JOHANNESBURG JOINT COUNCIL OF EUROPEANS & NATIVES.

CRITICISMS

OF

DRAFT PROCLAMATION

AMENDING

THE NATAL CODE OF NATIVE LAW OF 1891

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THE NATAL CODE OF NATIVE LAW OF 1891.

In the Union Government Gazette of 6th November 1931, there appeared a draft proclamation by the Governor-General amending the Natal Code of Native Law which was annexed as a schedule to the Natal Law No. 19 of 1891 (and amended by statute from time to time). The draft code contains one hundred-and-seventy-two clauses and deals with many matters of administration, Native family law etc., but Chapter 2 is of paramount public importance for it concerns the personal rights of Natives, not only in Natal and Zululand, but also in the Transvaal and Orange Free State.

These sections define the powers of the Governor-General as Supreme Chief and of the Native Affairs administration as his executive, and they are applicable to the Natives of the Transvaal and Orange Free State by the operation of Section 1 of the Native Administration Act of 1927 (as amended by Act 9 of 1929).

The effect of the section is that when the Governor-General by proclamation vests in himself powers to be exercised as Supreme Chief in Natal, he is automatically vested with the same powers in the Transvaal and Orange Free State where tribal conditions are very different from those found in Natal. The draft proclamation has taken advantage of Act 38 of 1927 to give the Governor-General much wider powers as Supreme Chief than were ever exercised before in Natal, and both the old and the new powers will now be exercisable in the Transvaal and the Orange Free State as well as in Natal.

The enfranchised Natives of the Cape successfully opposed the extension to the Cape of the doctrine of the Supreme Chief, and consequently the proclamation will not apply in the Cape.

The Natal Code was framed forty years ago, when administration was so much more personal than today, when the ordinary courts were not so easily accessible, when communications were not so well developed and when the Natives of Natal were still unaccustomed to European institutions. Drastic as were the provisions of the Code of 1891 the draft proclamation of 1931 gives the Administration powers that are far more arbitrary than any found in the earlier Code. The Code of 1891 was passed after consideration by the Natal Parliament of that day; the present Draft Code will become law without Parliament having considered it at all unless steps are taken to force the proclamation on its attention. Representations have been made to the Minister of Native Affairs by a number of individuals and bodies urging him to withdraw the harsh provisions of Chapter 2 and advice has been received from the Department of Native Affairs that "in deference to the representations which have been put forward" the Minister has agreed to certain modifications. As will be seen these are inconsiderable and do not remove the grave objections to the proclamation, and it has therefore become necessary to oppose the promulgation of the proclamation even as modified. The proclamation will become law on promulgation unless Parliament specially resolves otherwise.

We oppose the proclamation because

1. It is based on an erroneous conception of the powers of the Supreme Chief in Bantu society as indicated by Chapter 2.
2. It confers extended powers for summary jurisdiction over Natives to the Administration thus gravely infringing the liberty of the subject.
3. It closes the doors of the Supreme Court against the Natives of Natal (including Zululand), Transvaal and Orange Free State/

by giving the Administration immunity from the control of the Courts.

1. The Powers of the Supreme Chief.

The conception of Bantu Paramount Chiefs as absolute and arbitrary monarchs first found expression in Natal in 1849 when the Chaka-Dingane tradition was dominant, and as time went on the powers vested in the Governor as Supreme Chief tended to broaden into uncontrolled authority, until Law 26 of 1875 and other legislative measures were passed to check the growth of autocratic powers in the hands of the administration.

Whatever may be said of Chaka and Dingane, whom Natal has taken as their models of Supreme Chiefs, it is now recognised that they were as unlike the true type of Bantu Paramount Chief as Napoleon differed from the average European monarch. The Bantu Chief, whether paramount or not, was not an absolute monarch. He was subject to "checks and balances" within the tribal organisation.

This view is supported not only by the researches of modern scientific investigators but by the experience of magistrates such as the late Mr. Aston Key and Mr. G.M.B. Whitfield, the author of Native Law in South Africa.

Even a paramount Chief was subject to censure from his council, and only a chief like Chaka who could rely on a standing army dared exert arbitrary authority over his people.

The draft proclamation, ignoring these views, actually extends the powers of the Supreme Chief which were thought to be adequate forty years ago. Freed of the checks and balances of true Native life the proclamation utilises a discredited idea to give the Supreme Chief absolute power over the person of the Native.

2. Summary Jurisdiction.

A. Section 5, enables a Native Commissioner to issue an order to a Native Chief or other Native, arrest him for non-compliance, and " summarily punish" the offender by a fine (up to £10) or imprisonment (up to two months). The Minister's amendment limits the orders to "any purpose of public interest, public utility, or for the purpose of carrying out the administration of any law, at any reasonable time and under reasonable circumstances and in pursuance of any such purpose may require (them) to render obedience, assistance and active co-operation in the execution of any reasonable order".

It is true that sub-section 4 provides that the actions of the Commissioner shall be reported to the Chief Native Commissioner who may confirm, reduce or disallow the punishment; but the burden of judicial responsibility is placed upon an administrative officer who has also to protect the prestige of his subordinate, who is to be both accuser and judge; and the Native is refused access to any Court for redress, as will be seen from Section 10 referred to below.

B. Section 8 enables the Administration to issue a proclamation for the arrest of any Native who is considered to be " dangerous to the public peace" and to keep him in prison for three months. At the end of the three months the Native may apply to the Supreme Court for his release. The Minister has now added " which shall " thereupon be granted by the said Court unless such person shall " then be detained under lawful warrant other than such proclamation".

There is nothing to prevent the Administration keeping its hold upon a Native who has been arrested and released under this section by issuing a new proclamation for his arrest, in which case the Native may only gain his freedom for a short time. It would be lawful to re-arrest him and detain him without trial for successive periods of three months by the issue of successive proclamations. And this without the Native having actually committed any offence.

The Administration justifies this section by saying that it has been taken over from the Cape Act 29 of 1897. That Act was passed to overcome a judgment of Chief Justice de Villiers in the Cape Supreme Court in the case of Sigcau versus Rex when the Cape Government was compelled to release Chief Sigcau who had rebelled within a year of the annexation of his country and who had been arrested on a proclamation. The Chief Justice in his judgment said

> " The Parliament of this country has never yet passed, and is not likely to pass, a bill for the condemnation of an individual without any form of trial."

The Cape Parliament, it is true, did pass such a measure, fearing the trend of events on its Eastern borders, but the Act remained a dead letter until 1926 Passed at a time of war it found no place in the peaceful administration of the Cape; what circumstance justifies its operation and extension to other Provinces thirty years later among people who have time and again proved their loyalty to authority? The measure is entirely contrary to both Dutch and English law under which, according to Chief Justice de Villiers "judicial powers were always confined to " the Courts of Justice".

Under this section a political Minister, who because of his own impatience of Native criticism or driven by pressure from his political supporters can compel administrative officers to use powers they generally prefer not to possess. Such officers will now not have the support of the Courts in resisting the misuse of political power. The most experienced and enlightened Native administrators dislike provisions of this kind, regarding them as a sign of weakness rather than as a source of strength.

3. <u>Immunity of the Administration from the jurisdiction of the Supreme Court.</u>

Section 10 prevents Natives going to the Supreme Court for redress against actions of the Governor-General as Supreme Chief or any of his subordinates. Section 10 (1) reads

> " Neither the Supreme Court nor any other court of law shall have jurisdiction to question or pronounce upon the validity of legality of any act done, direction or order given or punishment inflicted by the Supreme Chief in the exercise of his powers, authorities, functions, rights, immunities and privileges."

to which the Minister has now added.

> " or in any manner, save as in section 8 provided, to intervene in any such matter".

The Minister has therefore strengthened rather than weakened the drastic effect of this sub-section.

Hitherto the Courts, despite the immunity which Section 40 of 1891 Code sought to give the Supreme Chief, have held that they could scrutinise the actions of the Supreme Chief or his officers. The new clauses seek to reduce to the minimum the chances of any checks upon absolutism in administration.

Thus are the Natives of Natal, the Transvaal and Orange Free State deprived of the last vestige of their legal freedom. Hitherto their loyalty has been maintained despite the heavy strain put upon it by the severity of Union legislation, largely because the Higher Courts have never failed to protect them against administrative injustice. The new proclamation is designed to silence the Courts.

Unrepresented in Parliament, barred from the Courts, where is the Northern Native to go for redress? " It is a hopeful sign," said Chief Justice de Villiers in the case of Sigcau versus Rex, " when a Native chief seeks by peaceful means to obtain redress, instead of rousing his clan to rebellion." Within one year of his conquest the Chief had found his way to the Courts and there had obtained justice. Under the proclamation the Natives of Natal, the Transvaal and Orange Free State will be denied access to the Courts for relief from arbitrary administrative action and their only existing " peaceful means to obtain redress" will have been withdrawn.

Can Parliament ever have contemplated the use to which the Native Administration Act - the declared Native Charter - would

be/

be put to by this proclamation? Did it intend that vital principles would be set aside by an administrative act?

The proclamation will be yet another blot on our country's statute book. Can a country live that ignores such fundamental principles of good government as the liberty of the subject, his protection by the law and the eventual subjection of administration to the jurisdiction of the Courts ?

DRAFT PROCLAMATION : NATIVE LAW (NATAL).

SECTION 5 (1).

The Supreme Chief, Minister of Native Affairs, Chief Native Commissioner, and any Native Commissioner may command the attendance of Chiefs and other Natives for any purpose and may require them to render obedience and active co-operation in execution of any order.

Remarks.

1. This section as it stands gives any official the ~~xx~~ power to order a Native to do anything he wishes. It is almost absurd in the extent of the power given. The words "for any purpose" are far too wide. It allows a Native Commissioner to order Natives to do things for his own ~~benefitx~~ personal benefit. The section is altogether objectionable, but if the Native Department of Natal must have some such power, the words "any purpose" must be taken out or qualified. They should read "for some purpose of public interest, general utility, or better administration of law". (Instances of the last would be assistance in collection of taxes, in carrying out cattle dipping law, etc.).

2. It is wholly inadvisable to give such power to a Native Commissioner. It should be confined to the Chief Native Commissioner, who could give the order and let it be communicated through the Native Commissioner. I know from experience that the powers given by this section as it stands may lead to grave abuse.

SECTION 5 (3).

Subsection (3) is in direct conflict with one of the main principles of our law. It allows a man to be judge in his own case, If a Native refuses or fails to obey an order given, he may be summarily punished by the person who gave the order. There is no provision for taking evidence or making any record. It is true the Native may give reasons why the order was not obeyed, but failing to do so he may be sentenced to a fine of

£10 or to two months imprisonment.

The only ground on which such a provision can be supported is that if the official who gave the order is not the person to try the Native who disobeys, and has to refer the matter to another authority, his own authority in the district is gone.

The order given may be quite ~~unreasonable~~ unreasonable too: this should be provided for.

SECTION 5 (4).

This subsection (4) provides that any action taken by a Native Commissioner under subsection (3) must be reported to the Chief Native Commissioner, who may confirm, reduce, or disallow the punishment, and may order prosecution in another court. Protective as this clause sounds, in practice it is nugatory. The Chief Native Commissioner is bound if possible to support his subordinate. To disallow what he had done would destroy his authority in his district.

Any punishment imposed by a Native Commissioner should be subject to review by a Judge of the Supreme Court.

If the Natal officials cannot govern their Natives without such provisions as these of Section 5, subsections (1),(3),(4), they are not fitted to govern at all.

Reverting to the main subsection (1) :

To prevent all abuses this should read as follows :-

> "The Supreme Chief, the Minister for Native Affairs, the Secretary for Native Affairs, the Chief Native Commissioner, and in case of urgency the Native Commissioner, may command the attendance of Chiefs and Natives for any purpose of public interest, public utility, or for the purpose of carrying out the administration of any law, at any reasonable time and under reasonable circumstances, and may require him to render obedience, assistance, and active co-operation in the execution of any such order."

The reasonableness as to time and place must be kept in view; e.g., it would be wrong to call out Natives to make

roads in the middle of their reaping, or to send them from Zululand to work on roads in the Cape Province, which the section as it now stands actually allows.

SECTION 8.

This allows for summary arrest and detention for any time of a Native believed to be dangerous to the public peace. Some such power may be necessary under the conditions in Zululand, but we must not be taken to admit this need. The section provides that after three months any Native so detained may apply to the Supreme Court for his release, and then stops! It does not say what the Supreme Court may do. Now, it will be seen that, even if the Supreme Court orders the release, there is nothing to prevent the Supreme Chief (i.e., the Governor-General) from rearresting and detaining the man the next day.

Further, SECTION 10 absolutely deprives the Supreme Court of any power, for under that section the Supreme Court cannot pronounce upon the validity or legality of any order of the Supreme Chief. In fact, the two sections are contradictory as, while the first (i.e. 8) might presume a power to release, the second (i.e. 10) takes away that power. Thus a Native might be ordered to be detained for life and no one could question the validity (that is, the force and effect) of such order.

It seems clear that two sections have been taken from different pieces of legislation, and pasted together regardless of the effect of one on the other.

Section 8 is clearly taken from the old Cape Act No.29 of 1897 (commonly known as the Sigcau Act), but the protection afforded by that Act is not included. After the word "release" the Cape Act continues :-

> "provided, however, that any person so arrested or detained may after the lapse of three months from his arrest under such Proclamation apply to the Supreme Court of this Colony for his release, which shall be thereupon granted by the said Court, unless

such person shall then be detained either under any lawful warrant, other than such Proclamation, or under the operation of any Act of Parliament lagalising the further detention of such person in accordance with the provisions of such Act."

The course that must be followed, if we are not to have bare Martial Law, with no prospect even of an Act of Indemnity, is

(a) to take in the whole section of the Cape Act 29 of 1897,

(b) and delete Section 10.

One really alarming feature of this Draft Proclamation is that a provision in the Natal laws which was actually repealed by Act of Parliament is re-enacted in this Proclamation. The Proclamation thus defies Parliament as well as principle.

signed

C.H.TREDGOLD, Chairman of the
Cape Peninsula Joint Council of Europeans & Bantu.

Government Gazette, 4th August, 1933.

No.162, 1933.7

NATAL CODE OF NATIVE LAW: AMENDMENT

(Signed in English by His Excellency the Officer Administering the Government)

Whereas it is expedient to amend the Natal Code of Native Law contained in the Schedule to Proclamation No. 168 of 1932:

Now, therefore, under and by virtue of the powers vested in me by section twenty-four of the Native Administration Act, 1927 (Act.No.38 of 1927), I do hereby proclaim, declare and make known that the said Natal Code of Native Law shall be and is hereby amended by the insertion after section eight of the following new section:-

8. bis. The Supreme Chief may at any time and in his discretion order any Native suffering from leprosy to be removed to, and be detained in, any special place or premises, for the purpose of undergoing treatment, and such Native shall be subject to the regulations applicable to such place or premises.

God Save the King

Given under my Hand and the Great Seal of the Union of South Africa at Pretoria this Thirty-first day of July One thousand Nine hundred and Thirty-three.

JOHN S. CURLEWIS
Officer Administering the Government

By Command of His Excellency the Officer Administering the Government-in-Council.

P. GROBLER.

NATAL DRAFT CODE.

Notes of a Conference with the Secretary for Native Affairs, December 5th., 1931.

PRESENT: In addition to Major Herbst and Mr. Allison, Professor E. H. Brookes and Mr. Hugh Leith, Pretoria. Messrs. Rheinallt Jones and O. Schreiner, and Rev. E. W. Grant, Johannesburg.

Purpose: To ascertain the Department's view respecting some of the clauses in the draft amendments, and the reasons for their promulgation.

To press that more time is necessary for the study of the draft by those interested, and especially to make natives of the Transvaal and O. F. S. acquainted with its provisions.

Section 4. Extends immunity of the Supreme Chief from court jurisdiction to other officers of the Department. (Secretary stated that provision was made for this in the old Code). Pointed out that there was no legal obstacle to applying this outside a native area.

Summary procedure: Secretary stated this was taken over from Act 1 of 1909, Sect. 26. Pointed out that this Act was repealed under the Act of 1927. Was it right to re-introduce its provisions in the amended Code?

Section 5. sub - 6. Provision for re-trial in court of a person whose punishment under summary action of an official has been disallowed. Might be tried by the same official.

Secretary - would recommend that the words "unless the punishment be disallowed" be cut out.

Suggested that it is unwise to extend powers of summary treatment.

Secretary - abolition not favoured in Natal.

Section 6. Communal responsibility.

SecretaRy - this is not a case in which powers of the S. C. are extended to the Transvaal.

Section 8. Summary arrest of dangerous person and detention for three months without trial.

Secretary - admits danger, but must leave something to Administration. Provision necessary in case of disturbance such as that in Natal. Will be glad to have suggestions.

Brookes: 1. In the Cape the native law is only applied to definitely native areas. This law will now apply to towns such as Johannesburg and Pretoria.

2. All S. C. provisions must be studed in connection with a scheme of exemption. Is it right to extend these powers to the Transvaal until there is definite provision for exemption from the Code?

An anti-native minister might use Section 8 for crushing all kinds of movements. Press for delay until exemption question is settled.

Schreiner - suggests that wording should provide for the necessity for showing reasonable ground of suspicion.

Secretary - is willing to recommend that extension of powers of S. C. should be limited to scheduled native areas.