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NATIVE LAW AND ITS BACKGROUND

JULIUS LEWIN

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SOUTH AFRICAN INSTITUTE OF RACE RELATIONS
The Transvaal still awaits its Buffer. Changes introduced in this way are, however, only regional changes. Fortunately, we have at hand new machinery, in the form of the Native Representative Council, which is Union-wide in its structure. I should like to see this Council adopt the practice of discussing changes in Native law desired by the Native people themselves.

But we must not expect too much from that direction. In discussing particular amendments to Native law as to Court procedure, we are in a realm where few lawyers are competent to express an opinion, and where the Natives must needs trust their European friends almost blindly.

On the need for continuous revision of the law in the light of judicial decision and of changing circumstances, it is hardly necessary to lay emphasis. Even in England, not exactly the home of law reform, the Lord Chancellor a few years ago created a permanent commission whose task it is to report to Parliament from time to time whether certain changes in the Common Law are desirable.

To recognize Native law should not be to pedantry. Since the Native Appeal Court has shown itself as reluctant to encourage growth and change, we must look for another mechanism whereby the avowed aim of the Native Administration Act can be realized, namely, "the flexible adjustment" of Native law to the changing social and economic circumstances of the Native people.

Parliament, which in 1927 showed but a slender grasp of the issues involved in its legislation, might well entrust the task to a standing Select Committee of both Houses, and it might do this more confidently now that its own numbers have been not only increased but enriched by the addition of seven members elected by the Natives. In the reports of such a Select Committee, Parliament and the Administration would have the material they now lack on which to base a policy of regular revision of Native law and custom. Law is a social institution, made and moulded by men at every stage of its development. If it fails to reflect the changing nature of other men's activities, it runs the risk of falling deeply into disrepute.

A word in conclusion. If I have seemed to stress the weaknesses of the Union's system of law for Natives, I assure you that it is not for any lack of appreciation of its merits. On the contrary, I believe that no aspect of its general Native policy does our country as much credit as that concerned with the application of Native law. Nowhere in British Africa has there been any effort at all comparable with ours in this field, and perhaps nowhere in the whole continent. That is why I am anxious that we, as legislators, do not let this opportunity pass us by.

The position of the Coloured Community was thoroughly investigated and reported on by a Commission in 1937.

On the Indian population of the Union—numerically the smallest of the non-European groups, but in civilization the most advanced—there has been no investigation of corresponding scope or thoroughness. There have been several Government Committees and Commissions appointed to investigate particular problems. The most important of these was: the Indian Enquiry Commission of 1914, appointed as a result of riots in Natal, caused by taxation and other grievances; the Asiatic Enquiry Commission of 1919-1920 into conditions of Asiatic "encroachment" in respect of trading and the occupation of land; the Indian Colonisation Enquiry Commission, which reported in 1934 on the "Murray" Commission appointed in 1938 on the education of Indian children. At the present time there is an existing Commission which has been appointed to investigate the alleged penetration by Indians into so-called European areas in Natal and the Transvaal.

These enquiries were narrowed in their scope by the demand for prompt legislative or administrative action in particular directions.
of great value in the conduct of investigation of this nature. It is now the interest in finding expression through the presence in the Union of a diplomatic representative of the Indian Government, the Agent-General for India. After all, it was in the Union, and in fighting against the disabilities of the Indians there, that Mahatma Gandhi learnt his first lessons in political leadership. South Africa will not for ever be able to ignore India in detail with the Indians in the Union.

And lastly, whatever dividing lines or barriers may be desirable to maintain between racial groups, it is the right of every individual in South Africa to be given the opportunity for a full human life. South Africa, as little as any other country, can afford to waste human resources by denying to large sections of her population both the training through which their capacities could be developed in the full, and the right to use their trained capacities in whatever way they are fitted for, to the greater welfare of South Africa as a whole.

Of one thing there can be no doubt; the future, as the outcome of the present war, holds far-reaching changes for all of us. The present unstable structure of South Africa, as a part of the Union, will not be expected to endure for ever. Members of all non-European groups in the Union are making voluntary contributions to South Africa's war funds, while volunteers from all non-European groups are enlisting in the various special units organised for them. They should do so in spite of the disabilities and disadvantages imposed upon them under our present system, as a demonstration of loyalty which we shall not be able to ignore.

But, if the future relations between Europeans and non-Europeans are to be organized in such a way that fuller opportunities are made available for the latter, we shall need not only good-will, but also knowledge. This knowledge is most urgently required in respect of the section of which we know least—the Indians. Here is a gap which can be filled only by a comprehensive and authoritative study.

In 1917, the South African Institute of Race Relations approached the Agent-General for India of that time (Sardar Vallabhbhai Patel) with the suggestion that investigations of this kind would have great value not only for the Indian people of the Union themselves but also for the country generally, as it would complete the picture of our national life which had been left unfinished. The suggestion was heartily endorsed, and later the co-operation of the Department of Economics of Natal University College under Professor Burrows, Mr. Mahatma Gandhi, and a few others was obtained. When the Indian deputations visited South Africa, they were greatly handicapped by the lack of the kind of factual material which the proposed enquiry is intended to provide.

It is a task which should not be entrusted to persons for whom political issues are the prime consideration. The Carnegie Commission on the Poor White was the first—and so far is the only— enquiry of its kind which has been undertaken in a scientific spirit and with scientific methods. It was a great advantage that the recommendation of the investigators did not rest with a Cabinet Minister alone, and that the funds were largely provided by a non-Government body.

Where, then, is the money to come from? Seeing that the problems concern not Natal alone but the Union; and not the Union alone, but also India, it is reasonable to hope that the money will be provided from more than one source. The Union Government should welcome the investigation because of the value of the data to be gathered which should long ago have been at the disposal of Government officials, parliamentarians, and Commissions. The Union Government should, therefore, contribute a fair share of the cost.

The Government of India should be asked to help. It has actively interested itself in the welfare of the Indian people of the Union and has spent large sums in sending deputations to South Africa and in receiving deputations from South Africa. It also maintains an Agency in this country, which is constantly called upon to intervene on behalf of Indian Indians, without having at hand information that is essential for the tasks entrusted to it. When the Indian deputations visited South Africa, they were greatly handicapped by the lack of the kind of factual material which the proposed enquiry is intended to provide.

There are among the Indian people in the Union as well as in India—men who have wealth and who have shown their desire to help their people by generous gifts to one good object or another. It should not be difficult for them to realize that the welfare of their people is hindered through ignorance of their needs and that the enquiry here proposed would prove directly helpful to their people.

The future of the Indian people of the Union depends upon the knowledge and wisdom with which they confront them and the country are approached and dealt with. "The heart of the prudent getteth knowledge: and the ear of the wise seeketh knowledge." Surely, then, the first task is to seek knowledge.