

1937

38004

CO 533/476  
KENYA

38004

PENAL CODE LEGISLATION

Previous	297			
1936				
Subsequent				
1938				
R 297	1937			
R 309	29			
H. Mwangi				
D. Mwangi	19/6			
W. G. G. G.	17/10			
W. S. G. G.	27/10			
W. S. G. G.	30			
W. S. G. G.	1/11			
R 297	3/11			
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R 309	14/11			
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M. Mwangi	23/9			
M. Mwangi	29/8/37			
M. Mwangi	14			
1980	25/11			

PENAL CODE.

Trs. copies of letter from Kenya suggesting desirability of extending powers of Gov. in Council as to enable him to prohibit by order the local publication of any newspaper, book or document.

M. Bourge

I don't know whether this is your private opinion but it is a B.D. matter. It means power to censor the Press - desirable in spots perhaps but risky.

I am inclined to think there is much con<sup>o</sup> about it and I should like to warn Mr. Freestone accordingly.

550-769

29

See how numerous and complex on 46568/35 SA was amended.

It is already an offence under the Kenya Penal Code to print or publish any words or writing with a seditious intention (Section 47(b))

The proposal to prohibit the publication of any newspaper, etc., amounts, as Mr. Flood points out, to obtaining powers for a Press Censorship of the Press.

more 2

Library have prepared a statement showing the present position in the Dependencies as regards printing and publishing seditious matter.

The Kenya proposal goes beyond anything at present in force and from a general point of view I suggest that such a course is to be deprecated.

L. Sturges 11/10/37

Mr. Freestone's letter arises out of the 3<sup>rd</sup> on 46568/35 EA. It is clear from the 2<sup>nd</sup>

that the proposal that the  
Governor in Council should have  
the same power to prohibit  
publications in the Colony, as he  
has to prohibit the importation  
of seditious publications into the  
Colony, goes well beyond anything  
in force at present in the Colonies.

I attach 16198/30 Kenya, to No 6  
a which paper ref. is made  
in para. 3 of the 1st anal. to 1.

See G. Bushe's minutes of 6.1.31  
and the first parts of Sir  
C. Bottomley's minutes of 7.1.31  
thereon as relevant.

The position is that the  
Governor in Council has the  
power to prohibit the importation  
into the Colony of any newspaper,  
book, or document (Sec 35 of the  
Kenya Penal Code). He requires  
this power simply because he  
has no jurisdiction over the  
author of a seditious publication  
who is outside the Colony, unless  
it is amenable to the local  
courts. Within the Colony he  
has the powers under Secs 47, 48  
of the Code, which, so far as I  
can see, give him all the powers  
he wants.

To exercise the power to prevent  
the local publication of a document

logically presupposes that every  
document must be submitted to  
him in draft before it is published,  
otherwise how can he prohibit the  
publication of a document he has  
never seen? It is for the Courts,  
and not for Governor, to say  
whether a document is, or is not,  
seditious.

In my view, therefore, the suggestion  
now put forward should not  
be entertained for a moment.

Sir G. Bushe should see

J. H. Haldes  
19/10

Agree. They must propose amend  
section 48 (1), deleting "which has been  
declared by the Governor in Council to be a  
seditious publication or ~~is~~ substituted  
therefor". It will then I think be left  
to the Court to determine whether a  
newspaper or book contains seditious  
words or writing.

J. H. Haldes  
27.10.37

as things are

(1) and see why § 48 (1) need not be altered. It appears directly  
to § 52 & § 53 which give the Governor power to declare a  
document seditious or to prohibit its importation. Then § 47 makes  
it an offence to call or have, and document § 48 (1)  
says that anyone who gets such a thing must destroy it up.  
has remained however. But § 52 when it was inserted  
had the power to declare a thing seditious or to prohibit its  
importation. They should amend § 52 & the reference to it in § 47

§ 348. The Gov. will then still be able to prohibit the imputation of any document, and it won't be necessary to plead that it is seditious.

Keene applies to logic has a certain great claim of its own. But there is all the difference in the world between presenting imputation & suppressing a lawful publication. They ought to act, but don't. That a publication should not be a prohibited report unless it is seditious & that if anyone in Keene publishes such a thing the proper course is to sue him for sedition. If in fact a court finds that a thing is not seditious then its imputation should not be prohibited.

So I think the reply must be to the effect that the S. of G. could not agree to any ordinance which would in fact establish a Press censorship, & that if seditious documents are published a prosecution for doing so is the remedy. And as to repealing § 52 & the expenses to it in § 47 & 48.

1.14.37  
27.10.37.

As regards the new proposal I expect we all agree that it should be turned down.

As regards repealing § 52 - I think it would be better off the Statute book & always have thought so - but it will be a bit of a shock.

H.B.  
30/10

R. 297  
Pl. see A in book to H. 21 - & put up the papers & T.T. files about the seditious documents referred to.

Also have if you please referred to the Department, no. 4 in 46568/35?

W.S.B.  
1/11

Of course § 53 also applies to imprecision, lies & things etc. H.B.

110138/37 Mga  
42106/37 T. & P.M.

6 on 44076/36 Mga

Now in (b) the  
Kerley says that  
that he will  
Kerley says that  
Kerley says that  
Kerley says that

Noted

Since I got these additional papers, it has been necessary to send them to G. 568/35 E.A. for his note and I think it will be best to have a draft for comment on the same minutes as to the new proposal & § 52.

§ 52 (no. 1 on 42106/37 T.T.)

I don't if you can & you can see it, but this needs to be kept.

W.S.B.  
27/10/37 at once

In making a general enquiry directed by the S. of G. into the law relating to sedition (see my minute of 10.11.37 on T133/37-C.) I happened to see these papers. You will see from S. on 46568/35 E.A. that Keene have already agreed to bring their law into line with the new Bill. I think it will be well to refer to § 52.

W.S.B.  
11.11

See E.A. Enemas Conference  
I shall be very happy to receive a reply to (1) ~~any~~ in the near future.

DESTROYED UNDER STATUTE

Freston (to.)  
(cases for only reply to No. 1 in connection with the case. Date of 17th Feb.)

I am afraid that I must assume responsibility for the delay in dealing with this file which has occurred since the middle of November.

A draft despatch was then prepared, which was not very satisfactory, and I put it aside to await an opportunity of seeing how it would be affected by the general review of the legislation relating to sedition, mentioned in Mr. Dale's minute of the 11th November. In the rush of work in the Department in December and January I am afraid that this file escaped attention.

I now annex the General file (7133/37) on which the general review mentioned by Mr. Dale was undertaken, culminating in the confidential circular despatch of the 17th February mentioned by Mr. Freeston; and I submit drafts for consideration herewith.

J. J. Packer  
17.3.38.

5.2.38 (revised) 18.3.38

(U. M. S. (H. M. S.))  
Minute of 19/4

Mr. Dale & I have now received the 24th of your official letter, submitted h.v. The point that a local publisher is subject to the jurisdiction of the local courts, whereas a publisher outside the Colony is not, does not really strengthen the argument, since the people in the Colony who import & distribute literature originating outside are amenable to the local courts. We have therefore thought it

preferable not to include this point in the draft.

J. J. Packer  
22/3

The Kenya Government base themselves on logic: but I do not think that there is much in that. The only question is what measures do the practical facts of the situation in Kenya demand. The Executive Council would no doubt like a fairly wide power of executive interference in these matters and have no doubt rather jumped at the opportunity afforded by the argument from logic.

But the Secretary of State's policy is quite clearly laid down in the circular, and if the Kenya Government want to depart from that they must make out a case based not on logic but on the realities of the situation. As the position is quite clear I do not think I need trouble higher authority with this draft.

J. J. Packer  
24.3.38.  
Att. Gen.

To E. A. G. (revised) 25/3/38

C. J. Publications  
H. M. S. (H. M. S.)  
Ministry of Information  
Nairobi



C. O.

Mr. Paskin. } 24/3  
Mr. Dale. }

Mr. Howard. 23/3  
Mr. Dawe. 23/3

Sir H. Moore.

Sir G. Tomlinson.

Sir C. Bottomley.

Sir J. Shuckburgh.

Perm. U.S. of S.

Parly. U.S. of S.

Secretary of State.

C. D.  
R 24 MAR  
L 25

Amad. 1 on  
1938 file  
25 March

*J. S. S.*

(1)

I am etc. to refer to your

letter No.C/Leg.A.1 of the 27th of July, 1957, regarding the enquiry by the

Government of Kenya as to the reason why

it is considered that, in the case of

matter published within the Colony,

the question whether the matter is

seditious or not should be left to the

Courts to decide, whereas, on the other

hand, no objection is seen to the

Governor in Council being empowered to

prohibit the importation into the Colony

of any newspaper, book, or document.

2. It will have been seen, from

*M. O. Ombi Gyere's*  
~~the Secretary of State's~~ confidential

circular despatch of the 17th of

February, 1958, that he has recently had under

consideration the whole question of the

laws relating to sedition, and that the

power

**DRAFT.**

THE SECRETARY

CONFERENCE OF EAST AFRICAN GOVERNORS.

FURTHER ACTION.

(1 - 7133 / 37)  
for.

power, relating to the importation of literature, which

it is recommended should be taken (see Clause 2 of

Draft 'A' of the Model Clauses forwarded with the

circular despatch) is a power to prohibit such

importation "if the Governor is of opinion that the

importation ... would be contrary to the public

interest". After much consideration, Mr. Ormsby Gore

reached the conclusion that it was essential that

Colonial Governments should have the power to

prohibit the importation of certain kinds of literature

which is published in this country and on the

Continent, but ~~and in the case of~~ that the power

should be exercisable only if the Governor is of opinion

that importation would be against the public interest.

Mr. Ormsby Gore's view is that this is a wide power

and should not be extended except in a case of absolute

necessity. It will be observed that it will enable

the Governor to prohibit the importation not only

of seditious literature but also of literature which

is likely to be harmful on other grounds, such as

obscenity, blasphemy, &c.

3.

C. O.

Mr.

Mr.

Mr.

Sir H. Moore.

Sir G. Tomlinson.

Sir C. Bottomley.

Sir J. Shuckburgh.

Perms. U.S. of S.

Party U.S. of S.

Secretary of State.

DRAFT.

FURTHER ACTION.

3. The proposal made in the enclosure to your letter, that power should be given to the Governor in Council to prohibit the local publication of any document or newspaper, would amount to the conferring of complete powers of censorship on literature

originating in the Colony. It is possible that circumstances might arise which would make the conferring of such powers ~~unnecessary~~ <sup>justifiable</sup> for example, there

might be such a state of general unrest in a dependency that it would be

~~of such government and public order~~ necessary in the ~~public~~ interest to censor every newspaper intended to be

published. If any such special circumstances arise <sup>in Kenya</sup> in the future, it ~~may~~ <sup>will</sup> be necessary to consider whether

~~such~~ <sup>more stringent</sup> powers of control are required.

But until the granting of these powers is demonstrated to be essential, the

Secretary





general review was undertaken. The Government of Kenya can therefore be assured that their point was not overlooked when the circular despatch was prepared.

An official reply to your letter *is now being prepared & will* of the 27th July will, I hope, be ready to ~~go off~~ ~~go by the same mail as this letter, but~~ ~~if it is not I will see that it gets off~~ by an early mail. Briefly, the answer to the suggestion that it is illogical that the Governor-in-Council should not have power to prohibit the local publication of a document of which he is empowered to prohibit the importation, is that in the former case the publisher is within the jurisdiction of the local Courts whereas in the second case he is not, so that there is no way to control his publication otherwise than by prohibiting its importation.

U.E  
(Signed) A. J. DAWE

REF. No. C/leg/A.1.

CONFIDENTIAL

8th March, 1958.

My dear Dawe,

What follows is a matter, I imagine, for General Department rather than for you; will you be good enough to pass it on to the appropriate quarter?

(3) on 46568/35 E.A. In a letter to me of April 7th, 1956 (No. 46568/35), the Colonial Office directed a revision of the East African legislation dealing with seditious publications. My letter of July 27th, 1957, enclosed one from the Government of Kenya urging that the Governor-in-Council should have the power of prohibiting publication in the Colony of seditious literature. (1) on 38004/37 KENYA I sent a reminder on January 5th this year. (3) " " "

(No. 1 on 7133/37 Seal) A circular despatch (Confidential of February 17th) has now arrived, paragraph 4 of which merely reaffirms Lord Passfield's dictum that before action is taken against a local publication it must be adjudged to be seditious by a Court of Law. I have been asked by the Governor of Kenya, who takes a personal interest in this question, to enquire whether any further communication may be expected dealing with the specific arguments put up in the Kenya Government's letter of July 24th last. On the information before him Sir Robert Brooke-Popnam is, I understand, not very happy at the ruling in the circular, but before replying he is anxious to know whether the case put up in the Kenya Government's letter is going to be specifically answered. ENCL. TO (1) on 38004/37

Yours ever,

A. J. DAWE ESQ., O.B.E.,  
COLONIAL OFFICE,  
DOWNING STREET, S.W.1.

2

STATEMENT SHOWING POWERS WHICH EXIST IN THE  
COLONIAL DEPENDENCIES FOR DEALING WITH THE  
PRINTING AND PUBLISHING OF SEDITIOUS MATTER.

The offence is punishable by fine or imprisonment, or both,  
in the following Dependencies under local enactments (usually the  
Criminal Code) or under the English law, as applied.

Bermuda  
British Guiana  
British Honduras  
Ceylon  
Falkland Islands  
Barbados  
Gibraltar  
Grenada  
Jamaica

Kenya  
Nigeria  
North Borneo  
Nyasaland  
Northern Rhodesia  
Saint Helena  
Sarawak  
Somaliland Protectorate  
~~Uganda Protectorate~~  
Western Pacific

In addition to sentences of imprisonment &c., powers to  
confiscate and/or suspend a newspaper for specified periods or  
permanently exist in:-

Cyprus  
Fiji  
Malta

Mauritius  
Saint Lucia  
Saint Vincent

Palestine  
Seychelles  
Trinidad

The following Dependencies have no power to suspend a  
newspaper, but copies of any seditious newspaper, book or document  
may be confiscated. The typical form is ".....and such  
newspaper, book or document or such extract shall be forfeited".

Bahamas  
Gambia  
Gold Coast  
Hong Kong

Leeward Islands  
Zanzibar  
Tanganyika Territory  
Uganda Protectorate

In:- Federated Malay States  
Johore  
Kedah  
Kelantan  
Perlis  
Straits Settlements

provision is made in addition for confiscation of the printing

No local provision exists in Sierra Leone.

AIR MAIL

TELEGRAMS

"CONF. GOV. NAIROBI."

REF. No. C/TAG/A.1

RECEIVED  
6-7 AUG 1937  
C. O. REG.

OFFICE OF THE  
CONFERENCE OF EAST AFRICAN GOVERNORS  
P. O. Box 601  
NAIROBI, KENYA

27th July, 1937.

Sir,

With reference to my letter of the 12th October 1936, regarding the amendment of the sections of the Penal Code relating to seditious publications, I have the honour to transmit to you, for the consideration of Mr. Secretary Ormsby Gore, copies of a letter from the Government of Kenya suggesting the desirability of extending the powers of the Governor in Council, as to enable him to prohibit by order the local publication of any newspaper, book or document.

2. Copies of the Kenya Government's letter are being sent to the Governments of Tanganyika, Uganda, Zanzibar, Northern Rhodesia, and Nyasaland, to whom I propose also to communicate copies of your reply when received.

I have the honour to be,

Sir,

Your obedient servant,

*L. B. ...*

SECRETARY TO GOVERNORS' CONFERENCE.

THE UNDER SECRETARY OF STATE,

COLONIAL OFFICE,

DOWNING STREET,

S.W.1.

*Amend (C)*

2) on 46568/KEA  
4/7137/37  
31/8

OFFICE OF THE  
CONFERENCE OF EAST AFRICAN GOVERNORS  
P.O. BOX 601  
NAIROBI, KENYA

27th July 1937

NAIROBI  
CONFERENCE OF EAST AFRICAN GOVERNORS  
P.O. BOX 601  
NAIROBI, KENYA

With reference to my letter to you dated 12th October 1936 regarding the amendment of the Penal Code relating to seditious publications I have the honour to transmit to you for the consideration of Mr. Secretary of State, copies of a letter from the Government of Kenya suggesting the desirability of extending the powers of the Governor in Council, as to enable him to prohibit by order the local publication of any newspaper, book or document.

Copies of the Kenya Government's letter are being sent to the Government of Tanganyika, Uganda, Zanzibar, Northern Rhodesia, and Nyasaland, to whom I propose also to communicate copies of your reply when received.

I have the honour to be,

Yours obediently,  
J. A. G. A. U.

SECRETARY GENERAL  
CONFERENCE OF EAST AFRICAN GOVERNORS  
P.O. BOX 601  
NAIROBI, KENYA

The Secretary,  
To the Conference of East African  
Governors,

D/M.L.12/58/2/6/35.

NAIROBI.

24th July, 1937.

Sir,

With reference to your letter Ref.No.C/Leg/A.1 of the 4th May, 1936, I have the honour to inform you that a Bill to Amend the Penal Code has been drafted to give effect to the proposals indicated in paragraph 4 of your letter and was considered by Executive Council on the 25th June.

2. Section 53 of the Code empowers the Governor in Council to prohibit by proclamation the importation into the Colony of any book, newspaper or document. The Bill contains a clause to amend this section by substituting the word "order" for the word "proclamation". In the course of the discussion in Council it was suggested that the provisions of the Bill should be extended so as to empower the Governor in Council to prohibit by order not only the importation, but also the publication in the Colony of any newspaper, book or document. This suggestion received the support of all members of Council, with the exception of the Acting Attorney General, on the same ground that the Governor in Council should have the same powers to prohibit publication in the Colony as he has to prohibit the importation of seditious publications into the Colony.

3. The Acting Attorney General has represented that this suggestion is directly contrary to the principle laid down in paragraph 4 (a) of Lord Passfield's Despatch No.99 of the 7th February, 1931, (quoted in the enclosure in your letter under reference), where it is stated:-

"There is no objection/



"There is no objection to the grant of power to a Governor to prohibit the importation of any document. It should, however, I think, be a matter for the courts, and for the courts alone, to decide whether, apart from any question of prohibited import, a document is or is not seditious."

Mr. Willan further points out that both the Uganda and Tanganyika Governments have legislated on the lines suggested by Mr. Thomas, and that it is clearly desirable that the law regarding seditious publications should be uniform in the East African territories.

4. It is, however, not explained why, if the principle is accepted that it is a matter for the courts alone to decide whether a document is or is not seditious, this principle should be departed from in the case of imported documents but should be adhered to in the case of documents published in the Colony. It does, indeed, appear highly illogical that the Governor in Council should have no power to prevent the local publication of a document the importation of which in the same or a similar form he has prohibited.

5. In these circumstances I shall be obliged if the Secretary of State may be acquainted with the views of members of Executive Council as set out in this letter, and if this Government may be informed whether the Secretary of State maintains his objection to the extension of the powers of the Governor in Council as suggested by them.

I have the honour to be,

Sir,

Your obedient servant,

(Signed) H. L. Gurney.

for COLONIAL SECRETARY.