

# BECHUANALAND PROTECTORATE.

No. 75 of 1934.

(Promulgated 4th January, 1935.)

## PROCLAMATION

By His Excellency the High Commissioner  
Entitled the Bechuanaland Protectorate Native Tribunals  
Proclamation.

Whereas under and by virtue of Article *two* of the Order-in-Council dated the ninth day of May 1891, the High Commissioner is empowered on His Majesty's behalf to exercise all powers and jurisdiction which Her late Majesty Queen Victoria at any time before or after the date of that Order had or might have within the territory of the Bechuanaland Protectorate, and to that end to take or cause to be taken all such measures and to do or cause to be done all such matters and things within the territory as are lawful and as in the interest of His Majesty's service he may think expedient.

And whereas under and by virtue of Article *four* of the aforesaid Order-in-Council the High Commissioner may from time to time provide by Proclamation for the administration of justice, the raising of revenue, and generally for the peace order and good government of all persons within the territory, and in the said Article it is directed that the High Commissioner in issuing such Proclamations shall respect any native laws or customs by which the civil relations of any Native Chiefs, tribes or populations under His Majesty's protection are now regulated, except so far as the same may be incompatible with the due exercise of His Majesty's power and jurisdiction.

And whereas by section *ten* of the Bechuanaland Protectorate Proclamation of the 10th June, 1891, provision was made for the appointment by the Resident Commissioner subject to the sanction and approval of the High Commissioner of Native Chiefs to exercise jurisdiction in matters concerning natives as defined by rules established by the Resident Commissioner with the approval of the High Commissioner.

And whereas it is expedient to define and regulate the powers and jurisdiction of Chiefs so appointed and to provide for the establishment, constitution, powers and jurisdiction of native tribunals and generally for the administration of justice within the Territory in cases in which natives only are concerned.

Now therefore under and by virtue of the powers in me vested I do hereby declare, proclaim and make known as follows:—

1. Section *eight* of the Proclamation of 10th June, 1891, and Proclamation No. 1 of 1919 are hereby repealed and, notwithstanding anything contained in section *ten* of the Proclamation of 10th June, 1891, any appointment therein authorized may be lawfully made with or without any prior request on the part of the Chief concerned.

2. In this Proclamation and in any regulations made thereunder unless inconsistent with the context

"Chief" shall mean the Chief over any tribal area who has been recognized in that capacity by the High Commissioner and who has been appointed under section *ten* of the Proclamation of 10th June, 1891, to exercise jurisdiction.

"district" shall mean any Magisterial District established as such by notice in the *Gazette*;

"Headman" shall mean any person who has been appointed as such by the Chief or Sub-chief of a tribe or area and who has been recognized by the Resident Commissioner as such for the purposes of this Proclamation.

"Kgotla" shall mean the customary meeting of a tribe or portion thereof in some duly recognized place for the discussion of matters of tribal concern in accordance with native custom;

"Law of the territory" shall mean the common law and statute law from time to time in force in the territory other than native law and custom.

"native" shall mean any aboriginal native belonging to any tribe of Africa, and shall include persons of mixed race living as members of any native community, tribe, kraal or location in the territory;

"Native law and custom" shall mean in relation to a particular tribe or in relation to any native community outside any tribal area the general law and custom of such tribe or community except so far as the same may be incompatible with the due exercise of His Majesty's power and jurisdiction or repugnant to morality, humanity or natural justice or injurious to the welfare of the natives;

"Native tribunal" or "tribal tribunal" shall mean a Native Court constituted under this Proclamation;

"Tribal area" shall mean any reserve defined in Proclamations No. 9 of 1899, No. 55 of 1903, No. 28 of 1909, No. 2 of 1911, No. 31 of 1933, No. 44 of 1933, or any other area which has been or may hereafter be defined by law as such reserve.

3. Any appointment made under section *ten* of the Proclamation of 10th June, 1891, may be withdrawn by the High Commissioner if he is satisfied that it is necessary in the interests of justice that the person so appointed should no longer continue to act in that capacity. When the appointment is vacant by reason of such withdrawal or during any time which may elapse between the occurrence of a vacancy in the Chieftainship of a tribe and the recognition by the High Commissioner of the successor of the former Chief, the Resident Commissioner may appoint some person other than a Chief to exercise, during such vacancy, jurisdiction in terms of section *ten* of the Proclamation of the 10th June, 1891.

4. A Sub-chief appointed under the provisions of section *eleven* of the Bechuanaland Protectorate Native Administration Proclamation, 1934, shall within the area for which he is appointed and for so long as he holds such appointment exercise jurisdiction for the purposes of this Proclamation.

5. Every Chief or Sub-chief who is unable at any time to act as a member of a native tribunal shall report the fact of his inability to the Magistrate of the district and shall designate to such Magistrate a suitable person who subject to confirmation by the Magistrate will act in his place as such member during such inability. In the case of a headman in similar circumstances the report shall be made to his Chief or Sub-chief.

6. Any Chief, Sub-chief or Headman who is satisfied on information received by him that any native within the limits of his authority has committed a crime or offence shall cause such native to be arrested and to be taken forthwith before the native tribunal having jurisdiction or before the Magistrate of the district as the case may be.

7. (1) In each tribal area there shall be one or more tribunals which shall be known as Senior Tribal Tribunals, the members of which shall be nominated by the Chief from amongst the members of the Tribal Council constituted under section *five* of the Bechuanaland Protectorate Native Administration Proclamation, 1934. Every such Tribunal shall be presided over by the Chief or his deputy duly authorized to act as such, or in any part of the Tribal area where the Chief has appointed a representative by such representative if and when the Chief is not present in person.

The Tribunal presided over by the Chief shall be styled the Chief's Tribunal.

The names of the persons constituting the Tribunal in each case dealt with by it shall be duly recorded.

(2) Junior Native tribunals shall be constituted wherever in the opinion of the Chief or of the Resident Magistrate after consultation with the Chief such tribunals are necessary and for this purpose the Senior tribal tribunal of the area concerned shall appoint a headman to preside over each such Junior Native Tribunal and such Headman shall be responsible for nominating persons to act with him on such tribunal for the trial of cases. The names of the persons constituting the tribunal in each case dealt with by it shall be duly recorded.

(3) In the case of natives living outside tribal area junior native tribunals shall be appointed by the Magistrate where such appointment may seem to him to be required in the interests of justice after consultation as far as may be possible with the natives concerned. The Sub-Chief or Headman shall preside over each such tribunal.

(4) In the absence of a Chief, Sub-Chief, or Headman or of the person appointed under section *five* to act in his place, the member of the tribunal who is next senior in accordance with native law and custom shall preside.

(5) It shall be lawful for members of a tribunal to be paid out of any tribal fund which may have been or may hereafter be constituted by their tribe a fixed annual salary at such rates and under such conditions as may be determined by the Chief in Kgotla with the approval of the Resident Commissioner.

8. (1) Subject to the provisions of this Proclamation every senior tribal tribunal shall have and may exercise jurisdiction both of a civil and criminal nature over natives residing within its tribal area in all matters where such natives only are concerned, but the jurisdiction of any native tribunal shall not extend to the trial of natives accused of—

(a) treason; (b) sedition; (c) murder or attempted murder; (d) culpable homicide; (e) rape or attempted rape; (f) assault with intent to do grievous bodily harm; (g) offences relating to the currency; (h) perjury; (i) conspiring against or subverting or attempting to subvert the authority of any Chief or Sub-Chief; (j) offences constituted by any statute in force in the territory, unless in such statute it is otherwise provided.

The High Commissioner may from time to time by notice in the *Gazette* add to or withdraw from this sub-section any crime or offence to which the jurisdiction of any native tribunal shall not extend.

(2) The jurisdiction of native tribunals shall not extend to the hearing or determining of (a) any cause or proceeding whereby in the case of persons married under the law of the territory divorce is sought or a declaration of nullity of marriage or an order for judicial separation; or (b) any cause or proceeding arising in connection with a testamentary disposition of property or the distribution of the estate of a deceased person to which the law of the territory applies or arising under the law relating to insolvency or involving matters or relationships between the parties to which native law and custom are inapplicable.

(3) Every junior native tribunal shall have such jurisdiction over such portion of the tribal area as shall be indicated to it by the senior tribal tribunal for that tribal area or in the case of a junior native tribunal outside a tribal area by the Magistrate of the district.

(4) Every native tribunal shall exercise its jurisdiction in accordance with native law and custom.

(5) It shall be an offence for any person other than a native as defined by this Proclamation to take or attempt to take any case to a native tribunal.

9. Any member of a native tribunal who is certified by the Magistrate as being in his opinion unfit to act as a member of the tribunal by reason of his having been convicted of any crime or offence or for other reasons shall cease to be a member of the tribunal provided that such certificate shall only be given by the Magistrate after consultation with the Chief and tribe in Kgotla and after an opportunity has been afforded to the person concerned to show cause why it should not be given, and provided further that it shall be competent for the Resident Commissioner at any time to specify a period upon the termination of which the person concerned shall again be eligible to serve as a member of a native tribunal.

10. Every native tribunal which shall be satisfied on information received that any stolen property is within the area of its jurisdiction, such property having been introduced into such area from without or being the property of a person other than a native shall cause such property to be seized and detained pending the order of a Magistrate or of any native tribunal having jurisdiction in the matter and shall forthwith report such seizure to the Magistrate of the district.

11. (1) A native tribunal may summon before it for the purpose of giving evidence in any case any native within its jurisdiction. If such native be in employment, due notice of such summons shall be given to the employer. Should any such employer without just cause prevent or refuse to allow such native to obey such summons he shall be guilty of an offence.

(2) If any native who is required to attend before a native tribunal as a witness in any case be resident outside the jurisdiction of the tribunal or be in the employment of the Government the tribunal shall apply to the Magistrate of the district who may thereupon issue an order upon such native to attend before the tribunal. The Magistrate may, in his discretion, impose as a condition to the order, that the tribunal shall deposit such sum with the Magistrate for the witnesses' expenses as he may think just and reasonable.

In regard to the service of such order and in the case of any native who fails or refuses to comply therewith the same proceedings may be taken as would be applicable if the case in question were being heard before a Court of Resident Magistrate.

12. (1) A native tribunal hearing any case of an offence against native law and custom may if the person is adjudged to be guilty of the offence impose such punishment as may be allowed by native law and custom subject to the conditions and exceptions contained in this section.

(2) No punishment shall be imposed involving—

(a) death; (b) serious physical injury; (c) corporal punishment of women; (d) corporal punishment of any male person otherwise than under the conditions herein prescribed; (e) damage to or destruction of property; (f) banishment of a member of the tribe from the tribal area except with the approval of the High Commissioner; (g) forcible removal from any lands or residence of a person in lawful occupation thereof except with the approval of the Resident Commissioner; (h) deprivation of property otherwise than by fine lawfully imposed.

(3) Where a sentence of corporal punishment is imposed by a junior native tribunal it shall be reported before being carried into effect to the senior tribal tribunal for the area which may confirm, reduce, or vary the sentence.

(4) Any sentence of corporal punishment imposed, confirmed, reduced or varied by a senior tribal tribunal shall before being carried into effect be reported to the Magistrate of the district in accordance with the provisions of sub-section (2) of section *thirteen* of this Proclamation and shall only be carried out subject to such conditions and under such supervision as are prescribed in the case of a similar sentence imposed under the law of the Territory, or may be prescribed by regulation made by the High Commissioner. No person shall be sentenced by a junior native tribunal to corporal punishment exceeding four strokes or by a senior tribal tribunal to corporal punishment exceeding ten strokes in number.

13. (1) A native tribunal in the case of any person who may be adjudged by it to have committed any wrongful act may, in addition to or in place of any other punishment, direct that there shall be paid by such person to any person who has suffered injury or loss by reason of such wrongful act such amount whether in money or kind by way of compensation as may appear to it to be just.

(2) Where any native shall be sentenced to imprisonment with or without hard labour for a period exceeding two months, or where a fine is imposed or payment of compensation is ordered the combined amount or value of which is in excess of the amount or value of ten pounds, or where a native is sentenced to receive corporal punishment, the case with any remarks the tribunal may desire to append shall be reported to the Magistrate of the district who may confirm alter or reverse the conviction or confirm reduce or vary the sentence and whose decision shall be final. The Magistrate shall have the right to call for evidence.

Provided that nothing in this sub-section shall be construed as limiting any right of appeal conferred by section *twenty-one*.

14. Where any fine is imposed under this Proclamation by a native tribunal it shall be paid and dealt with in accordance with native law and custom; provided, however, that it shall be lawful for the tribunal to pay into any tribal fund which may have been or may hereafter be constituted such portion of any fine as may not be required for the satisfaction of any reasonable claims under native law and custom, and provided further that the records of each case shall include a detailed statement as to the disposal of the fine.

15. (1) Where under any sentence imposed by a native tribunal a native has become liable to serve a term of imprisonment the tribunal shall cause him to be brought before the Magistrate of the district who shall, if he is satisfied as to such liability, issue a warrant for the detention of the native in any gaol of the territory or for his detention for compulsory labour upon any work for the benefit of the tribe under the supervision and control of the Chief or Sub-Chief and on such conditions as the Magistrate may prescribe or as may be prescribed generally by regulation by the Resident Commissioner. The period of detention shall in each case be specified in the warrant.

(2) The Magistrate of the district shall by periodical inspection in the case of all persons committed for compulsory labour under the supervision of a Chief or Sub-Chief satisfy himself that the conditions of such a committal are being complied with and that the period of detention in every case does not exceed that specified in the warrant.

16. Every native tribunal shall, unless specially exempted by the Resident Commissioner, cause to be recorded in a form prescribed by the Resident Commissioner particulars of every case heard before it including the names of the parties to every such case or of the person accused in the case of any crime or offence, the nature of the dispute or of the crime or offence, the judgment of the tribunal and the amount of compensation, if any, in money or in kind, to be paid to any party and the amount of the fine or punishment imposed on any person adjudged guilty of an offence. Such records of senior tribunals shall be inspected by the Magistrate of the district at least once in every three months and such records of junior tribunals shall be inspected in such manner and so often as the Resident Commissioner may prescribe.

17. If it shall appear to a senior tribal tribunal that any case coming before it would from its nature or magnitude be more appropriately heard or tried by a Magistrate, the tribunal shall apply to the Magistrate of the district for leave to remove the case to his Court. The Magistrate shall thereupon, if the case is of a civil nature, proceed to hear and determine it, and if it appear that any crime or offence has been committed he shall take such steps as may appear to him to be necessary for the due prosecution thereof. Any case in which a person other than a native is a necessary witness shall be dealt with under this section.

18. (1) Notwithstanding anything contained in this Proclamation any native who is a party to a dispute which would in accordance with this Proclamation be heard and determined by a native tribunal who has reason to believe that the matter cannot be equitably adjudicated upon by the tribunal by which it would ordinarily be heard or that by reason of neglect or want of due diligence the adjudication of such tribunal is being unreasonably delayed or that the tribunal has unreasonably refused to hear and adjudicate upon such matter may in the case of a junior native tribunal report the matter to the senior tribal tribunal having jurisdiction and make application to that tribunal to hear and determine the matter.

(2) Where the tribunal concerned is a senior tribal tribunal or where in a case to which sub-section (1) applies the native concerned has reason to believe that the circumstances mentioned in sub-section (1) exist in the case of the senior tribal tribunal concerned he may make application to the Magistrate of the district to hear and determine the matter.

(3) The Magistrate to whom an application is made under sub-section (2) shall inform the senior tribal tribunal concerned that such application has been made and afford it an opportunity of showing cause why he should not grant the application. If the Magistrate is satisfied that the application should be granted he shall proceed to hear and determine the matter or otherwise deal with it as the interests of justice may require.

19. (1) Notwithstanding anything contained in this Proclamation a Court of Resident Magistrate shall have jurisdiction to hear and determine any case whether of a civil or a criminal nature where natives only are concerned if the Magistrate shall be of opinion, and shall certify accordingly, that it is necessary in the interests of peace, or for the due prevention or punishment of violence in respect of persons or property that the Court should assume such jurisdiction. Any judgment pronounced in any such case or in any case heard by the Magistrate under section *eighteen* shall be subject to the same provisions in respect of review or appeal as if it had been pronounced in the exercise of the ordinary jurisdiction of the Court.

(2) A certificate in terms of sub-section (1) signed by the Magistrate and included in the record of the case shall be sufficient ground for the assumption by the Court of jurisdiction under this section.

20. In the hearing and determination of any case by a Court of Resident Magistrate under section *eighteen* or *nineteen* the decision shall be in accordance with native law and custom but if such law or custom is not clearly proved or would, in the opinion of the Court, be incompatible with peace, order and good government or inapplicable to the matter before the Court the Court may determine the matter in accordance with the law of the Territory.

21. (1) Any native who is aggrieved by the decision of any native tribunal may, on giving such notice as is hereinafter prescribed, appeal from the decision of a junior native tribunal to the senior tribal tribunal having jurisdiction and from a decision of the senior tribal tribunal to the Court of Resident Magistrate, who shall have the right to call for evidence. The native tribunal against whose judgment the appeal is lodged shall have the right and may be required by the Magistrate to furnish reasons for its judgment. An appeal shall lie from the Court of Resident Magistrate to the Special Court only in cases where the amount of the judgment exceeds One hundred pounds or where the combined value of the fine and compensation exceeds Fifty pounds or where sentence of imprisonment for a period exceeding six months or of corporal punishment exceeding five strokes has been imposed.

Provided that the Special Court when in Session, and the President of the Special Court sitting in Chambers when the Court is not in Session, shall have power and jurisdiction to grant special leave to appeal against any judgment or order given by any Court of Resident Magistrate under this Proclamation, and if special leave be so granted the Special Court shall have power and jurisdiction to affirm set aside or vary any such judgment or order or to give such other directions as it may deem fit and proper. Each application for the grant of special leave to appeal shall be made through a Resident Magistrate who, in transmitting the application to the Registrar of the Special Court, shall state in writing whether or not there are in his opinion reasonable grounds for the application, and shall annex a copy of the record of the proceedings, and of his judgment with his reasons therefor. Each application shall be accompanied by a deposit of such sum not exceeding five pounds as the Resident Magistrate shall in his discretion determine, unless the Resident Magistrate upon application made to him shall have certified in writing that the applicant is unable to pay such deposit and that in his opinion there are reasonable grounds for an application for special leave to appeal. If any application for such special leave to appeal shall be refused, and if in the opinion of the Court or President such application was unreasonable and of a frivolous nature, the Court or President may order the forfeiture of the deposit; in the absence of such order the sum deposited shall be returned to the applicant.

(2) In the case of a sentence of corporal punishment notice of appeal shall be given within forty-eight hours after the sentence has been pronounced and the person sentenced to corporal punishment shall be informed at the time of the pronouncing of the sentence that he has forty-eight hours within which to give such notice of appeal. In the case of any other appeal notice shall be given within fourteen days after the judgment or sentence has been pronounced or within such longer period not exceeding two months as the Court to which the appeal is to be made shall allow.

(3) In the trial of any particular case or the hearing of any appeal under this Proclamation any Court of Resident Magistrate or the Special Court, as the case may be, may call to its assistance any number of assessors who shall be chosen by the Resident Commissioner from councillors or headmen or other natives suitably qualified to aid the Court. The assessors shall give their opinions and such opinions shall be considered by the Court and may be recorded in writing and form part of the proceedings but shall not be binding upon the Court. It shall be competent for any Chief or Sub-Chief to furnish to the Resident Commissioner from time to time a list of the names of any councillors or headmen or other natives who in his opinion are qualified by reason of their knowledge of native law and custom to act as assessors.

22. No member of any native tribunal shall adjudicate upon any matter, case or thing in which he has a pecuniary or personal interest.

23. Any member of a native tribunal who accepts or attempts to obtain from any person for himself or for any other person any reward other than by way of recognised remuneration or any bribe for doing or for forbearing from doing any act which as a member of such tribunal it was his duty to do, shall be guilty of an offence and on conviction before a Court of Resident Magistrate shall be liable to a fine not exceeding fifty pounds or in default of payment to imprisonment with or without hard labour for a period not exceeding twelve months and shall be ineligible to serve on any native tribunal for such period as may be prescribed by the Resident Commissioner.

24. Any person who shall without lawful authority exercise or attempt to exercise judicial powers under this Proclamation or who without lawful authority shall sit as a member of a native tribunal shall be guilty of an offence and on conviction by a Court of Resident Magistrate shall be liable to a fine not exceeding twenty-five pounds or in default to imprisonment with or without hard labour for a period not exceeding six months; provided that nothing contained in this section shall apply to members of a tribe or sub-tribe who in accordance with native law and custom shall attend the proceedings before a native tribunal and assist such tribunal in any civil or criminal case.

25. Any person who with intent to defeat, obstruct, or pervert the course of justice in any case before a native tribunal shall cause counsel or procure any native to delay or give or refrain from giving evidence before such tribunal shall be guilty of an offence and on conviction by a Court of Resident Magistrate shall be liable to a fine not exceeding twenty-five pounds or its equivalent in kind or in default of payment to imprisonment with or without hard labour for a period not exceeding six months.

26. Any native who after having received a summons lawfully issued by a native tribunal having jurisdiction over him fails without reasonable excuse to obey such summons may be arrested by the order of such tribunal and be brought before it and on conviction shall be liable to a fine not exceeding five pounds or its equivalent in kind or in default of payment to such other punishment as may be lawfully imposed under native law and custom.

27. Any native subject to the jurisdiction of a native tribunal who shall disobey any lawful order of such tribunal, or who when such tribunal is administering justice shall (a) refuse to answer any question lawfully asked by such tribunal, (b) refuse to sign or attest any statement lawfully required by such tribunal, (c) intentionally insult the tribunal or any member thereof, (d) intentionally obstruct the proceedings of such tribunal at any stage, shall be guilty of an offence and may be summarily sentenced to a fine not exceeding five pounds or its equivalent in kind or in default of payment to such other punishment as may be lawfully imposed under native law and custom.

28. Any person contravening or failing to comply with or being guilty of an offence against any of the provisions of this Proclamation or of any regulations made thereunder for which no penalty is specially provided shall be liable on conviction by a Court of Resident Magistrate to a fine not exceeding fifty pounds or in default of payment to imprisonment with or without hard labour for a period not exceeding six months.

29. Notwithstanding anything contained in any other law no legal practitioner shall appear or act for any party before a native tribunal or without the special leave of the Resident Commissioner in any case tried in accordance with native law and custom before a Court of Resident Magistrate.

30. The provisions of Proclamation No. 2 of 1896 and the Bechuanaland Protectorate Criminal Procedure and Evidence Proclamation 1933 (No. 20 of 1933) shall not have any application to the proceedings of any native tribunal or to appeals therefrom or review of the proceedings thereof to or by a Magistrate.

31. The Resident Commissioner with the approval of the High Commissioner may by Notice in the *Gazette* make, amend or cancel any rules for regulating the conduct and procedure in native tribunals and generally for effecting the purposes of this Proclamation.

32. This Proclamation may be cited as the Bechuanaland Protectorate Native Tribunals Proclamation, 1934, and shall have force and take effect from the date of its publication in the *Gazette*.

GOD SAVE THE KING.

Given under my Hand and Seal at Capetown this Twenty-eighth day of December, One thousand Nine hundred and Thirty-four.

H. J. STANLEY,  
High Commissioner.

By Command of His Excellency  
the High Commissioner.

E. COHEN,  
for Administrative Secretary.