

1931.

Kenya

No. 17010.

SUBJECT

C0533/405

Native Policy.

Previous

16356/30

16349/30

Subsequent

- 17403/31 (Annual Code Amendment)
- 18024/32 (Native Authority (Fund) Ord.)
- 18025/32 (Roads in Native Areas Ord.)
- 18157/32 (Native Passes Regs)
- 18204/32 (Prisons Bill)

H742

1. Mr. Moore Conf. 181 _____ 4th December
states as to reply to Mr. Conway Harvey's question
a despatch to be sent on question of amendments
necessary to existing legislation to bring it into
conformity with policy laid down in memorandum.

2. PS to Mr. Moore % _____ 6th December
explains circumstances in which telegram requesting
despatch re amendments necessary to existing
legislation was delayed, and states as to result.

Action required
on 16/12/30 later.

I think this is really all
right. I think we may put by
no. 1 & ack. no. 2 (PS Allen to
Mr Willcodes) & thank for the
explanation & say that we were that
nothing further need be done.

Stanford
8.13.

No. 1.

The letter to Mr. Harvey (see para. 4 of
No. 1) did not even conform to the wording sug-
gested in the Acting Governor's telegram (No. 5
on 16356/30) since it omitted any reference to the
necessity of ascertaining the Secretary of State's
wishes. Also it included a reference to the
despatch being prepared for purposes of a Parlia-
mentary answer, which was precisely the passage
objected to here, and which was the cause of the
Secretary of State's telegram (No. 6 on 16356)
being sent. However, as the letter to Mr.
Harvey

Harvey had been sent and acknowledged before the Secretary of State's telegram was received, one may agree that it would hardly be desirable to take any further action.

On the other hand, it is a little difficult to subscribe to the Acting Governor's view that his letter conformed generally with the Secretary of State's telegram - there seems to me to be very substantial differences - and it is somewhat disconcerting, when the matter was thought sufficiently important for a telegram, to be told that it is really immaterial.

Although it is doubtful whether the matter is worth pursuing, it might be just as well to send a despatch explaining why the Secretary of State's telegram was sent.

No. 2.

The fact that the Press were ahead of the Secretary of State's telegram was referred to in the minutes on No. 2 on the P.Q. file, 16356/30. Perhaps Mr. Parkinson will wish to reply to Mr. Moore explaining how this came about, with a hope that it won't happen again; and also saying as regards the local contretemps after the receipt of the Secretary of State's telegram, that one fully realizes that even under the best ^{of} systems it is difficult to avoid an occasional happening of this description.

This has been delayed for other papers, and also for the transfer from this paper of No. 8 ~~to~~ 16356/30 to which it more conveniently belongs.

J.H. Allen

21/1/31

I should prefer to leave all

this alone now. So long as we
have the press with us, we
must expect from time
to time difficulties arising
out of the desire of the
press to mesh up
snippets of news, & we
cannot really cope with
that. I do not
think that anyone is to
blame here; and the
circumstances in Kenya
were apparently abnormal -
his house was let down
by his office machinery,
but even so if his house
had in mind the Neuter,
as he says, I cannot
help thinking that we
would have been wiser
to word the reply to
Mr. Harvey's question
more cautiously. At
the same time I do not
want to write anyone
who has
ample worries - & I wd.
suggest that we let both
the deep & the shallow be fully
discussed.
Rec Parkinson
Paddy Good 23/1/31

P.T.O.

3
Ken's Dep. Moore Conf. 36 ——— 11 March
Enclose copy memorandum by Attorney -
General setting out items of legislation affected
by the memorandum on Native Policy and submit
comments on measures to which Attorney -
General has drawn attention

The Governor's Deputy sends home a
memorandum by the Attorney-General on legisla-
tion which might be considered contrary to
the White Paper on Native Policy.

I have dealt with the despatch and its
enclosure at length in the attached memorandum,
which I think covers all the ground except for
those Ordinances which are being examined
separately.

In replying to the Governor it would
only appear necessary to comment on those points
marked 'X' in my memorandum.

I fear this has been rather delayed, but
it has been difficult to get down to ~~it~~ during
the last month.

E. Eastwood
15.5.31

Shut up notes into a view to
amend as agreed recommendations
in the Dept to put forward.

J. V. Allen

16/6/31

I am afraid I also
have taken my hand
off this J.V.A. 16/6

J.V.A.

3a

4

1. Mr. Eastwood has gone carefully into all
this and his memorandum is attached as No.3(a).
There is risk of excessive and confusing minuting
if we were all to write separate minutes; I there-
fore now send on a second note which is attached
to the file as 3(b) in which we draw together the
threads and indicate what, as a Department, we
think should be done. For this purpose we have
used as a first draft the notes referred to in
Mr. Allen's minute of the 16th.

2. I do not think I need comment at length,
but I would like to point out that there is com-
paratively little after all which will need
amendment in the Kenya legislation in order to
bring it into strict conformity with the Native
Policy Memorandum. This is not a surprise to the
Department.

3. If the memorandum No.3(b) is approved
the action would be as follows:-

(i) Acknowledge the Governor's despatch and
express thanks for the care with which the matter
has been gone into.

(ii) Express concurrence in the construction
which has been placed on the Native Policy Memorandum:
see paragraphs 3-5 of the Attorney General's memoran-
dum and paragraph 2 of the despatch.

(iii) Agree that the legislation referred to
in paragraphs 6-8 of the Attorney General's memorandum
does not call for amendment, subject to a reserva-
tion in regard to the Sugar Ordinance.

(iv) Refer to the Legislation in V. of the
Memorandum as being dealt with separately.

(v) Comment on the remaining legislation

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as suggested in the memorandum.

(vi) Enter a caveat that the present review must not necessarily be taken as final as points may be brought to light from time to time in regard to which there may be ground for suggesting amendment of existing laws.

(vii) Suggest that the Government of Kenya should keep all the other East African Governments informed of the changes actually made in Kenya legislation in this connection so that those Governments may consider whether there is anything parallel in their legislation which should similarly be amended.

Acc. Parkinson

22.6.31

[As arranged I said this to Mr C. Bottomley before it goes to Mr Duncan, so that he may be able to see it in case he should be away when Mr Duncan has considered it.]

accf

I have read this through and agree generally, but I would rather not express an opinion on details till they have had legal scrutiny. I shall be back on July 1st.

23.6.31

I have carefully read the despatch of 11.3.31 (No.3), the Attorney-General's memorandum of 25.6.30 enclosed, note 3A, and memorandum 3B, and I agree with the views expressed in that memorandum - subject generally, of course, to what Mr. Parkinson says in 3(vi) of ^{his minutes of} 22.6.31. In view of what the Governor says on p.6 of his despatch about the Native Arms Ordinance (cap.137), I should have been inclined on the whole to express our agreement with him on this point rather more strongly than we do in the memorandum. Apart from this, I have no observations to make.

30th June, 1931.

H. Duncan.

I agree to Memo: 3 B & to Mr Parkinson's proposal for action, but as to Head VI (i) of 3 B. I think we might repeat what has been said before - that care should be taken that the 6 days before a quarter is administered without abuse or favour.

15.6.31 11/7/31

*Sec of State
(through Mr Shields)
I agree and also with the*

proposed procedure.

J.P.H.
2.9.31

Mr. Allen.

Mr Parkinson brought this to me some days ago. He said that Dr. Shick was content with the action proposed in the departmental memorandum ~~but~~ provided that the point about forest labour under the Native Authority Act was brought out.

Mr Parkinson asked me to prepare a draft for comment with the idea that it might be submitted to the Sps without further refs to Dr. Shick.

J.P.H.
10.8.31

In view of the above I pass this draft through to Tokensa with his permission

Mr Allen
14/8/31

See minutes
above

fact I did not make myself clear, I am afraid, to Mr. Parkwood: I think Dr. Shick will wish to see the Sps - in fact, I think I said to him that it would be easier for him to see exactly what we proposed if we might prepare a Sps. for comment.

~~J.P.H.~~
~~10.8.31~~

I pass the Sps. through to Tokensa who saw the file at the earlier stage. I will then go to Tokensa, who will arrange for Dr. Shick to have it at the first opportunity.

allp
20.8.31

Mr S. Wilson

Since this was drafted, there has been the change of Government. The Sps. is quite satisfied with the Sps. but you may wish the new Sps. to see it; as our authority is at present only oral from Dr. Shick.

Mr Allen.

The Sec of State Sps is as being the

allp
25.8.31

I don't want to bother him with
this. However, he has told me
that there is to be no change in
policy. In view therefore of fact
that Dr. Ghosh was content, &
that Department is satisfied, I
have passed draft.

5/11/31
alone

31.8.31

See: Sir C. D. B. [unclear] to see a
thing.

J. M. [unclear]
21/8/31

See
[unclear]
29.9.31

~~Sir C. [unclear]~~
~~[unclear]~~

No. Gov. Conf. (47) - 3. [unclear] [unclear]

3/8/32
8 SEP 1931

N.B.
See para 14
4. Separate
[unclear] for
[unclear] [unclear]
[unclear]

I don't want to bother him with this. However, he has told me that there is to be no change in policy. In view therefore of fact that Mr. Shields was content, & that Department is satisfied, I have passed draft.

G.H. 6
alone

31.8.31

See: Sir C. B. Stanley, to see a
them.

J.M. Allen
21/8/31

To: Gov. Comf. (H.) - 3. Answer. Cons.

3/8/32
8 SEP 1931.

See
C. B. Stanley
21.8.31

~~Sir C. B. Stanley~~
~~at~~

N. B.
See para. 14
4. Separate
introduction for
his replies
addressed

C. O.

X.17C10/31/Kenya.

47

Mr. Eastwood 10/8.

Mr. Allen. 17/8 17/8

Mr. Parkinson 20/8/31

~~Mr. Tomlinson~~

~~Sir G. Downey~~ W.D. 29/8/31

~~Sir J. Sturtevant~~

~~Sir G. Grindrod~~ X

~~Presid. U.S. of S.~~

Parly. U.S. of S.

Secretary of State.

W.S. Wilson
31.8.31

DOWNING STREET,

August, 1931.

8 SEP 1931

C. D.
R 31 AUG
D

Sir,

I duly received your

Confidential despatch No. 36 of the 11th March, in which you forwarded with your comments a memorandum by the Attorney-General setting forth in detail the items of Kenya legislation which might conceivably be held to be affected by the Memorandum on Native Policy in East Africa. I desire to record my appreciation of and thanks for the care which has been given to this matter, and I now have the honour to inform you of the ~~new~~ ^{views} ~~conclusions~~ which I have ~~reached~~ ^{formed} after full consideration of your despatch and the ~~Acting Governor's~~ ^{Attorney General's} memorandum.

2. I do not regard discriminatory legislation as necessarily of itself contrary to the Memorandum, and I concur in the view that no exception need be

DRAFT. for conson.
K. remembers not
at of a case

(3)

KENYA

CONFIDENTIAL (4)

GOVERNOR.

be taken to discriminatory provisions
which confer privileges or impose safeguards
for the benefit of the natives, ^{And, are} justified
by the needs of the native community.

I therefore ~~agree~~ that, with the exception ^{a reservation in regard to}
~~of~~ the Sugar Ordinance (Cap.134) ~~as to which~~
^{I refer later, I agree that}
~~there is a separate communication with you for~~
amendment is called for in the case of the
legislation referred to in paragraphs 6 to 8
of the Attorney-General's Memorandum.

3. Nor in view of the explanations furnished
any
in regard to them do I see reasons to

suggest any amendment of the following

Ordinances which are dealt with later in the
Attorney General's Memorandum:-

Chapter 62. Immigration Restriction
Ordinance.

Chapter 63. The Vagrancy Ordinance.

Ordinance No.21 of 1925. The
Methylated Spirits Ordinance.

Ordinance 25 of 1925. The Detention
Camps Ordinance.

Chapter 5.

Chapter 79. The Stock and Produce Theft

Ordinance.

Chapter 134. The Sugar Ordinance, ^{as} to which

I have already referred in para 2 (C)(1) of my Conf. Rep. of the 2nd July last

(1065781)

5. This leaves for consideration the

following Ordinances:-

Chapter 114. Roads in Native Reserves
Ordinance.

Chapter 129. The Native Authority
Ordinance.

Chapter 138. The Native Passes Ordinance.

Chapter 4. The Application of Indian
Acts to Natives Ordinance.

Chapter 75. The Railway Materials
Protection Ordinance.

Chapter 137. The Native Arms Ordinance.

Chapter 159. The Branding of Stock
Ordinance.

Ordinance
No. 10 of The Penal Code.
1930.

6. Chapter 114. Roads in Native Reserves
Ordinance.

Section 3 of this Ordinance

provides

provides that the Governor may require chiefs
etc. to mark the boundaries of their juris-
diction.

Section 4 lays down a penalty ^{not exceeding} of £75 for
failure to carry out orders under the
previous section.

Section 5 provides that (1) for the
purpose of carrying out an order under
Section 3 or (2) for the construction of a
road or bridge, as agreed with ^{the} Government,
^{etc} chiefs ^{or} may require all able-bodied men to
^{not more than} work unpaid for six days a quarter.

Section 6 lays down penalties for
refusing to labour, and for the exemption
of persons under contract for service
outside the Reserve. As you
know, it is my earnest desire that provisions
for forced labour of any kind should
disappear as soon as possible from the
laws of Kenya; ^{and as} ~~and as~~ I understand that in
recent years it has not been necessary to
have recourse to the provisions of this
Ordinance

Ordinance in so far as they relate to the construction and maintenance of roads in native reserves. ~~As there would seem to be no great necessity for the retention of those provisions, I should therefore be glad to see them repealed.~~

however
you may think it desirable to retain the provisions relating to the marking of boundaries, though I consider that the maximum penalty of £75 in section 4 of the Ordinance is unduly high. I would suggest, however, that this object ~~of these sections~~ might be achieved by including ^{penalties in section 3} this purpose among those contemplated by the Native Authority Ordinance, in which case no separate ^{penalty} Ordinance would appear to be necessary.

7. Chapter 129. The Native Authority Ordinance.

Sections 8 (h) and (n) provide for the "traditional" unpaid labour not exceeding six days a quarter, and for paid labour for porterage

porterage of Government servants or stores. In my confidential despatch of

³
(17097/31)

the 16th May I have addressed you fully on the subject of the continuation of forced labour in Kenya in which reference was also made to the desire of His Majesty's Government in the United Kingdom that forced labour of all ^{former} ~~tribes~~ should disappear as soon as possible in all the British Colonial dependencies; and I only wish to add that so long as ^{any} ~~these~~ forms of forced labour remain care should of course be taken that they are administered without abuse or favour.

I agree with your view that Section 8 (j) and ^{also} Section 11, as amended by Ordinance No. 16 of 1928, are unobjectionable.

8. Chapter 138. The Native Passes Ordinance.

This Ordinance provides that the Governor in Council may make rules controlling the movements of natives travelling into, out of, or within, the

*Amend
18/157/32
No. 1*

the limits of the Colony. Rules have been made under the Ordinance:-

(1) Providing that (with certain exceptions) no native shall leave the Colony without a pass from a District Officer.

(2) Restricting the entry of natives into the Tana River District.

(3) Providing that no native of the following tribes may leave his reserve without a pass from a District Officer, who may refuse one without reason given:-

Masai;

Lumbwa, Buret and ~~Satik~~ Satik;

Nandi;

Kamasia, Elgeyo, and Uasin Gishu Masai.

I realise that rules of the types mentioned in (1) and (2) above may be both necessary and desirable, but I am doubtful on present information whether the rules summarised in (3) are justifiable. ^{although} ~~although~~ I note your statement that ^{these} ~~these~~ rules have been found necessary to check the proclivities

of

of the tribes concerned in the matter of stock theft, and that their existence is appreciated by the elders of the tribes and has led to no complaints of hardship:

^{but} therefore in order to enable me to form a definite opinion I should be glad to have a more detailed report on the extent to which any of these rules are made use of, and the necessity for their continuance especially those which provide for passes for natives ^{wishing} ~~willing~~ to leave ^{certain} ~~labour~~ reserves and I would suggest that you should consider whether the matter might not be referred to the Native Councils concerned in the first instance.

9. Chapter 4. Application of Indian

Acts to Natives Ordinance.

I note that since the Indian Limitation and Prescription Act is not applied to natives a native ^{could not} ~~could not~~ claim title to land law, as others can, claim title to land

by

by undisturbed possession for 10 years. I am glad to learn that the Attorney-General is preparing a Limitation and Prescription Ordinance which will be non-racial in its character. In this connection I would invite attention to my ^{SR} Confidential despatch of the 30th April in which I dealt with the question of native rights to land outside the Reserves.

10. Chapter 75. The Railway Materials Protection Ordinance.

This Ordinance makes it an offence for any native to be in unauthorised possession of railway material in any area in which the Ordinance has been applied. I note that

you propose to amend the Ordinance so as to

make it non-racial in character. While I agree that

such an amendment would be a decided improvement.

^{It is} next, I would point out that the Ordinance

was passed as long ago as 1903 in the early

days of the Railway and I should be glad to

know whether recourse to it has been made

frequently, if at all, in recent years

and

*Amend.
17/08/31*

and whether it could not in present circumstances be repealed.

11. Chapter 137. The Native Arms Ordinance.

This Ordinance makes it necessary for a native to obtain a permit from the District Officer or from his employer ~~or~~ if he wishes to carry arms outside his Reserve: ^{Standard 111} ~~By~~ ^{No 38 v} an amending Ordinance ^{by} of 1929 employers must obtain written authority from the District Officer to give permits.

Although this Ordinance clearly involves discrimination I appreciate the argument that ~~the~~ ^{the} community other than natives is in the habit of carrying arms of the nature specified as a matter of daily practice. I also note that you regard it as necessary ^{for} in the preservation of peace and good order and I realise that natives as well as non-natives are protected by this measure of control of native arms. I am therefore prepared to acquiesce in the retention of this Ordinance.

Ordinance for the ^{present} / though I anticipate that the practice of carrying arms will gradually disappear and the repeal of the Ordinance will in time become possible without difficulty.

12. Chapter 152. Branding of Stock Ordinance.

In its present form the Ordinance provides that no native may mark any stock with a distinctive mark similar to any brand registered by a non-native. I note your opinion that there is no reason why a native who desires to brand his stock should not be permitted to do so, although it is unlikely that there will be many applications for brands. I consider, nevertheless that it would be desirable that the Ordinance should be amended so as to make it non-racial in character, and I should be glad if this could be done.

13. Ordinance No. 10 of 1930. The Penal Code.

(1) Section 28.

At

Amend. 17402/31

At present there is a higher scale of imprisonment, in default of payment of a fine, for a native than for a non-native. I note that you regard this differentiation as indefensible, but that in your opinion the scale is in practice interpreted in a just spirit. You suggest, therefore, that amendment should be made, but that it should wait till other amendments are found necessary. I agree that amendment is desirable, ^{and} but I should prefer that the ^{it} necessary amendment should be made at once.

(2) Section 135.

I agree to the retention of the existing provision which limits to European police officers ^{the} ~~in~~ power of searching non-native premises for a woman or girl unlawfully detained for immoral purposes.

(3) Section 147.

I welcome your suggestion that

this section should be deleted from the Code.

14. It would be convenient if

your replies on the various points dealt

with in the preceding paragraph, were made

in separate despatches.

15. The present review of the position

should not necessarily be regarded as final as

points may be brought to light from time to time in

regard to which there may be ground for suggesting

amendments to existing laws.

16. I would suggest that you

should keep all the other East African Governments

informed of the changes actually made in Kenya

legislation in this connexion in order that they

may consider whether there is anything parallel

in the legislation of ^{those} the other Dependencies

which should similarly be amended.

I have, etc.

(SIGNED) J. M. THOMAS.

Amul
17403/31

I have not before thought
it necessary to comment
on the Ordinance mentioned
in para 6 to 8 of the
Memorandum.

3A¹⁴

MEMORANDUM.

I take it that the principles stated in paragraphs 3 and 4 of the Attorney-General's Memorandum are acceptable. The object is to ensure that "the additional ~~benefits~~ and the exceptional safeguards" do not in fact lead to discrimination against the natives.

Chapter 127, The Native Registration Ordinance.

Chapter 129, Employment of Natives Ordinance.

Ordinance No. 5 of 1925, The Resident Native Labourers Ordinance.

A despatch dealing with these Ordinances has now been received by air mail, and it is not necessary to comment on them here. In addition to the specific points raised in the amending Bill, it will also be considered whether any amendment of other parts of the ordinances is desirable.

Collective Punishment Ordinance

This has been revised since the publication of the Memorandum, and no comment is required here.

Chapter 114, Roads in Native Reserves Ordinance

Section 3 of this Ordinance provides that a Governor may require chiefs, etc. to mark boundaries of their jurisdiction. Section 4 lays down a penalty of £75 for failure to carry out orders under the previous section. Section 5 provides that

(1) For the purpose of carrying out an order under Section 3, or

(2) For the construction of a road or bridge, as agreed with Government

Chiefs may require all able-bodied men to work unpaid for six days a quarter. Section 6 lays down penalties

for

for refusing to work, ~~that~~ to be in accordance with native law and custom, or a fine up to 30/- or imprisonment up to one month. Persons under contract for service outside the reserve are exempted.

On this Ordinance it may be remarked:-

- (1) That its contents do not seem to be covered by the short title;
- (2) That it ~~has~~ not been used, at any rate so far as forced labour is concerned, for some years.

I feel sure that it will not be desired to retain Sections 5 and 6. There is ample ~~power~~ to call out any unpaid forced labour that may be required up to six days a quarter for the making of roads under Section 8(h) of the Native Authority Ordinance.

I can believe that it may be necessary to retain the provisions of Sections 3 and 4 (though the penalty of £75 seems high). One would have thought, however, that their object could have been better achieved by additions to Sections 8 and 13 of the Native Authority Ordinance.

I would suggest that the Governor might be requested to arrange for the repeal of the Ordinance, amendments being made if necessary in the Native Authority Ordinance to cover Sections 3 and 4 with a modified penalty.

Chapter 129, Native Authority Ordinance.

(1) Section 8. (h) and (n) relate to forced labour.

A separate despatch has recently been sent ~~to the Gov.~~ covering this point.

In ^{the} paragraph 11 of his Memorandum, the Attorney-General refers to two further points of this Ordinance.

(a) Section 8(j) gives a Headman power to issue orders regulating the movements of natives from the jurisdiction

of

Jawad not use his argument as S 8(h) has 20000 a much more lenient appln. 1/17/39

X

16

or one Headman to that of another. In paragraph 11 of the covering despatch, the O.A.G. explains convincingly that this section is necessary in the interests of peace and good order. He says "there have been frequent instances of serious friction where there has been unregulated infiltration by the natives of one clan or tribe on the land over which another clan or tribe has the customary rights of occupation". (An instance of such movement is that of the Kikuyu into the Masai Reserve.)

(?by whom)

(b) Section 11, as amended by Ordinance 16/28. Whenever a District Officer finds that "any" member of a tribe or community, for the occupation of which land has been reserved, is cultivating or occupying any land outside the lands so reserved otherwise than by virtue of a valid contract or other lawful authority", he ~~is~~ may order him to remove on to the land reserved for his tribe. I think that in this form the section is harmless. The words underlined were only added in 1928, and before 1928 it would not have been harmless.

Chapter 63, Vagrancy Ordinance.

By Section 11 a Magistrate may order a native ^{to return} vagrant to the area reserved for the use of his tribe. I see no unfair discrimination in this.

Chapter 82, Townships Ordinance. This has ^{been repealed & replaced by a new Ordinance which is under consideration.} There is therefore no need to comment further here.

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Chapter 138, Native Passes Ordinance.

The Ordinance provides that the Governor-in-Council may make rules for controlling the movements of natives travelling into, out of, or within, the limits of the Colony. Until a few years ago rules existed under this Ordinance to the effect that all natives not in the employment of Government or a European employer must obtain a pass from a District Commissioner if they crossed the boundary of their district. These rules have now been repealed, but rules still exist under the Ordinance:-

- (1) Providing that (with certain exceptions) no native shall leave the Colony without a pass from a District Officer;
- (2) Restricting the entry of natives into the Tana River district.
- (3) Providing that no native of the following tribes may leave his reserve without a pass from a District Officer, who may refuse one without ~~cause~~ *reason given*:-

Masai;

Lumbwa, Buret and Sotik;

Nandi;

Kamasia, Elgeyo and Uasin Gishu Masai.

No fee is payable for these passes.

These passes are entirely independent of the Kipande system (under the Native Registration Ordinance). It will be observed that they are only required from certain pastoral tribes. The O.A.C. says that rules have been found necessary to check the proclivities of these people in the matter of stock theft, and that their existence is appreciated by the Elders of the tribes. The rules under (1) and (2) above seem to be unobjectionable, but those under (3) are open to some objection on principle, and one would have thought that the registration system ^x provided all the check that was necessary

of main point

necessary. It is to be noted that the rules were mostly made many years ago. They were dated 1906, 1907, 1914, 1909, 1913, 1918, 1914 and 1923. Mr. Deck, the Provincial Commissioner of Masai, was asked when he called the other day whether much use was made of these rules, and he said that so far as the Masai were concerned they were practically a dead letter, but he believed that they had been of use in the Lumbwa area recently in preventing stock theft.

I would suggest that the Governor be informed that the Secretary of State considers that the rules under (3) above are open to some objection on principle. and enquire whether it would be possible to repeal, ^{all} or, at any rate, some of them. The Secretary of State might ask that no further rules should be made without reference to him.

X

The Local Govt. (Municipalities)

Ordinance 1928

It will be convenient to consider this separately in conjunction with the new Townships Ordinance



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Chapter 77, Collective Punishment Ordinance.

Already dealt with - see page 1 above.

Chapter 79, Stock and Produce Theft Ordinance.

Sir Joseph Byrne is under an obligation to look into this Ordinance, and let the Secretary of State have his views regarding the amendment of it. If nothing is heard within the next few months he will be reminded, and the necessary notes have already been made on the papers (16055/30 and 15964/30). In the circumstances, no action seems required on this file.

Chapter 137, The Native Arms Ordinance.

The Ordinance makes it necessary for a native to obtain a permit from the District Officer or from his employer if he wants to carry arms outside his reserve. By an amending ordinance of 1939 employers must obtain written authority from the District Officer to give permits. There was considerable discussion regarding this amendment (see 15929/29), but the principle underlying the main Ordinance does not appear to have been considered. The attached note, put up by the Library, shows that there is nothing corresponding ^{to} the Ordinance in Uganda or Tanganyika, and I am a little doubtful whether it is right that it should continue in Kenya. On the one hand, it may be said that the Ordinance definitely involves discrimination. On the other, that its continuance is necessary for the keeping of order. I believe, as a matter of fact, that the Ordinance is not very much used, and that in practice it is not resented by the natives. I am sure that its repeal would have a bad effect on the political atmosphere in Kenya. Unlike most of the discriminating laws, this is one which in process of time, as the natives become more civilized and cease to carry arms, will gradually become obsolete. On the whole, I think it might be left alone.

Chapter 159, Branding of Stock Ordinance.

This provides that any non-native may register a particular brand for his cattle. No native is, however, allowed to mark any stock with a distinctive mark similar to any registered brand under penalty of imprisonment up to six months, and confiscation of his stock (Section 23). He may, however, mark his stock so long as ^{the mark} ~~it~~ is not similar to any registered brand, and includes neither letters nor figures (Section 22). The branding of stock is not compulsory, and the O.A.C. says that he sees no reason why a native who desires to brand his stock should not be permitted to do so, although he thinks that it is unlikely that there would be many applications for brands.

X

? Suggest that the Ordinance should be amended so as to make it non-racial in character. (Sections which would require amendment are Sections 5, 22 and 23).

The Methylated Spirits Ordinance.

Prohibits the issue of a licence to a native to keep for sale or to sell methylated spirits. This, like the Liquor Ordinance, is for the natives own protection and appears reasonable.

Detention Camps Ordinance.

Has been recently reviewed. Naturally, it applies only to natives and not to Europeans. I do not think this need be regarded as unfair discrimination.

Turning now to the matters dealt with in paragraphs 13 -- 15 of the Attorney-General's memorandum and paragraphs 23 -- 27 of the covering despatch:-

Memorandum, paragraph 13, Desp. paragraph 23.

It seems reasonable that subordinate courts should have a wider sphere of jurisdiction over natives. The difference in the ration scales of prisoners also seems reasonable.

Memorandum, paragraph 14, Despatch 24, 25 and 26.

These deal with the Penal Code. The revision of the newly enacted Code has to be considered at a conference to be held before the end of 1932. The despatch sent to Kenya as to this conference (No.6 on 16191/30) would, however, hardly have arrived before this despatch was sent, and the Governor might have modified his suggestions had he considered it.

He considers that the differentiation in the scale of imprisonment in lieu of a fine is indefensible, although I should have thought that there was some reason for differentiation. This seems one of the matters which could well be discussed at the conference. ^{? so suggest to Gov.} ~~This section~~ ^{native} does not occur in the Codes of other parts of East Africa. Although the principle does not appear to have been considered here since 1912, I feel sure that it would not be desired to retain this section, and the Secretary of State may clearly agree with the O.A.C., who suggests its abolition from the Code. ^{reference} (The despatch/recording the result of the only recent prosecution was that regarding the jury system, which has already been seen by ^{higher} authority (papers in circulation).

X

Section 147, constituting the offence of commission between a white woman & a ~~native~~ ^{native}

*except Nyaland

X

*there is no need to wait till the 1932 Conference before getting rid of this section.

I see nothing unobjectionable in the provision that search of non-native premises must be done by a European Police Officer.

Memorandum para.15 Desp.27.

None of the various points seem to require comment.

Clarendon

3 B¹³

MEMORANDUM .

I.

Kenya is the only Colony which has been asked to undertake this review, so the Department is dealing with the various Ordinances on their merits without reference to whether there is similar legislation elsewhere in East Africa or if there is such legislation without comparing it.

II.

So long as the natives are in the position of wards of His Majesty's Government some discriminatory legislation is inevitable.

(a) In some cases they are placed in a privileged position - and such legislation is clearly not contrary to the spirit of the Memorandum on Native Policy.

(b) In other cases discriminatory legislation may be necessary in the interests of the natives themselves so long as they are in a position of tutelage. Again such legislation is not contrary to the spirit of the Memorandum.

III.

In other words discriminatory legislation is not necessarily of itself contrary to the Memorandum and need only be objected to if repressive and unreasonable in nature : or as the Attorney General puts it, it is proper to pass legislation conferring privileges or imposing safeguards for the benefit of the natives but not discriminatory legislation which is not justified by the needs of the native community.

IV.

IV.

Applying these principles it seems clear that the legislation in paragraphs 6 to 8 of the Attorney General's memorandum corresponds with II(a) and (b) above and need not be discussed, except possibly the Sugar Ordinance (Cap.134), as to which see below.

It would also seem reasonable to place in the same category:-

Cap.62.

Immigration Restriction Ordinance (European deposit greater)

V.

We can leave out of discussion here legislation which is receiving special consideration elsewhere, viz:-

Cap.127.

(a) Native Registration ✓

Cap.139.

(b) Employment of Natives..

Ordinance No.5 1924

(c) Resident Native Labourers..

Cap.82.

(d) Townships. ✓

Ordinance 19 of 1928

(e) Municipalities. ✓

Ordinance 21 of 1928.

(f) District Councils. ✓

Cap.77

(g) Collective Punishment. ✓

Cap.79.

(h) Stock and Produce Theft. ✓

Cap.134.

(i) Sugar. ✓

The position in regard to each of these is, briefly:-

(a) Under separate consideration in Department.

(b) Amendments as recently approved by Secretary of State now being submitted to Legislative Council.

(c) Amendment is in abeyance, at request of Kenya Government.

NOTE: Dr. Shields' Committee is concerning itself with both (b) and (c).

- (d)) Restriction on movement of natives
- (e)) is being considered in connection
- (f)) with the new Townships Ordinance.
- (g) The Ordinance has been revised since the issue of the Native Policy Memorandum, and the Secretary of State has agreed to the continuance of collective punishment, as a temporary measure: a further despatch on the subject is now in.
- (h) A report is awaited from the Governor.
- (i) At the interview of the Kenya natives with the Secretary of State James Mutua objected to this Ordinance: the matter is being taken up in the despatch which is being sent to the Governor on the appropriate file about the interview.

(X.17165/31.)

VI.

This leaves the following matters for discussion:-

Cap.63 /
Vagrancy.

The Governor regards the power to return a vagrant to his reserve as beneficial and we see no unfair discrimination in this.

Cap.114
Roads in Native Reserves. /

The Governor proposes to retain the provisions, but we think that the sections relating to roads should be now repealed and that it should be suggested to the Governor that those relating to boundaries should be transferred to the Native Authority Ordinance with a modified penalty.

Cap.129
Native Authority. /

(1) Sections 8 (h) and (n) provide for the "traditional" unpaid labour of 6 days a quarter and for paid labour for portage

of

of Government servants and stores. The principle of these provisions is recognised by the Forced Labour Convention and the Governor suggests that no change be made. We agree.

A separate despatch has been recently sent to Governor about forced labour, to which reference can be made.

(ii) Sections 8 (j) and 11 as amended, regulating the movement of natives from jurisdiction of one headman to another, and providing that a native occupying without authority land outside a reserve may be ordered back to the reserve, are held to be unobjectionable. We agree.

Cap. 138
Native Passes. ✓

These passes are independent of registration (kipande) system and are required from certain pastoral tribes only. According to the Governor, this is not a disability on all natives, but a special safeguard in certain cases to prevent stock theft. The Governor suggests that the elders appreciate them and he has had no complaint of hardship in connection with the rules. It may be that other natives as well as non-natives benefit, but it is a doubtful case on the information available so far as concerns passes for natives of certain reserves to leave ^{Koba reserves.} ~~about~~ / We suggest that Governor should be asked for a more detailed report on the extent to which the rules are made use of and the necessity for their

their continuance, especially those which provide for passes for natives wishing to leave certain reserves, as Secretary of State is doubtful on present information whether their retention is justifiable - and enquire whether the matter could not be referred to the Native Councils concerned for discussion in first instance.

In one respect i.e. gaining title by undisturbed possession, ^{natives} are in a less favourable position than others, but a non-racial Ordinance is being prepared which will remove this discrimination. This should be noted; and there would be no objection to referring to the confidential despatch of 30th April about land for natives in this connection?

Under this Ordinance no native may have a licence to sell or keep such spirit for sale. We agree that this is a protection to the natives and should be retained.

Detention Camps save from prison contact natives guilty of offences involving no moral turpitude. We agree that this Ordinance should be retained.

The Governor proposes that the Ordinance should be made non-racial by substituting "unauthorised person" for "native". This would be a decided improvement; but is the Ordinance really necessary? It dates from 1903 when, no doubt, with the railway as a new thing in East Africa, natives found

Cap.4 Application of Indian Acts to Natives.

Ordinance 21 1925 Methylated Spirits. ✓

Ordinance 25 1925. Detention Camps. ✓

Cap.75 Railway materials Protection.

it a happy hunting-ground for metal and other perquisites. We suggest that enquiry be made whether recourse to this Ordinance has been made frequently or at all in recent years and whether it could not in present circumstances be repealed.

Cap.137 Native Arms.

The Governor wishes to retain it for the preservation of peace and good order. The Governor argues that no other community makes a practice of carrying arms of the nature specified i.e. spears, swords, simis, rungas, bows and arrows, clubs and such other weapons as gazetted from time to time. This is perhaps a doubtful case - see fuller note in Mr. Eastwood's memorandum tabbed Q. But natives as well as non-natives are protected by this control over native arms, and on the whole we think the Ordinance might be retained.

Cap.159 Branding of Stock.

The Governor proposes to remove the disability and we agree that the Ordinance should be amended so as to remove the existing discrimination.

VII.

As regards the Administration of Justice:-

Cap.5. Courts.

Subordinate Courts have a wider Civil Jurisdiction as regards natives. The Governor regards this as benevolent and unobjectionable. We agree.

Subsistence allowances for judgment debtors.

The Governor regards the existing racial discrimination in these cases as reasonable,

and

and to the advantage of the natives in certain respects. We agree.

VIII.

As regards the Criminal law:-

(A) Penal Code. ✓

Section 28. ✓
Higher scale of imprisonment in default of payment of fine.

The Governor regards this differentiation as indefensible, but he says that in practice scale is interpreted in a just spirit and he suggests that amendment should await further amending legislation when found necessary. We agree that amendment is necessary, but it seems undesirable to leave this discrimination on the Statute Book and we should prefer that Governor be asked to make the necessary amendment now.

Section 135. ✓
Search of non-native premises by European Police Officer only.

Governor cannot advise that search of European premises for a woman or girl believed to be unlawfully detained should be undertaken by native or Asiatic Police or even search of Asiatic premises by Asiatic Police. We agree that the existing provision should be retained.

Section 14)
Relations between white women and native men.

The Governor proposes the deletion of this section. We agree.

(B) Criminal Procedure Code. ✓

The new code gets rid of the two chief racial anomalies in the old code viz. (i) natives could be whipped for any offence; (ii) only a European could give evidence on oath in his own defence. But the following racial distinctions remain:-

(i) Sections 7, 10 and 11.
Natives can be dealt with summarily by a subordinate court for any offence other than treason, murder, manslaughter and rape.

The cost of bringing all such cases to the Supreme Court would in the Governor's opinion be prohibitive and in the circumstances unjustifiable. The Governor's further contention that as ^{far as} possible natives should be tried for criminal offences by the Administrative Officers "who understand their customs and their mentality", will not commend itself to our Legal Advisers; but it is unnecessary to go into that here - there will be full opportunity for that on the "Bentley case" file. We agree that the sections should be retained.

(ii) Sections 42 and 43.
Provisions as to security for good behaviour from vagrants, suspected persons and habitual offenders do not apply to Europeans in cases where they may be dealt with under the Vagrancy Ordinance.

The Governor makes no comment. This does not appear to be of material importance and might be left?

(iii) Sections 205 to 212.

Give Europeans right of trial by jury. No similar right given to any other section of the community.

The Governor makes no comment. The question of extending trial by jury to Indians has been for years a troublesome one involving political and other difficulties. It has been shelved, and we are now waiting at any rate for the outcome of the Parliamentary Committee on the wider question of a common electoral roll. The idea of trial by jury for natives has not hitherto been brought up for consideration. There is admittedly discrimination, but the Department is by no means sure that it is a discrimination as against the native or Indian.

Indian. It is quite possible that if anything is done, it will be in the direction of abolishing trial of Europeans by jury. It seems clear that we can leave this alone for the present.

H.A. J.
aef

21.6.31

Would you be good enough,
please, to let me know what ~~is~~
restrictions if any exist in the
T.T. on (a) natives (b) Europeans
possessing or
carrying arms? And what
is the position as to arms licences? &
are they issued on the same terms to
natives non-natives?

Eastwood

30-3-31.

There appear to be no restrictions on the carrying of arms in either territory apart from the possession of a licence issued under the authority of the Arms and Ammunition Ordinance (Tanganyika Cap.101 Revised Edition, Uganda No.14 of 1928) and in accordance with Rules issued thereunder.

In both territories Arms licences may be issued to natives for shot guns and ammunition for shot guns, but no arms licences may be issued to a native for any firearm other than a shot gun without the sanction of the Governor. This restriction does not apply in the case of non-natives.

Application for an arms licence may be refused to both native and non-native without assigning a reason. Such refusal is, in the case of non-natives subject to appeal to the Governor. There is no

provision for appeal in either territory in the case of natives.

The fee payable by a non-native for an arms licence in Tanganyika Territory is 5/- renewable annually. The fee payable by a native for an arms licence in respect of a smooth bore muzzle loading musket is 1/- per annum.

In Uganda the fee is 6/- in the case of non-natives and 4/- for natives

J. H. Thompson
1/5



KENYA.

GOVERNMENT HOUSE,
NAIROBI,
KENYA.

No. 36 CONFIDENTIAL.

11th March, 1931.

RECEIVED
7 APR 1931
COL. OFFICE

My Lord,

I have the honour to refer to Your Lordship's telegram No. 295 (Confidential) of the 27th November last and to transmit for Your Lordship's information a copy of a memorandum which was prepared by the Attorney-General on the 28th June last setting forth in detail the items of Kenya legislation which might conceivably be held to be affected by the Memorandum on Native Policy in East Africa.

2. In view of the terms of paragraph 3 of the Memorandum it is assumed that the legislation detailed in paragraphs 6 and 8 of Mr. MacGregor's memorandum do not call for any amendment in view of the fact that they contain provisions which are definitely benevolent to the native population in that they either confer special protection or concede special exemptions or privileges.

3. I will now pass to observations on the other measures to which the Attorney-General has drawn attention.

THE RIGHT HONOURABLE
LORD PASSFIELD, P.C.,
SECRETARY OF STATE FOR THE COLONIES,
DOWNING STREET,
LONDON, S.W. 1.

No H on 1/354/30

MEMORANDUM.

8 SEP 1931

Amund - Lord (H)

2.

- 4. Chapter 127. The Native Registration Ordinance.
Chapter 129. The Employment of Natives Ordinance.
Ordinance No. 5 of 1925. The Resident Native
Labourers Ordinance.

These Ordinances are now in process of amendment and in this connection I would refer to the correspondence ending with Your Lordship's despatch No. 750 of the 25th September last, to which I hope to send a reply at an early date. In the circumstances, I will not deal further with these Ordinances in this despatch.

NO 2 ex 16255/30
 /
 in lieu

5. Similarly, the Collective Punishment Ordinance has recently been amended with Your Lordship's approval and copies of the new Ordinance have just been transmitted.

- 6. Chapter 114. Roads in Native Reserves Ordinance.

In my opinion the provisions of this Ordinance are unobjectionable. It is desirable that the boundaries of Native Reserves and of native locations should be clearly demarcated in the interests of the people themselves in order to eliminate as far as practicable the possibility of any disputes, and it will be observed that section 5, which relates to roads, only becomes operative when a specified agreement has been entered into with the Government. While it is the case that there are no such agreements in force at the present time, it would I think be a mistake to repeal the Ordinance, for it might be found useful as the development of the Native Reserves progresses, and no agreement under this Ordinance would in the ordinary course be made without a prior discussion with the Local Native Council concerned under section 24 (1)(a) (v) of the Native Authority Ordinance (Chapter 129, as amended by the Operation Ordinance 1926).

7. Chapter 129. The Native Authority Ordinance.

The only provisions in this Ordinance which might be held to be in conflict with the memorandum are those of section 8 (h) and (n), but as requirements of this nature have been recognised as proper by the recent Convention on Forced Labour I do not propose any amendment.

8. I see no reason to recommend any alteration of the laws referred to in paragraph 11 of Mr. MacGregor's memorandum.

9. The Vagrancy Ordinance. Chapter 63.

An order for the return of a native vagrant to the area reserved for the use of his tribe is made for the native's own benefit and protection, in order that he may find himself in an area and in circumstances in which the ordinary necessities of life are available to him. It is the nearest equivalent to the action taken in the case of other vagrants, namely, their repatriation to their country of origin in order that they may join their relatives and friends.

10. The Townships Ordinance - Chapter 82.

The Rules which restrict the freedom of movement of natives in townships are as necessary to the protection of respectable natives as they are to that of other communities. Unrestricted movement of natives into and within townships leads to the collection in these areas of the worst class of idle disorderly and criminal natives. Such a class makes its living either by begging or by stealing. In the former case they impose themselves upon the hospitality of those members of their tribe who are in employment, relying upon native custom to preclude refusal, and become an intolerable burden upon a decent and industrious community. In view of the fact that

Government has set aside large areas of land for the use and benefit of the native tribes of the Colony, it is only proper that the townships, which were primarily established for occupation by non-natives, should be reserved for those who should properly reside there, and that the residence therein of natives should be confined as far as possible to those whose employment or legitimate business requires them so to reside.

11. The Native Authority Ordinance. Chapter 129, Section 8 (j).

The movement of natives

from the jurisdiction of one headman to that of another is a matter which has to be carefully regulated in the interests of peace and good order and in the maintenance of tribal authority. There have been frequent instances of serious friction where there has been unregulated infiltration by the natives of one clan or tribe on the land over which another clan or tribe has the customary rights of occupation, such infiltration is usually followed by a concerted attempt by the interlopers to defy the authority of the local native authorities, and to demand a separate headman of their own.

Section 11. The removal of natives who are unlawfully occupying Crown land outside their Reserve to the land which has been reserved for the use of their tribe is a normal administrative method of dealing with unauthorised trespass.

12. The Native Passes Ordinance. Chapter 138.

Rules under the Native Passes Ordinance, Cap. 138, will be found on page 1197 of Vol. II of the Orders, Proclamations, Rules and Regulations.

It will be observed that the tribes to which the Rules have been applied are all pastoral tribes, and the rules have been found necessary to check the proclivities of these people in the matter of stock

theft. The existence of the rules is appreciated by the elders of the tribes and I have received no complaints of hardship in this connection.

13. The Local Government (Municipalities) Ordinance, 1928.

The Municipal by-laws regulating the use of streets and other public places by natives, especially at night, and for the issue of residential passes to natives who are not in employment but nevertheless desire for some given reason to reside within the Municipality are essential to the preservation of order and for minimising crime as far as possible in a community where natives, some of criminal tendencies and others easily led, are subjected to the temptations of a large European town containing in addition a considerable Asiatic population.

14. Chapter IV. Application to Natives of Indian Acts Ordinance.

This Ordinance has one omission which may be held to leave natives in a less favourable position than non-natives. This omission lies in the fact that the Indian Limitation and Prescription Act has not been applied to natives and a native therefore could not in law, as others can, claim title to land by undisturbed possession for 10 years.

The Attorney-General is preparing a Limitation and Prescription Ordinance which will be non-racial in its application and will therefore remove this discrimination.

15. Chapter 62. Immigration Restriction Ordinance.

For the reasons set out in Mr. MacGregor's memorandum there would appear to be no need to amend this Ordinance.

16. Chapter 75. The Railway Materials Protection Ordinance.

This Ordinance has been applied to the

-following-

theft. The existence of the rules is appreciated by the elders of the tribes and I have received no complaints of hardship in this connection.

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For the reasons set out in Mr. MacGregor's memorandum there would appear to be no need to amend this Ordinance.

16. Chapter 75. The Railway Materials Protection Ordinance.

This Ordinance has been applied to the

following areas :-

- Coast Province.
- Ukamba Province.
- Kiambu District.
- Naivasha District.
- Nakuru District.
- Nyanza Province.

There would not seem to be any good reason why persons other than natives should not be liable to the penalties provided by this Ordinance for unauthorised possession of railway material, and I should propose that this Ordinance be amended by deleting section 2 and by deleting the word "native" in section 4 and substituting the words "unauthorised person".

17. Chapter 77. Collective Punishment Ordinance.

This Ordinance has been the subject of correspondence with Your Lordship ending with Kenya (Conf) despatch No. 3 of the 12th January, 1931, and I do not propose to refer to it further in this despatch.

No 2 ex 17054/31

18. Chapter 79. Stock & Produce Theft Ordinance.

Your Lordship has already advised me demi-officially that you intend to discuss the amendment of this Ordinance with Sir Joseph Byrne.

19. Chapter 137. Native Arms Ordinance.

I think that Your Lordship will agree with me that the provisions of this Ordinance are not only entirely unobjectionable but necessary to the preservation of peace and good order. As Your Lordship doubtless appreciates no community other than natives is in the habit of carrying arms of the nature specified as a matter of daily practice.

20. Chapter 159. Branding of Stock.

In my opinion this Ordinance is open to objection in that section 5 debars a native from registering a brand and sections 22 and 23 impose a further disability. The branding of stock is not compulsory and there would appear to be no reason

therefore why a native who desires to brand his stock should not be permitted to do so. In view of the frequency of transfer of livestock among natives in connection with marriage payments and other social customs it is unlikely that there would be many, if any, applications by natives for brands.

21. Ordinance No. 21 of 1925. Methylated Spirits Ordinance.

This Ordinance prohibits the issue of a licence to a native to keep for sale or to sell methylated spirits. Like the provisions of the Liquor Ordinance this provision is for the native's own protection and to keep temptation out of his way, in view of the fact that there is believed to be considerable consumption of methylated spirits by low-class natives, and it is most undesirable that this habit should be allowed to spread among the native population if it can be prevented.

22. Ordinance No. 25 of 1925.

The Detention Camps Ordinance, 1925. The whole object of this Ordinance is to protect natives who have been convicted of an offence not involving moral turpitude from being thrust among definitely criminal natives in a common prison, and is therefore entirely benevolent both in its intention and in its operation.

23. As regards the matters referred to in paragraph 15 of Mr. MacGregor's memorandum, the provisions mentioned are in my opinion entirely benevolent and unobjectionable. By conferring upon subordinate courts a wider sphere of jurisdiction in the case of natives the latter are definitely enabled to save expense, and the ration scales mentioned not only provide the native with the kind of food to which he is accustomed but

minimise the cost to a judgment debtor where payment has to be made for his subsistence and eventually recovered from him.

(Kana. 14)

24. I am of opinion that the differentiation in the scale of imprisonment which may be imposed in default of payment of a fine by a native is indefensible, particularly in view of the fact that the scale provided under the Detention Camps Ordinance (Amendment) Ordinance, 1926, is practically the same as that prescribed for non-natives under the Penal Code.

In practice, however, Magistrates and the Supreme Court interpret the scale in a just spirit, and I therefore suggest to Your Lordship that the matter is not one of sufficient practical importance to justify a special amending Bill, and that meanwhile this amendment be noted for incorporation with others when amending legislation is found necessary.

25. The provisions of section 147 not only contain a racial discrimination but, in my opinion, cast a quite undeserved stigma on the white women of Kenya. The result of the only recent prosecution brought under this section was conveyed to Your Lordship in my despatch Kenya No.92 dated the 11th February, 1951. I am advised that it will invariably prove difficult to get a jury to convict a white woman of an offence against this section, for in most cases the only evidence available will be that of natives, and I should prefer to see the section deleted from the Penal Code.

26. As regards section 135, I should not be prepared to advise that search of European premises should be undertaken by Native or Asiatic Police. At first sight it would appear that a search of Asiatic

No. 1 on 17113/37

In view
Extension of my
system to Indians

premises might reasonably be conducted by Asiatic Police but I think that the Asiatic community would as a general rule have more confidence in European Police for such a purpose; were it otherwise, suggestions of bribery, the "planting" of goods, or other corrupt practices would frequently be alleged.

27. The provisions of 7, 10 and 11 of the Criminal Procedure Code are necessitated chiefly by considerations of finance, for criminal cases against natives are far more numerous than those against the less numerous sections of the community and the provision of the necessary judicial staff to bring all native cases in which severe sentences are possibly involved before the Supreme Court would be both prohibitive as regards cost and quite unjustifiable in the circumstances. It is in every way preferable in my opinion that natives should as far as possible be tried for criminal offences by administrative officers who understand their customs and their mentality.

I have the honour to be,
 My Lord,
 Your Lordship's most obedient,
 humble servant,

H. W. Moore

GOVERNOR'S DEPUTY.

25th June, 1930 ?

The Honourable,
The Colonial Secretary.

The Note prefaced to the Memorandum of Native Policy in East Africa contains the following paragraphs: -

"The Officers Administering the Governments of these territories have been asked to take immediate steps to ensure that the policy in regard to native administration in these territories is brought into strict conformity, if in any respect this is not at present the case, with that laid down in the Memorandum."

2. I am of course as yet unaware of His Excellency's intentions regarding giving early effect to all or any of the suggestions embodied in the Memorandum but the following notes indicating racial discrimination or differential racial treatment in the statute law of the Colony may be of use when the Memorandum comes to be considered in detail.

3. Paragraph 3 of the Memorandum contains the following statements: -

"On the one hand, it must be the aim of the administration of every territory with regard to all the inhabitants, irrespective of race or religion, to maintain order, to administer justice, to promote health and education, to provide means of communication and transport, and generally to promote the industrial and commercial development of the country. In all this range of work persons of every race and of every religion, coloured no less than white, have a right to equal treatment in accordance with their several needs."

"It is with the additional benefits and the exceptional safeguards called for by the special needs of the peoples not yet able to stand by themselves under the strenuous conditions of the modern world that the trusteeship for the native races is particularly concerned".

4. It is I think permissible to construe these two paragraphs as meaning that though it is proper to pass legislation, such as the Native Lands Trust Ordinance, 1930, conferring special privileges on, or imposing additional safeguards for the benefit of the natives of the Colony, there should be no legislation discriminating against natives unless such legislation is justified by the needs of the native community

5. That this is the only, or necessarily the correct interpretation of these paragraphs, or of the Memorandum as a whole I do not assert. These notes are based on the assumption that it is at most not an unreasonable construction to place on the language used.

6. Our legislation contains a number of measures which are solely for the benefit of natives.

These are: -

- Chapter 130 - The Credit trade with Natives Ordinance,
- Chapter 131 - The Natives' Trust Fund Ordinance,
- Chapter 133 - The Native Liquor Ordinance,
- Chapter 134 - The Sugar Ordinance,
- Chapter 135 - The Native Foodstuffs Ordinance,
- Chapter 136 - The Preservation of Native Property Ordinance,
- Chapter 168 - The Native Christian Marriage Ordinance,
- Ordinance No.9 of 1930 - The Native Lands Trust Ordinance.**

7. Into that category might fairly be put also the Liquor Ordinance (Chapter 71) which contains a prohibition of the sale of liquor to natives, and the Native Vessels Ordinance (Chapter 108) which is designed to put a stop to kidnapping and slavery. It has been represented that the

fee for a passenger's manifest in that Ordinance makes travelling by dhow unduly expensive to natives, and that point is at present under consideration.

8. Native are given certain statutory exemptions or privileges in the following: -

Chapter 128. The Native Exemption Ordinance, which provides for exempting natives who have attained a certain social and educational standard from the requirements of certain statutes dealing with natives.

Ordinance No.7 of 1925. The Public Trustee's Ordinance. (By section 4 the estate of a native dying within a native reserve or other area set apart for natives is exempt).

Ordinance No.13 of 1926. The Estate Duty Ordinance. (By section 33 estate duty is not payable on the estate of a native living in a communal state in a tribe).

Official Gazette of 20th June, 1930. The Bankruptcy Bill. (By Clause 35 priority is conferred on (d) labourers' wages up to £50, and (e) all sums of money deposited by natives with the bankrupt for safe custody, whether the bankrupt held himself out as a banker or not).

4.

9. Chapter 127 - The Native Registration Ordinance.

Chapter 139 - The Employment of Natives Ordinance.

Ordinance No. 5 of 1935 - The Resident Native Labourers' Ordinance.

While in principle legislation of this nature is essential for the protection of natives who seek employment outside their reserves, there are detailed provisions in those Ordinances to which exception might be taken. Revised drafts of those Ordinances have just been sent to the Secretary of State and no further action would seem to be necessary pending a reply from him.

10. The following Ordinances, it might be argued, offend against the ideals set out in paragraph 12 of the memorandum dealing with forced labour -

Chapter 77 - The Collective Punishment Ordinance.

The provisions of sections 6, 7, 8 and 9 of the Ordinance which deal with forced labour are repealed in the Bill published in the Gazette of 20th June, 1930.

Chapter 114 - The Roads in Native Reserves Ordinance.

Section 5 empowers a headman or Council of elders to call out able bodied men to work for a period not exceeding six days in each quarter.

Chapter 129 - The Native Authority Ordinance.

The provisions of section 8(h) and (n) and the corresponding provisions of section 24 will require examination. The provisions of section 8(o) and sections 15, 16 and 17 would appear to be permissible under paragraph 12 of the memorandum.

with a

11. The freedom of movement of natives throughout the Colony is subject to restriction in the following Ordinances :

Chapter 63 - The Vagrancy Ordinance.

By section 11 a magistrate may order a native vagrant, under penalty, to return to the area reserved for the use of his tribe.

Chapter 68 - The Townships Ordinance.

A number of townships rules have been made which restrict the freedom of movement of natives in townships.

Chapter 158 - The Native Authority Ordinance.

By section 8(j) a headman may issue orders regulating the movement of natives from the jurisdiction of one headman to that of another: by section 11 as amended by Ordinance No. 16 of 1928 an administrative officer may order natives occupying land outside a reserve otherwise than by virtue of a valid contract or other lawful authority to remove on to land in the reserve.

Chapter 138 - The Native Passes Ordinance.

Ordinance No. 19 of 1928 - The Local Government (Municipalities) Ordinance, 1928.

(as amended by Ordinance No. 39 (30) and (65))
 Section 39 (30) and (65) empower a municipality to make by-laws regulating the use of streets and other public places by natives, and for regulating the issue of passes to and the carrying of passes by natives.

12. The following Ordinances contain express provisions relating to natives :

Chapter 4 - The Application to Natives of Indian Local Ordinance.

I am doubtful whether under this Ordinance a native could claim, as against a non-native, title to land by undisturbed possession for ten years under the Indian Limitation Act, 1877.

Chapter 32 - The Immigration Restriction Ordinance.

The amount to be deposited by an Asian or an African is less than the deposit required from a European. The reason is not racial, but is dictated by the difference in the probable cost of repatriation.

Chapter 75 - The Railway Materials Protection Ordinance.

Offences under this Ordinance can be committed by natives only.

Chapter 77 - The Collective Punishment Ordinance.

The principle of collective punishment is confined to native communities. In this connexion the observations of the Secretary of State in his confidential despatch of 15th May, 1930, are of interest "I hope that in a comparatively short time it will be found possible, if not to dispense with it (the Ordinance) entirely, at least to restrict its use more and more, and I should wish that end to be kept in view."

Chapter 79 - The Stock and Produce Theft Ordinance.

The imposition of a minimum fine of ten times the value of the stock or produce stolen is obligatory only in cases against natives. There is also provision for levying the fine communally.

The amendment of the Ordinance is now under consideration.

Chapter 137 - the Natives' Arms Ordinance.

This prohibits the carrying of native arms except under permit.

Chapter 159 - The Branding of Stock Ordinance.

A native may mark his stock with a distinctive mark provided that neither letters nor figures form part of such mark, and that such mark is dissimilar to any registered brand.

Ordinance No. 21 of 1925 - The Methylated Spirits Ordinance, 1925

By Section 4 a licence to sell or keep for sale methylated spirits cannot be granted to a native.

Ordinance No. 15 of 1925 - The Detention Camps Ordinance, 1925

Detention Camps are reserved for natives.

13. There remain for consideration the position of the native, as compared with members of other races, as regards the administration of justice. By Section 20 of the Courts Ordinance (Chapter 5) subordinate courts have a wider civil jurisdiction where the defendant is a native than they have when the defendant is a non-native. By Section 41 of the Civil Procedure Ordinance, 1924 (No. 3 of 1924) the Governor in Council may by notice in the Gazette fix scales, graduated according to race and nationality, of monthly allowances payable for the subsistence of judgment debtors. Differential scales are in force, for the obvious reason that it costs more to feed a European in prison than it does to feed a native. The scales at present in force are: -

- 9 -

Europeans	Shs. 2/- a day
Eurasians	" 1/40 "
Indians, Arabs & Swahilis	" 1/12 "
Natives	/72 "

14. As regards criminal law I am confining my remarks to the Penal Code (Ordinance No. 10 of 1930) and the Criminal Procedure Code (Ordinance No. 11 of 1930) which will come into force on 1st August, 1930. As regards the Penal Code, section 28 imposes a much higher scale of imprisonment for natives in default of payment of a fine: Section 135 provides that the search of non-native premises must be done by a European police officer: and Section 147 constitutes the offence of connexion between a white woman and a native man, there being no corresponding offence between a white man and a native woman, or any corresponding offence by an Asiatic.

15. The Criminal Procedure Code gets rid of the two chief racial anomalies in the Criminal Procedure Ordinance (Chapter 7), that natives could be whipped for any offence, and that no accused person but a European could give evidence on oath in his own defence. It still contains the following racial distinctions. By sections 7, 10 and 11 a native can be dealt with summarily by a subordinate court for any offence except treason, murder, manslaughter and rape. A subordinate court cannot pass on an Asiatic a sentence of more than two years or on a European a sentence of more than six months. By Sections 42 and 43 the provisions relating to security for good behaviour from vagrants, suspected persons and habitual offenders are not applicable to Europeans who may be dealt with under the Vagrancy Ordinance (Chapter 63). Sections 205

- 10 -

to give Europeans the right of trial by a European jury. No similar right is given to any other section of the community.

Sgd. A.L.A. MACGREGOR,
ATTORNEY GENERAL.

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GOVERNMENT HOUSE,
KENYA,
EAST AFRICA.

6th December, 1930.

Dear Parkinson,

No 3 on 16356/30
No 6

A despatch goes by the same mail as this letter explaining the circumstances surrounding the telegraphic correspondence commencing with my Confidential telegram No. 395 and ending with the Secretary of State's Confidential telegram No. 305 on the subject of the amendments which would be required in existing legislation to bring it into conformity with the policy laid down in the Memorandum on Native Policy.

As a good deal of publicity has been given in the local Press to the matter I should like to explain exactly what happened. The first intimation that I had of Mr. Roden Buxton's question in the House of Commons and Dr. Shiels's reply was in Reuter of the 25th November. I thought it peculiar at the time that I had had no telegram from the Secretary of State asking me to prepare a despatch on the lines since indicated, and made particular enquiries as to whether or not such a telegram had been received here. That telegram, as it later transpired, was in fact not received until 2 p.m. on Friday the 28th November.

As it.....

GOVERNMENT HOUSE,
KENYA,
EAST AFRICA.

6th December, 1930.

As it so happened, on that particular afternoon the coding clerk was snowed under despatching urgent telegrams, and was obliged to leave those not marked "Priority" until the Saturday morning for decoding, and it was on the Saturday morning that Conway Harvey asked his question in Legislative Council. As this was the last day of Council, I wanted to clear up outstanding questions as far as possible, and I gave instructions for a reply to be sent him in the terms of which you are already aware, but before doing so, bearing in mind the Reuter, I again enquired if any telegram on the subject had been received from the Secretary of State and was told no.

As a matter of fact the coding clerk, after decoding the telegram at about 10 a.m. on Saturday morning, sent it down, in the ordinary way, to the Chief Native Commissioner's office, and it did not reach the Clerk of Council's branch till after the written answer had been sent, while I did not get the flimsy copy till the Monday morning. There was certainly an element of delay here due to.....

GOVERNMENT HOUSE,
KENYA,
EAST AFRICA.

6th December, 1930.

due to an abnormal amount of coding on that particular afternoon, but had we had your telegram the same day as the Reuter or even a little later the mistake could not have arisen.

Yours sincerely,

R. Williams

(Private Secretary)

for His Excellency, who approved the draft, and is absent on tour.

A. C. C. PARKINSON, ESQ., O.B.E.,
COLONIAL OFFICE,
DOWNING STREET S. W. 1.
LONDON.

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KENYA.



GOVERNMENT HOUSE,
NAIROBI,
KENYA.

No. 181

CONFIDENTIAL.

RECEIVED
5 JAN 1931
COL. OFFICE

14th December, 1930.

My Lord,

No. 6 on 16356/30
No. 5

I have the honour to refer to Your Lordship's confidential telegram No. 305 of the 2nd December, 1930, in reply to my confidential telegram No. 414 of the same date on the subject of the despatch which Your Lordship has asked may be prepared on the amendments which would be required in existing legislation to bring it into conformity with the policy laid down in the Memorandum on Native Policy.

No. 5 on 16371/30

2. As explained to Your Lordship in my telegram No. 414, Mr. Conway Harvey asked in Legislative Council:-

"Will Government be pleased to lay on the table a copy of His Excellency's despatch on the subject of amendments which would be required in existing legislation to bring it into conformity with the policy laid down in the Memorandum on "Native Policy".

No. 14 on 16358/30

to which the following written reply was given in Legislative Council before Your Lordship's confidential telegram No. 295 of the 27th November was brought to my notice:-.....

THE RIGHT HONOURABLE LORD PASSFIELD, P.C.,
SECRETARY OF STATE FOR THE COLONIES,
DOWNING STREET,
LONDON, S. W. 1.

notice:-

"No despatch has been sent to the
"Secretary of State nor has His Excellency been
"requested to write one".

The above question and answer were published in the local papers side by side with the answer given in the House of Commons to Mr. Roden Buxton, and the suggestion was made that there was some mysterious discrepancy between the two official answers.

4. In order to avoid any possibility of an undesirable Press controversy arising I thought it desirable to take action at once. I therefore immediately despatched to Your Lordship the telegram referred to in the preceding paragraph, and at the same time caused the following letter to be written to Mr. Conway Harvey:-

"Dear Mr. Conway Harvey,

With reference to the answer given to your question in Legislative Council on the subject of amendments which would be required in existing legislation to bring it into conformity with the policy laid down in the Memorandum on Native Policy, I am directed by His Excellency to inform you that subsequent to the despatch of that reply a telegram from the Secretary of State asking for information to be forwarded by despatch in accordance with the

terms.....

terms of the Under-Secretary of State's reply on this subject in the House of Commons has been brought to His Excellency's notice.

As the despatch in question is an important one and the information required is for the specific purpose of providing the Under-Secretary of State with material for a Parliamentary reply, you will, His Excellency feels sure, agree that Government is not in a position at the present moment to give any assurance that it will lay a copy of a despatch which has not yet been written.

As His Excellency observes that the local Press has published your question on this subject and the answer given you by the Colonial Secretary, perhaps you would see that this letter receives a similar publicity.

Yours sincerely,

(Sgd.) J. L. Willcocks.

Private Secretary*.

5. Your Lordship will observe that the text of this letter conforms generally with the terms proposed in Your Lordship's confidential telegram No. 305 of the 2nd December, and as it had already been sent to and acknowledged by Mr. Conway Harvey before your telegram had been received, I did not consider it desirable to take any further action in the matter.

I have the honour to be,

My Lord,

Your Lordship's most obedient, humble
servant,

Wm. Willcocks

ACTING GOVERNOR.