

1934  
23298

1934  
23298

KENYA

C0533/451

Native Tribunals Ordinance.

Previous  3067/33.	Room 311 299 297 Liberty legal R 297	24/12 21/12 22/12 29/12
Subsequent  38183/35		
Room 309		26/10
Mr. Freestone		31/10
Mr. Bush		1/11
Mr. Flood		7/11
Mr. Flood		8
Sir C. Bostonley		10-11
Sir J. Moffat		12-11
Sir C. Bostonley		13-11
E. A. Dapst		14-11
Mr. Freestone		
297		18/12
Room 309		19/12
Mr. O'Leary		19/12
Mr. Flood		20/12 20

6. Native  
Tribunals  
Ordinance.

Governor Byrnie 151 leaf \_\_\_\_\_ 11 October 1934

Submits Bill to amend Sections 59, 12 of the Native  
Tribunals Ordinance, finishes explanation thereof & a report  
upon the working of the organization of Native Tribunals.

(Copy annexed)

Government Notice 134 of the 9th February 1934 is a notice of delegation of power to the person holding an office of Provincial Commissioner in each Province, of the Governor's powers under Sections 3, 5 and 6 of the Native Tribunals Ordinance 1930. Thus at present the power to dismiss, suspend or re-instate any member of a native tribunal "who shall appear to have abused his power, or to be unworthy or to be incapable of exercising the same justly, or for other sufficient reason," is vested in the Provincial Commissioner.

It is now proposed to give District Officers the power of suspension and re-instatement. This devolution of power appears to be all right but it is throwing extra responsibility on the District Officer. In practice, I should think the District Officer would never suspend a person until he was certain that the person suspended would be dismissed. According to the new Bill the period of suspension may be unlimited. It is not explained why the provision governing the period has been omitted.

As regards Section 3 of the Bill; there appears to be no reason why a native tribunal should not have jurisdiction to try cases in a purely minor township in a Native Reserve. The powers of the native tribunals in regard to the administration of the provisions of any Ordinances is laid down in Section 15 of the Native Tribunals Ordinance. I have in mind the provisions of the Townships

Ordinance

Ordinance.

As regards paragraph 4 of the despatch it is necessary to point out that when the principal Ordinance was submitted for non-disallowance it was found to be altogether to the Secretary of State's satisfaction, and Lord Passfield pointed out that Sections 30 and 34 provided for appeals up to a Provincial Commissioner only. As he considered that there ought to be an appeal beyond the Provincial Commissioner in every case, he suggested that in cases which do not find their way to the Courts either by transfer under Section 30(c) or by appeal to the Supreme Court by way of stated case under Section 34(4), there should be a final appeal to the Governor; and he suggested that amending legislation should be introduced at an early opportunity to effect this, or else reasons should be furnished for the contrary course. For the reasons set out in his despatch No. 18 of the 11th January, 1932, the Governor is in agreement with his advisers that no change is necessary in the provisions of the Ordinance dealing with the appeals from native councils. It is for consideration whether the points raised in Mr. Allen's minute of the 24th February, 1932, should now be taken up with the Governor or deferred pending further working of the Ordinance. (The life of the Ordinance has been extended to the 31st December, 1936.)

It is of particular interest in this connection

connection to examine the return of appeals for the half year ended the 30th June, 1934. We are only furnished with the figures of the Nyanza Province as the number of cases dealt with by native tribunals in this Province greatly exceeds that of other Provinces:-

Total cases dealt with by the tribunals (Nyanza Province)....	10703
Appeals to native appeal tribunals	3.3
Appeals to District Officers	3.
Appeal to Provincial Commissioner	1 case only
Cases revised by District Officers	1.2
Cases revised by Attorney-General	13 cases only

It may be assumed that the number of cases revised by the District Officers represents the percentage of cases in which they altered sentences.

The tribunals appear to be working very well in the Central Province and in the Coast Province, although in the latter a large measure of supervision is still necessary. Native tribunals have been established in the settled areas of the Rift Valley Province and in the Masai District. In the Turkana District it has been possible to establish one <sup>Central</sup> ~~Central~~ tribunal among the Suk. In the Northern Frontier District the tribunals appointed in the Ordinance proved, owing to the special tribal conditions obtaining in the area, to be ineffective. A new system of "arbitral" tribunals has been provided for in the Special Districts (Administration) Ordinance No. 13/1934.

Paragraph 6 of the Governor's despatch relates to the question of fees. In reporting on the situation in January, 1933, the Governor pointed out

No 3  
18010/32.

18010/32  
18010/32.

2317/34

No 2  
3057/35

out that the fees of most of the native tribunals in the Kikuyu Province <sup>were</sup> ~~was~~ insufficient to pay for the salaries of the tribunal's Elders. As a temporary measure Provincial Commissioners recommended that local native councils should meet the deficit by passing supplementary estimates. The position was to be examined and the Governor hoped to be able to report more fully on the accounting side of the management of those tribunals at such time as the question of the future of the Ordinance fell due. I cannot see that the Governor deals with the point directly although he has dealt at length with the arrangements made for a scale of fees. These arrangements appear satisfactory.

Paragraph 7 of the despatch. The Governor points out that sections 39 and 40 of the Ordinance contain a defect in that the Attorney-General's power of intervention is rendered useless in criminal cases where imprisonment for a period of less than four weeks has been awarded (i.e. about 80% of the total criminal cases) owing to the unavoidable delay in the transmission of the month's list of cases to the Attorney-General. But it must be remembered that (a) any person sentenced has the right of appeal to the Native Court of Appeal and from that Court to the District Officer and thence to a Provincial Commissioner and (b) all cases are confirmed or revised by Administrative Officers who are in a position to know the tribal law and customs of their areas.

That part of the Attorney General's

Memorandum

Memorandum which deals with the question of the period of imprisonment that may be awarded in default of a fine is receiving separate consideration.

? Subject to legal observations the terms of the new Bill may be approved. Say that the Governor's Report on the working of the Ordinance has been read with interest, and request that the Governor will furnish a further Report not later than the 30th of June in [1935/36]. Agree that no change is necessary in the provisions of the Ordinance dealing with the appeals from native tribunals, [but ask for suggestions with a view to remedying the position as regards the system of automatic appeal to the Attorney-General under Sections 39-40]. Note that the Attorney-General's second point is receiving separate consideration.

1936  
E.P.D.

Omit  
W.P.

C.A. Gosselin  
8/10/34

R. Bush

May we have your comments?

R. Bush  
1/11

The position with regard to appeals is inconsistent with the general policy approved last year in respect of Nigeria and generally, but I would not suggest any alteration of the position at present. The working of these Native Courts really depends on the District Officers. If they are determined to see that justice is done, and are not deterred by considerations of keeping the chiefs "sweet" and so on, then things go pretty well; otherwise they do not. In all the circumstances I agree with the action proposed.

H.B. 2.11.34.



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1936  
E.P.P.

Omit  
1936

The British

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B. B. 1/11

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H.B. 2.11.34.

This despatch is in two pieces. The first one dealing with the short Bill amending the present Native Tribunals Ordinance, and the second (paragraphs 5 to 8) a report on the working of the present Ordinance. The amendments are of a fairly simple nature, extending the power of the District Officer in relation to the suspension of <sup>members of</sup> Native Tribunals, and providing for the exclusion from paragraph 12 of any township situated within a native reserve by Government order. Paragraph 12 provides that "no native tribunal shall have jurisdiction to try the . . . . (c) Cognizance Offences committed in any place which . . . . is declared to be a municipality or a township." The effect of exclusion of certain townships in native reserves from this provision will be to give the native tribunal the jurisdiction to try suitable offences within the township.

I think that these two amendments, which are not really very great, and make for easier working of the thing, can be approved.

The report on the working of the Ordinance is quite interesting and is exactly what one would have expected with native communities, or such communities as backward as those in Kenya. The general tendency is that the native tribunals do not work too well at first but as they find their feet, get better and better and are now quite a satisfactory feature of the body politic. The Governor says that they have proved themselves to be highly efficient and have now become an essential part of the judicial system of the Colony. It is, of course, a slow process.

Satisfactory

Satisfactory tribunals do not come up in a night like mushrooms and when you get a set of people like the majority of the Kenya natives who do not know to understand what a formal court is with its ideas, the wonder is not that they do badly, but that they do so well.

It is very interesting to see that Mr. Harragin, the Attorney General, finds himself handicapped, in considering the proceedings sent to him for review, by his lack of knowledge of local native law and custom. This might be taken as a side-light on some remarks made by the Bushe Report, but I don't think it is, because what the Bushe Report required was that when a question <sup>of</sup> ~~whether~~ ~~relative~~ native custom etc. should be ~~approved~~ <sup>in</sup> ~~by~~ <sup>the</sup> Court, ~~then~~ the native tribunal, which administers native law and custom, should have anything that it laid in ~~its~~ <sup>its</sup> ~~own~~ <sup>own</sup> ~~power~~ <sup>power</sup> before them.

Mr. Harragin, in his Memorandum, refers to the question of imprisonment or fine. He points out that the native scores at present because in the case of small fines, with the present ratio between fine and imprisonment, he much prefers to go to gaol, and Mr. Harragin thinks that if imprisonment were put up, or a different scale of fine for imprisonment enacted, revenue would be increased and the number of people in gaol would be reduced. In the case of small fines, the European will, of course, always pay, and it is quite likely that unless the period of imprisonment was really large, the black man would go to gaol, but all the same, one does not want to have it said that a native of Kenya can be sent to gaol for six months for doing something for which he can only be fined 5/-, so I should be very cautious indeed before upsetting the thing again. The Governor tells us that the matter is receiving separate consideration and no doubt there is plenty of room for divergent views. As Mr. Bushe says, the

the working of these native courts depends very largely on the District Officer. That has been the case all over the world, and if you get a good District Officer who takes an interest in the working of his native courts, things run much more smoothly than if the District Officer is slack, when the Court very soon follows him.

I agree with Mr. Freeston that there is no use in asking for a further report for at least two years and indeed, I should stretch it a bit and make it three, if not drop it altogether. Proceed as proposed by Mr. Grossmith, substituting 1937 for 1936 and making the <sup>omission</sup> ~~omission~~ suggested by Mr. Freeston.

J. S. W. Flood  
8.11

Sir J. Moffat

The despatch (with its enclosures) and the Flood's summary minute contain all that it is necessary to read, but the minutes on 16092/30 & 18010/32 may interest you, if you have leisure.

(1) The draft Bill.

(2) Appeals. As Mr. Burke does not substantiate present allegations, we can have things as they are.

(3) Fines & imprisonment in default.

As the Government will report further, we need not discuss the point, but of the imprisonment is

is to be stiffened so as not to be attractive, <sup>to natives</sup> the fine imposed in the particular case must have some relation to <sup>probable ability</sup> ~~probability~~ to pay. If this is seen to, I see no reason to the tinged between races in regard to the punishment, which may be inflicted.

W. S.

10.11.34

As proposed. At once.

J. S. W. Flood  
12/11/34

2 To Kenya, Conf - copy 21 NOV 1934  
(Answered) 30/6/37

3/11

Barrow Bygone 591 20 Nov 34

Trans. & authenticated 9 1/2 printed copies of the Native Tribunal (Amend.) Ordinance No 51 of 1934

The copy delivered for the expansion of the Ordinance for a period of 3 years from the 31/12/33 or until repealed. Was conveyed in No 10 on 3057/1933. (Mr. Burke saw the despatch)

Sanction Lf.

C. P. Rowland  
19.11.34

Trans. & authenticated 9 1/2 printed copies of the Native Tribunal (Amend.) Ordinance No 51 of 1934

authenticated & printed copies to library

Order was necessary instead of the  
Proclamation, under Sec. 44 of the principal  
Order, which was uncompleted  
in No. 8 & No. 10 in 3057/33.

It may be noted that the present  
Order gives power to extend the  
principal Order by Proclamation beyond  
3 years from 31/12/33, and that No. 10  
in 3057/33 gave approval only for  
the three years' extension. But as  
such further extension by Proclamation  
remains subject to the S.G.S.'s approval,  
there seems to be no harm in pending  
at once for the possibility of the  
principal Order being still required  
after 31/12/38.

? G3 is prepared.

Carlyle  
31/12

J. Roberts  
20/12

J. E. W.

above

noted

29/12/34

Librarian's file  
to create

To Kenya 1064 (3 answers) G/3 21 DEC 1934

*[Handwritten initials]*



37



KENYA.

NO. 591.

GOVERNMENT HOUSE,  
NAIROBI,  
KENYA.

20<sup>th</sup> November 1934.

RECEIVED  
14 DEC 1934  
C. O. REGY

Sir,

I have the honour to transmit herewith two authenticated and twelve printed copies of an Ordinance entitled "The Native Tribunals (Amendment) Ordinance, 1934", which duly passed its Third Reading in the Legislative Council on the 25th October 1934, and to which I assented in His Majesty's name on the 15th November 1934, together with a copy of the Legal Report by the Attorney General.

I have the honour to be,

Sir,

Your most obedient, humble servant,

BRIGADIER-GENERAL.

G O V E R N O R .

Amended (4)

THE RIGHT HONOURABLE  
SIR PHILIP CURLIFFE-MILNER, P.C. C.B.E. M.C. M.P.,  
SECRETARY OF STATE FOR THE COLONIES,  
DOVING STREET,  
LONDON, S. W. 1.

No. LI.

1934



**Colony and Protectorate of Kenya.**

IN THE TWENTY-FIFTH YEAR OF THE REIGN OF

**HIS MAJESTY KING GEORGE V.**

**JOSEPH ALOYSIUS BYRNE, G.C.M.G., K.B.E., C.B.,**

*Governor.*

Assented to in His Majesty's  
name this 15<sup>th</sup> day of *November*  
1934.

**J. BYRNE**

*Governor.*

**AN ORDINANCE TO AMEND THE NATIVE  
TRIBUNALS ORDINANCE, 1932**

ORDINANCE No. LI of 1934

An Ordinance to Amend the Native Tribunals Ordinance, 1930.

ENACTED by the Governor of the Colony of Kenya, with the advice and consent of the Legislative Council thereof, as follows:—

1. This Ordinance may be cited as the Native Tribunals (Amendment) Ordinance, 1934, and shall be read as one with the Native Tribunals Ordinance, 1930, hereinafter referred to as the Principal Ordinance. Short title  
No. 39 of 1930.

2. Section 44 of the Principal Ordinance is hereby repealed and the following section is substituted therefor:— Repeal and  
replacement of  
section 44 of  
the Principal  
Ordinance.

44. This Ordinance shall continue in force until the 31st day of December, 1936, and shall then expire:

Provided that the Governor may by proclamation with the approval of the Legislative Council and of the Secretary of State declare that this Ordinance shall remain in force until a date to be fixed in such proclamation or until repealed."

3. This Ordinance shall be deemed to have come into operation on the 31st day of December, 1933. Date of  
commencement

Passed in the Legislative Council the twenty-fifth day of October, in the year of Our Lord one thousand nine hundred and thirty-four.

This printed impression has been carefully compared by me with the Bill which passed the Legislative Council and is presented for authentication and assent as a true and correct copy of the said Bill.

J. F. G. TROUGHTON

Acting Clerk of the Legislative Council.

PRINTED BY THE GOVERNMENT PRINTER, NAIROBI

LEGAL REPORT

THE NATIVE TRIBUNALS (AMENDMENT) BILL, 1934

Section 44 of the Native Tribunals Ordinance, 1930, provided that the Ordinance should expire on the 31st December, 1933, but that the Governor could by Proclamation with the approval of the Legislative Council and of the Secretary of State declare that it should remain in force until a date to be fixed in the Proclamation or until repealed.

*N-10 in 3057/33.*  
The Secretary of State's approval to the extension of the Ordinance was duly obtained and the necessary Resolution was passed in Legislative Council on the 30th November, 1933, but, unfortunately, no Proclamation was issued.

This Bill, which is retrospective in effect, makes the necessary provision for the Ordinance to remain in force until the end of 1936.

A Comparative Table is attached.

In my opinion, His Excellency the Governor may properly assent to this Bill in the name and on behalf of His Majesty.

Nairobi,  
25th October, 1934.

*W. H. H. H.*  
ATTORNEY GENERAL



COMPARATIVE TABLE

THE NATIVE TRIBUNALS (AMENDMENT) BILL, 1904.

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Clause.	Remarks.
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- 1. Short title.
- 2. New.
- 3. New.

C. O.

25298/34.

12  
2

Mr. Grossmith.  
Mr. *Freeston*  
Mr.  
Mr. Parkinson.  
Sir G. Tomlinson.  
Sir C. Bottomley.  
Sir J. Shuckburgh.  
Permt. U.S. of S.  
Parly. U.S. of S.  
Secretary of State.

16/11/34  
10/11

Downing Street,

21 November, 1934.

R 16 NOV.  
D-17

**DRAFT.**

KENYA.  
CONFIDENTIAL.  
GOV.

*Handwritten initials*

Sir,

I have etc. to acknowledge the receipt of your confidential despatch No. 151 of the 11th October and to inform you that I approve the terms of the draft Bill to amend Sections 5 and 12 of the Native Tribunals Ordinance 1930, and the introduction of the Bill into the Legislative Council.

2. I have read with interest your report of the working of the Ordinance and note that generally speaking the Tribunals are working reasonably well. I shall be interested to learn what progress has

**FURTHER ACTION.**

been

C. O.

23298/34.

2

Mr. Crossmith.  
 Mr. *Newton*  
 Mr.  
 Mr. Parkinson.  
 Sir G. Tomlinson.  
 Sir C. Bottomley.  
 Sir J. Shuckburgh.  
 Perm. U.S. of S.  
 Parly. U.S. of S.  
 Secretary of State.

*16/11/34*  
*15/11*

Downing Street,

21 November, 1934.

R 16 NOV.  
 D-17

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KENYA.  
CONFIDENTIAL.  
 GOV.

*Handwritten initials*

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2. I have read with interest your report of the working of the Ordinance and note that generally speaking the Tribunals are working reasonably well. I shall be interested to learn what progress has

**FURTHER ACTION.**

been

been made in say two years' time.

You will, no doubt, furnish me with a further report, in any case not later than the 30th June, 1937.

3. As regards the fourth paragraph of your despatch, I agree that no change is necessary in the provisions of the Ordinance dealing with the appeals from Native Tribunals.

4. I note that the question raised by the Attorney General regarding the period of imprisonment that may be awarded in default of a fine, is receiving your attention.

I have, etc.

307 P. CUNLIFFE-LISTER



AIR MAIL

KENYA

No. 151



GOVERNMENT HOUSE  
NAIROBI  
KENYA

RECEIVED

19 OCT 1934

C. O. REGY

11<sup>th</sup> October 1934.

CONFIDENTIAL.

Sir,

I have the honour to refer to your despatch No. 868 of the 16th November 1933, on the subject of the Native Tribunals Ordinance, 1930, and to transmit a draft amending Bill for your approval before introduction in Legislative Council. By this Bill it is proposed to amend Sections 5 and 12 of the Principal Ordinance.

2. Section 5 of the Principal Ordinance provides that a Provincial Commissioner may suspend, and, with the approval of the Governor, dismiss a Member of the Tribunal. Clause 2 of the draft Bill alters the procedure so that a District Officer will have power to suspend, and a Provincial Commissioner to dismiss, a Member, without reference to the Governor, and vests the powers of reinstatement in the District Officer instead of in the Provincial Commissioner. Because the Governor's powers under Section 5 of the Principal Ordinance have been delegated to Provincial Commissioners and Officers-in-Charge, vide Government Notice No. 134 of 9th February 1934, on page 216 of the Official Gazette 1934, the procedure is, in effect, only altered in so far as powers of suspension and reinstatement are given to District Officers.

5. ...

THE RIGHT HONOURABLE  
MAJOR SIR PHILIP CUNLIFFE-LISTER, P.C. G.B.E. M.C. M.P.,  
SECRETARY OF STATE FOR THE COLONIES,  
DOWNING STREET,  
LONDON, S. W. 1.

*Amend (2)*

No 10.  
3057/33

*W.P. ... 23044/34*

3. Under Section 12 of the Principal Ordinance Tribunals have no jurisdiction to try cognizable offences in any Township or Municipality. It is considered that the prohibition should not apply to certain townships in Native Reserves, and it is proposed in Clause 3 that the Governor should have the power to exclude townships in Native Reserves from the provisions of Section 12 (c) of the Principal Ordinance.

4. For the reasons set out in my despatch No: 18 of 11th January 1932, I am in agreement with my advisers that no change is necessary in the provisions dealing with the appeals from Native Tribunals.

5. I now report upon the working of the organisation of Native Tribunals:-

NYANZA PROVINCE.

(a) The following is the return of cases tried by Native Tribunals in the Nyanza Province for the half year ending 30th June, 1934:-

(Page 3) ...

NYANZA PROVINCE - NATIVE TRIBUNALS.

Return for half year ended 30th June, 1934.

STATION.	No. of Tribunals.		Total No. of Cases.		No. of Appeals to Native App: Tribunal.		No. of Appeals to District Commissioner.		No. of Appeals to Prov. Commr.		No. of Criminal Cases Revised by D.C.	No. of Criminal Cases revised by Attorney General.
	Civil.	Criminal.	Civil	Criminal	Civil	Criminal	Civil	Criminal	Civil	Cr.		
North Kavirondo	28	28	3898	1308	205	-	12	-	-	-	51	-
Central Kavirondo.	5	19	1300	1003	32	-	9	4	-	-	57	-
South Kavirondo.	35	35	1609	1291	41	76	1	4	-	1	24	15
South Lumbwa.	3	3	132	80	1	-	-	-	-	-	3	-
Kisumu-Londiani.	2	2	41	41	-	-	-	1	-	-	-	-
TOTAL:-	73	87	6980	3723	279	76	22	9	-	1	135	13

16

The number of cases dealt with by Native Tribunals in this Province greatly exceeds that of other Provinces, and the figures are instructive, as showing the small proportion of appeals as compared with the very large number of cases tried.

In Central Kavirondo there are five tribunals with Civil jurisdiction, the members being chosen from the group of locations over which each tribunal has power. A certain amount of favouritism by Elders for members of their own locations is reported, but this is overcome to a great extent by forming panels of 5 Elders to hear a case with parties outside their own location. There is one Appeal Tribunal for the District.

Tribunals with Criminal powers are constituted in each location, the District Commissioner remarks:-

"These are held in each location weekly. They are not so satisfactory as the Civil Tribunals and a certain amount of vindictiveness is often apparent in prosecutions. To overcome this I have tried to make the Chiefs understand that when they stand as prosecutors they must not also act as judges. When the mlango headmen get a better idea of their responsibilities they will be the prosecutors and the Chief the judge, ....."

There are three tribunals in South Lumbwa, one for each of the Reserves of Belgut, Buret and Sotik, with Civil and Criminal jurisdiction. As will be seen from the above figures the Kipsigis are not litigious.

There is a tribunal with Civil and Criminal powers in each location of South Kavirondo District and they appear to be working satisfactorily. The Appeal Tribunal deals with Civil and Criminal work, but it has been found advisable to withdraw the Criminal jurisdiction and criminal appeals are now heard by the District Commissioner.

In North Kavirondo there are Tribunals with Civil and Criminal jurisdiction in each location and one Appeal Tribunal. The tribunals have on the whole been

...



satisfactory. Fines are often difficult to collect.

Speaking generally the Provincial Commissioner considers the working of the Ordinance is good and that the tribunals are definitely improving.

CENTRAL PROVINCE.

(b) With reference to the Native tribunals in the Central Province, the Provincial Commissioner reports:-

"The success and popularity of the tribunals has been far in excess of anything that was originally anticipated and I, at least, am prepared to believe that this is due in no small measure to the honesty of their debates and the equity of their judgments and sentences."

The personnel of the tribunals consist of:-

- (i) President.
- (ii) Elders: Permanent.
- (iii) Elders: Panel.
- (iv) Clerk.
- (v) Process Servers.

(i) The President is elected after consultation with, and in most cases as a result of actual choice by, the Tribunal Elders. He is the spokesman of the tribunal and every effort is made to avoid the appointment of one who is a member of the official class. In consideration of this position a bonus is added monthly to his standard pay as an elder.

(ii) and (iii) There are two distinct divisions of elders sitting on each tribunal at any given time. A portion of these sit permanently and the remainder are drawn in rotation from a panel. These latter sit normally once, and at most twice, a year for periods ranging from one to three months.

In order to avoid any confusion regarding the functions of legislative bodies, such as the Local Native Council, and judicial bodies, such as the Native Tribunals, it is made very clear to all natives that although steps are taken to ascertain their wishes there is no question of popular election.

In the selection of elders every attempt is

made to ensure that representatives of the varied interests and thought find a place in its deliberations.

A certain amount of difficulty has been experienced owing to various European missionaries representing the non-appointment of a specific representative of their particular creed, on the grounds that their adherents will not obtain a fair hearing, but by a judicious blending of hereditary elders, who provide ballast, and the educated younger generation, who at worst add enthusiasm, a surprisingly well-balanced and fair-minded body has resulted, - and no complaints on these grounds have been raised since the inception of the scheme.

In earlier days the Legislative, Judicial and Executive functions amongst natives were one. Today the policy of divorcing these functions is beginning to be appreciated but in certain areas it has been found necessary to continue the representation of chiefs on the tribunal. There is occasional half-hearted grumbling but, as a body, natives realise the position and are content enough to continue with it.

(iv) The personnel of the actual tribunal is completed by the appointment of a clerk to the court. He enters cases, accepts fines and fees, issues receipts, keeps the tribunal accounts, notes judgments and makes out summons and warrants for endorsement by a District Officer. It is also his duty to keep the elders informed on judicial points. The fact that his salary is a reasonably high one, and the fact that a system of checking is maintained obviate risks of corruption; and since, in his position as an interpreter of the law, he wields some influence over the judgments, every effort is made to avoid bias by the importation of clerks from neutral areas.

(v) The Executive of a Tribunal consists in a body of Process Servers. As far as possible these are chosen to represent every location in the Tribunal's jurisdictional zone. These are selected by their chiefs and paid a small salary on a monthly agreement. The Tribunal's main executive is, in fact, the body of chiefs within its jurisdiction.

In regard to the actual checking of the elders judgments an officer visits each Tribunal at the close of the monthly sessions and scrutinises both civil and criminal ledgers. All cases in which judgment has been given are endorsed by him, and any who wish to appeal against conviction and sentence are brought before him. In civil cases leave to appeal is also granted.

Appeals can be brought in the first place before the Central Native Tribunal: from here they may be carried to the District Commissioners, and thence, if desired, to the Provincial Commissioner's court. It is a tribute to the Appeal Tribunal, however, that but few appeals proceed beyond this Court. In this Province the success of the Appeal Tribunal is largely due to the fact that the pay of the elders is relatively high, and since their number is small it is possible to appoint carefully chosen natives.

COAST PROVINCE.

(o) In the Coast Province, Headmen are almost everywhere excluded from taking part in the hearing of cases and in some districts the particular elders selected to hear particular cases are not made known till the cases come up for hearing.

The Mombasa Island Native Tribunal was established at the end of 1932, and empowered to deal with both civil and criminal cases. The difficulty caused by the number of tribes represented on the Island

was overcome by electing a panel of 25 elders from among the principal tribes on the island, each elder being elected by his own tribe in open meeting, the more important tribes (numerically) electing two and the lesser tribes one each. Where possible Christian Communities are represented by their own choice. The Provincial Commissioner reports that at first the elders had little or no idea of procedure and were apt to air their views in unison, but with patient training they appear to have grasped the methods by which a responsible court is conducted and their behaviour is now little short of exemplary. At first also, as was only to be expected, the tribunal inspired little respect among the local native inhabitants and the behaviour of some of the parties appearing before it was impertinent. This has had the fortunate result of creating a strong sense of dignity in the minds of the elders.

It is notable that many Arabs have now availed themselves of the Native Tribunal and even in criminal cases have submitted themselves to its jurisdiction. In the Teita, Digo and Giriama Districts the Native Tribunals there established, have worked satisfactorily though a large measure of supervision is still necessary.

#### RIFT VALLEY PROVINCE.

(d) In the settled areas of the Rift Valley Province, Native Tribunals with civil jurisdiction only, have been established and these are reported to be working satisfactorily.

In the Nandi and Elgeyo Districts the tribunals are, generally speaking, a success, especially when it is realised that in civil cases the payment of fees by the unsuccessful party is a direct reversal of the tribal custom.

NORTHERN FRONTIER DISTRICT.

(e) In the Northern Frontier District the tribunals appointed under the Ordinance, proved, owing to the special tribal conditions obtaining in the area, to be ineffective. A new system of "Arbitral Tribunals" has been provided for in the Special Districts (Administration) Ordinance, No. 13/1934.

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MASAI DISTRICT.

(f) There are three Tribunals in the Masai District, the tribe is not litigious and the work of these tribunals is very small.

TURKANA DISTRICT.

(g) In the Turkana District, it has been possible to establish one Central Tribunal among the Suk. At first only a few cases were brought, but recently there has been an increase. Its functions are properly carried out, and there is no doubt that it is appreciated by the tribe as a whole. The Officer-in-Charge is convinced that the Suk do not hesitate to bring their complaints to the Tribunal.

Amongst the Turkana tribe there are no tribunals, nor is the institution yet suitable to the needs and circumstances of these nomadic pastoralists. There is however a Joint Tribunal consisting of members of Turkana and Suk tribes which meets twice a year on the border to hear inter-tribal disputes arising generally out of water and grazing rights. An officer of one of the two districts is always present. This tribunal has only been in existence for two years and, though few cases have been brought before it, it is a considerable factor in the maintenance of peaceful relations between the two tribes.

6. In paragraph 4 of my despatch No. 60 of 19th January 1933, I mentioned the difficulty arising from

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the ...



the fact that the fees of most of the Native tribunals in the Central Province were insufficient to pay for the salaries of the Tribunal Elders.

Although fines are paid directly to Government, in the past, fees were the perquisite of the Tribunal itself and from them a fixed salary was paid to the Tribunal clerk and the Process Servers: the balance being distributed in equal portions amongst the Tribunal elders.

Charges have been directed against Native Tribunals of late that their scale of fees is exorbitant, that costs in connection with cases heard by them rise to ludicrous sums, and that until such excessive costs have been met no justice can be obtained. In the first place a scale of fees for civil cases is in force throughout the Province. This scale of fees which is, in fact, a fixed percentage of the sum, or the value of the object in dispute - has been agreed on by all officers in charge of Districts. It has been agreed that it is not excessive and was made with a view to checking frivolous litigation amongst a notoriously litigious people, ensuring, at the same time, that no bona fide litigation should be forced out of court on account of the expense, and also constituting a fund sufficient to meet the normal expenses of the Tribunal.

This scale is exhibited in all Tribunal Houses for general information, and even though probably 50% of the native parties to suits are sufficiently educated to make certain of their rights, no complaint has been reported of fees having been charged in excess of the schedule. To make the assessment even more certain a further standard scale of values of stock normally in dispute has been drawn up. This scale is also posted for public information and is subject to revision to bring it into line with current market prices. It will be

seen that possibilities of exorbitant hearing fees have been reduced to a minimum. Further, there is now no incentive to clerks or elders to falsify the fees. They are on a fixed salary and increased income cannot personally affect them.

In short the only way in which a native can pay fees in excess of the equitable amount is when he himself, in prosecuting a suit for the recovery of property which has no standard value, assesses the subject matter at a higher rate than its market value.

The only non-scaled payments allowed are those to meet the expenses of elders in land cases. Here I will quote the District Commissioner, South Nyeri:-

"There is no question that costs in these land cases are high and this is inevitable. If the land in dispute is 15 miles from, let us say, the Central Tribunal, Nyeri, motor transport is essential. Without it the elders cannot get through the work. Going round the boundaries takes time and the elders often spend a night on the spot. Subsistence allowance amounting to 1/- each is customary and is reasonable enough: and it must be remembered that in these important Githaka cases costs are normally borne by families and clans and so are contributed by a number of persons - it may be as many as 50 - it is the case that even now costs in a githaka dispute may amount to as much as 150/- with fees, transport, subsistence and the sheep for the customary land oath."

The Kikuyu is not slow to air his grievances and were there any serious grievance as regards the scale of fees and extraordinary expenses incurred in a tribunal-heard case there would have been numerous complaints.

It is scarcely necessary to stress the advantages of this present system of dealing with fees and of remunerating elders.

7. The consensus of opinion of Provincial Commissioners and District Commissioners is that the Native Tribunals have come to be looked upon by the natives themselves as an essential part of their tribal organisation.

I enclose a copy of a Memorandum by the Attorney General, in which he considers that on the whole the

Native tribunals appear to be working satisfactorily and the number of cases in which he has to interfere is, generally speaking, with a few exceptions, becoming less as time goes on. Under Section 39 of the Ordinance, he acts as an automatic and further Court of Appeal in every Criminal case, in that a complete return of all Criminal proceedings decided or brought before Native tribunals are forwarded to him monthly, and Section 40 lays down that such lists shall operate as an appeal.

He points out, however, that he does not receive these returns for about 15 days after the end of the month in which the cases were tried, and that therefore his powers of intervention in petty cases are not so satisfactory as would appear to be indicated by Sections 39 and 40. It must, however, be borne in mind that any person sentenced by a Native tribunal has the right of appeal to the Native Court of Appeal and from that Court to a District Officer and thence to a Provincial Commissioner.

Section 13 of the Ordinance lays down that Native tribunals shall administer the native law and custom prevailing in the area of the jurisdiction of the Tribunal so far as it is not repugnant to justice or morality, or inconsistent with the provisions of any Order-in-Council or any other law in force in the Colony, and the Attorney General points out that he is handicapped by his lack of knowledge of local native law and custom. This is an inherent defect in the system of automatic appeal to an Attorney General under Sections 39 and 40, but the position is safeguarded by the fact that these cases are confirmed or revised by Administrative Officers who are in a position to know the tribal law and customs of their areas.

That part of the Attorney General's Memorandum

which...

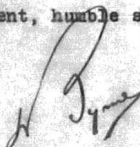
which deals with the question of the period of imprisonment that may be awarded in default of the payment of a fine is receiving separate consideration; the question is one of an amendment to the Penal Code.

8. I am therefore of opinion that in the exercise of their civil jurisdiction Native Tribunals have proved themselves to be highly efficient and to have become an essential part of the Judicial system of the Colony. In respect of criminal work, difficulty was experienced, when these courts were first constituted, in making the Elders realise the essential difference between criminal and civil cases, since to the native mind there was no such thing as an offence against the general community, each case, whether criminal or civil being merely regarded as a case of a private wrong which could only be dealt with by the award of compensation to the injured party. The Native Tribunals are, however, improving rapidly in this respect and their criminal judgments are giving less grounds for revision month by month.

I have the honour to be,

Sir,

Your most obedient, humble servant,



BRIGADIER-GENERAL.

G O V E R N O R .

26

A BILL TO AMEND THE NATIVE TRIBUNALS  
ORDINANCE, 1930.  
-----

BE IT ENACTED by the Governor of the Colony of Kenya, with the advice and consent of the Legislative Council thereof, as follows:-

Short title.

1. This Ordinance may be cited as the Native Tribunals (Amendment) Ordinance, 1934, and shall be read as one with the Native Tribunals Ordinance 1930, hereinafter referred to as the Principal Ordinance.

Repeal and replacement of section 5 of the Principal Ordinance.

2. Section 5 of the Principal Ordinance is hereby repealed and the following substituted therefor -

"Suspension and dismissal of members.

5. A district officer may suspend and a provincial commissioner may dismiss or may suspend any member of a native tribunal who shall appear to have abused his power, or to be unworthy or to be incapable of exercising the same justly, or for other sufficient reason. On such dismissal or for the period of his suspension the member shall be disqualified from exercising any powers or jurisdiction as a member of the tribunals unless and until he is expressly reinstated by the district officer."

Amendment of Section 12 (c) of the Principal Ordinance.

3. Paragraph (c) of section 12 of the Principal Ordinance is hereby amended by the insertion at the end thereof of the following proviso:-

"Provided that any township situated in a native reserve may be excluded from the operation of this paragraph by order of the Governor."

Amendment of Section 43 of the Principal Ordinance.

4. Section 43 of the Principal Ordinance is hereby amended by the deletion of the word "following" which occurs in the second line thereof and the substitution therefor of the word "following".

OBJECTS AND REASONS.

This Bill proposes to amend the Native Tribunals Ordinance, 1930, in three respects -



ATTORNEY GENERAL'S OFFICE,

P. O. BOX 112,

NAIROBI,

KENYA.

No. L. 308/3/55.

17th September, 1934.

The Hon'ble the Colonial Secretary,

N a i r o b i .

THE NATIVE TRIBUNALS ORDINANCE, 1930.

Ref. Your No. S/F.ADM.11/58 dated the 12th  
September, 1934.

Under Section 39 of the Native Tribunals Ordinance the district commissioner is required at the end of every month to forward to me a complete return of all criminal proceedings decided by or brought before a native tribunal in his district during the month, the list to contain the name of the defendant, the offence with which he was charged and, if convicted, the sentence or order in full. And it is provided in section 40 of the Ordinance that every such list shall operate as an appeal on behalf of every convicted person whose name is included therein, and I am empowered to exercise any of the powers conferred on an appellate authority by section 37. In other words I may vary, confirm or set aside an order, or order a retrial of the case.

2. Now the principal difficulties with which I have found myself faced since I arrived in the Colony are two -

- (a) In the first place the returns of the cases are generally received by me about 15 days after the end of the month in which the cases were tried, and consequently my powers of

intervention are practically useless in any case where imprisonment for a period of less than four weeks has been awarded and this class of case constitutes, I suppose, about 80% of the total.

I realise only too well that it would be impossible to submit returns at shorter intervals but I want to make it clear that my position in regard to the control of sentences is not so satisfactory as sections 39 and 40 would appear to indicate.

(b) In regard to offences against native law and custom, I am of course handicapped by my lack of knowledge of local native law and custom, and apart from such obvious cases as an excess of jurisdiction (e.g. a serious statutory offence treated as one against native law and custom) I generally have to accept the sentences imposed by the Tribunals and confirmed or revised by the district commissioner.

3. On the whole, however, so far as I am able to ascertain from the scanty information tendered to me in the monthly returns the tribunals would appear to be working quite well. Legal difficulties such as the period of imprisonment that may be awarded in default of payment of a fine and the question of compensation are gradually being overcome, and the number of cases in which I have to intervene is, generally speaking and with a few exceptions, becoming less as time goes on.

4. I do not, however, wish this statement to be taken as a suggestion that the tribunals have yet reached the stage where their jurisdiction should be widened

...

either by extending the list of offences which they should be empowered to try or by increasing their powers of awarding punishment. On the contrary I feel that their present jurisdiction is as far as we should go for some considerable time. And the ultimate success or otherwise of the scheme depends, in my opinion, almost entirely on the care with which the district commissioner exercises his powers of revision and confirmation, and the efforts he makes to enlighten the tribunals as to the law they may administer and the limits of their jurisdiction in cases where they "over-step the mark".

It may not be out of place here if I refer to the question of the period of imprisonment that may be awarded in default of the payment of a fine. In section 28 of the Penal Code, as originally enacted, a distinction was made between natives and non-natives; and, under the scale applicable to natives, in default of payment of a fine of between 6/- and 20/- imprisonment of 4 months could be awarded and, in the case of a fine ~~more~~ <sup>of</sup> 20/- and over, 6 months.

In 1931 the special provision relating to natives was repealed on the instructions of the Secretary of State (vide despatch Conf. (4) of 3.9.31) and the position now is that there is no racial distinction and the scale which is laid down is applicable to all races -

Now 17/10/31

Amount.	Maximum Period.
Not exceeding Sh. 10 .....	7 days.
Exceeding Sh. 10 but not exceeding Sh. 20 ...	14 days.
" 20 " "	100 ... 1 month.
" 100 " "	400 ... 2 months.
" 400 " "	1000 ... 4 months.
" 1000	... 6 months.

The Select Committee on the Penal Code (Amendment Bill which was enacted early this year recommended that

the present scale was unsatisfactory and that representations should be made to the Secretary of State and to the Governments of the East African Territories with a view to increasing the scale of imprisonment in default of payment of a fine, and I undertook to bring the matter to the attention of Government.

In the majority of the cases dealt with by the tribunals a fine of 10/- or 20/- and imprisonment in default is ordered and I feel that if the scale were increased the effect would be to increase the proportion of fines paid and thus reduce the number of persons undergoing imprisonment at a heavy cost to the State.

There are two ways of dealing with this question. The first is by re-enacting the two scales (one for European and one for natives) and the other is by providing for a general increase in the scale of imprisonment.

The first suggestion is I understand disapproved of by the Secretary of State, though in my view it is the most suitable for this country. (The file in the Secretariat dealing with Ordinance 41/31 should contain the Secretary of State's reasons for the repeal of the two scales) for it is manifestly absurd to order a native who receives between 6 and 10 shillings per month to pay a fine of 10/- or to go to prison for 7 days which is the present scale. He will always serve his 7 days so that in fact today a small fine is practically never paid by a native.

Failing two scales I am of the opinion that there should be a general increase in the scale of imprisonment in default of payment of fine.

In making these recommendations I am confident that I will have the unanimous support of the Administration and incidentally the European unofficals.

(sgd) W. Harragin.

ATTORNEY GENERAL.