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"REPRESENTATION OF NATIVES BILL"

To prohibit the further registration of Natives as Parliamentary voters; to make additional provision for the representation of Natives in the Senate; to provide for the establishment of a Natives Representative Council for the Union; to define the functions, powers and duties of the said Council; to provide for the representation of Natives in the Provincial Council of the Province of the Cape of Good Hope; to prescribe what Courts shall have jurisdiction to hear Election Petitions; and to provide for the declaration of certain persons to be non-Natives; and for other incidental matters.

Described

and

Analysed.

A N A L Y S I S

of

REPRESENTATION OF NATIVES BILL

"P R E L I M I N A R Y"

Comment: It is somewhat curious that the fundamental principle of the Bill, viz., Political Segregation, is introduced under the heading "Preliminary".

Section 1: This section provides for the gradual extinction of the Cape Native Franchise. After the passing of this Act, no Native, not already registered as a Parliamentary Voter, may be so registered. Those already registered retain their rights as voters, unless and until they lose the qualifications which entitle them to be registered.

Comment: (a) As the present Native voters die, or drop off the register for one cause or another, the Cape Native Franchise will be gradually extinguished. It may take fifty years before the last Native voter disappears from the register, but the process, though slow, is sure.

(b) Under the present Cape Native Franchise, Natives (men only), who possess certain educational and property qualifications, help to elect Members of the House of Assembly, on the same register as white men and women, enjoying adult franchise without any other qualifications.

The result of this section is that, in the end, Members of the House of Assembly will be elected by White voters only. This is the principle of Political Segregation. The House of Assembly is the real centre of political power under the present Constitution of South Africa. The aim of the section is to reserve the right of electing Members of that House exclusively to White men and women. The Assembly is to be the organ through which the White people of South Africa are to maintain their political supremacy over the non-White sections of the population.

(c) In coming to a decision on the merits of the principle of political segregation, everyone has to ask himself these fundamental questions; Is this principle in the best interests of the whole country, and of all its inhabitants, both White and Black? Will it make for better,

--or--

or worse, relations between the races? Will the Native peoples under this principle receive as good, or perhaps even better, opportunities for educational, economic, social development? What, in short, are the advantages which will accrue to both races?

(d) In attempting to answer these questions, certain subsidiary questions will present themselves, such as: Is the existence of the present Cape Native Franchise a danger to the White people in South Africa? Has it ever been abused (e.g. used against the interests of the Whites) during the more than eighty years of its existence? Would its extension to the other three Provinces constitute a danger to the well-being of South Africa as a whole?

(In this connection, it is worth noting that whilst ten years ago - before adult franchise had been extended to all White men and women - the Cape Native Franchise was, by its critics, attacked as a "danger", its abolition is now defended on the ground that it has become "useless" to the Natives.)

(e) Another aspect is: Is there any precedent for a group of people who have had the franchise, being deprived of it (except as a punishment for treason)? If not, are the reasons for creating a precedent sufficiently strong?

(f) Assuming that, rightly or wrongly, the Cape Native Franchise is abolished, is the alternative offered to the Natives in this Bill (see Parts I, II, III,) a fair equivalent for what is taken away? Note (1) that, in answering this question, account must be taken both of the practical, and of the sentimental, value of the present Cape Native Franchise; and (2) that this Franchise has a sentimental value, not only for the Cape Natives, but for all Natives throughout the country. On the other hand, the Bill, whilst taking away from the Cape Natives the Franchise to which they now have access, gives some degree of "representation" to the Natives of the other three Provinces who, at present, are totally disfranchised. Under the Bill, there will be a uniform system of representation for all Natives in the Union.

Section 2: This Section divides the Union into four electoral areas for the purposes of Native representation, both in the Senate and in the proposed Natives' Representative Council. After seven years these areas may be extended,

--but--

but may not - unless and until the Act is amended - exceed six.

The electoral areas are:-

(a) Natal.
(b) Transvaal and Orange Free State.
(c) The Transkeian Territories.
(d) The Cape Province, excluding the Transkeian Territories.

Comment: This section lays the foundation for the other side of Political Segregation, viz., for creating a separate machinery for the representation of the Native peoples.

Note that this machinery for representation covers the whole Union, and not the Cape only.

Attention is drawn to the difference of these voting areas, both from the recognised Provincial areas and also from the recognised Chief Native Commissioners' areas. The difference from the latter lies in the exclusion of the Witwatersrand as a separate area. (See Section 13, 2 (b).

The argument for the inclusion of this as a separate area lies jointly in its industrial and economic importance, the number of Native leaders of education residing there, and the advantage of encouraging a sense of responsibility among men who might otherwise easily become mere agitators.

The principal argument against is that the Witwatersrand is the only Chief Native Commissioner's area which includes no scheduled Native areas under the Land Act, and on the basis of territorial segregation is thus not entitled to a separate representation; also the Witwatersrand consists of urban areas (including mines). The Urban Native Advisory Boards form an electoral unit and the mine workers are not domiciled in the urban areas. (Yet, the various urban locations in the area do embody the principle of territorial segregation, though in a different form from scheduled areas under the Land Act).

The further point may be raised that the limitation to six areas, if it is intended to make provision for the eventual admission of the Protectorates into the Union, leaves no room for expansion in the Union itself. Moreover, can three Protectorates, each with an individuality and problems of its own, be conveniently accommodated in only two electoral areas?

--PART--

PART I.

PARLIAMENTARY REPRESENTATION OF NATIVES

Comment: This Part of the Bill provides for the first half of the alternative scheme of representation, viz., by offering the Native peoples a limited representation in Senate, but not in the House of Assembly.

Section 3. This Section provides for representation of Natives by four Senators to be elected by them at septennial elections, which are to be held on some day other than that appointed for any General Election of Members of the House of Assembly.

Comment: The manner of election of these Senators is prescribed in Part II of the Bill (see below).

The separation of the elections of Senators representing Natives from a General Election for the House of Assembly, is intended to remove these elections from the party-conflict of White parties. The hope appears to be that candidates for these Senatorships will not stand as members of one of the White parties in the "House", but as spokesmen of Native interests; and that the Natives will elect them without reference to the party-political situation in the White Electorate or in the House.

Only experience can show whether this hope will be realised. (The hope, expressed at the time of Union, that the Provincial Councils would not be run on the party-lines of Parliament, was not fulfilled.)

In any case, the provision for four Native-elected spokesmen in Senate, for Native interests is a recognition, not so much that Native interests are separate, and different, from White interests, but that they are common, and yet that the share of the Natives, as a group, in these common interests is apt to be ignored, unless it is specially voiced by representatives elected ad hoc.

Section 4. The four Senators are to be additional to the number of Senators prescribed under the South Africa Act, and are to hold their seats for seven years notwithstanding any earlier dissolution of the Senate. A Senator elected to fill a vacancy is to sit only for the unexpired portion of the original seven years' period.

Comment: It is to be noted that the total number of members of the Senate will be raised by this provision to 44. The total number of members of the House of Assembly is 150. The total voting representation of Natives will be thus 4 elected Senators plus the 4 Senators nominated by the

--Government--

Government "on account of their thorough acquaintance by reason of their official experience or otherwise with the reasonable wants and wishes of the coloured populations of the Union" - in all, a total of 8 out of 194 Parliamentary representatives.

It is, however, arguable whether or not the four nominated Senators can be regarded as representatives of the Native people.

Section 5. This Section lays down the qualifications of Senators elected under this Act. Senators are to have the ordinary qualifications of elected Senators. For our purposes, the most important of these are that they must be "British subjects of European descent", and that they must possess landed property to the value of £500. An additional qualification is laid down as follows:-

"Such persons must prior to election have resided "for two years within the Province or one or other of the "Provinces comprising the electoral area concerned or within "which such electoral area is situate".

These Senators will be full members of the Senate with all the customary voting powers, privileges and immunities of Senators.

Comment: The most important point in this Section is the provision that the Senators to be elected by the Natives must be Europeans.

On page 6 of the Select Committee's Report, it is revealed that a motion was put forward for removing the colour-bar in the case of these elected Senators, but that it was subsequently withdrawn.

The argument for the removal of the colour-bar is that, once the principle has been accepted of separating the Natives from all other voters, it is but logical that their representatives should themselves be Natives. It is not denied that suitable persons are available.

The arguments against are, first, the desire to prevent the great inroad into the principle of social segregation which would be made by the presence of Native Senators in Parliament itself, and, second, the belief that the case of the Natives can be better put by skilled European Senators familiar with Native conditions.

The provisos requiring £500 of landed property, and two years' residence in the Electoral Area prior to election require consideration. Neither proviso applies to the four nominated Senators at present "representing" Native interests in Senate.

How will these provisos work in practice?

--E.g.--

E.g. will the property qualifications not operate so as to exclude well-qualified friends of the Natives, such as Missionaries, or ex-Missionaries, and, in any case, so as to limit the Natives' choice by a factor utterly irrelevant to the suitableness of a person to represent Native interests?

Similarly, if "two years' residence prior to election" means "immediately prior" (cf. Section 15 below) will it not exclude from candidature men, like ex-Native Affairs Magistrates, who may have spent their whole lives in Native Territories and possess an unrivalled knowledge of Native interests and needs, but who have, on retirement, settled outside the area they are best qualified to represent?

PART II.

ELECTORAL COLLEGES AND PROCEDURE AT ELECTIONS

Section 6. This Section provides for the constitution of Electoral Colleges in each of the four voting areas. Senators will be elected by these Electoral Colleges. For the Transkeian Territories the Electoral College will consist of the Native members of the United Transkeian Territories General Council.

With regard to the three other areas, the Electoral Colleges are to be made up as follows:-

(1) The Chiefs of such Tribes as do not fall under the jurisdiction of a Local Council.

(2) The Native members of Local Councils (including Reserve Boards of Management).

(3) The Native members of the Native Advisory Boards.

In addition, in the Cape Province there are included headmen of locations which do not fall within the jurisdiction of a Local Council or under the jurisdiction of the Chiefs.

Comment: No adverse criticism has been heard of the provision with regard to the Transkeian Territories. Criticism of the other provisions has fastened principally on the exclusion from the Electoral Colleges of educated Natives living outside urban areas. Most Native Teachers and Ministers of religion, for example, will be completely disfranchised by these provisions. The Native Advisory Boards referred to are the Municipal Advisory Boards under the Urban Areas Act, and to some extent these provide for the representation of educated Natives in the towns. But such a

--recognised

recognised leader as the Rev. John Dube would have no place in the Electoral College for Natal.

A question to be carefully considered, especially in Natal, is whether the Electoral Colleges will be dominated by Chiefs, many of whom have no education and little conception of the relative worth of European candidates for Senatorship.

The arguments against these criticisms are that the educated Natives form a small minority of the total Native population; that, on the principle of segregation, it is the inhabitants of Native areas, as such, who ought to be represented, and that the Chiefs are the natural and traditional leaders in most of the Native areas.

In any case, the Native voters at the Cape urge that, for them at any rate, absorption into a communal vote through an Electoral College is no fair equivalent at all for the individual vote which each of them possesses now.

Section 7. This Section, together with the Schedule to the Act, lays down the method of electing Senators in areas outside the Transkeian Territories. Members of the Electoral College will not have equal voting powers, but will be granted a number of votes proportionate to the number of Natives within the area of jurisdiction concerned. The number of Natives within each area will be determined by Governmental enquiry on the basis of Natives registered for purposes of taxation.

There is a special proviso with regard to the areas of Native Advisory Boards, reading as follows:-

"Provided that in the case of Native Advisory "Boards, no Native shall be included in the number of Natives "so determined unless he was upon a day six months before the "fixed day domiciled within the area of jurisdiction of the "Urban Local Authority in respect of which such Native Advisory "Board is established, and provided further that no Native shall "be deemed to be domiciled within the area of jurisdiction of "such Urban Local Authority upon any particular date unless he "has had his permanent home within such area during a period "of not less than three years immediately preceding such date".

Provision is made for appeal to the Minister with regard to the determination of the number of voters for any particular voting unit.

Comment:

The first half of the proviso quoted above seems grammatically to have only one possible meaning, namely, that no Native entering an urban area after the passing of this Act may be counted for purpose of determining the voting value of a Native Advisory Board.

If this is the correct reading, it is not

--clear--

clear what is the purpose of the restriction proposed. Is it to restrict the influx of Natives into urban areas? If so, will it, in fact have this effect? i.e., will the knowledge that they will not count for the purpose of determining the voting value of a Native Advisory Board, keep any Natives from entering, and residing in, an urban area? In any case, is it fair not to count those who, for sound and legitimate reasons, go to an urban area and live there after the passing of the Act?

The second half of this proviso will, in practice, involve investigation too detailed for the available time of the Government Departments concerned. It is not clear whether the onus will lie upon a particular urban resident to prove his three years' residence or not. In general terms it may be suggested that if the Native Advisory Boards are to be represented at all, their representation should be on simpler lines and less fettered by provisions than is the case in the Bill.

Section 8. This Section deals with the nomination of candidates for Senatorial elections in the Transkeian Territories, and lays down the District Council as the body entitled to nominate.

No Comment:

Section 9. This Section deals with the more complicated question of nomination in other areas. Candidates may be nominated by any voting unit or combination of units representing not less than 2,000 votes. The person nominated must signify acceptance of nomination and make a declaration of qualification.

Comment: Nowhere is any provision made for the way in which candidates may bring themselves and their qualifications to the attention of the nominating bodies. Are there to be, prior to nomination, electioneering campaigns, with platforms, speeches, canvassing? The electoral areas being vast, how can a candidate make his claims effectively known? One candidate may be known to some Chiefs, Local Councils and Native Advisory Boards, another to others. Assuming that the nominators vote, severally, for their own nominees, the candidate who is nominated by those members of an Electoral College who happen, under Section 7, to be credited with most votes, will be automatically elected, without the Electoral College, as a whole, having had any opportunity of comparing the merits of rival nominees. (See also the comment on Section 12, below).

Section 10. This is a formal Section providing that if only one candidate is nominated he shall be declared duly elected, and if two or more candidates are nominated, an

election shall take place as laid down in Sections 11 and 12.

No Comment:

Section 11. This Section deals with the election of the Senator for the Transkeian Territories, and provides that the Electoral College shall actually meet and vote for the Senator. In terms of the Schedule, each member of the Electoral College shall have one vote. A careful reading of the Schedule, together with Section 12, will show that a modified form of proportional representation is being introduced in these Sections.

No Comment.

Section 12. This Section lays down the procedure for the election of Senators in the other electoral areas. Votes are to be cast before the Magistrate of the district. In the case of bodies such as Councils and Advisory Boards, these bodies shall decide by a simple majority, the votes to be cast and the order of preference as between candidates. The votes will be counted on the basis of the number of persons represented by each voting unit (See Section 7). Details of the counting in conformity with the principles of proportional representation are given in the Schedule.

Comment: Is this system of voting, taking it all round, not so complicated that it will be difficult for some of the voters, - particularly Chiefs - to see the relation between the votes they cast and the final result of the election? Might better results not be achieved by assembling the members of the Electoral College, each Council or Advisory Board having first selected its representative? At such a gathering the relative merits of different nominated candidates might be discussed.

PART III.

NATIVES' REPRESENTATIVE COUNCIL

Comment: This part of the Bill provides for the second half of the alternative scheme of representation, viz., by offering the Native peoples a Representative Council with statutory functions which are, however, of a purely advisory kind.

Section 13. In terms of this Section, a Native Representative Council is to be established, consisting of 22 members, namely:

(a) The Secretary for Native Affairs as Chairman;

(b) 5 European members (who shall not have the right to vote);

--(c)--

(c) 4 Nominated Native members appointed by the Governor-General;

(d) 12 elected Native members.

The five European members under head (b) are to be the five Chief Native Commissioners of the Union. Each of the four electoral areas shall elect three Native members; those for the Transkei will be chosen by the Electoral College in the same way as the Senators, but in the other three electoral areas members of Native Advisory Boards will be separated from the other members of the Electoral College and will choose one member in each area, while the remaining members of the Electoral College will choose two members in each area. The voting procedure shall be as in the case of the election of Senators.

Comment: In forming an opinion on this Section, the following questions have to be considered:

Will the Secretary for Native Affairs, as Chairman, and the five Chief Native Commissioners, as Assessor Members, not be embarrassed by controversial political discussions and votes on the part of the Native members?

To what extent will the discussions be more "political" than the discussions which take place in the Transkeian "Bunga", where the Chief Magistrate presides?

Will the presence of these powerful officials embarrass the Native members and prevent them from speaking their minds freely?

Should not all eight Senators, specially representing Native interests, or, at any rate, the four Senators to be elected by the Natives themselves be Assessor Members of this Council, so as to be better informed for their task of representing Native opinion in Senate? If so, like the five Chief Native Commissioners, they should not have the right to vote.

Section 14. In terms of this Section, the Native members of the Council shall hold office for a period of five years; members elected to fill vacancies shall be elected until the expiration of the five years' period. An allowance of £120 per annum is to be paid, together with travelling and subsistence allowance.

Comment: No objection can be raised to the payment of travelling and subsistence allowances. On the other hand, may the special allowance of £120 per annum not operate as an inducement to the members of the Council, and especially to the four members nominated by the Government and dependent on its good will, not to take a line displeasing to the Government, lest they be removed from the Council under Sections 16 and 17?

Is the Council likely to sit long enough to justify the payment of salaries, or will the members find it necessary to travel through their "constituencies" to keep themselves in touch with their constituents' needs?

Section 15. This Section deals with the qualifications of the Native members of the Council. Inter alia, they must have been born within the Union, domiciled within the Union for five years immediately preceding the date of appointment or election, and, for two years immediately preceding the said date, within the area for which appointed or elected, and must be Union Nationals.

Comment: This Clause is intended to and will effectively debar the election of a non-Union Native. It is open to question whether all the provisos are necessary.

Section 16. This Section deals with disqualification of members, but, in addition to the ordinary disqualifications, makes definite disqualifications of:- Removal from an urban area under Section 17 of the Urban Areas Act, or subjection to an Order issued under the provisions of Section 1, 12 of the Riotous Assemblies Amendments Act.

Comment: The reasons for these additional disqualifications are clear and cogent, but criticism may be brought against them on the ground that, by means of issuing an Order under the Riotous Assemblies Act, the Government may remove any inconvenient member from the Council.

Section 17. This Section deals with the vacation of office under the usual terms, with the addition, however, of two provisos, not usually found, namely when a member -

"(e) becomes in the opinion of the Governor-General "incapable of effective service on the Council "by reason of illness, infirmity or other cause.

"(f) becomes in the opinion of the Governor-General "unfit by reason of misconduct or other cause to "be a member of the Council".

Comment: Sections 16 and 17 give the Government ample power to disqualify, or remove, Native members of the Council for a great variety of causes, some of which are much more controversial than others. The Government will be well protected against "agitators" on the Council, whom it can remove at any time. On the other hand, the electing bodies have no means of removing a representative with whose attitude they are dissatisfied.

Is there not some danger that the control which, under these sections, the Government is able to exercise, will tend to diminish the value of this, numerically very small, Council, even in its purely advisory functions?

--Section--

Section 18. This Section deals with the functions, powers and duties of the Council. The Council must consider and report to the Minister upon:-

(a). Proposed legislation in so far as it may affect the Native population.

(b). Any matter referred to it by the Minister.

(c). Any matter affecting the interests of the Natives in general.

Any report made by the Council must be laid upon the tables of both Houses of Parliament, or of the Provincial Council, within the usual period of fourteen days after the report, or the commencement of the next Session if these bodies are not then in session. The Council may recommend legislation to Parliament or to any Provincial Council.

Sub-section 3 may be quoted in extenso:-

"No Bill or draft Ordinance which in the opinion "of the Minister after consultation with the Native "Affairs Commission, or of the Administrator of any "Province concerned, contains provisions specially "affecting the interests of Natives, shall be "introduced into the House of Assembly, the Senate "or into the Provincial Council concerned until it "has been referred to the Council for its con- "sideration".

Sub-section 6 lays down that the Council shall meet at any time and place fixed by the Minister, and its proceedings shall take place in public, subject, however, to such limitations as may be prescribed by regulation.

Comment:

Section 19 prescribes that certain estimates shall be laid before the Council (see later). Reference to Section 19 shows also that the Council will have to meet at least once a year ("before the commencement of each "ordinary session of Parliament, or as "soon as possible thereafter").

Section 18 must also be read with Section 13 in that it permits any Minister or Administrator and any member of the Native Affairs Commission to attend meetings of the Council and to speak, but not to vote.

Sub-section 3, quoted above, is a very interesting and important provision.

It must be noted that the wording, "(c) any matter affecting the interests of Natives in general" gives the Council the right to initiate discussions: it is not restricted to discussing matters initiated by the Minister.

The provisions of sub-section 6 are important. This would permit both Natives and interested Europeans to attend. It would appear desirable that the hall of meeting should give adequate facilities for the public to be present, and that the regulations should be such as not to restrict attendance by the public, provided that the public is of good behaviour (c.f. admission of public to Parliament or the Law Courts).

Section 19: In terms of this Section, as stated above, the Minister must summon annually a meeting of the Council, and place before it certain estimates, in particular the estimates of Revenue and Expenditure of the proposed South African Native Trust Fund, and the amount to be contributed from the Consolidated Revenue Fund to the Native Development Account. The Council's report on this shall be duly laid upon the tables of both Houses of Parliament.

Comment: This Section is an interesting illustration of the application of the principle of segregation. In itself an innovation, it is open to the criticism that the Natives are fundamentally affected by many provisions in the ordinary Estimates of Revenue and Expenditure, on which their Council is not consulted.

Sections 18 and 19, taken together, may - if free and frank discussion is not restricted - make the Native Representative Council a very useful organ for the crystallisation of Native opinion and its expression, not only to the Government, but to the white population of South Africa as a whole. Compared with the Native Conferences that could be called under the Act of 1920, the gains are: (a) that the Council now proposed must be called before every Parliamentary session; (b) that certain important matters must be laid before it for discussion; (c) that the Report must be laid before both Houses of Parliament or the Provincial Councils; (d) that the members of Council can themselves initiate discussion, and are not restricted to agenda laid before them by the Government.

Sixteen Natives are a small number to represent nearly 6,000,000 persons. Still, if wisely selected - only experience can show whether they will be - they may do good.

It should again however be noted that the educated and urbanised Natives are not likely to have any more influence on the election of members of the Council than they have on that of the four Senators.

--PART--

PART IV

PROVINCIAL COUNCIL REPRESENTATION OF NATIVES

Section 20: This Section provides for the election to the Cape Provincial Council of two members, one for the Transkei and one for the rest of the Cape Province. The election is to be held on some day other than that appointed for the General Election of members of the House of Assembly or of the Provincial Council.

Comment: This provision raises the main issues raised by Section 1 of the Act, and also the question whether representation in the Provincial Council is to be regarded as a quid pro quo for the loss of the Cape Franchise, or as desirable in itself. In the latter case, the question arises whether it should be limited to the Cape.

Section 21: This Section lays down that the two members of the Provincial Council shall be additional to the present total number, and that they shall hold their seats for a period of four years notwithstanding any dissolution of the Provincial Council within that period. It excludes them from the right to vote at an election of Senators, who as readers will remember - are chosen in each Province by an Electoral College consisting of the members of the Provincial Council and of the House of Assembly for the Province concerned. Vacancies are filled for the unexpired portion of the four year period.

Comment: The provisions with regard to the total number of members of the Provincial Council, and to the period of office of the Provincial Councillors concerned, are analogous to those referring to the Senators representing natives dealt with in Section 4.

Section 22: The qualifications of the Provincial Councillors under discussion are dealt with in this section, and should be read with some care. The second recognises three categories, namely:- "Any person who (a) is qualified to vote for the election of members of the House of Assembly, or (b) but for the provisions of this Act would have been qualified to vote in terms of paragraph (a), or (c) is qualified to be elected as a member of the Native Representative Council in terms of Section 15".

The effect of this is clearly that any person, European or Native, may be elected to these two posts.

The special provisions of Sections 16 and 17 of the Act (which should be referred to in this connection) apply to these Provincial Councillors.

Comment: It will be remembered that under the existing law there is no colour-bar in the Cape Provincial Council, and one Bantu member has already sat in it, representing a mixed constituency. This section adapts the old rule to the new conditions produced by the removing of native voters from the ordinary voters' roll.

--Section--

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The effect of this is clearly that any person, European or Native, may be elected to these two posts.

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Comment: It will be remembered that under the existing law there is no colour-bar in the Cape Provincial Council, and one Bantu member has already sat in it, representing a mixed constituency. This section adapts the old rule to the new conditions produced by the removing of native voters from the ordinary voters' roll.

--Section--

Section 23: This Section provides that these Provincial Councillors shall be elected in the same way as Senators representing Natives, i.e. by Electoral Colleges as already described.

No Comment.

Section 24: This Section provides that if at any time after the commencement of the Act, Native education, other than higher education, hospital provision for Natives, and certain roads in Native areas, cease to be matters falling under the Cape Provincial Council; then "Sections 20 to 23 inclusive shall be repealed by Act of Parliament".

Comment: This as it stands is a totally unnecessary section. The wording at the end is curious, and indeed unparalleled. No Parliament can bind any future Parliament to repeal an Act. In practice, it is most unlikely that any of the three categories, education, hospitals, or roads, will be withdrawn from Provincial Councils, so that this Section is likely to remain in any case a dead letter.

PART V.

MISCELLANEOUS AND GENERAL

Section 25: This Section deals with the question of the Courts having jurisdiction to hear election petitions. While in general terms, the provision with regard to Senators and Provincial Councillors are identical with the existing law, it is interesting to note that the Courts having jurisdiction in the case of the election of members for the Natives Representative Council are the Native Appeal Courts constituted under the Native Administration Act 1927.

Comment: Attention is drawn to the fact that the President and members of Native Appeal Courts must be civil servants. While it is unlikely that the Government would at any time bring pressure to bear on such Courts, it introduces a new principle that administrative officials should determine the result of elections.

Section 26: One of the most difficult practical problems in the working out of this Act will be the determination of the line between "natives" and "coloured people". This Section 26 aims at providing a safeguard for persons classified under Section 28 as "Natives" who wish to be regarded as "Non-Natives". The wording is so involved that it is difficult to say definitely just what persons are entitled to avail themselves of this procedure, but it seems probable that only persons of mixed blood, who might otherwise under the Act be regarded as Natives, may apply to be classified as "Non-Natives", and that no pure Native may so apply. (Read this section with the definition of "Native" under the heads (a), (b) and (c) in Section 28.)

--Petitions--

Petitions to be declared a "Non-Native" are to be referred to a special Board presided over by a Judge of the Supreme Court, which under certain specified limitations may recommend the granting of the petition. This recommendation must be laid upon the tables of both Houses of Parliament, and unless both Houses reject the recommendation it will be of effect.

No Comment:

Section 27: This Section empowers the Governor-General to make regulations. It is of the widest possible character.

No Comment.

Section 28: This is the definition section. Only two definitions call for special attention. The first of these is that of the "fixed day" which is defined as follows:- "The fixed date means the date as soon as possible after the first General Election of members of the House of Assembly to be held after the commencement of this Act to be fixed by the Governor-General by proclamation in the Gazette". It will be noted that this means that the new representation will only come into effect after the next General Election, which must take place in 1939 and may take place earlier.

The second important definition is that of "Native". It seems necessary to quote this lengthy and involved definition, as it is almost impossible to summarise it without leaving out some important point.

"Native" means:-

(a) Any member of any aboriginal race or tribe of Africa other than a race, tribe, or ethnic group in the Union, representing the remnants of a former race or tribe of South Africa which has ceased to exist as such race or tribe, and

(b) Any person whose father or mother is or was a Native in terms of paragraph (a), and

(c) Any person whose father or mother is or was a Native in terms of paragraph (b), and

(d) Any person not being a European, who -

(1) Is desirous of being regarded as a Native for the purposes of this Act, or

(2) Is by general acceptance and repute a Native, or

(3) Follows in his ordinary or daily mode of life the habits of a Native, or

(4) Uses one or other Native language as his customary and only mode of expression, or

--(5)--

(5) Associates generally with Natives under Native conditions,

But shall not include -

(i) Any person falling under paragraph (b) or (c) and born of a marriage as defined in Section 35 of the Native Administration Act (Act No. 38 of 1927), as amended, contracted prior to the commencement of this Act, or

(ii) Any person falling under paragraph (b) and born prior to the commencement of this Act who is by general acceptance and repute a European or non-Native, or

(iii) Any person falling under paragraph (c) who is by general acceptance and repute a European or non-Native and whose parents are or were by general acceptance and repute Europeans or non-Natives; who desires to be accounted a non-Native.

Provided that if any person asserts in the case of a person falling under sub-paragraph (ii) that the other parent (father or mother) of such a person is or was also a Native, the onus shall be on the person so asserting; and provided further that in the case of a person falling under paragraph (iii) the onus of proving that the parents of such person are or were by general acceptance and repute Europeans or non-Natives, shall not be on such person, but in any case where the contrary is alleged the onus of providing such allegation shall be upon the person who makes it".

Comment:

It appears that Section (a) removes pure Bushmen and Hottentots from the definition of Native, with the implication that they remain entirely "unrepresented", being excluded equally from the white voters' rolls, and the new scheme of Native representation proposed in this Bill.

How will this definition of "Native" work in practice?

In answer to this question, it should be noted that the proposed definition of "Native" makes this term cover two different classes of persons, viz. (a) what may be called "pure" Natives (see sub-section (a)), and what may be called "law-made Natives, viz. persons of mixed blood one of whose parents or grandparents (see sub-sections (b) and (c)) is a "pure" Native. Thus a person who is three-quarters "white" will be a "law-made" Native by definition.

When considering the effect of the application of this definition, we must distinguish two sets of cases, viz. (i) the population of South Africa to whom the definition will be applied immediately on its becoming

--law--

law; and the off-spring of mixed unions (legitimate or otherwise).

As regards (iii), the intention of the law is clearly not to investigate purity of descent beyond the grandparents among the existing population. Hence, e.g., a person, one of whose great grandparents was a pure Native, will, none the less, count as "white", unless he should happen to fall under the terms of sub-section (d).

As regards (b), the question arises whether the same escape from being a "Native" is automatically provided for the descendants of race mixture in the future, or whether the descendants of a person now classified as a "law-made" Native will for all future time be reckoned as ("law-made") Natives. Unless this door of escape is meant to be shut for the future, (so that, after the first classification of the population in terms of the definition, anyone who has any Native blood in him at all, will count as a "Native"), the principle of racial, or blood , segregation will not have been carried out; in fact, in a certain sense a premium will be put on miscegenation.

The ambiguity of the definition on this point is intensified by the fact that the definition tries to combine, and to work together, two tests of being a "Native", which are logically quite distinct, viz.,(a) the test of blood, (descent, birth); and the test of civilisation ("following in daily life the habits of a Native").

The effect of the definition, in the light of these two tests, is this:

(a) That no "pure" Native, however civilised, will ever be classified as anything but a Native. He will be judged solely by the test of blood, and not at all by that of civilisation. This is racial segregation, regardless of civilisation.

(b) Persons of mixed blood, will be "Natives" by the blood-test, whether or no their standard of life be civilised, if one parent or grandparent is a pure Native. Again, pure racial segregation.

(c) Persons of mixed blood, in whose ancestry the race-mixture occurred among the great-grandparents or earlier, will not be "Natives" by the blood-test, but may be so classed by the civilisation test. In the latter case, there will be segregation, not on the ground of "race", but on the ground of a "Native standard of life".

(d) How the two tests - which, as has just been shown, are sometimes to be applied together, and sometimes separately - will apply to the descendants in the third generation of persons originating from fresh miscegenations taking place after the Bill has become law, is not clear.

If the Boards, under section 26, have a hard task in dealing with doubtful cases in the existing population, they will have a harder one when they come to deal with cases arising from the offspring of fresh sex-relations between races, taking place after the commencement of the Act.

Note, finally, that a coloured man born before the commencement of the Act may be regarded as a Native, if he is born outside wedlock, and is not regarded by general repute as being a European or non-Native.

Section 39: Gives the short title (Representation of Natives Act) and lays down that the Act shall come into operation on a date to be fixed by the Governor General by proclamation in the Gazette.

No Comment.

/ML