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civil Rights & the African Population

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Government and Legislation

The system of separating the administration of the African population from the rest of the government service existed in three of the four colonies before Union. Since then the Native Affairs Department has widened its range of activity to embrace the supervision of the recruiting of African workers, and their conditions of work and general welfare in the principal mining and industrial centres, the supervision of housing in urban areas, the development of agriculture in the reserves, and the administration of justice in districts with a predominantly African population.

In addition, the principle has been adopted of meeting expenditure on Native education and agriculture from a separate fund consisting of a portion of the revenues derived from Native taxation. This arrangement has ensured the devotion of a minimum proportion of state revenues to the welfare of the African, but it has also excluded him from the benefits derived from the European community from the general departments of state. The effect of the discrimination has been seen most clearly in agriculture. The estimated expenditure by the Union Government on European farmers between 1910-35 is £100,000,000, against £228,821 spent on the purchase of land for Africans, and £445,000 spent from revenue and loan funds on development in the reserves.

The organisation of a separate Native administration has been accompanied by placing in the hands of the Executive wide powers of legislation in Native affairs. Under section 147 of the South Africa Act, the control of Africans is vested in the Governor-General in Council, who is their "supreme chief" under section 1 of the Native Administration Act of 1927, and whose powers outside the Cape Province are defined by the Natal Code of Native Law. Since the Code may be amended by proclamation, there are no legal limits to his powers of legislation. The Act of 1927 further gives power to amend by proclamation any law applicable in scheduled Native areas, or to proclaim new laws for them (sec. 25); to issue regulations, not confined to Native areas, on a defined range of subjects, such as the carrying of dangerous weapons and the "prohibition, control or regulation of gatherings or assemblies of Natives", and generally for "such other purposes" necessary for "peace, order and good government" (sec. 27); and to create pass areas and issue pass regulations (sec. 28). The only restriction on this edictal legislation is that proclamations must be laid on the tables of both Houses of Parliament, which by resolution can amend or repeal them

These powers of legislation by the Executive have parallels in other colonial territories. But they are exceptionally wide in the Union, andmay be used in matters that are not merely technical, but affect basic civil rights. An instance is Proclamation 252, 1928, which prohibits the gathering of more than ten Africans in locations and reserves outside the Cape without the permission of the chief and magistrate, except for religious, domestic, or administrative purposes.

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# CIVIL RIGHTS AND THE AFRICAN POPULATION

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## Government and Legislation

The system of separating the administration of the African population from the rest of the government service existed in three of the four colonies before Union. Since then the Native Affairs Department has widened its range of activity to embrace the supervision of the recruiting of African workers, and their conditions of work and general welfare in the principal mining and industrial centres, the supervision of housing in urban areas, the development of agriculture in the reserves, and the administration of justice in districts with a predominantly African population.

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In general, however, these powers have not been exercised for more than the issue of regulations for Native areas, such as might have come from state departments or local authorities in European areas.

The tendency in modern government to grant legislative powers under enabling rule-making clauses to departmental officials, and to give them extensive authority which is virtually outside the scope of the courts, is more evident in Native Affairs than in other spheres of state activity. Letters of exemption from laws affecting Natives, granted under sec. 31 of the Native Administration Act, 1927, may be cancelled at any time by the Governor-General without assigning a reason. Under section 17, Act 21, 1923, a magistrate after a semi-judicial inquiry may order an urban Native, suspected of being habitually unemployed or not having sufficient honest means of livelihood, and who cannot give a good and satisfactory account of himself, to be deported from the urban area to his home, any other place in the Union, or to be detained for two years in a farm colony. The Native in these cases has not committed an offence. A further instance of the wide discretionary powers of the Executive is Act 46, 1937, amending the Natives (Urban Areas) Act, which provides for the exclusion from an urban area of any Native considered by the Minister to be "surplus to the reasonable labour requirements of the area" (see below).

Civil Liberties

The Union's written constitution does not guarantee civil rights, as is done by the Bill of Rights or the Fourteenth Amendment to the Constitution in the United States. The courts have no power to declare Acts of Parliament ultra vires. As regards the common law the principle has been laid down that "the rights of personal liberty, which persons enjoy within this country, are substantially the same, since the abolition of slavery, as those which are possessed in Great Britain" (in re Willem Kok and Nathaniel Balie, Buchanan, 1879, 45). Owing to legislative changes in the common law this statement could not be considered accurate to-day for a number of generally accepted "rights", such as habeas corpus, protection against punishment without due process of law, freedom of assembly, speech and press, and freedom of movement, residence, and occupation.

Habeas Corpus. - The courts have granted writs of habeas corpus for the production of Africans, even where their detention was authorised by proclamation, on the ground that the grant of legislative powers to the Executive does not imply the delegation also of judicial powers without express words to that effect (Sigcau v. the Queen, 12 S.C. 256 (1895)). Section 8 of the Natal Code of Native Law, however, allows the "supreme chief" to order by proclamation the summary arrest and detention of an African who, in his opinion, "is dangerous to the public peace, if left at large", and only after the lapse of three months may the African apply to the courts for his release. Section 10 of the Code bars the courts from inquiring into the validity of acts done or orders given by the supreme chief or his representatives in the exercise of their powers.

Punishment without due process of law. - Section 5(3) allows an administrative officer to punish summarily an African by a fine of £10 or two months' imprisonment for the disregard of orders issued under s.s.(1). Section 5(1) of Act 38, 1927, empowers the Governor-General, "whenever he deems it expedient in the general public interest", to order the removal of a tribe or an individual African from any place to any other place in the Union. If a tribe objects, the order does not become operative until both Houses of Parliament have approved of the removal by resolution. The individual is not protected.

Under section 29(3) of Act 38, 1927, a person convicted of the offence of committing an act "with intent to promote any feeling of hostility between Natives and Europeans" may be prohibited by the Governor-General for a specified period, if he is an African and if the offence was committed outside a scheduled Native area, from entering or being in a place outside a scheduled area, while if he is not an African, and the offence was committed in a scheduled area, he may be excluded from it. Under section 1(14) of the Riotous Assemblies Act, 1914, as amended by Act 19 of 1930, the Minister may banish a person from any area on the ground that he is promoting feelings of hostility between European and other sections of the population. The Minister may be required to furnish reasons for the notice of removal, and as much of the information that induced him to issue the notice "as can, in his opinior, be disclosed without detriment to public policy". But the notice is not invalid because the person prohibited has not been given an opportunity of being heard; so long as the reasons stated by the Minister are truly his reasons, whether they appear sufficient or not, he need give no other reasons; and the court is bound to accept his statement that disclosure of information would be detrimental to public policy (Sachs and Diamond v. Minister of Justice, 1934, A.D.,11).

Assembly. - Section 1 of the Riotous Assemblies Act provides for the prohibition of a public gathering when there is reason to believe that it would seriously endanger the public peace. Sec. 27(1)(c) of Act 38, 1927 empowers the Governor-General to make regulations for "the prohibition, control or regulation of gatherings or assemblies of Natives". Proclamation 252, 1928, issued in terms of section 25 of the Act, prohibits more than ten Africans from assembling in a Native area in the Transvaal, Natal or Free State without the permission of the chief or headman, and the approval of the magistrate, except for religious, domestic, or administrative purposes. In urban areas the local authority may take regulations under section 23(3)(s) for the control and restriction of meetings or assemblies of Africans, but meetings may be prohibited only with the special approval of the magistrate, and then only if there is reasonable ground for believing that the holding of the meeting may provoke or tend to a breach of the peace.

Speech and Press. - Section 29(1) of Act 38, 1927 lays down that "any person who utters any word or does any other act or thing whatever with intent to promote any feeling of hostility between Natives and Europeans shall be guilty of an offence". This section "is primarily directed against what are popularly known as 'agitators' in districts in which Natives preponderate", it does not include within its scope criticism of the Government and members of Parliament

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generally; and it refers to only the general body of Natives and Europeans and not to individuals (Rex v. Bunting, 1929, E.D.L. 326; Rex v. Brown, 1929, CPD, 221; Rex v. Mote and Dumah, 1928 O.P.D.). There is no offence, unless the language used is accompanied by an intention to promote hostility, otherwise r person could discuss Native affairs without risking prosecution (Rex v. Bunting).

The difficulty experienced in securing a conviction owing to these decisions led to the amendment of the Riotous Assemblies Act in 1930, which as shown above empowers the Minister to ban sh persons when he is satisfied that they are promoting feelings of hostility. It also added s.s. (7) to section 1, which allows the Governor-General to prohibit the publication or dissemination of literature when he is of opinion that it is calculated to engender feelings of hostility between Europeans and other sections of the population. The person affected is expressly given the right to appeal to the supreme court.

Occupation. - In rural areas, the restriction upon the acquisition of rights in land by non-Natives within the scheduled areas, and the general policy of controlling settlement in them by Europeans, have led to the adoption of regulations controlling the issue of trading licen es and sites. Until recent years, the traders with few exceptions were Europeans, who developed strong interests and opposed the grant of trading rights to Africans as these acquired the necessary capital and experience. In the Transkeian Territories, the regulations are published under Proclamation 11, 1922, which provides that no store shall be set up within a radius of five miles from an existing trading site and enables traders to obtain full title to their sites. There are over 700 of these sites in the Transkei in European ownership, and only since 1935 have Africans been allowed to open stores, the total not exceeding 12 in 1936. Similar figures cannot be given for the other Native areas, but all are subject to regulations. In Natal and the Transvaal, locations trading sites are leased and new sites are granted after tenders have been invited for the lease. The number of African traders is believed to be relatively small.

Movement and Residence

The pass system developed historically as a method of stabilising the African population during the upheavel in tribal life that accompanied and followed the wars between colonists and Natives, and the subsequent dispossession of the latter from their lands. With the growth of the mining industry, its chief function came to be the enforcement of labour contracts, by preventing the desertion of workers. To-day it is an essential element in the machinery for enforcing segregation, and also an important means of restricting the migration from farms to the industrial centres.

In the Transvaal and Orange Free State, the existing general pass laws are contained in proclamation 150, 1934, issued in terms of the Native Administration Act, 1927. These require Africans entering the two provinces, or travelling in them outside the scheduled Native areas, to obtain passes which they must produce on demand by an authorised person, including the owner of land on which they are found. In Natal, an identification pass must be carried, and Africans entering or

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leaving the province require a pass in terms of Act 48, 1884. Those resident within the province may move about without a pass. In the Cape, passes are required only from "foreign" Africans, viz., from those belonging to the High Commission Territories or South West Africa, and from those moving in and out of the Transkeian Territories. Otherwise movement in the province is unrestricted except in certain urban areas.

Special provisions, designed to enforce contracts between labour tenants and farmers, are applied to the Transvaal and Natal by the Native Service Contract Act, 1932. In these provinces an African may not be employed, nor may a pass be issued to him to proceed to a place other than his home, unless he produces a document of identification. If he is domiciled in one of the provinces on land outside a Native location , he must also produce a labour tenant contract between himself and the owner of the land, or a statement by the latter that the holder is not obliged to work for him during the period for which he is seeking fresh employment. Permission must be obtained also from the guardian in the case of persons under 18 years of age.

Efforts made in the past to limit the number of Africans "squatting" on farms as cash or share-tenants culminated in the Native Trust and Land Act. Districts may be proclaimed under this Act in which an African will be prohibited from living on European-owned land, unless he is continuously employed by the owner, or is a registered labour tenant, i.e., one who works under contract for the owner, or is a registered squatter. Licence fees must be paid in respect of squatters, whose numbers may not be increased after the application of the Act. Labour control boards may be set up to determine the number of labour tenants required by landowners and to reduce the number if it is considered excessive. The surplus Africans must be expelled and accommodated in a Native area. Owing to the lack of land, these provisions have not yet been enforced.

The Native Labour Regulation Act, 1911, provides for a pass system in "proclaimed" industrial areas, of which there are 26 in the Union. In these districts contracts of service must be registered; Africans not in employment are required to obtain permits to seek work, or leave the area, and those in employment may not absent themselves from the property on which they are employed, unless they hold a special permit from the employer.

In South Africa, as elsewhere, the growth of towns has been accompanied by the migration from the countryside of peasants , under the influence of forces attracting them to the centres of civilisation and of pressure upon the rural community in the form of taxation, shortage of land, and the breakdown in general of their economy. But while in other countries they are in course of time absorbed in the urban society, the Union has adopted the policy of discouraging the development of a permanent urban Native population, while making it necessary for the African to seek employment in the towns and industrial centres. To carry out these conflicting aims, measures are taken to expel unemployed Africans and to limit the influx, especially of women, since it is assumed that the men will be less likely to settle in the urban areas if they are not accompanied by their families. In addition

to this system of partial segregation from the towns, a large portion of the Native population in the towns is under compulsion to reside in separate areas, and for this purpose the larger municipalities have established Native "locations" or villages, and hostels for men and women living on their own.

The law enforcing this policy is the Natives (Urban Areas) Act, 1923, amended by Act 25, 1930 and Act 46, 1937. In urban areas with Native locations, and of these there are about 240 in the Union, Africans may by proclamation be forbidden to live outside the location, unless they fall in one of the exempted categories, the largest of which consists of domestic servants and other employees housed by their employers. The prohibition extends to land within five miles, or when specially stated ten miles, of the municipal boundary. The majority of towns have "curfew" regulations that prohibit Africans from being without a permit in areas closed to Native residence during specified hours, which range from 9 p.m. to 4 a.m.

When an area has been proclaimed under section 5 of the Act, Africans may not enter to seek work or take up employment except under stated conditions. Twelve local authorities have applied this provision. In industrial and mining areas that have been specially proclaimed under section 12, of which there are 76, the local authority may require all contracts of service entered into by male Africans to be registered, and order them on entering the area to obtain a permit within a prescribed period to seek work or to visit. This permission may be refused if there is a surplus of labour available, or if the African is apparently bound to render service to a farmer in Natal or the Transvaal. The entry of women may be prohibited, unless they have the approval of the magistrate of their home district and of the local authority. The latter may not withhold permission if the woman's husband or her father has been continuously employed in the area for not less than two years, provided that the necessary accommodation is available. But the permission may be withdrawn in all cases at a month's notice. Unemployed Africans must report and find work during a period of not less than 7 and not more than 14 days. If the period is not extended, they must leave unless they were born and are permanently resident in the area. Males may be prohibited from working on their own account or as casual labourers without a licence. Where the registration of service contracts is in force, no person may introduce Africans to take up employment without written authority from the municipality and the provision of security against possible repatriation. Foreign Africans may not enter, take up or continue employment in an urban area without permission from the Secretary of Native Affairs.

Although the original Act gave power to exclude newcomers from urban areas and to remove unemployed men, the pressure of farmers for workers, the reluctance of local authorities to house an unlimited number of families in the locations, and the general desire to check the growth of the Native urban community, led to the adoption of more stringent methods of control in the Act 46 of 1937. This requires urban authorities to take biennial censuses of the African community, and to estimate the number "necessary to supply the reasonable labour requirements" of the area. In areas specially proclaimed the Minister, if he is satisfied that in any of these there are more Africans than are "reasonably" required, may require the municipality to furnish a list of those persons

who should be removed, and decide which of them are to leave the town. Accommodation must be found for them in a Native area. These provisions have not been operated as yet, and there is some doubt as to the class of person that will be affected. The Act does not distinguish between people who have grown up in the towns and those with a home in the tribal areas, between employed and unemployed persons, or between those working for Europeans and those who cater for the needs of the African community, such as artisans, traders, and teachers. There is no definition of "reasonable labour requirements", nor mention of seasonal fluctuations in the labour market, and it is possible that Africans will be considered "necessary" only after employable Europeans and other non-Africans have obtained jobs.

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