TRIBALISM COMING TO TOWN

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A BILL coming before the Union Parliament during the current session threatens to establish "Bantu urban authorities." From the indications given last year, the new measure is designed to lower the status of people in the towns to the level of tribesmen.

The Bill will abolish the small "Native advisory boards" that have existed in all urban "locations" or African townships since 1924 and it will evidently transfer their functions to individuals quaintly called "tribal ambassadors." This Bill (or another likely to emerge in a year or two) is also expected to establish in the townships tribal courts to be run on lines similar to the chiefs' courts in the reserves.

To appreciate what is involved in these proposals, it is necessary to have an outline of what the existing Bantu (rural) authorities are and of how the chiefs' courts work. There is, of course, one constant element in the Afrikaner attitude to Africans. Afrikaners believe that democratic institutions are unsuitable for the government of Africans and that, instead, Africans should be governed by their traditional tribal customs.

This idea is not original. The British used it all over Africa between 1920 and 1940, the period when "indirect rule" was so firmly orthodox a faith that officials in the Colonial Service and scholars in the universities who challenged it put their careers in jeopardy. In the 1920's ,when Hertzog's Nationalists first began to think about a Native policy for their party, they were impressed with this idea because it stressed the utility of the chieftainship. By administering the Africans in the reserves through the agency of their own chiefs, the European Government could (it was hoped) remain, if not invisible, at least in the background. Moreover, as Lugard, the father of indirect rule, realized in Nigeria, such a method of rural local government would be economical. For the white district commissioner would delegate to the chief all functions that did not impinge on European interests.

Indirect rule had three main features. First, it supported the authority of the hereditary chief over his tribesmen. Secondly,

the chief's right to hold a court was recognized and the force of government's authority was put behind his judgments. And thirdly, the chief was given control of a tribal treasury, the funds of which, drawn from local taxation, he could spend more or less as he pleased, and even on his own comforts.

When the Union in 1927 borrowed this policy for rural local government, the British were still under the illusion that it would answer African political aspirations for generations to come. In fact, however, the pretensions of indirect rule were abandoned under the pressure generated during the second world war, when the pace of political change in Africa could no longer be retarded. In any event, realists had begun to recognize that indirect rule offered the majority of educated Africans, careless in the choice of their parents and unrelated to a chief, no place in the structure of government. The new African leadership that emerged in the 1940's and 1950's had no interest in, and less than no enthusiasm for, the traditional chieftainship and its undemocratic ways.

The abandonment by the British of indirect rule as a substitute for policy was, however, lost on South African administrators who had adopted two of its three features. Legislation passed in 1927 empowered the Native Affairs Department (now re-christened the Bantu Administration Department or B.A.D.) to recognize chiefs and to authorize them to hold courts which were to hear civil cases, but only minor criminal cases. The Act, indeed, provided the general framework of Native administration in the reserves, especially in Natal and in the Transvaal where chieftainship had always been a force. In the eastern Cape Province, however, the Native Local Council system was well-established and chieftainship was comparatively weak. Accordingly, when the Nationalists later wanted to spread their "Bantu (local) authorities," they had to destroy the local councils, which they gladly did, if only because these had constitutions partly democratic.

Now it is a fact that the business of rural local government remains much the same, whether it is run by an autocratic chief or by a democratic council. This business is concerned with such things as the building of minor roads and bridges, water supplies, irrigation of lands, afforestation, the care of cattle, and, generally, the improvement of peasant agriculture. How well or badly this work is done, and with what technical skill, depends mainly on the amount of money spent on the equip-

ment and services required. The 300-odd "Bantu (rural) authorities" proclaimed since 1952 have not altered this situation in the least. They are merely a new name for the old chief; even their scope is defined in terms drawn, usually word for word, from the old legislation enacted in the 1920's. All that has really happened is that the fifty-year-old Transkeian *Bunga* or General Council was abolished and the powers of the district councils in effect transferred to chiefs willing "to co-operate with" (i.e. to accept without question or criticism) the over-riding authority of BAD, acting through its local white officials who are armed with ample legal powers of control.

Outside the Cape Province and some Transvaal districts, the creation of Bantu rural authorities also involved only a paper change of names. For one thing, the chiefs never had tribal treasuries nor have they yet gained visible access to tribal funds. What is more, they have never been instructed in the elements of public finance, let alone the mysteries of accounting and auditing.

Yet these chiefs are the men who will (with BAD's approval) nominate tribal "representatives" to go and sojourn in the urban townships. If one has to call these men tribal "ambassadors", one might recall the definition of an ambassador as a man sent abroad to lie for his country. No doubt these spokesmen will have to lie to their chiefs—or to the municipal officials whom they must confront when they replace the doomed advisory boards. But fancy titles will avail these men little. The advisory boards have for 35 years been concerned with such matters as houses, rents, beer-brewing, street lighting and drainage, sewage, lodger's permits and the like. They have also had the statutory right to scrutinize the estimates of revenue and expenditure from the special accounts that all municipalities must keep for township finances. To transfer this right to be consulted about such things to one individual (or even to a bevy of chiefs' agents) will be to reduce the right to a farce. The chiefs have neither practical experience nor personal knowledge of such municipal affairs, and their agents will be equally at sea. It can be predicted that sooner rather than later trouble will come as discontent rises to new heights in the urban townships. Perhaps that will be the signal for BAD to decide that the time has arrived to take over the whole administration of African affairs from the municipalities, a possibility foreshadowed for some years among municipal officials.

When the advisory boards have gone the way of the rural local councils, the system of African representation in the Union Parliament will be ready for destruction, and its fate has already been announced. The boards and the councils were among the voting units in the electoral colleges that chose the four senators. Once the elections are decided by Bantu authorities, rural and urban, Nationalist candidates may stand a better chance of success. There are, however, enough Nationalists in Parliament now to take care of all the Government's requirements, so the time will have come to abolish the whole system of representation. After all, it reflects an out-of-date compromise that Hertzog was induced to accept under pressure in 1936 when his coalition with Smuts governed the country. And the other half of that "settlement"—the enlargement of the reserves—has already been abandoned, as the Tomlinson Report revealed. Anyway, who cares in 1959 what promises were given to Africans in 1936?

Whether the chiefs will be empowered to hold courts in the townships remains to be seen. In these days no possibility is too fantastic to be translated into law. This particular possibility was contemplated by Mr. C. R. Swart, the Minister of Justice, in a speech to a Nationalist party congress in 1957 when he complained of the (imaginary) misconduct of African attorneys in the ordinary courts of law. The scheme seems to take this form: let tribal courts in the towns hear a large range of cases that now burden the Native Commissioners' Courts. Exclude white lawyers from these tribal courts—this provision was in the original Bill in 1952—but allow African lawyers to appear there. This discrimination would take a long stride towards the apartheid in law courts that is proving so hard to introduce by any other means.

What quality of justice chiefs or their agents would dispense in town can be estimated from the chiefs' courts held in the reserves. Through all the years since 1929 no change in these courts has been visible, except in one respect. Their powers to punish by fines of money or cattle were enlarged in 1955, and the category of criminal cases extended beyond offences supposedly known to tribal tradition. This last point is significant. It was an earlier indication of the Government's determination to use the authority of the chiefs to control tribesmen, even where the nature of the authority exerted had no true basis in Native custom. For example, the legislation of 1955 gave the chiefs power to punish criminal offences under the common law, such as assault

or theft.

This extension of the scope of chiefs' courts is objectionable on several grounds. Most of the 1,600 chiefs and headmen are uneducated men, and many are virtually illiterate. This was noted by the Native Economic Commission in its Report of 1932 which was the last survey made, and in the absence of training for chiefs, there is no evidence of improvement since then. On the contrary, the conduct of many chiefs' courts remains a scandal. Lawyers are prohibited from appearing in these courts, but glimpses of what goes on are obtainable from litigants who later seek the help of attorneys, and from the law reports that regularly record cases heard on appeal. For some years the chiefs were obliged to follow hardly any rules of proper procedure, and even now only a short set of rules is enforceable. The whole idea was to keep litigation between tribesmen an informal and simple affair "in accordance with Native law and custom." Nobody noticed or cared that the types of cases coming to the chiefs' courts were more likely to be complicated than simple. This increasing complexity was due to economic and social changes in African life that had reached even the most isolated tribes in the Union. The crudities and injustices of this system were modified by the right of a litigant to take his case to the Native Commissioner's Court when he was dissatisfied with the chief's judgments. As the chiefs' courts keep no proper records and no figures are ever published, no one knows in detail how many cases are heard, how many are taken on appeal, or what the litigants feel about the rough justice administered at this tribal level. How rough its quality is may be inferred from the fact that hearsay evidence is admissible and that the most elementary principles of justice need not be observed.

"In looking back over the martyrdom of man," G. M. Trevelyan wrote in his *History of England*, "we are appalled by the thought that any rational search after the truth in courts of law is a luxury of modern civilization. It was scarcely attempted by primitive peoples." Yes, indeed; perhaps that explains why the chiefs have been allowed for the last thirty years to run their courts in their own way, with little interference and less assistance from anyone conscious of the necessity to uphold minimum judicial standards. But a month after tribal courts are opened in the towns, the deficiencies of such courts will become notorious.

At the same time the fiction will be destroyed that most

African cases can be decided in accordance with tribal custom. To the ignorant it may seem at first glance like a neat and tidy solution "to apply Native law and custom to Natives" and the common law to everyone else (and even to Africans in their dealings with non-Africans). Of course, the fact, recognized by all except the apostles of apartheid, is that Africans have long ceased to live under the tribal conditions of the nineteenth century. They do not remain in their huts doing only what their grandparents did. They have been drawn deeply into the European economic and social system. In town and country, besides all their ordinary commercial transactions, they run savings accounts at the post offices, they take out burial and life insurance policies, and they sign hire-purchase agreements. Even in remote reserves, buying and selling at the stores owned by traders black and white, they handle money and goods more than cattle or hoes. Converted to Christianity, a rising proportion of all Africans get married either in church or at the commissioner's office and thus under the common law. This process of westernization, now far advanced, is fully reflected in litigation. To-day the cases coming before the courts are not mainly about *lobolo*, as in the past, but disputes of all conceivable kinds. Moreover, as in European litigation, very many cases turn on technical questions of legal procedure and practice. Tribal custom has no relevance to the big majority of cases, because money and private property and formal procedures were unknown to simple Bantu tribesmen living in an earlier stage of social development. That is why justice cannot be done to litigants if courts are permanently befogged by the illusion that tribal rules must prevail. In any event, all civil cases that involve a non-African must continue to fall under the common law and be tried by the ordinary magistrates' courts. And the current confusion will be worse confounded if, in accordance with the sacred principle of ethnic grouping, Zulu litigants have to go to Zulu courts, Basuto litigants to Basuto courts, and so on. When a Basuto sues a Zulu, the resulting conflict of laws will no doubt be promptly settled by providing the "tribal ambassadors" with a copy of that standard work, Cheshire's *Private International Law*!

One further aspect of the attempt to revive tribalism in decay may yet cause more disturbance than any other. This is the deliberate attack on the legal status of African women, which is linked with the imposition of pass books on them. It is signifi-

cant that in the pass book of every woman is to be inscribed the name of her male guardian who must be her husband or nearest male relative. This idea is derived from Native law and custom under which a woman's limited rights were in the hands of her guardian. In tribal society a woman was in effect "a perpetual minor," a child of a larger growth incapable of asserting or defending her own rights. This principle has not been absorbed into South African law, where it can correctly be applied *only* in those cases involving tribal custom in which the Native Commissioner's Court decides to follow tribal custom in the interests of justice. But simply by the effrontery of administrative action, women are now to be vexed by the necessity of producing their guardian's consent (if not the guardian himself) for almost any purpose, when an official so decides. This reluctant guardian, wherever he lives, will also be burdened with the duty of supporting women, including widows, expelled from the towns.

There is one consolation in all this planned mischief. Trying to bring tribalism to town will expose its theories and practices to the scrutiny from which the reserves have protected them for too long. There are now too many educated and sophisticated Africans living in urban areas to allow this crazy pattern of policy to succeed. Cities have historically been the cradle of civilization; in South Africa they will also provide the grave of tribalism.