

Sir Ketumile Masire and Some Documents on Constitution Making in Botswana: Notes from My Library

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Introduction

When the editor of the *Botswana Notes and Records* (BNR) issued a reminder on a call for papers for the 50th anniversary of the BNR and also dedicated to the life of the late second President of the Republic of Botswana, Sir Ketumile Masire, as Chairman of The Botswana Society, the publishers of the BNR, I thought of what it is that I could say as a fitting tribute to the former President, and Patron of The Botswana Society. The Society had issued a tribute on his life and role in the Society. I had had the privilege of working under President Masire on such (national) matters as: Kenya Elections in 1992, Presidential Commission on the Judiciary (Aguda Commission) of 1997, Vice Chancellor of the University of Botswana from 2003 to 2011, and the Botswana Society from 2013 to 2017.

Sir Ketumile was not only the longest-serving President but one of the architects of this Republic as detailed in his 2006 autobiography *Very Brave or Very Foolish: Memoirs of an African Democrat*. He had participated in the country's independence talks both locally and in London. As commonly known, before independence Botswana, which was a British territory, was known as Bechuanaland Protectorate. This piece seeks to review the 'road to independence' and look at some of the aspects of the Constitution-making process. This is gleaned from notes based on letters, minutes and notes made at the time. It is not a thorough study or historical treatise; rather it is based on notes from my library and written as a tribute to President Masire.

The documents I utilise in this note are not catalogued archival material but information I collected from various people during research for my doctoral work in the 1980s. Most of these people had participated in the constitutional discussions that led to the independence of Botswana in September 1966.

The Road to London

The road to Botswana's independence can be traced to the early 1960s with the passing of the Bechuanaland Protectorate (Constitution) Orders of 1961 and 1963, and the Bechuanaland Royal Instructions, 1963. The 1961 Constitution was announced through a White Paper on 15 September 1960. By 1963, talks had been held between various stakeholders in the country to discuss '(a) who should be consulted on future constitutional changes; (b) how the consultations should be conducted; (c) when they should take place; and (d) where' (Text of Announcement agreed on 2 July 1963). With regard to (a) 'it was agreed that as far as possible the review should be conducted by way of joint consultations between the Resident Commissioner and representatives of various political parties and groups meeting together, although this will not preclude separate consultations with individual groups from time to time in the common interest' (Text of Announcement agreed on 2 July 1963).

It must be noted that at the time the majority of the population –Africans –had formed themselves into political parties since the early 1960s. The minority groups, Europeans and Asians, were separately represented but not through collective formation. In the end, it was agreed that the *Dikgosi* (Chiefs), Bechuanaland Democratic Party (BDP), the Kgalemang Motsete faction of Bechuanaland People's Party (BPP), and the Europeans would each send their representative. The Asian Member of the Legislative Council would be invited to take part in the talks. The position of the Motsamai Mpho of BPP was a little dicy. Mpho had earlier broken away from the Motsete group. The matter was discussed but left

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to the Resident Commissioner to 'make a decision in the near future regarding its inclusion in the joint consultations' (Text of Announcement agreed on 2 July 1963).

It was essential that the meetings should take place in 'private' and participants have 'full powers to speak for their parties or groups', with the first meeting scheduled to take place in Lobatse starting on 21 August 1963. 'For the time being they will meet in the Bechuanaland Protectorate although it may be convenient to hold the final talks in London (Text of Announcement Agreed on 2 July 1963)'. Seeking independence from the British, it was natural that the parties would have to meet face to face with the British Government. For the preliminaries, it was well to discuss and negotiate with the British Government representatives in the Protectorate. The BDP also preferred the talks to be held in Bechuanaland as going to England would entail greater expenses.

However, the Motsete faction of BPP had always preferred the talks to take place in London and protested the holding of the talks in Lobatse or Mafeking (now Mahikeng). They believed that London would level the playing field. The main grain of protest was the 'hostile atmosphere' that obtained in the country against the BPP. Motsete argued that the Administration was biased against his party and favoured the BDP; the white traders and farmers as well as the *Dikgosi* were all against the BPP. The regional press and the legal profession were, too, not spared. In an impassioned plea to the Resident Commissioner, Motsete protested the venue of constitutional talks:

The Bechuanaland People's Party begs to submit this protest regarding the holding of the forthcoming constitutional talks in Bechuanaland, where a prejudiced, if not hostile atmosphere obtains against the Bechuanaland People's Party with its nationalist point of view, from the local white people generally, including Government officials, who, by and large are in favour of the Democratic Party of Mr Seretse Khama, thus engendering mistrust.

The battalions that will be set in motion against the BPP's submissions and in favour of its opponents, will be the press, which is entirely of the Republic of South Africa; the radio which is South Africa dominated as an adjunct of the SABC [South African Broadcasting Corporation] or Radio South Africa; the influence of the chiefs who are but junior officials subject to Govt instructions; and pressure from white traders, farmers and industrialist who are largely the watch-dogs of foreign capitalist interests.

From our recent experience we, as a political party, have had a demonstration of the strong prejudice of legal advisers at Mafeking, which is nearest to Bechuanaland. To get legal advice on the constitutional issues involved we, therefore, would have to go much farther afield, thus incurring much expense, and that the Government knows quite well, but revels at it as a welcome handicap to us.

In Britain, on the contrary, discussions would be on even ground for all parties, the climate of the talks being more impartial and healthier, and legal advice reasonably more accessible to all concerned equally

It is gratuitous and complacent but specious thinking to say, as Mr Seretse Khama is alleged to have said, that talks in Britain would entail greater expense. It certainly is wiser to do a thing well at the beginning (well begun is half the battle won) rather than make a wrong start necessitating delays for later corrections with more ex[pense]... which leave tensions and ill-feeling in their wake. By having the initial constitutional talks in London the ideal psychological and political atmosphere there would be more conducive to success, that is to a settlement arising from mutual understanding and reciprocal give and take (Motsete, K to Resident Commissioner 12 June 196).

This was not the only or last time Motsete had written to protest what he saw as government bias and discrimination against his party. He objected to a similar treatment with respect to travel grants. He had noted that *Dikgosi* and members of BDP benefitted or were favoured. 'It has been generally observed', he wrote, 'that only Chiefs, Civil servants and members of the Democratic Party appear to have been benefitting by travel grants awarded by the Government to such countries as Britain, Europe, USA, etc and that not a single member of the Bechuanaland People's Party has been thus "favoured' (Motsete to Government Secretary 19 August 1964). Motsete appealed to government to see to it that justice was done in this respect. In the same communication he protested that 'For the Government to appear thus openly biased in favour of one political party among several is an injustice to the latter, who expect similar allocations of travel grants to some of their members'.

The 1963 draft Constitution became the basis for the 1965 general election which were easily won by the united BDP while different BPP factions performed quite badly. The BDP leader, Seretse Khama, was designated Prime Minister for territory. Masire became Deputy Prime Minister. After the elections the task of negotiating the Constitution leading to independence fell on the parties represented in Legislative Assembly, the *Dikgosi*, and the European and Asian representatives. After a series of consultations, all the draft provisions were accepted except one. The *Dikgosi* were still uncomfortable with their role in the new dispensation. The gist of their argument was an enhanced role of the Chiefs and the House of Chiefs. They contended for a second equal chamber, an enlarged House to bring in people of calibre to enhance debates, that Bills seeking to amend the Constitution should be included within the classes of Bills which would be referred to the House of Chiefs, and that their position rank with that of ministers of state. They further proposed a change to the composition of the House of Chiefs. Instead of four elected members as proposed by the politicians, they preferred specially elected members. In short, they wanted to nominate for themselves the four members (Kgosi Bathoen II *et al.* to High Commissioner 30 December 1965).

With the Constitutional talks scheduled to start in February 1966, government had no alternative but to seek a compromise with the *Dikgosi*. The Prime Minister met and consulted with the House of Chiefs on 11 January 1966, finding merit in some of their suggested proposals. After considering the proposals from the House of Chiefs, the Legislative Assembly adopted a Motion Relating to the Independence Constitution, which Motion as finally approved read:

That this House approves the proposals set out in Legislative Assembly Paper No. 21 of 1965/66 (Proposals for an Independence Constitution) and Legislative Assembly Paper No. 27 of 1965/66 (Proposals for Independence Constitution) –additional proposals arising out of the discussions in the House of Chiefs, except that it considers that the specially elected members of the House of Chiefs should be drawn from among persons who are not and have not been for five years, actively engaged in politics, and endorses these proposals modified in this manner as the basis on which the attainment of independence by Bechuanaland should be negotiated between the Government of Bechuanaland and Her Majesty's Government in the United Kingdom (Legislative Assembly Paper No. 27 of 1966).

London and the Conference

Travel arrangements

Armed with the Motion and Draft Constitution, the Bechuanaland negotiation team set off for London. The Constitutional Conference was scheduled to take approximately two weeks beginning on 14 February 1966. However, travel logistics were not as simple as anticipated. The team had to travel through different routes. The officials, comprising Her Majesty's Commissioner (previously called the Resident Commissioner),

Attorney General and the Financial Secretary left Gaborone on 9 February 1966 by road for Jan Smuts Airport (now OR Tambo International Airport) in Johannesburg (South Africa) to catch a flight to London, arriving in London the following day (Ministry of Home Affairs Circular Memorandum No. 3, 3 February 1966, Ref: C.HA.43/3). The second team, consisting of the Prime Minister (Seretse Khama), Deputy Prime Minister (Masire), Senior Private Secretary, Kgosi Bathoen, and Private Secretary travelled by charter flight to Jan Smuts Airport on 11 February 1966 and arrived in London on 12 February. The Establishment Secretary arrived in London on 12 February, but it is not clear how he travelled (Ministry of Home Affairs Circular Memorandum No. 3, 3 February 1966, Ref: C.HA.43/3).

Philip Matante, the Leader of the Opposition and President of one of BPP factions, travelled through Lusaka, arriving in London on the 12 February. The choice of travelling through Lusaka was necessitated by the fact that Matante was *persona non grata* in South Africa due to his involvement with the liberation movements there prior to his return to Botswana (Ministry of Home Affairs Circular Memorandum No. 3, 3 February 1966, Ref: C.HA.43/3). Nor could he fly out through Salisbury (now Harare) where he was also banned. The only route available to him was through independent Zambia.

Matante's statement and refusal to participate

Matante had travelled to London not so much to participate in the independence constitutional talks but to register his party's objection to the talks not being more inclusive. Apparently, a decision had been taken after the 1965 elections that the independence talks would not be a broad church of all stakeholders. Rather, it would be limited to the Bechuanaland Government, British Government and political parties with representation in the Legislature. In other words, the intention was 'to divorce other Representatives of old and newly formed Political Parties from any further Constitutional Talks. That is to say, the only representatives, the Government will accommodate will be members of the respective political parties that have representatives in the Legislative Assembly' (Gaseitsiwe, SB to Colonial Secretary 6 December 1965). The source was Seepapitso Gaseitsiwe who was the leader of a fringe Botswana National Union party and also the son of Kgosi Bathoen II of Bangwaketse, and later his successor.

Matante and his BPP felt very strongly that the Bechuanaland Government did not have the mandate to negotiate for independence. On 15 February 1966 he presented a Memorandum on behalf of the Opposition to the Independence Constitution committee. The BPP's view was that 'Independence of a country is not a Party issue it is a National issue which demands that the entire nation and its traditional leaders as is the case is in Bechuanaland should be consulted in a proper way, democratically so that the Chiefs and the people should be satisfied' (Matante 15 February 1966). The talks ought to encompass consultation with all stakeholders as any 'attempt to overlook the interests, the will, the aspirations and desires of the people and Chiefs of Bechuanaland and impose and or force them to agree to proposals which... have not been explained to them and not having consulted them properly, will not be right step to take'.

Matante further implored the British Government that 'a Commission be appointed consisting of the representatives of all political parties, the Chiefs, the British Government and the Bechuanaland Government and that such a Commission would conduct consultations through[out] the entire territory to get the views of the people in writing or orally. This would facilitate a unanimous agreement on the Independence Constitution'. The views so collected would form the basis of the Constitution 'upon which the Bechuanaland Constitutional Conference could be based'. Once the Constitution was agreed upon then fresh elections would be held.

Matante was in a sense echoing the views raised by Bathoen three months earlier on behalf of the Botswana National Union. Bathoen had similarly called for an inclusive process which could culminate

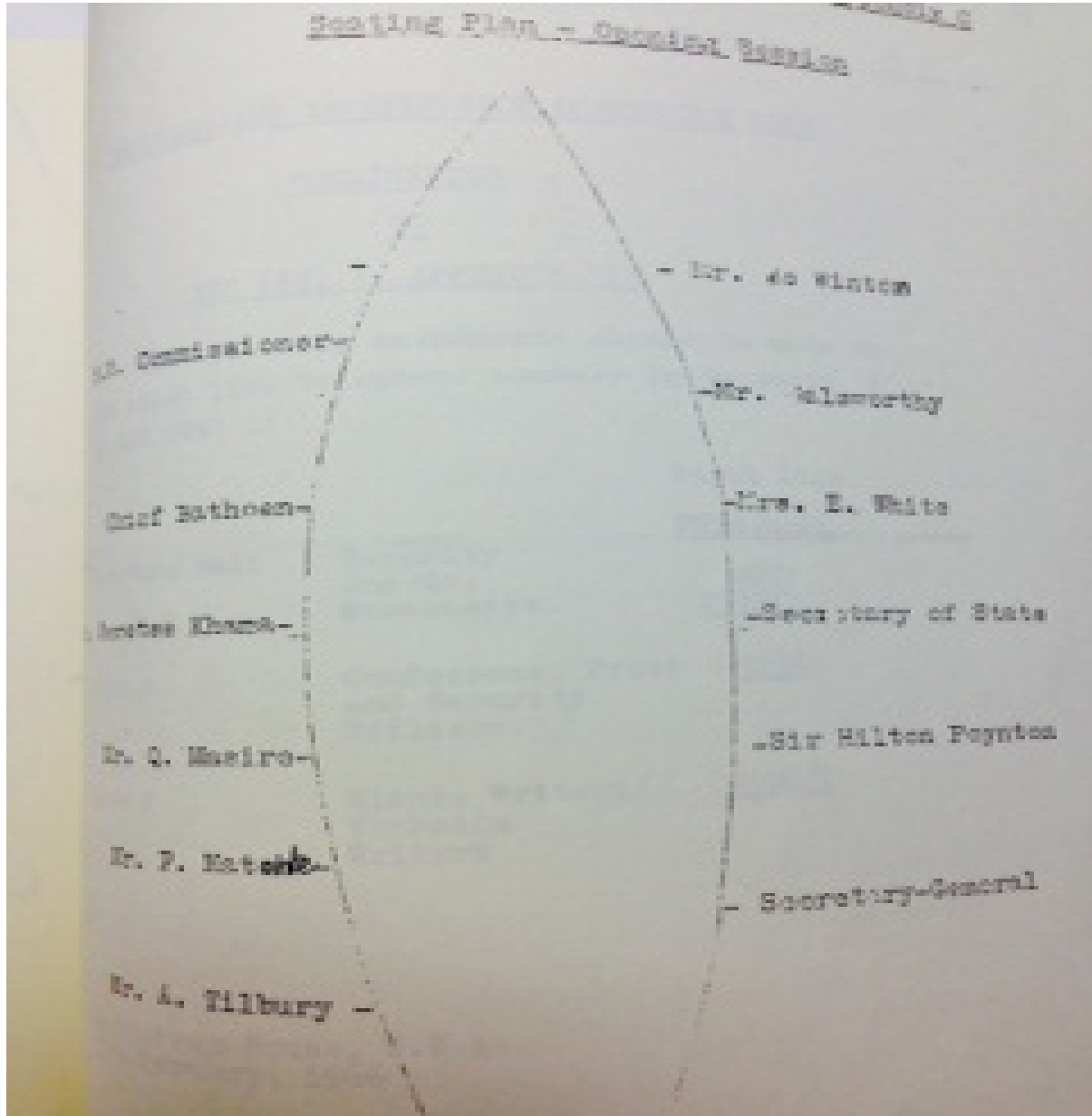
in either a referendum or general election. To do otherwise, he argued, was tantamount to 'an act of dictatorship, as it will only mean that the people must accept what has been decided for them without their mandates'. Such a conference 'would be unholy, unlawful and unconstitutional' (Gaseitsiwe, SB to Colonial Secretary 6 December 1965). 'It will be no different from Smith's UDI in Rhodesia which had placed it in troubles with the world.' He urged the British Government not allow it go ahead and 'if the Bechuanaland Government is allowed to monopolise these talks, the British Government shall be held responsible for any future dramatic chaos.... We do not want unlawful constitutional conferences and constitutional Era here' (Gaseitsiwe, SB to Colonial Secretary 6 December 1965).

In fairness to the Bechuanaland Government, Bathoen and Matante could at best argue that there was inadequate consultations and not that there were none. BPP was irked by the fact that they had dramatically lost the elections to the BDP. The Prime Minister had, after presenting amendments to the Constitution, appealed to the Legislators to 'give the proposals the widest publicity and should fully explain them' (Legislative Assembly Paper No. 27 of 1966). His desire was that after such discussion and debate he could take the proposals to London with the certain knowledge that he had the full support of the people. At any rate, after his presentation Matante was ready to leave as he had no mandate to participate in the talks. Appeals by the British Government for him to stay on were to no avail. A serious concern was expressed by Mrs Eirene Lloyd White, who was Parliamentary Under-Secretary of State for the Colonies, and who chaired the meetings, who declared that 'personally (as a politician who had been for thirteen years in opposition) and the Conference as a whole would very greatly regret Mr Matante's retirement and... would wish to urge him most earnestly to reconsider his declared intention'. Matante, however, was adamant. He had come with a mandate from his followers and did not wish to be party to the constitutional proposals 'where the method of approach had been completely wrong from the onset' (Matante 15 February 1965). Bathoen requested him to hear his presentation on the compromise reached between the Chiefs and the Government, and he obliged.

The conference and sitting arrangement

Once the opening ceremony and pleasantries were dispensed with, the negotiations started in earnest. At the opening session, the sitting plan was presented in the diagram below (Figure 1):

Figure 1: The Bechuanaland team, around the table (left hand side) consisted of (top to bottom) High Commissioner (Sir Hugh Norman-Walker), Chief Bathoen, Seretse Khama, Mr Q Masire, Mr P Matante, and Mr A Tilbury. On the right hand side sat the (British) Government team (top to bottom): Mr de Winton, Mr A Galsworthy, Mrs E White, Secretary of State (The Earl of Longford), Sir Hilton Poynton, and Secretary General.



Source: Communication from Conference Secretary General

Most of the work was done in plenary. The conference went through the draft Constitution provision by provision. Every word, sentence and paragraph would be considered and agreed. Contentious issues were referred to Committees. The record indicates that Masire participated in a number of Committees namely Fundamental Rights, Citizenship, Public Service, and Finance, Remunerations and Stocks. In most cases the committees worked on the basis of templates. Botswana was not the first country to obtain independence from Britain around that period, so there were a number of precedents to be followed or adopted from around the former British colonies. For Fundamental Rights the Committee considered precedents from Kenya, Malawi and Uganda. The Kenya model was accepted subject to modifications

along the Uganda model. 'The Conference considered that, subject to the specific comments set out in Annexure "E" (which incorporate the majority of the recommendations of the Committee on a Bill of Rights set up by the Kenya Constitutional Conference, 1962), sections 6 to 2 of the Second Schedule to the Uganda (Constitution) Order in Council, 1962 (S.I. 1962 No. 405), adapted as necessary to render them applicable to Bechuanaland, would constitute a suitable model for this code' (Report of the Fundamental Rights Committee 16 February 1966). The details appear in the draft proposals presented to plenary.

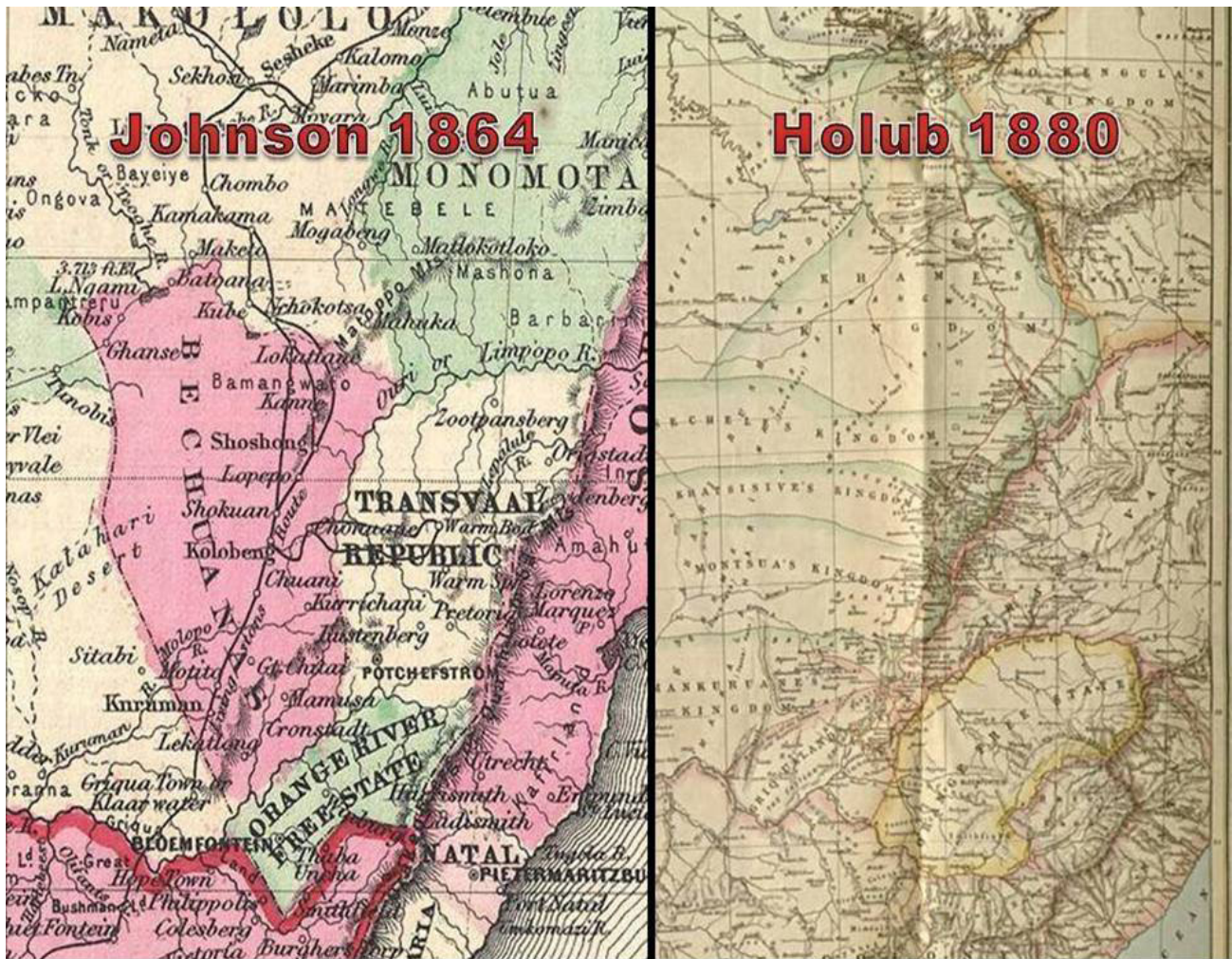
The Uganda model differed from the Kenyan one in two main respects. For instance, there was the issue of future citizenship of non-African resident in Uganda at independence. They were given a period within which to opt for citizenship or not. Second the Uganda model excluded sex as the basis of discrimination. This issue was later to occupy Botswana courts in the Unity Dow case of the early 1990s (*Attorney General v Dow* [1992] BLR 119). Dow challenged the constitutionality of a provision in the Citizenship Act that allowed Botswana men married to foreign women to pass Botswana citizenship to their children whilst Botswana women married to foreigners could not do the same. She contended that the provision discriminated on the basis of sex. The Constitution did not include the word 'sex' in the list of grounds on which discrimination was prohibited. The courts had to grapple with whether the word had been deliberately excluded, and ruled that it was an omission. The question still remains: did the founding fathers of Botswana omit or exclude the word 'sex' in Bill of Rights as the basis for discrimination?

For citizenship, again the Uganda model was adopted: no dual citizenship, who qualified to be a citizen at independence, how citizenship was acquired, what happened to former British citizens who still remained in the country, especially public officers. The future Public Service, and Finance and Stocks were discussed. Regarding Public Servants the discussion revolved around two issues. First the protection of the public service from public influence. In order to guarantee an independent and professional service, a Public Service Commission was established to handle all civil servants employment related appeals. The second issue was with respect to the future of non-Batswana public servants still in the service. Subject to the policy of localization, it was agreed to guarantee their tenure of service, though this was not included in the Constitution. Finally, the issue of Bechuanaland stocks issued in London under Colonial Stock Acts was discussed. Although this was not a matter for inclusion in the Constitution, 'it was usual for the Conference Report to include recognition of the need to make arrangements to ensure continuity in the observance of a territory's obligations in these matters after independence'. This was an explanation by Mr Galsworthy in Record of the Seventh Meeting held in the Main Conference Room, Marlborough House on 18 February 1966. In short, it was a matter for state succession and acknowledgment and acceptance of prior commitments entered into on behalf of Bechuanaland by the British Government.

Naming the country

How the country came to be named Botswana has always generated controversy and different names have been suggested over the years (Makgala 2008). However, the minutes of the London Conference indicated that 'It is proposed, in the interests of accuracy, that after Independence the country should be styled "Botswana"' (Explanatory to the Record of Third Meeting 15 February 1966). Precisely who came up with the name has also been difficult to pin down. Some writers have opined that at any rate the country, though a conglomeration of different tribal communities, has always been known as the land of Bechuana (Bechuanaland) and that the name did not necessarily refer to the Tswana group of people but the land mass stretching from the present day North West District (Ngamiland) to beyond the Molopo River in the south. To the east the country bordered the then Transvaal; to the west sharing the Kalahari Desert with the present day Namibia (see Maps 1 and 2 below):

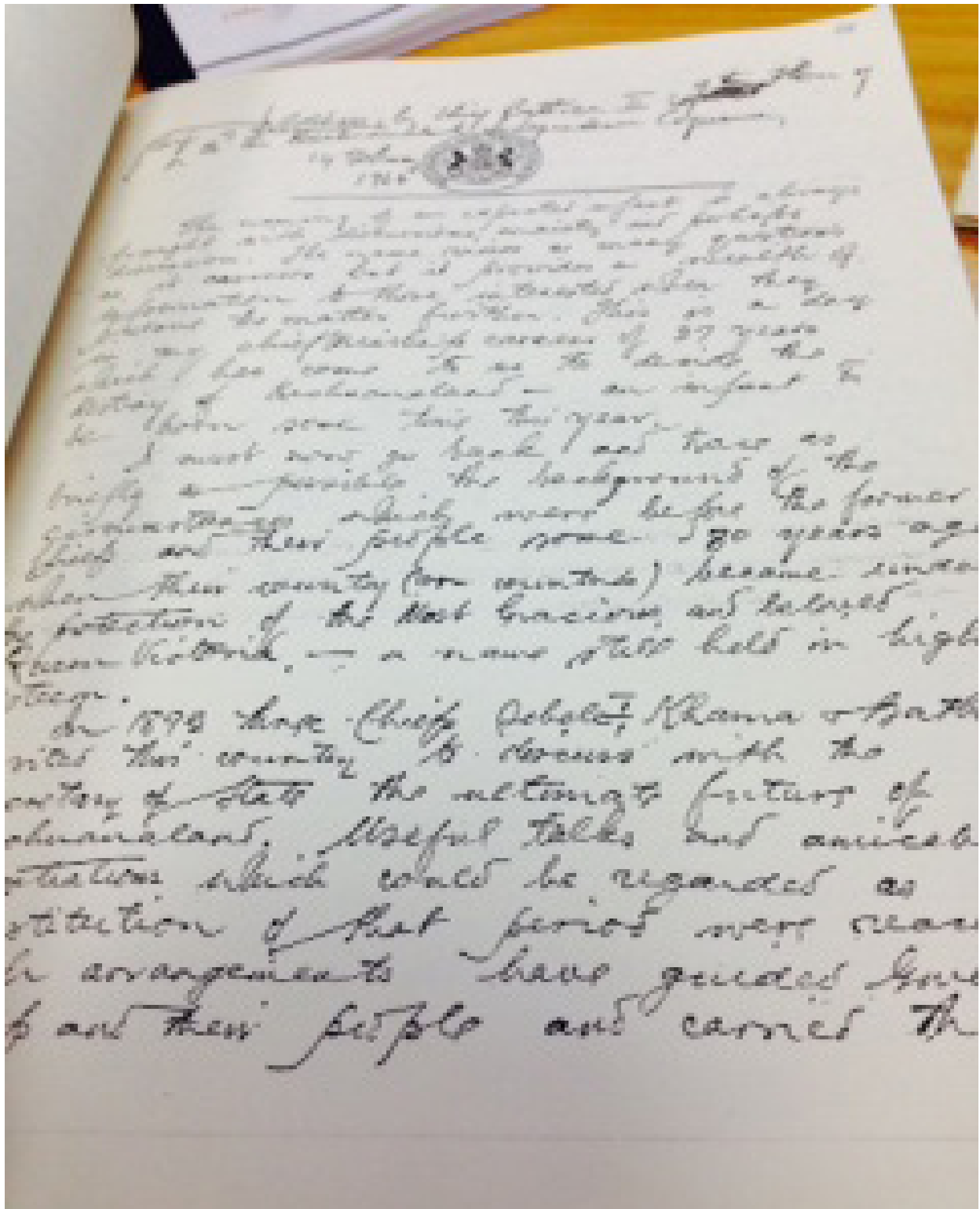
Map 1 and 2: Precolonial Botswana in 1864 and 1880



Source: Courtesy of Dr Jeff Ramsay

Jeff Ramsay, a renowned historian of Botswana has averred that the use of Botswana to refer to Bechuanaland could be traced to the 1930. In the first recorded usage, a certain Mongwaketse by the name of Leepile, who writing from South Africa, referred to the country as such. Another school of thought, and credible one, traces the use of the name to Motsamai Mpho. When he broke away from the BPP in 1963, he then called his party the Botswana Independence Party (Edge 1996; Gossett and Lotshwao 2009). Whilst all the other parties that contested the elections in 1965 used Bechuanaland, Mpho's party used Botswana instead. This, therefore, will make his party the first to use the name Botswana in official documents, albeit before independence. It would also be interesting to observe that Seepapitso Gaseitsiwe wrote to the Colonial Secretary on Bechuanaland Constitutional Developments in December 1965 in his capacity as National President of an organization calling itself Botswana National Union (Gaseitsiwe, SB to Colonial Secretary 6 December 1965). Yet again, another use of Botswana prior to independence. It was, however, at the Conference that Bathoen II addressed the meeting on the naming of the country. The handwritten presentation (see below) was subsequently typed into the record.

Figure 2: Kgosi Bathoen's handwritten presentation. The typed version is below



My Lord,

The naming of an expected infant is always fraught with discussions, anxiety and perhaps dissension. The name raises as many questions as it answers but it provides a wealth of information to those

interested when they pursue the matter further. This is a day in my chieftainship career of 37 years of which has come to us to decide the destiny of Bechuanaland—an infant to be born some time this year.

I must now go back and trace as briefly as possible the background of the circumstances which were before the former Chiefs and their people some 80 years ago when their country (or countries) became under the protection of the Most Gracious and beloved Queen Victoria—a name still held in high esteem.

In 1895 three Chiefs Sebele I, Khama and Bathoen I visited this country [Britain] to discuss with the Secretary of State the ultimate future of Bechuanaland. Useful talks and amicable negotiations, which could be regarded as a constitution of that period were reached. Such arrangements have guided Government, Chiefs and their people and carried them through peaceful and troublous days up to the present.

It has truly been said 'history repeats itself'. Today we have two grandsons Seretse (of Khama) and Bathoen II (of Bathoen I) who are here on a similar delegation. Bechuanaland appeared to have been a territory on the market when the British South Africa Company desired to govern it and later the Government of South Africa talked much about annexation. It has now become abundantly clear and evident that whatever happens the Government of Bechuanaland will fall in the hands of its original inhabitants like other African States (Bathoen 14 February 1966)

Bathoen added, in his handwriting, the following at the end of the typed script: 'Finally I thank you my Lord for your kind words and I associate myself with the remarks made by the Prime Minister. Botswana is born again'. This, however, does not suggest in any way that it was Bathoen who, on his own, named this country as Botswana. It could suggest that he was mandated to speak on behalf of the Bechuanaland delegation.

Independence celebration preparations

The independence talks over the country was set for the celebrations. In preparation for the celebrations, a national committee was established to co-ordinate the preparations and celebrations. Districts and villages were urged to establish local organizing committees. At the national level, the committee was chaired by none other than the Deputy Prime Minister, Masire himself. As the Bechuanaland Independence Celebrations Committee noted c.17 January 1966:

The first meeting of the Bechuanaland Independence Celebrations Committee was held in Lobatsi yesterday, with the Deputy Prime Minister, Mr Quett Masire, presiding. It was decided to recommend that the Independence Celebrations should extend over a four days period – from Thursday, September 29, over Friday, September 30, Saturday, October 1, and Sunday the second.

Midnight, September 29, would see the ceremony of the flag-raising and handing over of authority to the new Republic of Botswana. Suggestions were made on various forms of entertainment to be organized.

It was suggested that there should be a nation-wide football competition; choir festivals; and tribal dancing competitions. As these were nation-wide competitions, it should be possible for the whole of Bechuanaland to participate in some way in them. The finals would take place during the Independence Celebrations.

Conclusion

The death of Quett Masire in July 2017 brings to a close the long and illustrious career of one of Botswana's founding fathers. His involvement and role in the Constitution making dates back to the early 1960s. He played a pivotal role in the development of the Independence Constitution. He was one of the few surviving members of the Independence talks delegation. With his passing, from the Botswana team to the Constitutional Conference only one person remains—Alan Tilbury. He was Attorney General of Botswana until 1969.

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