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# A history of Botswana through case law

**Bojosi Otlhogile**

Department of Law  
University of Botswana

He never taught me; but has taught most of my friends and my wife. Many of them are now in academics or teachers. The one thing they all talk about is that famous tremendous voice. I have heard it too, in committee meetings and offices. The first time I met Prof. Leonard Ngcongco was in 1982. I was a student representative in the then joint Senate of the University of Botswana and Swaziland. A few months later I joined the University as a staff development fellow and had to face him as acting Deputy Vice-Chancellor and responsible for staff development fellows. I, for the first time, came face to face with the famed tremendous voice.

## Introduction

This paper deals with administration of justice in Bechuanaland during the colonial period. It argues that legal developments and the administration of justice in Bechuanaland reflected the official British policy at different periods in the governing of the territory of Bechuanaland. They were influenced by the changes in the official attitudes towards the country. It is argued further in this paper that for the eighty years Britain ruled Bechuanaland, decisions of cases coming before the courts seemed to change with the official policy. Cases were sometimes used to establish policy in the country. To illustrate these points, the paper looks at the history of Bechuanaland through the cases. Instances have been drawn from constitutional, criminal law cases and other facets of the administration of justice including the sentencing policy. The paper concludes by examining the factors that influenced British policy in Bechuanaland.

## Constitutional Cases

Colonial courts in Constitutional cases tended to favour the administration at the expense of individual freedoms. They were prepared to err in favour of the executive rather than individuals rights. Where individual rights clashed with administrative convenience the latter always prevailed. To demonstrate this two cases will be examined, in order to show how individual rights were pitched against both administrative convenience and constitutional considerations.

The first case arose in 1906 and dealt with the writ of *habeas corpus*, i.e. the production before the court of an unlawfully detained person; the second in the late 1920s had to determine the limits of chief's powers.

### *Habeas Corpus: the King v. the Earl of Crewe: Ex Parte Sekgome*<sup>1</sup>

The applicant, Sekgome Letsholathebe, was for a number of years prior to 1906, a regent of the Batawana ethnic group during the minority of his nephew Mathiba. He was arrested at Palapye and detained at Gaborone (now Gaborone) by the Resident Commissioner. Sekgome was arrested under a bill of attainder enacted by a Proclamation of December 5, 1906. Sekgome applied for a writ of *habeas corpus* in the courts in England. The point of contention was whether a writ of *habeas corpus* could issue out of England into any colony or foreign dominion of the Crown where there were established courts in the colony which were competent to grant the same. After accepting that a

protectorate was not the Crown's dominion but a foreign country the Court proceeded on the assumption that it had jurisdiction to hear the matter.<sup>2</sup> Secondly the judges assumed that there was a competent court to apply to in Bechuanaland.<sup>3</sup>

Having assumed jurisdiction, the Court stated that Habeas Corpus in England was a matter of statute—the *Habeas Corpus Act* 1862—and without validating legislation did not apply to a foreign country.<sup>4</sup> They also considered that one of the factors for successful application for habeas corpus was not fulfilled, that the writ must have been issued against the person who had the body of the gaoled person. In this particular case the writ was not against the Resident Commissioner nor the gaolers of Sekgome, but the secretary of state responsible for the Colonies.<sup>5</sup> In respect of a special Proclamation authorising the detention of any person the Court admitted that the fact that a man could easily be deprived of the protection of the law was 'an idea not accepted by English lawyers'. However, they dismissed the application on the basis that the deprivation of liberty was justified on the grounds of administrative convenience. The court held 'It is made less difficult if one remembers that the protectorate is over a country in which a few dominant civilised men [sic] have to control a great multitude of the semi-barbarous'.<sup>6</sup>

Though conceding the illegality of bills of attainder in general, the court was not willing to intervene in this particular case because to do so would retard administration in the protectorate.

The Proclamation of December 5, 1906, is, no doubt, in regard to Sekgome, of a stern and drastic nature. It is essentially a "privilegium"—legislation directed against a particular person; and generally, as I hope and believe, such legislation commends itself as little to British legislators as it did to the legislators of ancient Rome, in the best days of the republic... But we have not here to consider the case of a civilised and orderly State, such as modern England or the Rome of Cicero's time, but the administration of a barbarous or, at least, semi-barbarous community.<sup>7</sup>[Sic].

That the Court placed administrative convenience before individual freedom is beyond doubt. However, it must be remembered that the *Habeas Corpus Act* in England half a century earlier had made an enriching practical contribution towards the protection against unlawful detention. But it must be noted that the British colonial government and the courts did not rate the rights of subject peoples as equal to those of metropolitan citizens. Even more, by the nineteenth century English judges rated property rights higher than personal ones. Lord Mansfield's celebrated 'Let the black go free' did not apply to the dependencies nor did the "purity of English air" apply to the applicant in this case.

The decision in Sekgome's case only told half the story. The Court approached the case on the basis that there were competent courts in the territory to hear the application. However, a closer examination of the Proclamation of December 5, 1906 shows that that was not so. The Proclamation not only authorised the arrest and detention of Sekgome if the Resident Commissioner thought it necessary in order to maintain public peace and order, it also provided (i) for the indemnification of the Resident Commissioner in connection with the detention of Sekgome; (ii) for future detention and deportation of Sekgome by Order of the High Commissioner and (iii) prohibited any process questioning the legality of Sekgome's arrest, detention or deportation to have effect in the Protectorate.<sup>8</sup>

Effectively the Proclamation had deprived Sekgome of any recourse to the local courts. Another point to note is that even if he was not deprived of this right to the courts, the court structure, too, did not afford him any consolation. The only available court would have been the Resident Commissioner's Court. It would have been foolish to expect the Resident Commissioner's Court, presided over by the Resident Commissioner

himself, to declare his administrative act invalid only because he was sitting in his judicial capacity.

Sekgome had in fact before resorting to the English Courts tried to seek redress in local and regional courts in the Cape Colony.<sup>9</sup> His application was dismissed on a claim of no jurisdiction. Since the case was instituted in British Bechuanaland court the court disclaimed jurisdiction on the grounds that Sekgome was arrested and detained outside the court jurisdiction. The court again advised that the case should be instituted in Bechuanaland with appeal to the High Commissioner and subsequently to the Privy Council.<sup>10</sup>

Whatever, the outcome of the case, it illustrated one important fact. Where individual freedom conflicted with the interests of the administration, the courts took the side of the administration.

### ***Tshekedi Khama v. Simon Ratshosa***<sup>11</sup>

Simon Ratshosa, grandson of Khama III and Tshekedi's nephew, together with his two brothers, Johnie and Obeditse, had been at the centre of Bangwato power until Tshekedi took over as Regent. The latter ousted them from power by appointing new advisers to their exclusion. Incensed by their elimination from power, the Ratshosas refused to attend a Kgotla meeting to which they were summoned by Tshekedi. Forcibly brought before the Kgotla to account for their failure to attend the meeting, Tshekedi sentence was corporal punishment. Simon and Obeditse escaped, got their guns and attempted to assassinate Tshekedi.<sup>12</sup> They were convicted and jailed for attempted murder, their property destroyed by the Chief's regiment, and on their release from jail exiled by the British. The Ratshosa brothers sued Tshekedi for compensation for the burning of their houses and the destruction of their property.<sup>13</sup> The Resident Magistrate dismissed their claim, but on appeal the Special Court upheld it.<sup>14</sup> Tshekedi appealed against the decision of the Special Court to the Judicial Committee of the Privy Council and won.

The case raises interesting points especially the view of the High Commissioner and the approach of the Privy Council. It must be noted that Tshekedi appealed against the sound advice of the High Commissioner, the Earl of Athlone, who thought that the cost of appeal to the Privy Council would be heavy and even if Tshekedi were to win, the costs would be borne by the Bangwato since Ratshosas did not have the funds nor resources to pay them.<sup>15</sup> What the administration failed to understand was this: The case was more than a simply legal dispute. Tshekedi saw it as more than that. It was as much political as it was legal. It was vital for his rule that the judgment be set aside, for how could he function as chief if dissident subjects, whose property had been destroyed according to custom, could then sue him successfully in another court running side by side with his? It was to Tshekedi a defence of a constitutional right.

These were the points which were missed by both the Magistrate and Special Court in assuming jurisdiction in the case. It must be recalled that the various Orders in Council defining Britain's position as a protecting power made it clear that the Chiefs were to be allowed to continue to administer their internal affairs according to native law and custom provided they were not openly incompatible with British Justice or ideas of government. Magistrates were encouraged not to entertain actions where natives only were involved, and if they did assume jurisdiction they were to follow native laws and customs concerned unless such customs or laws were conflicting or unproven or 'incompatible with peace, order and good government'.<sup>16</sup> In that event they were to apply Roman-Dutch law.

The Judicial Committee of the Privy Council proceeded on the assumption that the burning of the dwellings were in accordance with custom and ordered by the appellant in his capacity as Chief; thus justified by custom and law. The Judicial Committee held that the Magistrate was wrong to have assumed jurisdiction. What is surprising is the

reluctance of the Judicial Committee to consider whether such custom, of burning subjects property, was incompatible with British justice and good government.<sup>17</sup> The judgment could only be explained on pragmatic grounds. The judges knew that in colonies British government and rule could not credibly succeed unless they had the cooperation of the chiefs. As their Lordships observed 'The British Government has no armed force in this reserve, and it looks to the Chief to preserve law and order within its boundaries'.<sup>18</sup> The desire for stable governance was to be achieved at the expense of individuals' interests. What is clear is that the British government were prepared to protect the chiefs as long as it suited them, otherwise, where it did not, they were always ready to take up cudgels against them.

### **Criminal Cases**

One of the characteristic features of the administration of justice in Colonial Botswana was that both the courts and judges were subordinate to the High Commissioner. The latter appointed and dismissed judges with very little guidance. The judges, too, were his legal advisers therefore very much accountable to him. The High Commissioner some times sat as the Court of Appeal over the territory's court. He therefore exercised tremendous power over the courts. He also had the power to stay proceedings and commute sentences.<sup>19</sup>

In some serious cases the courts lacked discretion in punishment. They could only impose mandatory maximum punishment with a recommendation to the High Commissioner. Even then the latter was not obliged to follow their advice. It was not uncommon for the High Commissioner in such cases to seek advice of people who did not participate at the trial.<sup>20</sup>

Closely related to the above was that the customary standard of proof in criminal cases that of proof beyond reasonable doubt, was not strictly adhered to. The judges were prepared to accept standards that were far less than those commonly demanded in such cases. The exigencies of the situation—the backwardness of the country and the lack of facilities for crime detection and investigation—were generally taken to bear on cases. As one judge observed in one case 'It must be admitted that there is not all the evidence one could have wished for in a murder case. At the same time if murders are committed on the very edge of beyond as in this case, it is quite impossible for the court to expect the same volume and quality of evidence as would be available were the deed committed somewhere in the bounds of civilisation. Were we to reject the case for the Crown on any of the grounds advanced by Counsel for the defence, it would be tantamount to confessing the impossibility of ever really securing justice in the case of crimes committed so far from the nearest civilised post'.<sup>21</sup> But were they really dispensing justice by lowering the standard of proof in criminal matters?

In other instances, cases were adjourned to allow the prosecution the opportunity of further investigation. The background (race) of the accused was also an influencing factor in the determination whether to allow further investigation, sentencing, or determination of guilt.<sup>22</sup>

Probably the single factor militating against fair trial was the (in) ability of the participants to communicate in court. In most cases the accused were illiterate indigenous people who did not understand the court procedure, let alone the court language. The Court, judges and prosecutors alike—did not speak the local language. This language barrier caused a lot of problems in the administration of justice. A judge who did not understand the language naturally would not be able to grasp the motive and feelings of the accused as he presented his case.<sup>23</sup> The judicial officer is obliged to assess the question of credibility, demeanour and reliability of witnesses and accused persons. The

assessment of demeanour in these situations is of course more of a guess than an accurate assessment of what is, without any language difficulty, a matter of great complexity.

Besides, as a commentator has observed the natives have ways of setting up their cases which 'naturally leaves the magistrate in perplexity and guess work on native law and custom of which they have never had an opportunity to study'.<sup>24</sup>

The solution was provided by the use of interpreters. Even then for one to be an effective interpreter one needs to acquire a mastery of the knowledge of the language and its culture. It must also be borne in mind that an interpreter is only a conduit between the speaker and the other party. As such the story loses its timbre and emphasis in the process.

It is significant to note that interpreters were not appointed on a full time basis. They were appointed *ad hoc*, as cases arose. *Ad hoc* appointments of interpreters undermined even the well-intentioned purpose, for such people would not usually be familiar with technical court language or even possess fluency in the accused's language.<sup>25</sup>

### Divergence of Values

Another issue to be addressed is the applicable moral values in a case before the court. Britain ran a parallel rule in Botswana—with customary and Roman-Dutch law operating side by side.<sup>26</sup> Each legal system embodied its own values. What values therefore were applied in criminal cases for example where the presiding judge was foreign and the accused an indigenous inhabitant? The question is not easy to answer one way or the other. A perusal of court records indicate that opposing values competed for recognition throughout the colonial period. In most instances the values that applied tended to reflect the official policy of the administration. During the early stages when the administration was not yet committed to any overt rule local values—customs, culture and traditional norms—were taken into account in resolving cases, even if only as a mitigating factor. As the British policy towards the country changed, so too, did the operating values change. The following cases will illustrate the point.

Four cases will be considered—two taken from the period between 1900 and 1930 and the other two after the 1930s. They were all murder cases.

In *Rex v. Banyatsan and Chelelo*<sup>27</sup> the accused were charged with the murder of newly born twins. The accused Chelelo was found guilty of murder and sentenced to death, and the second accused, Banyatsan, the daughter of the first accused, was found not guilty and acquitted.<sup>28</sup> As noted above, the death penalty was mandatory for murder. In his report to the High Commissioner, the President of Combined Court, recommended mercy. He took into account that the accused in committing the offence was merely following an old custom well recognised amongst the people of killing twins at birth. 'The customs of destroying twins', the President wrote 'which was formerly universal among the Bantu, took its rise, I believe in ancient times when all small communities were generally at war with each other, and it was found impossible for the mother to carry two children on her back, when the community to which she belonged was in flight'. The custom was practised by women only and men did not take part in it. The Court 'therefore desire most strongly to recommend the prisoner to mercy and suggest to Your Royal Highness [the High Commissioner] that a sentence of five years imprisonment with hard labour would both meet the ends of substantial justice and act as a deterrent as well'.<sup>29</sup>

In the next case of *Rex v. Case alias Saul and Ors*<sup>30</sup> tried for murdering a newly born baby, the accused were found guilty and sentenced to death. In recommending them for mercy the President emphasised the influence of their custom,<sup>31</sup> their mode of life and the difficulty of keeping them alive in prison.<sup>32</sup> The High Commissioner commuted the sentence to five years and ordered their immediate release.

These cases stand in stark contrast to those arising after the 1930s. The facts are almost identical but the recommendations differ in many respects.

In *Rex v. Kxmanka*,<sup>33</sup> the accused, stole and killed a goat which was being herded by the deceased, a little boy of about ten years of age and then murdered the boy in order to prevent him from reporting the theft. The accused subsequently confessed. On the basis of the confession the accused was convicted and sentenced to death. The Chief Justice, having found no extenuating circumstances, was unable to suggest any reason why the sentences of death should not be carried out.

The High Commissioner, Sir Evelyn Baring, was reluctant to confirm the sentence, and therefore sought the advice of Lt. Colonel Forsyth Thompson because of 'his experience in these matters'.<sup>34</sup> The advice sought was whether the accused was indeed a Mosarwa or a nomad or just a half caste who passed by the name of Mosarwa with similar lifestyle and outlook. Forsyth Thompson confirmed that the accused was a Mosarwa but recommended no mercy.<sup>35</sup> The overriding factor was deterrence and to instil respect of the law in the minds of the Basarwa community. 'The hanging of this man,' Forsyth Thompson advised, 'will demonstrate our determination to protect human life. Commutation would not do so in the minds of the other Bushmen, and I would therefore offer the advice that the sentence of death be confirmed'.<sup>36</sup>

Forsyth Thompson might have been experienced 'in these matters' but he certainly was not qualified to pronounce on the issue. He neither attended the trial nor read the record of the proceedings. Further he seemed to have taken into account activities which had no bearing in the case.<sup>37</sup> The decision whether or not to confirm the sentence should have been limited to the facts of the case.

*Rex v. Xaishe Tsaa*<sup>38</sup> was another case of what appeared to be a motiveless murder. The only eye witness was a ten year old boy who was with the accused. The deceased having been wounded with a poisoned arrow was left in the veld to die. The accused was convicted of murder and sentenced to death. The Chief Justice found no extenuating circumstances and the accused was executed. In mitigation the accused showed a remarkable failure to comprehend the proceedings. He admitted the killing but could not understand why 'the white people' were involved at all. In his view, the accused felt it was wrong and against their custom that the deceased's relatives had reported the matter to the police. 'The matter' he said 'ought to have been settled by the Bushmen themselves; it should not have come before the white people. If this case could be referred to the Bushmen to settle it, according to their custom, there would be a fight between the relatives of the deceased and myself, and the result would depend on who killed the other first'.<sup>39</sup>

These cases indicate a disparity and a complete divergence in the values of the people on both sides of the court. Of course, such murders could not be tolerated merely because there existed a diversity of values. The courts had a duty to administer justice therefore were 'not prepared to allow that sort of thing even though they may think there is some tribal custom permitting' it.<sup>40</sup> But should it not have been taken into account as a mitigating factor? The cases indicated the necessity of not separating law from the social system in which it operated. If the law was to be effective among the Basarwa (Bushman) then it had to reflect their social organisation. Basarwa were strictly egalitarian communities organised in independent family units. Land was held in common by the local group, but each family occupied the amount of land necessary to produce its own subsistence.<sup>41</sup> The division of labour by gender served family needs, while family relations were the principal relations of production in society. This structural pattern precluded the development of any form of authority. The only officers were those of band leaders and doctors. The former was a patriarch rather than a chief and due to the absence of an economic surplus he had no political power. The prevailing moral principles of general reciprocity and of sharing everything among the members of the group were the

antithesis of law as a social institution. Accordingly, his society possessed no judicial institutions nor had they any notion of similar mechanisms. There were naturally no enforcement agencies among them. Each man could pursue his private justice.

These cases were not isolated instances. That a traditional belief or custom was not an extenuating circumstances is well illustrated by cases of witchcraft and ritual (muti) murders in the period 1930s to 1940s.<sup>42, 43</sup> The approach reflected the thinking of the time.

### **Sentencing Patterns**

Sentencing in Bechuanaland courts seemed to have been greatly influenced by the general colonial policy. Whether an accused person would get a suspended sentence, fine, custodial sentence or otherwise depended upon the prevailing government policy and also of the accused's race. We shall limit our discussion to sentences of hard labour, custodial and indeterminate sentences.

#### ***Hard Labour***

Hard labour was common for most accused sentenced to custody. It accompanied a variety of offences—murder to theft—and was compulsory for most convicts. The official line was for the convicts to be employed on public works. However, the official opinion was not always positive. As one District Commissioner indicated 'Prisoners are often employed on public roads and other unproductive tasks'.<sup>44</sup> Since the majority of those sent to prison were Africans, hard labour became predominantly a preserve of the Africans.<sup>45</sup> Hard labour, therefore, did not only serve as punishment but also helped keep to the minimum administrative expenditure on public works. The courts stopped ordering hard labour as a part of the sentence during the 1950s and even then the administration proposed that prison-diet be decreased since the prisoners were no longer doing anything meaningful.<sup>46</sup> After all, why should the administration in punishing the convicts actually spend more in supplying their wants?

#### ***Custodial Sentence***

Imprisonment is one of those typical western concepts introduced in Africa during the colonial era.<sup>47</sup> The deprivation of liberty as a form of punishment apparently never occurred before. But exactly when the first prison was built in the Protectorate is not clear.<sup>48</sup> Seven years after the establishment of the Protectorate the administrators considered a lock up at Gaberones. In 1893 official correspondence indicates the desire to remove two long sentence prisoners to South African prisons.<sup>49</sup> What is clear, though, is that by 1906 a lock up was already in existence.<sup>50</sup>

Only in 1930s is there clear evidence of any official prison structures. These were run by District Commissioners in addition to their other duties including magistracy. By the end of the 1930s almost every reserve had a lock-up of one sort or the other.

Even then there was no clear official policy on the role of these prisons or for that matter on their effect on the local population. They had very faint idea on the repercussions of imprisonment on the indigenous population. Some officers saw the 'effect as seriously marked'<sup>51</sup> on the locals whereas others thought that prison life was too easy for the African.<sup>52</sup>

What is clear is that by the end of the Second World War an official policy was already settled: 'Natives do not regard imprisonment as a disgrace, nor is a short term of imprisonment a deterrent so that little is gained by such a punishment while familiarity breeds contempt'.<sup>53</sup> It has become judicial policy to imprison natives in situations where others got away with a fine.<sup>54</sup> Various reasons could be given for this. Prison conditions and treatment of prisoners were generally poor. Secondly, prison diet was seriously



inadequate and disgraceful. To keep a European prisoner would be expensive therefore budgetary considerations militated against it. All these factors would generally be known to the judges, who, after all, were legal advisers to the High Commissioner, thus at the centre of policy making.

It must, however, be stressed that some judges still argued that first offenders should be kept outside as much as possible and prison be resorted to at very last. It was also apparent that the majority of prisoners were defaulters on revenue laws. It made no sense sending them to prison, at governmental expense, nor in imposing stiffer fines.<sup>55</sup>

### **Conclusion: Changing Policies**

The fusion of the judiciary and the executive, throughout the entire colonial period save the last few years, had an impact on the administration of justice as a whole. The administration of justice, criminal trials, civil cases etc. tended to reflect the general policy of the administration at a given period. The changes we saw above on the disposal of cases could only be rationally explained on these grounds. Briefly, British colonial policy went through at least three phases.

The first phase was that of co-operation and dual rule. When Batswana sought protection from Britain the latter was committed to the maintenance of the traditional status quo. As long as there was no external threat Batswana would be allowed to continue to rule themselves without any interference. Besides the chiefs requesting protection, they did not ask for any abridgement of their traditional authority. The idea was protection from external threat, but for the chiefs to retain their traditional authority and institutions.<sup>56</sup> There was also a desire by the colonial authorities to lead their wards towards European values and civilisation. It was to be achieved through co-operation with the traditional authorities. Thus parallel rule sufficed for this purpose. This explains why the early courts were more accommodative to diverging values and customs rather than trying to stamp them out rigorously. To some extent this policy succeeded, for there were few areas of conflict between the two systems. This phase characterises the period 1885 to mid-1915.<sup>57</sup>

The second phase was influenced more by external events than internal relations between the protector and the protected. It covers the period between the First World War and the early 1930s. British colonial policy was criticised for neglecting the protectorates and there was also pressure from South Africa for the transfer of the protectorates.<sup>58</sup> The main influencing factor, however, was the League of Nations. The international community was pressurising colonial administrations to participate fully in the development of their outposts. The new policy, that of trusteeship, was now evolving whereby the people of the colonies would be prepared towards ultimate self-rule. It included the idea that there was a 'need to facilitate the transition of the subject people to a high state of improvement' based specifically on European values.

For British possessions the policy was formulated by that doyen of all colonial administrators, Lord Lugard.<sup>59</sup> The policy envisaged the bequest of European values to the native population.

Trusteeship 'implies the right, if not necessarily the ability, of the inferior race to advancement towards the position of the superior and the obligation on the part of his governors to secure to him the means of such advancement'.<sup>60</sup>

The agents of this policy were the colonial administrators, Britain's men on the spot. They were to implement the policy at all costs and without any compromise. Co-operation with the natives was relegated to the background.

The end result was that the meaning of 'protection' was either hardly considered or deliberately overlooked. Besides the British had long set the stage for this flexibility in determining the extent of their authority in the Order in Council of 1891.<sup>61</sup> That the

Chiefs would oppose it was not in doubt, they had always objected to any encroachment into their traditional authority.<sup>62</sup>

It is within this context that one would understand decisions in cases such as Tshekedi Khama v. High Commissioner.<sup>63</sup> It explains the reason for the administration going ahead with the enactment of Native Proclamations even against concerted objections and protests from the chiefs. The protectors saw it as an opportunity to advance the community whereas the chiefs saw it as an encroachment into their constitutional rights.<sup>64</sup> The only way the administration would succeed was to 'ride roughshod' over opposition from whatever quarter it came.<sup>65</sup>

The final phase of the policy could briefly be defined as incorporation and paternalism. The first aspect of incorporation dates back to the early days of protection. Originally Britain was not interested in establishing any kind of administration. The Protectorate was proclaimed as an insurance against others getting there first, certainly not as a region to be exploited or expanded. Apart from keeping the passage way open and protecting the chiefs against foreign powers, the rest was to be left to the chiefs to look after themselves. The existence of powerful chiefs and a strong framework of tribal government seemed to make this entirely possible.<sup>66</sup>

Unfortunately, as soon as Britain assumed protection over Bechuanaland events changed in the international sphere. The Berlin Conference of 1885 obligated the colonial powers to ensure the establishment of authority in the regions occupied by them. The predominant motive was the protection of existing rights and freedom of trade and transit with one another in those areas.<sup>67</sup> The *General Act* of the Brussels Conference of 1890 also encouraged the idea of European administrative activity in Africa especially to counter the slave trade and to open up Africa to legitimate commerce. Britain was initially not keen to use the wider power bestowed on her but only keen to keep them in reserve as a last resort. If, however, she was to fulfil her obligation to other protecting powers, Britain needed a change in policy. It could no longer use its "hands off policy" but rather change to construct a definite and substantial administrative and judicial bases. The change of policy meant that Britain now claimed the right to assert sovereignty in a protectorate. The earlier notion of very limited responsibility consequent upon a lack of sovereignty was being undermined. (It was also equally important that this change of policy was not communicated to the chiefs). This is the only ground on which one can reconcile such cases as Sekgome and Tshekedi in 1910 and 1936 respectively.

However, by the end of the South Africa War, Britain's official policy was changing and in favour not only of tight control but clearly in favour of the transfer of the territory to South Africa. It did not see any reason why this would not happen in due course. The stage had been set by the introduction of the Roman-Dutch law rather than English law. Hence the introduction of Section 105 into the *South Africa Act* in 1910, which provided for a possible incorporation of Bechuanaland into South Africa.

Incorporation was delayed until the 1930s. It could not be achieved until the inhabitants were ready for it. It was, therefore, for the colonial administration to take steps to prepare the inhabitants. The traditional institutions too, had to be transformed if the policy was to succeed. The policy envisaged two stages.

First the territory had to be transformed economically to make it attractive to South Africa and acclimatize the people to the impending social upheavals likely to be brought about by new economic activities. The administration in that event decided to open up the country to mining and prospecting. It was to be a tough struggle between the administration and local chiefs, especially Tshekedi.<sup>68</sup>

The second stage was to curtail the powers of the chiefs. The policy of incorporation could not be achieved whilst the chiefs remained with such enormous powers. The official policy was that these unchecked powers were detrimental to the interests of majority of indigenous people.<sup>69</sup> The administration, therefore, saw it as part of their

mission to protect tribesmen from what seemed to them the authoritarian and arbitrary rule of the chiefs. The operation of traditional institutions was measured by the standards of the administrators home culture. They were therefore anxious to make adjustment in tribal decision-making process. The policy was accompanied by a contempt for traditional leaders.

The chiefs were denounced as backward, lazy, incompetent and many were thought to be just drunkards and corrupt.<sup>70</sup>

The tragedy, however, lay in that the administration failed to understand that without the confidence and cooperation between the government and the governed changes could not come through. What was needed was mutual understanding and patient consultation between the parties. Instead, the Resident Commissioner tried to impose on chiefs and people what he believed to be good for them. His paternalistic attitude undermined the official policy and thus failed.

The timing, too, was bad. By 1934 Hetzog had made his most forcible demand for the incorporation of the High Commission Territories into South Africa. The people were hypersensitive about inroads into their security and status and every administrative endeavour, however well intended, was suspect.<sup>71</sup>

It is these changes in policy which informed the administration of justice in Botswana during this period. Judges, as legal advisers to the High Commission were invariably privy to them. That these policies made their way into judicial decisions is not surprising. Executive convenience had undermined judicial autonomy and independence, and shaped the legal history of Bechuanaland.

## Notes & References

1. [1910] 2 Kings Bench Division 576. This case is discussed in detail by Sanders AJGM (1992), *Bechuanaland and Law in Politicians Hands* (Gaborone: Botswana Society).
2. At p.593.
3. At pp.593, 606.
4. At 590. The court proceeded on the basis that a protectorate was a foreign country outside the territorial dominion of the Crown—per Vaughan-Williams L.J. at p. 607. Compare the decision with *Tshekedi Khama v. High Commissioner* [1926-53] High Commission Territories Law Report (HCTLR) 9; *Sobhuza II v. A. Miller*, [1926-53] High Commission Territories Law Report 1.
5. At p.610. Since colonial officers took direct instructions from the Dominion Office, was it not sufficient to discharge the writ if obtained against the Secretary of State for the Dominion Affairs?
6. At p.610 per Vaughan-Williams L.J.
7. At p.627-8 per Kennedy L.J. Lord Farewell L.J. was even more forthright: 'The truth is that in countries inhabited by native tribes who largely outnumber the white population such acts, although bulwarks of liberty in the United Kingdom, might, if applied there, well prove the death warrant of the whites. When the State takes the responsibility of Protectorates over such territories, its first duty is to secure the safety of the white population by whom it occupies the land, and such duty can best be performed by a responsible officer on the spot. There are many objections to the government of such countries from Downing Street, but the governor's position would be impossible if he were to be controlled by the courts here; acting on principles admissible when applied to an ancient well ordered State, but ruinous when applied to semi-savage tribes' pp.615-16.
8. Proclamation of December 5, 1906.
9. *Sekgome Letsholathebe v. Panzera*, (1906) 10 High Court of Griqualand.
10. At p.95-6 per Lange A.J.P. The court also overlooked the fact that the Resident Commissioner was resident in Mafikeng, well within the jurisdiction of the court.
11. 1931] Appeal Cases 784. For background to the case see Q.N. Parsons, 'Shots for A Black Republic: Simon Ratshosa and Botswana Nationalism' (1974) 73 *African Affairs* 449; Michael

- Crowder, 'Tshekedi Khama and Opposition to the British Administration of Bechuanaland Protectorate 1926-36' (1985) 26*b Journal of African History* 193, *The Flogging of Phineas McIntosh*. London (1988); Mary Benson, *Tshekedi Khama*. (London 1960).
12. *Tshekedi Khama v. Simon Ratshosa & Another* [1931] Appeal Cases 784. There is a difference of opinion as to the exact location of Tshekedi's wound. The law report refers to the 'side of the abdomen' (p.250) but the Resident Commissioner said on the arm—Sir Charles Rey: *Monarch of All I Survey* p.13 entry for 22 Jan-4 Feb 1930 (Rey's Diaries) ed. by Crowder and Parsons (Gaborone 1988).
  13. The sum they claimed was substantial since their houses were in the European style and they were lavishly furnished and equipped—*Ratshosa v. Tshekedi*, Special Court judgment in Botswana National Archives (BNA) C/8/726 (Bangwato Tribal Administration records) per Patrick Duncan P. Simon Ratshosa's own account appears in his unpublished manuscript *My Book on Bechuanaland Protectorate Native Custom* in BNA S598/2 pp.101-103.
  14. *Ratshosa v. Tshekedi*, Special Court in BNA C/8/726.
  15. The Earl of Athlone advised 'I wish you to understand quite clearly that I am not advising you to abandon your appeal because if I did so it might be thought that I was interfering with freedom of access to the courts. But I do wish to place on record in this letter (a) that you did not consult the Government as to the advisability of appealing but either acted on your own or on the advice of others; (b) that I consider that the appeal will serve no useful purpose; (c) that if you lost it much harm will be done and; (d) that it will cost the tribe a considerable sum of money even if it is successful'. BNA S59/6. 'Tshekedi, Chief: H. Com's letter to, 20 January 1930'. In fact Tshekedi's lawyers, Minchin and Kelly of Mafikeng, had advised of the chances of success in the Privy Council.
  16. S.9 of Proclamation of 10th June 1891. ('The court may decide in accordance with the law which would regulate the decision if the matter in dispute concerned persons of European birth or descent'.)
  17. However they did suggest 'Their Lordships think it is not out of place for them to suggest that if it is desired to prevent the repetition of such acts, it would seem to be for the High Commissioner to take such steps as he thinks necessary by way of administration' p.255. It was this reluctance which led Ratshosa later to write that the 'Protectorate Government is an absolute farce, because it has utterly failed to alleviate the suffering of... oppressed natives'. 'My Book on Bechuanaland Protectorate Native Custom' (unpublished) p.114 in BNA S598/2.
  18. *Tshekedi Khama & Ano v. High Commissioner* [1926-53] HCTLR 9. The case is widely documented from a political and historical point of view—Mary Benson, *Tshekedi Khama* (1960), Michael Crowder, 'Tshekedi Khama and Opposition to the British Administration of the Bechuanaland Protectorate 1926-36' (1985) 26 *Journal of African History* 193, 201-6; Anthony Sillery, Botswana: *A Short Political History* (London: 1974); *Founding A Protectorate* (The Hague 1965), Lord Hailey, *An African Survey* (Rev 1956); G. Gunderson, 'Nation Building and the Administrative State: The Case of Botswana' (PhD Thesis 1970) University of California, Berkeley, in BNB 2823; Harold H. Robertson, 'From Protectorate to Republic: The Political History of Botswana'. (PhD Thesis 1976) Dalhousie University; D. Wylie 'The Centre Cannot Hold: The Decline of the Ngwato Chieftainship' (PhD Thesis 1984) Yale, in BNB 9536. From a legal point of view see my article "Tshekedi Khama v. High Commissioner: The making of a court" 1993 *BNR* 29-38.
  19. proclamation 40 of 1912 'Establishing the Special Court for Bechuanaland Protectorate'; *Chemela Nina v. Tshekedi Khama* 1947 in BNA C/7/706; *John Mswazi v. Chief of Bangwato*, 98/44 in BNA C/8/718. See too *The King v. Earl of Crewe: Ex Parte Sekgome* (1910) 2 KB 576 where he excluded the case from the courts.
  20. *Rex v. Kxmanka* in BNA C/10/769; H.C. Despatch No. 7965 of 28th March 1946 also in BNA C/10/769, discussed in detail at text to footnotes 33-37.
  21. *R. v. Bagokele*, Criminal Case No. 21 of 1934 in BNA C/7/706 per Blackwell J. See too *R. v. Daniel Ross*, Criminal Trial No. 13 of 1953; *R. v. Barry Cr.* Trial No. 18 of 1933 in BNA C/7/706; *Rex v. Seretse Tebe*, Cr. Trial No. 4 of 1948 in BNA C/7/709; *Rex v. Samuel Robert Dunthorne* 1950 in BNA C/7/8727.
  22. *R. v. Kopinyana Manka* Criminal Trial No. 5 of 1947 in BNA C/8/716 (the case was adjourned to allow further investigation, subsequently the accused was found guilty of culpable homicide

- and sentenced to 3 years with hard labour), *R. v. Willeem Johannes Crous*, Cr. Trial No. 5 of 1949 in BNA C/7/709.
23. Per de Beer J. in *Rex v. Gaborone Phiri and Simple Letlhahula* File No. 4093 of 10th October 1944 in BNA C/8/727.
  24. Simon Ratshosa, 'My Book on Bechuanaland Protectorate Native Customs' in BNA S598/2 pp.109-110.
  25. Some of these interpreters were by no means efficient, as 'Notes for the Guidance of the Registrar of the High Court 1946-52' indicated. It advised the new Registrar to avoid certain individuals at all costs because they were 'probably the worst... interpreters' in BNA C/8/727.
  26. Tshekedi argued that in Bechuanaland, Britain practised parallel rule rather than indirect rule—'Chieftainship Under Indirect Rule' (1935)36 *Journal of the Royal African Society* pp.251-61.
  27. H.C. 293 (22nd November 1921) in BNA C/8/727. Some of these cases have been discussed in a different context in "Infanticide in Botswana: A footnote to Schapera" 1990 *Journal of African Law* 159-162.
  28. The Court having found that she did not take part in the murder and 'is said to have been crying while it was taking place'. pp.2-3.
  29. Per MacGregor President of the Combined Court p.2 'I have never been able to ascertain for certain why both children were destroyed, the only explanation forthcoming being that the relations could not decide which to preserve', he wrote.
  30. H.C. 106 (27th April 1923) in BNA C/8/727, *Rex v. Ramhilo alias Mafeking*, in BNA C/8/729 (died in prison). Cf *R. v. Xaru*, Criminal Case No.3 of 1930 in BNA C/7/706. The accused killed her newly born baby who was born deformed. At her trial she told the court 'I do not think it wrong to kill a child when it is deformed'. She was acquitted. The judgment/report is so scanty that it is not clear on what ground she was acquitted.
  31. 'In transmitting the record I desire on behalf of the Court to recommend the prisoners to mercy. There is no doubt at all about their guilt, indeed it is not denied, but they are wild bushmen subject to no sort of law tribal or other; they do not cultivate, they own no cattle or stock of any kind and have no settled home. The advent of a child therefore while the mother was still suckling another one must have been a problem to them. It is said that it is usual with them to do away with such children at birth and I have no doubt that it is so in view of their mode of living, as one does not see how they could reasonably expect to keep them alive'. p.1 in *Rex v. Case alias Saul*; BNA H.C. 106 supra.
  32. Because 'while in prison they just pine and die unless they are given special food ...' p.2.
  33. (1946) in BNA C/10/769.
  34. Letter from Sir Evelyn Baring H.C. No. 7965 of 25th March 1946 in BNA C/10/769. 'I am never quite happy in my own mind about apying the full rigour of our law to a nomadic or primitive savage'.
  35. Letter from Lt. Col. Forsyth Thompson to the High Commissioner No. 8619/2 II of 15th April 1946 in BNA C/10/769.
  36. Lt. Col. Forsyth Thompson continued 'The only law which these primitive people understnad is an eye for an eye, and if one kills another without provocation he does not expect mercy if found out. In this case a defenceless child was killed for no reason that could in this man's community be accepted as an adequate reason; if his sentence were commuted it would soon become known and the Bushman's and Mosarwa's respect for our "law" would deteriorate' He was executed on 18th May 1946.
  37. Lt Col. Forsyth Thompson took into account the fact that two years earlier Basarwa killed two R.A.F. officers whose aeroplane crashed in the territory. They were acquitted on a technicality—*R. v. Twaitwai Molefe and Ors* (1944) in BNA C/10/769.
  38. (1941) in BNA C/10/769.
  39. At p.6 of the transcript.
  40. *Rex v. Serese Tebe*, Criminal Case 4 of 1948 in BNA C/7/709 per Sir Walter Harragin J.
  41. Similarly the ownership of the game, wild foods and water holes was collective. Every member of the group produced for a common pool and consumed from a common pool - K. Jordaen 'The Bushman of Southern Africa: anthropology and historical materialism' (1975)XVII *Race and Class* 151.

42. *Rex v. Dintwe Dithupe and Mpolokan Maseiboko*, Criminal Case 20 of 1934 in BNA C/7/706; *Rex v. Sankoela and Ors.* (1949) in BNA S.441/10/4; *Rex v. Sebulantu Jakopa and Ramuku Kesidile Lathang*, Cr. App. 2 of 1956.
43. See Leslie Blackwell, *Blackwell Remembers: The Memoirs of Hon Leslie Blackwell Q.C.M.C.* (London 1972) p.114 where he states 'it was thought right to stamp heavily on witchcraft in the territory'.
44. D.C. Molepolole in BNA S.186/2/1 1938; Marlies Bouman, "Crime and Punishment in Botswana" MA Theses, Law and Criminology, Free University of Amsterdam 1984.
45. Of all reported cases from Bechuanaland between 1926 and 1953 there is no record of any European having ever been sent to prison. Even for those cases where the court had ordered prison sentence I was not able to find committal or release warrants—*R. v. A.S. Harmse*, Criminal Trial 14 of 1933 (2 1/2 years in prison for attempted murder of native constable); *R. v. Daniel Gordon Ross*, Cr. Trial No. 13 of 1935 (5 years with hard labour for brutally killing of an old insane woman) both in BNA C/7/706; *R. v. Phineas McIntosh & Ors.*, Case No. 82 of 1948/49 (1 year in prison for theft from Tribal Workshop); *R. v. Samuel Robert Dunthorne*, (1950) in BNA S/441.10/4 (5 years hard labour for culpable homicide of his wife). However, in 1933 a white ex-prisoner protested against treatment in prison—S. Langton 'Allegation of Cruelty against Protectorate Officers in Connection with the treatment of Prisoner O' in Bouman op.cit. p.125.
46. see my paper "For they pine and die: Prison and native mind" (forthcoming).
47. Milner, *African Penal Systems; The Centenary of the Deprivation of Liberty in the Netherlands—Report of Symposium 15-18 April 1986* (The Ministry of Justice, The Hague 1987). However, Clifford argues that anthropological studies in West Africa have described prisons and practice of incarceration even before the colonial era—*An Introduction to African Criminology* (London 1969) pp.188-9. Unfortunately Clifford does not quote any source for his allegation.
48. For the history of the Prison Department see—L. Ramokhua, 'The History of the Prison Department in Botswana' in K. Frimpong, *The Convict, The Law and the Prison (Proceedings of Prison Department Workshop 1985* University of Botswana 1987); K. Frimpong, 'Some observations on Botswana Prison System' (1986) 4 *Zimbabwe Law Review* 136.
49. BNA H.C. 92/47; BNA H.C. 177/7.
50. The case of *The King v. The Earl of Crewe: Ex Parte Sekgome* [1910]2 KB. 576 indicates that Sekgome was detained at Gaberones. The Blue Books of 1905, indicate that during that year 136 prisoners were imprisoned in three gaols of the Protectorate. See too Bouman op.cit. pp.120-126.
51. D.C. Lobatse, 1942 BNA S.185/2/1.
52. Resident Commissioner, Mafeking, BNA S.390/1; Tsabong, 1938, BNA S.186/2/1.
53. Judicial Circular No. 2/51 in BNA S.390/13; BNA S.186/1 'On the treatment of offenders in the colonies'.
54. BNA S.390/1; *R. v. Hendrick Lambert Strumpfer*, (1938) in BNA C/7/706 (culpable homicide).
55. *R. v. Ramatsiakanye* [1935-7] Vol. I in BNB 158 p.29; *Rex v. Mogopone Mgosi & Ors* [1935-7] Vol. I in BNB 158 p.30.
56. Lord Hailey, *Native Administration in the British African Territories Part V* at pp.193- 5; Gunderson, 'Nationa Building and The Administrative State; The Case of Botswana' (Ph.D Thesis 1970) University of California, Berkeley pp.107-112.
57. Harold H. Robertson 'From Protectorate to Republic: The Political History of Botswana' (Ph.D Thesis 1976) Dalhousie University. Parsons calls this era the 'neglected middle colonial period' in 'Shots for a Black Republic: Simon Ratshosa and Botswana Nationalism' (1974) 73 *African Affairs* 449. For some areas of conflict see Parsons 'Khama & Co.' and the Jousse Trouble, 1910-1916' (1975) 16 *Journal of African History* pp.383-408. The history of the change in policy is given by Robertson in 'From Protectorate to Republic' and Ross Johnston in *Sovereignty and Protection*. (London 1973). In what follows I have made considerable use of these works.
58. Perham and Curtis, *The Protectorates of South Africa: The Question of their Transfer to the Union*; Sillery, *Botswana: A Short Political History*; Ballinger, *The Cape Times* 16th November 1933 in BNA S353/14.
59. Lord Lugard, *The Dual Mandate in British Tropical Africa* (1965) especially pp.618- 19.

60. M.L. Hodgson, 'Britain as Trustee in Southern Africa' (1932)3 *Political Quarterly* p.398; Lord Lugard, *The Dual Mandate*.
61. Having been told to tread cautiously because the extent of Her Majesty's powers had not been defined, the High Commissioner deliberately ignored the advice and by Proclamation of 10 June 1891 proceeded to extend the power of Her Majesty. The Proclamation endowed the territory under his authority with a complete system of administration. Though this dismayed the Colonial Office, they nonetheless, reluctantly left those relating to Bechuanaland Protectorate intact. This turned the territory overnight into a 'Colonial protectorate'. See too Ross Johnston op.cit.
62. Morton and Ramsay, *The Birth of Botswana* (Gaborone 1987). 66, Parsons, *A New History of Southern Africa* (London 1982) p.242; Tlou and Campbell, *A History of Botswana* (Gaborone 1984) p.217.
63. [ 1926-53] HCTLR 9.
64. BNA S.358/20 Tshekedi to H.C. Sir William Clarke 16th December 1935. 'It would appear that the effect of the Proclamations as they stand is to transfer the government and rights of the tribe from the natives to the Administration... It behoves us all the more to see that our rights of independence under the Protection of Great Britain are not curtailed'. See to the same effect Bathoen II in BNA S358/6 'Might I ask whether His Excellency realises that the Proclamation now reduces the position of the Chief?'
65. Michael Crowder, 'I want to be taught how to govern my country not to be taught how to be governed'. Tshekedi Khama and Opposition to the British Administration in the Bechuanaland 1926-36' Workshop on Bangwato Politics Under Colonial Rule, University of Botswana 1985 p.13.
66. Morton and Ramsay, eds, *The Birth of Botswana*; Roberts, 'The Survival of the traditional Tswana Courts in the National Legal System of Botswana' (1972) 16 *Journal of African Law* 103; Sillery, Botswana; *A Short Political History*.
67. Ghai and McAuslan, *Public Law and Political Change in Kenya* (London 1970) p.4; Kamau Kuria and Ojwang, 'Judges and the Rule of Law in the Framework of Politics: The Kenya Case' 1979 P.L. 254; Ross Johnston, *Sovereignty and Protection* (1973), 237.
68. Official papers in BNA S.198/1; Crowder, 'Tshekedi Khama and Opposition to British Administration' (1985) 26 *Journal of African History* 193; BNA S.63/9 'Interview with Lord Passfield'.
69. See Rey's Report on Bechuanaland Protectorate of March 1931 in BNA S.353/13; Rey's Diaries; Rey's Papers 1929-35 in BNA RC 14/3; Tshekedi Khama v. The High Commissioner [1926-53] HCTLR 9 at 18.
70. See Rey's papers BNA S.353/13; BNA R.C. 14/3; Rey's Diaries p.69 entry for 20-21 May 1931.
71. BNA S.456/5 'Co-operation with Union Govt.'; Minutes of 20th Session of European Advisory Council, February 1936 in File No. 8374; Minutes of 21st Session E.A.C. 23rd October 1936.