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Detention Comes to Court: African Appeals to the Courts in Whitehall and Westminster, 1895–1922

Although the detention of African leaders had become routine since the early 1880s, particularly in West Africa, and its legality had occupied much of the time of officials in the Colonial Office, the question of the lawfulness of *ad hominem* ordinances did not come before the courts in the imperial metropolis until the last years of the century. Given the practical and financial problems faced by African detainees in bringing their cases to courts in London, it was only on very rare occasions that judges there were asked to consider the lawfulness of detentions made under local ordinances. On the few occasions when such cases did reach the metropolis – either at the Privy Council or at the Supreme Court of Judicature – judges had to confront the question of how far these detentions fitted with the rule of law so beloved of the common law system. Those who challenged detention ordinances made the claim that they violated fundamental principles inherent in the common law, confirmed by Magna Carta and subsequent statutes, which limited the power of colonial governors or administrators to order their detention either under local ordinances or by virtue of crown prerogative powers. In making these challenges, they drew on a rich, substantive vision of the common law, which was to be found not only in such constitutional texts as Dicey's *Law of the Constitution*, but also in the Whig histories which did so much to define Victorian Englishmen's understanding of their constitution. Those who defended the detentions looked to a more formal vision,

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seeking to establish the legality of the detention by a process of legislative affiliation.

The cases to be considered in this chapter did not come from West Africa, where political detentions had come to be routine after 1880. Although, as has been seen, there were occasional attempts to challenge detentions in the Gold Coast – and local lawyers, such as Edward Bannerman, willing to give advice – detainees in this part of Africa lacked the means and the support to get their cases to London. This was less true in South Africa, where detainees like Langalibalele, Cetshwayo and Dinuzulu had been able to draw on the help of supporters like the Colensos to make political cases for their liberation in London. The first cases to make legal claims for liberation here also came from South Africa. In the first of these, Sigcau's, the litigation reached the Privy Council as a result of the detainee's successful appeal to the Cape Supreme Court, which the Cape government wished to overturn in the highest imperial court. In the second, Sekgoma Letsholathibe's, the chief was able to litigate in London thanks to the help of a local supporter, and the fact that he had access to the necessary financial resources. In the third case to be considered – the post-war case of the Egyptian nationalist leader Saad Zaghlul Pasha – the detainee was the leader with the highest public profile to be detained in Africa since Urabi, and his network of support ran far wider than that enjoyed by the southern African.

The legal position which emerged from these cases was one which ultimately endorsed the formal vision of the rule of law, rather than the broad substantive vision invoked by the detainees. Rather than looking from the point of view of the liberties of the detainees, the courts concentrated on whether the powers exercised derived from a valid legislative source; and in exploring how far absolute powers could be delegated to local officials, the highest courts were to take an expansive view, to the detriment of African liberties. In upholding the executive's power to legislate for detention, judges often made assumptions about the political necessity for these powers, trusting to the executive to use such drastic *ad hominem* laws only in case of emergency. In fact, as shall be seen, these powers were rather used for convenience, by officials who had plans to release the detainees in question, at the very moment that they strove to defend their powers in court.

Sigcau, Sir Henry de Villiers and the Privy Council

The first significant case to raise these matters was *Sprigg* v. *Sigcau*, heard by the Privy Council in 1896. The case concerned the detention without trial of the paramount chief of the Mpondo. Although a treaty with the Mpondo had existed since 1844, Pondoland had never been annexed, in part because both the Cape Colony and Natal wanted to acquire it. However, British imperial interest in the area was renewed after 1890, as it became increasingly unstable, thanks to a conflict between Sigcau and his former prime minister, Mhlangaso. In this context, in exchange for British support, Sigcau agreed first to accept a British resident in his territory, and then in 1894 to a full cession to the British Crown. Under the terms of the cession, Sigcau was to remain nominally paramount chief, and was to receive a stipend, but his territory would be administered by the Cape government.[1]

Shortly before the cession, Sigcau had made one last push against Mhlangaso, who was driven to an area called Isiseli. As part of the settlement brokered by the British, Mhlangaso was to be removed from the territory, and the inhabitants of Isiseli were to submit to Sigcau and pay a fine to him of 200 cattle. However, it proved harder to settle these long-standing conflicts than the Cape government had hoped. Only 125 cattle were tendered, which Sigcau refused to accept. Keen to assert his authority, he demanded that the Isiseli people present themselves before him as a body, and that their leader, Patekili, should attend in person. Sigcau's high-handed treatment of the deputations sent from Isiseli served only to prolong the tensions the British wanted to assuage. Sigcau's attitude towards the colonial authorities also caused concern. Having agreed to explain the new system of tax registration to his people, Sigcau instead took the opportunity to attack the government because they had not ensured that the promises regarding the Isiseli were carried out to the letter, inducing his people to think that they did not need to register until the matter was settled. When the Registration Officers came to register his

[1] On the background, see esp. William Bramwell, 'Loyalties and the Politics of Incorporation in South Africa: The Case of Pondoland, *c.* 1870–1913', unpublished Ph.D. Dissertation, University of Warwick, 2015. See further William Beinart, *The Political Economy of Pondoland, 1860–1930* (Cambridge, Cambridge University Press, 1982).

own homestead, he was accused of insulting them. He was also accused of having a defiant attitude towards the chief magistrate, after attending a meeting accompanied by insolent followers carrying assegais. In addition to these particular acts, he was also accused of obstructing the administration of justice, in attempting to exercise his former chiefly jurisdiction. Nothing in Sigcau's conduct could be described as seditious or rebellious: but his reluctance to accept the realities of his new position made him an inconvenient thorn in the side of the colonial administration.

On 11 June 1895, Sir Hercules Robinson, the Governor of the Cape, accordingly issued a proclamation stating that Sigcau's presence in East Pondoland was a danger to public safety and good order, and authorising his detention.[2] On 18 June, he surrendered himself and was taken to Kokstad (in Griqualand East, into which East Pondoland had been merged). Four days later, the Governor-in-Council appointed a three-man commission to investigate Sigcau's conduct since the annexation of his territory.[3] The inquiry, which took place in Kokstad in the first two weeks of July, was not a judicial one: no criminal charges were made, and the commission did not observe judicial rules of evidence. The commissioners examined various accusations against Sigcau, but their conclusions were hardly damning. While they reported that his behaviour had 'been in many respects obstructive to the satisfactory magisterial administration of Pondoland' and likely to induce his followers to be unco-operative with the colonial authorities, they found 'that in each instance, excepting the case of the Patekili fine and the submission of the Isiseli people and registration, where obstructive conduct was brought home to Sigcau and complained of to him, he withdrew obstruction'.[4] At the same time, they found that the attitude and conduct of the people as a whole had been praiseworthy, and that this was something for which 'the chief

[2] Proclamation 231 of 1895.

[3] They were the chief magistrate of Griqualand East (W. E. M. Stanford), the assistant chief magistrate of Tembuland and Transkei (J. H. Scott) and the Cape Town chief of police (H. A. Jenner).

[4] 'Report of the Commissioners appointed to inquire into the acts and behaviour of the Pondo Chief Sigcau since the annexation of East Pondoland' (in the Privy Council papers for Case No. 12 of 1896: *Sir John Gordon Sprigg* v. *Sigcau*: British Library: PP 1316), p. 7.

should receive some credit'.[5] Although he had on numerous occasions sent letters to magistrates seeking to influence them, the commissioners felt that they did not constitute serious attempts to interfere with the magistrates, and they thought it natural that his followers would appeal to him in such cases. The commissioners also noted that he had surrendered himself to the authorities and had co-operated with the inquiry.[6]

Despite these findings, Sigcau was informed on 13 July that he could not return to Pondoland. He was given the choice either to stay 'closely guarded' in unspecified territories nearby or be removed to the Cape Colony, where he would be allowed greater freedom. In response, Sigcau asked what crime he had committed, whether the proposed exile would be for life, and which territories he might be sent to. Having received no reply, on 29 July he petitioned the Cape Supreme Court for his release. At the hearing on the following day, counsel for the Cape government argued that the Governor had used his powers under the Cape's 1894 Pondoland Annexation Act, which stated that the territory 'shall be subject to such laws, statutes, and ordinances as have already been proclaimed by the High Commissioner, and such as, after annexation to the Colony, the Governor shall from time to time by proclamation declare to be in force in such Territories'.[7] In its view, the Cape parliament had effectively delegated legislative powers to the Governor, insofar as the Transkeian territories which included Pondoland were concerned. The government's lawyers also pointed to the laws enacted to detain Langalibalele and Cetshwayo, to show that there were precedents of men held without charge under *ad hominem* laws. Sigcau's lawyers countered that there were constitutional limits on the power of the Cape parliament to issue such laws. According to Constitution Ordinance and Royal Instructions, the Governor could not assent to any legislation repugnant to the law of England or her treaty obligations, but had to reserve it for the signification of royal assent in London.[8] Since it was

[5] 'Report of the Commissioners', p. 7. [6] 'Report of the Commissioners', p. 15.

[7] Pondoland Annexation Act, No. 5 of 1894. The governor's powers in the territories were also governed by similar legislation relating to Tembuland (Act No. 3 of 1885) and Griqualand East (Act No. 38 of 1877).

[8] They cited *Cameron* v. *Kyte* (1835) 3 Knapp 332 for the proposition that the powers of a colonial governor were limited by his instructions.

clearly repugnant to the law of England to pass a law which authorised the imprisonment of an individual on the order of the Governor, the legislation under which he had acted was argued to be void.

In a judgment which gave an eloquent 'substantive' defence of the rule of law, the Cape court ordered Sigcau's discharge. The liberal Chief Justice, Sir Henry de Villiers CJ, was clearly troubled by the fact that Sigcau was punished by a proclamation which made no specific charges against him, even though a criminal code had been introduced in Pondoland, which defined offences – including offences against the administration of justice and the gathering of taxes – for which he could have been charged. While sympathetic to the constitutional arguments made on behalf of Sigcau, de Villiers did not consider it necessary to settle the question of whether a Cape statute assented to by the Governor in defiance of his instructions would be void.[9] Instead, he looked to whether the power in question had been delegated under the Annexation Act. As de Villiers saw it, while the Act authorised the Governor to legislate for Pondoland, it did not confer on him any judicial or quasi-judicial powers.[10] In the absence of clear language to that effect – and in light of the fact that a criminal code had been introduced into Pondoland – there was nothing to show that 'the Legislature intended to confer on the governor the power, in time of peace, of exercising arbitrary executive functions under the guise of legislative functions'. Invoking definitions given by Grotius, Blackstone and Austin, he noted that '[t]he term "laws" is wholly inapplicable to decrees directed against individuals.'[11] De Villiers spelled out the consequences of a finding for the crown:

> The exercise of such a power would deprive the subject of the right to be tried only by a constituted Court of law according to the forms provided by the law for specified offences only against the law, and it would debar him also of the

[9] *Sigcau* v. *The Queen* (1895) 12 SCR 256 at 265. A fuller version of his judgment is to be found in the records of the Privy Council appeal, Case No. 12 of 1896: *Sir John Gordon Sprigg* v. *Sigcau*; BL, PP 1316. He noted in passing that the Cape parliament had never yet legislated for the detention of an individual without trial, observing that Langalibalele had been tried in Natal and that Cetshwayo had been a prisoner of war. De Villiers, 'Reasons for judgment', BL, PP 1316, p. 22.

[10] De Villiers, 'Reasons for judgment', BL, PP 1316, p. 23; see also *Sigcau* v. *The Queen* (1895) 12 SCR 256 at 267.

[11] De Villiers, 'Reasons for judgment', BL, PP 1316, p. 24.

right of appeal, in the last resort, to the Privy Council. If it was legal to sentence Sigcau to perpetual exile for his alleged 'obstructive' conduct, it would have been equally legal to sentence him to death, and the sentence could have been carried out before the meeting of Parliament. He is a native, but he claims to be and is a British subject, and there are many Englishmen and others resident in the territories who are not natives and who, if the Respondent's contention be correct, would be liable to be deprived of their lives and property as well as their liberty otherwise than by the law of the land.[12]

De Villiers was also sceptical about the crown's claims that there would be disorder in Pondoland if Sigcau were released, reiterating the comment he had made in Willem Kok's case that a court's 'first and most sacred duty is to administer justice to those who seek it and not to preserve the peace of the country'.[13] In any event, he added that, '[i]t must tend to enlist the natives on the side of the laws if they know that the Courts of law are as ready and willing to protect their legal rights as they are to punish them for offences against the law.'[14]

The Cape government sought special leave to appeal to the Privy Council, arguing that the decision 'detrimentally interfered with' the administration of the territories in question, whose population 'is mainly composed of barbarous aboriginal tribes specially requiring firm administration'.[15] Although the House of Lords had held in 1890 that there could be no appeal from a habeas corpus decision to free a prisoner,[16] the Privy Council – confirming that a different approach would be taken in colonial appeals[17] – granted leave to appeal, on condition that the crown paid the costs. Leave having been granted in December 1895,[18] the case was argued in the following July, with judgment being given in February 1897. The

[12] De Villiers, 'Reasons for judgment', BL, PP 1316, p. 25.
[13] De Villiers, 'Reasons for judgment', BL, PP 1316, p. 27, quoting from his judgment in *In re Willem Kok and Nathaniel Balie* (1879) in Eben J. Buchanan, *Cases in the Supreme Court of the Cape of Good Hope during the Year 1879* (Cape Town, Juta, 1880), p. 45 at p. 66 [Juta Reports, 1879, p. 45].
[14] De Villiers, 'Reasons for judgment', BL, PP 1316, p. 27. Cf. 'The Liberty of the Subject', *Cape Law Journal*, vol. 12 (1895), pp. 193–196 and 'The Law of Personal Liberty in the Cape', *Cape Law Journal*, vol. 13 (1896), pp. 252–255.
[15] Petition to Her Majesty in Council for leave to appeal, 27 August 1895, 'Record of Proceedings', p. 33.
[16] *Cox* v. *Hakes* (1890) 15 App. Cas. 506.
[17] *Attorney General of Hong Kong* v. *Kwok-a-Sing* (1873) LR 5 PC 179.
[18] *The Times*, 9 December 1895, p. 13.

judgment, dismissing the Cape government's appeal, was delivered by Lord Watson. Discussing the proclamation, Watson held that it purported to exercise powers 'which are beyond the competency of any authority except an irresponsible sovereign, or a supreme and unfettered legislature, or some person or body to whom their functions have been lawfully delegated'. If the Governor had such powers, the court 'would be compelled, however unwillingly, to respect his proclamation', but if he did not, 'then his dictatorial edict was simply an invasion of the individual rights and liberty of a British subject'.[19]

Watson went on to express his satisfaction that no attempt had been made to trace the Governor's power to enact the proclamation from any authority derived from the Queen, 'because autocratic legislation of that kind in a Colony having a settled system of criminal law and criminal tribunals would be little calculated to enhance the repute of British justice'.[20] Looking more closely at the Pondoland Annexation Act, Watson held that it did not give the Governor the power to make any new laws, such as one detaining Sigcau. As he put it, '[t]here is not a word in the Act to suggest that it was intended to make the governor a dictator, or even to clothe him with the full legislative powers of the Cape Parliament.' It allowed him only to introduce into the territory general laws which already existed in other parts of the colony. The scheme of the legislation was 'to delay the enactment of many salutary laws elsewhere prevailing throughout the Colony until the native inhabitants of the newly annexed territories had so far advanced in civilization and in social progress as to make the gradual introduction of these laws advisable'. That being so, the Governor had acted *ultra vires* in purporting to enact new legislation to detain Sigcau.[21] The case was widely reported in England,[22] and the Judicial Committee's decision was interpreted by many as a reaffirmation of the rule of law.[23]

[19] *Sprigg* v. *Sigcau* [1897] AC 238 at 246. [20] *Sprigg* v. *Sigcau* [1897] AC 238 at 247.
[21] *Sprigg* v. *Sigcau* [1897] AC 238 at 247.
[22] 'An Illegal Proclamation', *The Standard*, 27 February 1897, p. 3; and *Morning Post*, 27 February 1897, p. 4. *The Spectator* noted that Watson 'spoke very strongly as to the illegality committed' (6 March 1897, p. 322).
[23] In December 1901, the Law Officers invoked this case as a contemporary illustration of Blackstone's comment that the law was 'benignly and liberally construed for the benefit of the subject': CO 885/15, quoting W. Blackstone, *Commentaries on the Laws of England*, 4 vols. (Oxford, Clarendon Press, 1765–1769), vol. 1, p. 134.

Watson's words also provided ammunition for those who sought to argue that colonial legislators did not have the power to pass 'autocratic' detention legislation which would by-pass an established system of civil and criminal procedure.[24] However, Watson's point that the proclamation would have been valid if it had derived from a lawfully delegated sovereign power did confirm that properly drawn legislation could confer draconian powers.

By the time that the Privy Council's judgment had been handed down, the Cape's Prime Minister Sir Gordon Sprigg no longer saw Sigcau as a threat,[25] and the government paid him £1,000 to settle a claim for false imprisonment.[26] The Cape ministry was less content, however, to leave the law as laid down by the Judicial Committee. After the decision, it introduced legislation 'to declare the powers of the Governor with reference to the Proclamation of Laws' in the Transkeian territories. This empowered the Governor by proclamation to authorise the summary arrest and detention of any person he considered dangerous to public peace for up to three months, and validated all proclamations purportedly issued hitherto under the Annexation Acts. In deference to the Judicial Committee's decision, the proclamation relating to Sigcau was the sole one exempted.[27] The proposal attracted strong parliamentary opposition from John X. Merriman and J. W. Sauer (who pointed out that Sigcau's release had not endangered the public peace),[28] but passed both houses.

In light of the decision in *Sprigg* v. *Sigcau*, the legislation was reserved by Governor Sir Alfred Milner for confirmation by the Secretary of State for the Colonies, Joseph Chamberlain, since it raised important questions of policy. Admitting that the measure was 'at variance with the principles which have been recognised in England for the protection of the liberty of the subject', the Cape government drew attention to the 'exceptional circumstances' which made it

[24] Montague Lush, arguing the case of Sekgoma Letsholathibe (discussed below), told the Court of Appeal that it would be 'congenial to our love, as a nation, of liberty and justice to act on the eloquent words of Lord Watson': CO 879/103/3, p. 236.

[25] *The Times*, 21 December 1896, p. 5.

[26] *Manchester Guardian*, 12 January 1899; and *Truth*, vol. 40 (12 January 1899), p. 141.

[27] Act 29 of 1879 (the text of which is in CO 879/51/5, Appendix, enc. in No. 1, p. 93).

[28] Quoted in David Welsh, 'The State President's Powers under the Bantu Administration Act', *Acta Juridica*, vol. 81 (1968), pp. 81–100 at p. 85.

necessary in the colonies: in the Transkeian territories, 'a handful of whites have settled down in the midst of an overwhelming mass of Kaffirs, who are but slowly emerging from barbarism . . . and the power of the Chiefs, although gradually waning, is still a fact which has to be reckoned with.'[29] Milner recommended that the measure be assented to, explaining that '[t]here is a great difference – there is no use in blinking it – between British ideas as to the treatment of native races and Colonial ideas.'[30] The Law Officers also reported that there were no legal or constitutional objections to the measure which would make it improper for the Queen to assent to it: 'The necessity for the suspension of the Habeas Corpus Act, and for empowering the Governor to legislate, is a matter of which the Cape Parliament must judge.'[31] In contrast to de Villiers's approach, which raised a question over whether the Cape legislature could delegate a power to implement legislation violating the principles of English law, officials in England simply presumed such a power existed. For them, what de Villiers had seen as a constitutional question was viewed as a political question, which was best left in the hands of colonial responsible governments.

Sigcau's case was the first challenge to the lawfulness of *ad hominem* detention legislation. The chief's successful application reaffirmed that African subjects were accorded the same legal rights, associated with Magna Carta and the ancient constitution, of which Englishmen were so proud, even as they were denied those political rights which an increasingly large proportion of Englishmen were beginning to enjoy. At the same time, Lord Watson's judgment left room for those rights to be removed, provided that it could be shown that the powers exercised by the colonial legislature or Governor were validly delegated from the sovereign source. Starting with the Cape ministry itself, colonial authorities learned to be careful in drawing up legislation to empower detention. In turn, the courts would be asked whether such laws should be broadly or narrowly construed; and, as shall be seen in the cases of Sekgoma and Zaghlul, courts in London, animated by similar fears to those articulated by the Cape ministry, soon opted for the narrower, formal view.

[29] Minute, 30 June 1897, CO 879/51/5, Appendix, enc. in No. 1, p. 93.
[30] CO 879/51/5, Appendix, No. 1, p. 92. [31] CO 879/51/5, Appendix, No. 3, at p. 96.

Sekgoma Letsholathibe

Whereas Sigcau's case came to the Privy Council in London, thanks to an appeal lodged and paid for by the Cape government, the second African case to reach the metropolis was brought by a detainee with the funding and support to bring his case directly before the English common law courts. The case was brought on behalf of Sekgoma Letsholathibe, the Tawana chief of the ruling tribe of Ngamiland, in the north-west of the Bechuanaland Protectorate.[32] Unlike Sigcau, whose territory had been annexed and become part of the Cape Colony, Sekgoma's homeland was in the constitutionally ambiguous position of some of the West African territories already encountered.

The British had declared a protectorate over Bechuanaland in January 1885, having in May 1884 entered into treaties with the chiefs of the Batlapins and Barolongs which conferred considerable powers – including the power to tax and pass laws – on the British.[33] These tribes had long sought protection, and the protectorate was proclaimed to prevent incursions from Boers from the South African Republic seeking land in these areas. In September 1885, the area of Bechuanaland south of the Molopo River was proclaimed to be part of British territory ('British Bechuanaland'), while the area to the north was to remain 'under Her Majesty's protection' (the 'Bechuanaland Protectorate').[34] British intervention in the protectorate was at first minimal, but in May 1891 a further Order in Council was issued, under the 1890 Foreign Jurisdiction Act.[35] This Order in Council made no reference to any particular treaties with African chiefs, but defined the area of the protectorate to extend to the Chobe and Zambezi Rivers. It conferred on the High Commissioner all powers which the Queen had 'within the limits of this Order'. It also empowered him to appoint administrators and magistrates and to

[32] On the Tawana, see A. Sillery, *The Bechuanaland Protectorate* (Oxford, Oxford University Press, 1952), ch. 14.

[33] The newly proclaimed protectorate, however, extended over a larger area than was occupied by these tribes. The Order in Council of 27 January 1885 is reproduced in PP 1885 (c. 4432) LVII. 359, enc. 1 in No. 1, p. 1. See W. Ross Johnston, *Sovereignty and Protection: A Study of British Jurisdictional Imperialism in the Late Nineteenth Century* (Durham, Duke University Press, 1973), pp. 150ff.

[34] Sillery, *The Bechuanaland Protectorate*, p. 58; and Johnston, *Sovereignty and Protection*, pp. 151ff.

[35] PP 1905 (130) LV. 7 at p. 6.

provide 'for the peace, order and good governance' of the protectorate by proclamation. The protectorate was thus in the same ambiguous position as a number of other African protectorates: although not annexed as a colony, British claims went beyond merely claiming a right to jurisdiction over British subjects by virtue of a treaty concession – the traditional view of a protectorate – to something which was closer to the general legislative and adjudicative powers of a sovereign, which was more in line with the continental view.

The Detention of Sekgoma

Sekgoma was the son of Chief Letsholathibe. On his death in 1874, Letsholathibe was succeeded by his son Moremi, who died in 1891 leaving a nine-year-old son, Mathiba. In 1895, Sekgoma became acting chief of the tribe with the support of the British, who told him that they would both recognise his authority over his country 'and will guarantee you in the possession of it'.[36] However, in 1905, his right to be chief was challenged by the supporters of Mathiba.[37] The immediate cause of the dispute was said to be Sekgoma's alleged ill-treatment of his wife, whom he accused of infidelity, though deeper political rivalries lay behind this apparently domestic quarrel.[38] In December 1905, his opponents petitioned for Sekgoma's removal, claiming that he had only been regent for Mathiba. The Resident Commissioner for Bechuanaland, Ralph Williams, was initially untroubled by this quarrel, but matters escalated after Sekgoma visited the colony in February on personal

[36] CO 879/53/6, enc. 2 in No. 137, p. 178.

[37] See J. M. Chirenje, 'Chief Sekgoma Letholathibe II: Rebel or 20th Century Tswana Nationalist?', *Botswana Notes and Records*, vol. 3 (1971), pp. 64–69; A. Sillery, 'Comments on Two Articles', *Botswana Notes and Records*, vol. 8 (1976), pp. 292–295; and J. M. Chirenje, 'Military and Political Aspects of Map-Making in Ngamiland: A Rejoinder to Anthony Sillery's Comment', *Botswana Notes and Records*, vol. 9 (1977), pp. 157–159. See also A. J. G. M. Sanders, 'Sekgoma Letsholathebe's Detention and the Betrayal of a Protectorate', *Comparative and International Law Journal of South Africa*, vol. 23 (1990), pp. 348–360.

[38] Sekgoma's wife was the niece of Chief Khama, while her alleged lover was the son of Dithapo, who was the prime petitioner against his rule. Sekgoma had quarrelled with Khama in 1900, and thought that he had been plotting his removal ever since: see F. B. Winter to Selborne, 29 April 1910: CO 417/483/20273, f. 40.

business.[39] In his absence, some members of his tribe sent for Mathiba to return and assume the chieftainship, whereupon Sekgoma's followers called him back to the tribe's capital, Tsau. Williams now began to fear a conflict, which might endanger white interests.[40] On his advice, the High Commissioner, Lord Selborne, decided that both Sekgoma and Mathiba should be kept away from their tribal homeland (the Batawana Reserve) pending an investigation into their respective claims. Sekgoma was met at Mafeking by two Bechuanaland policemen, and escorted into the protectorate. On 20 April 1906, a warrant was issued in Serowe (in the protectorate) to detain them both.

Two months later, an inquiry conducted by Williams in Tsau determined that Mathiba was the rightful chief.[41] Mathiba was duly released and instructed to return to Tsau, while Sekgoma remained in detention in Gaberones, protesting at being deposed without a trial.[42] As officials would soon discover, the legal basis for his detention was far from firm. Segkoma had been arrested under a simple warrant in Selborne's name, purportedly under the Expulsion of Filibusters Proclamation of 30 June 1891, which had been passed with the aim of removing disruptive Transvaal Boers from the protectorate. Selborne's advisers doubted whether Sekgoma could be properly dealt with under this legislation, and plans were made to replace it with a proclamation to authorise both Sekgoma's detention and his deportation. Influenced by his predecessor Lord Kitchener's proposal in 1901 to exile the troublesome Bakwena chief Sebele, Selborne wanted to remove Sekgoma from South Africa, preferably to the Seychelles.[43] To facilitate this, he repealed the 1891 proclamation and issued a new one on 14 September, which authorised him to order anyone he considered dangerous to the peace, order and good governance to leave the protectorate, and legalised the detention of anyone held within its provisions.[44]

[39] He wanted to commence divorce proceedings and consult a doctor about suspected cancer. CO 879/91/1, enc. 1 in No. 26, p. 44; enc. in No 37, p. 64; enc. 1 in No. 50, p. 76.

[40] CO 879/91/1, enc. 3 in No. 50, p. 77.

[41] CO 879/91/1, enc. 1 in No. 139, p. 216; and Sir Ralph Williams, *How I Became a Governor* (London, John Murray, 1913), ch. 22.

[42] CO 879/91/1, enc. 1 in No. 147, p. 232.

[43] CO 879/91/1, No. 186, p. 340; for Sebele, see CO 879/69/2, No. 260, p. 373.

[44] CO 879/91/1, enc. in No. 188, p. 341.

In order to avoid sending Sekgoma through the Cape, whose court had freed Sigcau, plans were made to remove him via Southern Rhodesia and Beira.[45] However, these plans foundered on the opposition of the Secretary of State, for just as Chamberlain had vetoed Sebele's deportation to the Seychelles, so Elgin vetoed Sekgoma's. Elgin pointed to 'the obvious objections to the penal transportation of a man who has committed no offence and is subject to no condemnation, and whose power to disturb the public peace may prove to be of a transient character'.[46] Nor was he prepared to consent to Sekgoma's detention for any longer than was necessary for Mathiba 'to establish his position completely'.[47] Elgin also pointed out the legal flaws in Selborne's new proclamation: since it was worded in such a way as to apply only to those who had already been told to leave but had not yet done so, it did not apply to Sekgoma.[48] Given these flaws, Sekgoma's detention could only be seen as an act of state, without legal warrant, which meant that further legislation, including indemnity provisions, would have to be passed.[49] London accordingly sent a new proclamation – 'founded on the experience of other similar cases' – to authorise the detention specifically of Sekgoma,[50] which was issued by Selborne on 5 December 1906.

Two weeks before the new proclamation was issued, Sekgoma applied to the High Court in Kimberley to obtain his release, having served a summons on the new Resident Commissioner of Bechuanaland, Col. F. W. Panzera, as he passed through the town. Aware that the warrant under which Sekgoma had been detained was invalid, Panzera realised that it was 'necessary, *pro forma*, to quote some authority', and so he simply responded that Sekgoma was being held under a warrant issued by the High Commissioner on 2 April.[51] News of this action reached the Colonial Office too late to give any direct instructions on how to defend the action, but a telegram was sent

[45] CO 879/91/1, No. 194, p. 349 at p. 350. [46] CO 879/91/1, No. 212, p. 364 at p. 365.
[47] CO 879/91/1, No. 205, p. 361.
[48] The legal advice Elgin received added that the proclamation permitted only the detention of such persons for three months from September 14: DO 119/778/3335/06.
[49] CO 879/91/1, No. 205, p. 361; No. 212, p. 364.
[50] CO 879/91/1 No. 212, p. 364 at p. 365.
[51] CO 879/91/1, enc. 6 in No. 236, p. 412.

signalling Elgin's approval of the conduct of his officials in respect of Sekgoma's detention. The careful wording was designed formally to ratify his detention as an act of state, and hence (if necessary) to put it beyond the court's jurisdiction, but without doing so overtly, given that the proceedings had already commenced.[52] This precaution turned out to be unnecessary, for Lange J accepted the crown's argument that this court in the Cape Colony had no jurisdiction to determine a case between a resident of the Bechuanaland Protectorate and its government. Since Sekgoma's own affidavit stated that he had only been arrested after he had entered the protectorate, Lange advised Sekgoma to appeal to the High Commissioner, and if necessary to the Privy Council.[53]

Over the next three years, Sekgoma remained in detention in a house in Gaberones, while the colonial authorities debated what was to be done with him. In March 1907, Sekgoma said he was willing to give up his claims to be chief, if he were allowed to move with his followers to another area, such as Barotseland.[54] Although Panzera was willing to entertain this proposal, Selborne rejected it, fearing that Sekgoma might return to Tsau, which might lead to bloodshed.[55] Mindful that it was both expensive and 'distasteful' to keep Sekgoma a prisoner, Selborne suggested in January 1908 that he might be allowed to live (under a proclamation) elsewhere in southern Africa, such as Nyasaland.[56] However, this proposal was again vetoed by Elgin, who opposed any removal which was not entirely voluntary, and who reminded Selborne that the chief was to be detained only until Mathiba was fully established.[57] This was not, however, an imminent prospect, for, as Panzera put it, Mathiba was 'more imbued with the characteristics of a lady missionary than those of a ruler'.[58]

In March 1908, the acting magistrate at Tsau, Lt. H. D. Hannay, detained four of Sekgoma's followers, having intercepted a letter

[52] See the minutes of Cox and Graham on this in CO 417/425/43031, f. 601, seeking to apply the rule in *Buron* v. *Denman* (1848) 2 Ex. 166.
[53] *Sekgome Letsholathebe* v. *Panzera* (1906) 10 Griqualand High Court Reports 90.
[54] CO 879/95/4, enc. 1 in No. 95, p. 139.
[55] Elgin agreed, though he wanted the question revisited 'a year or so hence'. CO 879/95/4, No. 95, p. 138; No. 100, p. 143; No. 119, p. 192.
[56] CO 879/98/1, No. 14, p. 20. The cost of keeping him at Gaberones was £756 per annum, whereas he could be given an annuity (as other chiefs had been) of £300.
[57] CO 879/98/1, No. 30, p. 57. [58] CO 879/98/1, enc. 3 in No. 101, p. 179.

purportedly from Sekgoma, ordering them to go to Portuguese territory, where he would join them.[59] This led officials once again to contemplate removing Sekgoma, whose continued presence in Bechuanaland was now considered to be disruptive.[60] At the same time, Sekgoma promised that, if he were released, he would report weekly to the Resident Commissioner at Mafeking and would not enter the protectorate without permission.[61] Panzera was keen to take up this offer, and move the chief to the Cape or Basutoland, but Selborne was not prepared to trust to Sekgoma's good will, and repeated his earlier proposal to deport him to the Seychelles via Beira.[62] Once again, he was rebuffed, for the new Secretary of State, the Earl of Crewe, was reluctant to bring a bill before parliament to allow his transportation over the seas, and thought it likely in its absence that Sekgoma's legal advisers would bring a writ of habeas corpus.[63] In Crewe's opinion, he would simply have to be held on parole elsewhere in South Africa, whatever the risks of his escape. As a result of these discussions, Sekgoma was offered a farm in the Barberton District of Transvaal.[64]

Although initially keen on accepting this offer, Sekgoma suddenly changed his mind at the beginning of March 1909, telling Acting Resident Commissioner Barry May that 'I wish to have my case tried before the Courts in England or else to be killed.'[65] What prompted his change of mind was the settlement of a dispute over his property, which freed funds to allow his case to be taken to London. When it came to dealing with Segkoma's rights to property, the authorities showed themselves to be much more legally punctilious than they were in dealing with his liberty. After his detention, the authorities had valued Sekgoma's assets in Ngamiland at 240 cattle, 176 sheep and goats, a handful of other

[59] CO 879/98/1, in enc. 1 in No. 66, p. 115. They were removed from the Twana Reserve to Quagganaai, using powers under Proclamation No. 15 of 1907, where they were detained until June 1909: CO 879/98/1, No. 98, p. 169, with enclosures; CO 879/102/1, enc. 1 in No. 171, p. 234.
[60] CO 879/98/1, enc. 1. in No. 52, p. 83.
[61] CO 879/98/1, in enc. 1 in No. 101, p. 178; enc. 1 in No. 68, p. 126.
[62] CO 879/98/1, enc. 1 in No. 101; enc. 2 in No. 101, p. 179; No. 102, p. 183.
[63] CO 879/98/1, No. 129, p. 217. [64] CO 879/102/1, No. 47, p. 74.
[65] CO 879/102/1, in enc. 2 in No. 78, p. 109.

animals and £88 in cash.[66] They at first considered appointing a *curator bonis* to manage this property while Sekgoma was in detention, but found that the Resident Commissioner's court had no power to do so. Plans to legislate to allow the appointment of a *curator bonis* for a detainee then stalled when Elgin objected that such powers were suitable only for managing the property of convicted prisoners.[67] They became redundant when at the beginning of 1908 Sekgoma gave a power of attorney to Charles Riley, a man of mixed race, who had lived in the protectorate for twenty-six years and who would be Sekgoma's dogged champion over the next four years. Riley also took up Sekgoma's claims to a much larger number of cattle in Ngamiland, and signalled his intention to commence proceedings for this property in the Assistant Commissioner's Court in Francistown. The prospect of these proceedings alarmed the authorities, given that it might require the presence in court both of Sekgoma and of many witnesses from distant Tsau.[68] A proclamation was therefore passed to empower a special commissioner's court to hear any disputes concerning Sekgoma's property at Tsau.[69] At these hearings, Sekgoma's agent laid claim to over 8,500 head of cattle, title to many of which depended on his right as chief. In the end, he was awarded only 1,260 head of cattle claimed,[70] to add to the 637 cattle which Riley had already recovered in the Acting Commissioner's court. If the award was less than Sekgoma had anticipated, it nevertheless provided valuable assets which could be used to fund his challenges to his continued detention.

With funds available, Riley proposed to go to London, along with the editor of the *Mafeking Mail*, G. N. H. Whales, to put the matter of Sekgoma's incarceration before the British public.[71] Meanwhile, negotiations over a possible relocation continued. By now, May had come to the view that the two Tawana factions would never be reconciled, and that Selborne's attempt to confer all power on

[66] CO 879/95/4, enc. 5 in No. 44, p. 74. At the same time, there were claims of some £848 against him.
[67] CO 879/95/4, enc. 6 in No. 44, p. 75; No. 58, p. 87; No. 60, p. 88; No. 111, p. 153.
[68] CO 879/98/1, No. 22, p. 42; enc. 1 in No. 39, p. 66.
[69] Proclamation 20 of 1908: CO 879/98/1, enc. in No. 46, p. 77; No. 47, p. 78.
[70] CO 879/102/1, enc. in No. 42, p. 64. [71] CO 879/102/1, enc. 1 in No. 70.

Mathiba had prevented the kind of tribal secession which was natural in Tswana society. He therefore proposed allowing Sekgoma and his followers to settle elsewhere in the region.[72] May met Riley in Mafeking, and discussed the possibility of relocating Sekgoma and his followers on land to the north of the Molopo River, but found Riley unwilling to enter into any commitments until he had returned from England. Selborne suggested, uncharitably, that Riley and Whales, who were on the verge of bankruptcy, simply wanted to travel at the chief's expense; more charitably, May suggested that Riley did not think he could advise Sekgoma to accept the offer of land on the inhospitable Molopo until he had exhausted all other options.[73] On 7 April, Riley and Whales sailed to London, along with Sekgoma's secretary, Kebalepile, to put their case before the British public.

Meanwhile, officials in London were confident that they had put themselves in a strong position if any question were raised in parliament. As Lambert minuted, having made two offers – of land in the Transvaal for Sekgoma himself, or territory near the Molopo where he could take his followers – the government could 'say that he is alone responsible for our having to keep him in detention at Gaberones to prevent his setting part of the Protectorate a blaze, and the sooner Messrs Riley & Whales are made to understand that they are wasting S's money in vain the better for Sekgoma'.[74] With the Colonial Office digging in its heels, at the beginning of September, Riley instructed solicitors to commence proceedings against Selborne – then in London – both for damages for false imprisonment and for a writ of habeas corpus. By the time the documents were ready to serve on the High Commissioner, however, he was on a ship bound for South Africa.[75] In his absence, the decision was taken to commence proceedings against the Earl of Crewe.

The Litigation in the King's Bench Division and the Court of Appeal

Sekgoma's application for a habeas corpus was filed in October 1909. In his answering affidavit, Crewe stated that Bechuanaland was

[72] CO 879/102/1, enc. 1 in No. 81. [73] CO 879/102/1, No. 84, p. 120; enc. in No. 95, p. 133.
[74] Minute by Lambert, 6 May 1909, CO 417/466/15267, f. 58.
[75] F. B. Winter to Crewe, 6 September 1909, T1/11299.

a foreign country, where the crown had jurisdiction by virtue of the Foreign Jurisdiction Act; that Sekgoma was lawfully detained by virtue of the proclamation of December 1906; and that his detention was an act of state which could not be questioned by the court. He also submitted that he did not himself have custody of Sekgoma and that in any event no writ of habeas corpus could run into this foreign territory. Against this, Sekgoma's lawyers took the view that Sigcau's case had established that a proclamation such as this was 'absolutely illegal', and that the African chief had a right to a habeas.[76]

In the Divisional Court, the judges saw two obstacles in the way of Sekgoma's application. The first obstacle related to the court's power to issue the writ. Chief Justice Lord Alverstone agreed that, if the protectorate were a foreign country, then the court would have no jurisdiction. However, in view of the fact that no court had yet determined 'the exact position of these Protectorates', and given that Sekgoma had been described as a British subject in Panzera's original affidavit in Kimberley, he was prepared to assume that Bechuanaland was a British dominion. Nonetheless, Alverstone held that Sekgoma was still debarred from seeking the writ in London: since, in his view, there were courts in the protectorate – set up under the Proclamation of 11 February 1896 – which could issue the writ, his application was barred by the 1862 Habeas Corpus Act, which enacted that no English court could issue the writ to a colony or 'foreign dominion' whose courts had the power to issue it. Instead of seeking his remedy in Westminster, Sekgoma should have gone to the Assistant Commissioner's court in Bechuanaland, and appealed from there to the Privy Council.[77] The second obstacle related to the choice of the Earl of Crewe as defendant. On this issue, the court held that the Secretary of State had neither custody of Sekgoma nor control of his gaoler. Since his only power was to advise the crown, he was not a suitable recipient of the writ.[78] This was, in fact, a rather artificial view to take: not only had Lord Crewe monitored all the negotiations with Sekgoma's representatives, but he was also the man who took the final decisions. Indeed, when preparing for the case in September, the

[76] This was Montague Lush's view, as expressed in the Court of Appeal: CO 879/103/3, p. 72.

[77] 'Proceedings', CO 879/103/3, pp. 66–67. [78] 'Proceedings', CO 879/103/3, pp. 63–69.

Colonial Office itself took the view that Crewe was the appropriate defendant.[79]

This court did not pronounce a judgment on the substantive question of the validity of the proclamation, though it was evident that the judges were sympathetic to Sekgoma's position on this point. Had the procedural points not got in the way, Alverstone indicated, the court would have granted the writ, since he felt that the question of the *vires* of the proclamation could not be settled merely on affidavits, but might require a special case.[80] He added that a proclamation providing for the detention of a particular individual was 'a very serious step indeed', which could be justified only by showing 'paramount authority recognised as being lawful'. In his view, such a provision would be impossible in any part of the British dominions where there was constitutional government, and could exist only in such places where no laws had been laid down by the crown and where no local law could deal with the matter.[81] Justice Darling, in his concurring judgment, added that the proclamation could not be seen as an act of state, but was a legal instrument whose validity could be questioned by the court. 'I am very much inclined to think', he concluded, that the proclamation 'does exceed the powers conferred upon the High Commissioner.'[82]

As Riley headed back to South Africa, optimistic of ultimate success, officials in London made preparations for the appeal, seeking a determination that would show that Sekgoma had no remedy in any imperial court. They were particularly keen to challenge the argument that Sekgoma was entitled to the rights of a subject. When asked about Panzera's affidavit describing him as a subject, Selborne replied that it had been drafted with 'imperfect legal knowledge', and connoted only that the chief was born within the limits of the area proclaimed a protectorate in 1885.[83] Legal advice was obtained from the India Office that no decision had ever been taken on the status of residents in the protected states, and notice was also taken of a Law Officers' opinion that they were not British subjects.[84] Evidence was

[79] As on official put it, 'the detention is clearly being continued with his authority'. Minute, 14 September 1909, T 1/11299.
[80] 'Proceedings', CO 879/103/3, pp. 38, 63. [81] 'Proceedings', CO 879/103/3, p. 65.
[82] 'Proceedings', CO 879/103/3, p. 69.
[83] Selborne to Colonial Office, 5 January 1910, CO 417/481/642, f. 55.
[84] A. J. Hare to Cox, 4 January 1910, CO 417/481/642, f. 52.

marshalled from treaties of protection and Orders in Council to establish that Africans in protected states were not British subjects.[85] Officials also looked for precedents in case law. For Bertram Cox, 'Our real sheet anchor is Staples v R if we can only get our counsel to read the shorthand notes.'[86]

Cox's reference was to an unreported case which went to the Privy Council in 1899, in which a British settler challenged his conviction for theft by the High Court of Matabeleland, which had no jury. Staples claimed that as a British subject, he had carried the rights of Magna Carta with him, and that these rights had been violated by the Matabeleland Order in Council which had been issued under the Foreign Jurisdiction Act. No formal decision had been handed down in this case, but the Colonial Office obtained a memorandum on the grounds of Privy Council's report, advising the Queen to reject the appeal. This memorandum – probably drafted by Lord Halsbury – related that Matabaleland was a foreign country, much like the Indian princely states which remained for important purposes foreign states whose subjects were not British. In places such as this, by virtue of the Foreign Jurisdiction Act, the crown had 'absolute power to say what law should be applied, as if it was by absolute conquest'. Although section 12 of the Act limited this absolute power by disallowing any orders 'repugnant to the provisions of any Act of Parliament extending to Her Majesty's subjects in that country', this did not refer to acts such as Magna Carta but only to legislation which 'applied in some special way to British subjects in the foreign country in question'. In the view of the committee, '[i]t would be a most unreasonable limit on the Crown's power of introducing laws fitting to the circumstances of its subjects in a foreign country if it were made impossible to modify any Act of Parliament which prior to the Order in Council might be invoked as applicable to a British subject.'[87]

[85] They pointed to Protection treaties, such as that with Zanzibar, which distinguished between British subjects and subjects of the Sultan: minute by Cox, 8 January 1910, CO 417/481/642; cf. E. Hertslet, *The Map of Africa by Treaty*, vol. 2 (London, HMSO, 1894), p. 769.

[86] Minute from Cox, 9 January 1910, CO 417/481/642, f. 51.

[87] *The Queen* v. *Staples*: Report of Proceedings before the Judicial Committee of the Privy Council 27 January 1899 and Memorandum of Reasons for the decision of the committee, CO 879/103/2, p. 3; last passage quoted by Farwell LJ, *Ex parte Sekgome*, p. 615.

Unlike the lower court, the Court of Appeal directly addressed the substantive issue of the validity of the proclamation, for it disagreed with the Divisional Court on the two procedural points. On the jurisdictional point, Sekgoma's counsel, Montague Lush, carefully demonstrated that the Bechuanaland courts did not have the superior court power to issue the writ.[88] On the point as to whether the Secretary of State was the right defendant, it was clear that the judges did not wish this point to get in the way of their determining the larger question.[89] The central question for the court to consider was hence that of the validity of the proclamation. At issue were the powers of the High Commissioner under the Order in Council of 1891. The crown's argument was that the king had absolute power in ceded or conquered territories, which (thanks to the Foreign Jurisdiction Act) Bechuanaland was deemed to be,[90] and that these powers could be delegated. Sekgoma's lawyers questioned this by arguing that the crown's powers were constitutionally limited. In so arguing, Lush invoked Lord Mansfield's dictum in *Campbell* v. *Hall*, that 'a country conquered by the British arms becomes a dominion of the King in the right of his Crown' and hence subject to parliament. While the king alone had the power to introduce new laws in such places, 'this legislation being subordinate [. . .] to his own authority in Parliament, he cannot make any new change contrary to fundamental principles'.[91] Furthermore, any rights the king had as a conqueror were given up when he set up a constitution and laws for the conquered or ceded land, as had been done when the system of courts was set up in Bechuanaland under the 1896 proclamation. Lush also challenged the idea that Bechuanaland was a 'foreign' territory to which the writ could not run. Since the crown had set up a system of government in Bechuanaland, it enjoyed *dominium* to all intents and purposes, which meant that the chief was entitled to the rights of Britons, including habeas corpus.

[88] *Ex parte Sekgome*, p. 591.

[89] CO 879/103/3, pp. 100–101; *Ex parte Sekgome*, p. 592 (Vaughan Williams LJ); p. 606 (Farwell LJ); p. 618 (Kennedy LJ, who disagreed, thinking Selborne should have been the defendant).

[90] CO 879/103/3, p. 143.

[91] *Campbell* v. *Hall* (1774) 1 Cowper 204 at 208–209. Cf. Joseph Chitty, *A Treatise on the Law of the Prerogatives of the Crown* (London, Joseph Butterworth & Son, 1820), p. 29.

Lush further argued that the powers conferred on the High Commissioner under the Order in Council were not arbitrary. To begin with, a crown whose own powers were constitutionally limited could not confer greater powers on its delegates than it enjoyed itself. Furthermore, under section 12 of the Foreign Jurisdiction Act, the crown had no power to issue an Order in Council repugnant to the Star Chamber Act of 1641, which Lush considered to fall within the Act's definition of legislation 'extending to the subjects of the Crown in that country'. As to the Bechuanaland Order in Council itself, section 2 stipulated that the High Commissioner could take only such actions as were 'lawful', which Lush contended meant lawful according to wider constitutional principles, which in turn placed a limit on his power to provide for peace, order and good government. While Lush did not deny that parliament had the power to legislate in an arbitrary way – as Lord Watson had conceded in Sigcau's case – he argued that a close examination of the instruments would reveal that this was not the case here.[92]

In answer, Sidney Rowlatt argued that the king was a constitutional monarch only in those dominions where constitutional government had been set up.[93] To dislodge Lord Mansfield's point that the crown's own power was limited by fundamental law, he argued that the rule from *Campbell* v. *Hall* had been clarified and modified by the Colonial Laws Validity Act of 1865, which was itself echoed in section 12 of the Foreign Jurisdiction Act. Invoking *R.* v. *Staples*, he argued that by virtue of this legislation, the crown's legislative capacity in the colonies was bound only by imperial legislation 'extending to the colony' or 'Her Majesty's subjects' in the jurisdiction in question. The crown's legislative powers in these areas were as extensive as those which had been conferred on colonial assemblies. To show the extent of these powers, he invoked *Phillips* v. *Eyre*,[94] where the Exchequer Chamber had recognised the power of the Jamaican legislature to pass an indemnity act after the Morant Bay rebellion, which qualified the feted 'fundamental laws'. Countering Lush's argument that the High Commissioner's powers to legislate for

[92] 'Proceedings', CO 879/103/3, p. 92 (in the Court of Appeal), p. 35 (in the Divisional Court).
[93] 'Proceedings', CO 879/103/3, p. 41 (in the Divisional Court).
[94] *Phillips* v. *Eyre* (1869) LR 4 QB 225; (1870) LR 6 QB 1.

peace, order and good government were limited, he also cited the 1885 Privy Council decision in *Riel* v. *the Queen*, in which Lord Halsbury held that similar words in the British North America Act conferred 'the utmost discretion' on the Canadian legislature, and empowered it (and similar legislatures) to pass laws which authorised 'the widest departure from criminal procedure as it is known and practised in this country'.[95]

All three of the judges in the Court of Appeal agreed in dismissing Segkoma's application. The clearest judgment was given by Lord Justice Farwell. He began by noting that the 'solution of the present case' was to be found in the fact that the despotic powers claimed by the crown in Bechuanaland derived not from the royal prerogative, but from the legislature, through the 1890 Act.[96] Turning to the question of whether these powers were limited by any 'fundamental law', Farwell drew on Willes J's comment in *Phillips* v. *Eyre* that this expression could connote either repugnancy to an imperial statute which applied to the colony or repugnancy 'to some principle of natural justice, the violation of which would induce the Court to decline giving effect even to the law of a foreign sovereign State'.[97] Answering Lush's argument that legislation directed against an individual was against natural justice, he cited Willes's view that the question of whether particular steps had to be taken to ensure the safety of the state was a political question for the legislator, not a judicial one. Farwell accepted Rowlatt's argument that the Colonial Laws Validity Act (and consequently the Foreign Jurisdiction Act) had in effect taken the place of Lord Mansfield's principle.[98] While he agreed that certain imperial acts could not be repealed by an Order in Council – such as the Slave Trade Act of 1843, which declared that it applied to 'British subjects wheresoever residing' – he held that the Star Chamber Act did not so apply. His reasons for taking this line were entirely political: 'The truth is that in countries inhabited by native tribes who largely outnumber the white population such acts, although bulwarks of liberty in the United Kingdom, might, if applied there, well prove the death warrant of the whites.' Principles which were

[95] *Riel* v. *the Queen* (1885) 10 App. Cas. 675 at 678.
[96] *Ex parte Sekgome*, pp. 611–612.
[97] *Phillips* v. *Eyre* (1870) LR 6 QB 1 at 20.
[98] 'Proceedings', CO 879/103/3, p. 174.

admirable when applied in 'an ancient well-ordered State' would be 'ruinous when applied to semi-savage tribes'.[99] On the further question of the extent of the High Commissioner's power to issue proclamations under the Order in Council, Farwell accepted Rowlatt's broad conception of these powers. For Farwell, the Foreign Jurisdiction Act was the crucial empowering legislation, for in his view, without such empowering legislation, the crown could not of itself authorise the acts complained of.

In his judgment, Farwell accepted Lush's contention that Sekgoma was a British subject, since the 1890 Act appeared to confer jurisdiction only over Her Majesty's subjects resident in foreign countries. By contrast, neither Vaughan Williams LJ nor Kennedy LJ regarded Sekgoma as a subject. While disagreeing with the position taken in W. E. Hall's treatise on the *Foreign Powers and Jurisdiction of the British Crown* that the Foreign Jurisdiction Act applied only to subjects,[100] Vaughan Williams thought that, if it did not apply, then the detention of Sekgoma could still be seen as an act of state, beyond the remit of the courts.[101] In Kennedy's view, even if Hall's interpretation of the act was correct, the crown still had a separate prerogative power to issue the Order in Council in any 'barbarous and unsettled territory' under British protection.[102] Unlike Farwell, Kennedy was thus prepared to accept that the crown had unlimited prerogative powers in some contexts. Notwithstanding their doubts about the reach of the Act, both these judges also derived the High Commissioner's powers from parliamentary authorisation. Vaughan Williams LJ admitted that his greatest doubts in the case derived from the fact that what was in effect a proclamation of the outlawry of an individual had been issued without any regard to earlier laws dealing with dangerous persons. Nonetheless, he accepted that the High Commissioner had the full legal discretion to issue such a proclamation under section 4 of the Order in Council.[103]

[99] *Ex parte Sekgome*, pp. 614–616.
[100] W. E. Hall, *A Treatise on the Foreign Powers and Jurisdiction of the British Crown* (Oxford, Clarendon Press, 1894), p. 221.
[101] *Ex parte Sekgome*, p. 596.
[102] *Ex parte Sekgome* p. 626, citing Hall, *A Treatise on the Foreign Powers*, pp. 224–225.
[103] *Ex parte Sekgome*, p. 604.

The Colonial Office was acutely aware of the importance of the case. As Lambert told Cox a week before the judgment was handed down, 'the Sekgome case involves the very basis of our administration in this & all Protectorates & we cannot afford to lose it, whether we look to the danger of tribal war among the Batawana, or the legal difficulties in every country administered under the Foreign Jurisdiction Act.'[104] They were well rewarded for the wait. In coming to its conclusion, the court did far more than justify the detention of Sekgoma, who might have been portrayed simply as a foreign ruler held by virtue of an act of state. The decision recognised an open-ended legislative power for the crown in the protectorates, uncontrolled by broader common law principles. Taking a very formalistic view of the rule of law, the Court of Appeal traced the kind of sovereign powers which Lord Watson had said in Sigcau's case would be needed to authorise the kind of legislation under which Sekgoma was detained from the Foreign Jurisdiction Act. This was a very slender base for such large power. The Foreign Jurisdiction Act had been drafted to deal with the extraterritorial jurisdiction of the crown over its subjects resident in foreign territories, and not to define its constitutional position in protectorates where it now sought to establish systems of government which local rulers were bound to obey. There was nothing in the words of the act to suggest that it was meant to apply to non-subjects, nor did it appear to confer general legislative powers over such people to the crown.

In deciding on the ambit of the crown's powers here, the judges relied on *R.* v. *Staples*, a case which was concerned with the much narrower question of whether an individual British subject carried all his common law rights into a foreign country in which the crown had extraterritorial jurisdiction. The judges' expansive interpretation of the act echoed the increasingly expansive view taken of protectorates at that moment. The words of the Order in Council were also broadly interpreted, with the judges taking the view that the limitation of the High Commissioner's powers to do such things as were 'lawful' was qualified only by section 12 of the 1890 Act. Similarly, the very broad discretionary powers conferred by the Order in Council on the High Commissioner were regarded as the equivalent of the legislative

[104] Lambert to Cox, 19 April 1910, CO 417/482/11600, f. 157.

powers of the parliament of Canada. This contrasted strongly with the approach taken by Chief Justice de Villiers in interpreting the ambit of delegated powers in Sigcau's case. De Villiers's distinction between legislative and judicial powers was not remarked upon by the judges in this case. Lush did try to invoke Lord Watson's judgment in support of his view that the High Commissioner could not be seen to have the despotic powers of an absolute sovereign, but with little effect. As Farwell LJ observed during argument, '[t]he actual decision was only on the construction of the Pondoland Annexation Act, and the reasons given were rather contrary to the general ideas.'[105]

Aftermath

The Court of Appeal's decision was informed in part by a sense of the imminent danger to the handful of white traders in Ngamiland were Sekgoma to be accorded the rights of an Englishman. Yet it was clear by then that the Colonial Office no longer regarded the chief as any kind of threat. At the same time that court proceedings were in progress, Riley was continuing to negotiate a settlement. He returned to Mafeking after the habeas hearings in the King's Bench Division, and consulted Sekgoma. Riley now advised the chief to accept any reasonable offer, but, as a back-up, he proposed further litigation, including an appeal from the adverse decision and an action of false imprisonment against Selborne.[106] In March 1910, Segkoma asked for a reserve on the Molopo River (as already proposed by the government) as well as an annuity of £150 and a *solatium* of £5,000 in settlement of all his claims against the government.[107] However, the government remained reluctant to release Sekgoma until it was sure that his troublesome followers would leave Ngamiland. They also baulked at the demand for £5,000, which Selborne regarded as a ruse by the 'unscrupulous and penniless adventurers' who had supported Sekgoma to extract more money.[108] Panzera agreed, telling High Commissioner Herbert Gladstone, '[t]he belief that a half breed like Mr Riley could force the hand of the Government would be a serious

[105] 'Proceedings', CO 879/103/3, p. 183. [106] CO 879/104/2, No. 28, p. 27.
[107] CO 879/104/2, enc. in No. 53; No. 28, p. 48.
[108] CO 879/104/2, No. 52, p. 44 at p. 46; enc. 2 in No. 58, p. 53.

blow to our prestige and dignity.'[109] In the end, the government agreed to pay a settlement of £2,000 and released Sekgoma in March 1911. The question of where to resettle Sekgoma continued to be debated over the next three years, with matters being complicated when the authorities found they had underestimated the size of his following. At the time of his death in January 1914,[110] plans were already being made for his followers to return to the Batawana Reserve, which could be divided between his followers and Mathiba's.[111]

Saad Zaghlul Pasha

Sekgoma's case determined that colonial authorities could make use of general delegated powers to legislate for the peace, order and good government of a territory to pass *ad hominem* laws to detain particular individuals indefinitely without trial. The Court of Appeal did not attempt to interpret such legislation narrowly, in order to make it consistent with the wider principles of the common law, but held that, where a formal line of valid authority could be traced from statute to proclamation, the rule of law had been complied with. It would take another decade before judges in London had to consider the lawfulness of a detention ordinance involving another African, where the legislation had been passed not under statutory powers, but by virtue of the prerogative. The litigation in question arose from the other end of Africa, and involved a much-higher-profile detainee, the Egyptian nationalist leader Saad Zaghlul Pasha. As in Sekgoma's case, the question of whether to continue the detainee's detention remained a political one which was more contested than the court perceived; and, as in Sekgoma's case, the court's reading of the law proved very friendly to the executive.

Zaghlul's Campaign for Egyptian Independence

Although the British had exercised *de facto* control since 1882, Egypt remained *de jure* a part of the Ottoman empire until the beginning of

[109] Panzera to Gladstone, 24 February 1911, T 1/11299. [110] CO 879/114/5, No. 8, p. 5.
[111] CO 879/114/5, No. 11, p. 7. See further CO 879/113/1, No. 14, p. 24; No. 21, p. 40; No. 26, p. 48; No. 33, p. 59; No. 39, p. 64; No. 46, p. 70 (and all enclosures therein).

the First World War. In December 1914, Egypt was declared a British protectorate, one month after the Ottomans had joined the war and martial law had been proclaimed. Remembering many promises made since 1882 that Britain had no ambitions to annex Egypt, Egyptian politicians assumed that the protectorate would be temporary only. By 1918, there were also high expectations that President Woodrow Wilson's declaration that the nations under Ottoman rule should be given the opportunity of autonomous development would be acted on to secure Egyptian independence. In the same week that the armistice was signed, a delegation – or *Wafd* – visited the British High Commissioner in Cairo, Sir Reginald Wingate, to put the nationalist claim. It was led by Saad Zaghlul Pasha. Zaghlul was a man of long political experience. Born in July 1858, he had been a journalist, a judge and a government minister, acting first as Education Minister and then as Minister of Justice. Having resigned the post in 1912, he was elected to the Legislative Assembly in the following year, becoming its vice-president.[112] Zaghlul's request in 1918 to be allowed to go to London to put forward the case for Egyptian independence was rejected by the Foreign Office, which considered Egypt far from ready for self-government.[113] In response, Zaghlul and his newly formed political party, *al-Wafd al-Misri* organised a mass campaign in favour of independence.[114]

Zaghlul proved to be a thorn in the side of the British administration, which soon took steps against what was considered

[112] See C. W. R. Long, *British Pro-Consuls in Egypt, 1914–1929: The Challenge of Nationalism* (Abingdon, RoutledgeCurzon, 2005), pp. 177–181; Afaf Lutfi Sayyid-Marsot, *Egypt's Liberal Experiment, 1922–36* (Berkeley, University of California Press, 1977), ch. 2; and James Whidden, 'The Generation of 1919', in Arthur Goldschmidt, Amy J. Johnson and Barak A. Salmoni (eds.), *Re-envisioning Egypt 1919–1952* (Cairo and New York, American University in Cairo Press, 2005), pp. 19–45. See also 'Outline of Saad Pasha Zaghlul's career as a nationalist leader, more particularly since the Proclamation of the British Protectorate over Egypt on December 18, 1914', TS 27/172.

[113] FO 407/183, No. 142, p. 213; No. 144, p. 214; No. 146, p. 215. See also M. Daly, 'The British Occupation, 1882–1922', in M. W. Daly (ed.), *The Cambridge History of Egypt: Volume 2: Modern Egypt, from 1517 to the End of the Twentieth Century* (Cambridge, Cambridge University Press, 1998), pp. 239–251.

[114] On this party, see Marius Deeb, *Party Politics in Egypt: The Wafd and Its Rivals* (London, Ithaca Press, 1979); and Janice J. Terry, *The Wafd 1919–1952: Cornerstone of Egyptian Political Power* (London, Third World Centre for Research and Publishing, 1982).

to be his campaign of intimidation. After he had presented a petition designed to pressure the Sultan,[115] the Foreign Office authorised his removal (under martial law powers) to Malta, where Egyptian political prisoners were already being detained under wartime legislation along with enemy aliens and prisoners of war.[116] The deportation of Zaghlul and three others on 9 March 1919 proved to be a political miscalculation, for it was followed by riots and demonstrations in Egypt, which served only to add strength to the nationalist movement. General Sir Edmund Allenby, who was sent to Egypt as Special High Commissioner in March with instructions to put the government on a 'secure and equitable basis', realised that concessions would have to be made to the nationalists.[117] Zaghlul was freed from detention, and proceeded immediately to Paris, where he intended to put Egypt's case to the post-war peace conference. Although he was denied the opportunity to do this, Zaghlul remained in Paris, keeping the case of Egypt in the public mind, by lobbying politicians and giving press interviews.

The 'Revolution of 1919' which followed the deportations forced the British government to rethink its policy.[118] In May, the decision was taken to send a special mission to Egypt, headed by Lord Milner, to inquire into the disturbances and report on 'the form of the Constitution which, under the Protectorate, will be best calculated to promote its peace and prosperity'.[119] When the Mission finally arrived in December, it received a hostile reception from the nationalist movement, which had called for a boycott. In this climate, Milner realised that he needed to engage with Zaghlul's *Wafd* party, which had gained a complete 'ascendancy over the Egyptian public'. Although Zaghlul could not be persuaded to meet the Mission in

[115] FO 407/184, enc. in No. 74, p. 62.
[116] Malta's Ordinance XX of 1914 gave the governor additional powers to secure public safety during the war. For wartime internment, see Matthew Stibbe, *Civilian Internment during the First World War: A European and Global History, 1914–1920* (London, Palgrave MacMillan, 2019); and Stefan Manz and Panikos Panayi, *Enemies in the Empire: Civilian Internment in the British Empire during the First World War* (Oxford, Oxford University Press, 2020).
[117] Peter Mansfield and Nicolas Pelham, *A History of the Middle East*, 5th ed. (Harmondsworth, Penguin, 2019), p. 199.
[118] See Long, *British Pro-Consuls in Egypt*, pp. 105–119.
[119] FO 407/184, No. 304, p. 255 at p. 256.

Egypt, he and seven other *Wafd* representatives went to London in June 1920 to negotiate with Milner.[120] These negotiations resulted in a memorandum, which came to be known as the Milner–Zaghlul Agreement. It envisaged a treaty being signed in which Great Britain would recognise the independence of Egypt as a constitutional monarchy, and in which Egypt would allow a British military force to remain in the country and officials to be appointed to protect foreign interests.

The 'agreement' was incomplete, for the parties remained at odds over a number of important questions, including the nature of the British military presence in Egypt. Although Zaghlul wanted to re-open some questions, Milner saw no purpose in any further discussions, since the 'agreement' was no more than a basis for future negotiations.[121] However, after Milner's report was published in February 1921, the British government proposed further consultations with an official delegation to be named by the Sultan. This delegation was to be made up of conservative nationalists, including Adli Yakan Pasha, who had acted as an intermediary with Zaghlul in the previous year, and who would become Prime Minister in March. Adli wanted to include Zaghlul in the delegation, and entered into negotiations with the *Wafd* leader to secure this. However, Zaghlul demanded too high a price for his participation: not only did he insist on the lifting of martial law and an assurance regarding the end of the protectorate, but he also wanted to lead a *Wafd*-dominated delegation. Since Zaghlul's demands were acceptable neither to the British nor to Adli,[122] he would form no part of the delegation.

Zaghlul spent the rest of the summer actively campaigning against Adli's delegation. He put his case before the British press, telling *The Times* that, if negotiations failed, 'Egypt will fight England in the same way as Ireland.'[123] Zaghlul's case was also publicised in parliament by a friendly group of Labour MPs.[124] In the middle of September, four of

[120] See PP 1921 (Cd. 1131) XLII. 629; and Long, *British Pro-Consuls in Egypt*, pp. 113–115.
[121] FO 407/187, No. 326, p. 273.
[122] FO 407/188, No. 209, p. 173. His substantive demands included no British appointed advisers, and no British troops east of Suez: FO 407/189, No. 26, p. 22.
[123] *The Times*, 15 September 1921, p. 7.
[124] For example, *Parl. Debs.*, 5th ser., vol. 142, col. 54 (24 May 1921); vol. 144, col. 2541 (21 July 1921); vol. 145, cols. 635ff. (28 July 1921).

these MPs arrived in Egypt on a fact-finding tour arranged by Zaghlul's supporters, who planned to hold mass meetings with them throughout Egypt. The presence of these politicians in Egypt worried both the Foreign Office and Ernest Scott, the Acting High Commissioner, since Zaghlul's campaigning threatened to cut the ground from under Adli's feet. Although there were some calls for him to be deported, Scott was reluctant to take this step: 'The one fatal policy is to deport people like Zaghlul one day and be obliged to give them a free run the next because we have not the determination or sufficient troops to follow up a drastic policy.'[125]

Matters came to a head in December, by which point Foreign Secretary Curzon's negotiations with Adli on Egypt's future had broken down. Allenby and the Foreign Office were now keen for Abdel Khalek Sarwat Pasha to become Prime Minister. However, since he was a man even more unpalatable to Zaghlul than Adli, there was concern that his appointment might lead to a revival of agitation. To smooth the path for Sarwat, Allenby banned a meeting which Zaghlul had planned for the end of December, and began to make plans for his deportation if 'he makes trouble'.[126] Zaghlul did not respond meekly. He issued a protest in the press against the prohibition, and took to the streets to welcome his agent returning from London. After two British soldiers were killed that night in Cairo, Allenby issued a martial law order prohibiting Zaghlul from any further participation in politics, and confining seven of his allies to their homes.[127] Zaghlul's response was blunt. Rejecting Allenby's 'tyrannical order', he declared that 'we are all prepared to meet what may possibly befall us with a steady heart and a calm conscience, knowing that any possible measures used against our lawful endeavours will only help the country to realise her aspirations to complete independence.'[128] In response, on 22 December Allenby ordered Zaghlul's arrest under martial law. He was rapidly moved to Suez (along with five supporters), pending deportation as soon as

[125] FO 407/191, No. 17, p. 21 at p. 22. Nonetheless, he was authorised to arrest and deport him if he considered it necessary: FO 407/191, No. 9, p. 4; No. 23, p. 35; No. 24, p. 35.
[126] FO 407/191, No. 47, p. 100. [127] FO 407/191, No. 48, p. 101.
[128] FO 407/191, No. 51, p. 102.

possible. Allenby wired Curzon: 'I suggest Ceylon. This would have great effect, as it is remembered in connection with Arabi.'[129]

Although Zaghlul was arrested and removed under martial law powers, the continuing existence of martial law was a matter of some embarrassment to the authorities in their efforts to broker a constitutional settlement. It remained in place mainly because it could not be lifted until an indemnity act had been passed, which British officials thought could not be done until a constitutional settlement had been reached.[130] An indemnity bill had in fact been drafted earlier in the year by the Judicial Adviser of the Ministry, Maurice Amos;[131] but martial law was not lifted (and an indemnity act passed) until July 1923, after Britain's unilateral declaration of the ending of the protectorate in February 1922 (which in effect implemented the proposals discussed in London). In the meantime, the British flirted with issuing some kind of proclamation setting limits to the use of martial law, but abandoned the idea as legally unworkable.[132]

The British authorities had also recently tried to temper the arbitrary nature of martial law, when using a military court for the political trial of Abd al-Rahman Fahmi and the leaders of the 'Vengeance Society'.[133] On 20 July 1920, Fahmi and twenty-six others (mainly students) were put on trial in the Permanent Military Court in Cairo for seditious conspiracy and incitement to murder. Although this was a trial under martial law, the authorities were keen for it to follow correct legal procedures throughout.[134] Linton Thorp, a member of the Egyptian Native Court, was appointed Judge-Advocate; the defendants were represented by English barristers; the procedure followed that used in English criminal courts; and the proceedings were widely reported in the press, with official encouragement. The prosecution case turned largely on the evidence of accomplices, whose reliability was questionable, but on 5 October,

[129] FO 407/191, No. 50, p. 102.

[130] Without a settlement, the Foreign Office thought that any indemnity act would require the consent of all the powers which had capitulatory rights in Egypt: FO 407/190, No. 56, p. 231.

[131] FO 407/189, No. 202, p. 210. [132] FO 407/189, No. 30, p. 24.

[133] See Malak Badrawi, *Political Violence in Egypt 1910–1925: Secret Societies, Plots and Assassinations* (Abingdon, Routledge, 2000), pp. 155–159.

[134] FO 407/187, No. 31, p. 21; No. 119, p. 88.

twenty-three of the accused were convicted. Seven of them, including Fahmi, were given a death sentence, which Allenby wanted to see carried out. However, they were able to invoke the provisions of the British Indemnity Act of 1920, which allowed anyone sentenced by a British military court in territory occupied during the war to have their sentences reviewed by the Judge-Advocate-General.[135] The case was sent to London for review, where a political decision was made that no penalty should exceed the maximum allowed under civilian law. This meant that all the death sentences were commuted to fifteen years' penal servitude.[136]

When it came to dealing with political dissidents against whom no legal case could be mounted, the authorities preferred expulsions to detentions under martial law. For instance, in July 1921, Prince Aziz Hassan – a supporter of Zaghlul and a 'professional anarchist', who had only recently been allowed to return to Egypt – was expelled, being given a visa only to visit France and Italy.[137] Similarly, in September, Ali Bey Kamel, vice-president of the Nationalist Party, was told that the authorities would expel him from Egypt under martial law powers if he did not leave voluntarily.[138] It is therefore notable that, when it came to Zaghlul, he was ordered to be detained without any form of trial, and not merely to be deported. From London's point of view, Zaghlul – the man with whom they had been negotiating a new constitutional dispensation for a prolonged period – needed to be removed and confined for political reasons, to prevent his interfering with the kind of settlement the British wished to impose in Egypt. The removal would require the kind of *ad hominem* legislation which had been used so commonly in West Africa, but which had not been used against that earlier nationalist leader, Urabi Pasha.

Zaghlul's Challenge to His Detention

Zaghlul was taken to Suez, and from there (on 29 December) to Aden. On 1 March 1922, he was taken to the Seychelles, to be detained under the Seychelles Ordinance No. 1 of 1922. In the meantime, on

[135] Indemnity Act 1920, 10 & 11 Geo. V c. 48, s. 5. [136] FO 407/188, No. 9, p. 3.
[137] FO 407/189, No. 197, p. 207; FO 407/190, No. 2, p. 1.
[138] FO 407/190. No. 62, p. 242; No. 67, p. 244.

28 February, the government announced the termination of the protectorate and the plan to end martial law once an indemnity act had been passed. Egypt's independence was to be a qualified one, for four crucial powers were retained for British control.[139] This was not the kind of independence Zaghlul had in mind. Over the summer, Labour MPs expressed concern about his continued detention, and its effect on his health. On 8 July, Zaghlul's wife wrote to the Colonial Secretary, asking for the immediate release of her husband, enclosing medical reports which suggested that his detention there posed a serious risk to his already weak health.[140] Given these concerns about his health, a decision was taken to move him to Gibraltar. On 16 August, he was deported from the Seychelles, and two weeks later, a Political Prisoners Detention Ordinance was passed in Gibraltar.[141]

Zaghlul arrived in Gibraltar on 3 September, one day before the publication of the order. Within three weeks of his arrival, Zaghlul applied for a writ of habeas corpus to the Supreme Court of Gibraltar. Presenting his case, G. M. T. Hildyard argued that section 4 of the ordinance – which removed Zaghlul's right to the writ – was 'unconstitutional'. He contended that, under the terms of the Royal Instructions under which he acted, the Governor of Gibraltar did not have the power to suspend habeas corpus, and that his power to make laws for the 'peace, order and good governance' of the City and Garrison did not authorise the passing of a law relating to anyone outside the colony, in order to create a penal settlement on the Rock.[142] The application was dismissed by Chief Justice Daniel T. Tudor on 27 September. The Chief Justice seems to have misunderstood the facts, for he held that Zaghlul had been convicted by a court martial

[139] They were the security of communications within the empire (including the Suez canal); the defence of Egypt against foreign aggression; the protection of foreign interests in Egypt; and control of the Sudan. For the announcement, see *Parl. Debs.*, 5th ser., vol. 49, col. 236.

[140] Letter from Saphia Zagloul, 8 July 1922, TS 27/172. See also *Parl. Debs.*, 5th ser., vol. 153, col. 1789 (8 May 1922); vol. 156, col. 1054 (11 July 1922).

[141] Gibraltar Order no. 9 of 1922. A copy is to be found in TS 27/172.

[142] He cited *Musgrave* v. *Pulido* (1879) 5 App. Cas. 102 (JCPC) in support of his arguments relating to the governor's limited powers. He also argued that, under the Royal Instructions, no ordinance was to be promulgated unless a draft of it had been published a month in advance, unless 'immediate promulgation' was indispensably necessary 'for the security of the City and Garrison', which could not be said to apply to a man who had not yet set foot on the Rock.

in Egypt prior to his deportation, and so could not be freed under a habeas corpus procedure. Tudor also rejected the argument that the Governor did not have the power to issue the ordinance. It was, he said, impossible to conceive 'how this enactment could have been framed' or Zaghlul detained as a political prisoner without instructions from one of the Principal Secretaries of State. It was obvious that Zaghlul's 'detention is authorised by an act of state', which the court could not look into. The judge also refused leave to appeal, not considering the matter to be 'of great, general or public importance'.[143]

While Zaghlul remained incarcerated, his plight attracted the attention of eighty-four Liberal and Labour MPs, who addressed a private letter to the Prime Minister on 9 December calling for his release (as well as the release of those still held in the Seychelles). Zaghlul's deportation had not, they argued, reduced the unrest in Egypt. Moreover, given his continued ill-health, they warned of '[t]he grave risk we are running of being accused of deliberately compassing the death of a man who commands the general respect and devotion of the mass of his countrymen'.[144] At the same time, alarming reports were circulating in Cairo about the deteriorating state of his health, which focused increasing attention on the issue of political prisoners. In this atmosphere, Allenby sought a friendly parliamentary question, to allow the government to make it clear that people were being detained not simply for their political views, but for provoking violence.[145] At this stage, however, neither Allenby nor the Foreign Office favoured releasing him.

It was in this context of continuing debate over his detention that a petition was lodged in the Privy Council for special leave to appeal against the decision of the Gibraltarian court. Zaghlul's petition raised the question of whether the crown had the power to detain him as a political prisoner without any charges being made against him.[146] The question at issue would be similar to that discussed in the Court of

[143] *Re Zaghlul Pasha* (1922) in (1813–1977) Gib. LR 58.
[144] The letter was co-ordinated by J. M. Kenworthy. A copy can be found in FO 141/809.
[145] Telegram from Cairo High Commission, 12 December 1922, FO 141/809. The question was duly asked and answered with Allenby's formulation: *Parl. Debs.*, 5th ser., vol. 159, col. 3353.
[146] Petition of Zaghlul Pasha, TS 27/172.

Appeal in Sekgoma's case, but with a significant difference: for in Zaghlul's case, the Governor had acted under the authority of the crown's prerogative powers, rather than under any power delegated from parliament. The case came before the judicial committee on 21 January, where W. H. Upjohn presented the argument for Zaghlul. First, he addressed Tudor CJ's holding that this was an act of state, which could not be questioned by the court. Insofar as his detention in Egypt was concerned, Upjohn – much of whose career had been spent as a Chancery lawyer – conceded that the court would have no jurisdiction, since Zaghlul was an alien detained outside the empire.[147] However, he argued that, once Zaghlul was on imperial soil, he was a 'friendly alien' entitled to the rights and liberties of a subject.[148] Upjohn did not spend much time on this point, since the judges seemed convinced that the case could not be settled by the 'act of state' arguments used by Tudor. Upjohn's second argument was that the Governor did not have the power to issue the ordinance. Since the Governor was bound by the Letters Patent appointing him to pass ordinances directed to him by the crown, Upjohn could not argue (as Hildyard had attempted) that he had exceeded the Royal Instructions. Instead, he argued that the king himself could not authorise such an ordinance, since he was bound (under Mansfield's doctrine in *Campbell* v. *Hall*) by the fundamental principles of the constitution.

However, the judges were sceptical about Upjohn's arguments. Haldane questioned whether the residents of conquered colonies acquired the fundamental rights of Britons as soon as they had been conquered, if the king chose not to alter an ancient local law allowing arbitrary imprisonment.[149] Sumner wondered whether it was appropriate for courts to question the decision of a Governor with the power to legislate for the peace, order and good governance of a colony that any particular provision was necessary for such purposes. The Chancery barrister Upjohn's response was that, if it was very clear that a law was not needed for such purposes – as was the case of a law

[147] 'In the Matter of Zaghlul Pasha: Petition for Special Leave to Appeal', TS 27/172.

[148] In support of this, he cited *Johnstone* v. *Pedlar* [1921] 2 AC 262, which held that the crown could not claim that the seizure of the property of a friendly alien (*alien ami*) resident in the United Kingdom was an act of state.

[149] *In the Matter of Zaghlul Pasha: Petition for Special Leave to Appeal* (First Hearing), TS 27/172, pp. 11–12.

to imprison a man of seventy without trial – then 'it is really a fraud upon the powers.'[150] This linked to Upjohn's third argument, which echoed Sir Henry de Villiers's judgment in Sigcau's case, which was that this was a *privilegium* made for one man, rather than a general law. Once again, the judges were sceptical, pointing out that this might be seen as a general law allowing the Governor to detain anyone deported from Egypt.

Upjohn's argument that it is the 'law in every civilised country of the world that a man is not to be condemned without being heard' cut little ice. Having read his Dicey, Haldane retorted that, in Belgium, freedoms all depended only on constitutional guarantees. Sumner simply observed that 'There are many kinds of civilisation, ours is not the best.'[151] The judges were not prepared to accept Upjohn's invocation of the principle of *Campbell* v. *Hall*. They wanted more specific information to show how the rights claimed for Zaghlul had become law in Gibraltar. However, the information before the highest court in the empire on what the law of Gibraltar actually was was woefully inadequate. Counsel for both sides admitted that they had not researched the matter in detail, while the judges had consulted only the main textbook on colonial law and a short article on Gibraltar. Given the lack of information, the hearing was adjourned for more research to be done.[152]

The case would return to the Privy Council on 9 March. In the meantime, officials in London and Cairo were already considering the release of Zaghlul. The Governor of Gibraltar – whose ordinance was ostensibly passed for the peace, order and good governance of his colony – was largely excluded from these discussions. The Foreign Office raised the matter at the end of January with a number of Egyptian nationalists connected with Zaghlul, who felt he could be

[150] *In the Matter of Zaghlul Pasha: Petition for Special Leave to Appeal* (First Hearing), TS 27/172, p. 21 (answering Lord Sumner).

[151] *In the Matter of Zaghlul Pasha: Petition for Special Leave to Appeal* (First Hearing), TS 27/172, p. 38.

[152] The brief works cited were A. W. Renton and G. G. Phillimore (eds.), *Burge's Commentaries on Colonial and Foreign Laws*, 5 vols. (London, Sweet and Maxwell and Stevens and Sons, 1908–1910), vol. 1, pp. 143–147 and a contribution by Archibald W. Fawkes (Gibraltar's Attorney General) on modes of legislation in Gibraltar in the *Journal of the Society of Comparative Legislation*, vol. 1 (1896–1897), pp. 144–146.

persuaded to give an undertaking not to return to Egypt if he were released.[153] With the prospect of an indemnity act soon being passed and a liberal constitution enacted, Allenby was keen to find a way to release Zaghlul. At the same time, he feared that, if Zaghlul were released without an undertaking not to return, there would be agitation for his return, which could be prevented only by the politically inconvenient continuation of martial law.[154] However, the authorities in Egypt calculated (correctly) that, for political reasons, Zaghlul would not want to return immediately. Allenby's plans to release Zaghlul were based on political calculations (designed to strengthen Adli's position) which were derailed as a result of bomb attacks in late February and early March, which resulted in the prolongation of martial law and the detention of six *Wafd* leaders. Officials in Cairo were discomfited by these detentions, aware that detention without trial 'leaves an open sore in public opinion here, and is calculated to provoke constant criticism at home'.[155] On the day after the Privy Council hearings resumed, Allenby was still discussing with Curzon the possibility of releasing Zaghlul on medical grounds.[156]

When the court resumed its sittings, the lawyers were much better informed about Gibraltarian law. Gibraltar was a conquered colony, ceded to Britain in the Treaty of Utrecht in 1716. It had received its first charter in 1720, empowering a Judge Advocate and two merchants to settle personal disputes in contract and tort. A second charter in 1739 reformed the judicial system, creating a Court of Civil Pleas, consisting of a Chief Judge (who had to be learned in the laws of England) and two Gibraltarians. It stipulated that the laws of England should be the measure of justice between the parties. It also created a criminal court

[153] Foreign Office to Allenby, 5 February 1923, FO 141/794/9.

[154] FO 407/196, No. 83, p. 121; No. 88, p. 123; Minute from Furness to Kerr (Cairo) 17 February 1923, FO 141/809/1.

[155] They thought the most palatable solution was simply to exile them, which 'worked quite well in the cases of Prince Aziz & Ali Fahmi Kamel'. In fact, the *Wafd* leaders did not remain in detention for long and were released on 15 April. Note dated 6 March 1923, and note from Furness to Kerr, 8 March 1923, FO 141/809/1; FO 407/196, No. 109, p. 157; No. 141, p. 199.

[156] Allenby to Curzon 10 March 1923, FO 141/794/9. There was also continuing pressure in parliament for his release: see *Parl. Debs.*, 5th ser., vol. 161, col. 1355 (13 March 1923).

to determine felonies and trespasses according to English law; though those suspected of treason were to be tried in England. A third charter in 1752 gave the court jurisdiction over real property and probate. A fourth charter was granted in 1817, reconstituting the Court of Civil Pleas, which was replaced by a fifth in 1830 creating a Supreme Court. This latter court was to decide cases 'according to the law in force' in the territory and all other laws enacted for the peace, order and good government of the colony. In 1867, an Order in Council was issued to clarify what law applied in Gibraltar, stating that the law of England as it then existed applied, except insofar as otherwise provided for by any Order in Council or local ordinance, made in the past or to be made in the future. A similar Order in Council was issued in 1884, which was followed by a Supreme Court Consolidation Order in 1888. A secret Order in Council – not made public until 1914 – had also been issued in 1896, which gave the Governor the power to dispense with laws during an emergency.

In the two months before the second hearing, lawyers at the Colonial Office prepared to answer the argument that the Governor's power to legislate was limited by fundamental principles of the English constitution, which had taken root in Gibraltar. Drawing on cases including *ex parte Sekgoma*, they argued that the Habeas Corpus Act did not apply to Gibraltar, either by virtue of express words or necessary intendment (as required by the Colonial Laws Validity Act).[157] Nor could the prerogative writ have any force in Gibraltar until it had been expressly introduced. Habeas corpus, they concluded, was 'merely imported by the Order in Council' of 1884 and had 'no greater force or effect there than a local ordinance on the subject'. The right to habeas corpus could accordingly be removed by a local ordinance. The Colonial Office's lawyers also addressed the argument that the Governor had gone beyond the Royal Instructions, and had passed an ordinance which was not for the peace, order and good governance of the colony. Responding to the first point, the Colonial Office's view was that this was not a matter for the courts: 'The Royal Instructions are a matter solely between the Crown and the Governor of the Colony', Sir John Risley opined, 'and if the later disobeys his Instructions he has to answer to the Secretary of State.'[158] On the second point, it was argued that the

[157] Letter from Sir John Risley to H. M. Greenwood, 16 January 1923: TS 27/172.
[158] Risley to Greenwood, 12 January 1923, TS 27/172.

provisions made during the First World War to allow detention without trial in Britain demonstrated that detention orders might well be made for peace, order and good government, and that, as preventative measures, they did not in themselves constitute punishment.[159] Equally, the power of the crown to make a *privilegium* for a single individual had been confirmed in Sekgoma's case.[160]

When the case returned to court, the question asked of the Privy Council was not whether Zaghlul should be freed, but whether there was a sufficiently important constitutional issue raised by his case to grant leave to appeal. In Upjohn's view, there was a serious question about the nature of prerogative powers to be determined: as he saw it, the principles of English law had been introduced into Gibraltar through the various charters, so that it was too late for them to be revoked by a prerogative Order in Council in 1884. Against this, the Attorney General, Sir Douglas Hogg, argued that, as a conquered territory, the colony was ruled only by such laws as the crown chose to impose, and that the crown retained all of its legislative powers, having specifically reserved the power to alter any of the charters it had granted. In Hogg's view, the rights of Englishmen did not migrate to colonies when they were conquered: Gibraltar had no habeas corpus in 1715, and it had never been introduced there by statute. No English statute had any force in Gibraltar save by virtue of the Order in Council of 1884, which reserved the power to change any law. Besides arguing these points of constitutional law, Hogg urged that he was 'very anxious that your Lordships ... should not give leave, for reasons that you appreciate having regard to what is going on in Egypt': it was 'a very very serious matter from the political standpoint'.[161] Given

[159] The reference was to Regulation 14B, issued under the Defence of the Realm Act, whose legality was confirmed by the House of Lords in *R.* v. *Halliday, ex p. Zadig* [1917] AC 260. See further David Foxton, '*R v Halliday, ex parte Zadig* in Retrospect', *Law Quarterly Review*, vol. 119 (2003), pp. 455–494; A. W. Brian Simpson, *In the Highest Degree Odious: Detention without Trial in Wartime Britain* (Oxford, Oxford University Press, 1994), pp. 12–26; and Rachel Vorspan, 'Law and War: Individual Rights, Executive Authority, and Judicial Power in England during World War I', *Vanderbilt Journal of Transnational Law*, vol. 38:2 (2005), pp. 261–343.

[160] 'Note for the AG' in TS 27/172.

[161] *In the Matter of Zaghlul Pasha* (Second Hearing), TS 27/172, pp. 10, 26.

that the Colonial Office was at that moment planning Zaghlul's release, the Attorney General's comment was at best disingenuous.

During argument, the different members of the judicial committee inclined to different positions. The judge most inclined to think that there was an issue to be debated was Haldane. 'I am sorry', he interjected at one point, 'but I do think a very considerable question arises whether the Prerogative of the Crown as regards places altogether outside these Islands without a Constitution can be exercised otherwise than in accordance with the law.'[162] Haldane not only considered that prerogative powers were bound by the common law, but also thought that the decision in *ex parte Anderson* had confirmed that the writ of habeas corpus ran throughout the empire, and that it could be removed only by an Act of the Imperial Parliament.[163] By contrast, Lord Dunedin was sympathetic to Hogg's argument that, just as the Imperial Parliament had taken away many rights by the Defence of the Realm Acts, so the crown could do the same thing by ordinance in a place where no constitution had been granted or legislature established.[164] Although he had been the one judge who felt that there was a question to be discussed, it was Haldane who was delegated to hand down the decision of the court: that leave would not be granted. No reasons were given.[165]

During the discussions, Haldane had seemed to suggest a possible alternative route for Zaghlul to pursue: if the court in Gibraltar was unable to issue a writ of habeas corpus (because of the ordinance), then he could try to obtain one from the King's Bench in London. However, it proved unnecessary to pursue the legal route much further, for, notwithstanding the Attorney General's repeated comments in court about the political danger of even discussing whether Zaghlul might have a case, steps were being taken to release him. Continuing concerns about Zaghlul's health had resulted in proposals that he be allowed to recuperate in Vichy, in France.[166] A medical report on the day of the

[162] *In the Matter of Zaghlul Pasha* (Second Hearing), TS 27/172, p. 17.
[163] *Ex parte Anderson* (1861) 3 E & E 487. Haldane quoted the *Case of Proclamations* (1610) 12 Co Rep 74 in support of his views on the prerogative.
[164] *In the Matter of Zaghlul Pasha* (Second Hearing), TS 27/172, pp. 10–11.
[165] The decision was reported in *The Times*, 10 March 1923, p. 4 and in *Solicitor's Journal*, vol. 67 (1923), p. 382.
[166] Letter from E. M. Dowson to Scott, 11 December 1922, FO 141/809,

hearing stated that he should travel to a European watering place for the sake of his health, and Zaghlul petitioned the French government to be allowed to go there. Within two weeks of the judicial committee's decision, Allenby had formed the view that he could be released, without giving any guarantees.[167] On 4 April, Zaghlul left Gibraltar for Toulon. Rather than proceeding to Vichy, he remained at Marseilles, where he resumed his political activity. With the lifting of martial law in Egypt, Zaghlul was told in July that he could return; and he returned on 17 September, to a much smaller crowd and far less political excitement than had been the case on his return from Malta.

In Zaghlul's case, the Privy Council had simply refused to consider whether a colonial Governor had the power to pass an ordinance to hold a detainee from another part of the empire. For most of the judges on the committee, no constitutional question was raised. Indeed, the Attorney General had regarded this as a matter of routine: 'We are not doing anything new here', he told the panel: 'I have some 60 or 70 similar ordinances in Africa during the last 40 or 50 years, in which an Ordinance, very much the same as this Ordinance, has been passed and the validity of which has not been challenged.'[168] The judicial committee accepted that the crown had full legislative power in colonies without assemblies, and that this power could be delegated to the Governor. This power could be called forth, shaped and defined by the king's ministers in London, and used for the purposes of imperial rule. Within the courtroom, the judges were impressed with the notion that there was a political emergency which needed exceptional powers. Yet, at the very same time that its law officers were warning the court of the grave consequences of an adverse decision, a much more flexible political game was being played.

Zaghlul remained a highly important political figure after his return. His *Wafd* party scored a resounding victory in the January 1924 elections, which obliged the king to appoint Zaghlul Prime Minister. His continuing demands for further concessions from Britain – including his assertive claims to Sudan – led to further conflict with Allenby, leading to his resignation in November. The *Wafd* continued

[167] Telegrams of 22 March and 24 March 1923, FO 141/794/9.
[168] *In the Matter of Zaghlul Pasha* (Second Hearing), TS 27/172, p. 30.

to dominate at the polls, however, and Zaghlul remained president of the assembly until his death in 1927.

Conclusion

The cases discussed in this chapter gave judges in London their first chance to consider the legality of the kind of *ad hominem* legislation which had become routine in the African empire since 1880. The cases raised the question of whether the executive had the power to pass such laws, which appeared to violate the guarantees of liberty found in Magna Carta, the Star Chamber Act and the Habeas Corpus Act, either on the ground of a delegation of legislative power from parliament or through the exercise of crown prerogative. Lawyers for the detainees argued for a broad, substantive vision of the rule of law, while the crown's lawyers argued the 'formal' case, that such legislation had to be seen as valid law, since it was derived from a valid source.

The legal position articulated in these decisions hardened over time. Lord Watson's decision in Sigcau's case was read as a liberal judgment, endorsing the rule of law. This judge seemed to find it inconceivable that British legislators could pass such 'autocratic' legislation where a functioning legal system was in place; and the Law Officers commenting on his judgment five years later were convinced that prerogative powers were bound by *Campbell* v. *Hall*. Yet the Cape was allowed to pass such autocratic legislation immediately after the decision, and the Court of Appeal accepted in Sekgoma's case that *ad hominem* ordinances could be passed by officials to whom general legislative powers could be seen to have been delegated. Zaghlul's case completed the legal picture, by upholding the crown's power to legislate in this manner in conquered colonies, unfettered by *Campbell* v. *Hall*.