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Women, Status, and Power

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I. Negotiation in Family Disputes in Botswana

Reproduction is central to any society. The arrangements surrounding pregnancy and birth have been subject to scrutiny in many cultures, which lawyers working in the western legal tradition have analyzed in terms of marriage. This concept has been used to structure accounts concerning the transmission of various forms of property and the varying nature of personal obligations. It has been used to provide a form of explanation for social order.

A. The Positivist Background

Problems associated with this form of structure are visible among the Kwena, who live in Botswana, Southern Africa and on whom this article is based.[1] This is because discussions on marriage have become associated with a particular type of legal analysis, one which upholds a rationalist image of law, associated with a series of empiricist presuppositions normally grouped under the label "positivism." Positivism as a jurisprudential term has come to stand for a wide variety of different forms of legal analysis and of institutional practice. As H.L.A. Hart has observed, positivism stands "for a baffling multitude of different sins."[2]

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1. This Article constitutes part of research which has been included in the author's Ph.D. thesis for London University, awarded in January 1988 (on file at *Cornell International Law Journal* offices).

2. H.L.A. Hart, *Positivism and the Separation of Law and Morals*, in ESSAYS IN JURISPRUDENCE AND PHILOSOPHY 51 (1983). For useful accounts of the plural constituents of the legal positivist paradigm, see N. SIMMONDS, THE DECLINE OF JURIDICIAL REASON, ch. 2 (1984); P. GOODRICH, LEGAL DISCOURSE, ch. 3 (1987). The relation of legal positivism to philosophical positivism has yet to find an adequate representation though, for two recent critical accounts, see R. MOLES, DEFINITION AND RULE IN JURISPRUDENCE, ch. 6 (1987) and D. GALBRAITH, A GENEALOGY OF LAW, ch. 5 (1988). The latter explicitly links the positivist paradigm not to sin but to an equally metaphysical fear:

These contemporary forms do however share certain superficial characteristics relating to a theory of sources of law. The label has commonly come to be associated with the identification of law as a system of norms tied to an established institutional framework,[3] one which is distinct from other social institutions and their norms.[4] Positivism also sees a world where the social order presupposes a hierarchy in which legal norms possess authority over other social norms.[5] It is an image

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> [T]he [positivist] paradigm enables us to think and speculate and act without having to deal with the moral aspects of that thought and action. It enables us to think and act and speculate without so much understanding that we would be paralysed by our own fear. It does this by distinguishing the "is" from the "ought" and alleging that the truth of the "is" may be separately revealed to us by means of the scientific method—experimentation, hypothesis. In the abstract, the "is" is distinct from the "ought" and therefore the scientist learns the doctrine that he can play with the "is" without being concerned with the moral results. This is of course a fiction. The method eliminates values psychologically, but not logically.

GALBRAITH, *supra* note 2, at 308.

3. D. MacCormick, *Law and Institutional Fact*, in AN INSTITUTIONAL THEORY OF LAW 49 (1986). A more linguistically orientated statement of the theory can be found in D. MacCormick & Z. Bankowski, *Speech Acts, Legal Institution, and Real Laws*, in THE LEGAL MIND (N. MacCormick & P. Birks eds. 1986). The principle of institutional genesis or source is there presented in terms of the composite of rules governing the issuing of specific norms. For a recent and greatly extended account of the institutional genealogy of law which critically incorporates the positivist borrowing of the civilian (Roman) concept of vitam instituere, see the work of P. LEGENDRE, LE DÉSIR POLITIQUE DE DIEU: ETUDE SUR LES MONTAGES DE L'ÉTAT ET DU DROIT 9-10, 43-46, *passim* (1988); L'EMPIRE DE LA VÉRITÉ 45, 129-30, 151-55 (1983).

4. H. KELSON, PURE THEORY OF LAW 1 (1970). The thesis of institutional distinctiveness gains its most interesting expression in H. Kelson, *The Function of a Constitution* in ESSAYS ON KELSON 109 (R. Tur & W. Twining eds. 1986). The constitution is depicted there as both a "natural reality," as instituted and effective, and also as the more familiar basic norm, the "transcendental logical condition of the judgments with which legal science describes law as an objectively valid order." *Id.* at 115. It is sufficient to observe in this context that the constitution is explicitly presented as foundational, both historically and logically. It is the first constitution, the law of laws of which in the end it is only possible to predicate belief. On the issue of distinctiveness, particularly in terms of "firstness," of bases or origin, see I. Stewart, *Kelson and Exegetical Tradition* in ESSAYS ON KELSON 123 (R. Tur & W. Twining eds. 1986); J. Derrida, *Préjugés* in FACULTÉ DE JUGER (1985). In Legendre's terminology, which derives from Derrida's, Kelsen can be viewed here as simply presenting another version of a traditional discourse of inauguration whereby scholasticism has always endeavored a legendary genealogy of Law (*Loi*): "this recourse to genealogy, that is to say to the family tree or order of ancestry and names—names of authors, names of texts, names of institutions—presents itself . . . as time or more specifically as the time of law. It is inaugural discourse." P. LEGENDRE EMPIRE DE LA VÉRITÉ (1983) (P. Goodrich trans.).

5. J. RAZ, THE AUTHORITY OF LAW (1979). Again, it is worth observing the correlation between the authority and the distinctiveness or identity of the legal institution in its positivistic definition. Raz presents a complex definition in terms of what he calls "the sources thesis." *Id.* at 47. On the one hand, law is law by virtue of its source, its point of origin, and "[a] law has a source if its content and existence can be determined without using moral arguments." *Id.* On the other hand, "the sources of a law are never a single act (of legislation, *etc.*) alone, but a whole range of facts of a variety of kinds." *Id.* at 48.

which embraces concepts such as autonomy and hierarchy[6] and which is oblivious to the structural inequalities that studies on gender have made apparent.[7] This Article analyzes how positivist concepts perpetuate an untenable methodologically and essentially authoritarian belief that law exists independently in society and that its norms, which are presented as the unique product of the legal sphere, dominate other normative systems present in any given society. Commentators derive this from limiting the study of law to the study of western institutions or to the internal dynamics of modern municipal legal systems.[8]

It is impossible to summarize the plethora of contemporary debates on the deconstruction[9] or reappropriation[10] of positivist conceptions of

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6. These characteristics have been associated with positivism and attacked by a number of scholars working in the field of legal pluralism, including J. COMAROFF & S. ROBERTS, RULES AND PROCESS: THE CULTURAL LOGIC OF DISPUTE IN AN AFRICAN CONTEXT (1981); F. SNYDER, CAPITALISM AND LEGAL CHANGE: AN AFRICAN TRANSFORMATION (1981); Abel, *A Comparative Theory of Dispute Institutions in Society*, 8 L. SOC. REV. 217 (1973); von Benda-Beckman, *Some Comments on the Problems of Comparing the Relationship Between Traditional and State Systems of Administration of Justice in Africa and Indonesia*, 19 J. OF LEGAL PLURALISM & UNOFFICIAL L. 165 (1981); Fitzpatrick, *Is It Simple To Be a Marxist in Legal Anthropology?*, MOD. L. REV. 472 (1985); Griffiths, *What Is Legal Pluralism?*, 26 J. OF LEGAL PLURALISM & UNOFFICIAL L. 1 (1986). Their views on positivism are also shared by those who work in the field of "Critical Legal Studies" in the United States, although those working in this field have diverse approaches to the alternative construction of law. For an account of the critical legal studies movement refer to R.M. UNGER, CRITICAL LEGAL STUDIES MOVEMENT (1986).

7. Such studies on the role of gender include edited works by C. FARNHAM, THE IMPACT OF FEMINIST RESEARCH IN THE ACADEMY (1987); M. ROSALDO & L. LAMPHERE, NATURE, CULTURE, AND GENDER (C. MacCormick & M. Strathern eds. 1980); WOMEN, CULTURE AND SOCIETY (1974); M. STRATHERN, DEALING WITH INEQUALITY: ANALYSING GENDER RELATIONS IN MELANESIA AND BEYOND (1987).

8. The defects of such an approach have been exposed in a seminal article by Galanter, *Justice in Many Rooms: Courts, Private Ordering and Indigenous Law*, 19 J. OF LEGAL PLURALISM & UNOFFICIAL L. 1 (1981).

9. Deconstruction is, in this context, best understood as a philological and historical examination of the object languages of knowledge, society and law. The argument developed in J. DERRIDA, DISSEMINATION 75-120 (1981), is one of consistently connecting speech to law, logos to nomos, through the mediation principle of the ancestry, filiation or paternity of the word. Deconstruction is in this sense a form of theoretical anthropology which endeavors to recount the limitations of western institutions and western tradition. *Id.* at 130-32. For translations of Derrida's work into legal theory, see, *e.g.*, Husson, *Expanding the Legal Vocabulary: The Challenge Posed by the Deconstruction and Defense of Law*, 95 YALE L.J. 969 (1986); Balkin, *Deconstructive Practice and Legal Theory*, 96 YALE L.J. 743 (1987); and the criticism of their approaches in Norris, *Law, Deconstruction and Resistance to Theory*, 15 J. OF L. & SOC'Y 166 (1981).

10. The strong vein of pessimism that has almost uniformly accompanied recent critical social anthropology has frequently implied a nostalgia for a lost dogmatic tradition and for a less rationalistic law. The hermeneutics which Derrida, for example, invokes against contemporary literalism carries with it considerable historical baggage in terms of levels and pluralities of meaning. Legendre concludes his most recent work, P. LEGENDRE, *supra* note 3, at 393-98, with the argument that contemporary legal institutions have reverted to a pre-scholastic literalism and have correlatively forgotten the symbolic value of dogmatics or what he terms the Poetics of Reference. The western juridical institution has abandoned the exchange of interpretations or arguments in favor of more terroristic forms of conquest in the name of reference, a perversion of law. More generally on pessimism, law, and the reap-

knowledge, society, and law. One can, however, clarify what is at stake in these debates—regardless of whether or not they potentially constitute a genuine paradigm shift. At the level of methodology or of more substantive claims concerning the distinctiveness of the concept of law, the positivism seeks to unify and universalize a specific and local legal tradition, one which may, according to Abel, be traced in more immediate terms "to John Austin's perceptions of, or prescriptions for, English Government in the nineteenth century."[11]

B. The Limits of Positivism

The critics of positivist legal doctrine have simply attempted to localize that tradition so that it may be recognized as a "parochial system of jurisprudence which had been designed for description and understanding within a particular institutional framework." For some, however, it has become so deeply embedded in the concept of law that in attempting to account for the maintenance of social order they have abandoned the concept of law in favor of the concept of dispute.[12]

Historically, the positivist tradition is theistic. It translates theological dogma into a secular jurisprudence and replaces the one God with Hobbes's Leviathan, the "mortal God." In cultural terms the dogmatic tradition centralizes legal power. This centralization of legal power under the auspices of the state which underpins positivist theories of law has come under attack. Griffiths, who coined the phrase "legal centralism" to describe this philosophy, states that the habit of describing all legal phenomena in relation to the state "is essentially arbitrary . . . the state has no more empirical claim to being the center of the universe of legal phenomena than any other element of the whole system does."[13] Griffiths's view is endorsed by Snyder, who accepts Griffiths's rejection of legal centralism and rejects "that law necessarily is the law of the state, is uniform and extensive and is administered by state institutions."[14] Another critic, Galanter, writing on access to justice in his seminal article on "Justice in Many Rooms: Courts, Private Ordering and Indigenous Law," shows how "several lines of social research on law" lead him to "submit that this legal centralist model is deficient."[15]

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propriation of tradition, see Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1 (1984); Stick, *Can Nihilism Be Pragmatic?*, 100 HARV. L. REV. 332 (1986).

11. Abel, *supra* note 6, at 222, 223.

12. Thus, Simon Roberts in his book, S. ROBERTS, ORDER AND DISPUTE: AN INTRODUCTION TO LEGAL ANTHROPOLOGY (1979), has a chapter entitled "Why Not Law?," and Abel commenting on the problems of law as an analytic concept particularly when framed in positivist terms has stated: "For the time being, at least, it seems clear that we must displace law from the centre of our conceptual focus [in favor of dispute] as we attempt to build social theory." Abel, *supra* note 6, at 224.

13. J. GRIFFITHS, THE LEGAL INTEGRATION OF MINORITY GROUPS SET IN THE CONTEXT OF LEGAL PLURALISM 48 (1979) (revised under the title WHAT IS LEGAL PLURALISM?).

14. Snyder, *Anthropology, Dispute Processes and Law: A Critical Introduction*, 8 BRIT. J. OF L. & SOC'Y 141, 155 (1981).

15. Galanter, *supra* note 8, at 2.

C. Positivism Imported to Botswana

A positivist concept of law came to Botswana in the form of an imported legal system.[16] One can easily discern the conceptual limitations of positivism, however, by examining the context in which it is subject to transformation and redefinition among the Kwena.[17] The positivist image of law is untenable among the Kwena. In their culture, they pursue strategies with regard to pregnancy and birth, but the negotiations required for marriage rarely come to fruition. Cultural norms are involved in this process and make their presence felt in the legal sphere. This displaces the emphasis that has been given to the superiority or uniqueness of "legal" norms and stresses the communality that exists between legal and social fields instead of upholding the divisions.

The formal legal system of Botswana sets up a dichotomy between "European" or "common" and "customary" law, in which the former appears to have superiority over the latter. When looked at in a Kwena context, however, this hierarchical division fades, and a more heterogeneous legal field emerges. In the Kwena world women are actively engaged in negotiations for support, compensation, or distribution of property, but they have less access to those resources which confer status and power. This makes them more vulnerable in their dealings with men.

These observations on law spring from a specific cultural context, but they raise broader issues concerning the conceptual structure of legal institutions and, in more general terms, the coherence of legal traditions. They come to the forefront and receive exposure because alternative forms of legal inquiry and methodology are employed as distinct from positivist terms of reference. Such forms are associated with a model of "law as process"[18] and with the pursuit of "legal pluralism."[19]

16. Prior to independence in 1966, Botswana was known as the Bechuanaland Protectorate. It derived its common law from the Roman-Dutch system operating in South Africa which had its roots in the Continental assimilation of Roman law at the time of its reception in Europe in the late medieval and early modern period. H.R. Hahlo & E. Kahn, *The Union of South Africa* in THE BRITISH COMMONWEALTH: THE DEVELOPMENT OF ITS LAWS AND CONSTITUTIONS (1960). While operative today, it exists along with other legal traditions such as the statutory criminal justice system which was derived from an English model as well as what is termed "Customary Law."

17. *See* Griffiths, Colonial Law and the Customary System in Botswana: Separation or Integration, Conference on Law and the Colonial Period in Africa, Stanford University, April 7-9, 1988 (to be published by Heinemann/Currey in a forthcoming volume on *Law in Colonial Africa*).

18. Nader, *An Analysis of Zapotec Law Cases*, 3 ETHOLOGY 404 (1964) proposed that in approaching the study of law more emphasis should be placed on legal processes and their relationship with the social context from which they derive. *See infra* note 26.

19. *See* Snyder, *Anthropology, Dispute Processes and Law: A Critical Introduction*, 18 BRIT. J. OF L. AND SOC'Y 141 (1981). Snyder states: "The view that any society or social group contains a plurality of legal orders or fragments of legal systems is well-known in jurisprudence and sociology of law." *Id.* at 155. However, while providing examples of three scholars who have elaborated different conceptual bases for the

Drawing on the discipline of social anthropology these forms of inquiry have embraced the study of disputes and social process and have engaged in the collection of empirical data.

As Moore commented on classifying legal systems, "the attention to social context is very much the anthropologist's approach."[20] In her opinion what is special about the anthropologist's view "lies in his tendency to see the legal system as part of a wider social milieu."[21] Unlike many lawyers, anthropologists tend to be more interested in structure, process, and general concepts than in the detailed exposition and analysis of substantive legal rules.[22] Such an approach led Moore to the conclusion that "to master the whole legal system of one society, procedural and substantive, one must master the whole institutional system of that society—from citizenship and political place to property and economic relations, from birth to death, and from dispute to peaceful transaction."[23]

Attempts at undertaking the project Moore suggests have varied and represented different theoretical approaches.[24] All, however, reject a legal positivist form of analysis and recognize the political and economic content of law, together with its dynamic, flexible, and plural character as revealed through the study of social processes. Much of the impetus for criticism came from work carried out by scholars within a different cultural milieu from their own, often in the "Third World."[25] They proceeded to build upon their study of foreign cultures in their re-examination their own legal traditions.[26]

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subject, he is forced to admit that "There is to date, no satisfactory theory of legal pluralism." *Id.* at 156. *See* Pospisil, *Legal Levels and Multiplicity of Legal Systems in Human Societies*, 1967 J. CONFLICT RESOLUTION 2 (1967). *See also* M.G. SMITH, SOME DEVELOPMENTS IN THE ANALYTICAL FRAMEWORK OF PLURALISM IN AFRICA (1969); Moore, *Law and Social Change: The Semi Autonomous Social Field as an Appropriate Subject of Study*, 7 L. & SOC. REV. 719 (1973), *reprinted in* S. MOORE, LAW AS PROCESS (1978).

20. S. MOORE, LAW AS PROCESS 215 (1978).

21. *Id.*

22. *See* Twining, *Law and Anthropology: Case Study in Interdisciplinary Collaboration*, 7 L. & SOC. REV. 561 (1973).

23. S. MOORE, *supra* note 19, at 215.

24. According to Snyder, Griffiths is concerned with elaborating a descriptive theory of legal pluralism within a positivist sociological framework while Fitzpatrick has sought to use Moore's notion of semi-autonomous social fields to develop a materialistic/structuralist conception of pluralism in underdeveloped countries. Snyder, *supra* note 14, at 156.

25. *See, e.g.*, Abel, *Customary Laws of Wrongs in Kenya: An Essay in Research Method*, 17 AM. J. COMP. L. 573; *see also* Moore, *Politics, Procedures and Norms in Changing Chagga Law*, 40 AFRICA 321 (1969); Nader, *supra* note 18.

26. *See* Abel, *Conservative Conflict and the Reproduction of Capitalism: The Role of Informal Justice*, 9 INT'L J. OF THE SOC'Y OF L. 245 (1981); *see also* MOORE, *supra* note 19, at 719. Nader has commented that "[i]n the United States, as well, there is a crisis that is challenging the position of law as defense, as protection, as orderly change. We hope there will come a time when the anthropological understanding of law in the United States is at least equivalent to our understanding of custom surrounding law among the peoples in this body, and that the barriers to implementing out knowledge will decrease." L. NADER & H. TODD, THE DISPUTING PROCESS—LAW IN TEN

Anthropologists have rejected positivist forms of analysis, culturally transposed, particularly in the African context where law has been identified within two distinct spheres which are recognized as the "European" or "colonial" sphere and the "indigenous" or "customary" sphere.[27] The law has been labelled in this way because of a cluster of characteristics which are said to come from different historical traditions and define them. The result is that the colonial sphere is identified in terms of the formal legal system, written rules, and a state-based or centralist perspective, and the customary sphere is identified in terms of informality, unwritten practices, and the interests of a locally based constituency.[28]

The labelling of African law has led to an assumption that the norms that operate in each sphere, stemming from different cultural considerations, are independent of one another.[29] Such a view underlies the belief that common law forums apply common law, representing a "European" profile, while customary law forums apply customary law, which through institution, setting, and values represents an "indigenous" or "traditional" profile. Following from this perspective is the assumption that where the norms associated with one system appear to operate in the other there has been co-option. This assumption underlies arguments that the colonial system has taken over and incorporated the customary system.[30]

To make such assumptions is dangerous, particularly as so much controversy has been generated at different levels as to the identification, classification, and characteristics of law.[31] There have been disagreements about the terms of debate ranging from disputes over classification[32] to the value of the construct itself.[33] The concept of "customary" law has been subject to criticism either for use as a "pure"

SOCIETIES xiv (1978); *see also* L. NADER, NO ACCESS TO LAW: ALTERNATIVES TO THE AMERICAN LEGAL SYSTEM (1980).

27. *See* A. ALLOTT & G. WOODMAN, PEOPLE'S LAW AND STATE LAW: THE BELLAGIO PAPERS (1985). In discussing legal pluralism in terms of these concepts, the editors associate customary law with "folk law," "people's law . . . unofficial law and indigenous law." *Id.* at 2.

28. *Id.* at 1. Allott and Woodman refer to "the world of customary laws—of the laws of peoples who use neither writing nor codified or recorded law, and who, in parallel, probably lack modern technologies and systems of government." *Id.* The editors having set up the opposition of "People's Law" and "State Law" go on to show how the Bellagio Papers call into question many of the assumptions on which such definitions are based and which have limited the scope of the study of law. *Id.* They recognize, for example, that by rejecting a definition of law based on western legal theory one may discover "unofficial law" within the state system as well as recognizing the role of state law in a "folk" system. *Id.*

29. Snyder, *supra* note 19, at 150 (referring to various writers who have taken this approach including anthropologists such as Bohannon who have based their work on the fundamental assumption that "customary law" is merely indigenous African law).

30. *See, e.g.*, Fitzpatrick, *Traditionalism and Traditional Law*, 28 J. OF AFRICAN L. 20 (1984) ("traditional law or customary law was a creation of the colonial period").

31. *See* Galanter, *supra* note 8. *See also* Griffiths, *supra* note 6.

32. An example is provided by the Gluckman/Bohannan debates in L. NADER, LAW, CULTURE AND SOCIETY (2d ed. 1969).

term of art[34] or for assertions that it is simpy the creation of a colonial power.[35] Some question the use and significance of labels, drawing attention to the fact that what may be termed the "customary" or informal system in fact reflects a high degree of hierarchy and formality,[36] in contrast with the so called "formal" or "colonial" system which relies on written rules but which one can only comprehend through a study of the informal mechanisms through which it operates.[37]

Research on the Kwena in Botswana on which this Article is based shares the critical perspective of those studies which undermine an interpretation of law based on the terms of legal positivism. When confined to the study of formal legal texts, such an interpretation can be imposed on Botswana, a legacy from its colonial past as a British protectorate.

II. The Botswana Legal System

A. Formal Legal System of Botswana

The national legal system of Botswana recognizes and incorporates both "customary" and "European" or "common" law. They are identified as separate spheres. Customary law is defined as being "in relation to any particular tribe or tribal community the customary law of that tribe or tribal community so far as it is not incompatible with the provision of any written law or contrary to morality, humanity or natural justice."[38] In contrast, common law is defined as "any law, whether written or unwritten, in force in Botswana, other than customary law."[39]

Not only are the spheres distinguished, but within the formal system there is a hierarchy of values and decision making bodies. Those associated with customary law find themselves situated at the bottom of this legal hierarchy. So, for example, in its very definition, if something which otherwise appears to be customary law is incompatible with written law or contrary to "morality, humanity or natural justice,"[40] it will not be defined or accepted as customary law. Decisions on what is or is not customary law are made by those within the common law system.

33. *See* S. ROBERTS, *supra* note 12, at 27. *See also* J. COMAROFF, BODY OF POWER, SPIRIT OF RESISTANCE: THE CULTURE AND HISTORY OF A SOUTH AFRICAN PEOPLE 3 (1985).

34. Fitzpatrick, *supra* note 30, at 22 (referring to revisionist scholarship shattering "the common idea of an essential traditional law directly incorporating a pre-colonial reality").

35. *See* Roberts, *Introduction: Some Notes on "African Customary Law,"* 29 J. OF AFRICAN L. 1, 4 (1985). Roberts, while recognizing the value of revisionist scholarship in revealing the extent and nature of colonial domination, nonetheless rejects an analysis of customary law in which domination provides "the total account." *Id.*

36. *See generally* R. ABEL, THE POLITICS OF INFORMAL JUSTICE (1982) (illustrating the danger of using terms such as formal and informal with the characteristics associated with them).

37. *See* Moore, *supra* note 19.

38. Customary Law (Application and Ascertainment) Act No. 51 (1969), at § 2.

39. *Id.*

40. *Id.*

Decisions made at the highest level within the customary system are subject to review by an array of officials with varying authority within the common law system. These include district commissioners, magistrates and high court judges,[41] all of whom are set above those in the customary system. In addition, certain serious offenses, such as treason, riot, murder, and rape are excluded from the jurisdiction of customary law[42] which reinforces the superiority of the "European" or "common" law system.

While the legal system does recognize that there is a relationship between the two systems, such recognition is limited. Officials in the customary system, for example, may apply common law in certain instances.[43] These instances, however, are clearly prescribed by the common law system through statute; in the handling of criminal law, they involve the handling of minor offenses.

B. The Hidden Strength of Customary Law

If an analysis of law in Botswana were to rest with the formal legal text, one would be left with an image of separate spheres of law occasionally interacting in prescribed circumstances. The two spheres of law would be unequally matched with "customary" or "indigenous" law finding itself subordinated to or even subsumed by the "European" or "common" law system.

Such an image distorts reality. The flaws become apparent when we look beyond the confines of the formal legal setting, as this Article does in taking account of social processes surrounding pregnancy negotiations. This Article focuses on two Tswana women, Teko and Nyana, and their claims as unmarried women for compensation for pregnancy. Comaroff and Roberts, distinguished scholars in the field of Southern African studies, illustrate the problems of describing law in terms of a code or rules, whether formal or customary.[44] They found that "Tswana dispute processes cannot be reduced to or explained by, formalist models or derivative logic."[45] In making this statement they expose the shortcomings of earlier research based on a positivist, or what they term a "rule-centered," approach. While recognizing the pioneering work of Issac Schapera, the doyen of Tswana studies,[46] they do criticize it for presenting too rigid and static an account of Tswana society, one which fails to "discuss dispute processes or the actions and motivations of living men."[47] Their alternative account is one which highlights the actor's perspective and presents a dynamic, highly com-

41. Leswape v. Leswape, High Court 1976.
42. Customary Courts Proclamation No. 19 (1961), at § 12.
43. *Id.*
44. J. COMAROFF & S. ROBERTS, RULES AND PROCESSES: THE CULTURAL LOGIC OF DISPUTE IN AN AFRICAN CONTEXT (1981).
45. *Id.* at 18.
46. J. COMAROFF, *supra* note 33, at xii.
47. J. COMAROFF & S. ROBERTS, *supra* note 44, at 18.

petitive universe, one which is open to negotiation, where the rules "sometimes contradicted one another" and "any conduct or relationship was potentially susceptible to competing normative constructions."[48] Research among the Kwena endorses this perspective and highlights the role that ordinary cultural norms play in a legal sphere.

The critical impetus of work within the traditions of legal pluralism or law as process and their methodologies is deconstructive. In substantive terms, the models associated with these forms are sensitive to the endlessly negotiated character of law. In more literary terms, the bland unity of doctrine is dissolved and displaced by a plural series of discourses present in every instance of legal exchange. In theoretical terms, emphasis is placed on the breakdown of a particular conception of legal order. The objectivity of legal procedures and the unity of normative systems are challenged. In the last instance, it could be argued, conceptions of unity and of system are pedagogic metaphors operating to map and to constrain our construction of legal institutions.

Any map has a point of projection; for the purposes of this Article that point will be moved geographically and conceptually from law to process, from marriage to procreation and from court to *kgotla*. It will do so in the context of women seeking compensation for pregnancy and support for children, highlighted by two disputes concerning Teko Mere and Nyana Segaethso, which provide typical examples of the issues and arguments that are at stake and which revolve around the concept of marriage.

To limit discussions to these two disputes would not be sufficient given the attempts to evaluate law as process by the critics of legal positivism. This requires the disputes to be placed within their social framework which is achieved by discussing them within the context of Mosotho *kgotla*, a social unit of Kwena life. The social and cultural environment is presented at length as it is not simply background information but an essential part of the Article, locating law within culture and dismantling the artificial boundaries that have been erected by those favoring the forms of analysis associated with legal positivism. In order to appreciate this framework, information will be presented on the Kwena as a group and on the structure of village life which is central to their existence.

C. Aspects of Kwena Culture: What Role Does the Law Play?

The Kwena are one of the dominant Tswana *merafe* (tribes) in Botswana.[49] They form part of the Sotho group of Bantu speaking peoples who populate the southern African continent. They are regarded as less politically dominant than their neighbors the Kgatla or Ngwato.[50]

48. *Id.*

49. Schapera, *Notes on the Early History of the Kwena*, 12 BOTSWANA NOTES & RECORDS 83 (1980).

50. *See generally* I. SCHAPERA & S. ROBERTS, RAMPEDI REVISITED: ANOTHER LOOK AT A KGATLA WARD (1975).

Today their tribal land is situated in the western part of the country known as Kweneng district. In 1981, the population of Kweneng accounted for one tenth of Botswana's population.[51] A large number of these people, approximately 20,000, are associated with households in their central village, Molepolole.[52] Traditionally they have depended on subsistence agriculture, cattle raising, hunting and gathering, and migrant labor in South Africa. The extent to which they can rely on any one of these activities has altered over time and is subject to continual shifts. Located on the edge of the Kalahari desert, Molepolole, the central village of the Kwena, functions as the administrative and political headquarters of the group. The population, which fluctuates due to seasonal considerations, migrant labor, and other factors, is organized through a series of interconnected social units which form part of a hierarchy over which the Chief's *kgotla* presides.

The organization of a Tswana village is well documented elsewhere[53] and will not be replicated here. The basic social unit of the village is the *kgotla*, which represents a group of huts centered together. This is the central meeting place where important administrative, political, ritual, and ceremonial events take place. It is presided over by the headman. The headman position is regarded as hereditary and passes from father to son. Above the *kgotla* is the subward which comprises a number of *kgotlas* grouped together and above that, the ward, which covers an even greater agglomeration of *kgotlas*.

In this way the whole village is brought under control. Molepolole has approximately seventy *kgotlas* at the lowest level of the customary system and five main wards. The headmen of the main wards are funded by the central government, but they do not possess the same formal powers as officals of the Chief's *kgotla*. The Chief's *kgotla* and ward is known as *Kgosing*. It is presided over by three officials who vary in authority from the Chief Regent to the Deputy Chief and down to the Senior Chief's Representative. They hold office on the basis of their relationship with the ruling Kwena family, and the appointments have been the source of some bitter political infighting.

In this system, Mosotho *kgotla*, on which the small group study was based, is close to the Chief's *kgotla*, both geographically and politically. It forms part of Basimane, a subward to the Chief's ward, *Kgosing*. Located on its current site since 1937 when the village moved from Ntsweng, it has grown from the original twelve households to eighteen households with another twelve affiliated households which have had to

51. Administrative/Technical Report, Populational and Housing Census, pt.1 1983, Ministry of Finance and Development Planning, Gaborne, Botswana at Table 1.

52. Summary Statistics on Small Areas (for settlements of 500 or more people), Population and Housing Census, pt.3, 1981, Ministry of Finance and Development Planning, Gaborne, Botswana at 7.

53. *See* A. KUPER, KALAHARI VILLAGE POLITICS (1970); S. ROBERTS, BOTSWANA: TSWANA FAMILY LAW (Restatement of African Law No. 5, 1972); I. SCHAPERA, A HANDBOOK OF TSWANA LAW AND CUSTOM (2d ed. 1955).

be built elsewhere in the village because of lack of space in the *kgotla*. The *kgotla* currently provides a focus for thirty households.

As with the Chieftanship, there have been political struggles between two families over the headmanship. While a majority of *kgotla* members recognize one man, Tshenolo, as the acting headman, another, Tshitoeng Mere, is the one who is formally recognized on paper by Tribal Administration in the Chief's *kgotla*. The families associated with the *kgotla* are all descendants from a common male ancestor—Mhiemang—and the fighting has been concerned with the degree of kinship involved.

III. Role of Marriage in Reproduction

In looking at law as process in the context of pregnancy disputes, it is necessary to grapple with the role that marriage plays within the society. Among the Tswana, the paradigm within which reproduction has been discussed in anthropological and legal literature is marriage. Schapera begins his account of Tswana family law by singling out marriage as the foundation of family life. He states that "[t]he family among the Tswana is founded upon marriage. A discussion of family law is therefore best introduced by an analysis of the conditions and forms of marriage."[54] He then proceeds to outline the rules that govern the situation, discussing at length the role of *bogadi* or bridewealth, betrothal and wedding ceremonies. The rationale for such an approach is based on the way in which marriage is perceived as a mechanism for the perpetuation of social cohesion through the transmission of property, recycling of resources, and structuring of personal obligations.

In Schapera's account, pregnancy is closely associated with marriage and those instances where pregnancy occurred outside marriage were regarded as an anomoly and deviant. He posits his analysis of the family, however, and of relationships which revolve around it, within a restricted framework. He draws on those situations that conform with his account of marriage. This framework, which is descriptive in theory and static in nature, purports to account for the whole of family law in Tswana society.

A. Empirical Study: Pregnancy Outside Marriage

This was not the situation that existed among the Kwena in 1984, when a detailed study of one social unit, Mosotho *kgotla*, was carried out in the village of Molepolole.[55] While there were those relationships that con-

54. I. SCHAPERA, *supra* note 53, at 125.

55. Research on the Kwena was carried out in Molepolole between January and August, 1982, and June and August, 1984. It was done with the assistance of Mr. Masimege, an interpreter and an established member of the community. There were two phases. The first was concerned with identifying from discussions with members of the community the kinds of problems that arose in family life, how they were dealt with and, in particular, what knowledge existed and what use was made of the various dispute forums in the village ranging from the *kgotla* to the Magistrate's courts. This

formed with Schapera's account of pregnancy within marriage, the overall picture was one in which individuals conceive and bear children in relationships which do not fulfill the formal requirements. This raises a question as to how much the discrepancy is due to changes and how much to the use of a methodology which follows a positivist model. The positivist model centers on a limited range of phenomena, namely accounts of marriage from those who are married, which perpetuates its thesis and attempts to elevate it to a universal status.

It is true that within Mosotho *kgotla* there have been changes in reproductive patterns between generations. Marriage structured the relationships within which children were conceived for the older generation, although there are a number of those who are middle aged for whom this was not the case.[56] Such marriages were generally customary in form and often re-enacted under the European system.[57] While European forms of marriage, whether civil or religious, are easily noted because they depend on an identifiable event, customary marriage is much harder to locate because it builds on a whole series of events which take place over time.[58]

According to the Kwena, a customary marriage has definitely taken place when the ceremony concerning *patlo* has been performed. Mmamosadi from Mosotho *kgotla* was married in this way. According to her mother:

> The parents, relatives and friends of the boy come to the girl's place. There they find the girl's relatives and friends assembled. There may be up to one hundred people there. The men do it in the *kgotla* and the women do it in the girl's mother's place. The men go into the *kgotla* where the girl is resident where they find all the male relatives. The boy's

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involved attending disputes at all levels as well as interviewing participants and those officials and third parties who were involved in the process. In addition, interviews were carried out with individuals who had experienced certain problems but had never raised them as disputes, in order to obtain a broader perspective on the operation of dispute processing.

The second phase of the research was concerned with a small group study of social units within the village, Mosotho *kgotla*, in order to acquire information on the social order in general and to establish the basic pattern with regard to family relationships on the ground. This information provided a backdrop within which those relationships which were the subject of disputes could be placed in perspective and enabled the connections between the two to be more comprehensively explored. The study involved tracing the level of the *kgotla* from its founding in 1937 up until the end of August, 1984. This involved acquiring the life histories of approximately three hundred individuals over two to three generations.

56. Of the 32 females in the older generation [G.3] who had children, seventeen were married and fifteen were involved in other types of relationships. Of the thirty-six males in that generation, twenty-nine were married and seven were involved in other types of relationships.

57. For example, of the seventeen marriages among women in G.3, nine also involved a "European" form of some kind, whether civil or religious. Of the twenty-nine males marrying in that generation, ten also celebrated in European form.

58. Among the Tswana it has been noted by Roberts, *supra* note 53, at 242, and by the Attorney General in his statement to Parliament concerning the Married Persons Property Bill [1970].

> maternal uncle (malome) stands up to say "We are asking for water (*ke kope metse*)." The response comes from the girl's maternal uncle "there's water you can drink it (*Metse ke no a ka'mwa ka pula*)."

She commented that:

> In the past a feast would happen. Now a feast is done only when people return from registration of marriage [under the European system].

Such marriages are not prevalent among the younger generation in the *kgotla* today. While almost all the adults have children, the numbers doing so in marital relationships have declined. While 68% of those having children in Generation 3 [G.3] do so within marriage, this number has dropped to 39% in the younger generation [G.4].[59] This does not mean that individuals have children in relationships which are accorded social recognition as marriages, without going through the formalities.

The research showed that a significant number had children in relationships categorized as "fleeting" or "brief." These were of such short duration and without any of the features associated with a customary marriage, that they could not be considered relationships which had involved the negotiation of a customary marriage that had failed. Nor could they be considered more informal unions which were recognized by the community, as they did not exhibit any of the features associated with such public acknowledgement.[60]

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59. A. Griffiths, Law and the Family in Molepolole: A Study of Family Disputes in a Kwena Village Table B at 424-27 (Ph.D. Thesis, London School of Economics and Political Science 1988) (unpublished manuscript, on file at *Cornell International Law Journal* offices), shows that out of sixty-eight adults in G.3 with children, forty-six of them have had them in a formal relationship. This may be compared with the twenty-three adults having children in G.4. Many of those individuals featured once in Table B have had several children with several fathers so that the number of pregnancies involved without marriage is in fact much higher. This is illustrated in Table D which shows that there were 109 relationships in Mosotho *kgotla* involving pregnancy without marriage, although only seventy-two individuals were involved. This number includes a number of individuals who were formally married, whose marriages broke down, and who have gone on to have children with other partners.

In looking at the overall number of relationships in which children were conceived in the *kgotla* and breaking them down into those involving marriage and those without, in Table E, we find that out of 172 relationships, only sixty-nine were within marriage and 103 were in other types of relationships.

60. *See id.* The relationships outside marriage constituted through *patlo*, or a European ceremony, were classified according to their characteristics as "Fleeting," "Brief," "Intermediate," or "Death." *See id.* at ch. 2 and apps. C and D. The "Fleeting" and "Brief" categories represent those relationships which have involved only one pregnancy and which have lasted up to a maximum period of two years. They represent those relationships which have not acquired enough features to be considered as a marriage-type relationship. They may be contrasted with those relationships in the "Intermediate" and "Death" categories, the latter representing those relationships which lasted up until the death of one of the parties, which have more of the features which may be associated with a potential customary marriage, although it never took place.

Out of the 103 relationships without marriage, seventy-six have ended. Of those that have ended, fifty-two fall within the "Fleeting" or "Brief" categories. There were fifteen in the "Intermediate" category showing some signs of social approba-

B. Economic and Political Causes

The picture presented by Mosotho *kgotla* is one where pregnancy and marriage have become separated. This is not an isolated development but is noted in other research on Botswana.[61] Adam Kuper, writing about the "Transformation of Marriage in Southern Africa," recognizes the decline of marriage in certain areas, notably Botswana. He examines the role of marriage, bridewealth, and the importance of women's agricultural labor within the economy of Bantu societies in Eastern and Southern Africa.[62]

In looking at the structure of the societies he observes that gaining membership in a political community often involved forging links of clientage, either directly with the Chief or with an important man in the area. He states that "[t]hese links typically hinged on exchanges of women and cattle."[63]

Kuper contrasts pastoral with agricultural communities and finds that women's labor, acquired through marriage, is of much more importance in an agricultural society where they are the ones who carry out the work. In a pastoral society, where attention is focused on cattle, women are less important because it is the men who are responsible for their management. In Botswana, where cattle are more productive and more plentiful, agriculture and therefore female labor is less highly valued.

Kuper recognizes that over the past fifty years the power of local chiefs to dispose of land and citizenship privileges in the traditional fashion has steadily declined. These powers gradually devolved on colonial officers and are excercised today by elected politicians, members of local land boards, and members of district councils. As a result of declining political power among the chiefs, the traditional bonds of clientage have tended to disintegrate. While cattle are still important, a rich man is less inclined to assume a traditional view of their dispersement.[64] Kuper notes that because of the breakdown of the relationship of clientship, influential political figures who were accumulating a

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tion, but only three out of the four in the "Death" category and of the relationships overall were regarded as informal marriages by the community.

61. Kocken and Uhlenbeck note in their study of Tlokweng that there had been an increase in the number of multigenerational households, due to unmarried women with children. E. KOCKEN & G. UHLENBECK, TLOKWENG: A VILLAGE NEAR TOWN 54-55 (ICA Publication No. 39, 1980). Molenaar notes in her study that there was a change in marriage patterns due to an increase in the number of unmarried ward members with children. M. Molenaar, Social Change Within a Traditional Pattern: A Case Study of a Tswana Ward 180 (Dissertation, Leiden University 1980) (unpublished manuscript).

62. *See* Kuper, *The Transformation of African Marriage in Southern Africa*, in SOUTH AFRICA AND THE ANTHROPOLOGIST (A. Kuper ed. 1987).

63. *Id.* at 136.

64. *Id.* Kuper explains that this is because cattle now have an immediate monetary value and can be sold at abbatoirs. As in many areas where milk may be sold commercially, the wealthier and more influential men frequently rationalize their cattle holding and buy ranches or have commercially organized cattle posts.

number of wives as a consequence, or as an expression, or as a means of maintaining their political ties, no longer have either the opportunity or motivation to do so. He concludes that "[w]ith the disappearance of its political rationale, preferential marriage on kinship lines is rapidly becoming a thing of the past, though it may still be practiced more than people themselves recognize."[65]

Given this situation one must reconsider the role marriage plays in structuring family life and the options open to individuals and their families when pregnancy occurs. The answers to these inquiries have often been pursued through the study of "disputes." Such a focus has linked anthropologists and lawyers and stimulated debates about the nature of norms that govern such disputes, whether or not they are invested with a "legal" quality, and their relationship with the culture in general.

Such discussions have inevitably become entwined with law, regardless of the participants' differing perceptions of the concept and their endorsement or rejection of the "legal" terrain. Whatever the debates, even activity falling within the most restrictive definition of disputes occurs in forums which are part of the formal legal system of Botswana. This means that by virtue of their setting, they acquire a legal status.

However, in considering the role that marriage plays in the structuring of family life, it is necessary to broaden the field of inquiry from the purely "legal," in the technical sense, to take account of those features which shape a family's existence and which may influence the choices they make. Such information is essential if one is to understand what occurs in the legal field, which is represented by disputes. Through such an inquiry, it becomes impossible to isolate law from culture and to ignore the impact that cultural norms possess on the legal sphere.

IV. Case Studies: Two Families' Interaction with Marriage, Reproduction, and the Law

A. Background: The Kwena Life Environment

1. Economic Subsistence

The Kwena world is cyclical in nature. It depends on seasonal migration from the village to the lands for agricultural purposes as well as on migration to the South African mines or mines elsewhere in Botswana. While such cycles are subject to alteration,[66] they still remain embedded in the culture, reinforced by personal experience of the lifecycle at an individual and household level.

Families live in households but are linked in relationships with kin that extend beyond the unit in which they live. For survival they depend on a plurality of resources drawn from rural and urban sectors. Urban

65. *Id.*

66. This has been the case recently due to environmental features such as drought and South African policies cutting back on the employment of migrant laborers from neighboring countries.

employment in the formal sector includes work in the mines or work as a government civil servant or a domestic servant. Informally, the proceeds of selling beer, fat cakes,[67] and other homemade items provide sustenance. The Tswana still practice subsitence agriculture, although it is clear that even in a good year it can no longer provide a major source of support.[68] In bad years, as the members of Mosotho *kgotla* have experienced through the 1980s drought, there is no support from this sector as production is non-existent. While cattle husbandry plays a prominent part in the Tswana psyche, few households possess them in substantial numbers. Several members of Mosotho *kgotla* did not have any. Those that did have cattle found that they were severely affected by the drought. In addition to these resources there are a variety of local and central government institutions that provide some piecemeal assistance, in the form of food for pregnant mothers and young children, meals at primary school, or a few days' worth of food every month for those who are sick with tuberculosis.

It is on all these resources that Kwena families draw. They are not dependent on any one source of support but attempt to spread the risk of economic activity through their kin group.[69] The way in which they do this and the success of their efforts will vary from family to family. As a result there is a constant shift in population of households as members leave to go to the lands or to the mines or other centers in search of educational training, employment, or to assist relatives.

2. *Patterns of Maturation*

The Kwena have developed patterns of existence in response to their environment that vary between generations and the sexes. The basic pattern established by the older generation is one where the boys alternate between herding cattle at the cattle post and their natal household, while girls alternate between helping their mothers with planting at the lands outside the village and carrying out domestic work in the household. Girls tend to spend less time at the lands than boys do at the cattle post, with the result that they are able to attend school in the village and so acquire a higher level of education.

As the lifecycle develops and children mature into young adults, the predominant profile for men of the older generation is one in which they did not attend school but herded cattle until they were old enough to acquire employment on a contractual basis at the South African mines. In contrast, the predominant profile for women of that generation is one where they attended the village school, assisted their mother with domestic tasks and cultivation of lands until they married, had children, and established their own household. A minimal number had any contact with formal employment.

67. These are doughy cakes similar to doughnuts.
68. National Migration Study 532 (1982).
69. *Id.* at 631.

Marriage marks a new stage in an individual's life cycle, but there are no set practices with regard to living arrangements. A woman might go and live straight away with her husband's family or she might bring him into the natal household. In time the couple was expected to build its own household.

As individuals age, they spend shorter periods away from the village and tend to locate themselves there or at the lands. The men cease to be involved in contract work outside the village, and they and their wives are often relied upon to look after the younger generation of grandchildren. In this way the life cycle with its development from childhood to old age and its movement to and from the village, lands, and employment sectors comes to an end.

There have been shifts in this pattern among the younger generation. The profile for men has varied in a number of repects. More men are educated at school and work outside the mines in government jobs or in private enterprise. At the same time, the numbers employed by the South African mines have dropped. This has made it difficult for the young male population in the village to find work.

The profile for women in the younger generation also incorporates changes, most notably, in connection with pregnancy and employment. Women continue to have children but without marriage. Unlike their mothers, increasing numbers work outside the home, although this is still below the employment levels for men in both generations.[70]

Education, employment, and reproduction emerge as the factors which are central to the Kwena experience. The way in which these elements coalesce, however, varies from family to family and presents diverse biographies even among the members of Mosotho *kgotla*. Featuring the biographies of two different family groups provides insight into the varying nature of status and power and how these affect negotiations over pregnancy. Their connection with the legal sphere will then be explored through two disputes concerning pregnancy which take place in the Chief's *kgotla*.

B. The Families of Makokwe and Radipati

Makokwe, one of the founders of Mosotho *kgotla*, had six sons and one daughter. His children follow a pattern established by their father's generation, except for the daughter who had children but never married. The sons herded cattle and then went to the South African mines. The sons married under the customary system and established their own households elsewhere in the village, except for one son, Kemongale, who acquired another household in Mosotho *kgotla*.

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70. Only 33% of women in G.3 and 48% of women in G.4 have experienced formal employment as compared with 84% and 58% of men in those generations. The number currently employed at the date of research was lower, representing 24% of women in G.3 and 31% in G.4, *supra* note 59, at app. B, compared with 62% of men in G.3 and 58% of men in G.4.

Apart from her pregnancies, the daughter, Olebeng, fulfills the profile for women of an older generation in that she was educated at school and helped at home with domestic duties. She has never moved outside the domestic sphere to experience employment working for anyone outside the family. The family's sphere of operation has centered on the South African mines, the village, and the lands-and-cattle post.

Radipati's family stands in sharp contrast with Makokwe's family. The latter represents the pattern established for generations, while Radipati's family is more characteristic of the new Kwena lifestyle. Radipati was also a founding member of the *kgotla*. He married twice, and his second marriage was celebrated under both the European and customary systems. From his second union he had three sons and three daughters.

Unlike Makokwe's family, all the males went to school and two even graduated from university. They are all employed outside the mines. The two who were university graduates are government civil servants, working as an agricultural officer and a university lecturer. The other brother worked briefly at the mines, but gave that up to become a hospital orderly in the village. They all have children, but only the eldest son David has married.

Their three sisters were educated at school. They went, however, to enter the employment market in the capital city, Gaborone. One trained and worked as a nurse in South Africa but is now employed as a telephone operator. Another works as a teacher in the capital. The third worked as a domestic until she became too ill to do so. They all have children, but none has married.

In contrast with Makokwe, Radipati's family members have centered their sphere of operation away from the mines and on government-related employment in Botswana. They still have a connection with the lands-and-cattle post, but this is diminished through the employment of others who perform the seasonal tasks. It is within these different contexts that the issue of pregnancy arose. Among the Kwena, when a woman is pregnant for the first time, the options for her and her family are marriage or compensation for seduction. This is the same for other groups in Botswana; the only difference is that the amount of compensation varies.[71]

71. The Kwena set payment at 8 head of cattle or their monetary equivalent of 640 Pula which may be paid in a lump sum or by installments. There is no compensation for any subsequent children that a woman may have under the customary system and this is widely known in the village. There are, however, provisions for maintenance in the Magistrate's Court under the Affiliation Proceedings Act, 1970, as amended by the Affiliation Amendment Act, 1977. Under the Act, a sum is fixed at a weekly or monthly rate and is payable until the child reaches the age of thirteen or in certain circumstances, sixteen. Sections 6, 9 and 10 of the 1970 Act. Schapera refers to these options among the Ngwato, another Tswana tribe. I. SCHAPERA, *supra* note 53, at 266. In 1984, among another tribe, the Kgatla, such compensation was set at six head of cattle.

The families of Makokwe and Radipati reflect the factors that operate in the community with regard to negotiations over pregnancy. Their approach reflects considerations of status and power that are shaped by the environment in which they live and that inform their strategies and choice of legal forum.

1. Makokwe and Subsequent Generations

When Makokwe's daughter, Olebeng, became pregnant for the first time, the family was not interested in pursuing marriage or compensation. This attitude may be explained on the basis that Olebeng was the youngest member of the family and the only daughter. As her brothers were working at the South African mines and were married at the time of her pregnancy, her situation easily could be absorbed within the family. Her brothers could support the family and, through their marriages, had established networks and alliances beyond the immediate Makokwe family. It was unnecessary, therefore, for Olebeng to marry in order to extend the family's access to resources or political influence.

Olebeng experienced two more pregnancies with different partners. All of her children died within a few months of birth.[72] In following the pattern of the older generation, but without marriage, she has found herself in a situation where she has been dependent on her father, her brothers, and the men in her life for support. Her major resource lies in cattle and the cultivation of the family fields which requires that her brothers provide males to herd cattle and to plough for her. In return, she assists them at harvest time. She has no direct access to money, and her position has been exacerbated by the drought which has killed off her cattle and her crops. She is now considering moving from the natal household in Mosotho *kgotla*, in which she is the only family member, to another area in the village where her brothers have established households.

Today, in her brother Ramojaki's household, the family's perceptions surrounding pregnancy do not incorporate the idea of maintenance or the use of the Magistrate's Court. It is not perceived as part of "the Tswana way of doing things." Two of his daughters, Okahune, aged 19, and Mmamosadi, aged 16, became pregnant while at school.[73] In Okahune's case he has negotiated with the boy's family, which has agreed to pay compensation. In discussing the situation, he explained that "if they agree to pay 8 head of cattle that is sufficient."

Ramojaki is not interested in acquiring maintenence in the Magistrate's Court, stating that "if the man's family do not pay up we will go

72. A child's death shortly after birth is regarded as a bad omen among the Kwena and one which might well affect their attitude towards negotiation. However, it is interesting that in Olebeng's case no interest in negotiation was shown before the birth. Her family did not contact the man's family when her pregnancy became apparent.

73. 30% of women in G.3 and 29% of women in G.4 had to leave school because of pregnancy.

to *Kgosing*."[74] He prefers *Kgosing* to the Magistrate's Court because "[w]e Batswana know our procedure and we are inclined to support *Kgosing* even though we know we can go to the District Commissioner's ("D.C.'s") Court. [He is in fact referring to the Magistrate's Court.[75]] It is only children who go to the D.C.'s Court. In a situation like this (a first child) we would go to *Kgosing*."

In adopting this attitude he reflects the position of a number of people in the community. Laping, for example, who comes from a similar background and works at the South African mines, stated that when his daughter Sebena became pregnant for the first time, "we never considered going to the Magistrate's Court." This was because "[w]e felt the right thing to do was to go to *Kgosing* as this is the proper channel for such problems."

2. *Radipati's Family and Subsequent Generations*

Radipati's family also has been concerned with the advantages or disadvantages of pursuing marriage or compensation. Their circumstances have differed from those of the Makokwe family. Pregnancy for Radipati's daughters arose during employment outside the village and in some cases has involved actions in the Magistrate's Court.

The eldest daughter, Goitsemang, who is 47, met her first partner, who was from Molepolole, while they were both working in Johannesburg. When she became pregnant they agreed to marry. Her family accepted the situation because they considered it a suitable match. His family, however, did not take an active interest in the relationship beyond agreement to the marriage. Their lack of interest, coupled with their failure to attend two successive funerals for the children that Goitsemang had with their son, led to the relationship fading away.

Between pregnancies, Goitsemang continued to work, except for a short spell after the death of the second child. During that time she remained in the village and was supported by her family, in particular by her sister Salalenna, who was working in the capital city. When she recovered she went to live with her sister and found employment in Gaborone.

The father of her next two children is Patrick Kgosidintsi, who is also from Molepolole. He is a businessman who comes from an influential family.[76] Goitesemang's family was unhappy with the relationship because he was already married. Although he offered to marry Goitsemang polygamously, they as practising Christians were against it. The

74. The *Kgosing* is the Chief's *kgotla* and ward. *See infra* text preceding note 81.

75. Local people refer to the Magistrate's Court as the D.C.'s Court because in colonial times the D.C. often performed the function of a Magistrate.

76. Kgosidintsi's status derives from the fact that his family represents the second royal house of the *Kwena* descended from Sechele I in the second house through *Motswasele*. While members of the first house have been involved in the Chieftanship, the *Kgosidintsi*'s have looked to the politics of local government and business as spheres in which to extend their influence.

family was not interested in pursuing the matter of pregnancy. There may have been a number of reasons for this; for example, there is no remedy under the customary system beyond the birth of the first child. It is more likely, however, that they took no action because the Kgosidintsi's are an extremely powerful family and the sphere in which they have acquired prominence is one in which Radipati's eldest son David was seeking to establish himself at that time.[77]

The position with her sister Salalenna, who is 46, is somewhat different. In her case, an action for maintenence was raised in the Magistrate's Court in Gaborone. While working as a domestic, she met a Mokalanga from Francistown[78] and became pregnant. They agreed to marry, and they had two children together. When Salalenna decided to withdraw from the marriage on the grounds of his drinking, she was advised by her employer and her brother David to raise a maintenence case in the Magistrate's Court. They considered that it was easier to deal with the matter where both parties were living rather than to refer it back to the Chief's *kgotla* located in the home village of one of the parties.

Salalenna continued to live and work in Gaborone until she became too ill to do so. She now lives at home in Molepolole where she is supported by the family and where she looks after the children who are still at school.

The youngest daughter, Olebogeng, who is 35, also raised an action in the Magistrate's Court. Like her sisters, she met the father in Gaborone where she was working as a clerk. He was a Mokalanga from Francistown. Marriage never was considered as an option. When it came to discussing compensation and support, the man and his employer requested that the matter be dealt with in the Magistrate's Court in Gaborone rather than in the Chief's *kgotla* in Molepolole, which would have necessitated longer absences from work.

Olebogeng had another child with a Zimbabwean man whom she met in Gaborone.[79] They discussed marriage but nothing happened. He took his son away to live with him and has taken on the responsibility for his support. Olebogeng continues to work in Gaborone.

The men in the family have also been involved in negotiations over pregnancy. David, who is 37, had a child with a Swazi woman whom he met while he was at university in Swaziland. Their families met and agreed to marriage. They had another child and lived together for a number of years until she ran off with another man and her family came to claim the children, as if the marriage had never taken place.

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77. During the course of these pregnancies, Goitsemang remained in Gaborone where she continues to work and where she has built her home.

78. This is a long way from Molepolole. It is situated in the north of Botswana close to the Zimbabwean border.

79. During the Zimbabwean War of Independence there were a number of refugees from that country sheltering in Botswana.

When he went to work as a lecturer in Bophuthatswana he had another child with a woman called Shelley whom he subsequently married in a civil ceremony. According to his family, she comes from an influential family in the Mafeking district where he lives and works. This well may have influenced his decision to marry.

Pelonomi and Moses, his younger brothers, rejected marriage in their relationships and ended up paying compensation. In Pelonomi's case, he met the woman while he was working at the mines in Selebi-Pikwe in Botswana. His brother David negotiated and paid compensation to the woman's family there. In Moses' case, the woman was from a neighboring *kgotla* and her parents took the matter to the Chief's *kgotla*. While her family may have considered him a good marriage prospect, with his university education and government employment, he denied paternity and rejected any suggestion of marriage. He was ordered to pay compensation which his brother David provided.

Within the next generation, Goitsemang's daughter, Eva, has had a child. As Eva's family does not consider the man's family to be of the same status as themselves, they never considered marriage and they even have abandoned pursuing compensation because "the man's family is too poor to pay."

Throughout her pregnancy, Eva worked as a teacher in Gaborone. After giving birth in Molepolole, her family supported her. She has left her child with the family and has gone back to work in Gaborone.

3. Analysis

Within Radipati's family one can see a whole constellation of factors at work in the negotations over pregnancy. These include status, wealth, and power acquired through tribal and political affiliation, employment, and access to resources. The profile presented by this family and its sphere of operation is different from that of Makokwe's family. While the women in Radipati's family have depended on support from family members during pregnancy, this has been for a limited period and has not involved the prolonged support that someone within the older generational pattern, like Olebeng, has required. Men may have negotiated on behalf of the women and given advice on their course of action, but the women, through their employment and position as primary wage earners, have experienced a certain degree of autonomy. Goitsemang, in establishing her own household in the capital city, reflects this new status and power.

These family profiles are representative of the community; they illustrate the prevalence of pregnancy and the negotiations that surround it. Unlike Radipati's family, the majority of families enter into negotiations of some kind but these rarely surface as "disputes," brought in a local forum such as the *kgotla* or the Magistrate's Court. Negotiation forms part of the fabric of social life and continues to operate outside these more formal dispute-resolution structures. In this regard, what the Kwena experience need not be culturally isolated.

Galanter has indicated this is a phenomenon that occurs elsewhere.[80] This strengthens the case for expanding the study of law as process beyond formal structures, whether they be courts or other types of dispute forums, to take greater account of social processes.

Returning to the Kwena, in the minority of cases where relationships are pursued as disputes, the Kwena carry their cultural background with them. The norms that form part of the Kwena culture enter the legal sphere. This will be demonstrated by the disputes of Teko Mere and Nyana Segaethsho which took place in the Chief's *kgotla*.

V. Women, Pregnancy, and Dispute Resolution

A. The Framework for Dispute Resolution Within the *Kgotla*, or Customary Law

In Molepolole, disputes are located in dispute forums which reflect the hierarchical structure of the village. Disputes are first heard within the family *kgotla* of the man or the woman and if they are not settled, proceed from there to the subward, ward, and finally to the Chief's *kgotla*. Disputes also may proceed to the Magistrate's Court.

Within the customary system, when individuals quarrel or experience disagreements, particularly within the family sphere, an initial attempt to reach accommodation is made by the members of the families. When such family negotiations are unsuccessful, the dispute may be taken to the *kgotla* where the headman will attempt to mediate. Should this prove unsuccessful, the matter may be referred to the subward and the ward until it finally reaches the Chief's *kgotla*. This process, as demonstrated in the disputes discussed below, may take many years.

When a dispute is brought to the *kgotla*, the procedure begins with the grieving party stating his or her position. A third party, normally the headman, then asks any questions he considers appropriate and invites the other party to question anything that has been said. After this, the other members of the community present in the *kgotla* at the time may question the person raising the dispute. Although women may be present, they rarely participate in this stage. The other party to the dispute is then asked to state his or her position and is questioned in a similar manner.

At the end of this process, the parties are asked how they wish the dispute to be handled and members of the *kgotla* will make suggestions which may be formulated into recommendations by the headman. The parties are free to accept or reject the advice given, but it is hoped that these lengthy discussions will have enabled them to reach a basis for settlement. When they fail to do so and are sufficiently tenacious, the dispute will progress to the Chief's *kgotla*.

80. Galanter, *supra* note 8.

Molepolole has approximately seventy *kgotlas* at the lowest level of the customary system. These *kgotlas* comprise the five main wards. The headmen of the main ward are funded by central government, but they do not possess the same formal powers as do officials of the Chief's *kgotla*. The Chief's *kgotla* and ward is known as *Kgosing*. *Kgosing* is presided over by three officials who vary in authority from the Chief Regent, to the Deputy Chief, down to the Senior Chief's Representative. They hold office on the basis of their relationship with the ruling Kwena family, and the appointments have been the source of bitter political infighting. The Tribal Secretary and a number of clerks assist the Chief's officials by keeping written records of the proceedings and serving written notices, such as summonses, on those called to attend a hearing. It is only in the Chief's *kgotla* that proceedings are recorded and that decisions can be enforced.[81]

The Chief's *kglota* is at the apex of the customary system. The formal legal system of Botswana recognizes *Kgosing*'s independent of the formal system, as well as the *kgotla*'s authority to administer the formal system at a basic level, involving for example, the dispensation of statutory criminal justice in minor offenses. Within this formal system, *Kgosing* is lowest in the court hierarchy. Its decisions are subject to review by the District Commissioner and to overruling by the Magistrate and the High Court.

The dual roles of the Chief's *kgotla* have produced a hybrid of the formal and customary systems. On the one hand, many attributes of the formal system have been adopted. The *kgotla* itself often is referred to as the "Chief's *Court*" (emphasis added). Those who deal with disputes are referred to as "Presiding Officers," who give "judgments" and make "orders" affecting the "complainant," or person raising a dispute. In family disputes, as in other areas, there is power to impose a settlement. On the other hand, the *kgotla* has retained its customary character. There are no legal specialists operating in the system. Those hearing disputes all are appointed by virtue of their relationship with the ruling

81. Under section 4 of the Customary Courts Act (1969), the minister may regulate the powers of officials under the customary system. Under Statutory Instrument No. 118, 1976, issued under this section, those officials in Kweneng who are recognized as having power to impose fines or property and financial settlements at a certain value, are listed as the Chief, the Senior Chief's Representative, the Chief's Representative, and the headman of Motokwe. In other words, the senior wardheads in Molepolole are no longer recognized as having power to impose fines or a financial or property settlement. Statutory Instrument L2/7/11911, issued in 1984, increased the limits of their financial jurisdiction. This means that an individual has discretion to impose a fine or financial settlement up to that figure. In Molepolole it is established customary law that the claim for seduction is 640 Pula or eight head of cattle. This meant that until 1984 the Senior Chief's Representative was reluctant to hear a seduction case because while he had the power to hear such a case, he did not have the power to impose a settlement at the amount recognized under the customary system until 1984. This raises questions, too complex to be dealt with here, about the relationship between the *Kwena* customary system, central government, and the accommodation of these two systems with regard to the formal legal system.

Kwena family. Procedure within the Chief's *kgotla* takes the same form as elsewhere in the customary system and the research made it clear that third parties hearing disputes throughout the system operated on the basis of the same cultural norms at all levels.[82]

B. Case One: Teko Mere's Dispute

Teko Mere is a member of Makokwe's family. She is the daughter of Kemongale, who is one of Makokwe's sons and has a household in Mosotho *kgotla*. Like her aunt Olebeng, she has been to school but has never been employed and has had children outside of marriage. Both she and her family reflect a profile belonging to the older generation. Their sphere of operation has concentrated on the lands, cattle post, and the South African mines. They have political ties to those who run *Kgosing*. Teko's grandfather, Tshitoeng Mere, who appears with her in the case, was a favorite of the late Chief Kgari Sechele II.[83] He was a member of the tribal police and sat regularly with the elders in the Chief's *kgotla*. Due to his connections, he has been registered at *Kgosing* as the headman of Mosotho *kgotla*.

Given this background, it is not surprising that the issue of pregnancy was pursued in the Chief's *kgotla*. According to Teko, when her partner failed to support her and the children despite several meetings, she decided to raise a case at *Kgosing* herself. She did this because she was angry and desired some public recognition of wrong. According to Teko, she raised the case "because he deceived me, he told me that he was going to marry me. We were together eight years and then he stopped supporting me and the children." She raised the case at Kgosing with his parents' consent: "I knew to go to *Kgosing* through other friends who had been there."[84]

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82. The *kgotla* is closely tied to the established formal courts as well. The Chief's *kgotla* is situated on a hill in Molepolole, in a clearing together with the headquarters for the customary police. The *kgotla* meets between Monday and Friday and occasionally on weekends. It used to share the site with local government offices, but in 1984 the District Council and the District Administration moved to a site featuring the first two-story buildings in the village, which is a five minute walk from the Chief's *kgotla*. This site houses the D.C's office and the Magistrate's Court. The Magistrate's Court sits every Wednesday when the Magistrate comes out from the capital city, Gaborone, to hear both criminal and civil cases. Due to the overwhelming number of criminal cases which receive priority hearing, there is a substantial backlog of civil cases, some several years old. On a practical level, there is a close degree of cooperation between personnel. Officials from the Chief's *kgotla* are in regular communication with officials from the District Administration. The Magistrate's Court and the D.C. also confer with the Chief Regent and his colleagues. This degree of cooperation is not always found in other areas of Botswana. Indeed the government was so concerned about the general lack of cooperation between Chiefs and D.C.s that it organized a conference to promote harmony between them before the opening of Parliament in 1982.

83. He is regarded as one of the greatest *Kwena* Chiefs. He reigned from 1931-1962.

84. Transcript Case No. 1012/83. Heard November 22, 1983 by Mr. Kgosiensho, Deputy Chief. This was translated from court records by Mr. Masimege in 1984 and

The hearing begins with Teko setting out her complaint:

> In 1975, Rankolwane talked to me and proposed marriage. I agreed and we had sex. In April, 1976, I became pregnant. In December, I gave birth to a baby. In March, 1978, I had the second child. In September, 1980, I was pregnant again. I gave birth in May, 1981. He supported these three children well. He supported each one of them from confinement. Now he does not mention anything about marriage and does not support the children. I want him to tell me who the father of these children is and I want to know what does he think they eat because he does not support them. I have spoken to him several times before his parents. He does not take notice of what I say.

In her speech she is setting up the validity of the relationship and her appropriate handling of it. She mentions that marriage was promised. She shows that he recognized the relationship and took it seriously by providing support during and after confinement.[85] She indicates that she has dealt with the matter through the proper channels because she spoke to the man's father. This follows the practice of discussing the matter between the families before raising the matter in the *kgotla*.

After making her statement, Rankolwane, the man, is allowed to question her. He seeks to ask certain questions aimed at denying the relationship. He asks, for example:

> What proof do you have?

to which she replies:

> My proof is that you have never denied that you are the father.

This is a common assertion and is seen as having some cultural validity. She is then questioned by a *kgotla* member who asks her about the role that her parents played. This is significant because for a relationship to have any social recognition the families of the individuals concerned must be involved in its negotiation. To this she responds:

> My parents never went there [meaning to his parents].

This reply would be seen as damaging to her claim of social recognition because it appears that her parents had not visited his parents. She was then asked why she carried on her relationship with him in the way that she did, to which she responded:

> I agreed to continue bearing children with him because we had discussed the matter and agreed on marriage.

She attempts to provide social recognition by stating:

> He was always visiting my mother's place. He did not hide himself.

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information on the dispute was supplemented by personal interviews with the invidivuals concerned during the research trip.

85. This is the period immediately following birth when a woman is isolated from men in the community and particularly her husband. It generally lasts for a couple of months.

She was then asked what she wanted to do about the situation to which she replied:

> I want him to tell me who the father of these children is.

Mr. Kgosiensho, the third party hearing the case, then asked a series of questions geared to dealing with the recognition of the relationship, to which she responds:

> Yes, he is my husband. I was sleeping with him because his parents knew and had met my parents about the matter.

To back up her claim about recognition, her grandfather Tshitoeng then gives evidence. He gives a long statement aimed at establishing that the appropriate procedure has been followed, that is, he reported the pregnancy on the first occasion to the man's father, that he referred back to the man's parents on several occasions about the marriage and even returned money that they gave him because (the implication was) he was more interested in marriage than compensation. He then states:

> After this we brought the case to *Kgosing* so that they could tell us whether they [the man's family] are marrying or not.

For him the issue is one of marriage. The public forum is being used to put pressure on the man and his family by airing the matter publicly. For Teko the issue is one of parentage and support.

Tshitoeng is then questioned by the man, Rankolwane. His questions are aimed at discrediting Tshitoeng's claims that he followed the appropriate procedure. Asked when he reported seduction Tshitoeng replies:

> I went to tell Keboletse (Rankolwane's father) when Teko had the first child.

When a woman is pregnant the appropriate time to inform the man's family is before birth and just after the child has come out of confinement. He also adds:

> I also went and told him when the second child is born.

Tshitoeng is then questioned by Mr. Kgosiensho, who pursues the line of questioning concerned with correct procedure. In response Tshitoeng states:

> If Keboletse would speak the truth he would assure you that I have always been approaching him about this matter.

He is then obviously asked about the position regarding the two children and whether it is competent to raise a case at this stage, to which he replies:

> The second child is disputed. Yes, eight head of cattle are paid for the second child.

This is in response to a question about whether such payment can be made when one has more than one child.

The next part of the proceedings center on the man, Rankolwane, who outlines his position. He concentrates on establishing that he is not obliged to pay compensation because she has already had a child with another partner, in fact two children, before she had his child. When questioned by Teko about his allegations that she was involved with another man, he responds:

> I found that man sleeping with you at your mother's place. That man's name is Sephinnyane.

He then was questioned by Tshitoeng who asked about the man and Rankolwane replies:

> I found that man sleeping inside Teko's home. I questioned Teko as to who he was and she told me that he was an old boyfriend.

He then was asked if he found this state of affairs to exist, why he did not inform Teko's parents, to which he responds:

> I never told you because I knew that Teko was my *nyatsi* [meaning girlfriend/concubine].

In this response, by labelling her as his "concubine" he is trying to establish that this was not a marriage-type relationship, and therefore consultation with her parents was unnecessary. He is then asked what his intention was, to which he replies:

> I told you that my intention was to marry.

This reply means that when he entered the relationship, he intended to marry but as it progressed he changed his mind, having set up allegations of infidelity to substantiate his position. He then is questioned by Mr. Kgosiensho along other lines, namely his position with regard to the children. He admits paternity of one child saying:

> I have a child with her.

When asked about the care of this child and of Teko, he says:

> I took care of her in confinement for the two children.

This shows what a responsible person he is. However, to substantiate his previous position he immediately says:

> The second child was not mine.

When asked why he provided support if the second child was not his, he replies:

> I took care of her in confinement for the second child because I loved her.

He then is asked how he viewed his current relationship with her, to which he responds:

> She is no longer my wife because of her actions.

When asked about the status of the relationship with her parents, in an attempt to see how the relatives viewed their relationship, he attempts to portray her family in a bad light, to make it clear that he is not responsible for compensation by saying:

> Teko's parents never told my parents anything when Teko became pregnant with the first child.

He then, like Teko, produces a witness, his father, who backs up his son's version of events. The father maintains:

> Tshitoeng never came to report to me when the first child was born. To my knowledge, my son Rankolwane found Teko with two children already. He had the third child with her. Tshitoeng did not come to me even when the third child was born. I only saw him once when he came to report to me that the children were starving.

When questioned by Teko, he continues to support his son. He shows how his knowledge of the relationship between them was not acquired through the proper channels. He says:

> I was led to you by Rankolwane.

This establishes that he met her through his son instead of through her parents. When questioned about the children, he responds:

> I only know of one child.

He then is questioned by a *kgotla* elder who asks him how many children had been born when he met Teko's family, to which he replies:

> I don't know which child was born when I went with Rankolwane to Tshitoeng's place.

He then is asked about marriage, to which he replies:

> I told Tshitoeng that Rankolwane said that he was not ready to marry yet.

When asked by *kgotla* members about his information on pregnancy, he says:

> Tshitoeng never told me that Rankolwane had made Teko pregnant.

This is an attempt to emphasize that Tshitoeng never followed the appropriate procedure for marriage or compensation due to pregnancy. When asked about support for the child, he responds:

> I have never said that he should neglect her.

When finally both parties are asked to make a final comment about how they view their situation, Teko says:

> I want him to compensate me and we part.

Unlike her grandfather Tshitoeng, she is not interested in the issue of marriage. She is interested in the social affirmation of the breakdown

of the relationship, support for the children, and censorship of the man through a compensation award. Rankolwane responds:

> I do not know what compensation she wants from me because the first child was not mine.

To emphasize this point, he adds:

> I wonder if she means that I should pay compensation for my own child.

When Mr. Kgosiensho asks a *kgotla* elder for his opinion, he finds in favor of Teko, saying:

> The complainant has told this court that Rankolwane has three children with her. The defendant states in his defense that he only knows of one child. Accordingly the defendant has to pay 8 head of cattle as compensation to her.

Mr. Kgosiensho, however, is of a different view. He rejects the recommendation. He puts forward a summary of Teko's position:

> Teko has told this court that Rankolwane has three children with her outside the law [without *patlo*]. She states that she became pregnant in 1976 and had a baby in December 1976.

He then offers Rankolwane's version of events:

> In his defense, Rankolwane states that when he fell in love with Teko she was already pregnant with the second child. Then he went to the mines and says the child is not his. Rankolwane states that the only child he has with Teko is the third child.

Mr. Kgosiensho then evaluates the claims made by the family members:

> The evidence given by the parents [i.e., grandfather and father] on both sides does not show that the first child was reported to the boy's parents [pointing up a failure to adhere to a Tswana norm]. Tshitoeng states that the second child is disputed [i.e., that the dispute is over the second child]. The truth is that it is only the first child that is disputed [i.e. one can only consider raising a case over the first child]. This is according to Tswana custom.

He then states what the Tswana custom is:

> For the first child compensation of 8 head of cattle or 640 *Pula* is necessary.

He then gives his decision:

> Therefore this court does not find the defendant at fault.

He then says:

> The defendant is let free, [i.e., the case is dismissed].

The parties then were notified of a right to appeal within 30 days. Teko lodged a written request for appeal on the grounds that Rankolwane was the father of all three children and that he neglected to

support her and the children. She also stated in her appeal that Mr. Kgosiensho was biased because he "wandered in and out of the case" and "had already made his decision," without giving her a proper hearing. When the D.C. examined Teko's appeal, he ordered the case to be retried. This was not because of Teko's allegations concerning Mr. Kgosiensho, but because of her grandfather's participation in the dispute. According to the D.C.:

> The reason is simple and single. Tshitoeng Mere appears as the complainant's witness and also as a court member. This has never happened anywhere. One cannot testify against a defendant and later ask him questions as a member. I am ordering a retrial because I got from reliable sources that this is exactly what happened during the hearing.

One sees a conflict of values in the approach taken by the D.C. and that adopted by Mr. Kgosiensho. The D.C., who is a Motswana, could be said to reflect a European concept of justice. In his view, one cannot appear in a public forum in two capacities, as a court member and as a supporter of the person raising the matter. Mr. Kgosiensho, who explained that he discussed the matter at length with the D.C. over the telephone, stated, however, that he allowed Tshitoeng to speak "because I considered him as the parent of the child who normally is the person to claim 8 head of cattle in accordance with Tswana practice. I felt there was nothing wrong with him participating in the case and being a court councillor."[86] The D.C. believed that this prejudiced the case. Mr. Kgosiensho explained that the hearing was not prejudiced even though Tshitoeng gave evidence because a "court councillor has to follow proper procedure and will do this regardless of whether it is his own child or not [that is involved]."

The case was retried on December 1, 1984. It was heard by the Chief Regent, Mr. Mac Sechele, and he reached a different conclusion from that of Mr. Kgosiensho. The dispute follows the same line of argument presented in the initial hearing with Teko stressing agreement to marriage, and the recognition of the relationship through support provided during confinement. She also introduces a new element, that of the man's family encouraging the relationship by providing herbs for their use after the birth of a child. The provision of herbs is consistent with the practice of married couples.[87] By making this claim, Teko is underlining the fact that her relationship with Rankolwane was a marriage-type relationship. She ends by stating, as she did previously, that she reported the matter to his parents and that they had given up and told her to report to *Kgosing*.

At the end of the hearing the Chief Regent reaches a different decision from that of Mr. Kgosiensho. His reasons for this are:

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86. This is an honorary title that is given to those of the Chief's inner circle whose views are consulted when a dispute is being heard.

87. After the birth of a child, before a married couple may resume sexual intercourse, they must anoint themselves with herbs.

> The complainant told the court that on April 1976 she became pregnant. She told the defendant when she had borne a child. She bore the second child in March [1978] and the third child in [May 1981]. The complainant told the court that the defendant was supporting those two children and she even further explained that the defendant's father, Keboletse, was curing them with traditional medicine to unite them according to Tswana custom and this proves that he impregnated Teko. If Keboletse had not used that Tswana custom there could be no evidence of impregnation and you do not deny the third child is yours. The court will order you to pay for the third child.

The order was to pay 8 head of cattle or 640 *Pula* and, as with the previous case, they were notified of their right to appeal.

To account for the different judgments, one must look to the differences between formal and customary law. When questioned, Mr. Kgosiensho said that he had a different view in terms of Tswana law and custom from the Chief Regent. On his view, "[a]ccording to Tswana custom the woman had two children who did not belong to the man so there was no room for compensation for the third child."

Mr. Kgosiensho maintained that he would have had the same view if the second child had belonged to Rankolwane. However, he did say that if Rankolwane had been the father of the first child, he would have granted compensation even though the woman waited until after the birth of the third child to bring a case.

Women interviewed regarding child support disputes in *Kgosing* maintained that they had been sent away if they had more than one child. *Kgosing* dismissed their cases without any attempt to hear their grounds for claiming compensation. Their experience is evidenced by one recorded case (MO. 44/80) where a woman who came to *Kgosing* pregnant with her third child, complaining of neglect and support, was turned away with the ruling:

> There is no law governing concubinage. Therefore this woman is to report this case to the D.C. [Magistrate] for maintenance.

According to Mr. Kgosiensho, his approach is consistent. The case referred to above was not, according to him, a case where marriage was in issue and neither (in his opinion) was Teko's. Rankolwane gave her a child when she already had two. If they had been married or there had been a marriage-type relationship, the *kgotla* would have made an order for support but in these situations "as unmarried women, there was no latitude for the *kgotla* to make an order."

When asked about his response to the Chief Regent's decision in Teko's case, he and another *kgotla* member present at the interview expressed the opinion that it only had been reached on the basis of favoritism towards Tshitoeng.[88]

88. Rankolwane appealed to the Magistrate's court on January 16, 1984. His ground of appeal was that he was not liable to pay compensation when Teko already had two children. The community view seems to be that his position is correct. According to Teko, although the case has not been dealt with formally by the Magis-

In looking at Teko's situation one can see how she was caught between two sets of cultural norms. Given her background and environment, the Chief's *kgotla* was the natural place for her to bring her action. Living in the village as she does, it was the appropriate forum for her to make a public statement about the termination of the relationship, as well as the place to seek support. Indeed, her grandfather's relationship with those in authority was to her advantage in the second hearing, which only was displaced by the man's insistence on raising an appeal in the Magistrate's Court.

However, while one set of norms predisposed her towards the *kgotla*, another set operated against her. These were the norms concerning pregnancy where the prevailing view is that a woman is not entitled to compensation for seduction after the birth of the first child, particularly where a second partner is involved. The Chief Regent's decision ordering support for the third child was regarded as out of line by the rest of the community.

Teko's position is not uncommon. She reflects a social reality, that is, that there are a significant number of unmarried women who have several children with different fathers.[89] These women and their families are excluded from seeking assistance under the customary system. They are well aware of this, and in many cases where they failed to engage in pregnancy negotiations outside dispute forums, this was because a second, third, or fourth pregnancy was involved.[90] In this area, social reality is not culturally recognized among the Kwena, although it has become so among the Kgatla, a neighboring tribe.[91]

Although these women have the option of using the Magistrate's Court, which is available to them regardless of the number of children involved, access to the court is restricted. While legal representation is not required and there are no legal costs, the court meets only one day a

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trate's court, she heard the Magistrate's clerk tell Rankolwane that there is no ground for a case against him and that he need not provide child support. This is in direct contradiction to the statutory provisions contained in the Affiliation Proceedings Act. While she was told that the case was still pending, due to the backlog of cases in the court, she is not optimistic about the outcome when the case is heard and "feels compelled to leave the matter now."

89. Among her generation [G.4] there are twenty-seven women, including herself, in this position, compared with fifteen who have only had children within marriage.

90. In looking at the negotiation of 109 relationships in Mosotho *kgotla* in which children were conceived without marriage, including those which are current as well as those which have ended, we find that there was a high degree of interaction and involvement between families. A detailed analysis concerning the negotiation of these relationships is contained in Chapter 3 of the thesis. *Supra* note 59. In 61% of the situations, that is in sixty-six relationships, the families met to negotiate marriage (which never materialized) or compensation. In the forty-three cases where there was no negotiation, we find this was because the scope for such negotiation was limited or impaired. In seventeen cases this was directly attributed to the fact that the woman had already had a child.

91. Kgosi Linchwe II of the *Kgatla* has initiated compensation for each pregnancy within the *Kgatla* customary system.

week. On that day the Magistrate must deal with both criminal and civil cases, and the former are given priority treatment. Due to the heavy caseload of criminal cases, there is a backlog of cases which in 1984 was two years.

In Teko's dispute the parties presented their claims through the manipulation of certain norms. These included arguments over reporting, knowledge of pregnancy, and meetings between the families. Such elements are important because they contribute to the assessment of the validity of a claim. Among the Kwena, those who have a genuine grievance show this by being the first party to report to the family of the other party who is involved as well as to their own family.

In successful claims for compensation based on recognition of responsibility by the other party or on the failure of marriage negotiations, a party must demonstrate that the other family had knowledge of the situation and participated in the negotiation process. While Teko was unsuccessful in her manipulation of these norms (except in the second hearing which has been ignored), Nyana, who features in the following dispute, was able to manipulate them to her advantage.

C. Case Two: The Dispute of Nyana Segaethsho (woman) and Mokwaledi Mtutu (man)[92]

The case begins with Nyana making her claim. Like Teko, she stresses her desire for compensation and separation. She formulates the matter in this way:

> The defendant has caused me to bear a child and does not support me. Now that he is not supporting me I want him to compensate me and we separate.

The third party hearing the case, Mr. Kgosiensho, then advises her to recount the whole story, if there were any agreements between the families and so on. In light of this advice she continues:

> There was an engagement reached at the time. The arrangement was arranged between my parents and his parents. Then I don't know what happened.

The man was allowed to question her but declined. Mr. Kgosiensho then pursues the question of the nature of the relationship by asking:

> What was the agreement your parents reached?

She replies:

> It was marriage, that he was going to marry me.

He then continues by asking:

> What proof did they do to show you were to be married to him?

92. This dispute was attended by Mr. Masimege and myself during the research trip in 1982. Additional information was acquired through interviews after the hearing.

When she hesitates, he explains:

> Did they consult? Didn't they bring up anything showing proof that you were engaged to their son?

She knows what is required and responds:

> Yes, they brought the necessary things which, according to Tswana procedure, are always brought on engagement to the girl's parents as initial proof that the parties are to marry. The items were three blankets, a dress, a pullover, one bed sheet, a headress, a lantern and a pair of shoes.

Mr. Kgosiensho then tries to divine the man's attitude to her; he asks:

> Have you ever heard this man propose love? Did you ever talk it over together when he said he was in love and wanted to marry you?

She responds:

> Yes.

He then asks a question aimed at dealing with the issue of pregnancy, trying to establish how it fit into formal procedure:

> How did it come about that he gave you a child before marriage took place?

She is able to establish that the pregnancy (her first) was perfectly acceptable in terms of Tswana procedure because:

> His parents requested that we should be allowed to live together. They said that we could live together as man and wife until January the following year after plowing.

She is asked:

> What year was that?

and responds:

> 1978.

Mr. Kgosiensho then seeks to find out more about the relationship by asking:

> What happened that year after plowing?

She indicates that the man's parents were not fulfilling their side of the agreement by stating:

> They never said anything. They never took any action towards the marriage agreement.

Mr. Kgosiensho seeks more information on this point:

> Until when? How long did they keep aloof, how long did they allow the arrangement to continue?

She then responds:

From that time until today, during which time I had to bear a child.

This establishes that she only became pregnant after the parents agreed to their living together and thus accepted pregnancy. Mr. Kgosiensho then asks:

How many children do you have?

She replies:

One only.

Mr. Kgosiensho then shifts the discussion away from the man's parents to the role that her own parents played by asking:

During such a long period, what action did your parents take?

She shows that her parents behaved responsibly by replying:

My father went several times to demand to know why the marriage was not yet arranged and every time they would tell him that they would arrange marriage.

Mr. Kgosiensho then inquires about the man's conduct:

Then what did this man who intended to marry you actually say?

She responds by showing his behavior in a bad light:

He has never said anything. Since I came out of confinement nursing the baby, he disappeared and from then until today I haven't seen him.

Mr. Kgosiensho then tries to find out her attitude towards him with a view to reconciliation:

Could you tell me if you still love him?

She, however, rejects any move in this direction by responding:

No, I don't love him anymore.

Mr. Kgosiensho tries once more to see if they can mend the relationship. He asks:

Would you take him back again to marry?

She remains firm with her original position:

No, since he disappeared for many years.

The proceedings then center on the man, Mokwaledi, who is then asked to state his position. He seeks in his statement to repudiate her claim for compensation by stating that he is married to her and that the reason for his lack of contact with her is due to her bad behavior which is inconsistent with the role of a good wife. He states:

I was married to this young lady. I had a child with her. I took care of her from pregnancy into confinement and I did all that was needed for keeping her in confinement.

This establishes that he behaved responsibly and in accordance with what is expected in a relationship which is or has the potential for a customary marriage. He underlines the fact that this was a serious relationship by stating:

> The clothing which were to indicate that I was to marry her were given to her through our parents.

He also is stressing parental involvement and acceptance of the relationship. He then tries to discredit her claim of abandonment by stating:

> I was staying with her until the child was nine months after confinement. After that I went out to look for work, and the kind of work I was looking for was in fact obtained for me by her father.

He is, by discussing work, justifying his absence. He continues:

> It was a heavy job, and I did not stay long. I had to leave the job. Then I went to look for work at Lobatse. At that time I came to Molepolole in October to see her and the child. That was in 1980. When I came in she never took any care of me, she disliked my presence. She showed the dislike by taking certain personal effects I left in her care. She threw them outside the house. Then I went back to my work and never came back until today.

He then is questioned by Nyana, who seeks to refute his allegations of misconduct by asking:

> Which are the articles belonging to you that I took and threw outside?

She is implying that he has simply made this up. He responds:

> You took my bag for clothing and you put it outside the hut and then you locked up the hut.

She does not ask any more questions. Mr. Kgosiensho then seeks to find out what the relationship between the parties is by asking:

> Who is this? [turning to the woman].

He responds:

> It is my wife.

He is then asked:

> Under what law did you marry her?

He responds:

> I married her according to Tswana law.

He then is asked:

> How many years have you been married to her?

He replies:

I have been married to her for two years.

Mr. Kgosiensho then questions his credibility, by his observation:

Do you consider two years to be from 1978 to 1982?

To which the man has to reply:

That is not two years.

Mr. Kgosiensho builds on this response to ask what he has been leading up to:

Where have you been these four years? Have you been living with her?

He responds:

It is only one year that I have been living with her.

The veracity of this statement is then questioned by the Deputy Chief:

Did you hear her saying that she has never seen you since you disappeared until today?

He replies:

Yes, I did hear.

Mr. Kgosiensho is able to follow up this line of questioning by asking:

Is there any kind of husband who would stay away from his wife for such a very long time?

He attempts to justify his position by responding:

Yes, there could be such a husband when he was actually expelled.

Mr. Kgosiensho then sets out to test the truth of this allegation. He begins by asking:

If a man or his wife, who has authority to expel the other?

He responds:

It is the wife who can reject the man.

Mr. Kgosiensho asks a pertinent question relating to the correct way of handling marital disputes:

Under marriage custom what action do you take if your wife rejects you?

The man then states the accepted procedure, which is:

I must tell my parents and then complain to my wife's parents.

Mr. Kgosiensho then asks him, building on his response:

Have you ever told them of your complaint that your wife has expelled you from your dwelling house?

He responds:

I have never reported to them.

He attempts to salvage his position by stating:

I was in a hurry because I had to go back to work.

He is then rebuked by Mr. Kgosiensho who asks:

Which is most important, your wife and child, or the job you had secured then?

He is bound to respond:

My wife comes first.

When he makes this admission, Mr. Kgosiensho continues to emphasize his failure to act properly by saying:

Why did you act like that then, to just leave them in the lurch without letting them know where you had gone to?

He attempts to justify himself by saying:

It was because she chased me away.

Mr. Kgosiensho does not accept this. He asks:

What proof can you give to the fact that you were driven away because you have never reported to your parents or the girl's parents?

He stubbornly replies:

It was only because she ordered me out of the dwelling house.

Mr. Kgosiensho points out the inconsistency in this position:

Now if you did not report to either parents, who is at fault now?

He is forced to reply:

The fault lies with me because I did not report.

These exchanges emphasize the importance of parental consultation and involvement. This is followed up by Mr. Kgosiensho:

Do you think this young woman is merely just giving you trouble by accusing you for what you did?

He has to reply:

No.

Mr. Kgosiensho attempts to use Mokawaledi's failure to act properly to get him to accept the woman's claim:

Did you hear her saying that since you gave her a child you disappeared and broke your promise. Hadn't you better compensate her and stay away from her?

He still attempts to distance himself from the issue of compensation by stating:

I want to marry her.

In response, Mr. Kgosiensho asks him:

Can marriage constituted by force ever be set up? Can the marriage be set up by this dispute? How do you think you can marry when a case about it is already on, do you think there is any chance to do so?

This emphasizes that when an action is stated in terms of compensation at the Chief's *kgotla*, the parties' relationship is regarded as over. It is viewed as a social affirmation of breakdown. The man finally admits defeat and says:

No, I don't think there is any chance.

He then is asked:

Do you know your Kwena law?

He replies:

I don't know it.[93]

Mr. Kgosiensho starts to explain:

The Kwena law in a case of seduction is when a person gives a girl a child outside the law . . .

He then is interrupted by the man who claims:

I married her according to Tswana law and custom.

He is reprimanded by Mr. Kgosiensho:

Did you hear this woman saying that you had a child with her by mistake because at the time plans for constituting marriage were under way and you then disappeared and that in her feelings she is not going to marry you anymore. You had better compensate her with 8 head of cattle and you people part.

The man, however, will not give up his line of argument and states:

I had a child with her according to law, not outside the law, what do you mean by saying so? [i.e., that he did not].

In an attempt to martial support for his claim, he refers to the engagement presents and support given during and after confinement:

93. This would be seen as an admission of weakness as he is a member of the *Kwena*.

I had provided the initial property that is always given to an engaged woman and at childbirth I gave support and did everything until she was out of confinement.

Mr. Kgosiensho responds:

Did you hear in her statement that the arrangement was that you could live with her in the meantime by permission of both parents and that after plowing in January marriage was to take place. What made you not wait for that period?

He responds:

I did not wait because I and my parents were not ready for marriage.

Mr. Kgosiensho tries once again to get him to see that he has no claim to marriage:

Do you think the idea of you being given special permission to live with the woman you proposed for marriage comes under any law, because that special permission was for just a short period until after plowing, is that the law?

Note that he is emphasizing that the permission was limited. The man however remains obstinate:

That is not the law.

Mr. Kgosiensho continues to show him that there is no marriage:

Do you see that the permission was not a law. When she took out your clothing and locked the hut you did not take any action because you were not yet married to her, do you see that point?

He responds:

Yes, I see that point.

Mr. Kgosiensho brings the proceedings to an end by closing off discussion with him; he states:

I look upon you as a person who does not know Tswana law and custom because you were given special permission to live with the girl you were engaged to and then you abandoned her. You did not tell anybody either your parents or her parents, that shows that you do not know anything about Tswana law.

He then turns to the woman and asks her what her final wishes are. She reiterates her former claim:

All I can say is that he compensates me and that we separate.

Mokwaledi is then asked to make a final statement and says:

My last words are I want to marry her.

Mr. Kgosiensho then summarizes what he considers to be the evidence and his response to it. His summing up will be quoted at length

because it articulates the norms that in Mr. Kgosiensho's view underlie a Tswana marriage. He states:

> The complainant has explained to this court that the defender fell in love with her and that they consulted their parents on both sides about marriage. The parents on both sides acted accordingly by presenting the articles which are in accordance with Tswana procedure in marriage called *Peelela*. They finally gave special permission for the two lovers to live together with a pending arrangement for marriage. The marriage was to take place immediately after the plowing season in January 1978. No action was ever taken until they had a child. In this case the child was born outside the scope of procedure in terms of Tswana law. The complainant has told this court that her father has many a time been in contact with the defender's parents finding out the position regarding the proposed marriage. Nothing was then done, no action was taken until the case was brought here.[94]
>
> In his defense, the defender states that what the complainant says is the truth. He states that he went away from her because at one time when he visited her she threw away his personal effects. This is just a clumsy excuse because if he knew anything about the law of marriage according to Tswana custom there would not be a case like this. He never took any trouble to report to his "wife's" parents what his complaint was at the time. There is no marriage under Tswana custom where a husband will leave his wife and child for one year without any communication.

In other words, such behavior does not signify a marriage.

Mr. Kgosiensho continues:

> According to Tswana custom, there is no engagement that would last for four years.[95] With regard to what you wish as a defender this court cannot prevent you from marrying Nyana if you so wish. Now this is the order of the court. You are going to bring out 8 head of cattle to compensate Nyana for having given her a child.

The parties had different strategies for the manipulation of norms in this case. While Nyana stressed that this was her first child and that she was claiming compensation, the man attempted to deny her claim on the basis that they had married. While the man in Teko's dispute sought to argue that she was simply a *nyatsi*, or concubine, because she had three children when she raised the case, Nyana's partner adopted a completely different approach. Nyana's partner no doubt was aware that when a woman comes to the *kgotla* with her first child and alleges that a certain man is the father, she is likely to be believed. Her statement is enough. The man, in contrast, will have to meet much more stringent requirements for his denial of paternity to be accepted. While women have no power to pursue claims where they have had more than one child, they are invested with such power with their first pregnancy. For that brief period, they are in a superior bargaining position to the

94. In fact, it had been heard in three *kgotlas*.

95. This statement is dubious, as in practice it may last for years. However, in this case there was not the contact between the families that one would expect.

men.[96]

VI. Conclusion

Procreation is no longer tied to marriage among the Kwena. Among women of the younger generation and even among some of the older generation, pregnancy and marriage are separated with many women having children with different partners outside of marriage. Families may engage in negotiations over marriage, but such negotiations rarely come to fruition. Schapera, writing in the 1930s, presented a very different picture, one where family life revolved around marriage.[97] The discrepancy between the modern Kwena and Schapera's account may merely represent changes over generations. A fuller explanation of Schapera's findings, however, may be tied to his use of a methodology associated with legal positivism. Schapera's exposition of family life in *A Handbook of Tswana Law and Custom* was based on a static account of substantive rules relating to marriage based on information acquired from informants who constructed their model from an ideal situation.[98]

The modern material on the Kwena presents a different scenario. The predominant picture is not one of procreation within marriage, but one which stresses the fluidity of relationships. Individuals typically experience a number of different relationships. What does surface from such relationships is the importance of negotiation. The majority of relationships in which children are conceived in Mosotho *kgotla* may not reflect formal or informal marriages, but they do involve negotiation concerning the status of such relationships. This holds true whether the negotiations are between individuals and their families outside of dispute forums, the most common situation, or within such a forum, as illustrated in Teko's case. In looking at these negotiations, one becomes aware of the political and economic forces that are at work and which influence the legal process.

Findings on the negotiable character of law are not just limited to the Kwena, but may be found among other *merafe* in Botswana as demonstrated by Comaroff and Roberts.[99] Their observations may have

96. Unlike Teko's case where the matter was heard first at *Kgosing*, Nyana's case worked its way up to the Chief's *kgotla* from *Bobadidi* subward (of which both parties are members) to Kgaimena *kgotla*, a more senior subward, and finally to *Maunatlala* senior ward. The whole process from the first attempted hearing (the man and his family failed to turn up at all the hearings until the case was raised at *Kgosing*) until the hearing at *Kgosing*, took four years.

Comparing Nyana's situation with Teko, one can see that after the birth of the first child and the father's disappearance, the woman and her family did not let the matter lapse for a number of years but actively had pursued the matter for four years until it reached *Kgosing*. In the interim she did not have any further children. In discussion with Nyana, after the case, she revealed knowledge of the Magistrate's court but had rejected it as a forum because "I did not like the method of support, and I wanted to settle up once and for all."

97. I. SCHAPERA, A HANDBOOK OF TSWANA LAW AND CUSTOM (1938).

98. *Id.*

99. J. COMAROFF & S. ROBERTS, *supra* note 44.

a specific cultural base, but they are also the product of a form of methodology which differs from that employed by those scholars working within the confines of legal positivism. Such observations stem from an approach which takes account of a much broader range of phenomena. By looking beyond the study of substantive rules relating to marriage or institutions such as the *kgotla* or Magistrate's Court and examining social processes in Mosotho *kgotla*, taking the actors' perspective into account, one acquires a dynamic, flexible, and plural image of law. This image contradicts the account of law that is presented by legal positivists.

While Schapera's description of family life tied to marriage provides an account of Tswana society, it is limited to a small section of that society, in light of materials from Mosotho *kgotla*. That section of society is highlighted and isolated for study while the rest of society is ignored. A segment of society becomes elevated to a universal state of affairs whose norms are said to establish the framework within which all of that society operates. Such an approach distorts the reality of the situation and enhances, rather than closes, the gap between law and behavior.[100]

Schapera's approach to family law, with its limited recognition of norms, fails to recognize the position of the majority of the inhabitants of Mosotho *kgotla*. His positivist methodology restricts its examination of the foundations of family life to those individuals who were formally married or in marriage-type relationships. By creating such displacement, with marriage represented as the cornerstone rather than as a segment of society, it obscures the true nature of negotiation in Kwena society. When we note that negotiation of relationships is a general feature of Kwena society and that marriage is not a foregone conclusion, it becomes apparent that what occurs within dispute forums is merely an extension of what occurs within society generally. Just as everyday life involves negotiation over compensation or marriage, so these issues find themsleves debated in dispute forums against a background which, contrary to the image presented by Schapera, is fraught with ambiguity rather than certainty. Such deliberations revolve around the social recognition of a relationship, something which is open to interpretation and cannot be predicted in advance.

Whatever the difficulties of assessing the results of differing types of methodology and the role of generational change, we find that among the Kwena, marriage no longer can stand as the key institution for the transmission of various forms of property and personal obligations. In Botswana today, the conditions which fostered exchanges of women and cattle through marriage have altered. Access to resources, such as land and money, and to political power may be acquired in other ways. The role of formal employment also may be considered a new form of "property."[101] The tension between traditional and other axes of power, and

100. *See generally* Galanter, *supra* note 8, and Griffiths, *supra* note 6.

101. This is a term which originated with Charles Reich, *The New Property*, 73 YALE L.J. 73 (1963-64).

the complexities of living and operating within different spheres are illustrated through the experiences of members of Mosotho *kgotla* and, in particular, through the biographies of Makokwe and Radipati's family members.

Recognition of these changes in Botswana and their effect on individual experiences is something which Schapera's writing and scholars working within the framework of legal positivism ignore. The changing role of gender cannot remain unaddressed as it has been by those adopting a legal positivist form of methodology. While sharing a common experience, having children outside marriage, women's situations vary, depending on where they have centered their sphere of activities. Some, like Olebeng and Teko, reflect a profile belonging to the older generation in the *kgotla*. Their sphere of operation is restricted to domestic activities and subsistence agriculture. The diminishing returns in this sphere caused in part by drought but also by a general decline in productivity, have perpetuated the dependence of these women on men, so that they rely on their fathers, brothers, or partners for support.

In contrast, there are women such as Goitsemang and her sisters, within the profile of the younger generation. Their sphere of operation extends beyond domesticity to employment. While they also have relied on men for support, such reliance is not so protracted in nature, but is limited to short periods preceeding and following birth. Through their direct access to money as primary wage earners, they have been able to acquire a greater degree of autonomy, a situation that is demonstrated by the case of Goitsemang, who has been able to build her own household in the capital city.

It is within this cultural context that negotiations surrounding pregnancy take place. They do so at a level which forms part of the basic fabric of social life and which occurs, for the most part, outside formal institutions such as dispute forums. In this process various cultural norms structure the outcome according to procedures for reporting, family meetings, and the number of pregnancies involved. These norms make their presence felt in the legal sphere where negotiations are pursued as "disputes" in various dispute forums. The ways in which they do so and their manipulation by the parties concerned were highlighted by Teko and Nyana's disputes. In Teko's case, we find that although she was predisposed by her background to use the Chief's *kgotla*, she failed to establish her claim (except in the second hearing) because when she raised her action she had several children by two different fathers. This contravened the prevailing cultural norm that compensation can be paid only for the birth of the first child, with the result that her partner's argument, that she was simply a "concubine" and as such not entitled to support, was the one that the community favored. In contrast, Nyana was successful with her claim. She fulfilled the prevailing norm of one child while her partner failed to establish marriage, which was the ground on which he rejected her claim for compensation. Nyana illustrates the power that women may exercise with their first pregnancy.

This is lost, however, as Teko's case demonstrates, with subsequent pregnancies. As the pattern for women in Mosotho *kgotla* is to have several children during their lifetime, their experience of being in a superior bargaining position with men is a brief one.[102]

In exploring law among the Kwena through a particular form of inquiry, which looked beyond formal legal texts and its institutional setting, to social processes operating within the community in general, we find a very different image of law from that presented within a "positivist" tradition. Work within that tradition, whether in Africa or elsewhere, has, at its crudest, limited its examination of law to the relationship between "legal" rules located within a statutory or common law context, or at its most sophisticated, broadened the frame of reference, but still confined discussion to the internal dynamics of law.

As stressed at the beginning of this Article, such an approach endorses an image which reinforces concepts concerning the hierarchy and autonomy of law within the social order regardless of the cultural setting. This has meant that the legal sphere has been isolated from the rest of social activity and treated as an autonomous field. The norms that operate within it are designated as "legal" norms which are viewed as having an identity, or more properly, a validity which is unique and which differentiates them from other social norms.

The legal positivists construct a hierarchy within the social order, one in which "legal" norms predominate and rule as the norms which have superiority over all others. Such demarcation masks the subtleties of human interaction and denies any proper appreciation of the impact of the "social" on the "legal." The emphasis on autonomy and its association with value-neutral concepts such as "equality" obscures recognition of the roles that power and gender play as separate yet identifiable norms in the maintenance and dissolution of relationships.

Within Africa, the more insidious practical impact of this type of analysis has been not only to demarcate the social from the legal, but to divide the legal itself into different spheres defined as "customary" or "European." Such a distinction is to be found within the formal legal system of Botswana. This form of classification has had an impact on legal analysis in that it has led to an assumption that the norms that operate in each sphere stem from cultural considerations that are independent of one another. Not only is there segregation, but the "European" system is favored as the dominant system because of its superior position within the hierarchy of the formal legal system.

102. While they may turn to the Magistrate's Court for assistance, this is of limited value given that access is restricted to one day a week and that there is a two-year delay in handling civil actions such as maintenence. The position does not necessarily improve with a change of location. Those who have experienced the Magistrate's Court outside Molepolole, for example in Gaborone, also have experienced difficulties. Radipati's daughter Olebogeng received an award from that Court, but the man disappeared after making two payments and could not be traced.

While such a unitary image of law can be constructed for Botswana in terms of its formal legal provisions, it is contradicted by the study of indigenous forms of legal process among the Kwena. From their perspective, it is clear that whatever the origins of the systems labelled as "customary" or "European," they are mutually dependent, defining their role in relation to one another and operating a complex process of dispute manangement within a plural legal field. Officials such as Mr. Kgosiensho will direct individuals to the forums that they consider appropriate, and individuals may in turn indulge in "forum shopping."[103] It is not simply that justice may be obtained in many rooms, but equally that the sources of norms applied or rejected in different forums are similarly diverse.

In addition, we are forced to reconsider the nature of the legal institution when we are made to recognize the role that ordinary cultural norms play in the legal universe. So, for example, we find that the norms that are operative in Kwena culture with regard to pregnancy impinge on the legal sphere represented by Teko and Nyana's disputes. Such findings enable us to place the legal sphere in perspective either by forcing us to a realization that, if we adopt a "positivist" approach, law only reflects the end of a process which, for the most part, occurs outside of the law and of the operation of dispute forums, or alternatively, by making us redefine the parameters of law.

Through the study of families and households in Mosotho *kgotla*, we form a more informed image of law as we become aware that the elements which shape the process of negotiation and disputes are those which spring from the basic fabric of the culture and not from an isolated and restricted part of it. While such findings may be culturally based, they are, as stated earlier, the result of a particular form of methodology associated with models of legal pluralism and law as process which have set themselves up in response to and in rejection of legal positivist forms of analysis. In analyzing the form of inquiry that is employed in the conceptualization of law, we find that observations on law among the Kwena are not simply limited in interest to their specific cultural context, but are of greater siginificance, in that they make us reflect on the forms of inquiry that we pursue with regard to the conceptualization of law in our own society. Research findings will always have their own parameters, but debates over forms of legal analysis and concerning these types of methodologies have taken place over a broad range of cultures spanning the western world, Africa, and Asia. The cultural factors that inform these debates necessarily vary and provide their own specific insights, but in the last instance they express a common desire to develop a theoretical model which is sufficiently open to allow for cultural difference and for the diverse mechanisms of negotiation and mediation which permeate all exchanges, including those of law.[104]

103. *See, e.g.*, Griffiths, *Support for Women with Dependent Children in Botswana*, 22 J. LEGAL PLURALISM & UNOFFICIAL L. 1 (1984).

104. Strathern, *Discovering Social Control*, 12 J. L. & SOC'Y 111 (1985).