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SOUTH AFRICAN INSTITUTE OF RACE RELATIONS (INC)
SUID-AFRIKAANSE INSTITUUT VIR RASSEVERHOUDINGS (INGELYF)
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LEGISLATION RELATING TO INDIANS.

1. The South African Institute of Race Relations was founded in 1929 in the belief that the future of South Africa depends on the good relations of the different racial groups that make up its population.

The Institute is a non-political body concerned primarily with the objective study of race relations in South Africa, the assimilation of factual information, and the promotion of services where these are needed in the cause of race relations.

2. The Institute believes that racial friction often results where one racial group only suffers a specific hardship. Such friction leads to a deterioration of good race relations.

3. The Institute is therefore concerned that the Indian population of Natal suffers certain legal disabilities peculiar to their group. Some of this legislation, as will be outlined and analysed below, although enacted as protective measures for the Indian population, is now no longer relevant to present circumstances and is the cause of hardship and confusion.

(A) The Institute therefore submits that:

The distinction made between "Indian Immigrants" and "Passenger Indians" is no longer of practical value. The Institute holds that the distinction made between Indian Immigrant and Passenger Indian for the purpose of Registration of Births, Marriages and Deaths (the former under Natal Law 25 of 1891 and Act 2 of 1907, and the latter under the Indians Relief Act 22 of 1914 and the Births, Marriages and Deaths Act 17 of 1923) has caused much hardship and confusion and will continue to do so.

(i) The births of Indian Immigrants are registered on a return, Schedule F to Law 25 of 1891. In this schedule no provision is made for a surname. In the process of urbanization and Westernization, Indian Immigrants, in line with other Indians, have to an increasing extent adopted the European method of nomenclature. In the absence of a surname and the difficulties arising out of the official recognition of such names, many Indian Immigrants have resorted to various devices in the registration of their births to introduce the equivalent of a surname, with very conflicting results.

Further, each return on Schedule F must reflect the parents' names as registered and their numbers. Without this information, no birth can be registered in practice. This means that parents must produce their own birth certificates or passes so that their names and numbers can be obtained. Many births have remained un-registered because the parties concerned could not produce the information required, either because their births have not been registered or, if registered, could not be traced. Every indentured person so introduced into the Colony was assigned an Indenture Number. The children of a marriage between such persons received the combined numbers. The third generation received a combined number of already combined numbers. Today it has become impossible to trace a person's ancestry by means of his multi-number. Therefore these numbers no longer serve any practical value. The requirements of such numbers imposes undue hardships on those who for some or other reason are unable to produce them.

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While law 25 of 1891 provides for registration within 30 days and failure to do so is an offence, no provision is made for late registration of births.

This form of Birth Registration for Indian Immigrants has an undesirable effect in cases where such a child is adopted by Non-Immigrants. The parents by adoption are governed by Act 17 of 1923 but their adopted child by Act 25 of 1891. This also means that the child cannot automatically adopt the "Parents" surname. (Non-Immigrants have surnames as their births are registered in terms of Act 17/1923).

(ii) Indian Immigrants must register the marriages under Section 70 of Law 25 of 1891 and complementary Law 2 of 1907. Registration under this Section excludes the necessity of any religious ceremony. Both parties to such a marriage must be Indian Immigrants; if one party is not, then the marriage is invalid. (Chetty vs. Maduramah, 1925 N.P.D. 339). No other law relating to the registration of marriages is available to Indian Immigrants. When one of the parties is a Passenger Indian, they may register their marriage after performing the customary religious rites, in terms of Act 22 of 1914. Indian Immigrants have to produce their number when their marriage is registered. Failure to register after a religious ceremony has been performed is punishable under Act 2 of 1907. When a marriage has been registered in terms of Section 70 of Law 25 of 1891, divorce proceedings can be heard only in the magistrate's court and only on the grounds of adultery or continuous desertion for one year. Applications for custody of children or for sole guardianship as provided for in Section 5 of the Matrimonial Affairs Act 37 of 1953, in the case of Indian Immigrant marriages have to be made separately from the divorce action, as two different Courts have jurisdiction in each instance.

From the time of indenture Indian Immigrants have married other Indians. Some of these marriages, for convenience or other expediency, were registered under Section 70 of Law 25 of 1891. Legally these marriages are not valid. Two marriage validation acts were passed to validate such marriages, one in 1896 and another in 1944. All such marriages registered after 1944 are still invalid. So many factors and considerations have to be taken into account to distinguish legally between an Indian Immigrant and a Passenger Indian, that to do so is almost impossible for a lay person. The question of interpreting the definition of an Indian Immigrant as contained in Section 118 of Law 25 of 1891 has from time to time arisen. The Courts, however, have been hesitant to pronounce one interpretation which will apply to all cases. (See Ex parte Barbeau & Others, 1937 N.P.D., 156; Cross vs. Cross, 1955 (4) S.A. 36 (N); Rampatha vs. Chundervathee 1957 (4) S.A. 983).

The whole position of Indian Immigrants and the application of the laws relating to the registration of their births and marriages is in confusion. From what is evident in practice and the facts brought out in court cases, it is virtually impossible to determine which marriages registered in terms of the Indian Immigration Laws are valid and which are not, and which birth registrations are regular and which are not, unless tested by a court. The validation of these marriages affects the rights of:

(a) inheritance of the children born of such marriages;

(b) the widow in any estate of her reputed husband;

(c) a widow in any third party claim or workmen's compensation - the validity of her marriage need only be questioned and the matter then can only be settled through expensive legal action;

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(d) one of the parties to a marriage, in that the other party can apply for the marriage to be nullified and thus evade the fuller responsibilities of the marriage as originally contracted.

This matter is all the more serious if the fact is remembered that application for a marriage to be nullified has been prompted by:

(a) the intention of depriving the spouse of any rights in a joint estate;

(b) the intention to nullify the marriage when a divorce action has failed;

(c) attempts by relatives to deprive the surviving spouse and her children from benefiting in the estate of the deceased.

This confusion thus introduces all the disabilities suffered by a woman who lived with a man without having undergone any form of marriage, except that in cases brought before the Courts children may be declared legitimate.

The South African Institute of Race Relations therefore cannot but agree with Justice Milne when he said:

"It seems to me very desirable that the question of this Court's or the Magistrates' Courts' power to grant a divorce should not be left in any unnecessary doubt in cases of this kind, that is where each of the parties has an ancestor who was an Indian Immigrant introduced as such under the Laws in question ..... In view of the urbanization of Indian Immigrants and their inter-marriage with other Indians and with others, it is conceivable that the authorities concerned may now indeed consider that the time has come when the surviving legal distinctions between Indian Immigrants and other Indians in Natal need no longer be maintained". (Cross vs. Cross 1955 (4) S.A. 36 (N) Page 39).

(B) <u>The South African Institute of Race Relations thus recommends:</u>

(i) That the distinction between Indian Immigrants and Passenger Indians no longer be maintained.

(ii) That legislation relating to the registration of births, marriages and deaths of Indians be consolidated and brought on an equal footing with Europeans.

(iii) That a validation law be enacted to validate all marriages between Indian Immigrants and Passenger Indians not covered by previous validation acts, and that provision be made that no marriage can be invalidated on grounds of status.

(iv) That all new births registrations shall be registered according to the European method of nomenclature, and that provision be made for an interim period (not less than 5 years) during which each former Immigrant family shall re-register and establish a surname. It is recommended that this should be done by family applications covering all the members of the family, and that such registration be free of charge.

4. Under the Immigrants Regulation Amendment Act 43 of 1953, no Indian after marrying outside the Republic may bring his wife into South Africa. Neither can a couple domiciled in South Africa bring their child into

South Africa should it be born outside the borders of South Africa. The number of Indians who married outside the Republic steadily declined and is today negligible (in view of the present age and sex composition of the Indians in South Africa). Likewise the number of children born outside South Africa to Indian parents domiciled in the Republic is infinitesimal. For these reasons the Institute feels that the provisions of the law which enforce these restrictions are unnecessarily harsh and should be repealed.

5. Under Section 4 (a) read with the Proviso to Section 5 of the Immigrants Regulation Act 22 of 1913, Indians have been prohibited free movement from one province to another without a special permit.

The Institute holds to the principle that every citizen, regardless of his race, should be allowed to live and move as he wishes in South Africa. In view of the large Indian population in the Transvaal and the Cape Province, the Institute recommends that free inter-provincial movement of Indians be allowed, as a first step, between the Cape, Transvaal and Natal.

6. The payments of government grants and pensions in Durban are centralised at the office of the Department of Indian Affairs. The magistracy of Durban has as its southern boundary the Illovo River, which is some 20 miles from the centre of the City; to the north the magistracy extends up to Springvale which is about 15 miles from the centre of the City; and to the west the Indian population is scattered up to 15 miles from the centre of the City. It is thus evident that people have to come some considerable distance to receive their grants. Families dependent on the State represent the poorest section of the community. The transport fares which are paid to come to the office are an additional expense on the already difficult budget. Furthermore, recipients of such pensions are almost invariably old and disabled.

The Institute recommends that payment of government grants and pensions be decentralised and be paid out through local post offices, as is the case with all other racial groups.

ADDENDUM.

(THE FOLLOWING WAS SUBMITTED TO THE INSTITUTE BY A LAWYER)

(1) Indians born in Native States of India and who are domiciled in South Africa are not regarded as South African citizens nor citizens of India.

The various legislations in the Commonwealth countries have rendered such persons "stateless". The South African Citizenship Act 44/1949 made all Indians who were British subjects South African citizens but excluded persons born in Native States of India as these persons never were British subjects but only protected persons. Quite a number of Indians are affected. There is no point in keeping them stateless. We suggest such persons be made South African citizens.

(2) Indian parents born in India remain in South Africa on their domicile right but once they lose their domicile they lose the right of re-entry to South Africa. Although very few cases of Indians losing their domicile right exist, nevertheless, it would be better if such persons are treated as if born in South Africa.

(3) Children of Indians born in India while one of their parents was not at the time of birth domiciled in South Africa, are not regarded as having South African birthright and as such are not South African citizens. If possible this anomaly must be removed.

(4) Inconvenience is being caused to professional and businessmen if they have to travel from one province to another. They have to go personally to the Immigration Office to obtain a permit and report personally on their return. There is no sense in obtaining permits for interprovincial travelling.

If the system is maintained then permits of longer duration say three years be granted which can be renewed at expiry.

(5) Section two of Act 43/1953 prevents children under 16 born in India of Indian parents, both of whom are domiciled in South Africa from entering South Africa.

Prior to the passing of this Act, children under 16 years of age of parents domiciled in South Africa were entitled entry to South Africa. There are cases of children left over in India who are under 16 years of age. Relief should be granted to such children.

(6) In view of the provisions of identity cards being issued, there is no point in keeping the system of requiring Asiatics to take out registration documents.

(7) There is great need of introduction of religious teachers from India or Pakistan. Encouragement should be given to set up in this country a teachers' training college which could train religious teachers. For this purpose qualified teachers should he allowed to come to South Africa on temporary permits.

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DRAFT STATEMENT : DEPARTMENT OF INDIAN AFFAIRS

The South African Institute of Race Relations wishes respectfully to point out to the Honourable the Prime Minister that the Indian people of South Africa are closely integrated into the South African community, especially in Natal, where they have contributed very greatly to the total prosperity of the country.

The Indian community have accepted, and still accept, responsibilities which normally should not have been placed upon their shoulders, e.g. its members have raised very large sums of money towards the provision of their own educational and health facilities. This does not, however, justify the continuance of separate treatment for them in these or other respects.

The Institute is satisfied that the vast majority of South African Indians do not want to be made into a separate section with its own Department. The Indian community have no claim to so-called "homelands" which might seem to provide a moral basis for applying a policy of separate development to them. The Institute therefore respectfully urges that the Government should reconsider its plan to treat them on a differential basis by setting up a separate Department of Indian Affairs. Such separate departments set up for the Coloured and African people, while having accomplished much excellent work, have nevertheless underlined differences rather than fostering unity. Matters such as education, health, welfare, etc., are of national, not sectional, importance, and should be dealt with by departments concerned with the needs of all the people of the country.

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