

# THE 'WOMEN'S QUESTION' IN KWENA FAMILY DISPUTES

Anne Griffiths

## Introduction

Anthropologists have laid great stress on the need to study society as a whole, to examine every aspect of its make-up, particularly when exploring another culture, to acquire a true understanding and insight into the operation of that society and culture. Given this perspective, it appears inappropriate to isolate women on the basis of gender or class, as an object of study. Are women not simply members of society and has isolating them as an object of study not the danger of distorting the account of society as a whole?

While such concerns may be valid, appearances can be deceptive. By concentrating on women an imbalance created in the accounts of classical anthropologists such as Gluckman (1955), Bohannan (1957) and Gulliver (1963), who present society through the eyes of a male-oriented culture and treat women as adjuncts to male centres of power, is corrected. To look at women in isolation is not to distort the picture but to redress the imbalance,<sup>1</sup> and uncovers a perspective originally overlooked which leads to a more comprehensive account of society.

In my research, women were not originally targetted as the object of study, but emerged as a particular focus after fieldwork on family disputes revealed the specific problems they face, individually and

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<sup>1</sup> This perspective is endorsed in the Preface to Rosaldo and Lamphere (1974) and underlies the contributions to that volume.

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collectively, in utilising the legal system. These specific problems will be discussed in this paper in the context of two disputes concerning divorce and division of property among the Kwena in Botswana.<sup>2</sup>

### Kwena background

The Kwena are one of the dominant Tswana 'merafe' (tribes) in Botswana (Schapera 1980: 83). They are part of the Sotho group of Bantu-speaking peoples who populate the Southern African continent. Despite their history, they are regarded as being less dominant politically than their neighbours, the Kgatla or Ngwato, about whom Schapera and Roberts have written extensively.<sup>3</sup> 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 (Botswana 1983a: table 1) and a large number of these, approximately 20,000 people, are associated with households in the central village, Molepolole (Botswana 1983b: 7). Traditionally they depended on subsistence agriculture, cattle raising, hunting and gathering and migrant labour to South Africa, but the extent to which they rely on these activities has altered over time and is continually shifting.

In Molepolole, the basic social unit on which the structure of the village is based, is the kgotla, a group of huts centred together. A kgotla is also a forum where important administrative, political, ritual and ceremonial events take place. It is presided over by a headman whose position is 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.

Molepolole has approximately 70 kgotlas and 5 main wards. The headman of the main wards are funded by central government but they do not possess the same formal powers as officials of the Chief's kgotla. The Chief's kgotla and ward is known as Kgosing. It is presided over by 3 officials who vary in authority from the Deputy Chief to the Senior Chief's Representative. The latter hold office on

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2 These disputes form part of research which has been written up in a Ph.D. thesis for London University, awarded in January 1988.

3 Their work is documented in the list of references at the end of this article.

the basis of a relationship with the ruling Kwena family and the appointments have been the source of bitter political infighting.

In Molepolole, disputes are dealt with in dispute forums which reflect the hierarchical structure of the village. When individuals disagree, particularly within the family sphere, an initial attempt to reach accommodation is made by the members of the families concerned. Where such family negotiations are unsuccessful the dispute may be taken to the kgotla where the headman will attempt to mediate. If unsuccessful, the matter may be referred to the subward and the ward until it reaches the Chief's kgotla. This process may take many years. Family disputes may also be taken to the Magistrate's Court in the village or the High Court in Lobatse. Attempts to characterize these forums as 'customary' or 'European' fail as they are interactive and treated in practice by litigants and others as parts of one legal field.

When a dispute is brought to the kgotla, the procedure begins with the individual who has a grievance stating his or her position. A third party, normally the headman, then asks any questions he considers appropriate and invites the other party to the dispute to question anything that has been said. Other community members present in the kgotla at the time, are then invited to question the person raising the dispute. The same questioning process is then applied to the other party to the dispute. Although women may be present they rarely participate at this stage.

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

The Chief's kgotla is recognised as a court by the formal legal system of Botswana, both in terms of its own authority and also as an agency for administering national law at a local level, for example, the dispensation of statutory criminal justice in minor offenses. Within the formal system the Chief's kgotla features at the bottom of the court hierarchy and its decisions are subject to review by the District Commissioner (D.C.) and to appeal to the local Magistrate and the High Court. The Chief's kgotla is assisted by the Tribal Secretary and a number of clerks who are employed to keep written records of the proceedings and to serve written notice on

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those called to attend a hearing. It is only in the Chief's kgotla that proceedings are recorded.

The hybrid character of the Chief's kgotla is evidenced by a number of features. The language of the formal system has been adopted. The kgotla is often referred to as the 'Chief's Court' and those who deal with disputes are referred to as 'Presiding Officers' who give 'judgement' and make 'orders'. The person raising a dispute is referred to as a 'complainant'.

In family disputes, as in other areas, the kgotla may impose a settlement. There are no legal specialists involved and those hearing disputes are all appointed by virtue of their relationship with the ruling Kwena family. Procedure within the Chief's kgotla takes the same form as in other kgotlas and it appears from my research that third parties hearing disputes operate on the basis of the same cultural norms at all levels.

### The *BUSANG* and *SEITSHIRO* disputes: a case study

Our case study is of two couples, the Busangs and the Seitshiros, who are in the process of divorcing and dividing the family property.<sup>4</sup> While both disputes were subject to the same legal process involving divorce in the High Court, division of property in the Chief's kgotla, and although virtually identical sorts of property were at issue, the application of norms in these disputes was quite different. One woman was denied any share of the property, the other received a substantial share. In neither dispute did the woman receive a share equal to that of the man, as a result of local ideas concerning the nature of family property.

In order to place the disputes in their local context, I begin with some background material on Kwena ideas concerning the relevant customary law and on the law of marriage and divorce in the national legal system of Botswana.

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<sup>4</sup> These disputes are part of research findings from fieldwork that was carried out among the Kwena in Molepolole in January-August 1982 and June-September 1984.

*Kwena legal ideas*

Among the Kwena fault is the key concept which governs divorce and division of property. Parties should not separate unless one or the other of them is at fault. Conduct which gives rise to fault includes witchcraft and adultery. Fault is constructed, presented and interpreted according to Kwena perceptions of marital roles. Women find it harder than men to establish the relevant conduct or to reject allegations concerning their behaviour and this is highlighted in the Busang dispute, as we will see. A man may, for example, divorce his wife directly for adultery but she will not raise the issue directly because it is not considered grave conduct on the part of a man. She will pursue the dispute on the basis that his adultery has led to his failure to support his family. The claim of failure to support is viewed as a serious matter and it provides women with a vehicle through which they may get their relationship subjected to public scrutiny.

While the Kwena are unanimous in their views on the role of fault, my informants gave conflicting accounts of what each party to a marriage would be entitled to receive when a divorce is granted. They all agreed that the woman would be entitled to a share of the produce that she cultivated and to a share of the household goods but were in disagreement as to whether she had to return to her family if she was not at fault. If not at fault, she would be entitled to a number of beasts, up to a maximum of 8 head of cattle. The maximum number would only be awarded where there were sufficient cattle, for example, between 50 and 100 beasts available for distribution. In most cases, the woman would actually receive between 1 and 3 beasts. One cynical male observer from Maunatlala Kgotla, however, observed that such discussions were academic because "whatever the situation the woman is always found to be at fault". Where a woman is at fault and was to be sent back to her family, the Kwena disagreed about her entitlement to cattle. Some alleged that she would always be entitled to one beast to carry her belongings home, while others asserted that she would not be entitled to a single beast. The Busang dispute highlights how crucial the issue of fault may be for a woman.

In discussing divorce, which is meant to take place only in the Chief's kgotla but on occasion in fact is adjudicated at the ward level, some Kwena complained that the 'colonial' or 'common' law was encroaching on the customary system, particularly at the level of the Chief's kgotla. Members of Ntloedibe ward stated: "What is done today at Kgosing is not the Tswana way of doing things, it is based

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on Common Law.”<sup>5</sup> Members of Maunatlala ward commented that a certain decision at Kgosing, “was not based on old traditional Tswana ways of doing things, it was done on modern ideas.”

### *the law of marriage and divorce in Botswana*

The Busangs and Seitshiros were dividing their property according to customary law although they were not married under customary law. In Botswana, parties may marry under statute, with a religious or a civil ceremony, or under customary law. When they marry under statute they must divorce in the High Court.<sup>6</sup> Divorce there is based on the English model of irretrievable breakdown.<sup>7</sup> However, if you are African, the division of property will be dealt with according to customary law.<sup>8</sup> Application of customary law may be excluded before marriage, in which case property will follow a 'European' style of division on divorce that involves either community of property (where the assets will be divided equally between the parties) or under a separate property regime (where each party retains his/her individual ownership of assets, depending on whether the parties who excluded the application of customary law married under Statute before or after 1 January 1971.

In theory, division of property under the customary system is based on principles different from those of a division according to community of property, where the concept of 'fault' is irrelevant and the property is simply divided between the parties. Customary division is according to the sources from which the property is derived and the conduct of the parties. In both the *Busang* and *Seitshiro* disputes, the parties were married under statute and therefore divorced in the High Court but as Africans their property was dealt with in the Chief's kgotla under customary law, as they had not opted to exclude customary law.

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5 'Common Law' is in Botswana formally defined as "any law written or unwritten in force in Botswana other than customary law." (Customary Law Act, s.2.)

6 Matrimonial Causes Act 1972.

7 Matrimonial Causes Act 1972, s.15.

8 Married Persons Property Act 1970, s.7.

*Mr. and Mrs. Busang*

Mr. and Mrs. Busang from Molepolole were married in 1960. By the time their dispute featured in the Chief's kgotla in 1982 they had eight children, two of whom were adult. From the beginning of their relationship there were problems which, following current practice, were dealt with in various kgotlas until they eventually reached the Chief's kgotla in 1979. Unfortunately, attempts at resolving their problems were unsuccessful and the marriage was finally dissolved by divorce in the High Court in 1982, on the grounds of irretrievable breakdown caused by Mrs. Busang's behaviour. Mr. Busang was awarded custody of the 6 minor children but the distribution of property was referred back to the Chief's kgotla at Mrs. Busang's request because of failure to reach agreement.

At the time of their dispute the parties were not on an equal footing in terms of status and power in the community.

Mr. Busang was a respected figure who had acquired status through his employment as a government civil servant. He had been a D.C. in Tsabong and was at the time of the hearing an Under Secretary of Works and Communications. Not only was he close to ministerial rank but he belonged to a family that is considered very influential in Molepolole.

In comparison, Mrs. Busang lacked influential family connections and had no alternative source of status, for example, through employment. She had only recently started to generate income from the sale of jerseys knitted on her knitting machine.

*Mr. and Mrs. Seitshiro*

Mr. and Mrs. Seitshiro began their relationship when they met in 1960 and they had a child in 1961. They married in 1967. In the years following their marriage another two children were born. From 1975 on, serious problems arose in their relationship. Mrs. Seitshiro explained, "according to Tswana custom, whenever I had any complaint I went to Mr. Seitshiro's uncle and he came to the house and discussed it with Mr. Seitshiro and myself." This occurred on several occasions. She finally left the family home in Tlokweng outside the capital city of Gaborone in January 1980 to live in Molepolole where she was working as matron at the hospital.

In March that year, Mr. Seitshiro wrote and informed her that if she did not come home within fourteen days, "he would divorce me and charge me with desertion." Mrs. Seitshiro contacted her parents

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and her lawyer and after various consultations decided to divorce Mr. Seitshiro in the High Court. "I charged him with adultery, ill treatment and that he did not maintain me." Mr. Seitshiro did not defend the divorce which was granted in Mrs. Seitshiro's favour. However, after several meetings in court, where they failed to reach agreement about property, "we were asked to sign a paper stating that the property would be dealt with by Chief Gaborone of the Batlokwa according to customary law at Tlokweg."

Chief Gaborone never dealt with the property because Mr. Seitshiro wrote to the Commissioner of Customary Courts claiming that Chief Gaborone was prejudiced against him, "that he hates him and told one of the women in Tlokweg that he [Chief Gaborone] would fix him." As a result, Chief Linchwe of the Bakgatla was called in to deal with the division of property. At the division, Mrs. Seitshiro was accompanied by, "my two brothers, a male cousin and my three sisters. Mr. Seitshiro came with his uncle and two sisters and his brother-in-law from his first marriage."

At the time of their dispute, the Seitshiro's were more evenly matched than Mr. and Mrs. Busang, Mrs. Seitshiro having - through her education and training as a nurse - somewhat more status than her husband. She had been employed throughout her adult life and was matron of the hospital in Molepolole when the dispute came before Chief Linchwe in 1982. In contrast, Mr. Seitshiro did not have such high qualifications. Although educated, this was not to the same standard as that of his wife and throughout his married life he had only been employed intermittently as a bore-hole mechanic until he took over management of the bar in Tlokweg.

The property involved in the two disputes is as follows:

<i>Busang</i>	<i>Seitshiro</i>
modern dwelling house	modern dwelling house
vehicle bar	cocktail bar
bank savings: 1,500 Pula	
	bottle store
	butchery
furniture	furniture
domestic items	domestic items
ploughfield at Maologane	ploughfield at Tlokweg
10 head of cattle	cattle
10 goats	goats
	Rondevaal at Tlokweg



The *Busang* dispute was dealt with by Mr. Sebele, the Senior Chief's Representative at Kgosing in Molepolole on 16th July 1982. The *Seitshiro* dispute by Chief Linchwe of the Bakgatla in two sittings, the first at the cattlepost in Le Phephe on the 14th and the second on the 15th of June in the village of Tlokweg.

*commencement of the proceedings*

Both proceedings begin with the women outlining the property that they claim. Mrs. Busang states:

I am complaining about the property which I acquired jointly with Mr. Busang. I say this because it is he who divorced me.

I have asked him to let me have some of the things....

She then goes on to list the property outlined above.

Mrs. Seitshiro begins likewise:

I am married according to community of property. I demand a share of the property involving cattle, goats and a house at Tlokweg. At the cattle post I claim the pumping plant engine which was meant to water cattle and make an income by fees paid by people to water cattle.... I claim all this property because my husband turned me away, he did not want to live with me as his wife. We had agreed that I should buy some cattle out of sorghum we had at the time and also out of the money we were earning.

She also gave details of the property outlined above.

*questions by the third party hearing the dispute*

After Mrs. Busang makes her statement, she is questioned by Mr. Sebele in detail about the property. For example, she is asked about her claim to 1,500 Pula. Mr. Sebele inquires:

Is the money in the bank at the moment?

And after her reply he responds:

Are you definite about this money being in the bank?

His questions deal with specific items of property, for example:

You said there were 10 goats, we would like a full explanation as to how you arrived at the number 10?

In contrast, when Mrs. Seitshiro finishes her statement she is only asked one question by Chief Linchwe and that is concerned, not with

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the property she has described, but with the number of children that she has had with Mr. Seitshiro. She replies:

I have two sons with Seitshiro.

*questions by the husband*

The husbands are then permitted to ask questions. Both seek to question the account given by their wives of the marital property.

Mr. Busang, for example, asks his wife:

Since all the money deposited in the bank has a record have you a book for this money?

Mr. Seitshiro asks his wife about the contributions he made to the town house, to which she replies:

You have never contributed anything towards the buying of this house because no money was ever paid for its purchase.

In the interchange between husband and wife, Mrs. Busang fares badly. Mr. Busang manages to discredit her by forcing her to admit that she is making a claim based on the reproductive capacities of an ox. He observes:

When you said this ox reproduced 9 cows, you know an ox never reproduces. Do you think you are telling this court the truth that you are claiming 10 cattle from me?

This interchange is crucial as it seriously damages Mrs. Busang's credibility.

*questions by the kgotla*

At this point, the course of the two proceedings diverge because Chief Linchwe does not follow the usual procedure of throwing the matter open to the kgotla but cuts straight to Mr. Seitshiro's version of events. In contrast, Mr. Sebele in the Busang dispute opens the matter to questions from the kgotla. A lengthy interchange follows between Mrs. Busang, various kgotla members, and Mr. Sebele. The kgotla members concentrate on the issue of fault. The very first question Mrs. Busang is asked is by the Chief Regent, participating as an ordinary kgotla member. He asks:

When you started making your statement you wanted this property because your husband had divorced you. My question is did he just divorce you without any cause?

Mrs. Busang responds:

He just divorced me.

The Chief Regent continues:

Since you say he divorced you without any cause, have you ever heard of a case of that nature where a husband divorced his wife without any reason?

She is forced to respond:

No, I've never heard of such a case.

This is a crucial intervention which establishes the tone for the rest of the Busang dispute. The fact that it was asked by an influential member of the community did not pass unnoticed. The other kgotla members picked up the theme of fault and it dominated the rest of the proceedings. Mr. Sebele then engaged in a long interchange with Mrs. Busang which resulted in her dropping her claim to a substantial amount of the property. It is only after this that Mr. Busang gives his statement.

*husband's response to wife's claims*

When Mr. Busang gives his statement he is not concerned with the details of the property but seeks to establish fault on the part of his wife, which he claims excludes her from any entitlement to property. He begins:

In connection with the case I do not see anything that entitles this woman to the property she is claiming. She is not entitled to anything according to traditional custom. I'm saying this because she is the person who created all the troubles in our married life since we married on 12th November 1960".

He then expands on the line taken by members of the kgotla. He reads out verbatim the statement that he submitted to the High Court for divorce. He concludes:

I presented all the evidence to the High Court, to Justice Hannah on the 28th November, 1980. She did not contradict all this. She was represented by certain lawyers who I paid for. I had only paid the legal costs, she consulted the lawyer on her own, all I did was pay for the lawyer. This indicates that she was aware of everything that I presented to the court and she accepted it in toto. It now astounds me that she being aware of the fact that she has been instrumental to the breakdown of the marriage in collusion with her parents as previously stated, claims any property.

He goes on to stress his reasonable behaviour and her failure to act responsibly by cooperating with him:

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Before I conclude let me clarify a certain point regarding certain things I discussed with her before the case was decided at the High Court. I told her she did not have enough grounds to claim a share of the property because the matter will be referred to the kgotla to be settled in accordance with our tradition and custom and you are going to lose the case. Then I suggested that she should let me know what items of property she wanted and I would give them to her. I wanted her to list what she wanted so that I could tell the kgotla the division we had agreed to. I even gave her the option that if she wanted to take all the property I would let her have everything willingly.... Then we listed out the items and I came to Molepolole with the list on 25th July 1980 so that we could both sign an agreement which included the custody of the children. Then she refused to sign the list ... and then and there I knew that someone had advised her not to sign. Then on this wrong advice she made a different list with her lawyers which included things which did not exist.

Mr. Sebele does not question Mr. Busang at all, in marked contrast to his treatment of Mrs. Busang.

Mr. Seitshiro constructs his statement in the same vein as his wife, concentrating on specific items of property and how they were acquired. He begins:

This lady bought the bricks as soon as she arrived from England. There were more than 2,000 brick blocks. I had bought the corrugated iron in 1965. There were 9 sheets and I stored them at my mother's place. I was allocated a yard site in 1965 by the Chief with my headman named Mokete. I came there and began to build there after my marriage with Mathilda.

He tries to maintain that his wife is not entitled to the property on the ground that she never contributed financially to its acquisition. For example, he claims:

We had already paid the first builder the sum of 44 Puna. I don't know how much more money he was paid because my wife had the money. She was the person to do the payments. I struggled about money to pay for the building and my wife never contributed anything.

He also accused her of mishandling money:

Regarding the amount of 1,600 Pula, I asked my wife to let me have the statement of the expenditure in paying the builder and buying the necessary building materials. She refused to give me the statement.

His accusations include theft of property:

When I got home from Ghanzi I found that she had taken some blankets, plates, cups, and some other things in the house. Also the children told me that their mother had taken a number of things from the house. Sometime later I phoned her to tell her that I was surprised to find the house almost empty. Then she replied that it was herself who took the house property.

Chief Linchwe questions Mr. Seitshiro about his family situation.

*wife's questions to husband*

When Mrs. Busang questions her husband she attempts to refute the allegations of bad conduct. For example she asks:

Since you say I'm a harlot and having intercourse with other men what action did you take?

In contrast, Mrs. Seitshiro questions her husband about his statements regarding the property, for example:

Did you not instruct me to buy an engine in 1973 from Dr. Merryweather?

*contribution of kgotla members in the Busang dispute*

After the wives have finished their questions, the matter is thrown open to the kgotla in the *Busang* dispute but not in the *Seitshiro* dispute, where Chief Linchwe immediately proceeds to his decision.

In the *Busang* dispute the kgotla members' comments are all directed to the question of conduct and its relation to property. One kgotla member states:

In this present case the reasons were not contested by the wife. As he [Mr. Busang] said, she was not an asset except so far as bearing children. When considering cases of this nature they are usually based on consideration on the position of the children whether they are minor or grown up. But in a case where a woman left the husband and left the children with the husband as is the case now, she is just like somebody who is dead. I do not think her claim to property is justifiable. With whom is she going to share this property when all the minor children are under the custody of the husband? I can only go as far as that.

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Another kgotla expresses a contrary opinion:

We have been listening to this case all day and it is difficult for us to base our decision on customary procedure, all we can do is to ask Mr. Busang to be sympathetic and give her something.

Yet another kgotla member states:

I don't have much to say but I'll say what the other speakers have already said. I don't see any reason why the woman should be given a share of the property. Our Tswana expression is that she has committed suicide and someone who does so you don't cry for. When her husband wanted to sympathetically consider her position and give her property she turned that offer down. The husband had a kindness to ask her to make a list of all the items she wanted so that he could give them to her and she refused and insisted on having a case against the husband in connection with this property. She did not see the implications in the offer made by the husband, that he was willing to give some property voluntarily but did not want to argue about it. It is on those grounds I see no reason why this woman should be entitled to any of the assets. I contend that they belong to all the children she has deserted together with the husband. If she had been submissive to her husband and cooperated with him when he made an offer there would not have been all this trouble. She is instrumental to the divorce so I contend that she should get nothing.

*the decision in the Seitshiro dispute*

The procedural contrast between the two disputes is striking. In the *Seitshiro* dispute the kgotla is not consulted and the question of fault is never expressly raised. Instead Chief Linchwe concentrated on the assets that the parties acquired jointly and on their division. In his judgement he states:

When a woman is to return to her parents' home a man is ordered to give her some property, and property including cattle, in other words, a reasonable subsistence. A woman should not go back to her parents with nothing at all. Reasonable subsistence is a matter to be decided by the Chief and the men who are listening and discussing the case in the kgotla. In the case of *Mokohe v Mokohe* which was presided over by Kgosi Linchwe 11 (Linchwe himself), we gave the woman 140. We found that it was a reasonable share because she was also entitled to live a better life.

In this case between Mrs. Seitshiro and Mr. Seitshiro, I find that Mrs. Seitshiro's position has been simplified because she wants only 60 head of cattle and 10 goats.

She doesn't demand estate cattle. She demands the cattle which she worked for, because according to the law, if people separate they have to share the cattle which they jointly acquired when they married.

He explains that 'estate' cattle are "cattle which have been handed down from father to son," from generation to generation, "and they must remain with the man," they are, "not to be divided between the man and his wife."

Chief Linchwe's judgment on division is based not on fault but on what the parties acquired together after their marriage. With regard to the rest of the property he states:

I listened to your case regarding your immovable property. You have two fenced yards here, one yard is for dwelling premises, the other is for business premises. The business premises comprise a bar, a bottle store, two offices, a cocktail bar and butchery. They are all surrounded by a ploughfield. Then I told you yesterday, I am not going to act according to my personal opinion. I will lean to the decision arrived at for cases referred to which were heard at the High Court. These are cases between *Matlapeng Molomo* and *Tselane Molomo*. In this case it was decided that the man would take the bar and that the woman should take the bottle store. That was established by the Chief Justice in Gaborone. The woman was given the dwelling house in which she lives now and the order was that neither of them must sell the property which they were given because the property will later be inherited by their children. They were told that they were to use this property while they are still living. When they die the property goes to their children.

Now in this case, that of *Mrs. Seitshiro v Mr. Seitshiro*, I therefore decide that Mrs. Seitshiro shall take the bottle store and butchery. The toilet will be used jointly by them, each one will keep a separate key. The office goes to Mr. Seitshiro. The dwelling house belongs to both Mr. Seitshiro and Mrs. Seitshiro, when they die the premises shall go to their last born son (son of Mathilda and Mr. Seitshiro) whose name is Kesebonye. If Kesebonye should die while you two parents are living the premises will go to your first born son, Ramarettwa. If he should die before he is married the premises shall go to the first born son of the first wife, that is the rule according to Tswana custom. I hope that Mr. Seitshiro would not like us

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to use the hard rule of Common Law. We shall have to use the equity of the Common Law and I will do so if he likes. In Common Law a man can be imprisoned without a fine but Equity modifies this because one can be made to pay a fine instead of imprisonment when it considers fit.

This is what happened in the case of *Matlapeng* when he and his wife divided the property. The way the property was divided between them shows how Equity is administered.

### *the decision in the Busang dispute*

Mr. Sebele follows the advice of the majority of the kgotla members and states:

When the court considered Tswana custom the kgotla found that Gofetemang ... was not entitled to any property due to the fact that she was instrumental to the divorce, and further than when the marriage was dissolved at the High Court the children were given to the father. This property should be used for their maintenance. It is true and at the same time in accordance with customary law. I agree with the court members that Gofetemang is not entitled to anything. It is reported that she has all her clothing. Nevertheless this court pleads with Mr. Busang to be sympathetic. It is not a court order, it is a request. He must take into account the duration of their marriage and how many children they had together. He must try and consider her position sympathetically, it is not an order but a humble request.

### *comparison of the two disputes*

The results of these two disputes are very different. In one dispute the woman received nothing, in the other, the woman received a substantial share of the assets. What accounts for this difference?

One possible analysis would be that different types of legal models were employed and that the sex of the parties was of no relevance. This argument is based on the view that the *Busang* dispute reflects use of the 'customary' model while the *Seitshiro* dispute reflects a 'colonial' or 'Common Law' model. Mrs. Busang and Mrs. Seitshiro suffered the consequences or reaped the benefits of such models, which in themselves are indifferent to questions of gender. What is the validity of this argument?



The discussion and decision in the *Busang* dispute concentrated on the issue of fault, which is viewed by the Kwena as central to a division of property under customary law. In the *Seitshiro* dispute, however, attention was concentrated on the ascertainment of assets and their division between the parties, which seems to reflect a 'European' approach based on community of property. Nevertheless, one might argue that although the issue of fault was never expressly discussed in the *Seitshiro* dispute, it featured implicitly in the process. It was clear to an observer of the proceedings that Chief Linchwe regarded Mr. Seitshiro as untrustworthy and at fault in selling cattle without consulting his wife. However, even the decision was based on Mr. Seitshiro's fault, this does not account for the division that occurred. The wardheads from Molepolole who attended the hearing were amazed at the award of so many cattle to Mrs. Seitshiro. If they had been handling the dispute (a fact Mrs. Seitshiro was well aware of) the cattle award would have been smaller and she would not have received a half share of the other property. Chief Linchwe's handling of this dispute was seen by the wardheads as one influenced by 'Common Law'.

In giving his decision, Chief Linchwe expressly refers to cases heard in the High Court as authority which he will follow even though they concern "people who married according to community of property". He also refers to "the hard rule of Common Law and Equity". His division of property is similar to that in cases involving in which the situation was legally different, such as the *Molomo* case (which involved community of property) and the *Moisakamo* case (which involved the application of customary law by the High Court) (see Griffiths 1983).

The influence of the Common Law, however, is not limited to the Seitshiro dispute. It is also present in the *Busang* dispute. Mr. Sebele, like chief Linchwe, is aware of its existence and uses it at various points to control the dispute. For example, when Mrs. Busang refuses to withdraw her claim to 135 Pula, representing the proceeds from knitting jerseys, Mr. Sebele informs her that it is not an appropriate claim under customary law. She remains adamant, so he shifts his argument to one that is 'European' in nature, demanding 'proof' of the money's existence with reference to a bank statement. When she continues to protest, he asks her, "At the High Court, who won the case?" thereby closing the discussion of property and shifting the emphasis to the question of fault on her part.

Immediately following this interchange, he opens the discussion to the *kgotla*. A *kgotla* member raises the question of conduct and asks,

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"now that they are here what is the cause of their divorce?" Unlike the Chief Regent who asked that question a moment earlier, the kgotla member is informed that:

The time for that question has gone, this case was tried at the High Court and that was where all such questions were asked. All the questions must be based on the distribution of property. Since they are married in community of property what belongs to one belongs to the other, that is why she is asking for distribution of property.

While Mr. Sebele's response controls the scope of discussion it may also be interpreted as a subconscious incorporation of 'European' norms. He talks of property in terms of 'community of property' and of directing question to those relating to 'distribution of property'. Matters that have been dealt with in the High Court must not be raised again because they are *res judicata*. He behaves in a similar fashion elsewhere in the dispute. When a kgotla member asks about an alleged abortion, Mr. Sebele dismisses the question as irrelevant on the grounds that "we must bear in mind that this question was raised in the High Court. We are here to listen to Mrs. Busang and why she thinks she is entitled to the property."

The influence of Common Law is not restricted to Mr. Sebele's use of it. To endorse his position that his wife is at fault Mr. Busang relies heavily on the statement he presented at the High Court detailing her unreasonable behaviour. He uses the granting of divorce and an award of custody in his favour to support his claim that Mrs. Busang is not entitled to any property. His reference to the High Court is one that is accepted and acted upon by the kgotla. In his judgement, Mr. Sebele refers to the fact that under customary law Mrs. Busang was at fault "and further that when the marriage was dissolved at the High Court the children were given to the father," with the result that she was not awarded any property.

The Common Law is as present in the *Busang* as it is in the *Seitshiro* dispute. However, it is utilized for different purposes. In the *Busang* dispute, it is used to endorse the customary system's finding of fault; in the *Seitshiro* dispute it is used to justify a 'no fault' approach. One might argue that in the former it is transformed within the customary system to support the traditional position, whereas in the latter, Chief Linchwe uses it to innovate and transform the system.

One important feature illustrated by these disputes is the linkage between the two systems. The forum in which a dispute is handled cannot be isolated from other parts of the legal system within which

the whole process of dispute management occurs. Some would argue that the linkage simply reflects the supplanting of 'customary' norms with 'European' ones, with the result that Common Law gradually takes over, as illustrated by the *Seitshiro* dispute. But this would be too crude an analysis.

In the *Seitshiro* dispute, there are features which render labelling the outcome 'European' inappropriate. Chief Linchwe only half-heartedly follows cases where the system of community of property pursuant to statutory law was applied. He does not divide the cattle equally, as would have been required under community of property. He prefaces his decision on the cattle division with the remark that "where marriage has been contracted according to the Tswana custom ... according to Batswana if a woman and a man are divorcing the divorce is not about the distribution of estate property." He then proceeds to exclude estate cattle and those cattle which the woman's family have provided for the marriage - known as 'serotwane', from the calculation. While a community of property system recognizes the exclusion of property related to inheritance, this is not restricted to particular assets such as cattle. When Chief Linchwe excludes estate cattle he is following traditional Tswana practice. He may borrow the language of community of property and talk of a 'joint' division but he does so in a context which takes the customary system into account.

The same approach is used in dealing with the parties' immovable property. While Chief Linchwe refers to High Court decisions, and claims to follow them, there are features which are out of place in a system of Community of Property. The parties are not given outright ownership of the assets that are divided, only the right to use them during their lifetime, so that the children will receive them on their deaths. While inheritance is a feature of all systems it is not one which determines the distribution of assets of divorce in a European system. In this dispute, Chief Linchwe ties up distribution of property during the parties' lifetime and on their death. He gives the children an express claim and does so in accordance with the customary system of inheritance. Kesebonye, the *Seitshiro*'s youngest son, is to inherit the modern dwelling and, "if he dies before he marries is to pass it to *Seitshiro*'s eldest son by his first marriage according to Tswana custom." Mr. *Seithiro* may receive the house but it is only to preserve it, "for the future use of your children."

This approach illustrates the process of cross-fertilization that occurs between systems. In his decision, Chief Linchwe refers to cases decided in the High Court on the basis of provisions regulating community of property. The cases cited also upheld the view that

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estate cattle should not be subject to division, recognized the claims of children and restricted the parties' ownership of assets to a life-time use, thereby incorporating 'customary' norms within a 'Common Law' system.

While the *Busang* dispute appears to adhere to a 'customary' model, there are also elements which reflect a 'European' influence. Mr. Sebele speaks in the language of 'joint' property and 'community of property', although like Chief Linchwe he places his own interpretation on these terms. As noted earlier, he treats certain matters as *res judicata*, a principle which is not employed in other customary forums such as the ward. His handling of the issues of property and conduct is ambivalent. At certain points in the dispute, discussions on conduct are terminated by him on the grounds that such questions have been dealt with in the High Court whereas at other points they are freely allowed.

One interpretation of this ambivalence may be to view it as reflecting a blurring of the distinction between 'customary' and 'Common Law' norms. Mr. Sebele's handling of the dispute can be said to continually shift from a 'European' to a 'Tswana' mode of inquiry. When he silences the kgotla member who asks about the cause of the divorce and declares that all questions must relate to the distribution of property, he is acting like a European judge, treating the matter as one that has already been adjudicated. When he allows Mr. Busang to restate the case he raised at the High Court, he is acting in a Tswana mode which considers the conduct relevant so that Mr. Busang may establish that, according to the customary system of the Kwena, Mrs. Busang has no claim to property. Mr. Sebele's ambivalence may be seen as an attempt to synthesize the two systems.

Striking in these two disputes is the extent to which they reflect a blend of 'customary' and 'European' norms. It is not the nature of property itself, that affects the distribution. In both disputes, similar sorts of property were involved, a mixture of what has been termed 'traditional' and 'modern' assets, yet a different distribution took place. Nor is it so that 'traditional' assets are treated one way and 'modern' assets another. While Chief Linchwe did applying 'customary' norms to cattle and 'European' norms to other property, Mr. Sebele did not differentiate between them in this way. He applied customary norms, particularly in respect of fault, regardless of the type of property involved, with the result that Mrs. Busang got nothing.

To limit our analysis of the choice of norms in disputes to the behavior of legal institutions such as dispute forums, would be to distort the picture. Such limitation has perpetuated the dichotomy between 'customary' and 'European' law. A broader perspective is required in order adequately to incorporate the cultural and legal elements in decision-making.

### The changing domestic and economic life-cycle among the Kwena

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 Africa mines. Cycles are subject to alteration, most recently as a result of environmental features such as drought and South African policies cutting back on the employment of migrant labourers from neighbouring countries. However, they remain embedded in the culture, reinforced by personal experience at the individual and household level.

Families live in households but are linked with kin in relationships that extend beyond the unit in which they live. For survival they depend on a plurality of resources drawn from rural and urban sectors. These include employment in the formal sector, at the mines, as a government civil servant, or as a domestic servant, or activities in the informal sector such as selling beer, 'fat cakes'<sup>9</sup> and other home-made items. Subsistence agriculture is still practiced although even in a good year it can no longer provide a major source of support (National Migration Study 1982: 532). In bad years, as the members of Mosotho kgotla have experienced through the drought in the nineteen-eighties, there is no support from this sector as production is non-existent.

While cattle and their husbandry play a prominent part in the Tswana psyche few households possess them in substantial numbers. Several members of Mosotho kgotla did not have any and those that did found that they were severely affected by the drought. In addition to these resources, there are a variety of local and central government institutions which provide some assistance, piecemeal, 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.

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9 Doughy cakes, similar to doughnuts.

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It is on 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, over a number of bases (National Migration Study 1982: 631). The way they do this and the success of their efforts 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, the mines or other centres in search of educational training or employment.

The Kwena have developed existence patterns in response to their environment which vary between the 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 mother 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 life-cycle develops and children mature into young adults, the predominant pattern for men of the older generation, represented in Figure A, is one in which they did not attend school but continued to herd cattle at a cattle-post until they were old enough to acquire employment on a contractual basis at the South African mines. In contrast, the predominant pattern for women of that generation, as represented in Figure B, is one in which they attended the village school, assisted their mothers 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.

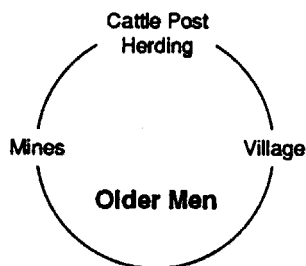


Figure A

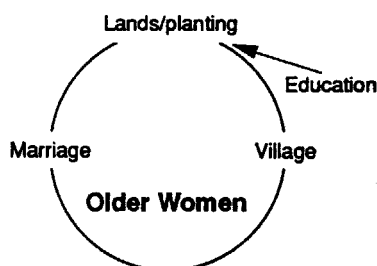


Figure B

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 immediately to her husband's family or she might bring him into her natal household. In time, the couple are expected to build their own house.

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 external contract work and they and their wives (particularly the women) 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 pattern of men has changed in a number of respects, as represented in Figure C. While a high number of males have been employed at the South African mines, the numbers have dropped from 84% in the older generation to 50% in the younger generation. In part, this is due to government cut-backs in migrant labour which left young men in the village without work. It is also due to a number of men having bypassed the mines altogether and acquired employment through government agencies or private enterprise. This group represented 9% of the older generation but has increased to 38% of the younger generation. The numbers of men who have received an education have also risen from 33% in the older generation to 39% in the younger generation. While the mines are still significant employers and the majority of males remain uneducated, there are a growing number of males who have received an education, who have never been to the mines and who have experienced a different type of formal sector employment.

The pattern for women in the younger generation represented in Figure D also shows changes, most notably in connection with pregnancy and employment. Women continue to have children but without marriage. Unlike their mothers, increasing numbers are experiencing formal employment, although this is still far below the employment levels for men in both generations.<sup>10</sup> A far higher

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<sup>10</sup> Only 33% of women in the older generation and 48% of women in the younger generation have experienced formal employment as compared to 84% and 58% of men in those generations. At the time of research, the numbers currently employed were lower, representing 24% of women in the older generation and 31% in the younger generation compared with 62% and 58% of men in those generations.

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proportion of women have been to school: 82% of women in the older generation and 85% in the younger generation.

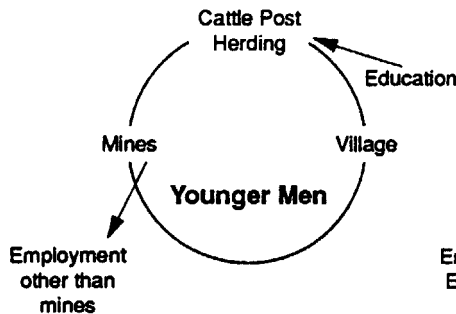


Figure C

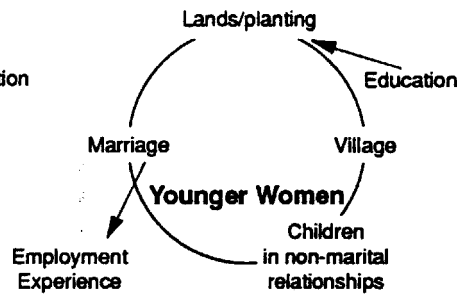


Figure D

One factor affecting women's access to formal sector employment is pregnancy. Almost all adult women in Mosotho kgotla have children and begin their reproductive cycle at an early age. In fact, 30% of women in the older generation and 29% of women in the younger generation were forced to leave school because of pregnancy. Recurring childbirth, on average every two years for a woman, restricts women's access to formal sector employment and in the case of those who have been dismissed from school on account of pregnancy, may mean that they have even less chance of entering the employment market. Of those who have experienced such employment in the older generation, only 18% made it into the labour market despite leaving school because of pregnancy, compared with 47% who did not suffer such a disadvantage. The gap has closed somewhat among the younger generation so that of those who have experienced formal sector employment, 29% left school because of pregnancy compared with 38% who did not.

In looking at the history of families and individuals, education, employment and reproduction emerge as factors which are central to their experience in society. The way in which these elements

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The data in the text and in this note are based on research in Mosotho Kgotla, Molepolole, 1984. A small group study of this kgotla was carried out, using Schapera's unpublished fieldnotes for 1937 and field research in June-August, 1984.



coalesce, however, varies from family to family and presents diverse biographies even among the members of Mosotho kgotla. So, for example, we find the members of Makokwe's family representing the pattern for the older generation illustrated in Figures A and B. The family's sphere of operation has centred on the South African mines, the village and the lands/cattle-post.

Makokwe's six sons, never attended school but herded cattle and then went to work in the South African mines. They married under the customary system and established their own households elsewhere in the village except for one son, Kemongale, who has acquired another house in Mosotho kgotla.

Apart from her pregnancies outside marriage, the daughter Olebeng, fulfills the profile for women of an older generation as she was educated at school and helped at home with domestic duties. She has never moved outside the domestic sphere or had employment outside the family.

In contrast, the members of Radipati's family represent the pattern for the younger generation illustrated in Figures C and D. Unlike Makokwe's family, all three sons went to school and two even graduated from university. They are all employed with the mines. The two university graduates are government civil servants, working as 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 apart from the eldest son have not married. The three sisters were educated at school and entered 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. They all have children but have never married.

Radipati's family has centred its sphere of operation away from the domestic family economy and the mines, and toward employment generated in Botswana by central and local government activities. They maintain a connection with the lands and cattle post but this is mediated through the employment of others who perform the seasonal tasks.

The influence of factors such as education, employment and reproduction on the society is represented in Figure E.

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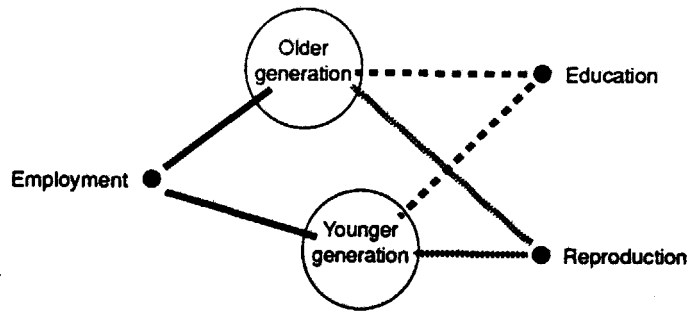


Figure E

## Reassessment of the *BUSANG* and *SEITSHIRO* disputes

How do the domestic and economic experiences of members of Mosotho kgotla connect to the *Busang* and *Seitshiro* disputes? When the participants in such disputes enter the formal legal dispute sphere they carry with them a cultural background which is not merely peripheral to the proceedings but forms the basis on which the parties' claims will be assessed. This is clearly illustrated by the *Busang* and *Seitshiro* disputes.

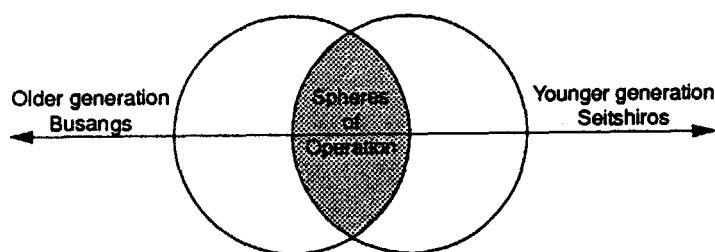
One element that cannot be ignored in these disputes is that of status. It is most evident in the *Busang* dispute, where the importance of Mr. Busang's government and family connections and a corresponding lack of such connections on the part of his wife, is clear. Status is an important feature of Tswana life. It was evident from ward discussions and comments made during disputes, that status among the Kwena is based on a number of factors which centre around education, employment and alliance with the ruling family.

Status is acquired in a number of ways which hinge on various spheres of operation connected with profiles for the older and younger generations. For example, those who have been educated are more highly regarded than those who have not and those who are in formal sector employment are more highly regarded than those who are not. There is also a preferred hierarchy among the employed with those who are in government service or running their own business at the top and miners and contract workers at the bottom. One comment heard during the research was that while ward-headmen are paid by central government, this is not as high a status as working for one of the government ministries. The factors which confer status often stem from a life-cycle pattern associated with the younger generation. On the other hand, there are still those such as traditional

doctors who derive their status from a sphere of operation that is associated with the older generation.

An adequate explanation of the decisions in the *Busang* and *Seitshiro* disputes could not be acquired through an analysis of the nature of the property involved or through establishing models of 'customary' or 'European' law. If, however, the focus shifts from these aspects and concentrates on the parties' cultural background and life-cycle patterns, we can perhaps find a way of reconciling the decisions which does not simply interpret them as contradictory approaches, the product of two different Chiefs applying their own notions of customary law, but as cases which reflect different positions on a continuous spectrum, as presented in Figure F.

Figure F



The parties to the two disputes may have possessed the same sorts of property but their life-cycle patterns were very different. Mr. Busang, with his high level of education and employment as a government civil servant, reflects the pattern associated with the younger generation while Mrs. Busang, with her elementary education and lack of formal sector employment, reflects the pattern associated with the older generation. While the parties' life-cycle patterns differed, when it came to assessing their situation and judging Mrs. Busang's claim, emphasis was placed on those norms associated with the pattern associated with the older generation. It was those norms, not the norms appropriate to the life-cycle pattern associated with the younger generation, which governed the dispute.

In contrast, both Seitshiros exhibited the pattern associated with the younger generation. With her education, overseas training and employment as a nurse, Mrs. Seitshiro's life-cycle pattern was quite different from that of Mrs. Busang, whose life centred round domestic

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activities. As a consequence, Mrs. Seitshiro was able to get a different set of norms applied to her dispute.

Through their different life-cycle patterns, these women found themselves in very different positions. When asked to outline her claim, Mrs. Seitshiro was able to talk in terms of the financial contribution that she had made to the assets in question. Indeed, the whole focus of the discussion between her and Mr. Seitshiro centred around who had provided money and what assets had been purchased with it. Given the evidence of Mrs. Seitshiro's direct financial investment in the assets, it would have been difficult to deny her a share of the assets on the basis of fault in the marital role. When, as in Mrs. Busang's case, there is no independent financial contribution, one is thrown back on assessment of contributions of a different nature, such as performance of the marital role.

Mrs. Busang had not made an independent financial contribution except with the money she had acquired from knitting. This was something which Mr. Sebele was prepared to consider although he ultimately rejected the claim on the basis that her husband had provided the money to buy the knitting machine and the wool. Mrs. Busang was not in a position to make an independent financial contribution, as Mrs. Seitshiro had done, because she did not have the same resources at her disposal: she was not well-educated and had never experienced formal sector employment.

### Implications for Kwena women

The implications of the above analysis for Kwena women may be assessed with reference to Mosotho kgotla. The resources which form the basis of property which sustains families and households in that kgotla are drawn from a number of sources - both 'traditional' and 'modern' - which have become integrated within their own local support cycle. While families and households are dependent on a number of sectors for support - formal, informal, government/institutional and kin-group - the crucial factor is money.<sup>11</sup>

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<sup>11</sup> For the purposes of this research, the formal sector comprised paid employment generated by the mines and what is termed 'other formal sector employment', which includes employment by the government (e.g. as a civil servant) or by private enterprise (e.g. as a clerk or labourer, or a domestic in a household). The informal sector comprised traditional activities such as cultivation of fields, plowing

While all households rely to varying degrees on a particular mix of resources, money is essential. Not a single household out of 30 could survive without it, whether provided directly or indirectly through kin.

The main source of money for households is acquired through income derived from men working at the mines. While women may be more highly educated they have less access to formal sector employment with the result that they do not readily have direct access to money. The situation is exacerbated by the difficulties plaguing the informal sector. The prolonged drought since the beginning of 1980 has meant that cattle have been seriously depleted and cultivation of land has become temporarily difficult or impossible. A few women have been able to generate income through the informal sector by selling beer or items such as home-made hats and clothes. However, the dominant picture is one of women being dependent on fathers, brothers and male partners for contributions, rather than providing financial resources themselves.

Relatively few women are in Mrs. Seitshiro's position; as we have seen, 24% of the older and 31% of the younger generation have employment in the formal sector, compared with 62% and 58% of the men. As the problems of the informal sector continue, women's chances of making financial contributions like those of Mrs. Seitshiro to the family assets are diminished. The implication of this is that women will most often find themselves in the position of Mrs. Busang when it comes to separation and division of property. In other words, the norms associated with the older generation and its life-cycle pattern will be used to govern disputes regardless of the type of property involved, and women will receive a relatively small share of the family assets. This is clear not only from the *Busang* dispute, in which substantial assets were involved, but also from disputes dealt with at ward level involving minimal resources. Even if women do

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and herding cattle. It included the brewing of 'bojalwa' (beer) and anything else which generates income but does not involve paid employment. Government/institutional support is provided through a variety of organizations and governmental agencies which reflect both temporary and more permanent measures of support. There are four main groups singled out for such support: pregnant women and young children, the old who are incapable, the unemployed, and the sick. Support through the kin group is provided by other members of the family. It covers a wide range of activities and may be direct or indirect.

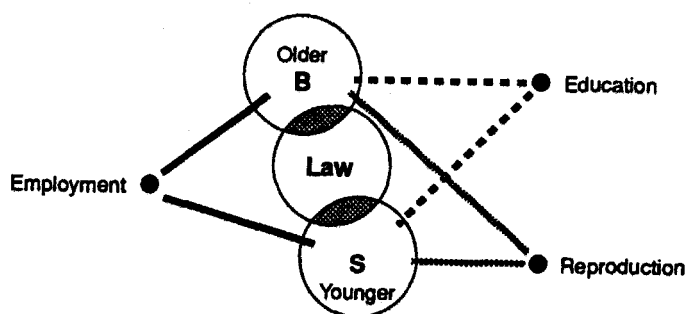
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find themselves in the position of a Mrs. Seitshiro, under Kwena law - even given a relatively liberal approach, such as that of Chief Linchwe of the Bakgatla - they will not receive a share of the property equal to that of the man because of the structure of family ownership.

Factors such as education, employment, and reproduction affect the economic opportunities that are open to individuals and their families, particularly women, and this leads to different kinds of life-cycle patterns within society. Such factors also make their presence felt in the legal sphere and influence legal outcomes, as illustrated by the *Busang* and *Seitshiro* disputes. The model of law as presented in Figure G seeks to make these connections manifest. This model goes beyond the limitations of conventional forms of classification, such as 'customary' or 'European', to embrace a much broader range of connections which have social processes at their foundation.

Figure G



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