

TRADITION AND CHANGE AT MOCHUDI:

COMPETING JURISDICTIONS IN BOTSWANA

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When we consider the relationship between the national law of an African state and the control institutions of the indigenous groups within it, only a limited understanding may be achieved through formal analysis of the provisions of national law, which in theory regulate this relationship. Much must also depend upon the nature of the indigenous arrangements concerned, which may vary to a profound extent: we cannot expect the same response to the national laws in a society made up of small groups of undifferentiated kin as might be found where more elaborate institutional forms are historically present. Similarly, in understanding the relationship between received laws and indigenous "laws," we must pay close attention to the way in which this relationship is seen by those subject to these systems. People living in indigenous societies do not necessarily conceive of this relationship in the same way as those who frame the statutes. Lawyers, particularly, need to undertake the uncomfortable task of shifting their perspectives to comprehend how the actors themselves see these rules and use them.

Very often it is assumed that all indigenous systems are rather static, cope badly with rapidly changing conditions in the society, and tend to fall apart in situations of "contact"; "law drives out custom" as Sahlins has put it.<sup>1</sup> That may well be a true picture in some small-scale societies, but it is not universally the case and in this article I shall examine one instance in which indigenous institutions have reacted extremely robustly to contact with received laws. The case I am going to take is that of the Kgatla, one of the Tswana tribes of Botswana. We know from the writings of Schapera how Kgatla control institutions fared in the early years of the Bechuanaland Protectorate.<sup>2</sup> In bringing that study up to the present, I shall concentrate upon those features of the indigenous system that have enabled it to survive so vigorously while formally subordinate to, and circumscribed by, the national law. In doing so I shall focus both upon particular institutional features found in the Kgatla case, and upon the way in which the relationship of received law and indigenous institutions is seen by the Kgatla themselves.

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Kgatla Society

The Kgatla occupy a territory of what is today about 2,800 square miles of South-East Botswana. There are probably about 35,000 of them, and of these around 20,000 have a permanent home in the central village, Mochudi; the remainder live in smaller villages outside or in isolated hamlets in the fields. Although the Kgatla live in a relatively well-watered part of Botswana when one remembers that a large part of the country is made up of the Kalahari desert, by most standards the terrain is very dry. But in most years there is good grazing for cattle and in perhaps one in three, when rain falls in sufficient quantities at the right time, good crops of maize and sorghum may be grown. The Kgatla would certainly see themselves as cattle herders first and cultivators second.

The Kgatla arrived in the area that they now occupy at the beginning of the 1870s, migrating westwards from the Transvaal. Even before that time they had had extensive "contact" with missionaries, traders, and settlers. Since the establishment of the present central village of Mochudi in 1871, missionaries and trading stores operated by expatriates have been continuously present and, since 1932, the village has constituted the administrative center of a district. Most Kgatla also have experience of travel outside their territory; the great majority of males have spent periods of employment abroad, and increasing numbers of females now leave the territory in search of employment. Latterly members of both sexes have also been leaving the territory in pursuit of education.

It is clear from the earliest descriptions that the Kgatla had an established form of state organization long before any contact with Europeans. The nature of this organization has been fully described by Schapera<sup>3</sup> and will be dealt with only in outline here. At the center was a ruler (kgosi) who administered his people through hereditary headmen, each of whom had charge of a defined residential area and supervised the herding and farming activities of residents who were for the most part his agnates.<sup>4</sup> The link between the ruler and the headman in each ward was also genealogical, and most of the forty-eight wards in the central village of Mochudi today are headed by men claiming descent from younger brothers of earlier rulers. The Kgatla believe that their tribe was founded by one Kgafela in the late seventeenth or early eighteenth century, and since that time the office of ruler has ideally devolved from father to eldest son, while younger sons of each ruler have gone off to form their own wards, assuming administrative control of these new subdivisions of the main group. Of course it has not always happened quite like this in practice, but that is the ideal model. Thus, in the Kgatla case, the state structure rests upon an agnatic system, which may be seen as an ever growing and deepening pyramid, the base of which is extended as more males are born.

In decision making, the ruler is surrounded by three different groupings to which he may turn for advice and confirmation. First is a small informal council drawn by him from among his immediate senior relations (his father's and his own younger brothers, his male cousins, and his maternal uncles), together with any other men who enjoy special positions of influence and trust. Secondly, he may call together all the headmen of the wards (the name conventionally given to the major administrative divisions into which the society is divided up). Finally, there may be a meeting to which all the adult male members of the society are summoned. Most everyday decisions are taken within the first of these groupings and any decision that is reached there is then transmitted to the headman of each ward, who himself passes it on down the administrative hierarchy. If more serious matters have to be discussed, all the headmen are summoned; and in matters of the greatest importance all the adult males of the society may be assembled.

The procedure in a meeting at any one of these levels is very flexible, and the actual location of authority is hard to pin down. Typically, the chief raises a matter that he wishes to take action on and speaks about it for a while. Then other people present give their views. Often when a clear view emerges quickly, the chief will summarize it and propose action along that line; there will be chorused assent, and the matter is concluded. Kgatla would say, though, that it is for the chief to decide, and not for the people at the meeting, at whatever level this may be. In one sense this may be true, but no chief would last long unless he enjoyed general acceptance and this would be swiftly eroded if he constantly tried to push through measures for which there was no support.

Many of the major decisions that are taken in these councils require action by large groups if they are to be carried out: in the past, if war was to be made, or the state organized for defense; today, if the cattle are to be rounded up, or if major waterworks are to be dug. Where anything like this has to be done, the age-sets will be called upon to do it. A new age-set is formed every five years or so when the young males of the society then approaching physical manhood are gathered together and submitted to initiation procedures (including circumcision). All those initiated together form the new set; and as the new sets are successively formed over the years, those above rise in seniority. The physically hardest work, such as major building projects and (formerly) making war, are left to the members of the more junior sets.

The Kgatla see the regularities of their everyday lives as being governed by a corpus of rules that they describe as mekgwa le melao ya Sekgatla, a phrase that has generally been translated as "Kgatla law and custom." This translation, however, is misleading in two ways. First, the terms melao and mekgwa are not sharply distinguished in the way that the translation would suggest. Secondly, "Kgatla law and custom" cannot be seen as a body of rules corresponding directly to our rules

of law, because the term embraces a whole repertoire of norms of different kinds, ranging from rules of polite behavior and etiquette, through moral imperatives and rules taken very seriously in the context of dispute, and even includes examples of what we would call legislation. Thus Kgatla norms do not contain that differentiated category of "legal" rules that so clearly characterizes our system. Norms governing social behavior on a visit to someone else's homestead fall just as clearly within the overall classification as those prescribing what must be done when one man's cattle destroy another man's field of corn. Nonetheless, everyone, even the chief, is expected to comply with these rules in their everyday behavior, and there is a Tswana saying, Molao sefofu, obile otle je mong wacne: "The law is blind, it eats even its owner."

The origin of some of these rules is seen by the Kgatla to lie in long-established and adhered-to patterns of approved behavior. Others arise out of decisions made by a chief in handling a dispute, and yet others out of direct announcements made by him in what we would see as statutory form.<sup>5</sup> Kgatla would distinguish among such announcements those that simply restate and emphasize something that already forms part of "Kgatla law and custom," but has perhaps become forgotten or carelessly observed. The occasion of any gathering in the Chief's meeting-place (kgotla) may provide an opportunity for such a reminder. On the other hand, an announcement that either expressly changes some existing rule, or provides a new regulation to deal with some special contingency, has to be introduced with more careful preparation. Kgatla say that when a chief wishes to make a change of this kind, he should call together the tribesmen so that the matter can be discussed. Only when he has done this, and following discussion in the kgotla announces a new rule, does such a rule become part of "Kgatla law and custom."

Although Kgatla would say that it is for the ruler to announce a new law, most would say that he should not do so unless the proposal he has already put to the kgotla meeting meets with approval. Where such a proposal does not attract support few would say that this prohibits a ruler from going ahead with his announcement, for there is a saying to the effect that "the chief's word is law" (Lentswe lakogosi kemolao), but the chances of such a rule being generally complied with are greatly lessened.

As well as providing signposts for proper social behavior, mekgwa le melao ya Sekgatla are seen as furnishing the criteria according to which disputes should be settled. All Kgatla talk freely about these rules, and consider that they know them; there is no sense in which they are the special preserve of some particular subgroup within the society. In the context of a dispute these rules may be expressly invoked, or more frequently referred to by implication through the way in which the details of a particular claim are presented. People are taken to know the rules, and the mere claim that "Molefe's son

has impregnated my daughter" or "Lesoka's cattle have trampled my corn" is sufficient to invoke by implication the body of rules that everyone knows to be associated with damage to crops by cattle and the impregnation of unmarried women. As in most societies, mekgwa le melao differ considerably in their degree of generality, and it is possible for them to be adduced in the context of a dispute in such a way as to conflict. Where, for example, two brothers are in dispute over who should inherit the mother's homestead, the one may invoke a general rule to the effect that close agnates should live peacefully together, whereas the other may rely on the much more detailed prescription to the effect that the youngest son should inherit the dwelling. It is where conflicting rules are relied on like this that it becomes necessary to talk about rules explicitly. Where both disputants agree as to the rules, but argue about the interpretation of facts in relation to an agreed rule, explicit reference is unnecessary.<sup>6</sup>

Settlement-directed discussion is seen under all circumstances as the most appropriate way to handle a dispute. Retaliatory violence and forceable retakings of property are tolerated within narrow limits, but these never enjoy social approval. Similarly, while it is recognized that supernatural agencies may be invoked in order to establish responsibility for harm or misfortune that has been suffered, further resort to these agencies when a human is identified as responsible is strongly discouraged. Such methods are recognized as likely to exacerbate a dispute in the event of their discovery by the other party.

The agencies for handling a dispute are located in the structure we have already considered. Where a quarrel breaks out between two people, Kgatla see it as their own responsibility to try and settle it between themselves through bilateral discussion; but because they realize that such negotiations may fail, and that the help of third parties may be necessary, they each keep their senior kinsmen in touch with what is going on from a very early stage. Relatively simple and recurring problems, like the destruction of crops by cattle, are typically resolved by the immediate parties; but where the matter is more serious, or where there has been a history of bad relations between the parties, the trouble may be taken directly to senior kinsmen. Under such circumstances, with tempers running high, attempts at bilateral negotiation may be avoided entirely through fear that a fight may break out.

Where bilateral attempts at settlement fail, or where they are not made through fear that they will lead to violence and heightening of the trouble, the disputants call on their immediate kin to resolve the matter. Although Kgatla rely heavily on their close agnates for help in disputes, trouble is seldom contained closely within the lineage and maternal kinsmen are likely to be drawn in from the beginning. These approaches may culminate in private negotiations or a formal meeting at the homestead of a senior member of the lineage to which either

disputant belongs. The mode of settlement attempted at this level depends upon the relationship of the disputants. Where they are not close kinsmen, the parties typically meet with their kin in support, and then the two groups try to feel their way towards a settlement by negotiation, without anyone seeking to mediate from a bridging position. Where they are related, a senior kinsman who can claim equally close relationship to both may try to mediate from a neutral standpoint. At this level no one is in a position to impose a decision, and if a compromise cannot be reached through negotiation, the matter has to be taken to the headman within whose ward the earlier meetings have been held.

The headman has a range of options available to him in dealing with the dispute. He may attempt to mediate directly by suggesting solutions that may possibly be acceptable to both parties; or he may send them away for further discussions with their close kinsmen if he feels that avenue has not been exhausted. However, although the headman may act as a mediator if he wishes, it is also recognized that he may attempt to resolve the matter by imposing a decision. Where he does so, the parties have the choice of accepting and complying with this decision, or taking the dispute to the chief. Where the matter is taken to the chief, he hears the report of the headman who dealt with the dispute below and the accounts of the disputants and their respective senior kinsmen. Then, like the headman, he may attempt to mediate, or proceed directly to resolve the matter by decision. Once a decision has been given, the chief has the capacity to enforce it if necessary. Disobedience will be met with corporal punishment, the confiscation of stock or the withdrawal of land allocations. The age-set organization provides the necessary machinery for enforcement; members of one of the more junior sets can be sent out to bring a recalcitrant individual before the chief or collect together his stock prior to confiscation.

Thus, in the Kgatla example settlement-directed talk enjoys preeminence as a mode of handling disputes, while such means as violent self-help and sorcery are strongly disapproved. In the settlement of disputes, as in the ordering of everyday life, people are expected to follow mekgwa le melao; but this repertoire of norms, ranging from the general to the particular, offers Kgatla considerable flexibility in managing their lives and in dealing with disputes. Nor can it be accurately seen as a discrete corpus of legal rules, ranging as it does from rules of polite behavior to mandatory statutory injunctions. Further, it does not constitute a monolithic system, as variations in content and in interpretation can be found both in different geographical areas, and at different levels in the state organization.

The hierarchical organization of the Kgatla state is matched in the organization of agencies of dispute settlement, as attempts at resolution should move from the disputants themselves, to the descent group, to the ward, and finally to the

chief. Further, while negotiatory and mediatory means of settlement may be attempted at all levels, these give way in the last resort to a judicial mode before a headman or the chief, while the latter has access to organized force in ensuring compliance with any decision if this should prove to be necessary.

#### Kgatla "Law" under the Protectorate and Thereafter

The foregoing section describes the Kgatla state in the latter part of the nineteenth century, before the Protectorate over Bechuanaland was declared in 1885.<sup>7</sup> Looked at from some angles, that event brought about immense changes: the state was subsumed in a colonial territory of which it became only a small part; the ruler lost his power of life and death over his people and was drawn into the local government of the Protectorate. On the other hand, practical results following upon this change of status were relatively slow to take effect in the Kgatla tribal area (Kgatlang). When the Bechuanaland Protectorate was established, it seems to have been the intention of the United Kingdom Government to maintain the authority of the rulers and to interfere as little as possible with the internal administration of the Tswana tribes;<sup>8</sup> and this policy was consistently followed for many years. No expatriate administrator was stationed in the Kgatlang before 1932, and only in 1934 were the general powers of the traditional rulers delimited by statute, and succession to the office of "Chief" (the title by which the traditional rulers came to be known) made subject to the approval of the central administration.<sup>9</sup> Even after 1934, the administration of the tribal areas was left far more firmly in the hands of the traditional authorities than was the case in the other British African territories to the North. It was as late as 1965, shortly before the independence of Botswana, that the authority of the Chiefs was seriously curtailed with the redefinition of their powers under a Chieftainship Law<sup>10</sup> and the introduction of a more democratic form of local government under the Local Government (District Councils) Law.<sup>11</sup> In 1970, the powers of the Chiefs were reduced further when responsibility for the administration of land in the tribal territories was taken away from them and placed with Land Boards.<sup>12</sup> Today, in theory at least, their powers in the area of dispute settlement are all that they retain.

Over this period, traditional forms of social organization seem to have changed relatively little in the Kgatlang. The central village of Mochudi remains subdivided into wards, and surveys conducted by Schapera in 1934 and Roberts in 1975 suggest that the household groupings found within wards largely retain their traditional agnatic character.<sup>13</sup>

At the same time, mekgwa le melao ya Sekgatla has continued to furnish the basic rules to which Kgatla remain subject in their daily lives. Under the General Administration Order in Council of May 9, 1891, the High Commissioner, in issuing Proclamations, was required to: "...respect any native laws or customs by which the civil relations of any native chiefs,

tribes or populations under Her Majesty's Protection are now regulated, except so far as such may be incompatible with the due exercise of Her Majesty's power and jurisdiction."<sup>14</sup> This reference to customary law in the Order assumed rather than expressly affirmed its continued application, but the formulation was consistent with the understanding reached between the United Kingdom Government and the Tswana chiefs, under which the authority of the latter over their respective tribesmen was to be limited to the least extent consistent with the declaration of a Protectorate. Since that time, mekgwa le melao (the traditional Kgatla laws) have remained the basic law applicable to Kgatla in everyday matters except in those cases (notably crime and land tenure) where statute has explicitly intruded. When the traditional dispute settlement agencies were expressly recognized by statute in 1934,<sup>15</sup> their civil and criminal jurisdiction was to be administered "in accordance with native law and custom,"<sup>16</sup> and subsequent legislation relating to these agencies has maintained this position subject to minor textual variations.<sup>17</sup> The general provisions governing the application of customary law today are contained in the Customary Law (Application and Ascertainment) Act, 1969, section 4 of which reads: "Save as is otherwise provided under this Act or any other law, customary law shall be applicable in all civil cases and proceedings where the parties thereto are tribesmen...."<sup>18</sup> Obviously there are areas where statute has overtaken Kgatla law--and I shall say a bit more about these later--but otherwise the basic law remains indigenous.

When we consider how the traditional Kgatla dispute settlement agencies have fared since the foundation of the Protectorate, it is important to remember what we have already noted about their character. Even before the Protectorate they were arranged on a hierarchical basis, and what Western lawyers would see as an appellate system operated: initial attempts at settlement were made by the kin of the disputants; if these failed the matter went to a meeting presided over by the ward headman; and if he was unable to resolve the matter it went finally to the ruler.

In the early years of the Protectorate this system was interfered with only to a very limited extent. Initially all that was done was to withdraw from the ruler power to deal with cases of homicide and disputes involving Europeans. Further, the traditional agencies retained virtually exclusive jurisdiction over tribesmen as the courts in the national legal system were not empowered to deal with disputes in which "Natives only are concerned, unless in the opinion of such Court the exercise of such jurisdiction is necessary in the interests of peace or for the prevention or punishment of acts of violence to persons or property."<sup>19</sup> And, as I have already said, no officer of the administration capable of exercising judicial powers was stationed in the Kgatla territory prior to 1932.



In 1934, under the Native Tribunals Proclamation,<sup>20</sup> steps were taken to put the operations of the traditional dispute settlement agencies on a more formal basis. This Proclamation, similar to those enacted in East and Central Africa at that time, established two classes of Native Tribunal, Senior and Junior, within which existing agencies might be recognized. The jurisdiction of these Tribunals was confined to "natives" and to be exercised in accordance with "native law and custom."<sup>21</sup> In the Kgatla territory, the Chief presided over the Senior Tribunal and several of the more prominent headmen of wards held Junior Tribunals. The remaining agencies at ward level were not recognized, nor were those below ward level; but unrecognized traditional agencies were permitted to function informally as tribunals of "arbitration," as the legislation put it.<sup>22</sup> The effect of the legislation was thus to grant formal recognition to agencies at the higher levels of an existing hierarchical system, while leaving agencies at the lower levels to operate informally. Apart from the requirement that recognized agencies should keep a written record of the disputes heard, their jurisdiction, procedures, and relationship with lower level agencies was scarcely affected.

Thanks to research conducted at the time by Schapera, we are well informed as to the nature and weight of the business conducted in the Kgatla Senior Tribunal (the Chief's court) following the 1934 Proclamation. Over the period of 1935 to 1939 an average of thirty-five disputes a year were heard by this agency.<sup>23</sup> Of these disputes, Schapera classified an average of 9 percent as family disputes (husband/wife, parent/child), 9 percent as property disputes, 11 percent as contractual, 43 percent as delictual (mostly assaults and the wrongful takings of property) and 29 percent as penal (mostly contempt cases).<sup>24</sup> A survey that I conducted in 1970 showed that this business had considerably increased, but the balance had altered relatively little.<sup>25</sup> Over the decade 1961-1970 the Chief heard an annual average of 96 disputes: of these 67 percent were delictual (still mostly assaults and wrongful takings), 6 percent were family disputes, 14 percent property disputes, 7 percent contractual disputes, and 6 percent of the business related to penal matters. The increased workload can be explained simply in terms of population growth: there was a threefold increase in the population of the Kgatla territory between 1935 and 1970. I have discussed the changing distribution of the business elsewhere.<sup>26</sup> The most significant feature is the basic similarity of the two sets of figures. The decline in the number of contractual disputes is inexplicable, as it is not matched by growing business of this kind in the magistrate's court. The general dominance of delictual business seems understandable, as the great majority of family disputes are typically resolved before lower level agencies, whereas assaults and wrongful takings are both more intractable and are seen to touch directly upon the authority of the chief. Most important, so far as the overwhelming majority of disputes in the Kgatla territory were concerned, the Chief's court remained the ultimate agency to which these might be taken. There is no indication

over this period of a drift away from using the Chief's court in favor of the courts of the national legal system, or any other agencies of dispute settlement. I shall come back to consider the work of the Chief's court further when I have outlined the place of the national laws in the Kgatla territory, and the way in which they are administered.

#### The Received Laws and Their Administration

During the early years of the Protectorate, officers of the administration had very little to do with the internal affairs of the Kgatla, and the impact of the received European law and judicial institutions was minimal. I have already noted that the courts established under the original constitutional provisions lacked jurisdiction over Africans except where this was "necessary in the interests of peace, or for the prevention or punishment of acts of violence to persons or property,"<sup>27</sup> and that in any event no magistrate was stationed in the Kgatla territory before 1932. Consequently, prior to that date the only experience Kgatla had of the national law arose out of occasional visits by magistrates stationed elsewhere to deal with matters involving death or serious injury, or disputes in which non-Africans had become involved.

However, in 1932 a magistrate's court, presided over by the District Commissioner, was established at an administrative center no more than a mile from the central village of the tribe. Since that time two systems of law have been available, and seen to be available, to Kgatla tribesmen. Under the present Subordinate Courts legislation, the magistrate's court has three roles to play. The first two of these are unambiguous: to hear disputes falling under the national law; and to act as the first appellate agency from decisions of the Chief's court. In the latter case, the magistrate is expected to apply the relevant Kgatla law. Thirdly, the magistrate does have limited original jurisdiction to hear disputes to which customary law is applicable; but where any such dispute is brought before him he is required to transfer the matter to the Chief's court provided "it is not contrary to the interests of justice to do so."<sup>28</sup> Apart from this limited original jurisdiction in the magistrate, the respective areas of competence of the national courts and the Kgatla courts are clear-cut when looked at from the angle of the lawyer, because the Customary Law (Application and Ascertainment) Act, 1969, provides quite elaborate rules specifying when national law or customary law should apply.<sup>29</sup> But we should not make the mistake of imagining that Kgatla tribesmen see these two systems of law with their respective agencies in the same light. For tribesmen, the two agencies represent choices that they seek to manipulate in developing their strategies in litigation; and the jurisdiction of the magistrate to hear disputes founded in customary law may provide an important bargaining counter.

Nonetheless, a false picture would be presented if it were suggested that the magistrate's court and the Chief's court

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represent rival agencies, each more or less equally successful in attracting business. Despite the fact that the threat of resort to the magistrate is a frequent ingredient of litigation strategies, the magistrate's court does an insignificant amount of business compared with the Chief's court: in several of the years over the last decade the magistrate heard less than a dozen civil cases.

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Against this background I now return to the question posed at the beginning of this article: why have the traditional Kgatla laws and the agencies administering them survived so well? A partial explanation of the vigorous survival of indigenous Kgatla control institutions may be found in the political organization of the Kgatla, in the nature of mekgwa le melao ya Segkatla and in the way these norms are seen to operate by Kgatla tribesmen. At the time the Protectorate was declared, a form of centralized state organization was operating in the Kgatlang, into which was built a well-established hierarchy of dispute settlement agencies--judicial agencies at the higher levels and negotiatory processes below. In the processes of settlement followed by these agencies it was recognized that a repertoire of rules, mekgwa le melao, played an important part. Because of the undifferentiated character of these norms, any exact analogy with the rules of the national legal system would be unwise. But they were nonetheless seen to operate in a rather similar way--being invoked in argument and decision making, and being applicable to great as well as small; many of them were clear-cut and very detailed, and they were seen by the Kgatla themselves as the criteria in accordance with which everyday life was organized and disputes were settled. Hence when the rules of the national legal system were brought into the Kgatlang, a broadly similar corpus of rules was already operating. This could not be said to be the case in some other parts of the former British African territories, where people thought much less clearly in terms of rules, and where the "ought" propositions regulating life were ill defined, not explicitly articulated and seldom conclusive in the outcome.

There was the further important point that, even before the foundation of the Protectorate, Tswana chiefs were well accustomed to alter the rules through processes akin to legislation where social change demanded it; and tribesmen acknowledged this capability. In this respect the Tswana chiefs were uniquely equipped to manipulate the normative system, and make it appear an effective competitor with the rules of the national legal system. Limited precolonial legislative activity has been reported from other African societies, but in no other case do the traditional laws appear to have been seen so clearly as instruments for controlling a society, and so extensively used for this purpose.

The fact that Tswana chiefs saw their traditional laws as the central means through which they controlled the societies over which they ruled resulted in their showing extreme hostility towards any move by the central administration to curb the operation of Tswana law. For the first twenty years or so of the Protectorate few clashes occurred; but as time went on the agreement between the Tswana chiefs and representatives of the U.K. government, that the Protectorate administration would interfere as little as possible with the internal running of Tswana tribes, inevitably came to be interpreted differently by the Protectorate government and the Tswana rulers. When this happened, governmental interference with the traditional laws gave rise to a continuing battle with the administration. It is not possible to trace this history in any detail here, but I shall mention family law as one area in which the policies initially formulated gave rise to early difficulties. Even before the Protectorate was declared Tswana tribesmen had been married in accordance with Christian rites by various missionaries, and the rulers made no objection to this. But with the enactment of a Marriage Proclamation, and the assumption of powers by magistrates to grant matrimonial relief, the rulers felt that their authority over their subjects was being interfered with: they should be responsible, they argued, for policing the Christian marriages of their subjects and where necessary granting matrimonial relief. For several years, the Kgatla chief flouted government authority by divorcing Kgatla tribesmen married according to Christian rites.<sup>30</sup> Of course, in the long run the Chiefs did not win this particular battle; but they did succeed in making it very difficult for their tribesmen to marry in accordance with the national law (e.g., by demanding a high "fee" for the necessary certificate stating that the parties concerned were not married to other people by customary law); and they manipulated Tswana law in such a way that the relief available on marital breakdown appeared more favorable than that allowed in the national courts. One example of this manipulation is sufficient here. Under the national law deserted wives and children, whether the marriage was under Proclamation or the traditional laws, could obtain periodic payments by way of maintenance in the magistrates' courts.<sup>31</sup> Initially these orders seemed attractive and attempts were made to utilize this form of relief, which competed with that offered by the Tswana agencies. However, Kgatla wives very soon found out about the problems of enforcing periodic payments by way of maintenance, and the lump sums in cattle awarded by the Chiefs appeared in an increasingly favorable light. Just the same thing happened with extra-marital pregnancies, in respect of which affiliation legislation provided for the payment of periodic sums in the magistrates' courts, But women found that they encountered evidentiary problems in common law courts and that maintenance orders were difficult to keep on foot. This resulted in a drift back to the traditional agencies with their lump sum payments in cattle. The Kgatla chiefs responded by increasing these payments from four to six beasts for a pregnancy; and they had already begun to

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allow claims in respect of second and subsequent pregnancies.<sup>32</sup> in doing this the chiefs were again able to make the traditional rules appear to tribesmen in a much more favorable light than those available under the national legal system.

Latterly, with the setting up of the District Council and the establishment of a Land Board to administer the land resources of the tribal territory, the powers of the Chief have been seriously eroded. But he retains his judicial powers, and as these have become his sole official channel for controlling Kgatla society they have been increasingly intensively utilized.

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The traditional Kgatla "Law" has thus flourished, and in doing so has come to be seen by tribesmen and by the central government of Botswana as being in competition with the national laws of the independent state. The very vigor of the indigenous system necessarily poses considerable difficulties for central government when development strategies come to be considered: for by manipulating the indigenous system, the traditional authorities are well placed to frustrate any purposive legislation of which they disapprove. If we look for a broader lesson in this case history, it must be that any generalization as to the relationship between national legal systems and indigenous systems is likely to be problematic: much must depend on the nature of a particular indigenous system and how members of the society concerned exploit it.

NOTES

<sup>1</sup>Moala: Culture and Nature on a Fijian Island, Ann Arbor, 1962, p. 119.

<sup>2</sup>See, e.g., "The Work of the Tribal Courts in the Bechuana-land Protectorate," (1943) 2 African Studies, 27-40.

<sup>3</sup>E.g., The Tswana, London, 1953; A Handbook of Tswana Law and Custom, London, 1938.

<sup>4</sup>Schapera, "The Social Structure of the Tswana Ward," (1935) 9 Bantu Studies, 203-24.

<sup>5</sup>For an account of Tswana legislative processes, see Schapera, Tribal Legislation among the Tswana of the Bechuana-land Protectorate, London, 1943.

<sup>6</sup>See Comaroff and Roberts, "The Invocation of Norms in Dispute Settlement: The Tswana Case" in Hamnett (Ed.), Social Anthropology and Law, London 1977, 77-112.

<sup>7</sup>The circumstances surrounding the establishment of the Bechuanaland Protectorate are described by Sillery, Founding a Protectorate, The Hague, 1965.

<sup>8</sup>Ibid.

<sup>9</sup>Native Administration Proclamation, No. 74 of 1934.

<sup>10</sup>No. 28 of 1965.

<sup>11</sup>No. 35 of 1965.

<sup>12</sup>Tribal Land Act, No. 54 of 1968, brought into operation by the Tribal Land Act Commencement Notice, S.I. No. 6 of 1970.

<sup>13</sup>Schapera, "The Social Structure of the Tswana Ward," (1935) 9 Bantu Studies, 203-44; Schapera and Roberts, "Rampedi Revisited: Another Look at a Kgatla Ward," (1975) 45 Africa, 253-79.

<sup>14</sup>Article 4.

<sup>15</sup>Native Tribunals Proclamation, No. 75 of 1934.

<sup>16</sup>Ibid.

<sup>17</sup>See Customary Courts Proclamation, No. 19 of 1961, as amended.

<sup>18</sup>No. 51 of 1969.

<sup>19</sup>Proclamation of June 10, 1891, S.8.

<sup>20</sup>No. 75 of 1934.

<sup>21</sup>Ibid.

<sup>22</sup>Ibid.

<sup>23</sup>See, Schapera, "The Work of the Tribal Courts in the Bechuanaland Protectorate," (1943) 2 African Studies, 27-40.

<sup>24</sup>Ibid, Table I.

<sup>25</sup>"The Survival of the Traditional Tswana Courts in the National Legal System of Botswana," (1972) 16 Journal of African Law, 103-29.

<sup>26</sup>Ibid.

<sup>27</sup>See note 19.

<sup>28</sup>Subordinate Courts Proclamation, No. 51 of 1938, S.31A, inserted in the principal Proclamation by the Subordinate Court (Amendment) Act, No. 44 of 1969.

<sup>29</sup>No. 51 of 1969; see especially ss. 4-6.

<sup>30</sup>See Roberts, Tswana Family Law, London, 1972, p. 9.

<sup>31</sup>Deserted Wives and Children Protection Law, No. 29 of 1962, ss. 2-3.

<sup>32</sup>See Comaroff and Roberts, "Marriage and Extra-Marital Sexuality; The Dialectics of Legal Change among the Kgatla," (1977) 21 Journal of African Law, 97-123.