Khama v. *Ratshosa* revisited: The Privy Council ruling of 1931 on house-burning

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In 1926 the Regent of the Bangwato, Tshekedi Khama, was wounded in an attack by the brothers Simon and Obeditse Ratshosa. In retaliation he ordered their houses burnt down, and they were subsequently imprisoned. The Ratshosas brought a civil action against Tshekedi for the loss of their property, and won in the highest Protectorate court, but Tshekedi successfully appealed to the Privy Council. It is usually stated that the Privy Council upheld Tshekedi as acting under customary law. We will argue that this is a misunderstanding of the ruling.

The appeal of the Ratshosa brothers was an important case in the history of the Bechuanaland Protectorate's dual system of law and government, sometimes called Parallel Rule. The original protectorate of 1885 had created only a loose and generally external control. In 1890–1 however the nature of British control altered. An Order-in-Council (9 May 1891)[1] authorized the High Commissioner for South Africa to exercise government over all persons in the territory, though with the provision that in issuing proclamations he must "respect" native law and custom.[2] Although he had been instructed to act cautiously, the High Commissioner, Loch, was concerned to be able to control the British South Africa Company, and in 1891 issued a Proclamation providing for an internal colonial administration in the Protectorate. [3]

Still, only a minimal administration was envisaged, and the British government did not intend to take over the main work of government from the existing African rulers. Thus, while the Proclamation provided for Magistrates under the Resident Commissioner, it limited their jurisdiction. Matters "in which natives only are concerned"[4] were outside their jurisdiction, unless intervention was necessary "in the interests of peace, or for the prevention or punishment of acts of violence to person or property".[5] If the magistrate *did* assume jurisdiction, he was to follow native law and custom, *unless* this native law was contrary to "peace, order and good government".[6] Thus, "native law" was to prevail in cases involving Africans only, unless the law concerned went beyond what the British considered acceptable. This was slightly modified by an 1895 direction that the magistrate also had jurisdiction in cases concerning "black men who do not belong to the tribe" and capital cases.[7]

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[1] Under the Foreign Jurisdiction Act 1890 (53 & 54 Vict. c. 37) s.5, where Britain exercised jurisdiction in a foreign country (which was the legal situation in a protectorate) the Queen in Council had the same powers (within that jurisdiction) that a Legislature would have had in a British possession.

[2] Order in Council, 9 May 1891 (4). Orders in Council and Proclamations are cited from *Bechuanaland Protectorate Orders in Council and Proclamations 30th June, 1890 to 31st Decemeber, 1929* (Kimberley: Government Printer, 1930). See also Anthony Sillery, *Founding a Protectorate: History of Bechuanaland 1885*-1895 (The Hague: Mouton & Co., 1965), p. 151. The requirement to "respect" native law was the subject of a case in 1936; see below.

[3] Proclamation by Sir Henry Brougham Loch [High Commissioner], 10 June 1891. Proclamations were referred to by date up to 1893; from 1894 they were numbered.

[4] Proclamation, 1891, cl. 8.

[5] Proclamation, 1891, cl. 8.

[6] Proclamation, 1891, cl. 9.

[7] Colonial Office to Rev. W. C. Willoughby, 7 December 1895, quoted in "Explanatory Memorandum

The story of the downfall of the Ratshosa family is well known. The brothers had built up a position of influence in the latter years of Khama III, and had greatly increased this in the reign of Sekgoma II. (Schapera regarded this as a sign of Sekgoma's weakness.[8]) Then, when Sekgoma heard that they had been starting to treat him as a cypher, he began to move against them, but just at this point he fell ill and died.[9] When Tshekedi Khama became Regent in 1925, he was determined to remove them from power, because of his need to establish control. Conveniently, the Ratshosas were very unpopular with the general Bangwato public: thus by striking against them he not only removed rivals but gained public approval.

Tshekedi moved quickly. Following clashes in which he humiliated the Ratshosa brothers, he staged what can only be regarded as a planned provocation, in which the brothers were summoned to a kgotla when he knew they would be at a wedding. For failure to appear they were ordered to be beaten; they refused on grounds of rank, and two of the three brothers (Simon and Obeditse) went and fetched guns with which they fired at Tshekedi, wounding him. Tshekedi's provocation thus worked a little too well, but he was lucky enough to avoid serious injury.

Tshekedi then sent regiments against the Ratshosas. The houses of all three, with contents, were burnt down. According to evidence later given in court, the Ratshosas were lucky to escape with their lives, and owed this to the Resident Magistrate's intervention.[10] These events took place on 5 April 1926.

The two Ratshosa brothers who had shot at Tshekedi were tried by Captain Reilly, a magistrate specially appointed to try the case[11] rather than the Resident Magistrate of Serowe,[12] and sentenced to ten years' imprisonment, subsequently reduced to four by the High Commissioner. The third, Johnnie, was not prosecuted. However, the brothers then sued Tshekedi for the destruction of their property when their houses were burnt. This property was considerable; not only were the houses of European type but they had built up significant amounts of western consumer goods on the European middle-class model. It has been noted, in fact, that spending on this rather than on clients had made them unpopular and left them fatally isolated.[13] Their case, of course, was that Tshekedi had acted beyond his lawful powers in destroying their houses. Tshekedi counter-claimed for damages for his injury.

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by His Excellency the High Commissioner [H. J. Stanley] on the Bechuanaland Protectorate Native Administration and Native Tribunal Proclamations", 28 December 1934, p. 2. This direction also provided for appeal to the magistrate in serious cases, though this does not seem to have been provided for in legislation until 1919.

8 I. Schapera, *Government and Politics in Tribal Societies* (London: Watts, 1956), p. 149.

9 Thomas Tlou, Neil Parsons and Willie Henderson, *Seretse Khama 1921–1980* (Gaborone: Botswana Society, 1995), pp. 17–18.

10 *Khama* v. *Ratshosa* [1931] AC 784, p. 792.

11 Diane Wylie, *A Little God: The Twilight of Patriarchy in a Southern African Chiefdom* (Hanover NH: Wesleyan University Press, 1990), p. 74.

12 H. B. Neale, RM Serowe 1924–7; see Neil Parsons & Glorious Gumbo, "Bechuanaland Colonial Administrators c.1884–c.1965, by Place, Date, Name, and Title, provisional version 16 November 2002", University of Botswana History Department website, http://www.thuto.org/ubh/bw/colad/coloff.htm, accessed 28 February 2011.

13 Wylie, *A Little God*, p. 76.

The Magistrate who first heard the case ruled (29 March 1928) against the Ratshosas.[14] Evidence from Bangwato elders agreed that it was in accordance with custom for the houses of rebels to be burnt down; in fact, in pre-colonial times the rebels would undoubtedly have been killed.[15] (Whereas the courts were supposed to know the British colonial law, they were not expected to know "native law" and so it had to be proved by evidence.) Therefore Tshekedi had been acting in accordance with customary law. The case was one which concerned natives only. Therefore he, the Magistrate, ruled according to this custom. The Magistrate noted that the chief should act on the advice of his counsellors and kgotla, but (in his view) it was clear that Tshekedi had done so and had the kgotla's unanimous support.[16] Tshekedi won his counter-claim for damages.[17] In fact, this picture of Tshekedi acting in a formal judicial process in the midst of violent chaos seems a little dubious,[18] but the truth of the matter is secondary here.

Two of the three brothers (Simon and Johnnie) then appealed to the Special Court of the Protectorate, which ruled on 5 December 1927. It dismissed most of their claims, but it reduced the damages to Tshekedi, and, crucially, it upheld the Ratshosas' claim on the house-burning.

The Special Court denied Tshekedi's case both in principle and in fact. In its view, it had not been proved that native law permitted such house-burning even after a trial.[19] In terms of the facts, the Special Court found that there had not actually been a trial,[20] and that there was no proof Tshekedi had acted with the support of his counsellors and kgotla as claimed.[21] The Special Court also did not agree that the situation could be regarded as a "state of war"[22] in which the actions could be considered military rather than judicial.

Tshekedi was determined to appeal against this ruling, which he believed undermined his authority. An appeal would have to be to the Judicial Committee of the Privy Council in London, the final court for the British Empire, and would therefore be both difficult and expensive. Tshekedi imposed a special levy to raise funds for the case. The Resident Commissioner (Jules Ellenberger) and the High Commissioner (Lord Athlone) advised him against an appeal, on the grounds that it was unlikely to succeed. Athlone held a formal meeting with Tshekedi, and warned that the case would be very expensive, and that even if he were awarded costs, the Ratshosas would not have the resources to pay them.

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[14] Shortly after this, Proclamation No. 11 of 1928 s.1(3) provided for cases involving natives to be transferred from the Court of the Resident Magistrate to the Special Court. See Geoffrey M. Kakuli, "The Historical Sources and Development of Civil Procedure and Practice in the High Court of Botswana", *Stellenbosch Law Review*, vol. 6 (1995) pp. 161–85, p. 167.

[15] *Khama* v. *Ratshosa* [1931] AC 784, p. 794.

[16] *Khama* v. *Ratshosa* [1931] AC 784, p. 792.

[17] *Khama* v. *Ratshosa* [1931] AC 784, p. 787.

[18] E.g. Michael Crowder, *Black Prince: A Biography of Tshekedi Khama 1905-1959*, unfinished typescript, 1988, Schapera Project web-site, Schapera E-Library: Classic texts, http://www.thuto.org/schapera/etext/classic/blpr.htm accessed 25 February 2011.

[19] *Khama* v. *Ratshosa* [1931] AC 784, p. 794.

[20] *Khama* v. *Ratshosa* [1931] AC 784, p. 794.

[21] *Khama* v. *Ratshosa* [1931] AC 784, p. 792.

[22] *Khama* v. *Ratshosa* [1931] AC 784, p. 794.

The attitudes of the officials varied somewhat. Athlone told Tshekedi that, despite this advice, personally he hoped that he did succeed. The Imperial Secretary (the High Commissioner's assistant) Captain Bede Clifford however was hostile, telling Tshekedi in an irritated manner that no court could approve what he had done.[23]

As it happened, Tshekedi was already planning a visit to England, related to the pressure from the British government to allow mining in his territory[24] and the threat of incorporation into the Union of South Africa. This visit enabled Tshekedi to discuss the case with his lawyers, though it was not heard until after he had left England. [25]

The case finally came to the Privy Council. Tshekedi's case was that the house-burning had been properly ordered in council, and was accordance with the custom of the tribe in cases of armed rebellion. He also made the claim that, subject to the 1891 Proclamation, the chief still had "internal sovereignty"[26] and so his lawful order was not justiciable at the suit of a subject.

The Dominions Office intervened in the case, essentially against Tshekedi. It presented a letter certifying that Tshekedi was not recognized as having sovereignty. It also submitted that the house-burning was not a judicial act, since there was no trial; that the custom was contrary to peace, order and good government and should therefore not have been followed by the magistrate; and that even if the custom was proved it did not justify the act of house-burning in the actual circumstances.[27]

On 10 July 1931 the Privy Council found in favour of Tshekedi. The fact of this ruling is narrated in many secondary sources, but, we shall argue, has generally been incorrectly understood.

In response to the Special Court, the Privy Council found that the evidence did show that Tshekedi had acted with the support of the kgotla, and that custom allowed house-burning in the circumstances.[28] Most secondary accounts[29] state or imply that this was the basis of Tshekedi's victory, for example:

> The Privy Council judged that Tshekedi had the right to inflict punishment on the Ratshosas in terms of traditional law, by which the Ratshosas were governed....[30]

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[23] Mary Benson, *Tshekedi Khama* (London: Faber & Faber, 1960), pp. 71–2.
[24] Michael Crowder, *The Flogging of Phineas McIntosh: A Tale of Colonial Folly and Injustice, Bechuanaland 1933* (New Haven: Yale U.P., 1988), p. 19. Although this episode features in the diary of the Resident Commissioner Charles Rey, there is very little on the court case. Charles Rey (Michael Crowder & Neil Parsons, eds) *Monarch of All I Survey: Bechuanaland Diaries 1929-1937* (Gaborone: Botswana Society, 1988).
[25] Benson, *Tshekedi Khama*, pp. 76–7.
[26] *Khama* v. *Ratshosa* [1931] AC 784, p. 790. Tshekedi had begun the discussions with his lawyers in England by implying this. See Benson, *Tshekedi Khama*, p. 76.
[27] *Khama* v. *Ratshosa* [1931] AC 784, p. 786.
[28] *Khama* v. *Ratshosa* [1931] AC 784, p. 794.
[29] A notable exception is that by Bojosi Otlhogile, which is discussed below.
[30] M. Crowder, "The Statesman", in F. Morton & J. Ramsay (eds), *The Birth of Botswana: A History of the Bechuanaland Protectorate from 1910 to 1966* (Gaborone: Longman, 1987), p. 51.

> The Judicial Committee of the Privy Council did allow Tshekedi to appeal, and upheld his claim under "traditional law."[31]

However, a careful reading of the judgment shows that the Privy Council found that the deciding issue was whether the magistrate had jurisdiction. The issue thus related to the very basis of the system of Parallel Rule. The crucial parts of the 1891 Proclamation were clauses 8 and 9:

> 8. The jurisdiction of the Courts holden by Resident Commissioners, Assistant Commissioners or Magistrates under this Proclamation shall not extend to any matter in which natives only are concerned, unless in the opinion of such Court the exercise of such jurisdiction is necessary in the interests of peace, or for the prevention or punishment of acts of violence to person or property.
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> 9. In every matter wherein jurisdiction is exercised by any such Court under the last preceding section of this Proclamation, the decision shall follow the laws and customs of the natives concerned, in so far as they are applicable; provided that if such laws or customs conflict or are not clearly proved, or if such laws or customs should be found to "be incompatible with peace, order and good government,"[32] 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.[33]

Thus, the colonial courts did not have automatic jurisdiction in matters where "natives only are concerned": they would only have jurisdiction if their intervention was necessary for peace or to prevent or punish violence. Whether this was the case would have to be determined by the magistrate in the specific circumstances,[34] and during the hearing one of the judges had questioned whether the Dominions Office had any right to propose overall policy on whether a custom was compatible with order and good government.[35]

What of this case, then? The plaintiffs were suing for damages in relation to their punishment for a very serious crime. The Privy Council could see no reason to imagine that it would be in the interests of future peace for such a case to be heard, especially since the sentences had already been reduced by the High Commissioner. Similarly, taking the case was not necessary in order to prevent or punish violence: there was no likelihood of further breach of the peace, and even if there had been, such a civil action would not be an appropriate way of dealing with it. [36] Therefore, the magistrate should have decided that he had no jurisdiction.

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[31] Wylie, *A Little God*, p. 75. See also e.g. Crowder, *The Flogging of Phineas McIntosh*, p. 17; S. M. Gabatshwane, *Tshekedi Khama of Bechuanaland: Great Statesman and Politician* [1961] (Cape Town: OUP, 1986), p. 6; Benson, *Tshekedi Khama*, p. 78.

[32] Quotation marks in the original.

[33] Proclamation of the High Commissioner for South Africa, 10 June 1891, quoted in *Khama* v. *Ratshosa* [1931] AC 784, pp. 789–90. This limitation was preserved under subsequent proclamations e.g. No. 2 of 1896 s.1.

[34] *Khama* v. *Ratshosa* [1931] AC 784, p. 796.

[35] See Benson, *Tshekedi Khama*, p. 78.

[36] *Khama* v. *Ratshosa* [1931] AC 784, p. 797.

It was on this basis that the Privy Council found for Tshekedi. The magistrate had decided for Tshekedi on the basis that his actions were in accord with native custom; the Special Court had decided against him on the basis that they were not. The Privy Council did not base their ruling on either view, but on the conclusion that the magistrate should not have decided the case at all. (A consequence, incidentally, was that Tshekedi's counter-claims, which he had earlier won, were also nullified.[37])

Incidentally, although in general the 1891 Proclamation limited jurisdiction, a 1919 Proclamation had created a right to appeal without any such limits from proceedings before a chief to a court composed of the chief and the Resident Magistrate, with further appeal (or reference if the two disagreed) to the Resident Commissioner.[38] This was not addressed by the Privy Council but raises the question of what would have happened had the Ratshosas appealed directly against Tshekedi's house-burning order, considered as a criminal sentence.

The Privy Council did nevertheless express views on other aspects of the case. As we have seen, it found that Tshekedi's actions were accordance with native custom.[39] However, it also stated

> Their Lordships desire to make it plain that their decision in this appeal must not be taken as in the least degree approving the action of the appellant in directing the burning of the plaintiffs' houses and their contents, and that if it had been necessary for the disposal of the appeal ... to express an opinion as to... cl. 9... (which it is not, in view of their decision in respect of cl. 8) they must have held that the custom... [of house-burning] was incompatible with peace, order and good government as expressed in cl. 9.[40]

This leads to the counterfactual question: if it *had* been necessary (for the reasons given in clause 8) for the magistrate to assume jurisdiction, what would have been the result according the Privy Council's ruling on the law? The magistrate was supposed in such cases to follow native law and custom unless it was incompatible with "peace, order and good government". Although the Privy Council accepted that Tshekedi's actions were according to custom, it also considered that the custom in question *was* incompatible with "peace, order and good government".[41] It follows that, under clause 9, the matter would have been decided under European law, which would certainly not have approved of house-burning. Thus, it appears that if it had been proper for the colonial courts to take the case, Tshekedi would have lost.

We may also consider a related counterfactual question. Suppose the Privy Council had ruled as it did that the magistrate had no jurisdiction, but it had also found that Tshekedi's actions were *not* in accordance with customary law at all? Since according to the Privy Council's judgment the matter was outside the magistrate's jurisdiction, Tshekedi would still have won his case.

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37 *Khama* v. *Ratshosa* [1931] AC 784, p. 798.
38 Proclamation No. 1 of 1919, 21 February 1919.
39 *Khama* v. *Ratshosa* [1931] AC 784, pp. 794–5.
40 *Khama* v. *Ratshosa* [1931] AC 784, pp. 797–8.
41 There may be a slight inconsistency with the Privy Council's remark on the inappropriateness of a lawsuit for damages against criminal punishment for serious crime, but that referred to whether it was necessary for peace for a magistrate should hear such a case, whereas the general observation on the custom being contrary to good government was made explicitly and with emphasis.

In other words, Tshekedi did *not* win because his actions were in accordance with native custom (although the court found that, as it happened, they were). He won because the magistrate had no jurisdiction. Thus, contrary to the usually-stated view, Tshekedi was not found to be within his legal rights. He was admittedly within his rights according to customary law, but it is also clear from the ruling that these rights were invalid in colonial law.

The Privy Council made a comment that if it were desired to prevent a recurrence of such events, this could be done by the High Commissioner administratively.[42] This suggestion seems at odds with the government view that the case showed a need for a new legal definition of powers.

Whatever the legal basis, though, Tshekedi had won his case. From his point of view what was essential was the fact that a subject's attempt to challenge him in the courts had been defeated: the victory he really wanted was political.[43] However, he apparently took the result as a vindication of his position and of his faith in the British legal system.[44] As he was not in England he may not have heard the details until later.

By 1930 the government was considering a new legal framework for chiefs' powers. Although the Dominions Secretary Lord Passfield (Sidney Webb) denied to Tshekedi that the house-burning case was the original cause of this,[45] the case must be seen as one of the factors leading to the 1934 Proclamations which attempted, ultimately unsuccessfully, to create a new type of tribunal to replace the traditional kgotla system of justice. In these proclamations house-burning was banned, and subversion against the chief was removed from the jurisdiction of "tribal" courts.[46] This in turn led to another constitutional case in which Tshekedi and Bathoen II challenged the Proclamation, but unsuccessfully.[47] An important distinction between the cases is that the house-burning case involved the interpretation of a Proclamation, albeit a very basic one, whereas the later case challenged a Proclamation in terms of the Order-in-Council which authorized all Bechuanaland Proclamations.

An article by Bojosi Otlhogile[48] correctly notes that the Privy Council held that the magistrate was wrong to assume jurisdiction, but refers to the Privy Council's "surprising... reluctance" to consider whether the custom was compatible with good

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[42] *Khama* v. *Ratshosa* [1931] AC 784, p. 798.
[43] See Bojosi Otlhogile, "A History of Botswana through Case Law", *Pula: Journal of African Studies* vol. 11 no. 1 (1997) p. 84.
[44] Crowder, *The Flogging of Phineas McIntosh*, p. 17. It may possibly be relevant that the Privy Council normally delivered only the result of the appeal orally in court, giving the reasons in writing: David M. Walker, *The Oxford Companion to Law* (Oxford: Clarendon Press, 1980), p. 999
[45] "Explanatory Memorandum", p. 5. Passfield apparently also stated however (Benson, *Tshekedi Khama*, pp. 78–9) that the case had shown the need for some statutory basis for chiefs' courts.
[46] Proclamation No. 75 of 1934, s.12(2)(e), s.8(1). See Isaac Schapera, *A Handbook of Tswana Law and Custom: Compiled for the Protectorate Administration* [1938] (Münster: International African Institute, 1994), p. 274.
[47] *Tshekedi Khama & Bathoen Seepapitso Gaseitsiwe* v. *the High Commissioner*, (1936) [1926-53] HCTLR 9, cited in *Halsbury's Laws of England*, (4th ed., London & Edinburgh: Lexis Nexis, 2003) vol. 6 p. 418 para. 706 note 4.
[48] Bojosi Otlhogile, "A History of Botswana through Case Law", *Pula: Journal of African Studies* vol. 11 no. 1 (1997) pp. 82–95.

government.[49] The author suggests that this must be due to the practical consideration that British rule depended on the chiefs.[50] This argument however seems problematic. The court did in fact state unambiguously that it found the custom to be incompatible with good government. It refused jurisdiction on the grounds that jurisdiction was limited to a specific list of cases, none of which applied, and its judgment of that point is not at all unreasonable. It implied that the custom should be suppressed by the administration. Dr Otlhogile's interpretation seems more appropriate to an earlier case in which the courts had indeed clearly taken decisions on the basis of the maintenance of British power.[51] A further problem with this theory is to explain why, if the ruling was a pragmatic one supporting British rule, much official opinion was opposed to it.

Our interpretation of the case would seem to clarify its relevance to the 1934 Proclamations. According to the ruling, Tshekedi's actions had been contrary to good governance, and yet the issue of jurisdiction had prevented this being dealt with. From the British point of view, this was clearly unsatisfactory.

Some of the lack of clarity in these cases derived ultimately from the origins of the Protectorate. The use of a protectorate to establish a colonial degree of control was an innovation first tried in Bechuanaland, and one in which government practice went ahead of agreed legal theory at first.[52]

In many ways, the question of whether or not the house-burning was in accordance with "native law" involved mismatched categories. In his *Handbook of Tswana Law and Custom* Isaac Schapera wrote that in precolonial times any man scheming against the chief "was killed, often secretly and without open trial; his dwellings and all their contents were burned, and all his cattle were confiscated by the Chief. It was regarded as a case of 'war', and the usages of peace were therefore suspended..."[53] This situation really belongs to the borderlands between law and political violence. Diane Wylie has noted how as the courts became "relatively more distant from the arenas of chiefly power [they] made more abstract and Eurocentric judgments."[54] As well as Eurocentrism, though, there was the attempt to force an accepted form of political action into a supposed legalistic procedure.[55]

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[49] Otlhogile, "A History of Botswana through Case Law", pp. 84–5.
[50] Otlhogile, "A History of Botswana through Case Law", pp. 85. This is supported by a quotation (*Khama* v. *Ratshosa* [1931] AC 784, p. 791) to the effect that Britain relied on the chiefs for law and order, but in context this statement is part of the background description of the Protectorate.
[51] *The King* v. *Earl of Crewe: Ex parte Sekhome* [1910] 2 KB 576. See A.J.G.M. Sanders, *Bechuanaland and the Law in Politicians' Hands* (Gaborone: Botswana Society, 1992) pp. 15–32.
[52] This analysis follows W. Ross Johnston, *Sovereignty and Protection: A Study of British Jurisdictional Imperialism in the Late Nineteenth Century* (Durham, NC: Duke University Press, 1973, chapter 7.
[53] Isaac Schapera, *A Handbook of Tswana Law and Custom: Compiled for the Protectorate Administration* [1938] (Münster: International African Institute, 1994), p. 274.
[54] Wylie, *A Little God*, p. 74.
[55] See also Paul S. Landau, *Popular Politics in the History of South Africa,1400–1948* (Cambridge: CUP, 2010), p. 236, questioning what he sees as the reduction of politics to custom in such analyses by Schapera.

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Proclamation by Sir Henry Brougham Loch [High Commissioner], 10 June 1891, *Bechuanaland Protectorate Orders in Council and Proclamations*, 1890–1929 pp. 75ff.

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