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THE CONSTITUTIONAL DEVELOPMENT OF THE SOUTH AFRICAN PROTECTORATES.

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Dear Sir,

Having heard of your visit to England, I take the opportunity to suggest for your consideration and representation to the Colonial Office the following observations on the present constitutional question of the development and destiny of the South African Protectorates.

My first point is that in spite of the Schedule to the Act of Union, these Protectorates have an indisputable moral claim to development according to the traditional principles of British Colonial administration, the policy of the handing over of a British Colonial possession being entirely unknown in the history of British Colonial government; its existence in the Schedule to the Act of Union should be viewed in the light of the constitutional position of the Union in relation to the authority of the British Crown at the time of the passing of the Union Act, and secondly the Scheduled policy should be examined in the light of fundamental constitutional changes since the enactment of the Act of Union by the British Parliament in 1910. Thirdly, the destiny of the Protectorates should be allowed to take the natural course which it might reasonably be considered it would have taken if there never was enacted an Act of Union in 1910. Fourthly, there is a strong moral obligation on the part of the British authorities concerned and the British Parliament carefully to examine the nature of the new and differential citizenship and civil rights of Union Natives created by a series of Acts passed by the Union Parliament.

So much, Sir, for indication of the course which an investigation should take. I now proceed to summarise the arguments I desire to be brought to the serious consideration of the British Colonial Office and Parliament.

(1) As regards the scheduled policy, I submit that :

(a) The Schedule was drafted by a Convention of the then

then uniting Provinces of South Africa not then recognising any moral claim of the Natives of the Protectorates to direct representation at that Convention, and without first having obtained an expression of opinion on the matter from the populations of the Territories, so that the undertaking of future incorporation was a concession of the British Parliament to express desire of the Union but without relation to that of the Protectorates.

(b) When the Convention of 1909 put incorporation of the Protectorates into the Schedule it did so without first consulting the opinions of even the European populations of the Provinces, as the question of the incorporation was unknown in the politics of the separate Provinces. Therefore the difference of opinions at present existing, even among Europeans alone, may reasonably be assumed to have existed to an incomparably greater degree in 1910 than now.

(c) When the Act of Union was passed by the British Parliament in 1910 the legislation of the Union Parliament in many important respects affecting the Natives of the Union was subject to the King's veto. Since then a series of legislative Acts has been enacted by the Union Parliament which gradually minimised and finally eliminated the safeguard of the King's veto. Such legislation morally released the British Government from all the obligations taken at the time of Union in regard to Native matters of dual and partially-dual responsibility between the Imperial and Union Parliaments. Therefore the obligation to transfer the Territories cannot now be maintained on sound constitutional grounds. In addition it may be remarked that the elimination of the power of the King to overide a decision of the Union Parliament is highly repugnant

to the mind of the Natives, all the Native races of the Union having by tradition a monarchical conception of government.

(d) In the absence of any indication of acquiescence of the Native populations of the Territories, at the time of Union, in the policy contained in the Schedule it is but reasonable to view the inclusion of the policy of incorporation in the Schedule as an indication of an ideal of territorial expansion similar to the ideals of Cecil Rhodes in regard to Imperial expansion in Africa than as a settled policy to whihh are attached the ordinary obligations to carry out the provisions of a constitution. If this view is controverted then the conclusion cannot be avoided that in passing the Act of Union containing this Schedule the British Parliament was authorising what would virtually be an act of appropriation by conquest of these Territories by the Union of South Africa should the consent of the Natives of those Territories never be forthcoming, and the framers of the Schedule at the time of Union could not have been unaware of the state of Native opihion in the Territories when they formulated the Schedule, and on the other hand, the British Parliament could never have lightly stipulated the consent of the Natives to incorporation. Therefore in all negotiations such consent should be given as sacrosanct a meaning as any other word contained in the Schedule.

(2) Another and distinct argument for stayed and non-incorporation at present is that of the history of constitutional development of British Colonial possessions; and the inhabitants of the Protectorates have a reasonable and moral claim to the advantages of the natural development conferred by British policy on communities of her Colonial possessions. Amongst these

may be mentioned the following (the order of treatment is that of Stephen Leacock) :

Taking first the present Dominion of Canada which was a Crown Colony from the time of its conquest in 1791, a Representative Colony until 1840, and since then a Responsible Colony.

By the passing of the "Pitt's Comstitutional Act of 1791" a further step was attained in the constitutional development of Canada when an elective chamber was established. This stage is an excellent ideal for introduction into the present development of the Protectorates. There is no reason to believe that the South African Protectorates would not be amenable to the Constitutional cevelopment through the stages in which the following British possessions have passed :

In the first stage of development (where the legislature consists of appointed officials and non-officials) may be mentioned :

(1) The Straits Settlements.
(2) Hong Kong.
(3) Fiji
(4) Trinidad
(5) Sierra Leone
(6) Gibraltar
(7) St. Helena

and

(8) Honduras

In the second stage (where the legislature consists of elected and nominated members) we have :

(1) Ceylon
(2) Jamaica
(3) Mauritius

} These two are single-chamber legislatures.

(4) Bahamas
(5) Barbados (two houses: one of which is elective)

(6) British Guinea

and

Bermuda

(LEACOCK CLASSIFIES ALL THESE SEVEN TYPES AS BEING REPRESENTATIVE COLONIES)

I did not think it necessary first to examine the comparative economic resources of these Islandic possessions and the South African Protectorates, their relative populations and land areas in order to see if the Protectorates are capable of the traditional development indicated above, but it may be pointed out that the outstanding difference in the territorial situation of the Islands and the Protectorates (the former being surrounded by seas and therefore easily accessible to commercial traders while the Protectorates are hinterland possessions, the advantages of maritime position may be more than off-set by the possibilities of mineral wealth in the Protectorates. The matter of resources, however, is a subject for investigation by a commission.

(3) Another important argument for non-incprporation is the fixed nature of representative European opinion to preserve the power of legislation and the plums of administration in the Union for Europeans only. It might be well therefore to keep the Protectorates as fields for the black man's scope of segregated development. Black men in South Africa have not got the chance which their brethren have in other parts of British Africa where, for example, according to a recent number of the Southern Croww newspaper Mr. Mulugwanya was shown in his official robes and as having been Uganda's Chief Justice for 21 years. The West Coast possessions and the American-financed state of Liberia may also be mentioned as ideals for future development of the Protectorates. The status

of Uganda, of Sierra Leone or of Liberia, and even that of Egypt, is not unattainable by our Protectorates if they are given gradually increased powers of responsibility in their government. Given the security of a fairly responsible form of government for the security of loans, the economic progress of the Protectorates would be by leaps and bounds.

A greater argument for non-incorporation is lack of assimilation of ideals in important matters of policy. Want of such assimilation at the time of Union of the South African Provinces may be said to be the root of nearly all political troubles through which we have passed since its existence.

To mention only a few of the most important matters in regard to which there should be complete assimilation of ideals between the Protectorates ad the Union before any prospect of incorporation can be discussed:

In the first place in the Union there are two types of citizenship established by extraordinarily rigid provisions of the Union Constitution, requiring a two-thirds majority to effect a change; and from a close study of party political principles it is apparent that a change to equal rights of citizenship cannot reasonably be expected for many generations to come. On the other hand the Protectorates though by nature of their forms of Government they have not yet attained full constitutional rights of citizenship, they have such rights by inference at common law.

Secondly, the civil common law rights of the Union Natives are seriously curtailed by the Native Affairs Administration Act by the provisions of which the ordinary Courts of the country are not available for suits between Natives except in the Native Courts and in accordance with Native law whether such law is or is not reconcilable

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with Canon law, or whether it is or not correct according to Native law as distinguished from the decisions of Native Courts which do not follow any enacted code, there being no such code except that which applies in the Province of Natal, and what is more, suits at Native law are not permissive but obligatory even where a person who initiates a suit would get a better redress at common law in the ordinary Courts. So that in this way the Union sets a serious limit to the liberty and citizenship of a Native. Though Native law operates in the Protectorates I am not aware that it is not permissive to sue in the ordinary Courts.

It is not intended in this statement to refer in detail to the limitations of citizenship rights contained in the various Acts of the Union Parliament, because the statutory limitations of rights are matters of common knowledge, but reference may be made to one or more outstanding cases.

For instance there is the Principal Public Service Act which takes away pension rights from non-Europeans and gives them bonuses instead. I do not know the pension laws in the Protectorates, but I should be more than surprised to find that there is a provision confining pensions to the European personnel of the public service there.

Then again in the Union we have a divided European population on the question of the ideal and status of the Union. Very often we hear arguments for and against the divisibility of the Crown. In the Protectorates the King is one and indivisible and all the people stand as one man behind him.

In the Union we also have two flags; there being one in the Protectorates, and we have two official languages in the Union; they have one in the Protectorates. These are matters of such importance that it is fatal to take lightly any differences of opinion upon them.

The argument of differentiating legislation is the weightiest of all and is so important that it should form the subject of a separate statement. Those who desire to read the sources and course of such legislation should read the late Sol. T. Plaatje's Native Life in South Africa, a book in which it is stated that one Union statute sent some Natives of the Union to Gazaland.

There is also the great difference of constitutional relations of the Union and the Protectorates to the Imperial Government resulting from the new status law recently passed by the Union Parliament. By that Act the Union Parliament placed South Africa in a position known in the language of constitutional relations as sovereign or external independence, and the nett result of this Act is that so far as South Africa is concerned only the Protectorates and the Rhodesias still remain as before constitutionally and sentimentally bound to the Empire. I know that the common stock argument used in justification of this Act is that it was a natural consequence of the so-called Statute of Westminster; I say so-called in the sense that at its best the Westminster recommendation far from being a statute, was a mere resolution of an extraordinary meeting of Imperial and Dominion Ministers of the Crown. I use the expression "extraordinary meeting" to indicate that neither in the text books on the constitution of Britain nor in the legislative constitutions of any of the Dominions is the provision to be found laying down the procedure of inter-Imperial recommendations followed in Imperial Conferences. Therefore the Westminster status resolution will go down in history as an act by far transcending in high-handedness the greatest degree ever issued by any one of the present Central European or Fascist dictators, and it was made by Imperial and Dominion statesmen who, while this recommendation lasts, will be

regarded as being guilty of one of the greatest dereliction of duty to the cause of Imperial expansion and solidarity. Though it is unpleasant to make ominous predictions I ask to be allowed to say that if ever the question of the danger of Imperial disintegration arise, it will primarily be referable to this iconoclastic recommendation of the Westminster Conference made by a statesmanship which dismally failed to make a proper and fuller appraisement of the national and international power of this great heritage handed down to us by our forebearers - our great Empire; great in the benign blessings it has bestowed on the Islandic and African communities to which I have referred at the beginning of this statement and which I plead that the Protectorates may be allowed to emulate; greater still in the security with which it invests international treaties. No wonder that immediately before the outbreak of hostilities with Italy, the African community of Abyssinia asked to be made a mandate of the Imperial Government, a request which, had it been acceded to, would have immeasurably advanced the cause of civilisation and peace in Africa.

I have said that the Protectorates and the Rhodesias are attached constitutionally and sentimentally to Imperial authority, and I now suggest that it might be regarded as being proper and calculated to instil a desire on the part of the Protectorates to discuss the merits of incorporation if the attention of the Union were first to be directed to the question of its amalgamation with the Rhodesias, and I suggest further that it is imposing on the Protectorates to ask them to discuss incorporation before the self-governing and responsible communities of the Rhodesias have been won over to the Union, but I am persuaded to think that the analogy of the arguments against incorporation of the Protectorates is at present complete in regard to

to amalgamation of the Union with the Rhodesias.

I think it will be conceded that whatever are the present developments of British Colonial policy, it is fitting to draw attention to what British statesmen thought should be the destiny of the Protectorates at the time of accepting responsibility for them. Their ideal may be seen in the following passages of Leacock :

"As the new colonies grew in population and importance, the opinion gained strength that both justice and expediency demanded that they should administer their own affairs" (Page 255).

"The British system if the word may be allowed, recognises no absolute right of self-government. It aims, in other words, to allow the inhabitants to govern when sufficiently civilised to do so with advantage, and where this is not the case, to provide a just and impartial administration of those colonies of which the population is too ignorant and unintelligent to manage its own affairs" (Page 259).

Another statement says:

"It is recognised therefore that the government adopted in each colony must be in accordance with the particular conditions presented, must vary according to the race, character, and number of the population, their degree of enlightenment, the extent of the territory, and (as in the code of Gibraltar) with the possible military importance of the Empire" (Page 259). Furthermore the author says : "Colonies shall be extended such a measure of self-government as the circumstances seem rightly to demand". The author further adds that "The principle of political training for future self-government for self-government, as is seen in the case of the elected municipal bodies in India is also recognised".

The following passage singularly proves the author's

author's accuracy in his statement of the British policy, for the statement describes with exact precision the present system of administration in our Protectorates:

"In the case of every colony, however, the Crown retains a certain power of control; the Governor, or executive head of the colony, sometimes nominal sometimes actual, is the nominee of the Crown; the Crown reserves a veto on all legislation; the final court of appeal for colonial cases is the judicial committee of the Privy Council" (Page 259).

Now the passages I have recalled from Leacock I think sufficiently show the course of natural development of a British possession, and I trust they bring home the force of the sharp contrast between the settled Colonial policy of England and the new doctrine of handing over a Colonial territory and its population to some other contiguous authority.

Apart from all these considerations, the policy of handing over is more than costly to the interests of Imperial expansion. The force of this argument is best appreciated when British Colonial expansion is compared with Colonial expansion of other European powers. For example French Colonial possessions, which include many parts of Northern Africa, are estimated by Leacock at 4,000,000 square miles with a Colonial population of 44,000,000. The Colonial possessions of the Netherlands, says Leacock, "are of great wealth and importance. Their population outnumbers that of the mother country on the ratio of eight to one, although of the forty-seven million inhabitants less than one hundred thousand are white." (Page 270). Has anyone the right to ask for the cession of any of these Netherlands possessions to some other community, for example, to India on the grounds of natural contiguity to that Continent? If there can be no moral claim for such a request, how is it conceivable to justify the claim of cession of any of

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the British Protectorates to what we are often told is now an independent Union of South Africa? I earnestly urge the dismissal of this claim as being preposterous.

Think of these millions as a factor of the Netherlands and French Colonial military power in order to see in clear perspective the folly of asking Great Britain to withdraw from her present South African possessions. I can imagine one saying that by this last remark I have introduced the question of the militarisation of Natives in Africa. So have I, and what is more I submit that the employment of Eritreans to conquer the old Empire of Abyssinia and the present employment of Morroccans in the civil war of Spain are two events which prove that the law of necessity has disposed of the idle sentiments of peace time. I therefore plead for the use of every possible influence and power against this destructive doctrine of decentralisation and for the direction of the attention of statesmen to the lasting benefits to the present and future generations of the wise policy of centralisation of Imperial and Colonial power in the matter of Colonial expansion in Africa.

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