SEX, COLOUR AND THE LAW

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ONE vital feature of South Africa's policy of apartheid is known to have failed—the attempt to prohibit by law sex relations between the races. So vital is this feature that critics of prevailing policy have long been accustomed to the inevitable question put by their opponents: "How would you like your sister to marry a Native?"

Those who do not reply with an emphatic negative are regarded as beyond the pale of normal controversy. Not only opposition to any form of social equality, but also the retention of innumerable legal disabilities in the political and economic spheres, is ultimately defended by pointing to the disaster of social and sexual equality that would otherwise overtake the country. What Myrdal found in the southern part of the United States and recorded in '*The American Dilemma*,' is true of South Africa, if one looks beneath the surface of any argument—sex is the hidden principle, at least in popular theory, around which the whole structure of apartheid is organized.

It has not always been so. The arguments against social equality are no doubt old, though they have hardly ever been explicitly discussed in the large literature on race relations in South Africa. What is relatively new is the resort to law to ensure that a powerful aversion which is supposed to exist in cultural theory shall be maintained in actual practice.

Looking back, one finds that the first attempt to legislate on the subject of sexual apartheid seems to have been made early in this century, soon after the close of the South African War, in all four British Colonies (as they then were). A Cape law passed in 1902 was adopted in the Transvaal, the Orange Free State and Natal in 1903, when a similar ordinance was applied to all three of those territories. The Cape law simply prohibited under a severe penalty intercourse between consenting adult persons "for the purpose of gain", if the woman was white and the man black (but not between white men and black women). In the Transvaal and Natal the reference to gain, i.e. money, was omitted. The enactment of this double moral standard is in line with British Colonial tradition, which passed

similar laws in Rhodesia and Kenya and no doubt elsewhere, laws generally repealed or amended only in recent years.

The immediate reason why the British introduced this law into South Africa was evidently the arrival of prostitutes from Britain on the Rand during the Boer War. Although they meant to cater for the British soldiers, the prostitutes found clients among Africans, a situation that must have alarmed all who believed that if the sex barrier collapsed, other colour bars would not survive.

The main idea behind the law, however, was the one still found in the American South and described by Myrdal. It is that whereas sex relations between white men and black women affect only the Negro race, sex relations between white women and black men "would be like an attempt to pour Negro blood into the white race". The reasoning here runs like this: the child of a black woman by a white father would be regarded as black (regardless of its actual colour); whereas the child of a white woman by a black father would pass as white and thus dilute the purity of "white blood."

Whatever the mythology, it should be noted that when Afrikaner governments came later to legislate on the subject, they abandoned the double moral standard upheld by British laws. Oddly enough, for nearly three centuries after white settlement had taken root at the Cape, the Afrikaners made no effort to curb miscegenation by law. This attitude cannot be explained by the absence of inter-racial intercourse, as the present-day existence of one and a half million Cape Coloured people sufficiently testifies.

How extensive miscegenation was in the seventeenth, eighteenth and nineteenth centuries, it is hard to say. Once the process had been established, people of mixed descent would, of course, reproduce themselves and so enlarge the coloured population. But there can be no doubt that miscegenation did take place on a considerable scale long before social theory and political pressure combined to render it unmentionable.

The first "Immorality Act" against sexual intercourse (but not against inter-marriage) between Europeans and Africans was passed by the first Nationalist Government in 1927. The well-known politician, Tielman Roos, who was Minister of Justice at the time, spoke of requests for legislation he had received from white women's organizations; and he recalled that several commissions of inquiry had objected to the double

moral standard reflected in the earlier laws enacted by the British before Union in 1910. Unlike the British, however, the Nationalists aimed to treat both races and sexes alike; they "wanted to protect black women from white men" as well as white women from black men. Moreover, Tielman Roos had no objection to inter-marriage between the races. Although he noted with satisfaction that the law in the Transvaal had never allowed such marriages—by simply making no administrative provision for them to take place—he added that Transvalers could cross the boundary, get married in another province, and then return to live, quite legally, in the Transvaal.

For the next ten years the subject was not apparently debated in Parliament, although one cannot be sure because Hansard omits the key word—"immorality"—from its index. Nor was much heard of it in the press, except for an occasional report of a case brought before the Courts. By 1937, however, the situation of the rival political parties had changed. The "purified" Nationalists under Malan's leadership by then formed the official opposition; and—probably to forestall them—General J. J. Pienaar, who supported the Hertzog Government, introduced a private member's Bill to extend the legal prohibition against intercourse with Africans to inter-marriage with them. Among others, J. H. Hofmeyr, the liberal Cabinet Minister, opposed this measure, contending that it was unnecessary to apply law to prevent something, admittedly undesirable, against which strong social sanctions anyhow existed. As the Government did not allow time for the Bill to proceed, it was never voted upon and fell away.

Miscegenation was, however, an awkward subject for an uneasy coalition, and Hertzog gained time by appointing a Commission of Inquiry. Its Report on mixed marriages, published in 1939, recommended the Transvaal evasion of the direct issue by providing different administrative regulations for marriages between two white persons and between two non-white persons, but making no provision at all for inter-racial marriages. This should be done "without the use of language or expression which might give offence to any race or persons."

One of the two women members of this Commission, Mrs. N. B. Spilhaus—an old Cape liberal—expressed dissenting opinions. She quoted figures to show that marriages between white and black had since 1925 numbered less than one per cent. of all marriages and had decreased to four per thousand.

"Colour," she remarked, "had been infiltrating into the white population since the seventeenth century, with no visibly bad results in the descendants of the families in which it is present."

The Commission was asked to consider inter-marriage only, but it perceived—what Tielman Roos had somehow failed to realize ten years earlier—that if the problem was defined as miscegenation, or sex relations across the colour line, it would be necessary to prohibit intercourse as well as inter-marriage; and that, of the two, the former was the wider "social evil".

Being an enlightened person, Mrs. Spilhaus shrank from tackling this "evil" by law, foreseeing that "armies of detectives, police, and night-watchmen" would be required for its enforcement. She also realized, if dimly, that there was more than one problem, since she doubted "that the class of persons who indulge in immoral intercourse will be easily driven into marriage" (with an African), as Tielman Roos had supposed. The Commission did not even consider extending the proposed law to the Cape Coloured people.

The outbreak of the Second World War postponed further debate on the question. It also led to Hertzog's downfall and put Smuts in office, with Hofmeyr in an influential position, for the next eight years. By the time that period was drawing to a close, Malan's party was conducting an election campaign on various issues, of which one was the menace of miscegenation and the necessity for new laws to combat it.

The Malan Government, taking office in 1948, promptly carried out this part of its programme. In 1949, marriage between white and *any* non-white persons was firmly prohibited; and in 1950, sexual intercourse outside marriage was likewise prohibited if one person was white and the other "coloured", a term defined very broadly so as to include the Cape Coloured people and Asians as well as Africans. In 1957, the Strydom Government went still further and made it a criminal offence to commit "any immoral or indecent act", if one person was white and the other coloured (but not if both were white or both coloured).

This last amendment to the law was designed to make it much easier for the police to secure convictions in cases (which were common enough) where actual or attempted intercourse was hard to prove. The difficulty of proof was anticipated by the 1939 Commission, which suggested a rule of law declaring that "proof of the existence of certain circumstances shall be deemed

to be *prima facie* evidence of intercourse, e.g. that the parties were living together for a period, or were occupying the same room at night, or were discovered in a state of undress, or in such circumstances as would naturally lead to the inference that illicit sexual relations had taken place, or were about to take place."

After the new Act was passed in 1957, however, it was enough for the prosecution to show that one of the accused had attempted or invited or incited the commission of an (undefined) indecent act. It is the application of this Section 16 of the Immorality Act of 1957 which has produced the spate of prosecutions reported in the daily newspapers in rising numbers during the last couple of years. By 1960 it was known that over 300 cases had been heard every year since 1951 in the magistrate's courts in all parts of the country. This means that one person is prosecuted on every working day on which the courts sit. Incidentally, in their eagerness to prosecute, the police (like the 1939 Commission quoted above) have lost sight of the important distinction between stable and lasting relationships, involving families with children, and casual incidents resembling prostitution. The term miscegenation is used by those in authority to cover both these very different kinds of human relations.

In 1959 the daily press was disturbed by the extent of miscegenation disclosed in court cases. Some of these cases made news; for among the accused in various provinces since 1957 were a predikant, the headmaster of a school, a well-known attorney, wealthy farmers who were married men, and the secretary to the late Prime Minister—all men whose social status was much higher than that of the men normally accused. From some cases it could be inferred that the police received help from informers; but even so, a senior police officer has admitted that only a very small proportion of all the offenders against the law are discovered.

The situation revealed is a curious commentary on the attitude to apartheid of an unknown number of white men; and especially of Afrikaners, who admittedly form a high percentage of the men brought to court.

The leaders of the Afrikaner community are themselves somewhat at a loss to explain, or to explain away, the situation. Of course, their debates, seldom in public, are influenced by the preconceptions of the powerful Dutch Reformed Church about sexual morality in general and by its anxiety about the deteriora-

tion of Afrikaner family life in the urban environment. The Government itself is now confronted by an awkward situation. The penalty for miscegenation is imprisonment, usually for six months, without the option of a fine. The possible maximum term of imprisonment has been increased since legislation was first passed, but heavier punishment has obviously not had the desired effect. No Government will repeal the existing laws. It seems likely that the present Government will simply try to hide the Afrikaners' "shame" by a new law prohibiting the press from publishing reports of the cases heard in court.

The Dutch Reformed Church has obviously discovered that the Afrikaners' interest in sex has increased, is increasing, and ought to be diminished.

It is significant that the Immorality Act of 1957 also tightened the law affecting brothels and prostitution; and from recent cases in the courts, the police are known to have increased their zeal in combating these forms of unlawful activity. What has hardly been perceived, however, is the probable relation between miscegenation and prostitution. There is reason to believe that before 1950, the majority of professional prostitutes came from the ranks of non-white women. In the Cape Province these would have been attractive Coloured women, and elsewhere African women newly emancipated from tribal restraints and newly introduced to the arts of cosmetics and fashionable dress.

After the law had tried to cut off this supply by making all intercourse with non-white women a serious crime, it seems probable that the demand for prostitutes, known in almost every port and big city in the world, has been met in South Africa by a certain class of white women, including Afrikaners.

The first Immorality Act was passed in the 1920's, the years when industrialism and urbanization first began their rapid growth; and renewed efforts were made to extend the law in the 1930's, when the same economic and social processes had gone further and made a wider impact on all races of the population. No city in the western world claims to have rid itself of prostitutes or to have solved the moral and social problems implied by their continued existence. No one should therefore be surprised to find that Cape Town, Durban, or Johannesburg has a similar problem, perhaps aggravated by racial factors. It seems probable, when sex relations with non-white women were penalized, that some white women were exposed to temptations which seldom came their way previously.

Yet even these assumptions do not account for the whole situation. The rising number of immorality cases heard in the courts do not come only, or even mainly, from the cities and bigger towns. Records show that cases are heard all over the country, including the smaller *dorps*, where professional prostitution seems unlikely ever to have flourished. Moreover, miscegenation is not the same thing as prostitution, which implies payment to the woman for her services. To judge by the press reports, evidence of payment by the white man is lacking in some (perhaps many) cases, possibly because it is not necessary for the police to prove payment in order to secure a conviction. Nor would an unsolicited payment, made on a single occasion, necessarily stamp the woman as a prostitute within the normal meaning of that term. In the kind of case which is commonest nowadays, the police have merely to produce some evidence from which it can be inferred that overtures to intercourse were made.

It would seem that in order to understand the sexual attraction which black women have for some white men, it would be necessary to inquire beyond the sexual demand supplied by prostitutes in other countries. It would be necessary to know something of the special white mythology about the enjoyment of sex across the colour line, which is known to exist in the American South and which may exist also in South Africa.

One other aspect of the question may be touched on. Although there is no evidence to support their view, some Nationalists appear to believe that it is the liberals, with their emphasis on human rights and their desire for social contact between the races, who are likely "to go too far" and indulge in miscegenation. In January 1959, for example, the Minister of Bantu Administration asked the City Council of Johannesburg to agree to prohibit a dozen white citizens (whose names were given) from receiving Africans as visitors in their homes (a prohibition possible under another law passed in 1957). Nationalist newspapers, supporting the ban contemplated by the Minister, were quick to hint that social contact would or could lead, among other things, to contravention of the Immorality Act. It seems that some Nationalists think about these things in the terms Abraham Lincoln spoke of when he once "protested" against the counterfeit logic which presumes that "because I do not want a Negro woman for a slave, I do necessarily want her for a wife. "(Lincoln himself was "horrified by the thought of the

mixing of blood by the white and black races").

The Nationalists hate any kind of informal social contact between white and non-white people. Not content with avoiding such contact themselves, they want to prohibit others from having it. One way of preventing it is to imply that such contact inevitably leads to miscegenation. And, of course, the mere threat of prosecution under the immorality laws would be enough to deter most men from inter-racial contact with women, because a prosecution, reported in the press, is enough to ruin a man's reputation, even if it ends in his acquittal.

That this is not a fanciful idea is perfectly illustrated by a case heard last year in a Cape Town court. The only evidence against a white bus driver charged with immorality was that he had been found playing cards late at night with a Coloured family. A member of the family testified that they had helped the accused when he was down and out, giving him food and ironing his shirts. Acquitting the accused, the magistrate advised him to break off his friendship with the Coloured family. "For a white man to have social contact with non-Europeans," he said, "is to run a very grave risk."

Amid the new forms of statutory immorality created by South African law, the true nature of morality is forgotten. True morality in sex relations, as Bertrand Russell has pointed out, consists essentially of respect for the woman and unwillingness to use her solely as a means of personal gratification without regard to her own desires. In this light one can see how improbable it is that positive respect for human rights, and proper recognition of social equality between races and sexes, would lead to those very casual sex relations across the colour line which form the bases of criminal charges.

For the men typically convicted of statutory immorality are not liberals openly preaching the importance of racial equality. On the contrary, they are men caught in a web of racially prejudiced thought and action; for it is precisely those who habitually treat non-white people as tools to be used for the white man's convenience, who find it natural to use black women for a passing sexual purpose.

From most of the cases reported in the press, this conclusion is clear: miscegenation arises out of the whole system of racial inequality, out of the popular habit of regarding all non-white people as essentially inferior, and out of contempt for "lesser breeds without the law."