A B S T R A C T

One of the main themes of South African history is the modification of African tribal life and institutions by the impact of the white society. Both British officials and settlers played a part in this process, but with very different motives and effect. The British, anxious above all else to save defence expenditure, were not prepared to risk provoking a war and had very little incentive to invest large sums in the administration of the tribes. Settlers, on the other hand, had a vested interest in manipulating tribal society for their own ends: not only did their personal security rely upon quiescent tribesmen, but so did the economic development of the colony, dependent as it was on trade and labour. In addition, the settlers lived, at least along the eastern border, in close contact with the tribes, and were therefore more conscious than officials of those aspects of tribal life which offended Victorian Christianity's ideas of decency and morality. Tribal society was regulated by tribal law under the control of the chiefs; in order to attack aspects of the society, alterations had to be enforced in tribal law. As a result, once the grant of Responsible Government in 1872 gave the settlers control of their own internal affairs, Cape policy on tribal law becomes of particular interest as a study of how a colonial society attempted to impose often unwelcome changes on an indigenous

people, and with what results for both societies. As the problem presented by the African tribes bulked so large in the settler view, there is very little documentation available on the position of the few Khoi and San still living in tribal units, and they have not been included in this study.

The Cape at this time was not attempting control by a single policy. For historical reasons it had inherited two contrasting policies in two separate areas for dealing with tribal law and societies. Within the colony, tribal law received virtually no recognition except illegally from magistrates faced with the impossibility of implementing the Roman-Dutch law of the Cape in totally tribal settings; within Basutoland, on the other hand, the policy was to administer tribal law and by degrees to introduce colonial law and values to the society. A variation on the latter theme was found in the Transkeian territories, where until 1879 Cape officials had no legal power to do more than advise the chiefs of what actions would be displeasing to the government; but by a deliberate policy of pretence they assumed the powers of magistrates and established a large administration. This gave rise to certain problems peculiar to the area. Both policies required the use of resident magistrates, to hear cases after or in lieu of the chief. This automatically challenged the chiefs' authority and aroused their hostility even where none had initially existed. Yet

virtually no force was normally available to the magistrates for dealing with opposition.

A detailed study of the way in which officials attempted to overcome these difficulties and implement the policies, and with what results, must of necessity be largely descriptive, but an attempt has been made to evaluate the success of the policies in achieving their aims, the mechanisms involved, the reasons why the policies succeeded or failed, and the results which were implicit in them. Particular attention has been devoted to the effects of the policies on the different sections of African society and their reactions. To avoid much duplication of details of the mechanics of magisterial rule, the system has been dealt with in detail in the context of Basutoland, and the chapter on the Transkeian territories is used to concentrate on points of contrast and difficulties peculiar to the area as a result of its constitutional and other problems. Although Britain's role as protector of the tribes was very muted after the grant of Responsible Government, it has also been touched upon where relevant.

By 1880 events had forced the Cape Parliament to realize the importance of its policies on tribal law, and the report of the Commission on Native Laws and Customs, which appeared in 1883, provided a detailed survey of past policies, the current situation, and made recommendations for future action in the light of the experience of many countries with 'native problems'. It marks the end of an era of haphazard policies

on tribal law in the Transkeian territories, and coincided with the end of the Cape's rule in Basutoland. It also virtually coincided with a change of government which probably determined the future policy on tribal law followed in the Cape Colony proper. It therefore marks a suitable point at which to take stock of the Cape's initial attempts to rule through or despite tribal law.

These show the impossibility of using legislation and a handful of white officials to attack a self-sufficient society's laws. The African tribal societies in the Cape Colony proper continued to a large extent to ignore the colonial machinery of law provided for their use, unless driven into the world of the colonists by economic or other factors. Strong inducement was necessary to make a tribesman abandon his chief's court. Only where magistrates recognized tribal law - illegally in the Cape, legally in Basutoland, and later in the Transkeian territories - did they have greater success in gaining control of the society through legislation and the magistrates' courts. Ironically, to be able to destroy the system they had first to use it.

But the establishment of the government in control automatically created divisions within the society and deepened existing ones. While these divisions could in general be manipulated to ensure that the government did not face a combined opposition, a blunder on the part of officials or the Cape government could unite the tribe in attack. In such

situations the only hope the government had of maintaining power was to be able to demonstrate that it had adequate power to protect its friends and punish its enemies immediately. Where it was unable to do this, as in Basutoland, it had no hope of re-asserting control of the situation.

But where it succeeded in remaining in command of the situation, the system used in Basutoland and the Transkeian territories, in conjunction with economic and missionary influences, was highly effective in rapidly breaking down tribal authority and leading to the absorption of tribesmen into the colonial society. How much it depended on and interacted with other forces in achieving such an aim has been emphasized throughout this study; but it certainly hastened the process and must bear some of the responsibility for the repressive reaction which followed from a minority white society unprepared for competition from Africans for land and jobs.

The volume of relevant material for a study of this nature is enormous, despite a fire in 1892 which destroyed many early Native Affairs Department files. The most valuable papers were mainly in the archives of London, Cape Town and Maseru, although the printed parliamentary papers also contained much useful material. However, there are difficulties in discovering what the provisions of the tribal law were before it was affected by the colonial society: the detailed evidence of the 1880-83 commission came relatively late in the day, and early evidence is neither detailed nor

consistent, and lacking altogether on some tribes. Unfortunately too, any study of African responses to colonial society in this period must inevitably suffer from the defect of one-sidedness in being nearly all written by white men.

CAPE POLICIES TOWARDS AFRICAN LAW

IN CAPE TRIBAL TERRITORIES

1872-1883

S.B. Burman

Thesis submitted for the degree of Doctor of Philosophy

University of Oxford

1973

BODLEIAN LIBRARY OXFORD DEPOSITED THESIS 5.4.74

BODLEIAN LIBRARY OXFORD 24 APR 1974 RHODES HOUSE

CONTENTS

		Page
NOTES ON ABBREVIATIONS AND TERMINOLOGY		iii
PREFACE		1
1.	THE NON-GOVERNMENTAL AGENTS AND MECHANISMS OF CHANGE IN AFRICAN LAW a. African society and its law b. White society and African law	5
2.	AFRICAN LAW POLICY TILL 1872	37
3.	THE AGENTS AND MECHANISMS OF MAKING TRIBAL LAW POLICY	68
4.	THE CAPE COLONY	112
5.	BASUTOLAND: THE IMPOSITION OF MAGISTERIAL RULE a. Background b. Rule by magistrates: changes imposed on tribal law	162
6.	BASUTOLAND: THE FAILURE OF MAGISTERIAL RULE a. The breakdown of magisterial rule b. Attempts to re-establish magisterial authority	274
7.	THE TRANSKEIAN TERRITORIES a. Background b. Cape Rule	313
8.	THE 1883 CAPE NATIVE LAWS AND CUSTOMS COMMISSION	387
CONCLUSIONS		411
APPENDICES		420
BIBLIOGRAPHY		432 A

NOTES ON ABBREVIATIONS AND TERMINOLOGY

Acc.	Accession
A.Y.B.	Archives Year-Book for South African History
Brit. Parl. Papers	British Parliamentary Papers
Cape	Cape Archives, Cape Town
Cape Parl. Papers	Cape Parliamentary Papers (Annexures and Appendices to the Votes and Proceedings of the Cape Parliament
C.M.K.	Chief Magistrate, Kokstad
C.M.T.	Chief Magistrate, Thembuland or Transkei
C.O.	Colonial Office (Britain - Papers in P.R.O.)
encl.	enclosed
G.H.	Government House (Papers in Cape Archives)
G.T.J.	The Graham's Town Journal
Hansard	Hansard's Parliamentary Debates (British Parliament)
Lesotho	Lesotho Archives, Maseru
MSS. Afr.	African Manuscripts Collection, Rhodes House Library, Oxford.
MSS. Brit. Emp.	British Empire Manuscripts Collection, Rhodes House Library, Oxford.
N.A.	Native Affairs (Papers in Cape Archives)
P.M.	Prime Minister (Papers in Cape Archives)
P.R.O.	Public Record Office, London
S.A.P.L.	South African Public Library, Cape Town
-/TA	Tamacha, King William's Town (Papers in Cape Archives)
Tel.	Telegram

U.B.R.	(Unpublished) Basutoland Records, ed. G.M. Theal (in Cape Archives)
U.C.T.	University of Cape Town, Jagger Library.

In general the modern orthography for African names had been used, with the exception of 'Basutoland' for 'Lesotho' and 'Basuto' for 'southern Sotho'.

PREFACE

Much has been written about the methods used by the present South African government to impose its will on the Africans within the borders of the Republic; less attention has been directed to those used in the South African colonies in the period of conquest and colonization, when as yet unbroken tribes were first brought under the rule of the colonial societies. David Welsh's recent study of the system which Shepstone established in Natal[1] has provided a detailed record of how control was exercised there, but no similar study exists of the methods used by the only other South African state which set out systematically to rule the tribesmen with which it came into contact - the Cape. The subject has been touched on by many historians, but the actual mechanism has not been examined whereby a magistrate, quite often with only a clerk and two policemen, could impose on anything up to 40,000 tribesmen a code of foreign and often inappropriate laws. Nor have the effects it had on tribal law and society in this early period been examined in detail.

The initial steps to establish control over the tribesmen were taken long before the Cape colonists gained control of their own internal affairs, but the British officials were anxious above all else to save defence expenditure; if modifying tribal society would provoke rebellion, then tribal society

---

[1] D. Welsh, The Roots of Segregation (Cape Town, 1971).

would be left untouched as much as possible. The colonists, on the other hand, were concerned not only about their personal security, but also about the future economic development of the colony, which in turn depended on peace, labour and markets. Their closer contact with the Africans also left them more aware than British officials in Cape Town of the many facets of tribal life which were contrary to Christian morality and Victorian propriety. They therefore had a far greater interest in altering tribal society to meet their labour and trade requirements and their prejudices. To do this, they had to attack its internal structure, which was governed by tribal law; and so the Cape's policies on tribal law become of particular interest after the settlers were given Responsible Government in 1872. Legislation explicitly only for Africans was frowned on in this period, and was as yet relatively unimportant as a method of control, by comparison with what it was later to become.

In 1872 the Cape took control of two tribal areas already annexed to it: British Kaffraria and Basutoland. With each it had inherited a policy on tribal law which for historical reasons were very different from each other. In the years that followed it annexed Griqualand East, Fingoland and the Idutywa Reserve in 1879, set in motion the annexation of Gcalekaland, Thembuland and Emigrant Thembuland, and annexed Griqualand West in 1880. This last territory contained very few Africans apart from the migrant labourers on the diamond fields - only a few Xhosa, Rolong, and part of the Thlaping clan which came under the control of the chief Jantje, who was living in British

Bechuanaland. As it was simply ruled as part of the Cape Colony and African administration in the area was very poorly documented,[1] it has not been included in this study. But the Cape found in the Transkeian territories a new field for experiment in managing tribal societies and the problems it encountered there provide interesting contrasts to the situations in the other two tribal areas it already administered. By 1880 the Cape Parliament had realized the necessity for reviewing its various methods of dealing with the Africans under its control. The report produced by the Cape Native Laws and Customs Commission in 1883 for the first time consciously formulated future policy in the light of its experience in ruling the tribes.

The need for studies of African responses to colonial policies has been stressed by the most recent school of South African historical writing, and an attempt has been made in this dissertation to investigate the effect of tribal law policies on the African societies involved. The difficulty of finding evidence which has not been filtered through missionary, official or settler writing has not in this case been met by taking oral evidence: tribal law has been so altered by legislation in South Africa over the last hundred years that it was felt the effects of early changes and the details of unwritten law as administered by tribal courts a century ago were probably better recorded by contemporary observers. The almost overwhelming amount of material relating to this subject to be found in the Cape, Lesotho, and British official records provides an abundance

---

[1] I am indebted to Inez Sutton for making available to me the extensive research material for her dissertation on this area.

of witnesses, of many political shades of opinion. But any study of this topic can of necessity only touch upon the results of contemporary economic changes on tribal society, and therefore provide only a partial view of the effects of the colonial society. It is hoped that this detailed study of one aspect of the process will assist towards a fuller understanding of the many others involved.

CHAPTER ONE

THE NON-GOVERNMENTAL AGENTS AND MECHANISMS OF CHANGE IN AFRICAN LAW[1]

a. African society and its law

The Bantu-speaking tribes arrived in South Africa as a result of a process of expansion and colonization begun by their forefathers far to the north many centuries earlier. They probably first crossed the Limpopo during the twelfth century and by the eighteenth century were as far south as the Fish River, where they first came into conflict with the Dutch colonists expanding northward from the Cape Colony.[2] The luckless original inhabitants of the area, small yellow-skinned men who belonged to two closely related peoples known to the colonists as 'Hottentots' and 'Bushmen', were slowly pushed north by the colonists and expelled or absorbed by the advancing tribes.

These tribes were divided into various language groups, of which the Cape was to come into contact during the eighteenth and nineteenth centuries with two - the Nguni and the Sotho. The Nguni lived along the eastern coastal corridor

---

[1] This chapter is based on a number of sources apart from those specifically cited, viz: E.H. Ashton, The Basuto (London, 1952); E.H. Brookes, The History of Native Policy in South Africa (Pretoria, 2nd edn., 1927); E. Casalis, The Basutos (London, 1861, translated from Les Bassoutos, Paris, 1859); D.F. Ellenberger, History of the Basuto, Ancient and Modern (rewritten in English by J.C. MacGregor, London, 1912); T.O. Elias, The Nature of African Customary Law (Manchester, 1956); H. Kuper & L. Kuper (eds.), African Law: Adaptation and Development (Berkeley, 1965); R.W. Lee, Introduction to Roman-Dutch Law (Oxford, 1915); J. Lewin, An Outline of Native Law (Cape Town, 4th ed., 1966); I. Schapera (ed.), The Bantu-Speaking Tribes of South Africa (London, 1937); W. Shaw, The Story of my Mission in South-Eastern Africa (London, 1860); J.H. Soga, The South-Eastern Bantu (Johannesburg, 1930); G. Wille, Principles of South African Law (Cape Town, 1937); M. Wilson & L. Thompson (eds.), Oxford History of South Africa (London, 1969); and many of the documents cited in chapters 4, 5, 6 and 7 below.

[2] These colonists were governed by Roman-Dutch law, later to be modified by English law after the Cape became an English colony.

formed by the sea on the one side and the escarpment of the central plateau on the other. They spoke what were virtually dialects of the same language and shared a common culture to a large extent. The Sotho, who had settled on the interior plateau, were more diverse, dividing into the Tswana to the west, the Southern Sotho who moved off to the south-east into what became known as Transorangia and Basutoland, and the Northern Sotho who moved east into what became the central and northern Transvaal. Yet despite these differences, the Nguni and Sotho shared a basically common culture.

> Both were cattle-keepers and cattle meant far more to them than a mere source of food and clothing. Cattle were the only currency in which the dowry validating a marriage could be paid. They were the only acceptable sacrifice on important ritual occasions and their possession was the sign of social status. The cattle enclosure (Kraal)[1] was the centre of every settlement not merely in the physical but also in the social sense. In this area, ritually taboo to women, the men would gather to discuss questions of policy or law. In addition to their herds, however, the two groups also practised agriculture. Millet, the staple crop, with the later addition of maize, was planted mainly by the women, and corn not needed for immediate consumption was stored in covered pits beneath the surface of the cattle enclosure. It was this mixed economy which enabled the Bantu to maintain relatively high population densities and to develop more complex social and political institutions than their predecessors.[2]

Tribes did not usually consist of more than a few thousand members, most of whom would be members of the lineage from which the chief and many of his officials and advisors were drawn. In addition, individuals and families who belonged to other clans would join the tribe and, in return for protection, adopt the ancestors of the chief as their own

---

[1] The term 'kraal' was also used to refer to the whole family settlement.

[2] J.B. Omer-Cooper, The Zulu Aftermath (London, 1966), p. 14.

protectors and his cause as theirs, even where this meant fighting their own clansmen during a war. Nor was the chief only the religious and military leader of his people; he was also civil and judicial head of the tribe: he provided for the needy, his decisions were in theory final in all political matters and his court acted as the ultimate court of appeal from all other courts.

But in practice, except in the rare cases where a chief was in a particularly strong position to manipulate tribal loyalty, patronage and faction rivalries, he was unable to override the customs of the tribe against the will of the people.

> [A chief's] will was tempered, and to a large extent controlled, by a council so weighty and influential that no step of serious tribal importance was taken until the whole matter had been discussed by it at length. If a chief who attempted to change a law or custom[1] did so withoug consulting his councillors and without allowing the change to be publicly and thoroughly canvassed before it was adopted,[2] the possibility would be, if the law were at all objectionable, the disaffected portion of his tribe would withdraw its allegiance from him and transfer it to some subordinate chief of the same clan.[3]

Councillors on such occasions would probably be all the important subordinate chiefs of the tribe - usually close relatives of the chief or related to him by marriage - but

---

[1] There has been a tendency for outside observers to believe that no distinction could be drawn in tribal society between custom and law, but this is inaccurate: laws were customs the breach of which rendered the offender liable to a specific penalty at the discretion of a judicial functionary, while breach of a custom would render an offender liable to abuse, ridicule or ostracism at the worst.

[2] Among the Southern Sotho it was normal before important changes were made to hold a national assembly or pitso of all adult men, where great freedom of speech was allowed.

[3] G.M.B. Whitfield, South African Native Law (Cape Town, 2nd edn., 1948), p. 3.

in daily affairs he would also have a council of confidential advisors to whom he was expected to listen. These advisors, many of whom would be relatives, would be influential men in close touch with their own local section of the tribe. If he went against their advice, he was likely to have trouble, while if he had their agreement and support he could normally be sure his wishes would be respected.

Apart from their other duties, these advisors would assist the chief to judge cases, including appeals, arising from the laws; most cases were heard in the first instance by the lesser chiefs and headmen in their districts, usually with the assistance of the local heads of villages or men of importance.[1] Sub-chiefs had wider jurisdiction than headmen, and some of the more serious crimes could be tried only in a chief's court. Sometimes there would be a hierarchy of sub-chiefs, each responsible to the chief above him, as was for example created by the Basuto system of 'placing'.[2] At the bottom of the pyramid of those in authority were the kraal-heads, who were responsible for all those resident in their kraals, just as each chief was responsible for everyone under him.

Blood feuds between or within families were not allowed as a means of obtaining retribution between members of the same tribe; although self-help was permitted if an offender was caught in the act, criminal cases were always heard in

---

[1] Villages were not common. The Nguni, owing to fairly plentiful water supplies in their territory, tended to live in scattered kraals; the Sotho more often lived in villages.

[2] For a detailed account of the 'placing' system, see G.I. Jones, 'Chiefly Succession in Basutoland' in Succession to High Office, J. Goody (ed.) (Cambridge, 1966).

the courts, and if in civil cases agreement could not be reached by direct discussion between the people concerned,[1] the complainant had to resort to the courts.[2] In his fundamental approach to law and justice as something to be administered by public courts, the tribesman's attitude did not therefore differ a great deal from that of the colonist; nor in most cases were the elements of how a case was conducted very different in tribal as opposed to colonial courts: both heard evidence for the two sides in the case and passed judgment accordingly. But in the details of how each society attempted to reach a just decision, there were great differences. In tribal courts there were no strict rules of evidence or procedure.

> Time was not considered an important element in the trial, which was allowed to drag on until every source of information likely to throw light on the point at issue had been investigated, and until every member of the tribe who felt like it had cross-examined the parties and had made any statement calculated to assist in the elucidation of the matter in dispute.[3]

Even strangers were free to give their opinions and participate in the trial. There were no professional lawyers in tribal society and each party in the case (and his relatives and friends) would put his case. In a criminal case the accused would be repeatedly cross-examined. Women, children, close relatives and spouses were all competent witnesses, hearsay

---

[1] Usually at a special meeting attended by their close relatives and presided over by the offender's kraalhead.

[2] This remedy was not open to him where he was wronged by the senior chief of the tribe, since it was virtually unknown for a chief to be sued in his own court. If, when approached privately, a chief refused to make reparation, the man had no remedy except to transfer his allegiance to another chief, if he could.

[3] Z.K. Matthews, 'Bantu Law and Western Civilization in South Africa: A Study in the Clash of Cultures' (Yale Univ. M.A. thesis 1934), p. 197.

evidence was valid (though it carried less weight), and in most tribes witnesses were present throughout the proceedings. Although evidence was not given on oath, a witness might be challenged to swear an oath at any stage in the proceedings to impress the truth of his evidence upon the court, and would then swear by whatever the tribe held most sacred. However, perjury was not always punished when detected, and it was accepted as a part of litigation tactics that the litigants might use unscrupulous methods. Inability to understand the white man's complicated rules of evidence and procedure was to make for much disillusionment with the white man's justice in future legal contact between the races.

As the law in which they dealt was rooted in established custom, precedents were of the utmost importance. In a society without writing, as tribal society was before the arrival of the white man, most men could perform feats of memory which were most impressive by the standards of a literate society. Precedents had to be carried in men's memories, and old men could quote in great detail cases of a similar nature which had been tried many years before. Although established principles were strictly followed, because of this unwritten state of the law it could be adapted to changing conditions almost imperceptibly. Bold innovations, however, were rare, and as a result of this communal nature of legal settlements and trials, and communal participation in the legislative process, most tribesmen had more than a nodding acquaintance with the law and did not regard it as a set of inexplicable rules.

Once a case had been thoroughly discussed,[1] the chief or headman would deliver his judgment. As the matter had been argued at length, the decision normally gave general satisfaction in the tribe, which would feel that justice had been done. Refusal to carry out a decision of the chief's court (or an order to appear before it) was regarded as treason - a major crime for which in such cases the penalty was confiscation of property and even possibly death. The chief was entitled to keep part of the fine in civil cases in payment for his services, and such payments formed part of his regular income. In addition, as the defendant or accused had to be given notice of the case against him and the date of the hearing, a court messenger would often have been employed, and would also have to be paid from the judgment debt. The same would apply if his services were required to enforce the judgment. The concept of 'costs' was therefore familiar to the tribesman. But since in civil law cases the gainer paid the costs, often a high percentage of what he recovered, the system of law subsequently introduced by colonial magistrates was to prove preferable in this respect.

Chiefs would usually have at least one executive officer, called an induna, who was often deliberately chosen from outside the chief's lineage so that he could not use his considerable power to usurp the chief's position. An important or paramount chief would probably have a number of indunas, of which

---

[1] Even if it was an appeal from a lower court, the whole case would have been heard again in full, with the original judge in addition explaining how he had reached his decision.

the principal one would, among his other duties, receive all cases that came to the chief's court, arrange for them to be heard, and might himself act as judge. Similarly a senior prince might deputise as judge, verdicts in the more serious cases then being referred to the chief for confirmation. He might possibly reduce the sentence or, in cases where the chief himself passed or confirmed the sentence, the man sentenced might ask a senior prince or induna to intercede for him. This method of begging for clemency was to prove effective on occasion with white magistrates too once they arrived on the scene, but Schapera describes another means of obtaining mercy which white magistrates failed to recognize officially, even though there must have been difficulties in practice in arresting offenders who resorted to it:

> In all [tribal] groups there are also recognized places of sanctuary, such as the hut of the chief's mother or the graves of his ancestors, to which men fearing death may flee if they can; their lives are then inviolate, though they may be expelled or punished in some other way, unless they succeed in escaping to another tribe.[1]

In practice though not in formula, a distinction was drawn between civil and criminal offences. Civil offences violated private rights in property arising from personal status, ownership of property or contracts entered into. Remedies available were to obtain either the restoration of the property or compensation for the violation of rights in it. Crimes, on the other hand, were offences against the chief as guardian of the tribe, each member of which 'belonged' to him and could not be injured in person or, sometimes, in reputation.

---

[1] 1. Schapera, Government and Politics in Tribal Societies (London, 1956), p. 81.

Schapera lists as examples breaches of laws made by the chief, witchcraft,[1] incest and often also homicide and other cases of bloodshed, although these last-mentioned were, he records, treated primarily as civil wrongs among the Southern Sotho.[2] Crimes could never be compounded and had to be reported to the nearest local ruler, who saw to the trial of the offender.

As a result of the criterion used in distinguishing between crimes and civil offences, some common offences defined as crimes (offences against society) in European legal systems were regarded in tribal law as offences against the individual only - for example, theft. Punishment for crimes were generally confined to fines paid in livestock.[3] These ranged from a single head of cattle to confiscation of all property (known as 'being eaten up'), according to the nature of the offence, the offender's previous record, and his social status, but food was never included in the sentence of confiscation. As the chief was regarded as the injured party, he alone could claim the fine, although he might make a gift of part of it to the injured man or relatives of a murdered man 'to wipe their tears'.[4] Flogging and banishment were sometimes resorted to in the punishment of less serious crimes, but there were no prisons and the death penalty was

---

[1] Some tribes distinguished between sorcery and witchcraft, but as both were held to involve evil magic, as opposed to that used by doctors and diviners the terms 'witchcraft', 'witches' and 'wizards' are used in this thesis, as they were by contemporary writers and legislators, to include sorcery.

[2] Schapera, Government and Politics, p. 79.

[3] Money was foreign to South African tribal society.

[4] Fines and confiscations formed an important part of a chief's income.

usually reserved for acts regarded as so anti-social as to endanger the community, such as rebellion and witchcraft. In these latter cases, however, ordinary forms of trial procedure were often suspended. Charles Brownlee, the Cape Colony's first secretary for native affairs, has left a description of the fate of men or women accused of witchcraft, for example:

> In all cases when an individual was accused of witchcraft, it was the object of the priest to extort confession of guilt, as well as that the victim should name some accomplice. If these ends were gained, and the supposed charms produced, which might consist of filth, wood, bones, rags, hair, or almost anything else, the accused escaped torture, but was ever after an outcast from society. He generally left the tribe in which he was accused; but at all times after he laboured under suspicion, and was liable to be again accused. Should the accused maintain his innocence, he was stretched on the earth between four stakes driven into the ground, to which his hands and feet were tightly fixed. Various kinds of torture were then applied ... but in some cases even this dreadful torture was heroically borne, and the victim died rather than admit he was guilty, or implicate others. When confession was extorted, death, as a penalty, was only inflicted when chiefs, or persons of note, were said to be the sufferers from witchcraft.[1]

The cattle of people convicted of witchcraft were forfeit to the chief. Because of this forfeiture, witchcraft accusations were often made by the chiefs' witchdoctors against rich men, and were also sometimes used as a way of removing troublesome councillors. But as the causes of illness were not understood, witchcraft was genuinely believed to be responsible for such misfortune. The sickness or death of a chief, for example, almost always resulted in a 'smelling out' of witches and a witchcraft trial.

Although these criminal law provisions existed, they were only a minor part of the law; most men would in the course of their lives be affected only by the civil law, which was rooted

---

[1] C. Brownlee, Reminiscences of Kafir Life and History (Lovedale, 1896), p. 132.

in the institution of the family rather than in that of the tribe. A man's connection with his family determined all his legal relationships - whether or not he was liable for his actions, whether he could sue or be sued, under what conditions he could make a valid contract binding either himself or another, whom he could marry and on what conditions, what he might do with his property during his lifetime or what his kinsmen might do with it after his death. Family law was thus the most highly developed aspect of tribal law and the one which would most affect tribesmen if changed. It was also unfortunately the branch of the law containing most of the concepts that Victorians found offensive in tribal society.

In this society the family was usually formed of all those who came under the legal authority of the head of the settlement or kraal. This was normally a man; women were regarded as perpetual minors and only in exceptional circumstances did a woman become head of a kraal. The kraalhead's authority was reinforced by the belief that he was the direct representative of the ancestors and the mediator between the living and departed members of the family. For a man to cut himself off from the kraalhead was to forfeit the protection of theancestral gods during his lifetime and a place in the family cult, necessary for the well-being of his spirit, after his death. It also ensured him of their anger, for the acts most displeasing to the spirits was neglect or disregard of the customs of the country.

The family members under his power would include not only his wives (for tribal marriage was at least potentially polygamous)[1] and their children, but any of his own younger brothers

[1] There is evidence that in practice many men - a majority in some Cape Nguni areas - had only one wife. See C.W. de Kiewiet, 'Social and Economic Development in Native Tribal Life' in The Cambridge History of the British Empire (Cambridge, 2nd edn., 1963) viii. 839-40.

and those of his father who had not set up their own kraals on marriage, with all their wives and descendants. There might also be some other people who were not necessarily blood relatives but who had lost or abandoned their own natural kraalheads and voluntarily placed themselves under his power. The kraalhead represented everyone in his kraal, making all binding contracts and holding all property in trust for the household,[1] suing and being sued for all kraal members, disposing of the young men and women in marriage, often without regard to their wishes. But in practice the arbitrary exercise of his power would be limited by customary consultation with the senior men of the family, his natural affection for its members, and fear of both public opinion and punishment by the spirits. This meant that in fact, if not theory, there was to a large degree joint ownership and control of property, and a collective responsibility which made the whole kraal liable for the misdeeds and debts of its inmates. Thus among the Cape Nguni if the spoor of stolen animals could be traced to a kraal but not beyond, the whole kraal became liable for compensation if the guilty individual could not be found.

In kraal matters the married men had a good deal of influence, especially in regard to matters affecting their own wives and children and the property attaching specifically to their establishments. A man could only marry and take part in the councils of his community after undergoing the rites of initiation into manhood, which included practices and dances highly objectionable to Victorians. From the point of view of government officials who later were to find

---

[1] Except such personal property as weapons and clothing, which were owned individually.

themselves responsible for enforcing law and order in African communities, the most disturbing feature was that described by the agent with the Thembu, J.C. Warner.

> During the whole time of their initiation, which generally lasts until the Kafir corn crops are reaped, the boys form an entirely separate community; they sleep in one hut and no others are allowed to eat with them. As soon as the soreness occasioned by the act of circumcision has healed, they are, as it were, let loose on society, and exempted from nearly all restraints of law, so that even should they steal and slaughter their neighbours' cattle, they would not be punished; and they have the special privilege of seizing by force - if force be necessary - every unmarried woman they choose, for the purpose of gratifying their passions.[1]

Despite strong government objections to these abakweta or 'white boys' (a name derived from the fact that they were smeared with white clay for the whole period of their separation), initiation played too important a role in the life of an African youth to be suppressed easily.

Despite the fact that among the Sotho and some Nguni, women also underwent initiation, both the Nguni and Sotho regarded even a married woman as a perpetual minor who after marriage came under the guardianship of her husband, with her own family retaining ultimate guardianship. She was also under the general guardianship of the Kraalhead. Each married woman, whether or not a man's only wife, lived in a separate hut, and to each hut of a wife (or 'house'[2]) was allotted livestock and land for cultivation to maintain her

---

[1] J.C. Warner's section in J. Maclean (Compiler), A Compendium of Kafir Laws and Customs (Mount Coke, 1858), p. 98.

[2] A 'house' was the unit of a wife and her children, to whom attached certain property, rights and status. In some tribes a junior wife was not given her own hut until after she had borne a child, and certain wives who were married as 'seed-raisers' or servant wives did not found separate houses.

and her children. To protect these, she could appeal to the kraalhead against her husband's (or his heir's) misuse of this property and, if not satisfied, to the chief himself, despite the normal rule that she could not act for herself in court. No house could be enriched at the expense of another, and the kraalhead was expected to provide marriage-cattle for his sons, wedding outfits for his daughters, and maintenance for his wives and dependants.

Marriages were arranged by the elders of the two kraals involved and could sometimes take many months to arrange. Marriage by elopement was practised to some extent to overcome the opposition of the elders to a particular match, in which case the elders generally acquiesced in the situation but exacted a fine for the elopement as well as the customary marriage payment for the bride. There were very few essential requirements for a marriage to be valid: simply the consent of the contracting parties, though not necessarily of the couple involved, payment or arrangements for payment of the marriage-cattle for the bride (called <u>lobola</u> by the Nguni and <u>bohadi</u> by the Sotho), and the formal handing over of the bride by her family to her husband's family. All other customs associated with the marriage could be omitted without affecting the validity of the marriage, but these three elements were always required to be present. Attacks by the missionaries and government officials in later times on the giving of marriage-cattle were therefore attacks on the basis of African law marriage.

It is important to note that the payment of the marriage-cattle was not regarded as similar to paying for a purchase, and both the Nguni and Xhosa used separate words to denote the handing over of the marriage-cattle and payment for goods. Nor were women regarded as objects: they could not be bought, sold, exchanged or destroyed at will, nor given away. The marriage payment was regarded as security given by the husband for his own good conduct towards his wife, for if she left him because of ill-treatment, he lost his claim for the return of the cattle. It was also to some extent a payment to her father for his consent to the marriage, whereby he lost the services of his daughter and her future children: unless the marriage-cattle were paid, the children generally remained under the power of the woman's family.[1] Finally, it also guaranteed the good behaviour of the wife to some extent, for if she left her husband without just cause, he could claim back the marriage payment. Rather than surrender it, her family would do everything possible to effect a reconciliation. Misunderstanding by missionaries and colonists of the purpose of the marriage payment was to cause much trouble in the future.

In tribal society many court cases arose from the web of debts created by marriage payment obligations. Payment of the cattle did not always take place before the marriage. A man's family would usually provide the cattle for at least his first wife, but these cattle might become available only

---

[1] S.M. Seymour, Native Law in South Africa (Cape Town, 1953), pp. 66, 137, but cf. Cape Parl. Papers, 1873, Appendix III, Special Commission on the Laws and Customs of the Basutos, p. 53: Letsie's evidence, 5 Dec. 1872.

when his sister married and marriage-cattle were received for her. Or if the cattle were not forthcoming from his family, a man might marry on credit, promising to pay all or the balance of the cattle when the first daughter of the marriage was herself married, the marriage-cattle received for her thus in effect paying for her mother. As debts were not wiped out by death, that many years' delay in payment might result from such arrangements was not considered an insuperable obstacle, even if, for example, a daughter was not born of the marriage.

The marriage had the result of transferring the guardianship of the woman from her father to her husband, although her own family retained an ultimate guardianship over her all her life. To many white men this seemed to place her in the position of a slave, but in practice the property on which she depended for food and clothing was well protected,[1] as was her person. In Maclean's Compendium of Kafir Laws and Customs the ways in which her person was protected are clearly outlined:

> Although in theory, perhaps, the power of the husband over the wife is considered absolute in every thing but taking her life; yet in reality there are many checks to his power. His own friends will interfere to prevent his indulging in any great degree of brutality towards her. If he mutilates her, or inflicts any permanent injury on her body, the Chief will demand the "Izizi" or blood atonement. If also she can succeed in running away to her friends, they have a legal right to make an additional demand of cattle to those already paid for her, and to detain her until such demand has been complied with. And if a woman utterly refused to live with her husband, on account of ill usage, there is no law to compel her to do so; and the only remedy he has, is to demand that the dowry be refunded to him; but the law will not support him even in this, if she has borne him a family of children.[2]

---

[1] See p. 19 above.

[2] J. Maclean (Compiler), A Compendium of Kafir Laws and Customs (Mount Coke, 1858), pp. 69-70.

As regards property, apart from the ultimate sanction of protection by the kraalhead, custom, if not law, gave her some control over the property necessary for her survival, although she could not actually own it: any dealing with any property that attached to a house was done by the husband in consultation with the wife in question and her eldest son when he became old enough. In addition, amongst most Nguni tribes a wife did actually have legal control to a large extent over one category of cattle: those given to her on her marriage, usually by her father. As custom ordained that a newly married wife must abstain from the use of meat and milk of her husband's family until she was fully received into the family group - a lengthy and gradual process - she at first had need of her own cow for milk to maintain herself and her children. As long as the wife remained at the husband's kraal, she was entitled to the possession and use of the cow and its increase, and the husband could not part with any of them without her consent. If the marriage was dissolved other than by the woman's death, the husband or his heir was liable to restore them to the woman's family.

By tribal law a marriage might be dissolved for several reasons, some of which did not apply in European legal systems. A husband might obtain a divorce unilaterally by expelling his wife from his kraal with the intention of permanently discarding her (in which case he forfeited the marriage-cattle), or he might divorce her for repudiating the union, as shown, for example, by refusal on her part to

render conjugal rights. If she deserted him without cause, of if he discovered after marriage that prior to marriage she had become pregnant by another man, he could divorce her. Whether barrenness was a valid reason for divorce is unclear.[1] But in contrast to both English and Roman-Dutch law, adultery on the part of the wife, unless it was incestuous or otherwise offended tribal morality, was not normally a sufficient cause for divorce, although the husband could claim damages from the man involved and any child born as a result of the adultery was regarded as the child of the husband. He was also free to punish his wife with a beating, and repeated acts of adultery on the part of the wife entitled the husband to dissolution of the marriage. On the other hand, a woman could claim a dissolution of the marriage[2] if she was grossly ill-treated by her husband, or if he either permanently deserted her or grossly neglected her. Impotence or inability to render conjugal rights on the part of the husband also entitled her to a dissolution, although a more common solution was for the wife to agree to cohabit with some relative as a 'seed-raiser', the children of which union were regarded as the husband's. Persistent accusations by the husband that his wife was practising witchcraft, a very serious charge, were regarded as adequate grounds for divorce, as was incestuous adultery on the part of the husband. In all cases of

---

[1] See Maclean, Compendium, p. 116; S.M. Seymour, Native Law, p. 109; Cape Parl. Papers, G4-83: appendices B & C to the Report of Government Commission on Native Laws and Customs; Casalis, The Basutos, p. 184.

[2] I.e. she could return to her family permanently without necessarily rendering them liable for the return of the marriage-cattle.

dissolution, whether any, part or all of the marriage-cattle, were forfeited depended on the circumstances of the case, including whether there were any children of the marriage.

In addition, the death of the husband did not dissolve the marriage - his widow continued to be a 'wife' of his kraal - and although death of the wife dissolved the union, it did not necessarily end the existence of the house created by the marriage. When a wife died (or even while she was alive in certain circumstances) a husband could marry another wife and place her in the house of the missing wife to 'raise up seed' to that house. Where a wife died after a short time without having borne a reasonable number of children, the husband was entitled under certain conditions to demand a partial refund of the marriage-cattle, but might instead be offered another girl from his deceased wife's family, her younger sister generally going to take her place. The children of such wives were counted as the children of the original wife of the house.

Even odder to strangers to such tribal society was the fact that anything that could be done by a man by way of 'raising seed' for himself during his lifetime could be done for him after his death. Marriage-cattle could be paid out of his estate for a 'seed-raiser', and a man, usually a male relative selected to take his place in the marriage. Even if a son died unmarried, a 'marriage' could be created for the dead man in this way. The reason was at all costs to obtain a male heir. Z.K. Matthews described the beliefs

which gave rise to this practice:

> the man who has no male heir cannot have his name perpetuated in the group to which he belongs; he leaves no one to sacrifice to the ancestral spirits; no one to settle the disputes that will arise out of the distribution of his estate and to act as guardian over his children.[1]

Similarly, a widow was expected to remain with her husband's family to bring up her children, assist with the work and, although she could not be forced to do so, to have further children by some man approved by the family, which would be regarded as the children of her dead husband. If instead she chose to return to her own family, according to the law of most tribes her guardian was liable to return at least part of her dowry. Alternatively, she might be allowed to return to her family without a demand being made for repayment of the marriage-cattle, but in that case she was still regarded as part of her husband's family and, if she married again, the marriage-cattle paid by her new husband went to her deceased husband's heir.

Where the marriage was dissolved, the husband remained the guardian of the children if he had paid marriage-cattle, although if they were too young to be taken from the mother's care she might be allowed to keep them until they were older. The woman was entitled to take from the joint property only her personal belongings. In contrast to English and Roman-Dutch law marriages, tribal law marriages were usually dissolved extra-judicially by agreement between the families of the spouses and outside intervention was required only if

---

[1] Matthews, 'Bantu Law', p. 163.

the families failed to agree, in which case the chief or headman was called in to act as arbitrator. Thereafter a woman's guardian in her own family had a duty to support her, unless she remarried.

Many problems in the marriage laws came to light when inheritance disputes were brought to court. As the South African tribes did not have a knowledge of writing until after the arrival of the missionaries, the making of wills was unknown. However, a man might in the presence of witnesses tell his heir what he wished to be done with his property after his death, and these wishes would be strictly obeyed as long as they did not contradict the tribal law governing intestate succession. These detailed rules on succession varied between the Nguni and Sotho, depending on the methods by which the different houses were ranked, but the general rules were well established by custom. Unlike the Roman-Dutch law of intestate succession, by which the deceased's property was divided between all his children, only men could inherit (with certain exceptions among the Basuto[1]), and the eldest son of a house (or his son, if he were dead) inherited all the property and debts of that house: younger sons who had not yet married would, for example, be provided with marriage-cattle from the property of the house. The heir of the great (or first-ranking) house succeeded to his father's position as kraalhead, with all the rights and duties which that entailed in family and

---

[1] Cape Parl. Papers, 1873, appendix AAA, Special Commission on the Laws and Customs of the Basutos, p. 45: George Moshweshwe's evidence, p. 55: Chief Jobo's evidence. But c.f. Seymour, Native Law, p. 146.

tribal matters. He also inherited not only the property and debts of his house, but also the kraal property and debts, as distinct from those falling to other houses. To a far greater extent than in European legal systems, an heir stepped into his father's shoes, inheriting all his rights and liabilities, past, present and potential, in respect of the family and house of which he was heir: his liability for debts, for example, was not limited by the amount he inherited, and in certain circumstances he was liable for his father's delicts. A further difference to European legal systems was that as a result of the institutions of the levirate and the marriage of 'seed-raisers', the heir could be dispossessed later by an heir not only unborn at the time of his father's death, but unconceived. The position of the women of the kraal was legally unchanged by the death of the kraalhead.

Theoretically these rules applied to chiefs too, but an Nguni chief generally did not marry his great wife until late in life, and her eldest son was therefore often very young when the chief died. In such cases a brother of the chief would usually act as regent and not infrequently usurped the chiefdomship.

It should be noted that land was never inherited by heirs, since it was always held by the chief in trust for the tribe and merely allocated for use by the members of the tribe. It would revert to the chief if abandoned or if the holder died, and could then be reallocated, although it was usually allowed to pass automatically to the heirs of

the deceased. The chief was unable to sell tribal land, but this fact was not always appreciated by white settlers who received what they thought was ownership of the land and what the chief thought was the right of occupation at his pleasure. The tribesman assumed 'that every man had the right to the use of land just as he had a right to breathe the air, and the notion of the exclusive rights of individuals, which could be sold, over land that was neither a building site, nor under cultivation, was foreign.'[1]

A man's position in his family also played a large role in the tribal law governing contracts. As Gluckman explains, in tribal society:

> most of the transactions in which men and women are involved are not specific, single transactions involving the exchange of goods and services between relative strangers. Instead, men and women hold land and other property, and exchange goods and services, as members of a hierarchy of political groups and as kinsfolk or affines. People are linked in transactions with one another because of pre-existing relationships of status between them.[2]

Examples of this were the contracts between the families of spouses about payment of the marriage-cattle, and such contracts as <u>etula</u> and <u>ukukwenzelelele</u>. <u>Etula</u> denoted the obligation of a junior house to refund marriage-cattle taken from a senior house to pay for thewife of the junior house, or, among the Nguni, an obligation of a son to repay his father for the marriage-cattle given for his first wife. In either case repayment is usually promised from the marriage-cattle of

---

[1] M. Wilson, 'Co-operation and Conflict: The Eastern Cape Frontier' in Wilson & Thompson (eds.), <u>Oxford History</u>, pp. 268-9.

[2] M. Gluckman, <u>Politics, Law and Ritual in Tribal Society</u> (Oxford, 1965), pp. 48-49.

the eldest daughter of the marriage for which the cattle was paid. Ukukwenzelelele denotes the obligation to repay contributions made by members of the bridegroom's family to the marriage-cattle for his first wife. However, contracts other than those arising from family law (but still usually linked to tribal status) were also part of tribal law. One of the commonest was that of ngoma (Xhosa) or mafisa (Sotho), whereby cattle or other livestock were given on long loan on condition that the ownership of both them and their increase remained with the lender: the person to whom they were lent had, for example, the use of the cattle for ploughing and the milk of the cows, but could not sell or exchange them. This was frequently used by the chiefs as a form of patronage. As writing was unknown, all contracts were verbal and would be enforced by the tribal courts so long as the parties had had the power to contract and the making of it could be proved to the satisfaction of the court, by means of witnesses or otherwise. Only the kraalhead had full contractual capacity; all other members of the kraal had to be assisted by him if their contracts were to be valid and binding, although he could employ agents.

Tribal law also afforded to the kraalhead redress for the violation of any right representing material value. Thus he had an action for injury to his property or that of the members of the kraal, and also for injury to a woman in so far as his rights in her had been violated. Materially, an unmarried woman represented the potential value of her marriage-cattle, which would be lessened by her seduction; a kraalhead

therefore had a claim to damages against a man who seduced her. Similarly, by payment of marriage-cattle he had obtained exclusive rights to his wife which were violated by a man who committed adultery with her. There was also a civil action for defamation where the defamatory statements imputed witch-craft. However, in contrast to Roman-Dutch law, there was never liability for injury done to property by accident; the injury must have been negligently or intentionally inflicted.

The amount of damages differed in tribal law from English or Roman-Dutch law. Damages were not, of course, claimed in money; the property injured or destroyed had to be replaced. When property was stolen and recovered uninjured, it was merely restored to the owner and no fine was claimable by him, but where it was not recovered, the owner could claim up to ten times the value of the thing stolen. Nor was it illegal to seize by force an article needed as evidence of guilt in an action against him. Failure to understand the white man's attitude to these matters was to make for a great deal of ill-feeling among the tribesmen when white law was imposed upon them.

b. <u>White society and African law</u>

However, even before the white man imposed his laws on Bantu-speaking tribal communities by virtue of conquest or in the name of protection, his society was affecting tribal law in ways which were to gather momentum as the century

progressed. Missionaries and traders were to be the initial bearers of values which were incompatible with tribal society and law as it existed, but behind them lay all the pressures of an individualistic, profit-seeking economy.

Missionaries objected to the whole tribal concept of marriage, the central institution around which the civil law revolved. They brought with them the European view of a marriage as a contract between individuals rather than families which would thus automatically terminate on the death of the individuals and was essentially monogamous. Polygamy, the sororate and levirate, a woman's inability to refuse to marry a man she disliked, tribal attitudes to adultery and seduction, and in most cases the giving of marriage-cattle all met with their extreme disfavour. They were shocked by initiation practices and by the ancestor worship which bolstered the position of the chief and kraalhead, and appalled by witch-craft beliefs and punishments. Their attempts to prevent their converts from participating in any of these institutions or attitudes challenged the authority of the chief and his courts, and affected not only the converted, but also the unconverted, since often only one member of a family became a Christian. This brought the missionaries into conflict with the laws of succession and the perpetual minority of women, as well as the law governing marriage: they tried to prevent converts and the children of converts from coming under the authority of pagan fathers or heirs who might send them to initiation schools or marry them to pagans willing to

pay marriage-cattle. In all such cases, or where converted spouses were obliged by the missionaries to renounce already existing polygamous marriages, the legal and economic rights of the unconverted tribesman were challenged. Moreover, as the chiefs not unnaturally usually opposed missionary efforts to undermine tribal law, the missionaries quite deliberately worked to undermine the chiefs and their courts.

Less obvious but even more insidious in challenging tribal social and legal values were the economic changes brought about by the white society to the south. Contrary to contemporary myths, by the mid-nineteenth century what were to become Cape Nguni tribal territories, and also Southern Sotho territories were overcrowded and overgrazed, and confiscation of land by whites continually aggravated this problem. Tribal herds, never as numerous as the white settlers believed, became increasingly depleted, and marriage-cattle became more and more difficult to find for even one wife. The tribal economy was essentially a subsistence economy in which trade and barter played no significant part. As a result, where family cattle were not available, and a potential father-in-law could not be persuaded to part with his daughter on credit, only the chief's patronage remained to a young man in search of marriage-cattle. But contact with the money economy produced an alternative solution - that of selling the occasional surplus of produce or other goods in demand to traders in return for stock or money. And where poverty did not drive tribesmen into the arms of the trader, the demand for manufactured goods created by the traders (and the

missionaries, insisting on their converts adopting white clothing) soon had the same effect. Although white encroachment continued to make for ever-shrinking tribal lands and diminishing wealth, demand for manufactured goods increased as tribal industries died in the face of competition from European goods. So, even before white administrations took charge in tribal areas and imposed taxation, a second way of obtaining money or stock was being tentatively tried by the tribesmen - that of selling their labour to farmers, which brought them into close contact with the values of the white man. With the coming of white administrations and taxation, the Cattle-Killing of 1857, and the droughts of the sixties, selling his labour and even his cattle often became the only way a tribesman could eat and pay his debts.

But though these means of obtaining goods, cattle, food or tax money helped to solve the tribesman's immediate problems, in the long run they brought about the slow disintegration of his whole way of life. Quite apart from the problems posed for a chief by the arrival of a white administration, his authority over the tribe weakened as men found an alternative source of marriage-cattle. It weakened further where tribesmen were given land on individual tenure or began to buy or hire farms, paying with money, goods, or services, and thereby by-passing his distribution of land. The same applied in the case of the landless class which began to develop, and to these not only the value of the chief altered, but that of the tribal family. Although African farm wage-earners without any rights to grow some crops and keep a little livestock on

the farmer's land were still fairly rare until the last decade of the nineteenth century or later, a few already existed; to such a man a wife became an expensive luxury, not a necessary food-producer, and children a burden until old enough to earn money themselves. To some extent a wife's value diminished in the same way when ploughs, which had to be operated by men, replaced the tribal hoe wielded by women, although she remained necessary as a weeder; and having more than one wife continued to be a status symbol for a long time. Simultaneously, as alien concepts of sale become more common, the attitude to the giving of marriage-cattle altered to equate it increasingly with a sale price for women rather than a binding force between two families for the preservation of a marriage. By 1876 the magistrate at Victoria East was describing it as:

> a custom which of late years has so degenerated, if I be allowed to use such a term, that women are now sold to my certain knowledge in this part of the Colony for actual money, in addition to all kinds of herbivorous quadrupeds.[1]

Increasingly too marriage-cattle were given by an individual, not a family. Traditional responsibilities to one's kinship group began to break down. Although theoretically the earnings of kraal members came under the control of the kraalhead for common use, the growing economic independence of the kraal members and new attitudes of profit-seeking and exploitation acquired through contact with the money economy undermined this principle. Nor law to allow all was it helped by the Cape administration's alteration of tribal /

---

[1] Cape Parl. Papers, G.16-76, p. 76: Nightingale's annual report. There is evidence of this happening in other districts too, e.g. King William's Town. See Cape Archives, 1/TA 4/1, pp. 48-49: Bulana vs. Mfuzwe, 24 Feb. 1879; 1/TA 4/4, p. 96: Jack Ulanu vs. Unkabi.

adults to obtain their majority and freedom from the control of the kraalhead. Variations on the metaphorical lament voiced at a public meeting by a Basuto counsellor in 1875 could be heard throughout the latter part of the nineteenth century:

> My misgivings are these: why am I disowned by my own children? They kick me, and no longer recognize me as their father. I am still complaining of this.[1]

Moreover, often the problems arising from the new economic activities of the tribesmen found no precedent in tribal law and, to protect their individual ownership and other rights foreign to the system, tribesmen were obliged to resort to the Roman-Dutch legal system rather than the informal negotiations of the elders or the chief's court. This further undermined their own legal authorities, and was most noticeable with commercial transactions, where African society could be seen over-rapidly conforming to Maine's dictum that 'the movement of the progressive societies has hitherto been a movement from Status to Contract.'[2]

As tribesmen became peasants or landless labourers in the service of white men, tribal law fell increasingly out of step with their new activities and values. In a purely tribal setting it had arisen naturally out of their ethical beliefs and social organization; the principles of right and wrong it enforced had been recognized as just and obvious, and for that reason had been obeyed. And where temptation existed,

---

[1] Cape Parl. Papers, G.16-76, p. 15: Ramatseatsana's speech at the annual Basutoland pitso, 4 Nov. 1875.

[2] H.S. Maine, Ancient Law (London, 10th edn., 1930), p. 182.

in the close-knit tribal society in which they lived often fear of public derision had been a strong enough deterrent to prevent infringements. As conditions changed however, the law no longer had the same obvious justice nor sanctions for an increasing number of Africans; but nor had the white man's principles of right and wrong, which were imposed on them by the distant administration and sprang from a different set of values derived from very foreign social and economic conditions. What had been an ordered and understood way of life became more and more a struggle to survive against overwhelming economic pressures, the apparent - and often very real - inconsistencies of the white man's governments and agents, and laws which made no sense.

It is against this background of change and disintegration in tribal law that the Cape's policies on it must be viewed. That they greatly aggravated the situation there can be no doubt, but equally it is certain that even had a policy of complete recognition of tribal law been adopted, that law could not have survived as it had been before the arrival of the white man.

CHAPTER TWO

AFRICAN LAW POLICY TILL 1872

The initial policy pursued by the Cape governors after black and white first began to come into collision on the eastern frontier of the Cape in the 1770s was to keep the two races separated as much as possible. But despite the government resorting to a variety of methods to achieve this, contact between the races continued to increase, bringing with it increasing friction. The frontier farmers, hungry for more land, would encroach on tribal lands until fighting broke out; then the superior weapons of British troops, reluctantly sent in by the governors to protect the farmers, would ensure victory over the tribesmen, whose land would be confiscated as a punishment for taking up arms.

By January 1834, when Sir Benjamin D'Urban arrived as governor at the Cape, the frontier had advanced up to the Keiskamma River. D'Urban's instructions were to find a method of protecting the frontier farmers modelled on the use of treaties in India: he was to make treaties with independent chiefs who were to continue to rule under the guidance of British advisors placed with them. But before he had time to implement the new system in full, war broke out. When restoring the peace in May 1835 he chose a more direct form of control than treaties with independent chiefs beyond the border: he proclaimed the land between the Keiskamma and the Kei as Queen Adelaide Province and ordered Colonel Harry Smith to expel the Xhosa beyond the Kei.

The execution of his order, however, proved to be impossible, so in September a treaty was made with the Xhosa within the province, who were to be given locations and 'become subjects of His Majesty, amenable to, and under the direct protection of, the colonial laws and government'.[1] The treaty made it quite clear that Cape criminal law would apply in cases of treason, murder, rape, arson and theft, and that punishing alleged witches was forbidden and would itself be severely punished. But apart from these offences, it was specifically provided that 'English laws do not apply, and will not be applied to or interfere with the domestic and internal regulations of their tribes and families, nor with their customs.'[2] Tribal law was therefore recognized, with certain modifications in what the British classified as criminal law, in the Cape's first African tribal territory, and chiefs were to be appointed as magistrates within their own locations.

The ultimate aim, however, was the imposition of European values and law. This was made clear in the treaties, which provided that ministers, schoolmasters, and, where necessary, English magistrates or residents would be appointed within the Xhosa locations. D'Urban was quite explicit in his despatch of 7 November: the tribal system was to be gradually undermined until the chiefs found that they had no power left to make war and Cape law could easily be imposed.[3] Colonel Smith, who was

---

[1] K.N. Bell and W.P. Morrell (eds.), Select Documents on British Colonial Policy 1830-1860 (London, 1928), p. 459.

[2] Ibid., p. 460.

[3] P.R.O., C.O. 48/162: Treaties (enclosures 5A, 5B, and 8), notes on the treaties of 17 Sept. 1835 (enclosure 6), and confidential memorandum (enclosure 7), encl. in D'Urban to Glenelg, no. 20, 7 Nov. 1835.

entrusted with the enforcement of this policy, was even more explicit in his autobiography.[1] English magistrates were duly appointed and African policemen were allocated to them to enforce their rule. For this purpose they also had the much more effective assistance of the military and of martial law, proclaimed by the governor. Smith directed the magistrates to decide all cased of law themselves, while he acted as final court of appeal and began to discourage polygamy, which he believed led to cattle thefts from the Cape to obtain marriage-cattle. He even suggested that a code of modified tribal law be introduced as the next step to altering the indigenous law.[2] In embryo, therefore, there were already present most of the important features of British and Cape rule as it was to be instituted in Basutoland 22 years later: recognition of modified tribal law; white magistrates exercising judicial power with final appeal going to the government's senior officer in the territory; use of African policemen; and the idea at least of a code of tribal law.

Whether the system would have succeeded is doubtful: as the Basutoland experiment was to show, great tact was necessary to prevent such an arrangement resulting in a revolt, and Colonel Smith was not the man for a delicate job. But as events transpired, the system was not in operation for long. D'Urban had exceeded his instructions in extending British rule over the large new province, and then failed to defend his actions

---

[1] G.C. Moore Smith (ed.), The Autobiography of Lieutenant-General Sir Harry Smith (London, 1903), pp. 430-51.

[2] Brit. Parl. Papers 1837, xliii (503), p. 251; Smith's notes, 18 Apr. 1836, enclosure 16, in D'Urban to Glenelg, 9 June 1836.

adequately either to Lord Glenelg, the new secretary of state in Britain, or to the Colonial Office. Both were left to glean information from missionary and humanitarian sources. Despite opposition from the king and from D'Urban's friends, the humanitarians' objections and, above all, Whig retrenchment policies, led to the decision to abandon the province. D'Urban became demoralized by the government's indication that it intended to pursue this course. To make matters worse, not only did Glenelg disapprove of the proclamation of martial law, but the Cape judges warned that martial law was illegal in a territory which had been annexed to the Cape and thereby brought under the authority of the Cape Supreme Court.[1] As a result, without warning his subordinates, D'Urban revoked the proclamation of martial law on 18 August 1836, to the consternation of both the men charged with ruling the province - Colonel Harry Smith and the newly created lieutenant-governor of the Eastern Districts, Andries Stockenström, who subsequently wrote:

> here I have the control of thousands upon thousands of furious barbarians, and some equally furious white savages, thrown upon me without any system of rule, beyond that which prevailed throughout the Colony; so that Colonel Smith, when he received the proclamation repealing martial law, with truth exclaimed to his Assistant, "the sooner we march out of the province the better, for how am I to eat up a Kaffir according to Blackstone?"[2]

The removal of martial law effectively sealed the fate of the province, and in October D'Urban ordered Stockenström to

---

[1] J.S. Galbraith, Reluctant Empire (Berkeley, 1963), pp. 119-121; W.M. MacMillan, Bantu, Boer, and Briton (London, 2nd edn., 1963). p. 182.

[2] C.W. Hutton (ed.), The Autobiography of the late Sir Andries Stockenstrom, Bart. (Cape Town, 1887), ii. 45.

abandon it. So ended the first experiment in the direct rule of a tribal territory in South Africa.

One part of the 1835 settlement however remained. In the 1820s the disorganized remnants of several Natal tribes broken by Zulu attacks fled to the Pondo, Thembu and Xhosa for shelter, were given cattle under the ngoma system, and became a client class known as Mfengu,[1] meaning 'beggars'. They soon became resentful of their low status resulting from their lack of cattle, and of the fact that the chiefs discouraged them from acquiring any. Nor did the tendency of their host tribes to look down on them for their outlandish pronunciation ease the situation. It was only a short step from there to regarding themselves as an oppressed minority. The arrival of the missionaries preaching a way of life which challenged traditional values provided a channel through which to express their opposition, and many converted. The chiefs naturally opposed this movement and so turned the missionaries into champions of the Mfengu.[2] When, during the 1834-5 war, British troops entered the Transkei, the Mfengu living with the Xhosa begged to be placed under British protection. D'Urban, anxious to weaken the Xhosa, acquire more labour for the colony, and protect these pro-British tribesmen, offered to settle 17,000 of them in territory taken from the Xhosa chiefs

---

[1]Called 'Fingos' or 'Fingoes' by the officials and settlers.

[2]Omer-Cooper, The Zulu Aftermath, pp. 165-6.

after the war round Fort Peddie as a buffer to secure the frontier. The Mfengu accepted his offer, bringing with them to their new territory round Fort Peddie 22,000 of their Xhosa masters' cattle and so laying the foundations of much future bitterness between them and the Xhosa. This was the first large-scale settlement of Africans within the colony proper and had the advantage of being of a group with very few hereditary chiefs. The resident agent therefore had some scope in securing co-operative headmen, although recognized leaders were generally established as headmen. This, together with the extent to which their traditional culture had been undermined by the Zulu wars, and their gratitude at being given land of their own, made them more willing than other South African tribes to submit to colonial law and the foreign ideas it involved. They continued to flourish in their new home even after Queen Adelaide Province was abolished, and subsequently obtained locations in other divisions as well.

To replace the province as a means of safeguarding the frontier farms, a treaty system with independent chiefs was introduced but by 1846 it had broken down, mainly owing to agitation against it by the frontier farmers and traders anxious for access to tribal lands and markets. In 1844 Maitland abrogated the treaties and announced new ones, the terms of which were virtually dictated to the tribes and were a major cause in deciding the Ngqika on war. Ironically, however, one of the clauses which did the most damage was the result of Maitland's piety and missionary advice, rather than of pressure by settlers

and traders:[1] article 20 made a direct attack on the chief's legal powers and the tribal system by providing that tribesmen were to be free from their chief's interference if they wished to convert to Christianity and live near mission stations; they were not to be forced to comply with tribal customs.

In March 1846 war broke out. It proved expensive for Britain and in London Earl Grey, the new secretary of state, sought a solution to the problems of the continually disturbed eastern frontier of the Cape. Once again India was regarded as a suitable model: Sir Henry Pottinger, who had gained a reputation as a British official in the east and was well-versed in the workings of the Indian feudatory states, was sent to the Cape to replace Maitland and to institute a similar system on the Cape frontier. The initial instructions prepared for him by Sir James Stephen, under secretary of the colonial office, were for the establishment of a British protectorate between the Keiskamma and Kei, without the introduction of English law, institutions or settlers.[2] His final instructions were vaguer,[3] no doubt to give him greater discretion until he had seen what conditions were like once the war ended, but they contained much the same ideas:

> If Cafraria or any part of it were to be added to the Cape Colony, the Laws of that Colony would as a necessary consequence extend to it. If it should be erected into a separate Colony, it must have a separate Legislature, upon which must at once devolve the difficult task of

---

[1] Galbraith, Reluctant Empire, p. 170.

[2] P.R.O., C.O. 48/264: draft instructions to Pottinger, n.d., prepared by Stephen, cancelled portion of draft, p. 376.

[3] Ibid., Grey to Pottinger, no. 1, 2 Nov. 1846.

> determining what System of Laws should be there established. As it is moreover a barbarous Country, possessing no Laws under which civilized men could live, it would be impossible as in other conquered Countries, to adopt the laws of the conquered, so that the Laws of the Conquerer, that is the Law of England would have to be taken as the basis on which the Government and Social System of the new Colony must be established.[1]

However, the instructions went on, as English laws and institutions could not successfully be operated by an uncivilized people, it would be best to induce the chiefs and their tribes to acknowledge the queen as the protector of the nation, and to receive a British officer as the commander-in-chief of all their national forces. The chiefs, whose authority should as far as possible be supported, should be made subordinate in civil as well as military affairs to this British officer who would be called commandant of Kaffraria. The instructions did explicitly add that this system of government would be only an interim measure until the tribes had been civilized. Nobody seems to have realized that it was impossible simultaneously to support the chief's power and to attack the tribal system on which it was based.

Pottinger, however, had very little opportunity to establish any frontier policy, as his brief period of office (less than a year) was almost entirely occupied with military problems. His successor, Sir Harry Smith (the Colonal Smith of D'Urban's Queen Adelaide Province), was given the same instructions as Pottinger had received.[2] He arrived as the war ended

---

[1] Ibid.

[2] P.R.O., C.O. 48/279: Grey to Smith, 10 Sept. 1847.

and immediately proclaimed British sovereignty over an area of land between the Keiskamma and Kei, to be known as British Kaffraria. He then proceeded to hold a meeting on 7 January 1848 at which the chiefs swore an oath:

1. To obey the laws and commands of the high commissioner as great chief and representative of the queen of England;
2. To compel their people to do the same;
3. To disbelieve in and cease to tolerate or practice witchcraft in any shape;
4. To prevent the violation of women;
5. To abhor murder, and to put to death every murderer;
6. To make their people honest and peaceable, and never to rob from the colony or from one another;
7. To acknowledge that their lands were held from the queen of England;
8. To acknowledge no chief but the queen of England and her representative;
9. To abolish the sin of buying wives;
10. To listen to the missionaries and make their people do so;
11. On every anniversary of that day to bring to Kingwilliamstown a fat ox in acknowledgment of holding their lands from the queen.

Some of these conditions are subversive of the whole network of Kaffir society, nevertheless the chiefs took the oath in the name of the Great Spirit without any compunction. Few of them had any intention of keeping it. [1]

Smith, however, threatened them with dire consequences if they did not keep faith,[2] and on the basis of their submission proceeded to institute the anomalous system envisaged by his instructions, with many of the features of the 1835 plan incorporated in it.

---

[1] G.M. Theal, History of South Africa since September 1795 (London, 1908), iii. 57.

[2] To make his point, he had a wagon loaded with explosives blown up in front of the chiefs.

To achieve his aims, the tribes were to be allocated reserves by the high commissioner as great chief. Colonel George Mackinnon, a British officer, was appointed to rule British Kaffraria as commandant and chief commissioner, with two civil commissioners under his control stationed with the tribes, Colonel John Maclean and Charles Brownlee, who later became the Cape's first secretary for native affairs. The idea of the commissioners applying tribal law was not entertained, despite Sir Harry Smith's 1836 advocacy of a tribal law code - an omission which can probably be explained by Smith's pre-occupation with affairs in Natal and the Orange River Sovereignty.[1] Instead the territory was ruled by martial law, with the civil commissioners instructed to rule 'through the medium and instrumentality of the chiefs',[2] even though the oath to which the chiefs had sworn and all other instructions to the commissioners indicated an intention to undermine the institution of chieftainship. Thus commissioners were to review the chiefs' judicial decisions (made according to tribal law) to ensure that 'justice and humanity' were observed, even though this would on occasion undermine both tribal law and the chiefs' authority; the commissioners could not, for example, take cognisance of any marriage-cattle claims.[3] Similarly missionaries and traders were encouraged to introduce

---

[1] Brookes, History of Native Policy, p. 87.

[2] Brit. Parl. Papers 1847-8, xliii (969), pp. 40-41: 'Instructions from the High Commissioner to Lt.-Col. Mackinnon ... and Commissioners under his direct control', n.d., encl. in Smith to Grey, no. 17, 4 Jan. 1848.

[3] A.E. du Toit, 'The Cape Frontier: A Study of Native Policy with special Reference to the years 1847-1866', Archives Year Book for South African History, 1954, i. 37.

the tribesmen to European values which undermined the chiefs' authority, and the commissioners themselves increasingly abandoned any attempt to rule through the chiefs;[1] to enforce their orders they had two divisions of African police, and troops were available for emergencies.

To alarm the tribesmen further, just across the border in the newly annexed district of Victoria East they could see the effects of Cape law on tribal life: a large group of Mfengu were settled on government land, for which they paid quit-rent, under appointed headmen but with the Reverend Henry Calderwood and three white superintendents of African locations in charge of them. The superintendents were required to settle petty disputes - by what law was carefully not stipulated - assisted by the headmen. Pagan rites and practices regarded as injurious to morals or offensive to decency were discouraged, and much active encouragement in the form of prizes was given to the adoption of European habits. Smith stated that he intended to introduce the system into all divisions of the Cape in which the Africans showed a disposition to occupy government property.[2] At Wesleyan instigation a tract of land of some 150 square miles on the extreme north eastern border was in fact annexed to the Cape in July 1850 under much the same system, having been declared an African reserve subject to Cape law, with land allocated on payment of quit-rent. It became known as the Wittebergen Reserve. Reports of it would soon have reached the tribes of British Kaffraria.

---

[1] Ibid., pp. 39-40, 56-7.

[2] Brit. Parl. Papers 1850, xxxviii (1288), pp. 1-4: Smith to Grey, no. 2, 15 Mar. 1849, and enclosures; pp. 12-13: Smith to Grey, no. 6, 24 May 1849, and enclosure 1.

These were baffled by the European values with which they were suddenly confronted. Du Toit cites the report in the Grahamstown Journal of 15 January 1848 of the meeting Smith had held on 7 January:

> No great disapprobation [was] expressed until those clauses were referred to which forbade tyranny and injustice towards their women. The prohibition of the purchase of wives with cattle seemed to excite, not anger, but surprise.[1]

Smith's frontal attack on one of the essentials of the legal form of marriage - the giving of marriage-cattle - was certainly his most blatant and potentially far-reaching attack on tribal law, but his attempts to change witchcraft beliefs and punishments would be regarded by most tribesmen as extremely dangerous, and changes in the traditional punishment of murderers required careful explanation before they were likely to be accepted. Even offering tribesmen protection from their chiefs was liable to offend their sense of loyalty to the men who had so recently led them in war, while the chiefs themselves had no illusions about their loss of power as well as revenue when prevented from 'eating up' troublesome subjects; the liberal giving of presents to reward good conduct was inadequate compensation.[2] When drought aggravated the critical land shortage, the mounting discontent among the chiefs and people found expression in a 'prophet' and led to war which in turn led to Smith's recall.

The man sent to replace him was Sir George Cathcart, also an army officer, who brought the war to a conclusion and by

---

[1] Du Toit, 'The Cape Frontier', op. cit., i. 37, footnote 82.

[2] Cape, P.M. 259: memorandum by Brownlee, 7 July 1876, pp. 9-10.

October 1852 was in a position to impose peace terms. His outlook was entirely that of a military man: he simply wished to prevent the tribes from fighting the Cape in another war or, if they did, from fighting effectively; the question of civilizing or converting the tribesmen did not interest him. He proclaimed the country as far as the Kei to be British territory and by 1854 had assigned the tribes locations in British Kaffraria, excluding all but some Mfengu from the easily defended Amatola Mountains; in the Amatola the Mfengu were settled in a crown reserve in which a limited number of whites were also settled for military reasons. He then set about conciliating the chiefs in British Kaffraria, a pre-requisite for preventing a further uprising. Cathcart favoured a policy of genuinely upholding their authority and leaving them to administer tribal law unhindered.[1] He believed that 'through intercourse with Europeans, commerce and education, the gradual work of civilization', the practices most objectionable to Christianity would be removed.[2] Only some Mfengu and Tembu living in the Cape Colony came under colonial law; for the rest, Colonel John Maclean, who had long experience as a British official among the tribesmen, was appointed chief commissioner of British Kaffraria, and the two government commissioners under him were given none of the magisterial powers they had held under Smith, being purely political agents.[3]

---

[1] Brit. Parl. Papers 1852-3, lxvi (1635), p. 226: Cathcart to Newcastle, no. 51, 11 Feb. 1853; P.R.O., C.O. 48/353: Cathcart to Maclean, 29 Mar. 1854, enclosure 3 in Cathcart to Newcastle, no. 22, 15 Apr. 1854.

[2] Brit. Parl. Papers 1854-5, xxxviii (1969), p. 16: Cathcart to Newcastle, no. 5, 13 Sept. 1853.

[3] Cape Parl. Papers, G.4-83, report, p. 16, paragraph 15.

Even cases of witchcraft and smelling out were tolerated, though discouraged verbally, as Maclean felt it was worse than useless to attempt to alter tribal customs when the administration did not have the power to intervene effectively. He even drew up detailed regulations which provided for full recognition of tribal law, with no appeal from the chiefs' courts except in cases which the commissioner of the division found to be repugnant to 'the general principles of humanity'.[1] However, Cathcart's departure prevented their promulgation.

Nor did the formal recognition of tribal law take place, although it should have occurred with the promulgation of the letters patent erecting British Kaffraria into a separate government. Following the precedent set by Natal, formal recognition had been recommended in 1850 by a Privy Council committee to whom the question of the government of British Kaffraria had been referred, and instructions to that effect had been issued. However, the frontier war had intervened, and though the same instructions were repeated in 1854, Cathcart left them for his successor to promulgate. It seems that they never were.

With the arrival of his successor, Sir George Grey, policy on tribal law underwent yet another complete reversal.

> Grey considered it impossible for any people subject to such a system to advance in civilization; he also referred to the apparent anomaly of chiefs in a British possession exercising independent powers and jurisdiction, and deriving a considerable revenue from what might be termed the fines and fees of the Courts of Justice - thus exercising sovereignty by appropriating to their own wants

---

[1] Du Toit, 'The Cape Frontier', op. cit., i. 82, quoting from Cape G.H. 8/3: manuscript entitled 'Regulations and Laws for the Government of British Kaffraria'.

> what should have been a part of the public revenue, and interfering with the prerogative of mercy by preventing the Crown from remitting fines and penalties however justly imposed, and finally, preventing the Crown from throwing over its quiet and well-disposed Kaffir subjects the protection offered by British laws.[1]

He proposed a scheme whereby the number of government officials with the tribes in British Kaffraria should be increased and chiefs and their principal counsellors should receive monthly salaries in place of the fines and fees they had received. Fines and fees imposed in future for all public offences were to become Crown revenue, except in cases of manslaughter, when they were to go to the relatives of the dead man, not the chief as in tribal law. The officials should be given magisterial powers and act as advisers in the trial of all cases, gradually weaning the chiefs from the exercise of criminal jurisdiction. In civil cases too colonial law was 'by imperceptible degrees' to be introduced in place of tribal law.

Grey believed that the prevailing cattle sickness would render the chiefs more amenable than usual to an alteration in their source of revenue, since the normal source of their fines was being reduced. His optimism, however, was not shared by the men on the spot. Maclean replied to Grey's proposals with a list of reasons why they were unlikely to work: apart from practical difficulties he foresaw, he thought that Grey had overestimated the results of the cattle sickness and misunderstood the nature of the Africans' attachment to the institution of chieftainship; they would believe Grey's plan was 'adopted solely for the purpose of destroying it and their independence

---

[1] Du Toit, 'The Cape Frontier', op. cit., i. 94.

together'. They would also regard it as a breach of faith, having been promised by Cathcart that 'the chiefs would in future be allowed to govern their people after their own manner in all cases not repugnant to morality and common humanity'. Brownlee's reply was in a similar vein.[1] But although both Brownlee and Maclean favoured first trying out the new system on the more docile Mfengu and Themba within the Cape's borders, Grey insisted that they sound out the chiefs' reactions to it. After this had been done, the plan was formally laid before them at two meetings, and the Khosa chiefs were then induced individually to accept the proposals.

The British government reacted with cautious optimism to Grey's report of his system, expressing the hope that his bold plan might solve the problem of the Cape's troubled frontier.[2] The chiefs however were very wary of the new system, fearing - with reason - that their authority would be undermined. The chief Sandile objected to magistrates being appointed to his sub-chiefs, as he feared they would regard this as putting them on the same level as himself. Similarly, the question arose as to whether 'salary' payments to counsellors should be through the chiefs, as compensation for the patronage the chiefs had forfeited, or whether the counsellors should be paid directly by the magistrates, to ensure their loyal co-operation with the government. In the end Maclean directed that the latter course be adopted, and this system was subsequently followed in Basuto-land as well. Grey even contemplated instituting the election

---

[1] Brit. Parl. Papers 1856, xlii (2096), pp. 18-19 and 22: Maclean to Grey, 4 Aug. 1855 (enclosure 2) and Brownlee to Maclean, 8 Aug. 1855 (sub-enclosure 2 in enclosure 3), encl. in Grey to Molesworth, no. 9, 18 Dec. 1855.

[2] P.R.O., C.O. 48/368: minutes on Grey to Molesworth, no. 46, 18 Dec. 1855.

of counsellors, but dropped the idea after Maclean pointed out that so foreign a system would arouse great opposition from the chiefs.[1]

During 1856 this system of magisterial justice was extended to the Mfengu living on the Crown reserve in the Amatolas, with Mfengu headmen filling the role played by counsellors in Xhosa areas. And in the rest of British Kaffraria, the locations of the chiefs were divided into districts and sub-districts under salaried headmen and sub-headmen respectively, who had police and administrative duties for which they were responsible to their chiefs and, ultimately, to the special magistrates.[2] This system worked better to some districts than in others, and eventually an African police force was introduced to augment the scheme, another feature which was subsequently followed in the Basutoland system.

During Grey's term of office the allocation of land on individual tenure was introduced for Africans in 1855,[3] when Africans belonging to the Lovedale Mission in the district of Victoria East received grants. Within the next few years surveys were carried out in locations in the Peddie and Fort Beaufort Districts and grants were also made to individual chiefs and their children. A combination of reasons were advanced in favour of individual tenure: it was held to undermine the chiefs, promote better agriculture, and give the Africans security of tenure. But the chiefs not unnaturally opposed it and the common people found it both expensive and strange. As

---

[1] Du Toit, 'The Cape Frontier', op. cit., i. 97.

[2] Cape Parl. Papers, G.4-83, report, p. 17, paragraph 19.

[3] Prior to this, grants for individual tenure had been made to the Khoi of the Kat River Settlement.

a result the majority of Africans, especially pagans, did not take kindly to this unsolicited importation of colonial law into what they regarded as their perfectly adequate tribal system of communal tenure. As Brownlee explained in 1876:

> The heathen natives are still content to hold their land in common, and consider it a reproach cast upon their chief that they should seek to have the ground subdivided and held by individual title.[1]

Between 1853 and 1877 only a small proportion of the titles issued for Africans were taken up,[2] and where chiefs were particularly opposed to them, as in the four locations surveyed in the Peddie District between 1859 and 1869, no titles were taken up at all.[3] Nor did all the chiefs take up titles for even their own individual farms.[4]

How great a part Grey's interference in the traditional tribal social structure played in bringing about the Cattle Killing of 1856 is difficult to determine.[5] In his speech to Parliament of 7 April 1857, he described how effective his magisterial system had been in undermining the power of the chiefs and pointed out:

---

[1] Cape, P.M. 259: memorandum by Brownlee, 7 July 1876, p. 16.

[2] Cape Parl. Papers, G.4-83, appendix F, pp. 367-372.

[3] Ibid., G.16-76, pp. 174-5: Brownlee's annual report. When Brownlee wrote his report in 1876, no titles in those locations had been taken up yet.

[4] E.g., ibid., G.17-78, p. 192: Hemming to Merriman, 26 Nov. 1877.

[5] The Cattle Killing of 1856-7 resulted from prophecies by various Xhosa women and girls that if the people would destroy their corn, cease to plant, and kill their cattle, then on a certain day the ancestors would sweep the white man into the sea and provide plenty for all. Many Xhosa and a few Thembu obeyed. The day first named passed as usual and the excuse was made that by not killing their cattle some men were preventing the ancestors from coming. After the day had been named and proved uneventful several times, vast numbers starved to death and many, emaciated and destitute, sought work in the colony.

> How far what followed sprang from those proceedings I cannot say, for several causes for discontent have been alleged on behalf of the Kafir races.[1]

Certainly lungsickness had taken great toll of tribal cattle and drastic overcrowding of tribal territories aggravated the problem. But the evidence provided by the Cattle Killing of the desperation to which the Africans had been driven by these problems, was not heeded. Grey took advantage of the Cattle Killing to confiscate much of the land held by the rebellious chiefs and to place white settlers on it, thereby finally abandoning the policy of reserving British Kaffraria mainly for the Africans. And Maclean issued new instructions to the magistrates in April 1857 which indicate that the chiefs were considered to have forfeited their judicial powers to the magistrates in criminal cases at least. It is evident that every opportunity was taken by Maclean to break the power of the chiefs, and several leading chiefs and headmen were sentenced to transportation.

However, as the magistrates gained control of the judicial system, steps were taken to ensure that they more rigorously observed judicial procedure and provided a less arbitrary form of justice. Maclean's instructions of April 1857 ordered magistrates to hold preliminary examinations of cases and that the trial of capital offences was to take place before a court of three, composed of the magistrate as president and two co-opted army officers. In addition, particular precautions were to be taken regarding the different classes of witnesses,

---

[1] Cape Parl. Papers, Votes and Proceedings of the House of Assembly, 1857, p. 4: Grey's speech to the Cape Parl., 7 Apr. 1857, paragraph 35.

Christian as well as heathen.[1] In October 1857 a criminal court of five members was set up to try serious crimes within British Kaffraria (although British subjects could still be tried by the Cape courts if it was deemed expedient to do so), and the special courts set up under martial law fell into disuse. But the magistrates' discretion in trying cases still far outran their training and no doubt led to many mistakes and injustices. As the attorney general wrote to the secretary for Kaffrarian affairs:

> I feel of course the difficulty in which the Resident Magistrate of British Kaffraria is placed by being forced to exercise an absolutely unlimited jurisdiction. It is a great hardship upon this gentleman to be obliged, sitting singly, without a bar, without a professional education, and without a salary at all adequate to the responsibility cast upon him, to decide cases involving the nicest questions of law and fact, and, it may be, large amounts of money.[2]

To assist these officials Maclean compiled a handbook on tribal law which consisted mainly of notes by the Reverend H.H. Dugmore, J.C. Warner, agent with the Thembu, and Charles Brownlee, with additional miscellaneous information. As none of the contributors had legal training, the wording was often vague and some important topics were not covered; but although incomplete and occasionally contradictory, it was the only guide to the tribal law of the Ciskei until the report of the 1883 commission on tribal law was published, and therefore much used.

While the magistrates tightened their control over the tribes in British Kaffraria between 1854 and 1859, further European concepts and institutions were making their appearance

---

[1] Du Toit, 'The Cape Frontier', op. cit., i. 102.

[2] Cape, G.H. 17/2: Porter to Travers, 14 Jan. 1860.

in the area and indirectly affecting African attitudes to their laws and customs. Not only were roads being built and an African hospital and schools being established, but new land regulations for British Kaffraria were introduced in 1858 which allowed Africans to buy a minimum of ten acres of land at £1 per acre. That land could be bought was an even more foreign idea to tribal land law than that it could be granted by the government, but was believed by Maclean to be of similar political importance in making the tribesmen independent of their chiefs and giving them a vested interest in maintaining peace. The chiefs were not slow to realize the significance of the move and opposed the purchase of land by their people.[1] In the same year Africans in many areas were moved into villages, and taxes on both huts[2] and certain live-stock were introduced. The income soon covered all the expenses of Grey's system of payments to chiefs, headmen and counsellors, as well as magistrates' salaries. Grey was thus able to argue that his system of civilizing British Kaffraria was no more expensive to the British Treasury than Cathcart's system of completely accepting the tribal system and recognizing tribal law.

In the Cape Colony proper the practice existed of officially applying unmodified colonial law to all tribes irrespective of whether they had been brought within the Cape's boundaries at their own request or, as with the Thembu near Queenstown, without

---

[1] Cape Parl. Papers, G.12-77, pp. 174-5.

[2] Natal had first used a hut tax in 1849 and no doubt gave Grey the idea.

their consent. Warner, the agent with the Thembu in the colony, had warned against this from the beginning, pointing out in 1855 that such action would probably jeopardize the peace of the frontier.[1] After the Cattle Killing, disillusionment with the chiefs led to many Thembu bringing their cases to him, which he settled according to tribal law.[2] But when he did try to impose Cape colonial law in 1858 and arrested a celebrated rainmaker, the attorney-general refused to prosecute on the grounds that the man might sincerely believe that he could bring down rain.[3] An irritated Warner pointed out the difficulties of his position and those of the Thembu, who in practice lived as an independent tribe ruled by their chiefs, while in theory standing on exactly the same footing as other colonial subjects, over whom neither their chiefs nor the political agent had any judicial authority.[4] He urged that the actual position be legalized by the introduction of a form of law combining tribal and Cape legal principles. A bill was laid before Parliament to exempt the Thembu from Cape law, but the lower house threw it out. Warner therefore continued to exercise his illegal powers with the full support of the authorities, though not the judges, who reversed his decision when a case was taken to them on appeal and cautioned him

---

[1] Cape Parl. Papers, A.40-58, p. 1: Warner to (?) Southey, 19 Jan. 1858.

[2] Ibid., p. 2.

[3] Ibid., p. 3: Warner to Southey, 30 Mar. 1858; p. 6: remarks and instructions of the attorney-general.

[4] Ibid., pp. 6-7: Warner to Southey, 6 April, 1858.

against applying tribal law to people resident in the colony.[1] To enable the Thembu to continue under tribal law, Warner eventually took part of the tribe out of the colony.

Similarly, in the Wittenberg Reserve Austen applied a mixture of Cape and tribal law, which landed him in difficulties when petitions to Parliament against his decisions led to awkward questions by the opposition and his hasty transfer from the reserve.[2] Even in the Mfengu locations the superintendents usually applied tribal law to some extent, acting through the headmen.

By the latter part of 1859 the tribesmen were beginning to recover from the devastating effects of the Cattle Killing and to voice objections to the white man's rule. The Mfengu disliked being forced into villages and in the Fort Beddie District, as mentioned above,[3] refused to take up their titles in four locations which had been surveyed. The Thembu living in the Queen's Town District were reacting strongly against the imposition of colonial law, and most were even willing to abandon their land and move into the Transkei to avoid it and preserve their chieftainship.[4] Nor did those unwilling to move accept colonial law; they simply did not believe that it would be enforced. As Warner reported:

> the Leader of those who oppose this removal is the Notorious Chief Gwesha, who is noted for his hatred of the "white man" and for his determined opposition to the restraints of Colonial Law. Nor do the arguments made use of by his party indicate any inclination

---

[1] A. Wilmot, The Life and Times of Sir Richard Southey (London, 1904), p. 375: appendix F.

[2] Cape, G.H. 14/7: Wodehouse to Bowker (private), 4 Jan. 1870.

[3] See p. 55 above.

[4] P.R.O., C.O. 48/402: Wynyard to Newcastle, no. 44, 10 Mar. 1860, and enclosed reports by Warner, 14 Feb. 1860, and Edye, 11 and 14 Feb. 1860; Warner to Southey, 19 Mar. 1860, encl. in Wynyard to Newcastle no. D59a, 2 Apr. 1860.

> to submit thereto; but on the contrary, they are such as breathe a spirit of hostility to us.
>
> They say it will be time enough to move when they find Colonial Law forced upon them beyond what they are willing to submit to.[1]

While in British Kaffraria, where colonial law was being at least partially enforced under martial law,[2] Maclean noted that the chiefs were beginning 'to feel the pressure of the authority of their Magistrates' and were inciting opposition to the government.[3]

It was in this atmosphere that on 26 October 1860 a proclamation was issued making British Kaffraria into a separate dependency of the Crown under Maclean as lieutenant-governor, and bringing it in all matters under the operation of ordinary, rather than martial, law. An attorney general was appointed and a supreme court established in November 1861, with trial by jury for those criminal cases which came before it. The governor was empowered to proclaim acts of the Cape Parliament as law in British Kaffraria, but for the rest all proclamations and regulations previously issued for the territory continued in force - a formula later adopted for Basutoland.

The process of imposing colonial law and values in the dependency was taken a step further in 1862 when, at the instigation of the missionary conference,[4] Maclean ordered the magistrates to refuse to entertain cases arising from marriage-cattle claims.

---

[1] Ibid.

[2] E.g., the death sentence was given for murder, including infanticide. See Cape, G.H. 17/2: Porter to Travers, 10 Jan. 1860.

[3] P.R.O., C.O. 48/402: secret service information enclosed in report by Maclean, no. 18, 25 Mar. 1860, encl. in Wynyard to Newcastle, no. 59a, 2 Apr. 1860.

[4] Du Toit, 'The Cape Frontier', op. cit., i. 166, footnote 12.

But this was reckoning without Wodehouse, who had become governor that year. At his insistence, the circular was withdrawn and the matter submitted to Newcastle, the secretary of state.[1] Wodehouse's letter outlining the problem and the reply he received illustrate not only Wodehouse's own liberal views; they also indicate why during the three remaining years of direct British rule in British Kaffraria the magistrates' courts were left free to administer as much tribal law as each magistrate thought legal. Wodehouse argued that not only were the Africans so attached to the custom of giving marriage-cattle that suppression of it might lead to trouble, but also that it was not a particularly vicious custom. 'It is easy', he wrote, 'to call it by hard names, and to excite an undue prejudice against it; but it is quite in conformity with the usages of the world in all ages and under all religious dispensations.' After arguing this in detail, he continued with the legal argument that once British Kaffraria had acquired regularly constituted courts of law, the executive could no longer dictate to magistrates what classes of complaint they might entertain.

> That was a question which it then became the duty of each Magistrate to decide for himself, to the best of his ability according to the law of the land and subject to the revision of the Supreme Court. A general direction from the Government to the Magistrates to refuse a hearing to any party complaining of a specific grievance, amounts in my opinion to virtual legislation, for the purpose of depriving that party of a right that he was previously assumed to possess. And I fear that if a dismissal of any such complaint were carried in review before the Supreme Court, and the Magistrate were to justify it by the order of the Government, it might become the duty of the Judge to make such comments on the case as might prove exceedingly inconvenient.

---

[1] P.R.O., C.O. 48/414: Wodehouse to Newcastle, no. 152, 12 Sept. 1862.

Newcastle agreed, adding that Wodehouse might also have pointed out to Maclean

> that in virtually interfering with a Native Custom, he had contravened the Royal Instruction which preserves the Laws, customs, or usages prevailing amongst the Natives, except so far as they may be repugnant to the general principles of humanity recognized throughout the whole civilized world, & the power of amending any such laws & for providing for the better administration of Justice among the Natives, as may be found practicable, is reserved to the Crown.[1]

The magistrates' courts continued to hear cases arising from marriage-cattle claims.

Within the colony certain aspects of tribal law also gained legal recognition, but proved rather a mixed blessing. The principle of collective responsibility for cattle theft was embodied in the Cattle Thefts Repression Act of 1864 and welcomed by the farmers in the hope that it would reduce losses suffered from cattle thefts. The act did not legalize the African law principle of collective responsibility, but prevented any action or appeal against decisions based on this principle. This resulted, in some districts at least, in severe deterrent punishments, such as those described by Warner to the Native Affairs Commission of 1865: he explained that while a convicted stock thief was punished with imprisonment with hard labour according to colonial law, if his kraal was also morally and, according to African but not colonial law, legally certain to have had knowledge of the theft, the inhabitants were also fined according to tribal law.[2] Since in tribal law conviction would have resulted in the fine only, to African eyes this would have been double

---

[1] P.R.O., C.O. 48/414: final draft of reply of Newcastle to Wodehouse, 11 Nov. 1862.

[2] Cape Parl. Papers, 1865, Commission on Native Affairs, evidence, pp. 80-81, answers 812-817; Cape, N.A. 294: report of the select committee appointed to consider and report on thefts of stock, paper submitted by J.M. Orpen, 13 May 1873.

punishment for the same offence.

The same year the Native Succession Act belatedly legalized the tribal law system of inheritance, though not, according to subsequent judicial interpretations, the validity of the marriages on which it was based. Nor did it apply to land held under individual tenure. However, even with these limitations the colonists were considerably less pleased with recognition being given to that part of tribal law, and the 1865 Cape Commission on Native Affairs commented:

> The Act of last session on the Native Law of Inheritance has met with almost universal disapproval. The whole evidence goes to show that the tendency to legalise native custom in this matter, will be to retard the progress of civilization, and to perpetuate some of the very worst features of heathenism.[1]

Despite such condemnation, in September 1864 an ordinance was drafted for British Kaffraria - by the governor himself - with a similar aim: in addition it recognized marriages by tribal law. Such legislation was quite as necessary in British Kaffraria as in the Cape itself, since the problem of what to do with the estates of white settlers had led to the extension to the territory in 1861 of the Cape's Roman-Dutch law on marriage and inheritance. It was only by turning a blind eye to African estates that officials in British Kaffraria had been able to prevent the African property system being reduced to complete chaos. But the new ordinance, in addition to recognizing tribal law marriages, also made provision for those tribesmen who had married according to Cape law, and declared invalid subsequent

---

[1] Cape Parl. Papers, 1865, report, p. xxv. There are a few interesting exceptions to this general condemnation, such as Brownlee's written evidence, appendix i, p. 12, and Tainton's reply to the circular, appendix i, p. 91.

tribal law marriages where a wife by an earlier colonial law marriage was still alive. This safeguard was welcomed by some missionaries as an improvement on the Cape Native Succession Act, which was then believed to have recognized tribal law marriages. Like the act, the ordinance did not apply to land, since tribal law made no provision for land being inherited by individuals. As individual tenure became more common, the existence of this legislation was to cause much confusion and delay in administering the estates of land owners.[1]

The following year, at the insistence of the British government, the Cape legislature reluctantly annexed British Kaffraria. In its anxiety to be rid of the expense of administering British Kaffraria, the British government does not seem to have shown Newcastle's earlier concern not to trample on African customs. It is possible that the full legal effect of annexation was not realized at the time. No provision was made for separate legislation for the territory, but laws and ordinances in force at the time of annexation were to remain so until repealed, unless repugnant to Cape legislation.[2] Unfortunately most tribal law was regarded as repugnant to colonial law, as became evident over the years as cases were taken to the Supreme Court. By 1875 the Cape Native Succession Ordinance was the only law peculiar to the territory.[3] By Ordinance 11 of 1865 British Kaffraria was divided into the two magisterial

---

[1] E.g. Cape Parl. Papers, G.17-78, p. 49; G.33-79, p. 183.

[2] H. Tennant and E. Jackson (eds.), Statutes of the Cape of Good Hope, 1652-1895 (Cape Town, 1895), i. 962: Act 3 of 1863, section 12.

[3] P.R.O., C.O. 879/9: African Confidential Print 98, p. 3.

districts of King William's Town and East London, but with the special magistrates, who fell under the new King William's Town District, remaining with the tribes in what was then a distinctly anomalous position. Appeals from the resident magistrates' courts went to the Eastern District Court of two judges set up in Grahamstown in 1864. From there a further appeal lay to the Supreme Court in Cape Town.[1] The annexation came into effect in April 1865.

This was the legal position when the question of giving the Cape Responsible Government became urgent several years later. Whether the colonists should be given this privilege, including control of the Africans within their borders, was much argued.[2] Some, such as Wodehouse and Earl Grey, feared that the colonists would legislate in favour of their own interests and prejudices, entirely ignoring the interests of the Africans. It was also argued that African policy would become a party matter, subject to change every time ministers changed and highly unsettling for the African population. But the new governor, Barkly, argued that, being responsible for their own defence once they were given Responsible Government, the colonists would be careful not to resort to racial and frontier policies which would push the Africans into war or revolt; and even the leading liberal, Saul Solomon, believed that 'the sense of justice of the colonists as well as the numbers and power of the natives would prevent oppression.'[3] Moreover,

---

[1] Act 21 of 1864 and Act 3 of 1865.

[2] For a summary of the arguments, see D.C. Saunders, 'The Annexation of the Transkeian Territories (1872-1895) with special reference to British and Cape policy' (Oxford Univ. D.Phil. thesis 1972), pp. 87-96.

[3] Cape Argus, 30 May 1872 (debate of 27 May), quoted in Saunders, 'The Annexation', p. 95.

many parliamentarians argued that African administration would be kept out of the arena of party politics. These optimistic assertions were to be proved wrong within the next ten years, not least in the field of policies on African law.

CHAPTER THREE

THE AGENTS AND MECHANISMS OF MAKING TRIBAL LAW POLICY [1]

When in 1872 the Cape Colony acquired a responsible ministry, it undertook for the first time the responsibility of administering the affairs of the Africans living both within and beyond its borders. To do this a Department of Native Affairs was set up and a secretary for native affairs appointed from 1 December 1872 as the minister responsible to the Cape Parliament for the department.[2] However, Responsible Government did not give the Cape complete self-government. Through the governor, the imperial government retained the power to prevent the Cape Colony from operating in opposition to imperial interests; although in theory the governor was to act on the advice of his responsible advisers, in practice he was in the anomalous position of remaining ultimately responsible to the British secretary of state for the colonies.

The governor, however, was also the British government's agent responsible for extra-colonial affairs in South Africa - termed the high commissioner. As high commissioner his position was theoretically clearer: Responsible Government in the Cape did not affect his extra-colonial powers. But in practice it proved virtually impossible to separate the problems of the frontier within and beyond the colony and, acting on the instructions of Lord Kimberley, the governor announced that he

---

[1] I am indebted to Dr. C. Saunders for the loan of his B.A. Hons. thesis, which was especially useful for this chapter: C.C. Saunders, 'The Cape Native Affairs Department and African Administration on the Eastern Frontier under the Moltero Ministry, 1872-78' (Cape Town Univ. B.A. Hons. thesis 1964).

[2] The establishment of a Native Affairs Department and the appointment of an official in charge of it had been recommended by the Commission on Native Affairs, 1865, proceedings, p. xxvi.

would act only on the advice of the Cape ministers.[1] Although this policy was later countermanded by Lord Carnarvon, Kimberley's successor,[2] a precedent had been established which led to trouble when a governor later attempted to assert his right to independent action as a high commissioner.[3]

Initially, therefore, the most influential figure in determining the government's policies on African affairs was the secretary for native affairs. That this policy-making role was not shared more by the prime minister, John Charles Molteno, and the other members of the five man cabinet was largely a result of the expertise of the first man appointed to hold the office. Charles Pacalt Brownlee, who took office on 2 December, was appointed for his outstanding knowledge of African affairs rather than his political influence. Born in 1821,[4] the eldest son of a missionary of the London Missionary Society to the Ngqika, he grew up amongst the Africans on his father's mission stations until 1835, when the family had to flee to escape an attack by tribesmen during the frontier war.

---

[1] Cape, G.H. 31/13: Barkly to Carnarvon, no. 33, 27 Mar. 1876, quoted in P. Lewsen, 'The First Crisis in Responsible Government in the Cape Colony', Archives Year Book for South African History, 1942, ii. 234. The governor-high commissioner was paid from colonial revenues, which gave Cape parliamentarians a reason for querying his actions. See C.O. 48/510 (Treasury): Cole to Herbert, 29 Jan. 1884, and minute by Fairfield, 10 May 1889.

[2] Lewsen, 'The First Crisis', op. cit., ii. 234.

[3] For an account of the way in which it led to the dismissal of the Molteno ministry, see J.A. Benyon, 'Basutoland and the High Commission with particular reference to the years 1868-1884: the changing nature of the Imperial Government's "special responsibility" for the territory', Oxford Univ. D.Phil. thesis 1968, pp. 326-42.

[4] There is some confusion about the date of his birth, but he himself gives this date. See C. Brownlee, Reminiscences of Kafir Life and History (Lovedale, 1896), p. 347. For the following details, see ibid., pp. 2-12.

He then spent three years in Natal as interpreter for a party of American missionaries and returned to farm on the eastern frontier of the Cape until the 1846 frontier war, in which he participated. At the end of 1846 he was appointed clerk to the Ngqika commissioner and a year later was replaced by his younger brother, James, while he himself became Ngqika commissioner, stationed at Fort Cox as British agent to Sandile until the chief was deposed. War ensued after the tribe refused to accept Brownlee as a substitute for Sandile, James was killed, and Charles Brownlee spent six months in command of a levy of Mfengu at Fort Peddie; but in 1853 he assisted Cathcart in ending the war by negotiating with the chiefs, and was restored as Ngqika commissioner, with his brother-in-law this time as his clerk. In 1867 his post was abolished as part of Wodehouse's retrenchment policy, and in May he was appointed civil commissioner and resident magistrate in Somerset West. In 1871 he was promoted to King William's Town, taking up his post early the following year. In 1872 he was therefore almost uniquely experienced in African customs and administration, and had great influence with many of the more important chiefs. James Rose Innes, son of the under-secretary for native affairs and later chief justice of South Africa, who served as a clerk in the Native Affairs Department under Brownlee, wrote that the secret of his influence with Africans was their belief in his character 'as a just man who told them the truth however unpalatable, but who genuinely sympathised with their race.'[1]

---

[1] B.A. Tindall (ed.), James Rose Innes - Autobiography (London, 1949), p. 23.

His knowledge of the Xhosa language and tribal law was excellent[1] - he contributed a detailed and accurate section to Maclean's Compendium of Kafir Laws and Customs, which served as a handbook for magistrates throughout the period under discussion - though he occasionally fell into the trap of attributing Xhosa customs to all tribes.[2] But not many men were in a position to challenge Brownlee's rare mistakes of this kind, and his expert opinion carried great weight. His influence was also enhanced by the fact that, as the Cape increased the area under its control, it was his department which undertook the government of these areas, since they were inhabited almost entirely by Africans. As a result, the personnel under its direction increased rapidly and was further augmented by a new category of Native Affairs Department officials within the colony.

Despite these advantages, Brownlee was not in a position to dictate policy on African affairs to his parliamentary or cabinet colleagues. Stanford, who was later to become permanent head of the Native Affairs Department and who got to know Brownlee well in 1876 when acting as his interpreter and companion during a visit to the frontier and Transkei, described him as 'the big-hearted Minister' and 'the essence of kindliness towards all',[3] but this quality could be more of a hindrance

---

[1] Although he usually used an interpreter when colonists attended his meetings. See J.W. Macquarrie (ed.), The Reminiscences of Sir Walter Stanford (Cape Town, 1958), i. 70.

[2] E.g., in his report in the Cape Native Blue Book for 1875 Brownlee attributed to the Basuto as well as the Xhosa a prohibition on marriage between cousins. In fact the Basuto regarded marriages between cousins as highly desirable. See Cape Parl. Papers, Appendix ii, A6-79, p. xl-xlii: appendix D.

[3] Macquarrie, Reminiscences, i. 70.

than an asset in politics. When appointed, Brownlee was without parliamentary experience and was described as 'better qualified to conduct an indaba across the Kei than to make an impression on the House'.[1] Nor does his undoubted expertise appear to have withered opposition even at close quarters in cabinet meetings and cabinet minutes, especially after J.X. Merriman's appointment to a ministerial post in 1875.[2] Merriman, who had a scathing tongue, had no respect for Brownlee or his policies, and during the 1877-8 war in particular the two men clashed frequently.

Brownlee was also sometimes accused of nepotism, with some justification it seems.[3] The large number of his family in influential Native Affairs Department posts may be explicable on the basis of superior qualifications derived from their missionary background[4] - and Brownlee's own early experience of appointments was not likely to leave him feeling that there was anything wrong in appointing members of his family if they had proper qualifications - but there is some evidence that he would unjustifiably protect members of his family even when one proved incompetent. His brother-in-law, T.A. Cumming, who

---

[1] J.H. Hofmeyr, The Life of Jan Hendrik Hofmeyr (Cape Town, 1913), p. 121.

[2] E.g. P. Lewsen (ed.), Selections from the Correspondence of J.X. Merriman, 1870-1890 (Cape Town, 1960), p. 43, footnote 45; Cape, N.A. 399: minutes by cabinet members on report by L. Marquard, 25 Oct. 1876: Rhodes House, MSS. Afr. s.23 (Molteno Papers), ii. 203: Merriman to Molteno (private), 22 Sept. 1876; Jagger Library, University of Cape Town, Stanford Papers, F(c)1: A. Stanford to W.G. Stanford, 24 Sept. 1877.

[3] Lewsen, Selections, pp. 42-3.

[4] See p. 85 below.

was also the son of a missionary, was in charge of the Idutywa Reserve when Brownlee took office. When shortly after this a commission appointed before the advent of Responsible Government reported, severely criticising Cumming for lack of judgment, impartiality and firmness, the report was never published and Cumming remained at his post. Later, similar representations from a special commissioner appointed to report on the Transkei had no effect either. It was only after a display of 'incredible supineness' convinced the new governor in 1877 that Cumming 'was quite unfitted for such a post', that he was removed. This protection, and Brownlee's entourage of brothers-in-law when visiting the Transkei aroused much resentment among the magistrates under him.[1]

The member of the cabinet who next to the secretary for native affairs had the greatest influence on tribal law policy was the attorney general. Questions were constantly being referred to him by the Native Affairs Department, as the correspondence files show, and on occasion he could give rulings which greatly altered some facet of tribal law for some or even all districts. In 1879, for example, Driver, the special magistrate at Glen Grey, mentioned to Ayliff, Brownlee's successor, during the latter's visit to the district, that under the Native Succession Act cases occasionally came before him which required him to treat children as if they were

---

[1] Jagger Library, University of Cape Town, Judge Papers, handwritten copy of the commission's report, 30 Dec. 1872; II 40: Tainton to Judge, 12 Feb. 1873; II 34: E.B. Chalmers to Judge, 19 Feb. 1873; II 38: W.D. Fynn to Judge, 14 Mar. 1873; II 39: Edmonstone to Judge, 20 Aug. 1873; II 43: Blyth to Judge, 16 Feb. 1874; Rhodes House, MSS. Afr. s.23, ii. 135: Probart to Molteno, 13 Jan. 1876; Brit. Parl. Papers 1878, lv (Col. 961), p. 93: Frere to Carnarvon, 25 Sept. 1877.

'part and parcel of a man's goods and chattels'.[1] Ayliff suggested that Driver send him particulars 'for consideration with a view, if necessary, to future Legislation on the subject.'[2] Driver sent the court record of a common type of case in which a widow had elected to return to her family after her husband's death, taking her young children with her, and the husband's family had brought a claim for the return of the children. By the local tribal law the husband's family had a right to receive back either the children or the marriage cattle given for their mother. The woman's family in the case in question had been prepared to return the children provided that the interim cost of maintenance was paid, Driver had therefore given a perfectly adequate judgment according to tribal law for the return of the children (not necessarily immediately) on payment of the interim costs. However, the papers were sent to the attorney general, and his opinion changed the future interpretation by Driver at least[3] of the Native Succession Act in a way no doubt highly confusing to the Africans:

> I am clearly of opinion that children are not property within the meaning of that word in Act No. 18 of 1864. Property in that enactment means ordinary movables or immovable property and does not include human beings which would be wholly repugnant to the policy of the Colonial law.[4]

He went on to indicate that the question of the children would have to be decided by colonial law relating to guardianship

---

[1] Cape, N.A. 180: Driver to Ayliff, 18 Sept. 1879.

[2] Ibid.

[3] There is no indication of whether this ruling was sent to other magistrates besides Driver.

[4] Cape, N.A. 180: opinion from attorney general, 10 Mar. 1880.

and custody, which was outside the competence of the magistrate's courts - and usually of the Africans' pockets.

Other departments of the government also affected tribal law policies, though much more indirectly. On the Treasury depended to some extent the number and quality of officials available to implement government policy; on the Department of Crown Lands depended the number of locations which could actually be surveyed and made available for grants under individual tenure; and the amount of assistance which the Department of Education was willing to render to schools in African territories to some extent determined how much the Native Affairs Department could look to 'civilizing agencies' rather than more forceful means of weaning Africans from their customs. Unfortunately the Native Affairs Department was consistently starved of funds[1] and surveys of locations would be stopped when a shortage of surveyors occurred within the colony. But the Education Department acted on the principle of giving 'liberal encouragement to early efforts in the direction of education, in the hope and expectation that as the advantages of instruction became more evident to the people, they would be prepared to contribute more liberally to the support of schools.'[2] In practice this meant that where the population consisted almost entirely of Africans, aid was given so long as it was requested, a schoolhouse was provided, and some contribution was made towards the support of a teacher.

---

[1] This had an unfortunate effect upon the quality of magistrates available for appointment. See pp. 86-87 below.

[2] Cape, N.A. 295 (Education): Cameron to Ayliff, 11 July 1878.

As Africans in all areas showed a keen interest in education, pagans usually only a little less so than Christians,[1] this policy meant that schools soon existed in all districts in the colony, and were slowly established in the Transkei, though often teaching only a tiny percentage of the children in the district. Grants were also given to missionary schools and proved of particular benefit in Basutoland, where all the schools were run by missionaries. An attempt was made to institute a government educational system there, as although many pagans wanted education for their children, they feared to send them to missionary schools in case they were converted; but the new inspector of schools on his initial tour of the country showed himself to be strongly in favour of religious education even in government schools, and aroused such overwhelming opposition from the magistrates as well as the pagans that he resigned and the whole scheme collapsed.[2]

Brownlee's new Department of Native Affairs took over its functions from an existing branch ofthe Cape government: until 1872 all questions concerning Africans had been dealt with by the Cape Colonial Office, a sub-department of the Border Department, which had supervised officials appointed to control the African population both within and outside the colony. On all questions concerning Africans beyond the border, however, the high commissioner had retained overriding control. But

---

[1] See magistrates' reports in the Cape Blue Books on Native Affairs; Cape, N.A. 295: report from inspector of schools, Basutoland, to superintendent-general of education, 12 Aug. 1874. However, magistrates and missionaries occasionally reported that pagans in their areas were completely disinterested in having their children educated.

[2] Cape, N.A. 295: (Education) Langham Dale to Nixon, 26 Aug. 1874.

Brownlee did not inherit even the personnel of the Cape Colonial Office; in common with some other government departments, his newly created Native Affairs Department was very slenderly staffed. Apart from himself as its ministerial head, for its firts five years the staff consisted of only a chief clerk and a messenger. Although one or two temporary clerks were employed to assist the chief clerk, it was January 1877 before a permanent clerical assistant was at last appointed, and only in 1878 was the post of under-secretary for native affairs created. Until 1878 the chief clerk therefore exercised far more power than the title of his office suggested, supervising the general running of the department and acting as deputy in Brownlee's frequent absences on the frontier.[1]

This would have been particularly true of H.E.R. Bright, who was appointed clerk in succession to W.H. English in December 1874 (entitled chief clerk after May 1876 and under-secretary in July 1878). Prior to that he had spent three years as clerk to the governor's agent in Basutoland. Brownlee had no experience of this area and probably paid particular attention to Bright's advice on it. Bright's general influence is indicated by the department files, which contain various despatches sent to the secretary for native affairs by officers in tribal areas on which the chief clerk's opinion as indicated by memoranda or minutes is endorsed as future policy by Brownlee. Bright's sympathy with the Basuto and friendship with the

---

[1] In all, Brownlee spent more than a year of his five year term of office on the frontier, and also spent over five months in England in 1875-6 for medical treatment.

magistrates stationed there was to prove his undoing. In 1881 the Sprigg government, having antagonized both the Basuto and Basutoland administration, transferred him against his wishes to a magisterial post in the colony, and replaced him with James Rose Innes, related to Sprigg by marriage. His transfer was much criticized by Sprigg's political opponents.[1]

A second result of the smallness of the staff was that the men on the spot were perforce allowed a great deal of discretion in their actions. The departmental staff was soon unable to keep up with the inflow of letters, which were dealt with according to strict civil service procedure and replies hand-copied into record books.[2] According to Bright's successor as under-secretary, by the early 1880s there was ample work for nine clerks to do.[3] Improvements in the postal service to outlying areas were therefore outweighed by the growing departmental delays in answering letters. General Charles Gordon, when he visited the country in 1882, found magistrates complaining that their questions were not being answered.[4]

Unfortunately the qualifications of the men on the spot for exercising such extensive discretion in judicial and administrative matters left much to be desired. Within the colony the men who dealt with African affairs usually held the combined offices of civil commissioner and resident magistrate

---

[1] E.g., Cape Argus, 11 Jan. 1881; Graham's Town Journal (hereafter G.T.J.) 4 Apr. 1881.

[2] Tindall, James Rose Innes, p. 22.

[3] Cape Parl. Papers, G.110-83, evidence, p. 414; question 5717 & 5718.

[4] Cape Times, vol. xii, no. 2657, 8 May 1884: General Charles Gordon's memo. of 1882.

of a division or district, and were not exclusively concerned with Africans. Nor were they officials of the Native Affairs Department. In the Western Cape there was only a sprinkling of Africans, but in 1875 in ten districts in the Eastern Cape Africans formed more than fifty per cent of the population,[1] and in some districts more than ninety per cent.[2] The first Cape Blue Books on Native Affairs carried reports from the eight districts with the highest African populations - over seventy per cent in each district - but as Africans became more numerous in other districts the area covered by the blue books increased, until by 1883 the government official in every district in the Cape Colony was requested to report on the African population within his division. Knowledge of African languages, customs and laws was not essential for an appointment as resident magistrate to any district, and ignorance of this kind was not uncommon among men appointed to even the districts most densely populated by Africans.

Nor were such men always gifted with sufficient wisdom to use properly the wide discretion allowed them. The files contain many examples of magistrates displaying lack of judgment or consideration of a kind which could only aggravate relations between the administration and the Africans governed - and presumably only a minority of such cases would have reached the Native Affairs Department or newspapers.[3] In 1881, for example,

---

[1] Aliwal North, Bathurst, Bedford, East London, Fort Beaufort, King William's Town, Peddie, Queenstown, Victoria East, and Wodehouse.

[2] Cape Parl. Papers, G.42-76: census map giving proportion of races for each district.

[3] On this see Cape Times, vol. xii, no. 2657, 8 May 1884: General Charles Gordon's memo. on magistrates and the Native Affairs Department of 1882.

E.B. Chalmers, the civil commissioner and resident magistrate at Komgha, drew down the condemnation of both the Cape Mercury and Christian Express for his harsh and legalistic operation of the pass laws. As the correspondent of the Cape Mercury reported:

> there is no sharper magistrate than Mr. Chalmers of the Komgha. All the natives who want passes entreat the location inspectors not to give them a route via Komgha as there they are treated like dogs.[1]

In March Chalmers arrested the Rev. Mr. Mzimba, Mfengu minister of the Lovedale congregation, for being without a pass and carrying firearms (although Mzimba had permission to do so). Moreover, he insisted on imprisoning Mzimba in highly unpleasant conditions for the weekend, despite one of the Komgha constables who knew Mzimba offering to be responsible for his appearing before the magistrate. The indignant Christian Express pointed to it as 'a very flagrant case of the working of a system which puts vast power into the hands of some who are, apparently, not very capable of using it.'[2]

However, harm inadvertently done by such men could to some extent be rectified by a knowledgeable officer living on the spot, and the office of the civil commissioner and resident magistrate of King William's Town developed in a rather haphazard manner into a kind of regional headquarters, partly because it was able to forward urgent messages by telegraph to Cape Town in cases of emergency. The civil commissioner also forwarded correspondence from officials beyond the Kei

---

[1] Quoted in the Christian Express, vol. xi, no. 126, 1 Mar. 1881, p. 14.

[2] Ibid., no. 127, 1 Apr. 1881, p. 2.

and of special magistrates under his control in African areas.[1] Eventually in 1878 a new post was created within the Native Affairs Department - that of resident commissioner for native affairs, who was to be based in King William's Town and to act as the secretary's deputy on the frontier, unhampered by having charge of any particular area. Charles Brownlee, who had just ended his term of office as secretary for native affairs, was the first and only man to hold this post, which unfortunately was abolished it seems when he was appointed chief magistrate of Griqualand East in late 1878.

The special magistrates in African areas under the control of the civil commissioner of King William's Town[2] were part of the class of officials which gradually grew up within the colony, appointed by the secretary for native affairs specifically to deal with Africans. Such men were usually appointed from outside the civil service on the advice of the resident magistrate of the district and were under his control. The special magistrates, whose appointments to tribes dated back to the 1865 annexation of British Kaffraria, had among their other duties that of hearing cases arising out of tribal law, settling disputes referred to them, and holding preparatory examinations on crimes committed in their districts; but they were not able to enforce their decisions legally, although they did so in practice.[3]

---

[1] For examples of magistrates reporting to the civil commissioner at King William's Town, see Cape, N.A. 150. On the way the office was run, see G.T.J., 20 Jan. 1875, quoting the Kaffrarian Watchman.

[2] See pp.47,52 above. There were three special magistrates at Tamacha, Middledrift, and Keiskammahoek (in 1873 the last-named was replaced by a clerk in charge), and one clerk-in-charge with the Ngqika chief, Sandile, in the district of Tembani.

[3] Cape Parl. Papers, G.4-83, evidence, p. 261; questions 4821-3; p. 201: question 3498.

Appeals could be taken to the resident magistrate of the district, though they rarely were;[1] in practice even the special magistrate based in King William's Town appears to have been left very much to himself, leading him to complain

> I feel sometimes as tho' [sic] I could go mad having nothing else to do but deal with black faces from day to day and from week to week, no change, no relief of any kind.[2]

The difficulty experienced by the Africans as well as the magistrate in such a situation is indicated by his further remark:

> I do not think there is a worse set of Natives on the Frontier to manage than those of my district and I rather like the responsibility of keeping them in order than otherwise. All I want is a little more power in my own hands and not be running the risk of being hauled over by the Attorneys.[3]

Even the special magistrates did not necessarily have the basic knowledge to rule the people under them properly. The special magistrate at Middledrift, who in 1881 had been a special magistrate for over twenty-five years and controlled about 14,000 Africans, understood but did not speak their language and knew little of African law.[4]

As civil commissioners in districts other than King William's Town also proved to be in need of assistance in supervising their African populations, superintendents were eventually appointed between 1874 and 1877 in some districts,

---

[1] Cape Parl. Papers, G.4-83, evidence, p. 199: question 3444; appendix C, p. 117: question 1; appendix D, p. 320.

[2] U.C.T., Judge Papers, II 40: Tainton to Judge, 12 Feb. 1873.

[3] Ibid. Tainton and his brother were murdered during the 1877-8 war.

[4] Cape Parl. Papers, G.4-83, evidence, pp. 199-200: questions 3443 and 3450; appendix C, p. 117, question 1.

but with minimal judicial powers, if any. The category of superintendents and inspectors subsequently appointed under the 1876 and 1878 Native Locations Acts[1] had no authority to settle any cases, but could only prosecute contraventions of the acts or the regulations made under them before the resident magistrates. Theoretically judicial control therefore remained with the resident magistrates, but in practice superintendents were frequently asked by people in their locations to settle cases, and did so.[2]

The officials stationed with tribes beyond the colony's border were also brought under the Native Affairs Department and, as the Cape extended its control, their number slowly increased from an initial five at the beginning of 1873. Due to the unsystematic way in which the Cape extended protection to additional tribes, within a few years officials with administrative charge of particular districts or tribes were known by a plethora of designations, such as 'governor's agent', 'chief magistrate', 'resident magistrate', 'agent', 'superintendent', 'special magistrate', 'clerk in charge', 'clerk with this or that chief' and 'officer in charge'. However, each name often designated only one official, rather than a category, and in the Transkeian territories there were during the first few years of colonial rule not enough officials to do the work required of them. This was partly for financial and political reasons, partly because when making such appointments the secretary for native affairs (or, in later years, the under-

---

[1] Act 6 of 1876 and Act 8 of 1878.

[2] Cape Parl. Papers, G.20-81, pp. 91-2; A.26-83, evidence, p. 19: question 154; G.4-83, evidence, p. 265: Innes to W.B. Chalmers, 14 July 1881.

secretary) took into consideration such factors as the candidate's knowledge of an African language and experience in dealing with Africans. How important this was in preventing injustices is illustrated in numerous incidents, such as that described by W.C. Scully, which occurred while he was magistrate of Mount Frere:

> A woman who had been called upon to give evidence was asked as to whether she knew a certain man who was interested in the issue. She replied in the direct negative. I happened to know, from the statements of other witnesses, that she and this man had lived within a few hundred yards of each other for many years. Naturally I concluded that she was lying. I told her so, and added that I was sure she must have seen him over and over again. But she adhered firmly to her statement that she had never either seen or heard of him. What I regarded as her mendacious obstinacy angered me exceedingly. I was on the point of ordering her arrest for perjury when my Native clerk bent down and whispered to me the word "inhlonipu," and in a flash I understood. The man in question happened to be the uncle of the woman's husband, so according to custom she was not supposed to be aware of his existence nor of the existence of any male relative of her husband in the ascending line. It would have been disgraceful for her to have admitted having ever seen or even heard of any such relative, or even to have used any word in which the dominant syllable of his name occurred.[1]

There was found to be a dearth of suitably qualified men, and not surprisingly a very high proportion of those found suitable for Transkeian appointments came from missionary families. A few had been missionaries themselves. Many had known each other since childhood and often political and judicial affairs of the tribes with which they were stationed were settled by informal and sometimes irregular arrangements.[2] On occasion

---

[1] W.C. Scully, Further Reminiscences of a South African Pioneer (London, 1913), pp. 278-9.

[2] E.g. Macquarrie, Reminiscences, i. 184.

men were brought in from outside the civil service,[1] but neither pay nor conditions of work were good; magistrates were even intended to pay the expenses of entertaining chiefs out of their meagre salaries.[2] Frere was unimpressed by the quality of the Transkeian officials he found in office when he arrived in 1877. He wrote to Carnarvon:

> Among the officials connected with the Natives are many "worthy men" in the sense of amiable men, of high moral character; and there are doubtless some well acquainted with the Natives, their language and habits, who have not become assimilated to them in habits of life or thought. But energetic, well-trained officials, who are good office men, active administrators, sound-hearted and high-spirited gentlemen, who know the Natives, and their habits and language, but who retain their European turn of mind, and thought, and standards of conduct, are certainly very rare.d Such men could, it is clear, do whatever Government pleased with the Natives of any tribe or race, and train them in a course of rapid and progressive improvement to almost any extent. But the present mode of selecting, treating, and paying public servants here is not such as would attract men of the kind I have described.[3]

Certainly the records contain many cases where Transkeian magistrates displayed inefficiency, lack of tact and judgment,[4] several were dismissed for embezzlement,[5] and the files show a yawning ignorance by many, including at least one chief magistrate,

---

[1] E.g. Rhodes House, MSS. Afr. s.23, ii. 129-30: Solomon to Molteno, 6 Jan. 1876.

[2] Cape, N.A. 294: Mills to Brownlee, no. 35, 9 July 1873.

[3] Brit. Parl. Papers 1878, lv (c.1961), p. 167: Frere to Carnarvon, 14 Nov. 1877.

[4] E.g. Cape, N.A. 4, pp. 236-7, 247-51: Blyth to Bright, no. 255, 2 July 1879, and enclosed minutes; N.A. 5, pp. 32-33: Blyth's remarks on Merriman's report encl. in Blyth to Bright, no. 339, 2 Oct. 1879; N.A. 398: Pamla to Brownlee, 5 May 1873; Cape, N.A. 399: Judge Dwyer to Barkly, 23 Oct. 1876.

[5] E.g. Nesbitt (Cape, P.M. 259: controller and auditor general to Scanlen, 6 Aug. 1881); Davies (N.A. 305: solicitor general to Sauer, no. 21/109, 6 Feb. 1882); Pattle (N.A. 303: appointment of Chalmers to try Pattle for embezzlement).

of the most basic rules of procedure and evidence.[1]

However, by 1879 there was a more optimistic outlook for the future. Bright wrote that there were 150 people on the register of applicants for positions in the Native Affairs Department,[2] and though many of these were for positions as clerks, the files show a large number were able to speak an African language and had either grown up or had experience of living in African territories.[3] Many were the sons of men who were officers of the Native Affairs Department themselves, and a few were even the third generation to seek a post in the service. In addition in 1878, the system of using a senior magistrate to control the less experienced or able men stationed with the tribes was introduced in the Transkei as well as the colony, and survived longer there than at King William's Town.

In Basutoland, which the Cape controlled from 1871 to 1884, very few officials, including the governor's agent, spoke the local language when first appointed. Several complained of the impossibility of adequately administering the large areas and difficult terrain which comprised their districts, although this was later partly remedied by sub-dividing some districts. The governor's agent was particularly overworked.[4] All the

---

[1] E.g. Cape, N.A. 9, pp. 32-39: Blyth to Rose Innes, no. 812, 22 Apr. 1881, and attorney general's official report and unofficial note on the case; N.A. 6, pp. 126-9: Blyth to Ayliff, no. 42, 6 Feb. 1880, and attorney general's minute on the case; J.M. Orpen, Some Principles of Native Law Illustrated (Cape Town, 1880), pp. 30-37.

[2] Cape, N.A. 401: Bright to Baillie, 7 Apr. 1879.

[3] See especially N.A. 400 (covering 1878) and N.A. 401 (covering 1879).

[4] But Basutoland does not appear to have been unique in this respect. The chief magistrate of the Transkei, for example, complained that he quite often was obliged to work from 9 a.m. to 12 p.m. See Cape, N.A. 2, p. 135: Blyth to Ayliff, no. 158, 21 Dec. 1878.

Basutoland magistrates had administrative as well as judicial duties, such as issuing trading licences, collecting hut tax, and making roads; the governor's agent had all the duties of a resident magistrate in the district of Thaba Bosigo until 1877, when his chief clerk, Henry Lee Davies, was promoted to that post. In addition, he was from mid-1872 also accounting officer for Basutoland,[1] which entailed such a vast amount of complicated paperwork that in 1877 he eventually persuaded the Native Affairs Department in Cape Town to appoint the assistant magistrate for Thaba Bosiu to do some of the work,[2] and in 1878 to appoint a full-time accountant.[3] As governor's agent he administered the government of Basutoland and dealt with all decisions and correspondence of a political character, since he believed the magistrates' duties to be of a purely judicial and administrative nature.[4] It remains a mystery where he also found the time to act as chief magistrate with duties which included hearing appeals from the courts of the other magistrates, reviewing their decisions, and acting as judge of the divorce and insolvency courts. He certainly discouraged magistrates from seeking his advice on points of tribal law,[5]

---

[1] Lesotho Archives, S9/1/3/2: Griffith to Civil Commissioner, Aliwal North, 24 June 1872.

[2] Cape, N.A. 274: Griffith to Brownlee, no. 21, 27 Feb. 1877; N.A. 275: Bowker to Ayliff, no. 25, 18 March 1878.

[3] Ibid., Griffith to Ayliff, no. 69, 4 Dec. 1878, minute by Ayliff, 17 Dec. 1878.

[4] Cape, N.A. 273: Griffith to Brownlee, 2 Feb. 1875.

[5] Lesotho Archives, S9/1/3/2: Griffith to Rolland, 30 Apr. 1873; Griffith to Austen, 19 Jan. 1874; S9/2/2/3: Griffith to Rolland, 18 Feb. 1876.

leaving them to settle matters as best they could. Nor were conditions conducive to the long hours of office and court work these duties required.. In 1878 Bowker, temporarily acting as governor's agent, described them to the secretary for native affairs:

> The Governor's Agent's and magistrate's offices are in adjoining rooms, very small and stuffy, and very inadequate, - hot in summer and icy cold in winter. No privacy is attainable and things are apt to get inextricably jumbled. The clerks' offices, two in number, are at a distance in separate buildings. When the Governor's Agent or the Resident Magistrate wishes to communicate with his clerk, he has to go out in sun or rain or cold or wind - or else shout in an undignified manner unless the orderly happens to be at hand ... the present buildings are ... falling into disrepair and quite unworthy of being the head offices of Government. They were originally the premises of a Kaffir trader built in the first year of our occupation, and are shabby and paltry beyond description. The court room is very insufficient, dark and close, - and when densely crowded as it is three or four times a week is something like a second "Black Hole of Calcutta".[1]

In the Transkei and Basutoland especially, to be a good magistrate a man required not only knowledge of the tribe he was with, good judgment and tact, but the ability to withstand years of isolation from his own culture; often his family, his clerk (if he had one), and possibly a nearby trader or missionary would be the only personal contacts he would have with it, even when not cut off from the nearest village by flooded rivers; and if he did not speak the local language

---

[1] Cape, N.A. 275: Bowker to Ayliff, no. 25, 18 Mar. 1878. Uncomfortable as these conditions sound, they were quite luxurious compared with some in which Transkeian magistrates were expected to work. The agent with Kreli, for example, was obliged to use 'a Kafir hut' as his office until in 1875 the principal chiefs voluntarily donated a number of cattle to enable him to build a bigger office; the magistrate at the Isomo began his term of office without either house or office, living in a waggon; and the resident in St. John's Territory initially operated from a tent. See Cape Parl. Papers, G.16-76, p. 44; Cape, N.A. 1, p. 16: Gladwin to Ayliff, no. 4, 7 Feb. 1878; Cape Parl. Papers, G.21-75, pp. 100-1.

he would have very little opportunity for spontaneous conversation with anyone else. Blyth's verdict on a magistrate who had taken to drink to alleviate his boredom was equally applicable to several others:

> Mr. Merriman has very good abilities, but his position as Magistrate of the Idutywa is a very isolated one, and it requires a man of peculiar temperament to make a successful Transkeian Magistrate.[1]

The isolation of a Transkeian magistrate's position was so unpopular that even higher pay was not regarded as sufficient compensation.[2] As one colonial special magistrate explained:

> I do not consider that the extra £100 I should get by going up there would counterbalance the advantages I would have to give up here. I would much rather be put about and try to live on £250 in a town than take my wife and children to burry [sic] amongst Natives for £350.[3]

However, where a man possessed all the requisite qualities and was placed with a tribe which had no objection to him personally, the system of magisterial control often worked well, as many examples in Basutoland, the Transkei and even the Ciskei demonstrate. The official reports and files contain many instances where tribesmen displayed affection for their magistrates, including several petitions for magistrates to be transferred back to the tribe. While no doubt some were motivated by a desire for the return of a lax magistrate in place of a strict new official, many ring true.

---

[1] Cape, N.A. 5, p. 213. The magistrate in question was the brother of Brownlee's bête noire and yet another missionary's son.

[2] E.g., U.C.T., Stanford Papers, F(b)2: E.B. Chalmers to Judge, 18 Mar. 1873; Judge Papers, II 40: Tainton to Judge, 12 Feb. 1873.

[3] Ibid.

Unfortunately ignorance of local conditions on the part of the Native Affairs Department in Cape Town could lead to a good man being placed with the wrong tribe, as Elliot, the chief magistrate of Thembuland, bitterly pointed out in 1882:

> Since Mr. Sauer was raised to the position of S.N.A. I have never once been consulted upon <u>any</u> appointment in this District, but on the contrary appointments have been made of which he knew I entirely disapproved. I feel that square men are being rapidly put into round holes, and that they can't be <u>made</u> to fit.... Nothing could have been more detrimental to the interests of this Territory than placing Shaw in Bomvanaland.[1] He is disliked and distrusted by both Bomvanas & Gcalekas, and if a rain comes I shall hear nothing from that District till it is too late to adopt precautions, and Shaw will share Hope's fate.[2] I never knew anything more injudicious than that act, besides it is grossly unjust to Vice. But I suppose I have no power to compel the Ministers to act with either discretion or justice.[3]

And at the other extreme, officials sometimes were so well suited to their tribes that they became hotly partisan in favour of their own particular tribe. This made the settling of theft and other cases with other tribes, especially traditional enemies, very difficult.[4]

Various common administrative problems could also complicate relations between the magistrate and the tribe with which he was placed. Given the lack among magistrates of a knowledge of the indigenous languages, good interpreters were essential;

---

[1] M.B. Shaw was a very experienced magistrate, whose first appointment in the Transkei had been in 1852 as resident for the whole of the Transkei, see Cape, N.A. 9, p. 257: memorandum on Shaw's career.

[2] Hope was a magistrate who was murdered in 1880 by the tribe with which he was stationed.

[3] U.C.T., Stanford Papers, F(g)6: Elliot to Stanford, 19 Dec. 1882.

[4] E.g., U.C.T., Judge Papers, II 29: Southey to Edmonstone, 29 Oct. 1872; Cape, N.A. 8, pp. 6-7: Blyth to Ayliff, no. 2, 7 Jan. 1881.

but there is evidence that these were not always forthcoming, especially as the many idioms of the African languages made a detailed knowledge of the language, customs and psychology of the tribe necessary for accurate interpreting.[1] Even for the very important office of King William's Town the magistrate could write of his interpreter, the son of a German missionary, that both his Xhosa and English were bad.

> How magistrates who did not understand the language themselves got on with him I cannot understand; and with his bad interpreting he must only have been the cause of a great deal of injustice being done.[2]

A few Africans, such as Tiyo Soga, began in the late 1870s to obtain posts as interpreters and clerks to magistrates, especially in the Transkei, where it was government policy to employ them where possible.[3] But there seem to have been many cases where the magistrates found them unsatisfactory[4] and Mabille, a Basutoland missionary, pointed out that they often favoured their friends.[5]

Nor could the police employed in enforcing the law be relied on to be able to communicate with the Africans. Frere wrote in 1877 that 'at present it is the exception to find a

---

[1] N.N. Franklin, Natives and the Administration of Justice (Johannesburg, n.d.), pp. 34-5.

[2] Cape, P.M. 259: Chalmers to Scanlen, 30 Aug. 1881.

[3] Cape, N.A. 3, p. 151: Blyth to Bright, no. 213, 9 May 1879. Africans could be paid lower wages.

[4] Cape, N.A. 5, p. 58: Blyth to Ayliff, no. 347, 9 Oct. 1879, and see many examples in files of African clerks being dismissed.

[5] Rhodes House, MSS. Brit. Emp. s.18 (Anti-Slavery Society Papers), G140/243a: Mabille to Chesson, 15 Apr. 1881.

private who knows either the topography of the district or the language of the natives in it';[1] and the magistrate at Glen Grey, noting that the chief constable in his district, who was responsible for collecting arrear house duty in that predominantly African area, could not speak the language either, added:

> after he has finished his work so far as he is able, it remains for the magistrate to explain to each Native why he has to pay a fine of two shillings upon every ten shillings duty in arrears. The performance of this kind of work among natives should be entrusted to persons who can speak the language and give explanations to the people.[2]

It can therefore be seen that whatever policies towards tribal law were decided upon in Cape Town, there was a strong probability that ineptitude, understaffing, and the necessities of local conditions would lead to delays, changes and miscarriages of justice in implementing them among the Africans.

The men on the spot, who faced all the problems of implementing the policies, naturally tried to ensure that they were not asked to enforce policies they found offensive or impossible to implement. But they were not allowed to write to the press, which limited their opportunities to express their opinion to their internal departmental reports and the occasional chance to bring a matter to the attention of the secretary for native affairs when he visited their district. Given the smallness of frontier communities, it

---

[1] Rhodes House, MSS. Brit. Emp. s.23, i. 223: minute by Frere on Frontier Armed and Mounted Police, 3 Nov. 1877.

[2] Cape Parl. Papers, G.8-83, p. 101.

seems likely that magistrates would on occasion have provided the inspiration for newspaper letters from missionaries, or the reports which appeared in the frontier press 'from our correspondent in Alice' and other villages in African areas, often to be picked up later and reprinted by the Cape Town newspapers. But this did not enable magistrates to use their intimate experience of tribal law problems to add weight to their arguments, so it is not surprising that they seized upon the appearance of the Cape Blue Books of Native Affairs from 1874 to put forward their recommendations. The civil commissioner for King William's Town and the special magistrates under him repeatedly emphasized the need for the special magistrates to be given the legal power to enforce their decisions given according to tribal law; and over the years magistrates were to press for such reforms as the separation of the duties of resident magistrate and civil commissioner, on the grounds that the duty of the latter kept Africans away; the abolition of the post of headman in the Victoria East Mfengu location; replacing the African law court messenger system with the use of policemen; the introduction of the poor law to increase the number of convictions in theft cases; the introduction of a law of prescription for debts; the introduction of individual tenure in some areas where it did not exist; supplementary legislation to the Native Succession Act of 1864, or its suppression; the recognition of only the first wife or even the complete suppression of polygamy and the giving of marriage cattle; and most sweeping of all, the

complete suppression of African law and customs.[1] Several of these recommendations were implemented, though whether as a result of the magistrates' suggestions it is impossible to tell.

But the excellence of the basic aim of the policies dictated by the Native Affairs Department during the Molteno ministry's term of office was seldom disputed by the officials involved in implementing them, even where there was disagreement over the details of the method. Brownlee's views on the desirable policy to adopt towards African law and customs were common among men of his background in the 1870s. He believed it to be both the duty and in the interest of the colony 'to advance the civilization of the natives under our rule';[2] the arguments were usually all on how fast. Brownlee's long experience amongst the tribes led him to advocate a cautious approach when instituting changes.[3] He realized that in practice African law would have to be administered in some areas, and had in fact done so himself while resident magistrate at Somerset East and King William's Town. He believed that 'Native Communities generally, that is while in a state of heathenism, are better governed by their own laws than by ours'.[4]

---

[1] E.g. Cape Parl. Papers, G.27-74, pp. 16, 58-59; G.16-76, pp. 63, 64, 76; G. 12-77, pp. 14, 113; G.17-78, pp. 43-5, 49, 50, 59, 118; G.33-79, pp. 183, 186-9; G. 13-80, pp. 174, 183-4, 186; G.20-81, pp. 92, 102, 103; G.33-82, pp. 115, 116, 118, 149, 175; G.8-83, pp. 28, 88; G.3-84, pp. 31, 37, 76.

[2] Ibid., A.49-65, p. 1.

[3] Brit. Parl. Papers 1856, xlii (1096), p. 22: Brownlee to Maclean, 8 Aug. 1855, sub-enclosure 2 in enclosure 3 in Grey to Molesworth, no. 9, 18 Dec. 1855.

[4] Cape, N.A. 840: Brownlee to Halse, 1 Apr. 1873.

Similarly, although the policy adopted by the ministry was gradually to undermine the power of the chiefs and replace tribal institutions with colonial ones, Brownlee believed in meanwhile utilizing the power and prestige of the chiefs rather than ignoring it and antagonizing the tribesmen.[1] It is likely that his clashes with Merriman resulted from more than a personality clash between the sharp-tongued Merriman and the easy-going Brownlee. Merriman's declared belief was in direct contradiction to the policy which Brownlee was attempting to apply:

> much if not all of our present difficulties arise from the persistent efforts made by the present administration to lessen the powers of the chiefs and to introduce European laws and customs in place of the more convenient native customs.[2]

The policy of the next ministry under Sprigg, although not on the face of it different in kind to Brownlee's, visualized so different a time scale as to be in fact of a different nature:

> For the pragmatism and intelligent laxity of the Molteno ministry's native policy was now to be substituted the Spriggite policy of 'vigour'. Instead of a steady sapping of the chief's powers and gradual loosening of the bands of tribal authority, so as to facilitate the introduction of magisterial controls - the characteristic feature of Cape native policy, the process was to be vastly accelerated. What had, over several decades, involved much patience and improvisation in those Cape frontier districts where the process was fairly well advanced was now to be achieved in the untamed districts within the life-span of a single ministry.[3]

---

[1] Cape Parl. Papers, G.16-76, p. 103; Rhodes House, MSS. Afr. s.23, ii. 192-3: Brownlee to Molteno, 11 Mar. 1876.

[2] Ibid., iii. 149.

[3] Benyon, 'Basutoland and the High Commission', p. 372.

The man who was to implement this policy was William Ayliff, the new secretary for native affairs. He was knowledgeable enough about African customs - as the third son of a missionary, the Rev. John Ayliff, he had grown up on mission stations mostly among the Mfengu, but also on one for displaced Thembu, Tswana and Mfengu. But he seems to have been a singularly colourless man and practically no writer on the period, whether contemporary or historian, mentions more than the fact that he was appointed. In day to day matters the under-secretary for native affairs controlled matters - Ayliff told De Wet, the secretary for native affairs in the 1884 government, that he himself saw every letter but did not read all: 'they were sent to him with marginal notes describing contents - the routine letters he did not interfere with but no letter of importance was answered without his seeing the reply.'[1] But the policies of the ministry were obviously all Sprigg's.

This placed the second under-secretary for native affairs to serve under Ayliff in a particularly powerful position, since he was related by marriage to Sprigg. James Rose Innes succeeded Bright from January 1881, after a career which had included a period in the influential post of resident magistrate of King William's Town, followed by a short spell as administrator of Griqualand West before the post had been abolished on the annexation of that territory to the Cape. His views on tribal law were much the same as Brownlee's: in 1877 he

---

[1] U. C.T., Stanford Papers, F(i)4: Walker to Stanford, 20 May 1884.

informed the Defence Commission that

> the existence of Kafir Law implies of necessity the existence of Kafir tribunals; and I would allow these people to avail themselves of their Kafir tribunals, and go to their chiefs or headmen to get them to settle cases of that nature.[1]

It is almost certainly due to his and Bright's efforts that the tribal law policy was not more affected by Ayliff's 'vigorous policy' towards African affairs. As it was, the ministry inadvertently brought about the ruin of the promising experiment in Basutoland of using tribal law institutions to introduce European values to the Basuto.

Ayliff's successor, J.W. Sauer, who took office in the middle of the Basuto revolt, could hardly fail to be aware of the dangers of enforcing rapid changes in African customs. Three weeks before taking office, he told the Legislative Assembly that African customs should not be disregarded:

> they ought to utilise and work through them towards civilisation.... What should be done was to have a native administration through the natives themselves, and have less of what he might call "Europeanisation".[2]

But in office his views on the subject were probably of no great importance, for there is evidence that much of the Native Affairs Department's policy was in fact determined by Rose Innes rather than Sauer. Sauer was 'a master of parliamentary tactics, with a special aptitude for feeling the pulse of the House.'[3] But Joseph Walker, a friend of Sauer's

---

[1] Cape Parl. Papers, G.1-77, evidence, p. 56, question 1608.

[2] G.T.J., Parliamentary Supplement, 2 May 1881, reporting debate of 20 Apr.

[3] Tindall, James Rose Innes, p. 56.

successor, reported that he never looked at any departmental letters - 'in fact did nothing. So you may judge how Master Innes has entirely manipulated the Native Depart[men]t.'[1] Without an active secretary for native affairs, there was very little check on the activities of the under-secretary. Parliament was poorly informed on African affairs in African areas, especially as the files show that reports from magistrates were censored before publication in the blue books. Saul Solomon wrote in 1880:

> you will be surprised how little we know here of what is going on in these extra-colonial territories. Most of our information we get from Imperial Blue Books. There is no one, scarcely, among the Natives, but officials & those who depend on officials, and naturally such men feel very great restraint in saying anything that might bring them into difficulty.[2]

But although the Innes-Sauer policy on tribal law sounded remarkably like Brownlee's of five years earlier, the very different background against which it should be viewed had quite changed the perspective with which the department viewed the disappearance of African law and tribunals. As has been shown,[3] the policy of undermining the chiefs and introducing European institutions was first instituted in 1835 when Queen Adelaide Province was established, and can be traced, with interruptions, through Sir Harry Smith's governorship to that of Sir George Grey, whose policy Brownlee acknowledged to be the source of the Molteno ministry's own.[4] It underlay all the apparently

---

[1] U.C.T., Stanford Papers, F(i)4: Walker to Stanford, 20 May 1884.

[2] Rhodes House, MSS. Afr. s.18, C147/181: Solomon to Chesson, 24 Feb. 1880.

[3] See chapter 2.

[4] Cape, P.M. 259: memorandum by Brownlee, 7 July 1876, p. 13.

varied policies on tribal law implemented by the government between 1872 and 1883. Until the war of 1877, the ministry confidently believed that this policy was both desirable and wholly beneficial for the Africans; even after the war, this attitude was to continue to permeate African policy thinking, although with a stronger emphasis on the need also to safeguard the interests of the white population, until the Basuto revolt of 1880 brought disillusionment and a complete though short-lived loss of confidence in the Cape government's ability to civilize or even rule the African.

But even in the heyday of colonial confidence, there were many colonists more concerned with acquiring more land, more trade, more labour, or greater safety, than with civilizing the African. While on the other hand some individuals or bodies objected to specific policies as injurious to the Africans. A number of means were available to these varied groups for influencing at least the details, if not the basic aim, of policies on African affairs and tribal law.

The Cape Parliament was the obvious target, especially as there were in fact, if not in theory, approximately six parliamentary parties, each elbowing for position and supporters.[1] Petitions were therefore frequently submitted to Parliament and the files show a large selection relating to policies on tribal law. A typical example was provided by a meeting of farmers of Upper Blinkwater, which sent the colonial secretary various

---

[1] For Governor Frere's analysis of the parliamentary scene, see P.R.O., C.O. 48/494: Frere to Beach, 22 June 1880.

resolutions on theft and shortage of labour. Resolutions 7 and 8 read:

> It is very much to be deplored that natives are allowed to come amongst us with the privilege of enjoying their own laws and customs, which are so disgusting, and which ought not to be tolerated by any Civilized Government.
>
> This meeting is of opinion that polygamy and buying wives should at once be stopped, as this is the principal temptation for stealing stock.[1]

Although the secretary for native affairs might disagree completely with such petitions, the ministry could not afford to ignore large groups of voters in country districts. This was especially the case after the formation in 1878 of the Dutch Farmers' Protection Association, whose general aim was 'to watch and protect the interests of Farmers in this Colony'[2] and would no doubt have opposed any attempt to legalize African law in the years in question. It is of interest that there are no petitions from African voters in the files for this period, although African voters would very probably have been Christian and in full agreement with the Farmers' Protection Association on questions of African law.

Sometimes too petitions not directly relating to tribal law nonetheless resulted in parliamentary, if not executive, action on this question. In 1873, for example, a select committee was appointed to consider and report on petitions from Albert and Queen's Town for action to prevent stock lifting. The report presented in June 1873 included a paragraph which read:

> Evidence having been given by the Secretary for Native Affairs that the Kafir custom of paying a certain number of cattle for a wife is recognised in some of the Colonial Courts, your Committee are strongly of opinion that such

---

[1] Cape, N.A. 399: Sweetman to Molteno, 7 June 1876.

[2] Cape, P.M. 304: confidential minute on the Afrikaner Bond and Farmers' Protection Association by Scanlen for Robinson, 8 May 1882.

> recognition is impolitic and prejudicial to the public interest, and should therefore no longer be permitted. And they are further of opinion that the attention of the Government should be directed to the gradual assimilation of the native laws and customs to those of the Colony.[1]

The matter was referred to Brownlee, but he was out of sympathy with the commission's point of view and took no action to implement the first part of the recommendation.

Indirect attempts to influence Parliament or the government through individual members are obviously less easy to document, but there is evidence that they did take place on this issue. There were certainly a number of appeals to Brownlee and Molteno to permit African law to be recognized by the magistrates in the colony. Many such letters came from law agents and attorneys who not only saw the injustices resulting from non-recognition, but also lost a great deal of money through being unable to take claims based on tribal law before magistrates who refused to recognize it.[2] Certain other members had special connections with particular tribes, and would usually be asked by the tribe for assistance in matters requiring legislation. J.M. Orpen, for example, while a member of Parliament, acted as unofficial spokesman for the Basuto. But there was one other obvious member of Parliament to whom people could appeal for assistance in matters affecting Africans: Saul Solomon, senior member for Cape Town. James Rose Innes,

---

[1] Cape, N.A. 294: report of select committee, June 1873.

[2] Cape, N.A. 398: Taylor, agent for Magitola, to Brownlee, 21 Apr. 1873; Blundell to Molteno, 26 Sept. 1873; Bell to Brownlee, 23 Dec. 1873; N.A. 403: R.W. Rose Innes to Sauer, 27 July 1882.

later chief justice of South Africa and son of the under secretary for native affairs, described him as the most remarkable man in the Legislative Assembly.

> Saul Solomon was handicapped by physical disability which would have deterred any but a man of exceptional courage from entering public life. So diminutive in stature that a specially raised seat had to be constructed for him, he dominated the House from that coign of vantage. He practised none of the arts of oratory, for he was not an orator, but a consummate debater. His presentation of facts was masterly, his argument relentless. When, many years later, I listened to Joseph Chamberlain, the resemblance between the styles of the two men impressed me forcibly. There was the same clarity of language, the same mastery of facts, the same sharp staccato sentences. Both were awkward men to interrupt, but there was in Saul Solomon a burning indignation at injustice, a determination to help the under dog, which did not, in like degree, characterize the English statesman.[1]

In addition, until 1881 Saul Solomon owned the influential Cape Argus, by which he was able to gain a wide audience for his views and the causes he espoused.

However, rather than attempt to sway the Cape Parliament or government, some people chose to appeal to the British government to exercise her influence and, after 1877, legal right,[2] to prevent 'undesirable' policies from being implemented. Although personal contacts among British members of Parliament were occasionally utilized for the purpose,[3] the usual channel

---

[1] Tindall, James Rose Innes, p. 20.

[2] By an imperial permissive act, which Frere desired to assist him in achieving confederation in South Africa, African policy was reserved to the imperial government. See Clause 55 of 40 and 41 Vic., ch. 47, Brit. Parl. Papers 1878, lv (C.1980), Mar. 1878, appendix, pp. 34-41.

[3] E.G., P.R.O., C.O. 48/505: Letter by W.L. Coakes, a missionary in the Transkei, to a member of the British Parliament, 4 Dec. 1882.

for such protests was through the Aborigines Protection Society, a philanthropic society which had exercised great influence in the heyday of Exeter Hall, but which by 1872 was in decline. Not only important colonists like Charles Lennox Stretch corresponded with the secretary of the society, but so did various members of the Cape Parliament, like Saul Solomon. By the 1880s, some Africans from Cape territories were also among its correspondents. On major issues the society would in turn make direct representations to the government in Britain through petitions to and interviews with ministers, or else organize a campaign in the House of Commons though sympathetic members of Parliament. It also had its own newspaper, the Aborigines' Friend, as well as access to English newspapers, from which the colonial press would often pick up items.[1] Matters of tribal law were brought to the society's attention by a number of correspondents, and the files contain heated correspondence on such matters as the evils of polygamy among the Nguni - woman slavery, as it was called[2] - and the need for individual tenure,[3] both of which causes the society espoused.

---

[1] E.g., excerpts from J.T. Jabavu's letter to Chesson, 13 May 1881, were published by Chesson in the Daily News and subsequently appeared in the colonial press. See Rhodes House, MSS. Afr. s.18, C139/3: Jabavu to Chesson, 13 Sept. 1881.

[2] E.g., ibid., c.123: letters from William Adams and J. Ackerman; C134/235: Froude to Chesson, 26 May 1875; MSS. Afr. s.22 (Anti-Slavery Society Papers), G.10: case of Martha Kuswyo; undated minutes of meeting.

[3] E.g., Rhodes House, MSS. Afr. s.18, C143/121: J. Mullens to Chesson, 31 Dec. 1877; C147: letters from J. Silberbauer.

Similarly, missionary societies would sometimes make direct representations to British ministers on the evils of various policies affecting tribal law, but their influence had greatly declined since the middle of the century. As the Christian Express pointed out when describing the May meetings of the missionary societies in 1880:

> Among speakers and platform people there was a great paucity of peers and M.P.'s and men of any public distinction. There were more Earls in Lord Beauchamp's drawing-room, the other day, to hear about the work in a ritualist London parish, than on the platform of the great Church Missionary Society. Even English bishops and deans put in but a scant attendance.[1]

What influence such groups had was further diminished once the new telegraph was completed. By 1880 the Cape government had the advantage of its opponents in being able to reach the ear of the British government first: charges for using the telegraph were very high, but government messages were sent at half price. As letters took approximately twenty-five days to reach England from South Africa, there was ample time before the first protests arrived from the Cape for the British government to approve new regulations or other important policies passed by the Cape Parliament.[2]

What influence the British government did exert over Cape policies on tribal law after the advent of Responsible Government was in preventing laws being put into effect rather than causing new laws to be made. As Christopher Saunders has shown,[3] once the Cape had been granted Responsible Government, the British

---

[1] Christian Express, vol. x, no. 120, 1 Sept. 1880, p. 12.

[2] Rhodes House, MSS. Afr. s.18, C147/178a: Solomon to Shesson, 13 Jan. 1880.

[3] Saunders, 'The Annexation'.

government had generally neither the means nor inclination to force it to adopt any particular policy in ruling the African areas under its control. Carnarvon was sent the first Cape Blue Book on Native Affairs and was favourably impressed with Cape African policy. In 1876 he was still of the same opinion:

> I have no desire to find fault with the course which has been pursued by your advisors on native affairs. On the contrary, I have given on many occasions emphatic praise to a policy which has been, in dealings with these uncivilised or half-civilised races, prudent and liberal.[1]

When the British government did become seriously alarmed that Cape rule in its African territories would provoke a revolt in South Africa and trouble in the British Parliament, it proved unable to force the Cape to submit to positive imperial control of its African law policy.

An interesting question is why the missionary societies had so little success in affecting tribal law policy, if not through the British government, at least through their connections in South Africa. They had, after all, an annual missionary conference which, though without either legislative or executive power over the churches it respresented, was interdenominational and attended by missionaries from the colony, Transkei and Basutoland. The college at Lovedale trained ministers from all denominations. The Kaffir (later, Christian) Express acted as the missionary newspaper for all three areas, being read by many in addition to the local missionary papers. A common policy on tribal law would therefore seem indicated. Nor were

---

[1] Quoted by P.A. Molteno, The Life and Times of Sir John Charles Molteno, K.C.M.G. (London, 1900), p. 213.

the kind of changes missionaries favoured in African law the sort to provoke charges of that cardinal sin for missionaries in South Africa: meddling in politics; the issues that interested them were not issues of party politics.[1] But the missionaries themselves seem to have been the main obstacle to the exertion of their influence. As the Kaffir Express of August 1871 rather bitterly explained of the annual missionary conference:

> Let us take the case of three or four of the most common subjects we have to deal with - ukulobola, circumcision, and the native ministry. These are brought up and introduced and thoroughly discussed, in the papers prepared by the writers appointed to examine them. But while the mind of the writer has fully weighed and thoroughly grasped the subject and has endeavoured to suggest practical remedies, - to the minds of his audience, many of these remedies involve, it may be, serious and startling changes, or perhaps a good deal of labour out of and beyond the round of routine. Each member of the Conference occupies his place, not officially or representatively of his denomination, but simply as an individual missionary. He is unwilling to agree to anything that may commit himself or the body to which he belongs, lest he may be called upon by his own brethren at next meeting of the church court or district, to give an explanation of his conduct.[2]

It is true that in 1871 the conference did appoint a committee rather than an individual 'to take the whole matter of Circumcision into careful consideration, with the view of seeing what can be done for its discontinuance; both on the part of the Missionaries and that of the Government';[3] but when the committee reported in 1873, it recommended an attack on the custom by use of moral influence rather than by legislation.

---

[1] Though from 1880 the Christian Express aroused much antagonism by attacking the government's disarmament policy and thereby entering the political arena.

[2] Kaffir Express, vol. i, no.11, 1 Aug. 1871, p. 1.

[3] Ibid., vol. iii, no. 36, 6 Sept. 1873, p. 2: paper read at the missionary conference by the Rev. R. Birt.

Its recommendations for parliamentary action were of a very minor nature, which might account for their subsequent success:

> Let a petition go from the Conference, and also from every church organization working in Kaffirland to both houses of Parliament praying that the Government may be pleased, through all its officials, to discountenance to the utmost the customs connected with the rite of circumcision.
>
> And further, to pray that all abakweta boys be rendered punishable by exposing themselves in any public road, or at any village, or mission station, or trader's shop, or canteen.
>
> And further, that all abakweta dancing at the kraals within the bounds of this colony be put down as a nuisance and an indecency.[1]

A further petition from the conference two years later,[2] matched as it was by similar pleas from some of the magistrates in their annual reports in the Blue Book for Native Affairs, finally bore fruit in Brownlee's letter 'To the Native Chiefs, Headmen, and common people, under British rule'. Without threatening any specific punishments, he indicated that the government disapproved of these customs and that magistrates had been instructed to discountenance them as much as possible, as well as female initiation.[3]

But the missionaries were much less successful in their crusade against the giving of marriage cattle and, outside the colony, polygamy, Any concerted action on these customs was very difficult to achieve, since missionary opinion was not unanimous on almost any question arising out of such cases.

---

[1] Ibid., p. 3.

[2] Cape, N.A. 398: J.A. Chalmers to Barkly, 8 July 1875.

[3] Kaffir Express, vol. v, no. 62, 1 Nov. 1875, pp. 4-5: Brownlee's circular dated 13 Aug. 1875.

These divisions were particularly obvious at the meetings of the missionary conference. At the 1873 missionary conference, for example, a paper was given by the Rev. Mr. Kropf, defending the giving of marriage cattle and recommending that those practising it should not be excommunicated. His point of view was vigorously attacked by both the Kaffir Express and Little Light of Basutoland.[1] A similar division of opinion can be seen in the account of the 1880 conference, where the Rev. H. Kayser found both supporters and opponents when he read a paper in which he implied that polygamy was not in itself sinful.[2] Such differences of opinion were also evident and publicly argued outside the conference. In Natal one school of thought, headed by Bishop Colenso, believed in making allowances for African customs as long as necessary; another group, which included the American missionaries and Wesleyans, believed the giving of marriage cattle should be banned, and opposed the sanction and control of it by the Natal Native Marriage Act. In the Transkei Bishop Callaway, the Bishop of St. John's, decided in 1879 to sanction polygamy to the extent of allowing women living in a state of compulsory polygamy to be baptised. He was roundly condemned by a missionary of the Basutoland synod, who was supported by the Christian Express.[3] The result of all this wrangling was that the missionaries spoke with too divided a voice, except in the

---

[1] Kaffir Express, vol. iii, no. 36, 6 Sept. 1873, pp. 3-4; Little Light of Basutoland, no. 11, Nov. 1873, p. 44.

[2] Christian Express, vol. x, no. 121, 1 Oct. 1880, p. 4; vol. xi, no. 127, 1 Apr. 1881, pp. 11-12.

[3] Ibid., vol. ix, no. 104, 1 May 1879.

unique conditions of Basutoland,[1] to form an effective pressure group on most African law issues.

But in assessing how effectively various methods and groups influenced tribal law policy, it should be borne in mind that the balance between parliamentary and executive control of tribal law policy lay far more in favour of executive control than was the case with most other policies of comparable importance. Circumstances had conspired from the start to give the under secretary for native affairs a great deal of influence in formulating what policy the officials with the tribesmen were actually expected to implement - despite the fact that even men who would readily bow to the expertise of the permanent civil service in most other departments, notoriously felt themselves knowledgeable enough to pontificate on the vital and intricate subject of what to do with the African and his wicked ways. The only secretary for native affairs in the period who had sufficient control of the department to have ensured that it rigidly enforced parliamentary policy was far too knowledgeable about the tribes to have done so when it would obviously have led to disaster. And if parliamentary policy was judiciously ignored by the senior executive officials, parliamentary committees might make recommendations and Parliament even pass laws without having any effect on some areas of the country.

At an even more basic level, it was the decision of the man on the spot which ultimately decided whether a law should be implemented. And given the unique conditions of the tribal territories, it was necessary that he be left that discretion

---

[1] See chapter 5.

to some extent, even though the result might be that sometimes he or, through him, a missionary, farmer or trader, might be more influential than Parliament or the Native Affairs Department in deciding what actually happened in his court. Few subjects gave rise to so much popular mythology and refusal to face the facts as that of the ability and willingness of the African to adapt to the way of life the settler brought to South Africa. As a result the field of tribal law provides numerous examples where policies were solemnly advocated by all and sundry, including parliament, although completely impracticable. It is therefore in the field of tribal law that policy and practice most widely and flagrantly diverged on numerous occasions, and nowhere is this more evident than in the Cape Colony proper.

CHAPTER FOUR

THE CAPE COLONY

When the Molteno ministry came into office, it inherited a set of beliefs and resulting policy on how to deal with people of different cultures living within the Cape's borders: if all were obliged to abide by the laws set by the most civilized section of the society, all would be forced to reach that section's standard of civilization. They would become not only god-fearing Christians, but also useful citizens under the British flag. The results of applying this policy to the Khoi people and liberated slaves had been disappointing to some extent, but had not disproved the theory. African society was admittedly a tougher proposition, but patience and time would, it was felt, work the necessary transformation. Therefore, when the Molteno ministry took office, the legal position in the Cape Colony allowed no magistrate authority to apply any law other than the Roman-Dutch law of the colony, as modified by legislation. An examination of how this policy actually worked in the Cape during the first years of self-government provides a case study of an attempt to change a society completely by legislation.

The Molteno ministry did not however blindly continue the policy without further consideration. As has been pointed out,[1] the legal situation made no allowance for the realities of tribal society as it then existed in border areas of the colony; and some three months after taking office the new ministry was confronted with the question of whether the legal position should not be brought into line with existing social

---

[1] See chapter 2.

usages. Halse, the newly appointed resident magistrate of Herschel, wrote to Brownlee asking whether he might administer tribal law in certain cases, and Brownlee put the matter before the ministry in March, 1873.

Judging from Brownlee's reply to Halse, it would seem that the ministry either deliberately decided to leave the answer vague, or could not reach an agreed decision. In his letter of 1 April, Brownlee told Halse that the ministry was 'at present not prepared to decide the question in reference to the law which you are to administer in your District, that is, whether they shall order you to administer Colonial law in all cases which may come before you.'[1] It is possible only to speculate on the reasons for this hesitation. It may be that the cabinet hoped for a more rapid change than was in fact to take place in tribal custom, and that within a few years colonial law could be applied without incongruity. But a more probable explanation, given Brownlee's expert knowledge of how slowly change took place in tribal society and his belief in the need for tribal law on occasion is that a clash occurred in the cabinet between those who favoured his approach and those to whom such a step was anathema. Opposition could have come from either of two schools of thought which opposed the recognition of tribal law: one objected to creating a separate class of citizens subject to special treatment, the other to prolonging and encouraging tribal customs. Or, it is possible in view of an indication later in the letter that

---

[1]Cape, N.A. 840, p. 29: Brownlee to Halse, 1 Apr. 1873.

the ministry intended eventually to refer the matter to the attorney general to see what steps were necessary to make the application of tribal law legally permissible.

The question of whether to apply tribal law did continue to exercise the policy makers after this date, for some six months later Brownlee wrote a four page memorandum on the recognition of tribal law marriages, beginning with the words:

> The question herein referred to is an important one and one with which sooner or later we must deal with [sic].[1]

He then stated his basic position on tribal law recognition:

> At the conclusion of the war in 1853 when the Kafirs really became British subjects, Sir George Cathcart in making peace with them told them they could in British territory live under their own chiefs and laws. Before annulling this permission or right, we must legislate to meet the case, but even though we should legislate upon it all rights acquired under the conditions of peace must be recognized.

He recommended that all existing marriages and rights connected with them should be registered, but that in future only one wife should be registered and she alone recognized as a man's wife. Only her children should be entitled to inherit their father's property. 'This' he wrote, 'I think is the farthest we can go just now in this matter'. But six days later he replied to a critic of the existing situation that the government could not even 'at present pretend to legislate on it.'[2] Despite subsequent similar recommendations from the Missionary Conference, the Commission on Colonial Defence, and officials

---

[1] Cape, N.A. 398: memorandum by Brownlee, 22 Oct. 1873. The memorandum was probably produced as a result of a letter from a law agent in the Bathurst district, pointing out the evils of the legal position of African law marriages. See Cape, N.A. 398: Blundell to Molteno, 26 Sept. 1873.

[2] Ibid., minute by Brownlee, 28 Oct. 1873.

supervising Africans,[1] neither Brownlee nor subsequent ministers for native affairs felt the time was opportune for moving on this matter, and tribal law was not recognized within the colony until 1927.[2]

As a result, government and court records, and even the newspapers, abound with cases where hardship was caused by failure to recognize African law. Most frequently a tribesman would be suing for the return of a deserting wife or relative's widow married according to tribal law, or for the cattle he had given for her, but unless the marriage was recognized, he would usually find himself unable to obtain the return of either the woman or the cattle.[3] As this became evident, it was not unknown for the wife's family deliberately to take advantage of the situation to defraud the husband by refusing to surrender the marriage cattle which they acknowledged they owed by tribal law.[4] Cases for damages for adultery were frequent, and again depended on the magistrate recognizing marriages celebrated according to tribal law.[5] Initiation ceremonies also gave rise to cases, a common cause for dispute being whether the ox slaughtered at a girl's puberty feast, when provided by someone other than her guardian, was a gift or a loan. In the latter case the agreement was usually that it should be repaid from her marriage-cattle when these

---

[1] Cape, N.A. 399: Harper to Molteno, 27 Sept. 1876, with ministers' minutes and draft reply; Cape Parl. Papers, G.1-77, report, pp. 17-18; G.13-80, p. 184.

[2] By section 11 of the Native Administration Act, no. 38 of 1927.

[3] E.g., G.T.J., 2 Feb. 1872, quoting from the Graaff Reinett Herald.

[4] E.g. G.T.J., 9 Feb. 1872.

[5] E.g., Cape, N.A. 398: Taylor, agent for Magitola, to Brownlee, 21 Apr. 1873; Bell to Brownlee, 23 Dec. 1873.

should be received, and claims would arise years later when the girl was married.[1] Some officials who apparently had no objection to the institution of marriage-cattle donations, would not hear cases arising out of initiation ceremonies.[2]

Numerous problems also arose from the government's zeal in undermining the tribal laws of communal tenure. The tribal system was undoubtedly open to abuse, notably the allocation of the best land to the chief's favourites or to those who offered the most lavish bribes, but the imposition of the colonial law system resulted in many injustices. Where locations were surveyed and Africans were informed that in future communal tenure would not be recognized, many inhabitants found themselves, as a result of inadequate surveys, allocated plots of land unfit for cultivation. Where there were no surplus plots in the location for which these could be exchanged, men would often refuse to take up their titles, on which they had to pay quit-rent and survey charges for the worthless land.[3] Or sometimes they would not have the money to pay the charges for the survey and title, and so could not take up their titles.[4] After a few years some magistrates would take steps to re-allocate unclaimed titles,[5] and Africans would find themselves landless and with no claim on the land they had held jointly with the rest of the tribe.

---

[1] E.g., Cape 1/TA 4/4: Tamacha district cases, 8 Dec. 1879 - 4 Aug. 1880.

[2] E.g., Cape Parl. Papers, G.33-79, p. 181.

[3] E.g. Cape Parl. Papers, G.17-78, p. 52; G.4-83, appendix F, p. 373: surveyor general to commissioner of crown lands, 30 July 1881.

[4] Ibid., G.13-1880, p. 181; G.20-1881, p. 108.

[5] Ibid., G.17-78, p. 52; G.4-83, appendix F, pp. 367-372.

Sometimes too Africans would get into trouble with the imperfectly-understood money economy, and would then find their land seized in payment for their debts, leaving them landless. An illustration is provided by the case of the Thembu chief Gungubelele, who seems to have led his section of the tribe in revolt against the Cape government in 1878 as a result of tangling with the law over his land transactions.[1] As grants were often made too small for subsistence farming in a deliberate attempt to force Africans into the labour market, they might themselves be the cause of Africans getting into debt. The superintendent of the Heald Town location, for example, wrote in 1877:

> The size of arable land appears rather small, taking all circumstances into consideration; but the original idea seems to have been that the women should cultivate the lands while the men earned money in other ways. In fact, however, this is not the present result, consequently many of the residents in this location are often in very straitened circumstances, as depending entirely upon their lands for the support of themselves and their families. At the present time, owing to the drought and the high price of grain, a good many of the natives here are living on one meal a day.[2]

The resulting sequestrations of land as Africans ran into debt led to white men buying up sequestrated farms in areas which had been intended for African occupation, thus increasing the already acute land shortage for Africans.[3]

Then there were the difficulties which arose in court cases connected with the ownership and leasing of land when it was discovered that Africans had not understood the laws

---

[1] Cape Parl. Papers, G.17-78, pp. 188-192; Cape Times, 9 July 1878, p. 3.

[2] Cape Parl. Papers, G.17-78, p. 52.

[3] Ibid., p. 192: Hemming to Merriman, 26 Nov. 1877.

governing grants made to them by title deeds. In many areas, such as the Mfengu locations in the Fort Beaufort and Victoria East Districts, grants to the Mfengu had carried the condition that land could not even be leased without government consent. Nonetheless, in many cases land had been sold or leased without the necessary permission, and transfer duty at death was very rarely paid. As the magistrate of Victoria East reported:

> Much was due to ignorance, but I believe that the expense attending the conveyance of land is a consideration that deters many of these people from having their holdings properly transferred.
>
> They seem to be under the impression that the mere possession of the title deed secures them in the possession of the ground.[1]

Courts were not always prepared to recognize the de facto lessees or new owners as having such status in law. Among other cases in which this could lead to difficulties were those involving the inheritance of ground, a subject already confused by the existence of the Native Succession Act and Native Succession Ordinance,[2] and complicated by the necessity of applying colonial law.

A further potential source of trouble for Africans wishing to inherit ground was presented by a practice which grew up as a result of shortage of land. Several chiefs bought land for their tribes from contributions provided by the tribesmen. Oba, for example, bought two farms in this way, and his magistrate was quick to see the problem this presented:

---

[1] Cape Parl. Papers, G.8-83, p. 55.

[2] See chapter 2, p. 64.

> I pointed out to the Chief that according to our law the property being transferred to him alone, might at his death be claimed by his lawful heirs, to the exclusion of the shareholders, and said it would be advisable for him to take measures to avoid future litigation and trouble. He gave me a characteristic Kafir reply to the effect that "sufficient unto the day is the evil thereof".[1]

Even failure to recognize African procedural rules in court could lead to injustices inexplicable to one accustomed to tribal courts. A translated account by 'an uncivilized native', Mhlakwapalwa, of his experiences when giving evidence in a circuit court illustrates this point. A man was being tried for accusing Mhlakwapalwa's wife of witchcraft and burning down her hut, nearly incinerating her and Mhlakwapalwa in the process. Mhlakwapalwa's statement made at the preliminary proceedings in the magistrate's court was read to him, and

> according to our Gcaleka custom I assented to each question with a loud "Ewe!" as we always do. No Gcaleka can go on talking to another person unless he receives some reply. He would cease speaking, and say it is no use addressing a deaf and dumb man. So when this long man with the mtika[2] spoke to me I assented in accordance with our custom, notwithstanding that he told me some things which I did not agree to. I answered "Yes!" as a sign that I was listening. I presumed, as is always the case in our Gcaleka courts, he would presently sit down and tell me to go on (quba); then would I thunder forth in my best style what I knew, convincing every one in court that I was an orator and councillor of the chief. But it presently appeared such was not to be the case, for after repeating a few more statements to me the gentleman in the mtika stared at me from under his eyebrows for a few seconds, showed the whites of his eyes, shrugged his shoulders, said a few words to the judge in a despairing manner, and sat down. This puzzled me,

---

[1] Cape Parl. Papers, G.16-76, p. 73.

[2] mtika = loose gown.

> but what followed puzzled me more. The judge suddenly appeared to be moving, his face became red, he spoke to the old gentleman [the interpreter], and it was clear to me that he was angry. The old gentleman then addressed me as follows: "The judge says you are not speaking the truth; you made one statement before the magistrate and now you make another. You are an old man, and it is correct to presume, as such, you would have more respect for the truth than a boy, but this does not appear to be the case. You are fortunate in escaping a prosecution for false swearing and a long term of imprisonment. You may go, but consider yourself fortunate at being allowed your freedom.[1]

Similar perjury accusations could have arisen from lack of understanding of African attitudes to oaths. Not all judges and magistrates would have had the knowledge of African custom exhibited by the magistrate of Bedford when he wrote in 1882:

> There is also, I regret to find, a great want of truthfulness amongst the Natives, and several have already tried to deceive me by telling me the most bare-faced and abominable untruths. The swearing in Court is something most wicked and sinful, though perhaps they are not much to blame on account of swearing by God, which they do not consider so binding as swearing by their mother or the bones of their chief, in whose existence they have a firm belief.[2]

How little the oath administered in court must have meant to most Africans at the time is indicated by the fact that some fifty years later Z.K. Matthews, himself an African, could write:

---

[1] 'Mhlakwapalwa at a Circuit Court', Cape Law Journal, vii (1890), 233-4. There are examples of very similar cases occurring during the period under review, e.g. in Tamacha in 1879, a case was reheard by the magistrate because the defendant, who had lost the case, pleaded that the facts as then stated were false and defendant misunderstood purport of several questions put to him. The magistrate reversed his earlier judgment. Cape 1/TA 4/1, p. 24: Nonike vs. Vusani, 11 Feb. 1879.

[2] Cape Parl. Papers, G.8-83, p. 108.

> On this matter of oaths, it is noteworthy that different tribes have different oaths which are calculated to impress upon their minds the necessity for telling the truth. In the opinion of the writer the oath usually taken on the Bible in European courts makes hardly any impression on the Native mind. Having taken it, their evidence is often anything but the truth. In any event, it is not as impressive to them as swearing by one's father (especially if dead), or by one's sister or by any departed ancestors, especially male ascendants, or by one's totem where totems exist.... But with the non-Christian natives who constitute about two-thirds of our native populations, the old Bantu forms of oath are the only ones they know and revere, and to apply any others to them, as is so consistently done in our South African courts, is to say the least, absurd.[1]

Although men on the spot soon became well aware of the difficulties involved in ignoring tribal law and procedure, many disapproved of recognizing the law on moral grounds. They denounced polygamy and circumcision ceremonies as immoral and degrading, and the giving of marriage-cattle as leading to slavery for the woman; she was, they said, sold to the highest bidder without reference to her wishes, and obliged to work for the rest of her life to support her lord and master in idleness.[2] Even more sweeping but not unrepresentative were the views of the resident magistrate ot Victoria East when he wrote:

> The polygamic customs of the natives is another element productive of much dissension and litigation. Several cases have come before me lately which proved this.[3]

Some magistrates also believed the enforcement of tribal law had practical disadvantages for the colonists. Apart from the

---

[1] Matthews, 'Bantu Law', pp. 199-201; but cf. Maclean, Compendium, p. 165.

[2] E.g., Cape Parl.Papers, G.16-76, p. 63; G.20-81, p. 124; G.33-82, p. 176.

[3] Ibid., G.3-84, p. 76.

commonly voiced complaint that the giving of marriage-cattle led to stock-stealing,[1] it was argued that polygamy merely multiplied this effect by the number of wives obtained. Polygamy was also held to enable men to live in idleness instead of coming onto the labour market for the good of their souls and the colonial economy.[2] Circumcision ceremonies were held to promote stock-stealing, since the head of the kraal where the celebratory dances were held would steal cattle to fulfil his traditional obligations to provide for the many guests invariably attending.[3] In addition, the dances were said to lead to fights, assaults, sometimes murder, and to leave servants quite unfit for work next day.[4]

Yet despite both the legal position and the moral and pragmatic objections of magistrates, it is known that African law was often applied. One means of doing so was supplied by the proviso in Roman-Dutch law that it could be administered by treating acceptable customs as implicit agreements. Exactly which customs were acceptable - that is, not contrary to public morality and civilized practice - was a matter for the magistrates to decide until such time as the superior courts saw fit to give judgment on the question; and perhaps it was fortunate for many Africans that the courts were extremely reluctant to do so. In 1875 an effort was made to take a case before the Eastern Districts' Court as a test case on an aspect of the

---

[1] E.g., Cape Parl. Papers, G.16-76, p. 61; G.17-78, pp. 43-45, 59; G.13-80, p. 184.

[2] E.g., ibid., G. 27-74, p. 17.

[3] E.g., ibid., G.3-84, pp. 18-19.

[4] E.g., ibid., G.12-77, p. 135.

custom which gave rise to most disputes: the giving of marriage-cattle for a tribal law marriage.[1] It was thought that the Native Succession Act of 1864 might be argued to have reversed the general assumption that African law marriage was immoral because of its potentially polygamous nature. Mr. Justice Dwyer however announced that 'he certainly would not sit there to administer Kafir Law',[2] and as the claim for the return of marriage cattle was made by an heir, he dismissed the case on the grounds that the Native Succession Act ousted the higher courts from jurisdiction in such matters and delegated them to the magistrates.[3] This left the magistrates exactly where they were before, and some superior court decisions could even be interpreted as running counter to the general policy of regarding African law marriage as an un-acceptable custom. A decision in 1875 was interpreted by a magistrate as sanctioning the customary law marriage of at least the elder or principal wife,[4] and even those tribal law marriages which were actually polygamous were recognized by some circuit courts for the purpose of the rules of evidence, causing the exasperated magistrate of Queenstown to remark in his annual report in 1877:

---

[1] Cape, N.A. 398: J. Ayliff to Brownlee, 7 Dec. 1874; G.T.J., 21 May 1875: second editorial.

[2] G.T.J., 25 May 1875: detailed report on Adam (Curator ad litem, of M'pendukwana) vs. Dalza.

[3] In 1880 the Eastern Districts' Court did give a judgment on part of the 1864 Native Succession Act; but it ruled that the act had not been intended to introduce into Cape law the rights of an African heir to the services of a widow or the return of her dowry, and that therefore this feature of African law was definitely not legitimized by the act. See Sengane vs. Gondele, 1 E.D.C. 195.

[4] See p. 127 below.

> There is another evil of a serious character to the peace and prosperity of the Colony. The evidence of these so-called wives is refused by some judges. The consequence is frequent miscarriages of justice, as in many cases of sheep stealing, the thief and his women eat the sheep, and some of the judges holding the women all to be wives, refuse their evidence.
>
> It seems curious, to say the least of it, that judges, who attach great importance to English custom, should endeavour to uphold a system, which in my opinion, ought not to be maintained by any Christian community.[1]

It is difficult to gauge the effect of this confusion on which customs could be regarded as acceptable. None of the magistrates were trained lawyers and some may not even have known that they could recognize acceptable customs. But it is known that some did, and as increased prosperity enabled more Africans to hire lawyers, they probably benefited more often from such recognition.[2] In addition, it is known that in the frontier districts with the highest proportion of Africans in the population, at least some magistrates besides the special magistrates in the King William's Town District applied African law in cases between Africans. It could hardly be otherwise. Apart from the indignation which the more sympathetic magistrates obviously felt at the injustices produced by non-recognition of African law, strong practical reasons forced even those who disapproved to accord some measure of recognition unless they chose to ignore the realities of the situation completely. Many criminal cases and all civil cases would come before a magistrate's court only if the injured party chose to bring it

---

[1] Cape Parl. Papers, G.17-78, p. 44.

[2] E.g., Klaas vs. Jack, heard in the resident magistrate's court, Grahamstown, and reported in the Eastern Star, vol. ix, no. 966, 23 Apr. 1880.

there. If, as was the case, the magistrates wished to replace the chiefs as the judges in disputes between Africans, they had to offer a system of law which the Africans would believe to be preferable to that of the traditional courts; and the strange and totally incomprehensible colonial law could hardly compete in this contest. Moreover, in the first few years of Cape rule, many magistrates had none or very few police at their disposal.[1] Even had the magistrates encouraged men to appeal against unfavourable judgments in the chiefs' courts, they would have had no way of enforcing their colonial law decisions if African community opinion had not supported them. Ironically, therefore, to gain control of judicial and administrative functions in the African communities, magistrates found themselves obliged to uphold the very tribal law which they were supposed to be abolishing. It is easy to over-simplify the picture - in some communities Christians or even heathen headmen paid by the government were willing to provide the magistrate with the necessary support for his colonial law decisions - but in general magistrates had to find some way of applying tribal law.

Some defined 'acceptable' implicit agreements very widely; others obviously thought they had authority to recognize African law; still others applied it as arbitrators by consent of both parties, thus taking the case technically out of court. The early reports show Halse in Herschel administering African law

---

[1] In the magisterial reports in the Cape Native Blue Books the need for more police is a constantly reiterated refrain.

as an arbitrator.[1] Judge at Queenstown recognized ukulobola and other African customs as implicit agreements under the law of contract.[2] There are indications that his subordinates, the superintendent of the Mfengu location and the special magistrate of the Thembu location, recognized it too.[3] Nightingale at Victoria East interpreted a judgment of the Eastern Districts Court in 1875 as recognizing African marriages as legal under Cape law, at least as far as the elder or principal wife was concerned,[4] and on this basis decided to give effect to marriage-cattle contracts, although his interpretation does not appear to have been shared by the other magistrates.[5] Before that date he had, as arbitrator, recognized tribal customs.[6] Honey at Fort Beaufort enforced marriage-cattle claims.[7] Cole at Wodehouse tacitly recognized tribal law.[8] In the King William's Town District, apart from the special magistrates, the superintendent of the Ngqika location recognized a wide range of tribal customs.[9] Of the officials in the nine districts on the frontier with the highest proportion of Africans in the population, only those of Peddie,

---

[1] Cape Parl. Papers, G.16-76, p. 91.

[2] Ibid., G.4-83, evidence, p. 183, questions 3168-73; p. 332, question 5948.

[3] Ibid., G.16-76, p. 90; G.33-79, p. 181.

[4] Ibid., G.1-77, evidence, p. 239, question 4296; G.16-76, p. 78: Nightingale to Brownlee, 5 Feb. 1876.

[5] I have not been able to trace the case, but Nightingale did give effect to such cases thereafter. See ibid., G.12-77, p. 124.

[6] Ibid., G.27-74, p. 4.

[7] Ibid., G.21-75, p. 57.

[8] Ibid., G.27-74, p. 59.

[9] Ibid., A.7-78, pp. 94-95: Frere to Carnarvon, 21 Nov. 1877.

Aliwal North and East London were too discreet to indicate whether or not they were recognizing tribal law (though there is other evidence that the magistrate at East London did not).[1] In other words, in the first few years in which the Cape took control of its frontier districts, most of its officials in those districts, by their own admission applied at least those aspects of tribal law which most commonly arose in marriage and inheritance cases. The Cape's policy of rapidly civilizing the Africans by non-recognition of their law was being only partially applied, and had been found incompatible with genuine magisterial control in the areas with the greatest proportion of Africans in the population.

The results of this partial application of government policy was no doubt highly confusing to the Africans. When de facto magisterial recognition of African law is taken with the non-recognition cases mentioned above, the picture that emerges in the early years of Cape rule is that the probability of a magistrate administering African law declined roughly in proportion to the percentage of Africans in his district. Africans would be faced with this haphazard situation when seeking redress in a 'foreign district',[2] and this would have happened increasingly frequently as the series of droughts and bad harvests from 1877 onward brought more and more Africans further west in a search for work, shelter, or pasture for their livestock.

---

[1] Cape, N.A. 398: Taylor, agent for Magitola, to Brownlee, 21 Apr. 1873.

[2] E.g. ibid.

Nor was there any certainty that a new magistrate would continue his predecessor's policy. In 1874 the magistrate at Fort Beaufort, for example, heard thirty-two civil cases, 'and nearly all of these arose out of questions of property in cattle connected with heathen marriages and dowry'.[1] Yet in his report of 1879, his successor wrote of the practice of giving marriage-cattle: 'I have done what I could to discourage this barbarous custom',[2] and two years earlier the newly appointed superintendent of the Heald Town location, the big location in the Fort Beaufort District, wrote that in parts of the location:

> many of them are complete heathens, and practise, as far as they dare, the customs of their forefathers, such as Ukulobola, "circumcision", and other heathenish rites, together with their licentious accompaniments. I am doing what I can to put down these customs, refusing to entertain any cases arising out of them, or to allow them, either to settle them themselves, or to take them elsewhere.[3]

That he could even attempt such drastic measures with any hope of success is probably at least partly explained by the fact that the headmen in the location had been appointed only fairly recently and only in one or two cases were they tribal headmen rather than simply government appointees.[4]

Even more confusing for the tribesman was that on occasion there did not have to be a change in personnel among the officials for them suddenly to find themselves unable to have their cases settled according to tribal law, as had been

---

[1] Cape Parl. Papers, G.21-75, p. 57.

[2] Ibid., G.13-80, p. 184.

[3] Ibid., G.17-78, p. 52.

[4] Ibid., G.21-75, p. 57.

done till then. As the system of periodical courts was extended to new districts, African law was refused recognition and certain classes of cases were even taken out of the hands of the magistrates entirely. The clerk in charge at Keiskammahoek, who until then had always settled land disputes, indignantly reported:

> since the establishment of a periodical court here the lawyers have taken exception to cases of this nature being heard either by the Resident Magistrate or the officer in charge, because they bind rights in future and are consequently beyond the jurisdiction of the inferior courts. At present a man has no remedy if his neighbour should think fit to step in and cultivate his land. Let me give a case by way of example. A complains that B, who is his neighbour, simply ploughed up 4 or 5 acres of land he had been cultivating for years. A summons is issued against B to appear before the magistrate. Exception is taken to the jurisdiction, and the case is thrown out. A then endeavours to bring the difference to arbitration, but B refuses to give his consent, acting upon the advice of his attorney. The consequence is that A has no remedy, as he cannot afford to enter an action before the higher courts.[1]

The special magistrate also added that:

> Formerly all cases which required to be dealt with according to native usage were tried in a summary and irregular way by the Special Magistrate, to the satisfaction of all parties. Since the establishment of a periodical court here, this mode of procedure has been suppressed, a great many grievances are not easily redressed, and the result often is dissatisfaction.

Even where African law was recognized by the magistrate, there was no guarantee that he would not still be resented by the tribesmen as usurping the chief's position. In the King William's Town District the special magistrates had applied tribal law since the special magistracies were established, yet the court records for the Tamacha special magistracy, for

---

[1] Ibid., G.3-84, pp. 37-38.

example, show numerous instances of men being fined for impertinence to the special magistrates, for refusing to appear before them, for contempt of court, and for disobeying orders.[1] While many cases are probably explicable on other grounds, the number involved does seem to indicate that magisterial courts, even when applying tribal law, were not welcomed by all.

This was probably at least partly due to the fact that the tribesman could not be certain what variety of African law he would find being applied. In most, if not all, areas, the magistrate attempted to modify it. Judge, for example, in the influential King William's Town magistracy, wrote in 1881:

> I hold that it is of supreme importance that in native cases justice should be most carefully administered and that they should be decided by colonial law, modified by native custom.[2]

A study of the court records of magistrates ostensibly applying tribal law gives some examples of how this principle worked in practice.

In civil law cases the magistrates tended to uphold the position of women rather more than was allowed for in tribal law, thereby undermining the powers of her guardian. Tainton, special magistrate for the Tamacha District, refused to allow a dead husband's family to reclaim either his widow or her marriage-cattle when she returned to her family, 'the woman

---

[1] See Cape, 1/TA 2/5: returns of complaints, fines, etc. 1865 Jan. - 1879 Nov.; 4/4: cases 8 Dec. 1879 - 4 Aug. 1880.

[2] Cape Parl. Papers, G.20-81, p. 92.

having faithfully served her Husband during his life-time'.[1] While Dick, Tainton's successor, refused to insist on a wife returning to her husband, even when her family had lost all its cattle in a recent war and could not repay the marriage-cattle. 'I will not', he added in recording the judgment, 'under any circumstances compel a woman to live with a man, when there is no prospect of them living happily together.'[2] The magistrate would also on occasion allow a woman to bring a case herself where she could not have done so in tribal law.[3] And in contractual claims Dick incidentally imported into his judgments the colonial legal concept of the prescription of claims by lapse of time: he refused to order the return of marriage-cattle where the husband waited many years before claiming back his wife.[4]

In cases which the colonial law defined as criminal law cases, the magistrate was quite likely to treat acts which in tribal law were not offences or only minor ones as crimes to be punished according to their gravity in the eyes of the colonial, not the African, law. The special magistrate for Tamacha punished 'the practising of witchcraft'[5] and wife-beating, although these were not usually offences in tribal law.

---

[1] Cape, 1/TA 2/5: Ndhlakusi vs. Jarana, 4 Dec. 1876.

[2] Cape, 1/TA 4/1, pp. 90-91: September vs. Yamile, 20 Mar. 1879.

[3] E.g., Cape 1/TA 4/4, pp. 157-8: Galeka vs. Tamashe, 4 Aug. 1880.

[4] E.g., Cape 1/TA 4/4, pp. 45-6: Qwayi vs. Mbada by Qangana, 31 Mar. 1880.

[5] I.e. pretending to possess supernatural powers which enabled the possessor to discover harmful witches or to make rain. An indication that this was not an unusual offence is the fact that in the Tamacha District alone, nine cases occurred in the last nine months of 1874.

In punishments too, colonial law was imposed. Imprisonment, unknown in tribal law, was universally used by magistrates by the time the Cape achieved Responsible Government, and deportation, also unknown in tribal law, was available for certain crimes. Apparently it continued to be feared long after imprisonment had lost its terrors: it was for that reason that Holland, magistrate for Fort Beaufort, in 1879 advocated that it should again be made the compulsory punishment for stock-stealing:

> I believe it would have a deterrent effect were all convicted stock-stealers transported to some distant place to serve their time. I believe there is nothing a native dreads more than this; my reason for saying so is that during the time the rule existed for sending stock-stealers to Cape Town, the parents of some of those convicted came to me and offered a number of cattle not to send their sons away.[1]

The tribesman as yet unaccustomed to colonial law would therefore have found even the magistrate's court which purported to administer his own tribal law full of strange and often unwelcome innovations.

Even where the magistrate desired to apply African law as it existed in tribal society, he often had difficulty in discovering what that law was. Outlines of traditional tribal law were rare. Maclean's Compendium was probably known to most magistrates - the 1865 Commission on Native Affairs had asked in its questionnaire whether the Compendium was known to officials answering the circular and the majority of officials in the frontier districts had replied in the affirmative - but it was inadequate and occasionally contradictory. The Colonial

---

[1] Cape Parl. Papers, G.33-79, p. 184.

Defence Commission of 1877 recommended that a code of tribal law be drawn up as a guide to magistrates,[1] but this was never done. Yet even magistrates with long experience of tribal areas were not necessarily well versed in tribal law.[2] An African could not therefore be sure that even a magistrate set on applying the traditional law of the tribe would do so accurately in his case.

But to complicate the problem, when African societies were plunged into periods of rapid change, the traditional flexibility of African customary law made for uncertainty as to which customs existed. The discovery of the diamond fields accelerated these changes which had first begun when contact was made with the money economy, and the process was further aggravated by the scattering of the tribes brought about in the 1870s and 1880 by wars, land confiscation, drought, and increased taxation. The baffled magistrate would find himself confronted with conflicting evidence as to whether a custom was now observed, as the Grahan's Town Journal ironically described in 1875:

> a large array of witnesses was mustered on either side - any number being available to say it is, and as many to say it isn't. If the subject were not too serious, we might remark that much amusement would have been furnished by seeing a regiment of witnesses, technically called experts, marched one after another into the box to testify to the affirmative, and a second regiment to swear to the negative, while individuals would nave pointed out that the custom was recognized by the Gaikas, but repudiated by the Hlambies and, if adopted at all by the Fingoes, was laid aside on the decease of a particular chief. That where a Kafir Magistrate had enforced it in one case, he had rejected it in another; that owing to circumstances of a particular native the custom did not apply in this case, and so on ad infinitum,....[3]

---

[1] Cape Parl. Papers, G.1-77, report, p. 17.

[2] E.g., Cape, N.A. 275: Rolland to Brownlee, no. 12, 25 Jan. 1878.

[3] G.T.J., 21 May 1875: second editorial.

Moreover, as the tribes mingled more and more, magistrates must have faced an increasing number of intricate legal problems as to which law to apply in disputes between men of different tribes, who might also have made agreements in areas where neither of them lived. By the 1880s reports are coming in from magistrates, especially in areas where public works are being carried on, that the Africans in their areas were not only Xhosa and Mfengu, but Sotho, Thembu, and Zulu. Africans adopting Christianity added a further complication to the problem of which law should be applied in certain cases. Magistrates, completely untrained even to recognize the legal problems involved, yet caught in the middle of this culture collision, would have needed the wisdom of Solomon to have done justice in many cases.

Given the uncertainties of entering into litigation before white magistrates, it is worth asking what proportion of Africans did so and why. The picture which emerges from a careful examination of available records[1] is very incomplete. In the frontier districts with the highest proportion of Africans in the population, the magistrates only occasionally mentioned in their reports that they were hearing civil cases. In 1874 the magistrate's court at Fort Beaufort heard 32 civil cases, and by 1875 the number had shot up to 159, 'most of which were between natives and of a very tedious nature, and often occupied the magistrate's time and attention for whole

---

[1] Many records of magistrates' courts, which are in the Cape Archives, were unsorted and not available to the public when I visited the archives.

days.[1] Unfortunately figures are lacking for the number of cases brought to the magistrate's court after he and the superintendent began to discourage the use of tribal law. At Herschel the magistrate heard 33 civil cases and complained that 'for four days in every week there is a constant litigation, chiefly confined to disputes about their common lands or inheritances, dowries and wife desertions, and most of which are at the suitor'sspecial request heard and settled by the magistrate, as arbitrator according to native law.'[2] In 1878 he heard 49 civil cases and mentioned in his report on 1879 that land disputes were constantly brought to his court for settlement, although the land had not been surveyed and was allocated by headmen. By 1881 land disputes were still being brought to his court for settlement, in 1882 he heard 46 civil cases, and in 1883 the number rose to 84.[3] Whether he included African law cases settled by arbitration is unclear. In the King William's Town District the special magistrate at Keiskammahoek in 1879 found that once the rebellion was over - while it was on his court had been closed - 'the office was besieged with suitors anxious to have their cases attended to'.[4] The special magistrate at Middledrift reported that no headman had anything to do with any case,[5] and by 1882 the special magistrate for Tamacha heard 358 civil cases in one year.[6] All of which bears out the report of the

---

[1] Cape Parl. Papers, G.21-75, p. 57, G.16-76, p. 84.

[2] Ibid., p. 91.

[3] Ibid., G.33-79, p. 192; G.13-80, p. 188; G.33-82, p. 175; G.3-84, p. 25.

[4] Ibid., G.13-80, p. 175.

[5] Ibid., G.4-83, appendix D, p. 320: questions 9 and 15.

[6] Ibid., G.8-83, p. 89.

magistrate for the whole King William's Town District that

> in disputes or differences arising among natives, belonging to the same tribe and recognizing the same chief, instead of referring their matters for settlement to the chief or to the headman immediately over them, it has become quite a common occurrence to appeal to the courts for legal decision rather than accept or abide by the decision of the chief.[1]

In Victoria East the magistrate reported that by 1876:

> Of civil cases the number has greatly increased; indeed, the propensity for litigation seems to grow with advancing civilization, and a great deal of my time is taken up, both in court and out of it, in listening to, and deciding disputes of every imaginable description; some of which have agitated whole locations for years.[2]

In Peddie in 1879 the magistrate heard 149 African lawsuits, 'notwithstanding all my endeavours to discourage this apparent mania for litigation, which tends so much to harass and impoverish them'.[3] At Oxkraal and Kamastone locations in the Queenstown District the location superintendent was by 1880 settling most cattle trespass cases by arbitration,[4] and Africans were evidently attending the magistrate's court of the Glen Grey District.[5] In the Wodehouse District the newly appointed superintendent of natives reported settling 50 civil cases during 1882.[6]

From a quick reading it would therefore seem that Africans in virtually all the largely African frontier districts were resorting to the magistrates to settle their cases

---

[1] Cape Parl. Papers, G.16-76, p. 63.

[2] Ibid., G.12-77, p. 124.

[3] Ibid., G.13-80, p. 192.

[4] Ibid., G.20-81, p. 112.

[5] Ibid., p. 126.

[6] Ibid., G.8-83, p.80.

during the period under review. But various qualifications rather change the picture. To begin with, where parties could not agree on arbitration, if they wished their cases tried according to African law they were unable to resort to the white officials in those districts where the magistrate recognized African law only in his capacity as arbitrator. This would have applied at least to Halse and his successors at Herschel; to the superintendent of the Mfengu location in the Queenstown District at least until 1879, when he was given jurisdiction in minor criminal cases by being appointed a special justice of the peace in terms of Act 10 of 1876; to the clerk in charge of the Queenstown Thembu location until the district of Glen Grey was created as a magistracy in 1879; to Nightingale at Victoria East before 1875; and possibly in other districts as well. It seems likely that as a result many cases would therefore have found their way to the chiefs' courts rather than the magistrates'. As the experienced special magistrate at Keiskammahoek reported:

> If you turn these people away and decline to entertain their cases they go to their headman, who is only too glad to get back a little of his lost authority. He sets up his own court, fines the people, and reaps half the spoil.[1]

Secondly, there were all the cases which the magistrates refused to hear in any capacity, such as cases where one man charged another with bewitching him. Thirdly, in some areas lack of or inadequate magisterial supervision made it inevitable that only a tiny percentage of cases would have reached the

---

[1] Cape Parl. Papers, G.20-81, p. 103.

magistrates during much of the first years of Cape rule. The Colonial Defence Commission concluded its report in 1877 with the hope 'that an effort will be made for the first time to really govern the immense masses of natives residing within the Colony. At present they are not governed. They simply exist amongst the colonist in the same way as wild beasts exist.'[1] The commission recommended that a magistrate should be appointed to every 10,000 Africans, and commented unfavourably on the lack of supervision in both the Ngqika and Thembu locations. In this it was amply justified. 30,000 Thembu, for example, were supervised by only the two resident magistrates within whose districts they came: those of Queenstown and Wodehouse, with 20,000 in the former. Yet the magistrate of Queenstown was able to spend only three days there each month, part of which were taken up with hearing reports from the field cornets on their districts,[2] and as the magistrate pointed out, the cost of bringing a case before his court was so great that most Africans were forced to resort to the chiefs' courts.[3] In 1874 at his request a clerk in charge was finally appointed to the Queenstown portion of the Thembu and acted as arbitrator in civil disputes, since he had no magisterial powers.[4] But when the two halves of the location were finally amalgamated after the 1878-9 war (and a drop in population to about 34,000) and formed into the new magisterial

---

[1] Cape Parl. Papers, G.1-77, report, p. 19.

[2] Cape Argus, 22 Mar. 1873: 'Sketches from the East'.

[3] Cape Parl. Papers, G.27-74, pp. 60-61.

[4] Ibid., G.4-83, evidence, p. 324, question 5776; p. 185, questions 3195-6.

district of Glen Grey, the magistrate reported that this meant

> practically, the introduction of colonial law into a purely native district, for although these locations have been within the limits of the Colony for years, one portion at any rate was, to a great extent, excepting in occasional criminal cases, managed by petty chiefs and headmen under a sort of Kafir law. Queen's Town location has for years had a Government officer resident in it, and the natives in that portion of the district have been brought more directly under Colonial law, but the Wodehouse portion has not, and the occupants of it are really only now coming under its operation; consequently, the cutting off entirely from the headmen and petty chiefs the power of settling and carrying out cases at first met with some opposition from them, but the people seem to prefer it, for the law as administered by these men was in many cases unjust, and strictly speaking not Kaffir law.[1]

Fourthly, probably for the same reasons of inadequate colonial manpower, there are indications that in what colonial courts classified as criminal cases, Africans in the early days of colonial rule preferred to resort to tribal courts. In 1873, for example, the magistrate of Herschel reported:

> 1873 is remarkable for a total absence of reported thefts, or other crimes; no prisoners committed for trial, and the only cases of a criminal nature have been petty assaults committed in faction fights.[2]

Yet the estimated population of Herschel was 25,000. By way of contrast, the magistrate in Victoria East, with an African population of some 8,000, heard 75 criminal cases.[3] In 1874 the entire district of King William's Town, with a population of some 90,000, had only six reported cases of theft, which the civil commissioner himself remarked was a very small number.[4]

---

[1] Cape Parl. Papers, G.13-80, p. 182.

[2] Ibid., G.27-74, p. 11.

[3] Ibid., pp. 2-5.

[4] Ibid., G.21-75, p. 61.

In 1875 the special magistrate at Middledrift in the King William's Town District, with a population of over 15,000 had not one case of theft reported during the year.[1] It would be surprising if more cases than these had not occurred and not been settled privately; it seems far more probable that complaints of this nature were taken to the tribal courts. As the years pass, magistrates' reports reflect a higher crime rate and several magistrates remarked that this was probably due to the greater efficiency of the police rather than to more crime. As more district police forces were gradually established under Act 6 of 1873, and a Cape police force was eventually organized in terms of Act 12 of 1882, this explanation rings true and would probably also account for the Africans' earlier neglect of the relatively inefficient machinery of the white man for finding cattle or offenders.

Fifthly, there is evidence that some chiefs actively and successfully opposed the magistrates' taking over their judicial functions. In the Ngqika location in the King William's Town District, for example, the Ngqika commissionership had been abolished in 1868 to reduce expenditure, and the commissioner replaced by a clerk in charge, T. Liefeldt, a young and inexperienced man, who was, according to Frere, completely inadequate for the job.[2] It is certainly true that the Ngqika chief regained much of his judicial and executive power which Brownlee had kept in check during his commissionership

---

[1] Cape Parl. Papers, G.16-76, p. 61.

[2] J. Martineau, The Life and Correspondence of Sir Bartle Frere (London, 1895), ii. 205, quoting Frere to Merriman, 21 Nov. 1877; Cape Parl. Papers, A.17-78, p. 58.

there.[1] For this reason, in 1877 Brownlee decided to establish a special magistrate with Sandile, the chief, and appointed Wright in September 1877. The day after his introduction to the tribe, however, war broke out between the colony and Sarili, Sandile's paramount chief. In the rumour-ridden period that ensued, Wright was unable to regain control over the tribesmen and when in December the area was drawn into the fighting, Sandile rebelled.

Even at a lower level, a headman could prevent many cases reaching the magistrate. In the Wodehouse Umhlanga Location, for example, the magistrate complained bitterly of one, Klaas Kosana, 'a self constituted headman in the location, who has done all in his power to resist the proper administration of justice, and incited others to do the same.'[2] There are several reports of headmen being punished for setting up their own courts,[3] and Fleischer, while acting magistrate of Victoria East, reported that nearly all cases were taken in the first instance to the headman and only cases they could not settle came to the magistrate. 'In other words' he wrote, 'the headman stands between the magistrate and the people, and therefore it is almost impossible to deal with them satisfactorily or to reach some of their more objectionable customs.'[4] There is evidence that in some other districts too most cases went in the

---

[1] South African Public Library, John Cumming Correspondence: draft letter of Cumming to Innes, Feb. 1879.

[2] Cape Parl. Papers, G.8-83, p. 82.

[3] E.G., ibid., G.16-76, p. 76; G.13-80, p. 175.

[4] Ibid., G.33-70, p. 188.

first instance to the headmen.[1]

A factor which helped to bolster the chiefs and headmen in their fight to retain their judicial powers was that the lack of supervision in many districts enabled squatters from other tribes to move into locations with the connivance of the headmen. As the magistrate for Queenstown pointed out, such squatters were frequently men who had fled from justice elsewhere,[2] and therefore had a vested interest in upholding the authority of the local headmen, rather than of the more universal colonial government. But if a chief openly opposed the magistrate's court, even groups without a vested interest in supporting the chief probably did so from loyalty, conservatism, and a dislike of the magistrates' unknown and unpredictable courts.

It should be noted in passing that not all Christians resorted to the magistrates' courts either, since missionaries to some extent usurped their function. As the Reverend J. Harper of King William's Town admitted of missionaries administering mission stations:

> Most of us have had to act as magistrates in settling disputes connected with the worldly affairs of the people, and, however uncongenial to our tastes and feelings such work may have been, we have felt it to be our duty to give what aid we could to the maintenance of peace and morality.[3]

---

[1] E.g., Cape, 1/TA 4/1, pp. 22, 50, 76-7, 119; 4/4, pp. 101-2, 162-5; 4/6, pp. 86-88; N.A. 180: Nyakwe vs. December, 7 Aug. 1879, encl. in Driver to Ayliff, 18 Sept. 1879; N.A. 404: petition from Africans to Newlands mission station, East London Division, Nov. 1882.

[2] Cape Parl. Papers, G.27-74, p. 62.

[3] Christian Express, vol. xi, no. 33, 1 Aug. 1881, p. 6: paper to the missionary conference of 1881.

It therefore needs to be asked why Africans resorted to the magistrates' courts at all, given the inadequacies of such courts, the uncertainties of the law administered, the alternatives offered, and the pressure on at least some Africans to support the tribal courts. The answer seems to lie with a variety of different motives. The one the magistrates continually stressed was that their courts offered impartial justice, and that the Africans appreciated this after the favouritism and abuses of chiefs and headmen. Nightingale reported in 1876 that this applied particularly to Africans from the Transkei who settled in the colony:

> These people, when they have acquired property, more especially if they have done so in service in the Colony, and have been long absent from their own country, are afraid to return to their chiefs lest as they have often told me, they should be "smelt out" and "eaten up". And besides this they have greater faith in the justice and integrity of the Colonial Government than they have in the rule of their chiefs, and they therefore prefer to pay rent and to submit to certain restraints in the Colony rather than return to their own country for the sake of land gratis and more freedom.[1]

It seems too that in some districts, especially those without any important chiefs or headmen, the magistrates to a large extent had taken the place of such men in African eyes, and that taking a case to his court was the natural thing to do.

But African society was not homogeneous even within most districts, and it is important to note that Christians resorted to the courts more readily than pagans and Mfengu usually more readily than Xhosa. This would have been largely the result of Christians and Mfengu following a way of life which conformed more closely to that of the whites, involving contracts unknown

---

[1] Cape Parl. Papers, G.16-76, p. 74.

in tribal law such as the leasing of land, less observance of customs which the magistrates discouraged, and sometimes civil law marriages. Also, Mfengu headmen often had less power than Xhosa chiefs, and in the early years Christians would have found little sympathy in the courts of chiefs and headmen, the vast majority of whom remained pagan and often antagonistic to Christianity.

A further powerful factor forcing the Africans to resort to the magistrate's courts was the great mingling of the tribes, which led to more and more cases between men of different tribes. As Stanford explained, chiefs were apt to favour their own people when adjudicating on claims or accusations by members of other tribes against them. As a result, such cases were brought to the magistrates, 'and the chiefs themselves soon recognized that they were relieved of matters which had previously led to many troubles between themselves and their neighbours.'[1]

More than this, however, the wars of 1877-8 and 1880 disrupted and weakened tribal authority, and forced tribesmen to resort to magistrates where previously tribal courts had been tolerated and effective. The magistrates had for many years been undermining the authority of the chiefs by a variety of carefully devised administrative systems,[2] and for the same reason had enthusiastically advocated the introduction of individual tenure. How far they had succeeded even before the wars is indicated by Rose Innes's report from King William's

---

[1] Macquarrie, Reminiscences, i. 65.

[2] E.g. Cape Parl. Papers, G.16-76, p. 66; G.12-77, p. 140.

Town in 1879 that many Africans of all tribes in the district preferred white rule to following their chiefs into rebellion, and that this had led to distrust between kraals and locations under the same headman, and even within the same family.[1] Also significant is the fact that in the war of 1877-8 2,000 Ngqika tribesmen followed the magistrate rather than Sarili, and only some of the Thembu in the Thembu locations revolted. Even the numbers who revolted probably give an over-favourable impression of the strength of the colonial chiefs, the relevant ones to consider in connection with tribal courts in the colony. In time of war the major chiefs in the Transkei could call upon their tribesmen in the colony, who would leave their jobs and land to answer the call;[2] but by 1876 or 1877 for a minor case an African might well have found the local magistrate's court more effective than that of his chief in enforcing judgment. In some areas traditional tribal allegiance had so far disappeared that by 1883 the magistrate of East London could write:

> As a rule the Kaffir who has lived for many years in the Colony recognises no chief, and if asked the question, he either says he has no chief or names some chief long since dead.[3]

As an increasing number of tribesmen resorted to the magistrates' courts, this would have weakened the chiefs further and the whole process would have been reinforced, leading to a steadily decreasing clientele for the chiefs' courts.

---

[1] Cape Parl. Papers, G.33-79, p. 170.

[2] E.g. ibid., G.12-77, p. 133; G.20-81, p. 124.

[3] Ibid., G.8-83, p. 21.

It can therefore be seen that even with the disadvantages attached to the magisterial application of African law, the influences at work favoured the transfer of an increasing number of cases to the magistrates' courts: the factors which tended to keep the Africans away from them, such as understaffing, were slowly being eliminated and the forces which drove the Africans to them were steadily increasing. Except for one crucial factor. In so far as the administration failed to offer any means of settling African law disputes, the chiefs' courts were likely to survive because in such a situation they offered the only hope of remedy. No matter how much they were weakened, Africans would go to them where there was no alternative court for their problems, and would thereby constantly re-inforce the chiefs' judicial power.

Unfortunately for the administration, in the later 1870s and during the next decade magistrates came increasingly under pressure to enforce undiluted colonial law, even in the frontier districts. The government did not contribute much to this pressure. It is true that the Molteno ministry did issue a circular on 'heathenish customs' which frontier magistrates were instructed to try to eliminate,[1] and the next ministry even enquired into whether circumcision could be not merely 'discouraged' but actually banned;[2] but no legislation was passed on the subject. The attorney general's office advised that 'if boys after being circumcised go about in a state of nudity they can be dealt with under the new Vagrancy Act - &

---

[1] Cape, N.A. 932: Bright to Upington, no. 3/57c, 16 Sept. 1879.

[2] This enquiry was possibly made as a result of a letter from the Reverend Maggs of Newlands Mission Station on the problem. See Cape, N.A. 401: Ayliff's minute, 30 July 1879, on contents of letter from Maggs (missing).

this in the opinion of the present legal adviser to the Government is the best course to pursue.'[1]

One of the main factors in forcing the application of more colonial law, however, was an increase of law agents in frontier districts and an increase in wealth among a certain section of Africans which made the hiring of law agents possible. Agents were not necessarily lawyers themselves,[2] but not all magistrates felt able to deal with them as firmly as the forceful magistrate at Herschel:

> Of late law agents have come into Court and caused some difficulty by asserting their dictum in opposition to the judgment of the Magistrate and Headmen in Native cases, urging as a last resort that the whole thing is illegal and every case must be settled by Colonial Law. I need scarcely say that it would be fatal to allow Law Agents to upset a rule that has been found to work so well in the District. As I am responsible to Government for any charge, and in order to prevent confusion in Court, I have intimated that I will hear no Agent who brings a suit into Court, other than through the forms of Colonial Law, and maintain the right as arbiter in my District, for the convenience of the people, to deny the right of these Agents to dictate unduly or cause confusion, while I am acting reasonably and in the interests of the Government and the people, in the absence of any code of Native Law, like those in the Trans Colonial Territories.[3]

The situation described by the special magistrate at Keiskammahoek[4] probably represents a more common result of the appearance of lawyers on the scene; and even where law agents encountered firm opposition from the magistrates, they could often persuade dissatisfied litigants to appeal to the superior courts on the grounds that their cases had been tried illegally by tribal law.

---

[1] Cape, N.A. 295: Graham to Ayliff, 23 Sept. 1879.

[2] Any person of sufficient reputation could be admitted as an agent on the payment of a small sum of money. See Cape Times, 26 Apr. 1882, report on parliamentary debate.

[3] Cape Parl. Papers, G.8-83, p. 9.

[4] See pp. 130 above.

Magistrates felt that having their decisions reversed lowered their prestige in African eyes, and would go to great lengths to prevent an appeal. Rose Innes, for example, told the 1883 commission that when he became magistrate of King William's Town, he found that the agents who practised in the court had an understanding with the magistrate that the evidence in cases for the return of marriage-cattle decided according to tribal law should not be recorded and that the decision of the magistrate would be accepted without notice of appeal being given.[1]

Equally galling for a magistrate would have been persecution by the irresponsible frontier press for applying tribal law. This was no unlikely event and an indication that such attacks seriously alarmed the magistrates is provided by a letter from the magistrate of Herschel in 1877 refusing to order a widow to return to her late husband's family:

> I must again decline to administer a Law so utterly repugnant to my sense of decency and justice, more when, by doing so, I act illegally, and lay myself open to the attacks of such men as "Fiat Justicia" &c.[2]

His alarm is understandable when it is borne in mind that most frontier farmers felt strongly about suppressing tribal customs which they believed aggravated stock-theft, and that the many country newspapers were written largely for such a readership. Such newspapers were quite capable of launching vicious attacks

---

[1] Cape Parl. Papers, G.4-83, evidence, p. 500, question 8741.

[2] Cape, N.A. 279: Halse to Auston, 3 Oct. 1877, encl. in Rolland to Brownlee, no. 97, 26 Oct. 1877. 'Fiat Justicia' was a nom de plume periodically resurrected for letters of protest to the press, e.g. in the famous Koegas atrocities case in 1880.

on a magistrate's administration of justice,[1] and in the tiny white community of a country village, in which most frontier magistracies were situated, life could be very uncomfortable indeed for a government official if the community decided to make it so.[2]

Another group which advocated the suppression of tribal law was comprised of Christian Africans. Their numbers were steadily increasing, but the extent of their influence on magistrates is difficult to assess. Though they still formed only a small proportion of most districts,[3] they were usually vocal, literate, and ubiquitous. As the magistrate of Victoria East pointed out in 1870, educated Africans (a large proportion of which would have been Christian) were to be found 'in Government and newspaper offices, in mercantile establishments; indeed every walk of life appears to be opening up to them.'[4] They also had a widely read newspaper to back their views - the monthly missionary newspaper Isigidimi Samaxosa or The Kafir (and later, The Christian) Express, printed at Lovedale since October 1870 in Khosa and English. Frontier magistrates and many other white residents, as well as a large African readership, subscribed to the paper, which was neither a religious nor a sectarian periodical, but aimed to represent the cause of the missions generally and the interest of the

---

[1] E.g., the campaign against the magistrate at Grahamstown by the Eastern Star in 1880.

[2] E.g., Scully's description of such a situation. See Scully, Further Reminiscences, pp. 26-30.

[3] But not always. In 1876, for example, the clerk in charge of Keiskammahoek district reported that of the African population of almost 15,000, more than half that number were members of adherents of the different churches. See Cape Parl. Papers, G.16-76, p. 64.

[4] Ibid., G.16-76, pp. 76-77.

Africans. Government notices were also published in it and in 1882 the government authorised the circulation of copies of the Xhosa version among the Mfengu headmen in the Victoria East district for that reason.[1] In 1876 the English version appeared in an enlarged form under the altered title of The Christian Express, with the aim of spreading missionary intelligence among the churches of South Africa. From the first appearance of the paper in English, there was much debate in its letter columns on the compatibility of African law and Christianity, and it campaigned vigorously against the giving of marriage cattle, polygamy, and circumcision, denouncing them as immoral and degrading.[2]

The Christian Express does not appear to have been more extreme than many Christian Africans. Africans on mission stations often took particularly vigorous action against tribal law on their mission stations: the Africans on the Kamastone mission station, for example, petitioned the government to assist them to stamp out polygamy at the mission station;[3] and the Reverend John Harper wrote to the government on behalf of the Africans on one of his out-stations, asking the government to expel a pagan living at the station who had insisted on circumcising his son.[4] In 1882 the first meeting of ministers

---

[1] Cape Parl. Papers, G.8-83, p. 55.

[2] E.g. Kafir Express, vol. i, no. 14, 1 Nov. 1871, pp. 2-3; no. 15, 1 Dec. 1871, p. 3; vol. iii, no. 36, 6 Sept. 1873, pp. 3-4.

[3] Cape Parl. Papers, G.4- , appendix 3, p. 107; see also, for example, G.T.J., 9 Apr. 1875: E.C.J. to Editor, giving the resolutions passed by a large meeting of African Christians held at Kamastone in 1875 on the subject of circumcision.

[4] Cape, N.A. 402: Harper to Ayliff, 25 Mar. 1881; Harper to Chalmers, 20 May 1881.

of the Queenstown Wesleyan District, at which Africans formed a majority of the 39 ministers present, passed a resolution asking the government to ban the giving of marriage cattle.[1] Magistrates, believing that Christian Africans were becoming increasingly influential within their tribes,[2] were unlikely to take their opinions lightly, especially since they so closely matched those held by most magistrates themselves. The growing number of educated and usually Christian Africans becoming magistrates' clerks and interpreters, constantly on hand during the magistrate's working hours, would probably have helped to remind the magistrates of the influence of this group.

But African Christian opinion was not united. It depended to a large extent on the church to which the Christian involved belonged and the views of the local missionaries. Writing of the Keiskammahoek District, for example, with its varied collection of churches and mission stations,[3] the magistrates could still say in 1880:

> Ukulobola is still as deeply rooted as ever, nor is it confined to the heathen native only, as those who are supposed to be Christians and are regular attendants at church follow up the same practice, and it is a very rare case that a native gives his daughter in marriage without the customary dowry. The father of the young woman to be married is not so much to blame as the "lady" herself, as she invariably declines to get married unless the customary dowry is forthcoming - in fact, unless a man pays cattle for his wife, she refuses to perform the ordinary domestic duties pertaining, the house, [sic] jeering him [sic] by asking

---

[1] Christian Express, vol. xi, no. 133, 1 Aug. 1881, p. 6.

[2] E.g., Cape Parl. Papers, G.21-75, p. 64; U.C.T., D68/332 (Judge Papers), II 46, p. 247: Petition of Mrara, Tyopo and Nollela.

[3] 4 Free Church of Scotland churches and 4 mission stations; 1 Church of England mission station with 1 church; 1 Baptist chapel, 2 Wesleyan, 1 Lutheran, with some stations connected with the Independents. Cape Parl. Papers, G.16-76, p. 64.

> for the cattle that he paid for her. The evils arising from this dowry system are innumerable, but I do not see how, in the present state of Kafir civilization the custom can be abolished. Sweeping reforms would only lead to endless trouble and disputes.[1]

Christian Africans were probably not therefore as influential in preventing recognition of African law as might seem likely from a survey of the literature they produced.

These pressures do not appear to have much affected the application of tribal law in those frontier districts where it was traditionally recognized, but they may well have influenced the magistrates of newly created districts on the frontier. In the district of Stutterheim, created out of part of the original district of King William's Town in 1877, for example, the new magistrate refused to recognize tribal law, much to the confusion of the Africans in the district; they lived between the special magistrates of the King William's Town District and the magistracies of the Transkei, both of which recognized tribal law,[2] and while they themselves had fallen within the King William's Town District had been able to obtain magisterial redress according to tribal law. The pressures for the application of only colonial law may also account for the fact that in the East London Division, where the magistrates had not recognized tribal law but where the headman on the Newlands Mission Station had heard the actions of nearly the whole African population of the district, in 1882 or 1883 the headman was stopped from hearing cases.[3] Similarly, the pressures on magistrates may have prevented those in districts west of the

---

[1] Cape Parl. Papers, G.13-80, p. 177.

[2] Cape, N.A. 403: R.W. Rose Innes to Sauer, 27 July 1882.

[3] Cape, N.A. 404: petition from the Africans on the Newlands Mission Station, East London Division, November 1882.

border divisions from accommodating to the changing situation in their districts. As the years of drought, war, increasing taxation and shortage of land drove more and more Africans westward, the proportion of Africans in many of these districts grew rapidly. Such magistrates might have been expected to have made concessions to the condition of many of the Africans coming into their districts as tenants of farmers, often paying in labour or produce rather than money. Nightingale wrote in 1878:

> As a rule, if one wishes to behold a thoroughly savage Kaffir kraal such as those which existed in the land long before a white man's face was seen in South Africa, a visit to almost any farm in this or in the neighbouring districts will gratify one's curiosity. These neglected native locations on private farms hinder civilization and encourage crime.[1]

In the years which followed, reports of magistrates and inspectors of locations repeatedly stressed the completely unsupervised nature of kraals on farms in virtually every district and the 'savageness' of some locations. Yet magistrates who in the past had not recognized African law showed no inclination to modify their past practice.

As is to be expected in such a situation, there are indications that the Africans opted for some alternative to the magistrates' courts. The magistrate of Tarka, for example, who reported using 'every lawful means to discourage the heathenish customs of dowry (i.e., purchasing wives with cattle), polygamy, intonjane and abakweta',[2] provided an interesting

---

[1] Cape Parl. Papers, G.17-78, p. 120.

[2] Ibid., G.20-81, p. 121.

contrast to earlier reports of sympathetic magistrates when he added: 'The natives here have no mania for litigation'.[1] There was certainly a class of Africans in these districts which was glad to escape the tribal courts and even willing to accept colonial law with all its inconveniences. Many of those Africans who bought or leased land and farmed for themselves rapidly adopted the way of life of the colonists, from their education and their commercial transactions down to the furniture in their homes; but this group formed a relatively small minority in most districts, and most Africans would have opted for tribal law courts wherever possible.

Magistrates were obviously aware that their decrees that tribal customs should not be observed were by-passed or ignored. Police were used to prevent circumcision ceremonies especially, and presumably would have reported any instances of tribal courts being set up of which they heard, but they could not be everywhere. As the magistrate of Komgha reported of 1883:

> The Natives have not advanced a single step since my last Report, either as regards Education or Christianity. They do not openly practice their heathenish customs; but at their own kraals they do I believe to a great extent. Large beer drinking gatherings and public dances have been discouraged, but with all the vigilance of the Police the Natives watch their opportunity, and carry on the Intonjane and other dances, according to their customs.[2]

The picture which emerges from the reports is that such magistrates' work, both in their capacities as magistrates and civil commissioners, differed from that of frontier magistracies

---

[1] Cape Parl. Papers, G.20-81, p. 121.

[2] Ibid., G.3-84, p. 39. See also e.g. G.13-80, p. 194; G.8-83, p. 62.

because of the relatively high proportion of whites in the populations. They had little time and even less inclination for going to the trouble of ensuring that the Africans in their districts were obeying colonial rather than tribal law, so long as no scandal ensued. They left the management of the Africans largely to the inspectors of locations who had no judicial powers, and both their own and the inspectors' reports in general reflect far less interest in the Africans than those of officials in districts with only tiny white populations. It is clear that many magistrates regarded the Africans in their districts simply as a nuisance: the growing body of legislation applying only to Africans in such matters as passes, firearms, branding, special taxation, and locations engendered an ever increasing and unwelcome administrative load. And if magistrates did take care of the interests of the Africans under their charge, they were liable to find the local farmers' associations complaining about them to the secretary for native affairs for treating the farmers' interests as if of secondary consideration[1] - a protest from voters which could land the magistrate in trouble with his superiors. The Africans in their turn were sullen, hurt or angry over the laws which increasingly hemmed them in for the white man's convenience, and the way in which their opinion was either not asked or ignored. And the lack of understanding between ruler and ruled steadily increased, instead of disappearing.

---

[1] E.g., Cape, N.A. 402: Manager, secretary to the Komgha Farmers' Association, to Sauer, 23 Aug. 1881.

This position underlines the inherent contradiction in the Cape's policy. They wished to draw the Africans into their society, for reasons of security, trade, and the Africans' good as they interpreted it. They believed that the way to bring this about was to force the Africans under colonial law, particularly into holding their land under individual tenure. To force the Africans into the colonial courts, they deprived the chiefs of the legal power to try cases and enforce their decisions, but found the Africans would still resort to them when the colonial courts refused to recognize African law and afford Africans remedies for their commonest complaints. This left them with three alternatives: to recognize tribal law, to use massive and expensive force to prevent Africans resorting to the chiefs' courts (though without affording an alternative remedy in many cases), or to turn a blind eye to the fact that their policy, far from creating one society, was ensuring the survival of African law as an alternative system outside their control. None of the alternatives appealed, and so in the end they muddled along using a bit of each and so ensuring both their own ineffectiveness and the ill-will of the Africans within their borders.

The same applied to their policy of individual tenure. To persuade Africans to accept individual tenure, the administration had to stress to the Africans that it ensured them permanent full and free control of their land. And this was remembered when natural increase within locations forced Africans to look elsewhere for land. By 1875, what Rose Innes described as 'quite a new feature', was developing: chiefs were beginning to

buy farms with money from cattle subscribed by their tribes for the purpose. In 1875 alone the magistrate for King William's Town reported that chiefs in three different frontier districts had done so the previous year.[1] The tribe would then treat the land as held in trust for them by the chief under the normal communal tenure system, and the chiefs' power was, if anything, enhanced. These and similar unsupervised locations on white-owned farms were believed by farmers and magistrates to increase stock-theft and encourage tribal culture, and were put down by colour-blind legislation in the Location Acts of 1876 and 1878, which limited the number of kraals on any farm to five, unless the occupants had contracts of service with the farmer. But Africans soon found a loophole: they bought land as co-owners, and as owners of the property on which they were located, the acts did not apply to them. The government hastily referred the matter to the attorney general, who confirmed that there was no way of bringing such groups under the acts,[2] and the courts indicated that the legislature would have to make its intentions clear before the acts could be regarded as excluding Africans from co-ownership.[3] The government was therefore faced with the unpleasant alternatives of either braving the fury of its voters, or passing race legislation which partially excluded

---

[1] Cape Parl. Papers, G.21-75, p. 61.

[2] Cape, N.A. 932: endorsement on letter from Ayliff to Upington, no. 3/387, 19 June 1879.

[3] Eastern Star, vol. x, no. 946, 10 Feb. 1880: report of the case John George Gilbert vs. Mxokelelwana and eight others.

the Africans from the benefits of the white legal system into which it sought to draw them. Either way, ill will between Africans and the white farmers amongst whom they lived was virtually ensured.

The fallacy in the assumptions behind the Cape's policy was that the quickest way to achieve change in African society and its values was by simply forcing through the change. Yet there was evidence available within the colony itself, apart from that provided by the African areas it ruled, that the policy of recognizing African law, however imperfectly, bred not only greater good-will, but also provided a more effective means of inducing Africans to modify their customs. Reports were available to them in their own blue book such as that from the special magistrate of Tamacha in 1882:

> Advantage has been taken of a plentiful season, to carry out very extensively their custom of circumcision, but, by certain checks placed upon them, the rites practised in connection therewith were very considerably moderated, and thus deprived of a great deal that is so offensive to decency and morality.[1]

or that from the magistrate at Peddie, where the magistrate reported in 1884:

> There have been a great number of Abakwetas during the year, ... I visited several of the larger dances and found them conducted very properly and without any disgusting gestures or customs popularly supposed in some quarters to be a necessary accompaniment.[2]

but prejudice, habit and self-interest seem to have prevented the colonists from realizing the true situation.

---

[1] Cape Parl. Papers, G.33-82, p. 118.

[2] Ibid., G.3-84, p. 48.

However, by 1881 even such stalwart advocates of the suppression of African law as the Christian Express realized that the official policy was not achieving its aims. There was a distinctly chastened humility in its description that October of the situation for the majority of unconverted Africans:

> They do not desire change, nor do they estimate our civilization and Christianity at the high value we estimate them. They are content with things as they are, and as they have found them, as they believe they have been in their father's days before them. Considering the strength of this feeling it is surprising that they have submitted as patiently as they have done to laws and customs, ways and modes of life and forms of administration so utterly foreign to them. They have reaped certain benefits no doubt, but at the cost of the up-turning of a large portion of the foundations of their social life, and habits as a people. And the result has been that they are landed, in what may be called the Transition State, in which a many [sic] of them are neither completely civilized nor entirely savage, neither educated nor ignorant, neither entirely heathen nor Christian. And all this is happening to them at a time when there is no tie between them and their white neighbours except that of mere employment and wages; while at the same time they have lost all that formed, in days gone by, their national life, and afforded that inspiration which is necessary for a race to hold together, or to attach themselves to another race. The individual life and the individual hut are not enough for this. And from this feeling of being no longer a people but mere scattered units, and the depression it occasions, and the discontent that follows, there has been struck now and again the spark, which has burst out with the flame of war.[1]

The creation of the Cape Native Laws and Customs Commission was therefore welcomed in the hope that it would provide an answer on how to rule the Africans. 'There is also a growing impression,' the Christian Express admitted, 'that we have been wanting in patience with these people in our work of

---

[1] Christian Express, vol. xi, no. 135, 1 Oct. 1881, p. 1.

leading them into the modes of civilized life; ... As administrators we have trusted perhaps too much to the power of mere legislative enactments.'[1] For ten years the Cape had ruled its African population by following a completely unrealistic policy except where the exigencies of the situation forced illegal modifications; by late 1861 most interested parties at last acknowledged the need for a properly informed policy towards African law.

---

[1] Ibid., pp. 1-2. See also Macquarrie, Reminiscences, i. 187-8.

CHAPTER FIVE

BASUTOLAND: THE IMPOSITION OF MAGISTERIAL RULE

a. Background

The Cape's policy towards tribal law in the colony proved at best ineffective, at worst disastrous. But it was largely determined by political and economic pressures. Outside the colony the Native Affairs Department had more freedom of action, and there it inherited from the British a very different policy to that pursued within the colony. The result was that even while the Cape was officially refusing to recognize tribal law within its borders, beyond them it was using a completely different method to control the tribes. The success of this method is particularly interesting when it is considered how small a number of magistrates, police, or armed forces were employed, and how great were the changes imposed.

It was in the isolated and mountainous tribal territory of the Southern Sotho that this policy was first systematically developed and its potential effectiveness realized. For a number of reasons it is best examined in detail in this setting, rather than in the many Transkeian territories where it was subsequently applied: there was essentially only one tribe in the area and its reaction to the colonial administration was well documented by long-established and trusted missionaries, as well as the magistrates; it was fairly isolated both geographically and by lineage from pressure exerted by neighbouring tribes; and the administration in the territory displayed the full range of organization developed in the Cape system of extra-colonial tribal rule, being comparatively large,

stratified, and efficiently well-documented. Basutoland therefore provides a better opportunity than the Transkeian territories to see how the system was meant to work when functioning properly, with relatively little outside interference or internal incompetence. To understand why it initially succeeded - and why it ultimately failed - it is necessary briefly to examine the formation and structure of the nation.

By the time the white man made contact with them, the Sotho had been settled for a number of generations on the high veld, over a much larger area than that of modern Lesotho. They came from beyond the Zambesi as part of the migration of the Bantu-speaking tribes into South Africa, and it is mainly from the Southern Sotho that Moshweshwe was to fashion his nation. Exact dates are uncertain, but oral and archaeological evidence indicates that by about 1670 at the latest, Sotho settlement was to be found on the plains which form the western part of modern Lesotho.[1] Between these tribes there were only minor differences of custom and language,[2] but 'each governed itself separately, and no supremacy existed between the chiefs other than that produced by the influence which talent might occasionally give to one of them.'[3]

The unification of these and other tribes into a supra-tribal nation was the result of events on the other side of the Drakensberg in what is now Zululand. The Zulu chief, Shaka,

---

[1] M. Wilson, 'The Sotho, Venda, and Tsonga' in Oxford History, Wilson and Thompson, i. 134-5.

[2] N.J. van Warmelo, 'Groupings and Ethnic History' in The Bantu-speaking Tribes of South Africa, Schapera, p. 58.

[3] G.M. Theal (ed.), Basutoland Records (Cape Town, 1883), i. 83: Moshweshwe to Montagu, 15 May 1845.

was pursuing a policy of tribal amalgamation by a series of devastating wars deliberately aimed at destroying existing political organization in conquered tribes. During his reign Shaka is said to have destroyed three hundred tribes and extended his power five hundred miles north, south and west.[1] The turmoil that resulted is known in Sotho as the difaqane,[2] denoting a state of forced migration.[3] Tribes fleeing from Shaka's armies, often as formidable marauders themselves, invaded the high veld through the Drakensberg passes in 1822, and for several years political and social chaos ensued, while the resulting famine drove some tribes to cannibalism.[4]

It was this chaos which was to enable an ambitious and exceptionally able man to amalgamate the hitherto jealously independent tribes into a nation. In about 1786[5] a son was born to an unimportant sub-chief of the Mokoteli, a junior branch of the Monaheng division of the Kwena clan.[6] From an early age, Moshweshwe, as the young man became known,[7] showed unusual promise, and before 1820 had already begun to acquire non-Kwena followers; these followed him when in about 1820 he

---

[1] E.H. Brookes and C. de B. Webb, A History of Natal (Pietermaritzburg, 1965), pp. 14-15.

[2] Derived from the more commonly used Nguni word mfecane: see Omer-Cooper, The Zulu Aftermath, p. 5, footnote 1.

[3] L. Thompson, 'Co-operation and Conflict: The High Veld' in Oxford History, Wilson and Thompson, i. 391.

[4] Ellenberger, History of the Basuto, pp. 217-26.

[5] The exact date of his birth is unknown: see G. Lagden, The Basutos (London, 1909), i. 24.

[6] Thompson, 'Co-operation and Conflict: The High Veld', op. cit., i. 398.

[7] For other names, see Ellenberger, History of the Basuto, p. 106-7. Amongst the English and settlers he became known as Moshesh.

set up a village of his own at Butha Buthe in a strong defensive position in the mountains of the north-eastern Lesotho. When later attacks convinced him that Butha Buthe was inadequate as a permanent home for his people, he moved some fifty miles to the south-west to Thaba Bosiu, a great flat-topped hill standing isolated in a fertile plain which could support a substantial population in times of peace. It proved to be defensible against all comers, and from there Moshweshwe slowly built up a nation which became known as BaSotho (i.e. the Sotho), corrupted to Basuto by the white men who first came into contact with it.

That he should have been able to do so was largely due to the widespread need for security in such dangerous times, but the importance of Moshweshwe's character and methods in securing unity should not be underestimated. The Rev. E. Casalis, a missionary of the Paris Evangelical Missionary Society who knew Moshweshwe well, has left us a description of his appearance as 'noble and dignified, his features bespeak habits of reflection and of command, and a benevolent smile plays upon his lips'.[1] J.M. Orpen, who frequently negotiated with Moshweshwe on behalf of the Orange Free State Government and was later to be acting governor's agent in Basutoland, believed him to be an exceptionally original, able and enlightened chief.[2] Certainly he often departed from traditional customs which failed to serve his needs,

---

[1] Casalis, The Basutos, p. 15.

[2] Special Commissioner of the Cape Argus (J.M. Orpen), History of the Basutus in South Africa (Cape Town, 1857), pp. 4-5.

and when faced with even apparently unfavourable events, showed great resourcefulness in turning them to his advantage.[1] A shrewd judge of character, he was, as a missionary who worked in Basutoland from 1833 to 1877 testified,

> at once fearless and cautious; very wary of entering upon a quarrel; but having once embarked on one, he carried it through with an intrepidity which nothing could daunt. He could see farther ahead than most men; and no matter what checks he encountered, he never lost sight of the end in view.[2]

The end he had in view from an early age was the federation of all clans and tribes in the surrounding country and the establishment of a uniform system of law and equity among them. To achieve this he sought to attract scattered individuals and tribes to him, while using every means to forestall attacks from those stronger than himself, and resisting fiercely when all else failed.[3] Thus, he paid tribute to any chief stronger than himself,[4] was not above persuading the Zulu to attack his potential enemies,[5] and where necessary would even humble himself before defeated enemies in an attempt to prevent their return, or to speed their departure.[6]

---

[1] V. Ellenberger, A Century of Mission Work in Basutoland, 1833-1933 (translated by E.M. Ellenberger, Morija, 1938), p. 13.

[2] Ellenberger, History of the Basuto, p. 229.

[3] Ibid., pp. 229-30.

[4] Ibid., p. 128.

[5] Omer Cooper, The Zulu Aftermath, p. 102.

[6] Casalis describes how, after an abortive attack on Thaba Bosiu by the Ndebele, Moshweshwe sent an offering of oxen after them as they retreated, to be eaten on their way home. The Ndebele were so impressed that they resolved never to attack him again: see The Basutos, p. 23. And J.M. Orpen tells how Moshweshwe, after repelling Sir George Cathcart at the battle of Berea, sent him a letter begging for peace with the words: 'You have shown your power. You have chastised. Let it be enough, I pray you.' - thus enabling Cathcart to depart without humiliation: see J.M. Orpen, Reminiscences of Life in South Africa (Struik Edition, Cape Town, 1964), pp. 140-3.

His methods of attracting followers were equally original and psychologically far-sighted. J.M. Orpen reported: 'His government has always been characterised by humanity, mildness, and justice; he has never been known to "eat up" his subjects; he forbade the punishment of death for witchcraft, and has uniformly endeavoured to suppress the bloody feuds so common among African tribes.[1] Casalis testified that during the twenty-three years he spent among the Basutos, the chief put no one to death from personal motives.[2] And according to Ramatsietsane, counsellor of one of his sons, Masopha, he abolished the traditional death sentence for murder, justifying this change with the argument that the execution made the executioner/who a murderer must in turn be executed, and so on ad infinitum.[3]

His magnaminity also attracted followers. According to his son, Nehemiah, he never kept re-captured cattle of other clans of the Basuto for himself, as he could have done according to custom, but returned them to their owners.[4] Ellenberger bears this out in his report that although the Mpiti clan refused Moshweshwe assistance when he was attacked by Shekeshe, he went to their aid when they in turn were attacked by the same enemy, and rescued their cattle which had been captured. This act secured for him the adherence of the whole Mpiti clan.[5] He used his wealth to pay the bohadi (or marriage-cattle) for the poorer of his people on condition that the bohadi of their

---

[1] Orpen, History of the Basutus, p. 4. See also Cape, G.H. 14/7: Statement by Moshweshwe to Wodehouse, 27 June 1864.

[2] Casalis, The Basutos, p. 220.

[3] Cape, N.A. 272: minutes of meeting, 20 Aug. 1873, encl. in Griffith to Molteno, no. 84, 27 Aug. 1873.

[4] N. Moshweshwe, A Little Light from Basutoland (Cape Town, 1880), p. 16.

[5] Ellenberger, History of the Basuto, p. 230.

daughters by those marriages should revert to him, thus ensuring both the gratitude of his people and an ever-increasing source of wealth for himself.[1] His herds were distributed throughout the country under the mafisa system, and in 1829 he added to these herds substantially by two raids against the Thembu.[2] Not surprisingly, many in search of a strong, just and generous protector chose to place themselves under him.

To further increase the number of his followers, Moshweshwe encouraged the many Sotho who had taken refuge in the Cape Colony and Natal to return to their country,[3] but he was not exclusive in accepting followers. Although Sotho formed the bulk of his adherents,[4] Nguni were also welcomed[5] and even cannibals, despite the fact that his followers desired to revenge themselves on the cannibals for past murders. With typical foresight and ingenuity, Moshweshwe, according to Casalis,

> saw that this would incur all the horrors of a civil war, and tend to depopulate still more a land already almost destitute of inhabitants.... He therefore answered, that man-eaters were living sepulchres, and that one could not fight with sepulchres.[6]

He provided them with cattle, on condition that they ceased to attack his people, and gradually weaned them from cannibalism.[7]

---

[1] Orpen, History of the Basutus, pp. 4-5.

[2] T. Arbousset and F. Daumas, Narrative of an Exploratory Tour to the North-East of the Colony of the Cape of Good Hope (translated by J.C. Brown, London, 1852), p. 428.

[3] Ibid., p. 428.

[4] V.G.J. Sheddick, The Southern Sotho (London, 1953), pp. 13-15.

[5] Omer-Cooper, The Zulu Aftermath, p. 103.

[6] Casalis, The Basutos, p. 19.

[7] Ellenberger, History of the Basuto, p. 233.

By 1848, after twelve years of uninterrupted peace, Moshweshwe was acknowledged leader of some 80,000 people.[1]

While individuals who sought his protection were incorporated directly into villages administered by himself or members of his family,[2] his method of retaining tribes that had joined him was to keep a very light hand on the reins. Small groups of refugees without a tribal identity were ruled by their own headmen, supervised by a member of Moshweshwe's family 'placed' in the vicinity.[3] Where a tribe with a recognized chief came under his rule, he was content to leave it under its own chief provided the supremacy of the paramount was recognized; Orpen wrote that no act of great national importance was legal or binding on them, or on the nation as a whole, unless discussed and agreed upon in a council consisting of all the chiefs.[4] To enhance his personal status and extend his influence, Moshweshwe married women from many different chiefly families.[5] By the time of his death, his system had produced not a united nation, but a loosely-knit federation in which not only different dialects, but different languages were spoken, and with a wide variety of customs. Holding this patchwork together required

---

[1] P.B. Sanders, 'The Life and Times of Moshoeshoe from his birth to the Proclamation of the Orange River Sovereignty in February 1848' (Oxford Univ. D.Phil. thesis 1969), p. ii.

[2] Thompson, 'Co-operation and Conflict: The High Veld', op. cit., i. 399.

[3] For the way in which the placing system enabled Moshweshwe's descendants to gain increasingly greater control of the positions of authority in the country, see G.I. Jones, 'Chiefly Succession in Basutoland' in Succession to High Office, J. Goody (ed.), (Cambridge, 1966), pp. 61-63, 68-69.

[4] Orpen, History of the Basutus, p. 4.

[5] Ellenberger, History of the Basuto, p. 108.

constant diplomacy and frequent compromise.[1]

It was his desire to further strengthen his nation that led Moshweshwe to invite missionaries to his country, after a Griqua hunter had told him how missionaries had helped the Griquas to organize themselves into effective states.[2] The missionaries who responded to his invitiaton were of the Paris Evangelical Missionary Society - Thomas Arbousset, Eugene Casalis, and the artisan Constant Gosselin - and arrived at Thaba Bosiu in June 1833. Moshweshwe made them welcome and established them some thirty miles south of Thaba Bosiu, where they named their station Morija.[3] Both Morija and the sites where he subsequently placed other French missionaries were on his more exposed borders - in the south-west Bethuli (1833) and Beersheba (1835), in the north Mekautling (1837). The missionaries were in practice used as a means of spreading his influence.[4] He did not hide his motives for inviting them; when in 1862 the French missionaries objected to the admission of Roman Catholic priests to Basutoland, he replied that 'he could not oppose any body coming into his country to teach his people, and that Protestants and Catholics, as he had been told, were like two cows whose bellowing was a little different from each other, but both would give milk.'[5] Despite this, his willingness to listen to and act on their advice (sometimes even in the face of hostility

---

[1] For a discussion of other factors making for tension in the Basutc nation, see A. Atmore, 'The passing of Sotho Independence 1865-70' in African Societies in southern Africa, L. Thompson (ed.), (London, 1969), pp. 290-3.

[2] Thomspon, 'Co-operation and Conflict: The High Veld', op. cit., i. 400.

[3] Ellenberger, History of the Basuto, p. 236.

[4] Thompson, 'Co-operation and Conflict: The High Veld', op. cit., i. 401.

[5] Little Light of Basutoland, no. 5, May 1877, p. 4.

from his less open-minded followers), his interest in Christianity, and the converts they soon made, led the missionaries to identify themselves closely with the Basuto cause and to provide invaluable advice and assistance in all Moshweshwe's subsequent dealings with the British and Boers. However, although the missionaries and Moshweshwe served each other well, the seeds of future conflict were present. The Paris Evangelical Mission Society had an uncompromising attitude towards indigenous customs, especially polygamy and initiation schools; from the start it used its influence to try to change the tribal law which governed these customs, thereby arousing deep resentment and fear amongst the more conservative elements in the country.

Even in Moshweshwe's time, some changes of this kind were made at their instigation, for the paramount liked to stand well with his missionaries,[1] had an exceptionally open mind to new ideas, and was empowered by tribal custom to make at least temporary changes. As Casalis explains:

> The chiefs have the right of making laws and publishing regulations required by the necessities of the times. These laws, which are generally temporary, have received the name of Molaos (our law, or commandment). Higher than these edicts rank the Mekoas (the use and wont), which constitute the real laws of the country.[2]

---

[1] In the 1860s he did have a brief period of reaction against the missionaries.

[2] Casalis, The Basutos, p. 228. Assisted by the missionaries, Moshweshwe reduced three laws to writing after the British abandoned the Orange River Sovereignty: an ordinance prohibiting the liquor trade in Basutoland, a proclamation prohibiting the killing of people imputed to be witches, and a 'Law for Trade' decreeing that traders could not own land but merely held it at the chief's pleasure and that in matters of debt they fell under his jurisdiction. See Lagden, The Basutos, i. 299-305. George and Sofonia Moshweshwe also claimed that their father had written laws on circumcision, theft, and the drinking of the local beer called joala. See Cape Parl. Papers, 1873, evidence, appendix III, Special Commission on the Laws and Customs of the Basutos, pp. 43 and 46.

Thus, for example, Moshweshwe even temporarily banned initiation rituals,[1] to which the Sotho attached the utmost importance,[2] and several of his sons did not attend initiation school, including the last son of his great wife.[3] However, he was always very conscious that his rule ultimately rested on consent, and was careful not to exceed the limits of his subjects' tolerance to foreign ideas.

But foreign ideas were drastically affecting the Basuto way of life in another sphere, despite all Moshweshwe's efforts. Since the early nineteenth century Afrikaner farmers from the Cape Colony had seasonally crossed the Orange River to graze their herds, and from about 1820 a permanent population began to grow up north of the Orange. A few of these farmers in the 1830s settled on land which Moshweshwe claimed between the Orange and the Caledon, but they and the Basuto lived peacefully enough alongside each other, until the Great Trek greatly increased the white population north of the Orange. The newcomers were given Moshweshwe's permission to graze their cattle until they were ready to move on, but were warned that they were not being granted any permanent rights in the land. As with other tribes, in Basuto law tribal land was inalienable and the concept of selling land was unknown.[4] Having heard of this practice of the whites however, and fearing lest advantage be taken of him, Moshweshwe refused to receive any payment from white farmers,

---

[1] Cape, G.M. Theal (ed.), (Unpublished) Basutoland Records - contracted to U.B.R. below, iv. 141-2: 'Notes on the Political and Social Position of the Basuto Tribe', 30 Mar. 1868.

[2] Ellenberber, History of the Basuto, p. 280.

[3] Little Light of Basutoland, no. 6, June 1876, p. 23.

[4] G.M. Theal (ed.), Basutoland Records, i. 85-86: Moshweshwe to secretary to government, 15 May 1845.

not even the customary present of cattle as recognition of his suzerainty.

There followed an inglorious episode in which the British government made a futile attempt to prevent Boer encroachment by annexing Moshweshwe's territory to the Orange River Sovereignty. But the British resident failed to act in an impartial manner in land disputes and, when fighting broke out between British and Basuto, the British were defeated. A change of policy led to the British abandonment of the sovereignty in 1854 and a series of wars between the Basuto and Boers. Although the Basuto won the first encounters, Moshweshwe foresaw that time was working against the federation he had spent his life creating, and that in British protection lay its one chance of safety. He repeatedly asked to be made a British subject but the British refused for fear of being involved in further expense.

By 1865, however, the Boers had the advantage of the Basuto in guns, ammunition, and leadership. Moshweshwe was growing old and his sons and their followers were quarrelling over the succession; the Orange Free State, on the other hand, had a considerably increased white population and a capable and energetic leader, President J.H. Brand. Molapo, Moshweshwe's second son, made a separate peace and reluctantly agreed to become a subject of the Orange Free State.[1] Deprived of his assistance, Moshweshwe was obliged at the Treaty of Thaba Bosiu in 1866 to cede nearly all the lowlands of Basutoland to the

---

[1] Molapo subsequently claimed Moshweshwe had ordered him not to fight the Boers so that his country could be used as a cattle refuge, place to grow corn, and rallying point when the Boers tired. See Cape, G.H. 14/7: Molapo's message to Currie, 29 Mar. 1868. Molapo was only absolved from his allegiance to the Free State in April 1870 and only then formally rejoined the nation under the British.

Orange Free State, but the Basuto violated the treaty almost immediately and war broke out again in 1867. The Orange Free State policy of destroying crops and reducing the Africans to starvation rapidly brought the Basuto state to the verge of disintegration, and the dispersion of its people seemed imminent.

In a last effort to prevent this, Moshweshwe, his sons, missionaries and friends bombarded the high commissioner with pleas for British intervention. Wodehouse was sympathetic but helpless in the face of his instructions from England.[1] However, events elsewhere had been working in Moshweshwe's favour, eroding Colonial Office confidence in its policy of neutrality. Doubts were growing about the wisdom of allowing the Boers to continue their activities unchecked: the severe terms inflicted on the Basuto by the Treaty of Thaba Bosiu might force a disrupting Basuto migration and had led to the expulsion of the French Protestant missionaries;[2] Basuto raids in pursuit of the Boers were interfering with Natal's trade and development and threatened to affect the Cape Colony;[3] there were also reports of slavery in the Transvaal and of African chiefdoms being harrassed by commandos; the Orange Free State's power had been enhanced by Molapo's agreement; worst of all, the British feared that the Boers might gain access to the sea through Pondoland, thus

---

[1] Lagden, The Basutos, ii. 425.

[2] The missionaries at once complained to both the British and French authorities, who were sympathetic. See Theal, Basutoland Records, iii. 656: Rolland, Mabille and Cochet to Wodehouse, 6 Apr. 1868; pp. 662-3: French consul at Cape Town to Wodehouse, 21 Apr. 1866; P.R.O., C.O. 48/432: Wodehouse to Cardwell, no.44, 12 May 1866, minute by Cardwell, 21 June 1866.

[3] P.R.O., C.O. 48/438: confidential memorandum for the British cabinet, Nov. 1867, following Wodehouse to Buckingham, no. 88, 17 Sept. 1867.

simultaneously isolating the Cape from Natal and allowing other European influences into South Africa.[1] In December 1867 the Cabinet instructed Wodehouse that he might annex Basutoland - but to Natal, not directly to Britain, and only with the consent of both Natal and the Orange Free State.

The Basuto were in such a desperate position that they would have accepted even this,[2] but they feared annexation to Natal as they believed the colonists would oblige them to surrender their guns.[3] Wodehouse had wider fears: apart from disliking the idea of a much-strengthened Natal,[4] he suspected the white community there would subject the Basuto to its own interests.[5] The Cape was not prepared to accept Basutoland as part of its territory,[6] and he knew that the Free State would object to British interference in a war they had almost won. He therefore proceeded to ignore his instructions, cut off the supply of Free State ammunition at the Cape ports and, on 12 March 1868, proclaimed Basutoland annexed to the Crown. A detachment of Cape Frontier Armed and Mounted Police under Sir Walter Currie as high commissioner's agent was sent to give effect to the annexation.[7] Not unexpectedly, the Free State

---

[1] P.R.O., C.O. 48/432: Wodehouse to Cardwell, no. 43, 12 May 1866.

[2] C.W. de Kiewiet, British Colonial Policy and the South African Republics, 1848-1872 (London, 1929), pp. 203-4.

[3] Cape, N.A. 272: minutes of meeting held 20 Aug. 1873, encl. in Griffith to Molteno, no. 85, 27 Aug. 1873; Cape Parl. Papers, G.33-79, p. 34.

[4] Benyon, 'Basutoland and the High Commission', pp. 158-9.

[5] De Kiewiet, British Colonial Policy, p. 228.

[6] Benyon 'Basutoland and the High Commission', pp. 159-161.

[7] Cape, G.H. 14/7: Wodehouse to Currie, 14 Mar. 1868.

disputed the right of the high commissioner to interfere, and even sent a deputation to London to protest. This delay was ended in February 1869 by the Aliwal North Convention, which Wodehouse concluded with the Free State government to settle the boundaries of Basutoland. The Boers, fearing the annulment of the Bloemfontein Convention,[1] agreed to Molapo rejoining the Basuto nation and surrendered a large part of their recent conquests, though not enough to prevent Basuto disillusion with the effectiveness of British protection. In addition, the Basuto had been excluded from the discussions on the convention which intimately affected them. Tsekelo Moshweshwe and two white supporters, David Dale Buchanan and the Rev. Mr. Daumas, went to London to dispute it, which caused a further delay; but they were not successful. The convention was eventually ratified in March 1870, a few days after Moshweshwe's death.

Thus as Moshweshwe was removed from the scene, the British legally took his place as the supreme authority over the Basuto. But the date of the actual as opposed to the legal assumption of power by the British is less clear. Ever since Wodehouse had proclaimed Basutoland's annexation to the Crown in March 1868, the British had attempted to rule the country, though in practice the laws existed only on paper. Moshweshwe, failing in mind and body, had ceased some time before his death to be a power in the land. But the loosely-knit and heterogeneous Basuto nation was very much his creation; how far the white men would be able to impose their will on the Basuto depended, in the absence of large-scale force being available to them, on their

---

[1] De Kiewiet, British Colonial Policy, p. 233.

ability to emulate Moshweshwe in ensuring that the advantages of their rule outweighed the irritations and loss of independence it involved. The major irritation during the early years after magistrates were appointed, especially to the chiefs, was to be the changes imposed on tribal law and the chiefs' powers.

b. Rule by magistrates: changes imposed on tribal law

The Basuto had accepted British rule out of military necessity, not because they desired it for itself. The British government had been forced by fear of Boer activities and by Wodehouse's manipulations to receive the Basuto as British subjects; it did not wish to order their daily lives and was anxious not to incur any extra expense.[1] The obvious solution was to leave the Basuto to rule themselves so far as the mid-Victorian Christian conscience could allow, and to ensure that they paid for any costs incurred. But this ran counter to the prevailing idea both in Britain and South Africa that it was a Christian duty to 'civilize' the tribesmen. The Natal system of leaving the chiefs to rule their people, subject only to appeals to the magistrates, had initially developed more as a result of lack of funds than any ideology, and even that system would have aroused the opposition of the chiefs. Apparently Wodehouse contemplated no system of leaving the chiefs entirely to their own devices, subject only to limitations on their power to wage war; rather he seems to have anticipated that the Cape would be persuaded to annex the territory and extend colonial law to it, or that possibly a Natal-type model might be followed.

---

[1] De Kiewiet, British Colonial Policy, p. 230.

But the missionaries, with whom he discussed the question,[1] had their own ideas on the subject. On 30 March 1868 Emile Rolland, one of the French Protestant missionaries who had worked in Basutoland before the war, drafted what was to be a crucial memorandum in shaping tribal law policy in the territory[2] - though whether at Wodehouse's request is uncertain. In it he began with the assumption that some form of magisterial control would be instituted, for he argued that the main obstacle the British government would encounter in ruling the Basuto and 'rendering them obedient to British law' would be the power of the chiefs, great and small; therefore the aim of the government should be to diminish this power, preferably in such a way as not 'to excite the jealousy or embitter the prejudices of the natives'.

As a chief's power was based largely on his ability to reward those loyal to him with cattle, women and land, Rolland advocated a number of measures which would increase the wealth of private individuals and lessen that of the chiefs: as well as preventing the chiefs from 'eating up' anyone who became wealthy, he thought the institution of polygamy should be abolished as far as could be done by legal enactments attacking various rights flowing from polygamous marriages; and he also favoured a radical reform of the land laws to allow for individual tenure. To reinforce these measures, Rolland suggested that the headmen should hold their appointments subject to the pleasure of the Crown, and that especial favours be shown to those who

---

[1] P.R.O., C.O. 48/441: Wodehouse to Buckingham, no. 31, 2 May 1868.

[2] Cape, U.B.R., iv. 125-151: 'Notes on the Political and Social Position of the Basuto Tribe', 30 Mar. 1868.

adopted 'the habits of Christianity and civilization'. He pointed out that heathenism supported the chiefs and that whatever struck at heathenism, such as Christianity and education, would weaken them. He then went on to analyse the basic supports of heathenism, which he enumerated as the practices of bohadi and polygamy, witchcraft and circumcision. As he pointed out, Moshweshwe had already moved against witchcraft, although not against divination and rainmaking, which Rolland believed should also be put down.[1] But on the evils of circumcision especially he waxed eloquent, both as to its degrading effect on morals and its potential use to anti-government conspirators. He ended his memorandum by defending his advocacy of 'class legislation', arguing that the immediate introduction of Cape law would be impossible. Nor would a Natal-type system result in anything less than a reaction in favour of heathenism. It was therefore best to introduce temporary regulations 'conceived in the spirit of our laws' to pave the way gradually for the introduction of colonial law. Such changes would not be opposed: not only were the Basuto more pliable than the tribes to the south, but the effect of over 35 years of missionary work amongst them had resulted in one tenth of the tribe becoming Christian and had affected public opinion throughout the tribe. Now more than at any other time, he argued, the Basuto were prepared for, and many desirous of, great and sweeping changes, and their gratitude to the British for saving them from the Boers would

---

[1] This was a more radical suggestion than it sounds. As E.H. Ashton says: 'In the old days, recognized doctors, officially attached to the chief as rainmakers, diviners, or keepers of war medicine, ranked next to the chief himself in importance.' See 'Medicine, Magic and Sorcery among the Southern Sotho', Communications of the School of African Studies, University of Cape Town, new series, 10 (Dec. 1943), 3.

lead them to accept far greater alterations in their laws than other tribes annexed in the past.

Whether Rolland realized it or not, his analysis of the Basutoland situation had led him to advocate a system very similar to that first envisaged when Queen Adelaide Province was established 33 years before. And his authoritative memorandum obviously persuaded Wodehouse, for many of its suggestions were embodied in the system which the high commissioner proceeded to institute; though Wodehouse refused to attack certain features of tribal life which Rolland had wanted altered, and declined to use some of the methods Rolland had suggested. On 15 April 1868 Wodehouse met the chiefs in Basutoland,[1] received their formal submission, and under his legally questionable authority as high commissioner issued a temporary set of regulations.[2] These were designed 'to strike at the root of some of the most objectionable Native Customs'[3] and to pay for the administration to be set up in the territory by means of a ten shilling hut tax.[4] But in practice the regulations were not implemented; Currie and his successor, James Henry Bowker, found themselves fully occupied in just keeping the peace between the raiding Boers and Basuto.[5] A second visit by Wodehouse

---

[1] Cape, P.M. 259: copy of the original notes of the Rev. J.T. Daniel, who acted as interpreter to Wodehouse at the meeting.

[2] P.R.O., C.O. 48/441: regulations enclosed in Wodehouse to Buckingham, no. 31, 2 May 1868. For a discussion of the shaky legality of the high commissioner's rule in Basutoland from 1868 to 1871, see Benyon, 'Basutoland and the High Commission', pp. 266-7.

[3] P.R.O., C.O. 48/441: Wodehouse to Buckingham, no. 31, 2 May 1868.

[4] According to s.20, hut tax could be paid in money, stock or grain. A certain percentage, it had been agreed earlier, was to go to Moshweshwe. See Cape, N.A. 275: Petition enclosed in Rolland to Ayliff, no. 37, 20 July 1870.

[5] B.G. Cape, G.H. 14/7: Bowker to Wodehouse, 23 Oct. 1868; 16 Nov. 1868; 3 Dec. 1868.

in February 1869 had equally little effect, the only permanent result being that the new site then selected for Bowker's headquarters - Maseru - subsequently became the capital of the country. Until August 1870 Bowker, his deputy in the south, Inspector Surmon, and 100 policemen represented the only British presence in the country, and were hampered in the exercise of even moral persuasion by the British government's long delay in ratifying the convention.

Moshweshwe was by then feeble both mentally and physically,[1] almost totally ignored by his sons, and once the first relief at being rescued from imminent danger was past, the Basuto had become increasingly disaffected. In this they were encouraged by their chiefs, who might not realize all the implications of Wodehouse's policy, but who objected to the Aliwal North Convention and the control that the high commissioner's agent sought to impose by his regulations on their traditional right to allocate land. Had the convention been ratified immediately and money been made available, Wodehouse could have appointed magistrates and police officers before the people's gratitude had ebbed. Towards the end of the war tribal organization had begun to break down as defeat forced groups to disperse, and the people had so completely lost confidence in their chiefs that in many cases they had refused to obey or even acknowledge them. But when the British stepped in and fear of a major Boer attack receded, most Basuto found that the only authorities present able to settle cases were the chiefs, who took the opportunity

---

[1] He was too weak to attend the meeting. See e.g. Cape, G.H. 14/7: Bowker to Wodehouse, 3 Dec. 1868; 20 Mar. 1869.

to recover their control.[1]

Eventually by August 1870 the first hut tax was collected to provide for the expenses and salaries of the future administration of the country. The men who organized the collection were Surmon, who was deputising for Bowker as high commissioner's agent after the latter's appointment as commandant of the Mounted Police, and John Austen, ex-superintendent of the Wittenberg Reserve, who had been commissioned in May as magistrate of the Southern District of Basutoland. The Basuto were fully aware of the purpose of the collection, so it was something of a test of whether the chiefs and people were willing to work with the British. There was of course the carrot held out to the great chiefs of receiving ten per cent of the hut tax collected, and the great chiefs in turn customarily commanded a high degree of obedience.[2] Moshweshwe had by then been succeeded by his apparently co-operative eldest son, Letsie, who however had very little control over his two most powerful brothers, Molapo and Masopha[3] (together with Letsie the surviving sons of Moshweshwe's great wife). As it turned out, the great chiefs, with the exception of Masopha, willingly assisted in the collection; £3721 was received, much of it in kind, which was more than sufficient for the administrative expenses of that year.[4]

---

[1] Cape Parl. Papers, G.27-74, p. 22; Cape, G.H. 14/7: A. Davies to Bowker, 6 June 1869.

[2] Cape, U.B.R., vi. 81: Barkly to Kimberley, 18 May 1871.

[3] Sometimes spelt Molappo and Masupha or Masupa by contemporary writers.

[4] Cape, U.B.R., vi. 123-4: returns of revenue received up to 31 May 1871.

Encouraged by this proof of co-operation, Surmon and Austen decided that the time was ripe to promulgate a detailed set of regulations which Wodehouse had drawn up before his departure from South Africa in May;[1] there was to be a meeting of chiefs and headmen at Thaba Bosiu on 22 December 1870 to ~~formally~~ announce Moshweshwe's death to the nation formally, which provided a suitable opportunity. It was a bold move, for the regulations were a much more extensive embodiment of Rolland's ideas than the earlier ones promulgated; in them the attack on the chiefs' powers was fully spelt out and various time-honoured customs were challenged. The country was to be divided into three districts, each to have a magistrate who was to have jurisdiction in civil and criminal cases except where the offence was murder, rape, or arson with intent to kill, punishable by death under Cape law.[2] In such cases trial was to be by a court of two magistrates, with the high commissioner having the final say in certain circumstances.[3] The chiefs, of whom the three principal ones were each to reside in a district, could still try

---

[1] P.R.O., C.O. 48/450: Wodehouse to Granville, no. 62, 14 May 1870, enclosing regulations.

[2] Although by this date rape was almost never punished by the death penalty. See A. Sachs, Justice in South Africa (London, 1973), p. 57. Cape and tribal law differed on which offences were punishable by death. In tribal law murder and arson with intent to kill (capital offences in Cape law) were usually punishable by fines. Death was inflicted 'for acts of treason against the chief, and for being pronounced by a witchfinder guilty of having caused any great calamity. A man caught in the act of stealing cattle at night could be killed with impunity. A notorious thief whose conduct was likely to get the tribe into difficulty was usually put to death by order of his chief.' See G.M. Theal, History of South Africa, 1854-1872 (London, 1900), pp. 312-3, footnote 2. According to George Moshweshwe, a thief who resisted when apprehended could be killed. See Cape Parl. Papers, 1873, Appendix III Special Commission on the Laws and Customs of the Basutos, evidenc p. 47.

[3] Later altered to three magistrates. See Proclamation 51, 23 Aug. 1871.

any civil or petty criminal case, but the enforcement machinery of the state was not at their disposal and a suitor could bring the same case to the magistrate on appeal. When the legal advisor to the Colonial Office objected to this provision, Wodehouse explained that it was to stop the chiefs using their jurisdiction to prevent cases going before the magistrates;[1] but the chiefs would object much more strongly than the legal advisor, for according to an old Sotho proverb, 'a chief can't vomit'.[2] Even more objectionable to them was the section which declared all men to be equal before the law, thereby making it possible to charge even the paramount chief himself in court.[3] In addition, seizing property against the owner's will, except in execution of a magistrate's order, was declared to be theft, and thus deprived a chief of his right of 'eating up'.

Nor was this all: as Rolland had shown in his memorandum, chiefs had reason to be even more antagonized than the rest of the tribe by the alterations made in family law. Even the commoners much disliked them. The forcible marriage of unconsenting women was forbidden, as was the circumcision of anyone against his will or that of his parents; both these prohibitions could work against the traditional power of a father over his children and his right to claim his daughter's bohadi. For the same reason the provision declaring Christian marriages (valid without bohadi) to be as binding as customary ones was equally

---

[1] P.R.O., C.O. 48/450: minute of 1 July 1870 in enclosure 1 of Wodehouse to Granville, no. 62, 14 May 1870.

[2] Cape Parl. Papers, C.3-85, p. 7.

[3] Cape, N.A. 272: Tsekelo to Griffith, 30 Aug. 1873, encl. in Griffith to Molteno, 11 Sept. 1873.

unpopular. According to the Chief Tsekelo, chiefs had an additional reason for resenting the prevention of forcible marriages: when a chief took a fancy to a woman, a prudent father promptly married her to the chief irrespective of her wishes.[1] To ensure that the woman consented to her marriage, and to assist the magistrate to judge future cases arising out of bohadi claims, it was provided that in future all marriages were to be registered before a magistrate, to whom the parties had to declare their consent and pay a registration fee of two shillings and six pence; and in addition, all bohadi paid had to be registered - otherwise no action regarding the marriage or the bohadi could be brought before a magistrate. This unprecedented charge for legally recognizing a marriage was naturally resented, especially as it acted as a tax on polygamy.

There is some evidence that the legalizing function of registration was introduced at missionary prompting in an attempt to give Christian marriages priority over tribal law marriages:[2] in practice the missionaries ensured that Christian marriages were registered, while pagans were deterred by the expense and difficulty involved.[3] How the regulations gave

---

[1] Ibid.

[2] Cape Parl. Papers, A.18-72, evidence, pp. 7-8.

[3] It is difficult to gauge what proportion of the Basuto paid this charge in practice after the regulations came into force, as income from registration fees did not form a separate item in the annual revenue accounts. But in the 1873 commission report it was pointed out that 'the law with regard to the registration of marriage, as far as the heathen Basutos are concerned, has been quite inoperative', and at the 1874 annual pitso one headman remarked 'I see only the Christian people bringing their half crowns to register their marriages, but not the heathen people.' At the 1876 annual pitso Basutos rebuked their countrymen for not paying the registration fee. On the other hand, in December 1876 Austen was able to report that in his district the principal court work, of which there appears to have been no dearth,

(continued on next page)

preference to Christian marriages at the expense of the rights of a tribal law spouse is demonstrated by instructions from Griffith to Surmon that a Christian marriage must be registered despite the wife already having a tribal law husband.[1] This second marriage would then have been the only one recognized and protected by the courts. The resentment such a situation would have engendered among the pagan majority of the nation is understandable, and protests against it were not lacking.[2]

Quite as bad as the 'consent provision' to the Basuto was the right given to women whose marriages were not registered or who were widowed to the custody of their children until the boys were eighteen and the girls fifteen years of age; after that age the children would be considered as no longer minors. And of the same order was the provision giving widows the right to remarry, although custody of her children would then pass to her deceased husband's family or other relatives of the children. As has been pointed out, in tribal law a woman never obtained her majority, always remaining in the guardianship of some man of the family; she had no right to marry without her guardian's consent. This was now possible under the regulations for girls over fifteen years of age, and for widows. The obligatory

---

Footnote 3 continued from previous page:
consisted of petty assaults, and civil cases arising from the marriage laws. It seems probable that as the magistrates tried more and more cases, more marriages were registered. See Cape Parl. Papers, 1873, Appendix III, Report of the Commission on the Laws and Customs of the Basutos, evidence, p. 6; Cape Parl. Papers, G.21-75, p. 24; Cape Parl. Papers, G.12-77, pp. 13, 16, 6.

[1] Lesotho, S9/1/3/1: Griffith to Surmon, 11 July 1872.

[2] E.g. Little Light of Basutoland, no. 11, Nov. 1874, reporting on such protests at the 1877 annual pitso.

removal of the children from her custody on her remarriage, as provided in the regulations, was possibly inserted at the request of the missionaries,[1] presumably to prevent the children of a deceased Christian being reared in a heathen step-father's kraal - a possibility overlooked in the 1868 provisions.

There is a more significant difference between these provisions of 1870 and those of 1868 which both Tylden and Brookes overlook.[2] The wording of the 1868 regulations were so wide as to provide for a widow having both custody and guardianship of her children, whether she remarried or not. This was completely contrary to Sotho law, which would never regard a woman as capable of becoming a guardian - that is, having control over as opposed to the custody or care of the child - as she was herself perpetually under the power of a guardian. In the second set of regulations the word 'custody' is used throughout, which partly restores the guardianship of a widow's children to that in tribal law. The reason for the situation created by the first set of regulations can be traced to Rolland and the other missionaries. Their objections to the practice of the levirate would account for the provisions that widows should not be regarded as minors, could remarry without consent, and that they could still retain guardianship of their children. Retention of guardianship in such cases would also ensure that a Christian mother could prevent her children being brought up by heathen relatives. Similarly, to prevent heathen guardians

---

[1] Cape Parl. Papers, A.18-72, evidence, p. 6.

[2] G. Tylden, The Rise of the Basuto (Cape Town, 1950), p. 114; Brookes, History of Native Policy, p. 186. The regulations of 1871, to which Tylden and Brookes both refer, were identical on this point to the 1870 regulations.

from persuading the daughters of Christian widows to marry polygamists who would give bohadi for them, it was necessary that the guardianship as well as custody should remain with the mother, since the guardian obtained the bohadi cattle. Changing the tribal status of women to such an extent, and depriving the family which had paid bohadi of that woman's childrem, would have caused a great and almost universal discontent; it may be that when it came to drafting the second code of regulations, it was decided that it was inadvisable to try to introduce so radical a change at once. Or it may be that Wodehouse himself or his secretary drew up the new regulations in the belief that he was merely putting into clearer language the provisions of the 1868 code, unaware of the important legal and practical distinction between custody and guardianship.

The alterations in the criminal law were hardly to the liking of the Basuto either, though perhaps not entirely unexpected in all cases. The regulations provided that 'persons practising or pretending to practise witchcraft or other such acts' or falsely accusing another of doing so should be held to be rogues and by punishable accordingly,[1] while the killing of supposed witches was to be treated as murder. Despite Moshweshwe's earlier prohibition on killing supposed witches, most Basuto believed in the power to bewitch[2] and would regard this regulation as dangerous, while those chiefs who

---

[1] This was not interpreted to include rainmakers, despite Rolland's recommendation in his memorandum. See J. Widdicombe, Fourteen Years in Basutoland (London, 1891), p. 63.

[2] Little Light of Basutoland, no. 8, Aug. 1872, p. 31.

cynically manipulated witchcraft accusations to enlarge their wealth would bitterly resent it. Similarly, the death penalty for arson when committed with intent to kill and the severe punishment for rape - a flogging not exceeding fifty lashes, or confiscation of property, or both - were alien to the tribesmen's way of thinking. In Basuto tribal law both crimes were punished with fines, and rape was considered a relatively minor offence.[1] The death penalty for murder was not entirely new; in 1855 Moshweshwe had legislated that it be inflicted for killing supposed witches and, as mentioned above,[2] at the 1873 annual meeting an old counsellor of Masopha claimed that it had been tribal law, until altered by Moshweshwe, to execute all murderers, a statement which Letsie corroborated. But it was almost twenty years since Moshweshwe's changes were introduced and a new generation had never known such a provision. The introduction of the death penalty for arson with intent to kill can be accounted for by the administration's desire to stamp out the killing of supposed witches, who were often burnt alive in their huts - a traditionally acceptable way of eliminating them. Altogether the regulations introduced enough new ideas to upset the conservative Basuto, even without the blanket clause that all acts which by Cape law were offences were now to be punishable, subject to the special circumstances of the country.

Not unexpectedly, the regulations, when read to the national meeting, aroused heated protests. Molapo, Masopha,

---

[1] Theal, History of South Africa, 1854-1872, p. 313, footnote 1.

[2] See p. 168 above.

and the minor chiefs openly objected on the grounds that they ignored the chiefs, required payment for registration of marriages, and gave women rights which should belong exclusively to men. Vocal opposition was only halted by Letsie's order to the meeting that, as he was satisfied, the regulations were to be accepted.[1] Later in the day, however, a written address to Bowker was signed by the chiefs, in which they politely said that they thought the regulations reasonable but objected to mention of their rights and authority being omitted.[2]

It was this mild protest which Sir Henry Barkly found awaiting him when he assumed office as high commissioner on 31 December 1870 and turned his attention to what the British government insisted on regarding as an infant crown colony which was to be annexed to one of its neighbours.[3] He saw that the country would remain under the rule of these disgruntled chiefs until an adequate number of magistrates, properly organized and with well-defined duties, could establish a strong enough administration to make an impact on the daily lives of the people. As the plan to divide the country into three districts had not yet been implemented, Barkly decided, on Bowker's advice,[4] that the new regulations could be more effectively administered in four rather smaller districts. Charles Duncan Griffith, civil commissioner of King William's Town was chosen to organize it.

---

[1] Cape, G.H. 14/7: Auston to Bowker, 26 Jan. 1871.

[2] Cape, U.B.R., v. 553-4: Basuto chiefs to Bowker, 22 Dec. 1870.

[3] Cape Parl. Papers, A.4-71, p. 2: Kimberley to Barkly, 17 Oct. 1870.

[4] Cape, G.H. 14/7: Bowker to Southey, 10 Nov. 1870.

What Barkly failed to understand, even after a visit to Basutoland, was the strength of feeling against the regulations and the opposition the magistrates would encounter. He realised that Molapo and Masopha were disaffected, but reported reassuringly on the mood of the people after his meeting with Molapo:

> I learnt, however, that as soon as I was gone he harangued his people in rather strong language, telling them "that this Governor was no more good than the last, and that they had better go home and starve," an ebullition of wrath which is said only to have excited the laughter of the crowd, one of the minor Chiefs being bold enough to tell him that it was the sons of Moshesh who were no good, and that he himself would be the first to insist on payment of every penny of Hut Tax at the next collection.[1]

Letsie, he believed, supported the government, and he concluded:

> The fact is that however Molapo, Masupha, and one or two other of Moshesh's sons may indulge in dreams of reconquest, or chafe at the unaccustomed restraints which a Constitutional form of Government may impose on the exercise of their quasi-feudal prerogatives, the minor Chiefs and the people generally thoroughly appreciate the advantages of British Rule, and are only too glad to be left in the quiet enjoyment of the fruits of their industry, without being forced into fresh Military Service against the Free State.[2]

In the light of this apparently satisfactory situation, Barkly turned his attention to annexing Basutoland to either the Cape or Natal, in keeping with Britain's intentions from the first not to be saddled with it. The Cape seemed more suitable, but the Cape Legislative Council was not enthusiastic at the prospect of receiving yet more Africans within its boundaries. However, it became more reconciled to the idea after the select committee to which the Legislative Council referred the matter reported in August that Basutoland should

---

[1] Cape, U.A.R., vi. 92-93: Barkly to Kimberley, 18 May 1872.

[2] Ibid., vi. 99-100.

be secured for the wide field of profitable commercial enterprise it offered, especially as it was geographically connected with the Cape Colony and would be able to pay for its own administration.[1] By 10 August the Annexation Bill had been passed by both the Legislative Council and House of Assembly. It can therefore be seen that the Cape's motives in annexing Basutoland implied an official policy of breaking down the self-sufficient tribal economy to create a market for Cape goods and a source of labour for Cape needs. How little interest there was in developing Basutoland in any other way is perhaps best indicated by the fact that on the figures given Basutoland's revenue could only be regarded as adequate for its needs if (as was the case) no provision was made in the estimates for public works, buildings, education or postal communication.

Another indication of Cape lack of interest in Basutoland is the legal arrangements made for the territory. Cape policy at that date was to impose colonial law on all colonial tribal territories, but it was realized that the Basuto, fast recovering from the war with the Orange Free State, were a very different proposition from the docile Mfengu and defeated Xhosa of the Ciskei. Troops to repress opposition would be expensive, and some realization of the farcical results of the non-recognition policy in the Ciskei may also have played a part in the Council's reluctance to annex Basutoland unless the annexation was purely formal, maintaining intact the existing

---

[1] Cape Parl. Papers, C.1-71: report of the select committee on the Basutoland Annexation Bill.

system of rule by an imperial officer, with regulations that would require less enforcement than the alien laws of the Cape.[1] Thus the Annexation Act vested the duty of legislating for the territory in the governor, who was to lay all legislative enactments before the Cape Parliament within fourteen days of the opening of the session; unless altered they would remain in force. No parliamentary act would apply to the territory unless expressly stated to do so in the act itself or in a proclamation by the governor. And so the high commissioner was able to write to Letsie in August that the annexation made no difference to the position of the Basuto, except that it entitled them to the privileges of British subjects when they went into the Cape Colony. Griffith, who had duly arrived at the beginning of the months to take up his post as high commissioner's agent,[2] added that his relations with the Basuto would continue on exactly the same footing as Currie's and Bowker's had been.[3] Even after the Cape was given Responsible Government, Griffith's statement, though not that of the high commissioner, would for several years remain an accurate description of the facts if not the theory: Griffith would continue to exercise very wide discretion in deciding matters of policy. The Cape government, faced in Basutoland with an established government and code of regulations, was at first content to keep a watchful eye on him.

---

[1] P.R.O., C.O. 48/455: minutes encl. in Barkly to Kimberley, no. 53, 31 May 1871.

[2] Lesotho, S9/1/1/1: Griffith to Barkly, 7 Aug. 1871.

[3] Lesotho, S9/1/3/1: Griffith to Letsie, 26 Aug. 1871.

Even before the Annexation Act was confirmed by an order-in-council on 3 November, 1871, the machinery of government was set up to enforce the code of regulations. Basutoland was divided into four districts, as Barkly had earlier proposed.[1] Inspector William Henry Surmon, Bowker's deputy, was appointed to act as magistrate in charge of the Berea district,[2] formed by amalgamating the northern part of the central district with the southern part of Molapo's country in an arrangement which left Molapo with considerable influence in that district. He, however, resided in the northern part of his territory, now called the Leribe District after his village, where Major Charles Harland Bell assumed duty as magistrate on 13 May 1871.[3] An ex-army officer who had been recommended for his post by Currie,[4] Bell was described by Barkly as 'a gentleman of much experience in dealing with the Kaffir Tribes of the Eastern Frontier.'[5] The reduced central district was named after Thaba Bosiu which was situated in it, and was served by both the governor's agent performing the duties of magistrate from Maseru, and an assistant who was later to be based at Mafeteng. This was the Reverend Emile Rolland, whose memorandum on the Basuto had been so influential in the establishment of Basutoland's legal system

---

[1] Proclamation no. 51, 23 Aug. 1871.

[2] Government Gazette, no. 4365, 25 Aug. 1871: government notice no. 311, 24 Aug. 1871, stated that the governor had appointed James Surmon, Inspector of Armed and Mounted Police, to act as resident magistrate of the district of Berea, but judging from the correspondence files in the Cape and Lesotho archives, this is a misprint for W.H. Surmon.

[3] Cape, U.B.R., vi. 74: Surmon to Southey, 17 May 1871.

[4] Cape, G.H. 14/7: minutes of meeting between Barkly and Letsie, 16 Mar. 1871.

[5] Cape, U.B.R., vi. 87: Barkly to Kimberley, 18 May 1871.

and who resigned from the mission to become a magistrate.[1] The son of a Basutoland missionary,[2] he was brother-in-law to J.M. Orpen and the only magistrate to speak, read and write fluently in the language of the Basuto, though the other magistrates gradually acquired a working knowledge of it. Bowker, when suggesting him for the post, wrote of him: 'he is a first rate man and well liked by the Basutos.'[3] John Austen continued as magistrate in the south, now called the Cornet Spruit District. Tylden describes him as 'a very dark-skinned man',[4] which in a race-conscious country may explain his touchy, defensive attitude throughout his term as magistrate in Basutoland; he persistently reminded his superiors of his expertise gained from ten years of missionary experience and sixteen years living among Africans on the banks of the Orange before taking up his latest appointment,[5] but his knowledge of tribal law was rather uncertain.[6] He had originally been transferred to Basutoland to save the government from criticism of his trading activities in the Wittenberg Reserve, which he had pursued while acting as superintendent. The rough justice he had administered by means of an illegal

---

[1] Lesotho, S9/1/3/1: Griffith to Casalis, 17 Nov. 1871; E.S. Smith, The Mabilles of Basutoland (London, 1939), p. 205.

[2] Samuel Rolland, b. Switzerland 13 May 1801; d. Hermon Basutoland, 18 Jan. 1873. Arrived South Africa 1829, first established a mission station in Basutoland in 1835.

[3] Cape, G.H. 14/7: Bowker to Southey, 10 Nov. 1870.

[4] G. Tylden, The Rise of the Basuto, p. 116.

[5] E.g. Cape, N.A. 272: Austen to Griffith, 31 Jan. 1873, encl. in Griffith to Molteno, no. 33, 15 Mar. 1873; N.A. 273: Austen to Griffith, 19 Apr. 1876, encl. in Griffith to Brownlee, no. 19, 18 Apr. 1876.

[6] Cape, N.A. 275: Rolland to Brownlee, no. 12, 25 Jan. 1878: Lesotho, S9/1/3/2: Griffith to Austen, 21 Oct. 1871; Griffith to Austen, 19 Jan. 1874.

mixture of tribal and colonial law also had parliamentary repercussions.[1] His arbitrary actions and the fact that his son had fought with the Orange Free State in the last war had made him unpopular with the Basuto, but he was also respected, or at least feared.[2]

Colonel Charles Duncan Griffith, the leader of this team and the man who in practice for at least the next eight years was to exercise the most influence in deciding how Basutoland should be ruled, was an experienced and dedicated district officer. He had served with the Frontier Armed and Mounted Police and had been a magistrate in the Cape for nearly fifteen years, among other places in Grahamstown, King William's Town and Queeenstown. Although rigidly upright in his adherence to the regulations,[3] he was fully aware of the advantages of playing the chiefs off against each other.[4] His consistently firm and just handling of both subordinates and Basuto won him their respect, but it could only have been his own growing respect and liking for the Basuto[5] which gained him such trust and affection as are evident in the Basuto chiefs' unprompted

---

[1] Cape, G.H. 14/7: Surmon to Bowker, 13 Nov. 1868; Wodehouse to Bowker (Private), 4 Jan. 1870; Cape Parl. Papers, A.43-71, A.44-71 and A.45-71: Petitions of Tozane, Tsueu Lepota, and George Parkies respectively.

[2] Cape, G.H. 14/7: Bowker to Wodehouse, 23 Oct. 1868; Wodehouse to Burnet, 17 Nov. 1868; Cape Parl. Papers, 1879, Appendix II, A6, evidence, p. 14.

[3] E.g., on his arrival in Basutoland, Masopha sent him an ox, the traditional mark of respect for a chief, to which Griffith replied that he thanked Masopha very much if that was his motive, 'but at the same time with no wish to hurt your feelings or in any way treat you with disrespect I am obliged to decline your kind present and send the ox back to you because as an officer holding the responsible position which I do I am not allowed by the Queen's Regulations to accept any present or gift from any person.' See Lesotho, S9/1/3/1: Griffith to Masopha, 12 Aug. 1871.

[4] Lesotho, S9/1/1/1: Griffith to Southey, 8 Aug. 1871.

[5] Cape, N.A. 274: Griffith to Brownlee, no.13, 21 Apr. 1876; N.A. 273: no. 21, 31 May 1876.

plea when faced with his (temporary, as it turned out) removal to command the police and then the Cape forces in the 1877-8 frontier war:

> To the Chief Bartle Frere !
>
> Dear Sir,
>
> By this letter I desire to speak with you, and to question you; but not I only, likewise the men of Lesuto. What we wish to say to you is simply this:- We hear that the Chief Griffith is about to leave us, and return to the Colony. Now we say to you Sir, this news confounds us, we cannot rightly understand it. Also we say therefore how is it that our Chief is taken from us? Because as for this our shepherd, we have become intimate with him and we understand each other in all that we do. We also greatly love him as our shepherd. And now we humbly pray to you and say, Oh Sir, this shepherd of ours, we do not wish that he should leave us alone in the wilderness.
>
> As for our desire and our prayer to you, Sir, it is that you should leave us our shepherd that he may remain with us. This is truly what we ask, from you, Sir, by this letter. Again, Sir, you must not think that we could slight him who may come in the room of this our shepherd: but it is only because we have seen how he has worked in guiding this nation of the Lesuto. During all the years which he has lived with us we can say that he has guided us well, until now.
>
> This is why we address you on this matter of Mr. Griffith's leaving us.
>
> I remain, Yours,
>
> I Letsie, and the men of the Lesuto.[1]

Griffith's influence with the aged paramount chief can be gauged from the acting governor's agent report:

> The Chief Letsie upon hearing that Mr. Griffith would shortly leave Basutoland was so deeply affected as to be immediately seized with violent pain and sickness and was seriously ill for some days. I do not exaggerate in saying that Mr. Griffith's departure has deeply affected the whole Basuto tribe.[2]

---

[1] Cape, N.A. 274: Letsie to Bartle Frere, 10 Sept. 1877, encl. in Rolland to Brownlee, no. 87, 22 Sept. 1877.

[2] Ibid., Rolland to Brownlee, no. 87, 22 Sept. 1877.

After the Annexation Act became law the new regulations were re-proclaimed as the 'Governor's Code', and came into force on 1 Dec. 1871.[1] They were not exactly the same as those drafted by Wodehouse and accepted by the Basuto, as various deficiencies had to be rectified and changes recommended by Griffith were incorporated.[2] The most important (made at the suggestion of the magistrates[3]) was that infanticide and concealment of birth were to be punishable by imprisonment, although not offences in tribal law.[4] When the magistrates enforced this, yet another foreign concept was imported into Basutoland's criminal law.[5] The British Colonial Office had vetted the regulations before handing over them and the Basuto to the Cape, but despite objections from the legal adviser to the British Colonial Office, magistrates were left a good deal of discretion, especially on the question of punishments. As Sir Frederick Rogers, the under-secretary for state in the Colonial Office commented:

> These kind of rough rules for rough circumstances will seldom bear close legal inspection: and I am inclined to think that it is better that the authorities sh[oul]d be left without notice to exceed their powers when there

---

[1] Proclamation no. 74, 6 Nov. 1871.

[2] Lesotho, S9/1/1/1: Griffith to Barkly, no. 7, 16 Aug. 1871; no. 12, 22 Aug. 1871; Griffith to Southey, 30 Sept. 1871.

[3] Ibid., Griffith to Barkly, no. 7, 16 Aug. 1871.

[4] Cape Parl. Papers, 1873, Appendix III, Special Commission on the Laws and Customs of the Basutos, evidence, pp. 44, 47.

[5] E.g. Lesotho, S9/1/3/2: Griffith to resident magistrate, Aliwal North, 21 June 1875; Cape Parl. Papers, G.16-76, p. 5.

> is nobody to call them to account, than that they should be hampered by objections - on points of strict law - or that the Colonial Office should be called on to sanction especially that which is not [legal] in strict law.[1]

An unexpected embarrassment for the government resulted from these regulations. With such confirmation of the ineffectiveness of their letter of objection to Barkly, the Basuto chiefs decided that representations to the governor were obviously an inadequate means of expressing their dislike of the regulations; they therefore submitted a petition for the vote so that they could air their grievances and also have some say in the way their taxes were spent.[2] Orpen certainly and Buchanan possibly had a hand in the petition.[3] Mabille later claimed that it was written mainly on Orpen's advice,[4] but the ideas expressed in it, if not the timing, probably originated with the Basuto themselves. Certainly as early as January 1871 George, Nehemiah and Sophonia, provoked by the newly revealed regulations, had been saying that they should have a parliament of their own to make laws for the government of the country, and that the chiefs should have control of the tax revenue.[5]

The government, however, was unwilling to grant the Basutos the franchise. It replied through the governor that

---

[1] P.R.O., C.O. 48/450: third minute on enclosure 1 of Wodehouse to Glanville, no. 62, 14 May 1870.

[2] Cape Parl. Papers, A.18-72, pp. 20-22: Petition from the Basuto People praying for Representation in Parliament, 25 Feb. 1872.

[3] Cape, U.B.R., vi. 499: Barkly to Kimberley, 1 May 1872; vi. 471-2: Griffith to Southey, 24 June 1872; vi. 516-8: Griffith to Southey, 7 Sept. 1872; Cape Parl. Papers, A.18-72, appendix A, p. 17.

[4] Rhodes House, MSS. Brit. Emp. 518, C140/226a: Mabille to Chesson, 12 Jan. 1881.

[5] Cape, G.H. 14/7: Austen to Bowker, 26 Jan. 1871.

a necessary correlative of the franchise would be that Cape laws would supersede Basuto customary law and the land could then no longer be reserved for Basuto communal tenure.[1] This was a fallacious argument, as Orpen subsequently pointed out to Parliament,[2] but for some years[3] no more was heard from the chiefs about the vote. Possibly they were not willing to risk their position, for the governor had been careful to remind them in his answer that at present the government protected at least some of their tribal law privileges: he had recently instructed Griffith to entertain complaints against those tribesmen who would not perform agricultural labour traditionally done for the chiefs, although his motives were actually further to destroy the chiefs' powers.[4] Eight years later the governor's reply was to be denounced as having misled the Basuto about the very real change in status brought about by the annexation of Basutoland to the Cape. Certainly at the time the transition from British to Cape rule passed virtually unnoticed by both the Basuto and the tiny white community, unaware of the future upheaval which would result when the far away Cape politicians were given Responsible Government and eventually insisted on imposing their will on the country. Until 1880 life continued for most Basuto very much as before,

---

[1] Cape Parl. Papers, A.18-72, pp. 22-3: Southey to Griffith, 25 Mar. 1872.

[2] Ibid., pp. 17-18: appendix A.

[3] It was revived in 1878, without result. See Orpen, Some Principles, pp. 52-5: Petition of the Chief of the People of Basutoland, 1878. However, as early as 1874 Tsekelo was advocating a council of chiefs and headmen to advise Griffith - again without result. See Cape Parl. Papers, G.21-75, p. 19; G.17-78, p. 23.

[4] See p. 229 below.

though the wishes and values of the white men impinged increasingly on it and their law.

However the number of whites in Basutoland throughout the period remained very small. The 1875 census,[1] the only one taken in Basutoland by the Cape government, showed a total of 378 whites, and as land was 'leased' only to officials, traders and missionaries, no settler community developed. Until the 1880 Gun War depleted their numbers,[2] traders easily outnumbered both missionaries and officials. The first trader settled in Basutoland in 1834;[3] by 1872 there were 20 fixed trading stations, 30 by 1873,[4] and approximately 70 by 1877, many of them doing a great deal of business.[5] These men represented the interests for which the Cape had annexed Basutoland and were adding to the Cape revenues considerably,[6] but they were scattered throughout the country and the records show them uniting only twice to form a pressure group - in 1878-9 to press for changes in the trading regulations of 1877[7] and in 1879 to impress upon the visiting prime minister the dangers of applying the disarmament policy to Basutoland.[8] On what appears to be

---

[1] Cape Parl. Papers, G.16-76, pp. 18: census return, 28 Apr. 1875.

[2] By the end of 1881 there were only 27 traders in Basutoland, as against 22 in the Thaba Bosiu district alone the previous year. See Cape, N.A. 281: return by Orpen, 21 Jan. 1882.

[3] Orpen, History of the Basutus, p. 8.

[4] Cape Parl. Papers, G.27-73, p. 1.

[5] Cape, N.A. 274: Rolland to Brownlee, 28 Dec. 1877.

[6] As early as 1872 Griffith, after listing the main items purchased by the Basuto at trading stores, added: 'As nearly all these articles pay a considerable duty it will be seen that colonial revenue benefits largely by the Basuto trade.' See Cape Parl. Papers, A.23-73, p. 2: Griffith to Southey, 26 Aug. 1872.

[6] Cape, N.A. 275: Griffith to Ayliff, no. 72, 9 Dec. 1878; N.A. 276: Griffith to Ayliff, no. 102, 3 Dec. 1879.

[8] T.W. Irvine, British Basutoland and the Basutos (London, 1881), p. 22.

the only other occasion on which a trader made direct representations to the government, by protesting at the ban on the sale of red ochre, the regulation remained in force and was subsequently approved by the traders' meeting held in 1878. Moreover, the governor's agent was directly opposed to the policy of exploitation presupposed by the annexation.[1]

But as outlined above,[2] traders nonetheless had a great, though indirect, influence in reshaping the tribal way of life and tribal law. Because of its proximity to Griqualand West, Basutoland was particularly affected by them. By buying Basuto grain at the high prices generated by the demand for food at the new diamond fields, they drew more and more Basuto into the money economy and helped to develop a class of peasant producers. Even within the period of the Cape administration, the impact of the market economy was felt throughout the society. The attitude to bohadi was becoming commercialized already,[3] for example, and as early as 1872 the hut tax was paid entirely in cash, not kind.[4] A steady stream of migrant labourers moved between Basutoland and both the diamond fields and Cape railway works, attracted by the high wages and easy availability of guns;[5] by 1877 Rolland estimated that of the

---

[1] E.g. undated article from unnamed newspaper, probably the Northern Post, encl. in Cape, N.A. 275: Griffith to Brownlee, no. 72, 9 Dec. 1878.

[2] See chapter 1, pp. 32-33.

[3] Cape Parl. Papers, 1873, Appendix III, Special Commission on the Laws and Customs of the Basuto, p. 64: supplementary paper by Austen.

[4] Cape Parl. Papers, G.27-73, p. 1.

[5] Cape, N.A. 272: minutes of the annual pitso, encl. in Griffith to Molteno, no. 85, 27 Aug. 1873; Lesotho, S9/1/3/2: Rolland to labour agent, King William's Town, 4 Oct. 1875; Cape Parl. Papers, G.12-77, p. 4, 8.

adult male population of 25,000, at least 15,000 went out to service each year,[1] which incidentally must have further affected the women's role within the family and village. Moreover, already a tiny number of Africans, supporting themselves by trades or as transport drivers, postmen and policemen, depended on their waggons and labour as much as their land for their livelihood and the Basuto chiefs were not slow to realize that dependence on the white man's world loosened traditional controls.[2] Thus repeatedly in the early years of Cape rule there is evidence of them objecting to traders once they had experienced the effect of shops on tribal life.[3]

Nor were they slow to realize that the missionaries and their converts, who preached against polygamy, bohadi and circumcision[4] were their natural enemies, and reacted by oppressing the latter by whatever means came to hand. This fact was not lost on Rolland, who wrote:

> The Christians naturally look to the Government for protection and get it, and are thus strong partisans of our rule as opposed to that of the chiefs. In any outbreak they would side with us to a man, and their example would be followed by their friends and relations and by all those who have learned to look up to their

---

[1] Cape, N.A. 274: Rolland to Brownlee, 28 Dec. 1877.

[2] E.g., Cape, N.A. 272: statement by Jan Makhatlane, encl. in Griffith to Brownlee, no. 111, 28 Oct. 1873; N.A. 277: Surmon to Griffith, 28 June 1880. As early as 1834, with the influx of cattle earned on Cape farms or acquired through trade, Moshweshwe realized the potential threat and, to curb it, began to exact a portion of earned income from his subjects, until it became apparent that this was driving men away. See Sanders, 'The Life and Times of Moshoeshoe', p. 157.

[3] It is clear that protests were made after shops were experienced, since it was customary to consult a chief before allowing a trader to open a shop on his land. The chiefs must therefore have initially consented to the shops. See Cape, N.A. 281: Orpen to Sauer, no. 2/438, 16 Mar. 1882; Little Light of Basutoland, no. 9, Sept. 1873, p. 27; no.11, Nov. 1874, p. 43.

[4] Circumcision was particularly important to the chiefs in Basutoland, since the men who underwent the circumcision ceremony with him formed a permanent body of especially close advisors and headmen in later life. Ellenberger, History of the Basuto, p.281.

> superior intelligence and experience for guidance and advice. The chiefs know this and know that no intrigues could be carried out without some Christian hearing of it and warning us, and thus a great moral check is established upon them, far beyond that which would be exercised by a mere political minority of the tribe.[1] The tangible political influence of the missionaries themselves may not be very great, and is not actually exercised, - these gentlemen having taken very little part in the politics of the country.[2]

This last remark may be questioned when viewed against the evidence of missionary activities to have tribal law changed for the whole nation, involving as it did the political repercussions outlined above. Although there is little evidence on the question, presumably changes in tribal law were discussed on the occasions when missionaries and magistrates met, and the missionaries certainly campaigned vigorously, if not successfully, in their newspaper.[3] From 1872 to 1877 the French Protestant missionaries' monthly newspaper, Leselinyana la Lesotho, published a smaller English counterpart, The Little Light of Basutoland, three copies of which were requested for the Colonial Office in Cape Town every month[4] and it was also regularly sent to the governor, governor's agent and magistrates in Basutoland.[5] It is not clear whether it was ever opened by anyone in the government offices in Cape Town, but there is

---

[1] By 1874 approximately one tenth of the Basuto were Christianized. See Cape, N.A. 273: Rolland to Griffith, 30 May 1874, encl. in Griffith to Brownlee, no. 8, 7 July 1874.

[2] Cape, N.A. 274: Rolland to Brownlee, 28 Dec. 1877.

[3] E.g., Little Light of Basutoland, no. 5, May 1872, pp. 17-20; no. 6, June 1872, pp. 21-24; no. 7, July 1872, pp. 25-28; no. 9, Sept. 1872, pp. 33-35; no. 11, Nov. 1873, pp. 41-44; no. 1, Jan. 1876, p. 2; no. 6, June 1876, pp. 23-25.

[4] Lesotho, S9/1/3/2: Bright to Mabille, 28 March 1872.

[5] Cape, N.A. 276: Mabille to Griffith, 6 Jan. 1879, encl. in Griffith to Ayliff, no. 4F, 17 Jan. 1879.

evidence that it was read at least occasionally by the governor[1] and the Cape officials in Basutoland.[2] Probably as the only locally published English newspaper in the country it would have been read by most of the white community, especially as it carried government notices; and both as the only newspaper in the vernacular, and as the place where descriptions of impounded cattle were published, Leselinyana would have had a growing readership among the increasingly literate Basuto.[3]

In addition, several of Moshweshwe's sons, including the two eldest, had been partially educated in Basutoland by the French Protestant missionaries, who were anxious to use their influence with these and other chiefs to get certain tribal customs abolished. In this they did not have much success. Moletsane, chief of the Taung,[4] was actually converted to Christianity and abolished circumcision for his tribe;[5] but when Molapo, at missionary prompting, unsuccessfully attempted a similar abolition, he yielded when challenged by his son, Jonathan.[6] With Letsie they had even less hope of success.

---

[1] Cape, U.B.R., vi. 452: Barkly to Kimberley, 1 May 1872.

[2] Cape Parl. Papers, G.27-73, pp. 4-5.

[3] In 1871 Leselinyana had 480 subscribers. Between 1871 and 1879 the number of children attending school rose from 2129 to approximately 3000. See Cape Parl. Papers, A.23-73, p. 3: Griffith to Southey, 26 Aug. 1872; ibid., G.5-80, p. 6.

[4] Moletsane was a chief who had acknowledged Moshweshwe's paramountcy but who, in common with Masopha, Molapo and Moorosi, was virtually independent of Letsie in his own district. See Cape, N.A. 275: Rolland to Ayliff, no. 36, 19 July 1878.

[5] Little Light of Basutoland, no. 6, June 1876, p. 24.

[6] Ibid., pp. 23-25. That the missionaries ever persuaded Molapo to attempt to abolish circumcision is surprising. Although he was a lapsed Christian, in 1874 he was vociferously opposed to missionary schools on the grounds that they led to the abandonment of bohadi and circumcision. See Cape, N.A. 295: Nixon's report, 12 Aug. 1874.

He was, as the missionaries themselves admitted, 'still less strong than his brother Molapo'[1] and would have faced powerful opposition to such a step from his strong-willed, anti-Christian eldest son, Lerothodi.[2] While Masopha, Moshweshwe's third son in rank, baptised in 1841 and given the name of David, had left the church and become an enthusiastic supporter of the practice of circumcision.[3]

That the missionaries were not more successful through their pressure on officials at least seems at first surprising. The man who was assistant magistrate in Griffith's district and later acted as governor's agent for more than a year was the son of a Basutoland missionary, an ordained minister himself, and had resigned from the mission to enter the administration.[4] Austen had ten years of missionary experience behind him. Griffith himself was obviously highly thought of by the missionaries and took a keen interest in their work, both educational and religious.[5] Yet, despite all missionary arguments, polygamy, bohadi and circumcision continued to be recognized, if discouraged. The reason can probably be found partly in the tribal reaction against the extreme nature of the Paris Missionary

---

[1] Little Light of Basutoland, no. 6, June 1876, p. 25.

[2] Cape, N.A. 275: Rolland to Ayliff, no. 36, 19 July 1878.

[3] J.M. Mohapeloa, 'The Essential Masupha', Lesotho Notes and Records, 5 (1965-66), 11-12; Cape Parl. Papers, G.16-76, pp. 6-7.

[4] Lesotho, 99/1/3/1: Griffith to Casalis, 17 Nov. 1871; Smith, The Mabilles, p. 205.

[5] E.g., Little Light of Basutoland, no. 1, Jan. 1875, p. 2; no. 11, Nov. 1877, p. 4; Cape, N.A. 276: secretary, Paris Evangelical Missionary Society Conference to Griffith, 24 April, 1879, enclosed in Griffith to Ayliff, 27 April, 1879.

Society's views,[1] partly in the opinions and characters of Griffith and his magistrates. Sympathy for the arbitrary abolition of the most basic tribal customs was unlikely to come from a man who could quote approvingly, as Griffith did, the words of Sir Arthur Gordon:

> If we follow the example of those great masters in the art of Government, the Citizens of ancient Rome, and permit those who have come under our sway to develop in their own way and after their own fashion, the civilization that suits them, we shall do wisely and well.[2]

Not that Griffith was averse to guiding that development towards the goal of European values and way of life, but both his temperament and commonsense, not to mention his instructions from Cape Town,[3] led him to disagree with the missionaries as to the correct speed and method for achieving this. As early as 1873 he attacked the missionaries in his annual report for 1872 for checking religious and educational progress by over-zealously introducing certain uncalled-for measures.[4] Nor was he alone in this opinion. That year both Austen and Rolland voiced the same criticism in their annual reports, though these were tactfully censored by the government before publication.[5] Rolland went so far as to make it quite clear that in such matters

---

[1] Though both Catholic and Church of England missionaries viewed tribal customs less severely, these missions were relatively newly established and small in this period. See Cape, N.A. 274: Rolland to Brownlee, 28 Dec. 1877.

[2] Undated article from newspaper, probably the Northern Post, encl. in Cape, N.A. 275: Griffith to Brownlee, no. 72, 9 Dec. 1878. Sir Arthur Gordon was governor of the Fiji Islands.

[3] Lesotho, S9/1/3/2: circular by Griffith to Basutoland magistrates, 11 June 1872.

[4] Cape Parl. Papers, G.27-73, p. 2.

[5] Cape, N.A. 272: Austen's and Rolland's annual reports for 1872, encl. in Griffith to Molteno, no. 33, 15 Mar. 1873.

he supported the government against what he characterized as 'one of the narrowest sects in Europe'. In his 1877 annual report yet another magistrate, Major Bell, joined the attack; he suggested that the separation from tribal life enforced by the missionaries was responsible for the number of renegade converts in the country; 'There is at the station too much of the exclusiveness of a religious community, this becomes irksome to the converts, and at the same time causes the people to stand aloof.'[1] With so many magistrates sceptical of the missionaries' claim that only good could come from the rapid abolition of tribal customs, it is not surprising that missionary influence on Basutoland tribal law policy was not strong.

However, in essence the missionaries and magistrates differed only on the question of the desirable speed and method of abolishing tribal customs, not on the ultimate aim in this respect. Faced with a three-pronged attack by traders, missionaries and government on their customary means of influence, the chiefs not unnaturally did all they could to counteract the threat wherever they could detect it. It seemed likely that any large-scale revolt would most easily be led by one of the major chiefs, who could automatically command the allegiance of the largest numbers. However, the paramount chief, Letsie, did not seem a likely candidate; in 1878 the acting governor's agent described him as 'about 70 - In character he is timourous [sic], indolent, mild, suspicious, and peaceably inclined. He is very stout and unwieldy, and suffers from gout, is fond of

---

[1] Cape Parl. Papers, G.12-77, p. 7.

his ease and hardly ever stirs from his village.'[1] As he was completely under Griffith's influence and was supported in his position by the government against his more able and vigorous younger brothers, he had neither the will nor the incentive to lead a revolt.

His next brother, Molapo, at first seemed more threatening. The most powerful chief in the country after the paramount, capricious, arbitrary, and jealous of his prerogative,[2] he presided over the large and remote northern district which his harassed magistrate described as having least felt 'the white-man's power';[3] or, it seemed, that of anyone else:

> It has been a common thing when a Chief has on account of some crime sent to a village to seize the cattle of a villager, that the inhabitants have turned out in arms and resisted; the village communities have it would seem always considered themselves bound to protect the persons and property of the individuals composing such communities without in every case asking whether such individuals have or have not transgressed the law; a stranger is murdered in a village and the community band together to prevent the murderer being found out - and Molapo's country appears to have been for years a sort of Alsatia, a refuge for murderers and other transgressors.[4]

However, Molapo and his sub-chiefs had quite enough control over their subject Basuto to prevent anyone from entering the African police force established by Griffith in 1872 and, after six Zulus were recruited (Bell's entire police force), so incited

---

[1] Cape, N.A. 275: Rolland to Ayliff, no. 36, 19 July, 1878.

[2] Cape, U.B.R., vi. 397: Bell to Griffith, 17 Feb. 1872.

[3] Cape, N.A. 272: Bell to Griffith, 19 May 1873, encl. in Griffith to Molteno, no. 56, 26 May 1873. Molapo, by his submission to the Orange Free State, had escaped the devastating and humbling effects of the last two wars against the Boers, and displayed a more independent approach in his dealings with Cape officials than did the other chiefs. See Cape, U.B.R., vi. 411-2: Griffith to Southey, 27 Feb. 1872.

[4] Cape, N.A. 273: Bell to Griffith, 3 May 1875, encl. in Griffith to Brownlee, no. 34, 22 Feb. 1875.

their people against them that the police asked to be armed.[1] In August 1873 Molapo caused Bell some anxious hours by arriving with about 150 armed and drunken men to attend the trial of some of the chief's followers for assaulting Bell's chief constable in Molapo's presence.[2] Bell informed them that although they saw only three or four constables, the whole of the forces of the queen were at his back, a statement which he ruefully pointed out to Griffith was true in theory but unfortunately not in practice.[3] He himself advocated that an armed white police force be established in his district, and wrote a number of letters to the governor's agent pressing for the magistracy to be moved to a position which could be fortified and where Molapo could not see which tribesmen were disobedient enough to take their cases to the magistrate's rather than the chief's court or seek refuge at the magistracy.[4] Eventually by mid-

---

[1] Cape, N.A. 272: Bell to Griffith, 28 Aug. 1873, encl. in Griffith to Brownlee, no. 91, 9 Sept. 1873. Until these police were recruited, Bell had no police at all. See Cape, U.B.R., vi. 413: Griffith to Southey, 27 Feb. 1872. For an example of police being intimidated by Jonathan, Molapo's son, see Cape, N.A. 272: complaint by Jan Makhatlane, 17 Oct. 1873, encl. in Griffith to Molteno, no. 111, 28 Oct. 1873.

[2] Ibid., Bell to Griffith, 8 Feb. 1874, encl. in Griffith to Brownlee, no. 3, 26 Feb. 1874.

[3] Ibid., Bell to Griffith (Private), 19 Oct. 1873. Whether Molapo's motive was intimidation, as Bell claimed, is not entirely clear. The Rev. François Coillard, his missionary, wrote: 'my opinion isthat he had some undefined fear at the thought of going to court, before a new and strange power whose attributions are not yet fully known to the people of the country. He would therefore feel some security in having with him some of his men. This is, I believe, the reason why he requested me also to be present.' See ibid., Coillard to Bell, 17 Nov. 1873, encl. in Griffith to Brownlee, no. 3, 26 Feb. 1874. In his covering letter, Griffith agreed with the Rev. Coillard.

[4] E.g., ibid., Bell to Griffith, 19 May 1873, encl. in Griffith to Molteno, no. 56, 26 May 1873; Bell to Griffith, 28 Aug. 1873, encl. in Griffith to Brownlee, no. 91, 9 Sept. 1873; Bell to Griffith, 8 Feb. 1874, encl. in Griffithto Brownlee, no. 3, 26 Feb. 1874; Cape, N.A. 273: Bell to Griffith, 3 May 1874, encl. in Griffith to Brownlee, no. 8, 11 May 1875.

1876 the records show Bell to be ensconsed at a new site at Hlotse Heights, after a delay caused by the governor's agent's doubts about the expense involved in fortifying the new magistracy.[1]

But by then Griffith had taken full advantage of an unexpected event, which effectively converted Molapo willy-nilly into a government supporter. Langalibalele, a Hlubi chief living in Natal, defied a government order to register his guns and, when an armed government force was sent to enforce obedience, fled with his warriors and cattle over the Drakensberg towards Basutoland. He had already contacted Molapo, in whose territory many Hlubi were living, and expected at least shelter, if not active aid, despite the Cape government's warning to Molapo and Masopha not to receive his cattle for safekeeping.[2] The armed party which pursued Langalibalele was routed by his rearguard, which killed five men including the son of the Natal colonial secretary. Colonists throughout South Africa suddenly realized that unless the errant Hlubi clan was immediately and publicly subdued, South Africa faced the possibility of a full-scale rebellion by an unknown number of tribes, especially in view of Langalibalele's wide contacts.[3] Offers of help came from as far away as the Diamond Fields, and soon a Natal force was in pursuit while Cape forces advanced from Basutoland and Griqualand East. The Natal authorities offered a reward of 150 head of cattle for the capture of

---

[1] E.g., Cape, N.A. 272: Griffith to Brownlee, no. 6, 13 May 1874.

[2] Lesotho, S9/1/3/2: Griffith to Bell and Surmon, 15 July, 1873.

[3] Cape Parl. Papers, G.46-75, p. 6.

Langalibalele alive, 100 head if dead,[1] and Griffith on his own initiative promised Molapo and Letsie any cattle belonging to the rebels which they might capture. This latter offer, according to Lagden,[2] was probably the major factor in deciding the loyal response of Molapo and his sons; but in addition there was the fear that the Zulu would allow their cattle to overrun the Basuto cornfields if they got that far,[3] and the greater fear engendered by the prompt appearance of a contingent of the Frontier Armed and Mounted Police.[4] Despite all the colonial forces searching the mountains, it was Jonathan, Molapo's heir, who first found the exhausted Hlubi clan. By pretending friendship, he induced Langalibalele and his body-guard of eighty-four men (including five of the chief's sons) to surrender on 11 December 1873 without a fight. 200 more surrendered next day, but the main body of the clan were only compelled to disperse after being attacked by the police. Joel, another son of Molapo, meanwhile attacked the rear of the rebels on his own initiative and captured 500 head of cattle, which he was allowed to keep.[5] After a travesty of a trial, Langalibalele, his sons and some of his followers, were sentenced, Langalibalele himself to life imprisonment and banishment. He spent the next twelve years on Robben Island

---

[1] Lesotho, S9/1/3/2: Griffith to Letsie, 22 Nov. 1873.

[2] Lagden, The Basutos, ii. 483.

[3] Cape, N.A. 272: Bell to Griffith, 9 Dec. 1873.

[4] Cape Parl. Papers, G.27-74, p. 35.

[5] Cape, N.A. 272: Bell to Griffith, 9 Dec. 1873, encl. in Griffith to Molteno, no. 124, 9 Dec. 1873.

and the Cape mainland, until in mid-1885 his physical and mental debility induced the Natal government to agree to his return to Natal, although not as a chief.

Molapo realized that this betrayal of Langalibalele would earn him the distrust of other sections of his nation, as well as of the Zulu,[1] so there was a strong incentive to ensure his safety by the obvious means open to him - government support. In reply to a government letter of thanks for his part in Langalibalele's capture, he admitted that he had objected to Major Bell's presence at first, but declared that he was now very thankful to the government for sending him a magistrate.[2] His thankfulness was probably reinforced by the maltreatment of his ambassador to the Zulu paramount in September 1874,[3] which left him nervous enough to send to Bell in alarm in the middle of the following year when rumours began to circulate that Cetshwayo was preparing for war.[4]

Although Molapo's opposition to government did not therefore remain a problem for long, that of his brother Masopha, the third of the triumvirate of leading chiefs, never abated and increasingly became a focus for dissatisfaction with the government. A man who had obtained great influence with the tribe by his bravery in the war against the Orange Free State,[5] Masopha was already defying the Government when Griffith took

---

[1] Ibid.

[2] Ibid., Molapo to Brownlee, 17 Feb. 1874.

[3] Ibid., Griffith to Molteno, no. [illegible], 15 Sept. 1874, and enclosed statement.

[4] Cape, N.A. 273: Bell to Griffith, 19 June 1875, encl. in Griffith to Brownlee, no. 78, 26 June 1875.

[5] Lesotho, 99/1/1/1: Griffith to Barkly, no. 2, 15 Aug. 1871.

over. On Moshweshwe's death he moved to the back of Thaba Bosiu, the original citadel of the Basuto nation. It was already established as the customary home of the paramount and, on the division of Basutoland into districts, Masopha was allocated the Berea District and ordered by Bowker to move from Thaba Bosiu. He did not move however, and on Barkly's first visit to Basutoland the governor informed him that he was unlikely to receive his percentage of the hut tax unless he did so.[1] But Masopha, strong in the knowledge that the government could not enforce its will, stubbornly remained, and Griffith on his arrival tentatively suggested that it was a pity to make an enemy of him over a trifle such as whether he lived at Thaba Bosiu or seventy miles away. However, he added that in view of Bowker's and Barkly's warnings, 'it will not do to let him feel that he has got the better of us'.[2] Barkly believed it was imperative to move Masopha for other reasons:

> his bravery during the late war, and his great influence over the "Tribe", render it all the less desirable that he should be allowed to enjoy the prestige of residing at a stronghold - for which especially since it became the burial place of "Moshesh", the Basutos entertain a superstitious reverence which might easily be turned to account by an ambitious man desirous of subverting the authority, or disturbing the peace of the country of his more peacefully disposed elder brother.[3]

There followed a tussle of wills between Masopha and Griffith: Masopha refused to move and in 1872 Griffith withheld his hut tax percentage until he did so. Masopha retaliated by forbidding his people to pay further hut tax, an order which he

---

[1] Cape, U.B.R., vi. 93: Barkly to Kimberley, 18 May 1871.

[2] Lesotho, 59/1/1/1: Griffith to Barkly, no. 2, 18 Aug. 1871.

[3] Cape, N.A. 272: Barkly to Griffith, 2 Sept. 1871, encl. in Griffith to Brownlee, no. 12, 21 Nov. 1873.

only countermanded after Letsie agreed to ask the government to alter the boundary line of the two districts so as to cut Masopha's village into the Berea District. Letsie's role in this, as in other disputes, was dubious. At the 1873 pitso Masopha declared he would move if ordered to do so by Letsie - but Letsie never gave the order, whether because he feared disobedience or because he found it convenient to have a focus of disaffection apparently unconnected with himself is uncertain.[1] The Basuto were past masters at keeping all their options open, as their pre-1870 negotiations had shown. Meanwhile neither did Letsie make the promised request for a redefinition of the boundaries, Griffith continued to withhold the hut tax percentage, and Masopha ordered his people not to pay their 1874 hut tax.[2]

Faced with this deadlock, afraid of a serious loss of government prestige, and in need of the 1874 Berea hut tax, the government was about to adopt a face-saving formula to allow Masopha to remain at his village,[3] when he unexpectedly consented to move as soon as the grass and reeds were fit to use for building new huts.[4] In May he was persuaded to plough land in the Berea District preparatory to moving, whereupon Griffith, 'knowing the fickle and changeable character of the man, and the possibility of his still changing his mind again at any moment', hastily called a meeting of Letsie, Masopha, and their people

---

[1] In 1871 Griffith was informed that Letsie had ordered Masopha to leave Thaba Bosiu and that Masopha had replied that he would use force to resist any attempt to move him: See Lesotho, S9/1/1/1: Griffith to Barkly, 7 Aug. 1871. Masopha and Letsie had always been rivals. See Smith, The Mabilles, p. 298.

[2] Cape, N.A. 272: Bell to Griffith, 10 Nov. 1873, encl. in Griffith to Brownlee, no. 12, 21 Nov. 1873.

[3] Ibid., Griffith to Brownlee, no. 1, 30 Jan. 1874.

[4] Cape Parl. Papers, G.27-74, p. 33.

and announced that the boundary had been redrawn to include Masopha's present village within the Berea District, as an act of clemency by the government.[1]

It is questionable how far Masopha had ulterior motives in insisting on remaining near Thaba Bosiu - Griffith throughout obviously thought it could not benefit him strategically - but the five year struggle built up a reservoir of bad feeling between him and the government and he became the obvious champion to whom tribesmen could look whenever anti-government agitation arose, a situation little altered by his subsequent behaviour. At the 1873 pitso he publicly advocated that chiefs should be given the means to enforce summonses[3] and Surmon's annual report on 1874 noted: 'the Chief Masupha, while professing loyalty before any one favourable towards the Government, does, I regret to say, all he dares to keep his followers from becoming acquainted with, or obeying the instructions and laws of the government, and to uphold the continuance of their heathenish customs.'[4] At the 1875 national pitso Masopha declared that the people should bring all their cases to the chief in the first instance,[5] and later in the year he and Surmon clashed openly over a number of Surmon's legal decisions to which Masopha objected. Masopha complained to Griffith, who, after investigation, confirmed all Surmon's decisions and warned Masopha against his present course of obstructing his magistrate and

---

[1] Cape, N.A. 272: Griffith to Brownlee, no. 7, 14 May 1874.

[2] E.g., ibid., statements encl. in Griffith to Brownlee, no. 12, 21 Nov. 1873.

[3] Ibid., minutes of the annual pitso, 20 Aug. 1873, encl. in Griffith to Molteno, no. 85, 27 Aug. 1873, p. 44.

[4] Cape Parl. Papers, G.21-75, p. 9.

[5] Ibid., G.16-76, pp. 16-17.

doing his best to make the people dissatisfied with the government.[1] But this warning did not have the desired effect. Although Surmon and Griffith went out of their way to avoid a confrontation with Masopha,[2] he continued to oppose the government's policy of discouraging certain tribal customs. In 1877 the missionary newspaper, reporting that he had refused to sign a memorial for the abolition of circumcision, sighed: 'although he received some education in Cape Town, and was for a time a member of the church of Thaba Bosigo, he is now one of the worst heathen in the country.'[3] As late as 1880 his magistrate wrote to Griffith that it was not unusual for Masopha, when an important measure was being carried out by government or when the country was unsettled, to get up a scare in his district and have a difference of opinion with his magistrate 'evidently for the purpose of distracting the Government and if possible gaining back some of his gradually waning power.'[4]

It was obvious therefore that his influence had to be permanently neutralized if the government was to be safe to enforce and extend its policy of breaking down tribal laws and customs. The measures the government adopted fell into two categories - those aimed at preventing Masopha from forming an alliance with other chiefs, and those aimed at weaning the people

---

[1] Lesotho, 89/1/3/2: Griffith to Masopha, 8 Dec. 1875.

[2] Surmon even sentenced a man caught committing adultery with one of Masopha's wives to imprisonment with hard labour, and Griffith allowed the sentence to stand since adultery was still nominally a crime in the Cape, although never prosecuted. As he explained to the secretary for native affairs, 'upon grounds of policy I allowed the conviction to stand - the Chief "Masupha" being much enraged ... I was afraid might take the law into his own hands.' See Cape, N.A. 273: Griffith to Brownlee, no. 17, 20 Oct. 1876.

[3] Little Light of Basutoland, no. 2, Feb. 1877, p. 1.

[4] Cape, N.A. 277: C.G.H. Bell to Griffith, 3 Feb. 1880, encl. in no. 26, 10 Feb. 1880.

from their allegiance to the chiefs and attaching them instead to the government. In preventing Masopha from forming alliances, certain facts of Basuto life worked in favour of the government. Polygamy ensured that every chief had a large number of sons who survived childhood, and though tribal law prescribed inheritance by the eldest son of the great wife, the ruling was not rigid and was subject to confirmation by a lineage council after his father's death. Thus sons of minor wives, and even more so younger sons by the great wife, were all potential challengers to an heir, who was obviously very aware of this. Letsie's only surviving child by his great wife was a daughter, and although this girl had a son who by tribal law ranked as part of Letsie's family[1] and whom Moshweshwe had expressly declared to be the heir of the paramountcy, he had done so without consulting the tribe and in violation of the normal tribal law of succession passing only through the male line. The boy had no hope of inheriting instead of Letsie's established and powerful eldest son, Lerothodi, who was generally regarded as the heir. Rolland, who had been magistrate with Lerothodi for several years, described him in 1878 at the age of 41:

> He possesses much energy and activity, is courageous and hot-tempered, very wily and plausible, but is not much liked - he is quite uneducated and is proud and ambitious - professes great loyalty to the Gov[ernmen]t, speaks well and has always acted loyally and supported the Government. He is very intelligent, and recognises that it is in his interest to be loyal. He is a heathen and dislikes Christianity, but does not oppose it openly.

---

[1] The boy was born of a union with Molapo's eldest son, for which Molapo cattle had deliberately not been accepted. See Cape Parl. Papers, 1879, Appendix II, A.6, pp. xl-xlii: Appendix D; Jones, 'Chiefly Succession', op. cit., pp. 70-71.

> His residence is near Mafeteng (Mr. Surmon's magistracy)[1] and has a district of about 5000 souls who recognize him as chief. Letsie is very jealous of him but uses him largely as a messenger and generally listens to his advice. He is poor & more or less dependent on his father. A large proportion of the people near him are Christians, and becoming civilized.[2]

Lerothodi was therefore unlikely to join his uncle Masopha in an anti-government plot unless he felt very sure of its success and of the support of the people.

Of Moshweshwe's influential sons by his five minor wives, all but three of those living in Basutoland were given appointments in the police force[3] (to Letsie's and Masopha's great disquiet),[4] thus firmly tying their interests to those of the government; public service regulations were stretched to allow them to speak publicly at pitsos as chiefs rather than government employees.[5] Several of their sons and those of other chiefs and counsellors, some already in their twenties, were sent to school in Cape Town by the government in the hope that, away from the influence of friends and relatives, they would there acquire a liking for the white man's ways and presumably a healthy respect for the white man's power.[6] Griffith even took Lerothodi and four other important chiefs to Cape Town with him when he went on a visit, and reported them much

---

[1] Surmon had moved there in mid-1877 to replace Rolland as assistant magistrate of Thaba Bosiu.

[2] Cape, N.A. 275: Rolland to Ayliff, no. 36, 19 July 1878.

[3] I.e. Ntsane, Tlali or George, Pii or Sofonia, and Tsekelo.

[4] Cape, N.A. 275: Rolland to Ayliff, no. 37, 20 July 1878.

[5] Cape, N.A. 279: George Moshweshwe to Orpen, 27 Dec. 1881, encl. in Orpen to Sauer, no. 2/352, 30 Dec. 1881. Some of these chiefs provided invaluable assistance to the government; e.g. Griffith was to write in 1881 of George Moshweshwe: 'I don't know what I should have done without him when we first commenced our rule in Basutoland.' See Cape, P.M. 259: Griffith to Scanlen, 12 Dec. 1881.

[6] Cape, N.A. 272: Griffith to Brownlee, no. 11, 25 Nov. 1876; N.A. 274: Griffith to Brownlee, no. 40, 16 May 1877.

impressed by the experience.[1] In addition, allowances were paid to various chiefs who demonstrated their loyalty to the government by their good behaviour.[2]

The magistrates did their best not to give the chiefs any unnecessary cause for grievance against the government which might, despite other interests, drive them into Masopha's arms. Griffith, for example, agreed with Bell that his district was too long to be efficiently administered by one person, but felt that a sub-magistrate or clerk should be appointed rather than another magistrate of equal responsibility, as the division of the district into two separate juristictions 'would give dissatisfaction to the Chief Molapo'.[3] When in 1873 Letsie caused a national sensation by surrendering his nephew, the Chief Sekake, to the government on a charge of homicide, the government informed Letsie that it was willing to release the chief from imprisonment on payment of a fine of £75 'in consideration of your loyal conduct in delivering "Sekake" up to justice.'[4] When allaying fears or issuing orders to chiefs, Griffith often worked through Letsie,[5] thereby using tribal allegiance to ensure obedience and prevent an unpleasant confrontation with chiefs. Similarly, the use of Moshweshwe's

---

[1] Cape Parl. Papers, G.21-75, p. 2; see also pp. 17-18: Sofonia Moshweshwe's speech at the 1874 annual pitso describing the visit.

[2] E.g., Cape, N.A. 273: Griffith to Brownlee, no. 9, 18 Apr. 1876; N.A. 274: Griffith to Brownlee, no. 34, 9 May 1877.

[3] Ibid., Griffith to Brownlee, no. 49, 19 June 1877.

[4] Cape Parl. Papers, G.27-74, p. 35; Lesotho, S9/1/3/2: Griffith to Letsie, 30 Jan. 1874.

[5] E.g., Cape Parl. Papers, A.49-79, p. 16: Rolland to Hope, 30 Nov. 1877.

younger sons as policemen had the additional advantage of adding their authority to that of the government when sending them to cajole and, if necessary, force recalcitrant chiefs to obey the law.[1]

Dissatisfaction amongst both chiefs and commoners could often be nipped in the bud, for there was a constant circulation of information between the chief and his magistrate. Magistrates notified the chiefs of events of importance within South Africa and consulted them over such matters as land allocation within their districts;[2] chiefs in return were required to inform their magistrates if they held a public meeting, fortified a position,[3] sent or received ambassadors or messengers from inside or outside the country, and any other matter of importance which they deemed fit for their magistrate's ears. For those matters not reported, there were other sources of information. Messengers and many other Africans would usually make a courtesy stop at the magistrate's office when passing, even if not required to do so by government orders,[5] thus

---

[1] E.g., Cape, N.A. 276: Griffith to Ayliff, no. 39, 26 Feb. 1879.

[2] E.g. Cape, N.A. 275: Rolland to Ayliff, no. 18, 25 Feb. 1878. In terms of s.5 of both the 1871 and the 1877 regulations, the magistrate had an obligation to notify a chief of changes in land allocation.

[3] Cape, N.A. 276: Surmon to Griffith, 17 Feb. 1879, encl. in Griffith to Ayliff, no. 31, 19 Feb. 1879; N.A. 277: Bell to Griffith, 3 Feb. 1880, encl. in Griffith to Ayliff, no. 26, 10 Feb. 1880.

[4] Cape, N.A. 276: Austen to Griffith, no. 75, 29 Nov. 1879, encl. in Griffith to Ayliff, no. 108, 8 Dec. 1879; Lesotho, S9/1/3/2: Griffith to Bell, 26 May 1875.

[5] After May 1875 messengers from chiefs outside Basutoland were required to report themselves at the nearest Basutoland magistracy to the border. See Cape, N.A. 273: Griffith to Molteno, no. 63, 26 May 1875, minute by Brownlee, 7 June 1875.

enabling the magistrate to form a shrewd idea of whatever was afoot. Converts, missionaries and even traders[1] acted as a third column, and a corps of African detectives was supplemented by a systematic use of payment for information laid anonymously.[2]

Unfortunately these methods of keeping the magistrate in control of the situation could occasionally be turned against the government, as in the case of Tsekelo, one of Moshweshwe's sons by his sixth wife.[3] Moshweshwe's younger sons were poor men who were unable to express their discontent with the sons of the great house in the way which was traditional in the days of plentiful land - that of moving off with their followers to unclaimed land. To acquire power they had two choices: either to collaborate with the administration, or to become indispensable to the chiefs of the great house. Or the more devious could even try both courses simultaneously. The educated Tsekelo had been quick to offer his services to the new government. A month after Basutoland was annexed to the Crown, he and his brother George had written as much to Wodehouse, adding:

> we shall be pleased with all the laws which may be introduced in our country.... Your Excellency can therefore trust us, not looking to the colour of our skin, but believing that we are real Englishmen at heart.[4]

It is true that Tsekelo was subsequently one of the Basutoland delegates who went to London to object to the Aliwal North

---

[1] Apart from the fact that traders shops were used as informal meeting places where a good deal of gossip took place, traders would report to magistrates if there was any sudden demand for saddles and blankets, items needed by the Basuto when campaigning, e.g. Cape, N.A. 276: A. Barkly to Griffith, 15 Feb. 1879, encl. in Griffith to Ayliff, no. 31, 19 Feb. 1879; Surmon to Griffith, 24 Feb. 1879, encl. in Griffith to Ayliff, no. 36, 26 Feb. 1879.

[2] Ibid., Griffith to Ayliff, no. 34, 24 Feb. 1879.

[3] Sanders, 'The Life and Times of Moshoeshoe', p. 352.

[4] Cape, G.H. 14/7: Tsekelo and George Moshweshwe to Wodehouse,

Convention, and that he probably inspired both the opposition to the regulations promulgated in December 1870[1] and also Letsie's first objection to the exclusion of Nomansland from Basutoland;[2] but when the new magistrates took office under Griffith, he initially acted as a collaborator with the government, making a loyal speech at Griffith's first public meeting[3] and volunteering letters warning against the disaffection of the three principal chiefs and various other anti-government developments.[4] Griffith thought highly of his intelligence[5] and appointed him a sub-inspector in the Basutoland Police, a rather surprising move in view of Barkly's warning against employing him[6] and his past record.

> That young chief of persuasive manners, well educated, speaking English and French fluently, had proved for some years a mischievous purveyor of intrigues by means of letters and messages falsely purporting to emanate from his father; he was an unscrupulous man who had been charged and convicted of theft and other misdemeanours.[7]

It was even rumoured that he had twice tried to kill Moshweshwe.

In 1875 he accompanied Griffith to Griqualand East and was given leave to attend to some personal matters before returning to Basutoland. He proceeded to overstay his leave

---

[1] Cape, G.H. 14/7: Austen to Bowker, 26 Jan. 1871.

[2] Ibid., Barkly to Griffith, 8 July 1871.

[3] Lesotho, S9/1/1/1: Griffith to Barkly, no. 6, 16 Aug. 1871.

[4] Cape, N.A. 272: Tsekelo to Griffith, 27 June 1873, encl. in Griffith to Molteno, no. 71, 10 July 1873; Tsekelo to Griffith, 30 Aug. 1873, encl. in Griffith to Molteno, 11 Sept. 1873.

[5] Ibid., Griffith to Molteno, no. 71, 10 July 1873; Griffith to Brownlee, no. 11, 28 Oct. 1873.

[6] Cape, N.A. 273: Barkly's memo. on Griffith to Molteno, no. 16, 23 Feb. 1876.

[7] Lagden, The Basutos, ii. 459. See also Wodehouse's testimony on his bad character and past behaviour, in P.R.O., C.O. 48/449: Wodehouse to Granville, no. 22, 21 Feb. 1870.

by several months,[1] teaching the followers of his discontented brother, Nehemiah, the skills he had learned in the police. Griffith dismissed him from the service and in 1876 wrote in disillusioned tones to Brownlee: 'with regard to "Nehemiah" and "Tsekelo" I am well aware that they are both restless scheming fellows who cannot exist without some sort of Excitement.'[2] Yet Tsekelo must have been a remarkable man, for in 1877, after he had served a three month prison sentence for being an accessory to a theft, the acting governor's agent wrote to Brownlee on his behalf. He reported that Tsekelo now deeply repented and suggested, in view of his undoubted ability and good conduct since leaving prison, that he be given a post in the Transkei, away from the scene of his previous folly. 'This plan would also possess the advantage of removing Tsekelo from Basutoland where he would always be tempted by the influence his .. words possess with the other chiefs to intrigue.'[3] His influence by this date could not be doubted; the magistrate of the Berea District and just reported that Tsekelo appeared to have considerable influence in the district, especially with Masopha,[4] and at the previous annual pitso the chiefs had chosen him as their mouthpiece, impressed probably by his knowledge of the white man's world gained largely in their schools and

---

[1]Cape, N.A. 274: Rolland to Brownlee, no. 109, 19 Nov. 1877.

[2]Cape, N.A. 273: Griffith to Brownlee, no. 7, 13 Apr. 1876.

[3]Cape, N.A. 274: Rolland to Brownlee, no. 109, 19. Nov. 1877.

[4]Ibid., enclosing Barkly to Rolland, 16 Nov. 1877.

service. Unfortunately however Brownlee was against employing him inthe Transkei[1] and Tsekelo continued to create excitement for himself.

This took the form of stirring up trouble among the chiefs and in 1878 uniting Letsie with Masopha[2] in a petition for a number of changes in the regulations, basically aimed at removing all power from headmen, who tended to support the government, and giving the great chiefs completely untraditional despotic powers. Nor had Tsekelo forgotten himself: the government was asked to place itself under the direction of an African council under the presidency of Tsekelo, who was to receive a salary of a guinea per diem! The petition purported to come from the whole tribe, but the indignant acting governor's agent pointed out that not only was the petition in Tsekelo's style and handwriting, but was signed only by Letsie and Masopha and two confidential servants of each, that not another chief or headman knew of it, and that there had been no meeting at which it was submitted to the people. He concluded that since neither Letsie nor Masopha would dare to mention it to their headmen or people, the only value of the petition was in 'showing the nature of the schemes which it is Tsekelo's life-business to promote in his mysterious itinerations from one chief's place to another. I firmly believe that in this instance the chiefs are merely his puppets.'[3]

---

[1] Ibid., see Brownlee's footnote.

[2] Significantly Molapo was not informed of the petition. See Cape Parl. Papers, G.33-79, pp. 33-35.

[3] Cape, N.A. 275: Rolland to Ayliff, no. 37, 20 July 1878. Rolland's judgment was confirmed when the 1878 annual pitso indignantly repudiated the petition. See ibid., pp. 31-36.

Although Tsekelo's efforts to unite the chiefs had to be carefully watched, the danger of a revolt by the chiefs steadily diminished so long as the process of weaning the people away from them continued successfully. This required a nice judgement of what changes in tribal law would be tolerated by the people in return for such advantages as government protection against unjust acts by their chiefs, while simultaneously preventing the chiefs from becoming so discontented at their loss of power over their people that they united against the government. An initial salutary lesson assisted Griffith to strike a suitable balance in future. He had started off briskly with a circular to his magistrates on 30 Jan. 1872:

> With reference to Native Customs in Basutoland, and the attitude which Officers of the Government should assume with regard to them, I shall from time to time have occasion to communicate with you my views and instructions.
>
> Some of these customs will be found not only harmless but useful and beneficial to the people at large, and in that case they should be encouraged and supported. Others will be found hurtful and illegal, both in the general tendency and practical results, and these should be discountenanced and done away with at once.[1]

He then proceeded to recommend the encouragement of maboella (the custom of setting aside and protecting winter grazing lands from animals during the summer to ensure some grass survived the severe winter frosts) unless proved to have been used by chiefs or others 'as a means of oppression, injustice, or petty annoyance'. He also ordered the discouragement of letsima, which he regarded as 'pernicious in its tendencies' and described in terms which clarify his objection to it:

---

[1]Lesotho, S9/1/3/2: circular by Griffith to Basutoland magistrates, 30 Jan. 1872.

> It consists in the compulsory cultivation of the Chiefs' garden by the enforced labour of any of the common people whom they may call upon, from time to time, to work for them without wages, without compensation, and without their being allowed to plead any excuse, however reasonable, for noncompliance with the requisition to labour thus arbitrarily (often most oppressively and injuriously) inflicted upon them by their chiefs.[1]

In addition, as he subsequently pointed out to Southey:

> when the custom of Letsima, which is one of long standing, was originally adopted by the Basuto Chiefs, it applied only to the cultivation of one garden in each case, namely that belonging to the Great Wife of each Chief. Gradually however the application of the custom has been extended to the cultivation of <u>all</u> the garden lands of the Chiefs, which have consequently greatly increased in number and extent, the produce being sold by the Chief for his own benefit. Thus have the Chiefs established a traffic to their own advantage, upon the forced labour of the people; claiming for the whole of their arable lands the benefit of a custom which, arbitrary as it was when applied to a limited area, became well nigh intolerable when extended to an almost indefinite because ever increasing number of gardens.[2]

Magistrates, Griffith ordered in his circular, were to protect Africans refusing to take part in this custom.

The circular was partly the result of a case which had come before Griffith that month - Motube <u>vs</u>. Makhebe and others - for assault committed on Motube by order of Masopha for not attending Masopha's gardening session. In giving judgment for Motube, Griffith had been careful not to speak out against the <u>letsima</u> system as such but only against the practice - a recent development since Moshweshwe's death - of using personal violence to enforce it. But he promptly sent out the above confidential circular to the magistrates. Although he had not publicly

---

[1] <u>Ibid</u>.

[2] Cape, U.B.R., vi. 408-9: Griffith to Southey, 27 Feb. 1872. There is no indication whether Griffith and the other magistrates realized that the <u>letsima</u> system was also used to cultivate <u>lira</u> lands, the produce of which was not the chief's private property but was given to the poor and widows. See J.M. Mohapeloa, <u>Africans and their Chiefs</u> (Cape Town, 1945), p. 4.

attacked the custom, the case aroused great interest throughout Basutoland and Letsie and Molapo both immediately objected (although, surprisingly, not Masopha, who caused the fines imposed on Makhebe and the others to be paid).[1] Molapo went so far as to let it be known in his district that he would fine any person who did not attend his gardening session and punish anyone who complained to the magistrate about such a fine.[2] This alarmed Griffith sufficiently for him to write to the governor for instructions.[3] The reply took the form of a rebuke for acting 'somewhat precipitately in endeavouring to set aside suddenly and without reference to the several native chiefs, a custom of long standing in the country, such as Letsima.'[4] It would, Barkly suggested, have been more judicious to have announced at the hearing:

> that, while bound to protect every one from violence, you were quite prepared to hear what Masupha might have to urge in defence of his claim to Motube's labour on the occasion. This would have afforded you an opportunity for showing that the sons of Moshesh had encroached on the liberty of the people, and the result would probably have been to establish a right of commuting whatever feudal service was really due into a trifling money payment, if the defendant preferred making such payment to working.[5]

These instructions resulted in Griffith directing his magistrates to proceed with caution in discouraging the custom and to inform him of the views of the chiefs in their districts before taking

---

[1] Cape, U.B.R., vi. 408-11: Griffith to Southey, 28 Feb. 1872.

[2] Ibid., pp. 397-8: Bell to Griffiths, 17 Feb. 1872.

[3] Ibid., pp. 405-14: Griffith to Southey, 27 Feb. 1872.

[4] Ibid., p. 436: Southey to Griffith, 16 Mar. 1872.

[5] Ibid., p. 437. His suggested move was in the dual tradition of endeavouring to attach the people to the administration without too greatly annoying the chiefs, and at the same time of drawing the people more into the money economy.

any decided measures to suppress customs sanctioned by long usage.[1]

This setback caused Griffith and his magistrates to tread more carefully thereafter. In November 1872, for example, special permission was obtained from the governor to allow Bell to fine rather than execute some Zulu murderers in the Leribe District, ostensibly because Molapo had made special representations on their behalf that they had been left in ignorance of the nature and force throughout Basutoland of the new regulations, but also because the execution of the murderers would probably have resulted in bloodshed.[2] It was this case which prompted Griffith to issue a circular on the subject to the Basuto on 17 December 1872, explaining the new capital punishment regulations. Significantly, it was a copy word for word of Theophilus Shepstone's 1850 circular, in which the diplomatic agent to the Natal tribes had carefully made use of African law concepts to explain the alien provision to the Zulu.[3]

Everything possible was done to decrease the people's feeling of unfamiliarity with the new court procedure. Griffith, in 1873 when writing to Rolland, stated: 'in Civil Cases, all the Rules of Court apply, at the discretion of the Magistrate, and with due regard to the circumstances of the country',[4] which

---

[1] Lesotho, S9/1/3/2: circular from Griffith to Basutoland magistrates, 11 June 1872. Letsima continued to be a respectable enough institution for Griffith in 1873, when trying to recruit labour for the railway works near Port Elizabeth, to use the concept of letsima to convey to Letsie that the Basuto had an obligation to provide labourers for the government. See ibid., Griffith to Letsie, 20 May 1873.

[2] Cape, N.A. 150: Griffith to Southey, no. 88, 18 Sept. 1872. See minute of21 Oct. 1872.

[3] Ibid., Griffith to Molteno, no. 109, 17 Dec. 1872.

[4] Lesotho, S9/1/3/2: Griffith to Rolland, 23 June 1873.

left the magistrates with plenty of discretion as to how they would try cases. Griffith, for example, always invited chiefs and counsellors who were present at trials to speak in court.[1] For the same reason, (and because of the importance of negotiations with chiefs), care was taken to try to obtain competent and trustworthy interpreters, a difficult task since the missionaries had given all instruction in the vernacular until the British took over the country.[2] Therefore in 1877 it was agreed to give clerks £50 extra if they were proficient enough to act as interpreters, since no officer other than those who had grown up in the country had succeeded in acquiring more than a very imperfect knowledge of the notoriously difficult language.[3]

To further discourage the feeling amongst the Basuto that the administration was a strange and unfriendly foreign import imposing inexplicable laws, Griffith also took over the Basuto custom of holding national meetings to discuss the laws, at which every male member of the nation was free to speak irrespective of rank. Molteno was rather dubious of this move, disliking the idea of large gatherings of Africans, but Griffith's reply listing the advantages to be gained from such meetings overwhelmed all argument.[4] He pointed out that according to national custom whatever was said or done at pitsos acquired the stamp of authority; that attendance at these meetings by

---

[1] Cape Parl. Papers, G.47-82, p. 158: Rolland to Orpen, 13 Mar. 1882.

[2] Theal, History of South Africa since 1795, vi. 335.

[3] Cape, N.A. 274: Rolland to Brownlee, no. 90, 18 Oct. 1877, Brownlee's minute.

[4] Cape, N.A. 272: Griffith to Molteno, no. 88, 27 Aug. 1873.

the chiefs was regarded as their acknowledgement of their subordination to government, and 'as the common people are allowed to speak, they also are enabled to assert their position as subjects of the Queen, having equal rights with the Chiefs to protection and other benefits conferred upon the country by the Government'; that by holding all such meetings, government acquired prestige as being able to summon the only real national meeting in Basutoland, while at the same time making the Basuto feel that they had a say in how the country was run and that the government cared about their welfare; that it thereby acted as a safety valve, enabling men to communicate their grievances publicly to the government, and generated an infectious spirit of loyalty which could be used by government to influence the people in favour of desired projects. At each of the first few annual pitsos, which lasted a full day ending with three cheers for the Queen, the regulations were read aloud and objections to them and the governor's agent's rulings were expressed, answered, and occasionally noted with a view to alterations in the matter.[1] By 1874 Griffith could report that the annual pitso was attended by all the principal and other chiefs, headmen, and common people from even the remotest parts of the country.[2]

---

[1] E.g., Little Light of Basutoland, nos. 10-12, Oct.-Dec. 1875, p. 47. There are, however, indications that the Basuto became increasingly disillusioned with the extent to which they were able to influence policy through the pitso. For example, at the 1875 pitso one tribesman demanded: 'I want to know what answer the Queen has ever sent to our misgivings expressed at these annual meetings? And yet I have often heard misgivings expressed but never any answer.' See Cape Parl. Papers, G.16-76, p. 15.

[2] Cape, N.A. 272: Griffith to Molteno, no. 100, 14 Oct. 1874.

Pitsos were also held to discuss special issues, which ensured that commoner's views were known on such matters and that information was not withheld from the people by dissatisfied chiefs: aims also achieved by the magistrate sending policemen or himself visiting the villages to tell the people of controversial matters.[1] For the same reason there was also, for commoners as well as chiefs, free access to the governor's agent and magistrates.[2]

Whether it was the result of deliberate policy or not, the Basuto's feeling of familiarity and identification with the administration would have been further increased by the gradual appearance in its ranks of young men whose families were known to the Basuto and whom they had often known as children. In 1871 Bell's son, Charles George Harland Bell, was appointed clerk to his father, and in 1873 his brother, Fitzwilliam Bell, was appointed clerk in the district of Berea. Both young men spoke Sotho.[3] Shortly thereafter Charles Maitin, who had been born in Basutoland, the son of one of the French Protestant missionaries,[4] was appointed clerk to the assistant resident magistrate of the Thaba Bosiu District. He not only spoke the language perfectly, but could both read and write it.[5] In 1877

---

[1] E.g., Cape, N.A. 273: Austen to Griffith, no. 73, 11 Nov. 1876, encl. in Griffith to Brownlee, no. 54, 14 Nov. 1876.

[2] This right was liberally exercised; see e.g., Cape N.A. 276: Griffith to Ayliff, no. 22, 5 Feb. 1879; Davies to Griffith, 15 Feb. 1879, encl. in no. 7, 4 Feb. 1879.

[3] Cape, N.A. 274: Rolland to Ayliff, 28 Dec. 1877.

[4] Pierre-Joseph Maiten, b. Switzerland 17 June 1816, d. Ladybrand, South Africa, 1 April 1903. Arrived in Basutoland 1842.

[5] Ibid.

Surmon's brother, James Surmon, was appointed clerk to the magistrate at Mohales Hoek. In the same year Arthur Barkly, a relative of Sir Henry Barkly, the ex-governor of the Cape, was appointed as magistrate for the Berea District, a fact which Masopha announced with some pride at the 1877 pitso after Sir Henry Barkly's farewell letter had been read to the nation:

> I thank the Government for my new magistrate (Mr. Barkly). He is the son of "Ramabekebeke" (glittering uniform), the author of this letter, and the Government has given him to me.[1]

By 1878 Charles Bell had been promoted to the rank of magistrate, and both he and the clerks mentioned above each served in a number of districts throughout the country, often as acting resident magistrates.

An increasing number of Africans were being brought into contact with the administration by the creation of new magistracies: the assistant magistrate of Thaba Bosiu District was moved to Mafeteng soon after the administration was established, and in 1877 a separate magistrate of Thaba Bosiu District was appointed, to relieve the governor's agent of that responsibility. In the same year an assistant magistrate was appointed to the Cornet Spruit District, based at Quthing, as Austen had found his district too big for him to be able to exercise more than a nominal control over part of it.[2] Simultaneously, as the magistrates were extending their control, the great chiefs were losing theirs. As each of the great chiefs was assigned a

---

[1] Cape Parl. Papers, G.17-78, p. 24.

[2] Cape, N.A. 273: Griffith to Brownlee, 9 Sept, 1876.

district, he ceased to be a national figure to a large extent and lost much of his power in districts other than his own. This had the unfortunate effect, so Letsie claimed, of undermining his control over his more rebellious brothers,[1] but also undermined their ability to unite the whole nation in rebellion.

On the other hand, the prestige and power of the magistrates continued to increase. Although sheer weight of numbers meant that magistrates still exercised control only by virtue of African consent, they had acquired the means to enforce their decisions where enforcement would not arouse large scale public defiance. In 1872 Griffith had established the Basutoland Mounted Police Force,[2] paid for from the steadily rising hut tax, to replace the sixteen privates of the Frontier Armed and Mounted Police, who had formed the entire police force in Basutoland after Griffith took charge.[3] Magistrates also had the often effective threat of withholding the hut tax percentage when dealing with obstinate chiefs, since after Griffith took charge all chiefs, petty chiefs and headmen or others who made themselves useful to the magistrate in each district in collecting hut tax was paid according to the magistrate's recommendations.[4] In addition commoners found that they were able to defy their chiefs on certain issues with effective government support, as

---

[1] Cape, N.A. 281: Letsie's speech in minutes of pitso held on 16 Jan. 1882, encl. in Orpen to Sauer, no. 2/377, 25 Jan. 1882.

[2] For details, see Tylden, The Rise of the Basuto, p. 232.

[3] Cape, U.B.R., vi. 413: Griffith to Southey, 27 Feb. 1872.

[4] Lesotho, S9/1/3/2: circular from Griffith to resident and assistant resident magistrates, Basutoland, 22 Apr. 1873.

under the regulations not only lesser chiefs, but even Moshweshwe's sons and the paramount himself[1] could be charged in court and fined, or even whipped[2] and imprisoned.[3] In civil suits as early as 1872 chiefs were being summonsed for debt by commoners.[4] Government power also had the advantage over that of the chiefs of extending to areas where the chiefs had never had any authority without resorting to raids, notably for obtaining redress against Orange Free State and Cape settlers.[5]

Nor was the Government slow to realize the active assistance the forces of western civilization were rendering in drawing the people away from their chiefs. Apart from encouraging traders, missionaries and education,[6] with particular emphasis on the education of girls,[7] Griffith successfully advocated the appointment of district medical officers on the grounds that the 'barbarous superstitions' of the Basuto could best be destroyed

---

[1] Little Light of Basutoland, nos. 2-3, Feb. & Mar. 1875, p. 12.

[2] Cape, N.A. 283: minutes of pitso, 25 Apr. 1883, encl. in Blyth to Sauer, no. 41/83, 27 Apr. 1883.

[3] By February 1879 eight of Moshweshwe's sons had been in prison, according to Letsie. See Cape, N.A. 276: Letsie to Austen, 9 Feb. 1879, encl. in Griffith to Ayliff, no. 31, 19 Feb. 1879.

[4] Cape Parl. Papers, G.27-73, p. 9.

[5] E.g., Lesotho, S9/1/3/2: Griffith to President of Orange Free State, 30 June 1873.

[6] The government in 1871 agreed to subsidize mission schools and tried unsuccessfully during the next few years to set up secular schools. See Lesotho, S9/1/3/1: Griffith to Casalis, 14 Oct. 1871; Cape Parl. Papers, G.27-74, p. 26: Griffith's report for 1871.

[7] Educating women was regarded as a means of attacking polygamy, the levirate, the sororate, women's status in tribal law as perpetual minors, and various other customs which were regarded by the missionaries and administration as degrading. See e.g., ibid.; Little Light of Basutoland, nos.2-3, Feb. & Mar. 1875, p. 9.

by teaching the people 'the absurdity of the modes of cure resorted to by their witch-doctors.'[1] By the end of 1876 the appointment of three district surgeons had been authorized, the surgeons to be stationed at Leribe, Maseru, and Mohales Hoek so as to have as wide an influence as possible.[2] These district surgeons would, incidentally, have been another source of information to the magistrates on local opinion. Their work brought them into close contact with people from even remote villages, and the evidence shows them to have been in touch with the magistrates. One, Dr. Henry Taylor, was actually the son-in-law of Major Bell, the magistrate in his district.

Despite what the missionaries bitterly described as the Basuto's servile respect for their chiefs, almost bordering on superstition,[3] it seems clear that in a surprisingly short time the government had successfully won over the support of the people, for its challenge to the chiefs' authority to settle all cases proved increasingly effective. Griffith in his 1873 report in the Cape Native Blue Book gave a clear picture of the opposition the magistrates faced in 1871 and how they were able to overcome it:

> At first very few Basutos brought their cases before the magistrates, most of them being deterred by fear of the chiefs, who foresaw the loss of their power. The people were taught to believe that the magistrates had come to subvert all their cherished laws and customs. They were told that although the white man might be clever enough in many ways, he never could understand and grasp the merits of a native case as these chiefs could.

---

[1] Cape, N.A. 273: Griffith to Molteno, no. 108, 10 Dec. 1875.

[2] Ibid., Griffith to Brownlee, no. 73, 11 Nov. 1876. See Brownlee's minute.

[3] Little Light of Basutoland, no. 8, Aug. 1872, p. 32.

> Gradually, however, by dint of perseverance and firmness, and by a judicious mixture of forebearance and severity, the magistrates succeeded in winning the confidence of the common people. These began to find out that the Government was their true friend and protector against the arbitrary and unjust acts of their chiefs. Every case which was decided by the magistrates was duly canvassed, and increased the prestige of the Government. Prejudices began to disappear, and many people openly supported the Government; those who did so prominently being jeered at by the chiefs as "rebels and turncoats".[1]

The statistics for a magistracy give some idea of the increase in government strength: in the sub-district of Thaba Bosiu some thirty civil cases were heard in 1872; in 1873 sixty-six. 'A much larger number of cases, principally of a petty character, were settled amicably out of court, on the recommendation of the magistrate.'[2] By 1878 the acting governor's agent was able to write to the secretary for native affairs that the Africans brought most or all of their cases to the magistrates,[3] while Rolland could add a few months later: 'most if not all the headmen are loyal supporters of the Government, and would refuse to join the great chiefs in any movement hostile to the Government.'[4] Altogether, the government's divide and rule policy with regard to both chiefs and people had been extremely well managed. After some initial wavering, the Basuto had loyally assisted the government in the face of the Langalibalele revolt; had remained quiet in 1876 when Nehemiah, Moshweshwe's influential son in Griqualand East, was charged with inciting

---

[1] Cape Parl. Papers, G.27-74, p. 22.

[2] Ibid., p. 35.

[3] Cape, N.A. 275: Bowker to Ayliff, no. 25, 18 Mar. 1878.

[4] Ibid., Rolland to Ayliff, no. 37, 20 July 1878.

rebellion and faced a delayed and lengthy trial;[1] and, apart from the Quthing District, had not become even restive when the eastern frontier of the Colony rose in revolt in the 1877-8 war.[2] Asked by the government in 1878 for his opinion as to why Letsie had remained loyal then, Rolland gave as the first three reasons Letsie's realization that it was not in his self interest to rebel, the friendly and confidential relations between him and the government officers, and 'the conviction that the large majority of the people were loyal and satisfied with our rule and w[oul]d not support a rebellion.'[3] (The remaining reasons he suggested were fear of the Orange Free State, the Basuto's own natural peace-loving disposition coupled with widespread missionary and civilizing influences, and the lucrative state of the grain trade.) In discussing the possibility of a general Basuto uprising, he added that:

> no such combination could be found or carried out except through gross mismanagement on our part, preceded by misgovernment and consequent unpopularity. As long as the <u>personnel</u> of the Government commands respect and is duly supported by the indispensable display of material force, so long will we possess the confidence and respect of the people.[3]

It is interesting in this context to note J.H. Bowker's comments of 18 April 1878 on his return to Basutoland as acting governor's agent to relieve Rolland after an absence of seven or eight years:

---

[1] Partly it seems because the Phuti, the clan occupying that part of Basutoland nearest Griqualand East, had no sympathy with Nehemiah's land grievances. Austen however took no chances, immediately visiting Moorosi and various petty chiefs to explain the cause of Nehemiah's apprehension. See Cape, N.A. 273: Austen to Griffith, no. 73, 11. Nov. 1876.

[2] Cape, N.A. 274: Rolland to Brownlee, no. 96, 24 Oct. 1877; <u>Cape Parl. Papers</u>, G.17-78, p. 4.

[3] Cape, N.A. 275: Rolland to Ayliff, no. 36, 19 July 1878.

[4] <u>Ibid.</u>

> There is one point upon which I think the public have formed an erroneous opinion, and that is that the Basuto chiefs have lost their power and influence. It is true that our plan works well, and the chiefs do not discourage the introduction of law, or their people resorting to the magistrate's courts, as it releases them from a large amount of work, and the percentage paid them out of the hut-tax is equivalent in money. But in every other way their attachment to the chiefs is quite as strong as when I took over the country from Moshesh in 1868. There are a few time-serving vagabonds, who will betray their chiefs to-day and their magistrates to-morrow, but the mass of the people are in all matters of state, as much devoted to their chiefs as in the days of the old chief; consequently the introduction of any new system must be most cautiously done, and every preparation for a united opposition seen to.[1]

This opinion appears directly to contradict all the other evidence available, so the question must be asked whether Bowker was likely to have been able to form a clearer view of the situation than the magistrates on the spot. This seems improbable. He had been in charge of the country for only two years some seven years earlier when conditions were very different, and when he wrote this letter had been back in Basutoland just over a month, most of which he had spent campaigning in the wildest and most lately controlled area of Basutoland. Griffith, when he wrote his detailed account of how cases were gradually drawn away from the chiefs' courts, had already been governor's agent for over two years and was describing a process in which he had actually participated.[2] The only indication in the early annual reports of the magistrates that the increased number of cases brought to the magistrates was with the consent of the chiefs comes from Bell's report for 1874,[3] by which stage Molapo was anxious to

---

[1] Cape Parl. Papers, A.49-79, pp. 30-31: Bowker to Ayliff, 18 Apr. 1878.

[2] See p. 237 above.

[3] Cape Parl. Papers, G.21-75, p. 8.

stand well with the Cape authorities. All other reports for the early years speak as if the chiefs opposed their loss of jurisdiction. The judicial situation Bowker described in 1878 was almost certainly the result of the chiefs being worsted in the earlier struggle to win over the people, and not an indication that they were more than resigned to their loss of jurisdiction. If this is correct, it seems Bowker was probably misled by his short and superficial observation in an unrepresentative corner of Basutoland into overemphasizing the degree of attachment of the people to the chiefs.

That there was attachment cannot be denied. Traditional loyalty to the chiefs was deeply ingrained, and in 1878 Arthur Barkly could still write of 'the slowness with which some among the natives have emancipated themselves from the control of their chiefs, though aware that their power to enforce obedience has long passed away.'[1] That same year Rolland and Davies, faced with a riotous and seditious village meeting held by three chiefs,[2] decided they would have to hold a public enquiry rather than a trial: 'We knew that however loyal the people might be they would shrink if called upon to incriminate these chiefs.' And Canon Widdicombe, the Church of England missionary at Leribe, has left evidence of the flourishing state of the institution of letsima despite official disapproval.[3] But all

---

[1] Cape Parl. Papers, G.17-78, p. 7.

[2] Cape, N.A. 275: Rolland to Ayliff, no. 47, 17 Sept. 1878.

[3] Widdicombe, Fourteen Years in Basutoland, pp. 47-8.

the magistrates, including Rolland with his long and intimate acquaintance of the Basuto, were unanimous throughout their reports on the slackening of the chiefs' influence and the preference of the people for Cape rule. Unless the entire administration was guilty of consistently closing their eyes to the true state of affairs, it would seem that Bowker was mistaken.

So successful a challenge to tribal custom in such a short period of time gives rise to the suspicion that the magistrates were perhaps not enforcing those aspects of the regulations most unpopular with either the chiefs or people. But sufficient records survive to show that this was not the case. As mentioned above,[1] chiefs were tried in court, and on the even more sensitive question of land allocation, Griffith acted firmly despite periodic protests and attempts at obstruction from the chiefs. He did not claim the exclusive right to allocate land, but insisted on ultimate control. As he explained to a complaining Letsie,

> the Government has never interfered with any old kraals and in the allotment of land the Chiefs are expected to consult the Government first; and the Government reserves its right to interfere where a Chief is acting unjustly to the people, or trying to cause disputes between people, as is often the case.[2]

He and his successors duly interfered in various cases where chiefs tried to drive men off land allocated to them,[3] and adjudicated in disputes over land rights.[4] There is also evidence that on at least one occasion Griffith used his power

---

[1] See p. 236 above.

[2] Lesotho, S9/1/3/2: Griffith to Letsie, 19 Dec. 1872.

[3] E.g., ibid., Griffith to Nehemiah, 9 Sept. 1871; Griffith to Masopha, 9 Sept. 1871 and 30 April 1873.

[4] Cape, N.A. 272: Rolland to Griffith, 23 June 1873; Lesotho, S9/1/3/2: Rolland to Surmon, 13 Sept. 1875.

to locate people himself.[1] Furthermore, he obtained a ruling from the secretary for native affairs that the wood, reeds and grasses highly valued by the Basuto for such uses as thatching and basket-making should be considered as transferred with the land to the queen; patronage in distributing them was no longer a right of the chiefs but a privilege delegated to them by the government, which would be removed if abused.[2] At the 1874 annual pitso this was announced to the people, presumably much to the irritation of the chiefs, who had been able to exercise a great deal of power through their patronage and had lately used it unfairly to oppress certain government supporters.[3]

Surviving evidence, though scanty, also shows that a blind eye was not turned to regulations as galling to commoners as to chiefs. In 1876 the Little Light of Basutoland was able to report of circumcision:

> We are happy to state that the Magistrates connected with the British Government in this country, do their utmost to put it down. They seize every opportunity to help the Christians whose children are sometimes enticed away to be circumcised. They commend the parents who forbid their children to go to the rite, as there is a law giving the guardian such authority.[4]

The right of a widow to custody of her children,[5] and of a girl to freedom to marry against her father's wishes once she had reached the age of majority[6] were enforced; infanticide and

---

[1] Cape, N.A. 275: Rolland to Ayliff, no. 47, 17 Sept. 1878.

[2] Cape, N.A. 840: Brownlee to Griffith, no. 143, 3 July 1873.

[3] Cape, N.A. 272: Griffith to Molteno, no. 100, 14 Oct. 1874.

[4] Little Light of Basutoland, no. 6, June 1876, p. 25.

[5] Lesotho, S9/1/3/2: Griffith to Austen, 19 Jan. 1874.

[6] Lesotho, S9/1/3/2: Griffith to Bell, Dec. 1874. The father in this case was Molapo.

concealment of birth were punished,[1] and imprisonment was frequently used as a punishment.[2]

So successful was the administration during this period that magistrates were able not only to enforce the 1871 changes in tribal law and custom, but also to extend their scope. In June 1872, as a result of the Basuto chiefs' petition for the vote,[3] the Cape House of Assembly appointed a select committee to consider and report on the Basutoland regulations.[4] It recommended a number of changes, but J.M. Orpen, the chairman, persuaded it and the House of Assembly that a more thorough knowledge of Basuto law and custom was required before the regulations could be altered. As a result, the governor in August 1872 appointed Griffith chairman of a special commission consisting of the magistrates of Basutoland to inquire into and report upon the laws and customs of the Basuto, and on the operation of the regulations established for their government.[5] The commission sat from only 3 to 10 December 1872, probably because it was considered unwise for the magistrates to leave their districts for more than a week, and took evidence from two missionaries and nine Africans, including a brother of

---

[1] See above, p. 199 , footnote 5.

[2] E.g., Cape, N.A. 273: Bell to Griffith, 26 Jan. 1875; Griffith to Brownlee, no. 61, 22 Dec. 1876.

[3] Although Austen subsequently produced evidence to show that the chiefs had not wanted such an enquiry. See Cape Parl. Papers, 1873, Appendix III, Special Commission on the Laws and Customs of the Basutos, pp. 66-7; supplementary paper by Austen.

[4] Cape Parl. Papers, A.18-72: Report and Evidence of the Select Committee of the House of Assembly on Regulations for the future Government of British Basutoland.

[5] Cape Parl. Papers, 1873, Appendix III, Report and Evidence of the Special Commission on the Laws and Customs of the Basutos.

Moshweshwe, the Paramount Chief Letsie, and three of his half brothers, two of whom had received part of their education in Cape Town. Of the nine, three were Christians (including Moshweshwe's brother) and one a church attender although not formally converted. Only two of the nine were not chiefs, one being a counsellor sent by the semi-independent chief, Moletsane. There was no representative of the Chief Moorosi[1] of the Taung, whose customs differed slightly from other clans in Basutoland, and the predominance of Moshweshwe's family - five of the nine African witnesses - makes it even more dubious that all variations in the law throughout Basutoland were noted. The Zulus resident in Molapo's district, for example, would almost certainly have retained some aspects of Zulu tribal law, but the regulations recommended by the commission were to be applied to all Africans living in Basutoland.

On the main institutions involved, although opinions of the value of cattle marriages and polygamy varied, there was unanimity on the lack of value of circumcision schools. However, closer investigation shows that of the seven men who were asked their opinion of the matter, two had not been circumcised and another was the paramount chief, whose father had temporarily abolished the custom; two others were Christians, one a church attender, and one a counsellor of the Christian chief, Moletsane, who had abolished circumcision for his tribe. Luckily the magistrates knew their districts and although in its report the commission recommended that circumcision ought to be abolished as soon as possible, it added the warning that

---

[1] Also spelt 'Morosi' and 'Moirosi' by some nineteenth century writers.

> at the same time your Commissioners consider it to be their duty to point out the inadvisability of dealing roughly with this custom, bad as it is, for in the districts of Leribe, Berea, and Cornet-spruit very large numbers of the chiefs and people are staunch supporters of it, and would probably strongly resent its suppression. Therefore great caution will be necessary in any steps which are taken for abolishing it.[1]

Together with 'lebollo' or circumcision, the commission classified polygamy and 'marriage with cattle' as the customs which appeared to be 'most injurious to the people, morally, socially, and politically, and to retard them in the progress of civilization.'[2] It believed the latter two to be too firmly established to be abolished easily, but that over a long period government and missionary influence would lead to their disappearance. In this it explicitly disagreed with the missionaries who gave evidence and who, according to the commission, wished to make Christians of the Africans by legislation; in contrast the commission believed this must result from conviction, although the government should at every possible opportunity indicate to the Basuto that it did not approve of 'these heathenish and barbarous customs'. It was fortunate for Basutoland's tranquillity that the 'expert evidence' of the missionaries was given before men with some claim to expert knowledge themselves, and who also had the responsibility of enforcing their recommendations.

On a more detailed level, the commission recommended a number of changes in the regulations, as a result of the

---

[1] Cape Parl. Papers, 1873, Appendix III, Report and evidence of the Special Commission on the Laws and Customs of the Basutos, p. 5.

[2] Ibid., p. 5.

magistrates' eighteen months experience with them. To make magisterial justice less arbitrary, they suggested various amendments in the review and appeal procedures which would accord more nearly with the tribal law position and so appear more just to the tribesmen.[1] These still did not meet Orpen's criticism in his appendix to the select committee's report:

> In Basutoland, with its scant European population, the magistrates have little society, save with each other. The few Europeans there are on terms of perfect social equality and intimate intercourse - a few gentlemen constantly at each others' houses. An appeal from one to the other of them is not, on constitutional grounds, a sufficient thing, though I believe Mr. Griffith to be one of the best constituted minds I know to bear the strain.[2]

But the continued inability of the Cape courts to administer tribal law legally left very little alternative.

Of the other innovations suggested, the most important were those dealing with the marriage regulations. The commissioners found it necessary to draft an entirely new set of regulations for various reasons: they were making several important innovations safeguarding Christian marriages from the effects of tribal law marriages, while bowing to the need to abolish obligatory registration of marriages and the compulsory removal of a widow's children from her custody if she remarried. The innovations in the draft marriage regulations were all designed to ease the path of the Basuto who wished to follow in the white man's ways. Civil marriage, as opposed to marriage by a Christian minister, was made legal 'in order to

---

[1] But see Bell's attack on these provisions. ibid., G.17-78, pp. 5-6.

[2] Ibid., A.18-72, p. 17: appendix A.

meet the case of many people who are unable to get married by a Christian minister, either because they are heathens or under church discipline.'[1] Both civil and Christian marriages were to confer on the parties and their children the same rights as marriages contracted under the marriage laws of the Cape Colony - a move recommended by Mabille to prevent the children of converts being claimed by heathen relatives. For the same reason, where a couple were converted and remarried by Christian rites the children of their tribal law marriage were brought under Cape marriage law. However, some provision was made to prevent the children of Christian and civil law marriages claiming to be the only legal heirs, to the exclusion of children of earlier marriages by tribal law to other wives, in the event of their father dying intestate: such estates were to be administered according to the relevant Cape ordinance 'in so far as it shall be deemed applicable to the circumstances of the country.'[2] The commissioners also believed the Basuto should be given the right to make wills, a feature virtually unknown in tribal law.[3] Presumably to prevent complications when applying Cape law, the age of majority for all Basuto, men and women, was fixed at twenty-one years of age.[4]

Provision was also made for granting divorces in cases of people married either according to tribal law or in civil law or

---

[1] Cape Parl. Papers, 1873, Appendix III, Special Commission on the Laws and Customs of the Basutos, report, p. 6.

[2] Ibid., p. 10: s. B, 11.

[3] According to the evidence taken by the commission, the only man known to have made an (oral) will was Moshweshwe. However, the chiefs Letsie and Jobo both favoured the idea.

[4] This was the origin of a similar provision in the Transkeian Territories some years later. Stanford inaccurately believed it to originate from the 1883 Cape Native Laws and Customs Commission. See Macquarrie, Reminiscences, p. 100.

Christian ceremonies, a point which had been overlooked in the earlier regulations, to the distress of the missionaries. Mabille had shown that many men regarded a Christian marriage as 'something like a joke',[1] a way of acquiring a wife without having to pay bohadi, until a more valued wife could be afforded. Despite promises not to marry any additional wives by tribal law, many men did, and the second wife was then regarded as the principal one. The missionaries were naturally anxious to prevent this, but when Griffith had drawn the governor's attention to it in 1871, the governor had thought it too radical a charge at that time.[2]

On the other hand, the commission bowed to the need for increased access to the courts in disputes arising out of marriages by tribal law: as recommended by the select committee, it abolished the missionary-instigated obligatory registration of marriages. The pagan majority of the population had never registered theirs; 'the consequence', the commissioners reported, 'is that those people are now obliged to go to their chiefs with their cases of disputed dowry, our courts being closed to them.'[3] As this directly conflicted with the policy of weaning the people from the chiefs' courts, the commissioners recommended that registration should be optional. But since they offered no new incentive to register a marriage, the new provision was unlikely to have any effect beyond legalizing the existing

---

[1] Cape, U.B.R., vi. 281-6: Mabille's statement encl. in Griffith to Barkly, 1 Sept. 1871.

[2] Ibid., vi. 309: Southey to Griffith, 18 Sept. 1871.

[3] Cape Parl. Papers, 1873, Appendix III, Special Commission on the Laws and Customs of the Basutos, report, p. 6.

situation. However, it was felt necessary to retain obligatory registration for Christian and civil law marriages, so the minister or officer performing the ceremony was given the power to register the marriage, to save the parties involved what was often a long journey to the magistrate's office. And the provision was to apply retrospectively to legitimise some earlier registrations by missionaries.[1]

Another suggestion of the select committee was adopted by the commissioners, probably for humanitarian motives; they recommended that it should no longer be obligatory to remove a widow's children from her custody on her remarriage. The redrafted regulations provided that in tribal law marriages not only guardianship but also custody should in future be regulated according to Basuto law and custom. This is the first positive indication that anyone drafting a set of regulations for Basutoland was aware of the difference between these concepts, and even here the wording is slightly unclear. The overall effect of the recommended changes in the marriage regulations was to give the magistrates' courts power to hear virtually all recent cases arising out of marriages in Basutoland; by far the greatest cause of litigation in the country had been brought within the scope of the administration's control.

In the section on land and hut tax the commission again recommended various innovations as well as changes. The changes were relatively minor, but in addition, freedom of movement was partially curtailed by making it obligatory to obtain a pass when leaving Basutoland and to report to the

---

[1] Cape Parl. Papers, A.18-72, p. 3.

magistrate of the district within ten days the arrival and property of anyone entering the country. Failure to report could be punished by a fine on the local chief or headman. Passes were already demanded by the Cape, but this was the first time such a limitation on freedom was to be imposed within Basutoland; and chiefs were already expected to report the arrival of ambassadors from foreign chiefs, but not of every visitor. Both controls were probably introduced in an attempt to check stock theft, but would also have given the magistrates a greater check on what was going on in the country. On the other hand, such requirements were bound to be unpopular, which would possibly explain the governor's earlier veto on Griffith's suggestion that a provision for passes be included in the 1871 regulations.[1]

The second major innovation in this section dealt with a matter to which the chiefs had always objected, and would continue to do so when this new section came into operation:[2] provision was made for the establishment of government pounds for stray stock. The position in Basuto tribal law was that all strays were reported to the principal chiefs and eventually became their property if unclaimed.[3] According to Rolland, 'a good deal of petty stealing was thus carried on by them.'[4] Griffith had in fact soon after his arrival in the country

---

[1] Cape, U.B.R., vi. 315: Southey to Griffith, 28 Oct. 1871.

[2] E.g., Lesotho, S9/1/3/2: Griffith to Letsie, 19 Dec. 1872; Cape, N.A. 275: petition from the chiefs enclosed in Rolland to Ayliff, no. 37, 20 July 1878; N.A. 276: Austen to Griffith, 7 May 1879, encl. in Griffith to Ayliff, 12 May 1879.

[3] Cape Parl. Papers, 1873, Appendix III, Special Commission on the Laws and Customs of the Basutos, evidence, p. 56.

[4] Cape, N.A. 275: Rolland to Ayliff, no. 37, 20 July 1878.

forbidden the chiefs from claiming strays[1] and the following year had established a pound in Maseru for all stray cattle found in Basutoland, with Sofonia Moshweshwe as pound master.[2] This prevented the chiefs from augmenting their herds by what they regarded as their lawful right, and the perpetuation and extension of government interference could not fail to be unpopular with them.[3]

However, although from the start the commission's report was in practice to act as a handbook on tribal customs for the magistrates in Basutoland[4] in the same way as Maclean's 1858 Compendium of Kaffir Laws and Customs was used in the Ciskei and Transkei, there followed an interval of over four years before the changes recommended by the commission were implemented, much to the irritation of the magistrates.[5] After consideration by Brownlee and much drafting and re-drafting by Griffith and the attorney general, the amended regulations were eventually proclaimed on 1 July 1877.[6] Although there were numerous changes beyond those recommended by the select committee and special commission, many were merely to close loopholes in

---

[1] Lesotho, S9/1/3/2: Griffith to Basutoland magistrates and chiefs, 7 Sept. 1871.

[2] Government Notice no. 2 of 1872, Basutoland, published in Little Light of Basutoland, no. 2, Feb. 1872.

[3] Letsie claimed that he opposed the laws because men would impound each other's cattle out of spite, and that it was difficult to discern which were real strays on a large commonage, but Rolland replied that he had never heard of Basuto impounding neighbours' stock out of spite, and that in fact strays were reported to the magistrates by the headmen. See Cape Parl. Papers, G.33-79, p. 32; Cape, N.A. 275: Rolland to Ayliff, no. 37, 20 July 1878, and encl. petition.

[4] Theal, History of South Africa since 1795, iv. 339.

[5] E.g. Cape Parl. Papers, G.27-74, p. 37; G.21-75, p.11; Cape, N.A. 273: Griffith to Brownlee, no. 39, 27 Feb. 1875; Cape Parl. Papers, G.16-76, p. 10.

[6] Proclamation no. 44, 1 July 1877.

the wording of the laws or clarify the intentions of the original legislators. Slight alterations were made in some punishments and some changes were made in sentencing policy.

The section on marriage underwent very few changes from the form drafted by the special commission, but one alteration is of interest, more for the influence it had in the Transkei than its effect in Basutoland. It resulted from a suggestion by Griffith when returning a rough draft of the amended regulations to Brownlee:

> The only regulation which appears to me to require specific amendment is No. 7 under the head of marriages according to Basuto Customs or "Cattle Marriages" - I think this clause ought only to provide for the registration of the <u>first wife</u> - by this means we should be discountenancing polygamy - whereas by registering all the marriages of a polygamist we are encouraging this form of marriage - we should then be able to say, well, we recognize your first wife, but we cannot recognize any others as we don't approve of polygamy and therefore don't want to know anything about the other wives.[1]

Brownlee had agreed[2] and the suggestion was embodied in the regulations, but would apparently have been completely ineffective legally since the regulations contained no provision that registration was necessary for magisterial recognition of a marriage; the courts could still have heard cases dealing with all or any of the marriages of a polygamist.[3] No important

---

[1] Cape, N.A. 274: Griffith to Brownlee, no. 11, 18 Apr. 1876. As this suggestion was originally made by Rolland in his 1868 memorandum, it is possible that he gave Griffith the idea. The 1875 missionary conference at Bloemfontein, an account of which was published in the <u>Little Light of Basutoland</u>, had also advocated this measure. See <u>Little Light of Basutoland</u>, nos. 10-12, Oct.-Dec. 1875, p. 42.

[2] Cape, N.A. 274: Brownlee's minute on Griffith to Brownlee, no. 11, 18 Apr. 1878.

[3] It is not clear, however, whether this was realized. Both Griffith's attitude in the passage quoted above and that of the missionaries' annual conference of 1879 seem to indicate that with tribal law marriages the courts may in practice have entertained cases arising from only the first marriage. See Cape, N.A. 176: Dieterlen to Griffith, 24 Apr. 1879, encl. in Griffith to Ayliff, 27 Apr. 1879.

changes were made in the special commissions' suggested regulations on land, hut tax, pounds, passes, etc., and although the trading regulations were extended, they did not introduce any new principles which affected tribal law.

But one radical change was made in the regulations as originally drafted by the commission: for the first time provision was made to apply colonial law to the white section of the Basutoland population, and in doing so the whole legal policy on the conflict of laws shifted against the Basuto. It is true that some alteration was required to make legal the application of Cape law in cases between whites in Basutoland: it was inconceivable that African law should have been applied, and Bowker in his evidence before the select committee had admitted that he would have applied Cape law illegally in such cases;[1] but the new regulations provided that Cape law was to apply except where all parties in the case 'are what are commonly called Natives, in which case it may be dealt with according to Native law.'[2] This meant that in all disputes between white men and Basuto, colonial law would apply. And the section went on to provide that 'the proceedings shall, as near as may be, and so far as circumstances will permit, be the same as those in the Courts of Resident Magistrates in the Cape Colony.' This allowed a fair amount of discretion to the magistrate in how rigidly he applied colonial procedure, but the attitude to tribal law and procedure was changed at a stroke from regarding it as the normal law of the country to regarding it as a concession made to the Africans.

---

[1] Cape Parl. Papers, A.18-72, evidence, p. 9.

[2] Section 24.

The regulations in general bear the marks of more professional drafting than any earlier Basutoland code, and undoubtedly strengthened the administration by meeting several complaints of the Basuto, notably the compulsory registration of marriages. Also, by bringing marriage cases within the scope of the magistrates' courts, they further undermined the rapidly dwindling power of the chiefs' courts. But they also introduced several new grounds for complaint, especially the interference in the tribal law of inheritance, the legal sanction on Christians marrying by tribal law while still married by Christian rites to another wife, and the application of colonial law in disputes with white men. Even more serious, by the introduction of Cape law as the basic law of the country, they posed a long-term, though unrealized, challenge to the Basuto's own legal system.

However, the Basuto apparently accepted the new code, as they had the old. At the pitso at which it was read to the nation, no objections were voiced except to the one pound deposit required when lodging an appeal.[1] Yet despite such acquiescence, there were indications that not only the chiefs but the people were most unhappy with the changes introduced by the white man. They might swallow their grievances for the other advantages the new order gave them, but in a few years their traditional way of life was being altered before their eyes and was no doubt deeply disturbing. Missionary influence was especially insidious and all-pervasive; in his 1874 report,

---

[1] Cape Parl. Papers, G.17-78, pp. 23, 24: Tsekelo's and Ramatseatsana's speeches at the 1877 annual pitso, 1 Nov. 1877.

for example, Griffith could write:

> so deeply has the leaven of Christianity penetrated amongst the Basutos that, at least in some of its outward observances, it affects even the raw heathen population to such an extent that none of them are to be found working in their gardens, or travelling the roads, on the sabbath day; a remarkable circumstance, unparalleled (as far as I am aware), amongst the heathen in any other tribe under British rule.[1]

To add to tribal disquiet, most Basuto probably overestimated the degree of collaboration between the missionaries and administration. After the extreme resolutions of the 1872 Paris Missionary Society synod became known, Griffith found it necessary to write to Letsie in view of the rumours that the government would support and carry out the resolutions, asking him to make it generally known that the government was no party to them.[2] Griffith also did his best to reconcile the Basuto to the changes imposed by the regulations; of the 1874 pitso he demanded:

> I ask you whose subjects are you? (The people answer "the Queen's".) When Moshesh annexed any tribe to his own people, did he learn their customs and laws, or did they learn his? (The people answer "They learnt his.") Well, then, do you want to teach us how to govern you? We come to teach you, not to learn from you![3]

But though such tactics might convince the Basuto that they should accept the regulations, they would hardly reconcile them

---

[1] Cape Parl. Papers, G.27-74, p. 25.

[2] Lesotho, S9/1/3/2: Griffith to Letsie, 18 Dec. 1872. The resolutions were so extreme that they caused a schism in the church in Basutoland; part of the Christians at the Hermon mission station refused to accept them and formed an independent church. See Cape, N.A. 272: Rolland's annual report for 1872 enclosed in Griffith to Molteno, no. 33, 15 March 1873.

[3] Cape Parl. Papers, G.21-75, p. 26.

to the injustices occasionally generated either by the clash of Basuto and European values or by the different policies within the Cape and Basutoland. And injustices could also occasionally result from mistakes being made by Basutoland magistrates as to the content of tribal law.[1] Altogether it seems inevitable that such conditions should have generated strong if often subconscious unease among the Basuto.

The result, as in so many other places in Africa, was the rise of a millenarian movement. There had been one in Basutoland some thirty years before[2] and a variety of 'prophets' and 'prophetesses' since then.[3] The reaction to the increasing influence of foreigners after the Cape annexation produced another batch. By 1873 Tsekelo Moshweshwe ended a letter to the Government with the ominous warning:

> The eighth matter which I wish to explain to you clearly is one hidden to those who are foreigners (i.e. not Basutos). It relates to Basuto customs, and consists in designs enforced by commands from the dead, and which are transmitted by diviners who dream dreams. It is said that Moshesh has said that his children are to blame for having allowed the white men to make a plaything of his residence (or tribe). He says they must only enter into the Queen's Government with one foot, for his ultimate design is to release them from the dominion of the white man.
>
> This is a matter to which you ought to pay especial attention above others, for it surpasses all the rest in stupidity, and also in being believed and honoured.

---

[1] E.g. Cape, N.A. 272: minutes of annual pitso, 20 Aug. 1873, encl. in Griffith to Molteno, no. 85, 27 Aug. 1873; N.A. 274: resident magistrate, Herschel, to Austen, 3 Oct. 1877, encl. in Rollandto Brownlee, no. 97, 26 Oct. 1877. (In this case the complainant's claim was not good in native law, so no substantial injustice resulted; but in the many cases which must have arisen with Basuto living on both sides of the Border, the result cannot always have been so fortunate); N.A. 275: Rolland to Brownlee, no. 12, 25 Jan. 1878.

[2] Little Light of Basutoland, no. 3, March 1876, p. 14.

[3] Tylden, The Rise of the Basuto, p.42; Smith, The Mabilles, pp. 120-1.

> It is said that Moshesh is exceedingly angry, and that he commands in the strongest manner that his people should have no fellowship with the white men. That a certain specified ox must be immolated, with which Moshesh's sons must purify themselves, and then also purify the nation.... There is also already another message which comes through a prophet in Morosi's country commanding people to hate the Queen's Government by order of Moshesh, and threatening that if they do not obey his commands he will smite the tribe a second time with the white men, and further that he will command the white men to introduce new laws into the country, that those laws may oppress and afflict us, and drive us out of this country and cause us to go into the land of the stranger to perish there.[1]

However, the administration could do nothing about the movement, and there is no further mention of it until the last edition of the Little Light of Basutoland for 1875 reported:

> A few weeks ago, the rumour went like lightning through a great part of Basutoland that the gods had made special revelations. Many women and girls were said to be under the influence of the gods, and began to prophesy all kinds of things. There was a great shaking of the head whilst prophesying. The message was as follows: The God of the white man does not exist; therefore all that has been brought into the country by the white man must be cast away: merino sheep, angora goats, horses, ploughs, pots, pipes, woollen and cotton blankets and all kinds of European clothing. Messages were sent here and there, to get the people to obey the order; two or three villages consented to give up the pipe, but nothing else, they and all other people declaring they could not live without the other things .... The villages where such prophets lived were for some time shut against the people who Sunday after Sunday go into the different villages to try and instruct the poor heathen. Messages were sent to Christians that, if they did not throw their religion away, they would be cast into fire, etc. Some members and candidates were so frightened that they listened to these lying messages and have gone back to the orgies of the heathen dances and of the circumcision. But the influence of these prophecies has already much diminished.[2]

The missionaries were being rather over-optimistic, although in the same issue they reported a revival of the rite of

---

[1] Cape, N.A. 272: Tsekelo to Griffith, 30 Aug. 1873, encl. in Griffith to Molteno, 11 Sept. 1873.

[2] Little Light of Basutoland, nos. 10-12, Oct.-Dec. 1875, p. 47.

of circumcision for girls throughout the country, which should have warned them that anti-Christian feeling was increasing. But they merely blamed it on feminine superstition prevalent even among converts that an uncircumcised girl was unfit to become a mother. Ironically, it seems that under the influence of the national return to paganism, the British change in the African law of guardianship was having the opposite to the desired effect: women were encouraging girls to run away from missionary classes to initiation schools, but the widows among them were now protected in their custody of their children even if Christian relatives objected.[1]

Throughout 1876 the prophecy movement grew in strength. Almost every issue of the Little Light bemoans its effects. In March a missionary went to see several of the prophetesses with their attendants, and gave an account of his interview with them and of their beliefs.[2] From late March the Little Light claimed that the novelty of the prophets was wearing off and that fewer people were going to see them[3] but in October there was a revival of their power.[4] The missionaries suspected that the movement was created by the chiefs or other dissatisfied parties,[5] but the administration obviously did not share this opinion: to judge by the Cape files, Griffith did not

---

[1] Ibid., pp. 47-48.

[2] Ibid., no. 3, Mar. 1876, pp. 13-14.

[3] Ibid., nos. 4-5, Apr.-May 1876, p. 20.

[4] Ibid., no. 10, Oct. 1876, p. 43.

[5] Ibid., nos. 10-12, Oct.-Dec. 1875, p. 47.

discuss the matter with either the secretary for native affairs or the governor. Nor, although Governor Barkly knew of it,[1] did Griffith make more than a passing reference to it in his report on 1876.[2] None of the other magistrates mentioned it either, except Rolland, who gave a light-hearted account of it, and Austen, who merely remarked in his report of December 1875 that 'rumours of absurd false prophets' were circulating,[3] and the following year that 'that absurd phenomenon' had gradually died away.[4] The official attitude was obviously expressed by Barkly when he wrote in his farewell letter to the Basuto:

> I deemed it unwise to take notice of this delusion, and thus give it importance, believing that if left to itself it would die out.
>
> I have not been mistaken in this expectation.[5]

On the other hand, if the missionaries' suspicions are ignored, it is difficult to explain why the movement should have revived from late 1875 to March 1876 and again in October. Tylden suggests it was caused by the shock to national prestige of Molapo's submission to the government and the public indignation at the arrest of Nehemiah,[6] but Molapo's submission had come in 1873, two years before, and Nehemiah's arrest took place after October 1876.[7] Another possibility is the strong unrest caused

---

[1] Cape, N.A. 274: Barkly's farewell letter to the Basuto, Mar. 1877.

[2] Cape Parl. Papers, G.12-77, p. 4.

[3] Cape Parl. Papers, G.16-76, pp. 4, 8-9.

[4] Cape Parl. Papers, G.12-77, p. 4.

[5] Cape, N.A. 274: Barkly's farewell letter to the Basuto, Mar. 1877.

[6] Tylden, The Rise of the Basuto, p. 126.

[7] Little Light of Basutoland, no. 12, Dec. 1876, p. 53.

by the rumours that Carharvon had offered the Orange Free State a piece of Basutoland as inducement to join Carnarvon's South African confederation, but the rumours were only publicly discussed by the Eastern Star and the Friend in April 1876,[1] and could hardly have been circulating for some six months before being mentioned by the irresponsible and rumour-prone press; while the denial of the rumour took place in the Cape Parliament in July.[2] Drought did not affect Basutoland in 1876, and although the diamond boom began to tail off from that year, the effects were only just beginning to be felt by the date in question. But in November 1875 Masopha was in the middle of his dispute with Surmon, and in December was reprimanded for his actions; it may be that the missionaries were at least partially right in thinking that the chiefs were behind the prophecies.

The movement, however, did not die but merely subsided. At the 1878 annual pitso someone mentioned that the prophetesses were still prophesying and that a number of people consulted them to learn what was going on at the war front, but it seems from the reaction of others present at the pitso that he had breeched an unspoken conspiracy of silence.[3] The prophetesses were lying low for the moment, though by 1879 they would be influencing Masopha with their prophecies that he was to be the future paramount chief.[4]

---

[1] Cape, N.A. 274: Griffith to Brownlee, no. 13, 21 Apr. 1876.

[2] P.R.O., C.O. 48/478: Barkly to Carnarvon, no. 84, 12 July 1876.

[3] Cape Parl. Papers, G.17-78, pp. 20-21.

[4] Germond, Chronicles of Basutoland, p. 391.

Before then, however, a far greater reaction to the regulations had taken place which clearly showed how fine was the balance which enabled the administration to impose the regulations on unwilling chiefs: after a long history of resisting magisterial authority, Moorosi finally rebelled. His earlier subjection to the regulations shows an interesting variety of tactics by the administration. The veteran chief of the Phuti, who had been Moshweshwe's ally and vassal, had been content enough while left alone in his rugged southern corner of the country, secured by distance and the periodically impassable Orange River from too much interference by the district magistrate at Mohales Hoek. The people on his side of the Orange were a mixture of Phuti, a few Mosuto, and about 1000 Thembu, and according to Griffith were 'about the wildest and most uncivilized of any in this Territory.'[1] On Griffith's recommendation a separate sub-district was created over this area, with a magistrate based at Quthing. A clerk, Hamilton Hope, was promoted to magisterial rank to fill this post and was duly introduced to Moorosi and his people by Griffith, who reported that they received the new magistrate 'most cordially, the old Chief Morosi expressing his thanks to the Government for the interest taken in him and his people by kissing my hand and saying that he received the Magistrate with his whole heart.'[2] Griffith did not mention that this took place only after Moorosi had opposed the subdivision for a full day, saying that he did

---

[1] Cape, N.A. 273: Griffith to Brownlee, 9 Sept. 1876; N.A. 274: Rolland to Brownlee, 28 Dec. 1877.

[2] Ibid., Griffith to Brownlee, no. 34, 9 May 1877.

not want a magistrate and was quite satisfied with the seat of magistracy being situated at Mohales Hoek.[1] Hope was left twelve African policemen[2] and it was arranged that Moorosi, as the principal chief and a man of great influence in the new district, should be paid an allowance of £50 per annum 'to retain his influence on the side of the Government';[3] all looked set for another peaceful take-over of chiefly power.

But Moorosi had fought too many battles to surrender without a struggle once he had time to discover what was involved in accepting a magistrate. Less than two months later he descended on his young and untried magistrate with over five hundred fully armed followers primarily to dispute the magistrate's right to try cases before they had first been brought before the chief's customary court. The struggle of wills lasted through a tense five days of meetings and resulted in one man being accidentally shot dead. Moorosi eventually, on the advice of some of his counsellors and possibly bearing in mind the loss of his allowance, temporarily abandoned his demands and returned to his mountain top to brood over the matter.[4] Griffith, advising Hope on how to enforce the new regulations in that unpromising situation, wrote:

---

[1] Cape, N.A. 276: Austen to Griffith, 7 May 1879, encl. in Griffith to Ayliff, 12 May 1879.

[2] Cape, N.A. 274: Griffith to Hope, 4 July 1877, encl. in Griffith to Brownlee, no. 56, 11 Julyn 1877.

[3] Ibid., Griffith to Brownlee, no. 34, 9 May 1877. See Brownlee's minutes of 28 May 1877.

[4] Ibid., Hope to Griffith, 23 June 1877, 25 June 1877, 26 June 1877, encl. in Griffith to Brownlee, no. 56, 11 July 1877.

> It will however be very necessary for you to be most careful and judicious in carrying out the judgements and orders of your Court to see that they are not carried out by your policemen &c with too high a hand - every possible care must be taken to prevent any of "Morosi's" supporters being forced into open resistance or bringing on a crisis, as, I am not in a position to say that you would receive any physical support if such an unfortunate result should happen.[1]

But Griffith's advice came too late. The day after it was written, Moorosi informed Hope that he had ordered a sub-chief against whom Hope had awarded damages not to pay until Moorosi had first reported the matter to Letsie and asked his advice on the subject; and Hope had promptly replied that if the complainant in the case sent to say that the judgment had not been satisfied, he would enforce it, for : while Moorosi was at liberty to send any message in the matter to Letsie, the magistrate was not responsible to either of them.[2] Griffith, on being informed of this, at once despatched Inspector George Moshweshwe and Sub-Inspector Sofonia Moshweshwe to Letsie to recommend that if Moorosi applied to him, he should advise compliance with the magistrate's rulings. He also requested Letsie to send an official messenger with George and Sofonia to explain to Moorosi his present position under the government. To Hope he wrote advising that he should not act hastily but should try to persuade the sub-chief to comply with the judgment without having to enforce it.[3] This diplomatic handling of the case averted a crisis: the sub-chief satisfied the judgment of the court and George and Sofonia returned with a long letter from

---

[1] Ibid., Griffith to Hope, 4 July 1877, encl. in Griffith to Brownlee, no. 56, 11 July 1877.

[2] Ibid., Hope to Griffith, 5 July 1877, encl. in Griffith to Brownlee, no. 57, 11 July 1877.

[3] Ibid., Griffith to Brownlee, no. 57, 11 July 1877 and enclosed Griffith to Hope, 7 July 1877.

Moorosi claiming all the trouble to date had been due to misunderstandings - which Griffith clearly believed to be an attempt by the old chief to save face.[1]

Despite this outward submission, Moorosi remained unreconciled to magisterial rule and in November, after Rolland had temporarily replaced Griffith, attempted to stage another armed gathering at the magistracy to dispute Hope's powers. Hope, faced with Moorosi's determination to have a meeting with him at the magistracy, tried to dissuade him from bringing his followers armed,[2] and when this failed,[3] made a direct request to the nearest commander of the Cape police that a strong patrol be sent to the border.[4] In the opinion of the acting governor's agent, this precipitate action could only have served to aggravate the error of agreeing to a meeting in the first place,[5] and he immediately wrote reprovingly to Moorosi, cancelling the meeting.[6] He also arranged for Letsie to send a messenger to remind Moorosi of his subordinate position.[7] This produced the appearance of submission from Moorosi again,[8] but the effect

---

[1] Ibid., Griffith to Brownlee, no. 74, 18 Aug. 1877.

[2] Cape Parl. Papers, A.49-79, pp. 10-11; Hope to Moorosi, 23 Nov. 1877.

[3] Ibid., p. 11: Moorosi's reply to Hope.

[4] Cape, N.A. 274: Hope to Brownlee, 29 Nov. 1877.

[5] Cape Parl. Papers, A.49-79, pp. 8-9: Rolland to Brownlee, 5 Dec. 1877.

[6] Ibid., pp. 12-13: Rolland to Moorosi, 28 Nov. 1877.

[7] Ibid., p. 16: Rolland to Hope, 30 Nov. 1877.

[8] Ibid., p. 18: Rolland to Brownlee, no. 11, 25 Jan. 1878.

was shortlived. In February the following year a number of men under Doda, a son of Moorosi, mobbed a policeman serving a writ for arrears of hut-tax from some widows[1] and, when a criminal summons was issued against Doda and his men, most of them fled with their stock to the mountains. Moorosi, called upon to arrest Doda, pleaded that he could not find him and twice offered money to pay Doda's obligations; it therefore seems unlikely that he had actually instigated the incident, even if, as Rolland suspected, he subsequently sanctioned it. Hope, however, refused the money and informed Doda's people that he would not receive their hut tax nor grant them passes till the matter was settled.[2] But neither Hope, Letsie nor Ellenberger, the local missionary, were able to persuade Moorosi or Doda to surrender.[3]

It was this deadlock which Ayliff faced on becoming secretary for native affairs in February 1878. His opinion after reviewing the correspondence was that Hope had again acted unwisely, firstly in not following Austen's more experienced lead in exempting the widows from hut tax under his discretionary powers, secondly in refusing the money Moorosi had offered, which could have been interpreted as a token of submission, and thirdly in antagonizing Doda's people by refusing to grant passes, since

---

[1] The Phuti objection to the widows paying hut-tax stemmed partly from their view of women as perpetual minors; paying hut-tax implied a right to hold land, which in traditional society women could very seldom do. See A. Atmore, 'The Moorosi Rebellion: Lesotho, 1879', in Protest and Power in Black Africa, R.I. Rotberg and A.A. Mazrui (eds.), (New York, 1970), p. 14.

[2] Cape Parl. Papers, A.49-79, p. 24: Hope to Rolland, 28 Feb. 1878.

[3] Atmore, 'The Moorosi Rebellion', op. cit., p. 15.

the evidence showed many of them were against Doda's actions.[1] To make matters worse, not only was Hope antagonizing the people, but Moorosi was simultaneously doing his best to ensure that they were on his side. Hope bitterly reported:

> Latterly in every case, whether civil or criminal, that Morosi has been able to hear of, he has pointedly taken the part of the defendant or the accused as the case may be, and has done his best to prevent the case coming to court, by sending for the defendant the very day he was summoned for, and sending me a message to tell me he had done so.
>
> Rather than have any disturbance at present, I have postponed cases as often as three times to try to get them settled quietly; in most instances I have been successful, but in some not.[2]

Matters were only resolved by the arrival in Basutoland of James Henry Bowker to replace Rolland as ~~acting~~ governor's agent. He at once went to Quthing where, with Lerothodi's help, he arranged for Moorosi to surrender his son on condition that he would not be flogged. Doda was merely fined.[3] Much against his will, Hope was replaced by Auston,[4] and there seemed every reason to hope that Moorosi would subside into submission: he had publicly surrendered his son, been placed under an experienced magistrate, and had the example of the Cape's victories on the other side of the Drakensberg to remind him of the forces he would be facing if he gave too much trouble.

Nor was this hope at first disappointed. In September Moorosi readily surrendered two other sons who had organized a

---

[1] Cape Parl. Papers, A.49-79, p. 25: Ayliff to Rolland, no. 121, 16 Mar. 1878; S.A.P.L., Noble Papers: Hope to Bailie, 24 Apr. 1878.

[2] Cape Parl. Papers, A.49-79, p. 27: Hope to Ayliff, 14 Mar. 1878.

[3] Ibid., pp. 29-31: Bowker to Ayliff, 18 Apr. 1878; A.6-79, evidence, p. 73.

[4] Cape, N.A. 275: Bowker to Ayliff, no. 31, 8 May 1878.

stock theft,[1] but in November Austen made the serious mistake of unnecessarily pushing the old chief too far. Legally but unwisely he convicted Doda and Thladi, a grandson of Moorosi, of being accessories before and after an act of theft committed twelve months earlier during the cave episode, and sentenced them to four and two years' imprisonment with hard labour respectively.[2] Doda was a favourite younger son, a fact which Austen would have known even before he reported that 'the Chief Morosi appeared with the two accused natives on the day set down for their trial - and remained in Court the whole of the three days occupied on the trial - that he came with a large following all without arms of any kind - and all behaved in a most orderly manner.'[3] Austen further added that he had given the chief and principal men full scope to put any questions they pleased to the prisoners and witnesses, and that Moorosi had stuck most tenaciously to the defence of Doda, whom he held to be innocent. But nearly all the influential men agreed with Austen's assessment of Doda's guilt - including, interestingly, Letuka, who as Moorosi's heir would have had a vested interest in seeing a favoured challenger behind bars.[4]

---

[1] Ibid., Austen to Griffith, 28 Sept. 1878, encl. in Griffith to Ayliff, 22 Oct. 1878.

[2] Cape Parl. Papers, 1879, Appendix II, A.6, evidence, pp. 74-75.

[3] Cape, N.A. 275: Austen to Griffith, 23 Nov. 1878, encl. in Griffith to Ayliff, no. 71, 9 Dec. 1878.

[4] As a result of assisting the government to bring his three brothers to trial, Letuka incurred his father's displeasure. He had until recently been living out of Basutoland, and Moorosi refused to give him land in the Quthing District as he feared that Letuka, by working with the magistrate in suppressing crime, would strengthen government influence. Austen, in keeping with the administration's tradition of securing the loyalty of heirs, promptly suggested that the district be divided into wards and that Letuka be made a ward master. See ibid., Austen to Griffith, no. 8, 20 Nov. 1878, encl. in Griffith to Ayliff, no. 77, 26 Dec. 1878.

In view of Morosi's known feelings, Austen showed further lack of judgment in not placing a proper guard on the lock-up where the prisoners were awaiting transportation to the Cape. This resulted in the door of the lock-up being forced one night early in January and the men inside being freed.[1] Suspecting Moorosi of being responsible, Austen called upon him to help capture the prisoners,[2] and Letsie was persuaded to exert pressure on Moorosi when it became fairly certain that Doda was being hidden on Moorosi's mountain.[3] Whether such measures would eventually have had any effect is uncertain, for at that point the Cape government, to support its demands for Doda's surrender, ordered reinforcements to move to Palmietfontein, the nearest colonial military camp to Moorosi's country. Griffith, back in Basutoland by this time, was not told of the troop movement in advance and prophetically pointed out that it might frighten Moorosi and his followers into rebellion - for fear of invasion and punishment.[4] It was Austen, however, who made the final and crucial mistakes which alienated most of the people who had remained loyal and frightened Moorosi into action: as the more inexperienced Hope had done, he took fright at rumours that Moorosi was about to attack the magistracy and, without referring to Griffith, sent his wife and children to Palmietfontein over the border in the Cape. At the same time

---

[1] Cape, N.A. 276: Griffith to Ayliff, no. 20, 5 Feb. 1879, and enclosure.

[2] Ibid., Austen to Griffith, 4 Jan. 1879, encl. in Griffithtoo Ayliff, no. 7, 14 Jan. 1879.

[3] Ibid., Griffith to Ayliff, no. 15, 28 Jan. 1879; Letsie to Austen, 9 Feb. 1879, encl. in Griffith to Ayliff, no. 31, 19 Feb. 1879.

[4] Ibid., Griffith to Ayliff, no. 23, 5 Feb. 1879.

he called upon the officer in command there to march up every available man to defend the magistracy, a move which Griffith subsequently judged to be as unwise militarily as politically.[1] As evidence later showed, Moorosi was certainly preparing for war,[2] but whether he would have attacked the magistracy before his territory was invaded is unknown; even at that late date Letuka prevented a raid the day after the troops arrived at Palmietfontein.[3] But the following day Austen clinched matters by abandoning the magistracy as a result of further statements made to him that an attacking party was forming. Presented with this victory before they had even fired a shot, the Phuti sacked the building and looted the loyals who had stayed behind.[4] And left without protection from the government, even the hitherto loyal Letuka joined his father.[5]

The Cape government was faced for the first time in Basutoland with a full-scale revolt, brought on almost entirely by a chief objecting to the application of the regulations, and subsequent ill-judged actions by the government and his magistrate. Nor could the government be sure that Moorosi would be regarded unsympathetically by other chiefs in Basutoland. As shown above, none of the major chiefs were happy with the regulations, and there were other factors which were making for general unease

---

[1] Ibid., Griffith to Ayliff, no. 35, 24 Feb. 1879, and enclosures.

[2] E.g., Cape Parl. Papers, A.49-79, pp. 103-7.

[3] Cape, N.A. 276: Austen to Griffith, no. 41, 22 Feb. 1879, encl. in Griffith to Ayliff, no. 37, 26 Feb. 1879.

[4] Cape Parl. Papers, A.49-79, p. 55: Ayliff to Brownlee, Elliot and Blyth (tel.), 26 Feb. 1879; pp. 131-2: Austen to Ayliff, 8 July 1879.

[5] Ibid., p. 89: Griffith to Ayliff, 9 March 1879.

among the Basuto at that time: the memory of the announcement made by Griffith at the 1878 pitso that the Cape planned to disarm the Basuto[1] was not entirely wiped out by Bowker's and Griffith's subsequent assurances that only rebels would be disarmed;[2] and restlessness was being generated by the Zulu war, which had begun the previous month and produced on 22 January the stunning defeat bythe Zulu of a British army as Isandhlwana. News of this disaster, which had an enormous impact on all tribes throughout South Africa, had soon reached Basutoland, encouraging Moorosi in his defiance of Austen.[3] Moorosi could therefore have hoped for sympathy at the very least from the other major chiefs, and would probably not have revolted had he not expected assistance from Molapo, Masopha, and possibly Letsie.[4]

But other factors came into play which even enabled Griffith to contemplate using the Basuto to punish Moorosi.[5] The Phuti

---

[1] Cape Parl. Papers, G.33-79, p. 30. How far this was a cause of Moorosi's rebellion was much disputed, opinions ranging from Austin's and Mabille's that it played no part in the decision to rebel, to Rolland's belief that it was the basic cause of the disquiet among the Phuti which made the rebellion possible. However, it seems clear that even Rolland believed that had Austen remained at his post, no rebellion would have occurred. See Cape, N.A. 276: Austen to Ayliff, 31 July 1879; 7 Aug. 1879; Rhodes House, MSS. Brit. Emp. S18, C140/254a: Mabille's notes on the Basuto, n.d., probably enclosed in C140/251, Mabille to Chesson, 30 Dec. 1881; Cape Parl. Papers, 1879, Appendix II, A6, evidence, pp. 76-78.

[2] Smith, The Mabilles, p. 245.

[3] Cape, N.A. 276: Austen to Griffith, no. 41, 22 Feb. 1879, encl. in Griffith to Ayliff, no. 37, 26 Feb. 1879; Austen to Ayliff, 31 July 1879.

[4] Austen believed Letsie had encouraged Moorosi to defy the government but had not intended him to carry matters so far. See Cape, N.A. 276: Austen to Ayliff, 19 June 1879.

[5] Cape Parl. Papers, A.49-79, p. 56: Griffith to Ayliff, 26 Feb. 1879.

were separated from the rest of the Basuto by differences in language, descent and customs,[1] for having always been more an ally than a subject of Moshweshwe, Moorosi and his clan were never fully absorbed into the Basuto nation. Moorosi's independence had extended to preventing Letsie from placing some of his sons high up the Orange River,[2] an interference which would have annoyed the paramount's family even more than Moorosi's subsequent rescue of his son from jail. And this latter piece of presumption provoked Letsie to demand of him:

> how is it, if Moorosi be a servant of Moshesh's, that his sons should be held so much more precious than the sons of Moshesh - for eight of Moshesh's sons have been in prison and yet no man opened the prison for them?[3]

As Hope had pointed out earlier, it would benefit Letsie in a number of ways if Moorosi defied the authorities and were attacked with Letsie's help: Letsie could avenge his grudge, seize Moorosi's cattle as loot, and obtain his land for Letsie's younger sons, which would also substantially increase Letsie's hut-tax percentage.[4] But whether these incentives alone would have led Letsie and his brothers to assist the government, or at least stay neutral, is an academic point; Griffith clinched the question in favour of Basuto assistance by warning Letsie and the Basuto that if they did not turn out to assist the government in suppressing the rebellion, he feared that the

---

[1] Cape, N.A. 274: Rolland to Brownlee, 28 Dec. 1877.

[2] Cape Parl. Papers, A.49-79, pp. 26-27: Hope to Ayliff, 14 Mar. 1879.

[3] Cape, N.A. 276: Letsie to Austen, 9 Feb. 1879, encl. in Griffith to Ayliff, no. 31, 19 Feb. 1879.

[4] Cape Parl. Papers, A.49-79, pp. 26-27: Hope to Ayliff, 14 Mar. 1879.

Quthing District would be confiscated to pay for the expenses of the Cape troops used.[1] Letsie subsequently claimed - though admittedly while trying to prevent the confiscation of the Quthing District - that this threat alone induced him to fight.[2]

The government had thus eliminated the possibility of a united revolt under the Basuto chiefs, though military operations lasted from March until November 1879 before Moorosi's formidable mountain was captured (incidentally giving Lerothodi an excellent opportunity to study the methods of fighting employed by the Cape forces[3]). In the final storming of the mountain on 20 November 1879, the old chief and all his principal sons were killed,[4] and though Doda escaped, he subsequently surrendered himself in December 1881.[5] It looked as if Basutoland could return to normal and the government's 'civilizing' programme could proceed, with one of its bitterest opponents removed. But this was reckoning without the government in Cape Town six hundred miles away. Ignoring all warnings, it proceeded with blind obstinacy to create in Basutoland the very condition which Griffith and his magistrates had spent the past nine years working to make impossible.

---

[1] Cape, N.A. 277: Griffith to Ayliff, no. 46, 12 Mar. 1880.

[2] Ibid., Griffith to Letsie, 12 Mar. 1880, encl. in Griffith to Ayliff, no. 46, 12 Mar. 1880.

[3] Tylden, The Rise of the Basuto, p. 133.

[4] Cape, N.A. 276: Austen to Griffith, 22 Nov. 1879, encl. in Griffith to Ayliff, no. 105, 3 Dec. 1879.

[5] Cape, N.A. 280: Clarke to Orpen, no. 116, 24 Dec. 1881, encl. in Maitin (for Orpen) to Sauer, no. 2/349, 29 Dec. 1881.

CHAPTER SIX

BASUTOLAND: THE FAILURE OF MAGISTERIAL RULE

a. The breakdown of magisterial rule

The Molteno ministry had been replaced in February 1878 by one under Gordon Sprigg, with William Ayliff as secretary for native affairs. That year they steered through the Cape Parliament a measure ironically entitled the Peace Preservation Bill, which enabled the executive to issue proclamations ordering Cape Africans to hand in their arms. It was on hearing of this that Griffith had warned the 1878 pitso that Basuto disarmament would be called for. The act as it stood did not apply to Basutoland but unfortunately Sprigg, visiting Basutoland in the middle of the Moorosi trouble, saw a force of 7000 Basuto cavalry perform manoeuvres and decided that the policy must be applied there too.[1] In his subsequent obstinate insistence on this policy he was supported by Sir Bartle Frere, the Cape governor since 1877, who was bent on achieving a South African confederation and believed that disarmament was essential if this policy was to succeed.[2]

To the Basuto, such an idea was anathema. There had over at least the past six years been a great increase in gun buying, often out of wages earned at the diamond fields,[3] and quite apart from the hours of labour invested in each gun, weapons were considered a sign of manhood.[4] They might also become necessary for defence once more should the white man ever abandon Basutoland as had happened in 1854,[5] and no argument advanced by the

---

[1] Benyon, 'Basutoland and the High Commission', p. 374.

[2] Ibid., p. 375.

[3] Cape, N.A. 272: Tsekelo to Griffith, 27 June 1873, encl. in Griffith to Molteno, no. 71, 10 July 1873.

[4] Cape Parl. Papers, A.49-79, p. 11: Moorosi's reply to Hope.

[5] Lagden, The Basutos, ii. 486.

government or missionaries could overcome the combined force of these considerations. If any issue was likely to unite the whole nation in opposition behind any available tribal leader, this was it.[1]

To make matters worse, the Cape government had simultaneously announced a number of other decisions, each of which alone would probably have aroused only dissatisfaction; combined with disarmament and the government's mishandling of its implementation, they could hardly have been worse timed. Having decided to punish Moorosi's rebel clan, Sprigg produced a plan for dividing the Quthing District into white farms. This scheme was to produce repeated protests from both Griffith and Letsie[2] on the grounds that this was entirely contrary to the undertakings of the British governor to Moshweshwe never to alienate any portion of Basutoland, and that the nation, having loyally supported the government against Moorosi, had done nothing to deserve such treatment. To understand the strength of the Basuto reaction to the confiscation of Quthing, it should be borne in mind that the Basuto felt they had already been unjustly deprived by the British and the Cape governments of much of their national patrimony since 1844, the latest deprivation being the Matatiele District. The Basuto claim to this land was based on a grant

---

[1] Significantly, that barometer of tribal opposition to white civilization, circumcision, was much in evidence in the magistrates' reports for 1879. A. Barkly and Surmon both remarked on the strength of the custom in their districts, and Davies wrote of the great increase in his district of the number of circumcision lodges established for both males and females in 1879. See Cape Parl. Papers, G.13-80, pp. 23, 23 and 26.

[2] E.g., Cape N.A. 276: Griffith to Ayliff, no. 104, 27 Nov. 1879; Letsie to Griffith, 9 Feb. 1879, encl. in Griffith to Ayliff, no. 111, 13 Dec. 1879; N.A. 277: Griffith to Ayliff, no. 22, 31 Jan.1880; Letsie to Griffith, 6 Feb. 1880, encl. in Griffith to Ayliff, no. 37, 1 Mar. 1880; Letsie to Griffith, 9 Mar. 1880, encl. in Griffith to Ayliff, no. 46, 12 Mar. 1880.

by Faku to Moshweshwe which the Cape government regarded as invalid, but the Basuto naturally regarded the Quthing confiscation as further evidence that the Cape government desired to gobble up Basuto land for white men's farms.[1] Furthermore, the ministry decided to double the hut tax to £1.[2] This was a completely unjustifiable move in view of its already announced intention of appropriating £12,500 from the Basutoland account to pay for Cape expenses,[3] despite the original undertaking that all money raised in taxes in Basutoland would be spent on Basuto needs.[4] As the missionary newspaper had complained about this breach of faith in more than one issue,[5] it seems reasonable to assume that a large number of Basuto would have been aware of the full injustice of the tax increase.

Both Rolland in giving evidence before the Select Committee on the Basutoland Hostilities,[6] and Griffith in a letter to the secretary for native affairs, unmistakably warned of the cumulative effect of these measures on Basuto good-will. Griffith added that by obliging him to enforce them the government had placed him in an unequivocal position 'which must naturally create a wide gap in that good feeling which has hitherto existed between the whole nation and myself as their "Father" and the

---

[1] Cape Parl. Papers, 1879, Appendix II, A.6, evidence, pp. 81, 83-5.

[2] Announced at the 1879 annual pitso by Sprigg. See Cape Parl. Papers, G.13-80, pp. 40-41.

[3] Cape, N.A. 277: Griffith to Ayliff, no.17, 6 Jan. 1880.

[4] Little Light of Basutoland, no. 8, Aug. 1877, pp. 1-2; no. 10, Oct. 1877, p. 2.

[5] Ibid.

[6] Cape Parl. Papers, 1879, Appendix II, A.6, evidence, pp. 81-82.

Government representative.'[1] But the ministry remained set on its course. In March it confirmed its intention to auction the land in the Quthing District[2] and a month later formally doubled the hut tax by a proclamation amending the Basutoland regulations.[3] In addition the same proclamation provided for quit-rent grants of land round the magistracies and to 'traders residing at isolated stations', which was a further violation of Wodehouse's agreement with Moshweshwe and as such a further grievance on the Basutos' rapidly lengthening list. Its inspiration was probably a request from the traders' meeting of 1878 to which Griffith had been sympathetic,[4] but it was almost certainly illegal in view of past parliamentary recognition of Basuto tribal land as being inalienable. Even in quieter times comment would have been difficult to avoid, but to have introduced the measure at such a time was an open invitation to trouble. With thirty-two years of service behind him,[5] Griffith had his pension to consider, but he was deeply attached to the Basuto and aware of the inevitable result of the policies he would be forced to implement. Placed in this impossible position, he asked for long leave,[6] but was too valuable for the government to spare at such a time.[7]

---

[1] Cape, N.A. 277: Griffith to Ayliff, no. 17, 6 Jan. 1880.

[2] Cape Parl. Papers, A.12-80, pp. 10-11: Bright to Griffith, 4 Mar. 1880.

[3] Proclamation no. 49, 12 Apr. 1880, ~~for which see Appendix III.~~

[4] Cape, N.A. 275: Griffith to Ayliff, no. 72, 9 Dec. 1878.

[5] Cape, N.A. 277: Griffith to Ayliff, no. 17, 6 Jan. 1880.

[6] P.R.O., C.O. 879/17, African Confidential Print, no.255, p. 61: memo by Frere, 19 July 1880, encl. in Frere to Kimberley, no. 174, 20 July 1880.

[7] Cape, N.A. 279: Ayliff to Griffith (semi-official), 6 Apr. 1880.

The missionaries, as the original advisors of the Basuto, were soon drawn into the mounting protests. The Reverend Adolph Mabille sent Griffith an open letter to the governor and two petitions against disarmament from Letsie, one to the governor and the other to the queen.[1] They were unsympathetically received by both Frere and Hicks-Beach.[2] The Quthing missionary, the Reverend Frédéric Ellenberger, wrote to Griffith to object to the boundaries to the lands it was proposed to allot to his mission station, and to point out that the confiscation of Quthing was contrary to Moshweshwe's original arrangement with the British;[3] but without effect.[4] Missionary appeals to Frere had merely annoyed the governor,[5] and although at missionary prompting the Aborigines Protection Society espoused the cause,[6] the Colonial Office in England was unsympathetic to pressure from it or from the missionaries themselves for fear of being drawn into the looming revolt.[7] For this same reason, representations from Basutoland traders were equally ineffective.[8] In the

---

[1] Cape, N.A. 277: Griffith to Ayliff, no. 16, 26 Jan. 1880, and enclosures.

[2] P.R.O., C.O. 48/494: see Beach's minute, 9 Apr. 1880, on (missing) Frere to Beach (confidential), 2 Mar. 1880; Beach's minute, 21 Apr. 1880, on (missing) Frere to Beach (confidential), 15 Mar. 1880. For the missing despatches, see British Parl. Papers 1880, li (C2569), pp. 6-9, 17-22.

[3] Cape, N.A. 277: Ellenberger to Griffith, 19 Feb. 1880, encl. in Griffith to Ayliff, no. 42, 3 Mar. 1880.

[4] Ibid., Griffith to Ayliff, 26 May 1880, with enclosures.

[5] P.R.O., C.O. 879/17, African Confidential Print, no. 255, p. 9: Frere to Kimberley, no. 98, 10 May 1880, and enclosures.

[6] Rhodes House, MSS. Brit. Emp. S18, C128 and C140: letters from Mabille and Casalis. For an account of the Society's campaign, see Benyon, 'Basutoland and the High Commission', pp. 398-9.

[7] Ibid., pp. 399-402.

[8] British Parl. Papers 1880, l (C.2482), p. 1: Morisse to Beach, 13 June 1879.

British Parliament Gladstone refused to intervene,[1] and when the English ministry did finally make representations to Frere, they were too weak to be effective.[2] Pressure within the Cape Parliament was equally useless, as the matter had become a party issue once the Opposition had realized that it was a good platform on which to attack the government;[3] but it did not have the support to effect a change of policy. The only effective blow was achieved by Mabille, and had the unfortunate effect of weakening the authority of the local administration. Mabille refused to translate or print the proclamation extending the Peace Preservation Act to Basutoland,[4] and as the Morija press was the only one in the country, he succeeded in delaying the date on which the proclamation was to take effect. With subsequent delays, it eventually came into force only on 12 July.[5] However, little as the local magistrates wished for disarmament, they were obliged to implement the policy and had realized that the inevitable failure to disarm the Basuto by moral pressure alone would lead the Basuto to regard the government as weak; so they had been much relieved when the reluctant government was at last persuaded to send the proclamation to Griffith - only to be frustrated by Mabille.

---

[1] British Hansard, 3rd series, 1880, ccliii. 455-8.

[2] British Parl. Papers 1880, li (C.2569), p. 6: Beach to Frere (tel.), 10 Mar. 1880; pp. 49-51: Kimberley to Frere, 20 May 1880.

[3] P.R.O., C.O. 48/494: Frere to Beach (confidential), 22 June 1880.

[4] Cape, N.A. 277: Griffith to Ayliff, no. 55, 5 Apr. 1880, and enclosures.

[5] P.R.O., C.O. 879/17, African Confidential Prints, no. 225, p. 25: Frere to Kimberley (confidential), 30 May 1880; Smith, The Mabilles, pp. 258, 260-1.

With the administration hamstrung and most Basuto antagonized by the new measures, the chiefs found themselves in an unexpectedly strong position. Their long-standing grievances over the effects of the regulations on their customary powers, made them the natural leaders to spearhead Basuto opposition now that at last they had the people behind them. But Letsie was old, obese, sick and vacillating, much under the influence of Griffith and the missionaries, and unwilling to lead a revolt which, if successful, would have disastrous results for Basutoland. As Moshweshwe's close advisor and heir, his experience fitted him to understand better than most the inevitability of aggression by the land-hungry Orange Free State should Basutoland completely shake off colonial rule - and protection. He therefore set out to do all in his power to avert the armed resistance which he foresaw would follow if the government tried forcibly to disarm the Basuto. Upon the failure of the petition against disarmament which he had with missionary help sent to the governor (in effect the Cape Government),[1] he arranged for a delegation of chiefs and a missionary to take petitions against disarmament and the alienation of Quthing to the Cape Parliament in April.[2] The Basuto willingly subscribed the money for the trip and with Griffith's help Letsie successfully besought the government to suspend the Peace Preservation Act from coming into effect until an answer

---

[1] See p. 279 above.

[2] Cape, N.A. 277: Letsie to Griffith, 1 Mar. 1880, encl. in Griffith to Ayliff, no. 48, 19 Mar. 1880; Letsie to Griffith, 11 Apr. 1880, enclosed in Griffith to Ayliff, no. 63, 16 Apr. 1880; Letsie to Griffith, 11 May 1880, encl. in Griffith to Ayliff, no. 87, 18 May 1880.

was received to the petition to the Queen and the delegation in Cape Town.[1]

This moderate opposition had the effect of further strengthening the chiefs as Arthur Barkly pointed out in May 1880. Their rapidly reviving power was not, he wrote,

> as heretofore, confined to the ignorant and barbarous alone; for, as the chiefs have, thus far, carried on their opposition with a fair show of adherence to constitutional means, and, ostensibly at any rate, repudiated the idea of any appeal to physical force, they find followers now amongst the more moderate and intelligent natives in the country.[2]

But despite their moderation, the Basuto chiefs were not allowed to argue their own case before Parliament, and though J.M. Orpen and Mr. Fuller, one of the members for Cape Town, did it well for them, the motion to alter the policies did not succeed.[3] Letsie advised submission rather than violence but was in the uncomfortable position of advocating a policy to which the vast majority of his tribe and fellow chiefs were opposed, and from which there now seemed no escape short of armed revolt. Griffith became seriously alarmed that the paramount chief, who had neither the energy nor the power over his people to grapple successfully with the current state of affairs, might be drawn into the anti-government movement;[4] such action was Letsie's only hope of undermining Masopha, who was daily strengthening his position as leader of the majority view and whom the

---

[1] Cape, N.A. 277: Letsie to Griffith, 11 May 1880 and 17 May 1880, encl. in Griffith to Ayliff, no. 87, 18 May 1880.

[2] Ibid., A. Barkly to Griffith, 8 May 1880.

[3] Smith, The Mabilles, p. 260.

[4] Cape, N.A. 277: Griffith to Ayliff, no. 2/104, 29 June 1880.

prophetesses had begun to predict would be the next paramount chief. It must have been obvious to Lerothodi that if he was to retain the paramountcy, he must join his powerful uncle in leading the opposition to disarmament.

Molapo counselled obedience to the government but had not been much involved in the dispute, as he had been stricken with paralysis since mid-1879.[1] His death on 28 June was to bring his branch of the family back into the limelight. Joseph, his eldest son by his great wife, was insane and his heir was therefore his second son by that wife, Jonathan.[2] However, Joel, Molapo's eldest son but by his second wife, proceeded to contest the inheritance.[3] Faced with this challenge from his elder brother, the young Jonathan turned to the government as his father had done before him to safeguard his interests, thus becoming one of the few chiefs of Moshweshwe's family to remain loyal. In contrast, most of Jonathan's half-brothers supported Joel once Jonathan had indicated his intention of obeying the disarmament law.[4] In this way the extremely bitter family squabble over the Leribe inheritance became inextricably bound up in that district with the challenge to the government's right to rule, and was to complicate the pacification of the district.

---

[1] Widdicombe, Fourteen Years in Basutoland, pp. 136-7; Smith, The Mabilles, p. 261.

[2] Cape, N.A. 282: Baillie to Orpen, 29 Oct. 1882, encl. in Orpen to Sauer, no. 2/587, 18 Nov. 1882.

[3] Widdicombe, Fourteen Years in Basutoland, p. 99. Joel was relying on an alternative school of thought which believed that the eldest son of the second house should succeed if that of the first house was dead or incapable. I am indebted to Dr. P.B. Sanders for this information.

[4] Ibid., p. 216.

The polarization of Molapo's family was just beginning when three members of the Cape Town deputation reported to a great pitso on 3 July, the day after Molapo's funeral which had drawn a large part of the nation to Thaba Bosiu.[1] In the speeches afterwards the division between the two groups who were to be called rebels and loyals could be clearly seen, with Masopha speaking out against disarmament. Letsie called upon everyone to follow the example he was about to set and surrender all guns, but a few days later the nine guns Letsie was sending to the magistrate in fulfilment of this pledge were forcibly seized by some of his younger sons and other young men of his tribe. The letters and telegrams sent after this event show the final collapse of the magistrates' authority. They tell of widespread victimization of loyals whose property was 'eaten up' and who were sometimes killed fighting to protect it.[2] Davies, reporting on confiscations by Bereng Letsie in the Thaba Bosiu District, gamely wrote that he would be glad to comply with Griffith's instructions in the matter 'and if in your opinion I ought to resort to the ordinary courses of the Law in this case I will do so without loss of time';[3] but when he subsequently served Bereng with a summons, the chief tore it up, burnt it, and threatened to punish the bearer: and Davies was quite unable to punish Bereng.[4] Even in districts where such dramatic events

---

[1] Cape, N.A. 278: minutes of meeting held on 3 July 1880.

[2] For numerous examples, see Cape, N.A. 278; Cape Parl. Papers, A.22-81 and A.29-81.

[3] Ibid., A.29-81, p. 41: Davies to Griffith, 18 July 1880.

[4] Cape, N.A. 278: Griffith to Ayliff, no. 2/129, 2 Aug. 1880, and enclosures.

did not occur, the magistrates' power ebbed away, as Surmon clearly described in his annual report:

> Now came a time of anarchy. The natives, who had always before behaved respectfully, and implicitly obeyed the Magistrate in all things except that of disarmament, now defied his authority, first in one thing, then in another, till in a short time it was respected only by a very few.[1]

Many who would have preferred to have remained neutral joined the rebels in self-defence, and refugees flooded into the magistracies.[2] All orders to Masopha and the other rebel chiefs to restore captured cattle had practically no effect except where Letsie intervened.[3] The whole country was patrolled by armed bands and, though no European was molested, the traders began to leave or send their families and goods out of the country, and at least one shop was sacked.[4] Masopha fortified Thaba Bosiu and people from the Orange Free State began to cross freely into his district and traded without obtaining licences from Maseru.[5] After several villages of loyals in the Berea district were attacked, at Griffith's orders C.G.B. Bell abandoned the Berea magistracy and fell back on Maseru with his

---

[1] Cape Parl. Papers, G.20-81, p. 7.

[2] Without more detailed records than exist, it is impossible to estimate the size of the potentially loyal minority, especially as many Christians rebelled too. The existence of Christian rebels can probably be partly explained by the sympathetic attitude of the French Protestant missionaries towards the Basuto dislike of being disarmed, although they never advocated revolt. See Ellenberger, A Century of Mission Work, p. 218; Rhodes House, MSS. Brit. Emp. S18, G140/253c: Mabille's notes on the Basuto, n.d., probably encl. in G140/251: Mabille to Chesson, 30 Dec. 1881.

[3] Cape, N.A. 278: Griffith to Ayliff, no. 2/148, 18 Aug. 1880.

[4] Widdicombe, Fourteen Years in Basutoland, p. 146.

[5] Cape Parl. Papers, Appendix 1, vol. iii, A.22-81, p. 9: Griffith to Sprigg (tel.), no. 385, 26 July 1880.

clerk and police, since they could not hope to withstand a similar attack from Masopha.[1] Only the Leribe District remained fairly quiet,[2] and even there when Jonathan surrendered his guns the government felt obliged to return them to him for his own protection.[3] Arthur Barkly in the south, in danger of being cut off from Maseru, was ordered to report anything serious directly to the colonial secretary as well as to Griffith.[4] On 8 August Surmon's report to the governor's agent gives some idea of the complete breakdown in communication between the magistrates and the rebels in their districts:

> All the ordinary business of my office, such as hearing cases, receiving hut tax, &c., is suspended. It is very seldom that anyone living off the Reserve comes to the office.[5]

Griffith was in the same position but was able to fall back upon the power of the paramount chief, and for a few weeks it looked as if this might yet save the administration. Letsie was persuaded to exert his authority, which was still sufficient to enable him to recover the captured cattle from Berens and to fine him.[6] Lerothodi's supporters melted away[7] and at Letsie's orders both he and Nkwebi Letsie restored most of the property taken by them.[8] Masopha refused to allow his warriors to

---

[1] Cape, N.A. 277: Griffith to Ayliff, no. 2/114, 21 July 1880.

[2] Cape, N.A. 278: Griffith to Ayliff, no. 2/107, 7 July 1880.

[3] Cape Parl. Papers, G.20-81, p. 19.

[4] Ibid., A.22-81, p. 8: Griffith to Sprigg (tel.), no. 354, 21 July 1880.

[5] Cape Parl. Papers, Appendix I, vol.iii, A.29-81, pp. 90-91: Surmon to Griffith, 8 Aug. 1880. The reserve was the area round the magistracy reserved for the government.

[6] Ibid., p. 80: Griffith to Letsie, 27 July 1880; A.22-81, p. 13: Griffith to Sprigg (tel.), no. 411, 1 Aug. 1880.

[7] Ibid., Griffith to Sprigg (tel.), no. 420, 2 Aug. 1880.

[8] Cape, N.A. 278: Griffith to Ayliff, no. 2/148, 18 Aug. 1880.

attack Maseru, and the magistracy at Berea remained untouched.[1] Letsie, taking heart, led a thousand men to Thaba Bosiu, where he met Masopha and Lerothodi and was at first hopeful of being able to settle matters by fining them; but it soon became apparent that Masopha would not submit, Letsie did not dare to remain on the fortified Thaba Bosiu for fear of Masopha,[2] and matters continued to teeter on the edge of chaos. On 18 August Griffith acknowledged this, reporting to the secretary for native affairs that law and order had for some time been in abeyance. 'It is evident that the crisis through which we are passing is an endeavour on the part of some of the Chiefs to re-establish their arbitrary power and if possible regain their independence',[3] an opinion shared by Barkly, Austen, C.H. Bell, C.G.H. Bell, and at least one missionary.[4] Several of the magistrates stressed how the chiefs drummed up support from the people by spreading stories of imminent changes to be made in tribal law, such as the suppression of polygamy. But although the magistrates retained virtually no power in their districts, they had not yet been attacked; the possibility of regaining control, though slight, remained and Griffith again repeated

---

[1] Cape Parl. Papers, Appendix I, vol.iii, A.22-81, pp. 14-15: Griffith to Sprigg (tel.), no. 431, 4 Aug. 1880.

[2] Ibid., pp. 17-20: telegrams between Griffith and Sprigg, nos. 456-471: A.29-81, pp. 88-90: Griffith to Ayliff, no. 2/140, 16 Aug. 1880, and enclosures; pp. 95-96: Griffith to Ayliff, no. 2/146, 18 Aug. 1880 and enclosures; Cape, N.A. 278: message of Letsie encl. in Griffith to Ayliff, no. 2/145, 18 Aug. 1880.

[3] Ibid., Griffith to Ayliff, no. 2/148, 18 Aug. 1880.

[4] Cape Parl. Papers, G.20-81, pp. 5, 12-14; Cape, N.A. 280: C.H. Bell to Griffith, 10 Jan. 1881, and C.G.H. Bell to Griffith, 4 Oct.1881, encl. in Griffith to Sauer, no. 2/327, 3 Dec. 1881; Cape Parl. Papers, G.27-82, pp. 172-3: Dyke to Sprigg, 27 Aug. 1880.

past requests for a large force stationed in Basutoland to enforce the law.[1]

It was at this point that Sprigg arrived in Basutoland. By the beginning of August he had already begun to complain about the conflicting reports and advice he was receiving from Barkly, Surmon, Griffith and a French Protestant missionary visiting Cape Town, each of whom was reporting conditions in only a small area of Basutoland.[2] Eventually he decided to visit Basutoland to inspect conditions for himself.[3] Shortly after Letsie had left Thaba Bosiu, the newly arrived Sprigg visited him and also had interviews with George, T/sekelo, Sofonia and Ntsane Moshweshwe, and with Jonathan Molapo, at which the seriousness of the situation was finally impressed upon him. Letsie called a pitso at which to try to obtain the nation's submission to terms offered by Sprigg in a last-minute attempt to prevent full-scale rebellion and to restore the magistrates' authority, and J.M. Orpen, a member of the Legislative Assembly and champion of the Basuto in Parliament, attended as Sprigg's negotiator. If the rebel chiefs and people would comply with summonses and appear personally in court, they would only be fined. Compensation for seized property would have to be given and a token number of guns surrendered by Lerothodi and the other rebel chiefs as earnest of future disarmament.[4] But the moment for

---

[1] Cape, N.A. 278: Griffith to Ayliff, no. 2/145, 18 Aug. 1880.

[2] Cape Parl. Papers, A.22-81, p. 14: Sprigg to Griffith (tel.), no. 432, 4 Aug. 1880.

[3] Minutes of interviews by Sprigg and other information on his visit are in ibid., pp. 21-43.

[4] Ibid., pp. 34-5: Griffith to Letsie, 5 Sept. 1880.

such negotiations was already past. Masopha now knew his own strength. He did not attend the pitso but simultaneously held a gathering at which his young warriors were prepared for war; and Lerothodi, who at first appeared to co-operate with Letsie, refused to surrender any guns.[1] There was no apparent need for him to do so: not only had he seen the incompetence of the Cape forces against Moorosi, but had heard that the British government had repeatedly refused to send troops to assist the Cape.[2] With all hope of compromise gone, the inevitable outbreak came a few days later when Lerothodi attacked a column of soldiers moving up to Mafeteng.[3] His attack marked more than the beginning of the Gun War; it marked the end of the magistrates' carefully constructed network of trust and interests which, with British prestige, had enabled them to rule the country virtually without force despite widespread opposition to the regulations.

b. Attempts to re-establish magisterial authority

The War which followed proved far more disastrous than Sprigg had feared. Cornet Spruit magistracy had to be abandoned,[4] Quthing, Mafeteng, Leribe and Maseru were attacked and besieged.[5]

---

[1] Benyon, 'Basutoland and the High Commission', p. 423.

[2] Tylden, The Rise of the Basuto, p. 146.

[3] P.R.O., C.O. 879/17, African Confidential Print, no. 225, p. 140: Frere to Kimberley (tel.), 15 Sept. 1880.

[4] Cape, N.A. 278: Surmon to Griffith, 4 Nov. 1880, encl. in Griffith to Ayliff, no. 2/174, 15 Nov. 1880.

[5] Ibid., and enclosures from Austen and Bell; A. Barkly to Griffith, 22 Sept. 1880, encl. in Griffith to Ayliff, no. 2/160, 28 Sept. 1880.

From October a revolt in the Transkei, encouraged by Letsie,[1] further complicated matters for the Cape forces, and Auston was killed at the end of January 1881 in a badly planned sortie.[2] As a result of the revolt in the Transvaal, the Cape authorities began to fear collusion between the Free State Boers and the Basuto,[3] and by the time the Cape expenses for the war had reached over £3,000,000, the ministry was exceedingly anxious to make peace. However, the terms they finally offered in February 1881 were hardly calculated to be acceptable to the Basuto, and were rejected; they included the demand that the Basuto should still surrender their guns and that Lerothodi, Masopha and Joel should stand trial, although guaranteeing that they would not be condemned to death. But Lerothodi by then was also anxious to make peace: he was suffering from a painful inflammation of the bladder[4] and it was nearly the end of the summer rains which had been keeping the mountain rivers in full spate and hindering the movement of the Cape artillery. After much negotiation, Griffith met Lerothodi and set matters in train for the acceptance of an award made by the governor and announced on 29 April 1881.[5] With its announcement, the fighting gradually ceased.

---

[1] Brownlee, Reminiscences, pp. 208-9.

[2] Tylden, The Rise of the Basuto, p. 104.

[3] Rhodes House, MSS. Afr. 5909 (Kennan Papers), p. 40: Robert Kennan to his mother, no. 63, 17 Feb. 1881.

[4] Germond, Chronicles of Basutoland, p. 376.

[5] Cape Parl. Papers, G.26-82, p. 5: Award of 29 Apr. 1881.

The award provided for disarmament but licensing of guns or compensation for them, complete amnesty, Quthing remaining part of Basutoland, and a payment of a fine of 5000 cattle together with compensation for loyals and traders. This met all the rebels' demands, for it was obvious that the Cape could no longer enforce the disarmament provision - or anything else; although all the chiefs eventually accepted the award, they were back in the saddle and intended to stay there. Even Letsie could not be relied upon to help bolster the magistrates, for his role throughout the war had been highly questionable; apart from his intervention in the Transkei, there was evidence that his men had participated in the attack on the Mafeteng magistracy[1] and throughout the war he had remained in contact with the rebels,[2] who on some occasions at least would even surrender captured property to him if ordered to do so.[3] He was undoubtedly in a most uncomfortable position, desiring peace and protection for Basutoland, but also wishing to retain at least the nominal leadership of a nation unwilling to accept the Cape's conditions for peace. That he played a double role to some extent seems certain, since he retained his position as paramount chief in the eyes of his tribe and at least some of his authority, while ostensibly working for the enemy against which his heir and the majority of the nation

---

[1] Cape, N.A. 278: Barkly to Griffith, 22 Sept.1880, encl. in Griffith to Ayliff, no. 2/160, 28 Sept. 1880.

[2] E.g., ibid., Letsie to Griffith, 5 Dec. 1880, encl. in Griffith to Ayliff, no. 2/186, 13 Dec. 1880; various letters in N.A. 279 in February and March.

[3] E.g., Cape, N.A. 278: Letsie to Griffith, 13 Dec. 1880, encl. in Griffith to Ayliff, no. 2/190, 18 Dec. 1880; various letters in N.A. 279 in February and March.

were fighting. How far he remained loyal to the government is extremely difficult to judge from the scanty and conflicting evidence available, especially when it is borne in mind that he had learned his skills from Moshweshwe, who had lived by the maxim that language is not given to man to reveal his thoughts, but to conceal them.[1] In assessing how far chiefs who theoretically were enemies co-operated with each other during both the war and its aftermath, it should be remembered that the Basuto custom of marrying cousins knit all Moshweshwe's descendants in a web of relationships which would have been difficult to ignore. Jonathan, for example, was not only the son of Masopha's favourite brother, but married to one of his best-loved daughters.[2]

That there would be difficulties in implementing the award was therefore obvious to the new government which replaced the Sprigg ministry on 9 May 1881 in the middle of the negotiations over the award.[3] To make matters worse, the new ministry's policy could not be implemented by Griffith - as he himself pointed out, even if he were able to set aside his strong personal sympathy for the loyals, he was too deeply identified with the previous government and its failure to enforce disarmament to be able to re-establish the prestige of the government[4] - and so on 25 August he was given a year's leave[5] prior

---

[1] Cape Parl. Papers, G.20-81, p. 14.

[2] Widdicombe, Fourteen Years in Basutoland, p. 220.

[3] The secretary for native affairs in the new ministry had been M.P. for Aliwal North, very near the Basuto border, and was known as a staunch friend of the Basuto. See Rhodes House, MSS. Brit. Emp. S18, C140/242: Mabille to Chesson, 7 Apr. 1881.

[4] Cape, N.A. 279: Griffith to Sauer, no. 2/257, 27 June 1881.

[5] Cape, N.A. 280: Griffith to the resident magistrates and other gentlemen in the civil service, Basutoland, 26 Aug. 1881.

to retirement. His departure meant a very real loss for Basutoland, as even the new ministry which dispensed with his services realized:[1] not only was he a most able and upright administrator, but he was liked and respected by all sections of the community, black and white. But he was fortunate in not being responsible for the new ministry's policy; it aimed to avoid the expense of recruiting more troops or police, and to rely entirely on the chiefs to persuade their people to surrender the cattle required for compensation and the national fine. This was unrealistic. Very few chiefs, ruling ultimately by consent, could afford to antagonize their people to the extent of enforcing the restoration of all the loyals' stock: the Basuto regarded as rightful spoil anything captured in the war and would not easily surrender it.[2] The new acting governor's agent, Joseph Millard Orpen, was a long-standing champion of the Basuto in parliament and regarded as an expert on them, having known them and Moshweshwe's family personally for many years;[3] but the unfortunate new policy which he had agreed to implement necessitated pandering to those chiefs lately in revolt to ensure their co-operation. Not unnaturally the much-tried loyals were extremely bitter about this,[4] especially when it failed to produce most of the compensation owed or to enable them to return to their villages.[5]

---

[1] Cape Archives, acc. 1624 (3) (Wiid Collection), item I: memorandum by Sauer on Basutoland, 14 May 1881.

[2] Lesotho, S9/1/3/2: Griffith to Gladwin, 9 July 1875.

[3] Orpen, Reminiscences, pp. 208–17, 248; Cape Parl. Papers, A.18–72, pp. 11–12: appendix A.

[4] Cape Parl. Papers, G.47–82, p. 191.

[5] E.g., Cape, N.A. 280: Davies to Orpen, 20 Sept. 1881, encl. in Orpen to Sauer, no. 2/289, 27 Sept. 1881; Masopha to Orpen, 15 Oct. 1881, encl. in Orpen to Sauer, no. 2/306, 26 Oct. 1881; Orpen to Sauer, no. 2/325, 29 Nov. 1881; Surmon to Orpen, 30 Nov. 1881. encl. in Orpen to Sauer, no. 2/326, 3 Dec. 1881.

Some of the magistrates who had defended their magistracies almost entirely with the aid of the loyals, felt unable to accept the new policy either. By the end of September C.G.H. Bell asked for a transfer,[1] and Davies, making a similar request in November 1881, expressed their feelings clearly:

> I beg further to urge in support of my application that, having hitherto used my utmost endeavours to carry out the policy of the late Ministry; viz. - that of undermining the power of the Chiefs, & having taken part in the application to this country of the Peace Preservation Act, and persuaded as many as possible to remain loyal, I am very heavily handicapped in having now to work out the new order of things: - nor can I fail, under the circumstances of the case, to be partial to the loyals, who have fought side by side with us & risked their lives to save ours.[2]

Sauer appreciated these problems[3] and was probably keenly aware, as the Watchman alleged on 4 January 1882,[4] that the pre-war magistrates were unlikely to write glowing reports on their districts for the Cape Native Blue Book in 1882. By September 1882 almost all the pre-war magistrates and the more politically minded clerks were no longer in the Basutoland civil service: in January 1882 Maitin was obliged to resign to escape an unacceptable transfer, which he believed to be deliberate victimization for his known sympathies with the loyals;[5] in March 1882 Fitzwilliam Bell, who shared his brother's views,[6] was transferred

---

[1] Cape, N.A. 280: C.G.H. Bell to Orpen, 29 Sept. 1881; Orpen to Sauer, no. 2/328, 4 Dec. 1881.

[2] Ibid., Davies to Orpen, 17 Nov. 1881, encl. in Orpen to Sauer, no. 2/318, 18 Nov. 1881.

[3] Ibid.

[4] Cape, N.A. 281: article from the Kaffrarian Watchman of 4 Jan. 1882, encl. in Orpen to Sauer, 20 Jan. 1882.

[5] Ibid., Maitin to Orpen, 15 Jan. 1882, encl. in Orpen to Sauer, no. 2/367, 19 Jan. 1882.

[6] Cape, N.A. 282: Rolland to Sauer, no. 2/495, 15 May 1882, and enclosures.

to Kokstadt on unfavourable terms;[1] Davies did not serve as a Basutoland magistrate after December 1881;[2] C.G.H. Bell was transferred to the Transkei in 1882;[3] Arthur Barkly left Basutoland on sick leave in May 1881 and resigned without returning;[4] Major Bell died in July 1881;[5] Rolland since mid-1877 had been in charge of the Basutoland Education Department and had held his subsequent magisterial appointments on a temporary basis.[6] Of the pre-war magistrates in the territory, only Surmon remained in a permanent magisterial post there. Of the pre-war clerks who had served in Basutoland since the Cape took charge, only William Carlisle remained, and in August 1882 he too had applied for a transfer, which he eventually received in May 1883.[7] This meant that throughout the crucial period until October 1882 in which the Cape government was trying to re-establish magisterial rule, almost all the magistrates and clerks involved were either out of sympathy with the way in which they were expected to implement the policy, or relatively inexperienced

---

[1] Cape, N.A. 281: F. Bell to Orpen, 9 Mar. 1882, encl. in Orpen to Sauer, no. 2/430, 11 Mar. 1882.

[2] Cape, N.A. 280: Davies to Orpen, 21 Dec. 1881, encl. in Orpen to Sauer, no. 2/346, 26 Dec. 1881; N.A. 281: Davies to Rose Innes, 20 Mar. 1882.

[3] Lesotho, S9/2/2/3: Orpen to C.G.H. Bell, 30 Sept. 1882.

[4] Cape, N.A. 279: Griffith to Sauer, no. 2/251, 8 June 1881; N.A. 280: A. Barkly to Sauer, 1 Dec. 1881.

[5] Cape, N.A. 279: Griffith to Sauer, no. 2/261, 4 July 1881.

[6] Cape, N.A. 274: Griffith to Brownlee, no. 26, 11 Apr. 1877; Cape Parl. Papers, G.47-82, p. 157: enclosure A in Orpen to Sauer, no. 28, 16 Mar. 1882.

[7] Cape, N.A. 282: Carlisle to Clarke, 22 Aug. 1882, encl. in Orpen to Sauer, no. 2/549, 26 Aug. 1882; N.A. 283: Blyth to Sauer, no. 65/A, 8 Apr. 1883, minute 30 Apr. 1883.

in Basutoland politics and attitudes. To add to the problem, Orpen proved to be a most incompetent administrator.[1]

The task which faced them would have daunted even a well-established and united magisterial team. Ultimately the re-establishment of magisterial rule depended on the magistrates' ability to secure the property and safeguard the rights of anyone who entrusted himself to government justice, and this the magistrates would have had difficulty doing even had there been no opposition party in the country. Unfortunately, there was: Masopha at first refused to accept the governor's award at all and was only coerced into nominally doing so in September 1881, when Sauer began to organize an expedition by Letsie and Lerothodi against him.[2] This removed the main focus for disaffection in Basutoland and augered well for the enforcement of the award by the chiefs; but as soon as Sauer returned to Cape Town, having already withdrawn all colonial troops except the Cape Carbineers, the problem reappeared. An extract from the minutes of the 1882 General Assembly of the Paris Evangelical Missionary Society in Paris paints a vivid picture of what followed:

> This is the opportunity for which Masopha has been waiting. No sooner has Mr. Sauer left than he throws off the mask and, from his mountain-top, announces his refusal to submit. An attempt is made by Mr. Orpen with Letsie and Lerothodi's warriors, to capture him on January 24th and fails lamentably. It is henceforth obvious that the country is incapable of pacifying itself unaided. Is it in the power of the Colony to restore order by force of arms? By no means. It is not the solitary cavalry regiment left in Maseru which

---

[1] Ibid., Blyth to Sauer, no. 33/83, 7 Apr. 1883.

[2] Cape Parl. Papers, G.26-82, pp. 50-51.

> will achieve what the entire forces which the Cape Government could bring into line have failed to do. The situation is therefore grave, more so perhaps than ever before: in Basutoland anarchy, at the Cape impotence.[1]

Given this situation, the magistrates remained equally impotent. The picture which emerges from magisterial reports and other sources shows that the magistrates were unable to administer the law except amongst the loyals still living in the camps huddled round the magistracies; as Mabille wrote: 'the authority of the magistrates is not yet sufficiently recognised to induce people to take them their cases.'[2] A secondary reason, at least in the Leribe District, was that feeling was still so strong between the ex-rebels and the refugee loyals living at the camps that the former would not come to the magistrates' reserves.[3] At the end of November, Surmon reported from the Cornet Spruit District that all cases except one had been settled by the chiefs, and the exception had been brought to him at Letsie's specific direction.[4] Only three cases were brought to Bailie at Mafeteng during November[5] and Hatchard reported that to his knowledge only two cases had been brought by rebels before the magistrate at Maseru since the beginning of the peace negotiations, and both were cases against loyals residing in Maseru.[6] In the few cases where magistrates

---

[1] Probably by Dr. Eugène Casalis. See Germond, Chronicles of Basutoland, p. 397.

[2] Smith, The Mabilles, p. 309.

[3] Cape, N.A. 281: Bailie's report for 1881, 7 Jan. 1882, encl. in Orpen to Sauer, no. 2/410, 19 Feb. 1882.

[4] Cape, N.A. 280: Surmon's report, 30 Nov. 1881, encl.in Orpen to Sauer, no. 2/326, 3 Dec. 1881.

[5] Ibid., Bailie's report, 29 Nov. 1881, encl. in Orpen to Sauer, no. 2/326, 3 Dec. 1881.

[6] Cape, N.A. 281: Hatchard to Orpen, 9 Jan. 1882, for Cape Native Blue Book.

were able to secure restitution of loyals' stock, reinstatement of loyal headmen on their land, or witnesses for serious charges, it was usually only as a result of intervention by either Letsie or his sons on their behalf.[1] The customs of circumcision and witchcraft were revived in some areas to a great extent[2] and C.G.H. Bell's report of 30 November 1881 on the Leribe District seems to have been true for the whole country:

> On the conclusion of Peace with the Rebels there was an apparent desire on their part,to a certain extent to attempt compliance with the Governor's Award, and a wish to bring about a peaceful order of things. - Since then however, the rebel chiefs have gradually recovered breath, and they are now beginning to forget the anxiety and hardships they experienced during the rebellion, with the result that their attitude towards the Government is assuming a style of independence and defiance which must eventually necessitate coercion before the authority of the Government can be upheld in the country.[3]

Although Orpen in his reports had a tendency to paint a rosy and over-optimistic picture of the effect of his policy, the facts were eventually borne in on the Cape Government, which could not let this situation continue. Some other solution of the problem had to be found. With the British government's consent, they decided to use Cape troops to enforce fulfilment of the award, offering cheap farms from confiscated land as the lure to persuade colonists to enlist. The Basuto were given the deadline of 15 March 1882, a month away, by which to fulfil the award; otherwise it would be cancelled, Quthing confiscated,

---

[1] E.g., ibid., Surmon's annual report, 6 Jan. 1882, encl. in Orpen to Sauer, no. 2/410, 19 Feb. 1882; Nettleton to Orpen, 26 Jan. 1882, encl. in Orpen to Sauer, no. 2/396, 11 Feb. 1882; Cape Parl. Papers, G.47-82, p. 192; Cape, N.A. 280: Bailie's report 29 Nov. 1881, encl. in Orpen to Sauer, no. 2/326, 3 Dec. 1881.

[2] Cape, N.A. 281: Reports by Surmon, Clarke and Fr. Gerard, encl. in Orpen to Sauer, no. 2/410, 19 Feb. 1882.

[3] Cape, N.A. 280: C.G.H. Bell's report, 30 Nov. 1881, encl. in Orpen to Sauer, no. 2/326, 3 Dec. 1881.

and the Cape would enforce order in the rest of the country and confiscate the property of any who resisted their authority. This drew a storm of criticism from the humanitarians in England, the colonial press, and, most important, the Cape Parliament. The cabinet, finding itself without parliamentary support for the proposed renewal of the war, was forced to modify its ultimatum. Using as an excuse a plea by Letsie for more time, it announced that the award would still be cancelled on 15 March but that confiscation would not automatically follow on incomplete fulfilment of its terms.

Instead the ministry's third attempt at a solution was unveiled to the public in the governor's speech at the opening of Parliament, whose members were asked to endorse a policy which aimed 'at the gradual restoration of Law and Order by means of a force strong enough to support the authority of the Magistrates and to protect those who have proved themselves faithful in their allegiance to the Government.'[1] No force anywhere near sufficiently strong was ever in fact provided, but the government did try to create a more favourable atmosphere by repealing the Peace Preservation Proclamation on 6 April, though the £1 hut tax was to stand. A commission was set up to examine compensation claims by the loyals, and those who were unable to return to their villages were to be provided for in either Quthing or below the Drakensberg. Quthing was not to be confiscated, though settlement in it would remain, as it had

---

[1] Votes and Proceedings of the Cape Legislative Council, 1882, Minute I, p. 1; Governor's speech, 17 March 1882.

been since Moorosi's rebellion, under the control of the government. This was done to provide the loyals with land away from ex-rebel chiefs, but Letsie was very bitter about it;[1] and by omitting even to consult him as the only chief still with a claim to supremacy over the district, the government was itself violating the spirit if not the letter of the regulation providing for consultation with the relevant chiefs over land allocation.

The new policy was a dismal failure from the first. In Cape Town it did not receive the support of the Opposition, which regarded it as extremely humiliating. In the Assembly a bill to repeal the Annexation Act of 1871 was defeated by only twelve votes, and the Legislative Council actually passed a resolution favouring its repeal.[2] In Basutoland the new policy while not winning over the ex-rebels, turned the disappointed loyals against the government too. The position of the magistrates as enforcers of the law therefore did not improve. Nor were they helped by Major General Charles Gordon's short and disastrous visit to Basutoland in an attempt somehow to solve the situation for the Cape Government. He favoured a plan of indirect rule through the chiefs and two consultative councils, with no magistrates in the country except for a resident and two sub-residents whose main task would be to control the Basuto's

---

[1] Cape Parl. Papers, G.8-83, pp. 294: Orpen to Sauer, 31 Aug. 1882; G.54-83, p. 58: Letsie's speech on Quthing at the meeting with Scanlen and Sauer on 26 Mar. 1883.

[2] Benyon, 'Basutoland and the High Commission, pp. 516-7.

relations with adjacent territories.[1] It was the only type of plan which might have induced Masopha to co-operate,[2] but it was not officially supported by the government on the grounds that no chief was able to speak for the whole country in the way that the plan required.[3] Unfortunately, Gordon's visit clearly demonstrated to the Basuto the dissention among their white rulers:[4] not only did Gordon fail to bring Masopha to heel, but he was also probably partly responsible for the failure of the government-supported voluntary attempt by Letsie and Lerothodi to coerce Masopha into accepting the Cape's authority. At the close of 1882 the situation throughout the country was if anything worse than it had been at the end of hostilities.[5]

Faced with this situation, the first major economic recession since the boom begun by the discovery of the diamond fields, and with frontier problems in the Transkei and Bechuanaland as well as Basutoland, public opinion in the Cape veered increasingly in favour of abandoning Basutoland.[6] To make matters worse, the Orange Free State objected to the fighting that had developed along the border as a result of the refugees fleeing from the Leribe District.[7] The Scanlen government made

---

[1] Cape Parl. Papers, G.5-83, p. 16: proposed convention between the Cape and the Basuto, encl. in Gordon to Scanlen, 19 July 1882.

[2] Ibid., G.6-83, p. 35.

[3] E. Bradlow, 'General Gordon in Basutoland', Historia, xv. 4, 231.

[4] Cape Parl. Papers, G.8-83, p. 299: Orpen to Sauer, no. 71, 24 Oct. 1882.

[5] Ibid., reports of magistrates and missionaries in Basutoland for 1882.

[6] Ibid., G.9 (cont.)-82, p. 5.

[7] Lagden, The Basutos, ii. 539-40.

one last desperate effort to produce a solution, which it put to an extraordinary session of the Cape Parliament in January 1883. It was the only policy which under the circumstances had any chance of succeeding, but how great a concession the government was making is indicated by the fact that the policy was completely contrary to all Cape principles of control in tribal areas, being far more akin to the plan proposed by Gordon. For the first time since 1868 a government proposed to leave the management of Basutoland's internal affairs to the chiefs, and to control only external relations. In terms of past Cape policy, it was a retrograde step.

However, the scheme never really got off the ground, for it failed to gain adequate support from the Basuto chiefs and had only half-hearted support in Parliament: although the Assembly agreed to it, the Legislative Council voted for outright abandonment.[1] At first sight the lack of Basuto enthusiasm seems surprising, since the repeated demand of Masopha and his many sympathisers was for external protection from the Orange Free State but internal self-government, free from magisterial control and interference in tribal law - the policy the Cape was proposing. However, in mid-March Scanlen and Sauer had gone to Basutoland to sound out Basuto reactions to the proposed policy, and had indicated at the numerous meetings they held[2] that the alternatives were either complete withdrawal or, possibly, handing

---

[1] See Benyon, 'Basutoland and the High Commission', pp. 568-74, for a detailed account of various parliamentarians' attitudes towards the policy.

[2] See Cape Parl. Papers, G.54-83, A.24-83, A.24A-83, and A.24B-83 for reports on the meetings.

Basutoland back to imperial rule. It seems that the Basuto chiefs were so disenchanted with the Cape government that they would almost all have preferred to be under imperial rule again, and to some chiefs even complete abandonment seemed preferable.[1] The Cape government had recently contributed a number of irritants to the Basutoland scene which, together with the recent Gun War, explain these sentiments. In December it had succeeded in antagonizing both Letsie and the loyals by its indecision on whether to allow Nkwebi, an ex-rebel son of Letsie, to settle in Quthing or not, Letsie being angered that his nominee was not installed immediately, the loyals because they had moved to Quthing specifically to escape the control of the ex-rebel chiefs.[2] Then in mid-March Captain Matthew Blyth replaced Orpen, who was felt to be too closely identified with past policies.[3] Blyth was the first chief magistrate of the Transkei and one of his assistant magistrates has left a description of him which does much to explain his subsequent problems with the Basuto:

> My chief, Captain Blyth, was a dear old thing, as good as gold, but an old woman from the sole of his shoe to the top of his hat, an awful old woman, but with a good heart and a most awful temper. When he lost the latter no punishment was sufficient even for a trivial offence. But when some infernal scoundrel, who had committed an atrocity for which he ought to have been most severely punished, shed crocodile's tears and prated a heap of nonsense about his wife and children, the heart of the Chief Magistrate became as water, and his tears not infrequently flowed down onto the chief magisterial bench while those of the culprit watered the dock.[4]

---

[1] To judge from the accounts of the meetings of 19 and 20 Mar. 1883, the commoners would generally have preferred some sort of government to protect them from the arbitrary whims of their chiefs, but would probably have loyally accepted their chiefs' decision.

[2] Cape, N.A. 282: Orpen to Sauer, no. 2/600, 25 Dec. 1882, and enclosures; Cape Parl. Papers, G.8-83, pp. 271-2.

[3] Ibid., A.24-83, p. 10: Sauer to Orpen (tel.), 9 Feb. 1883.

[4] F.N. Streatfield, Reminiscences of an Old 'Un (London, 1911), p.235.

He was hardly a tactful choice as acting governor's agent: the Basuto suspected him of being mainly responsible for Nehemiah's wrongful imprisonment and his temper had earned him a reputation for severity which, after the easy-going Orpen, was not welcomed.[1] Moreover, the meetings held by Scanlen and Sauer led to the re-opening of many old grievances against the regulations, most of which were the result of the administration's original policy of undermining the power of the chiefs.

In an attempt to counter some of these objections, various modifications were made in the proposed scheme before the final draft was sent to Letsie on 31 March and made known to the chiefs and headmen at a meeting at Thlotsi Heights on 2 April 1883.[2] Although born of necessity, these were by far the most liberal regulations the Cape had ever offered an African people. They removed the magistrates (and, in practice, Cape law) from the average African's life unless he chose to appeal from his chiefs' decision. Only in a few, specific instances were cases reserved for magisterial attention. Although the governor was still to make the laws, the provision that the chiefs and headmen were to administer them was a farce; as shown above, many chiefs and headmen disapproved of the existing laws where they were contrary to tribal law, or did not understand the principles on which they were based. With magisterial authority under the proposed constitution far less in evidence than before the war, the only incentive to such chiefs to administer the modified law

---

[1] Cape Parl. Papers, G.54-83, p. 39.

[2] Lesotho, S9/2/2/3: Scanlen to Letsie, 31 Mar. 1883, enclosing proposed terms for the future government of Basutoland.

was fear of having their decisions set aside on appeal to the magistrates; and appeals were likely to remain rare while the chiefs retained their greatly strengthened position. It seems unlikely that the missionaries, who often acted as interpreters at the meetings held by Scanlen, Sauer and Blyth would have allowed the government to remain in ignorance of this fact, but they were also keenly aware of the evils abandonment would bring, and would have preferred even the proposed system to that alternative.[1]

The chiefs were not required to make an immediate response to the proposals of 2 April, and only after three weeks had elapsed was a national pitso held to receive their answer. It lasted for two days and the result was indecisive. Despite every effort by Blyth and the missionaries,[2] Blyth was obliged to report that Letsie's consent to the regulations was only wrung from him with the greatest difficulty, after he had tried in every way to evade the question.[3] Nor did Blyth believe him to be in earnest, even then: 'he is entirely in the hands of his sons, two of them, "Berong" and "Mama" secretly side with Masupha, and the arrogance and general bearing of these two Chieflets bode but little good to the general peace of this country.' Worse still, Masopha and his henchmen, Ramanella, refused to attend the pitso although summoned by Letsie, and Blyth doubted whether even firm action by Letsie would bring them to heel. The government's agreement that Letsie's

---

[1] Smith, The Mabilles, pp. 315-6.

[2] Ibid.

[3] Cape, N.A. 283: Blyth to Sauer, no. 41/83, 27 Apr. 1883, and enclosed minutes of pitso, 24-25 Apr. 1883.

position as paramount chief should be enhanced in order to restore his old powers would effectively explain Masopha's refusal to co-operate. Although the new regulations were promulgated, it looked as if there was no hope of them being accpeted by a united country, the Cape government's precondition for remaining in Basutoland. To emphasize the point, only five days later news was received from Leribe that Joel had attacked Jonathan with the support of Masopha.[1] Serious fighting continued until Letsie was persuaded to pass judgment at a national gathering held from 22 to 26 May to hear the case.[2]

But by that time the Cape government had lost confidence in its ability to cope with the situation. At the beginning of May it opened negotiations with the British government to hand over the country to its care,[3] and the news quickly spread. The resulting uncertainty as to the future placed Blyth and the magistrates in an increasingly uncomfortable position, but as evidence in the Cape files such as Blyth's report of 22 June 1883 showed, the government's new policy which he was attempting to implement did not appear to be very effective anyway.

> After three months careful and cautious working of this new system, I cannot say that it has met with that measure of success its liberal spirit deserved.
>
> The Chief Letsea is willing enough to take all the power to himself in dealing with cases,[4] and the general

---

[1] Cape Parl. Papers, A.24-83, p. 73: Blyth to Sauer (tel.), no. 192, 1 May 1883.

[2] Ibid., p. 78: Blyth to Sauer (tel.), no. 231, 27 May 1883. For minutes of the meeting, see Cape, N.A. 283: Blyth to Sauer, no. 53/83, 30 May 1883, and enclosure.

[3] British Parl. Papers 1883, xlviii (C.3708), pp. 1-3: Smyth to Derby, 1 May 1883, enclosing Scanlen's minute of 30 Apr. 1883.

[4] Under the new regulations apparently, Letsie legally retained all fines he imposed. In the three months from 1 July - 30 Sept. 1883, Blyth received only £14-16-3d in fines. See Cape, N.A. 283: Blyth to Sauer, no. 129/A F, 13 Sept. 1883; statement of actual revenue received, encl. in Blyth to Sauer, no. 135/A F,

> management of the tribe, except when grave difficulties arise as in the case of Masopha, when Letsea says he is powerless, "the Government must deal with that," but he is not so willing to recognise his obligations to the Government. The above remarks apply also to nearly every Chief in the country who now exercises his authority, and seeks his own aggrandisement without let or hindrance, and already the common people are sorely feeling the burden of their position, and would gladly welcome the just and humane rule of British Magistrates, but are afraid to make any move in this direction as they would incur the displeasure of their chiefs; and the power of the Government in Basutoland is not strong enough to protect them.[1]

Blyth's increasing and extreme distrust of Letsie[2] was probably aggravated by Blyth's own ill health,[3] but was also partially justified by Letsie's behaviour. However loyal the paramount chief might have desired to be, he had very little power with which to assist the government: his heir, Lerothodi, was loyal to the government, but he too was in poor health;[4] and Letsie's son next in the succession, Mama, and several of Mama's more influential brothers supported Joel and Masopha[5] and would have refused to help to subdue them. For the same reason, Letsie could not always ensure that the regulations were observed.[6] Besides, it is very possible that both Letsie and Lerothodi were happy to see magisterial control kept to a minimum, and found the rebel chiefs provided a useful excuse for inaction when required to bolster magisterial authority. Unfortunately the

---

[1] Ibid., Blyth to Sauer, no. 63/83, 22 June 1883.

[2] Ibid., Blyth to Sauer, no. 73/83, 15 July 1883.

[3] Ibid., Blyth to Sauer, no. 80/83, 6 Aug. 1883; no. 102/83, 20 Oct. 1883.

[4] Ibid., Blyth to Sauer, no. 93/83, 15 Sept. 1883.

[5] Ibid., Blyth to Sauer, no. 73/83, 15 July 1883.

[6] E.g., ibid., Blyth to Sauer, no. 87/83, 26 Aug. 1883.

lack of force at Blyth's disposal obliged him to rely entirely on Letsie to bring him those cases which according to the new regulations were to be tried by a government officer. Hence his frustration in October when Joel refused to surrender an accused man to him, saying Letsie had told him to deal with the case hi mself. Blyth angrily reported: 'This is Letsea's way of working, sending one message to Joel as in this case and he will tell me he will see to it at once.'[1] But as he must have realized, such behaviour on Letsie's part was inevitable, given Letsie's political circumstances and character: the paramount chief was unlikely to retain his position if he was blatantly and regularly disobeyed by rebellious chiefs, but was on the other hand too weak a character to defy the stern old administrator openly. Prevarication was the only solution.

How close the new system of self-government came to total breakdown as a result of Blyth's frustration with Letsie's alleged impotence and manoeuvres is perhaps best indicated by the exchange of letters between them on the subject of Letsie's abdication. Whether Letsie was in earnest or not is unknown, since events intervened before he could act. Possibly he was merely trying to enrol Blyth's sympathy and perhaps to frighten the government into supporting him when he wrote to Blyth that his loss of influence had made him decide to announce his abdication at a pitso, provided Blyth thought it advisable and that the government would appoint a more readily obeyed paramount in his place.[2] Blyth's exasperated reply reduced Letsie to angry

---

[1] Ibid., Blyth to Sauer, no. 106/83, 27 Oct. 1883.

[2] Ibid., Letsie to Blyth, 20 Oct. 1883, encl. in Blyth to Orpen, no. 106/83, 27 Oct. 1883.

sulks[1] and might have had far worse results had Britain not intervened:

> I am quite aware that for some time past you have not carried out anything that I wished you [sic] although it was for the good of your country.
>
> I cannot and do not think that your influence is so little as you say, and I am sure that if you really desired it, and gave positive orders that they would be obeyed, and any instructions I have given you would have been carried out at once.
>
> You can do as you like about calling a Pitso and perhaps it would be a good thing, as anything is better than this present way of going on. The presence of the Government in your country is a farce. I have honestly tried my best for your good, and that of your people and I have worked only through you as Paramount Chief, but I can do nothing more.
>
> I hear what you say about resigning your position as Paramount Chief. The Government will be sorry to learn that you have no power and influence. They will not mind who is Paramount Chief so long as their orders are obeyed - and the Basutos ruled justly and properly, so that there may be peace in the land and the present evil state of things come to an end.[2]

Fortunately at this stage the Cape's negotiations with Britain - prolonged by a dispute over financial contributions - were completed and a pitso was called on 29 November to ask the Basuto nation if it was willing to be ruled by Britain through the high commissioner and to pay a hut tax of ten shillings. Letsie, his sons, and the majority of the tribe returned an affirmative answer,[3] but Masopha, who did not attend the national pitso, held one of his own at which he rejected imperial rule.[4] The British government had informed Letsie that it could not take over a divided people, and there followed an axious period for

---

[1] Ibid.,Blyth to Sauer, no. 109/83, 17 Nov. 1883.

[2] Ibid., Blyth to Letsie, no. 507L, 22 Oct. 1883, encl. in Blyth to Sauer, no. 106/83, 27 Oct. 1883.

[3] P.R.O., C.O. 48/507: Smyth to Derby, no. 369, 12 Dec. 1883, enclosing report of the pitso from The Friend, 6 Dec. 1883.

[4] British Parl. Papers 1884, lvi (C.3855), p. 47: Smith to Derby (tel.), received 12 Dec. 1883.

the Cape ministers before the British government in mid-December decided that the Basuto majority in favour of British rule was large enough to warrant it accepting Basutoland.[1] Further attempts by Letsie to induce Masopha and Ramanella to agree to pay hut tax and accept a magistrate merely provoked them into doctoring their warriors for war and taxing Masopha's people to raise money for more arms and ammunition,[2] but by then the British government was committed to accepting Basutoland. Masopha had won his original battle to reduce the power of the magistrates and interference in tribal laws, for the British government was in future to rule with a very light hand. His continued rejection of British rule might have stemmed from fear of encroachment on the chiefs' powers by the magistrates once they were installed; or it might have indicated, as some suspected, that whatever the extent of his ambition when the Cape government originally took over Basutoland, by the time it left he was set on gaining full independence from Letsie, if not the paramount chieftainship for himself. He must have realized that while the legitimate paramount and his heir remained loyal and were supported by the majority of the tribe, any white overlord would seek to reinforce their power at the expense of all other Basuto chiefs' independence, in order to control the nation effectively.

---

[1] Benyon, 'Basutoland and the High Commission', pp. 617-19.

[2] Cape, N.A. 284: Blyth to Sauer, no. 12/83 [sic], 16 Feb. 1884, and enclosures.

On 18 March 1884 an order in council was promulgated 'notifying the Queen's assent to the Cape dis-annexation of Basutoland, assuming direct Imperial control and providing for all legislative and executive power being vested in the High Commissioner'.[1] On the same day Blyth handed over his duties to Colonel Marshall James Clarke, the new resident commissioner who was to replace the governor's agent, and the following day left Basutoland.[2] With his departure ended the Cape's responsibility for Basutoland, and on 29 May 1884 the Cape code of regulations, legally kept in force by a British order in council, was replaced by a new code of regulations promulgated by the high commissioner.[3]

The failure of the Cape's efforts to restore magisterial authority can be traced in the first place to the weak and unrealistic policies adopted after the governor's award was accepted, when firm measurez backed by adequate force might have reduced the exhausted rebel chiefs to submission. Given the blood-ties between the leading chiefs, it could not rely, as it tried to do, on the 'loyal' chiefs to subdue the rest of the nation. But it is doubtful anyway whether once the Basuto commoners and minor chiefs had seen the government's weakness during the war, the magistrates could again have won over their support and trust as completely as before the revolt. And without their full support, any successful imposition of further changes in tribal law would have been impossible. Griffith's initial success in changing

---

[1] Lagden, The Basuto, ii. 559.

[2] Cape, N.A. 284: Blyth to Sauer, no. 16/84, 18 Mar. 1884.

[3] British Parl. Papers 1884-5, lvi (C.4263), pp. 75-80: proclamation by Robinson.

tribal law had depended on the maintenance of a delicate balance which the Sprigg government had failed to understand and had destroyed for many decades, if not forever. But though the Cape's first efforts to administer tribal law had ended in failure, the lessons learnt were applied in the less promising Transkeian territories, ultimately with greater success.

CHAPTER SEVEN

THE TRANSKEIAN TERRITORIES

a. Background

In December 1872, when the Molteno ministry took office, the Basutoland administration was already establishing its position; by contrast, not only did the Transkeian territories present a less promising setting for the Cape's experiments in controlling and civilizing its black neighbours, but constitutional problems for several years prevented the legal administration of a Basutoland-type system of government in the area. Initially, therefore, the territories apparently necessitated the Cape finding yet another solution to the problem of how to rule a large number of potentially hostile Africans. But the Basutoland system was so convenient and successful that the Cape used it despite the illegality this involved, and for several years the territories were ruled by a system of bluff.

In contrast to its experience in Basutoland, the Molteno ministry suffered from a series of handicaps when it took over the territories: it did not inherit from Britain an administration legally enabled to impose any law in the area, and a long history of contact with and disruption by both the British government and Cape settlers had already built up a far greater resistance among most of the tribes to white administrations. The area between the Kei and Mbashe rivers being nearest to the colony, had suffered most from white incursions. The territory was initially occupied by the Gcaleka, the senior branch of the Xhosa tribe, which had clashed with the whites in 1835, 1846 and 1850-53[1], losing both land and cattle. The disastrous

---

1. For a summary of these episodes, see Saunders, 'The Annexation', pp. 35-38.

invasions of their territory disrupted tribal life; but as damaging, if more insidious, were the threats posed by both the missionaries and the changes imposed by Grey on that part of the tribe living in neighbouring British Kaffraria. The Cattle Killing which resulted in 1856 broke the power of the Gcaleka. Sarili, the chief, who was held to have instigated the movement as a means of driving his people to war with the colony, was punished by being forced with his people to fall back beyond the Mbashe.

While it was being decided what to do with the vacated land, it was kept empty of all people except a small group of Africans from the Ciskei, who were settled as a buffer along the west bank of the Mbashe in what became known as the Idutywa Reserve. A special magistrate had charge of them and they were joined by Gcaleka who subsequently came out of hiding in the area or returned from across the Mbashe. Plans to annex the area between the Kei and the Mbashe to British Kaffraria came to nothing in view of the extensive military requirements involved in keeping the area free of the original inhabitants. But Governor Grey argued that even though the colony might be at peace with tribes on the frontier, should they prove unable to keep order amongst themselves, they would frequently erupt over the frontier, pursuing refugees from their internal wars and causing loss of life and property in the colony.

> It is evident that the dangers with which a barbarous race upon our frontier thus threatens our possessions, whether we are at peace or war with them, would be very greatly removed if we could bring them under a system of local taxation and of European magistrates, such as I have described in the first part of this despatch; a broad belt beyond our frontier of quiet, contented, and prosperous natives, under such a system of taxation, even if they were governed by their own

> chiefs, aided by British magistrates, would place our frontier, wherever it might be situated, in sufficient safety.[1]

Therefore in 1864 Sarili was allowed to return to a strip of his original territory along the coast, although it was not to be considered as British land, and a resident, W.R.D. Fynn, was placed with him in July 1865.[2] The rest of the territory was divided between the Thembu from the Queenstown Division,[3] who were given the northern portion and a diplomatic agent, and the Mfengu, who were given a government official as agent and the rest of the land, to relieve the overcrowding in their colonial locations. The Emigrant Thembu were guaranteed independence from colonial rule and told that 'they would be permitted to manage their own internal affairs, in accordance with their own customs and usages, when not opposed to the laws of humanity';[4] but this promise was broken as soon as E.J. Warner, their agent, resigned in 1873. The Mfengu, who were also given a diplomatic agent, were to continue as British subjects of a kind, although they were not to be subject to colonial laws. Their newly granted land was divided into locations and given to headmen, who could bring a certain number of men each to occupy it.[5]

---

1. Cape Parl. Papers, A.102-61, p.3, paragraph 15: Grey to Newcastle, 9th Feb. 1861.

2. From the beginning, the Cape government accepted that where such arrangements were made, white men living in African territory were subject to tribal law. See e.g. Cape Parl. Papers, G.21-75, p.38; Cape, N.A. 305: Advocate Cole's opinion on the Flanagan case, Mar.1882.

3. Only a portion of the Thembu left the Colony. These became known as the Emigrant Thembu or Tambookie.

4. Cape, N.A. 401: E.J. Warner to Ayliff, 17 Apr. 1879.

5. Cape, N.A. 1, pp. 148-51: memorandum on the Mfengu by J. Ayliff.

The Gcaleka not unnaturally resented the Mfengu, of all people, being settled in what had been Gcaleka territory, and this sowed the seeds of future trouble.

Although the British had not annexed the territory, this new arrangement of tribes in the Kei-Mbashe area, each with an agent, offered an opportunity of extending a type of pseudo-magisterial authority into the territory. J.C. Warner, who had been resident with the Thembu in the colony, was made British resident in the Transkeian territories and stationed at the Idutywa with supervisory authority over the other Transkeian agents.[1] When he wrote to the governor for clarification of his and the agents' powers, he received a remarkably frank statement of how the British proposed that British officials should exercise the powers of magistrates, although not legally able to do so:

> His Excellency believes it to be essential to the successful working of the Transkeian Settlement, that the British officers employed there should be perfectly aware that they possess no authority, in the legal sense of the word, derived from the British Government, inasmuch as Her Majesty's Government have deliberately determined to relinquish the possession they obtained of that Country.
>
> The authority of the British officers, must therefore, strictly speaking, be derived altogether from the Chiefs and people with whom they dwell, and by whom any directions or advice they may give must be carried into effect.
>
> But although it is right that these officers should themselves correctly appreciate their position, it by no means follows that they should bring this circumstance prominently into notice, and thus lower their own influence in dealing with the natives.

---

1. When he retired in 1869, his post was abolished and the agents fell directly under the Native Affairs Department in Cape Town. See Theal, History of South Africa since September 1795, v.54.

> Each of the tribes settled in the Transkei looks with more or less jealousy on the others. Each desires to retain the good will of the Government. The leading men set a value on the allowances they receive. The individuals composing each tribe have become alive to the benefit of an impartial administration, and have probably little desire to come under the uncontrolled power of their chiefs.
>
> All these influences will operate to sustain the authority of the British Resident, and to enable him to procure the execution of orders given with discretion, and with a due regard for the habits and prejudices of the Native races.
>
> Whatever acts could be done by a British Officer as a 'Magistrate' can, as respects the Natives under him, be quite as effectually performed by the Resident through the co-operation of the Natives themselves and of their headmen,.....[1]

Acting on this advice, the 'Fingo agent' rapidly became virtually a magistrate, since the Mfengu had been accustomed in the colony to supervision from a white official and, with the hostile Gcaleka for neighbours, had an added incentive to co-operate with their agent. In November 1868 Warner persuaded them to agree to take cases to the agent on appeal, and to enforce his decisions unless the headmen and a meeting of the tribe decided to the contrary. That they did indeed take cases to the agent is indicated by the court figures for 1873, when the 'Fingo agent' decided 340 cases, 301 of which were civil law cases.[2] The government appointed many commoners as well as chiefs by birth to the office of headmen, and possibly the relative weakness of the Mfengu system of chieftainship compared with the situation in other tribes

---

1. Cape, N.A. 5, pp. 92-94: Southey to (?) Warner, no. 94, 8 Nov. 1866.

2. Cape Parl. Papers, G. 27-74, p. 41.

explains why the system worked so well.[1] Matthew Blyth, the second 'Fingo agent', who was apparently held in affection by them though ruling with a very firm hand,[2] even persuaded them to suppress certain practices connected with initiation rites which he thought objectionable,[3] and to accept stringent regulations limiting beer drinking.[4]

Similarly, the influence of the 'Tambookie agent' with the Emigrant Thembu benefitted from the fear of the four Emigrant Thembu chiefs of outside intervention - in this case from the Thembu paramount chief, Ngangelizwe, under whom they had no wish to come.[5] But Sarili resented having to communicate with Cape Town through an intermediary, and neither his resident, the official in the Idutywa Reserve, nor the 'Tambookie agent' had influence comparable with that of the 'Fingo agent'.[6]

The adjoining territory between the Mbashe and the Mtatha was inhabited by the Thembu paramount and his tribe, which had lived there for centuries in constant rivalry with their southern neighbours, the Gcaleka. The Gcaleka, who

---

1. Cf., Brownlee's arguments against a similar arrangement in Thembuland, p. 345 below. On the appointment of headmen, see Cape, N.A. 1, p.150: memorandum on the Mfengu by J. Ayliff. Subsequent files of correspondence from 'Fingo agents' show that the government freely deposed headmen when their behaviour did not meet with government approval.

2. Kaffir Express, vol. i, no.13, 1 Oct. 1871, p.4.

3. Saunders, 'The Annexation', pp. 53-4.

4. Kaffir Express, vol. ii, no.19, 1 Apr. 1872, p.3.

5. Cape, N.A. 401: E.J. Warner to Ayliff, 17 Apr. 1879.

6. Saunders, 'The Annexation', p.54; Cape, N.A. 150: Brownlee to Southey, 23 Oct. 1872. On the Idutywa agent, see pp. 73-74 above.

bore the full brunt of the white thrust northwards, inadvertently acted for the Thembu as a shield against white influences, which may partly explain why the Thembu did not generally participate in the Cattle Killing. Both the sight of white power forcing the Gcaleka across the Mbashe and fear of further Gcaleka attacks would account for the request in 1862 of Joyi, the Thembu regent, for British protection, but this was refused. When Ngangelizwe, a young man with expansionist inclinations, became paramount chief, conflict sooner or later over land which both tribes needed became inevitable.

To try to prevent it, Ngangelizwe's counsellors in 1866 arranged for the Thembu chief to take a daughter of Sarili as his great wife. Unfortunately, in 1870 Ngangelizwe, in one of his periodic fits of fury, so brutally ill-treated her that she fled to her father, permanently maimed. Fearing Kreli's vengeance, the Thembu chief requested the high commissioner to send an officer to reside with him. As a result, in February 1871 E.B. Chalmers was appointed resident with Gangelizwe, initially to prevent hostilities between him and Sarili.[1] Sarili was persuaded to take his complaint about his daughter's treatment to the high commissioner and, after investigations by the residents with the two tribes, the governor in 1871 fined Ngangelizwe forty head of cattle. Although Sarili accepted the fine, both he and his tribe considered it far too slight for the insult Ngangelizwe's conduct represented to the Gcaleka, and feelings between the two tribes were further exacerbated.

---

1. Cape, CMT 1/60: Griffith to Chalmers, 8[illegible] Feb. 1871.

In 1872 Ngangelizwe laid claim to the country of the Bomvana, who were living along the coast north from the Mbashe on land granted to them by the late Gcaleka chief, Hintsa. Moni, the Bomvana chief, had therefore acknowledged Sarili as his titular superior and, when Ngangelizwe raided him, appealed to Sarili for assistance. Sarili promptly swept through Tembuland, destroyed Ngangelizwe's 'great place', and then withdrew at the request of Ngangelizwe's missionary; a chastened Ngangelizwe asked his resident in November for British protection.[1] The governor appointed a three-man commission to investigate the dispute,[2] and it was this situation which confronted the Molteno ministry when it took office.

The Mpondo, who occupied the land north of the Thembu to the Natal border, also first encountered the British in their role of protectors: in 1841 the Cape government sent a 150-man force to protect the Mpondo from the trekkers in the Natal Republic. But this happy state of affairs was not to last. In 1844 a formal treaty was signed between the British and Faku, the Mpondo chief, which recognized Faku as ruler of the entire area between the Mthatha and Natal as far west as the Drakensberg. Unfortunately this did not correspond to the facts: various tribes, notably the Bhaca, Xesibe and Mpondomise, had fled to Pondo territory during the

---

1. U.C.T. Judge Papers, II: handwritten copy of report of commission to investigate the disturbance. The report was not published. See II 39: Edmonstone to Judge, 20[illegible] Aug. 1873.

2. Ibid., II 29: Southey to Edmonstone, 29 Oct. 1872.

mfecane and did not acknowledge Mpondo overlordship once the troubles were past. As Faku was nonetheless held liable for all raids from his territory, even though he did not in practice control the northern portion, he was persuaded in 1850 to sign a deed ceding part to Natal, an act which was to initiate a long history of friction between the Mpondo and British.

The ceded lands included part of the large, sparsely populated area south of the Drakensberg, known as Nomansland, which were also not under effective Mpondo control, and in 1859 Faku allowed Nehemiah Moshweshwe to settle there, between the difficult Bhaca to the east and the Mpondomise to the south. Two years later Moshweshwe consolidated this arrangement by making an agreement with Faku whereby this area became part of Basutoland tribal territories. The British meanwhile believed the land in question was theirs by virtue of the 1850 cession (but Natal was not allowed to annex it until the British government had first made all its arrangements for the area). Grey had authorized Nehemiah's move but also permitted the Griqua under Adam Kok to move from the Free State to the same area. When this duplication was realized, the Griqua were settled in 1862 to the north east of Nehemiah's Basuto on land which Natal also claimed under the cession. When in 1866 Natal was finally allowed to annex the remainder of the ceded land as Alfred Country, Faku rejected the cession as fraudulent and protested against the annexation, claiming that his land was being taken from him. In addition, neither he nor his successor, Mqikela, were happy about the settlement of the Griqua in his territory, for the Griqua had ambitions to dominate the area and clashed frequently with the Mpondo. In early 1865 they chased Nehemiah

Moshweshwe and his Basuto out of Nomansland, allegedly on account of their cattle-stealing activities, and when another group of Basuto, who had lost land to the Free State, settled round Matatiele, the Griqua obtained the acknowledgement of their chief, Makwai, that Kok was their overlord.

While the Griqua were asserting themselves, Nomansland was filling up. Lebenya and his Kwena from Basutoland settled west of Makwai; Lehana led the Tlokwe from the crowded Wittenberg Reserve to settle under the Drakensberg, and another chief from the reserve, a Christian named Zibi, trekked with his Mfengu into the same area near the Gatberg. To the south were Khoi squatters from the Cape Colony. As land became scarcer, boundary disputes increased, and for the weaker chieftains British protection probably offered the only guarantee of the retention of their land and by the prevention of Griqua domination. They were encouraged to ask for British residents both by the missionaries and the sight of how slight an impact British rule had on Basutoland between 1868 and 1870. The British felt free to intervene in the area, for in 1861 Faku had offered to cede to them a belt of country south of the Drakensberg on condition that the British exercised direct rule in the territory. No formal deed of cession was signed, but the British thereafter regarded the option as open to them and (after Responsible Government was granted to their Cape Colony), to the Cape. But Wodehouse was preoccupied with other more pressing matters and declined to extend British responsibility there. His successor, Barkly, appointed a commission to report on the situation in Nomansland and arbitrate in border disputes between the various groups in the area. The commission's arbitration alleviated at least one of the tribes in the

Gatberg area; but neither the commission's report of Griqua misrule, nor Bhaca and Mpondomise requests for British protection could persuade Britain to extend permanent imperial control to the area. With the Cape about to acquire Responsible Government, the Colonial Office wanted to see how the new ministry coped with lately annexed Basutoland before increasing its responsibilities.

b. Cape Rule

On achieving Responsible Government the Cape was faced with the question of whether to extend its rule beyond the Kei or not; Britain was unwilling to enlarge its commitments by extending protection to those tribes which had requested it, but the Cape could do so if Britainagreed. Concern for the stability of its eastern frontier, on both sides of which lived groups of Xhosa and Thembu, settled the question in favour of intervention beyond the Kei. It was thought better to control a whole tribe rather than to be at the mercy of events beyond the Cape's borders which might excite the section of the tribes within the colony. Brownlee therefore stated the ministry's policy to be to extend the Cape's influence and government peacefully to the Natal border, in order to safeguard peace on the Cape's borders.[1] But as stability rather than 'civilizing the tribes' or obtaining more land, labour, or even trade was the basic aim of the policy of extension,[2] implementation of the policy

---

1. Cape N.A. 840: Brownlee to Molteno, 2 May 1873.

2. Though Brownlee was fully alive to the advantages for trade offered by such an extension of Cape influence. See Cape Parl. Papers, G21-75, p. 137.

was to be cautious and slow. As Christopher Saunders points out, if in implementing the policy 'the colony was to provoke armed resistence, its policy would have been, at least in the first instance, counter-productive'.[1] This care not to provoke opposition from tribes east of the Kei was to have important consequences in African law policy. But Brownlee believed too strongly in 'civilizing the tribes' to leave chiefs to their own devices under colonial protection, any more than Wodehouse had proposed to do. No doubt Brownlee was also encouraged by the amount of influence some of the five agents already placed in the Transkeian territories had managed to exert in judicial matters. Therefore from the first the Basutoland policy of gradually weaning the people from the chiefs' courts and slowly modifying tribal law was consciously taken as a model by the new ministry, although it could not legally be imposed prior to annexation.

The immediate problem facing Brownlee and his colleagues was the settling of the dispute between the Thembu and Gcaleka, but they were not called upon to decide whether the Cape should extend British protection to the Thembu: Ngangelizwe withdrew his request. Once a member of the governor's commission explained to him,

> that in handing over his people to the Government he must understand that he would cease to exercise any jurisdiction, authority or power over them, he became very indignant and declared that he never would think of such a thing.[2]

---

1. Saunders, 'The Annexation', p. 100.

2. U.C.T. Judge Papers: 'Memoirs', p. 259, quoted by Saunders, 'The Annexation', p. 107. But Brownlee claimed that an influential and all but nominally independent sub-chief, Dalasile, had 'caused the failure of Gangelizwe's proposal'. See Cape Parl. Papers, G. 27-74, p. 137, and G.T.J., 20 Nov. 1872: article dated 9 Nov. 1872.

It is unlikely, however, that the ministry or governor knew of this when they decided that Brownlee should leave at once for the Transkei to try to bring about a permanent peace settlement between the warring tribes. Only three days after taking up his post, he left for the frontier area. On 2nd January, having waited in King William's Town until he received the report of the commission on the cause of the dispute, he crossed the Kei and induced the two chiefs to make peace, though again on terms which left Sarili dissatisfied. On 20th January the peace treaty was signed and Brownlee returned to the colony in early February, after visiting Fingoland and Bomvanaland.[1] In January the following year he visited areas of the Transkei which he had not seen the previous year, and made further trips to the Transkei in 1876 and 1877. He therefore saw a great deal of the area and had some idea from personal experience of the personalities of the chiefs and magistrates with whom he had to deal, but neither he, his immediate subordinate in the department, nor their successors, were able to assess situations which developed in the Transkeian territories from the same sort of detailed knowledge of the area which Bright was able to supply on Basutoland or Brownlee and Innes on the Ciskei.

Where to gain a foothold beyond the Mbashe was the next problem Brownlee faced. The tribes of the Gatberg area were already, arguably, British subjects by virtue of earlier residence in British territory, were afraid of external attack, and were strategically situated on the colony's border.

---

1. Cape Parl. Papers, A. 10-73.

J.M. Orpen, later to be acting governor's agent in Basutoland, was therefore offered the post of resident at the Gatberg with Lebenya, Lehana and Zibi, with the additional duties of acting as government representative for the whole area beyond the Mthatha. Orpen was instructed to act on the Fingoland model, which recognized tribal law so long as it was not cruel or unjust. A ten shilling hut tax was to be paid from 1 Jan. 1874.[1]

Brownlee subsequently visited the area, introduced a new assistant magistrate to be stationed in Nomansland, and explained to the tribes in detail how they were to be ruled:

> From the time of Mr. Orpen's appointment amongst you, and since you were made British subjects, you must understand that there cannot be two chiefs in the land. Mr. Orpen is here to decide cases between the chiefs and people, and between the people themselves. You are now under British law and British rule. The chiefs may wish to retain the same power that they possessed formerly over their own people but they must distinctly understand that this cannot be. The headman and chiefs may, as of old, decide in small matters, but have no power to enforce decisions, and if the people are not satisfied they must go to Mr. Orpen or the sub-magistrates. These few words embrace your position. When I say that the chiefs and headmen cannot enforce decisions in small matters, I wish it to be understood that they have far less authority in important cases, which must be reported to Mr. Orpen. If they cannot take cattle and other property from their people, they of course, cannot take the life of their subjects, and as British subjects, they will be under no circumstances allowed to take away the life of any of their people; even Mr. Orpen is not permitted to do this; but Government will appoint a tribunal to try cases, and in all probability Mr. Orpen will be the chief of that tribunal. You know well the sentiments of Government about witchcraft. Government will permit no one to suffer on the charge of witchcraft, and I wish you most distinctly to understand this point.[2]

---

1. Ibid., G. 27-74, p. 64: Brownlee to Orpen, 8 July 1873.

2. Ibid., pp. 139-40: Brownlee to Molteno, 15 Apr. 1874.

Orpen, however, was an arch-expansionist. Not satisfied with this beginning, he did his best to hustle the whole of Nomansland under the colonial umbrella. He succeeded in persuading the warring Mpondomise chiefs Mhlontlo and Mditshwa to ask to be made British subjects; and persuaded Brownlee that this extension of Cape protection was the only way to prevent the Mpondo, who had been in alliance with the stronger Mpondomise chief, Mditshwa, from gaining great influence in the area. As the Mpondo were known to be hostile to white encroachment, Brownlee agreed to accept the Mpondomise as British subjects, in what was to be called St. John's Territory. Orpen moved his residence to their land, immediately took steps to suppress witchcraft trials,[1] and began to draft a code of African law to be used in ruling them.[2] More than most magistrates, he could probably have imposed many changes in tribal law, for his success in stopping the endless raids and counter-raids had greatly impressed the Africans in the area;[3] but the code does not appear to have been completed and Orpen was also unsuccessful in persuading the Cape government to extend its protection to other tribes in Nomansland. The Bhaca, for example, first asked for protection in 1873, but their subsequently renewed request was granted only in early 1876.[4]

---

1. Cape, N.A. 399: Nelani-Valtyan to Brownlee, 12 June 1876.

2. Cape, N.A. 159: Orpen to Brownlee, 23 Oct, 1873, enclosing Orpen to Mditshwa and Mhlontlo, 23 Oct, 1873.

3. Cape, N.A. 398: petition from Mfengu for Orpen's reinstatement, 20 May 1875, and covering letter, Goss to Orpen, 20tMay 1875.

4. For their requests, see Cape Parl. Papers, A.105-80, p. 19: Innes to Brownlee, no. 4, 26 Sept. 1873; Rhodes House, MSS Afr. s. 23, ii.104: Probart to Molteno, 12 Oct. 1875.

Jojo and the Xesibe had to wait even longer.[1] The ministry required to be sure that each extension of control would not bring further border disputes in its wake. In 1875 Orpen resigned when the government declined to co-operate in his plans for annexing Griqualand, and his successor lacked the advantage of his reputation as a peace-bringer.

The Mpondomise chiefs, once peace was secured, displayed very similar reactions to those of Basutoland when confronted with magisterial authority in similar situations. And the administration followed the same policy of trying to wean people from them. Orpen informed the tribe that not only were witchcraft trials forbidden and killing for any reason prohibited, but an appeal was to be allowed to him in all cases in the future.[2] Brownlee subsequently elaborated on these rules when he met the Mpondomise the following year, adding that confiscation of property was also forbidden except by the judgment of a properly constituted court, and that chiefs were to have no authority to enforce any judicial decisions. Nor were they to be permitted to keep fines in future; they were to be paid salaries instead.[3] In addition, although the allocation of sites for the kraals of newcomers was to be left in the hands of the chiefs, the recipients could appeal to magistrates in case of injustice.[4]

---

1. See p.355 below. For Jojo's request to the Cape government, see Cape Parl. Papers, A. 105-80, p. 21.

2. Ibid., G. 27-74, pp. 94-5: Orpen to Mditshwa and Mhlontlo, 22 Oct. 1873.

3. Ibid., p. 143: Brownlee to Molteno, 15 Apr. 1874.

4. Ibid., G. 16-76, p. 26.

All these measures were already in force in Basutoland. Mhlontlo did not argue, but Mditshwa from the first challenged these rules. At a meeting with Brownlee on 11 March 1874, the secretary for native affairs silenced but probably did not convince him: after Brownlee had explained the above rules,

> Umditchwa replied that he was satisfied, and had only one word more, and that was in reference to witchcraft. He wished to propose that a compromise should be made in regard to it, that no one should hereafter be put to death for witchcraft, but that the property should be confiscated of those who committed witchcraft, but that they should in no case be put to death. Umditchwa was informed that this could not be done, the decision of Government was already made known, and could not be departed from.
>
> Government did not recognise witchcraft as any offence, and therefore could not permit any one to suffer for what, according to our law, was no offence. We could not act in opposition to our own law, and submission to our laws was a result of their becoming British subjects.
>
> Umditchwa replied:- Shall those who commit witchcraft, then, be permitted to go forth in daylight to destroy us without check or fear of punishment?
>
> Mr. Brownlee replied that Government had taken them over as subjects to protect them, and not to see them destroyed. Many native tribes have for long been under our protection; these tribes formerly put men to death on the charge of witchcraft, but since they became British subjects this had been prohibited and no one can now be made to suffer for witchcraft; still these people did not now die more than they did in the days when they destroyed people for witchcraft; and so it would be with the Pondomisi; they would find no new diseases among them because they could not punish for witchcraft, and they would live just as long as ever they did; for though they put people to death for witchcraft, children, and middle-aged, and old people died and so it would be to the end of time.[1]

Brownlee had more authority than merely the strength of his arguments behind him. The Langalibalele incident was not long past and had provided a timely demonstration of what happened to chiefs who challenged the colonial governments.

---

1. Ibid., G. 27-74, pp. 146-7.

The attention of the Transkeian tribes was focused on the incident by more than Orpen's calling up of a troop of tribesmen from the area to hunt Langalibalele in the Basutoland mountains. As Brownlee explained:

> It is said that Langalibalelo has twenty-seven sons, and it appears that his ancestors were equally prolific in soms, as chiefs of the Hlubi tribe, brothers, cousins, nephews of Langalibalele are to be found in all directions from this Colony to Natal, and in Basutoland. This will to some extent account for the interest taken in Langalibalele by the native tribes; this feeling not having been confined to Fingoes, but was shared in by the Gcalekas and all the tribes between this Colony and Natal; and even now many assert that Langalibalele is still at large, and it is difficult to say what effect a serious disaster on our part would have had upon the tribes beyond our borders.[1]

In addition, with the establishment of peace in the territory under Orpen, missionary teaching began to flourish, and both they and the magistrate received support from the Mfengu who were allowed to move into the territory from Pondoland.[2]

Later that year, according to Orpen, the people began to bring their cases to him.

> The first acts of jurisdiction came about through complaints made by or against Europeans, or people of opposing tribes. They were a cause of great jealousy to the Chiefs, who wished the people to be governed solely through them, which would have given them co-ordinate, or, in practice, superior authority, and made the reign of law impossible.
>
> Umditchwa came to my court, my tent I should say, with his followers, to protest against my interfering between him and his people, and taking their property from them by fines. I called his people within clear hearing, and repeated and elucidated the law I had laid down in my letter, which I had read out in his kraal on proclaiming authority, and told them every man, woman, child, and thing, was under Government law

---

1. Ibid., p. 150: Brownlee to Molteno, 15 Apr. 1874.
2. Ibid., G. 16-76, pp. 26-27.

> and protection, and no power should intervene between them, but that I would be happy if he would assist me in court, as I had invited him to do, or plead the cause of any of his people, and if he wished to oppose he could say so, and I should report it. He thanked me for teaching him and subsided for that time, and I told him he had done well in coming to be instructed in the right place, in court, and I continued punishing offences, and adjudicating, and more and more cases came.[1]

But neither Mditshwa nor Mhlontlo actually intended to accept the government's regulations. Orpen soon discovered that not only were they punishing murder themselves, but were still having people killed for witchcraft and other offences. He tried each of them and the other people involved, as well as another petty chief, Nelani, for another witchcraft murder aggravated by horrible tortures. All, including the two leading chiefs, were fined, and Nelani was banished.[2] After which Orpen reported:

> People are now beginning to bring complaints even against chiefs to me, and I lately obliged Umhlonhlo to give up a fine inflicted for witchcraft, and he appears determined to act in a straightforward way. He brought me a death-fine (Isizi) which had been sent him, publicly accepted his salary of £60 in lieu of fines, and came publicly to describe all the customs of his tribes to his father the Government, and ask which were approved and which disapproved by the Government.[3]

Mhlontlo obviously continued on this course, for the following year the acting resident, F.P. Gladwin, publicly presented a gift of ten head of cattle to him 'in the name of Government as a token of its approbation of all readiness to obey the commands and wishes of Government.'[4]

---

1. Ibid., G. 21-75, pp. 100-1.
2. Ibid., pp. 99, 101-3.
3. Ibid., p. 103.
4. Ibid., G. 16-76, p. 25.

But Mditshwa proved less amenable, probably from having been on the offensive in the wars with Mhlontlo until the Cape had intervened, and therefore less fearful of a withdrawal of Cape protection. In 1875 he protested against giving up the power to enforce decisions, and refused to accept his salary as an indication that he did not consent to forfeit his right to fines and confiscations. He also objected to the appointment of four headmen paid by the government, in his territory, who were to report crimes to the resident and assist him. The appearance of the frontier police in neighbouring Thembuland did produce from him indications of a greater willingness to co-operate, but he remained far from satisfied with the Cape's system of magisterial rule.[1]

Nonetheless, Gladwin was able to add:

> The native tribes have realized the benefit of Government being in the country in the settlement of long outstanding cases and in others where it was impossible to get justice, as in the case of a man of Umhlonhlo's who might have a claim against one of the Umditshwa's and vice versa, a considerable number of civil and criminal cases have been disposed of during the year.[2]

The process was assisted from 1876, when M.B. Shaw was appointed to the magistracy of Mhlonhlo's district, which was named the district of Qumbu. Gladwin was then able to give his full attention to Mditshwa's people.

On the surface, therefore, the Cape's method of rule as developed in Basutoland appeared to be working with the Mpondomise, even though the Cape had no legal right to impose

---

1. Ibid., pp. 22-3.
2. Ibid., p. 25.

it, and the reports from the areas where the British had first established officials were satisfactory too. In July 1874 the Mfengu in Fingoland began paying hut tax of ten shillings per hut, and by 1875 were meeting the cost of the administration of Fingoland. The Idutywa Reserve was also able through hut tax, which it paid in 1874 for the first time, to meet the entire cost of its administration.[1] Even more important, by 1874 the agent there could write:

> Witchcraft is not practised in this country, because a man charged with witchcraft at once reports to this office, and is protected. It is still believed in, and no doubt many petty cases occur, but life is safe.[2]

The following year he noted:

> The people, I think, are rather proud to pay hut-tax; they feel more independent of their chiefs, and more inclined to look to Government alone; the chiefs are aware of this and although they have never had the power in this country to settle cases, or inflict fines, independent of the office, they were inclined to make it a grievance when his Excellency the Governor passed through this country. It is well known the people are saved from much oppression by having cases decided at the Government office.[3]

Ayliff, the agent with Kreli, spoke highly of Kreli's behaviour toward himself as the representative of the government, his willingness to co-operate and entertain all reasonable suggestions, his dislike of taking life and his restrained behaviour when provoked by a white man.[4] Blyth reported from Fingoland: 'I receive every assistance from

---

1. Cape, N.A. 299: De Smidt to the Auditor General, no. 1279, 16 Aug. 1875.
2. Cape Parl. Papers, G. 27-74, p. 43.
3. Ibid., G. 21-75, p. 36.
4. Ibid., G. 27-74, pp. 45-6; G. 21-75, p. 38.

the headman and people in carrying on the duties of my office. The people are, I believe, thoroughly loyal, and favourably disposed to Christianity.[1] In Thembuland Hargreaves, the influential Wesleyan missionary who had educated Ngangelizwe, was kept closely informed by the Thembu of the many little difficulties which constantly arose between Ngangelizwe and his resident,[2] and no doubt, since he desired government rule in the country, did his best to smooth over the difficulties. Fortunately Ngangelizwe to a certain extent discountenanced witchcraft trials and, when one such case appeared in the colonial newspapers, assisted Wright, the new resident, to obtain restoration to the heirs of part of the property of the murdered man.[3]

Even the Emigrant Thembu gave trouble only temporarily, although their influential agent, E.C. Warner, had by then resigned to become a missionary, and their request that their new agent be from the same family had been ignored.[4] At first they had strongly objected to W.R.D. Fynn, the man appointed to replace Warner, since he had spent several years as agent with the hostile Gcaleka and was expected to reflect the Gcaleka attitude. But although he initially faced much hostility and annoyance, he soon won over all but one chief.[5]

---

1. Ibid., p.35.
2. Methodist Publishing House, Hargreaves Papers, Hargreaves diary, 1873.
3. Cape Parl. Papers, G. 27-74, pp. 46-7; G. 21-75, p. 40.
4. Their first agent had been J.C. Warner, who had been succeeded by his son, E.J. Warner, when they removed to the Transkei.
5. Ibid., G. 27-74, p. 135.

By the following year he was able to report that 'several of the Chiefs have given me every assistance to prevent witchcraft being carried on in this tribe.[1]

The tribes in the Gatberg area did not have a magistrate for any length of time before the end of 1875,[2] when J.R. Thomson was appointed to the district, which was renamed Maclear. They gave him no trouble, although Lehana's people had been deprived of their more fertile land by the 1872 boundaries commission, which they believed had been done in a deliberate attempt to break up the tribe. Their resentment left them unwilling to learn the white man's ways,[3] but no serious consequences resulted.

But even in this early period, before legislative delays and maladministration increased the difficulties of implementing the 'Basutoland tribal law policy' in the area, two important factors in establishing the effective administration in Basutoland were lacking in the Transkei. One was a strong and united infra-structure of missionary education and medical services to introduce European ideas and values. The magistrates attacking the institution of witchcraft needed the presence of doctors who could provide the tribesmen with an alternative means of discovering the cause of an illness. Yet until district surgeons were appointed to the territories after they were finally annexed, the Rev. William Girdwood seems to have been the only white doctor practising

---

1. Ibid., G21-75, p.40.
2. Their first magistrate was accidentally drowned shortly after taking up his post.
3. Ibid., G. 16-76, p. 31.

among the Africans of Gcalekaland and Fingoland, and he did not have proper medical qualifications.[1] As Orpen wrote in 1875,

> in these districts where we have put witch-doctors down, I wish Government would station a fully qualified medical man, at once without considering immediate revenue. After a time the practice would pay, and meantime Government would earn the gratitude of the people more than by anything else; and it is worth paying for. At present they feel as Cape Town would feel if all the medical men were banished, and only an inferior druggist left, and this though they knew the witch-doctors were not trustworthy.[2]

Similarly, in attacking tribal institutions the magistrates needed the education provided by missionaries to provide an alternative framework of ideas for tribal societies. But in the Transkei missionaries were completely lacking in some places and in others they were often of several rival missions, with different attitudes to tribal land institutions. In the Idutywa Reserve there were no white missionaries resident in 1874, and the magistrate reported: 'a few native agents have been employed; but their influence for good among a wild people is very little.'[3] In Gcalekaland there was in 1874 one resident missionary and another expected to arrive shortly. Four or five schools were run by African teachers belonging to different denominations, but were sparcely attended. The agent reported that there was no open hostility shown to Christianity - 'far from it.

---

1. Cape, N.A. 401; letters of 11 Oct. 1879 and 3 Sept. 1880; N.A. 1, pp. 242-7: Blyth to Ayliff, no. 43, 8 Nov. 1878 and enclosure.

2. Cape Parl. Papers, G. 21-75, p. 113. When Orpen referred to an inferior druggist, he probably had in mind African herbalists in tribal society, with whom the magistrates did not interfere.

3. Ibid., G. 27-74, p. 42. By 1875 the government agent reported that there were six schools, four supported by the government. See G. 16-76, p. 59.

Missionaries and teachers are generally treated with respect; but there appears to be simply a disinclination to embrace Christianity.'[1] In Emigrant Thembuland there were six mission stations of various denominations and their outstations, but the agent made no mention of schools.[2] Thembuland proper also had several mission stations. In 1874, apart from the Wesleyans under Hargreaves at Clarkebury, with their outstations, the Church of England had two missions and several outstations and schools, and the Moravians had one station and another in the course of formation.[3] But only in Fingoland had education made great progress. Apart from the 46 schools in existence in 1874,[4] the Mfengu collected half the £3000 needed to establish an educational institution of the same type as Lovedale,[5] and it was opened in 1877.

The Cape Native Blue Books, from which these figures were taken, also provide an indication of the wide differences of opinion among the missionaries in the area as to how far legislation should be used to alter 'undesirable customs': the missionary with Mditshwa's people did not think it advisable to interfere with African customs by legislation, except in cases where they were 'offensive to

---

1. Ibid., G. 27-74, p. 44. By early 1876 there were two missionaries with a third expected, and six schools. See G. 21-75, p. 37.
2. Ibid., G. 21-75, p. 40.
3. Ibid., G. 27-74, p. 47.
4. Ibid., G. 21-75, p. 34. By 1875 several new schools had been established. See G. 16-76, p. 51.
5. Ibid., G. 27-74, p. 149.

society, as public nakedness',[1] while at the other end of the scale, the Moravian missionary with the Gatberg tribes believed that the colonial law of monogamous, civil marriage should be enforced at once, marriage-cattle cases should be ignored, and the chiefs' jurisdiction in such cases should be excluded.[2] It seems unlikely that, with opinions so divided among themselves, the missionaries in the Transkei would have had much direct influence on government policy in the area. But they could have caused local variations in magistrates' application of tribal law to converts, with all the confusion which that entailed.

That even this was possible was due to the second important factor missing in the Transkei as opposed to Basutoland: central control was lacking in the country. There was no equivalent official to the governor's agent in Basutoland, and no code of regulations similar to those introduced into Basutoland as soon as magisterial rule was established.[3] How far colonial law was introduced when cases were decided was in practice very much a matter for each official to settle on the basis of the situation in the tribe with which he was stationed. Each official had orders to observe the rudiments of tribal personal law, not to enforce the death sentence, and to punish witchcraft allegations. Some officials, such as those with the Thembu and

---

1. Ibid., p. 32.
2. Ibid., pp. 33-4.
3. There was not even a code for any part of the territories.

Emigrant Thembu, in practice had very little power to hear cases or intervene in legal disputes.[1] At the other extreme, there is evidence that Blyth, the 'Fingo agent', took to himself exclusive jurisdiction in cases of rape, attempted rape, assault, and probably cases where white men were the plaintiffs.[2] Where cases were brought to officials, they had very little official guidance as to how far they could try to introduce Christian values. The Cape government, for example, widely distributed a circular in Xhosa from Brownlee expressing the government's disapproval of initiation ceremonies,[3] but magistrates were not ordered to refuse to hear cases arising from such ceremonies, and there is no evidence of how many, if any, magistrates felt able to do so on the strength of it. Since the general order to officials was to enforce tribal, not colonial, law when they tried cases, Christian converts apparently suffered on occasion; although there is evidence that the colonial government would intervene, even in sensitive Gcalekaland, where it heard of cases in which it thought an injustice was being done to converts through the enforcement of tribal law.[4] Some officials, such as Orpen's successor, did at their discretion apply colonial law 'in the case of Europeans and other civilized people'.[5]

---

1. As regards the Thembu, see ibid., G. 16-76, p. 47. As regards the Emigrant Thembu see p. 372 Below.

2. Cape, N.A. 154: William Nqikelano to (?) Brownlee, 22 Feb. 1876; Blyth to Brownlee, no. 14, 24 Feb. 1876; Liefeldt to Brownlee, no. 33, 13 Apr. 1876.

3. Cape Parl. Papers, G. 16-76, p. 26.

4. Cape, N.A. 399: Agnes Duma to (?) Brownlee, 16 Nov. 1876, and accompanying report by Ayliff and minute by Brownlee, 14 Dec. 1876. Brownlee laid down that a woman should be allowed to inherit in her own right if her Christian father had so provided in regard to his property.

5. Cape Parl. Papers, G. 16-76, p. 26.

Africans living on mission stations generally had their cases settled by the missionary according to the station regulations,[1] or sometimes the station regulations were treated by the magistrate as municipal laws and enforced in court. But with so many different mission societies operating in some areas, certain agents probably objected to enforcing in their courts the contradictory rules of the various societies.

Legally, regulations could not be proclaimed for a territory until it was annexed, and in 1875 steps were finally taken to place some of the Transkeian territories more firmly under Cape control and in a similar position to Basutoland.

The annexation of Nomansland to the Cape sooner or later was considered desirable, especially as it would join the Cape and Natal and facilitate Carnarvon's scheme of confederation. Fingoland and the Idutywa were the other two obvious areas for annexation, since residents were already stationed there and the tribesmen involved were friendly to the Cape. In 1875 the Cape Parliament requested permission to annex these three territories, and in response the draft letters patent supplied by London required the Cape legislature to annex the territories by act of parliament and to extend Cape law to them. However, Jacobs, the Cape attorney general, realized the impossibility of applying

---

1. But in 1880 missionaries coming under the Bishop of St. John's were specifically forbidden to act as magistrates, although they could continue to act as arbitrators. See Cape, N.A. 1147: 'Directions for the missionary' and 'Proposed regulations for the more effectual and better management of Natives on mission stations, or native Christian villages', encl. in Bishop of St. John's to Stanford, 24 July 1881.

Cape law in such an area and queried the London decision. The situation was after all very different from even the Cape border divisions. Jacobs favoured applying the Basutoland model, with Cape law only gradually introduced,[1] but Carnarvon believed that the establishment of Responsible Government rendered the case somewhat different from that of Basutoland, and required that the Cape Parliament should be more directly connected with the laws of the territories.[2] Eventually, however, he agreed to the compromise formula that on annexation the Cape law in these territories should be subject 'to such restrictions, alterations and additions as may be specially provided to meet the circumstances of the case.'[3] This in practice gave the Cape a free hand to introduce regulations of the Basutoland type, but the argument had delayed the drafting of the final letters patent, and they arrived too late for the Cape Parliament to annex the territories during the 1876 session. This was only the first of many delays in annexing Transkeian territories, which were to interfere increasingly with the administration of justice and the application of colonial law.

In the same year the Molteno ministry blundered, as it never did in Basutoland, in the way it sought to bring a tribe under the rule of its magistrates. The sequence of

---

1. P.R.O., C.O. 48/478: memorandum by Jacobs, 23 Feb. 1876, encl. in Barkly to Carnarvon, no. 20, 25 Feb. 1876.

2. Ibid., minute by Carnarvon, 26 Nov. 1876, on Barkly to Carnarvon, no. 20, 25 Feb. 1876.

3. Ibid., draft reply, 31 Mar. 1876, to Barkly to Carnarvon, no. 20, 25 Feb. 1876.

events began when Ngangelizwe's uncontrolled actions led to the reception of the Thembu as British subjects: on his orders a niece of Sarili, who had accompanied Sarili's daughter on her marriage and was still living at his kraal, was beaten to death. It is uncertain whether this order was prompted by his ungovernable temper or by a deliberate intention to provoke the Gcaleka into war (for which the Thembu were unprepared);[1] but he was then faced with the unwelcome prospect of a probable attack by the Gcaleka, followed by defeat and loss of territory as a likely result. This prospect did not please the Cape ministry either, for it had no wish to see the hostile Gcaleka gaining more land and dominating the area.[2] So when, at the prompting of Hargreaves, Ngangelizwe again appealed for protection, the Cape ministry agreed to accept the Thembu as British subjects. It suited the Cape's basic expansionist policy anyway. But Sarili was yet again baulked of revenge, and the majority of the Thembu were unhappy about their change of status. Dalasile, chief of the Qwati in north-west Thembuland and merely a nominal vassal of Ngangelizwe, agreed to become a British subject only after being persuaded by the Anglican missionary resident with him. Extension of Cape rule to the

---

1. Many of Ngangelizwe's people thought his conduct resulted from fits of hereditary, temporary insanity, but Wright, his resident, believed he did it to force the Thembu to fight another round with Sarili to wipe out the disgrace of their earlier defeat and that only when his own chiefs demonstrated their lack of support for him, did he ask for British aid. See Rhodes House, MSS Afr. s. 23, ii.57: Arobart to Molteno, 12 Aug. 1875; ii. 48-50: Wright to Molteno (private and confidential), 11 Aug. 1875.

2. Cape, N.A. 294: memorandum by Brownlee, no. 555, 11 Aug. 1875.

Thembu therefore not only further aggravated relations with Sarili, but also left the Cape government with less of a free hand in imposing conditions than was the case in Basutoland and with the Mpondomise.

It was Hargreaves who actually drafted the conditions under which the Thembu were received: among others, the chiefs were 'to exercise authority and settle law suits (except cases of murder, crimes arising out of the charge of witchcraft, Serious Assault, and theft from other tribes and from the Colony), within their own section, subject to right of appeal to the Magistrate.'[1] The conditions also included a provision that Ngangelizwe and his sub-chiefs should be recognized and paid salaries, but to this the Cape government would not consent: Ngangelizwe was to be deposed. The Thembu agreed.[2] In mid-1876 the Cape Parliament passed a resolution advocating the annexation of Thembuland. On the recommendation of a special commissioner appointed to settle the new form of government, a chief magistrate and three assistant magistrates were appointed to act as government representatives in their area and to recognize African law.[3] Although legally they came under the high commissioner, the Native Affairs Department exercised full control on his behalf; the Cape regarded annexation as an imminent formality.

It was then that problems began to develop. Britain decided to insist that the Cape annex Griqualand West as well as Thembuland, but the Cape was unwilling to relieve Britain

---

1. Dalasile agreed to similar terms, with extra conditions. See Cape, N.A. 307: conditions accepted by the Thembu and Dalasile, encl. in Elliot to Innes, 2 Aug. 1883.

2. Cape, CMT 1/60: Brownlee to Bowker (telegrams), 31 Oct. and 4 Nov. 1875.

3. Wright, the resident with Ngangelizwe, was appointed as first chief magistrate.

of that tiresome responsibility. Then, in Thembuland the Thembu chiefs were not taking easily to Cape rule. Large numbers of cases had soon been brought before Wright by their subjects,[1] and they alleged that the Cape was acting in bad faith in allowing its magistrates to sit as courts of first instance as well as appeal.[2] But Brownlee insisted that this feature should be retained. As he explained to Hargreaves in April 1876:

> It is quite natural to suppose that the chiefs will make an effort as far as possible to secure our protection, and at the same time to retain full and arbitrary power over their own people. In this way the proposal that all cases should go before them, before they go to the Magistrate, would to a great extent retain in the hands of the chiefs the full power they now possess, for most men after having taken their cases to the chiefs would either consider themselves bound to abide by their decision, or would be willing to bring upon themselves the discredit of appealing against the decisions of the chief, even though they felt themselves aggrieved, and thus the power and influence of the magistrate would be greatly weakened, and whenever a case passed through his hands he would be brought into direct antagonism with the chief, and thus a constant feeling of irritation would be kept up between the magistrate and the chief. In our arrangement we have followed the analogy at present subsisting between chiefs and people. Every suitor has the right to take his case either to a subordinate or the supreme tribunal as he sees fit, and this is the position we have taken.[3]

The resentment this attitude aroused almost certainly helped to produce the situation Brownlee described in July 1876:

> Gangelizwe feels sore at having been deposed, and, though at first he had very little sympathy from his people, a reaction has now set in, and the national veneration for the person of the chief, has induced

---

1. Rhodes House, MSS Afr. s, 23, ii. 171: Brownlee to Molteno, 2 Mar, 1876.

2. Cape Parl. Papers, G. 39-76, pp. 44-5.

3. Cape Parl. Papers, G. 12-77, p. 171: Brownlee to Hargreaves, 15 Apr. 1876.

> many of the Tembus to overlook the atrocities of Gangelizwe, in consequence of their freedom from them for the last year, and more especially on account of his humbled position.[1]

By November 1876 Thembu disaffection was so great that the Cape government decided to recognize Ngangelizwe as Thembu paramount, subject to the conditions of the previous year.[2] This was viewed by Britain as an admission of the Cape's inability to rule the area, and as a result it further delayed the annexation of the territory. The British government had to be reassured that Ngangelizwe was restored to his title and precedence as 'paramount chief' merely as an agent and subordinate of the government, limited like the other chiefs to jurisdiction in only minor matters, and even then concurrent with that of the magistrate. It was also informed that Ngangelizwe's jurisdiction extended only over his own branch of the Thembu, 'who form a minority of the Tribe'. Barkly wrote reassuringly that,

> this arrangement, which is precisely that under which Letsie the Paramount chief of the Basutos has lived for several years past, is found very convenient in smoothing the transition from Native to British Law, since under it a chief who enjoys the confidence of his people ratains a fair share of authority, while the Magistrate is relieved for the most part from deciding claims for quasi-feudal services or other questions dependent on tribal custom.[3]

But he could not disguise the fact that Ngangelizwe had been re-instated to prevent a Thembu rising, and that the Cape had misjudged how fast it could push the Thembu along the road to a magisterial take-over of the chiefs' authority.

---

1. Ibid., p. 148: memo by Brownlee, 14 July 1876. Brownlee had foreseen in April that the dissatisfied chiefs would support the movement. See pp. 171-2: Brownlee to Hargreaves, 15 Apr. 1873.

2. Ibid., pp. 178-80: Brownlee to Wright, 16 Nov. 1876.

3. P.R.O., C.O. 48/484 (Individuals): Barkly to Herbert, 6 Aug. 1877.

By their treatment of the paramount, they had given the chiefs an issue on which they had been able to unite the people behind them.

Attempts to increase colonial control in Griqualand East also aroused violent opposition and led to another blunder by the Molteno ministry's officials. At the end of 1875 Adam Kok died, and the Cape government refused to recognize a successor. Nor would it continue the temporary arrangement negotiated early that year whereby T.A. Cumming, a Cape official, had with Griqua agreement been appointed to act as co-ruler and magistrate of the country with Adam Kok. Blyth was appointed to Griqualand East as chief magistrate, and soon afterwards assistant magistrates under him were placed with tribes in the area, including the Bhaca. But the Griqua objected both to having a chief magistrate imposed on them and to Blyth as an individual, for his reputation for toughness had preceded him. Blyth, who was accompanied by a strong police force, promptly arrested two of the dissidents and disarmed others, forcing the Griqua dissatisfaction underground until it boiled up again in an abortive revolt in 1878.

But this was not the end of Blyth's troubles. Nehemiah Moshweshwe, who was living in Lebenya's location and still fighting to reclaim his Matatiele lands from which Adam Kok had driven him, objected even more strongly to the Cape's claim to authority in the area. A commission in 1875 had enquired into and rejected his claim, but by the end of 1875 many of his followers had returned to Matatiele and his influence in the area was increasing. When Cumming had ordered him to surrender some cattle allegedly stolen by his people, he had refused to do so on the grounds that

Cumming had no authority in the territory until such time as it was annexed. He and Tsekelo (the latter on his unauthorized leave from the Basutoland police) then proceeded to travel round the northern Transkeian territory seeking support for Nehemiah's claim and urging resistance to Cape encroachment.[1] Blyth, on his arrival, had them arrested and forbade Nehemiah to cross east of the Tina River without a pass. But six months later he and Nehemiah clashed again, this time over Nehemiah's followers refusal to obey Blyth's orders: a group of Basuto at Matatiele refused to obey a summons to the magistrate's office, and, when Blyth went to arrest them, put up an armed resistance before fleeing into the Drakensberg. Nehemiah, although he had been away in Lebenya's location at the time, was nevertheless held responsible; Blyth was, as has been pointed out, a very emotional man[2] and had obviously been exasperated by Nehemiah's activities. Nehemiah was arrested and, in April 1877, charged with inciting his people to rebellion. The trial, which was held in the colony, caused much excitement. As some of the men involved in the disturbance had already been fined and released, the trial appeared most unjust according to African law principles. As the Little Light of Basutoland explained:

> According to native custom, if it can be proved that they acted on Nehemia's orders, they are not guilty; the guilty one would be their chief; if they acted on their own responsibility, then they have been judged, and found guilty; then what can Nehemia's guilt be?[3]

---

1. Rhodes House, MSS. Afr. s. 23, ii. 146: Probart to Molteno, 25 Jan. 1876.

2. See p. 303 above.

3. Little Light of Basutoland, no. 2, February 1877, p. 3.

Although Nehemiah was acquitted on a technicality, the chief justice pointed out that the evidence did not incriminate him anyway. Many Transkeian officials feared that this verdict would bring white rule in the Transkeian territories into contempt, and it did add to the dislike and distrust with which the Basuto in the Matatiele district regarded magisterial rule - the fruits of which were to be reaped later.

It seems very unlikely that Blyth's administration of justice would have been popular with the other tribes of Griqualand East either. He continued the Griqua practice of sentencing men convicted of certain offences to corporal punishment, and also introduced a number of innovations which could not fail to be unpopular: imprisonment with or without hard labour and spare diet;[1] the foreign concept of the prescription of claims,[2] a very odd idea to a society which thought of claims resulting from marriage contracts in terms of several generations; the award of money damages to women in their own right;[3] and allowing women to bring actions themselves - in rape cases at least.[4]

But despite indications of opposition to Cape rule in Nomansland, in 1877 the bill for the annexation of Nomansland, Fingoland and the Idutywa was passed, and what discussion there was in Parliament hardly touched on the form Cape rule was to take.[5] Brownlee advocated annexation on the grounds

---

1. See Cape CMK 3/30: civil and criminal cases before the chief magistrate, Griqualand East, 1876 April-1879 July.
2. Ibid., Qobisile vs. Mayiso, no. 179, 3 Aug. 1877.
3. Ibid., Momoleleki vs. Kobotwane, Tom and Nyatoo, 9 Sept 1878
4. Ibid.
5. Cape Argus, 5 June 1877: debate of 4 June, quoted in Saunders, 'The Annexation', pp. 160-162.

that it was necessary for the defence of the Colony, the safety of which would be ensured by undermining the power of the chiefs and extending commerce and civilization. The Basuto claim to part of Nomansland as a result of Faku's grant was virtually ignored. As in Basutoland, Cape laws could be extended to the territories, but law could also be made by proclamation.[1] As Basutoland was already being used as a model by the administration in the territory, the bill did not involve any great changes in practice; it merely legalized many practices 'already in force'. But the Cape ministry had by then realized that the Transkeian territories were different from Basutoland in a number of important respects. The whole system which it approved was regarded as merely temporary, to be reconsidered when Thembuland was also annexed. That Thembuland's annexation would be delayed till 1885 and that the 'temporary' system would survive for over seventy years was not foreseen.

Regulations on the Basutoland model should have been issued in early 1878, as soon as the royal assent to the Annexation Bill was received. Blyth, the chief magistrate for Griqualand East, had already sent Brownlee an annotated copy of the Basutoland regulations, adapting them to the conditions in Griqualand East,[2] when suddenly attention was diverted elsewhere. In 1877 the ninth frontier war broke out as a result of the Cape sending troops to defend the Mfengu after skirmishes had occurred between Mfengu and

---

1. Act 38 of 1877.

2. He made few changes and introduced none of importance affecting personal or criminal law. See Cape, N.A. 284, pink folder: annotated copy of Basutoland regulations.

Gcaleka. Sarili decided to attack the Mfengu and their white allies, and the war subsequently spread to the Ngqika location in the colony, a large section of the Thembu location in the Glen Grey District, the Griqua in Nomansland and Griqualand West, and along the Cape's northern boundary into Tlhaping country. As Christopher Saunders points out:

> All the African groups involved in the wars and rebellions of the late 1870s had experienced or feared loss of land. All were beginning to feel the deep impact of the forces driving men out to labour on mines, railways or white farms.... There was a common desire to stem the tide of white control everywhere rolling in.... On the African side, the wars were attempts to regain what was left of the fading power of African societies to fashion their own destinies.[1]

It is impossible to estimate with accuracy how far the changes imposed on tribal law and administration caused this revolt, but these changes would have been part of the fabric of the changed society against which the tribes were making a desperate stand. As shown above, the colonial Thembu and Ngqika were dissatisfied with recent attempts to impose colonial law on them.[2] The Gcaleka, who led the war, had seen themselves slowly surrounded by territories under at least de facto Cape rule, and had lost more land in the process. Their own resident, Eustace, to Sarili's chagrin,[3] had been appointed without any consultation of the tribe, emphasizing their loss of independence. Despite Sarili's objections, the Cape government had offered salaries to some of the chiefs in an attempt to undermine his authority over them.[4]

---

1. Saunders, 'The Annexation', pp. 167-8.
2. See chapter 4.
3. D.B. Hook, With Sword and Statute (London, 1906) p.228.
4. Cape, N.A. 154: W.W. Fynn to Brownlee, no. 80, 5 Aug. 1876 and no. 95, 30 Sept. 1876.

Their neighbours and vassals, the Bomvana, had been detached from Sarili by placing a sub-agent with them in March 1877, and then subsequently, at their request, accepting them as British subjects.[1]

The war highlights yet another way in which the Transkeian territories were inherently more difficult than Basutoland for the Cape to rule. In Basutoland the enforcement of oppressive measures was the only way in which the people were likely to be united behind their chiefs once government had gained a certain degree of popularity; in the Transkeian territories an additional complication was provided by the fact that certain tribes were traditional enemies of other tribes. If the commoners of a tribe identified the Cape government with a traditional enemy, then however popular their resident had been, they were likely to follow their chiefs into battle against the government. The Cape, by coming to the defence of the Mfengu, undermined its policy with the Gcaleka as surely as disarmament was to undermine its much more entrenched position with the Basuto. The Ngqika, already antagonized by clumsy implementation of Cape policy, had answered the call of their paramount chief, Sarili; and the section of the Thembu which rebelled had, as a result of the Xhosa rebellion, been presented with an opportunity of throwing off Cape rule while the Cape had its hands full.

---

1. Rhodes House, MSS Afr. s. 23, ii. 141-3: Probart to Molteno, 16 Jan. 1876; ii. 124-7: Brownlee to Molteno, 4 Mar. 1876; Cape Parl. Papers, G. 33-79, p. 93; Cape, N.A. 307: Elliot to Innes, 2 Aug. 1883.

But the results of the war and revolts were the opposite of what they had been intended to achieve. The evidence indicates that, although the governor and Cape government had no desire for war and were caught unawares by its outbreak, after the Gcaleka attacked the colony Frere became convinced that African military power in South Africa must be broken.[1] On 5 October the high commissioner deposed Sarili by proclamation and proclaimed his country forfeit. Moreover, as a result of disagreements with Molteno and his ministers about the conduct of the war, he dismissed the ministry in February 1878 and appointed the less liberal Sprigg. When, unlike the Basuto war some years later, the Cape forces achieved a complete military victory, Sprigg's ministry was able to introduce resolutions in the 1878 session of Parliament to annex conquered Gcalekaland and also occupied Bomvanaland, which had been ceded to the government by the chief, Moni. The Ngqika, including many who had remained loyal, lost their locations in the colony. Many sought refuge on Ciskeian farms but over 7000 were settled in southern Gcalekaland, in villages, which allowed for greater magisterial control. M.B. Shaw was appointed their magistrate at Kentani. Most of the Gcaleka were re-settled north of them under Frank Streatfeild in a fraction of their originally much reduced territory, now designated the magisterial district of Willowvale. Magisterial control of the whole area was strengthened by the creation of three

---

1. Saunders, 'The Annexation', pp. 166-7.

chief magistracies, made in anticipation of the annexation of Gcalekaland, Bomvanaland, and Thembuland: the chief magistracy of the Transkei was composed of Gcalekaland, Fingoland and the Idutywa; that of Thembuland included Bomvanaland and Emigrant Thembuland, and that of Griqualand East - to which Brownlee was appointed - included Xesibe territory and all the land to the Gatberg.

Even greater changes than these were advocated by Frere. With his plans for confederation in mind, he advocated that the entire area between the Cape Colony and Natal should be formed into a province ruled by a chief commissioner, Cape officials, and a provincial council of Africans and whites. He added that 'the principles of the administration and of the law administered must be everywhere those of modern civilisation, not of Kaffirdom, embodying the ruling ideas of the English, Dutch, and Roman law-givers, not of the Kafir Chief and his councillors.'[1] The Sprigg ministry, however, had its hands full with the settlement of the territories and, during 1879, the Moorosi rebellion; so the magistrates were left to continue to administer African law.

In part of the territories, however, Frere did implement a policy of his own which was for many years to hinder all attempts to implement the Cape's policy on tribal law in that area: he decided to play off one faction of the Mpondo against another in order to obtain Port St. John's, which he believed Britain should possess for both strategic and commercial reasons. Relations between the Cape and the

---

1. British Parl. Papers 1878, lvi (C.2144), pp. 165-8: minute by Frere encl. in Frere to Hicks Beach, 4 June 1878.

Mpondo paramount deteriorated sharply, owing both to Frere's machinations and Blyth's personality. The influential widow of the Reverend Thomas Jenkins, Wesleyan missionary to the Mpondo, wrote to Ayliff from Pondoland:

> How is it that ever since Natal has been a Colony which is now upwards of thirty years the Pondos have been their border Tribe yet they live in peace with each other [along] a border that has neither Police or Soldiers to guard it - but no sooner does the Cape Government take over Griqualand, and Captn. Blyth at the head of affairs, than, there is always something wrong that the Chief does or says. Captn. Blyth distrust the Chief and he in return dislikes Captn. Blyth.
>
> Captn. Blyth has summonds [sic] Umqikela to a meeting on the 14th May at Kokstadt ... There are two things I am told to be demanded of the Chief in the meeting that is to take place first the suppression of witchcraft but it is utterly impossible to put it down all at once; also that he must consent to a British Resident in the country that [sic] I think if a suitable person was appointed would be a blessing to the Tribe, but then let it [be] voluntarily and not forced.[1]

The upshot was that Frere seized Fort St. John's in July 1878 and Jojo, chief of the Xesibe, obtained British protection and a Cape magistrate who came under the authority of the chief magistrate of Griqualand East.[2] Nqiliso, chief of the Western Mpondo, was recognized as the equal of the Pondo paramount, Mqikela,[3] and Frere by proclamation invited the minor chiefs to disregard Mqikela's authority. Nqiliso was also given a resident who was to exercise 'no authority of a judicial kind in Pondoland' but soon clashed with Nqiliso about his jurisdiction over white men in the

---

1. Cape, N.A. 400: Mary Jenkins to Ayliff, 11 May 1878.

2. Although a Cape administration was established in Xesibe country, neither the reception of Jojo nor the establishment of an administration was ratified by the Cape parliament or imperial government until 1886. See G.M. Theal, History of South Africa, 1873-1884 (London, 1919), i. 166-70.

3. Cape, N.A. 307: Agreement with Nqiliso, 17 July 1878, encl. in Elliot to Innes, 2 Aug. 1883.

territory.[1] The Anglican missionary to the Mpondo, Oxley Oxland, was appointed British resident in Mqikela's territory against Mqikela's wishes,[2] and found his position even more difficult than that of Nqiliso's resident: the Mpondo bitterly resented the seizure of Port St. John's, other British action in the area, and the imposition of a resident. Nor did Oxland improve matters: the Mpondo alleged that he consistently misrepresented them. They also pointed out that the Cape had no right to depose Mqikela as paramount chief, and that 'it was only the extremely passive and submissive attitude maintained by Mqikela, in spite of the many attempts that have been made to draw him into war - that has prevented his country sharing the fate of other Native Countries i.e. being annexed to the Cape Colony.'[3]

Both the Scanlen ministry and Governor Robinson subsequently admitted that the Cape removal of the Xesibe country from Mpondo protection was illegal and indefensible, and the Scanlen ministry offered to pay compensation;[4] but the Mpondo insisted on the return of the territories,[5] and this the Cape would not consider. Oxley's position continued to become more uncomfortable, until in 1883 the Cape attempted

---

1. Cape, N.A. 295: Nqiliso to Ayliff, 27 Nov. 1879.

2. Mqikela agreed to accept a resident only after much pressure had been exerted. See Cape, G.M.T. 1/147: Oxland to Blyth and Elliot 15 July 1878.

3. Rhodes House, MSS Br. Emp. s. 18, C.141/302 and 302a: Hamilton McNicholas to Chesson, 3 July 1884; C.141/303: Hamilton McNicholas to Chesson, 16 Aug. 1884.

4. Ibid.; British Parl. Papers 1882, xlvii (C.3112), pp. 89-92: minutes of ministers and governor, 3 Dec. 1881, encl. in Robinson to Kimberley, 5 Dec. 1881.

5. British Parl. Papers 1884, lvi (C.3855), pp. 8-13.

to impose a commission to decide the Xesibe-Mpondo border. This provoked renewed objections from Mqikela,[1] and Oxley was removed by the Cape government. Owing to the antagonism to him throughout his term of office, he had had virtually no effect on tribal law or its administration.

In the rest of the Transkeian territories, after the defeat of the 1877-8 war and the creation of the new chief magistracies, a re-arrangement of personnel took place which enabled the Cape to tighten its control of tribal law administration in the conquered tribes. Blyth was transferred back to the Fingoland area on promotion as the new chief magistrate of the Transkei. The people for whom he was responsible included the recently conquered Gcaleka and Ngqika tribes, who had long had a reputation for more firmly than any other tribe within the Cape sphere of influence withstanding 'civilizing' pressures. But Blyth was not the man to apply tribal law tamely, without trying to change it as rapidly as possible. With the approval of the secretary for native affairs,[2] at his first meeting with the newly arrived Ngqika, he produced a set of regulations which prohibited the custom allowing boys at the time of their initiation unusual latitude of conduct. They also banned 'the indecencies and dances attending the Intonjani', although not actually prohibiting initiation itself.[3]

---

1. Rhodes House, MSS Br. s. 18, C.160/181: Mhlangaso (for Nqikela) to Oxland, 27 October.1883.

2. Cape, N.A. 2, pp. 106-8: Blyth to Ayliff, no. 141, 18 Dec. 1878.

3. Cape, N.A. 1, pp. 163: Blyth to Ayliff, no. 7, 2 October 1878.

And his instructions to Shaw included the provision that 'no headman or chief will be permitted to hear or decide any case, but all cases will be brought to the magistrate whose decision shall be final in all cases under the value of £2', allowing for an appeal to the chief magistrate in all other cases.[1] The African court system of messengers who received part of the fine was to be replaced by the colonial system of police messengers receiving no reward beyond their salaries for their court duties, and fines were to be the property of the government in assault cases. Even in adultery cases part of the fine was to go to the government, and all fines were to be paid in money where possible.[2] As Gcalekaland was not yet annexed, the regulations could not legally be enforced, but the tribesmen could not know this and Blyth was able to report that the lately defeated Ngqika displayed a 'very good and contented feeling' about the proposed changes.[3] But when he announced similar changes at a meeting in the Idutywa Reserve, his ban on 'white boys' and Intonjane dances met with opposition from a leading headman and others,[4] an opposition which continued to

---

1. There is evidence that this regulation, and presumably the others were at the same time extended to Fingoland too. See Cape, N.A. 9, pp.225-6: Blyth to Ayliff, no.153, 20 May 1881.

2. Ibid., pp.161-4: Blyth's instructions to Shaw. There is also evidence that the new administration proceeded to treat infanticide as an offence. CMT 1/130: preliminary examination of Nomana and others, court of resident magistrate, Idutywa Reserve, 26 Apr. 1879; see Cape N.A. 5, pp. 282-4: Blyth to Bright, no.391, 22 Dec. 1879.

3. Ibid., p.163: Blyth to Ayliff, no.7, 2 Oct. 1878.

4. Ibid., pp.227-39: minutes of meeting held in the Idutywa Reserve, encl. in Blyth to Ayliff, no.41, 8 Nov. 1878.

manifest itself in a disinclination to obey the regulations.[1] And a few months later Blyth, on a visit to the Ngqika, found them less satisfactory too. 'I regret to observe a strong inclination on the part of many of the Gaikas to throw off all restraint, and plunge deeper into barbarism than ever', he wrote, adding with the severity for which he was renowned, 'but this feeling must be met by stringent regulations, and more complete supervision by their Magistrate as well as by the establishment of more Schools and increased Missionary efforts'.[2] Although by early August 1879 Blyth was able to report that his regulations to modify the initiation ceremonies were having effect,[3] he also reported that some of the Mfengu wished to move to Thembuland to escape his regulations on such matters as initiation and the wearing of clothes. He therefore advocated that the regulations should be extended to the other Transkeian and colonial districts where they were not in force, for he pointed out:

> the natives here think it hard that they should be subjected to laws here which are not in force anywhere else and I am naturally considered hard and have some difficulty at times in having the law fully observed.[4]

This was done for Gcalekaland in 1879,[5] but not for Thembuland.[6] The records for the chief magistracy of the Transkei indicate a much greater degree of compulsion being used to implement the Cape's tribal law policy than was

---

1. Cape, N.A. 4, pp.1-25: Blyth's report on the social and political condition of the Transkei and encl. report from T. Merriman, 3 July 1879.
2. Cape, N.A. 3, pp.162-3: Blyth to Ayliff, no.217, 2 May 1879.
3. Cape, N.A. 4, pp.102-3: Blyth's report on the social and political condition of the Transkei, 11 Aug. 1879.
4. Ibid., p.141-4: Blyth to Ayliff, 22 Aug. 1879.
5. See p. 366 below.
6. Cape N.A. 8, p.6: Blyth to Ayliff, no.2, 7 Jan. 1881.

necessary in all but the Xuthing District of Basutoland before this date.

Meanwhile the Cape government was further exacerbating relations between its officials and the people among whom they were stationed by insisting on disarming the tribes east of the Kei. The Gcaleka and Ngqika were disarmed before being allowed to settle in Gcalekaland, and the Mfengu and Emigrant Thembu were persuaded, despite much resentment, to surrender their guns. Thembuland proper and Griqualand East were not systematically disarmed, as the Zulu war and Moorosi rebellion broke out and the government realized that, with Cape troops fully occupied, disarming tribes near the Mpondo would leave them defenceless against their hostile neighbours. But disquieting rumours concerning the government's intentions spread throughout the area under Cape rule and led to much restlessness.

Unrest in the territories was further aggravated by delay in annexing Gcalekaland, Bomvanaland and Thembuland.[1] This delay resulted from Britain's continued reluctance to grant the necessary letters patent until the Cape government should agree to confederation schemes, but Sprigg refused to be stampeded into taking such a controversial matter before Parliament until he was ready. The delay in annexing the territories gave Cape humanitarians, angered by disarmament, time to marshall further support for their plan of direct British rule of the area east of the Kei, rather than by the Cape's white minority. Influential people like

---

1. P.R.O., C.O. 879/15; African confidential Print, no. 195, p. 13: Frere to Hicks Beach, no. 152, 19 May 1879; British Parl. Papers 1880, (C.2482) p. 45: Frere to Hicks Beach, 10 Oct. 1879.

Henry Callaway, Matthew Blyth, and Saul Solomon, now believed that only under British rule would African interests be safeguarded. The alternative of leaving the tribes to rule themselves was advocated only by Irvine, M.L.A. for King William's Town and influential Ciskeian trader, who argued 'it was far better to leave these barbarians to themselves than incur the great risks incidental to an attempt to force upon them our refined institutions.'[1] But the government did not think Britain would agree to direct British rule, and insisted that the Cape should rule the area. The Africans in the territories naturally heard of the dispute and became increasingly restless. By the latter part of 1879 both the Cape government and Frere were strenuously urging the British government to allow annexation, for the Cape's policy of bluff in imposing magisterial control in unannexed areas was being legally challenged for the first time. Cape officials were becoming querulous at not being able to punish the more serious crimes not provided for in tribal law,[2] and difficulties had arisen over the legality of civil marriages celebrated in the territory.[3] In late November, having extracted a promise that confederation would be raised in the Cape Parliament in 1880, Hicks Beach eventually agreed to the letters patent being issued.

By then, however, the Cape ministry had decided it could no longer delay bringing into effect the 1877 Annexation Act of Fingoland, the Idutywa and Nomansland, and in

---

1. Cape Argus, 14 Aug. 1879: speeches in the Assembly, 12 Aug. 1879, quoted by Saunders, 'The Annexation', p. 207.

2. E.g., Cape Parl. Papers, G. 33-79, p. 95.

3. Cape, N.A. 297: Mills to Bright, 16 Oct. 1879.

September 1879 Frere issued the necessary proclamations to bring this about.[1] They came into effect on 1 October 1879 and for the first time magisterial rule became legal in the Transkeian territories. The regulations by which the territories were to be ruled were partly based on ones drawn up by Blyth, which in turn were modelled on the earlier regulations he had introduced.[2]

This second set of regulations drawn up by Blyth were, however, phrased in rather unorthodox language and placed slightly greater pressure on tribesmen to adjust to the colonial economy than was the case with the Basutoland regulations. They were not specifically modelled on those of Basutoland, although many of the ideas and institutions of the Basutoland administration were reflected in them.[3] Bright, however, was the official in the Native Affairs Department responsible for ensuring that the regulations were drafted in acceptable form, and it is no doubt due to his intervention that the regulations which were eventually passed were closely modelled on those of Basutoland.[4] There were a number of minor differences from the Basutoland regulations, but the only important change in the personal law was in relation to marriage: in the new regulations African law marriages could be brought under the colonial law by registering them with the magistrate. Such marriages

---

1. For Fingoland and the Idutywa, to be known as the Transkei, Proclamation 110 of 15 Sept. 1879; for Nomansland, Proclamation 112 of 17 Sept, 1879.

2. Cape, N.A. 3, pp. 87-106: Blyth to Bright, no. 185, 3 Apr. 1879, and encl. regulations.

3. Cape, N.A. 3, pp. 131-7: Blyth to Bright, no. 203, 24 Apr. 1879.

4. British Parl. Papers 1880, 1 (C.2482), pp. 306-15: regulations for the Transkei; pp. 316-24: Regulations for Griqualand East.

could then, for example, be dissolved only according to the colonial law and by the chief magistrate. Presumably registration also rendered a man liable to a charge of bigamy if he subsequently married another woman according to colonial law. More important, the property of people who registered their tribal law marriage was distributed on their death according to the colonial Ordinance No. 104, or any other law of the Cape Colony having reference to the disposition of property, in so far as it shall be deemed applicable to the circumstances of the country, and only the marriage to the first wife could be registered. Therefore, although registration of a tribal law marriage did not prevent a man from marrying other wives by tribal law, it had the effect of disinheriting the children of all other wives, unless the chief magistrate made provision for them by availing himself of the provision about the circumstances of the country. Inheritance and guardianship questions were also to be decided according to the colonial law if an African died intestate, and it seems unlikely that the Native Succession Act, which applied only to Africans holding certificates of citizenship or living in 'Native Locations', would have been regarded as the relevant colonial legislation. If it were not applied, this was indeed a drastic step.

The other important change was that, while the allotment of land was vested in the governor, as in Basutoland, it was not subject to the same limitation that it was 'for the occupation of the several members of the tribe.'[1]

---

1. For a list of all the differences between these regulations and those of Basutoland, see Cape Parl. Papers, G. 4-83, appendix A, pp. 14-15.

This was to have important repercussions later in enabling white men to gain possession of part of Thembuland.

The provision for the registration of the first wife only, the inheritance provisions, and the payment of a fee to register marriages surprisingly met with no objections from the Africans in the Idutywa Reserve and Fingoland when meetings were called to announce to them the annexation and new laws.[1] The magistrate at Tsomo reported that one man even 'expressed his satisfaction at the registration of wives as he thus hoped to get rid of his eldest wife.'[2] The only criticism of the new regulations which came from the territories themselves came from Blyth, who wrote:

> I would also respectfully point out that the power placed in the hands of the Magistrates, and in my own, with regard to infliction of punishment is too large, and I consider that in grave and serious cases where the punishment would be very severe, that the proceedings should be forwarded to the Government before the punishment is carried out. I should then have the satisfaction of knowing that a professional and legal opinion supported me in my decision.[3]

His anxiety was understandable, for the punishments now open to the magistrates included long terms of imprisonment, deportation, and even the death sentence.[4] Until then the most stringent punishment allowed in murder cases was that

---

1. Cape, N.A. 5, pp. 1-33: Blyth to Bright, no. 339, 2 Oct. 1879, and encl. reports of the meetings.

2. Ibid., Pattle's report of the meeting at Tsomo.

3. Ibid., Blyth to Bright, no. 339, 2 Oct. 1879.

4. The death sentence was imposed for the first time by magistrates in the territories in 1880. See Brookes, History of Native Policy, p. 188.

used in the Idutywa Reserve and Fingoland, where the usual punishment was twenty-five to fifty lashes, confiscation of property, and expulsion from Fingoland,[1] a punishment nonetheless in excess of tribal practice. Neither colonial nor Transkeian magistrates had any experience of exercising such extensive powers of punishment as they now received.

Nor did the regulations meet with unanimous approval in the colony. Among other points, the Standard and Mail disapproved of magistrates hearing cases about marriage-cattle, and the Cape Argus condemned the criminal clauses as completely inadequate and as giving the magistrates too great a discretion in punishments. These articles Frere sent to London when forwarding a copy of the regulations,[2] but Hicks Beach was more alarmed at the possibility of objections in the British Parliament from supporters of the Aborigines Protection Society. He immediately asked his officials how the society was likely to react to the regulations. But once reassured that they were unlikely to object to them, he did not attempt to have any alterations made, for he anticipated that after annexation of Thembuland and Gcalekaland all existing practices would be reviewed and a more permanent and uniform system of government introduced for all Cape-ruled territories.

---

1. Cape Parl. Papers, G. 21-75, p. 75; Cape, N.A. 1, pp. 37-44: J. Ayliff to W. Ayliff, 24 Apr. 1878, and minute by Brownlee. At his first meeting with the people of the Idutywa Reserve on 7 Nov. 1878, Blyth had announced that the death penalty would in future be enforced, as well as deportation, but there is no record of this taking place before annexation. See Cape, N.A. 1. p. 233: minutes of meeting encl. in Blyth to Ayliff, no. 41, 8 Nov. 1878.

2. British Parl. Papers 1880, 1 (C.2482), pp. 327-331.

Within a month of the annexation of Fingoland, the Idutywa, and Nomansland, Blyth called a meeting of the magistrates, chiefs and headmen falling within the Transkeian chief magistracy, although Gcalekaland was not yet annexed. At the meeting the new regulations were read and explained and, Blyth wrote,

> as it is very important that there should be one uniform system in the Transkei, I have, pending your approval, directed Mr. Shaw and Mr. Streatfield, the Magistrates in Gcalekaland, to adopt these new Rules in their respective Districts. Although Gcalekaland is not included in His Excellency the Governor's Proclamation, I consider that there will be no difficulty and inconvenience in carrying out these Regulations.[1]

Ayliff approved[2] and thereafter Gcalekaland appears to have been ruled by Blyth as if it were already annexed.[3]

Despite the undercurrent of unrest throughout the Transkeian territories, the Cape pressed ahead with its 'civilizing mission'. Surveys were begun in the territories under Blyth's control, and to provide for large families unable to subsist on the proposed ten acre plots, Ayliff insisted on the second and other wives of polygamists being given small plots to be held in each woman's own name. This step was too radical an attack on a woman's place in African society even for Blyth, who hastened to point out:

> I do not think that in its present form that (sic) any man would allow his wife to have a grant of land in her own name or that any woman except a widow would care to have such a grant.[4]

---

1. Cape, N.A. 5, pp. 119: Blyth to Ayliff, no. 358, 24 Oct. 1879.
2. Ibid., minute by Ayliff, 12 Dec. 1879.
3. E.g. Cape, N.A. 7, pp. 64-8: Blyth to Ayliff, no. 183, 21 May 1880.
4. Cape, N.A. 5, pp. 110-111: Blyth to Ayliff, no. 356, 5 Nov. 1879.

He suggested that a second family plot should rather be given, but Ayliff remained adamant:

> Gov(ernmen)t thinks that each present wife should have three (3) Acres of land given in her own name for the benefit of herself and children and not in the name of the husband. These too often cast off a woman and are daily encouraged by Missionaries in so doing to allow of the woman being dependent upon them and Gov(ernmen)t thinks it just they should be thus provided for.[1]

But practical difficulties arose because most of the surveying had already taken place, and Ayliff bowed before this obstacle.[2] It was perhaps as well for the general state of the territories that he did.

However, the British government still had misgivings about allowing the Cape to annex the territories. Humanitarian criticism of the Cape's African policy was making itself not only heard but felt in the British Parliament, and the British government also feared that the current Cape policies, notably disarmament, might provoke a revolt which only British troops would be able to quell.[3] To try to retain some control over the Cape, the British government decided to insist that it first approve the way in which the Cape proposed to govern Gcalekaland and both parts of Thembuland before it agreed to their annexation: the regulations were to be reserved for Britain's approval as well as the Annexation Bill itself.[4] The Cape government objected to

---

1. Ibid., p. 109. minute by Ayliff, 12 Dec. 1879.
2. Cape, N.A. 299, C.B. Elliott to Bright, no. 63, 19 Jan. 1880.
3. Saunders, 'The Annexation', pp. 224-9.
4. P.R.O., C.O. 48/493: minute by Hicks Beach, 22 Feb. 1880, on Frere to Hicks Beach, no. 26, 26 Jan. 1880.

this demand, which it felt reflected on its status as a self-governing colony, and tried to allay imperial fears by declaring its intention to introduce regulations similar to those in force in Fingoland and Griqualand East. Hicks Beach, however, remained adamant, and it then agreed to submit the new regulations for approval, but refused to include them in either the Annexation Bill or a separate bill. As this left the Cape free subsequently to amend them out of all recognition, the British government felt unable to accept this compromise. Kimberley therefore had new letters patent sent out to the Cape providing that changes in any approved laws for the governance of the territories sere also to be subject to imperial approval.

But before the new letters arrived, the Cape government introduced an Annexation Bill in the 1880 session of Parliament. It closely resembled the 1877 Annexation Act and contained the Basutoland formula for colonial laws to apply as modified by proclamation reviewed by Parliament. It also included the Basutoland-type provision that future colonial acts should not apply unless specifically extended to the territories.[1] The detailed regulations for the territories were simultaneously tabled in Parliament, and again closely followed the Basutoland pattern, as modified the previous year for the Transkei and Griqualand East.[2]

The reception of the regulations was once again mixed. Among the Africans, especially in Emigrant Thembuland, there was dismay; the four emigrant Thembu chiefs petitioned Parliament not to pass the bill, claiming that when they

---

1. British Parl. Papers 1882, xlvii (C.3112), pp. 23-24: bill as amended by Parliament, encl. in Frere to Kimberley, 20 July 1880.

2. Cape Parl. Papers, G4-83, appendix A, 15.

had left the colony, they had been promised that they would be left independent.[1] But despite support for this petition from the Opposition leader, Scanlen, as well as Merriman and Orpen, the government refused to change the bill. It had no wish to leave an independent enclave in the middle of Cape territories, and did not consider the annexation would make any difference to the Emigrant Thembu, who had long had a resident, been disarmed, and were paying hut tax. Nor did the regulations meet with universal approval from the white population of the Cape. Although some welcomed them as a suitably gentle way of weaning tribal Africans from their barbaric habits, others, such as Merriman, attacked them as inadequate.[2] At a more basic level, however, the power delegated to the executive to issue laws and regulations for the territories was made an issue by Sprigg's opponents, who were anxious to weaken Sprigg and angered by the extension of the Peace Preservation Act to Basutoland before Parliament had met. It was felt that the delegated powers could be used by the executive as a way of enforcing unwelcome measures without having to submit to parliamentary scrutiny. As a result, at the bill's report stage, amendments were passed which eliminated the government's power to modify colonial law or to legislate by proclamation for the territories after annexation.[3]

---

1. Cape Parl. Papers, 54-80; Rhodes House, MSS. Brit. Emp. s. 22, G.9: Orpen to Chesson, 20 July 1880.

2. Saunders, 'The Annexation', pp. 236-7.

3. Brit. Parl. Papers, 1882, ixlvii (C.3112) pp. 31-34: proceedings in the House of Assembly encl. in Frere to Kimberley, 16 Aug. 1880.

This would have left Gcalekaland and Thembuland in terms of the bill in much the same position as the Ciskei, completely subject to colonial law.

Although the Cape government disapproved of the amendments and the upper house was doubtful of their wisdom,[1] the government decided to support the bill as a temporary measure until a new system of government for all the African territories under Cape rule could be devised. As Upington, the attorney general explained:

> Two reasons led the Government to accept the amendments referred to; in the first place, there was something to be said in favour of an extension of Colonial law to every portion of Cape Colonial territory, thus getting rid of barbarous customs; and secondly, it was considered highly dangerous as well as unconstitutional to continue a simply <u>de facto</u> Government in Tembuland and Galekaland.[2]

A commission entitled the Cape Native Laws and Customs Commission, was set up to investigate the question, and the bill was passed and sent to London with Frere's blessing:

> I quite agree with [my ministers] that it would be impossible to leave these territories any longer with a Government which is only a Government <u>de facto</u>, and the officials of which may at any moment be brought before the Criminal courts of the Colony for righteous acts, done in good faith, in the discharge of their official duties.[3]

But Kimberley would not accept that this was realistic,[4] and the bill was not approved. The ball was back in the Cape government's court to produce an acceptable formula for ruling all the African territories under its control.

---

1. <u>British Parl. Papers 1882</u>, xlvii (C.3112) pp. 34-36: proceedings in the House of Assembly and in the Legislative Council, encl. in Frere to Kimberley 16 Aug. 1880.

2. <u>Ibid</u>., pp. 36-7: minute by Upington, 10 Aug. 1880, encl. in Frere to Kimberley, 16 Aug. 1880.

3. <u>Ibid</u>., pp. 26-27: Frere to Kimberley, 16 Aug. 1880.

4. P.R.O., C.O. 48/494: minute by Kimberley, 19 Sept. 1880 on Frere to Kimberley, no. 208, 16 Aug. 1880.

But before the ministry had a chance to settle the problem, the territories erupted in a desperate attempt to throw off white supremacy. Soon after the commencement of the Basutoland war in September 1880, the Basuto in the Matatiele District of Griqualand East rebelled, followed shortly by the Mpondomise in the Qumbu and Tsolo Districts, the Qwati and some of the Thembu in Thembuland and Emigrant Thembuland. Even without Basutoland, the area in revolt was far larger than that involved in the 1877-8 war, and many whites suspected that the revolt was the result of a conspiracy; but the evidence of lack of co-operation between the rebel groups does not bear out this theory.[1] Every tribe involved had reason for disaffection. Some reasons were common to all tribes, such as disarmament, already enforced or feared in the future; fear of loss of land, a fear engendered by the proposed confiscation of Quthing; the compulsory branding of cattle, which it was thought was a preliminary to either taxation or confiscation; and rumours that African children were to be transported. Cattle speculation and the farming proclivities of some officials in the Transkei also engendered much discontent. 'It is a common saying' one magistrate reported, 'that "a man comes in on a lean horse, says he is a Magistrate, and in two years is a rich man."' But in addition, each tribe which revolted had grievances over the way their magistrates had modified their tribal law and traditional customs.

---

1. Saunders, 'The Annexation', pp. 244-5.

The Emigrant Thembu had perhaps the greatest reason to resent this. They had been promised their independence when they left the Cape, 'the Agent interfering only in cases in which disputes arose between the various chiefs, or when any serious injustice had been done by a chief to any of his people'[1]. Yet Brownlee announced to them at a meeting in early 1874 that they would one day have to pay taxes and come under colonial laws.[2] After the appointment in 1875 of Charles Levey, who had served under Blyth, they had been gradually brought under full magisterial control despite frequent protests by their chiefs.[3] From 1874 the agent fined men involved in witchcraft cases,[4] and in 1878 control tightened further when Emigrant Thembuland was divided into two districts, with a second magistrate.[5] By 1879 the magistrates took all fines for the government, except such portion as they saw fit to allow the chiefs; and even in theft cases, where the fine by tribal law went

---

1. Cape Parl. Papers, G.27-74, p.135: Brownlee to Molteno, 15 Apr. 1874.

2. Ibid., p. 136.

3. Cape, N.A. 307: Elliot to Innes, 2 Aug. 1883; N.A. 401: E.J. Warner to Ayliff (private) 29 Jan. 1879. Probart, while special commissioner in the Transkeian territories told Molteno that the Emigrant Thembu had been 'too long left to themselves' and needed more discipline, for which Levey's experience under Blyth would be useful. See Rhodes House, MSS Afr. s.23, ii. 124-5: Probart to Molteno, 26 Dec. 1875; he also called a meeting at which he forbade the chiefs to alienate land. See ibid., ii.197-8: Probart to Molteno, 29 Mar. 1876: Cape, N.A. 399: Probart to Brownlee, 29 Mar. 1876: memo. by Probart on means of bringing the Emigrant Thembu more completely under government control.

4. Cape Parl. Papers, G.21-75, p. 40.

5. Theal, History of South Africa, 1873-1884, i. 143.

to the owner of the stolen property, government claimed part of it. In addition, despite promises to the contrary, flogging had been introduced by the magistrates as a punishment enforced by their court. And land in Emigrant Thembuland had been granted to Mfengu and others without the sanction of the chiefs.[1] In 1879 not only had they been disarmed and made to pay hut tax, but appeal cases had been allowed from the chiefs to the magistrates;[2] and the following year moves were made to impose an additional house duty of ten shillings as well. Their petition against annexation of that year was ignored and, 'not knowing that the Bill was not to receive imperial assent, the Emigrant Thembu must have assumed it would soon take effect and introduce into their country the full force of colonial law'.[3] E.J. Warner had grown up among the Thembu in the colony while his father was their resident, and had then himself become their resident in Emigrant Thembuland before becoming their missionary. If any white man knew their feelings on political matters, it was he, and as early as 1879, in protesting on their behalf about the insidious take-over of power by the magistrate, he warned Ayliff:

---

1. Cape Parl. Papers, G.8-83, pp. 13-16.

2. Cape, N.A. 401: E.J. Warner to Ayliff, 17 Apr. 1879. But there is evidence that appeals were taken to the magistrate as early as 1875. See Cape, N.A. 403: W.R.D. Fynn to Innes, 1 Aug. 1882.

3. Saunders, 'The Annexation', p. 246.

> I am only surprised that the emigrant Tembus have shown such a peaceable spirit. For I do not hesitate to affirm it, as my opinion, that the action of Government in these matters would have driven any other native tribe to war. But I have repeatedly advised the Tembus to submit quietly, and only to use constitutional means to redress their wrongs, telling them I was quite sure matters would come right again, as probably much was done through a mistaken notion of their position.[1]

But the government stubbornly ignored their guaranteed rights, and eventually the majority of the Emigrant Thembu chiefs led their people into rebellion.

The Mpondomise chiefs had very much resented the way in which the magistrates had taken their powers and people from them, and tactless handling of Mhlontlo by the luckless Hope (after his transfer from Cuthing) had helped to alienate even the more docile of the two major chiefs. Sampson, an official in the area, reported for example that Mhlontlo had been infuriated at this time by Hope's refusal to see him before he had saluted the Union Jack flying outside the office. 'Mhlontlo, after staying for two days in his defiant mood, did salute the flag, but told the Kaffir police that he would soon make Hope pay for this.'[2] Similarly, Ngangelizwe bitterly resented his power being reduced to that of one of his own chiefs under Cape control. The Qwati chief, Dalasile, who had been so reluctant to accept British protection, had from the start resented magisterial interference in his judicial powers. After Walter Stanford fled from his Enqcobe magistracy during the rebellion, Dalasile

---

1. Cape, N.A. 401: E.J. Warner to Ayliff, 17 Apr. 1879.
2. V. Sampson, My Reminiscences (London, 1926), p. 50.

held a mock trial in the court house to emphasize his opinion of magisterial usurpation of his judicial authority.[1] And in the north the Basuto in the Matatiele District were not only related to the Basuto in Basutoland, but after the trial of Nehemiah, doubly distrustful of Cape authority.

It may be asked why the people united with their chiefs in revolting against a Cape rule that aimed to protect them from the chiefs' tribal law powers. The answer is no doubt to be found in the reasons for disaffection which all the tribes shared and which were cumulatively more than enough to have brought out in revolt far better-ruled people, as the Basutoland revolt demonstrated. But in addition the tribes had a number of other reasons for stronger loyalty to their chiefs than had the Basuto. None of the tribes in question had had an agent for more than six years, except the Emigrant Thembu and Ngangelizwe. With all tribes magistrates had been hindered in their early efforts to detach the people from their chiefs by a lack of legal power to act in unannexed territories, which made them appear weak to the tribesmen. No doubt they were also hindered by the lack of, and divisions among 'civilizing agencies'. The Emigrant Thembu commoners were almost certainly alienated by some of the legal measures introduced by the magistrates, and also the way in which they were carried out;[2] while the Thembu had been rallied behind Ngangelizwe as late as 1876, as described above.[3] No doubt too the sight of their neighbours

---

1. Macquarrie, Reminiscences i. 131.

2. Such as the method of enforcing sentences of flogging. See Cape, N.A.399; Judge Dwyer to Barkly, 23 Oct.1876.

3. See pp. 345-6 above.

in revolt against the infuriating occupiers of their countries stirred men to answer the war cry when in calmer moments they might have acted less rashly.

Reasons to revolt were not confined to the tribes which actually revolted, but other factors prevented even more from joining the rebellion. The Gcaleka and Ngqika had been too completely defeated in 1878 to be able to mount another campaign so soon. The Bhaca and Mfengu realized that by volunteering to fight for the colony, they could regain their arms, without which they could not have rebelled anyway. Besides, the Mfengu were aware that the many Mfengu who had earlier settled in rebel areas were being victimized for their economic resourcefulness and failure to assimilate.[1] Those Mfengu who had settled in Emigrant Thembuland on the border of Fingoland, and were not victimized, joined their countrymen when troops were moved along the Fingoland border.[2] The Western Mpondo used the war as an opportunity to [illegible] strengthen their ties with the colony by supplying an armed party, with Mditshwa's consent, to relieve a Mpondomise siege of white officials, missionaries and settlers;[3] and the Eastern Mpondo seem to have decided not to jeopardize the chances of a deputation they were planning to send to England in the hope of recovering their lost land.[4]

---

1. Saunders, 'The Annexation', pp. 254-5.

2. Cape, N.A. 8, pp. 3-6: Blyth to Ayliff, no. 2, 7 Jan 1881.

3. For an account of the roles played by Mditshwa and the Western Pondo in the relief, see Cape Times, 17 Nov. 1880, p. 3: reports by Granville to Elliot, 1 Nov. 1880, and Morris to Elliot, 3 Nov. 1880.

4. P.R.O., C.O. 48/500: Oxland to Ayliff, no. 38, 17 Feb. 1881, reporting meeting with Mqikela on 17 Feb. 1881, encl. in Robinson to Kimberley, no. 103 8 Mar. 1881

Had these tribes also revolted, the Cape might not have been able to suppress the revolt unaided. As it was, during the course of the rebellion many magistrates were obliged to abandon their magistracies, which were then looted and burned, as were mission stations and trading stores. Hope and two minor officials with him were murdered,[1] as were a few isolated white traders, woodcutters and a bricklayer.[1] But the rebellion had a quite specific aim, and in general the chiefs kept strict discipline among their tribesmen and prevented bloodshed for its own sake. As Mhlontlo declared, the war was not against missionaries and traders but to get rid of the government and its magistrates.[2] White women and children were not molested, and even magistrates were allowed to leave unharmed in most instances.

But as in 1877, the revolt did not succeed in dislodging the Cape government from the Transkeian territories. By mid-February 1881 it was over, suppressed by Cape forces. When Parliament met in April, however, the ministry had to face a motion of censure from the Opposition, led by Scanlen, who blamed government policy and maladministration for both the Transkeian and Basutoland rebellions. And in May the government fell on the question of its African policy.

In the territories themselves, life returned to normal very slowly, with unrest kept alive partly by an influx of squatters to Thembuland temporarily cleared of occupants,

---

1. At a meeting with Mhlontlo to enrol the Mpondomise to fight for the Cape government, the warriors doing a war dance stabbed them to death according to a pre-arranged plan. See U.C.T. Stanford Papers, F (c) 3: Davies to Ayliff, 29 Oct. 1880.

2. Ibid.

partly by the presence of refugee rebel chiefs; Sarili, for example, would not accept the Cape's terms and remained in exile in Bomvanaland, and Mhlontlo paid frequent visits from Basutoland.[1] The Matatiele, Maclear, Tsolo and Qumbu districts of Griqualand East were cleared of rebels and remained almost empty until after a commission had reported in 1883 on who should be allowed to settle there.[2]

But in contrast to Basutoland, the Transkei did eventually slowly return to normal. And as the Basutoland stalemate continued, attempts were made in the Transkei to prevent yet another revolt in the future. Inter-tribal and clan disputes, now recognized as a possible starting point for such risings, were firmly settled where possible. The land settlement after the war gave an opportunity to delimit several land boundaries over which there had been constant squabbling.[3] Some efforts were also made to enable the tribesmen to express their views more clearly in future. The most important of these arrangements was established by Blyth in Fingoland, where he called the leading Mfengu headmen together in 1882 and proposed a scheme for creating district committees electing a central committee, which at quarterly meetings would discuss taxation and general matters of interest - including presumably tribal law questions. As a forum for discussion it did not prove very successful;[4]

---

1. Streatfield, Reminiscences, pp. 194-203; N.A. 283: Blyth to Sauer, no. 109/83, 17 Nov. 1883; Hook, With Sword and Statute, p. 325.

2. Cape, N.A. 307: Marquard to Brownlee, no. 1971, 5 June 1883.

3. E.g. in Stanford's district in Thembuland, for which see Macquarrie, Reminiscences, i.176-7.

4. With emphasis placed on its taxation function, it became known as the District Fund Scheme.

'the minutes of the meetings show the magistrates dominated the proceedings and the headmen were given little opportunity to air their views'.[1] But it was a beginning of later and more successful institutions of that kind in the territories, and was extended to Gcalekaland in 1883.[2]

While the territories were still very unsettled, however, James Rose Innes, the new under secretary of the Department of Native Affairs, aggravated the situation by querying whether the Cape magistrates had any authority to exercise judicial authority in Thembuland, Gcalekaland and Bomvanaland. When the question was referred to the attorney general, he found that the 1875 extension of British protection was an informal act and that Thembuland was not part of the colony nor even British territory: Elliot had no authority to try or sentence any offender and could exercise judicial authority over non-British residents only with the consent of both parties.[3] Nor had the Cape government any right to confer jurisdiction upon him over persons resident beyond the limits of the colony. This left Rose Innes with no choice but to tell Elliot to assume he was acting with the tacit consent of the chief and not to submit cases to Cape Town for review in future.[4] It also meant that the Cape government had no way of legally enforcing the authority of its magistrates there or the laws they administered if they were challenged;

---

1. Saunders, 'The Annexation', p. 350.

2. Cape, N.A. 284: Girdwood to Hook, 22 Mar. 1883, reporting first monthly meeting.

3. Cape, N.A. 302: memorandum by Leonard, 4 Mar. 1881.

4. Cape Parl. Papers, G.4-83, evidence, pp. 429-30: Innes to Elliot, no. 2/344, 25 June 1881.

and this was brought home in 1881, when a white trader, Shadford Taylor, was fined by Streatfeild for participating in a Gcalekaland initiation ceremony. Blyth confirmed the fine, whereupon Taylor appealed to the Cape Supreme Court. The attorney general gave his opinion that the sentence was illegal, and the fine was ordered to be repaid.[1] Similarly, despite Blyth's objections, on government orders a fine was returned to Fynn, a headman who had been punished by the magistrate at Kentani for holding 'numerous obscene dances'.[2] And even when a white man committed a murder in Thembuland, it was held that the Cape magistrate could punish him only according to tribal law and that therefore the death penalty could not be enforced.[3]

The commission investigating the question of what system of law should be instituted in the territory was not expected to report in time for its recommendations to be acted on in the 1881 session, but action was urgently needed. The solution the Cape government advocated was that the British government should amend the second set of letters patent and assent to the 1880 Annexation Bill.[4] This would have brought the inhabitants of the territories in question under colonial law, with no recognition afforded to African law other than that provided by the Cape Native Succession Act. Scanlen admitted:

---

1. Streatfeild, Reminiscences, pp. 257-9; P.R.O., C.O. 48/505 E. Coakes to a member of the House of Commons, 4 Dec.1882.

2. Ibid.

3. Cape, N.A. 305: legal opinion by Coles on the case of Flanagan.

4. British Parl. Papers 1882, xlvii (C.3112), pp. 77-8: Robinson to Kimberley, 10 Oct. 1881, and encl. minute.

> Some inconvenience would arise under this Bill from the fact that the Magistrates could only exercise the limited jurisdiction granted to Colonial Magistrates, - all grave cases being reserved for adjudication by the Circuit Judge. But this would be far preferable to leaving the country in its present most unsatisfactory and dangerous condition for another twelve or eighteen months.[1]

But the British government refused to amend the letters patent, fearing attacks by both the humanitarians and Conservatives in Parliament.[2] The method to which it therefore resorted to put Cape rule in the unannexed territories on a legal footing was to commission the Cape governor as governor of Thembuland, Emigrant Thembuland, Gcalekaland and Bomvanaland, empowered to issue proclamations for their 'peace, order, and good government'.[3] In January 1882 a proclamation introduced Cape laws into these territories except as modified by the regulations it contained, which were exactly the same as the existing Griqualand East - Transkei regulations, thus making for uniform regulations throughout Cape-ruled territories east of the Kei, with the exception of Xesibe country.[4] And Act 40 of 1882 for the first time provided for appeals to go to the colonial high courts.[5]

---

1. P.R.O., CO. 48/501: Scanlen to Mills (private) 3 Oct. 1881, encl. in Mills to Herbert (private), 29 Oct. 1881, filed under minute sheet Cape 19028.

2. Saunders, 'The Annexation', p. 267.

3. British Parl. Papers 1882, lxvii (C.3112), pp. 87-88: Kimberley to Robinson, no. 37 15 Nov. 1881, and commission 14 Nov. 1881, encl. in Kimberley to Robinson, no. 38, 15 Nov. 1881.

4. Cape Parl. Papers, A1-82: Speech by Robinson at the opening of Parliament, 17 Mar. 1882. Xesibe country was probably not included because of possible repercussions with the Mpondo. See Saunders, 'The Annexation', pp.323-4.

5. Originally appeals could be taken to the secretary for Native Affairs; the Annexation Act of 1877 had also provided that the governor might proclaim any matter relating to the territories cognizable in colonial courts.

But by the end of September 1882, the British government was willing to allow annexation of the unannexed territories without conditions. The decision had come as a result of an invasion of white squatters into unannexed land east of the Kei, which had been cleared of Africans during the war. To contain this invasion, the Cape government had been obliged to act as if the territory was already annexed and allocate part of it for white-owned farms, to prevent white farmers from over-running the whole area and sparking off a war with the Africans. Even so, there was much discontent that more land had not been allocated to whites, and the Afrikaner Bond and Boeren Vereenigingen were particularly vociferous. The British government, which was nominally responsible for the area, was greatly relieved that the farmers had been contained, and at the same time alarmed by the growing move-ment within the Cape for direct British rule in the territories. If the movement became sufficiently strong, the Cape government would not only refuse to annex the territories, but even to rule them, leaving Britain with the cost and dangers of ruling a highly explosive area. In addition, the Scanlen government, with its policy of non-intervention among the African tribes, had met with the approval of the humanitarians and mission-aries. This removed the danger of an attack in the Commons if the British government allowed annexation without the safeguard of first approving the laws. But, ironically, now that the obstacles to annexation were removed, the Cape had lost interest in annexing the territories. By early 1883 the Cape government itself was advocating imperial rule east of the Kei.[1]

---

1. For a fuller discussion of these event, see Saunders, 'The Annexation', pp. 274-287.

Cape reluctance to annex the territories was largely due to the inability of the colony to regain control in Basutoland, and the loss of confidence in the justice of Cape rule which it and the Transkeian revolt had inspired. Imperial rule, which was not subject to the vacillations of party or local settler interests, was thought likely to be more just. In addition, the colony, which was in a period of economic depression and already in debt for the £3 million the revolts had cost, was faced with the probability of having to subsidize the administration in the territories for many more years. The Cape Native Laws and Customs Commission report, which appeared at this time and stressed the feeling of unrest among the African population both within and beyond the colony, merely increased the Cape's desire to be rid of this troublesome burden.

In the territories themselves, Africans apparently favoured imperial rule.[1] The magistrates were more divided. Brownlee, for example, feared that the chiefs would regain their power under the imperial government.[2] Stanford, on the other hand, favoured imperial rule.[3] The question was the main issue of the election campaign which began in 1883, with the Afrikaner Bond fighting to prevent an extension of imperial control in South Africa. Scanlen's party, committed to imperial rule in the Transkei, was returned but lasted less than a week. The Upington ministry which replaced it

---

1. U.C.T. Stanford Papers, F(g)5: Bellairs (for Sauer) to Stanford, 22 Apr. 1882; Rhodes House MSS Afr s.18, C139/2: Jabavu to Chesson, 18 May 1881.

2. Saunders, 'The Annexation', p.300.

3. U.C.T. Stanford Papers, F(g)5: Bellairs (for Sauer) to Stanford, 22 Apr. 1882: Rhodes House MSS Afr s.18, C139/2: Jabavu to Chesson, 18 May 1881.

in May 1884 was committed to retaining control of the Transkeian territories; had arrangements to place Basutoland under imperial rule not already been made, it would probably have prevented that too.[1]

That the territories had not been accepted by Britain at the same time as Basutoland was due to a number of reasons, the most important being that the rebellion there had been crushed and magisterial rule restored. This was, as has been stressed, in no way a result of wiser magisterial rule than in Basutoland, but of military strategy and the very fact which had played so important a role in causing the 1877-8 war: the various groups within the territory were essentially divided, rather than, as in Basutoland, essentially united. While the Basuto could play a waiting game with the administration, apparently co-operating but using the rebel section of the tribe to prevent the restoration of magisterial rule, no such option was open to the separate tribes of the Transkeian territories. If they did not genuinely co-operate, they knew that it would be obvious and that the Cape had the military power to enforce its will.

So it came about that it was not the territory where Cape rule had initially worked so well which remained under Cape control, but the more mismanaged Transkeian territories. And it was only they which in the end benefitted from the recommendations and exhaustive survey of the Cape Native Laws and Customs Commission on how the Cape could best rule its African population. These territories had suffered from

---

1. See the discussion of the parliamentary crisis in the Cape Argus, Weekly Edition, 7 Jan. 1885, p.3.

unfortunate introductions to both British and Cape power, maladministration by often ill-chosen administrators, unsuitable makeshift policies, and the inability of the Cape legally to enforce the system it was trying to impose. As a result, in 1880 the Cape's system of recognizing modified tribal law was thought by many to have failed, not only in its secondary aim of civilizing the tribesmen, but even in its basic aim of enabling the Cape to control the tribes under its rule; force had been required in both Basutoland and the Transkeian territories to re-impose the system. But a close examination of this initial failure shows that the system was not, as was the course pursued in the Cape proper, doomed to failure by its own inherent contradictions. It seems likely that in Basutoland it could have worked, had the government not insisted on imposing unacceptable legislation. Success in the Transkeian territories would have been more difficult to achieve even had the administration been efficient, centralized, sensitive, and adequately empowered to carry out the system; given the actual situation and the delicacy of the task, its initial failure is hardly surprising. More surprising is that the Transkeian tribes survived under Cape rule to be regarded by 1927 as better able than any other in the Union of South Africa to comply with the demands made upon them by the laws and institutions of the colonial society. In other words, within the aims it set itself, the 'Transkeian system' could some 45 years later be declared a great success.[1] No doubt this was partly due to the crushing of the 1880 rebellion and annexation of

---

1. E.g. Brookes, History of Native Policy, pp. 108-9.

the remaining Transkeian territories in 1885 and 1894, thereby making the legal imposition of Cape rule possible; but the awareness of the problems involved and steps taken to meet them flow from the detailed and able work of the Cape Native Laws and Customs Commission of 1880-83.

CHAPTER EIGHT

THE 1883 CAPE NATIVE LAWS AND CUSTOMS COMMISSION

Out of the public discussion in 1880 about the laws and regulations drafted for the government of Thembuland and Gcalekaland, the Cape Commission on Native Laws and Customs was born. The need for government investigation of tribal law in detail was not newly recognized: In 1873, for example, the resident magistrate for Queenstown recommended in an interview with Brownlee that a code of laws be framed,[1] and the 1877 Commission on Colonial Defence recommended the compilation of a 'code of Kafir Law'.[2] In the same year M.B. Shaw, the experienced magistrate in the St. John's Territory, in his annual report on 1876, put forward a plea for the compilation as soon as possible of a 'handbook and compendium of Kaffir Laws, &c. &c.'[3] and in 1880 Orpen wrote in a paper for the Cape Parliament that:

> 'previous to any further legislation, and especially action touching titles to land, a full report on the condition of law and land tenure in those countries (i.e. annexed to the colony) should be obtained - after hearing the Natives own representatives - and be submitted to Parliament.'[4]

The Sprigg government had actually decided to establish a commission on African inheritance, when the criticism of the 1880 regulations began.[5] So when Merriman moved

---

1. U.C.T., Judge Papers, 1140: Tainton to Judge, 12 Feb. 1873.
2. Cape Parl. Papers, G1-77, p.17.
3. Ibid., G12-77, P.55.
4. Orpen, Some Principles, p.80.
5. Cape Argus, 23 July 1880: proceedings in the Legislative Assembly, 22 July.

that a commission be appointed to investigate the complex question of what system of law and government should be applied in the territories,[1] the government decided to widen the terms of reference to the proposed commission to include other questions of African law, land tenure and local self government.[2] In the end it was authorized:

> '(a) To enquire into the Native Laws and Customs which obtain in the Territories annexed to this Colony, and to suggest such a code of Civil and Criminal Law as may appear suited to the future condition of those countries;
>
> (b) To enquire into the expediency or otherwise of providing for the Legalization of Native Marriages which have already taken place, regulating the validity of Native Marriages in the future, and Declaring or Amending the Law relating to the Succession of Property in such cases;
>
> (c) To enquire into the Native Customs in the matter of Land Tenure, and to make such suggestions regarding the Tenure of Land as may seem best suited to carry out, where practicable, the Policy of this Colony in the matter of Individual Tenure;
>
> (d) And to report on the advisability of introducing some system of Local Self-Government in Native Territories.'[3]

Everyone was agreed that these questions were long overdue for a full investigation, which probably explains why the investigation, when it came, was so thorough.

The chairman of the commission was Sir Jacob Barry, judge-president of the Eastern Districts Court, and the original members were Charles Brownlee, Dr. James Stewart,

---

1. Ibid.
2. Ibid., 27 July 1880: proceedings in the Legislative Council, 26 July.
3. Cape Parl. Papers, G.4-83, report, p.13.

who was principal of Lovedale, and the two magistrates, W.B. Chalmers,[1] holding office in the colony, and Walter Stanford, stationed in the Transkeian territories. John Noble, clerk of the House of Assembly, was secretary. The work of the commission was delayed by the outbreak of the Basuto Gun War within a month of its appointment, before it had met, and when it did finally hold a meeting in March, the unsettled state of the country prevented both Stanford and Brownlee from attending.[2] The meeting merely produced a preliminary report that under the circumstances it could not proceed with its work immediately,[3] and sittings began only in September 1881 after the parliamentary session had ended. In the meantime four extra members were appointed to the commission. Two were members of Parliament: Thomas Upington, who had resigned from the post of attorney general, and Jonathan Ayliff, the brother of the secretary for Native Affairs and member of Parliament for Grahamstown. The other two were Emile Rolland from Basutoland and William Bisset Berry, a medical doctor from Queenstown with a keen interest in African affairs, who was later to represent Queenstown in the Legislative Assembly and became speaker of it. Stanford was subsequently to describe in his Reminiscences the role most of these members played in the commission:

---

1. Brother of the notorious magistrate of that name at the Komgha. He subsequently resigned for the commission in October 1881.

2. Subsequently ill health prevented Brownlee ever attending any meetings of the commission, although he submitted written evidence.

3. Ibid., proceedings, pp.iii, v-vi; G.38-81: preliminary report, 3 Mar. 1881, p.1.

'Our Chairman was an able lawyer and in his examination of witnesses meticulously explored the laws, the customs and the practice of the native people. Sir Thomas Upington was then in the full plenitude of his great powers. Noble described him to me as like a race horse, trained to the highest pitch.

Dr. Stewart even then stood out as a deep thinker with great breadth of view. The chapter in the report on polygamy was his work and is well worth studying today. Mr. Jonathan Ayliff, an experienced lawyer, had great veneration for the Roman-Dutch Law as administered in the Cape Colony and was disinclined towards concessions in favour of native customs not recognised by that law. He fought his case well and finally submitted a minority report which, with characteristic conscientiousness and courage, he signed alone.

Dr. Berry even in those days had taken a great interest in the native people and his was the chapter on ...[1] He and I collaborated in the framing of the clauses in the criminal code on witchcraft and the spoor law...

...The introductory and historical part of the report was entirely [John Noble's] work, and his wise counsel on many an occasion guided the Commission in its duties.'[2]

When it did finally begin work, the commission was unusually thorough. Brookes, reviewing the history of African policy in 1927, called it 'probably the most useful Commission that has ever reported on Native Administration in South Africa',[3] an accolade earned by the breadth and amount of evidence it collected. Evidence was obtained from foreign countries with 'native problems', such as India, New Zealand, Canada, and Fiji, and both Cape and Natal books, pamphlets and parliamentary papers were laid before it. In the end the list of reading material before

---

1. Macquarrie's footnote 4, i.189: 'Probably the recommendations on the Native law of inheritance and on tenure of land.'

2. Macquarrie, Reminiscences, i.188-9 and 194.

3. Brookes, History of Native Policy, p.110

the commission was so extensive that it seems improbable that any of the members could have had an opportunity to study all of it properly.[1] In addition, oral and written evidence was collected from a large number of people in the Cape and Natal with much experience of African administration and tribal life, in a wide range of tribes.[2] Answers to a lengthy questionnaire were received from fifteen magistrates in African areas, (including the three chief magistrates); an inspector of locations; the superintendent of natives at Kamastone; eighteen missionaries, including an African minister, and the bishops of St. John's and Grahamstown; a headman from the Peelton mission station in the King William's Town district; and eight other people with expert knowledge, including two judges from Natal and Southey, the ex-Cape colonial secretary and lieutenant governor of Griqualand West. In addition, copies of a special circular were sent to chief and resident magistrates of African districts, and another to inspectors and superintendents of African locations. Twenty-three replies were received to the magistrates' circular (three of which came from the colony proper) and thirty-two from inspectors and superintendents. The surveyor-general supplied a report and detailed statement on the operation of the individual

---

1. A copy of the list of material available to the commission is in Cape, N.A. 1147.

2. Though it is interesting that Basutoland was represented only by J.M. Orpen, who gave oral evidence, and Emile Rolland as a commissioner. Griffith was too ill to either attend or fill in a questionnaire (See Cape, N.A. 1147: Griffith to Commissioners, 3 May 1882) and the assistant magistrates were not apparently asked to fill in questionnaires or give evidence. The commission had intended to visit Basutoland, but the unrest there made this inadvisable. See Cape Parl. Papers, G4-83, report pp.53-54, paragraph 114.

land tenure system, and the superintendent-general of education supplied a letter and memorandum on African education. A statement of revenue and expenditure in the Transkeian territories was included. Each of the three Transkeian chief magistrates sent in criticisms of the first draft of the penal code, the superintendent of the hospital for Africans in King William's Town provided a report on it, and historical information and genealogies of the tribes in Cape and Natal territories completed the appendix of miscellaneous papers. Over 100 people gave oral evidence to the commission, some at meetings of tribesmen in different areas, but of these over thirty-six Africans gave evidence singly or in small groups. Of the remaining witnesses, several had also filled in the questionnaires which had been sent out. Fortunately the commission was authorized to pay the expenses of witnesses it wished to hear,[1] which enabled it to call upon a wider range of people than those available in the territories it visited. And it even went to the trouble of following up evidence by post where a headman had felt unable to express an opinion on some matter before first discussing it with his people.[2] In addition, various unsolicited letters, cuttings and other information was received from interested parties.[3]

Stewart was also able to inform the commission of the opinions on African marriage law of the Eighteenth Annual United Missionary Conference, for he had used time allocated

---

1. Cape, N.A. 1147: authority granted, no.4/169, 11 Feb. 1881.

2. Cape, CMT 1/146: Noble to Elliot, 29 July 1882; N.A. 1147: Blyth to the commissioners, no.386, 18 Aug. 1882, and enclosed letter from Veldtman to Ayliff.

3. Ibid., correspondence sent to the commissioners, 1880-82.

to him at the conference to raise these questions in case the commission might wish for the missionaries' opinions. A motion was passed by the conference:

> 'that in the opinion of this Conference, the evils connected with polygamy and ukulobola, as practiced by the native races, will be greatly reduced by the extension of the Colonial Marriage Law to native marriages.'

but opinion as to how soon this should be done varied from Stewart's view that 'a considerable time should be given' to the chairman's belief that three year's notice would be long enough.[1]

One item before the commission which might have been expected to have influenced it was the Natal Native Commission report, which was produced in 1882, conveniently contemporaneous with that of its sister colony in South Africa. But the files show that the Cape commission received a copy of the report only in late November 1882, and then without the evidence: as this latter filled two good-sized chests, the Natal government was still considering whether to print it.[2] Two of the Natal commissioners supplied the Cape commission with written evidence, but the views of neither of them could have been representative of the report they produced anyway: no less than twelve of the fifteen man commission signed dissenting minority reports (including both the Cape commission's witnesses), which makes it a mystery how the majority report was ever passed.[3]

---

1. For an account of the conference discussion, see Christian Express, vol xii, no.145, 1 Aug. 1882, pp.7-10.

2. Cape, N.A. 1147: Natal assistant colonial secretary to the commissioners, 13 Nov. 1882.

3. Natal Parl. Papers, report of the Natal Native Commission 1881-2, pp.17-26.

But influence from Natal was not lacking. The lengthiest and probably the most important evidence in determining the commissions recommendations came from Theophilus Shepstone,[1] who in September 1881 came to Grahamstown to give evidence in person. As the man who had created and established Natal's African policy single-handed, he was listened to with much respect. No doubt he was also able to express his views on tribal law policy with telling effect while under cross-examination: Sir Bartle Frere in 1879 described him as 'a singular type of Africander Talleyrand, shrewd, observant, silent, self-controlled, immobile.'[2] And his view was that the Cape should rely more heavily on the tribal system and its law, moving closer to the Natal pattern. As he pointed out, Natal's African population had never revolted; the same could not be said for those tribes which had been faced with the Cape's more rapid 'civilizing policy'. With the prevailing loss of self-confidence felt in the Cape at that time after the 1880 revolt, his views were far more influential than would have been the case three or four years earlier.

His arguments were borne out by the officials from whom the commission took evidence when it travelled through both the Ciskei and Transkeian territories in October and November 1881. The evidence of Elliot, the chief magistrate of Thembuland, for example, was typical. He thought it would be

---

1. Macquarrie, Reminiscences, i. 192. Shepstone gave evidence before the commission for six days.

2. Despatch by Frere, 3 Feb. 1879, quoted in Brookes, History of Native Policy, p.45.

extremely unwise for the moment to introduce any radical changes in African law as then observed.

> 'As far as I have been able to gather, the native mind is far more suspicious of the intentions of the white man towards them than formerly. They look with the greatest suspicion at every act. The movements of this Commission are being most jealously watched. I am of opinion that if anything like sweeping alterations are attempted, that they will be forcibly resisted.'[1]

But although the commissioners were repeatedly warned not to press the Africans too hard, most of the officials, missionaries and Christian Africans who testified before it criticised tribal marriage, polygamy and lobola for all the usual reasons. In their report the commissioners agreed, though in more moderate language than that in which some of the evidence was given. They believed by abolishing the giving of marriage-cattle, the lot of the Africans, especially the women, would be very much improved, but they accepted that this should be done gradually: rather than prohibiting customs, they desired 'to mould native law into some shape that would conform more closely to civilized law and to secure the sanctity of marriage and the rightful place of women.'[2]

The revolt of 1880 had also evidently persuaded Scanlen that his earlier assimilationist policy for the Transkeian territories would be too precipitate, and when Barry now enquired whether he would accept a code of African law especially for them, he assented.[3] A special committee was therefore appointed in November by the commission, to

---

1. Cape Parl. Papers, G4-83, evidence, p.413, question 7403.
2. Ibid., report, p.31, paragraph 72.
3. U.C.T., Barry Papers, B.C.A. 32(1) pp.37-39: Barry to Scanlen, 15 Sept. 1881.

prepare a criminal code for the Transkei, Griqualand East, Thembuland, Gcalekaland and Bomvanaland. Marriage regulations and a draft succession act recognizing tribal law with certain modifications were also drawn up,[1] but as both Upington and Stanford agreed with Shepstone that a civil code might rigidify African law,[2] no full civil code was drafted.

The commission adjourned after November 1881, leaving Barry to draft the code with assistance on various clauses from other members.[3] He drew largely from the Indian codes of Lord Macaulay and Sir James Fitz-Stevens - his draft code resembled the Indian examples even more closely than the code which the Cape eventually enacted [4] - and in February 1882 another meeting took place to discuss the draft code, and the chief magistrates were asked to comment on both it and the civil regulations and act.[5] In preparing the final draft Barry was assisted by Richard Solomon, an advocate and later attorney-general of the Cape and Transvaal, who was appointed to the commission in June 1882 for this purpose. After the parliamentary session of 1882, eight members of the commission attended its final session to decide on the final report.

By the time the report appeared, it was no longer needed for the main purpose for which the commission had

---

1. Cape Parl. Papers, G4-83, annexures II and III to the report.
2. Macquarrie, Reminiscences, i.99.
3. See e.g. U.C.T., Stanford Papers, F(g)1: Noble to Stanford, 21 Jan. 1882.
4. The draft code had illustrations incorporated in it, as did the Indian code, but these were eliminated from the code as passed eventually.
5. Ibid.. F(g)6: Elliot to Stanford, 19 Sept. 1882.

been set up. The debate on whether the territories would not be better under imperial rule was in full swing; and even were they to remain under Cape rule, the commission's report would no longer be essential: by then the imperial government was not likely to insist on approving the way in which Thembuland and Gcalekaland were to be governed before sanctioning their annexation. But the need for a well-considered means of ruling the African territories remained and, for whichever government undertook the task, the report would obviously be of the greatest assistance.

The criminal code, in its final draft form, was basically a statement of the criminal law of the Cape Colony, though with certain essential modifications. And the administration of the code in the case of more serious offences was put into the hands of men not appointed by the Native Affairs Department: such offences against the code were to be dealt with by a special court presided over by a recorder (an arrangement which produced immediate criticism from the magistrates once the code became law, since referring cases to the special court made for greater expense and delays.)[1] The main additions to the ordinary colonial law which were incorporated in the code were the adoption of the provisions that anyone attempting to procure the enforcement of circumcision or intonjane by force or threats, or without the consent of parents or guardians, should be liable to imprisonment; both imputation of witchcraft and habitual practice as a witch-finder were made punishable offences; and

---

1. See Cape Parl. Papers, G.6-88: reports of the Transkeian magistrates.

communal responsibility was recognized in respect of stock theft. Liability for a bigamy prosecution was expressly excluded in the case of men previously married to more than one wife 'according to native custom, whether the same was registered or not'. This specifically removed one of the ambiguities introduced by the 1879 and later Transkeian regulations. In punishments, the use of fines was stressed, as being familiar to Africans, and the use of flogging was severely curtailed.

The main difference from colonial law as regards procedure was made in an attempt to more closely approximate to the African view that justice could be achieved only if every possible source of information were thoroughly investigated, and the accused and his wives were in future to be allowed to testify. A second important alteration was that African assessors were to be allowed to sit with the court, a practice which had been followed by some magistrates unofficially for many years.[1]

In civil law matters the commission also spelt out its recommendations, in the form of draft regulations on marriage, for 'the adoption of certain indirect measures, the effect of which would be gradually to draw certain restrictions round the practice [of polygamy] in the form of certain disabilities, without direct prohibition.'[2] Its main recommendations (made largely with the aim of raising the

---

1. E.g. Cape, C.M.T. 1/129: Mahlakaza vs. Mtikeri, 1875; N.A. 4, p.21-9: appeal case heard by Blyth, 1879; pp. 226-8: Blyth's report for Aug. 1879.

2. Cape Parl. Papers, G4-83, report, p.34, paragraph 83.

status of women) were that all existing marriages, however contracted, be recognized as valid, but that after a date at least five years ahead, only the first marriage should be recognized. After this date no court was to recognize marriage-cattle claims for other marriages, but the rights of children from other marriages were not to be affected. The Basutoland provision of only permissive rather than obligatory registration of marriages was recommended, a wise move in view of both Basutoland and Transkeian experience,[1] and that no court within the colony should be allowed to entertain any suit for conjugal rights in the case of polygamous marriages. The commission also recommended that within the colony no claim for the return of dowry should be heritable or transferable from the husband, thus preventing a widow being forced by her family to return to that of her husband against her will, so that they could retain the marriage-cattle. The giving of marriage-cattle was no longer to be essential for a marriage to be valid, and would only be claimable by the woman's family if the husband had originally agreed to give it. Within the colony marriages by tribal law were to be protected from supercession by a civil law marriage; a civil or christian marriage could only be celebrated if the tribal law marriage had been dissolved. And the custom of ukungena[2] was to be refused recognition. More conservative regulations were provided

---

1. For the number of marriages according to tribal law which were actually registered, see ibid., A104-82.

2. The custom whereby a widow was provided with a male consort approved by her late husband's family for the purpose of having children.

for the Transkeian territories than the colony proper, 'in deference' the commissioners explained, 'to the opinion of the Officers serving in the territories, who think that it would not be wise or politic at present to make sudden or sweeping alterations in the prevailing native laws and customs.'[1]

With similar considerations in mind, the commission also drafted a succession act for all African territories, defining existing African customs and usages relating to inheritance. This also laid down rules for testamentary disposition of property by Africans, for guardianship of incapable persons, and for the care and custody of their property. Such an act had been needed ever since the enactment of the Native Succession Act of 1864, which had provided for the administration of the African law of succession but had left undefined what this was. As with the marriage regulations, the commission again introduced certain modifications of the tribal law into the draft act, such as giving women the right to acquire property and dispose of it by will, and a procedure was laid down whereby Africans could choose to have their property distributed after their death, according to the colonial law of succession.

Continuing with the terms of reference, the commission advised that while individual tenure be encouraged, the available evidence indicated that the Transkeian territories were not at present ready for 'anything like a general system of dividing Native lands and securing rights of individuals

---

1. Ibid., G4-83, report, p.37, paragraph 96.

by separate title deeds.'[1] To safeguard tribal lands the commission recommended - obviously influenced by Natal practice [2] - that formal title deeds to them should be granted by the Crown and vested in boards of trustees nominated by the government and in each case including a chief or influential headman. African locations within the colony should be similarly safeguarded. The commission then spelt out in detail the rights of Africans to occupation of land in these areas, and suggested a simplification of the procedure required for transfer of land held by Africans under individual titles. It also recommended that land held under individual titles in the Transkeian territories should not be forfeit in the case of high treason or conspiracy.

Finally, the commission tackled the question of local self-goverhment. It pointed out that the present system of magistrates and chief magistrates was too impersonal and lacking in executive power to prove a satisfactory substitute to the Africans for the tribal system of rule by a chief. It therefore suggested that a permanent official, named the governor's deputy, should be stationed in the Transkeian territories, with duties very similar to those of the governor's agent in Basutoland; and that a council of Africans, the three chief magistrates and the governor's deputy be instituted with power to suggest or initiate alterations of the law for the consideration of the government. It also recommended that white men in the territory and those Africans

---

1. Ibid., report, p.40, paragraph 109.

2. In Natal tribal lands were vested in the Natal Native Trust, constituted in 1864, but there was no separate trust for each tribe.

who qualified for the vote should be represented in Parliament. A special recorder's court, mentioned above in connection with the penal code, should be established for the territories and would relieve the chief magistrates of their judicial duties, leaving them in 'a better position to act as guides, advisers and friends to the Natives, promoting their welfare and fostering their attachment to our rule.'[1]

The report concluded with recommendations for the suppression of the liquor traffic, repeal of the pass laws, superintendence and inspection of African locations, reforms in the Native Affairs Department, and the distribution of a _precis_ in the appropriate African languages of any new laws and regulations promulgated for Africans.

In England Lord Derby, the secretary of state for the colonies since the previous December, showed no interest in the report. He was far more concerned with the Cape campaign to refuse to rule the Transkeian territories at all, rather than with a report on how they should be ruled. Even when appealed to directly, the Colonial Office showed no inclination to influence the use to which the report might be put. In December 1882 a recently appointed missionary in the territories wrote to the Colonial Office on the need to suppress certain African rites and customs, and asked that the code on tribal law expected to be produced soon should not be accepted unless it would effect this. He feared, from such initial indications of the commission's thinking as had been made public, that the commission would not

---

1. _Ibid._, report, p.47, paragraph 126.

recommend an attempt to suppress African laws and customs 'for fear of unsettling the Native mind'.[1] Fairfield's cynical minute on this letter is probably indicative of Colonial Office thinking at the time: 'The writer', he wrote, 'has not been permeated with the newly approved doctrine of letting everyone stew in his own gravy.'[2] Similar customs, he pointed out, went on everywhere in Africa, and although partially stopped in Europeanised towns of West Africa, 'it would be out of the question to make a crusade against them in such a place as Gcalekaland'. It therefore seems likely that part of Derby's lack of concern with the report stemmed from the fact that it advocated a policy with which the Colonial Office basically agreed. The fact that Upington had been a member of the commission and had signed the report may well have contributed to the speed with which the British government subsequently consented without making conditions to the Upington ministry is annexation of Thembuland and Gcalekaland, even though Britain had initially insisted afresh that the Upington ministry submit a draft code too.

After the annexation of Gcalekaland and Thembuland in 1885, the work of the commission could at last be put to the use for which it was intended - to provide a uniform system of law for the Transkeian territories. The Upington ministry's first attempt in 1885 to get any of the commission's recommendations accepted was a failure: the relevant bills

---

1. P.R.O., C.O. 48/505: E. Coakes to (unidentified) member of the British Parliament, 4 Dec. 1882.

2. Ibid., minute by Fairfield, 8 Mar. 1883.

had to be withdrawn in the face of opposition from both people who believed them to provide for too much differentiation, and those who thought they did not provide enough. But the following year the Penal Code Bill, closely following the commission's code, was passed.[1] It was enacted for the territories on a territorial rather than a personal basis - according to Brookes, in order to save parliamentary susceptibilities [2] - and proved immediately successful, as can be seen from the reports of the magistrates and chief magistrates for 1887; the chief magistrate for Thembuland, for example, remarked:

> 'As the provisions of the Penal Code were not explained to the natives previous to their coming into operation, it is often better to let them see the practical working or operation of a change than it is to attempt a theoretical explanation. They doubtless looked upon it with some suspicion and distrust; they invariably do so regard all changes or departures from what they have been accustomed to. The Code and its mode of administration is now accepted as being fair and equitable, which is, I think, in no small measure due to the presence of councillors as assessors. These men are selected from the most astute and trusted councillors of the tribe. They watch the proceedings with much interest and intelligence, and from their intimate acquaintance with all the wiles and tricks of their people frequently put questions that materially assist the Court in eliciting the truth, and after their work is over they explain to the chiefs and people at their usual gatherings what took place.
>
> I attribute the total absence of political unrest and intriguing amongst my people during the past year to their acquiescence in the Penal Code and the mode provided for its administration. The Code, in my opinion, works well, and is admirably adapted to the present condition of the people. A more elaborate and intricate Code of Laws would neither be understood nor appreciated by them.'[3]

---

1. Act 24 of 1886.
2. Brookes, History of Native Policy, p.111.
3. Cape Parl. Papers, G.6-88, p.45.

The introduction of the other principal procedural alterations also met with approval. Stanford reported:

> 'The admission of evidence of prisoners has given general satisfaction. In native procedure this is always done, and before the change in ours I have been frequently asked by natives why it was that the person most interested in the trial should have his mouth "sewn up"'[1].

Various criticisms were made by several magistrates, but only the reports from the magistrates of Mount Ayliff, Mount Frere, and Kokstad indicated that the code was disliked or not understood by the Africans in those districts. Subsequent amendments have not been numerous, and the code seems to have been on the whole successful.[2]

The other suggestions of the commission, however, were not carried out. An attempt in 1885 to establish a council on the lines proposed by the commission and to give the people a voice in the laws by which they were governed did not get through Parliament. Similarly, the 1886 Representation Bill as initially drafted followed the recommendations of the commission but was rejected by Parliament. By the time the Transkeian territories were given representation in 1887, the Parliamentary Voters Registration Act had greatly altered the conditions from those on which the commission's recommendations had been based.[3] And the system of councils established under the Glen Grey Act of 1894 and subsequent proclamations owed more to Blyth's Fingoland councils under the District Fund Scheme than to

---

1. Ibid., p. 62.
2. Brookes, History of Native Policy, pp. 219.
3. Saunders, 'The Annexation', pp.351-7. The 1887 act excluded communally held tribal land from counting towards the property qualification necessary for being given the vote.

either the commission's recommendations or the 1885 or 1886 bills.[1] Similarly the draft marriage regulations, succession act, and land tenure provisions recommended by the commission were never enacted, and the magistrates continued as before.

As regards the Cape colony proper, no attempt was made to rationalize the tribal law situation. The commission had pointed out uncompromisingly that the actual practice in the Ciskeian area was illegal. Paragraphs 23 and 24 of its report read:

> 'It has, however, been brought out in evidence before the Commission, that in several of the Frontier districts the mass of the inhabitants of the Native Locations, although legally subject to Colonial law, have been only nominally so; and to a very considerable extent they are still actually under their own traditional laws and usages, to which they appear to be attached by habit and familiarity, as well as by the fact that their mode of procedure is simple and inexpensive.
>
> In the divisions of King William's Town and Queen's Town, more particularly, the Special Magistrates and Superintendents of Natives, without any judicial authority under statute, have continued to administer customary native law; and in some Locations and Villages the Native headmen deal with petty cases and disputes brought before them for arbitration and settlement, although there is no provision whatever for the enforcement of their decisions. This was the condition of things which the Commission found existing within the Colony at the time of its appointment.'[2]

Among its draft regulations, the commission had therefore included 'Regulations as to Native Marriages, &c., in respect of natives residing within the Colony Proper'[3] and, as mentioned above, had provided in these for the recognition

---

1. Ibid., pp. 371-2.
2. Cape Parl. Papers, G.4-83, report, pp. 18-19.
3. Ibid., annexure III to the report.

of African marriages and for colonial courts hearing cases arising out of them. Yet the government took no action to introduce this legislation nor to prevent the illegal administration of tribal law revealed in the report. Suppression was obviously out of the question without far greater force than the colony could afford, but neither is there any indication in the departmental files that legislation to implement the commission's recommendations was considered after the report was presented. The probable explanation for both this omission and the similar neglect of the draft Transkeian regulations and succession act, is that there was considerable opposition in the colony among even the English-speaking population to the legalizing of African polygamy,[1] and after 1883 the composition of Parliament definitely made such legislation impossible. There was no time for anything to be done about the Commission's recommendations before the election due at the end of 1883, and the Parliament which met in 1884 had for the first time a majority of Dutch members. Many of these were committed to a policy of repression towards the African population, best indicated by some of the proposals they introduced during the session, such as the flogging of servants after some summary process.[2] To have introduced legislation recognizing so emotive a matter as polygamous tribal marriages, which both the Dutch and many of the liberals would have regarded as either weak or blatently

---

1. E.g. see the editorial on African marriages in the influential Graham's Town Journal, 3 Nov. 1882, no doubt prompted by rumours of what the commission was about to propose.

2. Cape Argus, weekly edition, 7 Jan. 1885, p.3.

retrograde, would probably have led to a parliamentary defeat. No action therefore was taken during the life of the Upington ministry, and the commission's uncomfortable report slipped into the past.

The effects of the commission therefore at first sight seem to have been slight: merely a penal code enacted for the Transkeian territories, a special court for the territories, and what amounted to a very useful handbook for future magistrates with Cape-ruled tribes.[1] But it represents the decisive defeat of the school of thought that believed tribal law was too morally reprehensible a system to be recognized, irrespective of the results of non-recognition. Not that the commission anticipated the permanent recognition of African law; it visualized a very gradual introduction of colonial law principles, such as monogamy, and clearly believed this to be the only way of converting the Africans to colonial values.

> 'The establishment side by side within the Colony and its Native dependencies of systems of law distinct in character may at first sight appear to be objectionable; but with regard to the law of Inheritance and Succession it must be understood that it has been and will be followed by the Native population, whether it be ignored by the general law of the Colony or not, - an observation which applies with equal force to the other Native laws and usages dealt with by the Commission. The aim of those interested in the well-being of the Natives should, therefore, be to wean them gradually from these customs and to provide machinery by which they may be enabled in course of time to emerge from their uncivilized condition and join the ranks of their fellow subjects enjoying the benefits of a more enlightened system.'[2]

---

1. The report has also been invaluable for historical and anthropological studies of the area ever since it was published, and frequently referred to by later commissions on African affairs.

2. Cape Parl. Papers, G4-83 report, pp.39-40.

As a result of the recommendations of the commission, tribal law was firmly established as respectable enough for legally qualified judges to administer, and in the years which followed, a body of case law was developed by the Native Territories Appeal Court,[1] Through it men with legal experience systematically tackled the difficulties inherent in the conflict between tribal and Roman-Dutch law, ending the era, in the Transkeian territories at least, of rule by regulations which left the magistrates over-wide magisterial discretion in many instances. Through trial and error a more equitable compromise was reached than anywhere else in South Africa, and served as a model for the more tolerant elements in the legislation by the Union Parliament in 1927 which instituted a common policy on tribal law throughout the country.[2]

---

1. See W.E. Warner, Native Territories Appeal Court Cases 1891-1907, (Transkei, 1907).

2. H.J. Simons, African Women; their legal status in South Africa (London, 1968), pp.33, 53.

CONCLUSIONS

In the period covered by this study the Cape settlers first gained virtually full control of their own government, of the Basuto, and of all but one of the tribes - the Pondo - between the colonial border and Natal. To the tribes they became in effect an imperial power. And like all colonizers, they had to find some way of inexpensively controlling the tribes. To complicate their problem, they also wished to introduce their culture to the 'benighted heathen', both for the good of the heathen and the colonial economy. But many elements in the two cultures were incompatible; and to the colonists there was no question of colonial values bowing before tribal ideas if one or other had to give way.

The question therefore became how to enforce their culture and values on the tribes. The permanent use of large-scale force was both politically and financially impossible. In the end, the colonists armed their colonial magistrates virtually only with legal powers, with which to attack the tribal culture. This presupposed that the tribesmen would accept a legal system which refused to recognize most of the legal actions and contracts upon which their society was based. Such a supposition might have been realistic had Xhosa society included a majority of landless, rightless slaves; as it actually enabled them to participate far more fully in decisions affecting their laws and way of life than did the social structure of the Cape colonists, it offered no incentive to most tribesmen

to adopt the legal system which they were ordered to obey. As one white magistrate and a handful of police could not hope ultimately to control a district of some 30,000 Africans without using the mechanisms of the existing tribal order, the two societies continued to exist side by side, with the white legal system hardly impinging on the tribal in practice. When it did, it was certainly unjust and repressive, but for the majority of Africans living in the extreme eastern districts, it does not appear to have been more destructive of their society than the system applied in the extra-colonial territories; economic and military factors which scattered the tribes and drove the tribesmen into closer contact with the white society were of far greater effect than the attempts to impose the entire Roman-Dutch legal system on them. Only where the magistrates illegally recognized tribal law did they make a considerable impact on tribal society.

The Cape was indeed far more successful in its aims in the areas which it inherited from the British where it was committed to recognizing tribal law. There it soon learnt to manipulate the legal system which regulated the indigenous societies in such away as not only to control but to alter them. A study of Cape policies to tribal law in this period is a study of how by trial and error a colonizing power evolved a policy which spelt ultimate destruction for the social order of the indigenous societies; and of how and why those societies co-operated in its implementation.

The application of the policy in the Transkeian territories as compared with Basutoland highlights the necessary pre-conditions

for its success. It depended on the colonizers holding a fine balance between the benefits offered by their rule and the unpleasant changes they imposed on the daily life of the tribesmen. But where some chiefs were irreconcilable to their loss of independence or to the new changes, success depended on isolating them from the traditional support of their people and other minor chiefs, to prevent a full-scale rebellion. And ultimately this in turn depended on government supporters being assured that the colonizing power was able to protect them from the tribal authorities. Essentially, therefore, the policy depended on the continued military supremacy of the colonial power. As soon as this was in any doubt, the policy could not work; it is an obvious fact, but one which the Cape government repeatedly ignored in Basutoland, that whatever the incentive for a man to ally himself with the colonial power, he was very unlikely to do so if it would leave him unprotected from the inevitable vengeance of his own society. In the South African tribal setting collaboration depended in the last analysis on the collaborators believing that adequate force was available to ensure guaranteed and continuing protection.

The effect of this system on tribal society was to multiply the forces of disintegration let loose by the attack on corner-stones of tribal law. By forcing tribesmen to choose whether they were for or against the chief on many issues, it set up strains in the society which resulted in deep and lasting divisions. For the tribesman faced with the inducements

deliberately offered by the colonial system on the one hand, and inbred traditional loyalty to his chief on the other, the already traumatic effects of the strange society were greatly enhanced. Small wonder that all the millenarian movements of the period adjured the tribesman to destroy all the goods of the white man's world.

The alterations made in tribal law also increased and instigated other divisions within the society, notably between landowners of a certain class and tribesmen holding under communal tenure. As Colin Bundy has shown,[1] a peasant society had begun to emerge which ranged through all the stages of metamorphosis from tribesmen to small commercial farmers, who adopted a capitalist mode of production and the material and ideological values of the white society. For these latter, colonial law in all its aspects became not only acceptable but essential - a fact acknowledged in 1887 when the Cape made provision for exempting certain Africans from the operation of tribal law in the Transkeian territories. Although the destruction of the tribal social structure would inevitably have been an agonizing process for the vast majority of the Africans involved, no matter how gently contrived, the system which the Cape was following enabled those Africans who could in turn manipulate the institutions of the colonial society to rise within it, protected by the doctrine of equality before the law from the more blatant forms of discrimination. For those who could not

---

[1] C. Bundy, 'The Emergence and Decline of a South African Peasantry', African Affairs, vol. 71, no. 285 (Oct. 1972), 378-9.

manipulate the system, its injustices provoked a reaction which in time must have found political expression in an opposing party.

A further division which the government's policies on tribal law widened was that between Christian and pagan Africans. By legalizing many of the measures advocated by the missionaries, the government tended to identify itself in the minds of the Africans with the Christians, thereby rallying the pagans behind the chiefs. Although not all government supporters even in times of crisis were Christians, the goverment's policies on tribal law tended to add a more strongly political dimension to the divisions between pagan and Christian.

But ironically, as has been shown,[1] the very success of the Cape's policy on tribal law in the Transkeian territories in introducing Africans into the colonial society led to its own undoing. By accelerating the disintegration of tribal society begun by economic, missionary, and military action, it destroyed the fear of a tribal revolt led by hostile chiefs. On the other hand, it soon became evident that there was an inherent contradiction in simultaneously trying to undermine a social system and yet using it to bring about changes; the various aspects of the society could not be neatly insulated from each other, and as the authority and social mechanisms

---

[1] E.g., Simons, African Women; Sachs, Justice in South Africa.

which had maintained law and order within the society disintegrated, those of the whites were not always sufficiently accepted to replace them. Even more important, political, economic and demographic considerations made the full absorption of Africans into the larger colonial society no longer seem so desirable. The annexation of the Transkeian territories decreased the proportion of whites in the Cape's population from one third in 1865 to less than one quarter in 1891;[1] and at the same time the number of Africans able to compete with the whites as buyers of land and small commercial farmers continued to grow.[2] In 1913 came the Native Land Act, which closed the free market in land to Africans and heralded the full onslaught of future race legislation. By 1927, when the Union of South Africa adopted a unified policy on tribal law for the whole country, the wheel had gone full circle: tribalism had become desirable as a means of controlling and limiting African demands on the white society. The modified African customary law, which had been so carefully developed in the Transkeian courts as a gradual introduction to Roman-Dutch law, was granted full recognition as part of a scheme to bolster the tribal society it had been designed to destroy. Chiefs were to be allowed to exercise limited local jurisdiction, and their administrative powers were steadily increased, especially after the creation of tribal homelands. As they became increasingly identified with the

---

[1] Saunders, 'The Annexation', p. 447.

[2] Bundy, 'The Emergence', op. cit., p. 384.

South African government, the consensual basis of the justice which they administered waned.

> Their courts were regarded by their opponents as instruments of partiality and coercion rather than as the means of reconciling parties and asserting tribal unity; they enforced the white man's policies without the restraints which operated in the white man's courts, and their judgements generated rather than reduced social friction.[1]

By 1960, when civil war broke out in eastern Pondoland, the chiefs' courts had become as much a symbol of white repression as ever those of the magistrates' had been in the period of conquest: wherever the rebels gained control, popular courts were set up in opposition to them until the South African government reasserted its control.[2] The chiefs and people had changed roles as rebels and government collaborators.

By then Britain was powerless to exert any direct, constitutional pressure to protect the tribesmen from the oppression of the white society. But in 1879-80, during the annexation of the Transkeian territories Britain did prevent the colonists from implementing what could have been the very repressive policy of recognizing only colonial law in Gcaleka-land and Thembuland. Although the British government's attitude to what method should be used in governing the tribes, was dictated all along largely by the desire to avoid expensive rebellions, it is significant that Britain was still able to

---

[1] Sachs, Justice in South Africa, p. 117.

[2] G. Mbeki, South Africa, The Peasants' Revolt (Harmondsworth, 1964), chapter 9.

retain her role as 'protector of the tribes' even after allowing the colonist to take control of their internal affairs. This was because Gcalekaland and Thembuland were not yet part of the colonists' internal affairs, by virtue of annexation. The colonists may have been able to persuade the tribesmen to accede to the illegal method of rule which they adopted; Britain was less easy to persuade after the 1877-8 war. It was not by granting the Cape Responsible Government that Britain surrendered her ability to protect the societies of the tribes of South Africa's eastern coast from manipulation by the colonists; it was by allowing the Cape to annex the territories without incorporating the method of rule in a law which could not be changed without Britain's sanction. Though as subsequent South African experience with the entrenched clauses of the Union constitution shows, even such guarantees provided no sure protection.

In the long view, it must be asked whether the Cape government's policy on tribal law in the tribal territories had any real importance in the nineteenth century in bringing about the disintegration and divisions with which tribal society was plagued. It could be argued that economic forces would ultimately have achieved very much the same results, but this is doubtful: the difference in the time span involved made a qualitative as much as a quantitative difference. It is clear that government policy did strongly accelerate the process, and by heightening the rate at which changes were

taking effect, multiplied the difficulties of adaptation. Changes which could have been absorbed relatively painlessly over several generations aroused bitter and immediate reactions when pushed through in a decade. How strongly the tribesmen felt about interference with their more cherished laws is perhaps best indicated by the fact that virtually every record of serious unrest includes references to how the chiefs were drumming up support by spreading rumours of impending colonial changes in the tribal law. Ultimately it can be argued that the government policy, by so rapidly increasing the number of Africans able to compete in the tiny, minority white society, must almost inevitably have produced an antagonistic reaction from the colonists of even the 'liberal' Cape. If that is accepted, the policy of segregation of the twentieth century was not a new policy but actually inherent in that first instituted at the Cape with such different aims in view.

Appendix A

Extracts from the Basutoland Regulations of 1871

Courts of Law

1. By Proclamation No. 51, of the 24th August, 1871, the territory of British Basutoland has been divided into four Districts, termed respectively, the District of Thaba Bosigo, the District of Berea, the District of Leribe, and the District of Cornet Spruit; and these Districts are now subject to the jurisdiction and authority of the several Courts of Resident Magistrates of the Districts.

2. When any crime or offence shall be committed on the boundary of any two of the aforesaid Districts, or within the distance of two miles of any such boundary, or shall be begun in one District and completed in another, every such crime or offence may be dealt with, inquired of, tried, determined and punished in either of the said Districts in the same manner as if it had been actually and wholly committed therein.

3. The person and property of every individual will be equally respected and protected by the law.

4. The taking of the life of any person wilfully and maliciously will be held to be murder, and will be punishable by the death of the offender. Infanticide or concealment of birth will be punishable by imprisonment.

5. The taking of the property of any person against his will, except by order of a magistrate or assistant magistrate in due course of law, will be held to be theft, and punishable accordingly.

6. Arson, with intent to kill any person, shall be punishable with death. Rape shall be punishable with whipping, not exceeding fifty lashes, or confiscation of the property of the offender, or both.

7. All other offences against person and property shall be punishable by confiscation of the property of the offender, in the discretion of the Court, or by imprisonment, and, in the circumstances hereinafter mentioned, by whipping.

8. All acts which by the laws of the Colony of the Cape of Good Hope are held to be offences against person or property, shall, due allowance being made for the circumstances of the country, be held to be offences and punishable accordingly.

9. Any person forcibly compelling another to submit against his will to circumcision, or any other like act or ceremony, shall be held to be guilty of an assault, and shall be punishable accordingly.

10. Any person aiding in or procuring the circumcision of any youth without the consent of his parent or other person having the lawful custody of such youth, shall be guilty of an assault, and shall be punishable accordingly.

11. Every person practising or pretending to practise witchcraft, or other acts commonly regarded as such, shall be held to be a rogue, and shall be punishable accordingly.

12. Any person falsely accusing another of practising witchcraft or other such acts, shall be held to be a rogue, and shall be punishable accordingly.

13. Every person committing any theft of stock in the Colony of the Cape of Good Hope, or in Natal, or in the Orange Free State, shall be dealt with in like manner as if such theft had been committed in Basutoland.

14. Persons sentenced to imprisonment shall be confined, with or without hard labour, in some gaol or lock-up in Basutoland, or in such place in the Colony as the Governor shall from time to time appoint.

15. No female shall be sentenced to receive a whipping.

16. The trial of every person charged with any offence shall be held by the magistrate or assistant magistrate of the district (except as is hereinafter provided) in public, and the charge and the evidence given against such person, and the evidence adduced in his defence, and the finding and the sentence, shall be duly recorded by such magistrate or assistant magistrate. And a return of all convictions and sentences shall be sent at the end of each month by the magistrate or assistant magistrate to the Governor's Agent.

17. The trial of every person charged with a crime or offence punishable by death under the Laws of the Colony, shall be held before any three of the magistrates or assistant magistrates aforesaid, the senior to preside, at such time and place as shall be appointed by the Governor's Agent, and of which time and place due notice shall be given. If the magistrates or assistant magistrates shall differ with respect to the guilt of the person accused, he shall be discharged; if they shall differ with respect to the sentence to be passed upon any person convicted, the sentences proposed by them respectively shall be submitted for the decision of the Governor for the time being; and no sentence of death shall be carried into effect except upon the warrant of the Governor, to whom all the proceedings in the case shall be forwarded.

18. The magistrate, assistant magistrate, magistrates or assistant magistrates shall, in passing sentence of confiscation of property, declare and record the proportion which, when recovered, shall be given to the complainant, and that which shall be given to the person by whom the offender shall have been arrested and brought to justice, and that which shall be taken for Her Majesty for the purposes of the Government

19. It shall be lawful for the magistrate, assistant magistrate, magistrates or assistant magistrates, if he or they shall see fit to do so, in any case in which an offender may not be possessed of property sufficient to make due compensation for any offence of which he may have been convicted, and likewise at any time in the case of hardened offenders, to order such offender to be punished by whipping, not exceeding thirty-six lashes.

20. The magistrates and assistant magistrates shall have jurisdiction in all civil suits arising within their respective districts, and shall be bound, in respect of all such suits tried before them respectively, to record the matter of the suit, the evidence taken on both sides, and the judgment.

21. No decision of any dispute by any person other than a magistrate or assistant magistrate shall be held to debar either of the parties from instituting a suit in respect of the same before the magistrate or assistant magistrate of the district.

22. All summonses and subpœnas issued by a magistrate or assistant magistrate in any such suit may be served by the parties to the same, but it shall be lawful for the magistrate or assistant magistrate to award reasonable costs for such service against the losing party.

23. All writs of execution that may be issued by any magistrate or assistant magistrate shall be carried into effect by some person to be appointed by him; and it shall be lawful for such person to seize property sufficient to cover the judgment and costs, as well as the costs of such execution, as approved by such magistrate or assistant magistrate.

24. All judgments or decisions of the respective resident magistrates and assistant magistrates of the Districts of Berea, Leribe, and Cornet Spruit, and of the assistant magistrate of the District of Thaba Bosigo, in all civil causes, shall be subject to be reviewed by the chief magistrate of Basutoland; and when and as often as any Court of resident magistrate of any of the aforesaid Districts of Berea, Leribe, and Cornet Spruit, or the assistant magistrate of the district of Thaba Bosigo, shall sentence any person, upon conviction, to be imprisoned, with or without hard labour, for any period exceeding one month, or to pay a fine exceeding five pounds sterling, or the value of five pounds sterling, or to receive any number of lashes exceeding twelve, the magistrate or assistant magistrate pronouncing such sentence shall, upon the application of the person upon whom the said sentence shall have been passed, forward to the chief magistrate of Basutoland, not later than fourteen days next after the determination of the cass, the record of the proceedings in the case; and the said chief magistrate shall have full power to alter, amend, mitigate, or annul the said sentence; but he shall have no power to increase it.

Marriages

1. It shall not be lawful for any person to compel any woman to enter into a contract of marriage against the wish of such woman.

2. Any marriage celebrated by any minister of the Christian religion, according to the rites of the same, shall be taken to be in all respects as valid and binding, and shall confer on the parties to the same, and their issue, such and the same rights, to all intents and purposes, as marriages contracted according to the customs of the Basutos.

3. No marriage of any kind celebrated after the publication hereof, whether it be celebrated according to the rites of the Christian religion or according to the customs of the Basutos, or whether it be a first or subsequent marriage of either or both of the parties hereto, shall be held to be valid and binding on such parties, or to confer any rights on them or either of them or their issue, unless both the parties shall, within twenty days from the time when the same shall be celebrated, appear before the magistrate or assistant magistrate of the district, and declare their consent to the same. And such magistrate or assistant magistrate shall thereupon register the same in a book to be by him kept for that purpose; and a fee of two shillings and sixpence shall be thereupon payable to such magistrate or assistant magistrate for the purposes of the Government.

4. The dowry given in consideration of any such marriage, if any, shall likewise be registered at the same time as the marriage; and no suit shall at any time be entertained respecting such dowry unless the same shall have been given and registered with the marriage.

5. All questions which may arise in respect of marriages celebrated before the publication hereof shall be tried and decided in conformity with the customs in force at the time of such celebration.

6. If one of the parties to any marriage shall die, the survivor of them shall be entitled to the custody of any issue of the same, until they shall attain the age, in the case of males of eighteen years and in the case of females of sixteen years; and no such female shall before attaining such age be given in marriage without the consent of such surviving parent, nor without her own consent.

7. If any woman whose marriage shall not have been registered as aforesaid, shall, after the publication hereof, become the mother of any child or children, she shall be entitled to the custody of the same until he or she or they attain the age, in the case of males of eighteen years, and in the case of females of sixteen years; and no female child of such woman shall be given in marriage before attaining the age of sixteen years without the consent of such woman, nor without her own consent.

8. If the husband of any woman shall die, she shall be at liberty to contract a second marriage at her discretion. But in the event of her so marrying, the custody of the issue of her previous marriage shall thereupon be transferred to some person to be selected, if possible, from the relatives of such issue, by the magistrate or assistant magistrate; and the magistrate or assistant magistrate shall make order for the preservation and administration by the person to be so selected of any property belonging to the minors, for their benefit.

Lands and Hut Tax

1. The right of allotting the land for the occupation of the several members of the tribe is vested in the Governor.

2. For the purpose of this allotment, the territory will be subdivided into such and so many districts as may from time to time be found necessary.

3. This subdivision will be made by the Governor's Agent, subject to the approval of the Governor. And one of the principal chiefs or headmen will be nominated to the superintendence of each such subdivision.

4. Each such chief or headman will, as soon as practicable, submit to the Governor's Agent a list of the members of the tribe resident within or belonging to his subdivision, to whom he proposes that a tract of land should be allotted for occupation; and such allotment, subject to such alteration and amendment as may be found necessary by the said Agent, shall be made accordingly, and lists of all such allotments shall be thereupon made, and kept of record in the said Agent's office.

5. No addition to or alteration of such list shall be made, except with the approval of the said Agent, after communication with the chief or headman of the subdivision to which the same shall relate.

6. Every person to whom any such allotment shall be made shall be bound to pay to the said Agent or to the magistrate of the district, for the purposes of the government of British Basutoland, a hut tax, at the rate of ten shillings per annum for every hut that may be erected for the occupation of a family on such land.

7. In computing the liability of any person for payment of the hut tax, it shall be held that payment of the rate of ten shillings per annum shall become due for each wife of any person residing on any such lot, whether a separate hut shall be erected for the use of each such wife or not. The tax shall be also payable for every hut occupied by any unmarried man.

8. The hut tax hereby declared to be payable shall become due on the first day in June in each year. But it shall be lawful for the Governor from time to time to fix some other day at which the same shall become payable; provided that not more than one such payment shall at any time be declared to be payable within twelve months.

9. The hut tax hereby declared to be payable may be paid by the person liable for the same either in money, or in grain, or in stock, at the option of such person. The Agent shall in each year fix the value at which such grain or stock shall be received.

10. It shall be the duty of the chief or headman of the subdivision to collect the tax due from the persons residing in his subdivision, and to deliver the same at such time and place as shall be appointed by the Agent or magistrate of the district.

11. A receipt for the amount of tax paid by each person, signed by the Agent or magistrate of the district, or by some person thereto authorized by him, shall be delivered to each such payer. And such receipts shall, as soon as arrangements to that effect can be made, be written on paper bearing a stamp equal to the amount of tax received from such payer.

12. In the event of failure or refusal on the part of any person liable to hut tax to pay the same, the amount due may be recovered, by order of the Agent or magistrate of the district, by sale of so much of the property of such person as may be sufficient to cover the amount due, with any expenses that may be incurred for the recovery of the same. And it shall be lawful for the Agent or magistrate of the district, if he shall think fit so to do, and if he cannot obtain payment of the tax, to eject the person in default from the occupation of the land.

Appendix B

Comparable extracts from the Regulations of 1879 for Fingoland and the Idutywa Reserve, modelled on the Basutoland Regulations of 1877

Courts of Law

Courts of Resident Magistrates shall be and the same are hereby declared to be erected, constituted, and established for and within each of the following districts in the territory of the Transkei, that is to say, Nqamakwe, Tsomo, and the Idutywa Reserve; and the said courts shall be respectively holden by and before the Resident Magistrates for the Districts aforesaid. And it shall be lawful for the Governor of the Colony of the Cape of Good Hope, by any Proclamation to be by him, from time to time, issued for that purpose, to erect, constitute, and establish Courts of Resident Magistrates, to be held for and within such other districts respectively as the said Governor shall think fit to create, which Courts shall respectively be holden before such persons as shall respectively be appointed to be Resident Magistrates of such districts.

2. It shall also be lawful for the Governor of the Colony by any Proclamations to be by him from time to time issued for that purpose, as occasion may seem to him to require, to define, fix, alter, and appoint the local limits of the territory which shall be comprehended and included in any of the aforesaid districts, whether those already created, or such as shall hereafter be created, and within which the Resident Magistrate for such district shall have and exercise jurisdiction and authority; and whenever the said Governor shall deem it to be inexpedient or unnecessary that any of the said Courts shall continue to be holden for and within any of the districts aforesaid, then and in every such case it shall be lawful for the said Governor by any Proclamation to be by him issued for that purpose, to abolish such Court and the office of Resident Magistrate for such district, and also to annex any such district or any part thereof to any other district or districts; and every district or part thereof which shall be so annexed as aforesaid to any other district shall thereby become and be within and subject to the jurisdiction and authority of the Resident Magistrate of the district to which it shall be so annexed; and whenever any court shall be erected under and by virtue of the power and authority in that behalf herein-before mentioned, and the district assigned for the exercise of the jurisdiction of such court shall comprise territory which was before then, either wholly or in part, within the jurisdiction of some other Court or Courts of Resident Magistrate, then and thereupon such territory shall wholly cease to be within or subject to the jurisdiction of such other court or courts.

3. Every person who shall hereafter be appointed the Resident Magistrate for any district shall be so appointed by the Governor; and it shall be lawful for the said Governor when and so often as by reason of the death, sickness, absence, or other incapacity of any Resident Magistrate, it shall appear to him to be necessary or expedient so to do, to appoint some fit and proper person to act as and in the stead of such Resident Magistrate within his district; and all deeds, acts, matters, and things which shall be done and performed by or before any person so appointed to act as aforesaid, and under and by virtue of such, his appointment shall be as legal, valid, and effectual to all intents and purposes, as if the same had been done and performed by or before the Resident Magistrate instead of whom such person shall have been appointed to act: Provided, always, that no Resident Magistrate of any district existing at the time of the commencing and taking effect of these regulations, and of which the local limits shall not be changed by any such Proclamation as in the second section mentioned, need be appointed anew, but shall, without any fresh appointment, be deemed and taken to be the Resident Magistrate of such district.

4. Every person who shall in manner aforesaid be appointed to be a Resident Magistrate, or to act as or in the stead of any Resident Magistrate, shall before exercising any of the functions of his office take the oath of allegiance and the oath of office set forth in the schedule hereunto annexed marked A. before the Chief Magistrate or any Justice of the Peace, who are hereby empowered and required to administer the same; and every such person shall, as soon as he shall have duly taken the oaths aforesaid, cause such oaths to be recorded, and shall subscribe the same in the record book of the proceedings of his Court or of the Court in which he shall so have been appointed to act, as the case may be.

5. The courts of the Resident Magistrates aforesaid shall be respectively Courts of Record, and the pleadings and proceedings of the said Courts shall be carried on, and the sentences, decrees, judgments, and orders thereof pronounced and declared in open court, and not otherwise; and the several pleadings and proceedings of the said Court shall be in the English language; and in all criminal cases the witnesses for and against any accused person or persons, shall deliver their evidence viva voce, in the presence of the prisoner and in open court.

6. When any crime or offence shall have been committed on the boundary of any two districts, or within the distance of two miles from any such boundary, or shall be begun in one district and completed in another, every such crime or offence may be dealt with, inquired of, tried, determined, and punished in either of the said districts in the same manner as if it had been actually and wholly committed therein.

7. The person and property of every individual shall be equally respected and protected by the law.

8. The taking of the life of any person wilfully and maliciously shall be murder, and be punishable by the death of the offender. The taking of the life of any person wrongfully and unlawfully without malice shall be culpable homicide, and be punishable by imprisonment, with or without spare diet, and with or without solitary confinement, or by whipping not exceeding fifty lashes, or by fine, or by any two or more of such punishments combined.

9. The taking of the property of any person against his will and fraudulently shall be theft, and be punishable in like manner as if committed in any other part of the said Colony.

10. Rape shall be punishable with whipping, not exceeding fifty lashes, or by fine or by imprisonment, with or without spare diet, and with or without solitary confinement, or by any of the foregoing punishments combined.

11. All other acts which by the laws of the said Colony are held to be Offences against the person or property shall be held to be offences in the Transkei, and shall be punishable by fine or by imprisonment, with or without spare diet, and with or without solitary confinement, or by whipping not exceeding 36 lashes, or by any two or more of such punishments combined, and all persons tried for any offence may be convicted of any minor or other offence, in like manner as if the trial took place in any other part of the said Colony.

12. Any person forcibly compelling any other person to submit against his or her will to circumcision, or so compelling any person, male or female, to submit to any other like act or ceremony, shall be held to be guilty of assault, and [illegible] to the like punishment as he or she would be for the offence of assault.

13. Any person aiding or procuring the circumcision of any youth or girl without the consent of his or her parent, or other person having the lawful custody of such youth or girl, shall be guilty of an assault, and shall be punishable as in the last preceding regulation mentioned.

14. Every person practising or pretending to practise witchcraft, or other acts commonly regarded as such, shall be guilty of an offence punishable by fine or imprisonment, with or without spare diet, and with or without solitary confinement, or whipping not exceeding 36 lashes, or by all or any of such punishments.

15. Any person falsely accusing another of practising witchcraft, or other such acts, shall be guilty of an offence punishable as in the last preceding regulation provided.

16. Any person domiciled in the Transkei, who shall commit any offence in any place out of the Transkei may be dealt with in the Transkei in like manner as if such offence had been committed in the Transkei, and any person who shall commit any theft out of the Transkei and who shall bring the stolen property or any part thereof into the Transkei, may be dealt with in like manner as if such theft had been committed in the Transkei.

17. Persons sentenced to imprisonment, withoor without hard labour, shall be confined in some gaol or lock-up in the Transkei, or in such other place in the Colony of the Cape of Good Hope as the Governor shall see fit to direct.

18. No female shall be sentenced to receive a whipping.

19. The trial of every person charged with any offence shall be held by and before the Magistrate of the distßict in which it was committed (except as herein-after provided, and except as to cases falling within the 16th Regulation, which may be tried in any district of the Transkei), and every trial shall be held with open doors; and the charge, the evidence given for and against such person, the finding, and the sentence shall be duly recorded by the magistrate by or before whom the case is heard, and a return of all cases so adjudicated upon shall be sent, at the end of each month, by the magistrate to the Chief Magistrate of the Transkei.

20. The trial of every person charged with a crime or offence punishable by death shall be held before a court consisting of the Chief Magistrate and any two of the Magistrates aforesaid, at such time and place as shall be appointed by the Chief Magistrate who shall be the President of such court, of which time and place due notice shall be given. If the magistrates shall differ with respect to the guilt of the person accused the judgment of the majority shall be the judgment of the Court.

21. No sentence of death shall be carried into effect except upon the warrant of the Governor, to whom all the proceedings in the case shall (as soon as may be) be forwarded.

22. In case of a sentence of fine the fine shall belong to Her Majesty, to be applied for the purposes of the Government, provided, however, that it shall be lawful for the Magistrate pronouncing any sentence of fine to adjudge that a portion of the fine shall be given to the party injured or aggrieved by the accused, and a portion to any person on whose information the accused has been brought to justice, or who has materially assisted in bringing the accused to justice.

23. The magistrates shall have jurisdiction in all civil suits and proceedings over and against persons residing within their respective districts, and shall be bound in respect of all such suits and proceedings tried or heard before them to record the subject of the suit or proceeding, the evidence taken, and the judgment. All such suits and proceedings shall be dealt with according to the law in force at the time, in the Colony of the Cape of Good Hope, except where all the parties to the suit or proceeding are what are commonly called natives, in which case it may be dealt with according to native law, and in case of there being any conflict of law, by reason of the parties being natives subject to different laws, the suit or proceeding shall be dealt with according to the laws applicable to the defendant. And the proceedings shall, as near as may be, and so far as circumstances will permit, be the same as those in the Courts of Resident Magistrates in the Cape Colony.

24. All summonses issued by a magistrate or clerk of the Court in any civil suit or proceeding may be served by the parties to the same, and it shall be lawful for the magistrate to award reasonable costs for such service against the opposite party, if unsuccessful. If the parties are unwilling to serve any summons, the same may be served by any person who may be appointed for the purpose by the magistrate issuing the same, and the person applying for the same shall in such case, deposit the costs thereof with the magistrate, the question as to who is ultimately to bear such costs being left for the decision of the magistrate after the case is disposed of.

25. It shall be lawful for any person, being a party to any civil suit, action, or proceeding pending in the Court of any magistrate in the Transkei, to appeal against any final judgment, decree, or sentence of such Court, or against any rule or order made by such Court in any such civil suit, action, or proceeding having the effect of a final or definite sentence to the Chief Magistrate of the Transkei, and an absolution from the instance shall for such purpose be deemed a final judgment or sentence, provided that if he intend to appeal, he shall, within 14 days after the decision complained of, make known his intention to the clerk of the said court, who shall note his appeal, with the date thereof, in the proper column of the Record Book, and the party appealing shall then deposit and lodge with the clerk of the said court the sum of £1. sterling as a security for the costs of conducting the said appeal, and the said clerk shall make a note of the said deposit in the last column of the Record Book, immediately after the note of the said appeal, and thereupon the said appeal shall be allowed but not otherwise. The deposit aforesaid shall be forfeited to the Crown if the appeal shall be decided by the Court of Appeal to be frivolous or vexatious, or if it shall be abandoned or not duly prosecuted; but if otherwise, it shall be returned to the appellant. And in any case where an appeal may have been duly noted, the magistrate shall direct either that the judgment, sentence, decree, rule, or order appealed from, shall be carried into execution, or that the execution thereof shall be suspended, pending the said appeal, as to the said magistrate may appear most consistent with justice. And in case the magistrate shall direct any such judgment, decree, rule, order, or sentence to be carried into execution, the person in whose favour the same shall have been given shall, before the execution thereof, enter into good and sufficient security, to be approved of by the magistrate, for the due performance of such judgment or order as the Court of Appeal shall think fit to make thereupon; and in case the magistrate shall direct the execution of any such judgment, decree, rule, order, or sentence to be suspended pending such appeal, such magistrate shall and may, whenever it shall appear to him necessary and consistent with justice so to do, require the person against whom such judgment, decree, rule, order, or sentence shall have been given, before any order for the suspension of any such execution is made, to enter into good and sufficient security to be approved of by such magistrate, for the due performance of such judgment or order as the Court of Appeal

shall think fit to make thereupon. And the Court of Appeal may reverse or alter the judgment of the magistrate as justice shall require; and in case the record of the magistrate shall not appear to furnish sufficient evidence or information for the due determination of the case, may remit the said record to the magistrate, with instructions in regard to the taking or setting out of further evidence or information; or may order the parties, or either of them, to produce at some convenient time to the Court of Appeal, such further proof as may seem necessary or desirable; or such Court may take such other course as may lead to the just, speedy, and as much as may be inexpensive settlement of the case, making such order in regard to costs as justice shall require.

26. When and as often as any Court of Resident Magistrate shall sentence any person upon conviction to be imprisoned, with or without hard labour, for any period exceeding one month, or to pay any fine exceeding 5l., or to receive any number of lashes or cuts, exceeding 12, the magistrate pronouncing such sentence shall forward to the Chief Magistrate of the Transkei for his consideration as soon as practicable, and not later than 14 days next after the determination of the case, the record of the proceedings of the case, together with such remarks, if any, as he may desire to append, and in case the said proceedings shall appear to such Chief Magistrate to be in accordance with real and substantial justice, he shall endorse his certificate to that effect upon the said proceedings, and the said proceedings shall then be returned to the magistrate by whom the same shall have been transmitted; and any magistrate forwarding any such record shall inform the person convicted of the day upon which such record shall be forwarded, and it shall be lawful for any person duly acting for such convicted person to peruse, and if need be take a copy of such record, whilst in the possession of the Chief Magistrate, and it shall be lawful for such person, should he think fit, acting as aforesaid, to set down the case contained in such record for argument before the said Chief Magistrate. If, upon considering the proceedings aforesaid, it shall appear to the Chief Magistrate that the same are not in accordance with real and substantial justice, or that doubt exists whether or not they are in such accordance, it shall be lawful for the said Chief Magistrate to alter or reverse the sentence of the magistrate, and to set aside or correct the said proceedings; and, when it shall appear necessary or proper to do so, to remit such case to the said magistrate, with such instructions relative to the further proceedings to be had in such case as to the said Chief Magistrate shall seem calculated to promote the ends of real and substantial justice; but the said Chief Magistrate shall have no power to increase any sentence.

27. No suit or action claiming damages or other relief for acts alleged to have been committed during any military operations heretofore carried on in the Transkei shall be cognisable, entertained, or tried by or before any magistrate.

28. The rules, orders, and regulations respecting the manner and form of proceedings in civil and criminal cases before the Court of the Chief Magistrate and the Courts of the Resident Magistrates respectively in the Transkei shall, *mutatis mutandis*, and as far as the circumstances of the country will admit, be the same as those from time to time in existence as to the Courts of Resident Magistrate in the Cape Colony.

29. A tariff of fees to be taken by the officers of the Court of the Chief Magistrate and of the Resident Magistrates in the Transkei shall be framed and drawn up by the Chief Magistrate, and after approval by the Governor and publication in the "Government Gazette", shall have the force of law in the Transkei, but the same may be from time to time altered as aforesaid.

Marriages

30. It shall not be lawful for any person to compel any woman to enter into a contract of marriage, or to marry against her wish.

31. Any marriage celebrated by any minister of the Christian religion, according to the rites of the same, or by any civil marriage officer duly appointed by the Governor to solemnise marriage, or according to ordinary Kafir or Fingo forms, provided such last-mentioned marriage shall be registered within three months from the date of such marriage in a book to be kept for that purpose by the Resident Magistrate of the district, shall be taken to be in all respects as valid and binding, and to have the same effect upon the parties to the same and their issue and property as a marriage contracted under the marriage laws of the Cape Colony.

32. All questions of divorce or separation arising between persons married by a minister of the Christian religion, or by a civil marriage officer as aforesaid, or according to ordinary Kafir or Fingo forms and registered as aforesaid, except as herein-after mentioned, shall be decided according to the law then in force in the Cape Colony, and shall be heard and decided before the Chief Magistrate.

33. All questions of divorce or separation arising between parties married according to the laws and customs of the natives, which may arise or have arisen in respect of marriages celebrated between natives before the promulgation of these regulations, shall be tried and decided before any Resident Magistrate, in conformity with the native laws and customs in force at the time of such celebration.

34. No registration of a marriage solemnised by a minister of religion or a marriage officer as aforesaid, other than that prescribed by the 21st section of the Marriage Ordinance of the Cape Colony of September 1838, or the Marriage Act, 1860, of the said Colony shall be necessary; and all marriages registered as aforesaid shall be considered as legally registered.

35. Any persons married according to the native custom may register the first of the said marriages and no other, so long as the first registered wife is living, at the office of the Resident Magistrate for the district in which such marriage was celebrated, or in the office of the Resident Magistrate for the district in which the parties reside, provided that such registration shall take place within three months after the celebration of such marriage.

36. A registration fee of 2s.6d. shall be payable for the purposes of Government for the registration of all marriages, whether celebrated according to the rites of the Christian religion, before a marriage officer as aforesaid, or according to the custom of the natives.

37. In the event of the death of any person married by a minister of the Christian religion, or by a marriage officer as aforesaid, or according to ordinary Kafir or Fingo forms and registered as aforesaid, or of a person who has died leaving a will or other testamentary writing, made according to the law of the Colony of the Cape of Good Hope, all questions with regard to the registration of the will (if any) and the administration of the estate and property of such person, shall be regulated by the provisions of Ordinance No. 104, or any other law of the Cape Colony having reference to the disposition of property, in so far as it shall be deemed applicable to the circumstances of the country, the name of the Chief Magistrate of the Transkei being considered as inserted wherever the name of the Master of the Supreme Court appears in the said Ordinance or in any such law.

38. If any person as aforesaid shall die without having availed himself or herself of the provisions of the last preceding section by making a will, all questions in respect to inheritance or guardianship shall be decided according to the law of the Cape Colony.

Age of Majority

39. All persons, male or female, when they shall attain or who have attained, the full age of 21 years shall be deemed to have attained the legal age of majority.

Lands, House and Hut Tax, Pounds, Passes, &c.

40. The right of allotting the land is vested in the Governor.

41. For the purpose of such allotment the territory shall be subdivided into as many districts or wards as may from time to time be found necessary.

42. This subdivision shall be made by the Chief Magistrate, subject to the approval of the Governor, and a headman shall be nominated to the superintendence of each such subdivision.

43. Each such headman shall, as soon as practicable, submit to the Chief Magistrate a list of the members of the tribes resident within or belonging to his subdivision to whom he proposes that a tract of land should be allotted for occupation; and such allotment, subject to such alteration and amendment as may be found necessary by the said Chief Magistrate, shall be made accordingly, and lists of all such allotments shall be thereupon made and kept of record in the said office.

44. No addition or alteration of such list shall be made except with the approval of the said Chief Magistrate after communication with the said headman of the subdivision to which the same shall relate.

45. Every person to whom any such allotment shall be made shall be bound to pay to the said Chief Magistrate, or to the magistrate of the district, a house or hut tax at the rate of 10s. per annum for every separate house or hut that may be erected for the occupation of a person or family on such land.

46. In computing the liability of any person for payment of the house or hut tax, it shall be held that payment at the rate of 10s. per annum shall become due for each wife of any person residing on any such lot, whether a separate house or hut shall be erected for the use of each such wife or not, the tax shall be also payable for every house or hut occupied by any unmarried man.

47. The house or hut tax hereby declared to be payable shall become due on the 1st day of July in each year; but it shall be lawful for the Governor from time to time to fix some other day on which the same shall become payable; provided that not more than one such payment shall at any time be declared to be payable within 12 months.

48. It shall be the duty of the headman of the subdivision to assist in the collection of the tax due from the persons residing in his subdivision, and to report to the Resident Magistrate of the district all defaulters.

49. A receipt of the amount of tax paid by each person, signed by the Resident Magistrate of the district, or by some person thereto authorised by him, shall be delivered to the person paying.

50. In the event of a failure or refusal on the part of any person liable to house or hut tax to pay the same, the amount due may be recovered under a judgment of the Court of the Magistrate of the district, by sale of so much of the property of such person as may be sufficient to cover the amount due, with any expenses that may have been incurred for the recovery of the same; and it shall be lawful for the Magistrate of the district, if he shall think fit so to do, and if he cannot obtain payment of the tax, to eject the person in default from the occupation of the land, or to sentence the said person to imprisonment for any period not exceeding two months.

51. Every resident of the Transkei leaving the Transkei shall be provided with a pass signed by a Resident Magistrate or by his order; and any such person leaving the Transkei without such a pass shall upon conviction be liable to a fine not exceeding 20s.; and all persons entering the Transkei must be reported to the Resident Magistrate of the district by the superintendent or headman of the village in which they are within 10 days after their arrival: the report must include the number and description of persons, and an account of any property they may have brought with them. Any headman of a village neglecting to comply with this regulation shall be liable on conviction to a fine not exceeding 5l. sterling.

52. The Chief Magistrate is empowered to establish one or more pound or pounds in each district, and to appoint some fit and proper person to be poundmaster or keeper of every such pound; and it shall be competent for the Chief Magistrate to dismiss any such poundmaster or keeper for misconduct. The Chief Magistrate shall frame a code of regulations for the management of such pounds and publish the same for general information in the English, Dutch and Native languages.

B I B L I O G R A P H Y

This bibliography has been arranged as follows:

A. Manuscript Sources
   1. Official
   2. Unofficial.

B. Printed Sources
   1. Primary Sources
      a. Official Records
      b. Newspapers and Periodicals
      c. Contemporary Books and Pamphlets
      d. Documents subsequently published.
   2. Secondary Sources
      a. Bibliographies and Guides
      b. Select Books and Articles
      c. Unpublished Theses.

A. MANUSCRIPT SOURCES

1. OFFICIAL

a. In the Public Record Office, London.

i. Cape of Good Hope, Original Correspondence: Despatches, Offices and Individuals. vol. C.O. 48/162 (1835) - vol. C.O. 48/510 (1884).

ii. Cape of Good Hope, Entry Books of Correspondence vol. C.O. 49/41 (1847) - vol. C.O. 49/61 (1872) (end of C.O. 49 series).

iii. Cape of Good Hope, Minutes of the Cape Executive Council. vol. C.O. 51/163 (1869-72).

b. In the Cape Archives, Cape Town. (Papers are listed as in the Archives. At the time research for this dissertation was done, files originally numbered up to 119 had been split up and renumbered. Numbers below from NA 150 are the original numbers.)

i. Native Affairs Department Papers.

N.A. 1-10: Letters from Chief Magistrate, Transkei (1878-1881)

N.A. 40: Letters from Chief Magistrate, Tembuland (1876)

N.A. 150-8: Letters from Government Agents, etc. (1872-78)

N.A. 179-80: Letters from Civil Commissioners and Resident Magistrates in the Colony (1878-79)

N.A. 272-84: Letters from Governor's Agent, Basutoland (1873-84)

N.A. 294-309: Letters from Government Departments (1873-84)

N.A. 398-404: Miscellaneous letters received (1873-83)

N.A. 840-1: Letter Books(1873-76)

N.A. 932: Letters despatched (1879-80)

N.A. 1050: Circulars, Native Affairs Department

N.A. 1147: Correspondence 1880-2 of 1883 Cape Native Law and Customs Commission.

ii. Government House Papers

G.H. 8/48: Letters from Native Chiefs ... (1854-84)

G.H. 14/7: Letters from Native Chiefs and British Officials in Basutoland (1864-83)

G.H. 17/2: Letters from Supreme Court, Attorney General, and other departments (1850-84)

G.H. 17/4: Letters received from Native Affairs Department and its predecessor (1858-82)

G.H. 19/8: Papers re Sandilli, Kreli, etc.

iii. Attorney General Papers

A.G. 91-2: Letters received (1871-72)

A.G. 98: Letters received (1879)

A.G. 2710-12: Semi-official and private letter book (1880-84): odd references

A.G. 1095: Index of letters received.

iv. Prime Minister's Office Papers

P.M. 259: Prime Minister's correspondence, minutes, memoranda, etc. (1875-81)

P.M. 304: Confidential minutes to the Governor (1880-84).

v. Colonial Office Papers

C.O. 3090-3347: Letters received, Aborigines (1865-80): odd references.

vi. Chief Magistrates, Transkei and Tembuland

C.M.T. 1/60: Miscellaneous letters from private individuals and officials (1871-80)

C.M.T. 1/129-1/130: Proceedings, statements, miscellaneous (1871-87)

C.M.T. 1/131: Criminal Record Book (1882-87)

C.M.T. 1/134: Civil Record Book (1882-94)

C.M.T. 1/146: Correspondence re Commissions (1873-84)

C.M.T. 2/44: Miscellaneous papers from private individuals and officials (1878-84)

C.M.T. 2/100: Record Book of cases tried in the Court of the Chief Magistrate or Special Court, Transkei (1882-87)

C.M.T. 2/102: Civil Record Book (1880-92)

C.M.T. 2/103: Divorces (1880-91).

vii. Chief Magistrate, Kokstad

C.M.K. 3/1-3/3: Chief Magistrate's Note Books: Civil and Criminal Cases (1876-79)

C.M.K. 3/4: Chief Magistrate's Note Book: Criminal Cases in Review and Civil Cases in Appeal (1884-87)

C.M.K. 3/13-3/14: Chief Magistrate's Note Book: Criminal Cases in Review (1882-84)

C.M.K. 3/20: Chief Magistrate's Note Nook: Civil Cases in Appeal (1882-85)

C.M.K. 3/30-1: Miscellaneous correspondence and other papers relating to Court Cases (1876-79)

C.M.K. 5/3: Papers received from Surveyor General and Secretary for Native Affairs (1876-80).

viii. Magistrates Records (Many of these are very sparce, some were not yet numbered in the inventory, and some which were classified were in fact as yet unnumbered and not yet available to the public.) Odd references to various districts, notably Tamacha, King William's Town, and Aliwal North.

ix. Unpublished Basutoland Records (Collected by G.M. Theal). vols. IV-VI (1868-72).

c. In the Lesotho Archives, Maseru

i. Governor's Agent to High Commissioner and Colonial Secretary.
S9/1/1/1 - S9/1/1/2 (1871-81)

ii. Governor's Agent to Secretary for Native Affairs
S9/1/2/1 - S9/1/2/3 (odd references)

iii. Governor's Agent: miscellaneous correspondence despatched
S9/1/3/1 - S9/1/3/2 (1871-75)

iv. Chief Magistrate and Resident Magistrates to Colonial Secretary
S9/2/1/1 (1872-74)

v. Chief Magistrate to Magistrates
S9/2/2/1 and S9/2/2/3 (1872-74 and 1876-84)

2. UNOFFICIAL

a. Rhodes House Library, Oxford

British and Foreign Anti-Slavery and Aborigines Protection Society

(MSS. Br. Emp. s.18: letters received) - sundry correspondence in C.122-164

(MSS. Br. Emp. s.22) - folders G.9, G.10, G.13

Cape Colony Letters (MSS. Afr. s.1 and 2)

Hall Papers (MSS. Afr. s.54)

Kennan Papers (MSS. Afr. s.969)

J.C, Molteno Papers (MSS. Afr. s.23)

C.J. Rhodes Papers (MSS. Afr. t.4: Misc. material re Rhodes).

b. Foreign and Commonwealth Office Library, London

Wodehouse Papers (Acc. 13015)

c. Cape Archives

Unpublished Basutoland Records (These papers, already cited under official MSS. sources above, contain much material of an unofficial character.)

Southey Papers (Acc. 611)

Wiid Collection (Acc. 1624 (3)).

d. South African Public Library, Cape Town

J.K. Bokwe Papers - letterbook 1882-9

J.F. Cumming Papers (of little value)

J.X. Merriman Papers

J. Noble Papers

J. Rose Innes Papers.

e. Jagger Library, University of Cape Town

J.D. Barry Papers

E.A. Judge Papers

W.E. Stanford Papers.

f. The Methodist Publishing House, Cape Town

P. Hargreaves Papers.

B. PRINTED SOURCES

1. PRIMARY SOURCES

a. Official Records

BRITISH

i. Colonial Office Confidential Print - Africa
vols. C.O. 879/10 - C.O. 879-21.

ii. British Parl. Papers

1835	xxxix (50,252)	Papers re Cape (Native Inhabitants), I, II.
1836	xxxix (279)	Papers re Caffre war and Hintsa.
1837	xliii (503)	Despatches re Caffre war.
1847-8	xliii (912, 969)	Corresp. re Kafir tribes.
1850	xxxviii (1288)	Corresp. re Kafir tribes.
1851	xiv (635)	Report of select committee on relations with the Native Tribes.
1851	xxxvii (457)	Corresp. re Kafir tribes.
1851	xxxviii (424, 1360)	Corresp. re Kafir tribes.
1852	xxxiii (1428)	War of 1850-3 and dubious conduct of Moshesh.
1852-3	lxvi (1635)	Corresp. re Kafir tribes.
1852-3	lxvi (1636)	Papers re Representative Assembly.
1854-5	xxxviii (1969)	Papers re Kafir tribes.
1856	xlii (2096)	Papers re Kafir tribes.
1857-8	xl (2352)	Papers re Kafir tribes.
1865	xxxvii (3436)	Corresp. re annexation of British Kaffraria.
1868-9	xliii (4140)	Despatches on recognition of Moshesh.
1870	xlix (C.18, C.99)	Despatches on recognition of Moshesh.
1870	xlix (181)	Corresp. re Responsible Government at Cape.
1871	xlvii (C.459)	Corresp. re Cape of Good Hope.
1873	xlix (C.732)	Corresp. re Cape of Good Hope.
1877	lx (C.1748, C.1776)	Corresp. re Native Affairs in South Africa.

1878 lv (C.1961, C.2000) Corresp. re South Africa.

1878 lv (C.1980) Corresp. re Proposed Confederation.

1878 lvi (C.2079, C.2100, C.2144) Corresp. re South Africa.

1878-9 lii (C.2220, C.2222, C.2242) Corresp. re South Africa.

1878-9 liii (C.2252, C.2308) Corresp. re South Africa.

1878-9 liv (C.2374, C.2454) Corresp. re South Africa.

1880 l (C.2482, C.2505) Corresp. re South Africa.

1880 li (C.2569) Corresp. re Basutoland.

1880 li (C.2584, C.2586, C.2655, C.2676, C.2695) Corresp. re South Africa.

1881 lxvi (C.2740,,C.2783) Corresp. re South Africa.

1881 lxvi (C.2755, C.2821) Corresp. re Basutoland.

1881 lxvii (292) Native Customs in Natal.

1882 xlvii (C.2964, C.3112, C.3175) Corresp. re Basutoland and Territories to Eastward of Cape Colony.

1882 xlvii (C.3113) Corresp. re South Africa.

1882 xlvii (C.3280) Corresp. re contributions to Transkei and Zulu wars.

1883 xlviii (C.3493) Corresp. re Basutoland and the Native Territories.

1883 xlviii (C.3708) Corresp. re Basutoland.

1883 xlix (C.3717) Corresp. re Cape and Adjacent Territories.

1884 lvi (C.3855) Corresp. re Cape and Adjacent Territories.

1884-5 lvi (C.4263, C.4589) Corresp. re Cape and Adjacent Territories.

Hansard, 3rd series. vols. c (1848) - ccxviii (1884) (odd references).

iii. <u>The Colonial Office List</u>

1873-1884 (odd references).

CAPE

i. Votes and Proceedings of the Legislative Council
1872-1884 (odd references).

ii. Votes and Proceedings of the House of Assembly
1872-1884 (odd references).

iii. Annexures and Appendices to the Votes and Proceedings of the Cape Parliament (cited in the footnotes as Cape Parl. Papers).
The series number 'C' papers were printed by order of the Legislative Council, 'A' papers by order of the Assembly, and 'G' ones by order of the government.

A.40-58 Communications from the Agent with the Tambookies.

A.101, 102-61 Papers re occupation of Transkeian territory.

G.53-62 Corresp. re country between Bashee and Natal.

A.22-65 Act of annexation of British Kaffraria.

A.48-65 Corresp. re excitement along the frontier.

A.49-65 Corresp. re removal of Native Tribes.
Proceedings and Evidence of Native Affairs Commission (1865).

G.32-65 Corresp. re the Administration of affairs in Kaffirland and the Annexation of British Kaffraria.

A.14-67 Corresp. re Fingo exodus.

C.3,4,5-68 Petitions re Native Successions Bill.

C.10-68 Report of British Resident in Transkeian Territory.

G.30-68 Corresp. re annexation of Basutoland.

G.40-68 Further corresp. re annexation of Basutoland.

C.1-71 Report of select committee on Basutoland Annexation Bill.

A.37-71 Report on condition of Fingoes in Transkeian territory.

C.1-72 Minutes of Executive on Responsible Government.

C.6-72 Petition of the Basuto praying for Representation in Parliament.

A.18-72 Report of select committee on Basuto Regulations.

A.1-73 Speech at opening of Parliament.

G.41, 44-72 Reports on condition of Natives in Transkeian territory.

A.10-73 Report of Secretary for Native Affairs.

A.12-73 Report of Select Committee on Native Affairs.

A.23-73 Report of Governor's Agent on working of Basuto regulations.

G.27-73 Report of Governor's Agent.

G.34, 35-73 Report on condition of Natives in Transkeian territory.

Report of Special Commission on the Laws and Customs of the Basuto (1873).

G.27-74 Blue Book on Native Affairs.

G.37-76 Report of the Griqualand East Commission.

G.39-76 Report on Probart's mission to Tembookieland.

G.42-76 Census of Cape Colony.

G.52-76 Appendix to Blue Book on Native Affairs.

C.2-77 Letter from British Resident.

A.1-77 Speech at Opening of Parliament.

A.7-77 Petition of Letsie and others.

A.9-77 Papers re Nehemiah Moshesh.

A.19-76 Petition of P.E.M.S. against cession of Basutoland to the O.F.S.

G.16-76 Blue Book on Native Affairs.

A.21-77 Correspondence re Government Agent, Idutywa Reserve.

G.1-77 Report and Proceedings of the Colonial Defence Commission.

G.12-77 Blue Book on Native Affairs.

C.5-78 Papers re Griqualand East Land Commission.

A.2,4,5,6-78 Papers re Dismissal of Ministry.

A.12-78 Petition of Chief of People of Basutoland.

A.16,17-78 Despatches re Frontier.

A.26-78 Correspondence on Removal and Reinstatement of Mr. Cole.

A.51-78 Papers re Griqualand East rebellion.

G.17-78 Blue Book on Native Affairs.

A.6-79 Select Committee on Hostilities in Basutoland.

A.17,49,50-79 Papers on the Basutoland Rebellion.

A.25-79 Despatches re Expenditure on late war.

A.43-79 Return re Kafirs in Western Districts.

A.62-79 Return showing the number of Inspectors of Native Locations appointed under Act 6 of 1876.

G.33,33A, 43-79 Blue Book on Native Affairs and appendix.

G.58-79 Report of Griqualand East Commission.

A.10-80 Petition of Letsie and other chiefs to retain arms.

A.11-80 Petition of Letsie, other chiefs and headmen against the confiscation of Moorosi's land.

A.31-80 Proclamations of Laws of Native Territories annexed.

A.38-80 Disposal of Quthing to the Cape.

A.44,58,105-80 Papers on Pondo Affairs.

A.52-80 Basutoland Affairs.

A.54-80 Petition of Emigrant Tembus.

G.13-80 Blue Book on Native Affairs.

G.72-80 Remarks of Blyth on Griqualand East Commission.

A.3-81 Corresp. on Bright and Rose Innes.

A.22-81 Tel. Corresp. between Cape Col. Sec. and Col. C.D. Griffith.

A.24-81 Corresp. re Basuto

A.25,35-81 Reports from magistrates in Transkei.

A.29-81 Corresp. & Telegrams on Disarmament.

A.44-81 Minutes etc. on Basuto Peace Negotiations.

G.20-81 Blue Book on Native Affairs.

G.38-81 Native Laws Commission Report.

A.2-82 Petition of Jonathan Molapo for relief.

A.8-82 Tel. Corresp. re Masupha's acceptance of High Commissioner' Award.

A.15-82 Select Committee on Settlement of Tembuland.

A.24-82 Griqualand East Petitions.

A.30-82 Corresp. between Griffith and Sprigg.

G.26-82 Report of S.N.A. on visit of June 1881.

G.33-82 Blue Book on Native Affairs.

G.57-82 Corresp. re annexation of St. John's River Territory.

G.89-82 Corresp. called for by Dr. Matthews, M.L.A. on Basutoland.

C.2-83 Complaints of Emigrant Tembus.

A.26-83 Report of the Select Committee on the Native Locations Act.

A.27-83 Despatches re annexation of Basutoland.

A.31-83 Select Committee on Tembuland.

G.4-83 Report and Proceedings, with Appendices, of the Government Commission on Native Laws and Customs.

G.5-83 Corresp. between Government and Gordon.

G.6-83 Minutes of meetings and correspondence.

G.8-83 Blue Book on Native Affairs.

G.66-83 Report of the Tembuland Commission.

G.101-83 Report of the Civil Service Commissiom.

G.109-83 Report re Threatened Combinstion in Extra-Colonial Territories.

G.3-84 Blue Book on Native Affairs

C.3-85 Basutoland Report of the Resident Commissioner

iv. The Cape of Good Hope Government Gazette 1872-1884 (odd references).

v. Statutes of the Cape of Good Hope 1652-1895, ed. H. Tennant and E. Jackson, 3 vols. (Cape Town, 1895).

vi. Laws and Regulations of British Kaffraria previous to its annexation to the Colony of the Cape of Good Hope (Cape Town, 1869).

NATAL

Natal Parl. Papers Report of the Natal Native Commission 1881-1882.

b. Newspapers and Periodicals

The Times (London) (odd references).

The Cape Argus (Cape Town), 1873, 1874-76, 1881.

The Cape Times (Cape Town), 1878, 1882-84.

The Graham's Town Journal (Grahamstown), 1872-75 1878-81.

The Eastern Star (Grahamstown), 1880-81 and odd references.

The Kaffrarian Watchman (King William's Town) odd references.

The Kaffir Express (Lovedale) 1870-75.

The Christian Express (Lovedale), 1876-83.

The Little Light of Basutoland (Morija) 1872-77.

The Cape Law Journal (Grahamstown) 1884-90.

The Nineteenth Century 1877-80 and odd references.

The Cape Monthly Magazine (Cape Town) 1872-78 and odd references.

c. Contemporary Books and Pamphlets

Alberti, L. Account of the Tribal Life and Customs of the Xhosa in 1807 (trans. W. Fehr) (Cape Town, 1968).

Arbousset, T. and Daumas, F. Narrative of an Exploratory Tour to the North-East of the Colony ofthe Cape of Good Hope (London, 1852)

Ayliff, J. and Whiteside, J. History of the Abambo generally known as Fingos (Transkei, 1912, reprint Cape Town, 1962).

Bell, W.H.S. Bygone Days (London, 1933).

Brownlee, C. Reminiscences of Kaffir Life and History (Lovedale, 1896; 2nd edn. Lovedale, n.d.).

Bryce, J. Impressions of South Africa (London, 1897).

Caldecott, A. The Government and Civilization of the Native Races of South Africa (Cape Town, 1884).

Casalis, E. The Basutos (London, 1861).

Chalmers, J. Tiyo Soga (Edinburgh, 1877).

Chalmers, J. The Native Question (Grahamstown, 1878).

Chesson, F.W. The Basuto War (London, 1881),

Cunynghame, A.T. My Command in South Africa, 1874-1878 (London, 1879).

Currie, D. Thoughts upon the Present and Future of South Africa and Central and Eastern Africa (London, 1877).

Dower, W. The Early Annals of Kokstad and Griqualand East (Port Elizabeth, 1902).

Ellenberger, D.F. History of the Basuto, Ancient and Modern (London, 1912).

Frere, B. On theLaws affecting the Relations between civilized and savage life (pamphlet, London, 1882).

Froude, J.A. Two Lectured on South Africa (new edn., London, 1900).

Gibson, A.G. Reminiscences of the Pondomisi War of 1880 (2nd edn., Cape Town, 1890).

Gibson, A.G. Eight Years in Kaffraria (London, n.d.).

Glanville, T.B. — Abroad and At Home (Cape, n.d.).

Guthrie, F.H. — Frontier Magistrate (Cape Town, n.d.).

Holden, W.C. — A Brief History of Methodism, and of Methodist Missions in South Africa (2nd edn., London, 1887).

Hook, D.B. — With Sword and Statute (London, n.d. (?1907)).

Irvine, T.W. — British Basutoland and the Basutos (London, 1881).

Laurence, P.M. — Lovedale Past and Present (Lovedale, 1887).

Macdonald, J. — Light in Africa (London, 1890).

Mackenzie, J. — Austral Africa, Losing It or Ruling It, 2 vols. (London, 1887).

Maclean, C.B., ed. — A Compendium of Kafir Laws and Customs (Mount Coke, 1858; Cape Town, 1866; Grahamstown, 1906).

Malan, C.H. — South African Missions (London, 1876).

Matthews, J.W. — Incwadi Yami (London, 1887).

Moshesh. N. — Statement made by Nehemiah when in prison for the guidance of counsel (pamphlet, King Williams Town, 1877).

Noble, J. — South Africa, Past and Present (London, 1877).

Orpen, J.M. — History of the Basutus in South Africa, by the Special Commissioner of the Cape Argus (Cape Town, 1857).

Orpen, J.M. — Our Relations with the Imperial Government (Cape Town, 1879).

Orpen, J.M. — Some Principles of Native Government Illustrated (Cape Town, 1880).

Orpen, J.M. — Reminiscences of Life in South Africa from 1845 to the present day (Durban 1908; enlarged/edition, Cape Town, 1964).

Prichard, E. — by Struik, The Transkei Territories, South Africa (pamphlet, Cape Town, 1878).

Sampson, V. — My Reminiscences (London, 1926).

Scully, W.C. — Further Reminiscences of a South African Pioneer (London, 1913).

Shaw, W. — The Story of My Mission in South-Eastern Africa (London, 1860).

Statham, F.R. — Blacks, Boers, and British (London, 1881).

Streatfield, F.N. — Reminiscences of an Old 'Un (London, 1911).

Trollope, A. — South Africa, 2 vols. (London, 1878).

Widdicombe, J. — Fourteen Years in Basutoland (London, 1891).

d. Documents subsequently Published

Bell, K. and Morrell, W. eds., Select Documents on British Colonial Policy, 1830-1860 (Oxford, 1928).

Brownlee, F., ed. — The Transkeian Native Territories: Historical Records (Lovedale, 1923).

Buckle, G.E., ed. — The Letters of Queen Victoria, a Selection from Her Majesty's Correspondence and Journal between the years 1862 and 1885, 2nd ser., 3 vols. (London, 1926-28).

Buckle, G.E.,ed. — Correspondence between Major General Gordon and Mr. Scanlen (Cape Town, 1905).

Buckle, G.E., ed. — Correspondence of Sir George Cathcart, K.C.B., relative to his military operations in Kaffraria (London, 1856).

Eybers G.W., ed. — Select Constitutional Documents Illustrating South African History, 1795-1910 (London, 1918).

Germond, R.C. — Chronicles of Basutoland (Morija, 1967).

Harlow, V. and Madden, F., eds. British Colonial Developments, 1774-1834 Select Documents (Oxford, 1953).

Herstlet, E., ed. — The Map of Africa by Treaty, 2 vols. (2nd rev. edn., London, 1896).

Hutton, C.W., ed. — The Autobiography of the late Sir Andries Stockenström, Bart., 2 vols. (Cape Town, 1887).

Lewsen, P., ed. — Selections from the Correspondence of J.X. Merriman 1870-1890 (Cape Town, 1960); 1890-1898 (Cape Town, 1963).

Long, U. An index of authors of unofficial, privately-owned manuscripts relating to the history of South Africa, 1812-1920, with copies, summaries and extracts of documents ... (London, 1947).

Macquarrie, J.W., ed. The Reminiscences of Sir Walter Stanford 2 vols. (Cape Town, 1958).

Macfadyen, A.N., ed. Statutes, Proclamations, and Government Notices in force in the Native Territories of the Colony of the Cape of Good Hope, on the 30th June, 1907 (Cape Town, 1907).

Moore-Smith, G.G., ed. The Autobiography of Lieutenant-General Sir Harry Smith (London, 1903).

Theal, G., ed. Basutoland Records, 3 vols. (Cape Town, 1883).

Theal, G., ed. Proclamations, Notices, and Regulations in force in the Native Territories of the Cape Colony on the 20th of July, 1896 (Cape Town, 1896).

Tindall, B.A., ed. James Rose Innes, Autobiography (Cape Town, 1949).

2. SECONDARY SOURCES

a. Bibliographies and Guides

The following were found especially valuable to this study:

de Jager, E.J. A Select Bibliography of the Anthropology of the Cape Nguni Tribes (Johannesburg, 1966).

Mathews, N. and Wainwright, M.D. A Guide to Manuscripts and Documents in the British Isles relating to Africa (London, 1971).

Muller, C., van Jaarsveld, F. and van Wijk, T. A Select Bibliography of South African History (Pretoria, 1966).

Thompson, L., Elphick, R. and Jarrick, I. South African History before 1900: A Select Bibliography of Articles (Stanford, 1971).

Schapera, I. Select Bibliography of South African Native Life and Problems (London, 1941).

b. Select Books, Pamphlets and Articles

Agar-Hamilton, J.A. The Road to the North 1852-1886 (London, 1937).

Allott, A. Essays in African Law (London, 1960).

Ashton, E.H. 'Medicine, Magic, and Sorcery among the Southern Sotho', Communications of the School of African Studies, University of Cape Town, new series, 10 (Dec. 1943).

Atmore, A. 'The Moorosi Rebellion: Lesotho 1879' in R.I. Rotberg and A.A, Mazrui, eds., Protest and Power in Black Africa (New York, 1970).

Benham, W., ed. Henry Callaway, First Bishop of Kaffraria, a Memoir, by M. Benham (London, 1896).

Bennie, W., 'The Ciskeian and Southern Transkei Tribes' in A. Duggan-Cronin, ed., The Bantu Tribes of South Africa, III, I (Cambridge, 1939).

Benians, E., Butler, J. and Carrington, C., eds., The Cambridge History of the British Empire, III: The Empire-Commonwealth, 1870-1919 (Cambridge, 1959).

Bradlow, E. 'The Cape Government's rule of Basutoland 1871-1883', AYB, 1968, part II.

Bradlow, E. 'General Gordon in Basutoland', Historia, xv, 4 (1970).

Brookes, E. The History of Native Policy in South Africa from 1830 to the present day (n.p., 1924; 2nd edn., Pretoria, 1927).

Brookes, E.H. and Webb, C. A History of Natal (Pietermaritzburg, 1965).

Brownlee, F. 'The Administration of the Transkeian Territories', Journal of the Royal Africa Society, xxxvi, no. cxliv (July 1937).

Bundy, C. 'The Emergence and Decline of a South African Peasantry', African Affairs, 71, 285 (Oct. 1972).

Callaway, G. South Africa from Within (London, 1930).

Campbell, W.B. 'The South African Frontier 1865-1885: A Study in Expansion', AYB, 1959, part I.

Carter, G., Karis, T. and Stultz, N. South Africa's Transkei: The Politics of Domestic Colonialism (London, 1967).

Cell, J.W. — British Colonial Administration in the Mid-Nineteenth Century: The Policy-Making Process (New Haven, 1970).

Cohen, R., and Middleton, J. From Tribe to Nation in Africa (Scranton, 1970).

Cook, P.A.W. — The Social Organisation and Ceremonial Institution of the Bomvana (Cape Town, n.d.).

Davenport, T.R.H. — The Afrikaner Bond (Cape Town, 1966).

De Kiewiet, C.W. — British Colonial Policy and the South African Republics 1848-1872 (London, 1929).

De Kiewiet, C.W. — The Imperial Factor in South Africa (London, 1937).

De Kock, W. — 'Ekstra Territoriale Vraagstukke van die Kaapse Regering 1872-85', AYB, 1948, part I.

De Kock, W., ed. — Dictionary of South African Biography, I (Cape Town, 1968).

Dunn, W.H. — James Anthony Froude a Biography 1847-1894 (Oxford, 1963).

Du Plessis, J. — A History of Christian Missions in South Africa (London, 1911).

Du Toit, A.E. — 'The Cape Frontier: A Study of Native Policy with Special Reference to the Years 1847-1866', AYB, 1954, part I.

Elias, T.O. — The Nature of African Customary Law (Manchester, 1956).

Ellenberger, V. — A Century of Mission Work in Basutoland, 1833-1933 (Morija, 1938).

Franklin, N.N. — Natives and the Administration of Justice (Johannesburg, n.d.).

Galbraith, J.S. — Reluctant Empire (Berkeley, 1963).

Garthorne, E. — 'Applications of Native Law', Bantu Studies, III, 3 (July 1929).

Gluckman, M. — Politics, Law and Ritual in Tribal Society (Oxford, 1965).

Goodfellow, C. — Great Britain and South African Confederation (1870-1881) (Cape Town, 1966).

Gordon, R. — Shepstone (Cape Town, 1968).

Halford, S.J. — The Griquas of Griqualand (Cape Town, n.d.).

Hammond-Tooke, W.D. — 'Baca, Hlubi and Xesibe' in A. Duggan-Cronin, ed., The Bantu Tribes of South Africa, III, 5 (Cambridge,,1954).

Hammond-Tooke, W.D. — 'Chieftainship in Transkeian Political Development', Journal of Modern African Studies, 2, 4 (Dec. 1964).

Hardinge, A. — The Life of Henry Howard Molyneux Herbert Fourth Earl of Carnarvon, II (London, 1925).

Hicks Beach, V. — Life of Sir Michael Hicks Beach, I (London, 1932).

Hinchliff, P. — The Church in South Africa (London, 1968).

Hofmeyr, J. — The Life of Jan Hendrik Hofmeyr (Cape Town, 1913).

Holt, B. — 'Sir Henry Elliot', Africana Notes and News, XI, 5 (Dec. 1954).

Hunter, M. — Reaction to Conquest (London, 1936).

Hutchinson, B. — 'Some Consequences of Nineteenth Century Missionary Activity among the South African Bantu', Africa, 27, 2 (April 1957).

Jones, G.I. — 'Chiefly Succession in Basutoland' in J. Goodey, ed., Succession to High Office (Cambridge, 1966).

Kerr, A.J. — 'The Reception and Codification of Systems of Law in Southern Africa', Journal of African Law, 2 (1958).

Kilpin, R. — The Romance of a Colonial Parliament (London, 1930).

Kuper, H. and Kuper, L., eds. — African Law: Adaptation and Development (Berkeley, 1965).

Lagden, G. — The Basutos, 2 vols. (London, 1909).

Laurence, P. — The Life of John Xavier Merriman (London, 1930).

Lee, R.W. — Introduction to Roman-Dutch Law (Oxford, 1915).

Lennox, J. — South Africa - The Story of Our Missions (Edinburgh, 1911).

Lewin, J. — Studies in African Native Law (Cape Town, 1947).

Lewin, J. — An Outline of Native Law (Cape Town, 1966).

Lewsen, P. 'The First Crisis in Responsible Government in the Cape Colony', AYB, 1942, part II.

Lewsen, P. The Cape Liberal Tradition - Myth or Reality? (pamphlet, Johannesburg, 1969).

Lockhart, J. and Wodehouse, C. Rhodes (London, 1963).

MacCrone, I. Race Attitudes in South Africa (Johannesburg, 1937).

Mackenzie, W. John Mackenzie (London, 1902).

Macmillan, M. Sir Henry Barkly Mediator and Moderator (Cape Town, 1970).

Macmillan, W.M. The Cape Colour Question (London, 1927).

Macmillan, W.M. Complex South Africa, (London, 1930).

Macmillan, W.M. The Road to Self-Rule (London, 1959).

Macmillan, W.M. Bantu, Boer and Briton (2nd edn., London, 1963).

Maine, H.S. Ancient Law, 10th edn. (London, 1930).

Mansergh, N. The Commonwealth Experience (London, 1969).

Marks, S. Reluctant Rebellion (Oxford, 1970).

Martineau, J. The Life and Correspondence of the Right Hon. Sir Bartle Frere, 2 vols. (London, 1895).

Mason, P. Patterns of Dominance (London, 1970).

Mbeki, G. South Africa: The Peasants' Revolt (Harmondsworth, 1964).

McCracken, J.L. The Cape Parliament 1854-1910 (Oxford, 1967).

Mohapeloa, J.M. Africans and their Chiefs (pamphlet, Cape Town, 1945).

Mohapeloa, J.M. 'The Essential Masupha', Lesotho Notes and Records, 5 (1965-66).

Molteno, P.A. The Life and Times of Sir John Charles Molteno, 2 vols. (London, 1900).

Morrell, W.P. British Colonial Policy in the Mid-Victorian Age (Oxford, 1969).

Newton, A. and Benians, E., ed. The Cambridge History of the British Empire, VIII: South Africa (Cambridge, 1936; rev. edn. ed. E. Walker, 1963).

Omer-Cooper, J. — The Zulu Aftermath (London, 1966).

Pauw, B.A. — 'Patterns of Christianization among the Tswana and the Xhosa-speaking Peoples', in African Systems of Thought, preface by M. Fortes and G. Dieterlen (London, 1965).

Robertson, H.M. — '150 Years of Economic Contact between Black and White', South African Journal of Economics, 2, 4 (1934) and 3, 1 (1935).

Robinson, R. and Gallagher, J. — Africa and the Victorians (London, 1961).

Roux, E. — Time Longer than Rope (2nd edn., Madison, 1964).

Rotberg, R.I. and Mazrui, A.A., eds. — Protest and Power in Black Africa (New York, 1970).

Rutherford, J. — Sir George Grey (London, 1961).

Sachs, A. — Justice in South Africa (London, 1973).

Saunders, C.C. — 'Tile and the Thembu Church: Politics and Independency on the Cape Eastern Frontier in the late Nineteenth Century', JAH, XI, 4 (1970).

Schapera, I., ed. — The Bantu-Speaking Tribes of South Africa (London, 1937).

Schapera, I. — Government and Politics in Tribal Society (London, 1956).

Seymour, S.M. — Native Law in South Africa (Cape Town, 1953).

Sheddick, V.G.J. — The Southern Sotho (London, 1953).

Shepherd, R.H.W., — Lovedale South Africa ... 1841-1941 (Lovedale, n.d.).

Simons, H.J. — African Women; their legal status in South Africa (London, 1968).

Smith, E.S. — The Mabilles of Basutoland (London, 1939).

Soga, J.H. — The South-Eastern Bantu (Johannesburg, 1930).

Soga, J.H. — The Ama-Xhosa: Life and Customs (Lovedale, n.d.).

Solomon, W.E.G. — Saul Solomon 'The Member for Cape Town' (Cape Town, 1948).

Stow, G. — The Native Races of South Africa (Cape Town, 1905).

Theal, G.Mc. History of South Africa, 1854-1872 (2nd edn., London, 1900).

Theal, G.Mc. History of South Africa since September, 1795 (5 vols., London, 1908).

Theal, G.Mc. History of South Africa from 1873-1884 (2 vols., London, 1919).

Thompson, L.M. 'The South African Dilemma', in L. Hartz, ed., The Founding of New Societies (New York, York, 1964).

Thompson, L.M., ed. African Societies in southern Africa (London, 1969).

Tylden, G. The Rise of the Basuto (Cape Town, 1950).

Van den Berghe, P., ed. Africa Social Problems of Change and Conflict (San Francisco, 1965).

Walker, E.A. Historical Atlas of South Africa (Cape Town, 1922).

Walker, E.A. Lord de Villiers and his Times (London, 1925).

Walker, E.A. The Frontier Tradition in South Africa (Oxford, 1930).

Walker, E.A. A History of Southern Africa (3rd edn., London, 1957).

Walshe, P. The Rise of African Nationalism in South Africa (London, 1970).

Warner, W.E. Native Territories Appeal Court Cases 1891-1907 (Transkei. 1907).

Welsh, D. The Roots of Segregation (Cape Town, 1971).

Whitfield, G.M.B. South African Native Law, 2nd edn., (Cape Town, 1948).

Williams, D. When Races Meet (Johannesburg, 1967).

Wilmot, A. The Life and Times of Sir Richard Southey (London, 1904).

Wilson, M. 'The Mpondo and Mpondomise' in A. Duggan-Cronin, ed., The Bantu Tribes of South Africa, III, 2 (Cambridge, 1949).

Wilson, M. 'The Early History of the Transkei and Ciskei', African Studies, 18, 4 (1959).

Wilson, M. and Thompson, L., eds. The Oxford History of South Africa, 2 vols. (Oxford, 1969 and 1971).

Worsfold, B. Sir Bartle Frere (London, 1923).

c. Unpublished Theses

Benyon, J.A. 'Basutoland and the High Commission with particular reference to the years 1868-1884: The Changing nature of the Imperial Government's "Special Responsibility" for the Territory' (Oxford Univ. D.Phil., 1968).

Cragg, D. 'The Relations of the Amampondo and the Colonial Authorities (1830-1886), with special reference to the role of the Wesleyan Missionaries' (Oxford Univ. D.Phil., 1959).

Davenport, T.R.H. 'The Afrikaner Bond 1880-1900' (Cape Town Univ. Ph.D., 1960).

Master, W.M. 'Colonial Control in Thembuland and Resistance to it, 1872-1885' (Cape Town Univ. M.A., 1966).

Matthews, Z.K. 'Bantu Law and Western Civilization in South Africa; A Study in the Clash of Cultures' (Yale Univ. M.A., 1934) - on microfilm in Rhodes House.

Sanders, P.B. 'The Life and Times of Moshoeshoe from his Birth c. 1786 to the Proclamation of the Orange River Sovereignty in February 1848' (Oxford Univ. D.Phil. 1969).

Saunders, C.C. 'The Annexation of the Transkeian Territories (1872-1895) with special reference to British and Cape Policy' (Oxford Univ. D.Phil., 1972).

Trapido, S. 'White conflict and non-white participation in the politics of the Cape of Good Hope, 1853-1910' (London Univ. Ph.D., 1970).