

EXPLANATORY NOTES ON DRAFT SWAZILAND NATIVE COURTS PROCLAMATION.

Clause 1: "Native Court" IS THE only definition which requires some explanation. The word "established" is inserted to cover cases of Native Courts not already in existence and which, therefore, have to be "established" and "recognised" e.g. special Native Court for an urban area.

Clause 2: The procedure for obtaining the recognition of existing Native Courts or the establishment of new Courts is clearly laid down in this Clause. The Native Authority for the Territory puts up its recommendations to the Resident Commissioner (Clauses 2(1) and 2(2) and Resident Commissioner, subject to the approval of the High Commissioner, thereupon recognizes or establishes such Courts as he thinks fit by issuing them with a warrant. This Warrant is a document setting out the composition and limits of jurisdiction of the Court (See Clauses 2(3)). Clause 2(4) gives the Resident Commissioner necessary powers - again subject to the approval of the High Commissioner - to suspend, cancel or vary the Warrants e. g. there may be a rearrangement of areas of jurisdiction of two Native Courts or it may be decided to increase the jurisdiction of a Native Court which has shown itself capable of exercising greater powers. It should be noted that only those Native Courts which have been recognized or established by the Resident Commissioner by Warrant will be allowed to operate as Native Courts. In this connection attention is drawn to the second proviso to Clause 24 which permits adjudication by arbitration. Attention is also drawn to Clause 35 which makes it obligatory upon the Resident Commissioner to consult the Native Authority before exercising the powers conferred upon him by this Clause.

Clause 3: This Clause ensures that Swazi custom regarding the constitution of Native Courts is preserved. The proviso enables the Resident Commissioner, however, to prescribe the constitution of a Native Court in accordance with the instructions of the High Commissioner, and also after consultation with the Native Authority (See Clause 35). The powers given under the proviso could be used, for example, if a special Native Court had to be set up for an urban area where there is cosmopolitan native population.

Clause 4: Here again the Resident Commissioner cannot exercise these powers until he has consulted the Native Authority (See Clause 35). It should be noted that this Clause is so worded that if a member of a Native Court is suspended or dismissed this suspension or dismissal affects his powers as a member of the Court only. This Clause is of course different from Clause 2(4) which includes power to cancel altogether a Warrant.

Clause 5: This is self-explanatory.

Clause 6: This is self-explanatory. It is well known that there are frequent complaints about undue delays in holding trials before Native Courts. The powers given to the Resident Commissioner in the proviso are designed to obviate such delays if this should become necessary. Again it should be noted that the Resident Commissioner must consult the Native Authority before exercising these powers (See Clause 35).

Clause 7: The civil jurisdiction to be granted to each Native Court will be stated in its Warrant, and it will be

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for the Native Authority to advise the Resident Commissioner as to what jurisdiction should be given (See Clause 2). As at present Native Courts will have jurisdiction only in cases in which all the parties are natives. That is to say, if Europeans are involved the case must go to the Subordinate Court. The first proviso means that a Native Court may be given special power to try cases for the recovery of debts for example, try cases to recover Poll Tax or ~~Swazi~~ Cattle Dipping Charges from Europeans.

Clause 8: This is self-explanatory. It is proposed to give Native Courts powers to try criminal cases and it will be for the Native Authority to recommend to the Resident Commissioner that powers should be given to individual Native Courts (See Clause 2).

Clause 9: This is self-explanatory. 9 (a) obviously refers to the most serious offences. 9 (b) and (c) refer to cases in which European law solely is involved. 9 (d) prohibits the trial of cases of witchcraft without special permission. 9 (e) confirms existing practice.

Clause 10: This is common sense and confirms existing practice.

Clause 11: 11 (a) and (b) require no comment. 11 (c) refers to any Proclamation which may in future be issued which itself gives Native Courts jurisdiction. There are, of course, no such Proclamations in existence at present. 11 (d) refers to such laws which do not themselves give Native Courts jurisdiction but which the High Commissioner may, by order, decide to allow Native Courts to administer. These might include existing laws.

Clause 12: This is self-explanatory. See also note on Clause 11 (d). The High Commissioner might, for example, decide to allow Native Courts to try offences against the existing Native Tax or Dog Tax Proclamations.

Clause 13: The first point to note is that punishments according to native law and custom are authorised with the usual safeguards in regard to repugnancy.

As imprisonment is unknown in Swazi custom it has had to be included in this Clause. Clause 15 deals with places of imprisonment.

Native Courts are also given power to impose sentences of moderate corporal punishment upon juvenile male offenders. The provisions of Clause 14 should be noted in this connection. The whipping of adults has been omitted because this is contrary to Swazi custom and is being resorted to less and less in European Courts. It should also be noted that fines must be paid in cash. This is insisted upon because for so many years past criminal cases have been tried by European Courts and the Swazi are well accustomed to payment of fines in cash. An additional reason is that cash fines are easier to account for than fines in kind. Clause 16 provides for the payment of fines in instalments. The provision that fines or other punishment should not be excessive is important. It is obviously futile to impose a fine so high that the accused has no prospect of paying it. This is a commonsense point of view and is well understood by the Swazi.

Clause 14: The reason for this Clause is obvious. If the accused is sentenced to receive cuts and the cuts are administered straight away, his appeal would be no use to him even if it succeeded. Clause 32 deals with appeals.

Clause 15

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Clause 15: In Swaziland there are no Native Administration prisons like there are in countries like Nigeria. Prisons are costly to build and to administer. Therefore for the time being it is ~~NECESSARY~~ necessary to arrange for natives sentenced~~x~~ to imprisonment by Native Courts to be sent to the ordinary Government prisons to serve their sentences. This Clause sets out the procedure.

Clause 16: This Clause is clear. In most cases the best punishment is by fine and the provision allowing for payments by instalments means that a man need not be sent to prison because he is not able to pay the whole fine at once. It will be noted that ~~FINES MUST BE PAID IN CASH~~ although fines must be paid in cash (see also Clause 13) damages etc., e. g. for adultery can be paid in kind. If the property to be levied is outside the jurisdiction of the Court which gave judgment it can issue an order under Clause 36 to the Court of the area where the property is in order to obtain execution of the judgement.

16 (2) means that if the Native Authority think it is better to have damages etc. paid in cash instead of in kind, it can request the Resident Commissioner to order that this should be done in the area of any Court.

Clause 17: In Swazi law and custom there is not the clear distinction that there is in European law between criminal and civil cases e.g. in seduction cases there is a combination of criminal and civil aspects. To save the necessity for two separate trials ~~AND COMPENSATION TO BE PAID TO THE INJURED PARTY~~ in such cases this Clause provides that after one trial the Native Court may order the whole fine or part of it (which must of course be in cash - see Clause 13) or any ~~COMPENSATION~~ compensation to be paid to the injured party. If that party accepts it then he cannot sue again for damages.

Clause 18: This is clear and should be of great assistance to Native Courts in maintaining the dignity and decorum of their tribunals.

Clause 19.: This is clear and is a useful provision. So many delays in Native Courts are due to witnesses not appearing when they should. If the witness is outside the jurisdiction of the Court Clause 20 applies.

It is a frequent and bitter complaint among Europeans that their employees are kept unnecessarily long at trials before Native Courts. The proviso to Clause 19 (1) is designed to obviate such causes of complaint by making it necessary for the Administrative Officer to concur before the summons is issued. The Administrative Officer can then investigate to ascertain whether the Court is ready to take the witness's evidence expeditiously.

Clause 20: This is self-explanatory. If such powers become ~~NECESSARY~~ necessary the High Commissioner can be requested to grant them.

Clause 21: This ~~is~~ is clear.

Clause 22: This is clear.

Clause 23: This is clear and confirms existing practice.

Clause 24: This is clear. The difference between an act of arbitration in terms of the second proviso and a judgement of a duly constituted Native Court is that no legal steps can be taken to enforce the former whereas the law can be invoked to ~~ENFORCE~~ enforce the latter.

Clause 25: Briefly, this Clause means that a person who is

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a member of a Native Court or who expects to be a member of such a Court is prohibited from accepting a present as a motive or reward for giving a particular ~~and~~ decision in the ~~the~~ case or influencing other members of the Court to give a particular decision. This offence ~~is~~ is ~~serious~~ a serious one.

Clause 26: This Clause is very similar to Clause 25 and the same explanation applies, The only difference is that in Clause 25 reference is to persons who are members of Courts and on Clause 26 reference is to the bribing of other persons in order to get them to try to influence a Court or a member of a Court.

Clause 27: This section makes it a crime to give false evidence before a Native Court whether such evidence is given on oath or not. The offence is a serious one as it may result in an innocent person being convicted. Native Courts should be careful to distinguish between real false evidence and the mere placing by one of the parties to a case of the best possible complexion on the facts in so far as they support his case.

Clause 28: The main purpose of this Clause is to ensure the speedy and just trial of cases. It will be noted that the higher Court, whether it be Native Court of Appeal or Subordinate Court, may hear the case itself or refer it back to the Court to which it would originally have gone. Unless there are ~~any~~ special reasons to ~~the~~ the contrary the object should always be to support the authority of the Court below and not to try cases which the lower Court could try without interfering with the interests of justice. It will be noted that the person making the application must inform all the parties concerned beforehand.

It will be noted also that application must be made to the next highest Court above except in circumstances (set out in Clause 28 (2) which may make application to a Subordinate Court necessary.

Clause 28 (3) shows that these applications should not be granted unless the Native Court of Appeal or Higher Native Court of Appeal shall have had an opportunity of showing cause why they should not be granted. See Clause 31 for explanation of the terms "Native Court of Appeal" and Higher Native Court of Appeal".

Clause 29: This is clear. ~~Reference~~ Reference should be made to Clauses 28, 30 (c) and 34 (b) as to the circumstances in which cases may be transferred to a Subordinate Court. Clause 29 (2) ensures that a Subordinate Court can call to its assistance expert assessors in dealing with these cases.

Clause 30: These powers are similar to the powers which the High Court exercises over the Subordinate Courts of the Territory. Their object is to prevent miscarriage of justice in cases where the accused or the person against whom judgement has been given has not ~~applied~~ appealed. It must be remembered that Native Courts are to be given new powers ~~to~~ to try criminal cases which make these supervisory powers all the more necessary. The powers will be exercised in the same way as similar powers by the ~~a~~ Judge in respect of Subordinate Court cases. The ~~Judge~~ Judge decides whether "real and substantial justice" has ~~x~~ been done in the case and does not alter the judgment or ~~the~~ or sentence to what he would have given if he had been trying the case, unless he considers that real and substantial justice has not been done. The wording of the Clause is clear.

Clause 31: This is clear. There are different grades of Swazi Courts of Appeal the highest being the Paramount Chief's Courts.

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It is therefore necessary to have terminology to distinguish between ordinary Courts of Appeal and the Paramount Chief's Courts which would be Higher Courts of Appeal.

~~xxx~~ Clause 31 (2) will be redundant if, as is proposed, all Native Courts including Native ~~2~~ Courts of Appeal are ~~being~~ recognized ~~simultaneously~~ simultaneously.

Clause 32: This is straightforward and sets out the chain of appeal from the Native Court of first instance through the Native Court of Appeal, Higher Native Court of Appeal, Subordinate Court to the High Court. The difference from present practice will be noted. Instead of appeals from the Paramount Chief's Courts going to the High Court direct, provision is now made that they should first go to the Subordinate Court, ~~and from the Subordinate Court~~ The cases in which special leave to appeal is required from the Higher Native Court of Appeal to the Subordinate Court, and from the Subordinate Court to the High Court respectively in the second proviso to Clause 32 (3) and (4) should be noted.

Clause 33 : Leave to appeal after the expiration of the period of 30 days normally allowed may be given in very special circumstances by the Court to which the appeal lies. Each case must be considered on its own merits and it is impossible to lay down hard and fast rules for determining whether appeals out of time should be allowed or not.

Clause 34; Although an Appeal Court (including a Native Court hearing an appeal) may, under Clause 34 (a) increase sentence or an amount awarded as compensation etc., it can only do so up to the sentence or award which the Court originally hearing the case could have given. If an Appeal Court is of the opinion that a gross injustice has been done and ~~that~~ that it cannot put the matter right under this sub-section its correct course is to employ the provisions of Clause 34 (b), that is, to order a retrial. An Appeal Court (including a Native Court of Appeal) has the power to cause a case to be re-heard, if it considers the interests of justice would best be served by such a course, either in the original Court, by the Appeal ~~sixxxx~~ Court itself, by any other Native Court or before a Subordinate Court.

Clause 35: This Clause is inserted to show the Government's willingness and desire to work in the closest cooperation with and as far as possible in accordance with the wishes of, the Native Authority.

Clause 36: This Clause means that all Native Courts are bound to assist the High Court, Subordinate Courts or any other Native Courts by carrying out all the requests addressed to the Court such as requests for the arrest of persons who refuse to attend Court, the warning of witnesses or accused persons or defendants to attend Court and the seizure of property of persons who have failed to carry out judgments or pay fines. In fact, Native ~~sixxxx~~ Courts are bound to assist each other and Subordinate Courts and the High Court in every way. This Clause of course largely confirms existing practice.

Clause 37: This Clause means that no person who does anything which this Proclamation empowers him to do shall be liable to be sued for doing such an act, and even if he makes a mistake and does something ~~that~~ that he is not empowered to do, he shall not be liable to be sued so long as it was a genuine mistake made under the impression that he had such power.

Clause 38: This is a formal safeguard against the challenging

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Clause 38: This is a formal agreement against the challenging

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of the authority of a Native Court in the circumstances set out in the Clause.

Clause 39: This is Clear. The obligation upon the High Commissioner to consult the Native Authority before making rules should be noted. No rules have so far been drafted under this Clause. The power to make rules ~~have~~ is inserted so that it can be used later when the necessity for rules will undoubtedly arise.

Clause 40: This makes it clear that any powers granted to Subordinate Courts under this Proclamation are separate and distinct from those granted to them under the Swaziland ~~Criminal~~ Criminal and Evidence Proclamation 1938 which contains elaborate provisions not suitable for Native Courts.

Clause 41 : This is clear. The Schedule of the laws, repealed is ~~is~~ attached to the draft. Section 17 of Proclamation 4 of 1907 is the one which ~~says~~ says that the Paramount Chief and other Native chiefs shall continue to exercise jurisdiction according to Native Law and Custom in all civil disputes ~~shall go to the High Court instead of the Resident Commissioner formerly~~ and in which ~~only~~ natives only are concerned. Proclamation 63 of 1934 provides that appeals ~~from~~ from decisions in such civil disputes shall go to the High Court instead ~~of the procedure in regard to such appeals~~ Resident Commissioner as formerly, and gives more which ~~is~~ detail about the procedure in regard to such appeals. High Commissioner's Notice 167 of 1934 is the one which provides rules for appeals from the decisions of the Paramount Chief to the High Court.

Clause 42: This Clause is inserted to enable Courts existing at the date of commencement of the proclamation to carry on for a period of six months so that Warrants can be prepared for the Courts which will be recognized.

Clause 43: This is clear.

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SCHEDULE.

LAWS REPEALED.

<u>Number and Year of Law.</u>	<u>SUBJECT.</u>	<u>Extent of Repeal.</u>
Proclamation No. 4 of 1907.	Swaziland to jurisdiction relating to jurisdiction of native Chiefs.	Section 17.
Proclamation No. 63 of 1934.	Amending the Swaziland Administration Proclamation 1907.	The Whole.
High Commissioner's Notice No. 167 of 1934.	Rules for the Special Court of Swaziland in cases of appeal against any judgement or order of the Paramount Chief.	The whole.

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