of some male. Guardianship passes from her father (or, if he is dead, her guardian - his nearest male relative, usually her elder brother) to her husband on marriage. Marriage is an affair between the two family-heads concerned. Universally a payment, usually in cattle, passes between the two families. This payment, generally described by the Zulu term lobolo, inaccurately translated as "bride-price", has been variously analysed and defined: Perhaps as good an explanation as any is that it is the compensation to the family of the woman for the loss of the children whom she will bear to strengthen her husband's family. On widowhood, the woman falls under the guardianship of her own son if he is an adult, or her husband's brother or other male relative. If she re-marries this guardian receives the lobolo for her, and the children remain under his guardianship.

2. The tribal law has been modified by the Legislature. One of the earliest modifications was the requiring in all cases of the consent of a woman to her marriage. Practice has also changed as a result of culture contacts with Europeans, missionary work, economic forces, etc., in other aspects of marriage. In the Province of Natal, including Zululand, all these matters are regulated by the Natal Code of Native Law. In other parts of the Union they are not codified and the Native Appeal Courts are expected in their judgments to take cognisance of changes in the customary life of the people. Both systems have their drawbacks. In Natal there is a certain rigidity which can only be overcome by amending the Code. In the other Provinces there is uncertainty and the law is not always clearly known by the people. In both systems, but especially in the Natal system, there is the danger that the law will lag behind the rapidly changing facts, and the woman be denied a freedom which she may well desire to have. Outside Natal an unmarried woman or a widow if over twenty-one years of age is treated as a major and can inherit in her own right. In Natal she remains a perpetual minor unless "exempted" for all purposes or emancipated for certain purposes (see paragraph 9).

3. For many years a distinction has been drawn between marriage according to Christian (or civil) rites and marriage under Bantu law and custom. The Native Administration Act, 1927, confines the term "marriage" to the former and uses the term "customary union" for the latter. This tendency is not entirely satisfactory, but it is the legally accepted terminology and we shall use it in this Memorandum.

4. A marriage by Christian (or civil) rites takes place substantially under the same rules as apply to Europeans. A lower charge is made for civil marriage. As to the preliminaries of Christian (or civil) marriage, except for the general provision referred to in paragraph 5, there are no special rules in the Cape or in the Orange Free State. In the Transvaal, the procedure is that the parties must first appear before the Native Commissioner (as if they were going to contract a civil marriage) and satisfy him that everything - including the bridegroom's pass (!) - is in order. He may then marry them forthwith, or issue an Enabling Certificate, without which an ecclesiastical marriage officer may not marry them. The couple may also choose to be married by the Native Commissioner and then have the union blessed in Church.

In Natal, civil marriage without special conditions is permissible only when both parties to the marriage are exempted from Native Law (for the meaning of this phrase see paragraph 8). Where both or either of the parties are unexempted they must appear before the Native Commissioner, pay a fee of 10/- and give full particulars of their names, ages, tribes, etc. The Native Commissioner must explain to them the nature of a Christian

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marriage and the legal consequences which flow from it. Finally the consent of the father or guardian of an unexempted Native women is required. Where such cannot be obtained, e.g. on account of death, insanity or absence, or is unaccountably withheld, the parties may petition the Governor-General who may authorise the issue of a Licence. In the ordinary way the licence is issued by the Native Commissioner. Without such a licence the couple may not be legally married in Church.

The snag in this case is the requirement that the guardian must give his consent. It seems very reasonable, but it does not work out reasonably in practice. The guardian refuses to travel a long distance to the Native Commissioner's Court, or delays indefinitely, keeping the young couple waiting. Often an illegitimate child is born owing to the unreasonable delay, where this would not have happened had the law been different. There is a tendency on the part of some Native Commissioners to try to find a guardian at all costs even if there is no close or obvious guardian. The Petition to the Governor-General involves using the services of a legal man, at a customary fee of £5. This last point could be put right quite simply by having printed forms available at every Native Commissioner's Office.

It is suggested that in all cases the guardian should be allowed to report to the Native Commissioner's office nearest to him (that officer transmitting the certificate to the Native Commissioner before whom the bride and bridegroom appear) that the term "unreasonable delay" be understood to be a delay of more than two months after citation. It would be better for thelaw to be amended to fix this period of two months and to allow the Native Commissioner himself to authorise the marriage thereafter, thus eliminating the Petition to the Governor-General. <u>The delay in all this procedure is even more of a burden than the cost</u>.

5. Under section 22 of the Native Administration Act, 1927, a Native who has contracted a customary union may turn that customary union into a marriage by complying with the conditions summarised in paragraph 4 above, but if he wants to marry (e.g. by Christian or civil rites) <u>another</u> woman he must, under heavy penalty, first register with the Native Commissioner full particulars of every existing customary union, the children born of each customary spouse, and the nature and amount of the moveable property allocated to each "house" (i.e. the children of each customary union). Their rights are protected. They inherit as if the widow - the woman married by Christian or civil rites - were simply an additional customary spouse, and she inherits as if she were such. (For full particulars, see section 22, Act 38 of 1927).

6. <u>Legal effects of marriage</u>: Marriage (i.e. Christian or civil marriage) does not involve community of property, unless both parties ask for it within one month before the marriage. The position is thus the reverse of that with Europeans. This is generally considered a good provision, and no suggestion for change is made. (For full details see section 22(6) Act 38 of 1927.)

7. <u>Legal effects of marriage</u> (contd.) Marriage by Christian rites in Natal produces the effect that any customary union contracted during the subsistence of the marriage is bigamy and punishable as such. Elsewhere the customary union would not be punishable but would be unrecognised, the law treating it simply as an illicit relationship. The difficulty of the Natal law lies in its administration. This differs arbitrarily according to the views of the Native Commissioner. Some prosecute for bigamy, some - probably the majority - do not. It would seem better to prosecute all or none. Probably the law of the other Provinces (simply non-registration) is better.

Under the Natal law children of Christian marriages must themselves, when they marry, marry by Christian rites, and may not contract a customary union. This provision, at any rate, is regarded as objectionable by ecclesiastical as well as secular critics, and should be repealed.

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