

Conclusion

As the British empire expanded in Africa, many political leaders found themselves detained and deported from their homelands, deprived of their liberty without that due process of law which Britons had long regarded as the hallmark of their constitutional culture. They were detained under legal regimes of ‘exception’, under the cover of martial law or by virtue of *ad hominem* ordinances tailored to authorise the detention or deportation of named individuals by simple legislative fiat. The use of such detentions raises questions about the role of law in imperial expansion, about how far common law perceptions of the rule of law were applied in the empire, and about what the African experience can tell us about English ideas about the rule of law in the era in which Dicey wrote his celebratory *Law of the Constitution*.

Why did an imperial power committed to bringing the rule of law to its wider empire resort to detention without trial so frequently? As has been seen, detention was not a policy dictated from the centre. It was generally driven by the demands of officials on the ground, and many officials at the Colonial Office remained uncomfortable with the incarceration of political prisoners by ordinance.¹ There were a number of reasons why the authorities resorted to ‘exceptional’ forms of incarceration. In several cases – including Cetshwayo’s and Prempeh’s – the detainee was a ruler whose kingdom had been

¹ As R. H. Meade observed in 1887, ‘We dislike this special kind of legislation unless absolutely necessary’: minute dated 14 September, CO 96/182/1829.

conquered. In such cases, there was no offence for which they could be legally held, and with the end of hostilities, they should have been released. However, since their continued presence in their homelands was politically untenable for the imperial authorities, they found a precedent for exiling such rulers in the example of Napoleon, whose removal to St Helena had been validated by statute. Napoleon's continued detention as a prisoner of war was justified in the eyes of the British government by the fact that he had been put in their custody under a convention agreed by the allied powers after his defeat.² By contrast, in Africa, where rulers were removed after imperial wars of aggression, the colonial authorities were largely unconcerned with finding international law justifications for the ruler's continued detention; but they did need to insure themselves against possible habeas corpus applications brought by friends of the detainee.

In other cases, the detainee was not a vanquished potentate, but a political troublemaker, whom the authorities wished to silence. In such cases, there might be no offence with which the activist could be charged, or there might be a concern that any trial would end in an acquittal, either for want of evidence or from jury sympathy. These activists could be detained as political prisoners under ordinances designed either to curtail their present activities or to forestall the danger of any future ones. Examples of this can be found in a number of detentions on the Gold Coast of activists, such as Yaw Awua, who threatened to unsettle British policy towards Asante. It can also be seen in the exile of Zubayr, who was removed from Egypt for the sake of British military convenience. In such cases, detention ordinances – which might be passed in a single day by a legislative body dominated by the Governor – had the look of a cynical form of 'lawfare', being exercises of naked executive power in the guise of legislation. In other cases, however, the authorities were concerned

² *British and Foreign State Papers 1815–1816* (London, James Ridgway and Sons, 1838), p. 200. For the government's quest for legal justifications for his treatment as a prisoner of war, see R. A. Melikan, 'Caging the Emperor: The Legal Basis for Detaining Napoleon Bonaparte', *Tijdschrift voor Rechtsgeschiedenis*, vol. 67 (1999), pp. 349–362; and Renaud Morieux, *The Society of Prisoners: Anglo-French Wars and Incarceration in the Eighteenth Century* (Oxford, Oxford University Press, 2019), pp. 358–368.

with dealing with someone who had committed some kind of wrong, which the ordinary forms of law were powerless to deal with, as in Sierra Leone, where detention ordinances were used for peacekeeping purposes, occasionally even when it was felt that the ordinary criminal law might be too severe.

Jurisdictional Ambiguities

The decision to detain a political prisoner, rather than attempting a trial, often reflected jurisdictional uncertainties, when the colonial authorities were unsure whether they had the jurisdiction to proceed to trial. It was self-evident that rulers like Prempeh, whose kingdom lay beyond both the colony and the ‘protectorate’ of the Gold Coast, and over whose land the British had not purported to exercise an extraterritorial jurisdiction, could not be tried before British courts, though (as has been seen), the colonial authorities were keen to charge his prime minister, John Owusu Ansa, in a colonial court for an offence committed within its jurisdiction. There could also be uncertainty over how to deal with ‘external’ agitators who had settled within areas under British control. When the authorities in the Gold Coast considered how to deal with the intrigues of Asafu Agyei and King Tackie, they felt unable to put the former on trial – since he was an outsider who had taken refuge in the British protected area – but contemplated a trial for Tackie, who was thought to be under British jurisdiction in Accra.

The fact that *ad hominem* ordinances were most frequently used in West Africa to detain political prisoners may reflect the particular jurisdictional ambiguities in this region, where areas annexed as colonies shaded into ‘protected’ areas, which then bordered onto areas under wholly independent rulers. Although the British had exercised extraterritorial jurisdiction in West Africa under various Orders in Council issued under the Foreign Jurisdiction Acts, doubts remained over how far it extended. According to the understanding which prevailed in the years before the Berlin Conference, the extraterritorial jurisdiction given by the Orders in Council of 1872 and 1885 was limited in scope, being primarily intended to give jurisdiction over British subjects. When such instruments purported to grant jurisdiction over ‘persons properly enjoying Her Majesty’s

protection', this phrase was taken to connote only those attached to British consular offices, rather than being read broadly to cover all Africans considered to be somehow under British protection. Although the Orders in Council also granted jurisdiction over Africans where their chiefs had by treaty agreed to it, these treaties were not generally worded in such a way as to confer such general jurisdiction. For instance, even Consul Edward Hewett did not think that he had the jurisdiction to deal with Jaja, even though the standard form treaty which he took to the Niger delta in 1884 conferred exclusive jurisdiction on British consular officials over 'foreign subjects enjoying British protection'.³ In this context of 'protection', Jaja was treated like Abdullah of Perak – a ruler who could not be tried, but who should be investigated by a quasi-legal inquiry, whose findings could be used to justify a Napoleonic-style ordinance.

By the 1890s, a different view of protectorates was emerging. In July 1890, Sir Robert Herbert observed that 'the notion that the consent of minor chiefs is necessary as an antecedent to the establishment of a British protectorate over their territories has become out of date through the political development of the last two or three years.'⁴ In this decade, the jurisdiction conferred via the Africa Orders in Council over those 'enjoying Her Majesty's Protection' could be read much more broadly. In contrast to Hewett, Sir Claude MacDonald was confident in his jurisdiction to try Nana Olomu in his consular court for offences defined by the British. The fact that the basis of this jurisdiction was still not entirely secure, for all MacDonald's confidence, is evident not only from the flaws in the process – with officials in London puzzling over how the charges and sentences matched up – but also from the fact that Nana was eventually exiled under an *ad hominem* ordinance, rather than through ordinary legal processes. Where doubts remained that the colonial authorities lacked jurisdiction, an ordinance had to be used. This can also be seen in Sierra Leone, whose officials – under the watchful eye of the Colonial Office – were much more cautious in asserting their jurisdiction against 'rebels' than the Foreign Office's consular

³ Article III of the treaty, as found in FO 403/31, enc. in No. 88, p. 58.

⁴ CO 417/43/13242, quoted in W. Ross Johnston, *Sovereignty and Protection: A Study of British Jurisdictional Imperialism in the Late Nineteenth Century* (Durham, Duke University Press, 1973), p. 231.

officials in the Niger Coast Protectorate. In Sierra Leone, Bai Bureh's projected trial was derailed by the Law Officers' advice that an African living in the protectorate could not be regarded as a subject liable to the law of treason, even if he could be tried for a lesser offence. In his case, legal punctiliousness lay behind the decision to detain by ordinance: it was the fear of officials at the Colonial Office that the English lawyer sent to preside over the rebel trials might raise difficult legal questions which led them to refer the matter to the Law Officers in the first place. By the early twentieth century, when British jurisdiction in these areas had become more clearly defined, the use of such ordinances fell away, for political crime could be dealt with by other forms of legislation.

Alongside their use to authorise detentions in places where the British were unsure of their jurisdiction, *ad hominem* laws were also used to validate the outcome of flawed processes. One example of this was the case of Ovonramwen: having captured Benin City, Ralph Moor purported to apply an African customary law which he had no authority to exercise, and then proceeded to exile the Oba by simple pronouncement. In this case, it would take more than a decade for the authorities to validate his deportation by ordinance. Nor was it only in these frontier areas that such questions might arise. As Langalibalele's case shows, even in areas with settled legal systems, such as Natal, the detention of a political opponent might need validation by legislation to overcome jurisdictional errors which had been made by an over-zealous local official. In this colony, jurisdictional ambiguity arose from the system of legal pluralism formally introduced in 1849, when an ordinance re-established a jurisdiction of African customary law, while at the same time giving the Lieutenant Governor effective control over 'native law'.⁵ If this legislation was intended to recognise the need for African customary law to be the law applicable between Zulus – something which well suited Theophilus Shepstone's policy of 'indirect rule' – it proved highly problematic when applied to cases of political crime against the colonial authorities. It was not simply that Governor Pine's decision to try Langalibalele under 'native law' went against the established practice of using the ordinary courts to deal with serious crimes. It also demonstrated how incoherent his view of law was. Pine's aim was to convict Langalibalele of offences against the

⁵ Ordinance No. 12 of 1845, modified by Ordinance No. 3 of 1849.

state which he conceived of in terms derived from an English law which did not apply in Natal. Aware that the evidence available would not be sufficient for a conviction under English law, he framed the charges under 'native' law to give him the scope to convict. As with Nana and Ovonramwen, there were deep flaws in the jurisdiction which was purportedly exercised over Langalibalele, which needed to be regularised by legislative fiat.

'Reason of State' and the 'Rule of Law'

In the 1880s, the Colonial Office made it clear that legal cover, in the form of an ordinance, had to be given, if political prisoners were detained without trial. Officials did not take the view that detentions could be justified as acts of state, which would be beyond the jurisdiction of any court to consider. It was long settled that the crown could not, by virtue of its prerogative powers, detain any subject within its dominions for reasons of state: any such prisoner could be released on obtaining a writ of habeas corpus. The writ was also available to those who were not subjects, who had been unlawfully detained in the crown's dominions.⁶ This protection extended not only to natural born subjects, but also to 'alien amis', foreigners who were considered to owe a temporary 'local allegiance' to the crown and who consequently enjoyed the protection of its laws.⁷ This meant that there was little scope to invoke the notion of acts of state when it came to the detention of British subjects or of aliens within British territory.

By contrast, it was also well settled that 'alien enemies' were 'not entitled to any of the privileges of Englishmen'⁸ and could be held as prisoners of war or dealt with under martial law. While courts were willing to examine whether any detainee might properly be classed as a prisoner of war,⁹ the category was often a very fluid one,¹⁰ and the

⁶ See e.g. *The Case of the Hottentot Venus* (1810) 13 East 195.

⁷ See *Calvin's Case* (1608) 7 Co. Rep. 1a, and the discussion in Hannah Weiss Muller, *Subjects and Sovereign: Bonds of Belonging in the Eighteenth-Century British Empire* (Oxford, Oxford University Press, 2017), ch. 1.

⁸ *The Case of the Three Spanish Sailors* (1779) 2 W. Bl. 1324.

⁹ Paul D. Halliday, *Habeas Corpus: from England to Empire* (Cambridge, Mass., Harvard University Press), pp. 168–174.

¹⁰ Morieux, *The Society of Prisoners*, ch. 1.

case law suggested that the judiciary did not consider that it was limited to active combatants captured in the field.¹¹ The crown's power to detain such enemies derived from its prerogative power to make war and peace. International lawyers saw the detention of such prisoners as a continuation of hostilities, and expected warring nations to make agreements for the exchange of prisoners of war when hostilities ceased.¹² This raised the possibility that vanquished African chiefs, with whom no treaty of peace had been made, might be considered simply as continuing prisoners of war. It also raised the possibility that 'bands of marauders' – who were not considered to merit the status of prisoners of war but had long been considered as *hostis humani generis*¹³ – might also be held under acts of state exercised under prerogative power. On a few occasions, officials did suggest that detainees might be held as prisoners of war. In Sierra Leone, many of those captured in the Yoni wars were initially held as such. Similarly, after the end of the Anglo-Zulu war, both the Cape's Attorney General, Thomas Upington,¹⁴ and the Law Officers in London felt that the defeated king Cetshwayo could be held at the Cape as a prisoner of war. The Cape authorities also thought that the Griqua rebels of 1878 could be detained as such prisoners. However, in none of these cases were the detainees held as prisoners of war for long: in the case of the Yoni prisoners and Cetshwayo, legislation was passed to validate their detention, while in the case of the Griqua prisoners, their designation as such was successfully challenged in the Cape Supreme Court, when it was shown that these rebels had been treated by the colonial authorities as subjects. Although there might have been enough legal ambiguity about the status of prisoners of war or 'bands of marauders' to tempt colonial authorities to classify non-subjects as such, it is notable that officials did not seek to hold them as such without additional legal cover. They seem instead to have inclined to

¹¹ See *R. v. Schiever* (1750) 2 Burr. 765.

¹² Emer de Vattel, *The Law of Nations*, ed. Bela Kapossy and Richard Whatmore (Indianapolis, Liberty Fund, 2008 [1797]) Bk. III, ch. 8, § 154, p. 365; Henry Wheaton, *Elements of International Law*, 4th ed., ed. J. B. Atlay (London, Stevens and Sons, 1904), § 344, p. 478.

¹³ Robert Phillimore, *Commentaries upon International Law* (London, William G. Benning & Co, 1857), vol. III, p. 145.

¹⁴ CO 879/16/5, enc. 13 in No. 116, p. 281.

the view that those who were not the subjects of an enemy state with which Britain was at war should not be held as prisoners of war.

By the middle of the nineteenth century, it was also well established that people who owed no allegiance to the crown, whose rights had been infringed by acts authorised by the British government, could find no redress in English courts, since they were acts of state, which fell within the crown's prerogative to deal with foreign states and their subjects.¹⁵ While the case law (on invasions of property rights) suggested that the courts might consider whether the act in question 'bore the character of political acts of state',¹⁶ once that was established, they would take no further cognizance of them. In light of this doctrine, the detention of 'alien' political prisoners by the crown outside its own dominions might have been justified as an act of state, without any further legal cover. Nevertheless, it is striking how infrequently colonial officials invoked the act of state doctrine. It was generally invoked only to justify action taken in moving detainees from one colony to another, through areas over which the crown had no jurisdiction, as in the transportation of Abdullah to the Seychelles and of Jaja to St Vincent. Indeed, in Jaja's case, the Foreign Office went so far as formally to ratify Col. Harry Johnston's actions in moving Jaja from Opobo to Accra, in order to remove any risk that the officer might be sued for infringing his rights, since the ratification made this an act of state.¹⁷

Officials at the Colonial Office and Foreign Office do not seem to have thought they had the power to hold detainees in Africa simply for reasons of state. Instead, they consistently sought to provide a legal justification, in the form of an ordinance. Detainees were to be held by law. One reason for this may have been a purely practical one. The

¹⁵ See J. F. Stephen, *A History of the Criminal Law of England*, 3 vols. (London, MacMillan and Co., 1883), vol. II, pp. 61–62, 65. See further Amanda Perreau-Saussine, 'British Acts of State in English Courts', *British Yearbook of International Law*, vol. 78:1 (2007), pp. 176–254. There was much case authority, often arising from India, which showed that, where property rights had been infringed by crown, the matter was not justiciable: e.g. *Secretary of State for India v. Kamachee Boye Sababa* (1859) 13 Moore 22.

¹⁶ *Musgrave v. Pulido* (1879) 5 App. Cas. 102 at 113.

¹⁷ For this doctrine, see *Buron v. Denman* (1848) 2 Ex. 166, discussed in C. Mitchell and L. Turano, 'Buron v Denman (1848)', in C. Mitchell and P. Mitchell (eds.), *Landmark Cases in the Law of Tort* (Oxford, Hart, 2010), pp. 33–68.

colonial authorities sought to detain all their prisoners in gaols within British dominions, whether in Freetown, Gibraltar, St Vincent or the Seychelles, and, once in these places, detainees would obtain the rights enjoyed by all those with local allegiance. Viewed this way, ordinances were consequently a form of insurance against legal challenges. At the same time, it may be noted that, at a time when protectorates were not considered as being ‘dominions’ of the crown – and where ‘reason of state’ arguments might have run – ordinances continued to be passed to authorise the detention of political prisoners in such areas, such as Sekgoma Letsholathibe. Furthermore, as has been seen, ordinances were also passed to regularise proceedings which were thought to be legally flawed. Rather than accepting such proceedings as a *pis aller*, officials insisted on complying with proper legal forms. Whatever steps were taken had to be taken in a properly legal domain.

Officials’ punctilious insistence on the forms of legalism often made no practical difference to the detainee: as Ovonramwen found, an ordinance simply dotted the ‘i’s and crossed the ‘t’s. In some ways, this was little more than a bureaucratic following of forms, to ensure the formal validity of steps taken. Viewed in this way, the formalistic rule of law this represented did nothing for the liberties of the detainees, and was a world away from the common law ideology championed by the likes of Dicey. At the same time, however, the insistence by the metropolitan authorities on the forms of law being followed was not wholly insignificant: London, which had the power to disallow colonial legislation, could better monitor what was happening at the frontiers of empire if Governors and their law officers had to give reasoned justifications for their ordinances. This raises the question of how committed officials were to the rule of law. As has been seen, the concept of the ‘rule of law’ is an ambiguous one. According to one point of view, all that it requires is formal validation – whether direct or indirect – by a sovereign lawmaker. According to another, it connotes a commitment to a set of substantive principles long associated with the English common law, including the demand that no one be imprisoned without being tried in a court for a previously defined offence.¹⁸ The

¹⁸ For discussions of these aspects of the rule of law, see Joseph Raz, ‘The Rule of Law and Its Virtue’, in his *The Authority of Law* (Oxford, Clarendon Press, 1979), ch. 11; Lon L. Fuller, *The Morality of Law*, 2nd ed. (New Haven, Yale University Press, 1969), pp. 46–91; Friedrich A. Hayek, *The Road to Serfdom* (New York, Routledge,

formal version is undemanding but empowering: provided the correct procedures are followed, the most draconian legislation can be imposed for the benefit of those in power. The substantive version is more demanding, and there may be degrees to how far actual practices are able to live up to its demands. Nor is the rule of law in this sense self-executing: fidelity to its principles requires a commitment to its practice.

Looking at their domestic constitution, mid-Victorian jurists like Dicey were confident that the two versions of the rule of law were not in tension: the sovereign lawmaker was a parliament which could be trusted to speak in the name of a people whose constitutional culture was suffused with a commitment to the values of the common law. In the empire, however, the tension between those two visions became much more visible. The discomfort which officials at the Colonial Office and their political masters often showed towards 'exceptional' detention ordinances indicates that the common law principles they valued at home continued to nag their consciences; but how far it exerted an influence on their actions depended on how strong the counterweights were. When faced with the pressing demands of officials on the ground for tough action against political adversaries, as in West Africa, officials in London were generally prepared to put aside any qualms they had, and allow the formal rule of law to be used for imperial 'lawfare'. Elsewhere, however, the pressures exerted by public opinion, and groups such as the Anti-Slavery Society, might incline officials to insist more on the need for the due process of law to be observed. The strikingly contrasting approaches taken to Urabi Pasha and Al-Zubayr Rahma Mansur in Egypt may be explained in part by the very different reactions of British public opinion to these figures and the policy which lay behind their detention. Public and political opinion at the periphery might also need to be taken into account. In Natal, the pressure exerted by Bishop Colenso's campaign on behalf of Langelibalele may not have resulted in that chief's release, given the strong opposition of Natal's political elite; but, in the longer term, it was to exert an important influence on the

2008), pp. 112–124; David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (Cambridge, Cambridge University Press, 2006), p. 2; and T. R. S. Allan, *Law, Liberty, and Justice: The Legal Foundations of British Constitutionalism* (Oxford, Oxford University Press, 1993), p. 22.

decision that Dinuzulu could not simply be exiled by legislation, but had to be tried.

In an era in which London often deferred to the demands of the men on the ground, the approach taken to political detention was also importantly shaped by the character of the local legal culture. In this respect, the practice of the Cape Colony stands in sharp contrast to that of the West African colonies. At the Cape, there was not only a powerful Supreme Court, whose judges were learned in both Roman-Dutch law and common law, but also a liberal political system which recognised that Her Majesty's African subjects had the same legal rights as her European ones. In contrast to West Africa, where the colonial authorities resorted to *ad hominem* laws to hold perceived enemies through exceptional means, at the Cape detainees were treated in court by judges like Sir Henry de Villiers as British subjects who should no more be deprived of their rights than any Englishman in the colony. In areas where the political prisoner was regarded as a member of the political community, he was much more likely to be treated in a way which respected a substantive vision of the rule of law than in areas where he was seen as a Schmittian 'enemy'.¹⁹

Whereas in the frontier areas of West Africa, jurisdictional uncertainty led to a raft of ordinances authorising individual incarcerations, detention without trial was little used on the Cape frontier. There were of course men on the ground who were prepared to take draconian measures to deal with those standing in their way, as Sir Henry Pottinger and Sir Harry Smith did when holding Sandile without any apparent legal authority. However, for the most part, those who were not subjects were dealt with as prisoners of war, being released at the end of the conflict, whereas those who were subjects were treated as rebels. These rebels were still subjected to 'exceptional measures', for the 'Hottentots' of Kat River who rebelled in 1850 and the Ngqika who joined the war of Ngcayecibi in 1877 were tried and sentenced by martial law courts, rather than civilian ones. However, as the debates over the use of martial law in these episodes demonstrated, the Law Officers both in the colony and in the metropolis were aware of the legal problems it raised. With the

¹⁹ See Carl Schmitt, *The Concept of the Political*, trans. G. Schwab (Chicago, University of Chicago Press, 2007), pp. 26ff.

debates over Jamaica in mind, officials in 1878 strove to find a formula which would satisfy the demands of the rule of law. On numerous occasions throughout the century, from Chief Justice Sir John Wylde's advice in 1835 to Sir Henry de Villiers's ruling on the detention of Sigcau sixty years later, legal voices could be heard in the Cape reminding officials of the need to follow due process. The fact that this liberal regime did not extend beyond the Cape's borders can be seen from the fact that, after its conquest, British Kaffraria was governed under a permanent system of martial law; but even here, the desire of imperial officials to impose draconian penalties could be subject to some restraint, as when the liberal Attorney General William Porter's damning report on Mhala's trial in a special court resulted in a lighter sentence than had originally been intended.

The Cape's experience suggests that the extent to which a substantive vision of the rule of law was followed owed a good deal to how far local officials were committed to it. In turn, this might depend on how far they regarded those who challenged their authority as being part of their political community, and how far they regarded them as Schmittian enemies. During the Anglo-Boer war, politicians and lawyers at the Cape saw the Dutch-speaking rebels who joined the Boer forces as members of their political community, who ought to be afforded the protection of a substantive rule of law. In contrast to the experience of West Africa, where it was often the local officials who pressed for draconian measures, and officials in London who wished to restrain them, during the Anglo-Boer war, the demand for draconian measures generally came from the imperial authorities, who were apt to regard the Dutch speakers as enemies.²⁰ Here, it was the local political elites who called for restraint and for a commitment to the rule of law. This was not simply a matter of local legal consciences being more faithful to the English common law tradition than the English: the liberalism of men like Sir James Rose-Innes and Sir Henry de Villiers had its roots in a political culture which had developed at the Cape since the 1820s.

²⁰ For example, Milner wrote to Chamberlain on 16 July 1901, 'By all means let the greatest care be taken to make the trials correct, as military trials, & serious. Let every allowance be made for mitigating circumstances. But, where there are none, when a British subject has simply of his own deliberate choice gone out to join the invaders & to assist them in robbing his fellow citizens & burning their houses, why not shoot him?' Chamberlain Papers, University of Birmingham, JC 13/1/160.

The Cape colonists had long manifested a desire to defend their own rights when faced with imperial demands: the British project in 1849 to transport convicts to the Cape was met with a defiant response which not only scuppered the penal project but also paved the way for the creation of representative government in 1853.²¹ During the Anglo-Boer war, the language of the rule of law was for a number of liberals a means to defend local rights against imperial invasions, whether in the form of the detention of respectable Dutch-speaking citizens or in projects to suspend the Cape constitution.²²

The Anglo-Boer war consequently generated debates about the nature of martial law of a kind which had not been seen since the Jamaica controversy. Rather than being accepted simply as the rule of the military commander which had to be followed during the course of the war, the scope of martial law became a subject of negotiation between the imperial military and civilian authorities and the local political and legal establishments. If the courts came to accept that they could not interfere with military detentions during wartime, they asserted their right to hold the military to account after the war had ended. Nor was the legislative indemnity given to the military granted by simple fiat: instead, the legislation was itself the product of political negotiation which ensured that the sentences of those still incarcerated would be reviewed. This approach contrasted strongly with that taken in Natal after the Zulu rebellion of 1906. Here, the targets of martial law were not regarded as part of the same political community, but as dangerous enemies of the white settlers, enemies who needed to be controlled. Where care had been taken at the Cape to subject martial law to some form of legal supervision, in Natal, both the legal and the political authorities were content to give the Governor *carte blanche* to

²¹ Timothy Keegan, *Colonial South Africa and the Origins of the Racial Order* (London, Leicester University Press, 1996), pp. 225–233; and Philip Harling, ‘The Trouble with Convicts: From Transportation to Penal Servitude, 1840–67’, *Journal of British Studies*, vol. 53 (2014), pp. 90–93.

²² The limits of this political liberalism can be seen from the use of martial law and statutory emergency powers in South Africa after 1910: see Keith Shear, ‘Legal Liberalism, Statutory Despotism and State Power in Early Twentieth-Century South Africa’, *Journal of Imperial and Commonwealth History*, vol. 38:4 (2010), pp. 523–548; and Jonathan Hyslop, ‘Martial Law and Military Power in the Construction of the South African State: Jan Smuts and the “Solid Guarantee of Force” 1899–1924’, *Journal of Historical Sociology*, vol. 22:2 (2009), pp. 234–268.

deal with these enemies. Here, the most formal legal cover was thought to suffice, in the form of an indemnity act which the local legislature was prepared to make prospective. In a colony where the targets of martial law were regarded as outsiders in the political community, the constitutional culture which in other contexts led officials to recognise the importance of following the principles of the common law when dealing with all subjects had little purchase.

The Role of the Courts

Although the writ of habeas corpus reached throughout the British empire, there were few legal challenges made to detention without trial, and fewer still which were considered by members of the English judiciary. This was in part for practical reasons, most obviously the difficulty detainees might have in acquiring legal assistance and funding legal challenges. Occasionally, as in the case of Bo Amponsam, such attempts were themselves frustrated when the authorities rapidly passed detention ordinances. Nevertheless, questions remained regarding the validity of such ordinances, and the power of local lawmakers to issue them. Such ordinances also raised important questions about the constitution of the empire: how far 'fundamental' common law principles applied beyond British shores, and how far either the Westminster parliament or the crown through its prerogative could authorise local officials to detain without trial. They were also pertinent to domestic law: for the kind of powers delegated to colonial officials might be delegated to domestic ones as well. The few cases which did come before imperial judges were therefore very significant.

When cases eventually came to London, detainees found English judges less committed to a substantive vision of the rule of law than they might have hoped. As Sekgoma's case showed, the judges were prepared to uphold detention ordinances by tracing the slenderest pedigree to an authorising statute which would confer validity on them, and by rejecting arguments based on the idea that delegated powers had to be read within a broader framework of fundamental principles found in Magna Carta or cases such as *Campbell v. Hall*. The decision in *ex parte Sekgoma* exhibited a pro-executive approach to delegated legislation which would be echoed in the English cases

brought during the First World War, when challenges were made to regulations issued under the broad provisions of the Defence of the Realm Acts, which conferred a general power on the executive to issue regulations for the defence of the realm.²³ In the best known challenge, *R. v. Halliday, ex p. Zadig*, the House of Lords upheld Regulation 14B, which allowed the executive to detain persons of ‘hostile origins or associations’.²⁴ The executive-minded approach taken by judges in cases like *Zadig*’s rested on the assumption that in a time of war parliament had intended to confer draconian powers and that it was for parliament to control them. This approach was subsequently criticised by jurists who saw it as abandoning the principles of the rule of law: yet it was much more plausible for these judges to interpret the broadly drafted statute of a wartime parliament as conferring such powers than it had been for Sekgoma’s judges to find such an intention in the Foreign Jurisdiction Act. In the First World War cases, the majority of judges accepted that wartime exigencies demanded an executive-minded interpretation of the law, since ‘a war could not be carried on according to the principles of Magna Charta’.²⁵ They regarded such emergency powers as necessary to defend the state itself.²⁶ By contrast, in Sekgoma’s case, the executive-minded reading came from the judges’ perception that draconian powers were needed to control parts of an empire ‘peopled by lawless and warlike savages, who outnumber the European inhabitants by more than one hundred to one’.²⁷

²³ Defence of the Realm (Consolidation Act) 1914, 5 Geo. V c. 8, s. 1.

²⁴ *R. v. Halliday, ex p. Zadig* [1917] AC 260. Lord Shaw of Dunfermline dissented, opining (at p. 277) that parliament, in passing the Defence of the Realms Acts, had never sanctioned ‘such a violent exercise of arbitrary power’.

²⁵ *Ronnfeldt v. Phillips and Others* (1918) 35, *Times Law Reports* 36 at 37. Frederick Pollock’s response to Shaw’s judgment echoed Halsbury’s parliamentary defence of *Marais*: ‘[m]y private opinion is that there is no liberty of the subject in time of war within the realm.’ Mark De Wolfe Howe (ed.), *The Pollock–Holmes Letters: Correspondence of Sir Frederick Pollock and Mr Justice Holmes 1874–1932*, 2 vols. (Cambridge, Cambridge University Press, 1942), vol. 2, p. 245.

²⁶ For a study of judicial activism in the war, see 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 (2005), pp. 261–343.

²⁷ *R v. Crewe, ex parte Sekgome* [1910] 2 KB 576 at 627 (Kennedy LJ).

Rather than using a substantive vision of the rule of law to protect the liberties of detainees, judges in cases like Sekgoma's went so far as to indicate that the detention of political prisoners in protectorates might even be justified as acts of state, without needing further legal authority. The suggestion that Sekgoma's detention was an act of state was made – almost as an afterthought – in the last paragraph of Secretary of State Crewe's affidavit in answer to the application.²⁸ This might have given the judges an opportunity to look closely at the doctrine, and its relationship to the writ of habeas corpus. In the event, the judgments did not clearly explain the application of this doctrine, but rather used it as a fall-back justification for refusing the application. Vaughan Williams LJ and Kennedy LJ appeared to accept that the detention of an individual outside the crown's dominions could be properly denominated a political act of state, which the detainee – like any foreigner whose property rights had been infringed by an act of state – could remedy only via diplomatic means. They did not regard the writ of habeas corpus as a tool to test whether the crown's officers were acting lawfully, wherever they were situated.²⁹ Instead, they thought that the writ was available only to those whose right to the court's protection derived from their allegiance to the crown.

The court did consider whether Africans living in protectorates over which the British had taken effective control could claim the writ's protection, by virtue of owing some kind of allegiance to the crown. This raised questions about the status of protectorates. Mid-century case law suggested that the subjects of 'protected states' – such as the Ionian islands, which were recognised as an 'independent state' under the protection of the British crown in the Treaty of Paris in 1815 – were

²⁸ CO 879/103/3, Appendix B, pp. 248–249.

²⁹ According to Paul D. Halliday and G. Edward White, 'the critical concern of habeas jurisprudence as it evolved in early modern England and expanded into eighteenth-century imperial contexts was to emphasize the franchisal authority of the sovereign's officials, not the territory in which a prisoner was being held or the nationality status of the prisoner', 'The Suspension Clause: English Text, Imperial Contexts, and American Implications', *Virginia Law Review*, vol. 94 (2008), p. 700. However, Vaughan Williams LJ's judgment held that the writ could be used in Bechuanaland by British subjects, but that, in respect of non-subjects, the act of state defence could be raised. *R. v. Crewe, ex parte Sekgome* [1910] 2 KB 576 at 604–606.

not British subjects.³⁰ However, by the end of the nineteenth century, the line between colonies and protectorates was often a very blurred one, with the imperial power in fact exercising the full powers of a sovereign in these areas. In such places, there was no other state to which inhabitants could look for diplomatic protection if their rights had been infringed by imperial ‘acts of state’, which might have suggested that the latter doctrine could not apply. However, in Sekgoma’s case, the judges held to the view that protectorates were outside the crown’s dominions, so that the act of state doctrine could be applied. According to Kennedy LJ, what distinguished a protectorate from annexed territories was that only the latter entailed territorial sovereignty, ‘that absolute ownership which was signified by the word “dominium” in Roman law’.³¹ Given that, by 1910, the crown had long claimed the right to take ownership of ‘waste’ lands in African protectorates,³² this was not a convincing distinction.

The judgments in Sekgoma’s case were not particularly consistent, with the judges appearing to strive for arguments which would justify his continued detention. However, their loose dicta on acts of state were taken up by the Court of Appeal for Eastern Africa in 1913, in the case brought by the Maasai against the colonial government for a violation of their land rights. Dismissing their case, Chief Justice Morris Carter held that the British East Africa Protectorate was ‘technically a foreign country’, where each inhabitant was ‘technically a foreigner in relation to the protecting State’.³³ This meant that agreements between the Maasai and the British relating to land were treaties which were not justiciable in the court. Although he acknowledged that the remedies of diplomacy and war which were available ‘to a foreigner, the subject of an independent state’ were not

³⁰ *In re Ionian Ships* (1855) 2 Spinks Ecc. and Adm. 212 at 226. It was held that to regard them as such ‘would set the whole treaty [of Paris] at naught; it would be to make a mockery of the most stringent stipulations contained in that treaty’.

³¹ *R. v. Crewe, ex parte Sekgome* [1910] 2 KB 576 at 620.

³² Law Officers’ opinion, 13 December 1899, FO 403/283, No. 101, p. 113.

³³ *Ol le Njogo and Others v. the Attorney General and Others* (1913) 5 East Africa Law Reports 70 at 89. On the case, see Lotte Hughes, *Moving the Maasai: A Colonial Misadventure* (Basingstoke, Palgrave Macmillan, 2006), pp. 89–104; and Aman W. Kabourou, ‘The Maasai Land Case of 1912: A Reappraisal’, *Transafrican Journal of History*, vol. 17 (1988), pp. 1–20.

available for ‘a native of the Protectorate’, Carter justified it by quoting Lord Justice Vaughan Williams’s comment that ‘the Protectorate is over a country in which a few dominant civilised men have to control a great multitude of the semi-barbarous.’³⁴ The decision in *Sekgoma* had clearly sharpened a legal tool which could be used against African claimants; though the threat it posed to detainees was drawn in 1960, when the Court of Appeal confirmed that an African held in a protectorate was able to challenge his detention using the writ of habeas corpus.³⁵

Rather than seeking to rein in imperial administrators by insisting on the need for due process and the rule of law associated with the common law tradition, judges in London were prepared to find formal powers to detain, both in statute law (in *Sekgoma*’s case) and in prerogative powers (in *Zaghlul*’s). In this way, they appeared to be less sensitive to the demands of that tradition than some colonial judges, as well as some officials in the Colonial Office. Their decisions on martial law also consistently upheld the demands of the executive, with their deference to the executive perhaps most chillingly seen in Lord Halsbury’s refusal to consider the application of those sentenced to death at Richmond in *Mgomini v. The Governor of Natal*.³⁶ The legacy of the two main South African cases – *Marais*³⁷ and *Tilonko*³⁸ – for the rule of law was ambiguous. On the one hand, they confirmed that, during a time of war or rebellion, the civilian courts would not have any power to review the actions of the military, settling a question which had remained open since the Jamaica controversy in a way favourable to the crown. On the other, the decisions confirmed that the courts had to be satisfied as a matter of fact that a state of war existed.³⁹ These decisions confirmed that the

³⁴ *Olle Njogo and Others v. the Attorney General and Others* (1913) 5 East Africa Law Reports 70 at 97. The protected African’s ‘only remedy is an appeal to the consideration of the Government’.

³⁵ *Ex parte Mwenya* [1960] 1 QB 241.

³⁶ *Mgomini and Others v. The Governor of Natal (Natal)* [1906] UKPC 22.

³⁷ *D. F. Marais v. The General Officer Commanding the Lines of Communication* [1902] AC 109.

³⁸ *Tilonko v. Attorney-General of the Colony of Natal* [1907] AC 93.

³⁹ After martial law had been proclaimed in Ireland in 1920, the Irish courts did assert their jurisdiction to determine ‘whether a state of war exists which justifies the application of martial law’: Molony CJ in *R. (Garde and Others) v. Strickland* [1921] 2 IR 317 at 329, quoted in Colm Campbell, *Emergency Law in Ireland*,

crown did not have a prerogative power to proclaim martial law, and thereby protect the military from any lawsuits which might be brought after peace had been restored. Martial law was not an executive matter, but was subject to post-conflict review, whether by the courts or the legislature. How far the rule of law would be protected in future martial law episodes would depend on how far the courts would go in testing whether a state of war or rebellion existed, and how closely legislatures would examine military conduct during the crisis prior to passing indemnity acts.

The decision in *Marais* also narrowed the common law doctrine in another significant way. In debating the ambit of martial law, common lawyers after the Jamaica controversy had laid stress on the question of whether martial law powers were necessary to restore order. However, after *Marais*, the focus of the courts' attention shifted away from the question of necessity to that of whether a state of war or rebellion existed. The consequences of this can be seen in the approach taken in Ireland after 1920, when martial law was proclaimed in four counties, even though a statutory regime giving power to military courts had already been created by the Restoration of Order in Ireland Act.⁴⁰ In *R. v. Allen*, Molony CJ followed *Marais* in holding that whether or not a state of war existed was a matter of fact, which did not depend on whether the civilian courts were open. Once the court had been satisfied that a state of war existed – as it had here – it had no jurisdiction to question any acts done by the military. In Molony's view, the fact of the state of war determined the necessity for martial law: and so he did not consider the necessity of using martial law courts to impose death sentences in an area where statutory military courts had been given non-capital jurisdiction over the same offences.⁴¹ Faced with this approach, lawyers defending the Irish rebels began to argue that martial law was a prerogative power, which had been abrogated

1918–1925 (Oxford, Clarendon Press, 1994), p. 138. In *R. (O'Brien) v. Military Government of North Dublin Union Military Internment Camp* [1924] 1 IR 32 at 42, he found that a state of war did not exist in Dublin to justify the use of martial law powers.

⁴⁰ This readopted the provisions of the wartime Defence of the Realm Acts. For a detailed examination, see Campbell, *Emergency Law in Ireland*; and David Foxton, *Revolutionary Lawyers: Sinn Féin and Crown Courts in Ireland and Britain, 1916–1923* (Dublin, Four Courts Press, 2008).

⁴¹ *R. v. Allen* [1921] 2 IR 241 at 271.

by the statutory regime created by the Restoration of Order in Ireland Act. Although Molony CJ rejected this argument,⁴² it persuaded the Irish Master of the Rolls, O'Connor, in *Egan v. Maccready*.⁴³ His decision to order the military to order the release of John Egan, who had been sentenced to death by a martial law court, generated exactly the kind of clash between courts and military which the Cape's Acting Chief Justice, Buchanan, had in mind in Marais's case, when he asked 'suppose the military refuse to carry it out, who is going to enforce it?'⁴⁴ The fact that the British political authorities forced Maccready to comply – after he had declared his intention to ignore the court's order – showed that Buchanan's fear was not a strong reason for the courts to abstain from intervening.⁴⁵ However, O'Connor's prerogative view of martial law did not flourish.⁴⁶

In the event, this newly developed theory of martial law was not much called on, for, just as Britain's parliament created a statutory regime of emergency powers during the war through its Defence of the Realm Act, so the King-in-Council provided for emergency regimes to be put in place in the empire. In 1916, the British Protectorates (Defence) Order in Council gave Governors in African protectorates the power to make regulations for public security and defence, which included detention without trial and courts martial trials.⁴⁷ Further orders in council conferring emergency powers followed,⁴⁸ including the 1931 Palestine (Defence) Order in Council (which became 'a model for dealing with later insurrections' after its use during the Arab Revolt of 1936)⁴⁹ and the 1939 Emergency Powers (Colonial Defence) Order in Council. Powers given by such instruments were extensively used in

⁴² *R. (Romaine and Mulcahy) v. Strickland and Another* [1921] 2 IR 333.

⁴³ *Egan v. Maccready* [1921] 1 IR 265. ⁴⁴ *Cape Times*, 7 September 1901.

⁴⁵ See Foxton, *Revolutionary Lawyers*, pp. 285–293.

⁴⁶ O'Connor himself rowed back from it in *R. (Childers) v. Adjutant General of the Provisional Forces* [1923] 1 IR 5.

⁴⁷ British Protectorates (Defence) Order in Council, issued 30 March 1916. As has been seen, a secret Order in Council had been made on 26 October 1896, which gave the Governor of Gibraltar emergency powers, but it was not made public until 1914.

⁴⁸ They included the Defence (Certain British Possessions) Order in Council 1928 and the Malta (Governor's Emergency Powers) Order in Council 1928.

⁴⁹ See Simpson, *Human Rights and the End of Empire*, p. 86. For these regulations, see Matthew Hughes, *Britain's Pacification of Palestine: The British Army, the Colonial State, and the Arab Revolt, 1936–1939* (Cambridge, Cambridge University Press, 2019), ch. 2.

the post-war empire to restrict movement, censor the press, and arrest and detain without warrant. In some colonies, such powers were used to resettle populations and to demarcate zones in which the security forces could use lethal force against suspected insurgents.⁵⁰ Although the military did not consider that a statutory scheme precluded the use of martial law, it was soon found that more powers could be enumerated in legislative schemes, which would need no post-emergency indemnity to evade scrutiny. As a number of important recent histories have shown, in the dirty wars of decolonisation, in which legislative instruments had granted extensive rule-by-law powers to violate the very kinds of rights which British foreign policy makers wanted to see enshrined in international human rights instruments, the techniques of counter-insurgency used often involved mass detention, torture and extra-judicial killings, often deliberately and carefully hidden from judicial scrutiny.⁵¹ This was a world away from the constitutionalist rule of law which Dicey had espoused just as the ‘scramble for Africa’ began.

⁵⁰ See David French, *The British Way in Counter-Insurgency, 1945–1967* (Oxford, Oxford University Press, 2011), pp. 76–82.

⁵¹ Besides French, *The British Way in Counter-Insurgency*, see David Anderson, *Histories of the Hanged: Britain’s Dirty War in Kenya and the End of Empire* (London, Weidenfeld & Nicolson, 2005); Caroline Elkins, *Britain’s Gulag: The Brutal End of Empire in Kenya* (London, Jonathan Cape, 2005); Fabian Klose, *Human Rights in the Shadow of Colonial Violence: The Wars of Independence in Kenya and Algeria* (Philadelphia, University of Pennsylvania Press, 2013); and Brian Drohan, *Brutality in an Age of Human Rights: Activism and Counterinsurgency at the End of the British Empire* (Ithaca, Cornell University Press, 2017).