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# Democratic statecraft versus political legitimacy: The case of Botswana

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## Abstract

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In Africa, Botswana is widely regarded as a frontrunner in democratic politics. But the local political system has been wanting in some aspects. If political legitimacy may be high in “the land of Tswanas”, in many respects political leaders have denied Botswana’s citizens a freedom to shape their political future. To understand the failure of parliamentary institutions in Botswana, we propose to study what Carl Schmitt termed “political decisionism”. Decisionism continues to be relevant to our understanding of the functioning of sovereign state in a country where the political spectrum mainly rests on ethnic and religious affiliations around a strong leader whose legitimacy goes beyond parliamentary criteria.

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# Introduction

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The absence of political violence during elections and smooth transfer of power by the ruling elites in Botswana, in contrast to other African countries has resulted in Botswana being seen as 'the African miracle'. Botswana has enjoyed a stable liberal democracy since independence in 1966 and experienced three peaceful transitions. However, there are growing doubts as to whether Botswana is really the model of democracy (Maundani, 2005).

The First-Past-The-Post electoral system has fared poorly in this regard. It has produced a two-party system with one party dominating the poll. The effective two-party system has made it difficult for smaller political parties, let alone independent candidates, to develop a niche in the political environment. Yet another salient feature is the lack of internal democracy within political parties across the political plain (Mokopakgosi, 2000). The system promotes a predominant party system which undermines the much cherished idea of a multiparty democracy.

But regular free and fair elections do not in themselves mean democracy. Democracy is also about ensuring that electoral outcomes reflect the will of the people through effective parliamentary institutions. To fully understand the failure of parliamentary institutions in Botswana, we propose to study what Carl Schmitt termed "political decisionism". Decisionism seems to have withstood the test of time. Indeed it continues to be relevant to our understanding of the functioning of the sovereign state (Schmitt, 2005: xl) in a country where the political spectrum mainly rests on ethnic and religious affiliations around a strong leader whose legitimacy goes beyond parliamentary criteria.

## 1 - The constitutional frame of decisionism in Botswana

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Carl Schmitt was above all a German jurist and a professor of law before being a political theorist. For Schmitt, the State and the Political presuppose and are defined by conflict (1996: 19). They derive their definition from the friend/enemy distinction which is the specific criterion of the Political because it has the character of ultimate 'oppositions':

"Politics involves friends and enemies, the centrality of those who are with you and those against whom you struggle. Fighting and the possibility of death are necessary for there to be the political." (1996: 35)

Nevertheless, liberalism and capitalism have perverted both the State and the Political. Schmitt sees danger in liberalist democracies where politics rest on a set of mutually agreed procedures and rules. Because it wants to solve and erase conflicts, liberalism evades state and politics. War turns into competitions in the domain of economics and chiefs discussion in the intellectual realm. Discussion ends in a legal and complex frame of laws which strangles the Political. State and politics are then deprived of their specific meaning in order to secure liberty. Liberal society becomes a "huge industrial plant" (2005: 65) where bureaucracy can develop easily.

For Schmitt, such liberal societies can't cope with exceptional situations, *Ausnahmezustand* [state of emergency]. At unpredictable but necessary times "the power of real life breaks through the crust of a mechanism that has become torpid by repetition" (2005: 15). As a professor of law, Schmitt thinks that life can never be reduced or adequately understood by a set of rules, no matter how complex they are. To pretend one can have an ultimate "rule of law" is to set oneself up to be overtaken by events at some unpredictable but necessarily occurring time. Rule must be of men and not of law: *auctoritas non veritas facit legem* as Thomas Hobbes said.

Therefore, if “sovereign power and not truth makes laws”, every government capable of decisive action must include a dictatorial element within its constitution. This state of emergency must free the sovereign from any legal restraints to its power that would normally apply. However, Schmitt differentiates between “commissarial dictatorship” and “sovereign dictatorship”. The former defends the existing constitution and the latter seeks to create the conditions for a new one, given the collapse of the old (2005: xiv). The objective of Schmitt’s sovereignty is to “create a juridical order” (*Recht zu schaffen*) under conditions that threaten anarchy. The sovereign must decide both that a situation is exceptional and what to do about the exception in order to be able to create or recover a judicial order when the existing one is threatened by chaos (2005: xx). This is called decisionism. “Sovereign is he who decides on the exceptional case” (2005: 5). The Sovereign does not only define the “exception”: he is also revealed by and in it.

In *Die Diktatur*, Schmitt devotes the last chapter to Article 48 of the Weimar Constitution in order to consider the capacity of the German sovereign to “handle” this decisive/ definitive moment. In the case of Botswana’s constitution, we should see if its constitution offers an appropriate frame for decisionism.

According to the Constitution of Botswana, one can readily see that decisionism applies well to this country as well. Section 17, chapter II, refers to those situations “relating to emergencies”:

“The President may at any time, by Proclamation published in the Gazette, declare that a state of public emergency exists”<sup>1</sup> Such declaration can cease to have effect in the case of a Parliamentary declaration “at the expiration of a period of seven days”. In any other case, it should cease “at the expiration of a period of twenty one days”. Nonetheless, “a declaration approved by a resolution of the National Assembly (...) shall continue in force until the expiration of a period of six months” (Section 17, (3)).

Conversely, the Constitution does not indicate what constitutes an emergency. This is the assumption that underlay the vote of the Emergency Power Act (Ch.22: 4) (hereinafter referred to as EPA) in September 1966 (Nesereko, 2001). The Act empowers the President, whenever an emergency proclamation is in force, to make regulations ‘as appear to him to be necessary or expedient for securing the public safety, the defence of the Republic, the maintenance of public order and the suppression of mutiny, rebellion and riot, and for maintaining supplies and services essential to the life of the community’ (Section 3, EPA).

In that case, a state of emergency may still be declared even when there does not exist a situation that calls for remedial measures. This assertion is amply supported by the state of emergency that the President declared on 2 September 1999 (General Notice No. 336 of 1999). The only reason why the President made the declaration was to enable him to recall Parliament, which had been dissolved, to amend the Electoral Act to enable about 60,000 voters to be included on the electoral register for the then impending general election. According to the President, “the disenfranchisement of 60,000 voters was unacceptable ... and constituted an emergency situation”<sup>2</sup> (Mmegi: the Reporter, Sept 2-6, 1999). As in Schmitt’s decisionism, an emergency exists in Botswana only when the President says so (Nesereko: 317-318). Then Section 17 of Botswana’s constitution and the Emergency Powers Act seem to let the President act as a true Schmittian sovereign<sup>3</sup> (Section 48, Constitution of Botswana).

<sup>1</sup> Botswana’s constitution is taken from the Commonwealth Legal Information Institute, CommonLII:<http://www.commonlii.org/>

<sup>2</sup> See “Mogae declares state of emergency”, MMEGI: The Reporter (02-06 September 1999), p. 3. The President revoked the declaration he made on 2 September 1999, within less than 7 days after he had made it. See Revocation of the Declaration of Emergency Proclamation, 1999, General Notice 348 of 1999. On the same date he dissolved the parliament after it had passed the necessary amendments to the Electoral Act. See Dissolution of Parliament (No. 2) Proclamation 1999, General Notice No. 349 of 1999. Ref. from Neserko, pp. 318-319

<sup>3</sup> Botswana’s decisionism is also illustrated by Section 48 which gives the President “the supreme command of the armed forces of the Republic”. Section 48: “(1) The supreme command of the armed forces of the Republic shall vest in the President and he shall hold the office of Commander in Chief. (2) The powers conferred on the President (...) shall include— (a) the power to determine the operational use of the armed forces; (b) the power to appoint members of the armed forces, to make appointments on promotion to any office in the armed forces and to dismiss any member of the armed forces. (3) The President may (...) delegate to any member of the armed forces any of the powers mentioned in subsection (2) of this section. (4) Parliament may regulate the exercise of the powers conferred by or under this section.” Commonwealth Legal Information Institute,

An important presidential feature in the Botswana system of Government is the merger of the two executive functions of Head of State and Head of Government into office of the President. This is in contrast with the parliamentary system where the functions of Head of State, usually ceremonial in nature, are performed by a titular figure such as king or queen, while those of Head of Government are performed by a popularly elected politician called the Prime Minister. The other presidential feature in Botswana's system is the way the head of the Executive exercises his/her powers. As in the United States, the President of Botswana is the sole repository of executive power. Unlike his counterpart in Britain or Israel, he does not share that power with anybody, not even with the Cabinet (Part III, Constitution of Botswana).

Three points regarding emergency regulations are worth noting. The first is that the President is given power by way of making regulations to amend or alter existing laws passed by Parliament (Section 3 (2) (d), EPA). The second is that emergency regulations override the provisions of any enactment that may be inconsistent with them. This is so even when the President has not specifically amended or modified those provisions (Section 4, EPA). The third is that the regulations automatically lapse when the emergency proclamation under which they were made also ceases to have effect, unless they are sooner revoked (Section 5 (1) EPA) (Nesereko:320).

For this reason it can be said of Botswana, as did Bernard Tilleman and Andre Alen of the Belgian constitutional system, that: "It would in fact be more appropriate to talk about "division of powers" rather than "separation of powers". Separation of powers only implies that the Legislature, the Executive and Judiciary mainly exercise the tasks which are inherent in their principal function (Blanpain (ed.), 1992: 45).

## 2 - The sovereign as *Volksbewusstsein*

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What is all-important for Schmitt as regards the centrality of the exception for sovereignty is to restore, in a democratic age, the element of transcendence that had been there in the sixteenth and even seventeenth centuries.

"To the conception of God in the seventeenth and eighteenth centuries belongs the idea of his transcendence vis-à-vis the world, just as to that period's philosophy of state belongs the notion of the transcendence of the sovereign vis-à-vis the state." (2005: 48)

The consequence of Schmitt's notion of sovereignty is to try to resurrect in a secular age the qualities of transcendence political authority previously had.

Unfortunately, such transcendence has been lost in our liberal and democratic societies since the eighteenth century and the Enlightenment. "Liberal normativism" made transcendence no longer credible to most educated people in the nineteenth century. And a consequent atheism has begun to prevail since.

"the immanence philosophy (...) draws God into the world and permits law and the state to emanate from the immanence of the objective" (2005: 50).

The triumph of non-political, inhuman technologizing has been inevitable. Indeed, according to the German philosopher, we live in an "age of neutralization and depoliticization". The development of the theory of the state has displayed two characteristic moments: "the elimination of all theistic and transcendental conceptions and the formation of a new concept of legitimacy" (2005: 51). There is thus in Schmitt a challenge to those who would argue that politics in a democratic age can rest on discussion. Such a claim is for him the privilege of the bourgeois "discussing classes" as Tracy B. Strong notes (2005: xxv).

But Schmitt makes a proposal to solve this "onslaught against the political" (2005: 65).

First, political power should be understood on the model of God's creation (2005: xxvii). Power is to make something from that which is not something and thus is not subject to laid-down laws. All law is situational. If "the exception is that which cannot be subsumed", the sovereign's ability to decide "what must be done to eliminate" the exception must have transcendental characteristics. Then the monopoly of political decision-making should derive directly from theology.

"all significant concepts of the modern theory of the state are secularized theological concepts not only because of their historical development – (...) the omnipotent God became the omnipotent lawgiver – but also because of their systematic structure" (2005: 36).

Secondly, the "general will" should not be substituted for the human will of a sovereign (2005: 46). Unlike Rousseau, Schmitt does not believe in the myth of the creative power of the democratically equal populace.

"(...) the necessity by which the people always will what is right is not identical with the rightness that emanated from the commands of the personal sovereign" (2005: 48).

The French revolution was the historically concrete manifestation of this revolutionary fantasy which ended in the Napoleonic era, that is to say in a mere political dictatorship. The democratic notion of legitimacy should not have "replaced the monarchical" (2005: 51). Because "the rationalism of the Enlightenment rejected the exception in every form" (2005: 37), liberal democracies have failed since then to understand and to handle exceptional situations.

Thirdly, Schmitt is, in political matters, a realist as T. B. Strong observed (2005: xxvii). He accepts that legitimacy must be democratic. In fact, Schmitt continues the line of thought initiated by Carl Von Savigny for whom civil law acquired its character from the *Volkbewusstsein* – the common consciousness of the people – and was thus the product of the particular historically given qualities that a people might have. For Savigny, the sovereign or legislator was the expresser of the *Volksbewusstsein* (2005: xxvii).

"the world architect is simultaneously the creator and the legislator, which means the legitimizing authority" (2005: 48).

As a commentator of the Weimar Constitution, Schmitt clearly supported that a presidential election should be decided on the votes of the citizens and not confined to the party that wins the majority of seats in parliament. Indeed, the *Reichspräsident* was directly elected under universal adult suffrage for a seven year term<sup>1</sup>. Therefore, for Schmitt a strong dictatorship could embody the will of the people more effectively than any legislative body, as it can be decisive, whereas parliaments inevitably involve discussion and compromise. In brief, Schmitt promotes no less than a monarchical democracy.

However, in Botswana, under section 32 and 35 of the Constitution, the president is not directly elected by the citizens, but comes from the ruling party. Nevertheless, if Botswana's President lacks legitimacy according to Schmitt's decisionism because he is not popularly elected by the masses (Hansard, 1997), he is more powerful in the National Assembly which is supposed to be the people's representatives. He has the power to dissolve the parliament (Section 90<sup>(2)</sup>). Bills passed by the parliament cannot become law without his consent and his cabinet is part of the National Assembly enabling them to interfere unduly and influence the house (Section 87).

The *Volkbewusstsein* is not just a theoretical concept in Botswana. Since 1966, Botswana has had four different Presidents of the Republic. As an apparent implementation of Schmitt's political ideas, monarchy, theology and power have been linked in Botswana's politics. Originally, the first President of Botswana, Seretse Khama (1921-1980), was the son of Sekgoma Khama II, the paramount chief of the Bamanagwato people (the leading ethnic group in Botswana<sup>2</sup>), and the grandson of Khama III, their King. Seretse became *kgosi* (King) at the age of four. Removed from his chieftainship in 1951 for his inter-racial marriage, he was exiled. He finally returned to Botswana (then called Bechuanaland) in 1956 as a private citizen. Step by step, he leapt back onto the political scene: firstly he founded the nationalist Bechuanaland Democratic Party (1962).

<sup>1</sup> Article 41 to 59 of the Weimar Constitution (Section 3: the President and the Reich). See the official web site (in German): <http://www.lwl.org/westfaelische-geschichte/que/normal/que843.pdf>

<sup>2</sup> See the memorandum addressed to the Resident Commissioner dated 30 December 1965, copy available in National Archives as part of the documentation for the Bechuanaland Independence Conference, 1966.

He became Prime Minister in 1965. In 1966, the constitution he had supervised granted him the Presidency of Botswana<sup>1</sup>.

From then on, all Botswana's Presidents seem to have respected this legacy as they all came from the leading party, the BDP. Furthermore, it seems that they all anticipated the coming of Seretse Khama's son Ian Khama to power. Indeed, the second President, Quett Masire, stepped down and was replaced by the then Vice-President. And the third President, the current one, Festus Mogae, has decided to step down in 2008 in order to let current Vice-President Seretse Ian Khama (born in 1953), to become President of Botswana like his father. From the first to the fourth President, Botswana has been ruled by one party at the top of which there is one royal family: the Khamas.

Therefore, Presidential election in Botswana appears to be just a plebiscite. Section 35 of the Constitution avers that the vice president shall assume office with immediate effect when the incumbent resigns dies or ceases to hold office for any other reason. This provision allows for the automatic succession of the vice-president to the presidency. The practice in Botswana is that the incumbent leaves office a year before his term ends in order to let the vice-president rule (Onkemetse O T, 1994). Indeed, since independence, in Botswana, the President is always the last Vice-President (see table below).

Political Party	Date	President	Date	Vice-President
BDP	From 1966 to 1980 (+)	Sir Seretse Khama	From 1966 to 1980	Dr. Quett Masire
BDP	From 1980 to 1998 re-elected in 1994)	Dr. Quett Masire Joni Masire	From 1980 to 1983 (+) From 1983 to 1992 From 1992 to 1998	Lenyeletse Seretse Peter Mmusi (resigned) Festus Mogae
BDP	From 1998 to 2008	Festus Gontebanye Mogae (re-elected in 2004)	From 1998 to 2008	Ian Khama (son of Seretse K.)
BDP	From 2008 to 20??	Seretse Ian Khama	From 2008 to 20??	??

Elections legitimize the positions of those in possession of power (Kabwegyere, 2000:91). The president is not chosen by the people but by the legislature and the election process of the president in Botswana, therefore, may be considered undemocratic. The choice of the vice president is predetermined before the election within the party lines. The country thus is ruled by unelected persons (Mmegi, Feb. 2008).

Finally, Botswana's decisionism seems to be strengthened by the particular local bicameral system which favors traditional tribal leaders, i.e. local *Volkbewusstsein*.

The Parliament is composed of a National Assembly and a "House of Chiefs". According to Section 58 of the Constitution, the National Assembly has 57 elected members, four specially elected members and the Attorney General. The President is, ex-officio, a member of the National Assembly, and is entitled to speak and to vote in all proceedings of the National Assembly (Section 58). Such a situation is particular since one can hardly imagine that an opposing MP could vote differently from the President.

<sup>1</sup> According to Section 31 of Botswana's constitution: "(1) The first President shall be the person who immediately before 30th September, 1966 holds the office of Prime Minister under the Constitution. (2) The first President shall be deemed to have assumed office at the coming into operation of this Constitution. »  
Commonwealth Legal Information Institute, CommonLII: <http://www.commonlii.org/>

The House of Chiefs has 15 members. While seven members are subject to periodic election, eight are ex-officio members (section 77) due to their position of tribal leaders<sup>1</sup> (Section 78). The House is the successor to the pre-independence Native Advisory Council<sup>2</sup>. It is purely advisory to the National Assembly and to the Executive in matters that directly concern the chiefs, their respective tribes and their administration. It is designed to serve as a forum for heads representing recognised chiefdoms that have historically existed and held territory in Botswana in “their own right”. It is also a means of preserving the cherished institution of chiefs, which is hereditary in character (Nesereko, 2000: 152).

## Conclusion

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We can see, therefore, that Schmitt’s decisionism is obviously applicable to Botswana’s politics. While political decisionism may often lead to violent conflicts, the concept is not inherently evil when applied to Botswana. Nevertheless, even if democratic procedures have not been flaunted in Botswana, in a situation where one political party dominates both the executive and the legislative branches of government, there is cause for concern (Molomo, 2000).

The situation in Botswana may appear paradoxical. Botswana has transformed itself from one of the poorest countries in the world to a middle-income country with a per capita GDP a little inferior to that of South Africa (11,400 USD Vs. 13,300 USD). It has earned the highest sovereign credit rating in Africa and has stockpiled handsome foreign exchange reserves. Nevertheless, what has been a tremendous economical success since independence in 1966 (its economic growth averaged over 9% per year from 1966 to 1999, the highest growth rate on earth) has been accompanied by a gigantic contradiction in the health field.

Botswana is among the countries hardest hit by AIDS. In 2005 there were an estimated 270,000 people living with HIV in a country with a total population below two million. It gives Botswana an adult HIV prevalence rate of 24.1%, the second highest in the world after Swaziland<sup>3</sup>. As a consequence, life expectancy at birth fell from 65 years in 1990-1995 to less than 40 years in 2000-2005, a figure about 28 years lower than it would have been without AIDS<sup>4</sup>.

If decisionism has had much explanatory potential as regards Botswana until now, it seems that local political leaders must handle this major issue if they want to keep alive the “African miracle”. As the Member of Parliament for Gaborone South, Mr. Magama, said, some of Botswana’s democratic institutions and practices have become anachronistic and are in urgent need of reform (The Botswana Gazette, 2008).

<sup>1</sup> They “shall be such persons as are for the time being performing the functions of the office of Chief in respect of the Bakgatla, Bakwena, Bamalete, Bamangwato, Bangwaketse, Barolong, Batawana and Batlokwa tribes, respectively” (Section 78).

<sup>2</sup> Until the onset of British colonisation Botswana did not exist as a single nation. Up until the 19th century the peoples who make up Botswana today lived alongside each other as independent entities. Most of them had chiefs, dikgosi, ruling over them, while others were acephalous. In administering the Protectorate the British left the day-to-day administration of the Protectorate to the chiefs. Thus, it was the chiefs who maintained law and order in their respective areas of jurisdiction and collected taxes on behalf of the administration. The British administration established in 1919 a ‘Native Advisory Council’, later renamed the ‘African Advisory Council’ to advise it on ‘native affairs’. In 1920, the administration set up a European Advisory Council to advise it on matters affecting white people in the Protectorate. These two councils worked side by side and sometimes at cross-purposes until 1950 when a joint body, the Joint Advisory Council, was established.

<sup>3</sup> An earlier UNAIDS estimate of 37.3% prevalence in Botswana is now thought to have been too high. See the UNAIDS / WHO 2006 Report on the global AIDS epidemic.

<sup>4</sup> “The Impact of AIDS”, United Nations, 2004.

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